



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 13, 1998

Ms. Eliza May
Executive Director
Texas Funeral Service Commission
510 South Congress Avenue, Suite 206
Austin, Texas 78704-1716

Letter Opinion No. 98-108

Re: Authority of the Texas Funeral Service
Commission to prescribe requirements for
reciprocal licensure of funeral directors and
embalmers (RQ-1162)

Dear Ms. May:

You ask whether the Texas Funeral Service Commission ("commission") may adopt a rule prescribing the requirements of a reciprocal funeral director or embalmer license for a person holding a valid license from another state whose licensing requirements are not substantially equivalent to those of Texas. We conclude that the commission may not adopt such a rule.

Article 4582b, V.T.C.S., prohibits a person from acting as a funeral director or an embalmer unless licensed to do so by the commission. Section 3.B of article 4582b lists the eligibility requirements for a funeral director license:

B. (1) To be eligible for a license to practice funeral directing, an applicant must:

- (a) be 18 years of age or older;
- (b) have graduated from an accredited high school or passed an examination prescribed by the Central Education Agency [now the Texas Education Agency];
- (c) have graduated from an accredited school or college of mortuary science;
- (d) have served as a provisional licensee for not less than one year under the personal supervision and instruction of a licensed funeral director; and
- (e) successfully complete written examinations as described by Subdivision (2) of this subsection.

Similar requirements, listed in section 3.C., apply to the licensing of an embalmer:

C. (1) To be eligible for a license to practice embalming, an applicant must:

(a) be 18 years of age or older;

(b) have graduated from an accredited high school or passed an examination prescribed by the Central Education Agency [now the Texas Education Agency];

(c) have graduated from an accredited school or college of mortuary science;

(d) have served as a provisional licensee for one year under the personal supervision of a licensed embalmer; and

(e) successfully complete written examinations as described by Subdivision (2) of this subsection.

Other parts of section 3 detail the examination and provisional licensing procedures and impose additional requirements, such as an application fee. Each applicant for a Texas license must meet all of these conditions, with one type of applicant possibly excepted. Section 3.F provides: "The commission may waive any license requirement for an applicant with a valid license from another state having license requirements substantially equivalent to those of this state."

You tell us that the commission has adopted a rule by which an applicant holding a valid license from another state *not* having license requirements substantially equivalent to those of Texas may nevertheless be licensed in Texas if the applicant meets the requirements set out in the rule. The rule at issue provides:

§ 203.15. Requirements For Reciprocal Licenses

(a) All applicants for a reciprocal license must provide proof that the license held from another issuing authority is not lapsed and is in good standing. If the license is lapsed, the applicant must pass all examinations required by the commission for licensure in Texas.

(b) Each reciprocal applicant must pass a written examination of not more than 50 questions on applicable state laws and commission rules. The written examination will be available to be administered at each regularly scheduled meeting of the commission.

(c) At such time the examination is taken, the applicant may also be required to personally appear before the commission.

(d) Reciprocal applicants with a valid current license from another state which does not have license requirements substantially equivalent to those of Texas may be licensed in this state if the applicant meets the requirements as detailed in subsections (a)-(c) of this section and have [sic] practiced for at least five years in that state, have [sic] graduated from an accredited school or college of mortuary science, and have [sic] an active license which is not canceled, suspended, or revoked.¹

“In enacting this rule,” your letter states, “the Commission determined that an applicant who meets certain specified requirements for licensure and has practiced in the profession for at least five years has acquired the requisite experience and skills that meet the minimum standards for licensure in Texas as set forth in Section 3, Article 4582b, Tex. Rev. Civ. Stat.” You tell us that the commission adopted this rule because it is unaware of any state that has a licensing requirement similar to the Texas requirement that the applicant participate in a provisional licensing program for at least one year and work on a minimum of sixty cases.² “This poses a hardship on licensed funeral directors and/or embalmers in other states who wish to relocate to Texas, particularly if they are able to demonstrate that they possess the same degree of fitness required of applicants for licensure in this state” In other words, without subsection (d) of the rule, you suggest, no one would be able to receive a reciprocal funeral director or embalmer license in Texas.

While the consequences of a particular construction certainly may be considered in construing a law, and a statute should not be construed in a way that makes it futile, unfair, or unjust, this principle does not support the commission’s departure from a literal application of article 4582b in this case.

First of all, as you know, an administrative agency of the state has only those powers that are expressly conferred by statute and those necessarily implied from powers and duties expressly given or imposed.³ The requirements for the licensure of funeral directors and embalmers are set out in detail in article 4582b. Section 3.F of article 4582b unambiguously provides: “The commission may waive any license requirement for an applicant with a valid license from another state having license requirements substantially equivalent to those of this state.” Thus section 3.F allows the commission to waive licensing requirements for an applicant with a valid license from another state *only if* the other state has license requirements substantially equivalent to the Texas requirements.

¹22 T.A.C. § 203.15.

²See V.T.C.S. art. 4582b, § 3.D.1 (requiring embalmer provisional licensee to work on at least 60 cases); § 3.D.2 (requiring funeral director provisional licensee to assist with at least 60 cases).

³See *State v. Public Util. Comm’n of Tex.*, 883 S.W.2d 190, 194 (Tex. 1994).

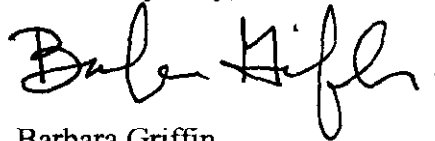
In the face of this clear legislative directive, the commission has no authority to waive the licensing requirements for a reciprocal license applicant if the licensing requirements of the applicant's home state are not substantially equivalent to those of Texas.

Secondly, while you do not tell us how the commission determined that not one of the forty-nine other states has licensing requirements similar to those of Texas, we think that a determination of substantial equivalency must be made in the context of a reciprocal license application, with the laws under which the applicant was licensed in his home state evaluated by the commission at the time of the application. Laws change. The commission should not assume that no other state has such requirements, but should ascertain this fact when called upon to do so.⁴ And, even if the commission's assumption is true, the fact that the statute might create a hardship in certain cases does not justify a departure from its terms.⁵ It is for the legislature to consider the wisdom of the statute in light of its effects and amend it if it finds it appropriate to do so.⁶

S U M M A R Y

The Texas Funeral Service Commission may not adopt a rule prescribing the requirements of a reciprocal funeral director or embalmer license for a person holding a valid license from another state whose licensing requirements are not substantially equivalent to those of Texas.

Yours very truly,



Barbara Griffin
Assistant Attorney General
Opinion Committee

⁴We question the commission's assumption that no such requirements exist in any other state. Our research found that in Arkansas, for example, an applicant for an embalmer's license must have served an apprenticeship of one year under the supervision of a licensed embalmer and assist in the preparation of at least 50 bodies. See Ark. Code Ann. § 17-29-301. We think that it is conceivable that the commission could find that a requirement like Arkansas's one-year apprentice program and 50-body minimum is substantially similar to Texas's one-year provisional licensing program and 60-case minimum.

⁵*Winder v. King*, 297 S.W. 689, 691, (Tex. Civ. App.--Amarillo 1927), *aff'd*, 1 S.W.2d 587 (Tex. 1928); *Lincoln Nat'l Life Ins. Co. v. Freudenstein*, 87 S.W.2d 810, 811 (Tex. Civ. App.--San Antonio 1935, no writ).

⁶*Vaughan v. Southwestern Sur. Ins. Co.*, 206 S.W. 920, 921 (Tex. 1918) ("[T]he remedy for a harsh law is not judicial interpretation, but its amendment or repeal.").