

2014.

FEDERAL DIRECTOR—INTERPRETATION OF AMENDED S. B. NO. 99
AS TO ELIGIBILITY FOR LICENSE, APPRENTICESHIP, EXAMINA-
TION AND POWERS OF BOARD OF EMBALMERS AND FUNERAL
DIRECTORS.

SYLLABUS:

1. *The term "funeral director" or "funeral directing" is defined by section 1335-5, General Code. Any person who has been engaged in the business or profession of funeral directing at the time of the passage date of Amended Senate Bill No. 99, as defined by section 1335-5 is entitled to a license pursuant to the provisions of section 1335-10, General Code.*

2. *An applicant for a funeral director's license who is otherwise qualified to receive a license, pursuant to section 1335-10, General Code, may not be prevented from receiving the same due to the fact that he has no financial interest in a funeral business.*

3. *The Board of Embalmers and Funeral Directors may by its rules and regulations require that an applicant for a funeral director's license to be secured by examination, serve two years of apprenticeship under a licensed Ohio funeral director. The Board may require that such apprenticeship be certified to the Board previous to the commencement of such apprenticeship. Such provisions, however, must not be given a retroactive effect.*

4. *The Board may by its rules and regulations permit an applicant to serve funeral directing apprenticeship at the same time he is serving embalmer's apprenticeship.*

5. *The Board may not require by their rules and regulations that an applicant for a funeral director's license by examination shall have a funeral establishment.*

6. *Section 1335-10, General Code, in referring to "passage date of this act" means the date the Governor signed Amended Senate Bill No. 99, or June 27, 1933.*

7. *The Board may permit anyone of their number to be present with an applicant who requests the right to review his papers in accordance with section 1335-4, General Code. The expenses of such review may not be charged to the applicant.*

COLUMBUS, OHIO, December 14, 1933.

The State Board of Embalmers and Funeral Directors, Cleveland, Ohio.

GENTLEMEN:—This will acknowledge receipt of your request for my opinion, which reads as follows:

"As Secretary-Treasurer of the Board of Embalmers and Funeral Directors of Ohio I have been instructed to write you for a quick opinion on several matters which pertain to the new embalmers and funeral directors law, Section 1335-1 to 14, inclusive, G. C.

No. 1. We wish to secure your interpretation of the terms: 'Funeral Director' and 'Funeral Directing' as used in the above mentioned law. We wish to know what, in your opinion, constitutes a Funeral Director.

No. 2. We wish to be informed who, according to Section 1335-10, G. C., is entitled to secure funeral directors license. We have received applications from several employees, including hired licensed embalmers, who are in no way connected with the funeral business except so far as a

weekly salary is concerned and who have no financial interest in any funeral director's business. We want to know if these men are, according to Section 1335-10, entitled to funeral directors license. Will you kindly enumerate who, according to this Section, is entitled to such license?

No. 3. Also inform us whether we can require, according to Section 1335-6, G. C., that an applicant for funeral directors license to be secured by examination, serve two years of apprenticeship under the direction of, and as an assistant to, a licensed Ohio Funeral Director.

No. 4. Kindly inform us if the Board can require that funeral directing apprenticeship be certified to the Board and if the Board can require that such certification be made at the beginning of the funeral directing apprenticeship.

No. 5. Is it within the powers of the Board to set up certain requirements of funeral establishment for applicants to secure funeral directors license by examination. This pertains to Section 1335-6, G. C., which states that the Board shall determine the qualifications of applicant for license by examination.

No. 6. If establishment requirements, as asked in No. 5, can be required within the power of the Board will an applicant, who has filled all other requirements and taken examination and received the passing grade, be qualified for license so long as he continues as a hired assistant to a funeral director or must the issuance of funeral directors license be withheld until such time as he becomes established as a funeral director in his own properly qualified establishment?

No. 7. In connection with requiring funeral directing apprenticeship kindly inform us if an applicant can be permitted to serve funeral directing apprenticeship at the same time he is serving embalmers apprenticeship, providing both are certified in the manner to be required by the Board.

No. 8. With reference to the issuance of funeral directors license, to be in accord with Section 1335-10, G. C., can it be required that an applicant, to secure funeral directors license, have had a *financial interest* in a funeral business on the passage date of the new law.

No. 9. What is meant, in Section 1335-10, G. C., by the term, 'passage date of this act'? Does this mean the date June 8, 1933, on which the bill passed the legislature, June 27, 1933, on which date it was approved by Governor White or does it mean June 29, 1933, on which date the law was filed in the office of the Secretary of State?

In connection with the above questions the following facts relating to the funeral directing profession are given by the Board for your information:

In order to join or become a member of any funeral directing association it is necessary that one be an owner, partner or stock holder in a funeral directing firm or corporation.

The public, when engaging a funeral director, engages the owner, a partner or a stockholder of the funeral firm; the public does not engage employees of the firm.

Most owners, partners, etc., employ embalmers, apprentice embalmers and other employees to carry on minor work which must be done about the funeral establishment. We have no knowledge of any funeral director employing a man for funeral directing only.

The owner of a firm usually takes charge of each funeral; only in cases of emergency are embalmers or other hired employees called upon to conduct or to direct a funeral service.

The conducting of the actual funeral service is only a minor part of the rendering of a complete funeral service. A complete funeral service, in the opinion of all owners, partners and stockholders of funeral corporations, includes the following: the furnishing, owning and operating of a complete funeral establishment, the selling of funeral merchandise, extending credit, financing their patrons, and either the actual conducting of the funeral service or the supervision and giving directions to some hired assistant as to the direction of the funeral service. Which funeral service is a minor part of the duties and responsibilities of a funeral director.

To the general public the words 'Funeral Director', 'Undertaker', and 'Mortician' do not mean an employee of a funeral director or one hired to work at a funeral establishment, which employee is rarely called upon to conduct a funeral as the owner of the business usually takes care of this duty.

No. 10. Section 1335-4, G. C., requires that all manuscripts submitted as answers to questions asked in an examination shall be kept on file for thirty days and shall be made available for reviews by the applicant in the presence of a member of the Board or shall be made available in case the applicant prosecutes error. What member of the Board shall go over the examination papers with the applicant, or in the presence of what members of the Board shall the applicant examine his papers?

No. 11. Who shall defray the expenses of members of the Board to be present at the examination, by an applicant, of his papers? Our law allows only twenty days Per Diem for each Board member each year. This number is hardly sufficient for the conducting of two required examinations per year and it is not expected that any member of the Board will have an excess of Per Diem to permit him to be present, with wages, for the examination of an applicant's papers. Further, traveling expense money is appropriated to our Board in limited amount. About thirty applicants fail each state examination. If any large percentage of this number were to request to examine their papers we would be confronted with a problem regarding compensation for members. Would it be lawful for us to request that the applicant requesting examination of papers take charge of this expense? We ask about 80 questions at examination and a paper could hardly be explained and examined with an applicant in less than one day's time."

For the sake of clarity, I shall refer to the questions in this opinion as you have numbered them. However, I shall answer the questions out of the order in which they are stated in your letter.

Your first question relates to a definition of the terms 'funeral director' and 'funeral directing.' The legislature, in the enactment of this new law, has seen fit to expressly define these terms. It is therefore impossible to take any other definition than the one expressed in section 1335-5, General Code. This section reads as follows:

"That for the purposes of this act, the term 'embalming' shall be construed to mean the preservation and disinfection, or attempted preservation and disinfection, of the dead human body by application of chemicals externally, or internally, or both. The term 'funeral directing' or 'funeral director' as used in this act shall be construed to mean (1) the business or profession of directing or supervising funerals for profit, (2) or the business or profession of preparing dead human bodies for burial by means other than embalming, or the disposition of dead human bodies; (3) or the provision or maintenance of a place for the preparation for disposition or for the care or disposition of dead human bodies; (4) or the use in connection with a business of the word or term 'funeral director,' 'undertaker,' 'mortician,' (5) or any other word or term from which can be implied the business of funeral directing; (6) or the holding out to the public that one is a funeral director." (Numbers, writer's).

For your convenience, I have numbered the various definitions that the legislature has given to these terms. Hence, in answer to your first question, it is my opinion that a funeral director is a person who falls within any of the above six classifications.

Your second question relates to section 1335-10, General Code, and you inquire who is entitled to a license pursuant to the provisions of that section. This section reads as follows:

"Any person who, at the time of the passage of this act, is actively engaged in the profession or business of funeral directing shall, within sixty (60) days after the passage of this act, register as such funeral director with the board on a form prescribed by said board, and upon payment of a fee not to exceed ten (\$10.00) dollars, such person shall be entitled to, and the board shall issue to such person a license as a funeral director; which such license shall remain in full force and effect until the first day of the year following the issuance of such license. Thereafter such person or persons shall renew such license or licenses as herein provided for."

Obviously, it follows that by virtue of this section anyone who has actively been engaged in the profession or business of funeral directing, as defined in section 1335-5, supra, is entitled to a license. It is therefore a question of fact in each case whether or not the applicant for a license as a funeral director meets with any or all of the qualifications of a funeral director, as defined by section 1335-5. You state that you have received applications from hired embalmers who have no financial interest in any funeral director's business. I do not believe that this fact alone would prevent the applicant from securing a license under section 1335-10. A financial interest is not required by either section 1335-5 or section 1335-10. An applicant could very well fall within the definition of a funeral director as defined in section 1335-5 without having any financial interest in the business other than the salary or commission that he receives for directing a funeral. Whether or not the applicants in the cases mentioned in your letter have been engaged in funeral directing as defined by the act is, of course, for your Board to determine from an examination of all the facts in each particular case. A more definite answer to your second question is impossible at the present time.

Your eighth question relates to the same subject matter. In view of my discussion relative to your second question, it is my opinion, in answer to your eighth

question, that you may not require that an applicant for a license as a funeral director by virtue of section 1335-10, have had a financial interest in a funeral business on the passage date of the new law.

Your third question relates to whether or not by virtue of section 1335-6, General Code, you may require that an applicant for a funeral director's license to be secured by examination, serve two years' apprenticeship under the direction of, and as an assistant to, a licensed Ohio funeral director. In answering this question, and also your fourth question, I assume you refer to applicants who, since the passage of the law, intend to enter the profession or business of funeral directing. Section 1335-6 reads in part as follows:

"Any person desiring to engage in the profession or business of embalming or funeral directing or both as defined in this act, shall make such application, be required to show such preliminary requisition, and shall take such examinations as shall be deemed necessary by the board in its rules and regulations.

The board shall publish in its rules and regulations the subjects to be covered in the said examination and the standards to be attained thereon. Changes in the rules and regulations shall be published and be given due publicity at least one year before becoming effective."

I do not deem it necessary to interpret this statute in connection with this question, in view of the fact that the legislature in the enactment of section 1335-11 has specifically provided for apprenticeship requirements. This section reads as follows:

"The board of embalmers and funeral directors of the state of Ohio may, by its rules and regulations provide for the manner in which an apprenticeship shall be served and the length of time thereof, which shall not be less than two years."

The answer to your third question is therefore in the affirmative.

A similar question to the one raised by your fourth question was passed upon in my Opinion No. 570, rendered April 13, 1933, to the old State Board of Embalming Examiners. Section 1342, General Code, upon which the question in that opinion was predicated, has since been repealed, but the opinion is analogous to the present question. The first branch of the syllabus of that opinion reads as follows:

"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."

The answer to your fourth question is therefore in the affirmative, subject to the limitation that your rule may not be so worded as to be retroactive.

In answer to your seventh question, it is my opinion that there is nothing in the new law that will prevent you from permitting an applicant to serve funeral directing apprenticeship at the time such person is serving his embalmer's apprenticeship. Likewise, your Board may provide that both apprenticeships shall be certified in a manner specified by your rules and regulations.

Your fifth question deals with the right of your Board, under section 1335-6 supra, to require that an applicant for a funeral director's license must have a funeral

establishment. By this, I infer you mean a definite location where funeral directing may be practiced regardless of whether the premises are owned, rented or leased as the case may be. In my answer to your second question, it was noticed that you could not require that an applicant for a license must have a financial interest in a funeral director's business. This is in a way dispositive of the fifth question. While it is true that by virtue of section 1335-6 you may require that an applicant for a funeral director's license by examination shall show certain preliminary requisites and take certain examinations, nevertheless such requirements must be reasonable. The right to practice a lawful profession or engage in a lawful business is a property right which is protected by the Federal and State Constitutions. Neither the administrative nor the legislative branches of the government have the right to impose unreasonable or unnecessary restrictions on them. *Norfolk Railroad vs. Public Service Commission*, 265 U. S. 70, 74. Section 1335-5, supra, defines what constitutes the business or profession of directing funerals. There is nothing in this section to indicate that one engaged in funeral directing must necessarily have a funeral establishment. A requirement such as you propose would be in conflict with section 1335-5. It is fundamental that the rules and regulations of your Board may not be in conflict with the statutory laws of this state. It is therefore by opinion that your fifth question must be answered in the negative.

Your sixth question is based upon an affirmative answer to your fifth question. In view of my answer to your fifth question, it is therefore unnecessary to answer your sixth question.

Your ninth question relates to what is meant by the term "passage date of this act," as it is used in section 1335-10, General Code. This section is quoted in full, supra. Section 16 of article II of the Ohio Constitution reads in part as follows:

"Every bill passed by the general assembly shall, before it becomes a law, be presented to the governor for his approval. If he approves, he shall sign it and thereupon it shall become a law and be filed with the secretary of state."

I call your attention to the case of *Patterson Foundry Company vs. Ohio River Company*, 99 O. S. 429. The first branch of the syllabus of that case reads as follows:

"The date of the passage of an act is the date of the last action required to complete the process of legislation and give the bill the force of law."

I also call your attention to the case of *Cincinnati Traction Company vs. Public Utilities Commission*, 113 O. S. 618. The sixth branch of the syllabus of that case reads as follows:

"The amendment to Section 614-87, General Code (111 O. L. 512), was adopted by the Legislature on April 17, 1925, and presented to the Governor on April 21, 1925, and was neither approved nor disapproved by him, and its passage therefore dates from the period of 10 days from the time of such presentation to the Governor, Sundays excepted, to wit, May 2, 1925."

The following is stated at page 628:

"It has been held by this court in *Patterson Foundry & Machine Co. vs. Ohio River Power Co.*, 99 Ohio St., 429, 124 N. E., 241, that the passage of an act refers to the date of the signing of the bill by the Governor, or the expiration of 10 days from the time the bill was presented to the Governor, if not signed by him."

Likewise, this rule is stated in 1 Lewis' Sutherland Statutory Construction, page 308, as follows:

"When no other time is fixed a statute takes effect from the date of its passage—from the date of the last act necessary to complete the process of legislation and to give a bill the force of law. When approved by the executive the act of approval is the last act, and the date of it is the date of passage of the act. If passed after a veto, the date of the final vote is the date of passage."

It is therefore my opinion in answer to your ninth question that the term "passage date" referred to in section 1335-10, General Code, means in the present case the day when the Governor signed Amended Senate Bill No. 99, or June 27, 1933.

In your tenth question you ask what member of the Board should go over the examination papers with an applicant pursuant to section 1335-4, General Code. This section reads in part as follows:

"* * * All manuscripts submitted as answers to questions in the examination shall be kept on file for thirty days by the board and shall be made available for reviews (review) by the applicant in the presence of a member of the board or shall be made available in case the applicant prosecutes error."

Since the statute does not say that a particular member of the Board shall go over the papers with the applicant but merely refers to "a member of the board," it is my opinion that any of the five members of your Board may go over the papers with the applicant. The applicant is not entitled to a particular member of the Board but only to a member of the Board, and likewise you are only required to furnish a member of your own choosing.

Your eleventh and last question relates to the authority of your Board to charge the applicant the expense of having a member of your Board review his examination papers. You state your Board is limited to a per diem compensation for twenty days of each year. It is to be noted that section 1335-4, which gives an applicant the right to review his papers, does not provide that the applicant shall pay the expense of such a review. Section 1335-3, General Code, reads in part as follows:

"* * * All of the members of said board, with the exception of the secretary shall serve without compensation, providing that each member, except the member who is secretary, shall be reimbursed for his necessary traveling expenses and the necessary expense incident to his attendance upon the business of the board, and in addition thereto the sum of ten (\$10.00) dollars per diem for each day, not to exceed twenty days per year, actually spent by such member upon the business of the board. Providing, the secretary shall receive and be paid an annual salary not to exceed three thousand (\$3,000.00)

dollars per annum, the amount and method of payment of which shall be fixed by said board and in addition thereto such secretary shall receive his necessary traveling and other incidental expenses as are incurred in the performance of such duties and all of such expenses, per diem, and compensation shall be paid out of the receipts of the board."

The secretary is a member of the Board. Section 1335-3. He receives a salary not to exceed \$3,000.00 per year. It may be safely presumed that in return the secretary shall devote a fair proportion of his time to the duties of his office, and it can likewise be inferred that the legislature had this in mind in limiting the per diem compensation of the other members of the Board to twenty days. The secretary, if your board determines, may, as a member, be present with the applicant pursuant to the provisions of section 1335-4. Section 1335-4, supra, is clear and unambiguous, and in such a situation language may not be read into a statute. It is therefore my opinion in answer to your eleventh question that you may not require that the applicant pay the expenses of the review which he is entitled to by virtue of section 1335-4.

Respectfully,

JOHN W. BRICKER,
Attorney General.

2015.

BONDS—MANDATORY TO LEVY ANNUALLY TAXES TO PAY INTEREST THEREON AND PROVIDE FUND FOR FINAL REDEMPTION THEREOF OF POLITICAL SUBDIVISION.

SYLLABUS:

It is mandatory to levy annually sufficient taxes to pay the interest on the bonds of a political subdivision and to provide a fund for their final redemption at maturity, even though by reason thereof such subdivision may not be able, on account of constitutional or statutory limitations, to levy a sufficient amount for other purposes.

COLUMBUS, OHIO, December 14, 1933.

HON. PAUL A. FLYNN, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication, which reads as follows:

"Section 5649-1 of the General Code, prior to its repeal, August 10, 1927, provided that a tax levy providing for interest and maturity payment purposes of serial bonds issued by any political subdivision, and for sinking fund purposes shall have preference to all other items.

"Inquiry is now made as to whether or not such a rule would still be followed. In 5625-3 it is provided that the taxing authorities shall levy such taxes as are necessary to pay the interest and sinking fund on, and retire the maturity bonds, notes and certificates of indebtedness, and the following section, namely, 5625-4, provides for the division of taxes, placing the general levy for debt charges first.