

I am of the opinion that the foregoing is a fair and truthful statement of the measure to be referred and accordingly submit for uses provided by law the following certification:

"I, John W. Bricker, Attorney General of the State of Ohio, pursuant to the duties imposed upon me under the provisions of Section 4785-175, General Code, hereby certify that the foregoing summary is a fair and truthful statement of House Bill No. 270 of the 90th General Assembly. JOHN W. BRICKER, Attorney General."

Respectfully,

JOHN W. BRICKER,

Attorney General.

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EMBALMING EXAMINERS—STATE BOARD OF—AUTHORIZED TO REQUIRE CERTIFICATE OF REGISTRATION FROM APPLICANT PRIOR TO COURSE OF STUDY—BOARD MAY REASONABLY REGULATE REQUIREMENT FOR ADMISSION TO EXAMINATION FOR LICENSE—STATEMENT OF APPRENTICESHIP MAY BE REQUIRED BY BOARD—APPRENTICESHIP UNDER REGISTERED EMBALMER.

*SYLLABUS:*

1. *The State Board of Embalming Examiners of Ohio has the authority to adopt a rule requiring that an intended applicant for an embalming license shall obtain a certificate of registration prior to entering upon the course of study or period of practical experience required by Section 1342, General Code, when such rule is not made to act retroactively.*

2. *Such board has no authority to adopt a rule purporting to regulate the requirements as to admission to examination for a license to practice embalming in this state, which is unreasonable or which may not be complied with within the period prescribed in Section 1342, General Code.*

3. *An applicant for an embalmer's license who has been regularly and steadily employed by an undertaking parlor, as the same is ordinarily conducted in this state, not as a side issue to other employment, and who has given diligent attention to his duties as an aide or helper to the embalming performed therein and has embalmed arterially, at least twenty-five dead adult human bodies, under the direct supervision of a licensed embalmer has complied with the practical experience requirements of Section 1342, General Code, and with the rules of the State Board of Embalmers of Ohio, even though the licensed embalmer under whom such experience may have been obtained, may also embalm for other undertakers.*

4. *When the rules of the board so require, such board cannot be compelled to admit an applicant to examination until he shall have furnished a statement as to his apprenticeship as required by Section 1342, General Code.*

COLUMBUS, OHIO, April 13, 1933.

HON. EDWIN H. WEBER, *Secretary-Treasurer, The State Board of Embalming Examiners of Ohio, Cleveland, Ohio.*

DEAR SIR: Your recent request for opinion reads in part, as follows:

"I am requested by our board to write to you for an opinion on the requirements of an applicant for embalmer's license by examination as set forth in the Rules, Regulations and By-laws adopted by our Board on August 14th, 1931, and according to Section 1342 of the General Code.

Section 1342 of the General Code reads in part, as follows:

'Every person desiring to engage in the practice of embalming or the preparation of the dead for burial, cremation, or transportation, in the state of Ohio, shall make a written application to the state board of embalming examiners of Ohio for registration, giving such information as the said board may, by regulation, require for such registration. Each application must be accompanied by a fee of one dollar with the certificates of three reputable citizens, one of whom shall be a licensed embalmer, that the proposed applicant is of good moral character and stating his age and general education which shall be a high school education or its equivalent. If the said Board shall find the facts set forth in the application to be true, the said board shall issue to said applicant a certificate of registration. Before a registered applicant can apply for and take an examination in the practice of embalming or preparing for burial, cremation or transportation, the body of any dead person in the state of Ohio, said applicant shall have completed to the satisfaction and approval of the said board, a course consisting of at least twenty-six weeks of studies in the science of embalming, disinfection and sanitation in a regular school of embalming, recognized by said board and shall have had at least two years of practical experience under a licensed embalmer in this state during which time he or she shall have embalmed, arterially, at least twenty-five dead adult human bodies.'

Covering this portion of Section 1342 of the General Code, and under the power granted our Board by Section 1338, which provides that, 'The Board shall from time to time make and adopt rules, regulations and by-laws for its government not inconsistent with the laws of this state and the United States,' we adopted on August 14th, 1931, the following rules governing registration:

Rule 1. Any person desiring to engage in the practice of embalming in the State of Ohio must first make application for registration with the State Board of Embalming Examiners of Ohio on Form A-1.

(NOTE—Form A-1 carries certificate of completion of High School or its equivalent, also three recommendations, one of which must be that of a licensed embalmer.)

Rule 2. This application must be filed with the Board and a certificate of registration secured prior to enrollment in a school of embalming and prior to beginning of apprenticeship. (Section 1342, G. C.) The State Board of Embalming Examiners of Ohio will not recognize a course of instruction in embalming secured or apprenticeship served by any person who is not first duly registered with the Board and the holder of a certificate of registration (Form A-2.)

In this connection we desire to secure an opinion from you as to whether an applicant can, under Section 1342 of the General Code, and the above rules and regulations adopted by our Board, claim

credit for apprenticeship served prior to the date he became qualified for registration. In other words, can the applicant claim apprenticeship served before he secured either the High School education or the equivalent to the High School education. \* \* \* \*

We also desire an opinion on the requirements of apprenticeship as set forth in Section 1342 of the General Code. The portion of Section 1342 applying to the apprenticeship requirements are:

\* \* \* Before a registered applicant can apply for and take an examination in the practice of embalming or preparing for burial, cremation, transportation, the body of any dead person in the State of Ohio, said applicant \* \* shall have had at least two years of practical experience under a licensed embalmer in this state, during which time he or she shall have embalmed, arterially, at least twenty-five dead adult human bodies. All applications for a license to practice embalming and the preparation of the dead for burial, cremation or transportation, in this state, must be made to the state board of embalming examiners in writing and contain the name, age, residence and the person or persons with whom employed, the name of the school attended together with a certificate from two reputable citizens that the applicant is of legal age and of good moral character, also a certificate under oath when required by the said board from the president or dean of the embalming school or college he or she has attended, that the applicant has complied with the requirements of said college or school and a certificate under oath, when required by said board, from the licensed embalmer under whom he or she has worked as an apprentice, that he or she has complied with the requirements of apprenticeship as set forth in this section \* \* '

We desire an opinion on what constitutes apprenticeship, as used in Section 1342, General Code. \* \* \* On August 14th, 1931, our Board adopted the following rule covering apprenticeship:

'Apprenticeship shall be construed as diligent attention to the subject matter in the course of regular and steady employment and not as a side issue to another employment.'

\* \* \* \* We wish to be informed whether we can be forced to accept, for examination, an applicant who has served two years under an embalmer for whom he did not work regularly and steadily. The particular case which we have in mind concerns a young man who assisted a person known as a 'trade embalmer', which term means an embalmer who does work for perhaps twenty-five firms and who is called to one funeral home perhaps only once in a month. The young man in question assisted the trade embalmer at such times as he happened to be called to the funeral home where the applicant was located. \* \* \* \* In this particular case the applicant claims apprenticeship served prior to the date when he received his high school equivalent certificate necessary to qualify him to serve apprenticeship.

The above quoted portion of Section 1342, General Code, contains the provision that the applicant for embalmer's license by examination shall make application to the Board and that such application shall contain a certificate under oath, when required by the Board, from the licensed embalmer under whom he or she has worked as an apprentice, that he or she has complied with the requirements of apprenticeship as set forth in this section.

The Embalming Board of Ohio has, at all times, required that the certificate of apprenticeship be made under oath. We desire your opinion on whether we can be forced to accept an application for license by examination when said application does not include the sworn certificate from the master embalmer concerning apprenticeship. This does not include a case of death of the master embalmer; such a case is covered in our rules and regulations."

You state that on August 14, 1931, the State Board of Embalming Examiners adopted certain rules and regulations which, among other things, define the time of filing the application for a certificate of registration required by Section 1342, General Code, to be filed by all prospective applicants for a license to practice embalming with reference to the time of obtaining the technical experience and training. Your first inquiry is as to the validity of Rule 2, as so enacted by your board.

The authority of your board to enact rules and regulations is contained in the following language contained in Section 1338, General Code:

"The board shall *from time to time* make and adopt rules, regulations and by-laws for its government not inconsistent with the laws of this state and the United States." (Italics, the writer's.)

Such statute expressly grants to the board the right from time to time to make rules and regulations which must not be inconsistent with state or federal laws.

I have, for the purposes of this opinion, assumed that the regulations in question were legally adopted. I therefore express no opinion concerning such question.

Section 1342, General Code, quoted in your request, defines the procedure to be followed by an applicant and the qualifications necessary for the issuance to him of a certificate of registration. You infer that the applicant in question has received his certificate of registration. I am therefore assuming that at the date of its issuance he had the necessary qualifications to receive it.

The authority of the legislature to delegate the power to make reasonable rules and regulations has been established by the courts. (Ex parte Company, 106 O. S. 50 and cases therein cited.) It is generally recognized that the power of the state to license or regulate occupations and professions is through its police power.

To justify the state, whether by legislative enactment or by administrative rule in exercising the police power in behalf of the public,

" \* \* \* it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." Lawson vs. State, 152 U. S. 133, 137.

The rules of the board which purport to regulate the business or profession of embalming, or define or regulate the persons who may enter or desire to enter such field must find their justification in the police power of the state, otherwise they are void. The right to practice a lawful profession or engage in a lawful business is a property right which is protected by both the federal and state constitutions. Neither the legislative nor the administrative branches of our government may impose unreasonable or unnecessary restrictions on them. *Burns Baking Company vs. Bryan*, 264 U. S. 504, 513; *Meyer vs. Nebraska*, 262 U. S. 390, 399, 400; *Norfolk Ry. vs. Public Service Com.* 265 U. S. 70, 74. It therefore follows that if the regulations of the board is authorized by statute and is reasonably necessary for the protection of the public welfare, safety or morals, it is valid, otherwise it is of no effect.

Does the statute authorize the State Board of Embalming Examiners to enact the rule requiring registration of the applicant prior to his commencement of the two years' practice mentioned in Section 1342, General Code?

What is the legislative purpose of requiring registration? No express purpose is stated in the statute. In the "Medical Board Act" (§§1263—1295, General Code), in the "Dental Board Act" (§§1314—1333, General Code), and in the "Pharmacy Board Act" (§§1296—1313, General Code), the reference is made to certificates of registration. However, it is to be noted that in such laws the reference is to the registration of licensed practitioners. An examination of the "Embalming Board Act" (§§1335—1348, General Code) shows that registration in such act means registration of those desiring to engage in the practice, rather than those licensed to practice. Section 1342, General Code, as enacted in 99 O. L. 508, did not require an application for certificate of registration but provided that upon receipt of his license such applicant should register the license with the board of health of the county in which he practiced. In 107 O. L. 656, the legislature enacted an act to further regulate the practice of embalming and so amended it that but little of the former section remained. It then, as now, provided that only registered applicants could be admitted to examination for license, and is substantially the same as the present section except for a later increase of educational requirements. The evident legislative purpose in the change of the statute was to require an applicant for a license to practice embalming to submit evidence of his qualifications as to general preliminary education and also as to moral fitness in order that the board might determine as to their sufficiency. Upon determining the facts stated in such application for registration to be true it is the duty of the board to issue a "certificate of registration." The statute provides that before the "registered applicant" can apply for and take his examination for a license the *registered applicant* shall have—

- (a) completed, to the satisfaction and approval of the board, a course of study described in the statutes of not less than 26 weeks.
- (b) shall have at least two years' practical experience under a licensed embalmer in this state, during which time he shall have embalmed arterially, at least twenty-five dead adult human bodies.

The language of the statute is that the "registered applicant" shall have completed such conduct, not that a person who shall have subsequently become a "registered applicant" shall have at one time or another attended a

school of embalming for not less than twenty-six weeks and at some time or another completed such period of experience.

Rule 2 of your Board, quoted above, places such construction on the statute, that is, that the applicant must have been a "registered applicant" at the time of obtaining his instructions in embalming and also at the time of obtaining his practical experience. Such construction does not seem to be in conflict with the language of the statute and it would not necessarily be against public welfare. However, I am informed that until the date of the adoption of such rule (August 14th, 1931) your board did not so interpret the act, and that until such date your application blank, which I assume paraphrased a by-law then in existence, read as follows:

"Note—This application according to a rule of the board, must be on file with the Secretary of the State Board of Embalming Examiners at least thirty days previous to the examination." (See Opinions of the Attorney General for 1931, Vol. 2, page 833.)

It has been held in the case of a judicial interpretation construing the meaning of a statute such construction determines the meaning of the statute and becomes a part thereof until modified by later decision or overruled by a court of superior jurisdiction in an appropriate action, and that any property rights obtained in reliance on such interpretation will not be affected by a subsequent change of judicial interpretation. *Metzger vs. Greiner*, 9 O. C. C., N. S. 364; *Lewis vs. Symmes*, 61 O. S. 471; *Thomas-Gilfillan vs. State*, 76 O. S. 341; *Bank vs. Lander*, 12 O. F. D., 426.

Like reasoning would lead to the conclusion that if the board had by rule placed a construction on the provisions of statute as to the time when the preliminary education must be obtained a change of interpretation by a change of rule could not affect any rights obtained prior to such change, but unless the applicant knew of the former ruling he could not claim that the change of construction affected his vested rights. *Sidney vs. Cummins*, 93 O. S., 328; *Lewis vs. Symmes*, 61 O. S. 471.

It would therefore appear that Rule 2 is a valid rule so long as it is not given a retroactive effect, that is, if a person who, relying upon the former rule of the board, has commenced his course of instruction or begun his two year period of practical training his right to credit therefor could not be annulled or affected by the subsequent amendment of the rule.

Your second query is as to whether an applicant must, during the time he obtains "at least two years of practical experience under a licensed embalmer in this state" and embalms at least twenty-five dead adult human bodies, be exclusively in the employ of such embalmer.

From the records of vital statistics, I find that during the year 1931, 75,500 deaths were reported in Ohio and that during the year 1930 there were 76,212 deaths in the state. The records further show that there are in excess of 3,275 licensed embalmers in Ohio. Assuming that forty per cent of the registered embalmers are inactive, the average number of bodies that could be embalmed by the remaining embalmers would be thirty-eight, or slightly less than one per week. The work of embalming a dead body would probably not take longer, on the average, than one-half day. If this be true, the embalmer might well embalm two bodies each day, if regularly employed at such occupation or profession, or, allowing for Sundays and holidays, could embalm six hundred bodies per year; however, if this be done, only

one hundred and ten of the 3,275 embalmers would be employed at their craft.

It must be borne in mind that the authority of the board to adopt rules and regulations is derived from the police power of the state. Such power whenever exercised must be reasonably exercised and the rule must be reasonably necessary for the accomplishment of the purpose intended. It must not be unduly oppressive upon individuals. *Lawson vs. State, supra.*

Your rule as to apprenticeship defines such word as follows:

“Apprenticeship shall be construed as diligent attention to the subject matter in the course of regular and steady employment and not as a side issue to another employment.”

As above pointed out, there probably is no undertaker-embalmer in the state who has enough strictly embalming business to employ an apprentice solely as a regular and steady embalmer-helper or apprentice. I therefore am of the opinion that the definition of an “apprentice” as contained in your regulations, if given such interpretation that it prevents or attempts to prevent the “apprentice” from otherwise employing such part of his time as may not reasonably be required in a regularly conducted business of embalming would have the effect of making such rule void. I am unable to state whether any undertaking parlor employe employs the full time of a licensed embalmer at embalming, but it is a general practice among licensed embalmers to devote a portion of their time to conducting and arranging funerals. The definition above quoted from your rules might be construed to prevent the so called apprentice from aiding in any duties except embalming. Such construction would make such rule unreasonable, if not absurd. It would not have a reasonable relation to the result sought to be accomplished.

The legislative intent and purpose as expressed in Section 1342, General Code, appears to be to require the applicant to have two years of practical experience in an undertaking parlor as the same is regularly and ordinarily conducted in this state, performing his duties under the supervision of a licensed embalmer, otherwise the remaining requirement that he must have embalmed arterially, at least twenty-five adult human bodies would be redundant, for if his exclusive time and efforts were employed in aiding an embalmer he probably would, during the period of a couple of months, have so embalmed twenty-five bodies.

I am unable to find in the statute any provision which would prevent a licensed embalmer from doing the embalming for more than one funeral parlor, nor do I find any provision which would require an embalming apprentice to be personally present at the embalming of every body embalmed by the licensed embalmer under whom he gains his practical experience.

It is within the province of your board to define what shall constitute “apprenticeship experience” acceptable to such board, provided such rule is reasonable and possible of attainment within the limitations imposed by statute.

It is the duty of the court in the interpretation of statutes to place such construction on a statute as will, if possible, avoid impossibility of compliance, injustice, inconvenience or absurdity, if consistent with the language used. *Moore vs. Given*, 39 O. S. 661; *Hill vs. Micham*, 116 O. S. 549.

As stated in Lewis' Sutherland Statutory Construction, Section 497:

"It is presumed, as well on the ground of good faith as on the ground that the legislature would not do a vain thing, that it intends its acts and every part of them to be valid and capable of being carried into effect."

A like presumption must be made concerning the intent of your board and where an ambiguity occurs, if possible, such a construction should be placed on the rule as will avoid injustice, unnecessary inconvenience, absurdity or impossibility, for such intent is never presumed.

As stated by Mr. Justice Stone, in *United States vs. Ryan*, 284 U. S. 167, 175:

"All laws are to be given a sensible construction. A literal application of a statute which had too absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose."

It is therefore my opinion that if the definition of "apprentice" as contained in your regulations is given a more restricted meaning than the legislative purpose as expressed by Section 1342, General Code, such rule would be void. In my opinion such definition does not require the "apprentice" to have any other practical experience than would be gained in an undertaking parlor as the same is regularly and ordinarily conducted during a period of two years, providing however, that all the embalming duties of such "apprentice" must be under the supervision of a licensed embalmer and at least twenty-five adult human bodies are embalmed by such applicant during such period.

Your third request is as to whether you can be required to accept an applicant for examination for a license to practice embalming whose master refuses to certify as to his apprenticeship, when the rules of the board by its regulations require a sworn statement as to such apprenticeship. Section 1342, General Code, sets forth as one of the requirements for admission to examination, that the applicant shall file with the board,

"a certificate under oath when required by said board, from a licensed embalmer under whom he worked as an apprentice, that he or she has complied with the requirements of apprenticeship as set forth in this section."

I express no opinion as to whether the board could waive such requirement, inasmuch as such question is not asked.

The ordinary meaning of the word "shall" is mandatory unless the context otherwise requires. The statute places the duty of furnishing such certificate on the applicant. I know of no rule of law which would require the board or any other official to perform a public act until the applicant can show that he is clearly entitled to have the act performed.

Specifically answering your inquiries it is my opinion that:

1. The State Board of Embalming Examiners of Ohio has the authority to adopt a rule requiring that an intended applicant for an embalming license shall obtain a certificate of registration prior to entering upon the course of study or period of practical experience required by Section 1342, General Code, when such rule is not made to act retroactively.

2. Such board has no authority to adopt a rule purporting to regulate the requirements as to admission to examination for a license to practice em-



balming in this state, which is unreasonable or which may not be complied with within the period prescribed in Section 1342, General Code.

3. An applicant for an embalmer's license who has been regularly and steadily employed by an undertaking parlor, as the same is ordinarily conducted in this state, not as a side issue to other employment, and who has given diligent attention to his duties as an aide or helper to the embalming performed therein and has embalmed arterially, at least twenty-five dead adult human bodies, under the direct supervision of a licensed embalmer, has complied with the practical experience requirements of Section 1342, General Code, and with the rules of the State Board of Embalmers of Ohio, even though the licensed embalmer under whom such experience may have been obtained, may also embalm for other undertakers.

4. When the rules of the board so require, such board cannot be compelled to admit an applicant to examination until he shall have furnished a statement as to his apprenticeship as required by Section 1342, General Code.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

571.

APPROVAL, BONDS OF METAMORA VILLAGE SCHOOL DISTRICT,  
FULTON AND LUCAS COUNTIES, OHIO, \$75,000.00.

COLUMBUS, OHIO, April 13, 1933.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

572.

APPROVAL, NOTES OF ELK RURAL SCHOOL DISTRICT, NOBLE  
COUNTY, OHIO, \$7,218.00.

COLUMBUS, OHIO, April 13, 1933.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

573.

APPROVAL, NOTES OF WEST ELKTON VILLAGE SCHOOL DISTRICT,  
PREBLE COUNTY, OHIO, \$3,906.00.

COLUMBUS, OHIO, April 13, 1933.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*