



**OFFICE OF THE ATTORNEY GENERAL**  
STATE OF ILLINOIS

March 7, 2000

**Jim Ryan**  
ATTORNEY GENERAL

FILE NO. 00-002

GOVERNMENTAL ETHICS AND  
CONFLICT OF INTEREST:  
Applicability of the State Gift  
Ban Act to Judges of Election

The Honorable Gary W. Pack  
State's Attorney, McHenry County  
2200 North Seminary Avenue  
Woodstock, Illinois 60098

Dear Mr. Pack:

I have your letter wherein you inquire whether the provisions of the State Gift Ban Act (5 ILCS 425/1 et seq. (West 1998)) are applicable to judges of election. For the reasons hereinafter stated, it is my opinion that judges of election are not subject to the provisions of the State Gift Ban Act.

The State Gift Ban Act was enacted by the General Assembly as part of an ethics and campaign reform package, and was intended to address public concerns which had arisen because of the acceptance by certain State officials of gifts of more than nominal value from individuals or special interest groups who then lobbied those State officials for legislative changes or

The Honorable Gary W. Pack - 2.

sought to conduct business with the State. (See Remarks of Rep. Kubik, May 22, 1998, House Debate on House Bill No. 672, at 1.) To avoid the appearance of impropriety created by such conduct, section 10 of the State Gift Ban Act (5 ILCS 425/10 (West 1998)) provides that:

"\* \* \* Except as otherwise provided in this Act, no member, officer, employee, or judge shall solicit or accept any gift from any prohibited source or in violation of any federal or State statute, rule, or regulation. This ban applies to and includes spouses of and immediate family living with the member, officer, employee, or judge. No prohibited source shall offer or make a gift that violates this Section." (Emphasis added.)

As used in the State Gift Ban Act, the term "member" refers to "\* \* \* a member of the General Assembly"; the term "officer" means "\* \* \* a State constitutional officer"; and the term "judge" refers to "judges and associate judges of the Supreme Court, Appellate Courts, and Circuit Courts". Similarly, the Act defines the term "employee" to include "\* \* \* all full-time, part-time, and contractual employees, appointed and elected officials, and directors of a governmental entity" (emphasis added). (5 ILCS 425/5 (West 1998).)

Under the language of section 10 of the Act, each "member, officer, employee, or judge" of a State governmental entity is subject to the Act's proscriptions. Clearly, however,

The Honorable Gary W. Pack - 3.

a judge of election is not a "member", "officer" or "judge", as those terms are defined in the State Gift Ban Act. Therefore, it must be determined whether a judge of election is an "employee", as that term is used in the State Gift Ban Act.

In Wargo v. Industrial Comm'n (1974), 58 Ill. 2d 234, the Illinois Supreme Court addressed the issue of whether a decedent who suffered a fatal heart attack in the course of carrying out his official duties as a judge of election was covered by the provisions of the Workmen's Compensation Act. (See Ill. Rev. Stat. 1965, ch. 48, par. 138 et seq.) In reaching its conclusion that the decedent was not within the coverage of the Workmen's Compensation Act, the supreme court found it necessary to categorize judges of election as either public employees or public officers. In making this determination, the court outlined the several indicia of public office: "\* \* \* (1) An authority conferred by law, (2) the power to exercise some portion of sovereign functions of government, and (3) permanency and continuity. \* \* \*" (Wargo v. Industrial Comm'n (1974), 58 Ill. 2d at 236, quoting 3 McQuillin, Law of Municipal Corporations, par. 12.35.) The court then reviewed article XIII of the Election Code (Ill. Rev. Stat. 1971, ch. 46, par. 13-1 et seq., now codified at 10 ILCS 5/13-1 et seq. (West 1998)), which

creates and provides for the office of judge of election.

Specifically, the court stated:

" \* \* \*

The indicia of an office we have described above are present here. \* \* \* These judges are appointed by the circuit court and are referred to as 'officers of the court' (par. 13-3 [now codified at 10 ILCS 5/13-3 (West 1998)]). Upon appointment they continue to be judges of all general and special elections held within their respective precincts or districts until other judges shall be appointed in the manner they were appointed. (Par. 13-6 [now codified at 10 ILCS 5/13-6 (West 1998)].) Persons serving as judges of election shall be 'capable and discreet electors.' (Par. 13-1 and par. 13-2 [now codified at 10 ILCS 5/13-1, 13-2 (West 1998)].) The statutory requirements for service as a judge of election include the qualifications that one be a United States citizen and be entitled to vote at the next election; that he or she be of good reputation and character and have good understanding and capability. (Par. 13-4 [now codified at 10 ILCS 5/13-4 (West 1998)].) The number of judges of election for a precinct or district is set by statute (5) and it is provided that no more than three of them can be from the same party. The term of office is designated as being for two years. (Par. 13-1 and par. 13-2 [now codified at 10 ILCS 5/13-1, 13-2 (West 1998)].) Judges of election are required to take an oath to support the constitutions of the United States and Illinois and to swear they are entitled to vote at the election in question and that

The Honorable Gary W. Pack - 5.

they will faithfully discharge 'the duties of the office of judge of election.'

\* \* \*

(Wargo v. Industrial Comm'n (1974), 58 Ill. 2d at 237-38.)

The court concluded, therefore, that judges of election must be considered public officers rather than public employees.

As previously noted, the term "employee", as used in the State Gift Ban Act, includes appointed and elected officials. Consequently, it follows that judges of election, being public officers, would generally be subject to the provisions of the State Gift Ban Act. In order to respond fully to your inquiry, however, it is also necessary to review the court's order in Illinois State Bar Association v. Ryan, Docket No. 98-MR-363 (Circuit Court, Sangamon County).

In Illinois State Bar Association v. Ryan, the plaintiffs alleged, inter alia, that the State Gift Ban Act was violative of article II, section 1 of the Illinois Constitution of 1970. Specifically, the plaintiffs' complaint alleged that by "\* \* \* establishing rules of conduct for judges and judicial candidates \* \* \* [by] directing the Chief Justice [of the Illinois Supreme Court] to appoint an ethics commission and \* \* \* [by] establishing an ethics commission with authority to discipline judges \* \* \*", the General Assembly had violated the separation

The Honorable Gary W. Pack - 6.

of powers provisions of the Illinois Constitution. Therefore, the plaintiffs sought a declaration that the State Gift Ban Act is unconstitutional as it applies to the judicial branch of Illinois government.

Subsequent to the submission of briefs and the holding of oral arguments, an order was entered by the circuit court stating that:

" \* \* \*

\* \* \* the legislative attempt to prohibit activities, albeit less stringent than the prohibition already in force as to judges, is found unconstitutional and of no effect as to members of the judiciary.

\* \* \*

Our state's constitution in Article VI, Section 15, provides for the creation and appointment of a Judicial Inquiry Board and a Courts Commission. \* \* \*

\* \* \* Those bodies and not the Supreme Court are vested with the jurisdiction over judicial discipline. Sections 45, 55 and 65 of the Act are unconstitutional as applied to the Judicial Branch of government.

\* \* \*

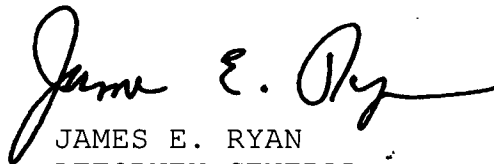
"

Because it has been determined that the State Gift Ban Act is unconstitutional when applied to the judicial branch of State government, a judge of election cannot be required to comply with the provisions of the Act. As noted above, a person

The Honorable Gary W. Pack - 7.

who holds the position of judge of election is considered, by express statutory provision, to be an "officer of the court" and therefore holds an office in the judicial branch of State government. Consequently, in accordance with the court's order in Illinois State Bar Association v. Ryan, it is my opinion that the State Gift Ban Act cannot be applied to judges of election. A second, unrelated question you have posed concerning the application of the Act will be addressed in a separate response.

Sincerely,



JAMES E. RYAN  
ATTORNEY GENERAL