

OPINION NO. 89-004**Syllabus:**

1. R.C. 3745.06 does not authorize the Environmental Board of Review to tax a party for the expense of preparing and transcribing the record of the proceedings out of which an appeal under that section arose.
2. In the event that an appeal is taken pursuant to R.C. 3745.06, the expense of preparing the transcript of the proceedings out of

which the appeal arose is to be taxed in the court of appeals as a part of the costs of the appeal, regardless of the reason for which the transcript was originally prepared.

3. The Environmental Board of Review is without authority to require a party which is pursuing an appeal under R.C. 3745.06 to provide the Board with a deposit as security for the cost of the transcript of the proceedings out of which the appeal arose; rather, the Board is under a duty to pay the initial cost of preparing and filing the transcript in accordance with R.C. 3745.06.

To: James L. Baumann, Chairman, Environmental Board of Review, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, February 23, 1989

I have before me your opinion request regarding the operation of that portion of R.C. 3745.06 concerning the expense of preparing and transcribing the record of proceedings before the Environmental Board of Review when the Board's order is appealed pursuant to that statute to the court of appeals. You have asked several questions which I have partially restated as follows:

1. Does R.C. 3745.06 require the Environmental Board of Review (EBR) to tax the expense of preparing and transcribing the record to a party appealing the case to the court of appeals?
2. If the party appealing the decision of the EBR is a governmental unit, does R.C. 3745.06 require that the governmental unit be charged the expense of preparing and transcribing the record upon appeal since such units are not exempted by the express language of the statute?
3. If an appeal is taken from the decision of the EBR in a case where the Board has previously ordered up the transcript, should the expense of preparing and transcribing the record be taxed as part of the cost of such appeal?
4. May the EBR require a party which is appealing the Board's decision to provide a deposit for the transcription of the record at the time the notice of appeal is filed, or must the Board advance the cost of transcribing the record and then bill the cost as an expense of the appeal?
5. In the event that the Board is required to collect the cost of the transcript after an appeal is filed, are the costs of the appeal simply taxed to the party losing the appeal, and can the costs be taxed by the Board prior to an ultimate decision on the appeal by a higher court?

Since your questions concern the authority of the Environmental Board of Review, I begin by noting that the Board is created pursuant to R.C. 3745.02. As a creature of statute, the EBR has only those powers and duties assigned to it by the legislature and those powers necessarily implied therefrom. 1979 Op. Att'y Gen. No. 79-093. See *State ex rel. Clarke v. Cook*, 103 Ohio St. 465, 134 N.E. 655 (1921); *Green v. Western Reserve Psychiatric Habilitation Center*, 3 Ohio App. 3d 218, 220, 444 N.E.2d 442, 444 (Summit County 1981) ("[a]dministrative powers are only implied when clearly necessary to effect an express power. Such implied power can be no greater than the express power and must be exercised subject to the same express power limitations" (citations omitted)).

Pursuant to R.C. 3745.04, any person who was a party to a proceeding before the Director of Environmental Protection or the director of a local board of health may appeal to the EBR an action of either the Director or a local board of health. See generally R.C. 3745.04 (defining "person" and "action," as those terms are used

in R.C. 3745.04). R.C. 3745.06 then provides for appeals of the orders of the EBR to the courts of appeals. It is, therefore, necessary to examine the provisions of R.C. 3745.06 to determine whether that statute authorizes the EBR to charge a party for the preparation and transcription of the Board's proceedings where such party appeals the Board's order to a court of appeals.

R.C. 3745.06 states in part:

Any party adversely affected by an order of the environmental board of review may appeal to the court of appeals of Franklin county, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. Any party desiring to so appeal shall file with the board a notice of appeal designating the order appealed....

....
 Within twenty days after receipt of the notice of appeal, the board shall prepare and file in the court the complete record of proceedings out of which the appeal arises, including any transcript of the testimony and any other evidence which has been submitted before the board. The expense of preparing and transcribing the record shall be taxed as a part of the costs of the appeal. The appellant, other than the state or a political subdivision, or an agency of either, or any officer of them acting in his representative capacity, shall provide security for costs satisfactory to the court. Upon demand by a party, the board shall furnish at the cost of the party requesting the record a copy of such record. If the complete record is not filed within the time provided for in this section, any party may apply to the court to have the case docketed, and the court shall order such record filed. (Emphasis added.)

With respect to this portion of R.C. 3745.06, your first question contemplates that the expense of the preparation and transcription of the proceedings before the EBR will be taxed to one of the parties by the Board itself as part of the costs of the appeal. Admittedly, when read alone, the sentence concerning the taxation of the expense of the transcript is unclear; the sentence simply states that such expense shall be taxed as part of the costs of the appeal, but fails to designate the entity with authority to tax such expense as costs. It is a fundamental rule of statutory construction, however, that in determining the meaning of a sentence within a statute, the sentence should not be dissociated from its context. Rather, the intent of the legislature should be determined from examining the enactment as a whole. *Black-Clawson Co. v. Evatt*, 139 Ohio St. 100, 38 N.E.2d 403 (1941). The appeal referred to in the above-quoted portion of R.C. 3745.06 is clearly that conducted by the court of appeals, not the appeal heard by the EBR, the latter being governed instead by R.C. 3745.04 and .05. That the legislature intended the cost of the transcript of the EBR hearing to be taxed in the court of appeals, rather than by the EBR, is apparent from reading the above-quoted language in the context of R.C. 3745.06 as a whole and, more specifically, the following language requiring the appellant, with certain exceptions, to "provide security for costs satisfactory to the court" (emphasis added). Since it is the court of appeals which determines the sufficiency of security for costs, it follows that the costs for which such security is provided are those in the court of appeals. Thus, the expense of the transcript, which is to be "taxed as a part of the costs of the appeal," is to be taxed in the proceedings in the court of appeals. See generally R. App. P. 24 (taxation of costs on appeal).

The authority of the Environmental Board of Review to assess costs against a party in a proceeding before the Board was discussed by my predecessor in 1979 Op. Att'y Gen. No. 79-089. Citing *State ex rel. Comm'rs. v. Gullbert*, 77 Ohio St. 333 (1907), the opinion notes that the power to assess costs must be expressly granted. Further, "[t]he authority for courts to assess costs is...expressly granted by statutes and rules which are not applicable to administrative agencies." Op. No. 79-089 at 2-284. Having found no express authority for the Board to assess costs, my predecessor concluded that the Board may not assess costs to parties in the proceedings before it. I concur with my predecessor's conclusion and find that just as the Board has no authority to assess costs to parties in proceedings before the

Board, it is also without authority to assess costs to parties in proceedings before the court of appeals.

Your second question concerns the taxation of the cost of the transcript where the party appealing the decision of the Board is a governmental unit. Pursuant to R.C. 109.12, the Attorney General is authorized to give legal advice, when so requested, to a state board in all matters relating to its official duties. Since, as stated in answer to your first question, the matter of the taxation of the expense of the transcript of proceedings before the Environmental Board of Review is, pursuant to R.C. 3745.06, not a function of the EBR, I must decline to address your second question.

Your third question asks: "If an appeal is taken from the decision of the EBR in a case where the Board has previously ordered up the transcript, should the expense of preparing and transcribing the record be taxed as part of the cost of such appeal?" Concerning the Board's duty to prepare and file the record of the proceedings out of which an appeal arises, R.C. 3745.06 states:

Within twenty days after receipt of the notice of appeal, the board *shall prepare and file* in the court the complete record of proceedings out of which the appeal arises, including any transcript of the testimony and any other evidence which has been submitted before the board. The expense of preparing and transcribing the record *shall be taxed* as a part of the costs of the appeal. (Emphasis added.)

Pursuant to R.C. 3745.06, once the Board has received a notice of appeal, it has twenty days within which to prepare and file in the court to which the appeal was taken the complete record of the Board's proceedings, "including any transcript of the testimony." Further, R.C. 3745.06 is clear in making the expense of preparing and transcribing the record part of the costs of the appeal. Your opinion request states that, on occasion, the Board has the transcript of its proceedings prepared for purposes other than inclusion in the record on appeal. R.C. 3745.06 does not, however, qualify or limit the instances in which the cost of preparing the transcript of testimony before the Board may be taxed as a cost of the appeal. Thus, whenever an appeal is taken from an order of the Board pursuant to R.C. 3745.06, the Board is under a duty to prepare and file with the court a record of the proceedings from which the appeal is taken; the expense of preparing and transcribing the record, including a transcript of the testimony, is part of the costs of such appeal, regardless of the reason for which the transcript was originally made.

Your fourth question asks whether the EBR may require a party which is appealing the Board's decision to provide a deposit for the cost of transcribing the record at the time of filing the notice of appeal or, in the alternative, whether the Board must advance the cost of transcribing the record. As stated above, since the EBR is a creature of statute, its powers are limited to those granted by statute. No statute of which I am aware expressly authorizes the Board to require a deposit for the preparation of a transcript to be used in an appeal under R.C. 3745.06. The only instance in which the Board may charge a party for the record of the Board's proceedings is where the party demands a copy of the record, in which case R.C. 3745.06 imposes a duty upon the Board to "furnish at the cost of the party requesting the record a copy of such record." Had the legislature intended that the Board collect the expense of the preparation of the transcript in advance of the appellate proceedings authorized by R.C. 3745.06, it could have expressly so provided. See *State ex rel. Judson v. Coates*, 8 Ohio N.P. 682 (C.P. Cuyahoga County 1901). See, e.g., R.C. 3745.05 (concerning the procedure in hearings before the EBR, states in part: "*The fee and mileage expenses incurred at the request of the appellant shall be paid in advance by the appellant, and the remainder of the expenses shall be paid out of funds appropriated for the expenses of the board*" (emphasis added)). I must conclude, therefore, that in the absence of statutory authority, the Board may not require a party which is appealing the Board's decision to the court of appeals under R.C. 3745.06 to provide a deposit for the cost of the transcript of the proceedings out of which the appeal arises.

Part of your question is whether the Board itself must advance the cost of transcribing the record. As discussed above, R.C. 3745.06 imposes upon the Board the mandatory duty of preparing and filing with the court to which the Board's order

has been appealed a "complete record of proceedings out of which the appeal arises, including any transcript of the testimony and any other evidence which has been submitted before the board" (emphasis added). The only statutory provision concerning payment for the expense of the transcript is that it "shall be taxed as a part of the costs of the appeal."

I am not aware of any cases or prior opinions of this office which discuss the operation of this portion of R.C. 3745.06. A similar provision, however, was interpreted in the case of *Smith v. Chester Township Bd. of Trustees*, 60 Ohio St. 2d 13, 396 N.E.2d 743 (1979). The *Smith* case originated as an appeal to the court of common pleas under R.C. Chapter 2506 from a decision of the board of township trustees removing Smith from his employment. Smith timely perfected his appeal. The board, however, refused to prepare and file the transcript of testimony from its removal hearing. Although the court ordered the board to file the transcript, the board refused to do so until Smith paid the cost of the transcript. The court in *Smith* found the question of initial payment for the cost of preparing the transcript to be governed by former R.C. 2506.02 (1956-1957 Ohio Laws 963, Am. H.B. 880 (eff. Sept. 16, 1957)), which stated:

Within thirty days after filing the notice of appeal, the officer or body from which the appeal is taken shall, upon the filing of a precipe, prepare and file in the court to which the appeal is taken, a complete transcript of all the original papers, testimony and evidence offered, heard and taken into consideration in issuing the order appealed from. The costs of such transcript shall be taxed as a part of the costs of the appeal.

Without analysis of the statute itself, the court concluded that:

case law in Ohio supports the view that the burden is on the administrative agency to produce the transcript for appeal. See, e.g., *Fleischmann v. Medina Supply Co.* (1960), 111 Ohio App. 449; *Sofer v. Housing Authority* (1975), 44 Ohio App. 2d 113. Implicit in these decisions is the conclusion that the duty to prepare the transcript includes the necessity of assuming the initial expense of its preparation.

....
...[w]e find that R.C. 2506.02 requires that the agency pay the initial cost of preparing the transcript of testimony and evidence....

60 Ohio St. 2d at 17, 396 N.E.2d at 746-47. Because of the similarity in language between the former R.C. 2506.02 and the portion of R.C. 3745.06 under consideration, I must conclude, based upon the court's decision in *Smith*, that R.C. 3745.06 imposes upon the Environmental Board of Review the duty of paying the initial cost of preparing the transcript of testimony.

Your final question reads as follows: "In the event that the Board is required to collect the cost of the transcript after an appeal is filed, are the costs of the appeal simply taxed to the party losing the appeal, and can the costs be taxed by the Board prior to an ultimate decision on the appeal by the higher court?" As set forth above in response to your second question, since R.C. 3745.06 requires the court of appeals rather than the Environmental Board of Review to tax the expense of preparing the transcript of the Board's proceedings, I must decline to address this question because it does not pertain to the Board's duties.

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. R.C. 3745.06 does not authorize the Environmental Board of Review to tax a party for the expense of preparing and transcribing the record of the proceedings out of which an appeal under that section arose.
2. In the event that an appeal is taken pursuant to R.C. 3745.06, the expense of preparing the transcript of the proceedings out of which the appeal arose is to be taxed in the court of appeals as a part of the cost of the appeal, regardless of the reason for which the transcript was originally prepared.

3. The Environmental Board of Review is without authority to require a party which is pursuing an appeal under R.C. 3745.06 to provide the Board with a deposit as security for the cost of the transcript of the proceedings out of which the appeal arose; rather, the Board is under a duty to pay the initial cost of preparing and filing the transcript in accordance with R.C. 3745.06.