# OFFICE OF COURT ADMINISTRATION

JERRY L. BENEDICT
Administrative Director



RQ-0538-JC

April 30, 2002

**By Certified Mail, Return Receipt Requested**

The Honorable John Cornyn, Attorney General
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-42579-02
I.D. # 42579

Re: Whether defining the Texas State Appellate Courts as state agencies for purposes of the Texas Commission on Human Rights Act violates the Texas Constitution and whether regulation of the internal employment policies of the Texas State Appellate Courts violates the doctrine of separation of powers.

Dear Attorney General Cornyn:

On behalf of the Chief Justices of the fourteen intermediate courts of appeals, I request an opinion in accordance with section 402.042 of the Texas Government Code.

During the 76th Legislative Session of 1999, the Texas Legislature mandated that the Texas Commission on Human Rights review the personnel policies and procedures of each state agency to determine whether the policies and procedures comply with the Texas Commission on Human Rights Act. *See* TEX. LAB. CODE ANN. §§ 21.451-21.456 (Vernon Supp. 2001). The statute provides for review, a compliance report, reimbursement for expenses, and an administrative penalty for failure to comply. *See id.*

Section 21.002(14) of the Texas Labor Code defines "state agency" as:

(A) a board, commission, committee, council, department, institution, office, or agency in the executive branch of state government having statewide jurisdiction;

(B) the supreme court, the court of criminal appeals, a court of appeals, or the State Bar of Texas or another judicial agency having statewide jurisdiction; or

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(C) an institution of higher learning as defined by Section 61.003, Education Code.

TEX. LAB. CODE ANN. § 21.002(14) (Vernon Supp. 2001). Noticeably, legislative agencies are absent from this definition.

Although the Labor Code includes the Texas State Appellate Courts in the definition of "state agency," the judiciary is not an agency but is a constitutionally established separate, equal and independent branch of government. TEX. CONST. art. II, §1; *see also Mays v. Fifth Court of Appeals*, 755 S.W.2d 78, 81 (Tex. 1988) (Spears, J., concurring); *LeCroy v. Hanlon*, 713 S.W.2d 335, 338 (Tex. 1986). By including Texas State Appellate Courts in the definition, the legislature unconstitutionally attempts to "force the judiciary into the role of a subordinate and supplicant governmental service – in effect, a mere agency." *Mays*, 755 S.W.2d at 81.

Furthermore, Texas courts have certain "inherent" judicial powers that are derived not from legislative grant or specific constitutional provision, but from the very fact that the court has been created and charged with certain duties and responsibilities. *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398-99 (Tex. 1979). This inherent power "also springs from the doctrine of separation of powers between the three governmental branches." *Id.* at 399. "This power exists to enable our courts to effectively perform their judicial functions and to protect their dignity, independence and integrity." *Id.* Employing personnel is an exercise of this inherent power. *See Vondy v. Comm'rs Court of Uvalde County*, 620 S.W.2d 104, 110 (Tex. 1981); *In re Polybutylene Plumbing Litigation*, 23 S.W.3d 428, 438 (Tex. App.—Houston [1st Dist.] 2000, pet. filed).

The Judicial Branch of the government of the State of Texas understands its responsibilities with regard to proper employment practices in the operation of its courts. However, the Texas Commission on Human Rights should not be permitted to dictate the terms of the employment policies adopted by the courts within the Judicial Branch. The independence of the judiciary is important, and it should not be treated as a "mere agency." *Mays*, 755 S.W.2d at 81. Although Texas Courts have not addressed this issue in an employment context, courts in other states have.

Most directly on point is the decision by the Supreme Court of Pennsylvania in *First Judicial Dist. of Penn. v. Penn. Human Rights Comm'n*, 727 A.2d 1110 (Pa. 1999). In that case, an employee, who filed a sexual harassment claim, sought "to impose a policy change which would affect all employees of the court." *Id.* at 1112. The Pennsylvania Supreme Court noted its prior decision holding that "in order to carry out the duties delegated to the judiciary by the Constitution, the courts must retain the authority to select the people who are needed to serve in judicial proceedings and to assist judges in performing their judicial duties." *Id.* The court reasoned, "It is self-evident that if the [Pennsylvania Human Relations Commission] imposed methods of employee selection or supervision or discharge, or directed that certain working conditions rather than others must apply, judges would have lost the power to control these aspects of the operation of the courts." *Id.* The court concluded, "a non-judicial agency's involvement in running the courts can never survive constitutional scrutiny, for no matter how innocuous the involvement

may seem, the fact remains that if an agency of the executive [or legislative] branch instructs a court on its employment policies, of necessity, the courts themselves are not supervising their operations." *Id.*; *see also Beckert v. American Federation of State, County and Municipal Employees*, 425 A.2d 859, 862-83 (Pa. Commw. Ct. 1981) (concluding that the power to select employees "may not, consistent with the constitutional doctrine of separation of powers, be policed, encroached upon, or diminished by another branch of government" because that power "would cease to be a judicial power if its exercise was subject to the monitoring and review of another branch of government"), *aff'd*, 459 A.2d 756 (Pa. 1983).

Similarly, the Michigan Supreme Court has noted, "That the management of the employees of the judicial branch falls within the constitutional authority and responsibility of the judicial branch is well established. The power of each branch of government within its separate sphere necessarily includes managerial administrative authority to carry out its operations." *Judicial Attorneys Ass'n v. State*, 586 N.W.2d 894, 896 (Mich. 1998). "[T]he fundamental and ultimate responsibility for all aspects of court administration, including operations and personnel matters within the [] courts, resides within the inherent authority of the judicial branch. The judiciary is an independent department of the State, deriving none of its judicial powers from either of the other 2 departments. This is true even though the legislature may create courts under the provisions of the Constitution. The judicial powers are conferred by the Constitution and not by the act creating the court. The rule is well settled that under our form of government the Constitution confers on the judicial department all the authority necessary to exercise its powers as a co-ordinate branch of the government. It is only in such a manner that the independence of the judiciary can be preserved. The courts cannot be hampered or limited in the discharge of their functions by either of the other 2 branches of government." *Id.* at 897-98; *see also Board of County Comm'rs of Lewis & Clark County v. Mont. First Judicial Dist. Court, Lewis & Clark County*, 10 P.3d 805, 811 (Mont. 2000) ("Allowing the County Commissioners to enforce county personnel polices would infringe upon the Judges' right to control their assistants); *McDonald v. Campbell*, 821 P.2d 139, 144-45 (Ariz. 1991) (holding that granting the right to directly interfere with a court's administrative personnel decisions to be an unconstitutional encroachment of powers granted to court).

It is not the position of the Chief Justices of the intermediate courts of appeals of the State of Texas that the courts may engage in unlawful employment practices in violation of the Labor Code. The Chief Justices of the intermediate courts of appeals simply contend that the doctrine of separation of powers is violated if the Texas Commission on Human Rights is permitted to dictate the terms of the employment policies adopted by the courts to ensure that unlawful employment practices do not occur.

In view of the foregoing authority, the Chief Justices of the intermediate courts of appeals of the State of Texas asked that I request the Office of the Attorney General to review the pertinent authority and issue an opinion with regard to whether: (1) defining the Texas State Appellate Courts as state agencies for purposes of the Texas Commission on Human Rights Act violates the Texas Constitution; and (2) regulating the internal employment policies of the Texas State Appellate Courts violates the doctrine of separation of powers.

Thank you for your consideration.

Sincerely,

Jerry L. Benedict
Administrative Director

JLB:lmo

cc: Chief Justices of the intermediate courts of appeals

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