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BOARD OF HEALTH—EMPLOYEES AUTHORIZED TO ENTER PRIVATE PREMISES—TO INSPECT FOR CONTAGIOUS DISEASE OR NUISANCES DANGEROUS TO PUBLIC HEALTH—IF OCCUPANTS REFUSE ADMITTANCE, SEARCH WARRANT IS REQUIRED EXCEPT IN IMMEDIATE MAJOR CRISIS OR WHERE ACTIVITY LICENSED BY BOARD OF HEALTH.

SYLLABUS:

The health commissioner and other employees appointed by the board of health of a general health district are authorized at reasonable hours and in reasonable circumstances to enter private premises and to inspect the same to determine whether contagious disease or nuisances dangerous to public health exist therein but where the person lawfully in occupancy of such premises withholds his assent thereto such right of entry and inspection can be exercised only under authority of a search warrant issued by a judicial officer as provided by law except in those cases where (1) an immediate major crisis exists where there is neither time nor opportunity to apply to a magistrate, or (2) the premises involved are those on which the occupant carries on an activity licensed by such board of health.

Columbus, Ohio, September 25, 1956

Hon. Paul J. Mikus, Prosecuting Attorney
Lorain County, Elyria, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"Do the health commissioner and duly appointed sanitary officers of a general health district created pursuant to Section

3709.01 R. C. have the authority to enter private premises within said district without a search warrant to inspect whether there is compliance with the health regulations and orders enacted by the Board of Health of said district?"

It is appropriate first to note that the question of the validity of legislation purporting to authorize the inspection of private premises in the exercise of the police power for the protection of the public safety, health, morals, and welfare, as distinguished from the detection of crime, involves a constitutional question of considerable difficulty which does not appear yet to have been fully settled by judicial pronouncement. The precise question is whether such inspection made without warrant is in violation of the guarantees against unreasonable search and seizure set out in the Fourth Amendment of the Constitution of the United States and in virtually identical terms in Section 14, Article I, Ohio Constitution. Section 14, Article I, reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized."

The general rule as to the necessity of warrant in effecting a legal search of private premises is stated in 47 American Jurisprudence, 512, 513, Section 16, as follows:

> "The only legal means which can be employed to search the premises of a private individual is a search warrant. Neither a private person nor an officer may break in on the privacy of a home and subject its occupants to the indignity of a search for evidences of crime without a legal warrant for that purpose; and the fact that such a search is made by an officer will not excuse it. Nor is belief, however well-founded, that an article sought is concealed in a house sufficient to justify a search thereof without a warrant. Mere suspicion or hearsay that some sort of crime may have been committed in a house or that such house contains some evidence that a crime has been committed is not sufficient justification for a search of it without a warrant.
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> "The necessity for a search warrant is not limited to searches of buildings used as homes; it extends as well to buildings used as places of business and to business offices. However, search warrants are not required for entries upon the premises of licensed businesses by the proper officers for the purposes of inspection at reasonable times and under authority of law.

> "The effect of a waiver of the right to security from search and seizure without a warrant is discussed elsewhere in this article."

This general rule prevails in Ohio, the leading case in this state on the point being State v. Lindway, 131 Ohio St., 166, the syllabus in which reads in part:

> "3. An officer of the law who makes search and seizure in a dwelling or other premises, without a warrant or with an illegal warrant, in contravention of Section 14, Article I, of the Constitution of Ohio, is a trespasser, and amenable to an action for such trespass."

In some jurisdictions the courts appear to hold that these constitutional inhibitions have no application to inspections related, not to crime detection, but to public health and safety measures. Thus, in 47 American Jurisprudence, 510, Section 13, it is said:

> "The use of a search warrant to prevent and detect crime is a valid exercise of the police power of the state. The constitutional provisions have no application to reasonable rules and regulations adopted in the exercise of the police power for the protection of the public health, morals, and welfare. Therefore, inspection of a place of business during business hours, in the enforcement of reasonable regulations in the exercise of the police power, is not a violation of the guaranty against searches and seizures. * * *"

However, in District of Columbia v. Little, 178 F2d 13, 13 American Law Reports (2d) 954, the decision was squarely to the contrary. The headnotes in that decision, as reported in 13 American Law Reports (2d), read in part:

> "4. The Fourth Amendment to the Constitution of the United States prohibiting unreasonable searches and seizures is not limited by the Fifth Amendment as to self-incrimination so as to permit searches of private homes without a warrant for the purpose of protecting the public health as distinguished from the purpose of searching for evidence of crime.
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> "5. The basic premise of the constitutional prohibition against unreasonable searches is the common-law right to privacy in one's home.
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> "7. The public importance of health laws and the beneficence and forebearance of health officers do not justify violation of the constitutional provision against unreasonable searches."

In the opinion in that case by Circuit Judge Prettyman it was said (pp. 959, 960, 13 ALR2d):

> "It is said to us that the regulations sought to be enforced by this search only incidentally involved criminal charges, that their purpose is to protect the public health. It is argued that the Fourth Amendment provision regarding searches is premised upon and limited by the Fifth Amendment provision regarding self-incrimination. It is said to us that therefore there is no prohibition against searches of private homes by government officers, unless they are searching for evidence of crime; that if they are searching for evidence of crime, they must get a search warrant, but that if they are searching for something else or are just searching, they need not get a search warrant; for searchers of the latter sort, we are told, home owners must open their front doors upon demand of an officer without a warrant. The argument is wholly without merit, preposterous in fact. The basic premise of the prohibition against searches was not protection against self-incrimination; it was the common-law right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization. It was firmly established in the common law as one of the bright features of the Anglo-saxon contributions to human progress. It was not related to crime or to suspicion of crime. It belonged to all men, not merely to criminals, real or suspected. So much is clear from any examination of history, whether slight or exhaustive. The argument made to us has not the slightest basis in history. It has no greater justification in reason. To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity.
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> "Much of the argument of the District is devoted to establishing the public importance of the health laws. Assertions are also made of the beneficence and forbearance of health officers. We may assume both propositions. But the constitutional guarantee is not restricted to unimportant statutes and regulations or to malevolent and arrogant agents. Even for the most important laws and even for the wisest and most benign officials, a search warrant must be had.
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> "We emphasize that no matter who the officer is or what his mission, a government official cannot invade a private home, unless (1) a magistrate has authorized him to do so or (2) *an immediate major crisis in the performance of duty affords neither time nor opportunity to apply to a magistrate.* * * *"
>
> (Emphasis added)

This decision was reviewed on a writ of certiorari by the United States Supreme Court which affirmed the judgment of the Circuit Court

on other grounds, a majority of the court deeming it unnecessary to reach the constitutional question. (339 U. S., 1). Justices Burton and Reed dissented, their views being stated in the third headnote of the decision (as reported in 94 L. Ed., 599, 600) as follows:

> "The duties which a health officer performs when, under statutory authority, he seeks to enter a building to inspect its sanitary condition, are of such a reasonable, general, routine, accepted and important character, in the protection of the public health and safety, that they may be performed lawfully without a search warrant as required by the constitutional prohibition against unreasonable searches and seizures."

In Chapters 3707. and 3709., Revised Code, boards of health are given authority to promulgate health regulations having the force and effect of law, the violation of which is punished as a misdemeanor. See Sections 3707.48 and 3707.99, Revised Code. Such boards may impose quarantine regulations on persons, on premises, and on public or private conveyances, and they are under a statutory mandate to abate and remove nuisances. All of these things may be done by order of the board directed to the persons affected, and provision is made for citation and hearing in the case of individuals who refuse or neglect to comply therewith. Section 3707.02, Revised Code.

On the inspection of buildings we find the following provision in Section 3707.07, Revised Code:

> "When complaint is made or a reasonable belief exists that an infectious or contagious disease prevails in a house or other locality which has not been reported as provided in section 3707.06 of the Revised Code, the board of health of a city or general health district shall cause such house or locality to be inspected by its health commissioner, and on discovering that such disease exists, the board may send the person diseased to a hospital or other place provided for such person, or may restrain him and others exposed within such house or locality from intercourse with other persons, and prohibit ingress and egress to or from such premises."

Additional, and more general, authority to inspect both public and private premises is found in Section 3709.22, Revised Code, as follows:

> "Each board of health of a city or general health district shall study and record the prevalence of disease within its district and provide for the prompt diagnosis and control of communicable diseases. The board may also provide for the medical

> and dental supervision of school children, for the free treatment of cases of venereal diseases, for the inspection of schools, public institutions, jails, workhouses, children's home, infirmaries, and county homes, and other charitable, benevolent and correctional institutions. The board may also provide for the inspection of dairies, stores, restaurants, hotels and other places where food is manufactured, handled, stored, sold, or offered for sale, and for the medical inspection of persons employed therein. The board may also 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. * * *"

Authorization to appoint sanitary police in city health districts, and an indication of their duties, are found in Sections 3709.15 and 3709.16, Revised Code, as follows:

Section 3709.15:

> "The board of health of a city health district may appoint as many persons for sanitary duty as the public health and sanitary conditions of the district require, and such persons shall have general police powers and be known as 'sanitary police.' The board may also appoint as many registered nurses for public health nurse duty as the public health and sanitary conditions of the district require, who shall be known as 'public health nurses.' The legislative authority of the city may determine the maximum number of sanitary police and public health nurses to be appointed."

Section 3709.16:

> "The board of health of a city or general health district shall determine the duties and fix the salaries of its employees.
>
> "No member of the board shall be appointed as health officer or ward physician."

From these provisions it will be seen that the board is given very broad powers to inspect both public and private premises for the purpose of discovering health nuisances, unsanitary conditions which affect the public health, and the existence of contagious disease, all with the object of taking such preventive health measures as may be found appropriate. In the exercise of these powers the board is authorized to act through the agency of the health commissioner, its sanitary police, and other employees.

It is to be noted, however, that nowhere in the statute is there any express provision, or even suggestion, that inspections of private premises

may be made without the assent of the owner or resident except by due process of law, i.e., there is no clear statutory authorization to enter private premises to make a health inspection without a search warrant where the tenant refuses his consent to such entry.

In this situation, especially in view of the unresolved constitutional question noted above, it becomes necessary to construe the statutes involved so as to avoid any doubt of invalidity, and to conclude, as I do, that there is no legislative intent or purpose to confer on these agencies and their employees the power to enter private premises in the exercise of their duties without a search warrant in those cases where the person in lawful possession withholds his assent to such entry.

Here it is proper to make certain further observations and to note certain limited exceptions to the conclusion just stated. In the first place it is only "unreasonable" searches that the constitution prohibits, and it is difficult to see how any occupant of private premises could lawfully prevent an inspection of them by the health authorities at reasonable times. In such cases it would seem that search warrants would be issued by the judicial authorities as a matter of course.

Moreover, even the United States Circuit Court conceded in the Little case, supra, that a warrant would not be required "in an immediate major crisis" where there was neither "time nor opportunity to apply to a magistrate."

Finally, it seems to be agreed that a public licensing agency enjoys the right to inspect the premises of its licensees to ascertain whether the statutes etc., under which the license was issued are being complied with, the application for such license being an implied consent to inspection at reasonable times. Thus, in the case of premises on which a food service operation is conducted, and with respect to which a license has been issued by the board of health of a general health district, it must be concluded that the board could cause such premises to be inspected at reasonable times and in reasonable circumstances without the consent of the person conducting such operation.

Apart from these exceptions, however, the board should be guided by the general rule as I have stated it above.

Accordingly, in specific answer to your inquiry it is my opinion that the health commissioner and other employees appointed by the board of

health of a general health district are authorized at reasonable hours and in reasonable circumstances to enter private premises and to inspect the same to determine whether contagious disease or nuisances dangerous to public health exist therein but where the person lawfully in occupancy of such premises withholds his assent thereto such right of entry and inspection can be exercised only under authority of a search warrant issued by a judicial officer as provided by law except in those cases where (1) an immediate major crisis exists where there is neither time nor opportunity to apply to a magistrate, or (2) the premises involved are those on which the occupant carries on an activity licensed by such board of health.

Respectfully,
C. WILLIAM O'NEILL
Attorney General