

State of Ohio
Office of the Attorney General



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March 10, 1981

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Frank W. King, Chairman
State Board of Building Standards
2323 West Fifth Avenue
Columbus, Ohio 43216



Dear Mr. King:

I have before me your letter of January 13, 1981, in which you have requested my informal opinion relative to a proposed examination for personnel employed by certified local building departments. A copy of your letter is enclosed for your reference.

The first question raised in your letter reads as follows:

1. Does the Board need statutory authority to require an examination that the applicant has to pay a fair and reasonable fee to offset the costs of administering the same?

This question raises three separate legal issues. First, does the Board have the authority to require that an applicant take any examination at all? Second, can the Board impose a fee for such an examination? Third, if a fee is collected, may the proceeds be placed in a special fund for the sole purpose of conducting the examination?

With respect to the first issue, it would appear that under R.C. 3781.10(E)(2) that the Board does have the authority to require that an applicant pass a test. That section allows the Board to establish "qualification" for such personnel, and in my view the examination would be a perfectly acceptable way of testing for qualifications. In fact, an examination would seem to be the fairest way of establishing qualifications, as it is probably the least subjective means available. Therefore, I conclude that an examination may be given.

The second issue is considerably more difficult to resolve. I have researched this issue at some length, and I have been unable to find a definitive answer. As a basic premise, it is well settled in Ohio that an administrative agency, such as the

Board of Building Standards, has only such powers as are specifically granted to it, or necessarily implied therefrom. See, 1969 Ops. Att'y Gen. No. 69-087. R.C. 3781.10(E)(2) empowers the Board to establish qualifications, and in my opinion the authority to give an examination is necessarily implied from that authority. However, I cannot say that the authority to establish qualifications necessarily implies the power to charge a fee for an examination. I note numerous instances in the Revised Code where the legislature has empowered various agencies to conduct "licensing" examinations, and, in those instances, the authority to impose a fee is specifically provided. See, e.g., R.C. 4703.16, R.C. 4707.10, R.C. 4713.10, R.C. 4715.13, R.C. 4717.06. It is a well recognized maxim of statutory construction that "expressio unius est exclusio alterius." Inasmuch as the General Assembly has not specifically provided for the Board to impose an examination fee, but has specifically allowed other agencies to collect a fee, I must conclude that the Board lacks authority to charge an examination fee of the type you describe.

While my answer to the second issue makes a detailed response to the third issue unnecessary, I would point out that under R.C. 131.08, the fee for an examination would have to be turned over to the state treasury to the credit of the general revenue fund even if it were collected. This result would follow since there is no specific provision in the Revised Code for the disposition of the monies thus collected. This tends to support my previous conclusion that a fee is not authorized by statute. Cf. 1977 Ops. Att'y Gen. No. 77-080.

In your letter, you have raised a second question which reads as follows:

2. Does the Board have statutory authority to approve and use an examination prepared, conducted, and graded by an impartial third party (i.e., Education Testing Service or BOCA); if so, is the nominal charge made to the applicant for taking the test required by the third party a permissible means of establishing qualifications of building department personnel under Section 3781.10 (E) (2) of the Revised Code?

This question raises two issues. First, may the Board employ an independently prepared and graded examination to determine if an applicant meets the Board's qualifications? Second, does the fact that the independent testing service charges a fee prevent the Board from adopting the test?

My research has failed to uncover any legal precedent one way or the other with respect to the first issue. However, I see no reason why the Board could not employ an independent

testing service to determine qualifications of applicants. I reach this conclusion for two reasons. First, the authority to give an examination is clearly implied from R.C. 3781.10 (E)(2), and authority to prepare a test or to approve a test prepared by someone else would, in my view, be well within that authority. In this regard, I note that many "qualifications" which are recognized require an agency to rely upon the "examinations" of others. For example, if the Board were to require that a chief building official be a graduate of an accredited university program in engineering, this would indirectly require the Board to accept the determinations made by the faculty of the university involved. Second, the use of independently prepared examinations is quite common among licensing agencies. I need only recall my own bar examination which employs the Educational Testing Service for a part of the examination. Thus, I conclude that the Board may approve an independently prepared and graded examination to determine qualifications for building department personnel.

As to the second issue, namely whether the charge made by the independent testing service would present a problem, I have found no legal precedent which provides any guidance whatsoever. The problem is that if the Board establishes a rule that the only way to be "qualified" is to pass the independent test, it will have done indirectly that which it could not do directly (i.e., impose an examination fee). I have found no authority which has invalidated such a system; I nonetheless feel that if the issue were litigated an applicant could convince a court that the testing system is invalid because it effectively imposes a fee. I do not have any definitive response to that argument, but I must confess that it would be a difficult argument to overcome. Therefore, I would recommend that the Board use an examination as an alternative means of establishing qualifications. For example, the Board could make a general requirement that an applicant have certain formal training and a specified length of experience, but that the formal training or experience could be reduced or eliminated if the applicant passed a test. In this way, the test would be analogous to a college program, and I do not see that anyone could argue that the money which would have to be spent on college or other formal training is a "fee". I must warn, however, that the Board should not make the "general" requirements so prohibitive that the examination becomes the only realistic means for an applicant to establish his qualifications.

I realize that this last response is not particularly helpful, and could well be more confusing than useful. However, I do not think that there are any clear cut answers to this question, and I felt that you are better served in the long run if you are made aware of that. I will endeavor to look for a definitive answer, but I doubt that one exists. The law is, after all, an inexact science.

I hope that this letter will prove useful to you. I would be happy to discuss this matter with you personally.

Very truly yours,

Karl W. Schedler

KARL W. SCHEDLER
Assistant Attorney General

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INTER-OFFICE COMMUNICATION

To Karl Schedler, Assistant Attorney General Date 1/13/81
From: Frank W. King, Chairman, Board of Building Standards
Subject: Request for Informal Opinion

OHIO DEPARTMENT OF INDUSTRIAL RELATIONS, COLUMBUS, OHIO 43216

Section 3781.10 (E)(2) provides that the Board of Building Standards may establish qualifications for officers or employees of a municipal corporation, township, or county which has been certified to enforce the state building code. Presently, the Board is considering amending the rules on certification of building departments to provide that chief building officials, plans examiners, and field building inspectors must take and pass a written examination as one of the criteria for being approved to work the above mentioned jobs. Consideration of these proposed amendments by the Code Revision and Personnel Committees has raised several legal questions:

1. Does the Board need statutory authority to require an examination that the applicant has to pay a fair and reasonable fee to offset the costs of administering the same?
2. Does the Board have statutory authority to approve and use an examination prepared, conducted, and graded by an impartial third party (i.e., Educational Testing Service or BOCA); if so, is the nominal charge to the applicant for taking the test required by the third party a permissible means of establishing qualifications of building department personnel under Section 3781.10 (E)(2) of the Revised Code?

Frank W. King

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