

1934

HEALTH, STATE DEPARTMENT OF—TO ESTABLISH STANDARDS TO DETERMINE QUALIFICATIONS OF LABORATORY TO GIVE STANDARD SEROLOGICAL TEST FOR SYPHILIS HAS AUTHORITY TO MAKE AND ENFORCE REASONABLE RULES RELATIVE TO EQUIPMENT, SUPERVISION AND PERSONNEL—SECTIONS 1243-6, 11188 G. C.

## SYLLABUS:

The state department of health in establishing the standards by which to determine the qualifications of a laboratory to give the standard serological test for syphilis required by the provisions of Sections 1243-6 and 11188, General Code, has authority to make and enforce reasonable rules relative to the equipment, supervision and personnel of such laboratory.

Columbus, Ohio, June 3, 1947

Dr. Roger E. Heering, Director, Department of Health  
Columbus, Ohio

Dear Sir:

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

“Section 1243-6 and Section 11188, of the General Code, provide, respectively, for the blood testing for syphilis of pregnant women and of applicants for marriage license. Sections 1243-6 and 1243-9, of the General Code (Prenatal), and paragraphs two and three of Section 11188, of the General Code (Premarital), are quoted below.

‘Section 1243-6. Every physician who attends any woman pregnant with child for conditions relating to pregnancy during the period of gestation shall take or cause to be taken a sample of blood of such woman at the time of first examination or within ten days thereof, and shall submit such sample to an approved laboratory for a standard serological test for syphilis. If, in the opinion of the physician attending such pregnant woman, the condition of such pregnant woman does not permit the taking of a blood sample for submission to an approved laboratory, then no sample shall be taken prior to delivery; however, if no sample shall be taken prior to delivery because of the pregnant woman’s condition, then such blood sample shall be taken as soon after delivery as the physician deems it advisable.’

Section 1243-9. For the purpose of this act, a standard serological test for syphilis shall be a test approved by the state department of health, and shall be made at a laboratory approved to make such tests by the state department of health. Such serological tests as are required by this act shall, on request of the physician submitting the sample, and on his certificate that the patient is unable to pay, be made without charge by the state department of health.

Section 11188. \* \* \* Provided, however, no license to marry shall be issued until there shall be in the possession of the clerk of the probate court a statement or statements, signed by a duly licensed physician of the state of Ohio, within thirty days of such examination, that each applicant, within thirty days of the filing of the application for the statement or statements, has submitted to an examination to determine the existence or non-existence of syphilis, which examination has included a standard serological test or tests for syphilis, and that in the opinion of the examining physician the applicant is not infected with syphilis, or, if so infected, is not in a stage of that disease which is communicable or likely to become communicable; or in the event either or both of the persons desiring to be married is a resident of a foreign state which has a similar law requiring a serological test and a physician's examination before marriage, a certificate from an officer empowered to issue marriage licenses in that state certifying that the laws of said state have been complied with and that the applicant's physical condition is such that he or she could be married in that foreign state. The physician's statement shall be accompanied by a statement from the person in charge of the laboratory making the test setting forth the name of the test, the date it was made, the name and address of the physician to whom a report was sent, and the exact name and address of the person whose blood was tested, but not setting forth the result of the test.

For the purpose of this act, a standard serological test for syphilis shall be a test approved by the state department of health and shall be made at a laboratory approved to make such tests by the state department of health. A report of such test shall be forwarded to the examining physician who has submitted the blood sample.

Since Section 1243-9 and paragraph three of Section 11188 provide that the test approved by the state department of health 'shall be made at a laboratory approved to make such tests by the state department of health,' the question has arisen as to the scope of authority of the department of health in requiring that certain qualifications of personnel be met by such laboratories as desire approval, with particular reference to the qualifications of the person in charge of the laboratory.

From the effective date of the premarital law, August 18, 1941, to January, 1947, laboratories were approved on the basis of the educational and experience qualifications of the laboratory personnel, including the person in charge. The department of health evaluated the efficiency of performance of laboratories during the summer and fall of 1946, on the theory that laboratory performance was more essential than the determination of qualifications of the personnel. Since January, 1947, laboratories have been approved only if they were able to meet the prescribed standards of performance, the factor of the qualification of personnel having been discarded, as it was felt that the citizens of Ohio were being afforded more reliable and efficient service by approval of only those laboratories that were able to meet established performance standards.

This is to request your opinion as to whether it is within the authority of the department of health to require, by regulation, that an approved laboratory shall be in charge of a physician qualified as a pathologist and to prescribe the educational and experience qualifications of personnel in such laboratories in addition to approval on the basis of performance, as established by evaluation of efficiency."

Since you have set forth the full text of Section 1243-6, General Code, dealing with the serological test for syphilis required to be given to every woman during pregnancy, and also that portion of Section 11188, General Code, requiring a serological test for syphilis as a condition precedent to the issuance of a marriage license, I do not deem it necessary to quote those sections of the statutes in this opinion. However, I do think it worth while to repeat your quotation of the two provisions of the statutes which relate to the laboratory at which such tests may be made. Section 1243-9, General Code, relating to the first subject, reads as follows:

"For the purpose of this act (G. C. Secs. 1243-6 to 1243-12), a standard serological test for syphilis shall be a test approved by the state department of health, and shall be made at a *laboratory approved* to make such tests by the state department of health. Such serological tests as are required by this act shall, on request of the physician submitting the sample, and on his certificate that the patient is unable to pay, be made without charge by the state department of health." (Emphasis added.)

The third paragraph of Section 11188 reads as follows:

"For the purpose of this act, a standard serological test for syphilis shall be a test approved by the state department of health and shall be made *at a laboratory approved* to make such

tests *by the state department of health*. A report of such test shall be forwarded to the examining physician who has submitted the blood sample." (Emphasis added.)

Your request raises the one question as to the authority of the department of health to require by regulation that an approved laboratory shall be in charge of a physician qualified as a pathologist, and to prescribe the educational and experience qualifications of personnel in such laboratories.

It is stated in 25 Am. Jur., 291 :

"The general rule is that statutes delegating to subordinate governmental agencies and authorities the power to enact and enforce health regulations are to be liberally construed in order to effectuate the purpose of their enactment."

This principle is so generally recognized that I do not consider it necessary to cite any of the numerous authorities in support of it. The same principle is announced in 20 Oh. Jur., page 542; and see, *Ex Parte Company*, 106 O. S., 50.

A like rule of construction is applied as to regulations made by the health authorities. In 25 Am. Jur., 300, it is said :

"Generally, what laws or regulations are necessary to protect the public health and secure public comfort is a legislative question, and appropriate measures intended and calculated to accomplish these ends are not subject to judicial review. So, the courts have no jurisdiction to interfere with the acts of health authorities except in cases of palpable abuse of the discretion conferred, unless such jurisdiction is conferred by statute, as is done in some cases. The judgment of the court should not be substituted for the judgment of the board of health. Moreover, every reasonable presumption should be indulged in favor of the validity of the action of health authorities. One who attacks a regulation or order of a health board has the burden of establishing its invalidity; and before an ordinance or regulation of a board of health can be said to be unreasonable, it should clearly so appear."

The authorities supporting this proposition are somewhat extensively set forth in the annotation in 80 Am. St. Rep., 213.

In the sections of the General Code which I have above quoted, the General Assembly has certainly conferred upon the state department of

health in clear and unmistakable terms, full authority to approve laboratories which are deemed safe and dependable for the purpose of making the tests in question. The General Assembly has not seen fit to prescribe any conditions, limitations or standards which must be applied in determining whether a laboratory shall or shall not be approved. What conditions, either as to equipment, supervision or personnel must be present in a laboratory in order to entitle it to the approval of your department are certainly matters that must be determined by medical and not by legal standards. What methods should be pursued in order effectually to check contagious disease cannot be determined by citing rules of law.

Your department is charged with the duty of approving laboratories in which the required tests may be safely and accurately made. It is only when your action has no real or substantial relation to the protection of the public health, or is arbitrary and oppressive, that the courts will interfere with your discretion. 20 Oh. Jur., 542; State Board of Health v. Greenville, 86 O. S., 1. In case it should be claimed that the regulations or qualifications which you might determine to impose are arbitrary, unreasonable or oppressive, that might become a question for a court to decide, but it could only be determined by the court on the basis of expert medical testimony.

I can only venture the opinion as a layman, that a laboratory, in order to be qualified and approved for the purpose in question ought to have proper equipment and qualified personnel, including competent supervision, so that its tests would be accurate and dependable and serve the purpose of the law. I see no reason why performance tests might not also enter into the determination if in the exercise of a reasonable discretion you deem them of value in reaching your decision.

In specific answer to your question, it is my opinion that the state department of health in establishing the standards by which to determine the qualifications of a laboratory to give the standard serological test for syphilis required by the provisions of Sections 1243-6 and 11188, General Code, has authority to make and enforce reasonable rules relative to the equipment, supervision and personnel of such laboratory.

Respectfully,

HUGH S. JENKINS,  
Attorney General.