



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 12, 1998

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

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,<sup>1</sup> and embalmers<sup>2</sup> to be licensed<sup>3</sup> by the commission.<sup>4</sup> To be eligible for a license to practice funeral directing or embalming, an applicant must serve as a provisional licensee<sup>5</sup> in a provisional license program<sup>6</sup> for at least a year under the *personal supervision* of a licensed funeral

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<sup>1</sup>See V.T.C.S. art. 4582b, § 1.A.1 (defining "funeral director").

<sup>2</sup>See *id.* § 1.D (defining "embalmer").

<sup>3</sup>See *id.* §§ 3, 4; see also *id.* §§ 1.A.2, 1.D.

<sup>4</sup>See *id.* §§ 3.A., 4.A.

<sup>5</sup>"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).

<sup>6</sup>"Provisional license program" or "program" as used in the act

(continued...)

director or licensed embalmer.<sup>7</sup> 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.<sup>8</sup>

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.*"<sup>9</sup> 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.<sup>10</sup> In the context of and as used in the provisional licensee training provision,<sup>11</sup> 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.<sup>12</sup> 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.

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<sup>6</sup>(...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).

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

<sup>8</sup>*Id.* § 3.D.

<sup>9</sup>*Id.* § 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.

<sup>10</sup>*See 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.").

<sup>11</sup>For 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).

<sup>12</sup>*See, 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.<sup>13</sup> Clearly, an agency may not amend a statutory scheme by rule.<sup>14</sup> 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"<sup>15</sup> 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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<sup>13</sup>*Railroad Comm'n v. Lone Star Gas Co.*, 844 S.W.2d 679, 685 (Tex. 1992).

<sup>14</sup>*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).

<sup>15</sup>V.T.C.S. art. 4582b § 3.D.1(b), 2(c).

**S U M M A R Y**

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,

A handwritten signature in cursive script that reads "Sheela Rai".

Sheela Rai  
Assistant Attorney General  
Opinion Committee