Since our previous discussion makes it clear that the question of moving a community college site may not be considered by the electors, no such "question or measure" is presented. Therefore the provisions of Section 4b, as well as Section 4a, may not be utilized in this situation.

It is therefore my opinion that sole authority to move the site of a community college facility from an established site to a different site exists in the board of trustees of the community college.

660502.1

FRANK J. KELLEY,
Attorney General.

EXECUTIVE BRANCH: Organization of principal departments.

The statutory provisions for filling vacancies on existing boards, commissions or agencies transferred by a Type II transfer under Act 380 P.A. 1965 enumerated and discussed.

Type II transfer of existing departments, boards, commissions or agencies to a principal department established by Act 380 PA 1965, the Executive organization act of 1965, discussed and construed.

Authority of heads of principal departments, directors and deputies to delegate or redelegate duties and functions to subordinates construed.

Under Act 380 P.A. 1965 as amended by Act 407 P.A. 1965 a director of a department, commission or board may not engage in any business, vocation or employment outside of his office except transactions for his own account and only then when there is no conflict of interest.

No. 4479A May 2, 1966.

Hon. George Romney
Governor
Capitol
Lansing, Michigan

Under date of March 9, 1966 I issued to you my Opinion No. 4479 construing the meaning of a Type I transfer under Act No. 380 Public Acts of 1965, known as the Executive organization act of 1965.[1] As stated in that opinion, due to your expressed desire that you be furnished with my response as expeditiously as possible as to the meaning of a Type I transfer, the several questions stated in your request were divided with only the Type I transfer covered by Opinion No. 4479 with the remainder of the questions to be answered at a later date. I now proceed to answer the balance of your queries.

You next inquire:

> "Questions have also arisen regarding the continuation of certain boards and commissions which have been given *a Type II transfer* to a principal department, particularly when it comes to the appointment or reappointment of the members of these boards or commissions. There

[1] M.S.A. 1965 Cum. Supp. § 3.29(1) et seq.

would appear to be little doubt that all of the powers, duties, functions, etc. of a commission given a Type II transfer are transferred to the principal department. However, the skeleton of the commission or board given a Type II transfer still remains. Therefore, the following problems have arisen:

"(1) Does the board or commission given a Type II transfer still exist?

"(2) If it does, who is to make the appointments to this board or commission—the Governor? as is normally the case, or has this been transferred to the department head?

"(3) What duties, powers and responsibilities can the principal department legally delegate to a board or commission given a Type II transfer?

"Your answers to the foregoing specific questions, plus your opinion generally on Type II transfers is requested."

A Type II transfer is described in Section 3 (b) of Act 380 P.A. 1965 in these words:

> "Under this act a type II transfer means transferring of an existing department, board, commission or agency to a principal department established by this act. Any department, board, commission or agency assigned to a type II transfer under this act shall have all its statutory authority, powers, duties and functions, records, personnel, property, unexpended balances of appropriations, allocations or other funds, including the functions of budgeting and procurement, transferred to that principal department."[2]

Under Act 380 P.A. 1965 there are 14 existing departments, boards, commissions or agencies which have been transferred to a principal department by a Type II transfer as described and quoted above.[3] In addition, the legislature undertook to transfer by a Type II transfer selected powers, duties and functions (but not all), and in one instance personnel, from designated departments, boards, commissions and agencies to a principal department. The legislature also used the Type II transfer to transfer the state board of assessors to the state tax commission within the department of treasury and to transfer the state board of libraries to the board of education within the department of education.[4]

You first ask: "Does the board or commission given a Type II transfer still exist?"

As to the 14 departments, boards, commissions or agencies described in the sections itemized in foregoing Footnote 3, the answer to your stated question is in the affirmative. This answer is made clear by the descriptive provisions of Section 3 (b) herinbefore quoted. It is further substantiated

[2] Act 380 P.A. 1965 was amended by Act 407 P.A. 1965 but no change was made in Sec. 3(b) by the amendatory act.

[3] See Secs. 30, 31, 104, 105, 154, 155, 182, 185, 186, 232, 259, 385, 431 and 432 of Act 380 P.A. 1965.

[4] See Secs 54, 79, 80, 81, 90, 156, 234, 328, 329, 330 and 12, 85, 309 of Act 380 P.A. 1965.

by the language of a Type III transfer described in Section 3 (c) of Act 380 under which an existing department, board, commission or agency transferred to a principal department under a Type III transfer is abolished. It is apparent from an eximantion of Act 380, supra, that the legislature used the Type I and Type II transfers described in that act for the purpose of continuing the existence of a department, board, commission or agency so transferred to a principal department and used the Type III transfer where the department, board, commission or agency was to be absorbed into the principal department with the transferred department, board, commission or agency thereupon being abolished.

Your next question may be stated in this way:

> If a department, board, commission or agency transferred by a Type II transfer continues to exist within a principal department, who is to make the appointments to any such department, board, commission or agency where a vacancy occurs? Is the governor to appoint, or has the power of appointment been transferred to the department head?

The answer to the foregoing stated question may be narrowed to consideration of those 14 departments, boards, commissions or agencies hereinbefore identified by the Type II transfer and the use of the Type II transfer may be disregarded where only selected powers, duties and functions are transferred by the Type II device since the department, board, commission or agency itself has elsewhere been transferred under Act 380 by either a Type I or a Type III transfer.

The composition of the 14 Type II transferred departments, boards, commissions or agencies and the method of selection of the membership must be separately examined to ascertain the impact, if any, of the Type II transfer upon the appointive power.

The Michigan historical commission (Sec. 30) and the highway reciprocity board (Sec. 31) are given a Type II transfer under Act 380 to the department of state.

> The Michigan historical commission is composed of 6 members with the governor serving ex officio. The 6 members are appointed by the governor by and with the advice and consent of the senate and serve staggered terms of 6 years each and until their successors have been appointed and qualified.[5]
>
> The highway reciprocity board is composed of the secretary of state, the state highway commissioner and the chairman of the Michigan public service commission.[6]

[5] C.L. 1948 and C.L.S. 1961 § 399.1 et seq., M.S.A. 1959 Rev. Vol § 15.1801 et seq.

[6] C.L.S. 1961 § 3.162, M.S.A. 1965 Cum. Supp. § 9.1736. Under Act 286, P.A. 1964, the office of state highway commissioner was abolished and the powers and duties of that office have been transferred to and vested in the state highway commission. The chairman or other person designated by the commission shall replace the state highway commissioner on all boards, commissions, authorities and agencies on which the state highway commissioner held membership by virtue of his office. M.S.A. 1965 Cum. Supp. § 9.216(1) et seq.

The state building commission (Sec. 104) and the state building authority (Sec. 105) are given a Type II transfer under Act 380 to the department of administration.

> The state building commission consists of the mayor of the city of Lansing as an ex officio member, 2 members to be appointed by the speaker of the house of representatives, 2 members to be appointed by the president of the senate, and 4 members to be appointed by the governor. The terms of the appointed members shall expire with the terms of the respective officers making the appointments.[7]
>
> The state building authority is governed by a board of trustees consisting of 5 members appointed by the governor, with the advice and consent of the senate, to serve staggered terms of 4 years each.[8]

The civil defense advisory council (Sec. 154) and the Michigan state safety commission (Sec. 155) have been given a Type II transfer by the legislature under Act 380 to the department of state police.

> The civil defense advisory council consists of not to exceed 15 members appointed by the governor by and with the advice and consent of the senate and to serve at the pleasure of the governor. It is to serve as an advisory body to the governor in the development of plans for the efficient utilization of the resources and facilities of the state for the purposes set forth in the civil defense act.[9]
>
> The Michigan state safety commission is composed of the following officials ex officio: the governor, who shall be honorary chairman, the secretary of state, the superintendent of public instruction, the state highway commissioner, and the commissioner of the state police.[10]

The state soil conservation committee (Sec. 182) and the Michigan state fair authority (Sec. 185) and the board of managers of the Upper Peninsula state fair (Sec. 186) have been given a Type II transfer by the legislature under Act 380 to the department of agriculture.

> The state soil conservation committee serves as an agency of the state and consists of 7 members, namely, the dean of agriculture located at Michigan state college [university], East Lansing, Michigan, the commissioner of agriculture, the director of the state department of conservation, and 4 practical farmers who shall be appointed by the

[7] C.L. 1948 § 18.15, M.S.A. 1961 Rev. Vol. § 3.516(15).

[8] Act 183 P.A. 1964, M.S.A. 1965 Cum. Supp. § 3.447(102). Under Act 183 P.A. 1964 vacancies on the board of trustees are to be filled by appointment by the governor with the advice and consent of the senate.

[9] Sec. 154 of Act 380 P.A. 1965 erroneously refers to Section 3 of Act No. 154 of the Public Acts of 1953, as amended, as being Section 30.233 of the Compiled Laws of 1948. The correct designation to be given to said Section 3 in the Compiled Laws is 30.223. Section 3 of Act No. 154 was last amended by Act 257 P.A. 1964. M.S.A. 1965 Cum. Supp. § 4.823(63).

[10] C.L. 1948 § 256.561, M.S.A. 1960 Rev. Vol. § 9.1704. The Attorney General has ruled in Opinion No. 4391 issued Dec. 10, 1964 (O.A.G. 1963-64, p. 523) that the chairman of the state highway commission or such other person as may be designated by the commission and the superintendent of public instruction appointed by the state board of education will become members of the state safety commission.

governor from among the directors of the several soil conservation districts. The 4 farmer members hold office for 4 years or until their successors are appointed and qualified. The non-farmer members hold office so long as they shall retain the office by virtue of which they serve on the committee.[11]

The Michigan state fair authority is composed of 20 members appointed by the governor by and with the consent of the senate for terms of 4 years each. Vacancies are to be filled in the same manner as is provided for appointment in the first instance.[12]

The board of managers of the Upper Peninsula state fair consists of 5 members to be appointed by the governor by and with the advice and consent of the senate to serve for staggered terms of 5 years each.[13]

The department of economic expansion (Sec. 232) has been given a Type II transfer by the legislature under Act 380 to the department of commerce.

The department of economic expansion consists of the executive director as head of the department to be appointed by the governor with the advice and consent of the senate and to serve at the pleasure of the governor.[14]

The boating control committee (Sec. 259) has been given a Type II transfer by the legislature under Act 380 to the department of conservation.

The boating control committee is composed of a representative of the Michigan waterways commission, a representative of the secretary of state and a representative of the department of conservation. The

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[11] C.L. 1948 § 282.4, M.S.A. 1958 Rev. Vol. § 13.1784. Act 334 P.A. 1945 amended Section 1 of Act 13 P.A. 1921 as amended to provide that whenever in any law of this state reference is made to the commissioner of agriculture such reference shall be deemed to be made to the state department of agriculture. Foregoing Section 1 was subsequently amended by Act 104 P.A. 1947 to provide that whenever in any law of this state reference is made to the commissioner of agriculture such reference shall be deemed to be made to the director of agriculture. See C.L. 1948 § 285.1, M.S.A. 1958 Rev. Vol. § 12.1. By Sec. 178 of Act 380 P.A. 1965 all powers, duties and functions of the director of agriculture are transferred by a Type I transfer to the head of the department of agriculture. By Sec. 176 of Act 380 the head of the department of agriculture is the commission of agriculture.

The director of the state department of conservation was employed pursuant to the authority conferred upon the commission of conservation by Sec. 1 of Act 17 P.A. 1921 as amended, C.L.S. 1961 § 299.1, M.S.A. 1958 Rev. Vol. § 13.1. By Sec. 253 of Act 380 P.A. 1965 all powers, duties and functions vested by law in the director of conservation are transferred by a Type I transfer to the department of conservation. By Sec. 251 of Act 380 the head of the department of conservation is the commission of conservation.

[12] Sec. 2 of Act 224 P.A. 1962, M.S.A. 1965 Cum. Supp. § 12.1280(22). The 1962 act provides that the then present members of the state fair commission shall be members of the authority until the expiration of their respective terms of office. In case of a vacancy, appointment shall be made by the governor, by and with the consent of the senate, for the unexpired term.

[13] C.L.S. 1961 § 285.141, M.S.A. 1958 Rev. Vol. § 12.1301.

[14] Act 116 P.A. 1963, M.S.A. 1965 Cum. Supp. § 3.540(11) et seq.

representatives of the 3 agencies shall be selected from the staff of each agency by its chief authority and designated as that agency's representative.[15]

The board of boiler rules (Sec. 385) has been given a Type II transfer by the legislature under Act 380 to the department of labor.

The board of boiler rules consists of 4 citizens appointed by the governor, together with a professor of mechanical engineering of the Michigan college of mines or the Michigan agricultural college or the university of Michigan.[16]

The state board of alcoholism (Sec. 431) and the Michigan crippled children commission (Sec. 432) have been given a Type II transfer by the legislature under Act 380 to the department of public health.

The state board of alcoholism consists of 5 members to be appointed by the governor with the advice and consent of the senate for staggered terms of 3 years each. Two members of the board shall be licensed physicians in the State of Michigan, and 1 of such physicians shall be a qualified psychiatrist. Three members of the board shall be appointed to represent the general public and shall be from any of the following fields: sociology, social work, health administration, education, labor, industry, finance, government, law and related field; but no more than 1 from any 1 of these fields.[17]

The Michigan crippled children commission is composed of 5 members to be appointed by the governor by and with the advice and consent of the senate to serve for staggered terms of 3 years each. All vacancies shall be filled by appointment by the governor.[18]

Further analysis of the composition of the foregoing 14 departments, boards, commissions or agencies transferred to a principal department by a Type II transfer discloses the following methods for selection of the membership:

[15] Sec. 1a of Act 240 P.A. 1962, M.S.A. 1965 Cum. Supp. § 18.1286(1a).

[16] Sec. 1 of Act 174 P.A. 1917, being C.L. 1948 § 408.301, M.S.A. 1960 Rev. Vol. § 17.131. Act 174 P.A. 1917 was repealed by Act 290 P.A. 1965 which by Sec. 26 thereof is ordered to take effect July 1, 1966. Under Act 290 P.A. 1965 being M.S.A. 1965 Cum. Supp. § 17.137(1) et seq. the board of boiler rules in addition to the commissioner of labor shall consist of 10 members to be appointed by the governor with the advice and consent of the senate for staggered terms of 4 years each.

[17] C.L.S. 1961 § 436.47a, M.S.A. 1965 Cum. Supp. § 18.1018(1).

[18] C.L. 1948 § 722.203, M.S.A. 1957 Rev. Vol. § 25.445(3).

Appointments by the governor with the advice and consent of the senate except as noted:

	Act 380 P.A. 1965
State Building Authority	Sec. 105
Civil Defense Advisory Council	Sec. 154
Michigan State Fair Authority	Sec. 185
Board of Managers of the Upper Peninsula State Fair	Sec. 186
Department of Economic Expansion	Sec. 232
Board of Boiler Rules[19]	Sec. 385
State Board of Alcoholism	Sec. 431
Michigan Crippled Children Commission	Sec. 432

Members serving ex officio:

	Act 380 P.A. 1965
Highway Reciprocity Board	Sec. 31
Michigan State Safety Commission	Sec. 155

Mixed membership with some members serving ex officio and the remainder appointed by the governor with advice and consent of the senate except as indicated:

Michigan Historical Commission	Sec. 30
State Building Commission[20]	Sec. 104
State Soil Conservation Committee[20]	Sec. 182

Members appointed by the chief authority of the department or commission and to serve as that agency's designated representative:

Boating Control Committee	Sec. 259

The foregoing analysis demonstrates that membership of the 14 designated departments, boards, commissions or agencies is not solely derived by virtue of the governor's appointive power. The question which you have raised indicates that the power to fill vacancies is to be exercised either by appointment by the governor or appointment by the department head but there is nothing in the language of Act 380, supra, that indicates any legislative intent that additional or new appointive power is conferred upon the governor. In my opinion he retains the appointive power theretofore conferred on him by the basic statutes as reviewed above. The support for this conclusion is found in Section 10 of Act 380, supra, which reads as follows:

> "All powers, duties and functions vested in the office of governor are continued, except as otherwise provided by this act."

I am of the further opinion that the legislature did not intend to abrogate

[19] The present statute (Act 174 P.A. 1917) does not require the appointment of the members of the board of boiler rules to be made with the advice and consent of the senate. But see Footnote 16, supra.

[20] Governor's appointment does not require the advice and consent of the senate.

the ex officio membership on these boards and commissions as established at the time of creation or subsequently supplemented by amendment. Neither do I believe it was the intention of the legislature to abolish the appointive power theretofore reposed in the speaker of the house of representatives and in the president of the senate and in the chief authority of state departments and agencies as shown by the foregoing resume. A careful reading of Section 3 (b) of Act 380, supra, will disclose that the powers, duties and functions transferred by a Type II transfer are the powers, duties and functions of the existing department, board, commission or agency to which the transfer is applied. This does not include the power of appointment since in no instance as shown by the foregoing analysis does any transferred department, board, commission or agency possess the power of self-appointment of the members of its governing board or commission. To accept the view that the power to fill vacancies in these 14 designated boards and commissions has been transferred by Act 380, supra, to the department heads would result in a repeal by implication of the appointive power spelled out in each of the foregoing basic statutes. Further than this, to conclude that the governor's power of appointment where it has existed prior to the enactment of Act 380, supra, has been transferred by that act to the various department heads would be to destroy the requirement of advice and consent of the senate made applicable to the extent indicated under the several statutes to gubernatorial appointments to these several boards and commissions. It is my judgment that the legislature did not intend to relinquish this responsibility and to confer on the heads of the principal departments the authority to fill vacancies on boards, commissions and agencies within their respective departments by the exercise of an unlimited appointive power. I therefore answer this portion of your restated question by advising that vacancies arising in the membership of any department, board, commission or agency transferred to a principal department by a Type II transfer are still to be filled in the manner prescribed in the basic act (or by the appointing authority named in the basic act if the act is silent on the filling of vacancies) relating to the creation of such department, board, commission or agency subject only to any amendment to the basic act.

Your third question is:

> "(3) What duties, powers and responsibilities can the principal department legally delegate to a board or commission given a Type II transfer?"

You have asked me to also comment generally on a Type II transfer.

Two basic methods were used by the legislature in Act 380 P.A. 1965 in transferring by the Type II transfer device. The first method is the standard Type II transfer described in Section 3 (b) of Act 380 which has a twofold purpose, namely,

(a) the transferring of an existing department, board, commission or agency as such to a principal department, and

(b) the transferring to the principal department of all of the statutory authority, powers, duties and functions, records, personnel,

> property, unexpended balances of appropriations, allocations or other funds, including functions of budgeting and procurement which the existing department, board, commission or agency had theretofore possessed.

The second method is the transfer of a portion of the powers, duties and functions from designated departments, boards, commissions and agencies to a principal department. Where the second method is used, Section 505 of Act 380 becomes applicable. That section reads:

> "When duties, powers and functions have been transferred by this act to a principal department, so much of the records, property, personnel and unexpended balances of appropriations, allocations and other funds, used, held, employed, available, or to be made available in connection with such powers, duties and functions shall be transferred to the department as the governor shall determine to be required for the performance of the transferred functions. Appropriations not so required shall be returned to the fund from which appropriated. No transfer of funds is authorized under this section if such transfer would result in the termination of any federal aid program. This section remains effective until December 31, 1966."

Each principal department created by Act 380, supra, is headed by either a single executive or by a commission or by a state board. The following table shows the distribution:

Single Executives	*Commission*	*State Board*
Dept. of State	Dept. of Agriculture	Dept. of Education
Dept. of the Attorney General	Dept. of Civil Service	
Dept. of Treasury	Dept. of Conservation	
Dept. of Administration	Dept. of Corrections	
Dept. of Military Affairs	Dept. of State Highways	
Dept. of State Police	Dept. of Civil Rights	
Dept. of Commerce		
Dept. of Licensing and Regulation		
Dept. of Labor		
Dept. of Mental Health		
Dept. of Public Health		
Dept. of Social Services		

Where a commission is the head of a principal department it is provided in Section 5 of Act 380, supra, that the commission may delegate such duties, powers and authority to the director of the department as the commission deems necessary to fulfill the duties and obligations of the commission. In addition, Section 279 of Act 380 provides that the principal executive officer of the department of corrections is the director of that department and Section 305 of Act 380 provides that the principal executive officer of the department of education is the superintendent of public instruction.

The pertinent provisions of Act 380 P.A. 1965 as they relate to the Type II transfer have placed the powers, duties and functions so transferred in a principal department without limitation or restriction and it

becomes obvious that no such powers, duties and functions are retained by the department, board, commission or agency from which the transfer has been made. It follows that your third question may accordingly be narrowed to inquire what powers, duties and functions may be delegated by the heads of the principal departments to the 14 departments, commissions and boards transferred by a Type II transfer and which have been described with particularity in answering the second question.

Anyone undertaking to determine the limits of authority to delegate or redelegate powers, duties and functions to another is confronted at the outset with the rule of law expressed by the maxim *delegata potestas non potest delegari* which means "A delegated authority cannot be re-delegated." 26A C.J.S. page 154, footnote 33. The maxim has its most common application in the law of agencies and so it has been said:

> "Where personal trust or confidence is reposed in the agent and especially where the exercise and application of the power is made subject to his judgment or discretion, the authority is purely personal and cannot be delegated to another unless there is a special power of substitution, either express or necessarily implied. Consequently, an agent cannot transfer such authority conferred upon him personally unless there is some manifestation of consent from the principal to such delegation. On the other hand, the performance of ministerial or mechanical acts may be delegated under ordinary circumstances by an agent, and the performance of such delegated acts will be regarded as the act of the agent and binding on the principal."[21]

Another rule of significance flows from the situation where duties or privileges are created by statute such as a statute requiring that the execution of deeds in which a married woman releases her dower interest shall be acknowledged personally before a notary public. Under this statute an acknowledgment by an agent appointed by the wife under a power of attorney is insufficient. The applicable rule may be stated in these words:

> Duties or privileges created by statute may be imposed or conferred upon a person to be performed or exercised personally only. Whether a statute is to be so interpreted depends upon whether or not in view of the purposes of the statute, the knowledge, consent, or judgment of the particular individual is required.[22]

In the case of *The People v. Collins,* 3 Mich. 343, Presiding Judge Green, in writing his views for an equally divided Court, gave the following informative expression to delegated power:

> "The people at large have divested themselves entirely of all legislative power, subject to be recalled or controlled by them only in the mode provided by themselves in their constitution of government. They have done this by using the most general and comprehensive language, and without any attempt to define it, or to specify the objects

[21] 3 Am. Jur., 2d, Agency, § 150 and cases collected in the applicable footnotes. See also *City of New Orleans v. Sanford et al.,* 69 So. 35, 41; *Hackney v. Fairbanks, Morse & Co.,* 143 S.W. 2d 457, 467.

[22] See *Restatement of the Law, Second, Agency 2d,* § 17 Comment b., page 86.

upon which it is to be exercised. It is not a mere delegation of power to an agent to act for and in the name of the principal, which the principal may exercise concurrently with his agent, and which the agent may at any time surrender into the hands of the principal at his discretion. It is an agency, but it is something more. It is an authority to exercise all that judgment and discretion which the principal might have exercised, without consultation with or in opposition to the will of such principal, and without being subject to any direct control by the grantor of the power. Is it an incident to inherent legislative power that it may be delegated; that incident adheres to the power in the hands of the legislative department of the government, qualified and limited only by the express provisions of the organic law, and the nature of constitutional organization. Those in whom this power primarily resided [the people], necessarily possessed the power to organize a constitutional government, and in doing so, to divide the powers of such government into such departments as they might judge best. It was competent for them to divest themselves of the right to exercise directly any of the functions of government. Not so, however, with the departments which they have created. The constitution vests the power of legislation in a select body of men, and there it must remain until the constitution itself is changed or abrogated. They have no authority to delegate *their* powers and exclude themselves from the right to their exercise. But it does not follow that they cannot create subordinate bodies with certain powers of legislation. * * * But these powers, the legislature may recall or modify at their pleasure. They have not surrendered any portion of their own, but they have authorized others for the time being, to exercise powers which they might themselves have exercised, and which still resided in them. Is it doubted that the powers alluded to are properly legislative? The legislative department of the government cannot exercise any other than *legislative* powers, except in the cases expressly provided in the constitution. (Article 3.) * * * It would seem to be sufficiently clear then, that it is in the very nature of legislative power, that it may, to some extent at least, be delegated, and that the maxim, delegata potestas, non potest delegari, has no application, as has been supposed * * *."
(bracketed material added)
(pages 350 and 351)

The rules of delegability or nondelegability of authority as developed in the law relating to the relationship of principal and agent have been applied by the courts in substantially the same manner under administrative law to administrative officers and administrative agencies. A summary from adjudicated cases appears in a leading text in these words:

"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, and that in all cases of delegated authority, where personal trust or confidence is reposed in the agent and especially where the exercise and application

> of the power is made subject to his judgment or discretion, the authority is purely personal and cannot be delegated to another unless there is a special power of substitution either express or necessarily implied. Accordingly, 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 administrative and 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. * * * A commission, charged by law with power to promulgate rules, cannot, in turn, delegate that power to another."[23]
> (pages 52 and 53)

It has been the practice among the agencies in the federal government, supported by decisions of the federal courts, to in general allow more liberality in the delegation of authority by federal administrators and federal commissions. In the case of *William G. Barr, Petitioner, v. Linda A. Matteo and John J. Madigan,* 360 U.S. 564, 3 L. ed. 2d 1434, Mr. Justice Harlan announced the judgment of the Court and delivered an opinion in which he said:

> "The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy."
> (page 1442)

The leading federal case is *Shreveport Engraving Co., Inc., v. United States,* (Circuit Court of Appeals, Fifth Circuit), 143 F. 2d 222, certiorari denied 323 U.S. 749, 89 L. ed. 600, rehearing denied 323 U.S. 815, 89 L. ed. 648, where it was concluded that a delegate may, without delegating, exercise his authority through persons he appoints. An authority to delegate authority may be conferred in the same manner as authority to do other acts for the principal and may result from formal writings or informal words. If the nature of the business, the conduct of which is committed to an agent, is such that it must be contemplated by the principal that the authority conferred on the agent will be exercised through subagents, a power in the agent to delegate that authority will be implied.[24]

A leading text writer on Administrative Law has said:

> "By and large, state courts are probably somewhat less liberal than federal courts in allowing subdelegation of power."[25]

[23] See 2 Am. Jur., 2d, Administrative Law, § 222 and the cases collected in the applicable footnotes.

[24] For a further discussion of the federal position, see the Final Report of the Attorney General's Committee on Administrative Procedure reproduced in Cases and Other Materials on Administrative Tribunals, Stason and Cooper, Third Edition, Section 6, page 19 et seq.

[25] Kenneth C. Davis, Administrative Law Treatise, Vol. 1, Sec. 9.06.

State courts have often invalidated subdelegations of the power of decision. The following selected cases are illustrative of this rule:

The chief auditor of the tax commission could not be empowered to determine and impose a deficiency sales tax including penalty and interest, the court concluding that the ascertainment of the deficiency and the penalty to be assessed was a quasi judicial act which only the commission could perform and was more than a ministerial act within the delegated powers of the chief auditor. The Court said: "The fact that the legislature gave the Tax Commission authority to employ agents, statisticians, experts, attorneys, and other assistants and employees as may be necessary to perform its duties does not give the Commission authority directly or by implication to deputize those matters which are quasi judicial in character."

State Tax Commission of Utah v. Chris Katsis, 90 Utah 406, 62 P. 2d 120.

Where the Chief Supervisor of the Florida Dry Cleaning and Laundry Board undertook to fix the time, place and notice of a public hearing on the adoption of regulations for price control, the Supreme Court of Florida held the procedure to be illegal and void because the determination of whether or not a public hearing should be held was exclusively the function of the Board and could not be delegated to the Chief Supervisor or to any employee. Neither could the Chief Supervisor at the hearing determine whether subpoenaes should issue or not issue nor could he rule on the admissibility, of evidence thereby controlling the contents of the record.

Florida Dry Cleaning and Laundry Board v. Economy Cash & Carry Cleaners, Inc., et al., 143 Fla. 859, 197 So. 550.

A board of dental examiners had no authority to appoint an investigating committee, where one individual was not a member of the dental profession, to hear charges filed against a member of the organization and the hearing was a nullity. The statute conferred no authority to appoint committees, referees, or any of its members to act in disciplinary matter.

State ex rel. Board of Governors of Registered Dentists v. Rifleman, 203 Okla. 294, 220 P. 2d 441.

Although there was no authority in the Unemployment Compensation Commission to delegate to a hearing referee the power of decision on a refund application, the Commission had the power to refer such a matter to a referee or a hearing officer, an examiner or a moderator —without power of determination—as a mere compilor of a record for the purpose of the agency's use and upon which it is not binding. Any power of decision invested in or exercised by such hearer, examiner or referee is ultra vires.

Horsman Dolls, Inc. v. State Unemployment Compensation Commission, 134 N.J.L. 77, 45 A. 2d 681.

In a proceeding before the superintendent of public instruction re-

sulting in the abolishment of a school district and the attachment of its lands to another district, it appearing that the facts were investigated by a subordinate who prepared the orders and affixed the superintendent's signature at his direction, the Court said: " * * *, the rule that requires an executive officer to exercise his own judgment and discretion in making an order to such nature 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, and also to draft it in the first instance. (citations omitted) It suffices that the judgment and discretion finally exercised and the orders finally made by the superintendent were actually his own; * * *."

School Dist. No. 3 of Town of Adams et al. v. Callahan, Superintendent of Public Instruction, 237 Wis. 560, 297 N.W. 407, 415.

Under a statute defining the term "order" to include any decision, rule, regulation, direction, requirement or standard of the Industrial Commission, only the Commission can make an order and its powers cannot be delegated to some subordinate.

Park Building Corporation v. Industrial Commission, 9 Wis. 2d 78, 100 N.W. 2d 571.

In a driver's license suspension proceeding it appeared that the driver had had his license suspended by administrative action of clerical employees in the office of the Director of Department of Licenses although the statute authorized the Director to suspend licenses in his discretion when he found certain circumstances to exist. The Supreme Court of Washington held that the Director could not delegate his responsibility and said: "We are satisfied that the legislature in enacting the foregoing statutes was cognizant of the multitudinous licensing functions carried on by the Department of Licenses, and recognized the practical and realistic administrative necessity of providing the director with assistants to carry out licensing duties.

"We do not believe, however, that when the legislature vested in the director discretionary power to suspend motor vehicle operators' licenses, * * *, it, absent express declaration, intended the power of executive decision in this area be delegated by the director to assistants, or relegated to a simple mechanical process.

"Gathering, collating, and presenting such facts as may be required by the director, together with making appropriate recommendations, preparing, signing, and mailing notices and orders in the name of the director are without doubt delegable duties. But, the basic responsibility and authority of exercising the discretion and power of decision, * * *, rests exclusively with the director.

" * * *

"We appreciate that, in any given case, the line between the exercise of independent judgment on the part of the director and reliance upon the judgment of a subordinate is difficult, if not impossible, to locate or define. Necessarily, it becomes a matter of degree.

dependent to a large extent upon administrative practice, policy, and judgment. Courts cannot, and should not, undertake a probe of the mental processes utilized by an administrative officer in performing his function of decision.

* * *."

Kenneth M. Ledgering, Realtor, v. The State of Washington, et al., Defendants, 63 Wash. 2d 94, 385 P. 2d 522, 526.

A statute of the State of Washington created the Board of Pilotage Commissioners and named as chairman the Director of the Department of Labor and Industries, ex officio, four other members to be appointed by the governor. At a hearing before the commissioners, the director authorized the Supervisor of Industrial Relations to set and act in his place and stead. The court held that the statute did not permit the designation of a substitute to act for the director and accordingly the action of the Board of Pilotage Commissioners was invalid.

Application of the Puget Sound Pilots Association on Behalf of the Members thereof, for an Upward Revision of Tariffs, Tolls and Charges, 63 Wash. 2d 142, 385 P. 2d 711.

The legislature in Acts 380 and 407 P.A. 1965 did not undertake to spell out the authority of the department head or the director to delegate or redelegate to others the powers, duties and functions transferred by the Type II transfer. In my judgment the legislature could have provided by statute the manner and extent to which such powers, duties and functions could be delegated and redelegated and I find no restrictive language in that respect in Article V, Sections 2, 3, 8 and 9 of the Constitution of 1963. I have examined the language of Section 7 of Act 380, supra, and consider the words "allocate and reallocate" in the first paragraph (a) as relating to changes in the organizational structure within a principal department. The legislature apparently did not intend in this first paragraph of Section 7 to authorize a delegation or redelegation of duties and functions because in the last sentence thereof it was said: "No substantive function vested by law in any officer or agency within the principal department shall be removed from the jurisdiction of such officer or agency under the provisions of this section."

Nor do I consider the second paragraph (b) of Section 7 of Act 380, supra, as expressive of any legislative intent that the duties and functions vested in the head of a department may be delegated or redelegated except as the authority to so delegate or redelegate can be found in some provision of existing law or under the provisions of Act 380. Illustrative of what is meant is the provision by law which permits the Attorney General to delegate authority to Assistant Attorneys General[26] and Act 380 which itself by Section 5 authorizes a principal department when headed by a commission to delegate such of its duties, powers and authority to the director as the commission deems necessary to fulfill the duties and obligations of the commission. Section 7 (b) by the last sentence thereof expressly transfers

[26] C.L. 1948 § 14.35, as amended by Act 2 P.A. 1948, 2d Ex. Sess., M.S.A. 1961 Rev. Vol. § 3.188.

the functions of rulemaking, licensing and registration including the prescription of rules, regulations, standards and adjudications to the head of the principal department into which a department, commission, board or agency has been incorporated by a Type II transfer but nothing is said about the authority of the head of the principal department to delegate or redelegate any of these statutory functions.

It is worthy of mention as bearing on the general problem of delegation of authority by a department head that the legislature by the enactment of Act 17 P.A. 1964, M.S.A. 1965 Cum. Supp. § 3.997, has expressly conferred authority on the head of a department to appoint in writing a deputy or other employee of the department to serve in the place of the department head as a member of any board, commission or agency of which the department head is made by law an ex officio member.[27]

A difficult decision for the heads of the principal departments, and to a lesser degree for the director of a department, deputy department heads, and executive officers, is to arrive at a workable understanding and arrangement within each principal department as to the type of authority and the extent thereof which may be delegated to subordinates. The problem under the Type II transfer will not be the same in all principal departments nor is the problem the same for the head of the department and the director, deputies, and executive officers. The issue for the latter three categories is one of redelegation, whereas the head of the department, having received all of the powers, duties and functions by the Type II transfer, is confronted with an initial delegation in every case, whether the particular authority may be delegated at all and if it may, then the proper extent thereof.

The legislature having failed to provide the method or extent of authority or delegation or redelegation of duties and functions to a board or commission given a Type II transfer, nevertheless some guidelines may be framed from the pronouncements by the Court appearing in the cases cited above. It seems to be generally accepted that if the act to be performed would require the judgment or the exercise of discretion by the head of the department,[28] such a function cannot be delegated. This is quite clearly the rule if the decision to be made by the head of the department is of a quasi judicial nature.[29] Aside from these areas where delegation is prohibited, it appears that what may be done is to some extent a matter of degree. There is no legal objection to the head of a department delegating to a subordinate or to a Type II transferred agency within the department the responsibility to conduct an investigation or to hold a hearing provided no discretion is conferred to determine the content and extent of the record and the record

[27] Act 17 P.A. 1964 is a general statute and would not be applicable to those situations of ex officio representation where the legislature has made express provision for a specific commission or board as to the method by which such representation is to be determined. See, for example, the State Highway Commission described at Footnote 6, supra, and the Superintendent of Public Instruction designated by Sec. 14 of Act 287 P.A. 1964, M.S.A. 1965 Cum. Supp. § 15.1023(4).

[28] The legislature in Sec. 6 of Act 380 P.A. 1965 has recognized that deputy department heads may exercise wide powers under certain conditions.

[29] *Detroit Edison Co. v. Corporation & Securities Comm.*, 361 Mich. 150.

so made is forwarded to the head of the department for final decision. The legislature has recognized and authorized this practice in proceedings taken pursuant to the Administrative Procedure Act, being Act 197 P.A. 1952 as amended.[80] Attention is directed to Sections 5 and 6 of that act.

It is my belief that the legislature did not intend that the head of the department exercise personally all details necessary to the administration of the powers, duties and functions transferred to the department head by a Type II transfer. Had this been the legislative intent, there would have been no purpose to be served by retaining the transferred department, board, commission or agency within the principal department. I therefore conclude that the legislature contemplated that the head of the department would make use of the membership of these Type II transferred departments, boards, commissions and agencies to make investigations, conduct hearings, prepare recommendations to the department head and in general to serve in an advisory capacity to the head of the department. Clearly the authority to perform ministerial acts can be delegated by the department head to any Type II agency in his department but decisions which require the exercise of judgment and discretion or which may be quasi judicial are the responsibility of the head of the department. It is impracticable for me to undertake to define areas of responsibility which can or can not be delegated. The ultimate outcome will to some extent depend upon the organizational structure of each individual department and the nature of the powers, duties and functions conferred upon the department by the Constitution or the organizational act of 1965 as amended. Any decision to delegate and subdelegate responsibility within a principal department must be made with caution and after careful consideration of the nature of the act and with due regard to the public trust which has been placed in the head of each principal department. In doubtful cases the safe course to follow is to avoid delegation or redelegation.

Lastly, you refer to Section 8 of Act 380 P.A. 1965 as amended by Act 407 P.A. 1965. Your request for comment by me on this section is in the following words:

> "In order that all of the people who come under the provisions of Sections 8 (a) and 8 (b) may be fully appraised of their responsibilities and informed as to what outside activity is lawful, it is requested that you render an opinion of what is meant by the words 'shall not engage in any business, vocation, or employment other than their office.' A clear and definitive statement by you on this point would be beneficial to me and to persons encompassed by Sections 8 (a) and 8 (b)."

Section 8 as amended by Act 407 P.A. 1965 now appears as follows:

> "(a) Heads of principal departments, commissions or boards, principal executive officers of departments, commissions and boards shall receive compensation prescribed by law.
>
> "(b) Directors of departments, commissions, boards and directors

[80] Act 197 P.A. 1952 as amended is C.L.S. 1961 § 24.101 et seq., M.SA. 1961 Rev. Vol. § 3.560(21.1).

of departments, boards and commissions transferred to a principal department shall not engage in any business, vocation or employment other than their office. Members of boards and commissions may so engage unless specifically prohibited by law."

At the outset it is to be noted that the positions to which Section 8 (a) is applicable are not the same positions as are covered by Section 8 (b). Section 8 (a) names:

Heads of principal departments, commissions or boards;

Principal executive officers of departments, commissions and boards.

Section 8 (b) covers:

Directors of departments, commissions and boards;

Directors of departments, boards and commissions transferred to a principal department.

Section 8 (a) within its own terms contains no proscription against engaging in outside activities or employment. However, Section 9 of Article V, Constitution of 1963, is applicable. It reads:

"Single executives heading principal departments and the chief executive officers of principal departments headed by boards or commissions shall keep their offices at the seat of government except as otherwise provided by law, superintend them in person and perform duties prescribed by law."

The controlling words of the proscription in Section 8 (b) are as follows: "shall not engage in any business, vocation or employment other than their office." To ascertain how far the proscription goes, it is necessary to gather the legislative intent in the use of the words "business, vocation or employment."

Business:

The case of *Harper v. Lowe*, 272 Mich. 331, was a workmen's compensation appeal by the widow of a deceased employee who had worked as a dairyman on a 67 acre estate occupied as a home. The estate was not operated for profit and the produce was consumed in the home. In denying recovery the Supreme Court said: "In ordinary parlance, 'business' means a commercial and profit-seeking occupation. * * * The conduct of a home is not a business within the meaning of the provision [of the workmen's compensation law]."

(bracketed material added)

(page 335)

In *Elizabeth McCoy v. Martin Brennan, Sheriff of Bay County*, 61 Mich. 362, a married woman and her two sons were copartners in a grocery firm. The mother took no active part in the management of the business but visited the concern about once in every two weeks and consulted with her sons whenever they sought her advice. The mother lived with her husband and housekeeping was her principal occupation. She drew money from time to time from the grocery enterprise. The issue in the case was whether the mother was entitled

to a business exemption from execution levy. Mr. Justice Champlin, writing for a unanimous Court, said: "The record shows that the business of this firm—that is, merchandising—was the principal business in which she [the mother] was engaged, and that she had no other. I do not think it is necessary that a partner should be an active member of the firm in order to be entitled to his exemption. He may be absent; he may be unable to give his personal attention through illness or inability to render assistance. The law has made no distinction between the active and passive members of a firm. That each should be entitled to his exemption works no harm or hardship to creditors. Every one dealing with a firm has a right to know, and is supposed to inquire, who compose the firm. Creditors give credit to the firm knowing that each partner is entitled to an exemption in a mercantile firm, and rate them accordingly."

(bracketed material added)

(pages 367 & 368)

In the case of *City of Bay City v. State Board of Tax Administration,* 292 Mich. 241, the Court had under consideration the meaning of "business activities." It was there determined that a showing of profit was not an essential element of business activity and the furnishing of services for a consideration was sufficient.[31]

Vocation:

In the case of *Miller v. Stevens,* 224 Mich. 626, the question was whether an individual who procured a purchaser of a business but who had never offered or rendered similar services for others, and whose regular business was selling coal was required to procure a broker's license under an Act which required such a license from one who sells or buys or negotiates the purchase or sale of a business as a whole or partial vocation. The court held that the license was not required since a "vocation" is a calling, a systematic employment in an occupation appropriate to the person employed.

Employment:

In the case of *English v. City of Long Beach et al.,* 77 Cal. App. 2d 894, 176 P. 2d 940, the Court concluded that the word "employment" must be construed according to context and approved usage of the language, and is defined as the act of attending to duties and services of another, the act of employing or using; service for another or for the public; the state of being employed.

In *The State of Ohio, ex. rel. O. F. Sears v. Richard McGonagle,* 16 O.C.D. 685, 5 Ohio Cir. Ct. Reps., N.S. 292, the Court said: "In distinguishing between an office and an employment, the fact that

[31] In Section 3, Chapter 2 of Act 284 P.A. 1964, the city income tax act, the legislature defined the term business in these words: " 'Business' means an enterprise, activity, profession or undertaking of any nature conducted or ordinarily conducted for profit or gain by any person, including the operation of an unrelated business by a charitable, religious or educational organization." M.S.A. 1965 Cum. Supp § 5.3194(13).

the powers in question are created and conferred by law is an important item to be considered in determining the question, for, though an employment may be created by law, it is not necessarily so, but is often, if not usually, a creature of contract. A public office, on the other hand, is never conferred by contract, but finds its course and limitations in some act or expression of the governmental power. Where, therefore, the authority in question was conferred by contract, it must be regarded as an employment, and not as a public office."
(pages 293 & 294)

In the case of *R. H. McManus Company v. Employment Security Commission,* 345 Mich. 167, our Court in discussing the test of the employment relation under the Unemployment Compensation Act, whether the relation was that of master and servant or that of independent contractor, concluded that the control of the work reserved in an employer which effects a master-servant relationship is control of the means and manner of performance of the work, as well as the result; whereas an independent contractor relationship exists where the person doing the work is subject to the will of the employer only as to the result, but not as to the means or manner of accomplishment.

The case of *The State of Nebraska ex. rel. Clarence A. H. Meyer, Attorney General v. Frank Sorrell,* 174 Neb. 340, 117 N.W. 2d 872, was an original action in quo warranto to test the right of a member of the Nebraska Liquor Control Commission to hold office. A statute of Nebraska prohibited a state liquor control commissioner from soliciting or accepting any gift, gratuity, emolument or employment from any person subject to the liquor control laws. Respondent Sorrell, who was a real estate broker, advertised for sale a tavern and package liquor business and removal proceedings were instituted against him on the basis that he had been employed by the operator of the tavern and liquor business in violation of the statute. Sorrell contended that he had not solicited the business and that he had not accepted anything from the licensees and accordingly his employment, if there was one, was gratuitous and did not violate the statutory provision. The Court rejected this contention and said: "It is the status and relationship that is condemned, not the nature of the benefit received."

It appears clear that the legislature did not intend the descriptive words, business, vocation or employment to be synonymous or to have an interchangeable meaning. Business is generally regarded as a comprehensive term. A person may engage in a business alone or with others. A business is an occupation; it covers those who engage in the purchase or sale of commodities or real property and those who engage in financial transactions. A person may be engaged in a business whether it operates at a loss or at a profit. A vocation has a somewhat different accepted meaning, normally referring to a trade or profession. Employment is the state of being employed, under hire or engaged for work, the rendering of services for wages or compensation but a person may nonetheless be in the employ of another if there is no arragement for the payment of wages or compensation or the arrangement results in a loss instead of a profit or the employment is to be furnished as a gratuity.

I find no legislative intent in the proscriptive words to prohibit persons who are directors of departments, commissions and boards within the provisions of Section 8 (b) from dealing or investing for their own account. I do not construe the language as prohibiting such an individual from buying or selling real estate for his own account, from speculating in stocks for his own account, or from buying and selling bonds and other securities for his own account so long as any such activity on his part does not unreasonably interfere with the work requirements of his office or position. However, any such action by an individual director may come under challenge for another reason in that his personal activity, although for his own account, may be in conflict with his duties as a state official. A conflict of interest might well arise if the commissioner of banking was found to be engaged in the purchase of the stock of state banks or if the insurance commissioner became a stockholder in an insurance company organized under the laws of this state or if the director of licensing and regulation was engaged in extensive real estate transactions with the purchase or sale consummated through licensed real estate brokers and salesmen. The foregoing examples are illustrative and are not intended to be exhaustive.

In conclusion, in my opinion directors of departments, commissions and boards within the purview of Section 8 (b) of amendatory Act 407 P.A. 1965 may not lawfully engage in any outside business, vocation or employment as those terms have been outlined and described in the foregoing text. While employed by the state, any such person must devote himself to the duties, functions and responsibilities of his office except only the right to engage in personal activities for his own account and only then if there is no resultant conflict of interest in the unhampered administration of his official duties and the performance of his public trust.

FRANK J. KELLEY,
Attorney General.