

**OPINION NO. 79-089****Syllabus:**

1. Although the Environmental Board of Review performs an appellate function and, in that respect, carries out a reviewing process which resembles that undertaken by courts of common pleas in certain instances, the Board is not a judicial body and may not assume powers granted solely to the courts.
2. Costs of a proceeding may be assessed only where an express statutory provision grants the power to do so; because no such authority has been expressly granted to the Environmental Board of Review, the Board lacks the power to assess costs in hearings before it.

**To: Thomas M. Phillips, Chairman, Environmental Board of Review, Columbus, Ohio**

**By: William J. Brown, Attorney General, December 6, 1979**

I have before me your request for my opinion regarding the following two questions:

1. Does the Environmental Board of Review have authority to require a deposit for court costs in a nominal amount in the nature of a filing fee at the time an appeal is filed before it—for instance, a filing fee of \$50.00?
2. Does the Environmental Board of Review have the authority to assess other court costs incidental to the appeal; for example, the cost of the attendance of a court reporter for the hearing, charged at the rate of - - - dollars per hour, and to require payment of these other incidental costs by the appellant at the conclusion of the hearing before the Environmental Board of Review?

The Environmental Board of Review (hereinafter "Board") was created by R.C. 3745.02 to provide a forum for hearing appeals regarding the actions of the Director of Environmental Protection and local boards of health. See R.C. 3745.04. The decisions of the Environmental Board of Review are appealable to the courts of appeals. R.C. 3745.06. Actions of most agencies of the State of Ohio are appealable in the first instance to a court of common pleas, as provided in R.C. 119.12 of the Administrative Procedure Act, rather than to another state agency. You suggest, therefore, that because the Board carries out a reviewing process which resembles that undertaken by courts of common pleas in other instances, the Board also possesses power to assess costs similar to that exercised by the courts.

Ohio Rule of Civil Procedure 54(D) was adopted by the Supreme Court of Ohio pursuant to Ohio Const. art. IV, §5(B), to govern all courts of the state. Rule 54(D) provides:

Costs. Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs.

R.C. 2323.31 authorizes a court of common pleas to provide by rule for an advance deposit for the filing of any civil action or proceeding. Thus, a scheme authorizing courts to assess costs is established by the Civil Rules and relevant statutes.

The question of whether the Board of Environmental Review holds the status of a court of common pleas was answered in Wooster Iron & Metal Co. v. Whitman, 37 Ohio App. 2d 1 (1973). There the court held that because the Board was an administrative agency and not a trial court, it could not be treated as a trial court; rules regularly applied to a court of record would not be applied to an administrative agency. I am aware of no cases or opinions of this office discussing the legislative purpose in creating the Board as an agency with appellate powers. It is clear, however, that the General Assembly intended to provide an opportunity for administrative review of the acts of the Director of Environmental Protection and the local boards of health before allowing judicial review of the acts. It is also clear that the Board does not acquire judicial powers merely because it carries on a reviewing process that is similar to that of the courts of common pleas.

Since the Environmental Board of Review is clearly an administrative agency and cannot, therefore, draw its power to assess costs from the power of the courts to do so, it is necessary to determine whether such power has been granted to the Board itself.

The power to assess costs must be expressly granted. As was stated in State ex rel. Commissioners v. Guilbert, 77 Ohio St. 333, 338-39 (1907):

Costs, in the sense the word is generally used in this state, may be defined as being the statutory fees to which officers, witnesses, jurors and others are entitled for their services in an action or prosecution and which the statutes authorize to be taxed and included in the judgment or sentence. . . . [Costs] are allowed only by authority of statute. . . . (Emphasis added.)

City of Euclid v. Vogelin, 152 Ohio St. 538 (1950). See also Benda v. Fana, 10 Ohio St. 2d 259 (1967). The authority for courts to assess costs is, as discussed above, expressly granted by statutes and rules which are not applicable to administrative agencies.

The power of an administrative agency in any instance is necessarily limited to such power as is clearly and expressly granted by statute. State ex rel. Clarke v. Cook, 103 Ohio St. 465 (1921). No express statutory authority to assess costs has been granted to the Board. Thus, the Board lacks the authority to assess costs to parties in the proceedings before it.

It might be argued that the Board might promulgate a rule allowing the assessment of costs pursuant to R.C. 3745.03, which vests the Board with the authority to "adopt regulations governing procedure to be followed in hearings before it." I do not find, however, that this provision constitutes the express statutory authority required by the case law discussed above. It is my opinion that, absent other statutory authority, the power to adopt rules governing procedure does not include the power to require payment of costs. This conclusion is supported by the fact that R.C. 3745.02 specifically provides that fee and mileage expenses of sheriffs and witnesses incurred at the request of the appellant shall be paid in advance by the appellant and "the remainder of the expenses shall be paid out of funds appropriated for the expenses of the board." The Board has no statutory authority to assess expenses to any person except in accordance with this provision. Hence, I conclude that the Board has no authority to provide for assessment of costs by rule.

Accordingly, it is my opinion, and you are advised, that:

1. Although the Environmental Board of Review performs an appellate function and, in that respect, carries out a reviewing process which resembles that undertaken by courts of common pleas in certain instances, the Board is not a judicial body and may not assume powers granted solely to the courts.
2. Costs of a proceeding may be assessed only where an express

statutory provision grants the power to do so; because no such authority has been expressly granted to the Environmental Board of Review, the Board lacks the power to assess costs in hearings before it.