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1. NURSE—NOT AUTHORIZED TO EXERCISE OFFICE OF ACTING HEALTH COMMISSIONER IN GENERAL HEALTH DISTRICT.
2. DISTRICT BOARD OF HEALTH—AUTHORIZED TO APPOINT PUBLIC HEALTH NURSE WITHOUT RECOMMENDATION OF HEALTH COMMISSIONER WHERE OFFICE OF HEALTH COMMISSIONER VACANT.

SYLLABUS:

1. A nurse is not authorized to exercise the office of acting health commissioner in a general health district.

2. A district board of health is authorized to appoint a public health nurse without the recommendation of a health commissioner for such district in a situation where the office of health commissioner is vacant.

Columbus, Ohio, September 28, 1950

Hon. Morris O. Gibby, Prosecuting Attorney  
Harrison County, Cadiz, Ohio

Dear Sir :

Your request for my opinion reads as follows:

“The following matter has come up and I request your

opinion on the same. Harrison County does not have a health commissioner although money has been appropriated for the position. However, the Health Department does have a nurse. Would the nurse be authorized to act as acting health commissioner?

“The second matter concerns Section 1261-22 of the General Code of Ohio; that code states that upon recommendation of the health commissioner the board of health may appoint a public health nurse. If there is no health commissioner, is the board of health authorized to appoint a nurse?”

Determination of the legal propriety of appointing a nurse to act as health commissioner requires construction of Section 1261-19, General Code. This section provides for the organization of a district board of health in a general health district and for the appointment of a health commissioner. With reference to the qualifications of the health commissioner this section provides in part as follows:

“\* \* \* Said appointee shall be a licensed physician and shall be secretary of the board and shall devote such time to the duties of his office as may be fixed by contract with the district board of health. \* \* \*”

In view of this plain and unambiguous provision of the statute, it is quite clear that a nurse would not possess the statutory qualifications requisite for appointment as health commissioner in a general health district. From this it follows that a nurse, appointed by the district board as “acting health commissioner” in a general health district, would, by reason of being ineligible for such appointment, be subject at any time to ouster from such office by proceedings in quo warranto.

Accordingly, it is my opinion that a nurse would not be authorized to exercise the office of health commissioner in a general health district even though designated by the district board of such general health district as “acting health commissioner.”

Your second question with reference to the appointment of a public health nurse requires a construction of Section 1261-22, General Code. This section reads in part as follows:

“In any general health district the district board of health may upon the recommendation of the health commissioner appoint for whole or part time service a public health nurse and a clerk and such additional public health nurses, physicians and other persons, as may be necessary for the proper conduct of its work. \* \* \*”

Where a public health nurse has been properly appointed by the board upon the recommendation of the health commissioner, I see no reason why such nurse should not continue to discharge her duties after the termination of the appointment of the health commissioner and during a period in which the general health district had no health commissioner or acting health commissioner.

If, however, your question is concerned with the authority of the district board of health to appoint a public health nurse in the absence of a recommendation of the health commissioner, the problem is somewhat more involved.

The legality of such appointment will depend, in my opinion, upon whether the statutory provision quoted above which provides for the appointment "upon recommendation of the health commissioner" is directory or mandatory. In this connection, the following statement is observed in 42 Am. Jur. 951, Section 92:

"\* \* \* While the appointing officer or body may listen to the recommendation or advice of others, yet the selection must finally be his or its act. \* \* \*"

In the case with which you are concerned it is quite clear that the appointment must be made by the district board of health and such appointment cannot be dictated by the health commissioner but the actual selection must be made by the board. Accordingly, I conclude that the statutory provision for a recommendation by the health commissioner is directory only and in the absence of any such recommendation a board would be authorized to make such appointment.

In reaching this conclusion I am not unmindful of the desirability that a recommendation, based on professional qualifications, made by the health commissioner who is required to be a licensed physician is of considerable importance; and it may be presumed that it was the legislative intent that a licensed physician should examine such qualifications prior to appointment. However, since it appears that under the provisions of Section 1261-18, General Code, at least one member of the district board of health is required to be a physician, the members of a district board of health, in making such appointment, would not be without the advice of a person qualified to examine the professional qualifications of the prospective appointee.

Accordingly, and in specific answer to your inquiries, it is my opinion that:

1. A nurse is not authorized to exercise the office of acting health commissioner in a general health district.

2. A district board of health is authorized to appoint a public health nurse without the recommendation of a health commissioner for such district in a situation where the office of health commissioner is vacant.

Respectfully,

HERBERT S. DUFFY,  
Attorney General.