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STATE OF NEBRASKA
OFFICIAL
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DEPT. OF JUSTICE

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SUBJECT: LB 447; Judicial service on various Commissions and Committees in light of the Separation of Powers Doctrine

REQUESTED BY: Joseph C. Steele, Court Administrator
Administrative Office of the Courts/Probation

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

This is the third opinion in a series of opinions we have provided to you in response to your questions concerning application of the court's decision in State ex rel. Spire v. Conway, 238 Neb. 766, 472 N.W.2d 403 (1991), to various activities of judges and employees of the judicial branch of state government. See Opinion of the Attorney General No. 92073, May 28, 1992; Opinion of the Attorney General No. 92022, February 18, 1992. This opinion involves LB 447 from the 1992 legislative session, the Juvenile Services Grant Committee, and the Youth Services Planning Commission.

In 1990, the Legislature enacted LB 663, the Juvenile Services Act [the "Act"]. LB 663, 91st Nebraska Legislature, Second Session (1990), codified at Neb.Rev.Stat. §§ 43-2401 et seq. (Cum. Supp. 1990). The purposes of the Act, a part of the state's program for dealing with juvenile criminal offenders, included: developing statewide criteria for programs or services for juveniles; assisting in the provision of appropriate preventive, diversionary, and dispositional alternatives for juveniles; encouraging coordination of the elements of the juvenile services system; and providing an opportunity for local involvement in developing community programs for juveniles. Neb.Rev.Stat. §43-2403 (Cum. Supp. 1990). The Act's provisions also provided for the award of grants to communities to assist in the implementation and operation

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of various programs for juveniles. Neb.Rev.Stat. §43-2404 (Cum. Supp. 1990).

Section 43-2411 established the Juvenile Services Grant Committee [the "Committee"] made up of a number of individuals and state officers including the State Court Administrator, the Probation Administrator, and several judges. The Committee had a number of duties with respect to the grants under the Act, including making recommendations to the Office of Probation Administration for grant awards. Neb.Rev.Stat. §43-2412 (Cum. Supp. 1990). The Office of Probation Administration generally administered the Act.

LB 447, passed this spring, moved the general administration of the Juvenile Services Act from the Office of Probation Administration to the Nebraska Commission on Law Enforcement and Criminal Justice [the "Crime Commission"]. As a result, the Committee now makes recommendations concerning awards under the Act to the Crime Commission. In Opinion No. 92022, we indicated that the Crime Commission is not a part of the judicial branch of state government. Consequently, you are apparently concerned that service on the Committee by judicial branch personnel might run afoul of the separation of powers rule established in the Conway case. For the reasons set out below, we believe that such service on the Committee is contrary to the Conway rule.

The Conway case involved Article II, Section 1 of the Nebraska Constitution, the provision dealing with the separation of governmental powers, and the court indicated that a state legislator could not also serve as an assistant professor at a state college. The now oft-repeated rule in Conway is as follows:

> ...article II prohibits one who exercises the power of one branch--that is, an officer in the broader sense of the word--from being a member--that is, either an officer or employee--of another branch.

238 Neb. at 782, 472 N.W.2d at 412. You and the Probation Administrator are members (either officers or employees) of the judicial branch of government, and the judges on the Committee are obviously judicial officers. Therefore, any of you violate the Conway rule if you are an officer of another branch of government through your service on the Committee.

As we indicated in our previous opinions, the Nebraska Supreme Court has discussed the indicia of public office. An office is "a public station or employment, conferred by the appointment of government; and embraces the ideas of tenure, duration, emolument and duties." State ex rel. O'Connor v. Tusa, 130 Neb. 528, 265 N.W. 524 (1936). An office also can be considered "a governmental

position, the duties of which invest the incumbent with some aspect of the sovereign power." Conway at 772, 472 N.W.2d at 407.

Under the provisions of the Act and LB 447, members of the Committee are appointed by a statutory procedure for a set term of years. Neb.Rev.Stat. §43-2411 (Cum. Supp. 1990). Provision is made for filling vacancies on the Committee, and Committee members receive their actual and necessary expenses. Id. In addition, it appears that the duties of the Committee are not merely advisory in nature, but involve the exercise of authority. For example, the Committee may "[e]stablish a minimum statewide criteria for programs" under the Act. Section 11, LB 447, 92nd Nebraska Legislature, Second Session (1990) The Committee may "[d]evelop or contract for the development of a statewide system to monitor and evaluate the effectiveness of plans provided under the act..." Id. The Committee may "adopt and promulgate rules and regulations necessary to carry out its work." Id.

On the basis of these various factors, we believe that the members of the Committee are public officers. Moreover, given the nature of their duties under the Act and LB 447, we do not believe that they are officers in the judicial branch of government. This is particularly true when it is considered that administration of the Act was moved from the Office of the Probation Administrator to the Crime Commission. Therefore, it is our view that service on the Committee by members of the judicial branch is contrary to the rule in Conway.

Your second question involves the Youth Services Planning Commission created by LB 447. That Commission includes the heads of various state executive agencies, members of the Legislature, the Probation Administrator, and a juvenile court judge. You are concerned with the judicial branch appointments in light of Conway.

Under LB 447, the function of the Youth Services Planning Commission is to provide the Legislature and the Governor with a state juvenile services implementation plan which will provide a method for the delivery of comprehensive services and programs for juveniles. Among other things, the purpose of the plan is to facilitate optimum delivery of services for juveniles, to prevent delinquency, and to reduce the amount of recidivism among juveniles. Upon legislative approval of the plan, the Office of Youth Services shall be established to provide youth services as prescribed in the plan. There is no term of office for members of the Planning Commission, and their plan must be submitted to the Legislature and the Governor by September 1, 1993.

In our Opinion No. 92073, we indicated that members of the judicial branch of government could serve on the Judicial Resources Commission. Our reasoning in that instance was based upon the fact

that the Judicial Resources Commission had no authority to enact actual changes in judicial districts, the number of judges, etc. The Commission could only recommend changes to the Legislature which the Legislature was free to adopt or reject. As a result, we concluded that members of the Judicial Resources Commission were not officers in the legislative branch of government, and officers and employees of the judicial branch could serve on that Commission under the rule in Conway.

In a similar fashion, it appears to us that members of the Youth Services Planning Commission are not officers or employees of the legislative or executive branches of government. Under LB 447, the Commission develops a plan for youth services and presents that plan to the Legislature and to the Governor. Upon legislative approval of the plan, the Office of Youth Services is established and the plan is carried out. Presumably, absent legislative approval, the Commissions's plan is of no effect. Therefore, we believe that members of the judicial branch of government can serve on the Youth Services Planning Commission without problem under the rule in Conway.

Sincerely yours,

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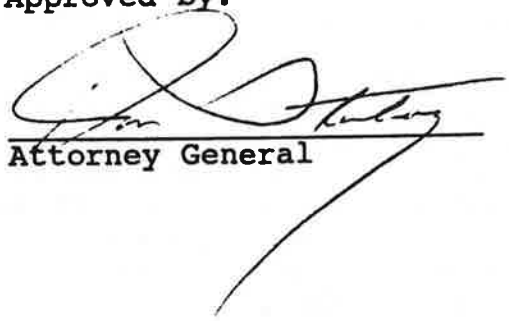

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