

December 17, 2009

Timothy Chesney, Chairman
Ohio Board of Examiners of Nursing Home Administrators
246 North High Street
Columbus, Ohio 43215

SYLLABUS:

2009-052

1. R.C. 4751.03(H) authorizes the Ohio Board of Examiners of Nursing Home Administrators to employ such employees as are necessary to carry out the work of the Board that is not performed by Department of Health employees who provide administrative, technical, and other services for the Board.
2. The Ohio Board of Examiners of Nursing Home Administrators is, for purposes of R.C. Chapter 124, the appointing authority of the persons it employs under R.C. 4751.03(H).



RICHARD CORDRAY
OHIO ATTORNEY GENERAL

December 17, 2009

OPINION NO. 2009-052

Timothy Chesney, Chairman
Ohio Board of Examiners of Nursing Home Administrators
246 North High Street
Columbus, Ohio 43215

Dear Chairman Chesney:

You have requested an opinion of the Attorney General concerning the scope of authority granted to the Ohio Board of Examiners of Nursing Home Administrators (“BENHA” or “the Board”) by R.C. 4751.03(H) with respect to the employment of personnel. According to the Board’s executive director, there is currently a dispute between the Board and the Ohio Department of Health (“ODH”) as to whether certain individuals performing services for the Board are actually employees of the Board or employees of ODH.

To answer your question, we first note that according to R.C. 4751.03(A), “[t]here is hereby established in the department of health a board of examiners of nursing home administrators.” As a creature of statute, BENHA has only those powers and duties assigned to it by statute. *See generally, e.g., State ex rel. Funtash v. Industrial Comm’n*, 154 Ohio St. 497, 96 N.E.2d 593 (1951) (syllabus, paragraph 1) (“[t]he Industrial Commission of Ohio is an administrative agency possessing only such powers and duties as are conferred on it by the provisions of the state Constitution and statutes”).

You specifically ask about the scope of authority granted to the Board by R.C. 4751.03(H), which states:

The board shall appoint a secretary who has no financial interest in a nursing home, and may employ and prescribe the powers and duties of such employees and consultants as are necessary to carry out this chapter and the rules adopted under it. Administrative, technical, or other services shall be performed, insofar as practicable, by personnel of the department of health.

R.C. 4751.03(H) thus expressly authorizes BENHA to employ necessary employees and consultants. R.C. 4751.03(H) qualifies the Board’s authority to employ necessary personnel, however, by requiring the Department of Health, insofar as practicable, to provide Department of

Health employees to perform administrative, technical, and other services for the Board. *See generally* R.C. 121.14 (in part, authorizing the Department of Health, among others, to “employ, subject to the civil service laws in force at the time the employment is made, the necessary employees, and, if the rate of compensation is not otherwise fixed by law, fix their compensation”). Accordingly, the Board’s authority to employ is limited to the employment of those who are necessary to carry out the work of the Board that is not performed by Department of Health employees who provide administrative, technical, and other services for the Board.¹

In accordance with R.C. 4751.03(H), services necessary to BENHA’s performance of its statutory duties may be provided not only by BENHA’s own employees, but also, to the extent practicable, by ODH personnel. For example, the Department of Health may determine that it is able to provide only one Department of Health employee to perform technical services for the Board. Should the Board find, however, that one such employee is insufficient to meet the Board’s needs, R.C. 4751.03(H) authorizes the Board itself to employ additional persons to perform necessary technical services. Similarly, should the Board find that it needs an employee or consultant to perform a service for which the Department of Health is unable to provide one of its own employees, R.C. 4751.03(H) authorizes the Board itself to employ someone to perform that service.

Based upon information provided by your Director, part of your concern appears to be whether BENHA or ODH is the “appointing authority,” for purposes of R.C. Chapter 124, of those persons the Board employs under R.C. 4751.03(H). As used in R.C. Chapter 124, the term “appointing authority” means “the officer, commission, board, or body having the power of appointment to, or removal from, positions in any office, department, commission, board, or institution.” R.C. 124.01(D). Because R.C. 4751.03(H) expressly vests in BENHA the authority “to employ and prescribe the powers and duties of such employees and consultants as are necessary to carry out this chapter and the rules adopted under it,” BENHA is the “appointing authority” of those persons it hires under R.C. 4751.03(H). In contrast, ODH employees who have been assigned to perform services for BENHA, as described in R.C. 4751.03(H), remain employees of ODH; BENHA is not the appointing authority of ODH employees who perform services for BENHA.

¹ Whether a particular person providing services to the Ohio Board of Examiners of Nursing Home Administrators (“BENHA” or “the Board”) is an employee of the Board or an employee of the Ohio Department of Health (“ODH”) is a factual question that cannot be resolved by means of an opinion of the Attorney General. *See generally* 1993 Op. Att’y Gen. No. 93-033 (syllabus, paragraph 1) (concluding, in part, that questions of fact “cannot be determined by means of an Attorney General opinion”); 1987 Op. Att’y Gen. No. 87-082 (syllabus, paragraph 3) (stating, in part, “R.C. 109.14 does not authorize the Attorney General to decide questions of fact by means of an opinion”).

Confusion as to the identity of the appointing authority of those persons hired by the Board under R.C. 4751.03(H) may have arisen from the General Assembly's establishment of BENHA as an entity within the Ohio Department of Health. R.C. 4751.03(A). That BENHA exists as an entity within ODH does not, however, alter the authority granted directly to the Board by R.C. 4751.03(H) to "employ and prescribe the powers and duties of such employees and consultants as are necessary to carry out this chapter and the rules adopted under it." R.C. 4751.03(H) grants ODH no authority with respect to BENHA's employment of persons, in addition to ODH employees, that BENHA finds necessary to perform its duties. *See generally, e.g.,* 1992 Op Att'y Gen. No. 92-062 (concluding, in part, that the General Assembly's express grant of authority to the State Criminal Sentencing Commission to employ necessary employees was sufficient to qualify the Commission as the appointing authority of such employees, even though, at the time, the Commission existed as an entity within the Office of Criminal Justice Services within the Department of Development).

Based upon the foregoing, it is my opinion and you are hereby advised that:

1. R.C. 4751.03(H) authorizes the Ohio Board of Examiners of Nursing Home Administrators to employ such employees as are necessary to carry out the work of the Board that is not performed by Department of Health employees who provide administrative, technical, and other services for the Board.
2. The Ohio Board of Examiners of Nursing Home Administrators is, for purposes of R.C. Chapter 124, the appointing authority of the persons it employs under R.C. 4751.03(H).

Respectfully,



RICHARD CORDRAY
Ohio Attorney General