

OPINION NO. 73-125**Syllabus:**

No person in attendance at a public rule hearing, conducted by the Public Health Council pursuant to R.C. 119.03, has the right to cross-examine any witness, but the Public Health Council may, in its sound discretion, adopt procedures permitting cross-examination during such hearings.

To: W. H. Veigel, Sec., Public Health Council, Dept. of Health, Columbus, Ohio
By: William J. Brown, Attorney General, December 12, 1973

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

"The first paragraph of Division (C) of Section 119.03 of the Revised Code reads as follows:

"(C) On the date and at the time and place designated in the notice, the agency shall conduct a public hearing at which any person affected by the proposed action of the agency may appear and be heard in person, by his attorney, or both, may present his position, arguments, or contentions, orally or in writing, offer and examine witnesses, and present evidence tending to show that said proposed rule, amendment, or rescission, if adopted or effectuated, will be unreasonable or unlawful."

"When a person offers testimony on the adoption of a regulation, we would like to have your opinion as to whether or not each and every person in attendance at the public hearing has the right to cross-examine every witness offering testimony."

The Section to which you refer, R.C. 119.03, is a part of the Administrative Procedure Act. It is settled that the Public Health Council is an "agency" within the meaning of that Act. Nursing Homes v. Council, 172 Ohio St. 227 (1961).

The Administrative Procedure Act provides for two distinct types of agency hearings: (1) a hearing before adoption, amendment, or rescission of any rule, the procedure for which is set forth in R.C. 119.03; and (2) a hearing which is required, with a few exceptions, before any agency may issue an adjudication determining the rights of an individual with respect to that agency's particular subject-matter, the procedure for which is set out in R.C. 119.06, 119.07, 119.08, 119.09, and 119.10.

The language of R.C. 119.03 which you have quoted pertains only to rules hearings, and it reads "offer and examine witnesses" (emphasis added). It does not give the right to cross-examine any witnesses. In contrast, R.C. 119.07, which governs adjudication hearings, specifically allows cross-examination of witnesses. It reads in pertinent part:

"Except when a statute prescribes a notice and the persons to whom it shall be given, in all cases in which section 119.06 of the Revised Code requires an agency to afford an opportunity for a hearing prior to the issuance of an order, the agency shall give notice to the party informing him of his right to a hearing. * * * The notice shall also inform the party that at the hearing he may appear in person, by his attorney, or by such other representative as is permitted to practice before the agency, or may present his position, arguments, or contentions in writing and that at the hearing he may present evidence and examine witnesses appearing for and against him."
(Emphasis added.)

Furthermore, R.C. 119.09 states in pertinent part that:

"In any adjudication hearing required by sections 119.01 to 119.13, inclusive, of the Revised Code, the agency may call any party to testify under oath as upon cross examination."

Here, again, the legislature has specifically provided for the

right of cross-examination in an adjudication hearing.

The above-mentioned Sections, being part of the Administrative Procedure Act, are in pari materia and must be construed together. State ex rel. Pratt v. Weygandt, 164 Ohio St. 463, 466 (1956). Thus, the fact that the right of cross-examination is specifically given for adjudication hearings and not for rules hearings leads to the conclusion that the legislature did not intend to confer this privilege on participants in rules hearings.

This does not necessarily imply, however, that an administrative body may not, in its discretion, allow cross-examination in such rules hearings. The court in In re Milton Hardware Co. 19 Ohio App. 2d 157 (1969), referring to administrative hearings in general, stated at page 161 that:

"* * * Generally speaking, the procedures to be followed before administrative agencies are not those which are required in ordinary civil actions. The strict rules of a judicial hearing do not govern in executive and administrative matters. State, ex rel. Mayers, v. Gray, 114 Ohio St. 270; Eastern Ohio Distributing Co. v. Board of Liquor Control, 59 Ohio Law Abs. 188.

"Generally, in the absence of statutory provisions to the contrary, an administrative agency may adopt and follow procedures for hearings and fact finding which are not strictly in accord with rules of practice as followed in the trial of civil actions.

"In like manner, where the statutes are silent thereon, an administrative agency may generally enact rules as to the standards of admissibility of evidence to be followed in its hearings. * * *."

While this decision was primarily concerned with adoption of standards of admissibility of evidence, the court was really addressing itself to the larger issue of the power of an agency to enact its own procedures in the absence of specific legislative direction. The problem faced in establishing procedures for cross-examination is the same one faced in establishing standards for admissibility of evidence, i.e., what power does the agency have to establish its own procedures. The above decision is equally applicable to the issue at hand.

There is nothing in R.C. Chapter 119 which prohibits the use of cross-examination in rules hearings. The foregoing has only established that the privilege of cross-examination was not conferred by the legislature as a "right" on participants in such hearings. Consequently, in accord with In re Milton Hardware Co., supra, the Public Health Council may use its discretion in establishing procedures to be followed in regard to the use of cross-examination in rules hearings, so long as such procedure results in a fair hearing.

In specific answer to your question it is my opinion, and you are so advised, that no person in attendance at a public rule hearing, conducted by the Public Health Council pursuant to R.C. 119.03, has the right to cross-examine any witness, but the Public Health Council may, in its sound discretion, adopt procedures permitting cross-examination during such hearings.