

OPINION NO. 84-074

Syllabus:

The Director of Health may not designate his executive assistant to serve in his place as a member of the Power Siting Board.

To: David L. Jackson, M.D., Ph.D., Director, Department of Health, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, November 28, 1984

I am in receipt of your request for my opinion as to whether you may appoint your executive assistant to serve as your designee to the Power Siting Board. I understand from your letter that the assistant director of the Department of Health, who had been designated to serve in your place on the Ohio Power Siting Board has recently resigned, and that there are no deputy directors within the Department of Health. You indicate that you now wish to have your executive assistant serve on the Board in your place.

I note first that, as an officer whose position and duties are created by statute, R.C. 121.02(G), R.C. 3701.02-.04, the Director of the Department of Health has only those powers which are expressly granted by statute or which may be necessarily implied therefrom. See State ex rel. Funtash v. Industrial Commission, 154 Ohio St. 497, 96 N.E.2d 593 (1951); Village of New Bremen v. Public Utilities Commission, 103 Ohio St. 23, 132 N.E. 162 (1921).

Concerning membership on the Power Siting Board, R.C. 4906.02 states:

(A) There is hereby created within the public utilities commission the power siting board, composed of the chairman of the public utilities commission, the director of environmental protection, the director of health, the director of development, the director of natural resources, and a representative of the public who shall be an engineer and shall be appointed by the governor, from a list of three nominees submitted to the governor by the office of the consumers' counsel, with the advice and consent of the senate and shall serve for a term of four years. The chairman of the public utilities commission shall be chairman of the board. All hearings, studies, and consideration of applications for certificates shall be conducted by the board or representatives of its members.

In addition, the board shall include four legislative members who may participate fully in all the board's deliberations and activities except that they shall serve as nonvoting members. The speaker of the house of representatives shall appoint one legislative member, and the president of the senate and minority leader of each house shall each appoint one legislative member. Each such legislative leader shall designate an alternate to attend meetings of the board when the regular legislative member he appointed is unable to attend. Each legislative member and alternate shall serve for the duration of the elected term that he is serving at the time of his appointment. (Emphasis added.)

In 1977 Op. Att'y Gen. No. 77-064, my predecessor considered the question whether the directors of certain state departments, including the Director of the Department of Health, could designate representatives to serve in their places as members of the Ohio Power Siting Commission.¹ Op. No. 77-064 concluded that R.C. 121.05 (allowing the director of an administrative department to designate an assistant or deputy director) authorized the Director of Health to appoint the assistant director of the Department or a deputy director to sit on the Commission in his stead in spite of the fact that R.C. 4906.02 specifically stated that the Commission, which at the time was composed of the Chairman of the Public Utilities Commission, the Director of the Environmental Protection Agency, the Director of Health, the Director of Development, and a public member appointed by the Governor, could "not make any approval [of a certificate of environmental compatibility and public need] without the consent of at least three members of the commission."

¹ In 1981, the name of the Power Siting Commission was changed to the Power Siting Board. Am. Sub. H.B. 694, 114th Gen. A. (1981) (eff. Nov. 15, 1981).

R.C. 121.05 currently provides for the appointment of an assistant director and deputy directors by the director of each state department specified in R.C. Chapter 121. R.C. 121.05 reads in pertinent part:

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, 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 superseded by a new designation.

See R.C. 121.06 (an officer appointed pursuant to R.C. 121.05 is appointed by and serves at the pleasure of the director of the department).

In Op. No. 77-064 my predecessor noted:

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.

Id. at 2-233 to 2-234.

In examining Op. No. 77-064, it is apparent that the conclusion of the opinion is narrowly drawn. While R.C. 4906.02 contemplates that a member of the Power Siting Board may designate a representative to serve in his place, the Director of the Department of Health is limited as to whom he may appoint to serve as his representative on the Power Siting Board, since he may designate only those persons whom he is statutorily authorized to designate. As stated in Op. No. 77-064 at 2-232:

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. 73-126.

See 1982 Op. Att'y Gen. No. 82-019 (a public body may not delegate duties which

require the exercise of judgment and discretion unless such authority is expressly conferred by statute, although a public body may delegate duties which are ministerial in nature if such authority may be implied). Accord 1982 Op. Att'y Gen. No. 82-048; 1981 Op. Att'y Gen. No. 81-074.

While it is clear under R.C. 121.05 and Op. No. 77-064 that the Director of Health may designate the assistant director or a deputy director to serve in his place on the Power Siting Board, I do not believe that R.C. 121.05 may be interpreted as authority for the Director to designate his executive assistant to serve on the Board. The terms "assistant director" and "deputy director" refer to specific positions or classifications within the state personnel system. See generally 1 Ohio Admin. Code 123:1-7-11 (setting forth the managerial and professional classifications for positions within the state service). An assistant director, as stated in R.C. 121.05, is an individual who is designated by the Director and who must act as director in the absence or disability of the Director. See R.C. 124.11(A)(9); 1 Ohio Admin. Code 123:1-47-01(A)(7) (an "assistant" is "the employee who aids and assists an appointing authority in the discharge and performance of duties which are of a confidential and fiduciary character and which involve the responsibility of his principal"). A deputy director, although not defined in R.C. 121.05, signifies an individual who is authorized to act on behalf of his principal, and holds a fiduciary relationship to such principal. See R.C. 3.06(A) ("[a] deputy, when duly qualified, may perform any duties of his principal"); R.C. 124.11(A)(9); 1 Ohio Admin. Code 123:1-47-01(A)(29) (a "deputy" is "an employee authorized by law to act generally for or in place of his principal and holding a fiduciary relationship to such principal").

While a Director's executive assistant may perform important responsibilities for the Director, and may even hold a fiduciary and confidential relationship to the Director, he is not the assistant director or a deputy director of the Department. See State ex rel. Myers v. Blake, 121 Ohio St. 511, 169 N.E. 599 (1929); State ex rel. Bryson v. Smith, 101 Ohio St. 203, 128 N.E. 261 (1920); State ex rel. Townsend v. Berning, 60 Ohio App. 458, 21 N.E.2d 1016 (Hamilton County 1938), aff'd, 135 Ohio St. 31, 19 N.E.2d 155 (1939); 1937 Op. Att'y Gen. No. 127, vol. I, p. 174 (distinguishing between an assistant director and an assistant to the director); 1916 Op. Att'y Gen. No. 1236, vol. I, p. 201. See also 1940 Op. Att'y Gen. No. 2657, vol. II, p. 788; 1915 Op. Att'y Gen. No. 3, vol. I, p. 3. Compare R.C. 124.11(A)(8) (including within the unclassified service persons appointed as assistants for principal appointive executive officers) with R.C. 124.11(A)(9) (including within the unclassified service persons appointed as "deputies and assistants of . . . principal executive officers authorized to act for and in the place of their principals, holding a fiduciary relation to such principals"). Because the executive assistant is neither an assistant director nor a deputy director, he may not, pursuant to R.C. 121.05, be designated to represent the Director of Health on the Power Siting Board. See generally State ex rel. Boda v. Brown, 157 Ohio St. 368, 372, 105 N.E.2d 643, 646 (1952) ("the express mention of but one class of persons in a statute implies the exclusion of all others"). Further I am unaware of any other statutory provision which would authorize the Director of Health to designate his executive assistant to serve on the Board.

In conclusion, it is my opinion, and you are advised, that the Director of Health may not designate his executive assistant to serve in his place as a member of the Power Siting Board.