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FILE NO. 87-004

ELECTIONS:
State Board of Election's
Power to Interpret
The Election Code

Richard A. Cowen, Chairman
State Board of Elections
1020 South Spring Street
Springfield, Illinois 62708

Dear Mr. Cowen:

Questions have recently arisen regarding the authority of the State Board of Elections to issue "advisory opinions" and other interpretations of the provisions of The Election Code (Ill. Rev. Stat. 1985, ch. 46, par. 1-1 et seq.). Although I am aware that this has been a long-standing practice of the Board, it is my opinion, for the reasons hereinafter stated, that it is unauthorized and improper, and may not be continued.

Section 1A-1 of The Election Code (Ill. Rev. Stat. 1985, ch. 46, par. 1A-1) provides:

"A State Board of Elections is hereby established which shall have general supervision over the administration of the registration and election laws throughout the State and shall perform only such duties as are or may hereafter be prescribed by law." (Emphasis added.)

The State Board of Elections is granted no general statutory authority to promulgate and issue administrative interpretations of The Election Code. It is well established that administrative agencies, such as the State Board, possess only such powers as are expressly conferred by statute, or those powers which arise by necessary implication from expressly granted powers. (Fahey v. Cook County Police Department Merit Board (1974), 21 Ill. App. 3d 579, 583.) Although section 1A-8 of The Election Code (Ill. Rev. Stat. 1985, ch. 46, par. 1A-8) does authorize the State Board of Elections to "consult with election authorities concerning the conduct of elections and registration", it neither expressly nor impliedly empowers the Board to issue general "advisory opinions" interpreting the provisions of The Election Code or advising upon its application.

Administrative agencies, such as the State Board of Elections, may issue administrative statements or interpretations of statutes only to the extent that such statements or

Richard A. Cowen - 3.

interpretations pertain to or implement the acts and procedures of the agency in performing its statutory duties and responsibilities. Thus, for example, it would be permissible for the State Board or its employees to issue statements describing the manner in which the Board will enforce specific statutes, or the interpretation given by the Board to statutes requiring or permitting agency action, such as hearing procedures or filing requirements. It is impermissible, however, for the State Board to issue interpretations of statutes which relate generally to election matters but which do not pertain specifically to the functions and duties of the Board.

I note that 26 Illinois Administrative Code 125.710 (1985) purports to authorize the issuance of "advisory opinions" in certain circumstances:

- "a) An advisory opinion may be requested from the State Board of Elections by any of the following:
- 1) a member of the Board;
 - 2) any county clerk or chairman or presiding officer of an election authority or any legal representative acting on their behalf;
 - 3) any local election official or any legal representative acting on their behalf;
 - 4) With respect to any issues concerning 'An Act to Regulate Campaign Financing' (Ill. Rev. Stat. 1981, ch. 46, pars. 9-1 et seq.). Any candidate for public office or the chairman or treasurer of any campaign committee which is, or may be required to file any Campaign Disclosure reports.

- b) The request must be submitted in writing to the General Counsel and shall set forth: the specific facts, activity or transaction that the requesting party is, or intends to undertake, and; the specific issues (including any applicable statutes or rules) on which the requesting party seeks an advisory opinion.

* * *

- c) The General Counsel shall review all requests for advisory opinions and if the General Counsel determines that the request is incomplete or does not otherwise qualify under paragraph (b) above, he shall within 14 days of the receipt of such request, notify the requesting party and specify any deficiencies in such request. The requesting party may appeal any such determination [sic] by the General Counsel directly to the Board.
- d) If the General Counsel determines that the request may qualify for an advisory opinion, or if the Board overrules the determination by the General Counsel pursuant to paragraph (c) above, then the request shall be referred to any appropriate divisions within the State Board of Elections for review and written comment. Such written comment shall be directed to the General Counsel, and the General Counsel shall in turn review and provide written comment on the request to the Board. The General Counsel shall also advise the legal representative of the party making the request for opinion that such a request has been made to the Board.
- e) 1) Within sixty (60) days after a request is received which qualifies for an advisory opinion, the Board shall issue to the requesting party either:
A) a written advisory opinion, or;
B) a statement that the Board declines to issue an advisory opinion.

- 2) An advisory opinion shall be issued only upon the affirmative vote of five (5) members of the Board.
- f) An advisory opinion rendered by the Board may be relied upon by:
- 1) the requesting party;
 - 2) Any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered, and;
 - 3) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which advisory opinion is rendered.
- g) Nothing contained herein shall preclude the distribution by the Board or any of its staff of information consistent with the Election Laws, any prior opinions of the Board, and any relevant federal or state case law.
- h) A copy of each advisory opinion shall be sent to the requesting party and to all election authorities. (Ill. Rev. Stat. 1981, ch. 46, par. 1-3(8)). In addition, a copy of the advisory opinion shall be sent to any legal representatives of the requesting party and the election authority or local election official which made the request for opinion."

An administrative agency cannot extend its substantive powers through the exercise of its rule-making power. (See Northern Illinois Automobile Wreckers and Rebuilders Ass'n v. Dixon (1979), 75 Ill. 2d 53, 60, cert. denied, 444 U.S. 844 (1979); Du-Mont Ventilating Co. v. Department of Revenue (1978), 73 Ill. 2d 243, 247-48.) In promulgating 26 Illinois

Richard A. Cowen - 6.

Administrative Code 125.710, which purports to authorize the issuance of "advisory opinions" to all local election officials, the Board has, in effect, attempted to establish itself as a state-wide legal advisor on the provisions of The Election Code. The rendering of legal advice to local election officials, however, is not the proper function of the Board.

Even if the State Board of Elections were to possess sufficient statutory authority to issue "advisory opinions" on the interpretation of The Election Code, it is my opinion, based upon the supreme court's holding in Stein v. Howlett (1972), 52 Ill. 2d 570, that the issuance of such opinions would nonetheless be improper. Factually, in Stein v. Howlett, the Secretary of State had been granted express statutory authority to render advisory opinions on questions concerning article 4A of The Illinois Governmental Ethics Act (see Ill. Rev. Stat. 1985, ch. 127, par. 604A-101 et seq.), under which the Secretary has numerous duties. The plaintiff contended that the Act was, for that and other reasons, unconstitutional. The court held that, under the Illinois Constitution, the Attorney General is the legal officer of the State and has the duty to conduct the law business of the State, both in and out of court, including the power to interpret State law. Therefore, any attempt by the General Assembly to delegate the power to render legal opinions to

Richard A. Cowen - 7.

another officer was unconstitutional. Stein v. Howlett (1972), 52 Ill. 2d 570, 586-87.

The reasoning of Stein v. Howlett necessarily invalidates any attempt by a State officer or agency to intrude upon the Attorney General's powers as legal officer of the State. Consequently, even if the power to render legal opinions were expressly granted to the State Board of Elections, which it is not, it could not be validly exercised.

Further, the practice of issuing "advisory opinions" directly to local governmental officers intrudes into the relationship between these officers and their attorneys. This is particularly serious at the county level, where the State's Attorney is, by law, the sole legal advisor and representative of the governing body and officers. (Ill. Rev. Stat. 1985, ch. 14, par. 5; see Ashton v. County of Cook (1943), 384 Ill. 287, 299-300.)

Therefore, because it is my opinion that you may not lawfully render legal opinions, I advise you to terminate the practice immediately.

Very truly yours,


ATTORNEY GENERAL