Opinion No. 226.

Industrial Hygiene Division—State Board of Health—Board of Health—Threshold Limits.

Held: The Industrial Hygiene Division of the State Board of Health is not given authority to make regulations establishing threshold limits for toxic dust, fumes, vapors and gases in industries in Montana because: The provisions of Section 4, Chapter 127, Laws of 1939, provide for an unconstitutional delegation of power to such a

board since no definite standard has been set. The contemplated action of the board is not of the type which can be allowed under broad general powers since no such necessity exists.

December 12, 1946.

Dr. B. K. Kilbourne
Executive Officer
Montana State Board of Health
Helena, Montana

Dear Dr. Kilbourne:

You have requested an opinion asking whether or not paragraph 4, Section 1, Chapter 127 of the Laws of 1939 gives the Industrial Hygiene Division of the State Board of Health authority to make regulations establishing threshold limits for toxic dust, fumes, vapors and gases in industries in Montana.

The primary question involved is whether or not the making of such a regulation would be improper as an attempt to legislate rather than carry out administrative functions. The principle that legislative authority may not be delegated has been considered fundamental in our government. (1 Cooley "Constitutional Limitations," 8th Edition, 224, 1927; Field v. Clark, 143 U. S. 649, 692; 12 S. Ct. 495, 1891.) This was well brought out in Montana in the case of McFatridge et al. v. District Court, etc., 113 Mont. 81, 122 Pac. (2d) 834 (1941), where it was said, quoting the syllabus (4):

> "The State Liquor Control Board is an administrative body; it has no lawmaking power, and while it is authorized to make rules and regulations, they must be limited in their purpose and effect as an aid in the administration of the law of its creation, and any such rules and regulations calculated to widen the scope of the law and extend the board's discretionary powers to matters beyond the purview of the Act are void and of no effect." (See also Chicago etc. Railway Co. v. Board of Railroad Commissioners, 76 Mont. 305, 313, 314; 247 Pac. 162, 1926.)

The difficulty of defining the line which separates legislative power to make laws from administrative authority has frequently been the subject of controversy. (U. S. v. Grimaud, 220 U. S. 506, 55 L. Ed. 563; 31 S. Ct. 480, 1921.)

> "The line of demarkation between those essentially legislative functions which must be exercised by the legislature itself and those of administrative nature or involving more details, which may be delegated to another body or officer, is very vague and fluctuating and is often difficult to discern." (Ann. 79 L. Ed. 448, citing Wayman v. Southern, 10 Wheat (U. S.) 1, 66 L. Ed. 253, 1855; Thompson v. Smith, 155 Va. 307; 154 S. E. 479; 71 A. L. R. 604.)

However, the question of whether an act is unconstitutional as an undue delegation of power appears to be primarily determined by two factors, namely: 1. Whether there has been a sufficiently definite standard set by the legislature, upon which the board may act; 2. Whether due to the purpose of the board, policy dictates that the standard set must be broad, and in turn whether any limitations are placed on such a board's action.

Upon the question of a necessary standard, we find Justice Cordoza in the case of ALA Schecter Poultry Co. v. U. S., 295 U. S. 495; 79 L. Ed. 1570; 55 S. Ct. 837; 99 A. L. R. 947, saying: The delegated power must be "canalized within banks that keep it from overflowing" and that it cannot be "uncontrolled and vagrant."

And in 11 American Jurisprducene at pages 955 and following:

> "A legislature in enacting a law **complete** in itself and designed to accomplish the regulations of particular matters falling within its jurisdiction, may **expressly** authorize an administrative commission, **within definite valid limitations** to provide rules and regulations for the complete operation and enforcement of the law **within its express general purpose. So long as a policy is laid down and a standard is established by a statute, no unconstitutional delegation of legisaltive power is involved in leaving to selected instrumentalities both the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.** A distinction is drawn between the more important

subjects which must be entirely regulated by the legislature itself and those of less interest as to which general provisions may be made and power given to administrative officers to carry out the details of such general provisions." (Emphasis mine.)

Chapter 127, Laws of 1939, is entitled:

"An Act to Create A Division of Industrial Hygiene Within the State Board of Health of Montana; **Defining Its Powers and Duties,** Requiring the Reporting of Occupational Diseases and Providing for the Inspection of All Places of Employment Where Occupational Diseases May Occur." (Emphasis mine.)

But, within the Act paragraph 1 of Section 2 refers not only to **occupational diseases** but includes all questions of industrial hygiene as follows:

"(1) To make studies of industrial hygiene **and** accupational disease problems in the industries of Montana; . . .

"(3) To make investigations of the **sanitary conditions** under which the men and women work in the various industries of the State;

"(4) To **make** and **enforce regulations** for the correction of **unsanitary conditions** found; . . ." (Emphasis mine.)

Thus, the necessary standard to be set should be a standard as to unsanitary conditions as provided in Section 4. In most instances of this kind the board is given general powers to find facts or circumstances or make rules or regulations, but these must be limited in their purpose and effect as an aid in the administration of the law. (See McFatridge v. District Court, et al., 113 Mont. 81, 89; 122 Pac. (2d) 834, 1941.) And the administrative body must not be allowed to take any action, legislative in character, upon its own initiative as stated in the case of State Railroad Commission v. Atlantic, 56 Fla. 617; 47 So. 969, 972 (1908), where the Court said:

"If the regulation or action of an official or board authorized by statute does not in effect determine what the law shall be, or does not involve the exercise of primary and independent discretion, but only determines within well-defined limits and subject to review, some fact upon which the law by its own terms operates, such regulation is administrative and not legislative, executive, or judicial in its nature and effect. The effect and operation of a statute may be conditional or contingent upon the ascertainment of particular facts, and may be made to depend upon a subsequent event. This principal has been applied in regulations relating to public service, occupations, schools, health, elections, safety, food, games, liquors, taxation or other public purposes." (Emphasis mine.) (See also Chicago Etc. Railway Co. v. Board of Railroad Commissioners, supra.)

There is a distinction between the power to pass a law and the power to adopt rules and regulations to carry into effect a law, the last named being administrative. In our problem the legislature has not seen fit to define "unsanitary conditions" at any place within the act, thus failing to provide the necessary standards or limits for the boards action. (This could be cured by further legislation.)

Though the definition of "occupational diseases" might by some very broad interpretation prove to set a sufficient standard for the promulgation of a rule upon threshold limits, the attempt to do so under Section 4 would be illegal since the term "unsanitary conditions" remains undefined and applies not only to questions of occupational diseases but to **all** questions of **industrial hygiene.**

A somewhat similar question was presented in California in the case of Schaezlein v. Cabiness, 135 Cal. 466, 67 Pac. 755, 1902, where the folowing act was in question:

"If in any factory or workshop any process or work is carried on by which dust, filaments or injurious gases are generated or produced that are liable to be inhaled by the persons employed therein, and it appears to the commissioner of labor statistics that such inhalation could, to a great extent, be prevented by the use of some mechanical contrivance, he shall direct that such contrivance shall be so provided, and within a reasonable time it shall be so provided and used."

(The act further provided for a penalty in case the factory operator did not comply with the commissioner's order.)

In holding the action of the commissioner to be an undue delegation of power, the Court said at page 757:

"The **legislature,** as we have said, may require the owners of factories and workshops to put their buildings in proper conditions as to sanitation, may require them to provide reasonable safe-guards against danger of the operatives, **but it may not leave the question as to whether and how these things shall be done or not done to the arbitrary disposition of any individual.**" (Emphasis mine.)

The Court further devotes considerable attention to a distinction between a board making rules and regulations for the use of **public property,** such as a fish and game commission does, and a board making a rule for **private industry.** In the former, wider latitude is given the board owing to the nature of the thing regulated. Though this case still appears to be the law in California (11 New Calif. Dig. 700, 1931) the act has been changed to provide for more definite standards. (See Deering's Cal. Codes, Sections 2350 to 2353, 1941.)

Likewise, it was held in Vallat v. Radium Dial Co., 360 Ill. 407; 196 N. E. 485; 99 A. L. R. 607, 1935, as follows:

"A statute which leaves to a ministerial officer to define the thing to which the statute is to be applied, is invalid as a delegation of its legislative powers."

And further:

"A statute requiring employers carrying on work which may produce occupational diseases to adopt and provide reasonable and approved devices, means or methods for the prevention of such diseases, charging the state department of factory inspection with its enforcement, and requiring employers upon notice in that department to install improved devices, means or methods reasonably necessary, is unconstitutional as delegating legislative power to administrative officers." (See also Parks v. Libby-Owens-Ford Glass Co., 360 Ill. 130; 195 N. E. 616, 1935.)

Even though it is true, there is an increasing tendency to give wider discretion to administrative bodies, this discretion is limited by the nature and purpose of such agency. Practical necessity and the particular facts will dictate in the case of each individual body; 42 Am. Jur. 336; 12 A. L. R. 1435. Thus, boards of health may often be given wide latitude in cases of emergency, but be limited where no such situation exists. In Blue v. Beach, 155 Ind. 121, 56 N. E. 89, a board of health was lawfully allowed to require vaccination of school children where an emergency existed. But a board was not allowed to make such regulation where smallpox was not prevalent in the comunity. (Potts v. Breen, 167 Ill. 67, 47 N. E. 81; 59 Am. St. Rep. 262; Wong Wai v. Williamson, 103 Fed. 1.) And in Montana even boards of health are limited to those powers expressly conferred on them. (Volume 20, Report and Official Opinions of the Attorney General 209, No. 165, and 29 Corpus Juris 248, as cited therein.) Such displays the necessity that a board's action be limited, even under broad powers in any case **where an emergency or like condition does not exist.** But, even here, a definite distinction must be made between boards of health and this board of Industrial Hygiene. In the former, the administration has to do with the protection of the public in general, while in the board under discussion the administration has to do with a particular class—industries —and the protection of a special group —the employees of that industry. Thus, the board must be limited in its action lest by arbitrary rules it may run contra to the due process clause of both the state and federal Constitutions.

Nor is this such a condition as to demand emergency action be taken under broad powers. The situation confronting the board is one which has existed for a long time in this state and with the legislature to convene in the near future, that body, if necessary, can rectify the condition in its own manner, properly and legally. The action of the board may be desirable, and expedient, but expediency does not enter into the interpretation of statutes. We must take the law as we find it and await its later results. Desirableness should never govern reason so long as

we retain a system of government by law and not by man.

It is therefore my opinion that paragraph 4, Section 1, Chapter 127 of the Laws of 1939, does not give the Industrial Hygiene Division of the State Board of Health authority to make regulations establishing threshold limits for toxic dust, fumes, vapors and gases in industries in Montana, because:

1. The provisions of Section 4 provide for an unconstitutional delegation of power to such a board since no definite standard has been set.
2. The contemplation of the board is not of the type which can be allowed under broad general powers, since no such necessity exists.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General