

1780.

STATE BOARD OF EMBALMING EXAMINERS—DISCUSSION OF RECIPROCAL RELATIONS WITH ANOTHER STATE—NO RIGHT TO REFUSE TO RENEW LICENSES SECURED BY EXAMINATION—EXCEPTION—WITHOUT AUTHORITY TO REFUSE TO ACCEPT APPLICANT FOR EXAMINATION MERELY BECAUSE APPLICANT RESIDES IN STATE WHICH DOES NOT RECIPROCATE WITH OHIO.

1. *When the State Board of Embalming Examiners of Ohio terminates reciprocal relations with another state in the matter of licensing embalmers, it is not only the legal right of said board, but its duty as well, to refuse to renew the "reciprocal licenses" theretofore issued by it to embalmers resident in such other state.*

2. *Under existing statutes, the State Board of Embalming Examiners of Ohio has no legal right to refuse to renew the licenses of Kentucky embalmers when such licenses were secured by examination (as distinguished from reciprocity), except for non-payment of the renewal fee.*

3. *Nor has said board the authority to refuse to accept an applicant for examination merely because such applicant resides in the state of Kentucky or in any other state which does not reciprocate with the state of Ohio in the matter of embalmers' licenses.*

COLUMBUS, OHIO, December 31, 1920.

THE STATE BOARD OF EMBALMING EXAMINERS, *Columbus, Ohio.*

GENTLEMEN:—Acknowledgment is made of your recent letter reading thus:

"At the last meeting of this Board, I was instructed to secure your opinion on the following questions:

1. Has the Ohio Board the legal right to refuse to renew the licenses of Kentucky embalmers, holding Ohio licenses, whether these licenses were secured by examination or reciprocity? I might state for your information that the Kentucky State Board of Embalming Examiners have refused for the past two years to renew the Kentucky licenses of Ohio embalmers holding the same, regardless of the fact that the majority of Ohio embalmers have secured their Kentucky licenses by examination.

—2. Has this Board the authority to refuse to accept an applicant for examination who is a resident of Kentucky?

I am enclosing a copy of a letter sent me by The O'Keef Company of Ironton, Ohio, and a letter from the State Board of Embalming Examiners of Kentucky, both of which are self-explanatory."

(1) We shall first consider the question whether your board has the legal right to refuse to renew what are called "reciprocal" licenses.

Section 1343-1 G. C., which is the only section of the embalming license act which deals with the matter of reciprocity with other states, says:

"The state board of embalming examiners may grant without examination an embalmer's license to a duly licensed embalmer of another state, who shall have been examined by a regular board of embalming examiners on substantially the same subjects and requirements demanded by the board of this state, and shall have obtained an average grade of not less than seventy-five per cent. in such examination. Such license shall be known as a reciprocal license, applications for which shall be made on a form containing a

certified statement from the board which granted the original license in the other state, stating the grade and result of examination. Each applicant for a reciprocal license shall pay a license fee of twenty-five dollars, which shall accompany the application for such license. Such reciprocal license shall be renewed annually upon payment of a renewal fee of one dollar as provided above."

Your board has already been advised by this department that said section is *directory* only, and not *mandatory*.

In opinion number 381, rendered June 16, 1917 (Vol. II Attorney-General's Opinions for 1917, p. 1029, 1034), it was said:

"This section does not make it the duty of your board to issue licenses without examination to embalmers of other states who are within the provisions of this section. The section is not mandatory; it is directory only. It provides that 'the state board of embalming examiners *may* grant without examination * * *.' It does not state that the board shall grant a license to such embalmers, but leaves it to the discretion of the board."

While section 1343-1 G. C. contains the provision:

"Such reciprocal license shall be renewed annually upon payment of a renewal fee of one dollar as provided above"

such provision does not, we think, mean that a reciprocal license once issued must forever afterward be renewed. On the contrary, renewal of such licenses is proper so long, and only so long, as the reciprocal relation endures between this state and the state wherein the reciprocal licensee resides. The fact that the legislature calls the license "reciprocal" is significant, at once suggesting an intention that your board should have the power to license or refuse to license embalmers from other states, according as there was or was not a condition of mutual obligation or action between this and other states in respect of embalming licenses. In other words, when your board terminates reciprocal relations with a given state, all outstanding "reciprocal licenses" held by embalmers of that state are *ipso facto* null and void. In such case no question of *renewal* will arise, for there is nothing to renew. Any other view of the meaning of section 1343-1 G. C. would produce this result: that even though the state of Ohio had no reciprocity with a foreign state, it would be compelled, if the renewal fee were tendered, to renew the licenses of persons who had secured reciprocal licenses at a time when Ohio *did* have reciprocity with such state. In other words, we should be forced to the view of "once a reciprocal licensee, always a reciprocal licensee." Such was not, we think, the legislative intention.

The first part of your first question is therefore answered by saying that when your board terminates reciprocal relations with another state in the matter of licensing embalmers, it is not only the legal right of your board, but its duty as well, to refuse to renew the "reciprocal licenses" theretofore issued by your board to embalmers resident in such other state.

The other phase of your first question is whether your board has the legal right to refuse to renew the licenses of Kentucky embalmers when such licenses were secured by examination, as distinguished from reciprocity.

In opinion number 1188, rendered to your board on April 29, 1920, the Attorney General, speaking of section 1343 G. C. (107 O. L. 656), said:

"An examination of the statutes creating the state board of embalming

examiners and defining its powers shows that they do not specifically provide for any residential or citizenship requirements of those who are permitted to make application to be registered for the purpose of an examination. * * * From the above it is clear, in so far as these statutes are concerned, that there is no designation as to who may become an applicant to be registered for an examination, other than 'every person desiring to engage in the practice of embalming,' etc., who can qualify as to his moral character and education."

This state of the law seems to be responsible for the fact that residents of Kentucky and of other states have applied for registration as embalmers in this state, satisfying all the requirements laid down by section 1342 G. C., passing the examination provided for by said section, and have received the embalmer's license spoken of in section 1343 G. C.

Said section 1343 G. C. contains this provision:

"Annually, on or before the first day of January, every license holder shall pay to the secretary-treasurer of the state board of embalming examiners the fee of one dollar for the renewal of his or her license for the incoming year, whereupon the secretary-treasurer shall issue a renewal card acknowledging the receipt of the fee therefor: * * *"

This provision indicates a legislative intention that licenses issued under section 1343 G. C. should be renewed upon the receipt of the license fee for the incoming year, and suggests no power or authority in your board to refuse to grant such renewal where payment is made or tendered in accordance with law.

Section 1343-2 G. C. indicates the circumstances under which an embalmer's license once issued may be revoked or voided, said section reading thus:

"The state board of embalming examiners may revoke and void a license obtained by fraud or misrepresentation, or if the person named therein uses intoxicants or drugs to such a degree as to render him unfit to practice embalming, or has been convicted of a felony subsequent to the date of his license, such revocation may be vacated, reversed or set aside for good cause shown at the discretion of the board."

It would seem that this section refers to the situation where it is desired to revoke and to void an outstanding license, rather than to the situation where the intention is not to *revoke* but to refuse to *renew* a license. This point, however, need not be decided here, it being sufficient to say that section 1343-2 G. C. does not authorize your board to refuse to renew a license issued under section 1343 G. C. for the mere reason that the holder of that license resides in a state which does not have reciprocity with Ohio in the matter of embalmers' licenses. On the contrary, under the statutes now in force, a non-resident of Ohio, once he becomes the holder of the kind of a license spoken of in section 1343 G. C. must be treated like resident licensees, and has the same right to have his license renewed as the resident licensee has.

You point out that the Kentucky State Board of Embalming Examiners refuses to renew the Kentucky licenses of Ohio embalmers who secured such licenses by examinations given by the Kentucky board. Whether the Kentucky board has the right to do this or not, depends upon the laws of Kentucky, concerning which I can express no opinion.

The authority of your board is, of course, to be ascertained by what the laws of Ohio provide, and not by what is done or omitted by the board of embalming examiners of other states.

Your question is therefore answered by saying that under existing statutes, your board has no legal right to refuse to renew the licenses of Kentucky embalmers when such licenses were secured by examination (as distinguished from reciprocity), except for non-payment of the renewal fee.

(2) Your second question is whether your board has the authority to refuse to accept an applicant for examination who is a resident of Kentucky; that is, whether an applicant may be denied an examination merely because he resides in Kentucky, or in any other state which does not reciprocate with Ohio in the matter of embalmers' licenses. This question has in effect already been answered. That is to say, attention has already been called to the holding of this department in Opinion number 1188, rendered to your board April 29, 1920, holding that

“ * * * it is not within the power of the state board of embalming examiners to refuse the application of one desiring to be licensed as an embalmer on the ground that he is not an American citizen, if said applicant can otherwise qualify.”

As said opinion points out, the statutes now in force do not lay down residential or citizenship requirements for those desiring to receive an embalmer's license upon examination. The refusal of your board to accept an applicant for examination who was a resident of Kentucky would be tantamount to the establishment of a residential or citizenship requirement stated negatively—namely “that such applicant must be a resident or citizen of some state other than Kentucky.”

Your second question is therefore answered in the negative.

Respectfully,

JOHN G. PRICE,
Attorney-General.