



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable George W. Cox
State Health Officer
Austin, Texas

Travis Co.

Dear Sir:

Opinion No. O-2869

Re: Authority of the State Health Officer, under subdivision (e), Section 6, Senate Bill 200, 46th Legislature, to revoke a permit upon proof of a violation by the permittee of rules and regulations promulgated by the State Board of Health under the authority of Section 5 of the Act.

Section 5 of Senate Bill 200, 46th Legislature, appearing as Section 5 of Article 4476a, Vernon's Annotated Civil Statutes, provides:

"The State Board of Health is hereby charged with the enforcement of this Act, for the protection of health and to prevent the spread of disease. It is further empowered, and its duty shall be to make, amend, alter or repeal general rules and regulations of procedure for carrying into effect all the provisions of this Act, and to prescribe means, methods, and practices to make effective such provisions."

Subdivision (e) of Section 6 of the Act then provides:

"Any permit issued in accordance with the provisions may be revoked by the State Health Officer upon proof of violation of any of the provisions of

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this Act. . . ."

Your letter of October 24, 1940, requests a legal opinion from this Department as to whether the State Health Officer would be authorized to revoke the permit of an operator who has violated the rules and regulations promulgated by the State Board of Health under the rule-making power of the Board set out above in Section 5. You also ask what procedure should be followed by the State Health Officer in doing so.

The purpose of empowering the State Board of Health to promulgate rules and regulations was to enable the more effective enforcement of the Act which was enacted under the State's police power for the protection of health and for the prevention of the spread of disease.

A vital requirement of the Act is that any person engaged in the business of manufacturing, repairing or renovating bedding shall obtain a permit from the Department of Health and shall register any germicidal process used in such business and secure the approval of the Department of such process.

The permit provisions of the Act are among those touching which the State Board of Health was empowered to promulgate rules and regulations. That compliance therewith is required of the permittee is indicated by the language of subsection (b) of Section 5 which authorizes a renewal permit "upon submission of proof of continued compliance with the provisions of this Act and the regulations of the Department." (Emphasis ours)

The validity of legislation which confers rule-making powers upon administrative agencies has been consistently upheld by our courts.

In *San Antonio v. Jones*, 28 Tex. 33 (quoted with approval in *O'Brien v. Amerman*, 112 Tex. 254, 247 S. W. 270), it was declared by the Supreme Court of Texas:

"The Legislature may grant authority as well as give commands, and acts done under its authority are as valid as if done in obedience to its commands. Nor is a statute, whose complete execution and application to the subject-matter is, by its provisions, made to depend on the assent of some other body, a delegation of legislative power. The discretion goes

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to the exercise of the power conferred by the law, but not to make the law itself. The law, in such cases, may depend for its practical efficiency on the act of some other body or individual; still it is not derived from such act, but from the legislative authority."

It was likewise stated by the San Antonio Court of Civil Appeals in *Tuttle v. Wood*, 35 S. W. (2d) 1061, (writ of error refused):

"It is true, of course, that the Legislature cannot delegate to an administrative board the power to make a law prescribing a penalty, but it is equally true that it is competent for the Legislature to authorize a commission or board created for that purpose to prescribe duties or ascertain conditions upon which an existing law may operate in imposing a penalty and in effectuating the purpose designed in enacting the law. It is in pursuance of this authority that railroad commissions, public utility commissions, livestock sanitary commissions, health boards and like agencies exercise their functions and administer and enforce laws relating to their several departments. In their very nature such laws must be flexible in order to give them practicable application to the diverse conditions which exist within the several states."

In *Re Rahrer*, 140 U. S. 554, it was said by Mr. Chief Justice Fuller:

"The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive."

See also the cases of *Nash Hardware Company v. Morris*, 105 Tex. 217, 146 S. W. 874; *Henry v. State*, 250 S. W. 190; *Ex Parte White*, 198 S. W. 583; *Nebbia v. New York*, 291 U. S. 502.

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It is the opinion of this Department that a violation of the rules and regulations promulgated by the State Board of Health in accordance with Section 5 of the Act, by a person engaged in the business of manufacturing, repairing or renovating bedding would constitute a "violation of any of the provisions of this Act" within the purview of Subdivision (e) of Section 6 of the Act, and upon proof of such, the State Health Officer would be authorized to revoke a permit theretofore issued to such operator.

The Act does not provide any particular procedure for the State Health Officer to follow in the revocation of a permit. The State Board of Health is, however, authorized by Section 5 of the Act to "make . . . general rules and regulations of procedure for carrying into effect all the provisions of this Act". It is our opinion that the Board should promulgate reasonable rules whereunder the permittee would be given notice and a hearing before the State Health Officer prior to the revocation of a permit. This would involve the giving of notice to the permittee of the existence of evidence before the State Health Officer of violations by the permittee of the rules and regulations promulgated by the Board, together with the right of the permittee to a hearing before the Officer at the time designated. If at such hearing it is established that the permittee has violated the rules and regulations of the Board, the State Health Officer would be authorized to revoke the permit.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Zollie C. Steakley*
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Assistant

ZCS:BBB

APPROVED NOV 16, 1940

James S. Mann
ATTORNEY GENERAL OF TEXAS

