OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

March 13, 2001

Jim Ryan
ATTORNEY GENERAL

FILE NO. 01-003

COMPENSATION:
Salary to be Paid to Temporarily
Appointed Department Directors

The Honorable Daniel W. Hynes
Comptroller
State House, Room 201
Springfield, Illinois 62706

Dear Comptroller Hynes:

I have your letter wherein you inquire regarding the rate of compensation to be paid to certain department directors of administrative agencies under the jurisdiction of the Governor who were reappointed to office with the designation "temporary reappointment" on January 16, 2001. For the reasons hereinafter stated, it is my opinion that the department directors who were temporarily appointed are entitled to receive the increased salaries authorized by the Governor in his letter to you dated January 12, 2001.

Pursuant to the authority conferred upon him by Public Act 91-25, effective June 9, 1999, and Public Act 91-798, effective July 9, 2000, Governor George H. Ryan established the annual

salaries for a number of his cabinet members, including administrative agency directors, for the terms beginning on the third Monday of January, 2001. In a letter dated January 12, 2001, the Governor advised the Secretary of State and you of the new salary levels. Subsequently, on January 16, 2001, the Governor reappointed certain administrative agency directors. Since the Senate was in recess at the time those appointments were made, the documentation related thereto states that the reappointments were to be considered "temporary reappointments" but that the directors who were temporarily appointed were to receive the salaries set by the Governor in his January 12, 2001, letter. You have inquired whether the department directors who were "temporarily reappointed" to office on January 16, 2001, should be paid at the rates in effect prior to January 12, 2001, or at the rates specified by the Governor in his letter of that date.

Article V, section 21 of the Illinois Constitution of 1970 provides:

> "Officers of the Executive Branch shall be paid salaries established by law and shall receive no other compensation for their services. Changes in the salaries of these officers elected or appointed for stated terms shall not take effect during the stated terms." (Emphasis added.)

Under the plain and unambiguous language of article V, section 21 of the Constitution, officers of the executive branch of State

government who are elected or appointed for a stated term are prohibited from receiving a mid-term change in salary. Therefore, it is necessary to determine, initially, whether department directors are officers of the executive branch who are subject to the provisions of article V, section 21 of the Illinois Constitution of 1970.

The Civil Administrative Code of Illinois (20 ILCS 5/1-1 et seq. (West 1999 Supp.)) provides for the several departments of State government. (20 ILCS 5/5-15 (West 1999 Supp.).) "Each department shall have an officer as its head who shall be known as director or secretary and who shall * * * execute the powers and discharge the duties vested by law in his or her respective department." (20 ILCS 5/5-20 (West 1999 Supp.).) "Each officer whose office is created by the Civil Administrative Code of Illinois * * *" is to be appointed by the Governor, by and with the advice and consent of the State Senate. (20 ILCS 5/5-605 (West 1999 Supp.).) Moreover, unless otherwise provided, "* * * [e]ach officer whose office is created by the Civil Administrative Code of Illinois * * * [generally] shall hold office for a term of 2 years from the third Monday in January of each odd-numbered year * * *". (20 ILCS 5/5-610 (West 1999 Supp.).) Prior to entering upon the discharge of the duties of the office, each officer must qualify for office by taking, subscribing and

filing a constitutional oath of office (20 ILCS 5/5-615 (West 1999 Supp.)) and by giving bond as prescribed by law. (20 ILCS 5/5-620 (West 1999 Supp.).) In return for carrying out their prescribed duties, "[t]he executive and administrative officers, whose offices are created by * * *" the Civil Administrative Code of Illinois, are entitled to receive annual salaries, payable in equal monthly installments in an amount established pursuant to statute. (20 ILCS 5/5-300 (West 1999 Supp.).) The indicia of public office include the creation of the position by law, the requirement of an oath or bond, duties prescribed by law rather than by contract or agreement and the continuous nature of the duties of the position without regard to the particular person who holds the position. (Wargo v. Industrial Comm'n (1974), 58 Ill. 2d 234, 237; People v. Brady (1922), 302 Ill. 576, 582; Ill. Att'y Gen. Op. No. 00-002, issued March 7, 2000; Ill. Att'y Gen. Op. No. 92-006, issued April 22, 1992.) Based upon the indicia of a public office, it is my opinion that department directors of administrative agencies under the jurisdiction of the Governor are officers of the executive branch of State government within the meaning of the Illinois Constitution. (See generally Peabody v. Russell (1922), 301 Ill. 439.) As such, department directors are subject to the limitations of article V, section 21 of the Illinois Constitution of 1970.

Having concluded that department directors are prohibited from receiving an increase in compensation during "the stated terms" of their offices, it is necessary to determine when the term of a department director ends. Section 5-610 of the Civil Administrative Code of Illinois (20 ILCS 5/5-610 (West 1999 Supp.)), which addresses the term of office of department directors, provides:

> "Term of office. Each officer whose office is created by the Civil Administrative Code of Illinois, except as otherwise specifically provided for in the Code, shall hold office for a term of 2 years from the third Monday in January of each odd-numbered year and until the officer's successor is appointed and qualified. Where the provisions of the Code require General Assembly members to be included in the membership of any advisory and nonexecutive board, the General Assembly members shall serve such terms or until termination of their legislative service, whichever first occurs." (Emphasis added.)

The primary purpose of statutory construction is to ascertain and give effect to the intent of the General Assembly. (In re Marriage of Burgess (2000), 189 Ill. 2d 270, 277.) Legislative intent is best evidenced by the language used in the statute. (King v. Industrial Comm'n (2000), 189 Ill. 2d 167, 171.) Where statutory language is clear and unambiguous, it must be given effect as written. People v. Whitney (1999), 188 Ill. 2d 91, 97.

Under the language of section 5-610 of the Code, a department director's term of office is fixed at two years measured "from the third Monday in January of each odd-numbered year". The General Assembly, however, has also specifically provided that a department director shall hold over upon the expiration of his or her term of office until a successor is appointed and has qualified. Thus, in advising whether three members of the State's Parole and Pardon Board who continued to serve beyond the statutory expiration of their terms pending reappointment and confirmation by the Senate were entitled to an increase in salary, Attorney General Castle noted that the term of office of a department director included not only the statutorily fixed term, but also the subsequent period of time ensuing until a successor is appointed and qualified. My predecessor then concluded that this holdover period was an extension of the original term of office and the officer could not receive a salary increase during such term. See 1957 Ill. Att'y Gen. Op. 67, 69.

In the current circumstances, the incumbent department directors' statutorily fixed terms of office concluded on January 14, 2001. At that time, no new department directors had been appointed by the Governor or confirmed by the Senate. Therefore, the incumbent department directors were required to

continue in office and lawfully held over. In contrast to the circumstances at issue in Attorney General Castle's opinion, however, on January 16, 2001, Governor Ryan exercised the temporary appointment powers granted by article V, section 9(b) of the Illinois Constitution of 1970 and by section 5-605 of the Civil Administrative Code (20 ILCS 5/5-605 (West 1999 Supp.)) to reappoint his holdover department directors on a temporary basis until such time as an official nomination to office could be made and Senate confirmation obtained. The intervening temporary appointments significantly distinguish the earlier opinion.

Article V, section 9(b) of the Illinois Constitution of 1970 provides:

> " * * *
>
> (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.
>
> * * * "
>
> (Emphasis added.)

Similarly, section 5-605 of the Civil Administrative Code of Illinois provides:

> "Appointment of officers. Each officer whose office is created by the Civil Administrative Code of Illinois or by any amendment to the Code shall be appointed by the Gover-

> nor, by and with the advice and consent of the Senate. In case of vacancies in those offices during the recess of the Senate, the Governor shall make a temporary appointment until the next meeting of the Senate, when the Governor shall nominate some person to fill the office, and any person so nominated who is confirmed by the Senate shall hold office during the remainder of the term and until his or her successor is appointed and qualified. If the Senate is not in session at the time the Code or any amendments to the Code take effect, the Governor shall make a temporary appointment as in the case of a vacancy.
>
> * * *
>
> (Emphasis added.)

It is well established that the power of appointment is not inherent in the office of Governor. (People ex rel. Gullett v. McCullough (1912), 254 Ill. 9, 16; People ex rel. Warren v. Christian (Wyo. 1942), 123 P.2d 368, 371; State ex rel. Smith v. Tazwell (Or. 1941), 111 P.2d 1021, 1024.) Thus, the Governor has only such power to appoint as is granted by the Constitution and by statute. Under the constitutional and statutory provisions set out above, it is clear that the Governor has been granted the authority to make a temporary appointment in cases of vacancies in office during the recess of the Senate. The resolution of your inquiry, therefore, turns on the issue of whether a vacancy in the office of department director existed on January 16, 2001, that could be filled by a temporary appointment.

The term "vacancy" is not defined in either the provisions of the Illinois Constitution of 1970 or the Civil Administrative Code of Illinois. Moreover, a review of the pertinent case law indicates that the word "vacancy" does not have a generally-accepted technical meaning. (People ex rel. Sergel v. Brundage (1920), 296 Ill. 197, 203; People ex rel. Parsons v. Edwards (Cal. 1892), 28 P.831, 832; Commonwealth ex rel. Barratt v. McAfee (Pa. 1911), 81 A.85, 88.) Thus, there is a wide split of authority among the various State courts on the issue of whether there is a vacancy at the end of a term when there is a holdover provision and no one has been selected to fill the office. (See, e.g., State ex rel. Thompson v. Gibson (Wis. 1964), 125 N.W.2d 636, 645; State ex rel. Ryan v. Bailey (Conn. 1946), 48 A.2d 229, and People ex rel. Baird v. Tilton (Cal. 1869), 37 Cal. 614, 621, wherein the courts held that an official who is statutorily required to hold over may not be replaced by a recess appointment unless the successor is appointed and confirmed, while State ex rel. Hodges v. Amos (Fla. 1931), 133 So. 623, concluded that although a holdover officer performs the official duties of the office after the expiration of his official term, the office is vacant as to the new term, in the sense that any office is vacant which is not occupied by a person chosen to fill it for such term; see also Denison v. State (Tex.

Civ. App. 1933), 61 S.W.2d 1017, 1021; State v. Young (La. 1915), 68 So. 241, (upon the expiration of an appointive office a vacancy exists).) These and other cases suggest that in making a determination with respect to whether a vacancy in office exists where an incumbent holds over, it is appropriate to consider not only the language of the statute or Constitution but also such factors as: legislative and constitutional intent; public policy; public interest; and the balancing of legislative and executive prerogatives.

Section 5-605 of the Civil Administrative Code of Illinois traces its origins to section 12 of "AN ACT in relation to the civil administration of State government, and to repeal certain acts therein named". (1917 Ill. Laws 12.) The language of the current statutory provision is virtually identical to that of the original enactment.

Article V, section 9(b) of the Illinois Constitution of 1970 was adopted by the Constitutional Convention with the observation that the provision was merely carrying forward article V, section 11 of the Illinois Constitution of 1870. (See 3 Record of Proceedings, Sixth Illinois Constitutional Convention 1324.) A review of the debates related to article V, section 11 of the 1870 Constitution (1 Debates and Proceedings, 1869-1870 Constitutional Convention 779-781) and its precursor, article V,

section 23 of the 1848 Constitution (Cole, Arthur Charles, ed., The Constitutional Debates of 1847 (Illinois State Historical Library, Springfield (1919)), p. 804-5), has unfortunately yielded no substantive commentary concerning the meaning of the term "vacancy" or the circumstances in which the Governor may exercise his temporary appointment power. Certain changes in phraseology of the various constitutional provisions, however, is noteworthy. Initially, the Governor was authorized to exercise his temporary appointment power when an officer died or an office "* * * by any means became vacant * * *" (Ill. Const. 1818, art. III, sec. 8). In the 1848 Constitution, the language was changed to permit the Governor to exercise his appointment power only for "* * * the filling of all vacancies that happen by death, resignation or removal * * *" (Ill. Const. 1848, art. V, sec. 23). In the 1870 Constitution, the Governor's temporary appointment power could be exercised "[i]n any case of vacancy * * *". (Ill. Const. 1870, art. V, sec. 11.)

With regard to the other factors, the case of Staebler v. Carter (D.D.C. 1979), 464 F. Supp. 585, is instructive. That case, which was one of first impression in the Federal courts and one of the more recent to examine the issue of vacancy, involved the analogous power of the President to make a recess appointment to the Federal Election Commission, pursuant to the provisions of

article II, section 2, clause 3 of the United States Constitution, to replace a commissioner whose statutory term had expired and who claimed entitlement to hold over pending the qualification of his successor by Senate confirmation. In reaching its conclusion that a vacancy existed on the Federal Election Commission to which a recess appointment could properly be made, the district court analyzed the constitutional considerations and the public policy and public interest issues related thereto, stating:

" * * *

> This case, * * * [citation], necessarily involves not merely the interests of the parties but also the proper distribution of power between the branches of government with respect to appointments to high office. Madison has noted that a partition of power 'must be supplied by so contriving the interior structure of government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.' The Federalist No. 51 (Wesleyan ed. 1961). The Constitution must be interpreted in light of that fundamental principle of checks and balances. [Citations.]
>
> As a necessary incident to a decision in this case a choice must be made between a construction of the Act supporting the exercise of executive authority and one which would vest greater power in the legislative branch. Given the need for such a choice, the constitutional scheme of checks and balances in this particular instance favors the claims of the executive.

> Under the constitutional plan, the several branches share a degree of responsibility with respect to a number of governmental functions. Even where there is such a sharing, however, one branch is generally assigned the preeminent or the more active role. * * *
>
> In the context of this overall design, the primary or initiating role in the appointment of officials is the President's. That much has been clear from the time Attorney General Henry Stanberry wrote in 1866 (12 Op.Atty.Gen. 32, 41-2 (1866)):
>
> > We must not forget that this power of appointment to office is essentially an executive function. It belongs essentially to the executive department rather than to the legislative or judicial. If no provision on the subject had been made by the Constitution, it would have been held appurtenant to the President as the head of the executive department, specially charged with the execution of the laws * * *.
>
> This does not mean, of course, either that Presidential power in this field is absolute--obviously it is not--or that every law dealing with appointments to office must necessarily be construed to favor the greatest possible role for the executive branch. But where, as here, there is an ambiguity, and where, depending upon the resolution of that ambiguity the President or the Congress may achieve a stronger voice (see infra), it is appropriate to consider that the President was intended by the framers of the Constitution to possess the active, initiating, and preferred role with respect to the appointment of officers of the United States.
>
> * * *

> If the Federal Election Campaign Act were to be construed as suggested by defendants, the most serious possible consequence would be that McGarry, should he remain unconfirmed, would serve until the end of the next session of the Congress, then to be replaced by another nominee of the President whose name would have to be submitted to the Senate and who would have to pass the scrutiny of that body. Executive control of this seat on the Federal Election Commission would thus be limited in duration, and it would be subject to the constant risk of adverse Senate action. See note 42 infra. Under plaintiff's construction, on the other hand, it is conceivable that a member of the Commission, once appointed and confirmed, albeit for a limited term, could remain in office indefinitely notwithstanding the expiration of that term, as long as the Senate refuses to confirm any successor, or indeed, as long as a significant number of members of the Senate is able to prevent the nomination of a potential successor from coming to a vote. The President would be totally powerless by constitutional means to protect himself and the power to nominate officials conferred upon him by Art. II, Sec. 2 of the Constitution from such usurpation. Clearly, the interpretation proffered by plaintiff is far more unbalancing of the harmonious interplay between the branches than that of defendants (cf. The Federalist No. 51, pp. 323-4; The Federalist No. 48, pp. 308-310) and should therefore be avoided if possible.
>
> * * * "
>
> Staebler v. Carter (D.D.C. 1979), 464 F. Supp. at 598-600.

The court's analysis of the issues and its conclusions are persuasive, and are equally applicable to the circumstances which are under consideration here. Under the Illinois Constitu-

tion of 1970, the primary or initiating role in the appointment of executive officers is the Governor's. (Ill. Const. 1970, art. V, sec. 9(a).) Indeed, article V, section 9(a) of the Illinois Constitution expressly provides that "[t]he General Assembly shall have no power to elect or appoint officers of the Executive Branch". Moreover, the officers subject to temporary appointments are those who are charged with carrying out the Governor's policies in the performance of their official duties, i.e., his cabinet.

A determination that once an agency director is appointed and confirmed, he or she remains in office until a successor is confirmed by the Senate, creates the real possibility that the Senate could use its confirmation powers to thwart the confirmation of a successor, thereby forcing the Governor to attempt to implement his or her policies through officers not of his own selection. Such action would be inconsistent with the separation of powers doctrine embodied in the Illinois Constitution. (Ill. Const. 1970, art. II, sec. 1.) After consideration of the various arguments tendered, it is my opinion that upon the expiration of an executive officer's fixed term, the office is vacant as to the new term if a successor has not been nominated by the Governor and confirmed by the Senate. It is for this term

that the Governor may make a temporary appointment, if the vacancy occurs while the Senate is in recess.

It has been suggested that two Federal cases more recent than Staebler v. Carter, Mackie v. Clinton (D.D.C. 1993), 827 F. Supp. 56, and Wilkinson v. Legal Services Corp. (D.D.C. 1994), 865 F. Supp. 891, reflect the current state of the law with respect to whether a vacancy in office exists when an incumbent holds over. In both of those cases, the district court concluded that a vacancy in office did not exist upon the expiration of a statutory term because the officers were authorized to hold over. I note, however, that Mackie v. Clinton was ultimately vacated as moot (1994 WL 163761 (D.C. Cir. 1994)), and that Wilkinson v. Legal Services Corp. was reversed and remanded (80 F.3d 535 (D.C. Cir. 1996)). Consequently, I do not believe that the district court's holdings in those cases affect the continuing validity of the decision in Staebler v. Carter.

You have also cited an opinion issued by one of my predecessors with respect to this issue. Specifically, in that opinion (see 1910 Ill. Att'y Gen. Op. 172), Attorney General Stead was asked to determine whether the Governor possessed the authority to appoint a person to the office of public administrator during a recess of the Senate, where, at the time the appointment was made, the incumbent public administrator was "* * *

holding the office and discharging the duties thereof. * * *" My predecessor noted "* * * that an office does not become vacant on the expiration of the fixed term of the incumbent of the office, where, under the law, he holds over until his successor is elected or appointed and qualified". (1910 Ill. Att'y Gen. Op. 173.) In reaching his conclusion that there was no vacancy in the office of public administrator to which an appointment could be made during a recess of the Senate, Attorney General Stead, like many of his contemporaries who examined this issue, did not consider the constitutional implications of his decision or the effects of his conclusions upon public policy and the public interest. It is my opinion that the position of the Federal court in Staebler v. Carter is the more reasoned approach and should be followed.

Having concluded that a vacancy exists when an incumbent officer's fixed term has expired and the officer is holding over, and that the Governor may make a temporary appointment to fill the vacant office, it must be determined whether a new term of office has commenced with the temporary appointment. As discussed above, under section 5-610 of the Civil Administrative Code of Illinois, officers whose office is created by the Code "* * * shall hold office for a term of 2 years from the third Monday in January of each odd-numbered year and until the offi-

cer's successor is appointed and qualified. * * *" In these circumstances, the department directors were temporarily appointed to office on Tuesday, January 16, 2001, the third Tuesday in January of an odd-numbered year. Moreover, by making the temporary appointments to the offices, the Governor necessarily terminated the right of incumbent department directors to hold over. It follows, therefore, that when the temporary appointee qualifies for office, a new term has begun, and the temporary appointee would be entitled to the salary fixed for the new term of office. Consequently, it is my opinion that the temporary appointees should be compensated at the rate set forth in the Governor's letter of January 12, 2001.

Sincerely,

JAMES E. RYAN
ATTORNEY GENERAL