

1961 O. A. G.

State. There was no emergency clause, and therefore the act will not be in effect until published by the Secretary of State, including the distribution of the same together with all of the enactments of this recent session of the General Assembly of Indiana.

OFFICIAL OPINION NO. 13

April 5, 1961

Mr. David Cohen, Chairman
State Highway Commission
11th Floor, State Office Building
Indianapolis 4, Indiana

Dear Mr. Cohen:

This is in reply to your request for an Official Opinion stated as follows:

“Now that Senate Bill No. 136 has been passed and has become a law with the effective date April 15, 1961, by virtue of an emergency clause * * *

“* * * I would like to have your opinion as to what limits there are in unrepealed laws and in Senate Bill No. 136 on the power of the Commission created under Senate Bill No. 136 to delegate authority.”

Your question is directed to the power of the Highway Commission to delegate powers which have been granted them in Senate Enrolled Act No. 136, being Chapter 201 of the Acts of 1961. The following statement in regard to Public Administrative Law is generally followed by all states as a basic premise in regard to the further delegation of powers delegated by the Legislature.

“* * * 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 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 min-

OPINION 13

isterial functions may be delegated to assistants whose employment is authorized, but there is no authority to delegate acts discretionary or quasi-judicial in nature. * * * 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. * * *

* * *

“The rule that requires an officer to exercise his own judgment and discretion in making an order does not preclude him from utilizing, as a matter of practical administrative procedure, the aid of subordinates directed by him to investigate and report the facts and their recommendation in relation to the advisability of the order. * * *”

42 Am. Jur., Public Administrative Law, § 73, pp. 387, 389.

See also: Grundstein, Subdelegation of Administrative Authority, 13 Geo. Wash. L. Rev. 144 (1945), and cases there cited.

It should first be noted that in the act in question there is statutory provision for subdelegation of important powers and functions. The scope of the powers and duties directly granted to the Executive Director, in conjunction with the implied authority in the Commission to delegate authority and responsibility to him, is apparent in the following provisions of Section 7 of the Act:

“SEC. 7. The Executive Director—Appointment—Qualifications—Tenure—Duties. The governor shall appoint an Executive Director of the Highway Commission who shall serve at the will and pleasure of the governor. He shall not be one of the members of the Highway Commission. The salary of the Executive Director shall be in such amount as determined by the governor with the approval of the budget agency but not less than \$18,000 per year.

“The Executive Director shall give his whole time to the duties of his office and shall not engage in any other business, vocation or employment.

“The Executive Director shall be the chief executive and administrative officer of the Highway Commission and shall have general supervision of its work and of each of the divisions and districts and of the supervisors and employees thereof, subject to the orders and under the direction, control and supervision of the members of the Highway Commission.”

Section 6 of the Act further provides as follows:

“SEC. 6. Execution of Instruments. All rules, regulations, documents and instruments of any kind issued, executed or promulgated by the Highway Commission shall be executed in the name of the ‘Indiana State Highway Commission’ by either the chairman of the Highway Commission, or, in event of his absence or inability to act, by the vice-chairman, or, to the extent expressly authorized by rule, regulation or resolution, the Executive Director; shall be attested by the secretary and shall be sealed with the official seal.”

This section expressly permits the execution of certain instruments by the Executive Director provided the Highway Commission grants such power by rule, regulation or resolution. However, the determination to execute instruments along with the responsibility for the same remains with the Commission.

In regard to subdelegation of duties apart from statutory authority, it would first be necessary to examine the individual duty or power in question, and determine whether it is purely a ministerial power or duty which might be delegated, or a discretionary or quasi-judicial function which could not. It is difficult to place in a definite category each of the many powers and duties granted to the Highway Commission, but it is noted that many of the functions which are ministerial are set forth as duties of the various Divisions in Section 8 of the Act, while many of the duties that are discretionary are set forth in Section 5, set out hereinbelow, and in the supplemental statutes which are still in effect.

OPINION 13

“SEC. 5. Powers, Responsibilities and Duties of Commission. The Highway Commission shall have the following powers, responsibilities and duties:

“1. To plan and supervise the administration and the conduct of the work of constructing, reconstructing, improving, maintaining and repairing the public highways and bridges of the State of Indiana.

“2. To enforce and execute the provisions of this act and of any other act relating to the construction, maintenance and repair of the public highways and bridges of the State of Indiana.

“3. To acquire, own and hold real and personal property in the name of the State of Indiana and to sell, lease or otherwise dispose of or encumber the same in connection with and in furtherance of the purposes of this act.

“4. To promulgate and adopt rules, regulations and by-laws governing its own operation in the manner now or hereafter provided by law, and to establish policies for the organization and operation of the Highway Commission.

“5. To consider and study the entire field of legislation and administration concerning roads and highways.

“6. To make biennial reports to the governor and to the General Assembly.

“7. To organize and administer the Highway Commission and its work in this connection, to supervise the work of the executive director and to create, merge and abolish divisions within the Highway Commission, except divisions specifically created by this act, and to transfer or merge functions among such divisions or among any created or merged, all in the interest of economy and efficiency.”

A ministerial act is defined in *Flournoy et al. v. The City of Jeffersonville* (1861), 17 Ind. 169, 174, as “one which a person performs in a given state of facts, in a prescribed manner, in

1961 O. A. G.

obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done." This definition has been quoted in numerous subsequent decisions.

It is difficult to give a general and complete definition of a discretionary or quasi-judicial function, since the determination depends upon all elements of the particular act to be performed. If the act relates to a basic function of the office and requires the exercise of discretion as to whether or not it is done, and further requires the exercise of judgment in its performance, then it would generally be considered as discretionary. Each function would have to be considered separately and a determination made, based on the general rules.

The answer therefore to your question depends upon a determination of the class within which the power or duty falls. If it is ministerial it may be delegated, if it is discretionary or quasi-judicial, the responsibility and authority to exercise and perform the same may not be delegated. The extent to which subordinates or employees are used to assist in these functions is an administrative decision, unless direct participation by the superior is required by statute, but in any event the final responsibility for all action taken under the provisions of this act remains with the Highway Commission.

OFFICIAL OPINION NO. 14

April 12, 1961

Mr. David Cohen, Chairman
State Highway Commission
11th Floor, State Office Building
Indianapolis, Indiana

Dear Mr. Cohen:

I have before me a request from Mr. George M. Foster, Executive Director of the State Highway Department, requesting my Official Opinion on the following question:

"Is it legal for a vehicle to cross a yellow barrier line in a restricted passing zone in order to make a left