

WILTSHIRE & SWINDON FIRE AUTHORITY

REPORT REFERENCE NO.	6 (b)
MEETING	Fire Authority
MEETING	24 September 2015
SUBJECT OF REPORT	Membership of Committees: Substitutions
LEAD OFFICER	Monitoring Officer
RECOMMENDATIONS	The Fire Authority continues its current practice with regard to substitutes.
EXECUTIVE SUMMARY	The Ethics Committee was requested by the Fire Authority to discuss the issue of substitutes. At its meeting on 26 August, the Committee considered a paper by the Monitoring Officer and decided to forward it to the Authority for consideration at this meeting. This report sets out the previous discussions and analyses the current legal position.
APPENDICES	<ol style="list-style-type: none"> 1. Legal Opinion obtained by Southampton City Council 2. Instructions for that Opinion 3. R (Carnegie) v L B Ealing (2014)

Introduction

- 1 The sequence of events that has led up to this report is that the issue of membership of committees and the use of substitutes was discussed at the meeting of the Fire Authority on the 25th September 2014 (Minute 37/14 refers). The Fire Authority resolved that all members of the CFA are substitutes for the Urgency Committee, with Committee members nominating another from their political group to deputise for them, excepting members from smaller political groups may nominate a Member from another party. The Fire Authority also resolved that the issue of substitutes be discussed by the Ethics Committee.
- 2 That discussion duly took place at the meeting of the Ethics Committee on the 23rd October 2014 (Minute 28/14 refers) and it was noted that the Monitoring Officer had advised that it was not reasonable for all members to be able to act as deputies for Committee members and outlined the disadvantages such as loss of benefits of regular attendance at committees. The Ethics Committee then resolved to recommend to the CFA that it appoint up to two named individuals for Swindon Members on Committees to act as deputies in their absence.

- 3 The Fire Authority then discussed this matter again at its meeting on the 11th December 2014, and it was resolved that the Group Leaders nominate deputies for the Ethics Committee members for both Wiltshire and Swindon members (Minute 72/14 refers). On the 12th February 2015, the Fire Authority resolved to request the political groups of the CFA to provide the Clerk with the names of up to two members from each group to act as substitutes for places allocated to them on each committee of the Wiltshire & Swindon Fire Authority, and to ask the Joint Committee to reconsider its view on the question of substitution, and to review the issue of substitutes at the AGM (Minute 95/14 refers).
- 4 At the Annual General Meeting on the 11th June 2015, the Clerk invited members to review the system of substitutes, and members were asked whether they wished it to continue or whether to introduce some other system. It was agreed to continue with the existing arrangements for the time being pending a report back on substitution from the Ethics Committee, and to arrange a meeting of the Committee in advance of the next meeting of the Authority in September. The Ethics Committee met on the 26th August and considered this paper and decided to forward it to the Authority for consideration at this meeting.

Legal Position

- 5 The starting point with regard to the appointment of substitutes or deputies is that the power to appoint committees is contained in Section 101 of the Local Government Act 1972. This provides that

“subject to any express provision contained in this act or any act passed after this Act, a local authority may arrange for the discharge of any of their functions - (a) by a committee, a sub-committee or an officer of the authority....”

- 6 This issue has been subject to litigation and it was established in the case of *R v Brent London Borough Council ex parte Gladbaum* and another, in 1989, that the appointment of councillors to Committees cannot be delegated by the Council to a committee or officer, but must be exercised by the full Council meeting. Brent LBC had argued that the decision could be so delegated. Mr Justice Nolan, however, stated as follows:

“at the end of the day, however, I come down firmly in favour of the arguments of the applicants. I do so firstly because of the nature of the power in question. The power to determine the membership of committees is not merely incidental but fundamental to the proper discharge of the functions which the Council were elected to perform. Yet, if the Council were right, it can be delegated not only to a sub-committee but to an officer in the authority or even to another local authority in subsections (1) (a) and (b). I cannot accept that the legislature intended to create such a possibility”.

- 7 Subsequently, the Local Government and Housing Act 1989 and regulations made thereunder provide, in essence, that such appointments shall be made in accordance with the wishes of the relevant political group.

- 8 In particular, section 16 of the 1989 Act sets out the Authority’s duty to give effect to allocations to the political groups and it provides that:
- (1) Where any relevant authority or any committee of a relevant authority have determined the allocation to different political groups it shall be the duty of that authority or committee so to exercise their power to make appointments to that body as to give effect -*

- (a) *as soon as practicable after the determination; and.*
- (b) *if a vacancy subsequently occurs on that body, as soon as practicable after the occurrence of the vacancy,*
to such wishes about who is to be appointed to the seats on that body which are allocated to a particular political group as are expressed by that group.
- (2) *Where -*
 - (a) *any person has been appointed, otherwise than for a fixed term, to a body to which section 15 above applies; and.*
 - (b) *that appointment was made, in pursuance of subsection (1) above, in accordance with the wishes of a political group, then, so long as that person's seat continues to be allocated to that group, the authority or committee which made the appointment shall act in accordance with the wishes of that group in determining whether and when to terminate the appointment.*
 - (3) *The proceedings of a body to which section 15 above applies shall not be invalidated by any defect by virtue of this section or that section in the appointment of any person to that body.*

- 9 It should be noted that section 16(1) still expressly states that the power to appoint to committees is that of the Authority, albeit that it requires the Authority to exercise that power in a particular way so as to give effect to the political balance requirements. If the 1989 Act had been intended to take away an Authority's power of appointment, and place it in the hands of an officer, then it could easily have been drafted to say so and the 1972 Act amended accordingly.
- 10 Authorities have dealt with this in different ways. Some have appointed named members to substitute for those unable to attend a meeting. Others have appointed a named pool of members, any of whom can substitute for anyone else. Yet others have required a member to temporarily resign from a committee if they cannot attend and then delegated authority to a 'Proper Officer' to appoint a substitute who then resigns after the committee meeting and the original member is then reappointed. How the latter course of action enables an Authority, however, to fully comply with section 100G of the Local Government Act 1972 which requires an Authority to maintain and keep open to public inspection " a register stating the name and address of every member of each committee or sub-committee ... for the time being" is unclear.
- 11 Such differences in approach is not ideal and Counsel's Advice has been sought by various Authorities over the years on this. For example, attached at Appendix 1 is an Opinion obtained by Southampton City Council from Michael Supperstone QC who, in essence, takes the view that s101 and the *Gladbaum* case have been superseded by the provisions in the 1989 Act and appointments to committees are no longer required to be made by the Authority itself because they are now purely administrative acts. The Instructions are also attached for the sake of completeness at Appendix 2.
- 12 As stated in paragraph 9 above, however, the 1989 Act does not alter the 1972 Act position that the power to make appointments to committees is vested in the Authority itself. On that basis, for example, Committees are still appointed by Council at the beginning of the Municipal Year but if Supperstone is correct, then this would be unnecessary and could be done by an officer. If not all independent members on an authority were formed into a political group, however, this would not be possible even under section 16 so in that instance, according to Supperstone, members of a committee could be appointed simultaneously by an officer and by the Authority which could cause confusion and it is difficult to believe that the 1989 Act intended to create such a possibility. Further, and on a practical note, the importance of the power still residing with the Authority is that Section 16(1) would still allow the Authority to ask that a political group reconsider a particular nomination if it deemed it appropriate to

do so whereas if the power was a pure administrative act, then that option would not be available.

- 13 Perhaps unsurprisingly, Opinions obtained by various local authorities have not always agreed with each other and no definitive way forward has yet been established and no leading case has specifically examined this issue although the issue has been alluded to in various cases. For example, attached at Appendix 3 is the case of *R (Carnegie) v L B Ealing* (2014) which involved the substitution of a member who would not be attending a planning committee meeting by another member of the same political group. That case involved the following Standing Order –

“Where any member of a committee, sub-committee, or panel is unable to attend a scheduled meeting of that body, for a reasonable reason, then a representative of that political group (if any), to which that member belongs, may, by written notice to the proper officer at any time before the day of the meeting in question, authorise the proper officer to make a change to the standing appointments of the committee, sub-committee, panel in question, to substitute an alternative member for the duration of that meeting.”

- 14 The Judge stated in para 36 that *“what happened was that Councillor Gulaid was substituted by Councillor Varma who, in turn, was substituted by Councillor Kang. Councillor Kang voted in favour of the proposal. However, all three councillors were duly appointed Labour Party members of the planning committee.”* Although not explicitly stated, the implication of that reasoning is that the effect of the standing order was that the Authority had appointed any member of a political group as a substitute for any other member of the same political group and so as due process was followed in terms of giving notice to the proper officer, the court did not intervene. Interestingly, the Judge went on to say that *“...in any event that decision making process is part of the democratically elected political process and is outwith the reach of the courts”* but it is not clear exactly what was meant by that statement as there are many instances of the Courts doing just that.
- 15 In summary, a sensible and workable arrangement is needed to ensure that the membership of every committee is known at any given time and that the right people are present and participating in each meeting. This is generally achieved in one of two ways: either by allowing the mechanics of appointing to a committee to be carried out by an officer on the instruction of the groups concerned or by nominating a prescribed list of substitute members for each committee. Either method can be argued to be lawful but there are advantages and disadvantages attached to each.
- 16 The appointment of named substitute members for each committee by an Authority at its Annual Meeting measures more closely to the principles of committee appointment laid down in the 1972 Act and the *Gladbaum* case, and is also compatible with the 1989 Act. It has the merit of certainty in that the membership of a committee is transparent and clear, and members can build up specialist knowledge and experience in the subject area of their particular committee and attend relevant training.
- 17 Accordingly, it is recommended that the Fire Authority continue its current practice as resolved at the February 2015 meeting.

Risks

- 18 The risk to the Authority is that a decision of the Authority is judicially challenged in the event that a member took part in the decision-making process who was not duly appointed by the Authority.

HR, Equality and Diversity Implications

19 There are no adverse implications arising from this report.

Environmental Implications

20 There are no adverse environmental implications arising from this report.

Financial and Legal Implications

21 The risk to the Authority is that a decision of the Authority is judicially challenged in the event that a member took part in the decision-making process who was not duly appointed by the Authority and this may give rise to financial costs

Combination Implications

22 There are no specific implications for Combination as the Dorset and Wiltshire Fire Authority will make its own arrangements in this regard.

Recommendations

23 It is RECOMMENDED that the Fire Authority continue its current practice with regard to substitutes.

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Unpublished documents used in the preparation of this report:

None

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