Note from the Attorney General's Office:

1973 Op. Att'y Gen. No. 73-126 was overruled in part by 1977 Op. Att'y Gen. No. 77-064.

OPINION NO. 73-126

Syllabus:

1. The director of natural resources may, pursuant to R.C. 1501.051, send his assistant or a deputy to sit in his place at meetings of the Ohio Water Development Authority. (Opinion No. 68-168, Opinions of the Attorney General for 1968, disapproved.)

2. The director of environmental protection is not authorized to send an alternate in his place to a meeting of the Ohio Water Development Authority.

To: Ned E. Williams, Exec. Dir., Ohio Water Development Authority, Columbus, Ohio

By: William J. Brown, Attorney General, December 12, 1973

I have before me your request for my opinion which reads as follows:

> A problem has arisen with the ex-officio members of the Ohio Water Development Authority Due to their heavy schedule and commitments, it is necessary for them to send a designated alternate to the OWDA meetings. Discussion has occurred in the past as to the right of the alternates to vote for the ex-officio members.
>
> We would appreciate your review of the 6121 sections of the Ohio Revised Code and your opinion as to the legality of an alternate voting and, if legal, what procedures and credentials are needed in designating the alternate.

R.C. 6121.02, which provides for the creation and membership of the Ohio Water Development Authority, reads in part as follows:

> There is hereby created the Ohio water development authority. Such authority is a body both corporate and politic in this state, and the carrying out of its purposes and the exercise by it of the powers conferred by Chapter 6121. of the Revised Code shall be held to be, and are hereby determined to be, essential governmental functions and public purposes of the state, but the authority is not immune from liability by reason thereof.
>
> The authority shall consist of seven members as follows: five members appointed by the governor,

> with the advice and consent of the senate, no more than three of whom shall be members of the same political party, and the director of natural resources and the director of environmental protection who shall be members ex officio without compensation. * * *

There is no provision in R.C. Chapter 6121. dealing specifically with the appointment of alternates by ex officio members of the Ohio Water Development Authority. It is necessary, therefore, to turn to other statutes and the general law relating to the delegation of duties.

In those cases in which the proper execution of a public office requires, on the part of the officer, the exercise of judgment or discretion, the presumption is that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and unless power to substitute another in his place has been given to him, either expressly or impliedly, he cannot delegate his duties to another. See Reike v. Hogan, 34 Ohio L. Abs. 311 (1940); State, ex rel. v. Kohler, 11 N.P. (n.s.) 497 (1911); Kelley v. Cincinnati, 7 Ohio N.P.(n.s.) 360 (1900).

Conversely, if the duty is only ministerial in nature, a public officer is able to delegate such duty to another. It is, of course, inconsequential by whom the mere physical act is performed when its performance has been guided by the judgment or discretion of the person chosen. Thus, unless expressly prohibited, the delegation of duties which are ministerial in nature may be accomplished in the absence of statutory consent either express or implied.

It is obvious that the powers of the Ohio Water Development Authority are rather far-reaching. They involve both the formulation and implementation of important state policy. One may readily infer from the very nature of the powers and duties entrusted to the authority, that its members must exercise a certain degree of judgment and discretion. I shall assume, therefore, for the purposes of this opinion, that you are concerned with the legality of sending alternates who will exercise their own personal judgment and discretion in the place of their principals.

The director of natural resources is, under certain circumstances, expressly authorized to delegate duties of a discretionary nature. R.C. 1501.051, which authorizes the director of natural resources to appoint an assistant and deputies and have such persons sit in his stead upon any board or commission of which he is by law a member, reads as follows:

> The director of natural resources shall appoint an assistant director and three deputy directors of the department of natural resources, who shall serve at the pleasure of the director. The assistant director and the deputy directors are in the unclassified service.
>
> The assistant director shall exercise such powers and perform such duties as the director of natural resources orders and shall act as director in the absence or disability of the director or in case of a vacancy in the position of director. The office

of assistant director is excepted from the provisions of section 121.05 of the Revised Code.

One deputy director shall be the deputy director for water, one the deputy director for recreation and forests, and one the deputy director for soils and minerals. The director shall allocate supervision and control of the work of the department among the deputy directors. The deputy directors shall perform such other duties as may be designated by the director.

The assistant director or a deputy director may, at the request of the director, serve in his place as member of any board, committee or commission of which the director is, by law, a member.
(Emphasis added.)

It should be noted that the Attorney General, in Opinion No. 68-168, Opinions of the Attorney General for 1968, applied the maxim expressio unius est exclusio alterius in concluding that R.C. 1501.051 does not authorize a director to send an alternate to a meeting of the Ohio Water Development Authority.

The conclusion reached by my predecessor is, I feel, erroneous. It should first be noted that the opinion overlooks the statutory powers of the assistant to the director of natural resources. The assistant, appointed pursuant to R.C. 1501.051 has, in many respects, the same status as the director of natural resources. It is clear that a public officer may delegate duties of any type to one who stands in the position of a deputy to him. Indeed, at common law the deputy and the principal occupied a single office. See Warwick v. State, 25 Ohio St. 21 (1874). Moreover, R.C. 3.06, which sets forth the powers of a deputy to a public officer, reads in part as follows:

(A) A deputy, when duly qualified, may perform any duties of his principal. A deputy or clerk, appointed in pursuance of law, holds the appointment only during the pleasure of the officer appointing him. The principal may take from his deputy or clerk a bond, with sureties, conditioned as set forth in this section. The principal is answerable for the neglect or misconduct in office of his deputy or clerk.

* * * * * * * * *
(Emphasis added.)

It should be noted that for purposes of this Section the term "deputy" must be given a functional definition. Thus, in the case of State, ex rel. Emmons v. Auditor, 131 Ohio St. 466 (1936) the Supreme Court, in holding that the title of deputy does not automatically place one in the unclassified civil service, stated at 469 as follows:

The third ground upon which the respondents rely is that the persons who hold the positions in question bear the title of deputy and therefore are placed within the unclassified civil service by virtue of Section 486-8(a), General Code. However, it must be clear that a mere title is not at all conclusive. The true test is the

> duty actually delegated to and performed by an employee. (Emphasis added.)

Thus, it is of no consequence that the individual authorized by statute to act for and in the place of the director is designated an assistant. It is clear that, by virtue of his powers and duties, he is in fact a deputy. Likewise, the three deputies appointed pursuant to R.C. 1501.051 are not, in a strict legal sense, deputies but merely assistants.

It is clear, therefore, that even if R.C. 1501.051 were properly construed as not permitting the director of natural resources to send alternates to a meeting of the Ohio Water Development Authority, he would certainly possess the power to send his assistant in his place. In any case, such a construction does not appear to be proper. Although the absence of the word "authority" from the final paragraph of R.C. 1501.051 provides a rational basis for the conclusion reached in Opinion No. 68-168, supra, I am convinced that the statute, more appropriately construed, authorizes the director of natural resources to send an alternate to an "authority" meeting.

An "authority" is simply a body having jurisdiction in certain matters of a public nature. I have been able to find neither a practical nor a theoretical distinction between an authority and a board, committee or commission. In New York, where many of the state agencies have been designated "authorities" no special significance has been attributed to the term and it is, apparently, used interchangeably with the terms "boards" and "commissions."

A comparison of those Ohio statutes creating commissions and those creating authorities, reveals no unique or special characteristics or powers possessed by one and not the other. R.C. 5538.23, authorizing the creation of the Parking Lot Commission, and R.C. 5537.02, authorizing the creation of the Turnpike Commission, to name but a few, are expressed in terms analogous to those of R.C. 6121.04, which creates the Ohio Water Development Authority.

Furthermore, it is significant that R.C. 1501.051 took effect in 1967 (132 Ohio Laws 2581) while R.C. Chapter 6121. took effect in 1968 (132 Ohio Laws 2806). Although it is true, as my predecessor indicated in Opinion No. 68-168, supra, that there were other agencies designated as authorities at the time R.C. 1501.051 was enacted, it is equally true that the director of natural resources was, at that time, not a member of any such authority. There was, therefore, no reason to include the term "authority" within the final provision of R.C. 1501.051.

The maxim expressio unius est exclusio alterius should be applied with caution in cases such as this. It is to be applied only as an aid in arriving at the intention of the legislature and not to defeat it. See City of Akron v. Dobson, 81 Ohio St. 66 (1909); State v. Cleveland, 83 Ohio St. 61 (1910). Moreover, the rule is not to be applied where there is some special reason for including the thing expressly mentioned by the statute and none for including the thing under consideration. Columbus v. Spielman, 19 Ohio N.P. (n.s.) 257 (1916).

In light of the foregoing, I think it clear that the

director of natural resources may, pursuant to R.C. 1501.051, appoint his assistant or any of his deputies to sit upon any board, commission, committee or authority of which the director is, by law, a member.

The director of environmental protection, on the other hand, is not expressly authorized to send alternates to the meetings of various boards or commissions of which he is required to be a member. Moreover, it should be noted that the director is not even authorized to appoint a deputy who would be qualified to assume the duties and exercise the powers of the director. It is apparent, therefore, that the director of environmental protection is required to perform personally those duties attendant to membership on the Ohio Water Development Authority.

In specific answer to your questions, it is my opinion and you are so advised that:

1. The director of natural resources may, pursuant to R.C. 1501.051, send his assistant or a deputy to sit in his place at meetings of the Ohio Water Development Authority. (Opinion No. 68-168, Opinions of the Attorney General for 1968, disapproved.)

2. The director of environmental protection is not authorized to send an alternate in his place to a meeting of the Ohio Water Development Authority.