



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

April 27, 2012

Shaw R. Friedman
705 Lincolnway
LaPorte, Indiana 46350

Re: Formal Complaint 12-FC-88; Alleged Violation of the Open Door Law by the State Employees Appeals Commission

Dear Mr. Friedman:

This advisory opinion is in response to your formal complaint alleging the State Employees Appeals Commission ("Commission") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Hon. Aaron R. Raff, Chief Administrative Law Judge, responded on behalf of the Commission. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that the Indiana State Personnel Department ("SPD") filed an appeal from an Administrative Law Judge's findings that awarded reinstatement to Amy Weaver. Following an appeal of the findings of the SPD and the submission of briefs, oral argument was held before the Commission at its February 21, 2012 meeting. The Board orally vacated the ALJ's findings and the incoming chair, Commissioner Joe Heerens ("Heerens"), with assistance from the Chief Administrative Law Judge ("Chief ALJ"), were delegated to reach and issue Findings of Fact, Conclusions of Law, and a Final Order of the Commission consistent with the guidance given by the Commission.

You provide that there was no mention in the February 21, 2012 minutes about the Commission having delegated or given authority for a single member to rule on post-hearing motions. Rather, the only delegation referenced in the minutes was the authority for Heerens, with the assistance from the Chief ALJ, to write a final order consistent with the guidance approved by the Commission at its February 21, 2012 meeting.

On March 5, 2012, you filed two substantive motions with the Commission, a Motion to Reconsider and a Motion for Recusal ("Weaver Motions"). You believed that such motions would be heard by the Commission at its March 27, 2012 meeting. You allege that the motions were never docketed for the March meeting and were never decided by the Commission in an open public meeting. Instead, on March 19, 2012, an

order was issued by Heerens denying both motions. The March 19, 2012 Order claimed general delegation authority under the Administrative Orders and Procedures Act (“AOPA”). The Order provided that the Commission had delegated ruling on these motions to Heerens, with procedural assistance from the Chief ALJ.

You allege that such delegation of a ruling by the Commission occurred between March 5, 2012 and March 19, 2012. This delegation would be considered “final action” pursuant to the ODL; as such a violation occurred when the decision was made in private by the Commission. The Commission had only given authority to Heerens to write the Final Order; the Commission’s act of delegating the authority to Heerens to rule on the Weaver Motions was not included in the delegation. You do not contest the ability or authority of the Commission to delegate certain matters; however you do contend that such delegation must occur at a public meeting, which did not occur in this instance as it relates to the ability of Heerens and the Chief ALJ to issue an order in response to the Weaver Motions.

In response to your formal complaint, Mr. Raff advised that the Commission did not violate the ODL in regards to the orders issued by Heerens, with the assistance of the Chief ALJ, relating to the Weaver Motions. The delegation of power was proper, pursuant to a previous decision made by the Commission in an open public meeting and the express statutory power enjoined by the Commission pursuant to the AOPA.

The Commission is an administrative adjudicative body charged with fairly and impartially addressing and resolving qualified state employee appeals under the Civil Service System and the prior State Personnel Act. The Commission proceedings are conducted pursuant to the AOPA. At the February 21, 2012 meeting, the Commission by unanimous public vote delegated to Heerens, with assistance from the Chief ALJ, the responsibility to reach and issue a Final Order in the matter involving Amy Weaver. The relevant portion of the Commission’s minutes provides that:

“The prior [Weaver] Non-Final Order was VACATED/MODIFIED in its entirety. The incoming Chair, Commissioner Heerens, with assistance from the Chief ALJ, was delegated to reach and issue Findings of Fact, Conclusion of Law, and a Final Order of the Commission consistent with the guidance given by the Commission.”

Thereafter, but before a Final Order was issued by the Commission, the Weaver Motions were filed. The Commission has provided that the Weaver Motions can be viewed as either procedural or some other species of pre-final order motions because they were filed before a Final Order was issued. Pursuant to the previous delegation by the Commission, Heerens duly considered and denied both motions. Both Heerens and the Chief ALJ understood the Commission’s public delegation to reach a Final Order in the matter to include the resolution of party motions made before the issuance of the Final Order. On April 2, 2012, the Final Order was issued.

AOPA is clear in giving the Commission the statutory authority to hold a public meeting and delegate a matter to a commission member for resolution of a final order. *See* I.C. § 4-21.5-3-28(b). The ODL certainly allows for decisions or action at a public meeting, but does not disallow or prohibit in anyway the delegation of a Final Order to a member of the Commission. The ODL and the AOPA must be read together, in harmony, in order to give the effect of the Indiana General Assembly's intent under both statutes. The cardinal rule of statutory interpretation is to ascertain the intent of the drafter by "giving effect to the ordinary and plain meaning of the language used." *Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825, 828-829 (Ind. 2011).

By any sound statutory reading or interpretation, a publicly made delegation, authorized by a full commission after public oral argument at a public meeting, to reach a Final Order necessarily includes the power to resolve motions filed before that Final Order is issued. This is textual in the AOPA: a designee does not just physically draft the final order, but shall conduct proceedings to issue a final order. *See* I.C. § 4-21.5-3-28(b). Conducting proceedings to a Final Order must include the resolution of pre-final order motions after oral argument has been held or else the words of the statute would not be given their meaning. Your suggestion to the contrary would frustrate public policy or misapply the AOPA. Resolution of your motions before the issuance of the Final Order was properly inside the scope of delegation under the AOPA, the ODL, sound public policy, and the delegation as evidenced by the Commission's minutes.

Alternatively, your complaint is moot or not a proper subject for the Public Access Counselor's for review as the Final Order has been issued by the Commission in this manner. The exclusive remedy to attack a final order of an administrative adjudicative decision under the AOPA by a Commission is to take judicial review. The Final Order issued cannot be collaterally attacked by challenging a procedural or pre-final order decision under the ODL. Even if the March 19, 2012 decision is void for any reason, the complaint still offers no relief. The Final Order of April 2, 2012 is valid and all pre-final order decisions were eclipsed by the Final Order. Any alleged error in the Final Order has to be challenged by judicial review, which is the exclusive remedy.

In addition, you were allowed an opportunity and failed to file a Motion to Correct Error after the Final Order was issued; which would have given you the public forum and public decision making process that you have sought. The Commission gave the Petitioner leave to file such a motion and have it considered by the entire Commission at the April 2012 Commission meeting. However, the Petitioner declined this option. Instead, you sent an email to the Chief on April 12, 2012 indicating that the Petitioner only wanted the agency record prepared so that judicial review could be taken.

ANALYSIS

It is the intent of the ODL that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. *See* I.C. § 5-14-1.5-1. Accordingly, except as provided in section 6.1 of the ODL, all meetings of the governing bodies of public agencies must be open at

all times for the purpose of permitting members of the public to observe and record them. *See* I.C. § 5-14-1.5-3(a).

A meeting is a gathering of a majority of the governing body of a public agency for the purpose of taking official action on public business. *See* I.C. § 5-14-1.5-2(c). “Official action” means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. *See* I.C. § 5-14-1.5-2(d). “Public business” means any function upon which the public agency is empowered or authorized to take official action. *See* I.C. § 5-14-1.5-2(e). “Final action” means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. *See* I.C. § 5-14-1.5-2(g). Final action must be taken at a meeting open to the public. *See* I.C. § 5-14-1.5-6.1(c).

You do not challenge the authority of the Commission to delegate power pursuant to the AOPA. Your complaint alleges that the Commission violated the ODL when it provided the authority to Heerens and the Chief ALJ to rule on the Weaver Motions, as such delegation was not made in an open public meeting. In response, the Commission provided that it unanimously voted and delegated authority to Heerens and the Chief ALJ at its February 21, 2012 to issue an Final Order and to conduct all proceedings to issue a final order as allowed under AOPA. Included with the ability to conduct “all proceedings” was the authority to issue orders in response to the Weaver Motions, as such motion were filed after oral argument was held on February 21, 2012 but prior to the issuance of the Final Order on April 2, 2012.

The AOPA provides that the ultimate authority or its designee shall conduct proceedings to issue a final order. *See I.C. § 5-21.5-3-28(b)*. The Commission delegated authority to Heerens and the Chief ALJ to issue a Final Order regarding Weaver on February 21, 2012. The AOPA does not solely give the Commission authority to issue a Final Order, but to also “conduct proceedings to issue a final order.” *Id.* As applicable here, it is my opinion that responding to the Weaver Motions would have been part of the proceeding to be conducted by Heerens and the Chief ALJ, which occurred prior to the issuance of a Final Order. Heerens and the Chief ALJ were delegated such power on February 21, 2012 after a unanimous vote by the Commission in an open public meeting. Accordingly, it is my opinion that the Commission did not violate the ODL as it took final action in an open public meeting regarding the delegation of authority, which included the ability to respond to the Weaver Motions pursuant to the AOPA.

CONCLUSION

Based on the foregoing, it is my opinion that the Commission did not violate the ODL.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" at the end.

Joseph B. Hoage
Public Access Counselor

cc: Hon. Aaron R. Raff