



WILLIAM J. SCOTT

ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD

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STATE OFFICERS:

Powers of Appointed Members of
New State Board of Education Prior
to Senate Confirmation

Honorable Michael J. Bakalis
Superintendent of Public Instruction
Office of the Superintendent
of Public Instruction
302 State Office Building
Springfield, Illinois 62706

Dear Mr. Bakalis:

I have your letter wherein you state in part:

"Several of the newly appointed board members of the State Board of Education have approached myself and members of my staff with certain concerns in regard to the powers, duties and functions of the new State Board of Education.

The concerns of these board members can be

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characterized as questions regarding their status during the period in which they are in an advisory capacity to the Office of the Superintendent of Public Instruction.

I am therefore requesting from you a legal opinion on the following questions:

1. Does the new State Board of Education have any power and/or authority prior to the entire board being confirmed by the State Senate, or is confirmation by the Senate a condition precedent to their functioning?
2. Prior to their confirmation, will members of the State Board be allowed a per diem allowance?
3. When the new State Board accedes to the duties currently delegated to the Office of the Superintendent of Public Instruction, will the State Board of Education be required to operate through the Department of Finance in such matters as travel expenditures and other monies expended, or will the State Board of Education be independent of the Department of Finance concerning the above questions?"

Section 2(a) of article X of the Illinois Constitution of 1970 provides:

"There is created a State Board of Education to be elected or selected on a regional basis. The number of members, their qualifications, terms of office and manner of election or selection shall be provided by law. The Board, except as limited by law, may establish goals, determine policies, provide for planning and evaluating education programs and recommend

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financing. The Board shall have such other duties and powers as provided by law."

Sections 1A-1 through 1A-4 of the School Code (Ill. Rev. Stat. 1973, ch. 122, pars. 1A-1 et seq.) implement this constitutional provision by specifying selection, qualification and terms for, and the powers and duties of, the members of the State Board of Education.

With regard to your first question, section 1A-1 of the School Code (Ill. Rev. Stat. 1973, ch. 122, par. 1A-1) provides in part:

"On or before January 1, 1974, the members of the State Board of Education shall be appointed by the Governor with the advice and consent of the Senate. The State Board shall consist of 17 members. * * *

Section 1A-3 of the School Code (Ill. Rev. Stat. 1973, ch. 122, par. 1A-3) provides in part:

"The State Board of Education shall assume full powers and duties after initial appointment upon the expiration of the term of the State Superintendent of Public Instruction elected in 1970. During the period from initial appointment to the assumption of full duties and authority, the State Board of Education shall function in an advisory capacity to and with the current constitutionally established office of State Superintendent of Public Instruction. * * *" (emphasis added)

It is my understanding that on April 11, 1974, the

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Governor, pursuant to above cited provision, "appointed" the members of the Board. It is my further understanding that, as of this writing, none of the members appointed by the Governor have yet been confirmed by the Senate.

It has been repeatedly held that where an appointment to public office requires approval or confirmation by somebody other than the appointing power, the appointment is not valid and perfected until the action of all bodies concerned has been taken. People ex rel. MacMahon v. Davis, 284 Ill. 439; McCall v. Cull, 75 P. 2d 696; United States v. Stewart, 19 How. (U.S.) 79; Marbury v. Madison, 1 Cranch (U.S.) 137; State ex rel. Nagle v. Stafford, 34 P. 2d 372; Lockwood v. Jordan, 231 P. 2d 428.

The word "initial" in the phrase "initial appointment" as used in section 1A-3 of the School Code can only be construed as the "first series" of appointments made pursuant to the new Act. The word "appointment" can only mean the completed, and consummated act of appointment. The confirmation of the Senate is the act necessary to complete the appointment.

Furthermore, I need not decide the question of whether the Governor could have made a temporary appointment to fill a possible vacancy in the offices during a recess of the Senate.

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pursuant to section 9 of article V of the Illinois Constitution of 1970. It appears from the facts surrounding the "appointment" or nomination of the appointees on April 11, 1974, that it was not the intention of the Governor to make a temporary appointment.

In a letter dated April 11, 1974, from Governor Walker to Secretary of State Howlett, after informing the Secretary of his appointments to the State Board of Education, and after setting forth the names and addresses of the appointees, the Governor states: "Subject to confirmation, upon the receipt of oaths, please issue the commissions."

As no confirmation has yet been had, and no oath taken, or commissions issued, it is my opinion that the "newly appointed" members of the State Board of Education cannot presently enter upon the duties of their office.

In answer to your second question, as I have just determined that the Board member appointees cannot as yet perform the duties of their office, it necessarily follows that they cannot receive a per diem allowance for meeting days under section 1A-2 of the School Code. Ill. Rev. Stat. 1973, ch. 122, par. 1A-2.

In your third question you have asked whether, upon

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acceding to the duties currently delegated to the Superintendent of Public Instruction, the State Board of Education will be required to operate through the Department of Finance in such matters as travel expenditures and other monies expended.

The State Board of Education is created by section 2 of article X of the Illinois Constitution of 1970. Section 2(a) of article X sets forth the duties of the Board, as follows:

"* * * The Board, except as provided by law, may establish goals, determine policies, provide for planning and evaluating education programs and recommend financing. The Board shall have such other duties and powers as provided by law."

Section 2(b) of article X provides:

"The State Board of Education shall appoint a chief educational officer."

The above language does not set forth the powers and duties of the Board with regard to its own fiscal operation. Such matters are left to the General Assembly ("as provided by law").

Section 1A-2 of the School Code (Ill. Rev. Stat. 1973, ch. 122, par. 1A-2) provides in part:

"* * * Expenses shall be approved by the Board and be consistent with the laws, policies, and requirements of the State of Illinois regarding

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such expenditures, plus any member may include in his claim for expenses a \$50 per day per diem for meeting days."

It thus appears that we must look to the "laws, policies and requirements of the State of Illinois" to determine in what fashion the Board is to operate in the handling of expenditures.

Section 10 of "AN ACT in relation to State finance" (Ill. Rev. Stat. 1973, ch. 127, par. 146) provides in part:

"§ 10. When an appropriation has been made by the General Assembly for the ordinary and contingent expenses of the operation, maintenance and administration of the several offices, departments, institutions, boards, commissions and agencies of the State government, the State Comptroller shall draw his warrant on the State Treasurer for the payment of the same upon the presentation of itemized vouchers, issued, certified, and approved, as follows:

For appropriations to:

* * *

(14) All other officers, boards, commissions and agencies of the State government, certified to by such officer or by the president or chairman and secretary or by the executive officer of such board, commission or agency and approved by the Department of Finance;

(emphasis added)

* * *

The omitted paragraphs 1-13 and 15 and 16 explicitly deal with

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other State officers, boards and commissions, and are not relevant to the State Board of Education.

It is clear from the above cited section that vouchers must be approved by the Department of Finance, and certified by the chairman of the Board chosen pursuant to section 1A-4(A) of the School Code. Ill. Rev. Stat. 1973, ch. 122, par. 1A-4(A).

With regard to travel expenditures, section 12 of "AN ACT in relation to State finance" (Ill. Rev. Stat. 1973, ch. 127, par. 148) sets forth the requisites for travel vouchers, and further provides:

"* * * An information copy of each voucher covering a claim by a person subject to the official travel regulations promulgated under Section 12-2 for travel reimbursement involving an exception to the general restrictions of such travel regulations shall be filed with the Auditor General who shall submit these vouchers, or a report thereof, to the Travel Control Board for approval. Amounts disbursed for travel reimbursement claims which are disapproved by the Board shall be refunded to the State and deposited in the fund from which payment was made."

The Travel Control Board is created by section 12-1 of "AN ACT in relation to State finance". Ill. Rev. Stat. 1973, ch. 127, par. 148-1.

Section 12-2 of the same Act provides:

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"§ 12-2. Official travel regulations shall be promulgated and published by the Department of Finance and shall be applicable to the expenditures of State funds by personnel of all State agencies as defined in the Illinois Auditing Act except the following: judges, members of the General Assembly, constitutionally elected State officers, and personnel under the jurisdiction of constitutionally elected State officers other than the governor. The travel regulations and changes therein shall become effective only upon their approval by the Travel Control Board." (emphasis added)

It appears from the foregoing that the travel regulations promulgated by the Department of Finance are applicable to State agencies as defined in the Illinois Auditing Act. However, the Illinois Auditing Act was repealed by Public Act 78-884, effective September 20, 1973.

A statute which refers to another statute incorporates part or all of it by reference. (Zurich General Accident and Liability Ins. Co. v. Industrial Commission, 331 Ill. 576.) A statute which specifically refers to the particular provisions of another statute incorporates such provisions as of the time of the adoption and, therefore, is not affected by any subsequent modification or repeal of the statute adopted, (Haas v. Lincoln Park Commissioners, 339 Ill. 491) unless the legislature has expressly or by strong implication shown its intention to incorporate subsequent amendments. (Culver v. People ex rel.

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Kochersperger, 161 Ill. 96; Taxpayers v. Sheahan, 45 Ill. 2d 75.) The language of section 12-2 of "AN ACT in relation to State finance" does not indicate an intention, express or implied, that the reference to the Illinois Auditing Act would include subsequent amendments. It has been held that, where no such intention is shown, the repeal of the statute referred to will have no effect on the reference statute unless the reference statute is repealed by implication with the referred statute. (Sutherland, Statutory Construction, §51.08, p. 324; In re Heath, 144 U.S. 92; Hanson v. Omaha, 61 N.W. 2d 556.) Therefore, the repeal of the Illinois Auditing Act has no effect on the reference of section 12-2 to the definition of "State agencies" in the Illinois Auditing Act.

Prior to its repeal, section 3 of the Illinois Auditing Act (Ill. Rev. Stat. 1973, ch. 15, par. 63) defined "State agencies" as:

"* * * [A]ll officers, departments, boards, commissions, institutions, universities, colleges, bodies politic and corporate of the State and any other person or any other administrative unit of State government or corporate outgrowth thereof, expending or encumbering State funds by virtue of an appropriation from the General Assembly, or handling money on behalf of the State, or holding any trust funds from any source derived."

The new State Board of Education clearly falls within the definition of State agency set out above, and would thus

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be subject to the travel regulations of the Department of Finance.

In addition, it should be noted, that even if we construe the reference statute (section 12-2 of "AN ACT in relation to State finance") as including any subsequent modifications and revisions of the referred statute (the Illinois Auditing Act), the result would be the same. Public Act 78-884 which repealed the Illinois Auditing Act, also enacted the Illinois State Auditing Act. Ill. Rev. Stat. 1973, ch. 15, pars. 301-1 et seq.

Section 1-7 of the Illinois State Auditing Act (Ill. Rev. Stat. 1973, ch. 15, par. 301-7) defines State agencies as:

"* * * [A]ll officers, boards, commissions and agencies created by the Constitution, whether in the executive, legislative or judicial branch, but other than the circuit court; all officers, departments, boards, commissions, agencies, institutions, authorities, universities, bodies politic and corporate of the State; and administrative units or corporate outgrowths of the State government which are created by or pursuant to statute, other than units of local government and their officers, school districts and boards of election commissioners; all administrative units and corporate outgrowths of the above and as may be created by executive order of the Governor." (emphasis added)

The State Board of Education, as a board "created by the

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Constitution", even more clearly falls within the above definition.

In summation, it is my opinion that the newly appointed members of the State Board of Education cannot undertake the duties of their office until they are confirmed by the Senate. Until so confirmed, they are not entitled to a per diem allowance for meeting days. It is my further opinion that upon assuming full powers and duties, the State Board of Education, must have all expenditures approved by the Department of Finance pursuant to section 10 of "AN ACT in relation to State finance", (Ill. Rev. Stat. 1973, ch. 127, par. 146) and is further subject to the travel regulations promulgated by the Department of Finance pursuant to sections 12, 12-1 and 12-2 of "AN ACT in relation to State finance". Ill. Rev. Stat. 1973, ch. 127, pars. 148, 148-1, and 148-2.

Very truly yours,

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