

## OPINION NO. 77-064

## Syllabus:

1. The Director of Environmental Protection, the Director of Health and the Director of Development may, pursuant to R.C. 121.05, designate their assistant directors or deputy directors to serve in their place as members of the Ohio Power Siting Commission. (Syllabus 2, 1973 Op. Att'y Gen. No. 73-126, overruled.)

2. The Chairman of the Public Utilities Commission and the public member appointed by the Governor are not authorized to designate alternates to serve in their place on the Ohio Power Siting Commission when matters before the Commission require the formal action of its members.

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To: Ned E. Williams, P.E., Chairman, Power Siting Commission, Columbus, Ohio

By: William J. Brown, Attorney General, October 17, 1977

I have before me your request for my opinion concerning whether a member of the Ohio Power Siting Commission may designate a representative to act in his stead at a public meeting of the Commission. The Ohio Power Siting Commission is, pursuant to R.C. 4906.02, composed of the following five members:

1. The Director of the Environmental Protection Agency;
2. The Director of Health;
3. The Director of Development;
4. The Chairman of the Public Utilities Commission, and
5. A Public Member appointed by the Governor.

You state in your letter that inasmuch as each of the Commissioners must not only devote his time to Commission activities, but also his own department and/or other responsibilities, attendance by all Commissioners at each and every Commission meeting is not always possible. Therefore, you have asked my opinion on the following questions:

(1) In order for the Commission to take formal action on any matter, is it required by Revised Code Section 4906.02(A) - or otherwise - for at least three regular members of the Commission to be present and to vote at the public meeting during which the matter is presented, or may a Commissioner send a representative to act in his stead?

(2) Assuming that a Commissioner may designate a representative, under what circumstances is it permissible for a

Commissioner to designate such representative to attend and vote on his behalf on matters before the OPSC at a public meeting of the Commission?

As examples of the type of actions referred to in your first question, your letter sets forth the following matters on which the Commission is required to take formal action:

- (a) Commissioners must vote to approve or disapprove an application for a certificate of Environmental Compatibility and Public Need.
- (b) Commissioners must execute an order granting a certificate of Environmental Compatibility and Public Need and other entries and orders as issued by the Commission.
- (c) Commissioners must vote to approve or disapprove the granting of statutory or rule waivers.
- (d) Commissioners must vote on questions involving personnel, budget or other administrative matters which come before the Commission.

It is significant that a Commissioner is required to exercise his judgment or discretion in performing each of the foregoing duties. Where the proper execution of a public office requires that the officer exercise his own judgment or discretion, the presumption is that the particular officer was chosen because he was deemed fit and competent to exercise that judgment or discretion. In such cases, the officer cannot delegate his duties to another, unless the power to so substitute another in his place has been expressly or impliedly granted to the officer. 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); 1973 Op. Att'y Gen. No. 7-126.

R.C. 4906.02, which provides for the creation and organization of the Ohio Power Siting Commission, reads in part as follows:

". . . All hearings, studies and consideration of applications for certificates shall be conducted by the power siting commission or representatives of its members. The Commission may not make any approval without the consent of at least three members of the commission."

The language of the statute clearly draws a distinction between those situations in which it is proper for representatives of commission members to act and those in which action must be taken by the members. Since the formal actions described in your letter require the approval of the Commission, it would appear these actions must be taken by Commission members.

It is important to note, however, that the members of the Commission, with the exception of the public member appointed by the Governor, serve on the Commission by virtue of their appointment to a particular public office. Three of these four ex-officio Commission members are directors of administrative departments of state government to which the provisions of R.C. Chapter 121. apply.

R.C. 121.05, set forth below, expressly authorizes the director of an administrative department to designate an assistant or deputy director. The statute also expressly provides that the director may designate his assistant director or 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.

"In each department there shall be an assistant director designated by the director . . . . In each department, the assistant director shall act as director in the absence or disability of the director. The assistant director shall also act as director when the position of director is vacant.

"A director may designate his assistant director 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, provided that such designee shall not execute or cause a facsimile of his signature to be placed on any obligation, or execute any trust agreement or indenture. 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 superceded by a new designation."

Thus, there is an apparent conflict between the provisions of R.C. 4906.02 and R.C. 121.05 regarding the authority of the director of environmental protection, the director of health and the director of development to designate a representative to formally participate in the activities of the Ohio Power Siting Commission. According to the rules of statutory construction contained in R.C. 1.51 "if a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both." I believe such a construction is possible in the present case.

It is clear that the three state department directors serve on the Power Siting Commission by virtue of their office. They do not serve as individuals. Thus, for the purposes of R.C. Chapter 4906, the term "member" properly refers to those individuals who are statutorily empowered to perform the duties of the offices enumerated in R.C. 4906.02. Specifically, the director of environmental protection, the director of health and the director of development may, pursuant to R.C. 121.05, designate their deputy or assistant directors to serve in their place as members of the Ohio

Power Siting Commission. When duly designated according to the provisions of R.C. 121.05, a deputy or assistant director may vote and participate in all proceedings and actions of the Commissions, except where the action relates to the execution of any obligation, trust agreement, or indenture.

I am aware that this conclusion is inconsistent with that set forth in 1973 Op. Att'y Gen. No. 73-126. In that opinion I was asked to consider whether the director of natural resources and the director of environmental protection could designate alternates to serve in their place as members of the Ohio Water Development Authority. Using reasoning similar to that developed above, I concluded that 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. However, in the second part of that opinion I concluded that the director of environmental protection was not authorized to send an alternate to a meeting of the Authority. In light of the foregoing, I am of the opinion now that the latter conclusion was erroneous in that it failed to consider the provisions of R.C. 121.05. Since the director of environmental protection is an ex officio member of the Ohio Water Development Authority, he may, pursuant to R.C. 121.05, send his assistant or a deputy to sit in his place as a member of the Authority. The second syllabus of 1973 Op. Att'y Gen. No. 73-126 is, therefore, overruled.

The Chairman of the Public Utilities Commission is also an ex-officio member of the Ohio Power Siting Commission. Since the Public Utilities Commission, however, is not one of the administrative departments enumerated in R.C. 121.02, the provisions of R.C. 121.05 do not apply to the question of whether the Chairman of the Public Utilities Commission may designate an assistant or deputy.

R.C. Chapter 4901 discusses the organization, officers and employees of the Public Utilities Commission. R.C. 4901.19 provides in relevant part as follows:

"The public utilities commission may appoint a secretary, attorney examiner, experts, engineers, accountants, and such other officers as it deems necessary, who shall be in the unclassified civil service and shall serve during the pleasure of the commission, . . ."

R.C. 4901.20 also addresses commission employees and provides in relevant part as follows:

"The public utilities commission may employ, during its pleasure, such other officers, and such experts, examiners, engineers, statisticians, accountants, inspectors, clerks, stenographers, and other employees as are necessary to carry out Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4925 of the Revised Code or to perform its duties and exercise the powers conferred by law upon the commission. . . ."

While neither statute makes express reference to the existence of an office of deputy or assistant commissioner,

it could be argued that the authority to appoint "other such officers as it deems necessary" grants to the Commission the authority to designate a deputy or assistant commissioner or commissioners. I am, unwilling, however, to conclude that such implied authority would extend to the specific situation herein under consideration. The duties of a deputy or assistant commissioner appointed by the commission under the provisions of either R.C. 4901.19 or R.C. 4901.20, would be limited to the exercise of those powers conferred by law upon the Commission. Under the provision of R.C. 4906.02 membership on the Power Siting Commission is expressly vested in the Chairman of the Public Utilities Commission; it is not conferred on the Commission itself. Moreover, I have noted that in authorizing the Commission to appoint officers and employees, R.C. 4901.20 specifically enumerates various Chapters within Title 49 of the Revised Code. The inference herein is that such officers and employees may assist the Commission in carrying out the duties ascribed to it in these particular Chapters. R.C. Chapter 4906 is omitted in this enumeration and I must conclude that the General Assembly purposely intended to exclude this Chapter. Thus, it is my opinion that the Chairman of the Public Utilities Commission is not authorized to designate an assistant or deputy to act in his stead in matters requiring the formal action of the Ohio Power Siting Commission. He may, however, pursuant to R.C. 4906.02 send a representative to participate in hearings or studies or the consideration of applications for certification.

The fifth member of the Ohio Power Siting Commission is a public member appointed by the Governor. The member does not serve on the Commission in an ex-officio capacity. Consequently he must personally perform those duties attendant to his membership, except in those situations in which members are expressly authorized by R.C. 4906.02 to send a representative.

Your second question regarding the circumstances under which it is permissible for a Commissioner to designate a representative, was augmented by the following examples of the type of guidance sought by Commission:

- (a) Is it sufficient for a Commissioner to send a letter with his designated representative authorizing such representative to act on his behalf?
- (b) Must a letter designating a representative also direct such representative to vote in a specified manner on each question before the Commission?

Since only the three Commission members who are also directors of state departments may send representatives to act in their stead on matters requiring formal action by the Commission, the provisions of R.C. 121.05, govern the manner in which these particular representatives may be designated. Under the provisions of this statute it is sufficient that the director file a written designation with the secretary of the Commission authorizing his deputy or assistant director to serve in his place. The designation remains in effect until withdrawn or superceded. It is not required by R.C.

121.05, or otherwise, that the director indicate the specific actions to be taken by the deputy or assistant. To the contrary, the presumption underlying R.C. 121.05 is that the deputy or assistant director is capable of exercising the judgment or discretion required to perform the duties of a member.

Thus, it is my opinion and you are so advised that:

1. The Director of Environmental Protection, the Director of Health and the Director of Development may, pursuant to R.C. 121.05, designate their assistant directors or deputy directors to serve in their place as members of the Ohio Power Siting Commission. (Syllabus 2, 1973 Op. Att'y Gen. No. 73-126, overruled.)
2. The Chairman of the Public Utilities Commission and the public member appointed by the Governor are not authorized to designate alternates to serve in their place on the Ohio Power Siting Commission when matters before the Commission require the formal action of its members.