

OPINION NO. 79-085**Syllabus:**

The Ohio State Dental Board does not have the authority pursuant to R.C. 4715.36 to subpoena the records of an individual, corporation, or business during the course of an investigation of a licensee. R.C. 4715.36 authorizes the issuance of subpoenas only for the purposes of a hearing.

To: Robert B. Ford, D.D.S., Secretary, Ohio State Dental Board, Columbus, Ohio
By: William J. Brown, Attorney General, November 19, 1979

I have before me your request for my opinion in which you ask the following question:

Does the Ohio State Dental Board have the authority to subpoena records of an individual, corporation, or business during the course of an investigation prior to the formal filing of administrative charges against a person licensed by the board?

I am assuming, for the purposes of this opinion, that by "investigation" you mean the gathering of information, interviewing of potential witnesses, and the like, by board employees with a view towards a determination of whether a licensee may be subject to disciplinary proceedings or criminal charges for violations of R.C. Chapter 4715 or rules promulgated by the board.

The subpoena power of the State Dental Board is codified in R.C. 4715.36,

which states in pertinent part:

The state dental board may hear testimony in matters relating to the duties imposed upon it by law, and the president and the secretary of the board may administer oaths.

The board, the accused, and any other persons interested in the hearing or investigation before the board, may require the attendance of such witnesses and the production of such books, records, and papers as any of them may desire at any hearing of any matter which the board has authority to investigate, and to take the depositions of witnesses residing within or without the state. . . . (Emphasis added.)

The foregoing statute enumerates three classes of persons which are entitled to subpoena books and records—the board, the accused, and other persons interested in a hearing or investigation. Each of these is entitled to demand the production of documents "at any hearing of any matter" before the board. Accordingly, R.C. 4715.36 clearly empowers the State Dental Board to issue subpoenas for the production of books and records at a hearing after charges have been filed against a licensee. There is no explicit authorization, however, for the issuance of a subpoena during the investigatory process, unless the word "hearing" may be construed so as to encompass such investigation.

The Ohio Supreme Court has stated that a "hearing" is a proceeding of relative formality, generally public, with definite issues of fact or of law to be tried, in which parties proceeded against have a right to be heard;" Board of Education v. Cuyahoga County Board of Revision, 34 Ohio St.2d 231, 233-34 (1973) (considering R.C. 5715.01, which authorizes board of revision to "hear complaints and revise assessments of real property for taxation"). Other courts have distinguished between hearings and investigations, stating that the term "hearing" is appropriate to quasi-judicial proceedings, while an investigation is a non-judicial function of an administrative agency seeking information for future use, rather than a proceeding in which action is taken against someone. Atchison, T. & S. F. Ry. Co. v. Kansas Commission on Civil Rights, 215 Kan. 911, 529 P.2d 666 (1974). See also In re Securities & Exchange Commission 14 F. Supp. 417, 419 (S.D.N.Y. 1936), aff'd, 84 F.2d 316 (2d Cir. 1936), rev'd, 299 U.S. 504 (1936) (vacated as moot); Roosevelt-Wabash Currency Exchange, Inc. v. Fornelli, 49 Ill. App.3d 896, 364 N.E.2d 449 (1977).

In Commonwealth ex rel. Margiotti v. Orsini, 368 Pa. 259, 81 A.2d 891 (1951), the court was directly presented with the question whether a statute empowering administrative agencies to issue subpoenas at "any hearing" could be construed so as to authorize their issuance during the course of an investigation. Noting that an "investigation" and a "hearing" are "not synonymous but distinctly and fundamentally different," the court found it to be significant that other statutes explicitly empowered the issuance of subpoenas for "investigations" or "hearings and investigations." Id. at 264-265, 81 A.2d at 893-894. Because the legislature recognized a distinction between the two, it was held that the statute did not authorize the use of compulsory process for the purposes of investigations of alleged violations of law.

The Ohio General Assembly, too, has recognized a distinction between "investigations" and "hearings" inasmuch as it has, in several instances, given administrative agencies the power to issue subpoenas for "investigations." For example, R.C. 4755.04 provides, in part:

The appropriate section of the Ohio occupational therapy and physical therapy board shall investigate complaints concerning the violation of section 4755.02 or 4755.48 of the Revised Code, and concerning alleged grounds for the suspension, revocation, or refusal to issue or renew licenses under section 4755.10 or 4755.47 of the Revised Code, and may subpoena witnesses in connection with its investigations.

See also R.C. 4723.29 (board of nursing); R.C. 4735.03 and R.C. 4735.04 (Ohio real estate commission); R.C. 4753.05(E) (board of speech pathology and audiology). The General Assembly did not expressly grant the dental board the power to issue subpoenas for the purpose of investigation apart from a hearing; rather, the language of R.C. 4715.36 supports the conclusion that the authority to require the issuance of subpoenas is limited to "hearings" and does not extend to investigations.

It might be posited that the use of such language as "persons interested in the hearing or investigation" and "any hearing of any matter which the board has authority to investigate" in R.C. 4715.36 gives rise to an implication that the General Assembly intended the term "hearing" to encompass the investigatory process. However, the language "interested in the hearing or investigation" is merely descriptive of those "persons" entitled to demand the production of books and records at a hearing. Thus, a person who was interested in an investigation that the board had conducted could require production of records at a subsequent hearing culminating from the investigation.

Moreover, it is my opinion that the language, "any matter which the board has authority to investigate," is a limitation on the parameters of the board's jurisdiction to conduct hearings. The board may not conduct hearings in relation to matters not connected with its duty to enforce the provisions of R.C. Chapter 4715. This interpretation is supported by the initial paragraph of R.C. 4715.36, quoted above, which authorizes the board to "hear testimony in matters relating to the duties imposed upon it by law."

A further reason for my conclusion that the word "hearings" in R.C. 4715.36 does not include the gathering of information in an investigation is the use of the term "accused" in the listing of those persons who may require the issuance of subpoenas. The word "accused" is not defined for purposes of R.C. 4715.36. However, Webster's New World Dictionary 10 (2d college ed. 1976), defines "the accused" as "the person who is formally charged with commission of a crime." Thus, one does not generally become an "accused" until there is some type of formal charge of a crime or offense made against the individual. See Steele v. State, 52 Del. 5, 151 A.2d 127 (1959). Until charges are filed against a licensee, therefore, there is no "accused" for the purpose of requiring the issuance of subpoenas.

Finally, I note that an administrative body may exercise only the powers and authority which have been conferred upon it by the General Assembly. State ex rel. Funtash v. Industrial Commission, 154 Ohio St. 497 (1951). Inasmuch as the power of the agency is strictly limited by the statute conferring the authority, the delegated powers will not be extended by implication. See City of Cincinnati v. P.U.C., 96 Ohio St. 270 (1917); State ex rel. Kahler-Ellis Co. v. Cline, 69 Ohio L. Abs. 305 (C.P. Lucas County 1954). Thus, the power to issue subpoenas exists only when expressly authorized, N.L.R.B. v. Barrett Co., 120 F.2d 583 (7th Cir. 1941), and the power to issue subpoenas for investigatory purposes will not be implied from the express power to subpoena for a hearing. Margiotti, supra. As noted earlier, when the General Assembly has desired to give an administrative agency the power to subpoena records during an investigation, it has done so expressly. E.g., R.C. 4723.29; R.C. 4735.03 and R.C. 4735.04; R.C. 4753.05(E); R.C. 4755.04. Moreover, in each of these instances, only the administrative board has been given the authority to issue subpoenas during investigations. If the term "hearings" in R.C. 4715.36 were construed as encompassing investigations, not only the State Dental Board, but all other "interested persons" could demand the production of such books and records as they desire. I do not believe that the General Assembly intended to give such sweeping power to any person claiming an interest in an investigation to compel production of the private records of another, absent the procedural safeguards which necessarily accompany a hearing.

Accordingly, it is my opinion, and you are advised, that the Ohio State Dental Board does not have the authority pursuant to R.C. 4715.36 to subpoena the records of an individual, corporation, or business during the course of an investigation of a licensee. R.C. 4715.36 authorizes the issuance of subpoenas only for the purposes of a hearing.