



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2018-9

Tony Boevers, Chairman
Oklahoma Construction Industries Board
2401 NW 23rd Street, Suite 2F
Oklahoma City, OK 73107

September 18, 2018

Dear Chairman Boevers:

This office has received your letter requesting an official Attorney General Opinion in which you ask, in effect, the following questions:

- 1. Does the Oklahoma Inspectors Act (59 O.S.2011 & Supp.2017, §§ 1031-1046) authorize the Construction Industries Board to enforce compliance with the building code adopted by a political subdivision?**
- 2. Does the Oklahoma Inspectors Act permit a political subdivision to engage someone other than an employee of the political subdivision, a “circuit rider inspector,” or an “authorized agent” to perform building and construction inspections on its behalf?**
- 3. If the answer to Question #2 is no, what is the authority of the Construction Industries Board to penalize a political subdivision for utilizing such a person to perform building and construction inspections?**
- 4. May the Construction Industries Board discipline a licensee for performing an inspection in a category for which the licensee is not licensed (e.g., a licensed plumbing inspector performing electrical inspections)?**

I.
BACKGROUND

Originally enacted in 1989, the Oklahoma Inspectors Act, 59 O.S.2011 & Supp.2017, §§ 1031-1046 (the “Act”), requires any person “act[ing] as or perform[ing] the work of a building and

construction inspector”¹ in Oklahoma to be qualified and licensed. 59 O.S.2011, § 1040. Any person who “act[s] or perform[s] as a building and construction inspector without a proper license” is guilty of a misdemeanor and subject to fines of up to \$2,500. *Id.* § 1044. Similarly, a political subdivision that “employs an unlicensed person to perform the duties and responsibilities of a building and construction inspector” is subject to fines of \$200 per violation, up to a maximum of \$1,000. *Id.*

The Act was initially administered by the State Board of Health, *see* 1989 Okla. Sess. Laws ch. 215, but that authority shifted to the Oklahoma Construction Industries Board (“CIB”) upon the CIB’s creation in 2001. *See* 2001 Okla. Sess. Laws ch. 394, § 27. The Act requires the CIB to “promulgate rules governing the examination and licensing of building, electrical, mechanical, plumbing, and other construction inspectors,” which rules may include “any or all nationally recognized inspector certification programs or codes for purposes of building and construction inspector licensing.” 59 O.S.2011, § 1032. It also created the Inspector Examiners Committee (the “Committee”) to assist the CIB in overseeing the licensing, continuing education, and discipline of building and construction inspectors. *Id.* §§ 1034–1035. Pursuant to the authority granted by the Act, the CIB has promulgated rules setting forth, among other things, the categories and classes of inspector licenses, the requisite qualifications, fee schedules, and procedures for obtaining such licenses, and continuing education requirements for licensed inspectors. *See* OAC 158:60.

The Act imposes two requirements for inspector applicants: (1) successful completion of a Committee-approved examination, and (2) being “employed” by a political subdivision. 59 O.S.Supp.2017, § 1036(A). An applicant who satisfies these requirements, pays the required fees, and “has otherwise complied with the applicable requirements of [the Act]” shall be issued a license by the CIB.² *Id.* In 2017, the Act was amended to provide for a separate class of license known as an “authorized agent” of a political subdivision. *Id.* §§ 1033(11), 1046. An “authorized agent” is not a governmental employee, but rather an independent contractor authorized by a political subdivision that issues building permits to conduct inspections on its behalf. *Id.* § 1046(B). An “authorized agent” licensee must satisfy the same licensure requirements as an inspector employed by a political subdivision and be “free of direction and control of any contractor who is requesting the inspection.” *Id.* § 1046(C).

¹ The term “building and construction inspector” is defined, in relevant part, as “any person actively engaged in the inspection of any phase of building and construction by the political subdivision having managerial and superintending control over building codes as the code official[.]” 59 O.S.Supp.2017, § 1033(4). It specifically includes plumbing inspectors, electrical inspectors, mechanical inspectors, and structural building inspectors. *Id.*

² The Act also permits the CIB to issue a “provisional license”—valid for a period of up to two years—to an applicant employed by political subdivision that permits the applicant to work as an inspector while seeking to fulfill the certification requirements. 59 O.S.2011, §§ 1033(9), 1036(A); OAC 158:60-5-2(f). Conversely, a previously licensed inspector who is no longer employed by a political subdivision, but is otherwise compliant with the Act’s licensing requirements, is eligible for renewal on “inactive” status. 59 O.S.Supp.2017, § 1038(D). The inspector’s license would be converted back to “active” status upon notifying the CIB of new employment with a political subdivision. *Id.*

Finally, the Act includes two geographical limitations. First, the Act does not apply at all in unincorporated areas³ of the State. 59 O.S.2011, § 1043. Second, a municipality or political subdivision with 10,000 or fewer residents is exempt from the Act, unless it employs the services of a “circuit rider inspector”⁴ or an authorized agent to conduct inspections on its behalf. 59 O.S.Supp.2017, § 1041; *see also id.* § 1046(B) (“An authorized agent . . . is required to be licensed regardless of the population of the political subdivision.”).

II. DISCUSSION

A. The Oklahoma Inspectors Act does not authorize the Construction Industries Board to enforce compliance with local building codes.

The CIB, like any statutory agency, “may exercise only those powers granted and may not expand those powers by its own authority.” *City of Hugo v. State ex rel. Pub. Emp. Relations Bd.*, 1994 OK 134, ¶ 15, 886 P.2d 485, 492; *see also Boydston v. State*, 1954 OK 327, ¶ 19, 277 P.2d 138, 142. The CIB has been granted broad authority “to adopt, amend, repeal, and promulgate rules as may be necessary to regulate . . . building and construction inspectors[.]” 59 O.S.Supp.2017, § 1000.4(A)(1). It has also been granted more specific powers under the Act. For example, the CIB oversees the examination and licensing of building and construction inspectors and regulates the conduct of persons providing building and construction inspections. *See* 59 O.S.2011, §§ 1032, 1036–1038, 1040. And together with the Committee, the CIB investigates and imposes discipline for violations of the Act or rules promulgated thereunder. *Id.* §§ 1035, 1039; *see also id.* § 1044. Fines assessed against persons “acting or performing as a building and construction inspector without the proper license,” or entities “employ[ing] an unlicensed person to perform the duties and responsibilities of a building and construction inspector,” *see* 59 O.S.2011, § 1044, are remitted to the Oklahoma Inspectors Revolving Fund to be used for purposes related to the Act. 59 O.S.Supp.2017, § 1042. In sum, the Act gives the CIB broad oversight over the qualifications and activities of building and construction inspectors and the employment of such inspectors by political subdivisions in the State, subject to the geographical limitations described above.

This broad authority notwithstanding, the Act neither explicitly nor impliedly authorizes the CIB to enforce building code compliance within political subdivisions. The responsibility for adopting and enforcing building standards within a political subdivision is left to the subdivision’s governing body, so long as the adopted standards meet the minimum requirements of the codes adopted by the Oklahoma Uniform Building Code Commission. *See* 11 O.S.2011, § 14-107; *see also* 59 O.S.2011, §§ 1000.23, 1000.29. By contrast, the Act focuses on the licensing and

³ “Unincorporated areas” are those outside the corporate limits of a municipality, city, or town that are incorporated pursuant to the Oklahoma Municipal Code or the Oklahoma Constitution. *See* A.G. Opin. 2013-5, at 47-48. Building codes may be adopted by the board of county commissioners to apply in unincorporated areas of the county, and such codes are typically administered and enforced by a county inspector. 19 O.S.2011, § 868.17A. In geographical areas of the State that do not otherwise have a building official, the State Fire Marshal is the governmental authority that administers and enforces compliance with building codes for most public and commercial buildings. *See* 74 O.S.2011, § 324.11(A), (C).

⁴ A “circuit rider inspector” is simply a licensed building and construction inspector employed by two or more municipalities or political subdivisions. 59 O.S.Supp.2017, § 1033(7).

qualification of the inspectors employed or otherwise engaged by a political subdivision for the purpose of ensuring compliance with its building code. The role of the CIB with regard to political subdivisions is solely to ensure that they (i) employ only licensed individuals to provide building and construction inspections, and (ii) notify the CIB when it employs an inspector. 59 O.S.2011, § 1044.

This reading is consistent with the Act's definitions of "building and construction inspector" and "building official." The former refers to "any person actively engaged in the inspection of any phase of building and construction by the political subdivision having managerial and superintending control over building codes as the code official for the purpose of enforcing and having the authority to enforce compliance with the applicable building codes and standards[.]" 59 O.S.Supp.2017, § 1033(4). The latter is "the licensed employee code official having the duty to administer and the authority to enforce building codes in the political subdivision." *Id.* § 1033(5). Through each definition, the Act recognizes that the political subdivision enforces compliance with local building codes, while the CIB simply ensures that those entities are utilizing qualified and licensed inspectors to do so.

B. The Oklahoma Inspectors Act permits only a CIB-licensed employee or "authorized agent" of a political subdivision to perform building and construction inspections on behalf of the political subdivision.

Next, you ask, in effect, whether a municipality or political subdivision may utilize the services of a person *other than* (i) a CIB-licensed governmental employee, (ii) a CIB-licensed "circuit rider," or (iii) a CIB-licensed "authorized agent" to conduct building and construction inspections on its behalf. The answer lies in the plain language of the Act, which makes it "unlawful for any person to act as or perform the work of a building and construction inspector *unless such person is qualified and licensed* as a building and construction inspector pursuant to the [Act]." 59 O.S.2011, § 1040. The only options for obtaining a building and construction inspector license pursuant to the Act are those you identify in your request: as a governmental employee, whether (i) a regular or provisional licensee or (ii) a "circuit rider inspector" employed by multiple governmental entities, *see* 59 O.S.Supp.2017, §§ 1033(7), 1036(A); or (iii) as an "authorized agent" of a political subdivision, *see id.* §§ 1033(11), 1046. An unlicensed person who conducts building and construction inspections would be in violation of the Act and subject to criminal prosecution. 59 O.S.2011, § 1044. Likewise, a political subdivision that "employs an unlicensed person to perform the duties and responsibilities of a building and construction inspector . . . shall be subject to an administrative fine[.]" *Id.*⁵

⁵ As originally worded, your question asks whether, by using the word "employs," Section 1044 prohibits *only* the use of an *unlicensed employee* to conduct building and construction inspections, but permits a political subdivision to utilize the services of an *unlicensed third-party* to perform such inspections. However, the word "employ" is broadly defined to mean "to use or engage the services of" or "to provide with a job that pays wages or a salary or with a means of earning a living." WEBSTER'S THIRD NEW INT'L DICTIONARY 743 (3d ed. 2002). Similarly, by allowing a political subdivision to avoid administrative fines simply by using a non-employee to conduct building inspections, the narrow reading of the word "employs" would undermine the whole purpose of the Act.

C. The Oklahoma Inspectors Act authorizes the Construction Industries Board to impose administrative fines against a municipality or political subdivision for violations of the Act.

You next ask about the authority of the CIB to impose administrative fines against a political subdivision that employs an unlicensed person to perform building and construction inspections. By the plain terms of Section 1044, a political subdivision that employs an unlicensed person for such inspections “*shall be subject* to an administrative fine of not more than Two Hundred Dollars (\$200.00) per violation,” 59 O.S.2011, § 1044 (emphasis added), which is collected by the CIB and remitted to the Oklahoma Inspectors Revolving Fund. 59 O.S.Supp.2017, § 1042. “Each day *a person* is in violation may constitute a separate violation,” meaning that the political subdivision would incur a fine for each day it employs an unlicensed person to “act[] or perform[] as a building and construction inspector” on behalf of the political subdivision. *See* 59 O.S.2011, § 1044 (emphasis added). However, the maximum fine imposed upon a political subdivision is not to exceed \$1,000. *Id.*⁶

You also ask about the manner in which the CIB would issue a citation to a political subdivision that has violated Section 1044 and the administrative procedure involved. While these questions are not specifically addressed in the Act, the CIB’s governing statute provides a procedure for issuing “a written order to any person or entity” that violates “any law which the board has authority to enforce.” 59 O.S.Supp.2017, § 1000.9(A). The statute sets forth notice and hearing requirements, but also provides that “[s]uch orders and hearings are subject to the Administrative Procedures Act.” *Id.* § 1000.9(E). Accordingly, while the Act itself does not establish procedures for the CIB to fine a political subdivision for violating the Act, the CIB may resort to the more general procedures of its governing statute to issue a citation and impose fines for violations of Section 1044.

Alternatively, the CIB’s governing statute also broadly permits the CIB to “[e]stablish and levy administrative fines for violations of law or rules in the trades and industries the [CIB] licenses or regulates,” *see* 59 O.S.Supp.2017, § 1000.4(B)(6), and to “[e]xercise all incidental powers and duties which are necessary to effectuate the provisions of . . . the Oklahoma Inspectors Act.” *Id.* § 1000.4(B)(1). Pursuant to this authority, the CIB could promulgate rules setting forth specific procedures for issuing citations to political subdivisions having violated Section 1044.

D. The Act authorizes the Construction Industries Board to discipline a licensee who performs inspection activities in a different license category than the active license he or she lawfully maintains.

As noted above, the Act provides the CIB with broad authority to promulgate rules for the licensing “of building, electrical, mechanical, plumbing, and other construction inspectors[.]” 59 O.S.2011,

⁶ In your request, you also ask, in effect, whether a political subdivision of more than 10,000 residents violates the Act if it (i) does not provide for an inspection of building and construction work performed in its jurisdiction, or (ii) provides for an inspection by an unlicensed inspector. The first scenario is not addressed in the Act, which deals solely with the qualification and licensing of inspectors and requires political subdivisions subject to the Act to utilize licensed inspectors. The second scenario would subject the political subdivision to administrative fines under Section 1044, as described herein.

§ 1032. Under Section 1039 of the Act, the Committee has authority to investigate and request an individual proceeding regarding the licensing and inspection practices of *all* building and construction inspectors, which includes all of the aforementioned categories. 59 O.S.2011, § 1039 (A), (B); *see also* 59 O.S.Supp.2017, § 1033(4) (defining “building and construction inspector”). Specifically, the Committee can request individual proceedings to determine whether an individual licensee made a misstatement on his or her license application, loaned or illegally used a license, demonstrated incompetency while acting as a building and construction inspector, or violated any provision of the Act or any rule promulgated or order issued pursuant to the Act. 59 O.S.2011, § 1039(B). If the licensee is found guilty of such conduct by an impartial hearing examiner, he or she may be disciplined by the CIB. *Id.* § 1039(C).

One situation in which the Committee may request an individual proceeding is when a licensed building and construction inspector “violate[s] any provision of the Oklahoma Inspectors Act, or any rule promulgated or order issued pursuant to the Oklahoma Inspectors Act.” *Id.* § 1039(B)(4). The CIB has established by rule unique license categories for the different types of building and construction inspectors. *See* OAC 158:60-5-1. A separate rule specifically provides that “[i]n political subdivisions where licensing is required by the Act, no person may perform building and construction inspections in a category in which he or she is not licensed.” OAC 158:60-5-3(e). So, for instance, an individual who performs the work of a plumbing inspector but is licensed only as an electrical inspector would be in violation of a CIB-promulgated rule. If the individual is found guilty of such a violation, the CIB may impose discipline pursuant to its authority under the Act.

It is, therefore, the official Opinion of the Attorney General that:

- 1. Pursuant to the Oklahoma Inspectors Act, the Construction Industries Board is tasked with licensing building and construction inspectors and regulating the licensing process, *see* 59 O.S.2011, § 1032; it is not authorized to enforce compliance with local building codes.**
- 2. A political subdivision that is subject to the Oklahoma Inspectors Act violates the Act if it employs, engages, or utilizes an unlicensed person to perform the work of a building and construction inspector. 59 O.S.2011, § 1044. The only persons who may be licensed under the Act are (i) an employee of the political subdivision, *see* 59 O.S.Supp.2017, § 1036(A); (ii) a “circuit rider inspector” serving multiple political subdivisions, *see id.* § 1033(7); and (iii) an “authorized agent” of a political subdivision, *see id.* §§ 1033(11), 1046.**
- 3. The Oklahoma Inspectors Act authorizes the Construction Industries Board to impose administrative fines against a municipality or political subdivision for violating 59 O.S.2011, § 1044. To issue a citation for violating 59 O.S.2011, § 1044, the Board may utilize the general procedures set forth in 59 O.S.Supp.2017, § 1000.9 or may promulgate separate procedures pursuant to its authority under 59 O.S.Supp.2017, § 1000.4(B)(1), (6).**
- 4. The Construction Industries Board may discipline a licensee who is found guilty in an administrative proceeding of having violated rules promulgated pursuant to**

the Oklahoma Inspectors Act. 59 O.S.2011, § 1039. Because Board rules prohibit a person from “perform[ing] building and construction inspections in a category in which he or she is not licensed,” see OAC 158:60-5-3(e), the Board may discipline a licensee found guilty of performing inspections in a category for which he or she does not hold a license.



MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA



LAUREN E. HAMMONDS
ASSISTANT ATTORNEY GENERAL

