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SPRINGFIELD

September 30, 1977

FILE NO. S-1295

PENSIONS:

Under Illinois Pension Code,
Employees Paid With CETA Funds
Must Participate in Retirement
Systems.

Honorable James R. Thompson
Governor of the State of Illinois
State House
Springfield, Illinois 62706

Dear Governor Thompson:

This opinion is in response to your questions concerning pension contributions for persons employed by the State and local governments pursuant to the Comprehensive Employment and Training Act. The opinion is requested in order to obtain a delay of the effective date of new Federal regulations concerning the paying of CETA funds into a retirement system. Specifically, you asked for a determination of the following questions:

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1. Under Illinois law are CETA employees of the State or a relevant unit of local government mandatory participants in the State Employees' Retirement System of Illinois or the Illinois Municipal Retirement Fund, respectively?

2. If so, must the General Assembly change or modify Illinois law before State or local prime sponsors or eligible applicants may comply with CETA regulations?

3. May the Governor by executive order or exercise of other executive authority alter the provisions of State law to bring Illinois in compliance with CETA regulations?

4. Can the changes necessary to implement State compliance with CETA regulations, if appropriate, be completed by October 1, 1977?

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In answer to your first question, persons employed with funds provided under the Federal Comprehensive Employment and Training Act of 1973 (29 U.S.C. §§ 801-992 (Supp. 1975)) are mandatory participants in the various retirement systems of their employers. This result is required by the Illinois Pension Code. For example, article 14 of the Code dealing with the State Employees' Retirement System states, in section 14-108 (Ill. Rev. Stat. 1976 Supp., ch. 108 1/2, par. 14-108) the following definition:

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"Any person employed by a Department who receives salary for personal services rendered to the State on a warrant issued pursuant to a payroll voucher certified by a Department and drawn by the State Comptroller upon the State Treasurer, including an elected official described in Section 14-143, shall become an employee for purpose of membership in the Retirement System on the first day of such employment.

* * *

Furthermore, section 14-135 states that:

"* * * A person entering service on or after January 1, 1972 shall become a member as a condition of employment and shall begin making contributions as of such date.

* * *

And the circle is complete with the definition of "service" in section 14-112:

"'Service': Service as an employee of a Department, for which compensation is paid by the State or by a State employees association
* * *."

I am informed that persons employed directly by the State with CETA funds are in fact paid in the manner described in these statutes, thus requiring that they be covered by the Pension Code.

Other articles of the Pension Code have similar provisions. In article 7, dealing with the Illinois Municipal Retirement Fund, section 7-137(a) states the following:

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"(a) The persons described in this paragraph (a) shall be included within and be subject to this Article and eligible to benefits from this fund, beginning upon the dates hereinafter specified:

1. Except as to the employees specifically excluded under the provisions of this Article, all persons who are employees of any municipality (or instrumentality thereof) or participating instrumentality on the effective date of participation of the municipality or participating instrumentality beginning upon such effective date.

2. Except as to the employees specifically excluded under the provisions of this Article, all persons, who became employees of any participating municipality (or instrumentality thereof) or participating instrumentality after the effective date of participation of such municipality or participating instrumentality, beginning upon the date such person becomes an employee.

* * *

Similarly, see sections 3-125, 4-124, 5-169, 6-166, 8-174, 9-170, 10-103, 11-170, 12-150, 13-170, 15-157, 16-157, 17-130, 19-101, and 19-208. Each makes employees of the various governmental units participants in a retirement system without an exception that could be construed as exempting employees paid with CETA funds.

Your second question was whether the General Assembly must change or modify the law in order for it to

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comply with new Federal regulations. These regulations, found in 42 Fed. Reg. 24522, 24524 (1977), (to be codified in 29 C.F.R. § 98.25(a)) provide that CETA funds may be paid into a retirement system on behalf of employees who:

" * * *

(1) Obtain unsubsidized employment with the employer, provided the time spent as a CETA participant is accredited service under the employer's retirement plan;

(2) Obtain unsubsidized employment with another employer provided benefits are portable;
or

(3) Obtain vesting.

* * *

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As to subparagraph (1) it is quite possible that a number of present CETA employees will later obtain employment not subsidized with CETA funds in the governmental agencies for which they are now working; if so they should be able to get pension credit for the time they have spent under CETA employment. However, there appear to be no provisions in the Illinois Pension Code for transferring pension rights to non-public employers as described in subparagraph 2. And, in any event, it is unlikely that all present CETA employees will later obtain unsubsidized employment with either

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their present employers or other employers, though they are all presently required to participate in pension systems.

Thus, the only possibility for meeting the new regulations is subparagraph (3), if all employees "Obtain vesting". But pension rights under the State Employees' Retirement System are not vested until an employee has served for at least eight years (section 14-148). Until then, a member is allowed to withdraw only his employee-paid contributions, without interest (section 14-168(a)). Similarly, section 7-141(a)4 requires eight years of service for all employees who began work after 1961. See also sections 3-111 (20 years required), 4-109 (20 years), 5-126 (10 years for employees under age 57), 6-122 (same), 8-132 (10 years for employees under age 55), 9-127 (same), 11-130 (same), 12-130 (same), 13-134 (same), 15-135 (eight years), 16-132 (20 years), 17-115 (five years ordinarily required), 19-111 (10 years), and 19-211 (20 years for employees under 50). Thus, while all the employees are required by the Pension Code to participate in retirement systems, not all of them will come within the provisions of subparagraphs (a)(1), (2) or (3) of section 98.25 of the regulations. In answer to your

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second question then, the General Assembly would have to change the provisions of the Illinois Pension Code to make them consistent with the new Federal regulations.

I also note that section 14-169(b) of the Code now requires Federal funds used in employment programs to be used to pay their proportionate share of the employer contributions for the State Employees' Retirement System. The effect of this provision should be considered when recommending changes in the Pension Code.

Your third question is whether the relevant provisions of the Illinois Pension Code may be modified by executive order of the Governor or other exercise of executive authority. The answer clearly is that they cannot. Article V, section 8 of the Illinois Constitution of 1970 provides that "The Governor shall have the supreme executive power, and shall be responsible for the faithful execution of the laws". It does not empower the Governor to change the laws. The closest approach to such a power is in article V, section 11 (agency reorganization), and exercises of this power may take effect only if set before the General Assembly for 60 days and not disapproved by it.

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In Buettel v. Walker (1974), 59 Ill. 2d 146, 153-154, the Illinois Supreme Court held invalid a Governor's executive order that purported to establish new legal requirements for contractors with the State. The court there said:

"* * * We do not agree with the defendants' contention that the order falls within the authority granted to the Governor by section 8 of article V of the Constitution, which states: 'The Governor shall have the supreme executive power, and shall be responsible for the faithful execution of the laws.' The purpose of the order appears to be to formulate a new legal requirement rather than to execute an existing one. * * *"

The courts of other States have held similarly in recent decades. In Martin v. Chandler (Ky. 1958), 318 S.W.2d 40, 44, the court rejected the argument that the Governor of that State could transfer responsibilities in the executive branch without authorization:

"* * * Even if we were to accept this premise, we could not reach the conclusion, contended for by the appellees, that the Governor therefore has the power to vest the distribution function in some other agency. The Governor has only such powers as are vested in him by the Constitution and the statutes enacted pursuant thereto. [Citation.] Basically, his power is to execute the laws, not to create laws.

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And in Terrell Wells Swimming Pool v. Rodriguez (Tex. Civ. App. 1944), 182 S.W.2d 824, 827, the court stated:

"* * * [I]t is sufficient to say that the Governor of this State, even in time of war, is without power to change the existing law merely by the issuance of a proclamation * * *."

Thus, I conclude that the relevant statutes may not be changed by executive order or other exercise of executive authority.

Your fourth question was whether changes necessary to comply with the new Federal regulations can be completed by October 1, 1977. Since the General Assembly is not now in session and will not reconvene until after October 1, and the necessary changes cannot be implemented by executive authority, I must answer the fourth question in the negative.

Very truly yours,

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