

OPINION 3

OFFICIAL OPINION NO. 3

February 1, 1961

Mr. Robert W. Kellum  
Executive Secretary  
Flood Control and Water Resources Commission  
486 State Board of Health Building  
1330 West Michigan Street  
Indianapolis 7, Indiana

Dear Mr. Kellum:

Your letter dated January 11, 1961 requesting my Official Opinion reads as follows:

"This office would appreciate receiving an official opinion from you on the following matter.

"Mr. Carl Vogelgesang has informed me that he has been requested by Mr. George E. Goodwin, newly appointed Chief Engineer of the Indiana State Highway Department, to represent Mr. Goodwin as a member of the Indiana Flood Control and Water Resources Commission. Mr. Vogelgesang has been a very able member of this commission during his service as chief engineer of the Highway Department. He is continuing as a member of the highway engineering staff.

"The 1945 Act establishing the Indiana Flood Control and Water Resources Commission provides that the chief engineer of the State Highway Department shall be an ex-officio member of this Commission.

"The question is: If Mr. Vogelgesang represents Mr. Goodwin, at written request of Mr. Goodwin to the Chairman of the Indiana Flood Control and Water Resources Commission, would Mr. Vogelgesang have full voting rights at meetings of the Commission?"

In substance you have inquired as to whether or not the duly appointed chief engineer of the Indiana State Highway Department, who by virtue of his position is an ex officio member of the Indiana Flood Control and Water Resources Commission, can legally appoint a proxy in writing so as to confer upon the proxy such member's voting rights.

In my opinion the foregoing question must be answered in the negative.

The statute in question, namely, Acts of 1945, Ch. 318, Sec. 4, as amended and as found in Burns' (1959 Supp.), Section 27-1104, reads as follows:

“There is hereby created the Indiana flood control and water resources commission, which shall consist of twenty (20) members, of which four (4) commissioners shall be ex officio members as follows: The head of the water resources division of the department of conservation, *the chief engineer of the state highway commission of Indiana, and the chief engineer of the public service commission or his designated principal water engineer*, the state sanitary engineer of the state board of health, and sixteen (16) commissioners who shall be appointed by the governor \* \* \*. A majority of commissioners shall constitute a quorum for the transaction of any business, the exercise of any powers or the performance of any duties. \* \* \*” (Our emphasis)

It is to be noted that the above statute provides only one instance in which a person named as an ex officio member of the commission has authority to designate a substitute, which authority is limited to naming the principal water engineer of the Public Service Commission to serve instead of the chief engineer of that commission. The statute makes no other reference to or provision for a substitute member or proxy with authority to perform the functions of the regularly appointed commission member.

A general statement of law concerning delegation of powers by administrative officers is found in 42 Am. Jur., Public Administrative Law, § 73, which reads as follows:

“It is a general principle of law, expressed in the maxim ‘delegatus non potest delegare’ that a delegated power may not be further delegated by the person to whom such power is delegated. Apart from statute, whether administrative officers in whom certain powers are vested or upon whom certain duties are imposed may deputize others to exercise such powers or perform

## OPINION 3

such duties usually depends upon whether the particular act or duty sought to be delegated is ministerial, on the one hand, or, on the other, discretionary or quasi-judicial. Merely ministerial functions may be delegated to assistants whose employment is authorized, but there is no authority to delegate acts discretionary or quasi-judicial in nature. Authority from the legislature is necessary to the power of a commission to appoint a general deputy who may exercise quasi-judicial powers. If such deputy may be appointed or the commission is given authority by the legislature to deputize quasi-judicial matters to others, it may do so. Statutory authority to a commission to employ agents, statisticians, experts, attorneys, and such other assistants and employees as may be necessary to perform its duties does not give the commission authority, either directly or by implication, to deputize those matters which are quasi-judicial in character. \* \* \*”

Section 26 of the same title in said treatise states:

“Administrative boards, commissions and officers have no common law powers. Their powers are limited by the statutes creating them to those conferred expressly or by necessary or fair implication. \* \* \*”

43 Am. Jur., Public Officers, § 461, states:

“\* \* \* A public officer, charged with the performance of official duties, does not necessarily have the power to delegate his authority to a person not authorized by law to act. \* \* \* as a general rule, legislative authority is essential to the appointment of a general deputy or a deputy or other assistant to whom to delegate quasi-judicial duties and matters. \* \* \*

*“Official duties involving the exercise of discretion and judgment for the public weal cannot be delegated. They can be performed only in person. \* \* \*”* (Our emphasis)

Indiana Law Encyclopedia, Vol. 1, Administrative Law and Procedure, § 22, p. 164 provides:

“As a general rule, administrative officers and bodies cannot alienate, surrender, or abridge their powers and duties, and they cannot legally confer on their employees or others authority and functions which under the law may be exercised only by them or by other officers or tribunals; and, although they may delegate merely ministerial functions, in the absence of statute or organic act permitting it, they cannot delegate powers and functions which are discretionary or quasi-judicial in character, or which require the exercise of judgment.”

A public officer is one whose duties “involve an exercise of some portion of the sovereign power.”

*Shelmadine v. City of Elkhart* (1912), 75 Ind. App. 493, 495, 129 N. E. 878.

See also: *State ex rel. Black v. Burch* (1948), 226 Ind. 445, 80 N. E. (2d) 294; reh. den. 226 Ind. 445, 81 N. E. (2d) 850.

In making top level decisions of a quasi-judicial nature, a member of the Flood Control and Water Resources Commission qualifies as a public officer whose official functions in that capacity may not be delegated to a non-member of the commission, but must be performed by the commission member in person.

Therefore, in view of the foregoing it is my opinion that, although Mr. Vogelgesang might properly attend the meetings of the Indiana Flood Control and Water Resources Commission in an advisory capacity at the request of the chief engineer of the Indiana State Highway Department, he would not have any voting rights at such meeting.