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Response to Frequently Asked Current Questions

1. May a Michigan County Board of Commissioners ("BOC") reverse a Health Officer's Epidemic Order?

Clearly not. The Michigan Public Health Code, MCL §333.2451 and MCL §333.2453, as well as R. 325.175(4), which is an administrative rule promulgated by the Michigan Department of Health and Human Services pursuant to MCL §333.2226(d) confer exclusive authority to the local health officer to issue ***local*** pandemic orders.

Furthermore, Michigan law has held that a health officers' findings relative to communicable diseases is final as long as there is a reason for them:

> "Within reasonable bounds, at least, the health officer's conclusion that a disease is communicable, and is a menace to public health, must be conclusive…"

Cedar Creek Tp v Bd of Sup'rs of Wexford Co, 135 Mich 124, 127–29 (1903)

2. May the BOC adopt a resolution asking its Health Officer to reconsider her epidemic order?

Not in Ottawa County. No statute confers on a county board of commissioners the authority to adopt such a resolution and it would run afoul of this Board's recent "rule" against adopting advisory resolutions outside of the Board of Commissioners' statutory authority. As I just opined, the BOC has no authority to reverse her decision, therefore, I conclude that the Board has no legal authority to adopt a resolution asking her to do so and it would be "out of order" under the Board's own recently adopted rule.

3. May the BOC terminate its health officer for adopting an epidemic order?

No**.** MCL §333.2465(1) confers on the BOC the right to appoint the health officer. MCL §46.11(n) grants to the BOC the authority to remove an officer it appointed; therefore, I conclude that the BOC ***generally*** has the power to terminate the health officer. However, the Michigan Supreme Court on several occasions—including a case involving the Ottawa County BOC—has held that the BOC may not legally exercise any statutory right if it is designed to second guess a decision over which the health officer has exclusive control:

> "The further contention is made that in any event this is not in its nature such a claim as comes within the intendment of the statute [Commissioners' authority to approve or reject claims for pay]. Claimant was employed as a quarantine guard to watch the premises in order to prevent the spread of smallpox. It is apparent that such services are usual and absolutely necessary in such cases. The claim in *Monroe v. Monroe Supervisors, supra*, was for services in acting as watchman.
>
> This statute has been liberally construed. It has been recognized that these are exigent cases, and that the public safety demands the greatest diligence on the part of public officers to prevent public calamity. We find no error in this record.
>
> The learned circuit judge, in his order above referred to granting the writ, followed the statute, and required the board of supervisors to do only that which by the plain terms of the law they should have done without the necessity of a court proceeding."

Bishop v Bd of Sup'rs of Ottawa Co, 140 Mich 177, 183 (1905)

> " It may be said that the Constitution gives to the board of supervisors the power to adjust all claims against counties, and that it cannot be taken away by statute, but a limitation on this broad proposition is found in the following cases, and this rule applies where the law has pointed out another mode of adjustment: *People v. Auditors*, 13 Mich. 233;

> *Kennedy v. Gies*, 25 Mich. 91; *Mixer v. Sup'rs*, 26 Mich. 425; *McMahen v. Aud*., 41 Mich. 223, 49 N. W. 921; *Endriss v. Chippewa Co.,* 43 Mich. 317, 5 N. W. 632; *Van Wert v. School Dist., 100 Mich. 334*, 58 N. W. 1119; Withey v. Cir. J., 108 Mich. 168, 65 N. W. 668; *Board v. Reynolds,* 121 Mich. 103, 79 N. W. 1121. The cases cited appear to us conclusive of most questions in this case."

Cedar Creek Tp v Bd of Sup'rs of Wexford Co, 135 Mich 124, 127–29 (1903).

Interestingly, political controversies over pandemics (smallpox in Ottawa and flu in Wexford) motivated each of these controversies between a BOC and health officer. Such is a collateral consequence of pandemics. Each case questions the ability of the Board of Commissioners to exercise what is generally within its powers in a manner to reverse, affect or react to what the Health Officer has done. In each case, the Michigan Supreme Court concluded that a BOC may not exercise its lawful authority in order to interfere with the health officer's lawful authority. Firing the Health Officer expressly or tacitly because of this mask mandate order would be overturned by the Courts as surely as the power of the BOC in each of these cases was recognized generally, but rejected in specific application.

MCL §46.11(n) itself is consistent with this case law in that it limits the authority of the BOC to terminate an officer to instances of "incompetence" or "official misconduct" and then only after a hearing and an opportunity for the officer to be heard. Case law indicates that the BOC's decision is subject to judicial review and will not be sustained if the factual record is insufficient to support the BOC's conclusion. See *McGregor v. Gladwin County Supervisors*, 37 Mich 388 (1877).

Thus, I conclude that the BOC may ***not*** terminate the Health Officer for issuing an order that many other county health officers and schools are issuing. This would also constitute the tort of wrongful discharge against public policy, giving The Health Officer a claim for monetary damages as well. See *MacNeil v. Charlevoix County*, 494 Mich 69, 79 (2009).

4. Would the Health Officer be civilly and criminally liable if she withdrew her mask mandate because of political pressure?

Yes. In fact, the statute that confers civil immunity on the health officer would withdraw it expressly in this situation:

> "(2) A local health officer or an employee or representative of a local health department is not personally liable for damages sustained in the performance of local health department functions, except for wanton and willful misconduct."

MCL §333.2465 (2).

MCR 750.505 also makes common law misfeasance (gross failure to perform or gross negligence in performance without malice) in office by county officials a felony punishable by up to 5 years in prison and a $10,000 fine. The Michigan courts have applied this felony to county officials who fail to fulfill the responsibilities of their office through misfeasance. This is the charge against former Governor Snyder and former DHHS Director Nick Lyon regarding the Flint water crisis. Last week, the Sheriff's deputy in the Parkland High School shooting in Florida who failed to go into the school when shots were first fired was charged and arrested for common law criminal misfeasance.

Having factually found that the limited mask mandate was necessary to protect children who have no possibility of being vaccinated, to rescind the resulting order because she was afraid for her job or caving to political pressure would clearly be willful misconduct under the statute above and expose the Health Officer to criminal prosecution for misfeasance in office.

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STATEMENT FROM CORPORATION COUNSEL

August 31, 2021

I understand that my assurances to a local constituent that the Health Department was ***not*** going to issue a mandatory vaccination order has been misquoted on Facebook and perhaps other media to state the opposite. In actuality, a constituent asked whether the government holds the power to order mandatory vaccinations, and I responded with the truth that while the United States Supreme Court has held that it has the power, the Ottawa County Health Department was not going to use that power relative to COVID 19. Here's the exact quote:

> "The HD absolutely holds that right as was established by the United States Supreme Court in Jacobson v. Massachusetts, which the 6th Circuit applied on Tuesday to the Michigan mask mandate. **But, Lisa [Stefanovsky—Health Officer] is NOT going to issue such an order.** In fact, her preK-6 order sunsets on vaccine AVAILABILITY ONLY, not even use. On the continuum of vaccine compulsion, no physical school, complete mask mandate for all students, limited indoor mandate conditioned on parental choice with available vaccine or do nothing, she chose the least intrusive action."

Passions over the limited indoor mask mandate for pre-K to Grade 6, have led some to intentionally misquote and misreport factual information. The truth is that public health officials' decisions are never absolute. The Courts will always protect against abuses and ensure that any mandate is reasonable. COVID 19 is a serious disease but no one in the public health community is even talking about mandatory vaccines. Instead, this decision is being left to employers and colleges and other voluntary associations. We will all make it through this pandemic with a reliance on good faith, kindness and fair dealing and respect for all.