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July 3, 1990

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ATTORNEY GENERAL OPINION NO. 90- 80

The Honorable Debara Schauf
State Representative, Eighty-First District
P.O. Box 68
Mulvane, Kansas 67110

Re: State Boards, Commissions and Authorities--
Parimutuel Racing--Executive Director;
Appointment Under 1990 Senate Bill No. 428

Synopsis: The executive director of the racing commission, as of July 1, 1990, serves at the pleasure of the commission and, absent violation of a protected liberty interest, may be removed at the pleasure of the commission. If the commission chooses to replace the current director, he may continue in office (as long as he remains qualified) until a permanent replacement is found, or the commission may replace him with an acting director who meets the statutory qualifications. In the latter event the commission should make its best effort to appoint a permanent, qualified director prior to adjournment of the 1991 legislature so that the senate may act to confirm or reject such appointee. Cited herein: K.S.A. 1989 Supp. 74-8805; 1990 Senate Bill No. 428; Kan. Const., art. 2, sec. 18, art. 15, secs. 1, 2.

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Dear Representative Schauf:

You request our opinion regarding appointment of the executive director of the racing commission pursuant to section 2 of

1990 Senate Bill No. 428, which provides in pertinent part as follows:

"On and after July 1, 1990, K.S.A. 1989 Supp. 74-8805 is hereby amended to read as follows: 74-8805. (a)(1) The governer commission shall appoint, subject to confirmation by the senate as provided by K.S.A. 75-4315b and amendments thereto, an executive director of the commission, to serve at the pleasure of the governer commission.

"(2) The executive director shall: (A) Be in the unclassified service under the Kansas civil service act; (B) devote full time to the executive director's assigned duties; (C) receive such compensation as determined by the commission, subject to the limitations of appropriations therefor; (D) be a citizen of the United States and an actual resident of Kansas during employment by the commission; (E) not have been convicted of a felony under the law of any state or of the United States prior to or during employment by the commission; and (F) have familiarity with the horse and dog racing industries sufficient to fulfill the duties of the office of executive director."

(Underscoring and strike type indicate legislative amendment.)

You first ask whether, after July 1, 1990, the racing commission may appoint a new executive director.

Article 2, section 18 and article 15, section 1 of the Kansas constitution authorize the legislature to provide for the election or appointment of all officers not otherwise provided for in the constitution. There is no constitutional provision regarding appointment of the executive director or the racing commission. Thus, the legislature may, and has, provided by statute for the appointment of the executive director. See Leek v. Theis, 217 Kan. 784, 808 (1975) ("the creation of various offices and departments of government not otherwise provided for in the Kansas Constitution is a legislative function. It is also a legislative function to determine the qualifications of the officers and by whom they shall be

appointed and in what manner they shall be appointed. . . there is no constitutional restriction on the legislature exercising its power as it shall see fit."); 63A Am.Jur.2d Public Officers and Employees § 28 (1984) ("An office created by the legislature is wholly within the power of that body, and it may prescribe the mode of filling the office. . ."). Further, the legislature may change the mode of appointment to all offices created by it. 63A Am.Jur.2d at § 96; Power v. Secretary of Dept. of Community Affairs, 388 N.E.2d 304, 308 (Mass. 1979).

There is no set term of office of the executive director of the racing commission. Rather, the executive director serves at the will and pleasure of the appointing authority. K.S.A. 1989 Supp. 74-8805(a), as amended. See also Kan. Const., art. 15, sec. 2; Stoldt v. City of Toronto, 234 Kan. 957, 964 (1984) (when the term of office is not determined by the constitution, statute or contract, the office is held at the pleasure of the appointing authority); 63A Am.Jur.2d at § 223. As of July 1, 1990, the appointing authority is the racing commission. 1990 Senate Bill No. 428, section 2(a). When an office is held at the pleasure of the appointing authority, no property right attaches to such position and the incumbent may be removed at the pleasure of the appointing authority. Stoldt, 234 Kan. at 965; 63A Am.Jur.2d at §§ 8, 221, 223. The foregoing applies although the appointing power attempts to fix a definite term. 63A Am.Jur.2d at §§ 223, 105, 162, 155 ("the language of a letter of appointment is irrelevant in determining whether an officer is granted a fixed term, for the appointing authority cannot confer a right to a fixed term of office when the underlying statute creates no such term."). However, while a public officer serving at the pleasure of the appointing authority is subject to removal without judicially recognized good cause, such officer may not generally be dismissed for exercising a constitutionally protected right. Stoldt, 234 Kan. at 966; 63A Am.Jur.2d at § 224. Additionally, if a terminated officer can show the termination imposed "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities," he may be able to assert violation of a protected liberty interest. Stoldt, 234 Kan. at 965. It is therefore our opinion that, unless the current executive director can show violation of a liberty interest for removal, the commission may replace him at will after July 1, 1990.

You next ask whether, if the commission chooses to begin the selection process for a new executive director, the current

director may be retained in an acting or temporary capacity or if someone else could be appointed in that capacity until a permanent replacement is made. As stated above, the executive director may be removed at the pleasure of the commission. If not removed, the current director may continue to serve until another is appointed in his place, unless he becomes disqualified to hold the office (i.e., he no longer meets the statutory qualifications). We have found nothing which would alter this conclusion should the current director wish to submit his application to the commission for consideration during the commission's selection process. In other words, the current director may hold his office even if being considered for possible reappointment. We note, however, that the commission need not reappoint the current director; they may choose instead not to remove him. See 63A Am.Jur.2d at § 225. Alternatively, the commission may remove the current director and replace him with someone else who meets the statutory qualifications to serve as acting director pending confirmation by the senate. See Leek v. Theis, 217 Kan. at 807, 808.

Finally, you question whether in the event of an appointment of someone other than the current director as acting or temporary director that person should be confirmed by the senate. As you point out, confirmation by the senate is the final step in completing a permanent appointment. If the individual appointed as acting or temporary director is not intended to be the permanent director, he or she should not be confirmed by the senate. However, we do not believe the commission can effectively avoid the requirement of senate confirmation merely by designating their appointee "acting" or "temporary" director. The commission, if it chooses to replace the current director, should make its best effort to locate a permanent replacement prior to the time the legislature adjourns the 1991 session.

In conclusion, the executive director of the racing commission, as of July 1, 1990, serves at the pleasure of the commission and, absent violation of a protected liberty interest, may be removed at the pleasure of the commission. If the commission chooses to replace the current director, he may continue in office (as long as he remains qualified) until a permanent replacement is found, or the commission may replace him with an acting director who meets the statutory qualifications. In this latter event the commission should make its best effort to appoint a permanent, qualified

director prior to adjournment of the 1991 legislature so that the senate may act to confirm or reject such appointee.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Julene L. Miller
Deputy Attorney General

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