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HEALTH, BOARD OF—GENERAL HEALTH DISTRICT—POWER GIVEN BY IMPLICATION TO REQUIRE LICENSE OF PERSONS WHO ENGAGE IN PLUMBING IN DISTRICT—SECTIONS 1261-3, 1261-42 GC.

SYLLABUS:

The board of health of a general health district, under the provisions of Sections 1261-3 and 1261-42, General Code, is given by implication the power to require a license of persons who engage in the occupation of plumbing in such district.

Columbus, Ohio, June 24, 1953

Hon. Richard P. Faulkner, Prosecuting Attorney
Champaign County, Urbana, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"Will you kindly furnish me with an opinion as to the legal authority of the Board of Health of the Champaign County, Ohio, General Health District to pass rules and regulations as to the licensing and bonding of plumbers to do plumbing in the General Health District?

"I have read your opinion No. 1729, issued August 1, 1952, to the Prosecuting Attorney of Hamilton County. However, you do not directly decide the above point.

"In surveying the general situation, of course, I find that municipalities can license plumbers but such licensing is only effective within the corporate limits of the municipality and while I find no specific authority to the General Health District for the licensing of plumbers under the General Section granting powers to the General Health District, Section 1261-4 states that the Board of Health is authorized to make such orders and regulations as it deems necessary for the public health, the prevention or restriction of disease, etc.

"In other opinions issued by the Attorney General's office, while this point has not been directly decided, the opinions seem to infer that the General Health District had such authority. * * *

"Of course in the Hamilton County case the question finally decided there was the invalidity of the specific ordinance they had which delegated the power of licensing to some other subdivision.

"My question is if the Board of Health of the General Health

> District passes direct legislation covering the licensing of plumbers and in general setting up the examinations and licensing directly from the Board of Health, if such legislation is legal. This is a matter of urgent importance in our Health District as our present licensing regulation is almost identical with that of Hamilton County and we have no other plumbers licensing system either in the county or any of the municipalities therein and I would therefore appreciate an early reply."

Because in your inquiry you have referred to the "legislative" power of the Board of Health, it is proper, at the outset, to note the observations of the courts regarding the essential nature of the powers of such boards. In Matz v. Cartage Co., 132 Ohio St. 271, Judge Williams stated, at page 279:

> "It is an accepted doctrine in our constitutional law that the law-making prerogative is a sovereign power conferred by the people upon the legislative branch of the government, in a state or the nation, and cannot be delegated to other officers, board or commission, or branch of government. Thus neither the Congress of the United States nor the General Assembly of Ohio can delegate its legislative power, but may confer administrative power on an executive, a board or commission."

In Weber v. Board of Health, 148 Ohio St., 389, the first paragraph of the syllabus is as follows:

> "Section 1261-42, General Code, which provides that '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 * * *' but does not provide specific standards for guidance, is a valid and constitutional enactment."

In the course of the opinion by Judge Stewart, we find the following statement at page 397:

> "We hold, therefore, that Section 1261-42, General Code, is a constitutional enactment and that under it the Board of Health of the Butler County General Health District had authority to enact reasonable, nondiscriminatory and legal rules and regulations in reference to garbage and hog feeding within its district."

From the foregoing, it will be seen that although the courts preserve the fiction that Boards of Health possess no legislative power, they recognize the authority of such agencies to promulgate and enforce "administra-

tive rules" having the force and effect of law, and this without the prescription of any guides or standards by the Legislature.

Before proceeding to an examination of the specific question here presented, it is proper first to observe that it has long been settled that the business of plumbing is one so nearly related to the public health that it is subject to regulation under the police power. In this connection, the Supreme Court held in State v. Gardner, 58 Ohio St. 599:

> "The business of plumbing is one which is so nearly related to the public health that it may, with propriety, be regulated by law, and reasonable regulations, tending to protect the public against the dangers of careless and inefficient work, and appropriate to that end, do not infringe any constitutional right of the citizen pursuing such calling."

In view of this close relationship between this business and the public health, and in view of the broad statutory powers of boards of health in the promulgation of health measures, it can scarcely be doubted that such boards have the power to regulate the business of plumbing within their respective districts.

As you have pointed out in your inquiry, in my Opinion No. 1729, dated August 11, 1952, I discussed the power of a board of health of a general health district to require a licensing system as an aid in the enforcement of its rules regulating the occupation of plumbing, but did not find the resolution of that question to be necessary in answering the precise question there presented. As I pointed out in that opinion, because the statutes do not expressly confer on boards of health the power to license as an aid to the enforcement of health regulations, the question arises whether such power is implied in the power to regulate.

It is generally held that local health authorities possess implied, as well as express powers and that the powers conferred on them by statute should be liberally construed. 20 Ohio Jurisprudence 557, Section 26; 39 Corpus Juris Secundum, 822, 823, Section 9. Moreover, in 53 Corpus Juris Secundum, 478, Section 10, we find the following statement:

> "Unless some other provision of law forbids the exercise of the power to license, the power of a municipal corporation to license an occupation or privilege and impose a license fee or tax thereon is generally implied from power to regulate such occupation or privilege, * * *."

In commenting on the Ohio decisions in my Opinion No. 1729, supra, on the powers of boards of health, I said:

"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 resolutions 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 therewith. 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." (Emphasis added.)

Certain of the material in the foregoing was quoted with approval by the court in McGowen v. Shaffer, 111 N. E. (2nd) 615. This was an action in the Common Pleas Court of Summit County to enjoin a general board of health from enforcing the provisions of a sanitary code which provided in part for the licensing of plumbers. In the course of the discussion on the implied power of such board in this respect, 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."

It will be observed that in both the Bowling Green and the Rhodes cases, supra, the powers of a *city* board of health were under scrutiny. It is well settled, however, that city boards of health are agencies of the state and although municipalities, under their home rule powers, are authorized to enact local sanitary regulations not in conflict with the general laws, city boards of health, as distinguished from the municipal legislative authority, operate under a statutory grant of power. Accordingly, the decisions above noted holding that city boards of health possess the power to license by implication in the power to regulate, must be deemed to apply with equal force to boards of health of general health districts. This being so, and in view of the necessity of according a liberal construction to the statutes enumerating the powers of such boards, I am impelled to the conclusion that boards of health of general health districts may lawfully prescribe by regulation a requirement for the licensing of plumbers as a condition of carrying on their occupation in such district.

It should be borne in mind, however, that in setting up any such licensing system, the board will find it necessary to prescribe standards and guides by which it is to be determined whether a license is to be issued or denied in particular cases. In this connection, your attention is directed to the fourth paragraph of the syllabus in the Weber case, supra, which reads:

> "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."

In commenting on the application of the Weber decision to the regulation under scrutiny in my opinion No. 1729, supra, I said:

> "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 prac-*

> *tical 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."

Assuming, therefore, that no difficulty will be encountered on this point, it is my opinion, in specific answer to your inquiry, that the board of health of a general health district, under the provisions of Sections 1261-3 and 1261-42, General Code, is given by implication the power to require a license of persons who engage in the occupation of plumbing in such district.

Respectfully,

C. WILLIAM O'NEILL
Attorney General