



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GROVER SELLERS
ATTORNEY GENERAL

Texas State Board of Embalming
Austin 22, Texas

Attention: Mr. Chas. B. Cook, Secretary

Gentlemen:

Opinion No. O-5916

Re: The authority of the State Board of Embalming to cancel the lectures and demonstrations held each year, due to the War Emergency.

Your letter of March 6, 1944, requests the Department's opinion on the following:

"Due to the War Emergency, the shortage of men power, gasoline, et cetera, the State Board of Embalming has concluded it will be better to pass the lectures and demonstrations for this year, which are due in May. I will appreciate your opinion as to whether or not we have this power."

Article 1577, Section 1, Vernon's Annotated Revised Statutes, is as follows:

"The Board of Embalming shall have the power and it shall be its duty:

"1. To prescribe and maintain a standard of proficiency as to the qualifications of those engaged, and who may engage in the practice of embalming in connection with the care and disposition of dead human bodies in this State, and shall have the right, to be exercised at its discretion, to employ capable and efficient lecturers and demonstrators in the science of embalming for the benefit of all licensed embalmers in this State. The said lecturers and demonstrators shall meet not more than once in each year with annual session

of the Texas Funeral Directors' and Embalmers' Association."

"No officer has the power to vary or waive any statutory law." Reeves v. Daisanroth, (1941) 288 Ky. 724, 157 S. W. (2d) 331, 138 A. L. R. 1493, p. 1496. A public officer is not permitted to substitute his own judgment as to the best means of performing his official duties, if such is contrary to the plain provisions of the statute; although in his doing so he does not have an evil or corrupt motive, and no loss results to the public, Sharp v. Brown, 38 Ida. 136, 221 P. 139.

"Discretion in the manner of the performance of an act arises when the act may be performed in one of two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed. But when a positive duty is enjoined, and there is but one way in which it can be performed lawfully, then there is no discretion." Blalock v. Johnston, (1936) 180 S.C. 40, 185 S.E. 51, 54, 105 A.L.R. 1115. See also: U. S. ex rel. United States Borax Co. v. Iokes, 68 App. D. C. 399, 98 F. (2d) 271, 281.

It is the Board's duty "to prescribe and maintain a standard of proficiency as to the qualifications of" embalmers. To do this, it is authorized at its discretion, to employ capable and efficient lecturers and demonstrators." The right of selection -- as to whom to employ -- is also to be exercised at its (the Board's) discretion."

Now, the rule is, where the statute prescribes the time within which public officers are required to perform an official act it is merely directory; unless, the statute denies the exercise of the power after such time or the nature of the act or the statutory remedy shows that the time was intended as a limitation. State v. Fox, (1939 Austin C. A.) 133 S. W. (2d) 987.

Texas State Board of Embalming, page 3

It is the view of this department that the Board is authorized to pass the resolution inquired about.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By (s) David Wuntch
Assistant

DW:db
DW:fo

APPROVED MAR. 21, 1944
(s) Grover Sellers
ATTORNEY GENERAL OF TEXAS

APPROVED OPINION COMMITTEE
BY (S) GWB, CHAIRMAN