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in which such appointee exercises any official jurisdiction. The operative phrase in this provision is "in which he (the appointee) exercises any official jurisdiction." (Parenthetical insert added.)

While it is true that the members of the police force in a fifth class city are appointees of the mayor, it would seem unreasonable to conclude that such police officers are "appointees" as that term is employed in the criminal statute. It would be more reasonable to assume the Legislature intended that statute to apply only to those "appointees" who would be officers exercising some of the sovereign authority of the governmental unit and not to police officer appointees who are mere "employees" and not "officers" in the legal connotation of that term.

OFFICIAL OPINION NO. 40

December 20, 1966

**STATE BOARD OF HEALTH—Medicare Act Establishing
Home Nursing Services—Agency Functioning in Relation
to Public, Rather Than as to Individuals.**

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

I am in receipt of your request for an opinion concerning the authority of the State Board of Health in relation to the home nursing services described in the federal Medicare Act. You asked two specific questions, to-wit:

1. Is the Indiana State Board of Health or any local board of health authorized to establish a home health agency as described in Title XVIII of P.L. 89-97 (Medicare)?

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2. If the answer to the preceding question is in the affirmative, would the board of health which establishes such agency and employs nurses who tend patients in the patient's home at the request of and under the direction of the patient's physician be liable for the acts of such nurses?

Public Law 89-97, Title I, § 102(a), 79 Stat. 313, 42 U.S.C. § 1395x, contains the following definitions:

“(o) The term ‘home health agency’ means a public agency or private organization, or a subdivision of such an agency or organization, which—

“(1) is primarily engaged in providing skilled nursing services and other therapeutic services;

“(2) has policies, established by a group of professional personnel (associated with the agency or organization), including one or more physicians and one or more registered professional nurses, to govern the services (referred to in paragraph (1)) which it provides, and provides for supervision of such services by a physician or registered professional nurse;

“(3) maintains clinical records on all patients;

“(4) in the case of an agency or organization in any State in which State or applicable local law provides for the licensing of agencies or organizations of this nature, (A) is licensed pursuant to such law, or (B) is approved, by the agency of such State or locality responsible for licensing agencies or organizations of this nature, as meeting the standards established for such licensing; and

“(5) meets such other conditions of participation as the Secretary may find necessary in the interest of the health and safety of individ-

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uals who are furnished services by such agency or organization;

except that such term shall not include a private organization which is not a nonprofit organization exempt from Federal income taxation under section 501 of Title 26 (or a subdivision of such organization) unless it is licensed pursuant to State law and it meets such additional standards and requirements as may be prescribed in regulations; and except that for purposes of part A such term shall not include any agency or organization which is primarily for the care and treatment of mental diseases.”

Public Law 89-97, Title I, § 102(a), 79 Stat. 313, 42 U.S.C. § 1395x, provides as follows:

“(m) The term ‘home health services’ means the following items and services furnished to an individual, who is under the care of a physician, by a home health agency or by others under arrangements with them made by such agency, under a plan (for furnishing such items and services to such individual) established and periodically reviewed by a physician, which items and services are, except as provided in paragraph (7), provided on a visiting basis in a place of residence used as such individual’s home—

“(1) part-time or intermittent nursing care provided by or under the supervision of a registered professional nurse;

“(2) physical, occupational, or speech therapy;

“(3) medical social services under the direction of a physician;

“(4) to the extent permitted in regulations, part-time or intermittent services of a home health aide;

“(5) medical supplies (other than drugs and biologicals), and the use of medical appliances, while under such a plan;

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“(6) in the case of a home health agency which is affiliated or under common control with a hospital, medical services provided by an intern or resident-in-training of such hospital, under a teaching program of such hospital approved as provided in the last sentence of subsection (b) of this section; and

“(7) any of the foregoing items and services which are provided on an outpatient basis, under arrangements made by the home health agency, at a hospital or extended care facility, or at a rehabilitation center which meets such standards as may be prescribed in regulations, and—

“(A) the furnishing of which involves the use of equipment of such a nature that the items and services cannot readily be made available to the individual in such place of residence, or

“(B) which are furnished at such facility while he is there to receive any such item or service described in clause (A),

but not including transportation of the individual in connection with any such item or service;

excluding, however, any item or service if it would not be included under subsection (b) of this section if furnished to an inpatient of a hospital.”

The agency described in the above statutes is one that provides a particular service on an individual basis. It is an agency that enters into a semi-contractual relationship with a succession of individual persons rather than one that caters to the public as a whole.

The State Board of Health, on the other hand, appears to be an agency created to function in relation to the public as a whole. This purpose is nowhere specified by law, but various

statutes pertaining to the Board of Health lead to this conclusion. For instance, Acts 1949, ch. 157, § 212, the same being Burns IND. STAT. ANN., § 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 food.
- “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 re-burial 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

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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.”

Not only does the statute above specify that the rules are to protect or to improve the public health, but all the fourteen specified topics are ones that concern the entire populace of the state.

In addition to the power to promulgate rules set out above, Acts 1949, ch. 157, as found in Burns IND. STAT. ANN. gave the State Board of Health authority in relation to certain matters. Sections 800 through 817, Burns §§ 35-1101—1118, concern control of communicable diseases; Sections 1300 through 1324, Burns §§ 35-2201—2225, concern food establishments; Section 2000 through 2009, Burns §§ 35-3401—3410, concern cosmetics.

While many other topics could be cited, all such topics have in common with the ones pointed out above the total application to all of the public as a unit. In all instances the concern of the State Board of Health is with the public *en masse* rather than with providing service for a single individual.

A careful examination of the statutes relating to the State Board of Health reveals no single instance where the board is empowered to deal with individuals as individuals except when such individual dealing is incidental to fulfilling the function of the Board of Health in relation to the public as a whole.

It is an elementary principle of administrative law that an administrative agency possesses and may exercise only those powers granted to the agency by statute. *Smith v. Thompson Constr. Co.*, 224 Ind. 565, 69 N.E. 2d 16 (1946); *Good v. Western Pulaski County School Corp.*, — Ind. App. —, 210 N.E. 2d 100, 6 Ind. Dec. 361 (1965).

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The absence of any statutory authority permitting the State Board of Health to deal with persons on an individual basis in a semi-contractual relationship leads to the inevitable conclusion that the State Board of Health is not empowered to establish a home nursing agency as described in the federal Medicare Act. Local boards of health have not been discussed since the same principles apply to them as to the State Board of Health.

Since the answer to the first question is in the negative there is no need to answer your second question at present.

OFFICIAL OPINION NO. 41

December 22, 1966

**PUBLIC WELFARE—Recipient of Benefits Committing Fraud
Upon Change of Status Without Informing Department
—Criminal Sanctions of Offenses Against
Property Act.**

Opinion Requested by Mr. Albert Kelly, Administrator, Department of Public Welfare.

Your letter dated November 25, 1966, asks for an opinion directed to the following:

“The question arises when an applicant for Public Welfare assistance who does *not* make false statements or representations and who honestly and correctly discloses his *present* financial condition and the occupants of his household when applying for assistance, but who after receiving assistance for a period of time becomes eligible for and starts to receive either Social Security, an inheritance or other income, or who later renders