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FILE NO. S-515

CONSTITUTION:
Statement of economic interests
applicability to employees

Honorable Michael J. Howlett
Auditor of Public Accounts
State House
Springfield, Illinois 62706

Dear Auditor Howlett:

I have your original letter and supplement thereto
wherein you state:

"House Bill 3700, passed by the 77th General
Assembly in Public Law 77-1806 and approved
by the Governor on January 24, 1972, amended
the existing Government Ethics Statute.

Among other things, the amendment provided for
the filing of a statement of economic interests
of all state employees earning over \$20,000 per
annum.

I have been informed that certain state em-
ployees have failed to file their statements
of economic interests, which were due under
the law, no later than June 30, 1972.

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Two college Presidents of State supported universities, together with the Executive Director of the Board of Higher Education, have failed to file with the Secretary of State information required under the Government Ethics Law.

I respectfully request your advice and Opinion in connection with the following questions:

(1) Whether or not I may continue to draw warrants in payment of the salaries of the college Presidents who failed to file.

(2) Whether or not I may continue to draw warrants in payment of the salary of the Executive Director of the Board of Higher Education, who also failed to file."

It is my understanding that the two University presidents of concern are the President of Southern Illinois University and the President of Northern Illinois University. All three gentlemen are paid at a rate of \$20,000 a year or more.

Section 2 of article XIII of the Illinois Constitution of 1970 provides as follows:

"All candidates for or holders of state offices and all members of a Commission or Board created by this Constitution shall file a verified statement of their economic interests, as provided by law. The General Assembly by law may

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impose a similar requirement upon candidates for, or holders of, offices in units of local government and school districts. Statements shall be filed annually with the Secretary of State and shall be available for inspection by the public. The General Assembly by law shall prescribe a reasonable time for filing the statement. Failure to file a statement within the time prescribed shall result in ineligibility for, or forfeiture of, office. This Section shall not be construed as limiting the authority of any branch of government to establish and enforce ethical standards for that branch."

On this date, I have issued Attorney General's Opinion No. S-514 wherein I hold that the ineligibility or forfeiture provision contained in section 2 of article XIII affects not only candidates for and holders of all state offices, whether created by the constitution or by statute, but, also, applies to candidates for and holders of offices in units of local governments and school districts, whether created by constitution or by law. A copy of this opinion is enclosed for your scrutiny.

The forfeiture penalty contained in section 2 of article XIII is self-executing in nature. There is no comparable penalty contained in the body of the Illinois Governmental Ethics Act itself. The only penalty provision in the Illinois Governmental Ethics Act is found at section 4A-107 (Ill. Rev.

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Stat., 1971 (Supp.), ch. 127, par. 604A-107) which penalizes the willful filing of a false or incomplete ethics statement.

Also, in that enclosed opinion I point out that the constitutional forfeiture provision does not affect public employees. Thus, if the presidents of the aforementioned universities and the executive director of the Board of Higher Education are public employees, they, of course, could not possibly be affected by said forfeiture provision.

The distinction between a public officer and a public employee has long been recognized by the courts. (See, 53 A.L.R. 595; 140 A.L.R. 1076). Over the years the Illinois Supreme Court and courts of other jurisdictions have outlined the ingredients that comprise an office as opposed to an employment.

An indispensable element of a public office, as distinguished from an employment, is that the duties of the incumbent of an office shall involve an exercise of some portion of the sovereign power. People v. Brady, 302 Ill. 576, 582; Olson v. Scully, 296 Ill. 418, 421; Martin v. Smith, 239

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Wisc. 314, 332, 1 N.W. 2d 163, 172; Parker v. Riley, 18 Cal. 2d 83, 87, 113 P. 2d 873, 875; State ex rel. Green v. Glenn, 39 Del. 584, 587, 4 A. 2d 366, 367; State ex rel. Barney v. Hawkins, 79 Mont. 506, 528, 257 P. 411, 418; 53 A.L.R. 595, 602; 140 A.L.R. 1076, 1081.

In People v. Brady, 302 Ill. 576, the Illinois Supreme Court held that committeemen of political parties were not public officers. The court placed strong emphasis on the notion that a person must exercise some portion of state sovereignty to be a public officer. At page 582, the court states:

"* * * The most important characteristic of an office is that it involves a delegation to the officer of some of the solemn functions of government to be exercised by him for the benefit of the public. Some portion of the sovereignty of the State, either legislative, executive or judicial, attaches for the time being to the officer, to be exercised for the public benefit. Unless the powers conferred by the act creating the office are of this nature the individual filling the office is not a public officer."

An office is a public position created by the constitution or by law, continuing during the pleasure of the appointing power or for a fixed time, with a successor necessarily

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being elected or appointed. (Bunn v. Illinois 45 Ill. 397; Fergus v. Russel, 270 Ill. 304; State v. Sowards, 64 Okl. Cr. Rep. 430, 82 P. 2d 324, 140 A.L.R. 1076, 1080; see, also, Ill. Const., art. V, sec. 24 [1870]). It should be noted that an office is enduring in nature and cannot be eliminated by the fiat of a superior official. Thus, if an office is vacated, it must be filled.

Section 24 of article V of the Illinois Constitution of 1870 read as follows:

"An office is a public position created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed. An employment is an agency, for a temporary purpose, which ceases when that purpose is accomplished."

This constitutional definition of public office and public employment applied only to state officers. (People v. Loeffler, 175 Ill. 585). The definition is broad enough to embrace within its terms all officers of units of local government, but it had no reference to them. It served as a guide to the General Assembly in making its appropriations,

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so that it could determine who were officers of the state and who were employees, and thereby comply with the constitutional provision prohibiting an increase in the salaries of state officers during their present term of office. Ill. Const., art. V, sec. 23 [1870]; People v. Brady, 302 Ill. 576; Fergus v. Russel, 270 Ill. 304, 322.

In Fergus v. Russel, 270 Ill. 304 at p. 322, the Illinois Supreme Court construed section 24 of article V as follows:

"* * * This is an explicit definition and must serve as the only guide of the legislature in making appropriations for the salaries of the officers of the State government. This definition contains two essential elements, both of which must be present in determining any given position to be an office: (1) The position must be a public one, created either by the constitution or by law; and (2) it must be a permanent position with continuing duties. To determine whether the first element is present we have but to look to our constitution and our statutes to see whether the particular position under consideration has been created by the constitution or by law. An office is created by law only as a result of an act passed for that purpose. The mere appropriation by the General Assembly of money for the payment of compensation to the incumbent of a specified position does not have the effect of creating an office or of giving such

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incumbent the character of an officer, (People v. McCullough, 254 Ill. 9,) as an office cannot be created by an appropriation bill. To ascertain whether the second element is present it is necessary to determine the character of the position. This is not determined by the method in which the occupant or holder of the position is selected, - whether by appointment or election. If the duties of the office are continuing and it is necessary to elect or appoint a successor to the several incumbents, then the second element is present whether the incumbent be selected by appointment or by election, and whether the incumbent be appointed during the pleasure of the appointing power or be elected for a fixed term. * * *

It should be noted that section 24 of article V of the Illinois Constitution of 1870 has been eliminated from the Illinois Constitution of 1970.

The fact that one occupying a position is compelled by law to give a bond for the faithful performance of his duties is some indicia that the position is an office not merely an employment. People v. Brady, 302 Ill. 576, 582; Martin v. Smith, 293 Wisc. 314, 332, 1 N.W. 2d 163, 172; State ex rel. Barney v. Hawkins, 79 Mont. 506, 528, 257 P. 411, 418; 53 A.L.R. 595, 608; 140 A.L.R. 1076, 1091.

Also, the fact that one occupying a position must subscribe to the oath required by the constitution or by law

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is strong indicia that the position is an office. People v. Brady, 302 Ill. 576, 582; Martin v. Smith, 293 Wisc. 314, 332, 1 N.W. 2d 163, 172; Kingston Associates v. LaGuardia, 156 Misc. 116, 281 N.Y.S. 390, aff'd 246 App. Div. 603; 285 N.Y.S. 19; 53 A.L.R. 595, 608; 140 A.L.R. 1076, 1092.

To summarize, there are two indispensable requirements of a public office. One, to be a public office, a position must possess a delegation of a portion of the sovereign power of the government. Secondly, the position must be created by the constitution or by law and must be of an enduring nature and not subject to abolition by whim of superior officials. Other indicia that a position is a public office are whether the individuals must give bond or take an oath.

The Board of Higher Education is a creature of statute. (Ill. Rev. Stat., 1971, ch. 144, par. 181, et seq.). It is not a body corporate and politic.

Section 4 of An Act creating a Board of Higher Education, defining its powers and duties, making an appropriation therefor, and repealing an Act herein named (Ill. Rev. Stat., 1971, ch. 144, par. 184, et seq.) provides, in part, as

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follows:

" * * * *

The Board may employ and fix the compensation of such professional and clerical staff and other assistants, including specialists and consultants, as it may deem necessary, on a full or part time basis."

Pursuant to this grant of power, the Board of Higher Education has created the position of executive director. The executive director of the Board of Higher Education does not exercise any portion of state sovereignty. The legislature in creating the Board of Higher Education delegated all powers to the Board. The executive director is subject to control in all things by the Board.

To reiterate, section 4 of An Act creating a Board of Higher Education, defining its powers and duties, make an appropriation therefor, and repealing an Act herein named (Ill. Rev. Stat., 1971, ch. 144, par. 184) authorizes the Board "to employ and fix the compensation of such professional and clerical staff and other assistants, including specialists and consultants, as it may deem necessary" Thus, the

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position of executive director is not directly created by law. More importantly, the position of executive director is not continuous or enduring in nature. It can be abolished if the Board deems it necessary.

Additionally, the executive director is not required by law to subscribe to an oath or to provide bond upon undertaking the responsibilities of his position.

I am of the opinion that the executive director of the Board of Higher Education is a public employee of the State of Illinois and as such he must file an ethics statement pursuant to section 4A-101(f) of the Illinois Governmental Ethics Act (Ill. Rev. Stat., 1971 (Supp.), ch. 127, par. 604A-101(f)). However, if the executive director of the Board of Higher Education fails to file his ethics statement within the time prescribed by law, this does not automatically result in the forfeiture of his employment. The forfeiture provisions of section 2 of article XIII of the Illinois Constitution of 1970 applies only to officers and not to employees.

Section 1 of the Regency Universities Act (Ill. Rev. Stat., 1971, ch. 144, par. 301) provides, as follows:

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"A system of Regency Universities is hereby created, to be effective July 1, 1967, and Illinois State University, Northern Illinois University and Sangamon State University are hereby designated as Regency Universities. A Board of Regents, hereinafter called the Board, is created to manage, operate, control and maintain Illinois State University, Northern Illinois University, Sangamon State University and any other universities hereafter designated as Regency Universities."

The Board of Regents are constituted a body corporate and politic. (Ill. Rev. Stat., 1971, ch. 144, par. 307). The General Assembly has delegated to the Board of Regents general powers (Ill. Rev. Stat., 1971, ch. 144, par. 307) and particular powers. (Ill. Rev. Stat., 1971, ch. 144, par. 308). Section 8 of the Regency Universities Act (Ill. Rev. Stat., 1971, ch. 144, par. 308) provides, in part, as follows:

"The Board shall have power and it shall be its duty to:

* * *

c. employ, and, for good cause, remove a president of each Regency University"

* * *

Section 1 of An Act providing for the management, operation, control and maintenance of Southern Illinois

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University (Ill. Rev. Stat., 1971, ch. 144, par. 651) provides as follows:

"There is hereby created a body politic and corporate which shall be styled the Board of Trustees of Southern Illinois University to operate, manage, control and maintain the University, hereinafter called the Board."

Section 8 of An Act providing for the management, operation, control and maintenance of Southern Illinois University (Ill. Rev. Stat., 1971, ch. 144, par. 658) provides, in part, as follows:

"The Board shall have power and it shall be its duty:

* * *

2. To employ, and, for good cause, to remove a president of Southern Illinois University.

.... "

* * * "

The position of president of Northern Illinois University and the position of the president of Southern Illinois University are created by law. These positions cannot be eliminated by the respective Boards that govern each University.

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If, for example, the presidency of Northern Illinois University becomes vacant, then, the Board of Regents must fill this vacancy.

However, the Regency Universities Act does not delegate any powers to the president of Northern Illinois University. The president of Northern Illinois University has only the authority delegated to him by the Board of Regents. Thus, the responsibilities of the president of Northern Illinois University may be contracted or expanded as the Board of Regents deem necessary.

Likewise, the president of Southern Illinois University has not been delegated any statutory powers. Thus, he does not exercise any portion of state sovereignty.

In Martin v. Smith, 239 Wisc. 314, 1 N.W. 2d 163, the Wisconsin Supreme Court had occasion to decide the question of whether the president of the University of Wisconsin was a public officer or a public employee. Unlike the presidents of Northern Illinois University and Southern Illinois University the president of the University of Wisconsin was delegated some

statutory powers.

"We come now to a consideration of the question whether the presidency of the University is a public office and the incumbent thereof a public officer. Section 36.06 relates to the duties and powers of the Board of Regents. Subsection (1) provides: 'The board of regents shall enact laws for the government of the university in all its branches; elect a president and the requisite number of professors, instructors, officers and employes, and fix the salaries' etc.

'(2) The board shall have power to remove the president or any professor, instructor or officer of the university when, in the judgment of the board, the interests of the university require it.'

'Sec. 36.12 President of the university. The president of the university shall be president of the several faculties and the executive head of the instructional force in all its departments; as such he shall have authority, subject to the board of regents, to give general direction to the instruction and scientific investigations of the several colleges, and so long as the interests of the institution require it he shall be charged with the duties of one of the professorships. The immediate government of the several colleges shall be intrusted to their respective faculties; but the regents shall have the power to regulate the course of instruction and prescribe the books or works to be used in the several courses, and also to confer such degrees and grant such diplomas as are usual in universities or as they shall deem appropriate, and to confer upon the faculty by by-laws the power to suspend or expel students for misconduct or other cause prescribed in such by-laws.'

Section 3 of ch. 4 of the by-laws adopted by the Board of Regents provides: 'Sec. 3. The President of the University shall be the executive head of the institution and shall hold his position at the pleasure of the Board of Regents. He shall generally manage and direct the University, carry out the policies and duties as set forth by the Board of Regents, and as President of the University by authority of the Board of Regents and subject to its approval shall make and enforce such rules and regulations as may be necessary or incident thereto and shall make appointments or accept resignations of personnel with rank less than that of associate professor and shall recommend to the Board of Regents the appointment of personnel with a rank equal to or greater than associate professor. The President of the University shall at each meeting of the Board of Regents present a report on actions taken by the administration of the University including appointments, resignations and regulations since the last meeting of the Board of Regents.'

It is to be noted that by sec. 36.12 such authority as the president has is subject in all things to the Board of Regents. The power given the Board to 'enact laws for the government of the University in all its branches' is very broad, subject to no limitations except such as are implied from the nature of the subject matter to which it applies. It may withdraw at any time any powers which it has conferred upon the president. The President serves only so long as in the judgment of the Board of Regents the interests of the University do not require his removal. There is vested in the Board by this clause of the statutes a power of removal that is absolute. It need not be for cause and when

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the President accepts an election to the presidency, he accepts it subject to the statutory authority of the Board.

* * *

Martin v. Smith,
239 Wisc. 314, 327-328,
1 N.W. 2d 163, 170.

The Wisconsin Supreme Court held that the president of the University of Wisconsin was a public employee.

"* * * The President of the University being subject in all things to the action of the Board of Regents, it is the Board of Regents and not the President that exercises some part of the sovereign power of the state. The President of the University is a subordinate of the Board of Regents in executing and carrying out the policies and laws laid down by it. * * *"

Martin v. Smith,
239 Wisc. 314, 333,
1 N.W. 2d 163, 172.

Applying the analysis of the Supreme Court of Wisconsin to the positions of president of Northern Illinois University and president of Southern Illinois University, the conclusion is inescapable that both of these positions are employments and not offices. Both presidents are subject to full control

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in all things by their respective Boards. They exercise no portion of state sovereignty. Unlike the president of the University of Wisconsin, they have no statutory powers. All of their authority is derived from their respective Boards.

Additionally, neither the president of Northern Illinois University nor the president of Southern Illinois University are required by law to take an oath or provide a bond upon undertaking the duties of their respective employments.

I am of the opinion that the president of Northern Illinois University is an employee of an institution under the jurisdiction of the Board of Regents; similarly, the president of Southern Illinois University is an employee of an institution under the jurisdiction of the Board of Trustees of Southern Illinois University. As such, both presidents must file an ethics statement pursuant to section 4A-101(f) of the Illinois Governmental Ethics Act (Ill. Rev. Stat., 1971 (Supp.), ch. 127, par. 604A-101(f)) and within the time prescribed by section 4A-105 of the Illinois Governmental Ethics Act. (Ill.

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Rev. Stat., 1971 (Supp.), ch. 127, par. 604A-105). If either president fails to file his ethics statement within the time prescribed by law, this does not automatically result in forfeiture of his employment. The forfeiture provision of section 2 of article XIII of the Illinois Constitution of 1970 applies only to officers and not employees.

It should be noted that any public officer or public employee who intentionally or recklessly fails to file the ethics statement required by the Illinois Governmental Ethics Act within the time prescribed by said act is subject to prosecution for official misconduct. Section 33-3 of the Illinois Criminal Code of 1961 (Ill. Rev. Stat., 1971, ch. 38, par. 33-3) reads, as follows:

"A public officer or employee commits misconduct when, in his official capacity, he commits any of the following acts:

(a) Intentionally or recklessly fails to perform any mandatory duty as required by law; or

(b) Knowingly performs an act which he knows he is forbidden by law to perform; or

(c) With intent to obtain a personal advantage for himself or another, he performs

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an act in excess of his lawful authority; or

(d) Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law.

A public officer or employee convicted of violating any provision of this Section forfeits his office or employment. In addition, he shall be fined not to exceed \$1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 5 years, or both fined and imprisoned."

Also, any public employee who fails to file the statutory required ethics statement would, of course, be subject to possible disciplinary action by his superiors.

In direct answer to your questions, since the forfeiture provision contained in section 2 of article XIII of the Illinois Constitution of 1970 does not apply to public employees, the executive director of the Board of Higher Education, the president of Northern Illinois University and the president of Southern Illinois University, did not forfeit their employment when they failed to file their ethics statement within the time provided by the Illinois Governmental

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Ethics Act. Thus, you must continue to draw warrants in payment of their salary.

Very truly yours,

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