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FILE NO. S-840

OFFICERS:

**Duty of the Attorney General
to Advise and Represent the
Illinois Soybean Program
Operating Board**

Allan Aves, Chairman
Illinois Soybean Program
Operating Board
P. O. Box 162
Sullivan, Illinois 61951

Dear Mr. Aves:

This responds to your request for an opinion concerning the Soybean Marketing Act (Ill. Rev. Stat. 1973, ch. 5, par. 551 et seq.) You have asked several specific questions, one of which is whether the Attorney General of the State of Illinois would defend the Illinois Soybean Program Operating Board if legal action were taken against it. Implicit in this question is also the question whether it is the duty of the Attorney General to advise the Program Operating Board. Because I am of the opinion that it is not my duty to advise or represent the Program Operating Board, I am unable to answer your other

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questions and do not list them.

The duties of the Attorney General are set forth in "AN ACT in regard to attorneys general and state's attorneys". (Ill. Rev. Stat. 1973, ch. 14, par. 1 et seq.) Section 4 of that Act provides that it is the duty of the Attorney General to defend all actions and proceedings against any State officer or to consult with and advise State officers. The Attorney General also has broad common law powers, including that of being the sole official legal advisor and legal representative of the boards, commissions and departments of State government. Fergus v. Russell, 270 Ill. 304 at 342.

While the General Assembly by statute may impose a duty on the Attorney General which did not exist at common law, the statute establishing the Program Operating Board does not provide that the Attorney General shall represent and advise you. It is, therefore, necessary to determine whether the members of the Board are State officers. In State Bd. of Agriculture v. Brady, 266 Ill. 592, the Supreme Court held that members of the State Board of Agriculture were not officers of the State. (See also The People v. Brady, 277 Ill. 124.) This was so even though in a prior decision (Miner v. State Bd. of Agriculture, 259 Ill. 549), the Supreme Court had held

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that the Board was a State agency. Members of the State Board of Agriculture were elected by delegates or alternates chosen by the several agricultural societies in the counties where such societies existed and by the board of supervisors or the county board in those counties where no society existed. The court stated at page 597:

* * * The situation presents the alternative that either the members of the State board are not officers of the State and have no powers or functions as officers, or the act is unconstitutional and void and the board has no legal existence. Section 22 of article 4 of the constitution prohibits the passage of any law granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise, and the power of appointment to public office is an attribute of sovereignty. Such a power is a privilege or franchise not belonging to citizens generally by common right, and it cannot be conferred upon agricultural societies or other voluntary associations or individuals. If such associations could appoint officers of the State under the name of the State Board of Agriculture, they could be authorized to appoint every public officer created by statute, which the constitution forbids. This question was settled in the case of Lasher v. People, 183 Ill. 226, where an act providing that inspectors of produce, exercising the powers of officers, should be composed of members of the Illinois State Horticultural Society, the Illinois State Dairymen's Association, and other societies, was declared unconstitutional and void.
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Similarly, the members of the Program Operating Board are elected by the individual soybean producers in this State. Although all soybean producers eligible to vote may not be members of a private association, there would seem to be no distinction between a group of individuals organized after they were authorized to implement a cooperative marketing program for soybeans and a previously existing private association.

While section 22 of article IV of the Illinois Constitution of 1870 was not specifically included in the Illinois Constitution of 1970, section 13 of article IV of the 1970 Constitution provides:

"The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination."

The explanation of this provision (S.H.A. Const. art. IV, sec. 13, Constitutional Commentary) states that it was meant to encompass most, if not all, of the several prohibitions against special or local legislation in the Constitution of 1870.

Even if the specific provision is not encompassed within the new Constitution, the delegation by the General Assembly of the sovereign power of electing State officers to private citizens would be subject to other constitutional considerations. In State Bd. of Agriculture v. Brady, supra,

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the Supreme Court stated that "the power of appointment to public office is an attribute of sovereignty". (Page 597 quoted above.) In Rouse v. Thompson, 228 Ill. 522, the Supreme Court quoted with approval, a statement from People v. Bennett, 29 Mich. 451 (1874): "It is impossible to sustain a delegation of any sovereign power of government to private citizens, or to justify their assumption of it". If the constitutionality of the Act is to be sustained, the members of the Board cannot be considered State officers.

Furthermore, if the members of the Program Operating Board were to be considered State officers, the provision in section 4 of the Act (Ill. Rev. Stat. 1973, ch. 5, par. 554), which authorizes the compensation of the members of the Board to be established in the marketing program adopted by soybean producers, would be of doubtful constitutionality. Section 21 of article V of the Illinois Constitution of 1970 provides that "officers of the executive branch shall be paid salaries established by law * * *". (emphasis added.)

There is no specific legislative intent shown in the Act that members of the Board are to be considered State officers. Rather, it appears from the Act that the involvement of the

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State with the operation of the Board is to be minimal. The Board does have authority to employ personnel and contract for services, which I believe would include the authority to hire an attorney. Only the Director of the Department of Agriculture is specifically given any duties in regard to the Board, and these appear to be ministerial. The Board, once established, is authorized to implement the marketing program for Illinois soybeans and to collect and expend assessments without further action by the State. The Act anticipates that the Board will operate without appropriation from the General Assembly.

Although I am of the opinion that members of the Program Operating Board are not State officers, I have considered this question only in regard to whether I have the authority or duty to advise and represent the Board. Whether the Program Operating Board is a State board or agency for other purposes under particular statutes, depends on the various definitions of State board or agency as used in the particular statutes.

Very truly yours,

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