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1. HEALTH, BOARD OF—COUNCIL OF CITY—WITHOUT POWER TO IMPOSE ANY DUTIES ON BOARD OF A HEALTH DISTRICT OF WHICH CITY IS A PART.

2. BOARD OF HEALTH—ANY DISTRICT—HELD RESPONSIBLE FOR ADMINISTRATION OF HEALTH SERVICE IN CITY—WITHOUT AUTHORITY TO ACT AS AGENT OF CITY TO ENFORCE SANITARY REGULATIONS— ESTABLISHED BY CITY ORDINANCE—MAY NOT COLLECT FOR CITY LICENSE OR INSPECTION FEES.

SYLLABUS:

1. The council of a city is without power to impose any duties on the board of health of a health district of which such city is a part.

2. The board of health of any district which is responsible for the administration of health service in a city, is without authority to act as the agent of the city in enforcing sanitary regulations established by ordinance of such city, or in collecting for the city license or inspection fees arising pursuant to the provisions of such ordinance.

Columbus, Ohio, June 2, 1955

Hon. Anthony J. Bowers, Prosecuting Attorney
Allen County, Lima, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

"At the present time there is a contemplated merger of the Lima City Board of Health and the County Board of Health, and several problems have arisen in this merger.

"The City of Lima, by ordinance of the council, charges a meat, milk and plumbing inspection fee, and the said inspection is carried out by the Lima City Board of Health. This inspection fee is used to help maintain the City Board of Health. We would like to know, in the event of a merger, as to what would happen to this inspection fee, mainly whether the city may retain this inspection fee.

"Our specific question is, 'May the city retain this inspection fee, and said fee go into the city treasury under any or all of the following merger plans?'

'1. When by contract, the county Board of Health takes over the functions of the city Board of Health?

'2. When by contract, the city Board of Health takes over the functions of the county Board of Health?

'3. When there is a formal statutory merger under R. C. 3709.07 forming a general health district and the administration of the combined district is taken over by the county Board of Health?

'4. When there is a formal statutory merger under R. C. 3709.07 forming a general health district and the administration of the combined district is taken over by the city Board of Health?'

"We have consulted with the State Board of Health and although they have not been able to give us a definite answer, they were of the opinion that in several counties, the city is able to retain their inspection fee.

"It is my opinion that under the above plans, two and four, there would be no problem, and the city could retain the inspection fee. Under plans one and three the City of Lima would have no control over the Board of Health, and the City Board of Health not carrying out the function of the ordinance, it would be improper for the money to go to the city."

By the provisions of Section 3709.01, Revised Code, the state is divided into health districts, each city constituting a "city health district," and townships and villages in each county to be combined into a health district and known as a "general health district."

It may be noted in advance that the matter of the public health is regarded as a state-wide function, and the various political subdivisions

have no authority to control health administration even within their own territorial boundaries. A city, for instance, has no function in carrying out the health laws except that by virtue of Section 3709.05, Revised Code, the legislative authority in every city except charter cities which had prior to September 4, 1941 established by charter provisions a public health administration, is required to establish a board of health, composed of five members appointed by the mayor and confirmed by the legislative authority. Once established, this board of health operates entirely under the state laws relating to health districts and defining the powers of the health board. Under the provisions of Section 3709.03, Revised Code, there is provided a district advisory council for each general health district, consisting of the chief executive of each municipal corporation not constituting a city health district, and the chairman of the board of township trustees of each township in such general health district. This advisory council has authority to appoint a board of health for the district.

The board of health of each city district and the board of health of each general district are authorized by Sections 3709.20 and 3709.21, Revised Code, respectively, 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. In each case it is provided that orders and regulations not for the government of the board but intended for the general public, shall be adopted, recorded, and certified as are ordinances of municipal corporations.

Section 3709.07, Revised Code, authorizes a city health district and a general health district to unite thereby forming a single district. This section reads as follows:

> "When it is proposed that a city health district unite with a general health district in the formation of a single district, the district advisory council of the general health district shall meet and vote on the question of union. It shall require a majority vote of the total number of townships and villages entitled to representation voting affirmatively to carry the question. The legislative authority of the city shall likewise vote on the question. A majority voting affirmatively shall be required for approval. When the majority of the district advisory council and the legislative authority have voted affirmatively, the chairman of the council and the chief executive of the city shall enter into a contract for the administration of health affairs in the combined district. * * *."

Section 3709.08, Revised Code, contains a further provision whereby a city constituting a city health district *may contract* with another city health district or with a general health district *for public health service.* This section reads as follows:

> "A city constituting a city health district may enter into a contract for public health service with the legislative authority or managing officer of another city or with the district advisory council of the general health district. Such proposal shall be made by the city seeking health service and shall be approved by a majority of the members of the legislative authority. Such a contract shall:
>
> "(A) State the amount of money to be paid by the city for such service and how it is to be paid;
>
> "(B) Provide for the amount and character of health service to be given by the city health district;
>
> "(C) State the date on which such service shall begin;
>
> "(D) State the length of time such contract shall be in effect.
>
> "No such contract shall be in effect until the department of health determines that the health department of the city or general health district providing such service is organized and equipped to provide adequate health service. After such contract has been approved by the department of health, the board of health or health department of the city or general health district providing such service shall have, within the city health district receiving such service, all the powers and shall perform all the duties required of the board of health of a city health district."

Both of the sections last quoted were, prior to the Code revision, a part of Section 1261-20 of the General Code. At the time of the revision the language of the General Code section was substantially the same as that above quoted, excepting that by an amendment effective October 2, 1953, the provision of Section 3709.08, which then authorized a contract only by a city with another city health district, was enlarged to include authority to make such contract with a general health district.

It will be observed that if the procedure is taken under Section 3709.07 supra, the contracting districts would become one district, which would be administered either by the board of health of the city district or of the general health district, as may be agreed in the contract. On the contrary, if the procedure is taken under Section 3907.08, Revised Code,

there is not thereby formed a united health district, but the city applying for such service merely obtains *health service* by virtue of the contract, and the board of health of the other city or of the general health district providing such service is to have within the city health district receiving such service, all the powers and perform all the duties which ordinarily would be required of the city health district making the application. Of the four propositions which your letter suggests it appears that No. 1 would contemplate a contract such as is provided by Section 3709.08, Revised Code, where the district board of health would take over the functions of the city board of health and furnish the service to the city. There being no further use for the city board of health, it would go out of business.

Propositions 3 and 4 are based on the contract authorized by Section 3709.07 where the districts are united as a general health district, and the administration of the combined district is taken over either by the general or city board of health, as may be determined by the agreement, in which case the board of the other district would become *functus officio.*

As to the arrangement embodied in your second proposition, whereby the city would take over the functions of the board of health of the general district, I do not find any statute contemplating or authorizing such an arrangement.

The purpose of your letter appears to be to find some authority under one or the other of the above plans, whereby the provisions of the city ordinance imposing an inspection fee for meat, milk and plumbing may be continued in operation, the work of inspection performed by the board charged with administration and the fees for such inspection paid into the city treasury, for the maintenance of the city board of health.

We may not deny the right of the city council by ordinance, to provide for such inspection and impose these inspection fees, but I note from your statement that this inspection is carried out at the present time by the city board of health. I do not find in the law any authority whereby a city council may impose any duties on the city board of health although, so long as the city remains as an independent health district, there probably could be no legal objection to such a degree of cooperation between the two bodies as would be conducive to the general purpose of preserving the health of the people of the city.

The city council is undoubtedly endowed both by the statutory law and by the provisions of the Constitution with authority to pass ordinances

designed to protect the health of its citizens. Among the general powers of the municipality set forth in Chapter 715 of the Revised Code, we find in Section 715.37, the following provision:

> "Any municipal corporation may:
>
> "(A) Provide for the public health;
>
> "(B) Secure the inhabitants of the municipal corporation from the evils of contagious, malignant, and infectious diseases;
>
> "(C) Purchase or lease property or buildings for pesthouses;
>
> "(D) Erect, maintain, and regulate pesthouses, hospitals, and infirmaries."

Other provisions authorizing a municipal corporation to protect the public health are found in Section 715.41, Revised Code, relative to the abatement of accumulations of stagnant water menacing the public health; also in Section 715.43, Revised Code, provisions relative to collection of sewage, garbage and refuse matter, and in Section 715.44, Revised Code, general power to abate nuisances. We may recognize the fact that practically all of these legislative provisions were enacted long before the enactment of the Hughes and Griswold Acts in 1919 and 1920, whereby the state took over the control of all health matters. However, we also find in Section 3 of Article XVIII of the Constitution explicit authority given to municipalities "to adopt and enforce within their limits such police, sanitary and other similar regulations as are not in conflict with general laws."

In the case of Bucyrus v. Department of Health, 120 Ohio St., 426, it was held as shown by the syllabus:

> "The provisions of Article XVIII of the Constitution of Ohio do not deprive the state of any sovereignty over municipalities in respect to sanitation for the promotion or preservation of the public health which it elects to exercise by general laws."

In Opinion No. 4292, Opinions of the Attorney General for 1935, page 624, a problem quite similar to yours was presented. It appears that the city of Sidney had contracted pursuant to Section 1261-20, General Code, with the board of health of the general health district for furnishing health service to the city. It was held as disclosed by the syllabus:

> "1. When a city health district unites with a general health district under the provisions of section 1261-20, General Code,

the council of the city embraced within such city health district has the power to enact an ordinance regulating the pasteurization of milk, unless such ordinance is in conflict with regulations of the board of health of the combined health district in which said city is located.

"2. If such ordinance is enacted, the city is without authority to require the combined board of health to enforce it.

"3. Under such a combination, the board of health of the combined health district may pass a health regulation requiring the pasteurization of milk to be sold in a city which is located within said combined health district.

"4. When a city health district unites with a general health district under the provisions of section 1261-20, General Code, the regulations of the board of health of the city health district made prior to uniting with the general health district, may be adopted by the board of health of the combined health district for, and be enforced in the territory comprising the former city health district. However, only regulations made pursuant to the provisions of section 1261-42 of the General Code (3709.21 R.C.) would be valid, in so far as the entire district is concerned."

In the case of State ex rel. Hanna v. Spitler, 47 Ohio App., 114, a resident of the city sought by mandamus to compel the city board of health to enforce an ordinance of the city relative to inspection of milk. It was held:

"2. Board of health of city health district is governmental agency separate and distinct from municipality and not subject to its jurisdiction (Sections 1261-16, 1261-30 and 4413, General Code)."

In the course of the opinion the court said:

"We find no provision of law making a board of health of a city health district subject or amenable in any way to the government of the municipality with which the district is coextensive, except that appointments of members of the board are made by the mayor of such municipality, and such board, under the law, constitutes a governmental agency separate and distinct from such municipality and not in any way subject to the jurisdiction of the municipality. It is said in 20 Ohio Jurisprudence, 572, that: 'Local health officers in the exercise of the power delegated to them are plainly engaged in a purely public service in the performance of strictly governmental duties. They cannot in any sense be considered as the agents of the corporation, which is, accordingly, not liable for their negligence or misdoings.'"

Since a board of health is strictly an agency of the state, created by statute, it would have only those powers committed to it by the law, and no authority having been given it to act as the agent for the municipality, it would seem to follow that it could not lawfully undertake to act for the city in the case you present, in making inspections provided for by city ordinance, and collecting and remitting to the city the fees provided by such ordinance for such inspections. Furthermore, the fact that a city in contracting with a county health district for a union of health functions, pursuant to Section 309.07, Revised Code, has agreed that the city board of health shall become the administrator of the resulting general district, and would give the city no right to impose upon the district special duties for the benefit of the city. Its board of health becomes in effect the board of the entire combined district.

In the light of the foregoing, it seems clear that the statutes of Ohio have made a complete separation of the functions of a municipality, on the one hand, and the powers of a board of health of which is may be a part, on the other. It follows that the legislative authority of a city which constitutes either a health district of its own, or becomes merged in a general health district, cannot impose any duties on the health district in either case. Nor does it appear that the health district may undertake the enforcement of city ordinances relating to sanitation or the collection of fees arising therefrom. If in the enforcement of a rule of the board of a general health district license or inspection fees are imposed or collected by the general health district, such fees would belong to the district and not to the city which may be a part of such district, and this would be true even though the rule established regulations relating to the city alone.

Accordingly, in specific answer to your inquiry it is my opinion:

1. The council of a city is without power to impose any duties on the board of health of a health district of which such city is a part.

2. The board of health of any district which is responsible for the administration of health service in a city, is without authority to act as the agent of the city in enforcing sanitary regulations established by ordinance of such city, or in collecting for the city license or inspection fees arising pursuant to the provisions of such ordinance.

Respectfully,
C. WILLIAM O'NEILL
Attorney General