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SPRINGFIELD

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FILE NO. 91-010

PUBLIC HEALTH:

Regulation of State University
Food Services by Department of
Public Health or Local Health
Departments

Dr. John Lumpkin
Director, Illinois Department of Public Health
535 West Jefferson Street, Room 450
Springfield, Illinois 62761

Dear Dr. Lumpkin:

I have your predecessor's letter wherein he inquired, firstly, whether either the Illinois Department of Public Health or local health departments have the authority to regulate food service operations on State college and university campuses, and, secondly, whether the authority to regulate such food service operations depends upon whether the food service is operated directly by the school or is contracted out to a private operator. For the reasons hereinafter stated, it is my

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opinion that when a food service is operated by a State college or university neither the Illinois Department of Public Health nor a local health department has the authority to regulate its operation.

State colleges and universities are those institutions of higher education which are created and governed by Acts of the General Assembly. They include institutions governed by the Trustees of the University of Illinois pursuant to "AN ACT to provide for the organization and maintenance of the University of Illinois" (Ill. Rev. Stat. 1989, ch. 144, par. 22 et seq.); the Regency University System created in "AN ACT to provide for the management, operation, control and maintenance of the Regency University System" (Ill. Rev. Stat. 1989, ch. 144, par. 301 et seq.); those schools governed by the Trustees of Southern Illinois University pursuant to "AN ACT providing for the management, operation, control, and maintenance of Southern Illinois University" (Ill. Rev. Stat. 1989, ch. 144, par. 651 et seq.); and the Board of Governors System created in "AN ACT to provide for the management, operation, control and maintenance of the State Colleges and Universities System" (Ill. Rev. Stat. 1989, ch. 144, par. 1001 et seq.).

The Department of Public Health was established by "AN ACT in relation to Public Health" (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 22 et seq.). Its regulations relating to food service sanitation are promulgated pursuant to the Illinois

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Food, Drug and Cosmetic Act (Ill. Rev. Stat. 1989, ch. 56 1/2, par. 501 et seq.) and the Sanitary Inspection Act (Ill. Rev. Stat. 1989, ch. 56 1/2, par. 67 et seq.).

The Food, Drug and Cosmetic Act defines "person" to include "individual, partnership, corporation and association". (Ill. Rev. Stat. 1989, ch. 56 1/2, par. 502.2.) The Act provides that an injunction may issue "restraining any person from violating" its provisions (Ill. Rev. Stat. 1989, ch. 56 1/2, par. 504), and that "[a] person who violates any of the provisions of" the Act is guilty of a misdemeanor (Ill. Rev. Stat. 1989, ch. 56 1/2, par 505). The provisions of the Act are not specifically made applicable to the State, its agencies, or employees.

The Sanitary Inspection Act is applicable to places, rather than people. It applies to premises which are:

"* * * used or maintained as a bakery, confectionery, cannery, packing house, slaughter house, creamery, cheese factory, restaurant, hotel, grocery, meat market, or as a factory, shop, warehouse, any public or place or manufacturing establishment used for the preparation, manufacture, packing, storage, sale or distribution of any food as defined by statute, which is intended for sale * * *"

(Ill. Rev. Stat. 1989, ch. 56 1/2, par. 67.)

The Act provides that the Department of Public Health shall issue an order upon finding a violation of sanitation regulations, and, if the violation is not abated through administrative proceedings, that the State's Attorney of the county in

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which the violation occurred shall enforce the Act. No reference is made in the Act to its applicability to State institutions, or for alternative enforcement where State institutions might be involved.

State colleges and universities are public corporations created by the General Assembly. (People ex rel. Bd. of Trustees of University of Illinois v. Barrett (1943), 382 Ill. 321.) Their property is State property. The State universities and their governing boards are arms of the State and are not independent or autonomous of the State. (Hoffman v. Yack (1978), 57 Ill. App. 3d 744.) They are clothed with sovereign immunity and are subject to suit only in the Court of Claims (Ill. Rev. Stat. 1989, ch. 144, pars. 22, 308a, 658a, 1008a; ch. 37, par. 439.8).

Because of their status as arms of the State, State colleges and universities are not generally subject to State and local regulations in the way that local school districts are. Local school districts are quasi-municipal corporations which are subject to State and county regulation in the same respect as are units of local government. (County of Macon v. Decatur School Dist. 61 (1987), 165 Ill. App. 3d 1; County of Winnebago v. Davis (1987), 156 Ill. App. 3d 535.) State colleges and universities, however, are not subject to regulation by another State agency or a local governmental agency unless the General Assembly so provides. Williams v. Medical Center Commission (1975), 60 Ill. 2d 389.

Neither the statutes governing the Department of Public Health nor the provisions of the Sanitary Inspection Act or the Food, Drug and Cosmetic Act specifically permit regulation of other State agencies. Generally, the sovereign's rights are never impaired by a general legislative enactment unless the statute expressly declares such an intent. (Lyman v. Division of Old Age Assistance, Dept. of Public Welfare (1940), 373 Ill. 27; American Legion Post No. 279 v. Barrett (1939), 371 Ill. 78.) Moreover, when statutes provide for enforcement by resort to the courts, such provisions may not be utilized against an arm of the State which is subject to suit only in the Court of Claims.

The General Assembly can provide that other State agencies are to be subject to inspection by the Department of Public Health, and has done so in some instances. For example, although State or university run hospitals are not generally subject to the Hospital Licensing Act (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 144(b)), the Department is authorized to inspect State institutions run by the Department of Mental Health and Developmental Disabilities, with the results to be reported to the Director, the General Assembly, and the Governor. (Ill. Rev. Stat. 1989, ch. 111 1/2, par 150.1.) The State in this manner has not subjected itself to suit for violation of its own regulations. It would be contrary to the reasoning of Lyman v. Division of Old Age Assistance, Dept. of Public Welfare and American Legion Post No. 279 v. Barrett to interpret the Sanitary Inspection Act in such a manner as to subject

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the sovereign to suit. If the General Assembly had intended to make State run food services subject to inspection by the Department of Public Health, it presumably would have done so in a way which would have avoided conflicting purposes.

The fact that the university contracts with a private contractor for the operation of the food service would not alter my opinion. Department regulation of the food service under such circumstances would interfere with the university's statutory power to enter into contracts for the provision of such services. (See e.g., Ill. Rev. Stat. 1989, ch. 144, pars. 48.1, 307, 673, 1007, 1011.) Moreover, the principles discussed above would apply equally to an attempt to regulate the provision of food services to a college or university under contract.

In conclusion, it is my opinion that university-run food services are not subject to Department of Public Health regulations for the reasons stated above, whether they are run directly by the university or by a private contractor with whom the university has contracted to run a food service.

Respectfully yours,

A handwritten signature in cursive script, reading "Roland W. Burris". The signature is written in dark ink and is positioned above the typed name and title.

ROLAND W. BURRIS
ATTORNEY GENERAL