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ATTORNEY GENERAL OPINION NO. 90-4

TO: Marvin Aslett, Chairman
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Marilyn Shuler, Director
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Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

Two opinion requests have been submitted asking whether the Director of the Department of Law Enforcement is the appointing authority for administrative purposes over the Idaho Racing Commission. Specifically, Ms. Shuler asks:

Does Title 54, Chapter 25 of the *Idaho Code* make the Idaho Racing Commission the "appointing authority" for either its director or for the office support staff?

If the answer to the first question is "no," are the people in those positions employees of the Department of Law Enforcement?

If the answer to the first question is "yes," does the Department of Law Enforcement, within which the Racing

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Commission exists, have any authority over or responsibility towards those two classifications?

CONCLUSION:

The Director of the Department of Law Enforcement is the ultimate appointing authority for the director and staff of the Idaho Racing Commission, since the commission is created within the department and has no specific authority to hire and fire employees. Therefore, the director is the appointing authority by operation of Idaho Code § 67-2405.

ANALYSIS:

The answer to your question requires an understanding of where the Idaho Racing Commission is situated within the overall structure of state government.

State government was reorganized effective January 1, 1975, by a 1972 amendment to the Idaho Constitution:

Art. 4, Section 20. Departments limited. - All executive and administrative officers, agencies, and instrumentalities of the executive department of the state and their respective functions, powers, and duties, except for the office of governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general and superintendent of public instruction, shall be allocated by law among and within not more than twenty (20) departments by no later than January 1, 1975. Subsequently, all new powers or functions shall be assigned to departments, divisions, sections or units in such a manner as will tend to provide an orderly arrangement in the administrative organization of state government. Temporary agencies may be established by law and need not be allocated within a department; however, such temporary agencies may not exist for longer than two (2) years.

The implementing legislation listed 19 agencies, including the Department of Law Enforcement:

67-2402. Structure of the executive branch of Idaho state government. - (1) Pursuant to section 20, article

IV, Idaho constitution, all executive and administrative offices, agencies, and instrumentalities of the executive department of state, except for those assigned to the elected constitutional officers, are allocated among and within the following departments:

. . .

Department of law enforcement

Key to this question is § 67-2405, which prescribes the authority of agency directors:

Powers and duties of department heads. - Unless specifically provided otherwise, each department head shall:

(1) Supervise, direct, account for, organize, plan, administer and execute the functions vested within the department as provided by law.

. . .

(8) Subject to law, and the provisions of the state's merit system, establish and make appointments to necessary subordinate positions, and abolish unnecessary positions.

(9) Each department head may, subject to law, and the state merit system where applicable, transfer employees between positions, remove persons appointed to positions, and change the duties, titles, and compensation of employees within the department.

(10) Delegate any of the functions vested within the department head to subordinate employees, except the power to remove employees or fix their compensation.

(Emphasis added.) Thus, the 19 department heads are empowered to establish and make appointments to positions within their respective departments unless that power is specifically given by law to another appointing authority.

This same concept is reenforced by the Personnel System law which defines "appointing authority" as "the officer, board,

commission, person or group of persons authorized by statute or lawfully delegated authority to make appointments or to employ personnel in any department." (Emphasis added.) Idaho Code § 67-5302(2).

Therefore, it is necessary to consider the statutory provisions that created the Idaho Racing Commission to determine whether the commission is specifically authorized to hire and fire staff.

The Department of Law Enforcement was created in 1919, and its structure is described in chapter 29, title 67, Idaho Code. Specifically, § 67-2901 empowers the director to "exercise all of the powers and duties necessary to carry out the proper administration of the department, and may delegate duties to employees and officers of the department." There is, however, a wide variety in the statutory powers of the director in relation to the various entities created within the department.

For example, the Teletype Communications Board is appointed by the governor, and is composed of county sheriffs, chiefs of police and state police. Though the board exists within the Department of Law Enforcement and the director of DLE is the executive officer of the board, the board has exclusive management control over ILETS, the state's law enforcement communications system. Idaho Code § 19-5203. Similarly, the State Brand Board exists within the Department of Law Enforcement, with board members appointed by the governor. Idaho Code § 25-1102. The board, rather than the director of the department, appoints the state brand inspector, who in turn hires staff. Idaho Code §§ 25-1103, 25-1104.

The Idaho Racing Commission does not have similar hiring authority. The commission is created in the Department of Law Enforcement, with three commission members appointed by the governor. Idaho Code § 54-2503. The commission, it is true, is authorized to "incur all such costs, charges and expenses as are reasonably necessary in carrying out the intent and purposes of this act," Idaho Code § 54-2504. However, this broad authority to incur costs, charges and expenses does not carry with it the kind of express authorization "by statute or by lawfully delegated authority to make appointments" that would be necessary for the commission to be an "appointing authority" under Idaho Code § 67-5302(2). The Idaho Legislature, as in the case of the State Brand Board, knows how to grant express hiring and

appointing authority to a board within the Department of Law Enforcement. The legislature has chosen not to include such authority in the Racing Commission's enabling statute.

The remaining sections of chapter 25, title 54, authorize the commission to promulgate rules and regulations to govern race meets and the pari-mutuel system, Idaho Code § 54-2506; to determine which persons participating in race meets shall require licenses, *id.*; to license, regulate and supervise all race meets held in this state, Idaho Code § 54-2507; to determine the kind and character of race meets to be held, the number of days of races and the number of races per day, Idaho Code § 54-2508; and to exclude from races any person who violates the Idaho Racing Act, Idaho Code § 54-2509.

Nowhere in the Idaho Racing Act is there any mention of a staff or commission authority to hire staff members. It is our opinion, under the principles enunciated in this opinion, that the Racing Commission is not expressly authorized to function as the "appointing authority" for a director or staff that the commission may wish to hire. That authority resides in the Director of the Department of Law Enforcement, unless he chooses to delegate said authority to the commission.

SUMMARY:

When an entity is created within a department, the director of the department is the hiring and firing authority unless provided otherwise by statute. The Idaho Racing Commission does not have such authority, though the Director of the Department of Law Enforcement may have in fact delegated hiring and supervisory authority to the Racing Commission.

The answers to the specific questions asked by Ms. Shuler are: (1) The Racing Commissioners are not the appointing authority for the commission's director and staff. (2) Idaho Racing Commission employees are employees of the Department of Law Enforcement. The Director of the Department may in fact have delegated hiring and supervisory authority to the Racing Commission, but himself retains the ultimate appointing authority for all purposes. (3) Not applicable.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution*

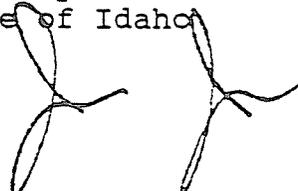
Art. 4, § 20.

2. *Idaho Code*

Idaho Code § 19-5203.
Idaho Code § 25-1102.
Idaho Code § 25-1103.
Idaho Code § 25-1104.
Idaho Code § 54-2503.
Idaho Code § 54-2504.
Idaho Code § 54-2506.
Idaho Code § 54-2507.
Idaho Code § 54-2508.
Idaho Code §§ 54-2509(2), (4).
Idaho Code § 67-2402.
Idaho Code § 67-2405.
Idaho Code § 67-2705.
Idaho Code § 67-2901.
Idaho Code § 67-5302(2).

Dated this 22nd day of June, 1990.

JIM JONES
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Analysis By:

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