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FILE NO. S-1285

STATE EMPLOYEES:
Validity of Lump Sum
Pay Increases

Honorable Michael J. Bakalis
Comptroller
State of Illinois
201 State House
Springfield, Illinois 62706

Dear Mr. Bakalis:

This responds to your letter regarding the following revision to section 11.00 of the Pay Plan for certain employees subject to the Personnel Code:

Section 11.00 IMPLEMENTATION OF PAY PLAN CHANGES, EFFECTIVE JUNE 30, 1977.

Those employees who have been at Step 7 for 3 or more years on June 30, 1977 will be given a single payment equal to 5% of their annual rate of pay.

Those employees on the payroll as of June 30, 1977 who were at Step 5 or 6 with 12 months or more creditable service as of December 1, 1976 shall receive a single payment equal to the value of a step increase multiplied by the number of months, commencing December 1, 1976 and ending June 30, 1977, in which they remained on Step 5 or 6. Creditable

service dates will be changed to reflect that, as of December 1, 1976, employees on Step 5 or 6 with 12 months creditable service were advanced to the next higher step. If employees affected by this provision were advanced to a higher salary during the period December 1976 and June 30, 1977, they shall receive payment equal to the difference between what was received and what would have been received had the provision been effective December 1, 1976.

A $100 payment will be granted to all employees, except emergency and temporary, subject to the Schedule of Salary Grades as of July 1, 1977.

Employees who would qualify for payment under the provisions above on leaves of absence of 90 days or less, shall receive the payments when they return from leave.

The above provisions do not apply to employees in recognized exclusive bargaining units or on other negotiated or prevailing rates.

In the Departments of Mental Health and Developmental Disabilities, Public Health, Industrial Commission and Corrections the effective date for the above provisions shall be July 1.

You have asked the following questions:

1. Do the payments authorized by section 11.00 violate the provisions of section 9 of the State Finance Act? Ill. Rev. Stat. 1975, ch. 127, par. 145.

2. Does the application of section 11.00 to employees of constitutional officers other than the Governor violate the doctrine of separation of powers?

Before answering these questions, it is necessary to outline the background of section 11.00. In Executive Order No. 6 (1973) Governor Walker provided collective bargaining

rights to employees of State agencies whose vouchers are subject to the approval of the Department of Finance. The Executive Order established the Office of Collective Bargaining which administers the provisions of the Order. The Office of Collective Bargaining is responsible for determining whether a particular unit of employees is appropriate for collective bargaining.

On February 27, 1976, in Case No. RC-14-OCB the Office of Collective Bargaining certified the American Federation of State, County and Municipal Employees (AFSCME) as the collective bargaining representative of the Clerical and Para-Professional Unit. This unit is made up of numerous clerical and para-professional classifications of State employees. These classifications have been established pursuant to section 8a of the Personnel Code. Ill. Rev. Stat. 1975, ch. 127, par. 63b108a.

On March 22, 1976, in Case Nos. RC-27-OCB and RC-28-OCB the Office of Collective Bargaining certified AFSCME as the collective bargaining representative of the Para-Professional Human Services Unit and the Professional Human Services Unit. Each of these classifications is made up of numerous classifications of State employees. These

classifications have also been established pursuant to section 8a of the Personnel Code.

On July 1, 1977, the Department of Personnel and AFSCME entered into two contracts. In one contract AFSCME represented State employees in the Clerical and Para-Professional Unit; in the other contract AFSCME represented State employees in the Para-Professional Human Services Unit and those employees in the Professional Human Services Unit. The pay provisions in both of these contracts were approved by the Governor and were made part of the Pay Plan. Although there are some exceptions, these pay provisions generally apply to all State employees in those classifications which are part of the Clerical and Para-Professional Unit, the Professional Human Services Unit or the Para-Professional Human Services Unit.

Because the revisions made in the Pay Plan pursuant to the collective bargaining agreement do not apply to all employees under the Personnel Code, the Director of the Department of Personnel with the approval of the Governor made those changes in section 11.00 quoted above. The changes in section 11.00 apply to all those State employees subject to the Personnel Code who are not members of a recognized exclusive collective bargaining unit. These changes parallel

the pay provisions in the collective bargaining agreements, thus complying with the statutory requirement that "the same schedule of pay may be applied to all positions in the same class" (section 8a of the Personnel Code (Ill. Rev. Stat. 1975, ch. 127, par. 63b108a)), and insuring that the integrity of the Pay Plan is preserved.

It should be noted that the pay provisions apply to employees under the Personnel Code, regardless of whether they are union members. The criterion for determining whether an employee is paid pursuant to changes made in accordance with the collective bargaining agreements, or pursuant to section 11.00 is whether the employee is a member of a class which is part of a collective bargaining unit, not whether the employee is a member of the union which represented the class in contract negotiations.

Your first question is whether payments made pursuant to section 11.00 would violate section 9 of the State Finance Act. Section 9 prohibits additional payments for work already performed and for which remuneration has already been made. Section 9 reads in pertinent part as follows:

" * * *

> Amounts paid from appropriations for personal service of any officer or employee of the State, either temporary or regular, shall be considered as full payment for all services rendered between the dates specified in the payroll or other voucher and no additional sum shall be paid to such officer or employee from any lump sum appropriation, appropriation for extra help or other purpose or any accumulated balances in specific appropriations, which payments would constitute in fact an additional payment for work already performed and for which remuneration had already been made, except that wage payments made pursuant to the application of the prevailing rate principle or based upon the effective date of a collective bargaining agreement between the State, or a State agency and an employee group shall not be construed as an additional payment for work already performed.
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> * * * "
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> (Emphasis added.)

As part of the Pay Plan, section 11.00 is a rule adopted under the Personnel Code and therefore has the effect of law. (Ill. Rev. Stat. 1975, ch. 127, par. 63b108.) Section 9 of the State Finance Act and rules adopted under the Personnel Code should not be construed inconsistently if it is possible to construe them otherwise. 1973 Ill. Att'y. Gen. Op. 177, 180.

Section 11.00 became effective on June 30, 1977. All payments provided for in the section are effective on

or after June 30. In order to receive these payments employees must be on the State payroll on either June 30 or July 1, depending on the type of payment. It is obvious that the payments in section 11.00 are not intended to remunerate employees for past services. For example, the $100 payment is made to all affected employees on July 1, even though they may have no prior service. While the 5% payments and the step increase payments provided for in the first and second paragraphs of section 11.00 are conditioned on the fact that some service was rendered prior to June 30 or July 1, employees who were on the payroll during this time, but who no longer are, receive no payments under this provision.

The Director of the Department of Personnel, under section 8a of the Personnel Code, has authority to establish a pay plan. This is what the Director has done. The prior service criterion for determination of the amount of pay may be viewed similarly to prior service requirements for longevity or step increases. Prior service or past experience is a well recognized criterion for determining basic salary and pay increases. While a lump sum payment is not a traditional form of a pay increase, it is within the range of the Director's discretionary power to establish a pay plan. A lump sum will

have greater impact on the government employee. "It is an incontestable fact of governmental employment practices that governmental agencies must compete in the labor market with non-governmental employers. Such competition includes not only salaries but sick leave time, vacations and numerous other conditions of employment." (San Joaquin Cty. Emp. Ass'n., Inc. v. County of San Joanquin, Calif. Appellate Court, 1974, 113 Cal. Rptr. 912, 914.) The Director in his judgment viewed this type of increase as necessary and I do not see that it is prohibited as additional payment for work already performed. I therefore am of the opinion that the payment of these increases does not violate section 9 of the State Finance Act.

Your second question relates to the application of section 11.00 of the Pay Plan to employees of constitutional officers other than the Governor and concerns whether such application violates the separation of powers doctrine. (Ill. Const. 1970, art. II, sec. 1.) At the outset, it must be noted that the separation of powers doctrine relates to the distribution of authority between the legislative, executive and judicial branches of government. It does not relate to

the distribution of authority between the various constitutional officers of the executive branch.

Employees of all constitutional officers other than the Governor are exempted from Jurisdictions A, B and C of the Personnel Code by section 4c of the Code. (Ill. Rev. Stat. 1975, ch. 127, par. 63b104c.) Section 4b of the Code (Ill. Rev. Stat. 1975, ch. 127, par. 63b104b), which authorizes the extension of Jurisdictions A, B and C to positions not initially covered by those jurisdictions, provides in pertinent part as follows:

> "Any or all of the three forms of jurisdiction of the Department may be extended to the positions not initially covered by this Act under a department, board, commission, institution, or other independent agency in the executive, legislative, or judicial branch of State government, or to a major administrative division, service, or office thereof by the following process:
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> (1) The officer or officers legally charged with control over the appointments to positions in a department, board, commission, institution, or other independent agency in the executive, legislative, or judicial branch of State government, or to a major administrative division, service, or office thereof, may request in writing to the Governor the extension of any or all of the three forms of jurisdiction of the Department to such named group of positions.
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> (2) The Governor, if he concurs with the request, may forward the request to the Director of Personnel.
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> (3) The Director shall survey the practicability of the requested extension of the jurisdiction or jurisdictions of the Department, approve

> or disapprove same, and notify the Civil Service Commission of his decision. If he should approve the request he shall submit rules to accomplish such extension to the Civil Service Commission.
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> (4) Such an extension of jurisdiction of the Department of Personnel may be terminated by the same process of amendment to the rules at any time after four years from its original effective date.
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> * * *

"

The Supreme Court discussed the validity of section 4b in Boner v. Jones (1975), 60 Ill. 2d 532. In that case it was contended that section 4b permits an unconstitutional infringement by the Governor upon the constitutional independence of the Secretary of State with respect to the hiring of employees in his office and that section 4b amounts to a legislative encroachment upon the executive authority of the Secretary of State, thus violating the doctrine of separation of powers. At pages 537 and 538, the court held that both contentions were without merit and noted that an extension under section 4b took place because it was requested by the constitutional officer himself. In support of its conclusion that the doctrine of separation of powers is not violated by section 4b, the court cited People ex rel. Gullett v. McCullough (1912), 254 Ill. 9, 29-30, in which the court held that "the legislature has the power, under the constitution,

to take from the executive officers of the State the power to appoint such assistants and subordinates as are necessary to enable them to discharge the duties required of such officers under the constitution and laws of the State."

If the employees of a constitutional officer have been brought under the Personnel Code pursuant to a request from that officer under section 4b, section 11.00 of the Plan applies to those employees. Based upon the Supreme Court's decision in Boner v. Jones, it is clear that the application of the Plan to employees of such constitutional officer is valid.

Very truly yours,

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