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HEALTH DISTRICTS, AUTHORITY TO REQUIRE REGISTRATION AND LICENSING OF WATER WELL DRILLERS AND PUMP INSTALLERS—FEES MAY BE CHARGED FOR SUCH REGISTRATION AND LICENSING TO COVER COSTS—INTER-DISTRICT LICENSING.

SYLLABUS:

1. Health districts, both city and general, have the power to require the registration and licensing of water well drillers and pump installers.

2. Health districts that require registration and the licensing of water well drillers and pump installers may charge the applicant for such registration and licensing, but there must be a reasonable correlation between the actual cost of administering the registration and licensing program and the fee charged.

3. A health district having established standards for registering and issuing licenses to water well drillers and pump installers, may grant such license to a person who has been registered and licensed by another board, but only after ascertaining that the standards adopted by such other board are at least equal to its own.

Columbus, Ohio, September 11, 1957

Hon. Herbert B. Eagon, Director
Department of Natural Resources
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

"The Ohio Health Commissioners Conference has indicated a concern over the growing public health problem of pollution of underground waters caused by indiscriminate and irresponsible drilling of domestic water wells. The Division of Water, Department of Natural Resources and the Ohio Water Resources Board in cooperation with the Ohio Health Commissioners Conference, the Ohio Public Health Association, the Ohio Department of Health and the Ohio Waterwell Driller's association are attempting through the compilation of a code of a minimum standards of waterwell construction and pump installation to be recommended for adoption by the various general and local health district boards.

"In 1946 the Ohio Water Resources Board adopted a water well construction code which was later approved by the Governor under the authority of Sec. 121.13 of the Revised Code. Due to a lack of field personnel to make inspections and enforce the provisions of this code it has not been adhered to.

"In view of the foregoing we respectfully request your opinion as to whether or not a city board of health or other local health district, under the provisions of chapter 3709, Revised Code, have the authority to adopt rules and regulations requiring that waterwell drilling contractors and waterwell pump installers may be required to register with the appropriate health district and obtain a license to engage in the business of waterwell drilling and pump installing before engaging in these activities. If in your opinion such a registration and licensing provision may be adopted would the city board of health or local health district be authorized to adopt a fee schedule and charge for licensing and registration.

"In the event your opinion is in the affirmative on each of the preceding questions would reciprocity between local health districts in licensing and registration be permissible."

The Ohio Water Resources Board was created by House Bill 339, 121 Ohio Laws, 305, which became effective October 5, 1945. In the beginning, the board was a part of the Department of Public Works. The

portion of the bill which was designated as Section 408-3, General Code, enumerated duties and powers of the board. It read in part:

> "The Ohio water resources board shall:
>
> "f. Prescribe such rules and regulations subject to and in accordance with the provisions of the administrative procedure act, for the drilling, operation, maintenance and abandonment of wells as may be deemed necessary by the Ohio water resources board to prevent the contamination of the underground waters in the state."

Later, by amended Senate Bill 13, 123 Ohio Laws 84, effective July 28, 1949, the Department of Natural Resources was created, and the portion of this act which was designated as Section 408-2, General Code, called for a division of water. The Ohio Water Resources Board was made a part of the division of water. Section 408-3, General Code, has since become Section 1521.04, Revised Code, and has remained in substantially the same form except that where the old section reads "The Ohio water resources board shall: * * *" the new section reads "The division of water shall: * * *" Apparently it is under the authority of this section that the rules and regulations of which you speak in your request were promulgated.

Health districts exist under the authority of Section 3709.01, Revised Code, which reads as follows:

> "The state shall be divided into health districts. Each city constitutes a health district and shall be known as a 'city health district.'
>
> "The townships and villages in each county shall be combined into a health district and shall be known as a 'general health district.'
>
> "As provided for in sections 3709.07 and 3709.10 of the Revised Code, there may be a union of two or more contiguous general health districts, not to exceed five, or a union of a general health district and a city health district located within such general health district."

The grant of powers to a city health district is found in Section 3709.20, Revised Code, reading in part as follows:

> "The board of health of a city 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. * * *"

Similar powers are granted to general health districts by Section 3709.21, Revised Code, which reads in part as follows:

> "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. * * *"

A further grant of power to both city and general health districts, supplementing those already mentioned, is found in Section 3709.22, Revised Code, which reads in part as follows:

> "* * * The board may also provide for the inspection and abatement of nuisances dangerous to public health or comfort, and may take such steps as are necessary to protect the public health and to prevent disease. * * *"

It is my opinion that there is ample authority given health districts by these sections to allow such health districts to adopt rules and regulations requiring the registering and licensing of water well drillers and pump installers. Unquestionably there is a definite relationship between the health of the public and the activities of water well drillers and pump installers. Many authoritative comments are to be found relating to the extent of the powers enjoyed by health districts and boards of health. In the case of Stubbs vs. Mitchell, 65 Ohio Law Abs., 204, the court said at page 208:

> "* * * the powers of boards of health are statutory and they are to be limited to those expressly conferred or fairly implied from those expressly granted * * *." Since the authority for the exercise of broad powers comes under the police power inherent in the State, the power is practically coextensive with the necessities that may arise for the purpose indicated. * * * However, it does not authorize the Board of Health to arbitrarily establish a rule without reason, but it leaves in the Board a very broad latitude in determining what is reasonable."

This is a reiteration of language found in the case of Metropolis vs. City of Elyria, 23 C. C. (N.S.), 544.

The rules and regulations promulgated by the water resources board are those deemed necessary to prevent the contamination of underground

waters in the state, whereas the concern of the health district is the public health, the prevention or restriction of disease and the prevention, abatement or suppression of nuisances. It is easily seen, therefore, that the concern of the health district is much broader in scope and more immediate than that of the water resources board. It appears that the authority of the two boards in question to prescribe rules and regulations overlaps. Advice given in Opinion No. 785, Opinions of the Attorney General for 1946, at page 142, seems appropriate here. On page 146 of that opinion the author states:

> "* * * In the event of a pollution which violates both the laws administered by the department of public health and those contained in Title III, Chapter 28 of the General Code concerning wild animals, you should cooperate with the department of health in correcting the condition which affects your common interest. If, however, for any reason such cooperation is impossible, you are still charged with the duty under the statutes of protecting and preserving the wild animals of the state, and you may proceed as indicated in this opinion against a person injuring such wild animals so long as such proceeding does not infringe on a *right* of another state department, political subdivision, etc."

In the instant case about which you inquire, both the water resources board and the health district may have a duty to perform in relation to water well drillers and pump installers, but the two agencies should cooperate wherever possible.

Having once concluded that the activities of water well drillers and pump installers are valid objects of concern of health districts and that therefore these activities should be scrutinized by the board, it them follows that the board has the implied power to license water well drillers and pump installers and to require them to register. In the case of McGowan vs. Shaffer, 65 Ohio Law Abs., 138, at page 144, the court said:

> "This court is of the opinion that while the statutes do not expressly give the defendant Board the right to license master plumbers and register journeymen for a fee, by reason of the powers given the Board by statute there is an implied authority to so license and register, as well as the fact that it constitutes a proper and inherent exercise of police power."

And at page 145 the court said:

"* * * Certainly, by scrutinizing the power given the general health district board, and by reason of their police powers, the board would legally have the right to order permits to be had in the regulation and operation of their duties. * * *"

In Opinion No. 4380, Opinions of the Attorney General for 1941, at page 886, the syllabus reads as follows:

"District boards of health of general health districts may by order or regulation in the interest of public health or for the prevention or restriction of disease, provide for the inspection of trailer camps and impose reasonable standards in connection therewith. * * *"

Later, in Opinion No. 1729, Opinions of the Attorney General for 1952, page 586, the author says at page 592:

"From all the foregoing, it will be apparent that while the law is not fully settled in Ohio on the point, there is some considerable authority for the proposition that boards of health may, as an incident to the regulation of an occupation which directly affects the public health, prescribe a licensing system therefor. * * *"

Granted now that health districts have the power to require the registering and licensing of water well drillers and pump installers, it follows that a charge may be made for such registering and licensing. In the 1941 Attorney General opinion, *supra*, the syllabus continues:

"* * * The costs of such inspection and the issuance of a permit certifying that there has been compliance with the standards may be charged to the operators of such camps."

And in the text of the same opinion at page 889 the author states:

"While the statutes do not expressly authorize the board to charge a fee for the costs of inspection and the issuance of a permit certifying that there has been a compliance with the orders or regulations *this authority is implied.* * * *"

(Emphasis added.)

In the case of Prudential Cooperative Realty Company vs. The City of Youngstown, 118 Ohio St., 204, at page 214 the court said:

"* * * Where the authority is lodged in the municipality to inspect and regulate, the further authority to charge a reason-

able fee to cover the cost of inspection and regulation will be implied. * * *"

On page 145, the McGowan case, *supra,* continues, reading as follows:

"Since the right to regulate plumbing is given the defendant Board, it follows that to regulate, they must inspect, and, impliedly, the right to inspect gives the Board the right to charge for that inspection.

"Thus * * * as long as the charges made therefor are not excessive, the defendant Board would have the right to license, register, issue permits for a fee, and to charge for inspection as such rights are in the exercise of proper police power and are implied by reason of the authority given the defendant Board by the statutes of the State of Ohio."

The caveat contained in the Realty Company case at page 214 is pertinent here also. It reads:

"* * * The fee charged must not, however, be grossly out of proportion to the cost of inspection and regulation; otherwise it will operate as an excise tax, which is clearly beyond the power of the municipality to impose."

The same is true of health districts. This is discussed in the case of Wolfe v. City of Columbus, 10 N. P. (N. S.), 196, where, at page 200, the court states:

"A license exaction in a proper case may reasonably include the cost of issuing the license and the necessary or probable expense of inspecting and regulating the licensed occupation. And the exaction under the police power will be presumed by the courts to be reasonable, unless the contrary appears on the face of the ordinances imposing it, or it is established by proper evidence. * * *"

Thus, the authorities present the proposition that where a body has the power to license and inspect, it has the corollary power to charge a fee for such inspection and licensing in the absence of an express prohibition. A health district has such power but the charge must be reasonable and there must be some correlation between the fee charged and the cost of such licensing inspection.

I shall now consider the last part of your request, where you ask if reciprocity is permissible between the local health districts in their licensing and registration activities.

Your third question is: "Would reciprocity between local health districts be permissible?"

"Reciprocity" is defined by Webster as "that relation of policy as to trade or other interests between countries under which special advantages are granted by one side, in consideration of special advantages granted by the other." Considered from that standpoint, I do not deem it worth while to give serious consideration to the question propounded. Plainly, there is no authority in the law for a mere exchange of favors or indulgence between two counties or two health boards.

I apprehend that the real question in your mind was whether a board of health would be justified in granting a license to a water well driller or pump installer without examination, solely on the basis of his having qualified for and secured such a license from the board of another district.

In the 1952 opinion, *supra,* this very question was considered. The syllabus reads:

> "1. Authority of general boards of health to require license of plumbers discussed.
>
> "2. A general board of health may not lawfully redelegate any quasi-judicial power which has been delegated to it by the General Assembly."

The pertinent section of the regulation of the board of health there under consideration read:

> "Any person may make application for registration to do plumbing and sewage disposal installation work within the Hamilton County General Health District who has a master plumber's license in force issued to him by any municipality in Ohio having a plumber's examining and licensing board requiring a written and practical examination for the issuance of such a license. * * *"

In discussing this regulation the author stated on pages 592 and 593:

> "* * * The essential effect of this provision is to delegate to another political entity the quasi-judicial power to determine for the board of health whether particular persons are qualified for a license within the district in which the board exercises jurisdiction. * * *
>
> "The only standard required under the board's regulation is that a municipality issuing the license be one which has a licensing board which requires a written and practical exami-

nation, without prescribing the subjects in which the applicant is to be examined and without prescribing the amount, if any, of practical experience required. *I am impelled to conclude that these standards are not sufficient to sustain the delegation of power and that the regulation must, therefore, be considered invalid under the rule stated in the Weber case, supra. * * *"*
(Emphasis added.)

The case last referred to is Weber v. Board of Health, 148 Ohio St., 389, in which the fourth paragraph of the syllabus reads:

"4. A resolution of the Board of Health of the Butler County Health District, which makes it unlawful to transport, deliver or deposit collected garbage for the purpose of feeding the same in whole or in part to swine or other animals into or within the territory under the jurisdiction of such board, but authorizes the health commissioner, without any standards for his guidance, to approve a system of collection and disposal of garbage and provides that after such approval the continuance of such system of collection and disposal shall not constitute a violation of the provisions of the prohibitory regulations, *is an attempted delegation of legislative power and is violative of the equal-protection guaranties of the state and federal Constitutions."* (Emphasis added.)

Then the 1952 opinion, *supra,* continues and quotes 42 American Jurisprudence, 387, Section 73, which reads as follows:

"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. A part 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 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 state commission empowered to establish standards in a particular industry may not delegate such power by promulgating a rule that the standards shall be those established by a Federal administrative body 'as the same have been or may hereafter be modified or changed'."

The author of the 1952 opinion, *supra,* objected to the board of health regulation because no standards were prescribed, and that was also the

objection in the Weber case. Obviously, therefore, a health district cannot require registering and licensing based upon compliance with standards set up by its own regulations, and then grant a certificate to an applicant upon his presentation of a license issued by another board, unless and until it has ascertained and determined that the standards of such other board are at least as severe as its own.

It is therefore my opinion and you are advised that:

1. Health districts, both city and general, have the power to require the registration and licensing of water well drillers and pump installers.

2. Health districts that require registration and the licensing of water well drillers and pump installers may charge the applicant for such registration and licensing, but there must be a reasonable correlation between the actual cost of administering the registration and licensing program and the fee charged.

3. A health district having established standards for registering and issuing licenses to water well drillers and pump installers, may grant such license to a person who has been registered and licensed by another board, but only after ascertaining that the standards adopted by such other board are at least equal to its own.

Respectfully,
WILLIAM SAXBE
Attorney General