

**OPINION NO. 81-026****Syllabus:**

The Ohio Power Siting Commission has the authority to enter into cooperative agreements with the agencies/offices listed below for the services of their employees to work on Power Siting Commission matters subject to reimbursement by the Commission:

- The Ohio Environmental Protection Agency;
- The Ohio Department of Natural Resources;
- The Public Utilities Commission of Ohio;
- The Ohio Department of Health;
- The Ohio Department of Energy;
- The Ohio Department of Economics and Community Development; and
- The Ohio Attorney General's Office.

June 1981

**To: James F. McAvoy, Chairman, Ohio Power Siting Commission, Columbus, Ohio**  
**By: William J. Brown, Attorney General, April 30, 1981**

I have before me your request for my opinion concerning the propriety of the Ohio Power Siting Commission entering into long-term agreements with its member agencies for the services of agency employees to work on Commission business subject to reimbursement by the Commission. The Ohio Power Siting Commission is, pursuant to R.C. 4906.02, composed of the following members:

1. The Director of Environmental Protection as Chairman;
2. The Director of Natural Resources;
3. The Director of Health;
4. The Director of Energy;
5. The Director of Economic and Community Development;
6. The Chairman of the Public Utilities Commission;
7. A Public Member appointed by the Governor; and
8. Four non-voting members of the Ohio Legislature.

You state in your letter that as a reflection of its multi-disciplinary membership, the Commission has entered into agreements with the executive departments represented on the Commission for the services of "coordinators" from each such department. You also note that the Commission has executed an agreement with this office for the services of legal counsel. Inasmuch as the State Auditor's Office in a recent examination of Commission finances has questioned the legality of these long-term agreements, you have asked my opinion on the following questions:

1. Is it appropriate for the Commission to enter into long-term agreements with the agencies/offices listed below for the purposes of obtaining the services of their employees to work on Commission business subject to reimbursement by the Commission:
  - The Ohio Environmental Protection Agency;
  - The Ohio Department of Natural Resources;
  - The Public Utilities Commission of Ohio;
  - The Ohio Department of Health;
  - The Ohio Department of Energy;
  - The Ohio Department of Economic and Community Development; [and]
  - The Ohio Attorney General's Office?
2. Assuming that such contractual agreements are permissible, what terms and conditions should be specified in such agreements beyond those already included (as indicated in the attached sample [to your letter])?

On page 6 of the Auditor's Report which, in pertinent part, is attached to your letter, it is noted that the agreements entered into by the Commission and the agencies listed above were made in accordance with R.C. 121.17. However, a reading of that statute in conjunction with R.C. 121.01(A) indicates that only those departments listed in R.C. 121.02 are authorized to cooperate with each other for the services of department employees. R.C. 121.01(A) provides that "[d]epartment' means the several departments of state administration enumerated in section 121.02 of the Revised Code." R.C. 121.17 provides that "the director of any department may empower or require an employee of another department, subject to the consent of the superior officer of the employee, to perform any duty which he might require of his own subordinates."

Such an interpretation of these statutes is consistent with my earlier opinion, 1976 Op. Att'y Gen. No. 76-017, wherein, at 2-51, I concluded that "R.C. 121.17 only allows for cooperative assignment of employees between one 'department' and another and the availability of R.C. 121.17 must be limited to assignment of employees between those departments identified and listed as such in

121.02." Inasmuch as the Power Siting Commission is not listed in R.C. 121.02, the authorization provided by R.C. 121.17 does not sanction the agreements in question. In spite of the lack of authority under this statute, however, the agreements between the Power Siting Commission and other agencies/offices of the state listed in your letter are not unlawful.

It is a longstanding principle of Ohio law that public officers have only those powers that are expressly delegated to them by statute, or necessarily implied from the powers so delegated. More specifically, the rule with regard to implied powers is that where an officer or board of officers is directed by statute to do a particular thing, in the absence of specific directions detailing the manner and method of performance, the command carries with it such additional, implied power as may be necessary for the due and efficient performance of the duty imposed. United States v. Laub Baking Co., 283 F.Supp. 217, 220 (N.D. Ohio 1968); State ex rel. Byrd v. Sherwood, 140 Ohio St. 173, 42 N.E.2d 889 (1942); State ex rel. Copeland v. State Medical Board, 107 Ohio St. 20, 140 N.E. 660 (1923); State ex rel. Hunt v. Hildebrandt, 93 Ohio St. 1, 112 N.E. 138 (1915), aff'd, 241 U.S. 565 (1916); Schultz v. Erie County Metropolitan Park District Board, 26 Ohio Misc. 68, 269 N.E.2d 72 (1971); 1978 Op. Att'y Gen. No. 78-034. A review of the Commission's enabling legislation indicates that, consistent with the doctrine of implied powers, the authority to contract with other state agencies for the services in question may be implied in order for the Commission to fulfill its statutory mandate.

The Power Siting Commission derives its authority from R.C. Chapter 4906, wherein it is directed to make determinations on applications for certificates authorizing the construction, operation and maintenance of major utility facilities in Ohio. The decisions of the Commission on such applications are to be made within the framework of a well-defined adjudication procedure, and the Commission may not grant a certificate for a major utility facility in Ohio unless, pursuant to R.C. 4906.10, it finds and determines:

1. The basis of the need for the facility;
2. The nature of the probable environmental impact;
3. That the facility represents the minimum adverse environmental impact;
4. That any transmission line facility is consistent with regional plans for expansion of the electric power grid;
5. That the facility will comply with Chapters 3704, 3734, and 6111 of the Revised Code;
6. That the facility will serve the public interest, convenience and necessity.

Recognizing not only the multi-disciplinary nature of the Commission, but also that each of the findings and determinations listed above falls largely within the expertise housed in the agencies represented on the Commission, it is appropriate that the Commission contract with its member agencies to take advantage of such expertise. The express authority and duty to make the findings and determinations listed above serves as a sufficient basis, in my view, upon which to conclude that the Commission has the implied authority to enter into the subject agreements so that it may carry out its statutory responsibilities. As the Ohio Supreme Court noted in its decision in State ex rel. Hunt v. Hildebrandt, "it would be the merest folly to command him [a public officer] to do a particular thing and then withhold from him the power to do it." 93 Ohio St. at 12, 112 N.E. at 141.

Additional support for my conclusion that the Commission has the authority to enter into the agreements described above is found in the appropriations bill (Am. Sub. H.B. 204 113th Gen. A. (1979) (eff. July 30, 1979)) of the 113th General Assembly. Am. Sub. H.B. 204 appropriates \$442,734.00 to the Commission for personal services in the current biennium. The amount appropriated exceeds the amount required to pay personal service expenses expressly authorized by R.C. Chapter 4906. R.C. 4906.02(A) authorizes the Commission to compensate the public member \$5,000.00 per year plus expenses. R.C. 4906.02(B) authorizes the

Commission to appoint a Secretary. The appropriation of nearly one-half million dollars for personal services, where only two positions are expressly provided for by statute, indicates authorization by the General Assembly to compensate additional personnel.

R.C. 4906.02 states, in part, that "[a]ll hearings, studies, and consideration of applications for certificates shall be conducted by the power siting commission or representatives of its members." Thus, since the appropriation act authorizes the Commission to incur personal services expenses beyond those expressly provided for in the codified statutes, and since R.C. 4906.02 requires the Commission's work to be performed by the members or their representatives, it appears that the contracts between the Commission and its member state departments for personal services are in accord with the General Assembly's intention as expressed in R.C. Chapter 4906 and, hence, permissible. Similarly, inasmuch as the Commission's statutory responsibilities require that its decisions be made within the framework of an adjudicatory process (R.C. 4906.02-4906.11, 4906.14), and recognizing that appeals from Commission decisions may be made to the Ohio Supreme Court under R.C. Chapter 4903 (made applicable to the Commission by R.C. 4906.12), it is appropriate that the Commission look to the Attorney General's Office, through formal agreement, for such services as representation of the Commission at adjudicatory hearings, legal advice to the Commission in disposing of certificate applications, and representation of the Commission on appeal.

As part of the first question in your letter, you have also asked my opinion on the propriety of the long-term nature of the agreements in question. It is my understanding that by "long-term" you mean one year contracts which run from July 1st of one year to June 30th of the following year, and which may be extended for an identical period of time by written consent of the parties.<sup>1</sup> In this regard, it is my view that, since the agreements in question are within the power of the Power Siting Commission to execute, it is permissible for the Commission to enter into such contracts, so long as the contracts are proper in form and extend for such time period.

In response to your second question, I would simply note that such contracts are subject to the same conditions as any other contract of a state department. Hence, I would suggest that each contract be reviewed by my office prior to execution to ensure its conformance to all applicable laws.

Therefore, it is my opinion, and you are advised, that the Ohio Power Siting Commission has the authority to enter into cooperative agreements with the agencies/offices listed below for the services of their employees to work on Power Siting Commission matters subject to reimbursement by the Commission:

- The Ohio Environmental Protection Agency;
- The Ohio Department of Natural Resources;
- The Public Utilities Commission of Ohio;
- The Ohio Department of Health;
- The Ohio Department of Energy;
- The Ohio Department of Economics and Community Development; and
- The Ohio Attorney General's Office.

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<sup>1</sup>Ohio Const. art. II, §22, which provides that appropriations made by the General Assembly may be only for two years, would limit the length of contracts entered into by the Commission to such a two-year period.