

OPINION NO. 2009-026**Syllabus:**

2009-026

1. The board of health of a general health district has no authority to require haulers of solid waste to obtain a license from, or pay a fee to, the health district in order to operate within the district.
2. A board of health of a general health district has the authority to promulgate regulations governing the collection and transportation of solid waste for the purpose of preventing or abating the creation of a nuisance.

To: Paul A. Dobson, Wood County Prosecuting Attorney, Bowling Green, Ohio

By: Richard Cordray, Ohio Attorney General, July 14, 2009

You have asked whether a combined general health district has the authority to prosecute an individual for failing to register as a solid waste hauler. You have explained that the health district has long-standing regulations that require any person who carries “out the business of solid waste hauler by providing and/or leasing solid waste containers, collecting solid waste, transporting solid waste or disposing of solid waste within the boundaries” of the health district to obtain an operating license for the first “solid waste collection and transportation vehicle” and a license for each additional vehicle used by the hauler. A fee must be paid for each license, which is valid for one year or until revoked. The board of health has also promulgated regulations establishing standards for the collection and transportation of solid waste within the district.¹ Solid waste collection and transportation vehicles and solid waste storage containers are subject to inspection by the health commissioner, who may also inspect solid waste transportation and disposal practices. Violations of the board’s regulations may result in revocation or suspension of a hauler’s operating and vehicle licenses, criminal prosecution, civil action, “and/or any other remedy provided by law,” including the penalties set forth in R.C. 3709.99. *See* notes 2 and 9, *infra*.

¹ For example: all solid waste storage containers and solid waste hauling vehicles “must be routinely emptied of their solid waste contents”; all solid waste vehicles “must be completely enclosed or be provided with covers so as to prevent refuse, waste and litter or any other solid waste from spilling upon the roadway or any property or land adjacent thereto”; solid waste vehicles “shall be of easily cleanable construction and cleaned routinely as to prevent odor, nuisance or insect infestation and breeding and shall be maintained in good repair”; the vehicles must have a fire extinguisher at all times; and all solid wastes “must be properly disposed of at an approved and licensed sanitary facility.”

In order to answer your question, we must first examine the authority of a board of health of a general health district to require that solid waste haulers secure a license and pay a licensure fee. The board of health of a general health district, as a creature of statute, has only those powers conferred by statute, either expressly or by necessary implication. *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536, at ¶¶ 38-40; *Wetterer v. Hamilton County Bd. of Health*, 167 Ohio St. 127, 146 N.E.2d 846 (1957). See R.C. 3709.01 (creating general health districts); R.C. 3709.02 (establishing boards of health of general health districts). We are unaware of any statute that expressly authorizes the board of health of a general health district to license or impose a fee on solid waste haulers.

Nor are we aware of statutory powers from which the authority of a board of health to license waste haulers may be implied. In R.C. 3709.21 the General Assembly has conferred upon boards of health the power to “make such orders and regulations as are necessary for [their] own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances.”² The Ohio Supreme Court has described R.C. 3709.21, however, as “a rules-enabling statute, not a provision granting substantive regulatory authority” to a board of health. *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health* (syllabus, paragraph 3). The court has explained that the General Assembly did not intend in R.C. 3709.21 or elsewhere to grant boards of health “unlimited,” “plenary,” or “unfettered” authority to adopt any rule deemed necessary for the public health. *Id.* at ¶¶ 22, 25, 41. Rather, “specific statutory authorization, beyond the general power set forth in R.C. 3709.21, is required before a local board of health can regulate in a certain area.” *Id.* at ¶ 29. As noted above, there is no “specific statutory authorization, beyond the general power set forth in R.C. 3709.21,” for boards of health to license solid waste haulers, and thus the authority to adopt licensure requirements may not be implied from R.C. 3709.21. *Cf. State v. Elliott*, 32 Ohio App. 2d 144, 146, 289 N.E.2d 183 (Monroe County 1971) (a “board of county commissioners does not have the authority under the provisions of R.C. 343.01(A) [now R.C. 343.01(G)(2)], either express or implied, to require licenses for the collection and transportation of solid wastes within a solid waste district”).³

This lack of authority may be compared to the statutory power of boards of health to otherwise participate in the regulation of solid waste. For example, boards of health are expressly authorized to license and collect fees from solid waste facil-

² Any person who violates a regulation promulgated under R.C. 3709.21 is subject to a fine for a first offense, and to imprisonment and a fine for subsequent offenses. R.C. 3709.99.

³ The pertinent language of R.C. 343.01 authorizes a board of county commissioners to adopt rules “[g]overning the maintenance, protection, and use of solid waste collection or other solid waste facilities located within” the county’s solid waste management district.

ities and infectious waste treatment facilities within the health district.⁴ R.C. 3734.04; R.C. 3734.05-.10. Boards of health are also authorized to license “scrap tire collection, storage, monocell, monofill, and recovery facilities,” and collect licensure fees. R.C. 3734.04; R.C. 3734.81-.82.⁵ If the General Assembly had intended to empower boards of health to also license and collect fees from solid waste haulers, it could have done so with similarly explicit language. See *Lake Shore Electric Railway Co. v. Public Utilities Commission*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (if the legislature had intended a particular meaning, “it would not have been difficult to find language which would express that purpose,” having used that language in other connections); *State ex rel. Enos v. Stone*, 92 Ohio St. 63, 67, 69, 110 N.E. 627 (1915) (if the General Assembly intended a particular result, it could have employed language used elsewhere that plainly and clearly compelled that result). See also *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, at ¶¶ 23, 25 (the enactment of statutes that “explicitly and in great detail identify[] specific areas where local boards of health have substantive regulatory power to address public-health issues” “indicates that the General Assembly did not intend through R.C. 3709.21 to vest local boards of health with plenary authority to adopt any regulations that they deem necessary for the public health,” for then such explicit statutes “would be rendered superfluous”).⁶

⁴ In order to carry out this licensure function, however, a health district must be placed on an “approved list” by the Director of Environmental Protection. R.C. 3734.08; 7B Ohio Admin. Code 3745-37-08 and 3745-37-09.

⁵ *Transporters* of scrap tires must, however, register with, and receive a certificate from, the Director of Environmental Protection. R.C. 3734.83.

⁶ Although general health districts have no statutory authority to license solid waste haulers, courts have upheld licensing requirements enacted by municipalities. See *State ex rel. Mooock v. City of Cincinnati*, 120 Ohio St. 500, 505, 166 N.E. 583 (1929) (syllabus, paragraph 2) (G.C. 3646 [R.C. 715.37] and G.C. 3649 [R.C. 715.43] confer “ample” authority on municipalities “to enact regulations conserving the public health and providing for the collection and disposition of garbage,” and “[i]t was within the province of the city authorities to commit the power of issuing permits for the collection and disposal of garbage upon a designated officer, leaving to him the terms and conditions under which they should be issued”); *Yutze v. Copelan*, 17 Ohio App. 461 (Hamilton County 1923), *aff’d on other grounds*, 109 Ohio St. 171, 142 N.E. 33 (1923) (upholding the constitutionality of an ordinance, passed pursuant to G.C. 4326 [R.C. 735.02], making it unlawful to haul garbage through the city unless the owner of the garbage first procured from the public service director a permit to remove it). R.C. 715.37 authorizes a municipal corporation to “[p]rovide for the public health” and “[s]ecure the inhabitants of the municipal corporation from the evils of contagious, malignant, and infectious diseases,” and R.C. 715.43 states that “[a]ny municipal corporation may provide for the collection and disposition of sewage, garbage, ashes, animal and vegetable refuse, dead animals, and animal offal, and may establish, maintain, and regulate plants for the disposal thereof.” R.C. 735.02 authorizes a municipal public service

Health districts are concerned that unlicensed haulers illegally dispose of the items they collect and that their loads may be improperly secured so that they fall on the roadways or on other vehicles. These offenses already constitute criminal violations under existing law. *See, e.g.*, R.C. 3734.03 (“[n]o person shall dispose of solid wastes by open burning or open dumping, except as authorized by the director of environmental protection”); R.C. 3734.99 (penalties for violation of R.C. 3734.03); R.C. 4513.31(A) (“[n]o vehicle shall be driven or moved on any highway unless the vehicle is so constructed, loaded, or covered as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping therefrom”); R.C. 4513.31(B) (“no vehicle loaded with garbage, swill, cans, bottles, waste paper, ashes, refuse, trash, rubbish, waste, wire, paper, cartons, boxes, glass, solid waste, or any other material of an unsanitary nature that is susceptible to blowing or bouncing from a moving vehicle shall be driven or moved on any highway unless the load is covered with a sufficient cover to prevent the load or any part of the load from spilling onto the highway,” unless it is a “rubbish vehicle in the process of acquiring its load”); R.C. 4513.31(C) and R.C. 4513.99 (violation of R.C. 4513.31(A) or (B) is a criminal offense); R.C. Chapter 3767 (establishment of statutory nuisances and remedies for abating them).⁷ *See also, e.g., Bailey v. City of Martins Ferry*, 46 Ohio St. 2d 95, 95, 346 N.E.2d 317 (1976) (a municipality may require that vehicles, when hauling rubbish, garbage, “or anything else of an unsightly or unsanitary nature, which can fall or be blown from said vehicle on to the alleys, streets, highways, sidewalks and property adjacent thereto” be covered with a tarpaulin or other cover that will prevent the materials “from being dropped or being blown from said vehicle,” and such ordinance does not conflict with R.C. 4513.31).

And, as discussed above, the health district has promulgated regulations governing the conduct of the business of solid waste haulers separate and apart from licensure. Although authority for a board of health to license solid waste haulers may not be implied from R.C. 3709.21, the statute expressly empowers a board of health to enact regulations for the “prevention, abatement, or suppression of nuisances.” *See also* R.C. 3707.01 (requiring a board of health to “abate and

director to “manage” garbage. Both *Moock* and *Yutze* also recognize the authority of a municipality to regulate the collection of garbage pursuant to its police powers under Ohio Const. art. XVIII, § 3. *See also City of Portsmouth v. McGraw*, 21 Ohio St. 3d 117, 488 N.E.2d 472 (1986).

⁷ R.C. Chapter 3767 establishes various activities as statutory nuisances. *See* R.C. 3767.01(C). For example, R.C. 3767.13(B) prohibits any person from causing or allowing “offal, filth, or noisome substances to be collected or remain in any place to the damage or prejudice of others or of the public” and R.C. 3767.32 prohibits littering. Enforcement of R.C. Chapter 3767 is left with the Attorney General, municipal and township law directors, and county prosecutors, or “any person who is a citizen of the county in which the nuisance exists.” R.C. 3767.03. *See also* R.C. 3767.04-.11; R.C. 3767.23-.28.

remove all nuisances within its jurisdiction”);⁸ R.C. 3709.22 (a board of health may “provide for the inspection and abatement of nuisances dangerous to public health or comfort, and may take such steps as are necessary to protect the public health and to prevent disease”).⁹ See generally 2006 Op. Att’y Gen. No. 2006-016. In *Weber v. Board of Health*, 148 Ohio St. 389, 74 N.E.2d 331 (1947), the court held that, although a board of health had no authority under G.C. 1261-42 (now R.C. 3709.21) to prohibit the transportation of garbage into the district for the purpose of feeding livestock, the board had the “power to make all reasonable rules and regulations for the conduct of that business, to the end that it may not become a factual nuisance.” *Id.*, 148 Ohio St. at 400.¹⁰ See also 1953 Op. Att’y Gen. No. 2679, p. 207, 209 (“[i]t is manifest that garbage, in order to be collected and properly disposed of must be transported in some manner,” and “[i]t would therefore be wholly unreasonable to attempt to prohibit its transportation”; however, “[i]t would be quite proper for a board of health to provide some regulation as to the manner in which the removal and disposition should be accomplished, with such precautions as will tend to prevent the garbage while in transportation or in process of disposal from becoming a nuisance or menace”). Thus, the board of health may continue to regulate the

⁸ See R.C. 3707.02 (a board of health may “cause the arrest and prosecution” of any person who neglects or disregards an order made by the board of health under R.C. 3707.01); R.C. 3707.021 (a board of health may seek injunctive relief against any person who does not comply with an order it has issued under R.C. 3707.01); R.C. 3707.48 (“[n]o person shall violate sections 3707.01 to 3707.53, inclusive, of the Revised Code, or any order or regulation of the board of health of a city or general health district made in pursuance thereof, obstruct or interfere with the execution of such order, or willfully or illegally omit to obey such order”); R.C. 3707.99(B) (whoever violates R.C. 3707.48 is guilty of a minor misdemeanor on a first offense and a fourth degree misdemeanor on each subsequent offense).

⁹ See R.C. 3709.211 (a board of health may seek injunctive relief against any person who fails to comply with an order it has issued under R.C. 3709.21); R.C. 3709.99(A) (“[w]hoever violates section 3709.20, 3709.21, or 3709.22 of the Revised Code or any order or regulation of the board of health of a city or general health district adopted in pursuance of those sections, or whoever interferes with the execution of an order or regulation of that nature by a member of the board or person authorized by the board, shall be fined not more than one hundred dollars or imprisoned not more than ninety days, or both”).

¹⁰ In holding that R.C. 3709.21 does not grant boards of health substantive power to address any public health issue in the absence of specific authorization set forth otherwise in statute, the court in *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536 explains that, in *Weber*, G.C. 1261-42 (now R.C. 3709.21) authorized the board of health “to regulate the transportation and use of garbage for animal feeding because such practices tended to create nuisances,” and “there was separate statutory authority that gave local boards of health the power to abate nuisances and adopt sanitary controls,” such as G.C. 1261-26 (now R.C. 3709.22) and G.C. 4420 (now R.C. 3707.01). *Id.* at ¶ 33.

conduct of solid waste haulers, without imposing licensure requirements, to the extent necessary to prevent or abate the creation of a nuisance.

In the interest of completeness, we note the case of *Rumpke Container Service, Inc. v. Zaino*, 94 Ohio St. 3d 304, 762 N.E.2d 995 (2002) involving imposition of the state sales tax on a taxpayer's purchase of trucks, truck parts, and containers placed on the trucks for hauling waste materials, where the taxpayer was a business collecting and transporting waste, refuse, and trash from sites for disposal in landfills. The taxpayer argued that it had been granted a permit from the local health district to engage in garbage collection and removal, and that such permit qualified the purchases for exemption from the sales tax under R.C. 5739.02(B)(32) and R.C. 5739.01(Z)(1).¹¹ The court found that, while the permit authorized the collection and removal of garbage, it did not meet the requirements of R.C. 5739.01(Z)(1), stating that, "while the Hamilton County General Health District may have the power to police the collection and removal of garbage through the granting of permits, it does not have the authority to regulate motor transportation of personal property belonging to others for consideration over or on the highways, roadways, streets, or any similar public thoroughfare within the meaning of R.C. 5739.01(Z)(1)" (such authority being given to the state public utilities commission). *Id.*, 94 Ohio St. 3d at 308.

Although the court did not question the authority of the health district to impose permitting requirements on garbage haulers, the district's authority was not the issue before the court, and ultimately proved immaterial to the court's conclusion—even if the regulation were valid, the permit it required did not qualify the taxpayer for an exemption under R.C. 5739.02. In light of the long-standing proposition that boards of health have only the authority that is expressly granted by statute or necessarily implied from an express grant, and that R.C. 3709.21 does not grant additional substantive powers to health districts, we decline to conclude, based on *Rumpke*, that boards of health have the authority to license and impose a fee on transporters of solid waste. Because a board of health of a general health district has no authority to promulgate regulations requiring waste haulers to obtain a license and pay a fee to the board, the board obviously has no authority to prosecute a hauler who does not comply with the regulations. *See State v. South*, 11 Ohio App. 2d 187, 190, 229 N.E.2d 104 (Clark County 1967) (a board of health's regulation requiring veterinarians to purchase tags and certificates to furnish to owners of

¹¹ R.C. 5739.02(B)(32) exempts from the state sales tax the "sale, lease, repair, and maintenance of, parts for, or items attached to or incorporated in, motor vehicles that are primarily used for transporting tangible personal property belonging to others by a person engaged in highway transportation for hire." R.C. 5739.01(Z)(1) defines "highway transportation for hire" as "the transportation of personal property belonging to others for consideration by . . . [t]he holder of a permit or certificate issued by this state or the United States authorizing the holder to engage in transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare." (Emphasis added.)

dogs inoculated against rabies “being invalid, the defendant [a veterinarian who inoculated a dog but failed to provide the owner with a certificate and tag] cannot be prosecuted for failure to comply”).

As discussed above, “specific statutory authorization, beyond the general power set forth in R.C. 3709.21, is required before a local board of health can regulate in a certain area.” *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, at ¶ 29. Although we have concluded that a board of health has no power under the current statutory scheme to license solid waste haulers and charge a licensure fee, boards of health have the option of pursuing legislation that would authorize them to do so. See 1999 Op. Att’y Gen. No. 99-009 at 2-70.

In conclusion, it is my opinion, and you are hereby advised:

1. The board of health of a general health district has no authority to require haulers of solid waste to obtain a license from, or pay a fee to, the health district in order to operate within the district.
2. A board of health of a general health district has the authority to promulgate regulations governing the collection and transportation of solid waste for the purpose of preventing or abating the creation of a nuisance.