



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

**Jim Ryan**  
ATTORNEY GENERAL

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FILE NO. 98-019

OFFICERS:  
Political Affiliation of Members of  
State Board of Education

The Honorable Vince Demuzio  
Assistant Democratic Leader  
309 Capitol Building  
Springfield, Illinois 62706

Dear Senator Demuzio:

I have your letter wherein you question the make up of the Illinois State Board of Education with reference to statutory political affiliation limitations. You also inquire, in the event that the Board were determined to be improperly constituted, whether actions taken by the Board since it was reorganized pursuant to Public Act 89-610, effective August 6, 1996, are invalid. I have been advised that, subsequent to the receipt of your letter, one member of the Board has resigned. Based upon that resignation, it is my opinion that the Board is properly constituted. With respect to your second question, it is my opinion that, notwithstanding any defect in the composition of

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Illinois State Board of Education since its reorganization, its members have been at least de facto officers since their appointment and confirmation, so that the actions of the Board are valid as to the public and to persons affected by them.

Public Act 89-610, inter alia, reduced the size of the State Board of Education from 17 to nine members. Section 1A-1 of the School Code, as amended by Public Act 89-610 (105 ILCS 5/1A-1 (West 1996)), provides for the members of the Board to be appointed by the Governor with the advice and consent of the Senate. In addition to requirements for regional representation, section 1A-1 provides:

" \* \* \*

\* \* \* At no time may more than 5 members of the Board be from one political party. Party membership is defined as having voted in the primary of the party in the last primary before appointment. \* \* \*"

The voting records of the initial nine members of the reorganized Board appointed on January 9, 1997, show that, in 1996, six voted in the Republican primary election, and three voted in the Democratic primary election. The membership of the Board when appointed, therefore, did not conform to the statutory party affiliation limitation. Subsequent to the receipt of your inquiry, however, one of the members of the Board who had voted in the Republican primary in 1996 submitted his resignation to

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the Governor, effective September 18, 1998. Because of this resignation, there are now no more than five members of the Board who are affiliated with any one political party, under the definition contained in section 1A-1. Consequently, it is my opinion that the composition of the Board is presently in compliance with the statutory requirements. Any appointment made to fill the vacancy created by the recent resignation, however, must be made with reference to the political affiliation limitations of section 1A-1 to assure that the membership of the Board remains in compliance with the statutory framework.

The voting records also show that one of the remaining Board members who voted in the Democratic primary in 1996 voted in the Republican primary in 1998. Since section 1A-1 provides that the Board shall "[a]t no time" contain more than five members affiliated with one political party, it has been suggested that the crossover vote would cause the member who was a Democrat at the time of appointment now to be considered a Republican, thus causing the balance of the Board to shift. Under section 1A-1, however, political affiliation is determined solely on the basis of a member's vote in the last primary before appointment. Although a later vote may be determinative of party affiliation for purposes of the possible reappointment of the

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member to a subsequent term on the Board, it does not affect political affiliation for the current term of office.

You have further asked whether actions taken by the Board while its membership was not in conformity with the statutory limitations may be subject to challenge. Our supreme court has addressed the issue of the validity of actions taken by improperly constituted bodies on a number of occasions. For example, in People ex rel. Engle v. Kerner (1965), 32 Ill. 2d 212, 222-223, the court recognized the constitutional invalidity of the apportionment of the General Assembly, but stated:

" \* \* \*

It is well settled that de facto officeholders, as we now have in the Senate, are vested with complete authority to act as such, particularly in the absence of any de jure officers. (See Lavin v. Commissioners of Cook County, 245 Ill. 496, 505-06; Harvey v. Sullivan, 406 Ill. 472, 479.) This principle, applied here, is in accordance with expressions in United States Supreme Court decisions, which have assumed that existing State legislatures, although elected from unconstitutional districts, have full power to act. (Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656, 676; 12 L.ed. 2d 595; Reynolds v. Sims, 377 U.S. 533, 586; Roman v. Sincock, 377 U.S. 695, 699.) It would therefore seem that plenary legislative power is still vested in the General Assembly as presently constituted.

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(Emphasis in original.)

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The court reached a similar conclusion in a case in which the actions of a county board of review were challenged based upon the political composition of the board. Boards of review are to be composed of two members of the political party polling the highest vote in the county prior to appointment, and one member of the party polling the second highest vote. (See 35 ILCS 200/6-15 (West 1996).) In People ex rel. Chillicothe Township v. Board of Review (1960), 19 Ill. 2d 424, five townships and their supervisors questioned the validity of the assessments and a multiplier applied to each township by a board of review which did not conform to the statutory requirements. The court stated, at pages 426-27:

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\* \* \*

\* \* \* A person actually performing the duties of an office under color of title is an officer de facto, and his acts as such officer are valid so far as the public or third parties who have an interest in them are concerned. (People ex rel. Phillips v. Lieb, 85 Ill. 484; People ex rel. Ballou v. Bangs, 24 Ill. 184; Leach v. People ex rel. Patterson, 122 Ill. 420.) Whether the Board of Review was legally constituted or not, the persons acting as such board were performing the duties of the board with apparent right under color of office, and their acts were thus valid as to the public and persons having an interest in them. (People ex rel. Hicks v. Lycan, 314 Ill. 590.) The Board of Review was thus composed of, at least, de facto officers, and from a review of the

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record and the authorities presented, its acts were apparently valid.

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In People ex rel. Hicks v. Lycan, a taxpayer also challenged the valuation of his property based upon the political affiliation of board of review members. The court held that the board of review members were de facto officers and their acts were valid as to the public or third parties having an interest in them. (People ex rel. Hicks v. Lycan (1924), 314 Ill. 590, 593.) These examples are illustrative of many other Illinois cases holding that a person who obtains office with the legal indicia of title is a legal officer until ousted, so as to render his official acts valid. See, e.g., People ex rel. Phillips v. Lieb (1877), 85 Ill 484 (assessor appointed after failure to elect one); Leach v. People ex rel. Patterson (1887), 122 Ill. 420 (board of supervisors elected pursuant to unconstitutional statute); Andrulis v. First National Bank of Lake Forest (1972), 4 Ill. App. 3d 436 (master in chancery held over and made report after office abolished by 1970 Constitution).

The public record shows that the Governor sent a message to the Senate on January 9, 1997, requesting confirmation of the appointment of the nine members of the Board of Education. (Journal of the Senate, January 9, 1997 at 64-65.) Five of the

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appointments were confirmed on January 28, 1997 (Journal of the Senate, January 28, 1997 at 132-33), and the final four (including two Democrats and two Republicans) were confirmed on a roll call vote on March 17, 1997. (Journal of the Senate, March 17, 1997 at 899-900.) The members of the Board, having been appointed by the Governor with the advice and consent of the Senate, as required by statute, clearly have held office with legal indicia of title. Therefore, in my opinion, all have been, throughout their tenure, at least de facto officers, and their acts as members of the State Board of Education are valid as to the public generally and to persons specifically affected by them.

Sincerely,

  
JAMES E. RYAN  
ATTORNEY GENERAL