Linda Willard

90040

STATE OF NEBRASKA
OFFICIAL
DEC 19 1990
DEPT. OF JUSTICE

DEPARTMENT OF JUSTICE
STATE OF NEBRASKA • 2115 STATE CAPITOL
TELEPHONE 402/471-2682 • FAX 402/471-3297 • LINCOLN, NEBRASKA 68509-8920

ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: December 18, 1990

SUBJECT: Authority to Regulate Funeral Establishments

REQUESTED BY: Senator Jacklyn J. Smith

WRITTEN BY: Robert M. Spire, Attorney General
Marilyn B. Hutchinson, Assistant Attorney General

You have asked whether the Department of Health has authority in Neb.Rev.Stat. §71-1325 to 71-1338 to adopt different regulations which apply to a "parent" funeral establishment and to its branch establishment(s). We have concluded it does not, as discussed below.

What is a funeral establishment? We have concluded a funeral establishment for purposes of regulation by the state is a business which meets the statutory definition.

A "funeral establishment" is defined in Neb.Rev.Stat. §71-1325(3) (Reissue 1990) to mean:

> a place of business situated at a specific street address or location, devoted to the care and preparation for burial, disposition, or cremation of dead human bodies, and for the purpose of conducting funeral services therefrom. . .

You describe a parent funeral establishment as one where dead human bodies are prepared for final disposition and a branch establishment as one where such preparation does not occur. The viewing of the body and other funeral services occur at whichever establishment is appropriate.

In the absence of anything to indicate the contrary, words in a statute must be given their ordinary meaning. Garza v. City of Omaha, 215 Neb. 714, 717, 340 N.W.2d 409 (1983). However, sometimes a court will interpret "and" in a statute to mean "or," but only if such an interpretation is necessary to avoid an absurd result or to achieve the intent of the Legislature. State v. Kinkaid, 235 Neb. 89, 93, 453 N.W.2d 738 (1990) and Ledwith v. Banker's Life Insurance Co. of Nebraska, 156 Neb. 107, 125, 54 N.W.2d 409 (1954).

L. Jay Bartel
Elaine A. Chapman
Wynn Clemmer
Delores N. Coe-Barbee
Dale A. Comer
David Edward Cygan
Mark L. Ells
James A. Elworth
Lynne R. Fritz
Denise E. Frost
Yvonne E. Gates
Royce N. Harper
William L. Howland
Marilyn B. Hutchinson
Donald E. Hyde
Kimberly A. Klein
Donald A. Kohtz
Sharon M. Lindgren
Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Melson
Steven J. Moeller
Harold I. Mosher
Fredrick F. Neid
Bernard L. Packett
Marie C. Pawol
Kenneth W. Payne
LeRoy W. Sievers
James H. Spears
Mark D. Starr
John R. Thompson
Susan M. Ugai
Barry Waid
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard

What was the intent of the Legislature? We have concluded there is no certainty of the general intent of the Legislature in regulating funeral establishments but it is clear that it did not create two classes of them for different regulation.

There is no suggestion in the statute that the Legislature intended to create two classes of funeral establishments and apply different regulations to them. There is not even any suggestion in the statute about why funeral establishments are regulated. So we consider the legislative history. See, Otto v. Hahn, 209 Neb. 114, 118, 306 N.W.2d 587 (1981).

The legislative history contains no hint that the Legislature intended to create two classes of funeral establishments, but it does contain some language suggesting the purpose of the regulation. As enacted in 1937, c. 154 authorized the Department of Health to adopt reasonable regulations:

> relating to the business of a funeral director, to the sanitary condition of places where such business or practice is conducted, with particular regard to plumbing, sewage, ventilation and equipment, and generally to carry out the various provisions of sections 71-1301 to 71-1324 in the protection of the peace, health, safety, welfare and morals of the public.

Neb.Rev.Stat. §71-1312 (Reissue 1950). The definition of a "funeral establishment" included the current language and the requirement that it consist of:

> a preparation room equipped with a sanitary floor, necessary drainage and ventilation, and containing necessary instruments and supplies for the preparation and embalming of dead human bodies for burial or transportation, and a display room containing a stock of funeral caskets and shipping cases.

Neb.Rev.Stat. §71-1301 (Reissue 1950). To get a license, the proposed funeral establishment had to be constructed and equipped as required by that statute. Neb.Rev.Stat. §71-1306 (Reissue 1950). The person in charge had to be knowledgeable in the signs of death, the manner by which death may be determined, the laws governing the preparation, burial and disposal of dead human bodies and the shipment of bodies dying from infections or contagious diseases, and local health and sanitary ordinances and regulations relating to funeral directing and embalming. Neb.Rev.Stat. §71-1303 (Reissue 1950).

All those sections were repealed by Laws 1957, LB 116. The introducer called it a "recodification" but the new law omitted the specifics cited above. They were not reinserted by Laws 1979, LB 94, effective in 1980.

In conclusion, there is no suggestion in the current law or in the legislative history that the Legislature intended to create two classes of funeral establishments and to treat those classes differently. Thus, there is no support for an interpretation of Neb.Rev.Stat. §71-1325(3) which would substitute "or" for "and." There is a suggestion that a funeral establishment is a business location where dead human bodies are prepared for final disposition. It follows that an establishment where no preparation of dead human bodies for final disposition occurs is not a "funeral establishment" and therefore is not subject to any regulation by the Department of Health under Neb.Rev.Stat. §71-1325 to 71-1338. Thus, there is support for a conclusion that a branch establishment as you describe it is not a funeral establishment.

<u>May the Department of Health create two classes of funeral establishments by rules and regulations</u>? We have concluded it may not.

In this case the Department of Health has been given the following rule-making authority:

> The Department of Health, upon recommendation of the Board of Examiners in Embalming and Funeral Directing, may adopt such rules and regulations as may be reasonable and proper for the purpose of carrying into effect the provisions of sections 71-1325 to 71-1338.

Neb.Rev.Stat. §71-1326 (Reissue 1990). The purpose of sections 71-1325 to 71-1338 is not stated in the statute.

> It is fundamental that the Legislature may not delegate legislative power to an administrative or executive authority. . . . The Legislature does have power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limits. . . . It is fundamental, also, that in the legislative grant of power to an administrative agency, such power must be limited to the expressed legislative purpose and administered in accordance with standards prescribed in the legislative act.

(Citations omitted.) <u>Lincoln Dairy v. Finigan</u>, 170 Neb. 777, 780, 104 N.W.2d 227 (1960).

> "The crucial test, for determining that which is legislative and that which is administrative, is whether the ordinance was one making a law or one executing a law already in existence; . . . ."

State ex rel. Nelson v. Butler, 145 Neb. 638, 647, 17 N.W.2d 683 (1945).

> The powers of the board not granted by statute are withheld . . .
>
> Police regulations with no other guide than the uncontrolled discretion of a board are discriminatory, and when so applied that all persons may not engage in legitimate callings upon equal terms, are void.

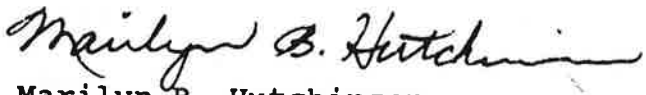
(Citations omitted.) State ex rel. Woolridge v. Morehead, 100 Neb. 864, 872, 161 N.W. 569 (1917).

In Seignious v. Rice, 273 N.Y. 44, 6 N.E.2d 91, 93 (1936), the court specifically held that classifying persons for different treatment was making a law and therefore could only be done by the legislature.

In conclusion, where the Legislature has not created two classes of funeral establishments, has not expressed the legislative purpose and has not prescribed standards in the statute, the Department of Health has no authority by rule and regulation to create two classes and regulate them differently.

Sincerely yours,

ROBERT M. SPIRE
Attorney General



Marilyn B. Hutchinson
Assistant Attorney General

Approved:

Attorney General

16-254-13