

OPINION NO. 82-066**Syllabus:**

1. The Physical Therapy Section of the Ohio Occupational Therapy and Physical Therapy Board is without authority to adopt rules that either set forth requirements for the supervision to be provided by a physical therapist to physical therapy assistants and support personnel, or that enumerate the duties that may be performed by physical therapy assistants.
2. The Physical Therapy Section is not authorized to adopt a rule which defines the term physical measures as used in R.C. 4755.40.

To: Charlotte Wilcox, Director, Ohio Occupational Therapy and Physical Therapy Board, Columbus, Ohio

By: William J. Brown, Attorney General, September 28, 1982

I have before me your request for an opinion concerning the rule-making powers of the Physical Therapy Section of the Ohio Occupational Therapy and Physical Therapy Board. You have asked whether the Physical Therapy Section is empowered to promulgate three rules which the Section filed, then later withdrew.

Initially, it must be noted that an administrative board, such as the Occupational Therapy and Physical Therapy Board, is a creature of statute. The board, therefore, has only those powers expressly granted by statutes. State ex rel. Clarke v. Cook, 103 Ohio St. 465, 467, 134 N.E. 655 (1921). The following statement describes the constraints involved in a legislative grant of power to an administrative board:

Such grant of power, by virtue of a statute, may be either express or implied, but the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective. In short, the implied power is only incidental or ancillary to an express power, and, if there be no express grant, it follows, as a matter of course, that there can be no implied grant.

In construing such grant of power, . . . the rules are well settled that the intention of the grant of power, as well as the extent of the grant, must be clear; that in case of doubt that doubt is to be resolved not in favor of the grant but against it. It is one of the reserved powers that the legislative body no doubt had, but failed to delegate to the administrative board or body in question.

State ex rel. Bentley & Sons Co. v. Pierce, 96 Ohio St. 44, 47, 117 N.E. 6, 7 (1917). Accord State ex rel. Kahler-Ellis Co. v. Cline, 69 Ohio L. Abs. 305, 308, 125 N.E.2d 222, 224 (Lucas County Common Pleas 1954) ("[A]n administrative body may not, by rules, add to its delegated powers no matter how wise such rules may be or how laudable are the ends so sought to be accomplished"). Thus, one must examine the statutes pertaining to the powers and duties of the Section in order to determine whether the legislature has expressed an intention to regulate in the areas relevant

to the subject matter of these proposed rules, and, if so, whether the power to implement that regulatory scheme has been delegated to the Section. See Burger v. Thomas, 42 Ohio St. 2d, 377, 379, 329 N.E.2d 693, 695 (1975).

The Occupational Therapy and Physical Therapy Board is created pursuant to R.C. 4755.03. Subsequent provisions of R.C. Chapter 4755 establish the duties and powers of the Physical Therapy Section of this Board. The general rule-making authority of the Section is set forth under R.C. 4755.41. This statute provides, in pertinent part, that "[t]he section shall adopt, amend, or rescind rules pursuant to Chapter 119. of the Revised Code necessary for the performance of its duties." (Emphasis added.)

The duties and powers of the Section are set forth under R.C. 4755.04, and R.C. 4755.41 through 4755.99. In summary, these duties involve the establishment and enforcement of qualifications for licensure of physical therapists and physical therapy assistants, R.C. 4755.42; conduct of examinations for licensure, R.C. 4755.43; issuance of licenses, R.C. 4755.44, R.C. 4755.45; upon a finding of sufficient grounds, suspension, revocation, or denial of a license to practice as a physical therapist or physical therapy assistant, R.C. 4755.47; determination and collection of pertinent fees, see, e.g., R.C. 4755.04, R.C. 4755.42; investigation of alleged violations enumerated under R.C. 4755.48 and initiation of connected court proceedings, R.C. 4755.04; holding investigations and hearings for the suspension, revocation or denial of licenses, R.C. 4755.04; maintenance of records of proceedings, a register of applicants for licensure, and a register of licensed physical therapists and physical therapy assistants, R.C. 4755.04, R.C. 4755.41; publication of standards for licensure, R.C. 4755.04.

Certain of these provisions expressly empower the Section to promulgate rules necessary for the performance of a particular duty. For example, R.C. 4755.42(B) provides educational requirements for physical therapy assistants, and authorizes the Section to prescribe by rule additional academic requirements for anatomical, biological or other physical science courses. Pursuant to R.C. 4755.43, the Section is similarly authorized to prescribe rules under which it shall conduct the examinations for licensure of physical therapists and physical therapy assistants.

Your request concerns the Section's authority to promulgate three particular rules. The first would establish supervisory requirements for physical therapy assistants and support personnel. The second would enumerate the duties that a physical therapy assistant may perform. I note, however, that the Section has not been expressly empowered to establish standards governing the practice or conduct of physical therapists, or physical therapy assistants. Compare R.C. 4701.03 (accountancy board may promulgate rules of professional conduct); R.C. 4703.02 (state board of examiners of architects may adopt rules governing the conduct and practice to be followed in the practice of the profession of architecture); R.C. 4725.04 (board of optometry may make rules governing the practice of optometry). Nor does the subject matter of these rules appear to fall within the scope of any duty which the legislature has delegated to the Section for performance. Since any doubt must be resolved against the exercise of the rule-making power, I must conclude that the Section is without authority to adopt rules that either set forth requirements for the supervision to be provided by a physical therapist to physical therapy assistants and support personnel, or that enumerate the duties that may be performed by a physical therapy assistant.

The third rule to which your letter refers would define the term "physical measures" as used in R.C. 4755.40. The General Assembly has defined this term by providing that "[p]hysical measures include massage, heat, cold, air, light, water, electricity, sound, and the performance of tests of neuromuscular function as an aid to such treatment." R.C. 4755.40(A). Thus, the legislature does not appear to have delegated to the Section the power to define this term in order to implement this regulatory scheme. Rather, the legislature, by providing this statutory definition appears to have pre-empted any effort by the Section that would seek to otherwise interpret this term. Again, any doubt in this respect must be resolved against the exercise of the Section's rule-making power in this matter.

It is, therefore, my opinion and you are advised, that:

1. The Physical Therapy Section of the Ohio Occupational Therapy and Physical Therapy Board is without authority to adopt rules that either set forth requirements for the supervision to be provided by a physical therapist to physical therapy assistants and support personnel, or that enumerate the duties that may be performed by physical therapy assistants.
2. The Physical Therapy Section is not authorized to adopt a rule which defines the term physical measures as used in R.C. 4755.40.