

OPINION NO. 96-046**Syllabus:**

1. The health care quality advisory council created by R.C. 4121.442 is without authority to permit a member who is appointed by the Governor to designate an alternate to vote on such member's behalf at council meetings.
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2. Pursuant to R.C. 121.05, the Administrator of Workers' Compensation may designate his assistant or a deputy to serve in his place as a member and chairman of the health care quality advisory council.

To: James Conrad, Administrator, Bureau of Workers' Compensation, Columbus, Ohio
By: Betty D. Montgomery, Attorney General, September 12, 1996

I have before me your opinion request in which you ask whether the health care quality advisory council (hereinafter, the council) may vote to authorize a member of the council to send an alternate to council meetings to vote on the member's behalf. You also ask whether the Administrator of Workers' Compensation may designate someone to chair the council in the Administrator's absence.

In order to answer your questions, it is first necessary to briefly examine the formation and duties of the health care quality advisory council. R.C. 4121.442 creates the health care quality advisory council. Pursuant to R.C. 4121.442(A), the Administrator of Workers' Compensation serves as an ex officio member of the council and also chairs the council. The balance of the council is composed of sixteen persons who possess the qualifications prescribed by R.C. 4121.442(A) and who are appointed as members by the Governor.¹ The council has two primary duties -- the duty to "develop standards [in accordance with specified criteria] for qualification of health care plans of the Ohio workers' compensation qualified health plan system," R.C. 4121.442(D), and the duty to make annual recommendations concerning changes in the rules

¹ R.C. 4121.442 provides for the appointment and qualifications of council members, as follows:

(A) There is hereby created the health care quality advisory council consisting of the administrator of workers' compensation and sixteen members appointed by the governor as follows:

- (1) Five individuals who represent the interests of employees;
- (2) Five individuals who represent the interests of employers;
- (3) One individual who represents the governor;
- (4) One physician licensed to practice medicine or surgery pursuant to [R.C. Chapter 4731];
- (5) One individual to represent the interests of hospitals;
- (6) One chiropractor licensed pursuant to [R.C. Chapter 4734];
- (7) One pharmacist licensed pursuant to [R.C. Chapter 4729];
- (8) One physician licensed to practice osteopathic medicine and surgery pursuant to [R.C. Chapter 4731].

All appointed members shall be knowledgeable in matters pertaining to the delivery of health care, the workers' compensation system, and health care administration and have at least three years experience in a position with primary responsibility for health care matters. The administrator shall serve as the chairman of the council.

(B) Appointed members shall serve at the pleasure of the governor....

adopted by the Administrator that implement the standards developed by the council, R.C. 4121.442(F).

Your first question asks whether the council may authorize a member of the council to send an alternate to council meetings for the purpose of voting on the absent member's behalf. It is well established that a creature of statute, like the health care quality advisory council, has only those powers expressly conferred upon it by the General Assembly or necessarily implied from such express powers. *See generally State ex rel. Ashcraft v. Industrial Comm'n*, 15 Ohio St. 3d 126, 129, 472 N.E.2d 1077, 1079 (1984) ("[t]he Industrial Commission is a creature of statute and as such, is limited to the powers conferred on it by statute"); *State ex rel. Clarke v. Cook*, 103 Ohio St. 465, 134 N.E. 655 (1921) (syllabus, paragraph one) ("[b]oards of education, and other similar governmental bodies, are limited in the exercise of their powers to such as are clearly and distinctly granted"). The powers of the health care quality advisory council, however, are limited to the development of standards as described in R.C. 4121.442(D) and the recommendation of changes in rules adopted for the implementation of the council's standards. Nowhere in R.C. 4121.442 has the General Assembly authorized the council to authorize its members to delegate to others their powers or duties.

It is important to note, however, that public bodies have limited inherent authority with respect to certain procedural matters. *See, e.g., 1995 Op. Att'y Gen. No. 95-030* (syllabus, paragraph one) (stating in part: "A district advisory council, established pursuant to R.C. 3709.03, has inherent authority to call special meetings of the council by acting through the concurrence of a majority of its members with respect to a particular meeting, or by promulgating a procedural rule authorizing specified officers or members of the council to call special meetings"); *1988 Op. Att'y Gen. No. 88-087* (syllabus, paragraph one) (stating in part: "A board of township trustees has authority to adopt reasonable rules for the conduct of its meetings"). Such inherent authority notwithstanding, any public entity that is a "public body," as that term is defined in R.C. 121.22(B)(1), must comply with the open meeting requirements of R.C. 121.22.

For purposes of R.C. 121.22, a "public body" includes "[a]ny board, commission, committee, or similar decision-making body of a state agency, institution, or authority, and... [a]ny committee or subcommittee of " any such body. R.C. 121.22(B). Pursuant to R.C. 4121.442, the General Assembly created the health care quality advisory council to develop standards for qualifying health care plans to be used in the workers' compensation qualified health plan system. As such, it constitutes a "public body" subject to the provisions of R.C. 121.22. *See 1993 Op. Att'y Gen. No. 93-012* (syllabus, paragraph one) (Industrial Commission is a "public body" subject to R.C. 121.22); *1988 Op. Att'y Gen. No. 88-029* (syllabus, paragraph two) (Public Utilities Commission Nominating Council is a "public body" for purposes of R.C. 121.22); *1986 Op. Att'y Gen. No. 86-091* (syllabus, paragraph three) (Ohio Legal Rights Service Commission is a "public body" for purposes of R.C. 121.22).

As stated in R.C. 121.22(A), "[t]his section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open

meetings, unless the subject matter is specifically excepted by law." Among the procedures that R.C. 121.22 imposes upon a public body in the conduct of its "meetings"² is the following:

(C) All meetings of any public body are declared to be public meetings open to the public at all times. A *member* of a public body *must be present in person* at a meeting open to the public to be considered present or *to vote at the meeting* and for purposes of determining whether a quorum is present at the meeting. (Emphasis added.)

Because the health care quality advisory council is a public body, each member of the council "must be present in person...to vote at the meeting," R.C. 121.22(C). In light of this requirement, I conclude that the health care quality advisory council may not permit a council member to authorize a representative to vote at council meetings in that member's absence.

While R.C. 121.22(C) requires each member of a public body to be present in person in order to vote at a meeting of that public body, it is also necessary to consider the power of an individual member of a public body to delegate to another his powers and duties. Whether a public officer may delegate his duties depends upon the nature of the duties to be delegated and, in certain instances, whether the officer has express statutory authority to delegate those duties. As stated in 1979 Op. Att'y Gen. No. 79-067 at 2-223: "If a duty imposed by statute is purely ministerial, *i.e.*, a 'mere physical act,' it may be delegated; the duty is not delegable, however, if it requires judgment and discretion in its performance." The exception to this rule is that an officer may delegate a discretionary duty if such delegation has been *expressly* authorized by statute. *Burkholder v. Lauber*, 6 Ohio Misc. 152, 154, 216 N.E.2d 909, 911 (C.P. Fulton County 1965) ("[w]here the powers of judgment and discretion are by law reposed in a public officer, the presumption is that such officer was selected because of his fitness and competency to exercise that judgment and discretion, and unless the authority to do so is expressly conferred upon him, he may not delegate his powers and duties to another" (citation omitted)).

The duties imposed upon the health care quality advisory council by R.C. 4121.442(D) and (F) to develop standards for qualification of health care plans of the workers' compensation qualified health plan system and to review the rules adopted to implement such standards are not simple ministerial duties, but require each member to exercise his judgment and discretion. A member of the council may not, therefore, delegate his duties as a council member to another to exercise in his absence, unless he has been expressly authorized by statute to do so.

The powers and duties of the sixteen council members appointed by the Governor are set forth in R.C. 4121.442. Nothing within R.C. 4121.442 or any other statute of which I am aware, however, expressly authorizes the appointed members of the council to delegate their duties as council members to anyone else, and, accordingly, I must conclude that they have no such authority.

Your second question asks whether the Administrator of Workers' Compensation may designate someone to chair the health care quality advisory council in his absence. Unlike the sixteen members of the council appointed by the Governor, the Administrator of Workers'

² R.C. 121.22(B)(2) defines a "meeting," for purposes of R.C. 121.22, as "any prearranged discussion of the public business of the public body by a majority of its members."

Compensation, an ex officio member of the council, has statutory powers beyond those set forth in R.C. 4121.442. It is, therefore, necessary to examine the other statutory powers of the Administrator in order to determine whether he may delegate to another his duties as a council member or as chairman of the council. In this regard, I note that R.C. 121.05 authorizes various administrative department heads to delegate certain of their powers, as follows:

Except as otherwise provided in this section, in each department there shall be an assistant director designated by the director of that department.... In each department, the assistant director shall act as director in the absence or disability of the director and shall also act as director when the position of director is vacant....

A director may designate any of his assistant directors or a deputy director to serve in his place as a member of any board, committee, authority, or commission of which the director is, by law, a member. Such designee, when present, shall be counted in determining whether a quorum is present at any meeting. He may vote and participate in all proceedings and actions of the board, committee, authority, or commission [with certain exceptions].... Such designation shall be in writing, executed by the designating director, filed with the secretary of the board, committee, authority, or commission, and shall be in effect until withdrawn or superseded by a new designation. (Emphasis added.)

Pursuant to R.C. 121.03, the Administrator of Workers' Compensation is an administrative department head.³ As an "administrative department head," the Administrator has those powers conferred upon such department heads by R.C. 121.05. *But see generally* 1977 Op. Att'y Gen. No. 77-064 (concluding, in part, that because the Public Utilities Commission was not listed in

³ R.C. 121.03 was amended in Am. Sub. H.B. 7, 121st Gen. A. (1995) (eff. Sept. 1, 1995), to include the Administrator of Workers' Compensation as one of the enumerated "administrative department heads," "until the date the workers' compensation oversight commission appoints the administrator as provided in division (F)(10) [*sic*] of [R.C. 4121.12]." As amended in Am. Sub. H.B. 7, R.C. 4121.12(F)(9) requires the workers' compensation oversight commission to appoint an administrator "[a]fter August 31, 1998." R.C. 121.03 was also amended in Am. Sub. S.B. 162, 121st Gen. A. (1995) (eff. Oct. 25, 1995), without inclusion of the Administrator of Workers' Compensation. (Am. Sub. S.B. 162 also amended R.C. 121.02, which creates the various administrative departments and their directors, without including the Bureau of Workers' Compensation.) In amending R.C. 121.03, Am. Sub. S.B. 162 made no mention of the amendment to R.C. 121.03 by Am. Sub. H.B. 7, but simply deleted the Director of Industrial Relations, which office was abolished in Am. Sub. S.B. 162, and limited to July 1, 1997, the office of Director of Liquor Control. Pursuant to R.C. 1.52(B), if amendments to the same statute are enacted without reference to another, the amendments are to be harmonized, "if possible, so that effect may be given to each.... The fact that a later amendment...fails to include language inserted by an earlier amendment, does not of itself make the amendments irreconcilable." R.C. 1.52(B). Thus, in accordance with R.C. 1.52(B), the list of administrative department heads prescribed by the two versions of R.C. 121.03 may be reconciled simply by including the Administrator of Worker's Compensation until appointment of the Administrator in accordance with R.C. 4121.12(F)(9) after August 31, 1998, deleting the Director of Industrial Relations, and limiting the position of Director of Liquor Control to the period preceding July 1, 1997.

R.C. 121.02 as an administrative department, R.C. 121.05 did not apply to the Chairman of the Public Utilities Commission). Pursuant to R.C. 121.05, the Administrator of Workers' Compensation may, therefore, designate his assistant or a deputy to serve in his place as a member and chairman of the health care quality advisory council. *See* 1984 Op. Att'y Gen. No. 84-074 (pursuant to R.C. 121.05, the Director of Health may designate the assistant director or a deputy director to serve in his place on the Power Siting Board of which he is an ex officio member).

It is, therefore, my opinion, and you are hereby advised that:

1. The health care quality advisory council created by R.C. 4121.442 is without authority to permit a member who is appointed by the Governor to designate an alternate to vote on such member's behalf at council meetings.
2. Pursuant to R.C. 121.05, the Administrator of Workers' Compensation may designate his assistant or a deputy to serve in his place as a member and chairman of the health care quality advisory council.