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April 13, 2020

Dr. Marylyn Ranta
President of the Milwaukee Board of Health
841 N. Broadway, 3rd Floor
Milwaukee, WI 53202

Re: The Board of Health's authority to create a task force or committee

Dear Dr. Ranta:

In an email dated March 12, 2020 you requested an opinion on whether the Milwaukee Board of Health (the Board") has authority to create a task force or advisory committee consisting at least partially of individuals that are not members of the Board. We understand this question was prompted by the Board's decision to create the Lead Advisory Committee (the "Committee"). The Board believes that creating the Committee will help the Board to promote public participation in dealing with lead issues, understand the impact of problems caused by lead, and include subject matter experts that will help inform its policy recommendations. It is our understanding that the Committee would be a formal creation of the Board pursuant to Section 4.5 of the Board's Rules and Regulations, the Board would select the members of the Committee, those members would potentially have voting rights as members of the Committee, and the Committee would hold meetings of its own that would subject the Committee to certain legal requirements such as Wisconsin's Open Meetings law. For the reasons outlined below, we have concluded the Board has the authority to create the Committee subject to certain restrictions. You also requested advice on whether the Board requires permission from the Commissioner of Health, Common Council, or Mayor before it can create the Committee. Because we have concluded that the authority to create the Committee rests with the Board, no outside permission is required to create the Committee.



In order for the Board to create the Committee the act must be explicitly or implicitly authorized by state statute. The Board, as a creation of state law, has "only those powers that are expressly conferred or necessarily implied from the statutory provisions under which it operates." *Conway v. Bd. of Police & Fire Comm'rs of City of Madison*, 2003 WI 53, ¶ 28, 262 Wis. 2d 1, 16, 662 N.W.2d 335, 342. In order to determine whether an action of a board is expressly or implicitly authorized, one examines the statute enabling its creation. *State ex rel. Castaneda v. Welch*, 2007 WI 103, ¶ 26, 303 Wis. 2d 570, 587, 735 N.W.2d 131, 140. The Board can only create the Committee if the statute that created the Board explicitly or implicitly authorizes it to do so.

In order to determine whether a board has express authority to take an action, courts "first look to the plain language of the statute" and where "the language of the statute is clear and unambiguous, [they] apply the language to the facts at hand." *Conway* at ¶ 30, 262 Wis. at 16, 662 N.W.2d at 342. Although the statute need not spell out every detail of the action taken, the elements of the action taken must match up with the statute. *Wisconsin Hosp. Ass'n v. Nat. Res. Bd.*, 156 Wis. 2d 688, 705-06, 457 N.W.2d 879, 886 (Ct. App. 1990). Therefore in order to determine whether the creation of the Committee is explicitly authorized, one must first see if the elements of the action are spelled out in the statutes that enable the Board.

The statute creating the Board does not mention any specific authority to create the Committee. Chapter 251 of the Wisconsin Statutes sets forth the duties and powers of the Board. The Board is the "policy-making body for a local health department" and is tasked with governing it. Wis. Stat. §§ 250.01(3) & 251.04(1). The Board is, among other things, required to "develop policy and provide leadership that fosters local involvement and commitment, that emphasizes public health needs and that advocates for equitable distribution of public health resources and complementary private activities commensurate with public health needs." Wis. Stat. § 251.04(6)(b).¹ None of the enumerated powers or duties set forth in Chapter 251 explicitly grants the Board authority to create the Committee.

"In addition to powers expressly conferred upon [it] by statute, [a board] has by implication such additional powers as are necessary for the due and efficient exercise of the

¹ Although there are additional powers and duties the Board has under state law, none of them explicitly authorize the creation of the Committee or align with the Committee's purpose and will not be analyzed herein. See e.g. Wis. Stat. §§ 251.04(1)&(2) (The Board must "assure the enforcement of state public health statutes and public health rules of the department as prescribed for a Level I local health department" and "shall assure that its local health department is a Level I, Level II, or Level III local health department, as specified in s. 251.05(1)"); Wis. Stat. § 251.04(6)(a) (The Board is responsible for assessing and advocating "for the provision of reasonable and necessary public health services").

powers expressly granted, or such as may be fairly implied from the statute granting express powers.” *Kasik v. Janssen*, 158 Wis. 606, 149 N.W. 398, 400 (1914); *see also* Wis. Stat. § 251.04(3)(The Board “may adopt those regulations, for its own guidance and for the governance of the local health department, that it considers necessary to protect and improve public health”). When determining whether implied authority exists, any reasonable doubt as to its existence in an agency must be resolved against the exercise of such authority. *See Conway* at ¶ 21, 262 Wis. 2d at 14, 662 N.W.2d at 341. The Board’s implied authority to create the Committee must be narrowly construed and only exists if it the Board deems the action necessary to carry out the express powers or duties set forth in Chapter 251 or is implied by the same.

The Board can create the Committee if the Board deems the Committee necessary to carry out its express duties. One of the Board’s mandates is to “develop policy and provide leadership that fosters local involvement and commitment, that emphasizes public health needs and that advocates for equitable distribution of public health resources and complementary private activities commensurate with public health needs.” Wis. Stat. § 251.04(6)(b). The purpose of the Committee in helping to promote public participation in dealing with lead-related issues, understand the impact of problems caused by lead, and include subject matter experts to inform policy recommendations aligns with the Board’s mandate under Wis. Stat. § 251.04(6)(b). It is reasonable for the Board to conclude that the Committee is necessary for it to carry out its mandate. Therefore the Board has implied authority to create the Committee.

Although we have determined that the Board does have authority to create the Committee, it cannot do so in a manner contrary to the language of the statute. “An administrative rule exceeds statutory authority if it conflicts with the language of the statute or the statute’s legislative intent.” *Conway* at ¶ 19, 262 Wis. 2d at 13, 662 N.W.2d at 341; *see also* Wis. Stat. § 251.04(3)(Regulations adopted by the Board “may be no less stringent than, and may not conflict with, state statutes and rules of the department.”). Wis. Stat. § 251.03 states that the “local board of health shall consist of not more than 9 members” that are appointed by the mayor and subject to common council confirmation. Wis. Stat. §§ 251.03(1)&(2). Although Board can create the Committee, doing so cannot increase the Board’s size above nine or allow for Board members to be appointed in a manner contrary to Wis. Stat. § 251.03.

Although Committee members selected by the Board can be members of the public, the non-Board Committee members would not be allowed to vote in Board matters. The Board currently has nine members that were appointed by the mayor and confirmed by the common council in accordance with Wis. Stat. § 251.03. The Board’s intent in creating the Committee is

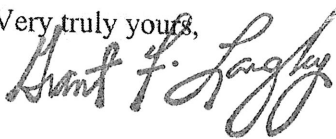
Dr. Marylyn Ranta
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to allow the Board to select individuals from the public to serve on the Committee. Allowing Committee members who are not Board members to vote in Board matters has the practical effect of increasing the membership and altering the manner of selection of the Board contrary to Wis. Stat. § 251.03. Therefore Committee members cannot be allowed to vote on Board matters. Further, Committee recommendations would need to be brought to the full Board for approval in order to ensure that all Board members have an opportunity to vote on the recommendations. Failure to do so has the effect of removing authority from those Board members who are not members of the Committee. Finally, the Board cannot authorize the Committee to take any actions that the Board itself cannot take such as procuring goods or services. In order to ensure these restrictions are clearly set forth, the existence of the Committee as well as its powers, membership, and authority should be clearly set forth in the Board's Rules and Regulations before the Committee is formed.

You also requested an opinion on whether the Board requires permission from the Commissioner of Health, Common Council, or Mayor before the Board can create the Committee. As discussed above, the implicit authority to create the Committee was granted to the Board pursuant to state law. Because the authority to create the Committee was granted to the Board, no formal mandate from any local authority needs to be given before the Board can act. The Board need not wait for permission to determine whether it wishes to create the Committee.

In sum, the Board has the authority to create the Committee subject to the restrictions discussed herein. This authority is implicitly granted pursuant to state law. As such, no additional permission or grant of authority is required in order for the Board to create the Committee.

Very truly yours,



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GK/cdr
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