

duplicate and triplicate copies thereof, all of which are herewith enclosed.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

3483.

DOG AND KENNEL FUND—BOARD OF COUNTY COMMISSIONERS—UNDER SECTION 5652-7a, G. C. WHERE INSUFFICIENT MONEY TO PAY EXPENSES AND CLAIMS—MANDATORY DUTY TO FIX LICENSE FEES—ALLOCATION—CONCLUSIVE.

SYLLABUS:

If in any year there is not sufficient money in the dog and kennel fund of a county, after paying the expenses of administration, to pay the claims allowed during such year for livestock injured or destroyed by dogs, and the board of county commissioners of the county acting under the authority of Section 5652-7a, General Code, finds such fact by entry on its journal, a mandatory duty is imposed upon such board of county commissioners to fix the dog and kennel license fees for dogs kept and harbored in the county for the ensuing year at such amount that when the same are multiplied by the number of licenses issued during the previous year the product will equal the aggregate of the claims for injured and destroyed livestock allowed by said board of county commissioners, plus the balance of said allowed claims for the previous year remaining unpaid, plus the expense of administration; provided that the increase in said license fees shall always be in the ratio of one dollar for male or spayed female dogs, three dollars for unspayed female dogs and ten dollars for dog kennel licenses. And such action, when the same has been taken by the board of county commissioners in pursuance to the provisions of this section of the General Code, is conclusive.

COLUMBUS, OHIO, January 3, 1939.

HON. FREDERICK L. ORUM, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR: This is to acknowledge the receipt of your recent communication in which you advise me that the board of county commissioners by a resolution duly entered upon its journal under date of December 5, 1938, made an order increasing the registration fees to be paid with respect to dogs kept and harbored in said county from the prior fee rate

of \$1.50 for male dogs, \$4.50 for female dogs, and \$15.00 for kennels, to \$2.00 for male dogs, \$6.00 for female dogs, and \$20.00 for kennels. And, in this connection, you state that the action thus taken by the board of county commissioners "was done due to the fact that there was insufficient funds raised last year to meet the demand on the dog and kennel fund."

Upon the facts thus stated in your communication, you have submitted certain questions for my consideration and opinion, which questions are therein stated as follows:

"1. Is it mandatory for the Commissioners to raise the dog license tax where there has been insufficient intake in the preceding year to take care of the sheep claims and the cost of administration.

2. If the County Commissioners through necessity have raised the rate from the 1st of December to the 15th of December, as provided for in Section 5652-7a, can they after the 15th, or after they have journalized their action reduce the rate?"

In the consideration of the questions presented in your communication, it is noted that section 5652, General Code, provides for the registration in the office of the county auditor of all dogs kept and harbored in the county, with certain exceptions as to which no question is here presented, and for the payment of certain fees with respect to the registration of such dogs, which fees are therein stated to be \$1.00 for each male or spayed female dog, and \$3.00 for each unspayed female dog. By section 5652-1, General Code, provision is made for the registration of dog kennels and for the payment of a fee therefor in the sum of \$10.00. By section 5652-13, General Code, it is provided that these fees shall constitute a special fund known as the dog and kennel fund which shall be deposited by the county auditor in the county treasury; and that the moneys in such fund shall be used for the purpose of defraying the cost of the administration and enforcement of the dog registration law in the county, for the purpose of paying animal claims presented and allowed in the manner provided by sections 5840 to 5849, inclusive, of the General Code, and if there are sufficient moneys therefor in the dog and kennel fund after the payment of such animal claims, to pay such excess moneys to a qualified society for the prevention of cruelty to children and animals as provided for in section 5653, General Code.

Section 5652-7a, General Code, which is referred to in your communication and under the authority of which the action of the board of county commissioners increasing the amounts to be paid as dog and kennel fees in the county was taken, provides as follows:

"If in any year there should not be sufficient money in the dog and kennel fund, after paying the expenses of administration, to pay the claims allowed for live stock injured or destroyed by dogs, the county commissioners between December 1st and December 15th shall ascertain the number of claims entered and the amount of money allowed for live stock injured and destroyed, and, also the total expense incurred by the administration of the dog law, such commissioners shall also ascertain the amount received for dog and kennel licenses. The license fees for the ensuing year shall then be fixed at such an amount that when multiplied by the number of licenses issued during the previous year the product will equal the aggregate of the claims for injured and destroyed live stock allowed by said county commissioners, plus the balance of said allowed claims remaining unpaid, plus the expense of administration. The increase in said license fee shall always be in the ratio of one dollar for male or spayed female dogs, three dollars for unspayed female dogs and ten dollars for a dog kennel license."

Construing this section of the General Code, the Attorney General in an opinion under date of December 12, 1927, *Opinions of the Attorney General, 1927, Vol. IV, page 2457*, held:

"Section 5652-7a, General Code, is applicable only when, in any year, there is not sufficient money in the dog and kennel fund, after paying the expenses of administration, to pay the claims allowed for live stock injured or destroyed by dogs during that year.

Claims allowed in former years, but unpaid cannot be considered as a basis for determining whether or not a deficit exists in the dog and kennel fund in any current year. Such claims can be paid only when a surplus exists in the dog and kennel fund after the expenses of administration and the claims allowed for such current year have been paid."

This opinion was followed in an opinion of the Attorney General under date of March 7, 1928, *Opinions of the Attorney General, 1928, Vol. 1, page 618*, in which the Attorney General, referring to his earlier opinion on the questions therein considered, said:

"You will note that the provisions of Section 5652-7a, *supra*, are applicable only when, in any year, there is not sufficient money in the dog and kennel fund, after paying the ex-

penses of administration, to pay the claims allowed for livestock injured or destroyed by dogs during that year. In other words, the jurisdiction of a board of county commissioners to fix increased license fees for the registration of dogs and dog kennels for any year next ensuing only exists where there is a lack of money in the dog and kennel fund, after paying the expenses of administration, to pay the claims allowed for live stock injured or destroyed by dogs during that current year. Claims allowed in former years but unpaid cannot be considered as a basis for determining whether or not a deficit exists in the dog and kennel fund in any current year."

The former opinions of the Attorney General above noted are referred to for the reason that it does not clearly appear in your communication whether the unpaid animal claims which occasioned the action of the board of county commissioners in increasing the amount of dog and kennel fees were claims allowed in the year 1938 or whether such unpaid claims, in whole or in part, were claims allowed for payment in prior years. Assuming, however, that the unpaid demands on the dog and kennel fund which caused the board of county commissioners to increase the amount of dog and kennel fees to be paid in said county, represented only unpaid animal claims for the year 1938, and assuming, further, that the respective amounts of these increases in these registration fees were such as are provided for by this section of the General Code on the facts presented to the board of county commissioners and found by said board in the resolution carried into its journal, it is clear that the board of county commissioners was *authorized* to take the action referred to in your communication.

However, the question here presented on the facts above stated and assumed is whether on these facts the statutory provisions above quoted imposed a mandatory duty upon the county commissioners to make this increase in the dog and kennel fees to be paid in said county. As to this, it may be noted that the question whether a particular statute is mandatory or directory depends upon the intention of the legislature in the enactment of the statute, to be ascertained from a consideration of the act—its nature, its character, its reason, its object, and its subject matter, as well as from a consideration of the language used in the statute. In this view, it is noted that it has been held by the courts that even in those cases where the authority to do a particular thing is conferred upon a public officer or board by the use of the word "may" in connection with the particular thing to be done or act to be performed, the term "may" when so used means "must." "in all those cases where the public are interested, or where a matter of public policy, and not

merely of private right, is involved." *Lessee of Swazey's Heirs vs. Blackman*, 8 Ohio, 5, 18; *Stanton vs. Realty Company*, 117 O. S., 345, 355. However, looking to the provisions of Section 5652-7a, General Code, it is noted that the term "shall" is repeatedly used therein in connection with the several things to be done by the board of county commissioners in carrying out the manifest purpose of the statute. And in this view and in view of the purpose to be served by this statute, no reason is seen for construing the statute otherwise than as imposing a mandatory duty upon the board of county commissioners to make an increase in the dog and kennel fee rates and to the extent provided for by this statute when such board of county commissioners finds the existing facts which authorize such board to take the action provided for in this section.

The conclusion here reached as to your first question would seem to make any consideration of your second question unnecessary. For if as a matter of fact there was not sufficient money in the dog and kennel fund, after paying expenses of administration, to pay the claims allowed during the year 1938 for livestock injured or destroyed by dogs, at the time the board of county commissioners took the action referred to in your communication, and such fact was found by said board as a predicate to its action in increasing the dog and kennel fees pursuant to the mandatory provisions of Section 5652-7a, General Code, such finding so made by the board of county commissioners is conclusive in the absence of fraud on the part of the board of county commissioners in taking such action or of such gross abuse of discretion on its part as might be tantamount to fraud. In 46 C. J., at pages 1033 and 1034, it is said:

"Where the decision of a question of fact has been committed to a particular officer, his determination will not ordinarily be reviewed by the courts, except as may be provided for by statute, although they may interfere in the case of an abuse of discretion or fraud upon his part or on the part of the person claiming rights under his act."

In support of the text above quoted, a large number of cases are cited, of which the following cases in point are noted: *Bates and Gould Company vs. Payne*, 194 U. S., 106; *State, ex rel., vs. Keefer, et al.*, 3 O. App., 426, 431; *United States vs. Fletcher, etc., Trust Company*, 197 Ind., 527, 535; *Belknap vs. Benton Township*, 169 Mich., 59, 64. Although it is sometimes difficult to determine when a public board has exhausted its authority when it has acted upon a particular matter within the scope of its authority (see *State, ex rel. Chapman, vs. Lessner*, 94 O. S., 387), it is safe to say that when such board has taken action on a matter committed to its authority, in a manner required by the mandatory provi-

sions of a statute providing for and requiring such action by the board, such action, when the same is taken by it in compliance with the terms of the statute, is conclusive.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

3484.

LICENSED FUNERAL DIRECTOR—SECTION 1335-6a G. C. NOT
CONSTRUED TO REQUIRE “FULL TIME” SUPERVISION
—FUNERAL HOMES, ESTABLISHMENTS OR BRANCHES
—SUPERVISION, MANAGEMENT, OPERATION — DIS-
CHARGE OF DUTIES.

SYLLABUS:

1. *The provisions of Section 1335-6a, General Code, can not be construed as requiring funeral homes or establishments or branches thereof to be under the “full time” supervision of licensed funeral directors.*

2. *The provisions of Section 1335-6a, General Code, require that funeral directors shall, in supervising funeral homes or establishments, as well as branches thereof, expend only that amount of time necessary to fully and efficiently discharge the duties connected with or incident to the management or operation of such homes or establishments.*

COLUMBUS, OHIO, January 3, 1939.

The Board of Embalmers and Funeral Directors of Ohio, Wyandotte Building, Columbus, Ohio.

GENTLEMEN: I am in receipt of your recent communication wherein you request my opinion on the following:

“As Secretary of The Board of Embalmers and Funeral Directors of Ohio I have been instructed to ask that you furnish an opinion as to the construction of Section 1335-6a of the General Code of Ohio. This section reads, in part, as follows:

‘* * * At least one licensed funeral director shall directly supervise each main establishment and at least one licensed funeral director shall directly supervise each branch establishment.’

We wish to determine whether the above quoted section re-