February 2, 1999

OPINION NO. 99-009

The Honorable W. Duncan Whitney
Delaware County Prosecuting Attorney
15 West Winter Street
Delaware, Ohio 43015

Dear Prosecutor Whitney:

We have received your request for an opinion on the question whether a general health district is authorized to require a state plumbing contractor qualification certificate for a person to be registered with the health district as a plumbing contractor. Your question relates to the Delaware City/County Health District, which is a general health district. *See* R.C. 3709.01; R.C. 3709.07-.071; 1991 Op. Att'y Gen. No. 91-016.

You have informed us that the Delaware City/County Board of Health currently has a regulation requiring that it maintain a register of all persons engaged or intending to engage in the plumbing installation business within the health district. For public safety reasons, the Board of Health is proposing to amend the regulation to require that, in order to be registered to operate within the health district, a plumber must have a state-issued plumbing qualification certificate. The local plumbers oppose the proposal, arguing that the health department does not have authority to impose such a requirement.

In order to address your question, let us first consider the statutes governing the issuance of plumbing qualification certificates. In 1992, the General Assembly enacted statutory provisions that created the Ohio Construction Industry Examining Board and provided for the certification of various types of contractors, including plumbing contractors. *See* 1991-1992 Ohio Laws, Part IV, 5348 (Sub. H.B. 402, eff. July 31, 1992). The Ohio Construction Industry Examining Board includes a plumbing section that provides examinations for plumbers to take to secure qualification certificates. R.C. 4740.02(A), (B); R.C. 4740.05. The examinations are administered by the administration section of the Board, which also issues qualification certificates to those who meet the necessary requirements. R.C. 4740.02-.04; R.C. 4740.06; *see also* 1994 Op. Att'y Gen. No. 94-088.

A qualification certificate is defined as "a certificate issued by the Ohio construction industry examining board to an individual or business entity as a … plumbing contractor." R.C. 4740.01(A). A plumbing contractor is "any individual who assumes responsible charge, supervision, or direction of persons engaged in plumbing contracting, or who engages in, offers to engage in, advertises, or otherwise represents that he is permitted or qualified to engage in the design of, planning of, superintending of, contracting for, or responsible charge of plumbing." R.C. 4740.01(E). A qualification certificate awarded to an individual may be assigned to a business entity with whom that individual is associated. R.C. 4740.07. Qualification certificates expire annually, and renewal procedures are prescribed. R.C. 4740.06(D). Qualification certificates may be suspended or revoked for various reasons, including gross misconduct in pursuit of profession or a violation of rules. R.C. 4740.10.

Existing statutes do not require that a person hold a qualification certificate in order to operate as a plumbing contractor.[1] Instead, they provide that, apart from the qualification

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[1] In fact, one of the statutory requirements for obtaining a qualification certificate for a plumbing contractor is that the individual must "for a continuous period of at least two years immediately preceding his application for examination, be engaged in plumbing contracting." R.C. 4740.06(B)(5)(c). Thus, there must be some manner in which an individual may be engaged in plumbing contracting without having a qualification certificate. *See, e.g.,* R.C. 4740.07(E) (work conducted by a business entity under a qualification certificate assigned to it is deemed to be conducted under the personal supervision of the person named in the qualification certificate).

Even though a person is not required by statute to hold a qualification certificate in order to operate as a plumbing contractor, it is necessary for a person to comply with certain state requirements to perform some types of plumbing work. *See, e.g.,* R.C. 3703.01 and R.C. 3703.04 (Superintendent of Division of Industrial Compliance prescribes minimum qualifications for plumbing inspectors and Director of Commerce appoints plumbing inspectors); R.C. 3737.65 (a person must have a certificate or provisional certificate issued by the State Fire Marshal in order to service, test, repair, or install for profit any fire protection or fire fighting equipment, except for public and private mobile fire trucks); R.C. 3781.105 (Board of Building Standards certifies individuals who design fire protection systems for buildings); R.C. 4104.02 and R.C. 4104.07 (Superintendent of Division of Industrial Compliance in the Department of Commerce issues certificates of competency for inspectors of boilers and unfired pressure vessels, in accordance with rules adopted by the Board of Building Standards); R.C. 4104.42 (a person must have a certificate of competency from the Division of Industrial Compliance in the Department of Commerce in order to act as an inspector of power, refrigerating, hydraulic, heating, and liquefied petroleum gas piping systems); R.C. 4104.44 (the Board of Building Standards is required to establish a program for the certification of welding and brazing procedures used on gaseous piping systems by the owner or operator of any welding or brazing business and for performance testing of welders and brazers who work on such systems).

certificate statutes, contractors subject to R.C. Chapter 4740 may be licensed only by a municipal corporation pursuant to R.C. 715.27 or by a board of county commissioners pursuant to R.C. 3781.102. R.C. 4740.12(A); *see* Ohio Legislative Service Commission, Preliminary Summary, Sub. H.B. 402, 119th Gen. A., at 1 (May 15, 1992) ("[t]he act does not require any individual engaged in these businesses [including plumbing contracting] to obtain state certification. However, if an individual obtains state certification for the business in which he is engaged, the act prohibits a municipal corporation or a board of county commissioners from requiring of that state-certified individual a competency examination, except as explained below").[2]

R.C. 3781.102 authorizes a board of county commissioners to adopt rules establishing standards and providing for the licensing of electrical and heating, ventilating, and air conditioning contractors. It does not mention plumbing and hence provides no authority for a board of county commissioners to license plumbing contractors. *See also* Ohio Legislative Service Commission, Preliminary Summary, Sub. H.B. 402, 119th Gen. A. (May 15, 1992).

R.C. 715.27 authorizes a municipal corporation to "provide for the *licensing of* house movers, heating, ventilating, and air conditioning contractors, refrigeration contractors, electrical contractors, *plumbers*, *plumbing contractors*, hydronics contractors, sewer tappers, and vault cleaners." R.C. 715.27(A)(3) (emphasis added). However, R.C. 715.27 contains the limitation that a municipal corporation cannot impose an additional examination, test, or demonstration of

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[2] The relevant statutory provisions state:

> (A) Except as otherwise provided in this chapter, only a municipal corporation pursuant to section 715.27 of the Revised Code or a board of county commissioners pursuant to section 3781.102 [3781.10.2] of the Revised Code shall regulate the licensing of heating, ventilating, and air conditioning contractors, refrigeration contractors, electrical contractors, plumbing contractors, and hydronics contractors.
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> (B) Nothing in this chapter shall be construed to limit the operation of any statute or rule of this state or any ordinance or rule of any political subdivision, district, or agency of the state that:
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> (1) Regulates the installation, repair, maintenance, or alteration of plumbing systems, electrical systems, heating, ventilating, and air conditioning systems, or refrigeration systems;
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> (2) Requires the registration and assessment of a registration or license fee of individuals who are engaged in the business of heating, ventilating, and air conditioning, refrigeration, electrical, plumbing, or hydronics contracting.

R.C. 4740.12.

technical skills upon a person who has a valid qualification certificate, except to the extent that the municipal corporation had established requirements different from state requirements prior to the enactment of the qualification certificate statutes. R.C. 715.27(B).[3]

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[3] The relevant statutory provisions state:

(A) Any *municipal corporation may*:

. . .

(3) Except as limited by division (B) of this section, provide for the *licensing* of house movers, heating, ventilating, and air conditioning contractors, refrigeration contractors, electrical contractors, *plumbers*, *plumbing contractors*, hydronics contractors, sewer tappers, and vault cleaners.

(B)(1) Except as provided in division (B)(2) of this section, a municipal corporation may, pursuant to division (A)(3) of this section, *require* all heating, ventilating, and air conditioning contractors, refrigeration contractors, electrical contractors, *plumbing contractors*, and hydronics contractors *to successfully complete an examination, test, or demonstration of technical skills and may impose a fee and additional requirements for a license or registration* to engage in their respective occupations within the jurisdiction of the municipal corporation.

(2) *No municipal corporation shall require any* heating, ventilating, and air conditioning contractor, refrigeration contractor, electrical contractor, *plumbing contractor*, or hydronics contractor *who has a valid and unexpired qualification certificate to successfully complete an examination, test, or demonstration of technical skills in order to receive a license or registration to engage in his respective business, except* that a municipal corporation that has *adopted, on or before the effective date of this amendment,* a heating, ventilating, and air conditioning, or refrigeration, electrical, hydronics, or *plumbing code* which is not in conflict with Chapter 3781. or 3791. of the Revised Code or rules adopted thereunder, may require a contractor who holds a valid and unexpired qualification certificate to successfully complete an *examination or test only in those areas that differ from requirements established under Chapters 3781. and 3791. of the Revised Code and rules adopted thereunder*.

(3) A municipal corporation may impose a fee and additional requirements for licensure or registration of an individual who holds a valid and unexpired qualification certificate in order for that individual to engage in his respective business within the municipal corporation, provided that the fee and additional requirements are the same for all individuals who wish to engage in that business. *If a municipal corporation imposes such a fee or additional requirements, the municipal corporation immediately shall permit an individual who presents proof of holding a valid and unexpired qualification certificate and*

Thus, the effect of holding a qualification certificate is that the holder is relieved of the necessity of taking tests to qualify to engage in business in various jurisdictions throughout the state, except in limited circumstances. *See* 1994 Op. Att'y Gen. No. 94-088. The analysis of the bill providing for the state certification program states that the legislation "prohibits a municipal corporation or a county from requiring of a state-certified individual a competency examination to engage in his certified business in the municipality or county, except under specified conditions." Ohio Legislative Service Commission, Preliminary Summary, Sub. H.B. 402, 119th Gen. A., at 1 (May 15, 1992).

In order to determine whether a general health district may require a qualification certificate as a condition for registering as a plumbing contractor, we must next examine the powers of a health district and the extent of a health district's authority to impose conditions upon persons who wish to register as plumbing contractors.

A general health district has broad authority to adopt rules that protect the public health. In this regard, R.C. 3709.21 states: "The board of health of a general health district may make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances." *See also* R.C. 3709.20. This general authority, however, must be construed in light of other statutes providing for specific types of regulation. *See Cookie's Diner, Inc. v. Columbus Bd. of Health*, 65 Ohio Misc. 2d 65, 74, 640 N.E.2d 1231, 1236 (Franklin County Mun. Ct. 1994) ("[s]o long as the boards [of health] promulgate regulations designed to promote the general policy of the General Assembly to protect the public health, and so long as the regulations are reasonable, nondiscriminatory, and not contrary to constitutional rights and to legislation, the regulations would be valid"); 1994 Op. Att'y Gen. No. 94-044; 1994 Op. Att'y Gen. No. 94-030.

Basic authority to regulate and inspect plumbing rests with the Division of Industrial Compliance in the Department of Commerce, with boards of health of health districts, and with certified departments of building inspection in municipal corporations. *See* R.C. Chapter 3703; R.C. 3781.03; 1992 Op. Att'y Gen. No. 92-043.[4] A board of health has authority, in certain

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> *who pays the required fee and satisfies all additional requirements imposed by the municipal corporation to engage in his respective business within the municipal corporation.*

R.C. 715.27 (emphasis added); *see also* R.C. 3781.102; 1994 Op. Att'y Gen. No. 94-088 (discussing similar provisions of R.C. 3781.102 pertaining to board of county commissioners). R.C. Chapters 3781 and 3791 govern the Board of Building Standards and address the authority of municipal, township, and county building departments to enforce building standards. *See, e.g.*, R.C. 3781.10.

[4] Duties regarding plumbing that formerly were imposed upon the Department of Health have been transferred to the Division of Industrial Compliance in the Department of Commerce.

circumstances, to require permits for plumbing projects and to make plumbing inspections, and is required to assure that nuisances are abated. *See, e.g.*, R.C. 3703.01; R.C. 3703.08; R.C. 3707.01; 1992 Op. Att'y Gen. No. 92-043 (syllabus, paragraph 1) ("[a] board of health of a general health district may, but has no continuing duty to inspect plumbing within the district, except in those circumstances where a plumbing condition constitutes a nuisance under R.C. 3707.01").

Prior to the enactment of the qualification certificate statutes, it was generally found that a board of health was authorized to require that those seeking to do business as plumbers within the health district register with the board, but that the board of health was not empowered to establish a system for the licensing of plumbers. *See Wetterer v. Hamilton County Bd. of Health*, 167 Ohio St. 127, 146 N.E.2d 846 (1957) (syllabus) ("[a] board of health of a general health district has neither expressed nor implied power under [R.C. 3707.01, 3709.21 and 3709.36] to enact rules and regulations to provide for the licensing of plumbers in such general health district"); 1960 Op. Att'y Gen. No. 1462, p. 398 (finding that health district had authority to require the registration, but not the licensing, of plumbers).[5]

There is no indication that the enactment of the statutory scheme for qualification certificates was intended to expand a health district's authority with respect to the licensing of plumbing contractors. The legislation enacting the qualification certificate provisions added the licensing exception for municipal corporations to R.C. 715.27(B) and added a similar exception for county commissioners with respect to electrical contractors and heating, ventilating, and air conditioning contractors. *See* R.C. 3781.102(C). The legislation provided no exception or authority for health districts to regulate licensing. *See* 1991-1992 Ohio Laws, Part IV, 5348 (Sub. H.B. 402, eff. July 31, 1992). Therefore, health districts come within the provisions of R.C. 4740.12 that prohibit further regulation of the licensing of plumbing contractors, but permit the districts to require "the registration and assessment of a registration or license fee of individuals who are engaged in the business of … plumbing … contracting." R.C. 4740.12(B)(2).

The board of health in question has required the registration of plumbing contractors in the past. It proposes to continue requiring the registration of plumbing contractors, but to add the restriction that registration be limited to those who hold qualification certificates. By imposing such a restriction, however, the board would effectively be requiring that plumbing

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See 1995-1996 Ohio Laws, Part V, 9163 (Am. Sub. S.B. 162, eff. Oct. 25, 1995); 1995-1996 Ohio Laws, Part VI, 11344 (Am. Sub. S.B. 293, eff. Sept. 26, 1996).

[5] 1966 Op. Att'y Gen. No. 66-172, at 2-370, stated that a health district had implied authority to license plumbers. However, it relied upon a lower court case, *McGowen v. Shaffer*, 65 Ohio Law Abs. 138, 111 N.E.2d 615 (C.P. Summit County 1953), that was discredited by *Wetterer v. Hamilton County Bd. of Health*, 167 Ohio St. 127, 146 N.E.2d 846 (1957). Therefore, 1966 Op. Att'y Gen. No. 66-172 is not persuasive on this point.

contractors secure a qualification certificate. This requirement is not mandated by state law. It may or may not be mandated in particular municipalities in accordance with their authority to license plumbing contractors. *See* R.C. 715.27. It is not mandated in unincorporated areas of the health district because, pursuant to R.C. 3781.102 and R.C. 4740.12, no subdivision has authority to regulate the licensing of plumbing contractors in those areas.

Hence, while the board of health might structure its requirement as a registration restriction, the requirement would operate to prevent persons who lack a particular credential from functioning as plumbing contractors and thus would serve as a licensing requirement. *See, e.g.*, *Wetterer v. Hamilton County Bd. of Health*; 1960 Op. Att'y Gen. No. 1462, p. 398. For a board of health to require a qualification certificate for registration as a plumbing contractor would constitute the regulation of the licensing of plumbing contractors for purposes of R.C. 4740.12. *See* 1960 Op. Att'y Gen. No. 1462, p. 398. Such action would conflict with R.C. 4740.12 and would exceed the authority of the board of health. It must be concluded, therefore, that a general health district does not have the authority to require a person to have a qualification certificate issued under R.C. Chapter 4740 in order to register with the district as a plumbing contractor.

A board of health might, as a matter of information, require those registering as plumbing contractors to indicate whether they hold a qualification certificate. If the information were used only as data and not to exclude anyone from registering, it would not be considered a licensing requirement.

It has come to our attention that certain boards of health may have taken action to require that a person hold a state plumbing qualification certificate in order to register as a plumbing contractor. For the reasons set forth in this opinion, we do not believe that existing statutes authorize boards of health to impose such a requirement. If the boards wish to require qualification certificates for registration, the statutes must be amended to permit them to impose that requirement.

Therefore, it is my opinion, and you are advised, that a general health district does not have the authority to require a person to have a qualification certificate issued under R.C. Chapter 4740 in order to register with the district as a plumbing contractor.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

February 2, 1999

The Honorable W. Duncan Whitney
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15 West Winter Street
Delaware, Ohio 43015

SYLLABUS: 99-009

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