

termine whether the interests of the taxpayers of that city would be better served by a gratuitous transfer of the property than by a sale of the property.

In summary, it is my opinion that when the creation of a county health department causes the dissolution of a city health department, the personal property used by the city health department remains the property of the city. It is my further opinion that the common council of the city may authorize the transfer of some or all of that property to the newly created county health department, either by sale or gratuitously, whichever the council deems to be in the best interest of the residents of the city.

OFFICIAL OPINION NO. 69

LOCAL HEALTH BOARD—Adoption of Rules and Regulations Concerning Food Establishments.

Opinion Requested by Dr. A. C. Offutt, State Health Commissioner.

I am in receipt of your inquiry concerning the powers of local boards of health. Your letter presents two questions which may be phrased thusly:

1. May local boards of health adopt rules and regulations concerning the operation of food establishments?
2. If local boards of health have such authority, are the rules and regulations they adopt subject to approval by the State Board of Health?

The State Board of Health and all local boards of health are organized under and regulated by the Public Health

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Code, Acts 1949, ch. 157, as amended. The same Act authorizes the regulation of food establishments.

To answer your first question, it is necessary to examine both the general powers given to local boards of health by that Act, and the provisions of the Act relating particularly to food establishments.

The general powers and duties of local boards of health and of the health officers employed by them are set out in Sections 400 through 424 of Acts 1949, ch. 157, as amended, the same being Burns §§ 35-501 through 35-525. Two such sections relate to rules and regulations.

The first section that pertains to rules and regulations, and then only tangentially, concerns health officers. Acts 1949, ch. 157, § 401, the same being Burns § 35-502, provides:

“Local health officers shall enforce the health laws, ordinances, orders, rules and regulations of their own and superior boards of health.”

This section, of course, does not give the local health officer the authority to adopt rules and regulations, nor does it give him the authority to enact health laws or ordinances. The juxtaposition of words in the statute, however, could induce the conclusion that (and therefore be considered authority for the proposition that) the health officer's board of health has the power to adopt rules and regulations. But again it must be noted that this section deals exclusively with the duty of the health officer to enforce rules and regulations. The section is concerned with duties rather than powers, and cannot be construed as a grant of power to any person or board. If some other portion of the Act grants the local health board the power to adopt rules and regulations, and if the board does adopt rules and regulations, then this section of the Act requires the health officer to enforce them.

The second section of that portion of the Health Code describing the powers of local health boards that concerns rules and regulations does give the local boards a limited power to adopt rules and regulations. Acts 1949, ch. 157,

§ 424, as added by Acts 1965, ch. 358, § 12, the same being Burns § 35-525, provides :

“The board of each local health department may adopt rules and regulations, not inconsistent with this act, laws of the state and regulations of the state board, for its own guidance, and as may be deemed necessary to establish administrative policies and procedures of the health department.

“The board of health may adopt personnel policies for compensated employees. In establishing personnel policies, the board shall consider and may adopt modern developments in the solution of personnel problems, as illustrated by, but not limited to ;

“1. The establishment of positions and homogeneous classes of positions for purposes of recruiting, personnel operations, and equalization of pay ;

“2. The establishment and adjustment of scales and rates of pay ;

“3. The filling of positions by promotions, by recruitment for original appointment, and by transfer ;

“4. The maintenance of attendance and performance records ;

“5. The establishment of working conditions, as illustrated by, but not limited to, probationary appointments and in-service training, vacations and other leaves of absence with or without pay, and retirement programs ; and

“6. The regulation of temporary and permanent separation from the service.”

The authority to adopt rules and regulations granted by the statute above is extremely limited and pertains only to the internal operation and management of the board. There is no indication that the board is given authority to adopt regulations affecting the conduct of the general public. The limit on the authority granted a local board to adopt rules and regulations is especially evident when contrasted with the authority granted the State Board of Health. Acts 1949,

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ch. 157, § 212, as amended by Acts 1967, ch. 58, § 1, the same being Burns § 35-213, provides:

"The state board may by an affirmative vote of a majority of its members establish and from time to time amend and repeal reasonable rules in order to protect or to improve the public health in this state. The rules may concern but shall not be limited to:

- "1. nuisances dangerous to public health;
- "2. the pollution of any water supply other than where jurisdiction is in the Stream Pollution Control Board;
- "3. the disposition of excremental and sewage matter;
- "4. the control of fly and mosquito breeding places;
- "5. the detection, reporting, prevention, and control of diseases which affect public health;
- "6. the care of maternity and infant cases and the conduct of maternity homes;
- "7. the production, distribution, and sale of human foods;
- "8. the conduct of camps;
- "9. standards of cleanliness of eating facilities for the public;
- "10. standards of cleanliness of sanitary facilities offered for public use;
- "11. the handling, disposal, disinterment, and reburial of dead human bodies;
- "12. vital statistics;
- "13. regulating and prescribing sanitary conditions and facilities in public buildings and grounds as illustrated by but not limited to plumbing, drainage, sewerage, water supply, lighting, heating, and ventilation other than where jurisdiction is vested by law in the Administrative Building Council;

“14. the administration of the laws of this state which require an examination for the discovery of syphilis prior to the application for or the issuance of a marriage license ;

“15. the design, construction, and operation of swimming and wading pools: Provided, however, that such rules shall not apply to any pool maintained by an individual for the sole use of his household and house guests.”

The power of an administrative agency, such as a local board of health, to adopt rules and regulations was described by the Supreme Court in *Indiana Dept. of State Revenue v. Colpaert Realty Corp.*, 231 Ind. 463, 479, 109 N.E. 2d 415 (1952), thusly:

“An administrative board has the undoubted right to adopt rules and regulations designed to enable it to perform its duties and to effectuate the purposes of the law under which it operates, when such authority is delegated to it by legislative enactment. *Blue v. Beach* (1900), 155 Ind. 121, 56 N.E. 89; *Albert v. Milk Control Board of Indiana* (1936), 210 Ind. 283, 200 N.E. 688; *McCreery v. Ijams* (1945), 115 Ind. App. 631, 59 N.E. 2d 133. But it may not make rules and regulations inconsistent with the statute which it is administering, it may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law. *McCreery v. Ijams, supra*; 73 C.J.S., Public Administrative Bodies and Procedure, §§ 93 and 94.”

The power of an administrative agency was also described by the Attorney General. In 1960 O.A.G., p. 109, at 113, it is stated:

“The rule-making power of state agencies is not inherent in any such agency but is derived solely by specific delegation from the Legislature itself. No state agency may adopt a rule or regulation which may have the force and effect of law and which may

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therefore be imposed upon those to whom it applies with the exaction of penalties for the violation thereof, unless such a rule or regulation is grounded upon the stability of a specific legislative act authorizing such rule."

The language enabling a local board of health to establish rules and regulations "for its own guidance" and "to establish administrative policies and procedures" contained in Burns § 35-525, *supra*, does not provide "the stability of a specific legislative act" authorizing a regulation which would "have the force and effect of law" and which would "be imposed upon those to whom it applies with the exaction of a penalty for the violation thereof." Therefore, I conclude that the Legislature has not granted to local boards of health the general power to adopt rules and regulations in the area of public health.

The conclusion above, however, does not preclude the possibility that the Legislature has granted to local health boards the power to adopt rules and regulations in the specific area of food establishments. The answer to that question requires examination of those provisions of the Public Health Code that specifically pertain to such establishments.

Those specific provisions are contained in Acts 1949, ch. 157, §§ 1300 through 1324, the same being Burns §§ 35-2201 through 35-2225. Section 1303, Burns § 35-2204, provides:

"The state board may make rules and regulations for the efficient enforcement of this provision and to establish minimum sanitary standards for the operation of all food establishments. Rules promulgated under the provisions of this division shall be made in accordance with the provisions of the state statutes concerning the establishment and promulgation of rules by state agencies."

I find in the sections pertaining directly to the regulation of food establishments no mention of local boards of health, although section 1305, Burns § 35-2206, concerns local health officers and provides:

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“For the purpose of enforcing this article, the local health officers shall be food sanitarians subordinate to the state board.”

The inevitable conclusion is that the local boards of health are given no authority to adopt rules and regulations by those provisions of the Public Health Code that pertain especially to the operation of food establishments.

Therefore, in answer to your first question, it is my opinion that local boards of health have no authority to adopt rules and regulations regulating the operation of food establishments within their jurisdiction, and that such authority is vested solely in the State Board of Health.

Since the answer to your first question is in the negative, your second question need not be answered at this time.

OFFICIAL OPINION NO. 70

**INDIANA SECURITIES ACT—Exchange of Stock
Where Insurance Companies Merge With
Non-Insurance Corporations.**

Opinion Requested by Hon. Edgar D. Whitcomb, Secretary of State.

I am in receipt of your recent letter which may be phrased thusly:

This letter is to request an official opinion of your office as to the applicability of the Indiana Securities Act as it pertains to exchange offerings of Indiana insurance companies under Chapter 61 of the Acts of 1967. This chapter allows Indiana insurance companies to create a holding company which has the powers of a general corporation and at the same time