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STATE OF ILLINOIS
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SPRINGFIELD

December 10, 1974

FILE NO. S-846

OFFICERS:

**Filling a Vacancy in Office
of Superintendent of State
Fair Agency**

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

Dear Comptroller Lindberg:

I have your letter wherein you state:

"I am attaching Voucher No. 131 which has been submitted to this Office for payment. This voucher is approved by Mr. Paul H. King on behalf of the Illinois State Fair Agency.

I also am attaching a copy of a letter from the Honorable Daniel Walker directed to the Honorable Michael J. Howlett, Secretary of State, dated January 11, 1974, designating Mr. King as Acting Superintendent of the State Fair Agency. I am also attaching a copy of the

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Secretary of State's 'Record of Executive Administrative Officers' with respect to the Superintendent of the State Fair Agency.

Will you please give me your Opinion as to whether or not a voucher signed by Mr. King as Acting Superintendent of the State Fair Agency legally justifies me in issuing a warrant in payment thereof."

On January 11, 1974, Governor Walker designated Paul H. King as Acting Superintendent of the State Fair Agency. It is assumed that on January 11, 1974, there existed a vacancy in the office of Superintendent of the State Fair.

Section 1 of "AN ACT relating to the Illinois State Fair, creating a State Fair Agency, defining its powers and duties, and repealing an Act named therein" (Ill. Rev. Stat. 1973, ch. 127, par. 401), reads as follows:

"§ 1. There is created the State Fair Agency which shall be in charge of a State Fair Superintendent. The Superintendent shall be appointed by the Governor by and with the advice and consent of the Senate. If the Senate is not in session when this Act becomes effective the Governor shall make an appointment as in the case of a vacancy.

The State Fair Superintendent first appointed hereunder shall serve until the

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third Monday in January, 1967, and until his successor is appointed and qualified. Thereafter the term of office of the State Fair Superintendent shall be for 2 years commencing on the third Monday in January of each odd-numbered year and until his successor is appointed and qualified. The salary of the State Fair Superintendent is \$16,000 per annum."

It is clear that section 1 authorizes the Governor to appoint, by and with the advice and consent of the Senate, a Superintendent of the State Fair. There is, however, no statutory provision pertaining to the filling of a vacancy in the office of Superintendent of the State Fair. The Governor is not authorized by statute to designate an Acting Superintendent of the State Fair.

The Illinois Constitution of 1970 contains a provision pertaining to the filling of a vacancy in an office subject to gubernatorial appointment by and with the advice and consent of the Senate. Section 9(b) of article V of the Illinois Constitution of 1970 reads:

"(b) If, during a recess of the Senate, there is a vacancy in an office filled by appointment by the Governor by and with the advice and consent of the Senate, the Governor shall make a temporary appointment until the next meeting of the Senate, when he shall make a nomination to fill such office."

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There is some confusion as to whether on January 11, 1974, when Mr. King was designated as Acting Superintendent of the State Fair, the Governor was exercising the authority granted to him by section 9(b). The Senate had adjourned on January 9, 1974, until January 29, 1974. Thus, it could be argued that a vacancy existed during a recess of the Senate and the Governor pursuant to section 9(b) could fill it by temporary appointment. However, it is my understanding that Mr. King has consistently been carried on the payroll of the State Fair Agency as "Executive V" at a salary exceeding approximately \$24,000 per annum. The Superintendent of the State Fair is by law authorized to receive only \$16,000 per annum. The salary differential would seem to indicate that the Governor did not intend to make a temporary appointment to fill a vacancy in the office of State Fair Superintendent.

The Governor does not have statutory authority, similar to that granted to him by section 12 of the Civil Administrative Code of Illinois (Ill. Rev. Stat. 1973, ch. 127, par. 12), to appoint an Acting Superintendent of the

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State Fair. (See, Atty. Gen. Op. No. S-598, June 1, 1973, regarding acting directors of Code Departments.) Therefore, if the Governor was not exercising his powers pursuant to section 9(b), then, I am of the opinion that the designation of Mr. King as "Acting Superintendent" was invalid.

However, if the Governor was indeed exercising his powers pursuant to section 9(b), then Mr. King became the temporary Superintendent of the State Fair. Section 9(b) authorizes the Governor to "make a temporary appointment until the next meeting of the Senate, when he shall make a nomination to fill such office". To my knowledge, the Governor has never nominated anyone as Superintendent of the State Fair and submitted the nomination for Senate confirmation. It is not necessary to state at what point failure to submit a nomination causes expiration of the temporary appointment. The Senate has been in session several times since January 11, 1974. There elapsed some five months between February 1, 1974, and July 13, 1974, within which to send a nomination to the Senate. There has been to date a lapse of more than ten months since Mr. King was first designated Acting Super-

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intendent. Assuming the Governor's designation of Mr. King as "Acting Superintendent" could be construed as an exercise of gubernatorial power pursuant to section 9(b), the Governor has failed to obey the mandate of section 9(b) in that he has not made a nomination to fill the office of the Superintendent of the State Fair at the next meeting of the Senate. Such a failure to nominate pursuant to section 9(b) causes an expiration of the term of the temporary appointee.

In State ex rel. Wayne v. Sims, 90 S.E. 2d 288, (W. Va. 1955), the Supreme Court of Appeals of West Virginia in construing section 9 of article VII of the West Virginia Constitution, which was similar to section 9(b) of article V of the Illinois Constitution of 1970, held that a failure to submit a nomination at the next meeting of the Senate caused the temporary appointment to expire.

I recognize a need to keep the State Fair Agency viable. Thus, a vacancy in the office of Superintendent should be promptly filled. On the other hand, the General Assembly, in creating the office of Superintendent of the State Fair

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specifically directed that the office be filled by gubernatorial appointment by and with the advice and consent of the Senate. The Governor did have the authority to make a temporary appointment pursuant to section 9(b), but his failure to propose a nomination to the Senate for confirmation has caused an expiration in his temporary appointment. If the Governor could make a temporary appointment for an indefinite duration to fill a vacancy, and concurrently fail to submit a nominee to the Senate for confirmation after having many opportunities to do so, then the interest of insuring the advice and consent of the Senate before making a permanent appointment would be rendered ineffectual and the mandate of section 9(b) of article V of the Illinois Constitution would be circumvented. See, Braden & Cohn "The Illinois Constitution", at 284.

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

"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, depart-

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ments, 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;

* * *

Clearly, the "executive officer" of the State Fair Agency is that individual who occupies the office of State Fair Superintendent. Since Mr. King is not legally the Superintendent of the State Fair, I am of the opinion that he does not have the authority pursuant to section 10 to sign vouchers drawing upon the appropriations to the State Fair Agency.

Very truly yours,

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