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SPRINGFIELD

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FILE NO. 88-001

STATE EMPLOYEES:  
Appointment of Persons to  
Assistant Attorney General  
Staff Positions Funded by the  
Department of Revenue

Roger D. Sweet, Director  
Illinois Department of Revenue  
101 West Jefferson Street  
Springfield, Illinois 62794

Dear Mr. Sweet:

I have your letter wherein you inquire whether those Assistant Attorney General staff positions which are funded by the Department of Revenue are subject to the rules and procedures of the Department of Central Management Services [DCMS] relating to the reemployment rights of laid-off, certified employees. For the reasons hereinafter stated, it is my opinion that the rules and procedures in question do not apply to the subject Assistant Attorney General staff positions.

Rather, the persons occupying those positions are subject to appointment exclusively by the Attorney General.

Pursuant to a cooperative arrangement between the Attorney General and the Department of Revenue, the Department has funded several Assistant Attorney General positions in the Attorney General's Revenue Litigation Division. For payroll and personnel purposes, the Department of Revenue has classified these positions as technical advisers, the DCMS designation for persons performing certain law-related services for the agencies of the State of Illinois subject to the Personnel Code (Ill. Rev. Stat. 1985, ch. 127, par. 63b101 et seq.). While the persons who staff these positions are paid out of the budget of the Department of Revenue, they are subject to the direction, control, and supervision of the Attorney General. In general, such persons assist the Attorney General in carrying out his duties pertaining to revenue law enforcement and collection, including conducting litigation on behalf of the State of Illinois with respect to revenue matters.

Pursuant to its power to promulgate rules implementing the Personnel Code (Ill. Rev. Stat. 1985, ch. 127, pars. 63b108, 63b108b.13), DCMS has adopted certain rules which establish reemployment and recall rights for laid-off, certified employees. Sections 302.570 and 302.580 of title 80 of the Illinois Administrative Code (1985) provide as follows:

"Section 302.570 Reemployment Lists

- a) The Department shall establish and maintain a reemployment list, by class and agency and county, or other designated geographical area approved by the Director before layoff. A certified employee who has been indeterminately laid off shall be placed in order of length of continuous service as defined in Section 302.190 on a reemployment list for recall to the first available assignment to a position in the class (or related classes with substantially similar requirements and duties) and agency, and county, or other designated geographical location or area in which the employee was assigned prior to being placed on the reemployment list. Where circumstances warrant, at the discretion of the Director, such reemployment list may be established by related classes whose duties are substantially similar to the class from which the employee was laid off.
- b) An employee whose name has been placed on the reemployment list will also be eligible for reinstatement in accordance with Section 302.610."

"Section 302.580 Employment From Reemployment List  
Whenever there is any person available on a reemployment list for recall to a vacant position for the same class, or related classes where such have been established pursuant to Section 302.570, agency and county or other designated geographical area, no temporary, provisional or probationary appointments shall be made to such vacancy."

Upon the indeterminate lay-off of a certified employee, he or she is placed, in order of seniority, on a reemployment list for recall to the first available assignment to a position in the class, agency, and geographical area in which the employee was assigned prior to being laid-off. Moreover, a vacant position in such a class, agency, and geographical area may not

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be filled by a temporary, provisional, or probationary employee if there are persons available for recall to the position on a reemployment list. (See generally Powell v. Jones (1973), 56 Ill. 2d 70, 78-79.) You ask whether a vacant Assistant Attorney General staff position which is funded by the Department of Revenue, as described above, is subject to assignment to an available, laid-off Department of Revenue technical adviser who is on a reemployment list, or, conversely, whether such position may be filled by the appointment of a person other than an available person on a reemployment list.

The purpose of the Personnel Code and the rules promulgated thereunder is to establish a system of personnel administration in State government based upon merit principles and scientific methods. (1978 Ill. Att'y Gen. Op. 132, 134-35.) The Personnel Code, as most other civil service laws, is designed to provide a method which ensures a competent and efficient body of employees for government. (See People ex rel. Mathes v. Foster (1977), 67 Ill. 2d 496, 502; Fahey v. Cook County Police Department Merit Board (1974), 21 Ill. App. 3d 579, 586; Hacker v. Myers (1961), 33 Ill. App. 2d 322, 333; People v. Niewinski (1957), 13 Ill. App. 2d 307, 313.) It deals with the classification and pay of many State employees, their merit and fitness, and the conditions of their employment

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(Boner v. Jones (1975), 60 Ill. 2d 532, 537), and gives those employees security from discharge on frivolous grounds. See Gibbs v. Orlandi (1963), 27 Ill. 2d 368, 372.

With the adoption of the Personnel Code, however, the General Assembly clearly recognized that certain public employment positions, due to the nature of their tasks and duties, should be excluded from civil service requirements and protections. Those positions which involve duties of a highly sensitive nature, which demand a high level of confidentiality, or which are policy-making or policy-implementing, have traditionally been exempted from civil service status for the reason that conferring protected status upon such employees may seriously hinder the successful operation of government. (See, e.g., Jafree v. Scott (N.D. Ill. 1974), 372 F. Supp. 264, 271, aff'd in part, rev'd in part, 519 F.2d 1405 (7th Cir. 1975); see also Dillon v. Nassau County Civil Service Commission (N.Y. Ct. App. 1978), 402 N.Y.S.2d 1001, 1003; Annot., 146 A.L.R. 818 (1943).) Because the positions under the Attorney General demand the exercise of great discretion and professional judgment and are of a policy oriented nature, the General Assembly expressly provided for the exemption of such positions from civil service status. (Ill. Rev. Stat. 1985, ch. 127, par. 63b104c.) Jafree v. Scott (N.D. Ill. 1974), 372 F. Supp. 264, 271, aff'd in part, rev'd in part, 519 F.2d 1405 (7th Cir.

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1975); Morton v. Hartigan (1986), 145 Ill. App. 3d 417, 423, appeal denied (1986).

The role of the Attorney General in the operation of State government has been firmly established:

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\* \* \* [T]he Attorney General is the chief law officer of the State, and the only officer empowered to represent the people in any suit or proceeding in which the State is the real party in interest, except where the constitution or a constitutional statute may provide otherwise. With this exception, only, he is the sole official adviser of the executive officers and of all boards, commissions and departments of the State government, and it is his duty to conduct the law business of the State, both in and out of the courts. \* \* \*

\* \* \*

Fergus v. Russel (1915), 270 Ill. 304, 342. "

See also Gust K. Newburg, Inc. v. Illinois State Toll Highway Authority (1983), 98 Ill. 2d 58, 66-67; People ex rel. Scott v. Briceland (1976), 65 Ill. 2d 485, 500; Stein v. Howlett (1972), 52 Ill. 2d 570, 584-87; Freels, Powers of the Attorney General of Illinois, 53 Chi. B. Rec. 119 (1971); Palincsar, Separation of Powers in Illinois and the Inability to Abrogate Common Law Powers of the Attorney General, 68 Ill. B.J. 264 (1979); Note, The Illinois Attorney General: Exclusive Legal Counsel for the State, 1975 U. Ill. L.F. 470 (1975).

In Environmental Protection Agency v. Pollution Control Board (1977), 69 Ill. 2d 394, 399-402, the supreme court further explicated the role of the Attorney General:

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\* \* \*

As the chief legal officer of the State, the Attorney General has the constitutional duty of acting as legal adviser to and legal representative of State agencies. He or she has the prerogative of conducting legal affairs for the State. The effect of this grant of power to the Attorney General is that Illinois is served by a centralized legal advisory system. There are, arguably, at least two reasons for this centralization. First, private counsel for State agencies are expensive. \* \* \* Second, centralization is more efficient. Whatever the merits of these arguments, it remains true that the duties of the Illinois Attorney General encompass advising and representing State agencies.

\* \* \*

\* \* \* It seems to us that if the Attorney General is to have the unqualified role of chief legal officer of the State, he or she must be able to direct the legal affairs of the State and its agencies. Only in this way will the Attorney General properly serve the State and the public interest. To allow the numerous State agencies the liberty to employ private counsel without the approval of the Attorney General would invite chaos into the area of legal representation of the State.

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Clearly, the only person authorized to represent the State of Illinois and its agencies before the courts and administrative tribunals and to advise agencies and departments of State government on an official basis with respect to legal matters is the Attorney General. See opinion No. 87-004, issued April 3, 1987.

In People v. Illinois Toll Highway Commission (1954), 3 Ill. 2d 218, the supreme court considered the constitutionality of an act which granted the power to the Toll Highway Commission to appoint persons to the position of Assistant Attorney General or special counsel by and with the consent of the Attorney General. As in the current situation, such persons were not paid from the Attorney General's budget. Rather, they were paid by the Toll Highway Commission, but such persons were subject to the control, direction, and supervision of the Attorney General. Noting that the multiplicity of the duties of the Attorney General forbids his personal attention to every matter, the court held that the Attorney General may act through deputies or assistants in carrying out his duties. (Illinois Toll Highway Commission, 3 Ill. 2d at 237; see also Scott v. Ass'n for Childbirth At Home, Int'l (1982), 88 Ill. 2d 279, 299; Saxby v. Sonnemann (1925), 318 Ill. 600, 607.)

Because of the unique and exclusive role of the Attorney General to provide all legal services for the State, the court held that, even though the attorney may be paid by an agency of government other than the Attorney General, any attorney who performs legal services for the State must be subject to the control of the Attorney General in all respects, including appointment:



" \* \* \*

The proper construction of the act [in question] is that the commission, from the funds available to it, allocates so much money as is necessary to pay for the necessary legal services. The function of the commission in making funds available for special counsel and attorneys is analogous to the function of the legislature in appropriating moneys to the Attorney General from the general revenues of the State. By the amount it appropriates \* \* \*, the legislature, too, in a sense controls the appointment and compensation of assistant Attorneys General. It is only in this sense that the commission can be said to appoint or fix compensation of special counsel or assistant attorneys. In harmony with our earlier holdings, the legislature intended that these special counsel and assistant attorneys be as much a part of the staff of the Attorney General and subject to his control in all respects as are those assistants paid from the funds appropriated directly to him by the General Assembly. Even though attorneys and special counsel for the commission may perform legal services for the State, their right to do so exists only because they are subordinates of the Attorney General.

\* \* \*

(Emphasis added.) (People v. Illinois Toll Highway Commission (1954), 3 Ill. 2d 218, 237-38.) "

If the Commission had been given the power to appoint persons to the staff of the Attorney General without his approval or consent, the act under consideration by the court would have been unconstitutional, but, since such appointments were made by and with the consent of the Attorney General, the court adjudged the act to pass constitutional muster.

When an Assistant Attorney General performs legal services for the State or the public interest, he or she is

acting on behalf of the Attorney General. As such, an Assistant Attorney General occupies a policy-making or policy-implementing position, and, therefore, he owes a duty of loyalty to the Attorney General and a duty to the public to act in harmony with the Attorney General. (Morton v. Hartigan (1986), 145 Ill. App. 3d 417, 423, appeal denied (1986).) In Jafree v. Scott (N.D. Ill. 1974), 372 F. Supp. 264, 273, aff'd in part, rev'd in part, 519 F.2d 1405 (7th Cir. 1975), the court addressed the relationship between the Attorney General and his assistants:

" \* \* \*

In order to carry out [his] statutory, constitutional and common law duties, the Attorney General maintains offices in Springfield and Chicago. Obviously the Attorney General cannot personally perform these duties. In order to assist the Attorney General in carrying out this mandate numerous Assistant Attorneys General are employed. It is only through these Assistants that the Attorney General can give guidance to public officers, appear in open court, attend meetings of public officials and otherwise act as the chief legal officer of the State of Illinois. In performing his duties, an Assistant Attorney General acts in the name of and on behalf of the Attorney General. It is axiomatic, therefore, that the Attorney General in selecting and retaining employees must have the personal loyalty and confidence that each Assistant will aid in fulfilling the Attorney General's public mandate. To remove from the Attorney General or in any way diminish his power over appointment and removal would be to emasculate the Attorney General's ability to fulfill his public trust. \* \* \*

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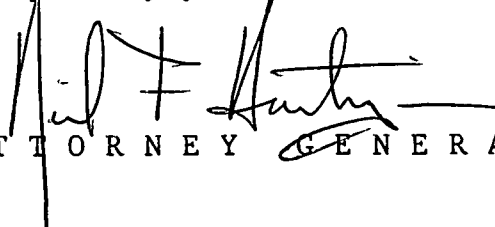
(Emphasis added.)

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Based upon the foregoing authorities, it is my opinion that any person who performs legal services for the State of Illinois, notwithstanding the agency of State government which compensates the person, is subject in all respects to the control of the Attorney General and that the Attorney General possesses the exclusive power to appoint persons to the position of Assistant Attorney General. Accordingly, even though the Department of Revenue provides the funds for several Assistant Attorney General staff positions, it is my opinion that those positions are fully subordinate to and under the control of, the Attorney General, and exogenous to the Department of Revenue, both with respect to selection of incumbents and performance of services. As indicated above, the Personnel Code and the DCMS rules promulgated thereunder apply only to employees holding civil service positions in State service. The DCMS rules have no application over employees whose positions are statutorily exempt. (Gaunt v. Payes (1965), 57 Ill. App. 2d 331, 340.) Because the positions in question are staff positions under the Attorney General, it is my opinion that they are not subject to the rules and procedures of DCMS relating to the reemployment rights of laid-off, certified employees.

Very truly yours,

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