

Ten Rules of Thumb For Local Boards of Health

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**2003 Public Health Conference
“Changing the Future”
March 26, 2003
Scheman Conference Center
Ames, IA**

I am going to spend my 10 minutes covering legal aspects of boards of health. If you would like a copy of my presentation, you can access it by going to the ISAC website, www.iowacounties.org, going to “Hot Topics,” and then going to “Board of Health Presentation.”

So here we go, in no particular order:

#1: The Board of Health has broad jurisdiction over health matters - The legislative grant of authority to boards of health is so broad that they can do most anything they want.

Iowa Code section 137.7 (1) says that local health boards “may provide such personal and environmental health services as may be deemed necessary for the protection and improvement of the public health.” This is very broad, and gives the board virtually unlimited discretion as to what services to provide.

Iowa Code section 137.5 states that the county board shall have jurisdiction over public health matters” in the county.

County boards of health are the governing boards in their county for public health. They establish the framework for public health and, with community involvement, select the county’s public health priorities. They provide the vision and the advocacy.

In Iowa Code section 137.6, it says that

“Local boards shall have the following powers:

1. Enforce state health laws and the rules and lawful orders of the state department.
2. Make and enforce such reasonable rules and regulations not inconsistent with law or with the rules of the state board as may be necessary for the protection and improvement of the public health.”

The administrative rules go even further: The local board of health “is responsible for safeguarding the community’s health.” And it goes on to say that the local board of health is responsible for “taking the lead in public health policy development.”

There is a case which dates back to the turn of the last century called Warner v. Stebbins. In that case some challenged the powers of a local board of health. The Iowa Supreme Court said that Chapter 137 vests broad discretionary authority powers in local boards of health. The Iowa Supreme Court said:

"The power given to local boards by this statute is broad. It is in the nature of legislative power delegated to the officers of a municipality for the preservation and promotion of the public health, and, while its use as an instrument of oppression by the local authorities will not be permitted, acts done thereunder, in good faith and for the purpose of promoting the general health . . . will be upheld by the courts."

The Iowa Supreme Court has said that in determining the validity of the acts of boards of health, a liberal construction is justified, in view of the public good to be accomplished. A regulation which is reasonably calculated to preserve the public health is valid, and will be upheld unless it clearly appears unreasonable.

It is not just that boards of health have a lot of authority under the Iowa Code. They also have the same home rule authority that counties themselves have. This was decided in a 1980 case called *Kasperek v. Johnson County Board of Health*. County home rule authority means that a local board of health can do anything it chooses to do, in the absence of a statute prohibiting such an action.

Be bold, be decisive. And if anyone second-guesses your board of health, and asks where they get the authority to do something, it is as simple as pointing them to Chapter 137.

#2: Boards of Health are autonomous from the board of supervisors -

When you get right down to it, what powers do Boards of Supervisors have over Boards of Health: 1)they appoint the members; 2)they determine county funding; and 3)they approve all regulations adopted by the Board of Health. They don't directly determine policy. They don't establish the budget. They don't enforce health regulations.

The political reality is that since the board of supervisors to some extent controls the purse strings, they can exert considerable pressure on the Board of Health. And the Board of Supervisors can stack the board of health with people that will carry out their wishes. But on a day to day basis, the board of health has independent authority to act as it sees fit.

The bottom line: the Board of Health is autonomous from the board of supervisors.

#3: In particular, the Board of Health is autonomous when it comes to personnel matters – there is a 2002 decision from the Iowa Supreme Court which all local board of health members need to be familiar with. It is from Bev Dickerson's county, though it involves things that happened long before the supervisors had the wisdom to put her on the board of health. It is called *Warren County Board of Health v. Warren County Board of Supervisors*. I could talk for an hour just about the implications of this decision, but let me hit the highlights.

Chapter 137 gives boards of health broad powers regarding public health matters. In particular, Iowa Code section 137.6 gives every board of health has the authority to “employ persons as necessary for the efficient discharge of its duties

The question that faced the Iowa Supreme Court recently was, can the board of health delegate that authority regarding personnel decisions to the board of supervisors?

In December, in *Warren County Board of Health v. Warren County Board of Supervisors* (01-1732), the Iowa Supreme Court considered a long-standing dispute in Warren County. The issue was whether the board of health had delegated to the board of supervisors the authority to hire and fire board of health employees. The situation, which began back in 1997, came to a head a year later when the board of health voted to fire the sanitarian, and then the board of supervisors told the sanitarian that he was not fired and put him back to work, claiming that the board of health had delegated those decisions to the supervisors.

The delegation claim was based on the history of past dealings between the board of health and the supervisors. The board of health had adopted the county employment manual, which contained policies and procedures. In addition, the board of health adopted the county’s classification and pay plan. The board of health also allowed the supervisors to control various employment decisions regarding other employees.

The Iowa Supreme Court sided with the board of health, for two reasons. First, the Supreme Court said that it doubted that the ability to hire and fire employees was a power that a board of health could ever delegate. It said that as a specific, enumerated power, it generally would not be subject to delegation. As a general rule, said the Court, a county “cannot surrender, by contract or otherwise, any of its legislative and governmental functions and powers,” unless authorized by statute. Here there was no such authorization.

The Court also said that even if the power could be delegated, there was no evidence in the record supporting a finding that the authority actually was delegated in this case. The county manual, for instance, did not mention delegation of the authority to terminate board of health employees. Governmental functions cannot be delegated “by mere acquiescence or default,” said the Court. The Court pointed out that there was “no evidence of a board resolution or other specific transfer of power.”

The point of the Warren County case that boards of health probably cannot give over employment decisions to the board of supervisors. Even if they can, the delegation of this authority must be very clear and formalized.

On this personnel issue, there is also an Attorney General’s opinion that says that the Board of Health, rather than the Board of Supervisors, determines salaries for BOH employees.

So when you get right down to it, what powers do Boards of Supervisors have over Boards of Health: 1) they appoint the members; 2) they determine county funding; and 3) they approve all regulations adopted by the Board of Health. They don't directly determine policy. They don't choose the staff. They don't set salaries.

#4: There is a specific procedure for adopting Board of Health regulations – A process which many counties seemed to have trouble with when it came to adopting regulations concerning livestock confinements.

This is explained in Iowa Code section 137.6. Technically what the board of health approves is called a “rule or regulation.” Passing a regulation is a seven-step process:

- 1) the first step in passing a regulation would be for the board of health to vote on holding a public hearing on the proposed regulation;
- 2) the next step is to publish a notice of the time and place of the hearing, as well as the general nature of the proposed rule. The notice must be published between four and 20 days before the hearing in one general circulation newspaper in the county.
- 3) notice of the hearing must also be given to the communications media in the county.
- 4) any “citizen” may appear and be heard at the hearing - everyone has the right to speak.
- 5) at any point after the hearing the board of health votes to approve the regulation.
- 6) the regulation must then be approved by the board of supervisors. This could be accomplished through a simple motion. The supervisors are not required to hold hearings on the regulation, or have several readings of the regulation. They are required to put the item on the board agenda.
- 7) the regulation becomes effective upon publication in a newspaper having general circulation in the county.

#5: Local Boards of Health are subject to the Open Meetings Law – This means 2 things: 1) you must post an agenda of the meeting 24 hours in advance (not publish – post); and 2) you must take minutes of the meetings. You don't have to publish the minutes – the administrative rules require that you send a copy to the state department of public health.

You cannot discuss matters at the meeting that have not been put on the agenda. Unless it is an emergency.

#6: You can only go into closed session in certain limited circumstances – 10 to be exact. The most likely ones that might pertain to you are: 1)to discuss litigation with your attorney, where the litigation has been commenced or is “imminent;” or 2)to discuss hiring, firing or job performance of employees, but only 1)where the employee requests a closed session and 2)having an open session would cause needless and irreparable harm to his reputation

#7: There is an art to going closed session – If you know in advance you are going to go into closed, session, you need to state that in the meeting agenda. When you need to go into closed session, you need to state for the record the statutory exception that you are relying on, and you need to have a recorded vote. The motion to close the session must get 2/3s vote of the entire board or, if less than a full board is present, the unanimous vote of all members present.

Which means 4 if 5 are present
4 if 4 are present
3 if 3 are present

When you are in closed session, in addition to taking minutes you need to tape record the closed session. You must keep the tape for one year. You cannot vote on anything in closed session. And you can only discuss in closed session that which pertains to the reason you went into closed session in the first place.

Get a copy of the FOI Council’s Open Meetings Law Handbook. They are available for \$3 or \$4. You can order one through the council’s website. Just type in “foi iowa” and that will get you there. If you are cheap, you can just print out one from that site, though it does not appear to be the most recent edition.

#8: You can have a supervisor on your Board of Health – there are pros and cons to doing that, but there is no question that it is legal to do so – there is an Attorney General’s opinion from April 27, 2001 that says so. Actually that opinion talks about conservation boards, but the analysis is the same. The point is, there is a statute, 331.216, that specifically says supervisors can serve on any county board or commission.

This has been the subject of some confusion because there was a 1979 and 1980 Attorney General opinion that said you could not have a supervisor on a board of health. But those earlier opinions were overruled by the latest opinion.

Having a supervisor on the board of health may help to clarify the good work that the board of health does, and give the board an inside connection on the board of supervisors. On the other hand, it may compromise the board of health’s autonomy and independence. That has happened.

But you should know that this option is available.

#9: Boards of Health probably cannot regulate livestock confinement facilities -

The recent Worth County decision is only a district court decision at this point, but it is pretty convincing, and it says that local boards of health do not have any authority to regulate confinement livestock operations. This is due to 331.304A, which was passed in 1998, and says that counties cannot regulate livestock operations unless they have “express statutory authority” to do so.

The issue of whether Chapter 137 regarding local boards of health is that sort of “express authority” was apparently argued to the district court judge, but did not make it into his decision, so that issue has not been decided.

#10: Local Board of Health members can only be removed “for cause” - Suppose you are controversial and confrontational and make waves? Does that mean you can be removed by the board of supervisors? Generally no. Although this issue has not been litigated in Iowa, the presumption in the law is that if there is a set term for a board appointment, then the appointee can only be removed in mid-term “for cause,” which generally means failure to conduct the duties of the office. It is supposed to be relatively difficult to get rid of board of health members.