

KERSTING  
Daniels  
N. Green

May 16, 1955  
Opinion No. 55-116

REQUESTED BY: C. G. Salsbury, M. D., Commissioner  
Arizona State Department of Health  
Phoenix, Arizona

OPINION BY: ROBERT MORRISON, The Attorney General  
Robert E. Kersting, Special Assistant  
Attorney General

QUESTION: Who has the authority and duty to make inspections of restaurants in small incorporated towns that do not have a city health officer and who have not requested the services of county health department, as provided in Section 62-218?

CONCLUSION: The Commissioner of Public Health.

It is fundamental that the State has inherent and plenary power to make and enforce regulations concerned with public health. (State v. Burdge, 95 Wis. 390, 70 N.W. 347, 37 L.R.A. 157, 60 Am. St. Rep. 123, citing, on page 398 of 95 Wis., on page 349 of 70 N.W., on page 160 of 37 L.R.A., and on page 125 of 60 Am. St. Rep.; Tiedeman's Limitation of Police Power, 2-5; Cooley's Constitutional Limitations; Thorpe v. Rutland etc. R. R. Co., 27 Vt. 140, 62 Am. Dec. 625; Lake View v. Rose Hill Cemetery Co., 70 Ill. 192, 22 Am. Rep. 71; State v. Noyes, 47 Me. 189; Waldschmit v. New Braunfels (Tex. Civ. App.), 193 S.W. 1077, 1080; Globe School Dist. vs. Board of Health, 20 Ariz. 208, 179 Pac. 55; Loftus vs. Russell, 69 Ariz. 245, 212 P.2d 91).

In 1954, the State Legislature extensively amended Chapter 68, dealing with Public Health. Pertinent parts of the resulting statutes are as follows:

"68-108a. The State Board of Health shall:  
(1) Protect the health of the people of the State of Arizona."

"68-110. The Commissioner of Public Health shall: \* \* \* (4) Administer and enforce the laws relating to health and sanitation and the rules of the department and regulations of the state board of health;  
(5) Provide for the examination of any premises if he has reasonable cause to believe that on the premises there exists a violation of any health law of the state or any regulation of the state board of health;

(6) Exercise general supervision over all matters relating to sanitation and health throughout the state. Whenever in the opinion of the commissioner it is necessary or advisable, a sanitary survey of the whole or of any part of the state shall be made. The commissioner may enter upon, examine and survey any source and means of water supply, sewage disposal plant, sewerage system, prison, public or private place of detention, asylum, hospital, school, public building, private institution, factory, workshop, tenement, public washroom, public rest room, public toilet and toilet facility, public eating room and restaurant, dairy, milk plant or food manufacturing or processing plant, and also any premises in which he has reason to believe there exists a violation of any health law of the state, and regulation of the state board of health, or any law which he has the duty of administering;

(7) Prepare sanitary and public health regulations for consideration by the board and shall submit to said board recommendations for new legislation.  
\* \* \* (Emphasis supplied)

"68-112(a) The State Board of Health shall, by regulation: (4) Provide reasonable regulations necessary to assure that all food or drink sold or distributed for human consumption is free from unwholesome, poisonous, or other foreign substances and filth, insects or disease-causing organisms. Such regulations shall prescribe reasonably necessary measurements governing the production, processing, labeling, storing, handling, serving and transportation of food and drink including but not limited to milk and frozen desserts. Such regulations shall prescribe minimum standards for the sanitary facilities and conditions which shall be maintained in any plant, packing house, abattoir, dairy, warehouse, restaurant, or other premises, and any truck or other vehicle in which food or drink is produced, processed, stored, handled, served or transported. Such regulations shall provide for the inspection and licensing of such premises and vehicles used in this connection, and for the abatement as public nuisances of any such premises or vehicles which do not comply with such regulations and minimum standards;"

"68-112 (d) The provisions of the regulations adopted by the board under the authority conferred by this act shall be observed throughout the state and shall be enforced by each local board of health.

Nothing herein contained, however, shall be deemed to limit the right of any local board of health, or county board of supervisors, to adopt such ordinances, rules and regulations, as authorized by law within its jurisdiction, provided that such ordinances, rules and regulations are not in conflict with the state law and are equal to or more restrictive than the provisions of the regulations of the state board of health." (Emphasis supplied)

"68-112 a. Public Nuisances. --(a) Any and all of the following conditions are hereby specifically declared to be public nuisances dangerous to the public health: \* \* \*

(3) Any restaurant, food market, bakery or other place of business, or any vehicle where food is prepared, packed, processed, stored, transported, sold or served to the public which is not constantly maintained in a sanitary condition; \* \* \*

(b) Whenever the commissioner shall have reasonable cause to believe from information furnished him or from investigation made by him, that any person is maintaining a nuisance or engaging in any practice contrary to the health laws of this state or contrary to any provision of this act or the regulations promulgated thereunder, he shall forthwith, serve such person by registered mail, a cease and desist order requiring such person to forthwith upon receipt of such notice, to cease and desist from such act. Within fifteen (15) days after receipt of such cease and desist order, the accused person may request the board to hold a hearing. The board, as soon as practicable, shall hold a hearing, and in the event it determines the order is reasonable and just and that the practice engaged in is contrary to the health laws of the state or any provision of this act or the regulations promulgated thereunder, the board shall order such person to comply with the cease and desist order."

A reasonable interpretation of the foregoing statutes would indicate that the Commissioner of Public Health has all of the power and duties specifically set forth, and that his jurisdiction extends throughout the State of Arizona.

It is the opinion of this office that the additional provisions of Chapter 68, ACA, 1939, as amended, relative to the establishment of and the powers and duties of county departments of health, district departments of health, city departments of health, and city-county departments of health, in no way limit either the powers

or duties of the State Board of Health and the Commissioner of Public Health. On the contrary, these additional statutory provisions (68-201, 28-202, 68-204, 68-205, 68-206, 68-212, 68-216, 68-217, 68-218) provide methods of co-operation and mutual assistance between referred to local departments of health and the State Board of Health in enforcing the regulations of the State Board of Health. In other words, the State Board of Health and the Commissioner of Public Health have the primary and over-all responsibility of protecting the health of the state. This responsibility is in no way diminished by additional statutory provisions relating to the establishment and powers and duties of local boards of health.

It is the opinion of this office that when there is an absence of proper regulation by any local government, relative to public health, whether such local government be a county, incorporated city or town, un-incorporated city or town or community, that the State Commissioner of Public Health has the authority and duty to require compliance with state regulations. Section 68-112 a, (b), as set forth above specifically provides for action by the Commissioner of Public Health under such circumstances.

ROBERT MORRISON  
The Attorney General

*Robert E. Kersting*

ROBERT E. KERSTING  
Special Assistant  
Attorney General

LLM

55-116