WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD

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FILE NO. S-791

OFFICERS:
Whether the Senate May Reconsider its Confirmation of an Executive Appointment.

Honorable Frank M. Ozinga
Illinois State Senator
Chairman, Executive Committee
State House
Springfield, Illinois 62706

Dear Senator Ozinga:

This responds to your request for an opinion concerning the appointment of Dr. Richard H. Briceland as Director of the Illinois Environmental Protection Agency. You have propounded five questions. Your first three questions are as follows:

> **"1. Is it a conflict of interest for Dr. Briceland to perform his duties and occupy the position of Director of the Illinois Environmental Protection Agency while still a federal employee**

on 'detail' as provided in the agreement, and pursuant to the terms of the Intergovernmental Personnel Act?

2. In conjunction with this question one, pursuant to the agreement and the terms of the Intergovernmental Personnel Act (in particular Title 5 U.S.C. §3373 (a)) who has the power of 'supervision of the duties' of Dr. Briceland?

3. Can the state legally contract with the federal government for the services of a state officer such as the Director of the Illinois Environmental Protection Agency under the terms of the Intergovernmental Personnel Act?"

Since the issues presented by these questions are before the United States District Court for the Northern District of Illinois, Eastern Division, in a case entitled Citizens For A Better Environment et al. v. Dr. Richard Briceland et al., it would be inappropriate for me to answer them. I am, however, enclosing a copy of the complaint in that case.

Your fourth question is as follows:

"4. Does the provision of Art. V, Sec. 21, Illinois Constitution of 1970, prohibit Dr. Briceland as an officer of the Executive Branch from receiving compensation from other than the State of Illinois, or from receiving compensation in excess of the salary established by law for Director of the Illinois Environmental Protection Agency?"

It is possible that this question will be rendered moot by the above mentioned decision. Should that decision not resolve this question, I would at that time reconsider it as required by section 4 of "AN ACT in regard to attorneys general and state's attorneys" (Ill. Rev. Stat. 1973, ch. 14, par. 4) upon a showing of proper constitutional or statutory interest by the Senate or a committee thereof, or if presented by you individually, upon a showing that the question relates to the performance of your official duties.

Your fifth question is as follows:

> "5. Does the Senate have authority to withdraw or revoke its confirmation of an executive appointment if it appears that Dr. Briceland's continuing status as a federal employee was concealed from the Committee?"

Section 9 of article V of the Illinois Constitution of 1970 provides in pertinent part as follows:

> "(a) The Governor shall nominate and, by and with the advice and consent of the Senate, a majority of the members elected concurring by record vote, shall appoint all officers whose election or appointment is not otherwise provided for. Any nomination not acted upon by the Senate within 60 session days after the receipt thereof

> shall be deemed to have received the advice and consent of the Senate. The General Assembly shall have no power to elect or appoint officers of the Executive Branch.

* * *

It is a generally accepted rule of law that "when the Senate has confirmed an appointment to office, it has performed the last act required of it, relative thereto, and it is without power to thereafter revoke its confirmation." (Witherspoon v. State, 103 So. 134, 138 (Miss. 1925).) See also State v. Hagemeister, 73 N.W. 2d 265 (Neb. 1955); State v. Hyde, 142 P. 2d 665 (Utah 1943) and McBride v. Osborn, 127 P. 2d 134 (Ariz. 1942).

The reasons for such a rule are well founded. To allow the Senate to reconsider its action at any time after its confirmation is final would make the appointee subject to the continuing jurisdiction of the Senate. Such continuing jurisdiction could unduly interfere with the officer in the conduct of his duties and would infringe both on the Governor's power of removal of the officer and the House of Representatives' power of impeachment. What has been stated by the United States Supreme Court in Marbury v. Madison, 5 U.S. (1 Cranch) 137, in regard to the power of appointment by the executive

of officers not removable at his will is equally applicable to the power of confirmation by the Senate. There the court stated at page 137:

> "* * * The last act to be done by the President, is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed. * * *
>
> Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. * * * *"

Although there are no Illinois cases directly on point to this particular question, the reasons for such a rule have been accepted by Illinois. The Illinois Supreme Court stated in The People v. Lower, 251 Ill. 527 at 529 as follows:

> "* * * It is true that an appointment is complete when the last act required of the appointing power has been performed, and the authority to make the appointment has then been exhausted. In such a case the appointing power cannot revoke the appointment, and the one appointed can only be removed by lawful authority. * * * *"

Once the Senate has confirmed the appointment and its action has become final, it has no authority to revoke the confirmation. However, it is equally well settled that legislative bodies have a right to reconsider their action under parliamentary rules and to rescind previous action. The Illinois Supreme Court stated in The People v. Davis, 284 Ill. 439 at page 443 as follows:

> "* * * A municipal council, like other legislative bodies, has a right to reconsider, under parliamentary rules, its votes and action upon questions rightfully pending before it and rescind its previous action. (Jersey City v. State, 30 N.J. L.521; Higgins v. Curtis, 39 Kan. 283; Tuell v. Meacham Construction Co. 145 Ky. 181.) * * * "

This rule applies equally well to Senates when considering the confirmations of appointees. See Witherspoon v. State, supra, and United States v. Smith, 286 U.S. 6. The question then is as stated in the Witherspoon case at page 137:

> "* * * Did the Senate confirm the appellant's appointment? Or, to express it differently, Was the affirmative vote on the resolution confirming the appellant's appointment final? For, unless that vote was final, the confirmation remained in fieri, and subject to the control of the Senate. * * * "

By paragraph (d) of section 6 of article IV of the Illinois Constitution of 1970, the Senate has the power to

determine the rules of its proceedings. Rule No. 7 of the Rules of the Senate concerns nominations subject to confirmation by the Senate. It provides in pertinent part as follows:

> "While any nomination remains with the Senate, it shall be in order to reconsider any vote taken thereon, subject to the provisions of Rule 49."
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> Rule 49 provides in pertinent part as follows:
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> "49. When a question has been once put and carried in the affirmative or negative, it shall be in order for a member of the prevailing side to move, on the same or following legislative day, for the reconsideration thereof, or give notice on the same or following legislative day, that he will make such motion not later than the next legislative day following the day on which he gives said notice. During this time he shall have control of the motion. No motion for the reconsideration of any vote shall be in order after a bill, resolution, message, report, amendment or motion upon which the vote was taken shall have gone out of the possession of the Senate. No motion for reconsideration shall be in order unless made at the next actual session day of the Senate. * * *"

As stated in your letter, "on March 6, 1974, the full Senate, on recommendation of the [Senate Executive] Committee and by record vote of a majority of the members

elected, gave its advice and consent to Dr. Briceland's appointment". I assume that such advice and consent was conveyed to the Governor. It would appear then that under the rules of the Senate that the Senate does not now have authority to reconsider its confirmation of Dr. Briceland since his confirmation has gone out of possession of the Senate and more than one legislative day has passed since his nomination was confirmed.

I, therefore, am of the opinion, in answer to your fifth question, that the Senate does not have authority to withdraw or revoke or reconsider its confirmation of Dr. Briceland. The fact that additional information has come to public notice, which may have had bearing on the Senate's action, is irrelevant in this context.

Very truly yours,

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