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HEALTH—PUBLIC HEALTH COUNCIL OF STATE DEPARTMENT OF HEALTH HAS AUTHORITY TO ADOPT REGULATIONS TO ESTABLISH MAXIMUM ALLOWABLE CONCENTRATIONS FOR SUBSTANCES USED IN INDUSTRY, DANGEROUS TO PUBLIC HEALTH—SECTION 1232 ET SEQ., G. C.

SYLLABUS:

The Public Health Council of the state department of health has authority, pursuant to Section 1232 et seq. of the General Code, to adopt regulations establishing maximum allowable concentrations for substances used in industry which are dangerous to public health.

Columbus, Ohio, December 8, 1945

Dr. Roger E. Heering, Director of Health
Columbus, Ohio

Dear Sir:

I have before me your communication requesting my opinion and reading as follows:

> "The Department of Health is given supervision of all matters relating to the preservation of the life and health of the people; is given authority to make standing orders and regulations for preventing the spread of contagious or infectious disease and for such other sanitary matters as it deems best to control by a general rule (G. C. 1237); it is also charged with the duty of making a careful study of the sanitary conditions and effects of localities and employments, and the business habits of the people (G. C. 1239), and of receiving and studying reports of occupational diseases (G. C. 1243-1 et seq.)
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> On consideration of the foregoing duties laid upon this department, we shall be glad to be advised if the Public Health Council is within its jurisdiction in adopting regulations establishing maximum allowable concentrations for substances dangerous to public health.
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> A copy of the suggested regulations is attached."

The general powers and duties of the department of health are set out in chapter 19, division II, title III of the General Code, comprising Section 1232 et seq. of the General Code. Those powers were to a considerable extent set forth in an act of the legislature passed in 1917, and found in 107 O. L., page 522. By the terms of Section 1232, General Code, the state department of health is to have and exercise all powers and duties theretofore conferred by law on the state board of health, and it is further provided that "all such powers, duties, *procedure and penalties* for violation of its sanitary regulations shall be construed to have been transferred to the state department of health by this act."

Section 1234, General Code, being a part of the same act, provided for the establishment of a public health council. That section as amended by the 96th General Assembly, provides for a council of seven members to be appointed by the Governor. Section 1235, General Code, prescribes the powers and duties of the public health council, and reads in part, as follows:

"It shall be the duty of the public health council and it shall have the power:

(a) To make and amend sanitary regulations to be of general application throughout the state. Such sanitary regulations shall be known as the sanitary code."

Section 1237, General Code, which has been in existence in its present form since 1908, reads as follows:

"The state board of health shall have supervision of all matters relating to the preservation of the life and health of the people and have supreme authority in matters of quarantine, which it may declare and enforce, when none exists, and modify, relax or abolish, when it has been established. It may make special or standing orders or regulations for preventing the spread of contagious or infectious diseases, for governing the receipt and conveyance of remains of deceased persons, and for such other sanitary matters as it deems best to control by a general rule. It may make and enforce orders in local matters when emergency exists, or when the local board of health has neglected or refused to act with sufficient promptness or efficiency, or when such board has not been established as provided by law. In such cases the necessary expense incurred shall be paid by the city, village or township for which the services are rendered."

As to prosecutions and penalties for violation of the regulations of the department of health, it is provided in Section 1247, General Code:

"All prosecutions and proceedings by the state board of health for the violation of a provision of this chapter which the board is required to enforce, or for the violation of any of the orders or regulations of the board, shall be instituted by its secretary on the order of the president of the board. The laws prescribing the modes of procedure, courts, practice, penalties or judgments applicable to local boards of health, shall apply to the state board of health and the violation of its rules and orders. All fines or judgments collected by the board shall be paid into the state treasury to the credit of such board."

Section 4414, et seq., General Code, prescribe penalties of fine and imprisonment for violation of regulations of local boards, and outline the procedure.

It appears to me quite clear that so far as the authority to make standing orders and regulations is concerned, the powers outlined in this statute

and vested in the board of health have been transferred in their entirety to the public health council. It will be observed that Section 1237 mentions as subjects for general regulation, "for preventing the spread of contagious or infectious diseases, for governing the receipt and conveyance of remains of deceased persons, and for *such other sanitary matters* as it deems best to control by a general rule." The language of Section 1235 which I have quoted, is "to make and amend sanitary regulations to be of general application throughout the state."

The word "sanitary" is a word having a wider meaning than the prevention of the spread of contagious or infectious diseases. Webster's Dictionary defines it thus: "Of or pertaining to health; designed to secure or preserve health." While the law very naturally places emphasis upon regulations designed to prevent the spread of communicable diseases in view of the obvious fact that they may become epidemic, it does not appear to be the policy of the law to limit the powers of either the state or local health authorities to the spread of contagious or infectious diseases but rather to guard the public health in every possible way and from every menace. Many diseases, by reason of the nature of their origin and the environment under which they breed, may affect large numbers of people without being contagious or infectious. Accordingly, the statutes to which reference has been made, specifically grant authority for the making of regulations not only for the prevention of contagion or infection, but "for such other sanitary matters" as the department of health "deems best to control by general rule."

In this connection, the language of Section 1239, General Code, is significant. It is provided:

> "The state board of health shall make careful inquiry as to the *cause of disease especially when contagious,* infectious, epidemic, or endemic, *and take prompt* action to control and suppress it. * * *"
>
> (Emphasis added.)

The language above quoted indicates that while communicable diseases constitute the special field for the action of the health authorities, they are not confined to that.

Section 1243-1, et seq., provide for the collection by the department of data relative to occupational diseases. Section 1243-1 provides in part:

"Every physician in this state attending on or called in to visit a patient whom he believes to be suffering from poisoning from lead, phosphorus, arsenic, brass, wood alcohol, mercury or their compounds, or from anthrax or from compressed air illness and such other occupational diseases and ailments *as the state department of health shall require to be reported,* shall within forty-eight hours from the time of first attending such patient send to the state commissioner of health a report stating:

(a) Name, address and occupation of patient.

(b) Name, address and business of employed.

(c) Nature of disease.

(d) Such other information as may be reasonably required by the state department of health."

(Emphasis added.)

Presumably the public health council will use this information as the basis for regulations to "control and suppress" the causes of such diseases.

The industrial commission has certain powers relative to occupational diseases. It seems proper to examine the laws relating to these powers and see whether they in any way limit the authority or duty of the department of health. Section 35 of Article II of the constitution, effective January 1, 1924, authorizes laws to be passed for compensating persons suffering from occupational diseases, and authorizing the collection of funds from employers to provide such compensation. Pursuant to such authority, the general assembly has enacted laws extending the powers of the industrial commission to include the granting of compensation for death or disability due to a large number of occupational diseases; these include diseases resulting from contact with many of the poisonous or noxious substances mentioned in your submitted schedule. See Section 1465-68, et seq., General Code.

Furthermore, the industrial commission has by way of guarding against such diseases, established a "department of safety and hygiene" which has formulated regulations designed to reduce the risk of accident and disease growing out of employment. Authority for such action is predicated on Section 871-22, General Code, which reads in part as follows:

"It shall also be the duty of the industrial commission, and it

shall have full power, jurisdiction and authority: * * *

(4) To ascertain and on and after the first day of September, 1913, to fix such reasonable standards and to prescribe, modify and enforce such reasonable orders for the adoption of safety devices, safeguards and other means or methods of protection to be as nearly uniform as possible as may be necessary to carry out all laws and lawful orders relative to the protection of the life, health, safety and welfare of employes in employments and places of employment or frequenters of places of employment.

(5) To ascertain, and on and after the first day of September, 1913, fix and order such reasonable standards for the construction, repair and maintenance of places of employment as shall render them safe. * * *"

Turning to the department of industrial relations, we find a somewhat similar situation. It is given authority to make specific orders to remedy dangerous conditions in factories and workshops and is required to see to the enforcement of laws intended to produce safe working conditions, and may make general orders to that end.

The law imposes certain penalties by way of fine and imprisonment for failure or refusal to comply with any lawful order of either of the above authorities, relating to safety of employes in or frequenters of places of employment, but I find nothing in these provisions which gives either the industrial commission or the department of industrial relations any exclusive jurisdiction.

Accordingly, it is my opinion that nothing in the laws relating either to the industrial commission or to the department of industrial relations, in any manner prohibits or limits the powers of the department of health through its public health council in enacting penal regulations of a general character designed to preserve and protect the public health, and in extending such regulations to cover occupational diseases.

It appears to be well settled that public health regulations based upon valid consideration of public health and welfare will be sustained by the courts, in the absence of plain abuse of discretion by the authorities enacting them. In 25 American Jurisprudence, page 299, it is said:

"Health regulations are of the utmost consequence to the general welfare; and if they are reasonable, impartial, and not against the general policy of the state, they must be submitted to by individuals for the good of the public, irrespective of pecuniary

loss. This is so whether the regulations are made by the legislature or by an agency delegated by it to act. Such regulations will be sustained if, upon a reasonable construction, there appears to be some substantial reason why they will promote the public health and if they are reasonably adapted to or tend to accomplish the result sought."

The same authority, at page 300, says:

"Generally, what laws or regulations are necessary to protect the public health and secure public comfort is a legislative question, and appropriate measures intended and calculated to accomplish these ends are not subject to judicial review. So, the courts have no jurisdiction to interfere with the acts of health authorities except in cases of palpable abuse of the discretion conferred, unless such jurisdiction is conferred by statute, as is done in some cases. The judgment of the court should not be substituted for the judgment of the board of health. Moreover, every reasonable presumption should be indulged in favor of the validity of the action of health authorities. One who attacks a regulation or order of a health board has the burden of establishing its invalidity; and before an ordinance or regulation of a board of health can be said to be unreasonable, it should clearly so appear."

At page 302 et seq. the same work instances some of the usual objects of health regulation which are upheld as legitimate exercise of the police power, including among others, regulations for the protection of waters from pollution, the prevention of the spread of communicable diseases, suppression of nuisances and regulation of trades and occupations in the interest of the public health. Referring to the subject last named, it is said at page 304:

"Laws enacted for the purpose of regulating or throwing restrictions around a trade, calling, or occupation in the interests of the public health are uniformly upheld and sustained. Such regulations are no less applicable in case a license has been issued to conduct a trade, calling, or occupation, notwithstanding information similar to that required under the health regulation was required for the purpose of obtaining such license. The question presented in cases where the validity of such laws is challenged is no longer whether the legislature has the power or authority to enact them, but whether the occupation, calling, or business sought to be regulated is one involving the public health."

The same principles are recognized by Ohio authorities. In 20 O. J., page 560, it is said:

> "The court will not interfere with a local police health regulation unless it is plain that it has no real or substantial relation to the public health."

In the case of Ex Parte Company, 106 O. S., 50, the court had before it the validity of certain rules and regulations adopted by the public health council of the state department of health, providing for the quarantine of persons found afflicted with a communicable disease, and it was there held:

> "Such regulations and the quarantine therein provided for are not in conflict with nor do they violate any provision of either the Federal or State Constitutions."

In the course of the opinion the court discussed the question of the right of the legislature to delegate its lawmaking power to the council and declared the authority given to a public health council and similar health authorities to adopt and enforce regulations was not an unlawful delegation of legislative power. The courts have sustained various health regulations which do not appear to be based exclusively on the prevention of the spread of communicable diseases. For instance, a regulation forbidding the sale of milk other than in sealed glass bottles—Staas vs. State, 15 O. C .C. (N.S.) 189, affirmed in 81 O. S. 497; a regulation authorizing the seizure and destruction of milk found to have a temperature above 50 degrees—Kaiser vs. Walsh, 4 O. N. P. (N.S.) 507, affirmed in 80 O. S. 742; a regulation forbidding the sale of ice cream in streets or public grounds except in sealed containers intended to prevent pollution from dust or other unsanitary conditions—Metropolis vs. Elyria, 23 O. C. C. (N. S.) 544; a regulation forbidding the slaughtering or dressing of animals or fowls in a building in which meats are sold—Shute vs. Elyria, 20 O. C. C. (N.S.) 369.

Coming, therefore, to the particular regulation which is the subject of your inquiry, I note from the memorandum attached to your letter, that it is proposed to adopt a regulation whereby it is declared that the exposing of any person or persons or the public to concentration in excess of the maximum allowable concentrations of certain named substances shall be considered to be dangerous to the public health. There follows a list of gases and vapors and the schedule of allowable concentration stated in parts per million by volume. The schedule also covers substances such as mineral dust and fumes with a like schedule of maximum allowable

concentration. The regulation submitted does not contain a description of the circumstances under which concentrations in excess of those allowed may become unlawful but I assume that it would be amplified by a provision somewhat similar to that which I find in the regulations of the State Board of Health of South Carolina, where provision is made making it unlawful for any person, firm or corporation to use or permit to be used in the conduct of his or its business in a manufacturing establishment or other place of employment, processes involving exposure to dust or gases arising from the materials listed, in excess of the specified concentrations unless arrangements have been made so as to prevent injury to health resulting therefrom.

I do not, of course, undertake to pass upon the technical accuracy or reasonableness of the regulation which you propose, but it is my opinion that it is within the powers given by law to the public health council to adopt a regulation of the character proposed.

Respectfully,

HUGH S. JENKINS

Attorney General