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Opinion No. 16

STATE BOARD OF HEALTH - powers - fluoridation of municipal water supplies; CITIES AND TOWNS - municipal water supplies - fluoridation. Sections 69-4901, 69-4902, 69-4903, 69-4106 and 69-4110, R.C.M. 1947.

HELD: The Montana state board of health does not possess the legal power to require fluoridation of municipal water supplies.

February 25, 1970

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Dear Doctor Anderson:

I am in receipt of your letter of February 2, 1970, in which you request my opinion on the following question:

“Does the Montana state board of health possess legal power to require fluoridation of municipal water supplies?”

In my opinion, the requirement of fluoridation of public water supplies in a fashion scientifically designed to minimize dental cavities, without producing any other generally harmful result, is within the general police power of government as such and would not violate any constitutional right of any citizen. See 43 A.L.R. 2d at p. 459, et seq., and the cases annotated in the later case service of A.L.R. 2d, Vol. 4, p. 876.

It therefore follows that the state legislature could require such fluoridation by statute. The state legislature has **not**, however, specifically acted on this subject and the question remains as to whether the state board of health has the power to require such fluoridation under and by virtue of statutes conferring on such board its general powers.

The only Montana statutes which I find bearing in any way on this problem are as follows:

“69-4901. **Public policy of the state.** It is the public policy of this state to . . . improve the quality . . . of water for public water supplies and domestic uses.”

“69-4902. **Definitions.** As used in this chapter . . .

“(6) ‘Public water supply’ means any . . . water supply that serves ten (10) or more families; . . .”

“69-4903. **Functions, powers and duties of state board of health.** The state board of health shall:

“(1) have general supervision over all state waters which are directly or indirectly being used by a person for a public water supply . . .

“(2) adopt rules, standards, and issue orders to . . . protect the quality of water . . . giving legal notice of the adoption by publication or posting, and by filing a copy in the office of the

clerk of the municipality or county where the rule or standard is effective.”

“69-4106. **Functions, powers and duties of state board.** (1) The state board shall: . . .

“(d) after consultation with the executive officer, adopt and enforce rules and standards . . . for the preservation of public health and prevention of disease; . . .”

“69-4110. **Functions, powers and duties of department.** With policy guidance of the state board, the department shall:

“(9) develop and administer activities for the protection and improvement of dental health”

It is a well settled rule of administrative law that an administrative body has no powers not actually granted by positive law (constitution or statute). As is said in 1 Am. Jur. 2d, Administrative Law, sec. 70, p. 866:

“Apart from instances in which an administrative agency is created and empowered by a provision of a state constitution . . . , the source of the powers of administrative agencies lies in statutes or ordinances

“Administrative agencies are creatures of statute and their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common law powers but only such as have been conferred upon them by law expressly or by implication.

“Official powers cannot be merely assumed by administrative officers, nor can they be created by the courts in the proper exercise of their judicial functions. Nonexistent powers cannot be prescribed by an unchallenged exercise”

And, as is said in 1 Am. Jur. 2d, Administrative Law, sec. 72, p. 868:

“The powers of administrative agencies are measured and limited by the statutes or acts creating them or granting their powers, to those conferred expressly or by necessary or fair implication.”

The problem here, of course, is in view of the fact that there is no express power granted to the state board of health by the state legislature in the area of fluoridation, may such power be found by necessary or fair implication of the above quoted statutes?

All the cases cited in the above mentioned annotation, 43 A.L.R. 2d at p. 459, et seq., and the cases annotated in the later case service of

A.L.R. 2d, Vol. 4, p. 876, and all of the cases I have found on the subject of fluoridation have involved actual municipal ordinances or statutory authority dealing specifically with fluoridation. In view of this trend toward actual and specific legislative authority in the area of fluoridation, it is my opinion that the power of the board of health to require fluoridation may **not** be found by necessary or fair implication in the existing statutes.

Therefore, it is my opinion that the Montana state board of health does not possess the legal power to require fluoridation of municipal water supplies.

As stated at the outset, however, it is my opinion that the state legislature itself may prescribe legislation requiring fluoridation of municipal water supplies and delegate specific authority to the board of health to administer such legislation.

Very truly yours,

ROBERT L. WOODAHL
Attorney General