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1. BURIAL AWARDS—RULES GOVERNING AND GRANTING BURIAL AWARDS—DIVISION OF AID FOR THE AGED—NOT SUBJECT TO PROVISIONS OF ADMINISTRATIVE PROCEDURE ACT—SECTIONS 154-61 TO 154-74 G. C.
2. DIVISION OF AID FOR THE AGED—NOT REQUIRED TO WITHHOLD PAYMENT OF FUNERAL AND BURIAL EXPENSES OF DECEASED RECIPIENT OF AID WHEN TOTAL COST EXCEEDS \$180.00—SECTION 1359-10 G. C.—HOUSE BILL 427, 99 GENERAL ASSEMBLY, 124 O. L., 471.

## SYLLABUS:

1. In adopting rules governing the granting of burial awards pursuant to the powers granted it by Section 1359-21c, General Code, the Division of Aid for the Aged is not subject to the provisions of the Administrative Procedure Act, Sections 154-61 to 154-74, General Code.

2. The amendment of Section 1359-10, General Code, by House Bill 427 of the 99th General Assembly, 124 Ohio Laws, 471, did not as a matter of law require the Division of Aid for the Aged to withhold payment of funeral and burial expenses of a deceased recipient of aid when the total cost of such funeral and burial exceeds \$180.00.

Columbus, Ohio, June 19, 1952

Judge J. H. Lamneck, Director, Department of Public Welfare  
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Under the provisions of Amended Section 1359-10 of the General Code, effective June 11, 1951, the Division of Aid for the Aged, upon the death of a recipient of aid, may order the payment to the proper persons entitled thereto of a sum of not to exceed \$180, to defray the *total* funeral and burial expenses of such deceased person.”

“Under the provisions of Section 1359-21(c) of the General Code, the Division of Aid for the Aged has power to establish and enforce rules and regulations not inconsistent with law as may be necessary or desirable to carry out the provisions of the Aid for the Aged Act.”

“The Division has adopted tentative rules governing payments for funeral and burial expenses of recipients. A copy of these tentative rules is attached hereto, marked ‘Exhibit A,’ and made a part hereof.

“In connection with the proper interpretation of these two Sections of the Code, your opinion is requested on the following:”

There follow six questions, which I shall consider separately hereafter. Your request concludes as follows:

“The funeral and burial expenses of about 65% of deceased recipients is paid from either property of the recipient or by friends and relatives of the decedent. The tentative rules attached are designed to keep the payments for burial and funeral expenses of deceased recipients within the amount of current appropriations for that purpose. If the Division is required under the law to make contributions towards the burial and funeral expenses of a deceased recipient, irrespective of the total amount of such funeral and burial expenses, then the amount of the current appropriation would be grossly inadequate. If the Division contributed to the funeral and burial expenses of every recipient who died without leaving any property for that purpose, current appropriations would only permit the payment of approximately \$60 for funeral and burial expenses of each such deceased recipient.”

The first question which you have presented is:

“1. Must the procedure outlined in the Administrative Procedure Act (154-61 to 154-74, inclusive, General Code) be followed by the Division of Aid for the Aged in adopting rules and regulations for the Division as authorized by Section 1359-21(c) of the General Code?”

Section 1359-21(c), General Code, to which you refer, provides that:

“\* \* \* The division shall have the power to establish and enforce such rules and regulations, not inconsistent with this act, as may be necessary or desirable to carry out the provisions of this act. \* \* \*”

So far as pertinent here the administrative procedure act, Sections 154-61 to 154-73, General Code, provides in part as follows:

“Section 154-63. Every agency authorized by law to adopt, amend or rescind rules shall comply with the procedure prescribed in this act for the adoption, amendment or rescission of

rules. Unless otherwise specifically provided by law, the failure of any agency to comply with such procedure shall invalidate any such rule or amendment hereafter adopted, or the rescission of any rule. No agency shall adopt any rule which is inconsistent with the constitution of the United States, the constitution of the state of Ohio or any law of this state."

"Section 154-62. The following words when used in this act shall have the meanings respectively ascribed to them in this section :

" 'Agency' means and includes, except as hereinafter limited, any official, board or commission having authority to promulgate rules or make adjudications in the bureau of unemployment compensation, the state civil service commission, the department of industrial relations, the department of liquor control, the department of taxation, the industrial commission, the functions of any administrative or executive officer, department, division, bureau, board or commission of the government of the state of Ohio specifically made subject to the provisions of the administrative procedure act, and the licensing functions of any administrative or executive officer, department, division, bureau, board or commission of the government of the state of Ohio having the authority or responsibility of issuing, suspending, revoking or cancelling licenses. \* \* \*"

It will be noted that the Division of Aid for the Aged and the Department of Public Welfare are not specifically included within the above definition of "agency," nor do the rules *which you have submitted for my examination* fall within the licensing functions of your department. It is therefore my conclusion that the adoption of such rules is not subject to the procedure set out in the administrative procedure act. This conclusion is further borne out by the provisions of Section 161-1, General Code, which prescribes how certain rules and regulations are to be filed and amended. The last paragraph of that section provides as follows :

"\* \* \* Provided, further, that the provisions of this section shall not apply to a rule as defined in section 154-62, General Code, in the administrative procedure act."

The other five questions which you have presented arise from certain specific rules which the division has adopted or which it now proposes to adopt. These rules are administrative interpretations of the provisions of Section 1359-10, General Code. Their full significance can best be understood by a review of the history of that section.

Prior to its recent amendment by the 99th General Assembly, 124 Ohio Laws, 471, Section 1359-10, General Code, provided in part as follows:

“Upon the death of a recipient of aid a sum of not to exceed \$140.00 may be ordered paid to the proper person entitled thereto to defray the burial expenses of such deceased person. The cost of the grave shall be paid by the division.

“An application, under oath, for such an amount for burial expenses shall be filed by the proper person entitled thereto.

“An itemized sworn statement of the burial expenses must be submitted by the undertaker.”

In Opinion No. 5653, Opinions of the Attorney General for 1936, page 774, rendered at a time when the statute provided that money “*shall* be ordered paid” rather than “*may* be ordered paid,” it was held that the division must pay a reasonable amount for a grave and the opening and closing thereof, in addition to the amount specified for burial expenses. The statute was subsequently amended to make the payment permissive, and the division adopted rules which set its maximum contribution for *all* expenses including a grave, at \$140.00. So far as pertinent those former rules provided as follows:

“Rule I

“Definition of Terms

“(a) Words and phrases used in this Title and in Section 1359-10 of the General Code of Ohio shall be construed as follows:

“\* \* \* (5) *Funeral expenses* shall be construed to include thorough embalming and care of the body, transportation from place of death to place of interment or cremation (except as stated in Par. (6) (c’)), casket, clothing and any other merchandise when furnished by the funeral director, and such services as are incidental and necessary to provide respectable burial service, except Sales Tax and ‘Other Burial Expense’ as defined herein.

“(6) *Other burial expenses* shall be construed to include the following items when necessary and furnished:

“(a’) The cost of a single grave space; the cost of opening and closing the grave; use of lowering device, grass matting, tent and chairs when furnished by the cemetery or a funeral director other than the one having the original contract.

“(b’) The cost of a shipping box, and outside wooden box or the least expensive outside receptacle, permitted by the cemetery and obtainable by the funeral director, other than a wooden box, when *required* by the cemetery.

“(c’) When it is necessary to transport the remains of a deceased recipient of Aid beyond a 35 mile radius from the funeral establishment the entire trip or trips in which the excess of a 35 mile radius is reached shall be deemed to be other burial expense.

“(d’) *Cremation* of the remains and disposal of the same.”

“(7) *Burial expense* shall be construed to include the total of ‘Funeral Expense’ and the total of ‘Other Burial Expenses’ as defined in Rule 1 (a) (5) (6).”

## “Rule 2

### “Amount and Limitation of Award

“(a) The Division may pay *from public funds*, in accordance with these rules and regulations, an amount *not to exceed* \$115.00 to “The proper person entitled thereto” for funeral expenses of a deceased recipient of Aid provided:

“(1) The total bill for funeral expenses (as defined herein) does not exceed the total sum of \$115.00 and,

“(2) The amount of the funeral award requested from public funds when added to funds available from any other source for the payment of said funeral expenses shall not exceed \$115.00.

“(b) In addition, the Division may pay from public funds an amount not to exceed \$25.00 for other burial expenses as limited and defined herein. When the other burial expense cannot be met within the amount of \$25.00 allowed for other burial expenses then the payment of an additional amount from private sources shall not in itself indicate that the entire cost of funeral and disposal of remains could have been met without public funds; except that the outside receptacle shall not exceed the cost of the wooden box or the least expensive receptacle permitted by the cemetery and obtained by the funeral director, other than a wooden box, when required by the cemetery.”

Referring particularly to sections (a) (1) and (2) and (b) of Rule 2, *supra*, it will be noted that the division specified that public money would not be contributed if the total “funeral expenses” as defined, exceeded \$115.00. It was provided, however, that the public contribution

would not be withdrawn simply because some private contribution had been made to the "other burial expenses" which included a grave, certain cemetery services, and extra transportation.

Section 1359-10, General Code, was amended by an act set out in 124 Ohio Laws, 471, effective June 11, 1951. As amended the statute provides in part as follows:

"Upon the death of a recipient of aid a sum of not to exceed one hundred eighty dollars may be ordered paid to the proper persons entitled thereto to defray the total funeral and burial expenses of such deceased person.

"An application, under oath, for such an amount for total funeral and burial expenses shall be filed by the proper person entitled thereto.

"An itemized sworn statement of the total funeral and burial expenses must be submitted by the undertaker."

It will be observed that the recent amendment raised the total permissible burial allowance to \$180.00, and deleted the separate reference to the cost of a grave. It also introduced the term "total funeral and burial expenses."

Since this amendment of the statute the Division of Aid for the Aged proposes to amend its rules. So far as pertinent here those proposed rules provide in part as follows:

Rule I. Definitions:

"\* \* \* D. 'Total burial expenses' is construed to mean and include the total expenses at the time of burial for providing the following items: casket and services, clothing, transportation of body, embalming, outside receptacle, opening and closing grave, cremation or grave lot, and such other services and material as are furnished to provide a decent burial.

"E. 'Itemized Sworn Statement' shall mean a true and correct statement of all burial expenses set forth and itemized in accordance with forms provided by the Division of Aid for the Aged."

Rule II. Payment of Burial Award:

"A. The Division may pay not to exceed \$180.00 for the burial of a recipient of Aid less any funds, donations or prepaid items from other sources available for burial expenses.

"a. A sum not to exceed \$140.00 may be paid to the funeral director for the cost of the funeral of a recipient of Aid.

"b. A sum not to exceed \$40.00 may be paid to the funeral director for the cost of the grave and the opening and closing thereof.

"c. When a body is to be cremated the funeral director may be paid \$180.00 to cover the total cost of funeral and cremation.

"B. Donations such as outside receptacles, grave lots, etc., accepted by and used in the burial of a recipient must be noted on the itemized statement and full credit given toward the expense of the burial.

"C. Donations of religious, lodge services or flowers will not be considered as part of the total burial expense.

"D. The Division will not pay for any burial when the total cost exceeds \$180.00."

As pointed out above, the old rules provided that the public contribution would not be withdrawn simply because private contributions were made toward certain "other burial expenses" and the total cost of the funeral was thereby increased. The new rules, however, provide that no public contribution will be made if the total cost of the funeral is in excess of \$180.00. They also provide that private donations, including funds and grave lots, shall be considered in arriving at the total cost of \$180.00.

The above set of facts presents two questions: 1. Are the proposed rule changes required by the amendment of the statute; and 2. Are the proposed rules within the powers of the division?

In answer to the first question, the only statutory change which might have affected the powers of the division was the adoption of the term "total funeral and burial expenses." While it might be argued that that language was inserted in order to fix the total cost of funerals of deceased recipients, it seems more logical to assume that it was designed to replace the separate reference to the cost of a grave and to include all costs within the \$180.00 maximum. It is therefore my opinion that the amendment of Section 1359-10, General Code, by House Bill No. 427 of the 99th General Assembly, 124 Ohio Laws, 471, did not as a matter of law require the Division of Aid for the Aged to withhold payment of funeral and burial expenses of a deceased recipient of aid when the total cost of such funeral and burial exceeds \$180.00.

When we consider the second question of whether the proposed rules are within the power of the division to promulgate, we have an entirely different problem. The mechanics of the administration of the law have been left largely to the division. As pointed out in your request, the General Assembly has appropriated an amount of money for the purpose of providing burials for deceased recipients of aid, which amount is substantially less than the product of \$180.00 multiplied by the number of probable deaths. This seems to be a clear indication of a legislative intent that the division should devise a program whereby the available funds will be disbursed in a manner which the division deems equitable.

It has been brought to my attention that certain of the proposed rules represent departures from accepted trade practices among funeral directors, or are in other ways considered unfair or burdensome to that profession. Those matters, of course, are questions for the judgment and fairness of the administrative officers of the division. On the facts before me, I cannot say that as a matter of law any of the proposed rules are either unreasonable or unlawful.

In light of the above I do not consider it necessary to discuss in detail the remaining five questions which you have submitted to me, since they involve particulars of the proposed rules. If I were to discuss them further, it would only be to consider their advisability or wisdom, and that is not within my powers.

Respectfully,

C. WILLIAM O'NEILL  
Attorney General