Letter Opinion No. 98-042
Re: Whether the Texas Funeral Service Commission may by rule allow an embalmer or a funeral director to provide personal supervision to a provisional licensee by being present on the premises (RQ-1010)

Dear Ms. May:

You ask whether the Texas Funeral Service Commission (the "commission") may by rule allow a licensed embalmer or funeral director to provide "personal supervision" to a provisional licensee by being present on the premises rather than in the room with the licensee during the course of any training activity. Based on the statutory definition of personal supervision, we conclude in the negative.

Article 4582b, V.T.C.S. (the "act"), pertains to funeral directing and embalming and requires funeral directors,¹ and embalmers² to be licensed³ by the commission.⁴ To be eligible for a license to practice funeral directing or embalming, an applicant must serve as a provisional licensee⁵ in a provisional license program⁶ for at least a year under the personal supervision of a licensed funeral director.

¹See V.T.C.S. art. 4582b, § 1.A.1 (defining "funeral director").
²See id. § 1.D (defining "embalmer").
³See id. §§ 3, 4; see also id. §§ 1.A.2, 1.D.
⁴See id. §§ 3.A., 4.A.
⁵"Provisional licensee"

is a person engaged in learning the practices of funeral directing and/or embalming under the instruction, direction, and personal supervision of a duly licensed funeral director and/or embalmer of and in the State of Texas in accordance with the provisions of this Act, and having been duly issued a provisional license by the commission prior thereto.

Id. § 1.E. (emphasis added).

⁶"Provisional license program" or "program" as used in the act (continued...
director or licensed embalmer. The commission must prescribe and supervise the course of
instruction given to provisional licensees in a provisional license program consistent with the act's
requirements.8

The act specifically defines the term personal supervision: "'Personal supervision' means
that a licensed funeral director or embalmer must be physically present at the specified place and
time of the provision of acts of funeral service."9 By its terms, the statute requires the supervising
funeral director or embalmer's physical presence at the particular place and time of the act or work
performed.10 In the context of and as used in the provisional licensee training provision,11 this can
reasonably only mean that the licensed funeral director or embalmer must be physically present in
the room with the licensee during the course of and in view of the work performed.12 Accordingly,
personal supervision of a provisional licensee under the act requires a licensed funeral director or
embalmer to be in the room with the licensee during the course of the training activity.

\[\text{(...continued)}\]

shall be construed as diligent attention to assigned duties and other matters performed in a
licensed funeral establishment in this state. The commission by rule shall define the terms
of employment of a provisional licensee, which must include service by the provisional
licensee under actual working conditions and under the personal supervision of a licensed
funeral director and/or embalmer.

Id. § 1.F. (emphasis added).

7See id. § 3.B.1(d), C.1(d); see also supra notes 5 & 6.

9Id. § 3.D.

9Id. § 1.R (emphasis added). "Funeral services" is broadly defined as "services performed incident to funeral
ceremonies or for the care and preparation of deceased human bodies for burial, cremation, or other disposition and
includes embalming[.]" and is therefore inclusive of any work performed by provisional licensees. See id. § 1.O.

10See id. § 1.R.; House Comm. on Business and Commerce, Bill Analysis, S.B. 876, 68th Leg. (1983) (Section
by Section Analysis) ("'Personal supervision' is defined to state that a licensed funeral director must be physically
present during a funeral service.").

11For example, with respect to embalming, the act provides that the commission shall not issue a license unless
and until the applicant has served a provisional license program of not less than a year under the personal supervision
and instruction of a licensed embalmer. See V.T.C.S. art. 4582b, § 3.D.1. Provisional embalmers also must report to
the commission each case they have handled or assisted with, certified by the licensee under whose personal supervision
the work was performed. See id. § 3.D.1(c). Likewise, provisional funeral directors must report to the commission each
case they have assisted in handling certified to by the licensee under whom the work was performed. Id. § 3.D.2(b).

12See, e.g., Ex parte Anderson, 902 S.W.2d 695, 699 (Tex. App.--Austin 1995, pet. ref'd) (statutory words are
to be read in context and construed according to rules of grammar and common usage); J.B. Advertising, Inc. v. Sign
Board of Appeals, 883 S.W.2d 443, 447 (Tex. App.--Eastland 1994, writ denied) (rule that statutory word to be read
in context and given its common and ordinary meaning unless it has acquired technical meaning applies to municipal
ordinance).
The statutory definition of personal supervision limits the commission's rulemaking authority in that regard. A regulatory agency may not adopt rules inconsistent with its statute. Clearly, an agency may not amend a statutory scheme by rule. Thus, the commission has no authority to adopt a rule allowing a licensed embalmer or funeral director to provide personal supervision to a provisional licensee by being present merely on the premises given the statutory definition of personal supervision. Your request suggests that a provision directing the commission "by rule [to also] establish guidelines for provisional licensee supervision under which [a] provisional ... licensee ... [is] granted increased responsibilities during the course of [the] program" gives the commission the requisite authority. We disagree. By its terms, this provision authorizes the commission to prescribe guidelines for supervising increased responsibilities assigned to a provisional licensee. It does not speak to the meaning of personal supervision specifically provided in the act or permit the commission to change the meaning by rule.

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14 *See State v. Jackson*, 376 S.W.2d 341, 345 (Tex. 1964) (when legislature acts with respect to particular matter, administrative agency may not so act with respect to matter as to nullify legislative act even though within agency's general regulatory field).

15 V.T.C.S. art. 4582b § 3.D.1(b), 2(e).
SUMMARY

The Texas Funeral Service Commission cannot by rule allow a licensed embalmer or funeral director to provide personal supervision to a provisional licensee merely by being present on the premises.

Yours very truly,

[Signature]

Sheela Rai
Assistant Attorney General
Opinion Committee