

April 28, 2009

**OFFICIAL OPINION 2009-5**

The Honorable Mara Candelaria Reardon  
Indiana House of Representatives  
200 W. Washington St.  
Indianapolis, IN 46204

**RE: Commission on Hispanic and Latino Affairs;  
Role of Proxies**

Dear Representative Reardon:

In your e-mail communication of March 30, 2009, with Mr. Gordon E. White, Deputy Attorney General, you posed the following restated five (5) questions with respect to the Commission on Hispanic and Latino Affairs (hereafter, the "Commission"):

1. The chairperson initially canceled the Commission meeting of January 29, 2009, due to inclement weather. Later, the executive director advised members that the Commission meeting would be held. Was this a legal meeting of the Commission?
2. What are the differences between a "designee" and a "proxy"?
3. Can proxies be used to establish a quorum?
4. Can proxies be used to vote on official Commission business? According to the advisory opinion of March 26, 2009, the answer appears to be no.
5. Commission business may have been conducted in the past through the use of proxies. If this did occur, is such Commission business now considered invalid? With reference to the election conducted on January 29, 2009, should another election be held?

**BRIEF ANSWERS**

1. The statutory provisions creating the Commission do not speak to a quorum. However, statute does require the Commission, in order to conduct its business, to have the affirmative votes of a majority of the appointed members. The Commission is presently at its full complement of twenty (20) appointed members. Accordingly, the Commission, in order to conduct its business, would require the affirmative votes of at least eleven (11) members. The meeting of January 29, 2009, was a legal meeting as statute does not indicate how many members are necessary in order to have a meeting. However, without the affirmative votes of at least eleven (11) members, the Commission could not conduct any business, including the election of officers.

2. Statute provides that only the six state agency directors and the Lieutenant Governor can appoint designees to act in their stead. No other Commission member is authorized to act through a designee or a proxy. Any designee, however, must be a Hispanic or Latino employee of the state agency or the Lieutenant Governor's office in order to qualify as a designee. A properly appointed and qualified designee has the same authority to act as the state agency or office the designee is representing.
3. The statutory provisions creating the Commission do not address a "quorum." However, statute does indicate that, in order for the Commission to conduct business on any measure before it, there must be affirmative votes of the majority of the appointed members. At present, the Commission has a full complement of twenty (20) members. Accordingly, in order to conduct business on any measure before the Commission, there would have to be affirmative votes of at least eleven (11) members. If a measure before the Commission has not received the affirmative votes of at least eleven (11) members, then the measure is not yet concluded.
4. Although Commission business may have been conducted in the past through either unqualified designees or unauthorized proxies, such Commission business is not invalidated by application of the doctrine of *de facto* officer.

## ANALYSIS

### **Background**

The Commission is composed of twenty (20) members, with six (6) appointed by the President Pro Tempore of the Senate, six (6) appointed by the Speaker of the House, one (1) by the Governor, and the remaining seven (7) designated by statute. These remaining seven are directors of state agencies (the Secretary of the Family and Social Services Administration, the Commissioner of the State Health Department, the State Superintendent of Public Instruction, the Commissioner of the Department of Correction, the Director of the Civil Rights Commission, and the Commissioner of the Department of Workforce Development) along with the Lieutenant Governor. Ind. Code § 4-23-28-4.

These latter seven members are authorized by statute to appoint a "designee," but this designee must be "a Hispanic or Latino employee" of the respective state agency or the Lieutenant Governor's office. Ind. Code § 4-23-28-4(a)(5)-(10), (12). The appointment by the Governor must be "[a] Hispanic or Latino business person[.]" Ind. Code § 4-23-28-4(a)(11). While four (4) members must be members of the General Assembly, Ind. Code § 4-23-28-4(a)(1), (2), the remaining eight (8) appointments by the President Pro Tempore of the Senate and the Speaker of the House must be "members of the Hispanic/Latino community who are not members of the general assembly." Ind. Code § 4-23-28-4(a)(3), (4).

Other than the six (6) directors of state agencies and the Lieutenant Governor, no other appointed member of the Commission is specifically authorized to designate anyone to act in that member's stead.

Under Ind. Code § 4-23-28-8, “[t]he affirmative votes of a majority of the members appointed to the commission are required for the commission to take action on any measure, including final reports.” The Commission is presently at its full 20-member complement.

The Commission is required to elect, at its first meeting each year, a chairperson and a vice chairperson. Should a vacancy occur in either of these offices, the vacant office will be filled by a Commission member selected by vote from the remaining Commission members. The term of office is for one year and expires at the first meeting of the Commission the following year. Ind. Code § 4-23-28-6.

Your questions arise as a result of a meeting of the Commission held on January 29, 2009. As this was the first meeting of the year, officers were to be elected.<sup>1</sup> According to the minutes from the January 29, 2009, meeting, the candidate for chairperson received “10 official votes,” with “[o]ne proxy vote...noted but not counted towards the official count.” The same occurred and was recorded for the vote for the candidate for vice chairperson. Votes were not tabulated for those elected to the offices of the secretary and the treasurer.

### **Was the January 29, 2009, meeting of the Commission meeting a legal one?**

Ind. Code § 4-23-28-5(a) indicates that “[t]he commission shall meet on call of the chairperson or at other times that the commission determines.” The Commission’s by-laws incorporate the statutory language and add that “[t]he commission shall meet monthly.”<sup>2</sup> The meeting of January 29, 2009, was a scheduled meeting of the Commission. There appears to be no disagreement that this was a scheduled meeting for which proper notice was provided pursuant to I.C. § 5-14-1.5 *et seq.* (the Open Door Law).

Indiana experienced inclement weather just before the scheduled meeting of the Commission. It appears the chairperson, Mr. Alfonso Vidal, sent an email to Commission members, indicating the meeting should be canceled. However, the executive director was unsure whether the meeting could be canceled on such short notice. After a series of communications between and among members, the executive director indicated there were sufficient members present in Indianapolis to conduct the meeting. The meeting was held.

Statute does not indicate that there must be a certain number of Commission members present in order to have a meeting. Statute does indicate that there must be a certain number present in order for the Commission “to take action on any measure.” See Ind. Code § 4-23-28-8. The Commission meeting of January 29, 2009, was a legal meeting. Whether there were sufficient numbers “to take action on any measure” will be discussed *infra*.<sup>3</sup>

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<sup>1</sup> While statute refers to the election of a chairperson and a vice chairperson, the Commission’s by-laws call for the additional election of a secretary and a treasurer. These latter two offices are also to be determined at the first meeting conducted each year. These four officers comprise the Executive Committee. See **Article V: Commission Officers.**

<sup>2</sup> **Article VI: Meetings; Subcommittees.**

<sup>3</sup> This Advisory Opinion does not address any construction of the Open Door Law. This is within the province of the Public Access Counselor. See Ind. Code § 5-14-4-10(5),(6). The Public Access Counselor can be reached via <http://www.in.gov/pac/>.

## What are the differences between a “designee” and a “proxy”?

“In general a proxy is one who has the same authority to act and vote as does the member.” *Indiana Board of Public Welfare v. Tioga Pines Living Center, Inc.*, 622 N.E.2d 935, 943 (Ind. 1993). A “proxy” is “[o]ne who is authorized to act as a substitute for another[.]” *Black’s Law Dictionary* 1263 (8<sup>th</sup> ed. 2004).

A “designee” is “[a] person who has been designated to perform some duty or carry out some specific role.” *Black’s Law Dictionary* 478 (8<sup>th</sup> ed. 2004).

The differences between “designee” and “proxy” are subtle: a proxy is often discharging a specific, limited function (such as voting at a shareholders’ meeting), while a designee will have general authority to act on behalf of another. Any differences, however, are largely immaterial to your overarching concern. In order to be a proxy or a designee, there has to be authorization to act through such a substitute.

The General Assembly did not authorize any Commission member to designate a proxy, although the legislature did authorize the six (6) state agency directors and the Lieutenant Governor to appoint designees, albeit within certain specific criteria. The statutory provisions governing the formation and duties of the Commission are not ambiguous. The same requirements are reflected in the Commission’s by-laws.

The General Assembly, in creating other similar groups, has indicated whether such members may or may not use proxies. See, *e.g.*, Ind. Code § 10-15-2-2(d), permitting a member of the Indiana Emergency Management, Fire and Building Services and Public Safety Foundation to cast the vote of another member who is absent so long as the proxy is in a written form required by the Foundation; Ind. Code § 31-26-6-12(d), (e), allowing certain members of a Regional Services Council to designate in writing a representative or proxy; Ind. Code § 23-6-4-10(14)(A), authorizing an Indiana Business Development Credit Corporation to establish by-laws to, *inter alia*, “establish internal governance procedures and standards, including procedures for voting by proxy at and for giving notice of meetings of directors and of members and shareholders”; and Ind. Code § 36-12-8-14(b)[repealed 2012], authorizing a member of the Board of Directors for the Library Service Authority to “designate an individual to vote as proxy for that director if written authorization is delivered to the secretary of the executive committee before a meeting of the board of directors meeting.” Also see Ind. Code § 5-28-4-6, prohibiting members of the Indiana Economic Development Corporation Board from voting by proxy; and Ind. Code § 14-29-7-7 prohibiting members of the River Commission from voting by proxy.

The legislature has also been specific with regard to who may appoint a “designee.” See, *e.g.*, the Board of Trustees for the Center for Agricultural Science and Heritage, Ind. Code § 15-13-11-3; Commission on the Social Status of Black Males, Ind. Code § 12-13-12-3[repealed 2012, current version Ind. Code. § 4-23-31-3] ; the Military Base Planning Council, Ind. Code § 4-3-21-4; the Native American Indian Affairs Commission, Ind. Code § 4-4-31.4-5[repealed 2012, current version Ind. Code § 4-23-32-4]; and the Indiana Kids First Trust Fund Board, Ind. Code § 31-26-4-6.

With respect to the Commission on Hispanic and Latino Affairs, the General Assembly did authorize some members to appoint designees to act in their stead but did not extend this to all or even a majority of the membership. The intent was to ensure as much as possible that the membership of the Commission would be intimately familiar with and representative of the needs of Hispanics and Latinos in Indiana across all areas of life and livelihood. Permitting other Commission members other than the state agency directors and the Lieutenant Governor to appoint their own designees when statute does not confer such authority would appear to be inconsistent with the statutory language and the apparent legislative intent.<sup>4</sup>

### **Can proxies be used to establish a quorum?**

As noted in the Advisory Letter of March 26, 2009, “[t]he affirmative votes of a majority of the members appointed to the commission are required for the commission to take action on any measure, including final reports.” Ind. Code § 4-23-28-8. The statute does not specifically address what a “quorum” would be nor does it state how many members are necessary to conduct the business of the Commission, including its elections.

“A quorum is defined as the number of persons that are members of a body when assembled who are legally competent to transact the business of such a body. Normally, ... a majority is considered a quorum[.]” *Davidson v. State of Indiana*, 221 N.E.2d 814 (Ind. 1966). The affirmative votes of a majority of members appointed are necessary for the Commission to take action on any measure. As the Commission is presently at its full 20-member complement, by statute, the Commission would require the affirmative votes of eleven (11) members “who are legally competent to transact the business” of the Commission in order to take action on any measure, including elections.

No other Commission members except the six (6) state agency directors and the Lieutenant Governor are authorized to participate through designees. A designee of one of the state agency directors or the Lieutenant Governor would be included in the determination of the number of Commission members necessary to constitute a majority vote. As no other Commission member is authorized to appoint a designee or a proxy, such an unauthorized designee or proxy could not be included in the determination of the number of Commission members necessary to constitute a majority vote on any matter before the Commission. Such an unauthorized designee would not be “legally competent to transact the business” of the Commission.

The statement in the By-Laws that “[a] majority vote of members present for a meeting shall be required for all actions of the Commission” may not be in concert with the plain language of the statute under some circumstances. The statute requires the “affirmative votes of a majority of the members appointed to the commission” in order for the Commission to take official action. The statute does not qualify this as a majority of those members *present*. The Commission, in order to take action, must have the affirmative votes of eleven (11) members where all twenty (20) members have been appointed. Where there are fewer than twenty (20) members appointed, the

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<sup>4</sup> In addition, the statutory direction for interpreting legislative enactments seems to indicate that unless representative capacity has been granted, it is not presumed that it exists. See Ind. Code § 1-1-4-1(5) (“When a statute requires an act to be done which, *by law*, an agent or deputy as well may do as the principal, the requisition is satisfied by the performance of the act by an authorized agent or deputy”). Emphasis added.

statute still requires a majority of the members appointed to vote in the affirmative in order to take action on any matter.

**Can proxies be used to vote on official Commission business? According to the advisory opinion of March 26, 2009, the answer appears to be no.**

As noted *supra*, only the designees of the six (6) state agency directors and the Lieutenant Governor are authorized to vote on official Commission business. No other Commission member is authorized to act through a designee or a proxy.

**Commission business may have been conducted in the past through the use of proxies. If this did occur, is such Commission business invalid? With reference to the election conducted on January 29, 2009, should another election be held?**

Commission business conducted in the past is not invalidated by the past practice of using proxies or appointing designees who do not meet the statutory qualifications as “a Hispanic or Latino employee” of the appointing state agency director or the Lieutenant Governor. The doctrine of *de facto* public officers is founded upon the principles of necessity and public policy. The recognition of the validity of the acts of a *de facto* officer date to the Fifteenth Century.<sup>5</sup>

The doctrine is often described as follows: A person who assumes and performs the duties of a public office under color of authority and is recognized and accepted as a rightful holder of the office by all who deal with this person is a *de facto* officer, even though there may be defects in the manner of the person’s appointment, or the person was not eligible for the office, or failed to conform to some condition precedent to assuming the office. The acts of such *de facto* officer are binding and valid as to the public and other third parties.

One who holds office under the color of an election or an appointment and discharges the purported duties of office in full view of the public without being an intruder or usurper, is at least a *de facto* official. The authority of a *de facto* official cannot be collaterally attacked. The validity of a *de facto* officer’s acts may only be challenged directly against the individual who purports to hold the office. For the protection of the public who deal with him, the acts of a *de facto* officer are as valid as the acts of a *de jure* officer. [Citations omitted.] All that is required to make an officer *de facto* is: that he claim the office, be in possession of it, and perform its duties under the color of election or appointment. [Citation omitted.] If their election or appointment were valid, they (*de facto* officers) would be *de jure* officers. [Citation omitted.]

*Carty v. Indiana*, 421 N.E.2d 1151, 1154 (Ind. Ct. App. 1981). See also *Sullivan v. City of Evansville*, 728 N.E.2d 182, 190 (Ind. Ct. App. 2000) (...Sullivan failed to challenge the eligibility of the Commission members before his hearing, and he has failed to demonstrate that the administration of a disciplinary hearing by *de facto* public officers acting without objection under

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<sup>5</sup> See *Connecticut v. Carroll*, 38 Conn. 449 (Conn. 1871), the leading case on this doctrine. *Carroll* details the history of this doctrine and its public policy underpinnings for why the actions of *de facto* officers must be considered valid as to the public and third parties.

the color of their appointment constitutes fundamental error”); *Book v. State Office Building Commission*, 149 N.E.2d 273, 298 (Ind. 1958) (“The law seems to be well settled in Indiana that one who is elected or appointed to an office under an unconstitutional statute, before it is adjudged to be so, is an officer *de facto*, and his acts will be held valid in respect to the public, whom he represents, and to third persons with whom he deals officially”); *Platte v. Dortch*, 263 N.E.2d 266, 269 (Ind. 1970); *Michigan City v. Brossman*, 11 N.E.2d 538, 542-43 (Ind. Ct. App. 1937) (city was bound by contract entered into by *de facto* officers whose municipal positions were later declared to be unconstitutional).

Because members of the Commission, including those designees who do not meet the statutory qualifications, believed their appointments to be valid and discharged their responsibilities as Commission members, they are either *de facto* or *de jure* officers, depending upon the regularity or irregularity of their respective appointments. In either situation, the acts of the Commission are deemed valid by operation of this doctrine. They would not be considered “usurpers” who knew of the defects of their appointments; rather, they assumed their offices in a manner thought to be correct by them and others.<sup>6</sup>

Although the doctrine of *de facto* officers will validate past Commission actions, an election of officers must be conducted. The doctrine of *de facto* officers cannot validate a vote that failed to satisfy an unambiguous statutory requirement.

As noted *supra*, Ind. Code § 4-23-28-8 requires “[t]he affirmative votes of a majority of the members appointed to the commission ... for the commission to take action on any measure....”<sup>7</sup> The Commission currently has a full complement of twenty (20) members. By statute, the affirmative votes of eleven (11) members are necessary “for the commission to take action on any measure,” including the election of officers. The minutes from the January 29, 2009, meeting indicate that the candidates for chairperson and vice chairperson received only ten (10) affirmative votes.<sup>8</sup> The candidates for chairperson and vice chairperson—and, by extension, the candidates for treasurer and the secretary—require eleven (11) affirmative votes each in order to be elected to these offices.

It should also be noted that statute requires of a designee of a specified state official to be “a Hispanic or Latino employee” if the state official will not participate in person. Ind. Code § 4-23-28-4(a)(5)-(10), (12). If a designee does not meet this statutory qualification, the designee is not qualified to serve in any capacity on the Commission.

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<sup>6</sup> See *In Re Bankers Trust*, 403 F.2d 16, 20 (7<sup>th</sup> Cir. 1968).

<sup>7</sup> As noted in the Advisory Opinion of March 26, 2009, the Commission’s by-laws contain a provision that reads: “Eleven (11) members of the Commission constitute a quorum for the transaction of business. A majority vote of members present for a meeting shall be required for all actions of the Commission.” This provision is not consistent with the statute, especially when applied to the facts in this matter.

<sup>8</sup> There do not appear to be any votes taken for secretary or treasurer. Their elections were by “acclamation.” The by-laws require these officers to be elected. Even though statute does not address these two offices, this would be a measure before the Commission that would require eleven (11) affirmative votes. These officers did not receive the requisite number of affirmative votes.

Sincerely,

Gregory F. Zoeller  
Attorney General

Kevin C. McDowell  
Deputy Attorney General