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STATE OF ILLINOIS

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SPRINGFIELD

June 1, 1973

FILE NO. S-598

OFFICERS:

**Governor's power to
appoint Acting Directors
of Code Departments**

Honorable George W. Lindberg
Comptroller
State of Illinois
201 State House
Springfield, Illinois 62706

Dear Mr. Lindberg:

I have your letter wherein you state:

"The following facts have come to my attention:

1. Edward Weaver resigned as Director of the Department of Public Aid on February 12, 1973; on February 13th, Joel Edelman was designated by the Governor to be Acting Director of that Department.
2. January 15, 1973, Gordon Ropp resigned as Director of Agriculture; on January 16th, Robert J. Williams was designated by the Governor to be Acting Director.
3. Franklin Yoder resigned as Director of Public Health on February 16, 1973;

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Joyce C. Lashof, M.D., was designated by the Governor on February 19th to be Acting Director of Public Health.

4. On January 31, 1973, Allan Landholt resigned as Director of Aeronautics; there has been no designation of Acting Director in this Department, and I am informed that this Department is being headed by Mr. William B. Ricks.

Each of these offices is subject to the provisions of Sec. 12, Chap. 127, requiring that they be appointed by the Governor, by and with the advice and consent of the Senate, and specifying the conditions under which vacancies in these offices may be filled and when Acting Directors may be named.

Will you please give me your opinion on the following questions:

- a. Can the Governor designate an Acting Director to discharge the duties of Director without the necessity of nominating Directors, and submitting those nominations to the Senate; and
- b. Should these Acting Directors be paid by the Comptroller of the State of Illinois for their services in discharging the duties of the Director; and
- c. Should I honor vouchers calling for payments which are signed by such Acting Director so designated."

It should be noted that on May 11, 1973, the Governor nominated Robert J. Williams to be the permanent Director of

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the Department of Agriculture. Furthermore, on January 26, 1973, the Governor designated William B. Ricks as Acting Director of the Department of Aeronautics. I assume Mr. Landholt resigned prior to Mr. Ricks' designation as Acting Director.

Customarily, the Attorney General furnishes written opinions to State officers upon legal questions relating to the duties of such officers. It appears to me that the first question you ask is not pertinent to the duties of the Office of Comptroller; therefore, I respectfully decline to answer your first question.

With regard to your questions b and c, for reasons set forth in detail, I am of the opinion that the answer to both questions is in the affirmative.

Section 9(a) of article V of the Illinois Constitution of 1970 reads as follows:

"(a) The Governor shall nominate and, by and with the advice and consent of the Senate, a majority of the members elected concurring by record vote, shall appoint all officers whose

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election or appointment is not otherwise provided for. Any nomination not acted upon by the Senate within 60 session days after the receipt thereof shall be deemed to have received the advice and consent of the Senate. The General Assembly shall have no power to elect or appoint officers of the Executive Branch."

The Illinois Supreme Court has frequently stated that the constitution of this State is not a grant of power to the General Assembly but is a limitation upon its power. All legislative power is vested in the General Assembly subject to the restrictions contained in the constitution. People ex rel. Greening v. Bartholf, 388 Ill. 445; Kocsis v. Chicago Park District, 362 Ill. 24.

Section 9(a) is unique in that the legislature's power over the mode of appointment to State office is preserved; however, in case of legislative inaction or silence the constitution authorizes the Governor to appoint by and with the advice and consent of the senate. This reflects undoubtedly the concern the framers of our constitution had for insuring that the executive power shall always be capable of exercise. There should be no point of time when the Governor

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is incapable of executing the laws. There should never be an interval of time when the executive power is dormant.

Section 9(b) of article V of the Illinois Constitution of 1970 is likewise illustrative of the framers concern that the executive power always be capable of exercise and the government be kept operative. In contemplation of the long period of time wherein the legislature is not in session the Governor may appoint, without the advice and consent of the senate, albeit, he must nominate someone and appoint with the advice and consent of the senate once the senate returns to session.

Despite the importance of insuring that the executive power is capable of immediate action, the General Assembly has broad authority to prescribe the manner and mode of appointing persons to State office. It specifically retains this otherwise inherent authority under that part of section 9(a) of article V that reads "not otherwise provided for." This phrase had its origin in section 10 of article V of the Illinois Constitution of 1870. Said section 10 reads as follows:

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"The governor shall nominate, and by and with the advice and consent of the senate, (a majority of all the senators elected concurring, by yeas and nays,) appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for; and no such officer shall be appointed or elected by the general assembly."

A provision of the Constitution of 1970 identical with a provision of the Constitution of 1870 is subject to construction given the prior provision by the Illinois Supreme Court. (People ex rel. Sadler v. Olson, 245 Ill. 288; People ex rel. Cromer v. Village of Maywood, 381 Ill. 337, cert. den., 318 U.S. 783, 87 L. ed. 1151, 63 S. Ct. 854). Therefore, cases construing section 10 of article V of the Illinois Constitution of 1870 are of particular interest in discerning the intent and meaning of section 9(a) of article V of the Illinois Constitution of 1970.

In People v. Evans, 247 Ill. 547, the Illinois Supreme Court upheld the power of county judges to appoint members to the Miners Examining Board. In construing section 10 of article V of the Illinois Constitution of 1870, the court, at page 556,

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stated:

"* * * It was clearly the intention of the framers of this constitutional provision that the appointing power, in cases of all offices established by the constitution or created by law, should be vested in the Governor, unless the appointment or election to such offices is otherwise provided for by the constitution or by statutory enactment. The language found in said section of the constitution, 'and whose appointment or election is not otherwise provided for,' is plain and unambiguous, and clearly indicates that if by the constitution an office is established and the method pointed out in the constitution for filling such office is otherwise than by appointment by the Governor, the portion of the section which provides that 'the Governor shall nominate and by and with the advice and consent of the senate' shall appoint all officers, etc., would not apply as to such constitutional office; and if this be true, it is, we think, equally true and if an office be created by the legislature and a method otherwise than by nomination and appointment by the Governor to fill such an office is provided for by law, such law would not be subject to constitutional objection on the ground that the legislature had deprived the Governor of a part of his appointing power."

In People v. Chicago Transit Authority, 392 Ill.

77, the Illinois Supreme Court stated, at page 97:

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"It is finally contended that the provisions of the act for the appointment of the members of the Transit Authority Board are in violation of the doctrine of separation of the powers of government provided in article III of our constitution, since three of the board are to be appointed by the Governor, to be approved by the mayor of the City of Chicago, and four by the mayor, to be approved by the Governor. This is provided in section 20 of the Transit Authority Act. It is argued that the General Assembly does not have power to subject the appointments of the Governor to the approval of the mayor. Section 10 of article V of the constitution provides that the Governor shall nominate and, by and with the advice and consent of the Senate, appoint all officers whose offices are established by the constitution or created by law and whose appointment or election is not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly. The implication of this section is that, aside from constitutional officers, offices which are created by statute may be filled by such method of appointment as the General Assembly may provide. * * *"

Through the phrase "not otherwise provided for" the framers of the Constitution of 1970 are preserving for the legislature broad power to deal with the appointment of State officers.

There are statutory provisions dealing with the various offices you refer to in your letter.

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Section 3 of the Civil Administrative Code of Illinois (Ill. Rev. Stat., 1971, ch. 127, par. 3) reads, in part, as follows:

"The Departments of State government are created as follows:

* * *

The Department of Agriculture;

* * *

The Department of Public Health;

* * *

The Department of Aeronautics;

* * *

The Department of Public Aid;

* * *

"

Section 4 of the Civil Administrative Code of Illinois (Ill. Rev. Stat., 1971, ch. 127, par. 4) reads, in part, as follows:

"Each department shall have an officer at its head who shall be known as director or secretary and who shall, subject to the provisions of this Act, execute the powers and discharge the duties vested by law in his respective department.

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* * *

Director of Agriculture, for the Department
of Agriculture;

* * *

Director of Public Health, for the Department
of Public Health;

* * *

Director of Aeronautics, for the Department
of Aeronautics;

* * *

Director of Public Aid, for the Department of
Public Aid;

* * *

Section 13 of the Civil Administrative Code of Illi-
nois (Ill. Rev. Stat., 1971, ch. 127, par. 13) reads, in part,
as follows:

"Each officer whose office is created by
this Act, except as otherwise specifically
provided for in this Act, shall hold office
for a term of 2 years from the third Monday
in January of each odd-numbered year and un-
til his successor is appointed and qualified.

* * *

Section 12 of the Civil Administrative Code (Ill.
Rev. Stat., 1971, ch. 127, par. 12) reads, in part, as follows:

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"Each officer whose office is created by this Act, or by any amendment thereto, except the office of Assistant Director of Public Aid in the Department of Public Aid, shall be appointed by the Governor, by and with the advice and consent of the Senate. In case of vacancies in such offices during the recess of the Senate, the Governor shall make a temporary appointment until the next meeting of the Senate, when he shall nominate some person to fill such office, and any person so nominated, who is confirmed by the Senate, shall hold his office during the remainder of the term and until his successor shall be appointed and qualified. If the Senate is not in session at the time this Act, or any amendments thereto, take effect, the Governor shall make a temporary appointment as in the case of a vacancy.

During the absence or inability to act, of the director of any department, or of the Secretary of Transportation, or in case of a vacancy in any such office until a successor is appointed and qualified, the Governor may designate some person as acting director, or acting secretary, to execute the powers and discharge the duties vested by law in such director or Secretary.

* * *

"

Section 12 provides that the Governor shall nominate and by and with the advice and consent of the senate appoint the directors of the various code departments, including those referred to in your letter. These directors are to serve a two year term beginning on the third Monday in January of

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each odd-numbered year.

To promote the policy of insuring that the executive branch is capable of continuous and smooth operation, the Governor is authorized to select the directors of the code departments.

If a vacancy occurs during the recess of the senate, the Governor may appoint someone to fill the office. However, once the senate reconvenes the Governor shall nominate and by and with the advice and consent of the senate appoint someone to fill the remainder of the term. This provision was inserted in contemplation of that situation where the senate would be in recess for a long period of time.

The second paragraph of section 12 is of particular interest to us. It states that in case of a vacancy in the office of director of any department or of the Secretary of Transportation the Governor may appoint an acting director or acting secretary to execute the powers and discharge the duties of the particular office. This provision enables the Governor to act immediately in filling a void in the day to day

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operation of State government.

If the Governor could not immediately appoint someone to fill that void, there would be an interval of time during which a part of the executive branch would be incapable of action. Such a situation is, of course, intolerable. It seems clear then that the Governor may appoint an acting director in cases where the vacancy in the office occurs when the senate is in session or when the senate is not in session. The acting director serves merely in a caretakers status to insure the viability of the particular department and he is subject to removal, at any time, by the Governor. This, of course, distinguishes the acting director from the appointee, either temporary or permanent. The appointee can be removed only pursuant to pertinent constitutional and statutory provisions. See, Illinois Constitution, art. V, sec. 10.

This provision authorizing the Governor to designate acting directors, to insure that the code departments are completely viable, was enacted in 1927. (Laws of 1927, p. 844). Recently, the provision was amended to provide that in case of

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a vacancy the Governor may appoint an acting Secretary of Transportation. P.A. 77-153.

There is no limit placed on the time in which a person may serve as acting director. If the General Assembly intended to place such a limit on the time in which a department may be headed by an acting director, it could easily do so. The determination as to what is for the public good is a question to be decided in this instance by the General Assembly. In so doing that body is vested with wide discretion which the courts cannot curtail except where its action is evasive of, or contrary to, some prohibition of the constitution.

To reiterate, the General Assembly has been vested with broad power to regulate the manner and mode in which persons are appointed to State office. (Ill. Const., art. V, sec. 9(a)). It has exercised this authority in such a manner to insure that the executive power is never dormant and is always viable. To be sure, in some instances the competing policy of insuring that an appointee is competent by subjecting him to senate confirmation will suffer but this is a matter

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for legislative determination and the wisdom of such a policy is not a matter for judicial control.

In the past, acting directors have served for relatively long periods of time. This is strong indicia of the legislative intent to not limit the time a department may be headed by an acting director.

Even if one were to regard the provision in section §2 pertaining to acting directors to be ambiguous, the courts would give great weight to the contemporaneous construction placed on it by officers of the State charged with the duty of executing this provision. (Mississippi River Fuel Corp. v. Ill. Commerce Comm., 1 Ill. 2d 509; 34 I.L.P., Statutes, sec. 128, p. 117 (1958)). Such contemporaneous construction will usually be adopted by the courts, particularly if such contemporaneous construction is consistent, uniform and long continued. McNely v. Board of Education of Community Unit School Dist. No. 7, 9 Ill. 2d 143.

The following table contains a list of those persons designated as acting director during the past four years. This

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list, which spans the life of the 76th and 77th General Assemblies, as well as the Constitutional Convention of 1970, also indicates the period of time in which each individual served as acting director.

Department	Acting Director	Appointed	Period of Service
Mental Health	John Briggs	4/1/69	1 year
Finance	John W. McCarter	12/31/69	3 years, 1 month
Conservation	Dan Malkovich	1/19/70	9 months
Personnel	Alan Drazek	2/18/70	1 year
Mental Health	Albert Glass	4/ 1/70	1 year
Financial Institutions	Louis Yangas	8/ 1/70	6 months
General Services	Frank Resnik	2/ 4/71	1 year, 2 months
Children and Family Services	Edward Weaver	9/23/71	6 months
Mines and Minerals	Dayton McReaken	1/ 1/72	1 year, 1 month

In conclusion, I am of the opinion that the acting directors referred to in your letter should be paid by the

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Comptroller of the State of Illinois for their services and
you should honor vouchers calling for payments which are signed
by such acting directors.

Very truly yours,

A T T O R N E Y G E N E R A L