

OPINION NO. 79-093**Syllabus:**

1. Due to the absence of an express statutory grant of power to enforce its final orders, the Environmental Board of Review has no authority to take legal action if its orders are not followed.
2. Hearing examiners are included within the provision of R.C. 3745.02 allowing employment of "employees . . . necessary to perform [the Board's] duties"; thus, the Environmental Board of Review may employ hearing examiners as needed.
3. Although R.C. 3745.02 requires the Environmental Protection Agency to furnish "clerical and stenographic services" to the Environmental Board of Review, the services of hearing examiners are not included in that term and the Agency is not required to provide such services.
4. The services of an official court shorthand reporter are "clerical and stenographic services" for the purposes of R.C. 3745.02; the Environmental Protection Agency, therefore, must provide these services to the Board to the extent that such services are reasonably available from the resources of the Agency.

To: Thomas M. Phillips, Chairman, Environmental Board of Review, Columbus, Ohio
By: William J. Brown, Attorney General, December 11, 1979

I have before me your request for my opinion regarding certain powers of the Environmental Board of Review. Your questions have been modified since your initial request and may be restated as follows:

1. What legal steps are appropriate for the Environmental Board of Review to take in the event it becomes apparent that its final orders have not been followed?
2. May the Board use hearing examiners to help with the disposition of its cases?
3. If hearing examiners may be used, should they be provided by the Environmental Protection Agency pursuant to R.C. 3745.02, which requires the Agency to furnish "clerical and stenographic services" to the Board?
4. Are the services of an "official court shorthand reporter," as that term is used in R.C. 3745.05, included in the definition of "clerical and stenographic services," thus requiring the Agency to provide such services to the Board?

Your first question concerns the power of the Environmental Board of Review ("Board") to enforce its final orders. I shall assume for the purposes of this opinion that your question is limited to orders issued by the Board which affirm, vacate or modify the action taken at the lower level. R.C. 3745.06. It is a well established principle of law that the power of an administrative agency is necessarily limited to such power as is clearly and expressly granted by statute. State ex rel. Clarke v. Cook, 103 Ohio St. 465 (1921); 1965 Op. Att'y Gen. No. 65-010. In order for the Board

to possess the power to enforce its orders, this power must be expressly granted to the Board by statute. R.C. 3745.02 through R.C. 3745.06, which govern the acts of the Board, do not include any grant of enforcement power. Thus, it is my opinion that the Board lacks power to take any steps to enforce its final orders.

In your second question you ask if the Board may use hearing examiners in disposing of its cases. As was stated above, the Board does not possess powers which are not expressly granted by statute. Hence, if the Board is to utilize hearing examiners, the power to employ the examiners must be granted by statute. This power is found in R.C. 3745.02, which states in pertinent part:

The board may appoint a secretary to hold office at its pleasure. The secretary shall perform such duties as the board prescribes, and shall receive such compensation as the board fixes in accordance with schedules as are provided by law for the compensation of state employees. The board may employ such other employees as are necessary to perform its duties, and such other employees shall be in the classified service. The board may retain the services of experts, consultants, and intermittent help. (Emphasis added.)

The statute thus allows the Board to employ persons who are necessary for the performance of its duties. The General Assembly has limited neither the type of personnel that may be employed nor the type of duties that may be performed by such personnel. Therefore, there is no prohibition against construing the above provision to include the authority to employ hearing examiners. The Supreme Court has held that the appointment of hearing examiners is a permissible delegation of authority by an administrative body. Bell v. Board of Trustees of Lawrence County General Hospital, 34 Ohio St. 2d 70 (1973). Therefore, since R.C. 3745.05 requires the Board to hold hearings on appeals from the Agency's orders, it is my opinion that the Board possesses the authority to employ hearing examiners pursuant to R.C. 3745.02 if it is in need of additional personnel to hold the hearings.

You should note, though, that in appointing hearing examiners and delineating their duties, the Board must retain the authority to make the ultimate determination as to the reasonableness and lawfulness of the action which is the subject of an appeal. R.C. 3745.05 imposes on the Board the duty to issue orders regarding the appeals it hears. The Board must state in its orders whether the action which is the subject of the appeal was lawful and reasonable. The duty to make such a determination has been imposed solely on the Board. Where powers requiring judgment and discretion are given to a public officer or board, the powers may not be delegated. Burkholder v. Lauber, 6 Ohio Misc. 152 (C.P. Fulton County 1965). Thus, the Board may not delegate the power to make the ultimate determination on the appeal. The duties of the hearing examiners may be such that they hold the hearings and make recommendations, but the hearing examiners may not be the final authority in making a determination which the Board is required by statute to make. Although the Board possesses the power to employ hearing examiners, it may not delegate to them its duty to review the lawfulness of the Director's action.

In your next question you ask whether the hearing examiners should be furnished to the Board by the Environmental Protection Agency ("Agency"). The applicable statute is R.C. 3745.02, which states in part:

The environmental protection agency shall furnish such clerical and stenographic services to the board as the board requests and is [sic] reasonably available. (Emphasis added.)

You suggest that hearing examiners might come within the definition of clerks or stenographers. Webster's New World Dictionary 265 (2d college ed. 1976) defines "clerk" as "an office worker who keeps records, types letters, does filing" and performs other similar tasks. "Stenographer" is defined as a person skilled in "stenography," the "work of writing down dictation, testimony, etc. in shorthand and later transcribing it, as on a typewriter." Webster's Dictionary, supra, at p.

1395. The term "hearing examiner" is not defined in the dictionary, but it is clear that in common parlance the term refers to one who conducts hearings and listens to testimony; thus, that person would not fall within either of the above definitions. The Agency is under no duty, therefore, to furnish hearing examiners to the Board.

Your last question is whether the Agency must furnish court reporters to the Board. R.C. 3745.05 requires the Board to make a record of all hearings. The statute states in part:

A stenographic record of the testimony and other evidence submitted shall be taken by an official court shorthand reporter.

The use of the words "stenographic" and "shorthand" indicate the intention of the General Assembly that the court reporter's duties parallel those of a stenographer. As noted above, "stenography" includes the transcription of testimony. I conclude, therefore, that the services of a court reporter, as referred to in R.C. 3745.05, are included within the definition of stenographic services as used in R.C. 3745.02.

Having determined that court reporters are within the purview of R.C. 3745.02, it is necessary to determine the nature of the duty imposed on the Agency by that statute. By stating that the Agency shall furnish services to the Board, the General Assembly has imposed a mandatory duty on the Agency. State ex rel. Niles v. Bernard, 53 Ohio St. 2d 31 (1978); 1979 Op. Att'y Gen. No. 79-035. Moreover, the Court of Appeals has stated that "[c]lerical and stenographic services must be provided by the agency to the board." Kripke-Tuschman Industries v. Williams, No. 78AP-865 (Ct. App. Franklin County July 31, 1979). Therefore, upon request by the Board, the Agency must provide the Board with clerical and stenographic services. The duty of the Agency to provide the services, however, is limited to situations when such services are "reasonably available." No statutory definition of "reasonably available" is given. Hence, I must look at the ordinary meaning of the words. R.C. 1.42. Webster's Dictionary, supra, defines "reasonably" as "not extremely" or "not excessively" at p. 1183. "Available" is defined at p. 96 as that which "can be got, had, or reached." Therefore, the provision imposes upon the Agency the duty to supply the services if they are not extremely or excessively difficult to obtain.

Although "reasonably available" does not appear elsewhere in R.C. Chapter 3745.02, the final paragraph of R.C. 3745.02 does provide, in part:

The board shall provide itself and its employees with such offices, equipment, and supplies as are necessary to perform its duties, using those available from the environmental protection agency wherever possible. (Emphasis added.)

The sense of both this sentence and the language quoted above concerning the provision of clerical and stenographic services is that the services and supplies that are to be provided to the Board by the Agency are those which are reasonably available from within the services and supplies under the control of the Agency. It is a principle of statutory construction that all words within a statute are to be given effect. R.C. 1.47(B). If the Agency were required to provide the Board with all clerical and stenographic services which the Board requests, regardless of the resources held by the Agency, the words "and is reasonably available" would be of no effect; it is implicit in any language governing the provision of services that such services can be provided only if they are reasonably available in the marketplace. By way of analogy, if the Agency were required to provide all offices, equipment, and supplies needed by the Board, there would be no need to include the provision that those available from the Agency be used wherever possible.

Accordingly, I conclude that the Agency must furnish to the Board such clerical and stenographic services as are reasonably available to the Agency from its own staff or other resources. Thus, if the Agency currently employs clerks or stenographers and they can be spared without extreme difficulty to the Agency,

they must be provided to the Board at the Board's request. Similarly, if the Agency has resources available for hiring such services for the Board, it must do so. I do not find, however, that the Agency's duty to provide such services is absolute. If the Agency is not able to obtain such services from within its staff and budget without extreme difficulty, then the Agency need not provide the Board with such services, even though the services may be available in the marketplace. Hence, the determination as to whether the Agency must provide services of court reporters to the Board is a question of fact, dependent upon the resources which are available to the Agency.

Accordingly, it is my opinion, and you are hereby advised, that:

1. Due to the absence of an express statutory grant of power to enforce its final orders, the Environmental Board of Review has no authority to take legal action if its orders are not followed.
2. Hearing examiners are included within the provision of R.C. 3745.02 allowing employment of "employees . . . necessary to perform [the Board's] duties"; thus, the Environmental Board of Review may employ hearing examiners as needed.
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