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HEALTH, GENERAL, BOARDS OF—AUTHORITY TO REQUIRE LICENSE OF PLUMBERS—BOARD MAY NOT LAWFULLY REDELEGATE ANY QUASI-JUDICIAL POWER DELEGATED TO IT BY GENERAL ASSEMBLY.

SYLLABUS:

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.

Columbus, Ohio, August 11, 1952

Hon. C. Watson Hover, Prosecuting Attorney
Hamilton County, Cincinnati, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"On August 13, 1951, the Board of Health of Hamilton County, Ohio, General Health District adopted a resolution providing rules and regulations for the installation and inspection of plumbing in Hamilton County, Ohio.

"Pertinent sections of said resolution read as follows:

"'All plumbing and private sewage disposal installations, repairs and replacements within the Hamilton County General Health District shall be done only by permit, issued by the Hamilton County District Board of Health, and under the supervision of a registered master plumber, registered by the Hamilton County Health Department.'

"'All persons engaged in or intending to engage in the business of plumbing and sewage disposal installation work within the limits of the Hamilton County General Health District shall register with the Health Department of the Hamilton County, Ohio, General Health District.

"'Application for registration. 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, or any person who has heretofore been licensed by the District Board of Health of Hamilton County, Ohio. A fee of $15.00 will accompany the application for registration of the master plumber and a fee of $5.00 will accompany the application of the licensed journeyman plumber. If a master plumber or journeyman plumber has his license revoked by the municipality issuing the same it shall automatically revoke his registration as master or journeyman plumber as such within the limits of the Hamilton County General Health District.'

"The question of the authority of a general health district to adopt regulations of this type has been raised.

"I am aware of Informal Opinion No. 437, dated October 19, 1948, which was rendered by one of your predecessors in office. In view of said opinion, I am requesting an opinion from you at this time with reference to this matter."

In the informal opinion to which you refer the writer first notes that boards of health are creatures of statute and so possess only statutory powers. He then observes that in the case of municipalities the General Assembly, in Section 3637, General Code, has *expressly* authorized provision for the licensing of plumbers. Proceeding then to an examination of Section 4420, General Code, he says:

"Section 4420, General Code, states that the board of health, except in cities having a building department, may regulate the location and construction of water-closets, privies, cesspools, sinks,

plumbing and drains. However, as can readily be seen, there is no provision in this section which would allow a district board of health to license plumbers."

It is quite plain that the writer of this opinion gave no consideration to the possibility that such boards may possess implied powers incident to the powers expressly conferred on them, but rather appeared to prefer the strictest sort of interpretation of the powers of such boards.

The powers of boards of health are set out in Sections 1261-30 and 1261-42, General Code. Section 1261-30 reads:

"The district board of health hereby created shall exercise all the powers and perform all the duties now conferred and imposed by law upon the board of health of a municipality, and all such powers, duties, procedure and penalties for violation of the sanitary regulations of a board of health shall be construed to have been transferred to the district board of health by this act (G. C. Secs. 1261-16 to 1261-43 and 1245 et seq.). The district board of health shall exercise such further powers and perform such other duties as are herein conferred or imposed."

Section 1261-42 reads in part:

"The board of health of a general health district may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances, and shall have the power to require that no human waste, animal waste, or household wastes from sanitary installations within the district be discharged into a storm sewer, open ditch or water course without a permit therefor having been first secured from the board of health of the health district under such terms and conditions as the board may from time to time require. * * *"

In order to ascertain the nature of the powers conferred by the provisions of Section 1261-30, supra, it is necessary to refer to Section 4404 et seq., General Code, relative to municipal boards of health. Sections 4413 and 4420, General Code, are as follows:

Section 4413, General Code:

"The board of health of a city may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances. Orders and regulations not for the government of the board, but intended for the general public shall be adopted, advertised, recorded and

certified as are ordinances of municipalities and the record thereof shall be given, in all courts of the state, the same force and effect as is given such ordinances. Provided, however, that in cases of emergency caused by epidemic of contagious or infectious diseases, or conditions or events endangering the public health, such boards may declare such orders and regulations to be emergency measures, and such orders and regulations shall become immediately effective without such advertising, recording and certifying."

Section 4420, General Code:

"The board of health shall abate and remove all nuisances within its jurisdiction. It may by order therefor compel the owners, agents, assignees, occupants, or tenants of any lot, property, building or structure to abate and remove any nuisance therein, and prosecute them for neglect or refusal to obey such orders. Except in cities having a building department, or otherwise exercising the power to regulate the erection of buildings, the board of health may regulate the location, construction and repair of water-closets, privies, cesspools, sinks, plumbing and drains. In cities having such departments or exercising such power, the council by ordinance shall prescribe such rules and regulations as are approved by the board of health, and shall provide for their enforcement."

From an examination of these sections it would appear to be the intent of the General Assembly that the board of health of a general health district, in addition to the powers conferred by the provisions of Section 1261-42, supra, should have all of the powers granted to city boards of health under the provisions of Section 4413, General Code. The problem at this point is, therefore, to ascertain whether these statutes, by implication, grant to the boards of such general health district the power to adopt and enforce a regulation such as that described in your inquiry.

From an examination of the pertinent sections of the regulation in question, it would appear from one point of view that the health board has not undertaken to establish and operate a licensing system for plumbers but has merely forbidden the pursuit of the occupation of plumbing within its jurisdiction by any persons except those who have previously been licensed either by an Ohio municipality or have heretofore been licensed by the "district board of health of Hamilton County, Ohio." I assume, in view of the latter provision, that the board here in question did at some previous time establish and enforce a system of licensing of plumbers.

In another view of the matter, it could probably be contended with considerable persuasive effect that the system of registration which the Hamilton County general health district has prescribed in the regulation in question does constitute a licensing system of a sort, and that it has delegated to "any municipality in Ohio" the power to examine applicants for license within the district. For this reason we may first briefly refer to the question of whether the statutory powers of a general health district are such as would justify, by implication, the establishment of a system of licensing for this occupation.

In Martin v. Bowling Green, 12 Ohio Law Abstract, 191, 6th District Court of Appeals, 1932, the court was concerned with the case of an alleged violation of an order of the board of health of the city of Bowling Green, forbidding the sale of milk for household beverage purposes without having first obtained a permit to do so, as required by the regulations of said board. In the opinion by the court in this case, we find the following statements, pp. 191, 192:

> "* * * Martin claims that he was wrongfully refused a permit and also that the resolution of the Board of Health is invalid because it delegates to the Health Commissioner duties that can be created only by ordinance of the City Council, and further claims, as we understand it, that the resolution is invalid and unconstitutional in that in addition to that required to obtain the permit, a fee is required for inspection and that the fee charged therefor is greater for inspection deemed necessary to be made in a county other than that in which Bowling Green is situated, when the supply of milk sold in Bowling Green is there obtained.
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> "We find no provision of law prohibiting reasonable fees for such inspections and certainly it is lawful as a health measure to require that those selling milk shall first obtain a permit. * * *"

Because the statute then under consideration did not expressly grant to the board of health the power to require a license of such vendors, it is clear that the court found such power to exist by implication.

In Opinion No. 4380, Opinions of the Attorney General for 1941, p. 886, the syllabus is 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 there-

with. The cost 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 said camps."

In the course of the opinion the writer said, pp. 889, 890:

"While the statute does 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."

In Harrison vs. Rhodes, et al., an unreported decision of the Common Pleas Court of Franklin County, Ohio, No. 176570 (1952), the court upheld the validity of a regulation of the board of health of Columbus, Ohio, providing for a system of permits and inspection fees for the operation of eating and drinking establishments. In that case the defense appears to have been based primarily on the lack of power in the board, in the absence of express statutory provision, to impose a system of inspection fees, and the discussion in the opinion is directed primarily to this point. Nevertheless, the judgment upholding the validity of the regulation necessarily involved a decision as to the validity of that portion of the regulation providing for a system of licensing. Here again the existence of the power to provide for a system of licensing must necessarily have been found by implication in the statutes to which we have already referred.

In Heilman's Restaurant, Inc. v. Lefever, an unreported decision in the 9th District Court of Appeals, Lorain County No. 1209, 1950, the court was concerned with the validity of a regulation of the board of health of the city of Lorain prescribing a licensing system for restaurants. In that decision the court held the regulation invalid primarily on the ground that the system of licensing of restaurants had already been established under the provisions of Section 843-2 et seq., General Code. The reasoning of the court was that since the state had preempted the field covered by the board's regulation, such regulation would be in conflict therewith and hence invalid. The court does not appear to have considered the question of whether, in the absence of such a statute, the health board might lawfully have prescribed such licensing system; and there is nothing in the decision to indicate that the court in any way questioned the possibility that such licensing power might have been

conferred upon the board of health by a necessary implication in the statute prescribing the power of such board.

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.

It would appear, however, to be unnecessary in the instant case to express a categorical opinion on this point. The reason for this lies in the fact that the board of health has here prescribed a regulation prohibiting the carrying on of the business of plumbing within its statutory jurisdiction except by persons who have been licensed as plumbers by some other political entity, i.e., by any municipality in Ohio having a plumber's examining and licensing board requiring a written and practical examination for the issuance of such license. 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. It may be observed also that such delegation of power is made without prescribing any rules and standards by which applicants for license as a plumber are to be examined. With respect to the latter point, your attention is invited to the ruling of the court in Weber v. Board of Health, 148 Ohio St., 389, the third and fourth paragraphs of the syllabus of which are as follows:

> "3. Under the provisions of Section 1261-42, General Code, the board of health of a general health district has a wide latitude in making and enforcing rules and regulations for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisance, but when such board passes a resolution which prohibits a business not unlawful in itself and which is susceptible to regulations which will prevent it from becoming either a health menace or a nuisance, such board transcends its administrative rule-making power and exercises legislative functions in violation of section 1 of Article II of the Constitution of Ohio.
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> "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 Constitution."

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 examination, 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.

There is, however, a more cogent reason for doubting the validity of the regulation here in question. This reason is found in an attempted redelegation by the board of the power which has been delegated to it. As stated in 42 American Jurisprudence, 387, Section 73:

> "It is a general principle of law, expressed in the maxim 'delegates non protest delegate,' that a delegated power may not be further delegated by the person to whom such power is delegated. 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 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. * * *
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> "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.' "

Accordingly, in view of the attempt by the board in this regulation to redelegate a power which has been delegated to it by the General Assembly, and in view of the fact that such delegation has been attempted

without prescribing rules and standards within the meaning of the decision of the Weber case, supra, I am impelled to conclude that the regulation which is the subject of your inquiry is invalid.

Respectfully,

C. WILLIAM O'NEILL
Attorney General