September 28, 2015

The Honorable Dennis Watkins
Trumbull County Prosecuting Attorney
4th Floor Administration Building
160 High Street N.W.
Warren, Ohio 44481-1092

SYLLABUS: 2015-030

1. Pursuant to R.C. 3709.09(D), when a person installs or operates a household sewage treatment system without paying the fee required for obtaining an installation or operation permit from a board of health of a general health district when the fee is due, the board shall assess a penalty equal to twenty-five percent of the fee for obtaining an installation or operation permit.

2. The portion of a penalty collected by a board of health of a general health district pursuant to R.C. 3709.09(D) that exceeds twenty-five percent of the permit fee is subject to refund by the board. A refund may be paid from the fund to which the penalty was credited.

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OPINION NO. 2015-030

The Honorable Dennis Watkins
Trumbull County Prosecuting Attorney
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Dear Prosecutor Watkins:

You have requested an opinion about the amount that a board of health of a general health district may assess as a penalty against a person who does not obtain an installation permit or an operation permit for a household sewage treatment system.

You have explained that since 2003, the board of health of the Trumbull County general health district has assessed a penalty, in varying amounts, against a person who fails to obtain either an installation permit or an operation permit for a household sewage treatment system. From 2003 until June 30, 2010, the board assessed a penalty equal to the fee that would have been charged to obtain the respective permit. Between July 1, 2010, and the fall of 2012, the board assessed a penalty equal to twenty-five percent of the installation permit fee against a person who did not obtain an installation permit, and a penalty equal to the operation permit fee against a person who did not obtain an operation permit. Since the fall of 2012, the board has assessed a penalty equal to twenty-five percent of the installation permit fee and twenty-five percent of the operation permit fee against a person who fails to obtain the respective permit.

Your questions arise from the General Assembly's amendment in 2009 of R.C. 3709.09, which, *inter alia*, added division (D). Am. Sub. H.B. 1, 128th Gen. A. (2009) (eff. Oct. 16, 2009, with certain sections effective on other dates). R.C. 3709.09(D) provides, "[i]f payment of a fee established under [R.C. 3709.09] is not received by the day on which payment is due, the board of health shall assess a penalty. The amount of the penalty shall be equal to twenty-five per cent of the applicable fee." You ask whether, before and after the enactment of R.C. 3709.09(D), the board of health of the Trumbull County general health district assessed appropriate penalties against a person who did not obtain an installation permit or who did not obtain an operation permit. If it is determined that the board of health did not assess the correct penalty amount, you ask what the correct amount should have been. You further inquire whether the board of health is required to issue a refund to a

person who was assessed a penalty that was higher than the statutorily authorized amount. Finally, you ask if the board must issue a refund, from which fund it should be paid.[1]

Your inquiry asks us to determine whether the board of health of the Trumbull County general health district acted lawfully when it assessed and collected certain penalties at various time intervals during the preceding twelve years. "It is beyond the scope of the opinion process to resolve 'questions of fact regarding the lawfulness of actions taken in the past or the rights or liabilities of particular individuals or governmental entities.'" 2011 Op. Att'y Gen. No. 2011-009, at 2-73 (quoting 2005 Op. Att'y Gen. No. 2005-043, at 2-472); *accord* 2014 Op. Att'y Gen. No. 2014-024, at 2-217; 2013 Op. Att'y Gen. No. 2013-025, at 2-252. "There is a presumption of validity of action taken by a public official in the course of the performance of the official's duties." 2005 Op. Att'y Gen. No. 2005-043, at 2-472. Furthermore, "action taken by public officials is presumed to have legal effect, even though some errors may occur." *Id.* at 2-472 to 2-473. The opinion-rendering process may not be used to determine whether, under the law as it existed in the past, the board of health of the Trumbull County general health district assessed the appropriate penalty. Whether the board of health acted in accordance with the law in the past must be determined by local officials or, ultimately, the judiciary. *See* 2013 Op. Att'y Gen. No. 2013-025, at 2-252. We are able, however, to address the board of health's authority under the current law. *See* 2005 Op. Att'y Gen. No. 2005-043, at 2-456. Accordingly, this opinion addresses the board's authority to charge a penalty under the law as it currently exists and discusses general principles of law regarding refunding moneys that the board of health may have charged and collected erroneously.

Penalty for Failing to Obtain an Installation Permit or an Operation Permit

The board of health of a city or general health district may charge fees for certain services that the board provides in relation to the regulation of household sewage treatment systems. R.C. 3709.09(A). With respect to the establishment of fees, R.C. 3709.09 provides, in pertinent part:

> (A) The board of health of a city or general health district may, by rule, establish a uniform system of fees to pay the costs of any services provided by the board.
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> ….
>
> Fees for services provided by the board for purposes specified in … [R.C. 3718.06][2] … shall be established in accordance with rules adopted under [R.C. 3709.09(B)].

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[1] For ease of organization, we have summarized your nine questions.

[2] Fees for services provided by a board of health for purposes specified in other sections of the Revised Code shall also be established in accordance with R.C. 3709.09(B). R.C. 3709.09(A). Because those services are not relevant to your inquiry, we have omitted reference to those sections in this opinion's discussion of R.C. 3709.09.

> (B) The director of health shall adopt rules under [R.C. 111.15] that establish fee categories and a uniform methodology for use in calculating the costs of services provided for purposes specified in … [R.C. 3718.06].

R.C. 3709.09(A)-(B) (footnote added). Among the purposes specified in R.C. 3718.06 is the issuance of installation permits, operation permits, and alteration permits by a board of health of a city or general health district. Under R.C. 3718.06(A), "[a] board of health [of a city or general health district] shall establish fees in accordance with [R.C. 3709.09] for the purpose of carrying out its duties under [R.C. Chapter 3718] and rules adopted under it, including fees for installation permits, operation permits, and alteration permits issued by the board." Pursuant to R.C. 3718.06(B), "the director of health [of the Ohio Department of Health] may establish by rule a fee to be collected from applicants for installation permits and alteration permits issued under rules adopted under [R.C. Chapter 3718]." R.C. Chapter 3718 governs household sewage treatment systems and small flow on-site sewage treatment systems.

Reading R.C. 3709.09(A) and (B) together with R.C. 3718.06, it is evident that the board of health of a city or general health district shall establish fees to recover the cost of providing permits for the installation, operation, and alteration of household sewage treatment systems. The fees a board of health charges for issuing those permits shall be established in accordance with the Department of Health's fee categories and methodology for calculating the cost of service. R.C. 3709.09(A), (B). When issuing a permit for the installation or alteration of a household sewage treatment system, a board of health shall charge and collect both the board of health's fee and the Department of Health's fee. R.C. 3718.06(A) (board of health's fees for an installation, operation, or alteration permit); R.C. 3718.06(B) (Ohio Department of Health's fee for installation or operation permits). A board of health shall collect the board's permit fees and deposit them "in a special fund of the district to be used exclusively by the board[.]" R.C. 3718.06(A). The Department of Health's permit fees that are collected by a board of health shall be transmitted to the Director of Health in accordance with R.C. 3709.092. R.C. 3718.06(B).

When a permit fee required by R.C. 3709.09 is not timely paid, "the board of health shall assess a penalty." R.C. 3709.09(D); *see generally* R.C. 3709.091(B) (requirement to notify real property owner "of the amount of the fee and any accrued penalties for late payment of the fee" when the owner "fails to pay a fee … for an operation permit for, or for inspection of, a household sewage treatment system or a small flow on-site sewage treatment system"). R.C. 3709.09(D) restricts the amount of the penalty for failing to pay any fee established by R.C. 3709.09 to "twenty-five per cent of the applicable fee."[3]

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[3] Attached to your letter requesting an opinion is an e-mail notice from the Chief of the Bureau of Environmental Health of the Ohio Department of Health explaining the operation of R.C. 3709.09(D). According to that notice, the "applicable fee" in R.C. 3709.09(D) is the portion of the permit fee that corresponds to a board of health's costs, rather than that portion of the fee corresponding to the Department of Health's costs.

In light of the plain language of R.C. 3709.09(D), a board of health shall assess a penalty for the failure to pay when due any fee that is established under R.C. 3709.09. The requirement that the penalty equal twenty-five percent of the fee for the applicable permit applies to any of the fees that a board of health may charge under R.C. 3709.09. Fees for installation permits as well as operation permits are established under R.C. 3709.09. R.C. 3709.09(A); [2014-2015 Monthly Record] Ohio Admin. Code 3701-29-05(D)(4),(8), at p. 2-630 (a board of health's fee for an installation permit or an operation permit for a household sewage treatment system is established pursuant to R.C. 3709.09). Therefore, pursuant to R.C. 3709.09(D), when a person installs or operates a household sewage treatment system without paying the fee required for obtaining an installation or operation permit from a board of health of a general health district when the fee is due, the board shall assess a penalty equal to twenty-five percent of the fee for obtaining an installation or operation permit.

Obligation to Refund Penalties Collected in Excess of Statutory Limit

We now address whether a board of health of a general health district is required to refund moneys when the board has charged and collected a penalty in an amount greater than the amount specified in the statute. A board of health of a general health district is a creature of statute, possessing only those powers expressly provided by statute, or any powers implied as necessary to carry out an express power. 2009 Op. Att'y Gen. No. 2009-026, at 2-176.

1986 Op. Att'y Gen. No. 86-041 addressed a similar question to yours. In that opinion, the Attorney General considered whether the State Teachers Retirement System (STRS) and the School Employees Retirement System (SERS) were required to refund retirement contributions that were paid based upon amounts that were excluded from compensation and not subject to retirement contributions. *Id.* at 2-218. The opinion reasoned that the contributions that STRS and SERS are authorized to accept are determined by statute. *Id.* If contributions were paid in contravention of those statutes, "neither STRS nor SERS had authority to accept such contributions." *Id.* The opinion concluded that "the portion of the contributions attributable to such amounts is subject to refund to the school board and member which made such contributions." *Id.* (syllabus, paragraph 3). The opinion further noted that no statute set forth "the Boards' powers or duties with respect to contributions made in excess of those authorized by statute." *Id.* at 2-218.

We find the reasoning of 1986 Op. Att'y Gen. No. 86-041 persuasive. R.C. 3709.09(D) expressly limits the amount that a board of health of a general health district may charge and collect as a penalty to twenty-five percent of the applicable permit fee. Accordingly, a board of health has no authority to collect any amount in excess of that statutorily determined amount. As unlawfully collected moneys, the amount of the penalties collected in excess of the statutory limit is subject to refund. *See San Allen, Inc. v. Buehrer*, 8th Dist. No. 99786, 2014-Ohio-2071, at ¶ 123 ("Ohio courts have long recognized that persons from whom funds have been unlawfully collected and retained by the state may be entitled to equitable restitution").

You have also asked if a board of health is required to refund a portion of the penalties collected, from which fund shall the refund be paid. We are not aware of any statute or regulation that addresses the manner in which a board of health of a general health district may refund a penalty

collected in excess of the statutory limitation of R.C. 3709.04(D).[4] It is, therefore, reasonable to consider other statutes that direct the manner in which other public entities may refund fees or penalties that have been erroneously collected. One such statute is R.C. 131.39, which provides:

> If a state agency determines that all or a portion of a fee, fine, penalty, or other nontax payment made to the agency is not owed, the agency may refund, from the fund to which the payment was credited, the amount that is not owed. If the agency lacks sufficient unencumbered appropriations to make the refund, the agency may request the controlling board for authority to make the refund. The board may authorize the agency to make the refund upon a determination that the refund is due and that sufficient unencumbered money remains in the fund.

"'A general health district is a political subdivision of the state'" and is not a state or county agency. 2010 Op. Att'y Gen. No. 2010-019, at 2-115 (quoting 1995 Op. Att'y Gen. No. 95-030, at 2-149); 1994 Op. Att'y Gen. No. 94-096, at 2-475; *see also* 1975 Op. Att'y Gen. No. 75-036, at 2-142 to 2-143 (explaining that reference to city and general health districts as state agencies in opinions and cases was intended to emphasize that the health districts are separate from the political subdivisions that comprise them). As a separate political subdivision, a board of health of a general health district is not required to comply with R.C. 131.39. Nevertheless, the provisions of R.C. 131.39 present a reasonable method for determining which fund shall be the source of a refund. Accordingly, in the event that a board of health of a general health district is required to refund a portion of a penalty that was erroneously charged and collected, the refund shall be paid from the fund to which the penalty was credited.

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[4] When a statute provides a means of correcting an error or refunding moneys erroneously paid, a public entity may not correct the error in another way. *See N. Olmsted City School Dist. Bd. of Educ. v. Cleveland Mun. School Dist. Bd. of Educ.*, 108 Ohio St. 3d 479, 2006-Ohio-1504, 844 N.E.2d 832, at ¶ 40 ("the processes put in place by the General Assembly provide certain procedures for the correction of errors and … therefore, no extrastatutory remedies are appropriate"); 2005 Op. Att'y Gen. No. 2005-043, at 2-474 ("the actions of public officials taken to calculate and levy the taxes … may be modified or corrected only in accordance with provisions of statute or through proper administrative or judicial procedures"); 1987 Op. Att'y Gen. No. 87-110, at 2-733 to 2-735 (errors in metes and bounds descriptions may only be corrected in accordance with corrective procedures provided by statute (overruled in part, on other grounds, by 1994 Op. Att'y Gen. No. 94-066)); 1986 Op. Att'y Gen. No. 86-092, at 2-525 (may not recover overpayments by using a means that differs from the means provided by statute); 1982 Op. Att'y Gen. No. 82-089, at 2-248 (statute provides process for refunding intangible taxes); *see also Akron Transp. Co. v. Glander*, 155 Ohio St. 471, 480, 99 N.E.2d 493 (1951) ("when a statute directs a thing may be done by a specified means or in a particular manner it may not be done by other means or in a different manner").

Therefore, the portion of a penalty collected by a board of health of a general health district pursuant to R.C. 3709.09(D) that exceeds twenty-five percent of the permit fee is subject to refund by the board. A refund may be paid from the fund to which the penalty was credited.

Conclusions

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

1. Pursuant to R.C. 3709.09(D), when a person installs or operates a household sewage treatment system without paying the fee required for obtaining an installation or operation permit from a board of health of a general health district when the fee is due, the board shall assess a penalty equal to twenty-five percent of the fee for obtaining an installation or operation permit.

2. The portion of a penalty collected by a board of health of a general health district pursuant to R.C. 3709.09(D) that exceeds twenty-five percent of the permit fee is subject to refund by the board. A refund may be paid from the fund to which the penalty was credited.

Very respectfully yours,

MICHAEL DEWINE
Ohio Attorney General