



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

May 20, 1939

Mr. N. J. Dartez, Secretary
State Board of Barber Examiners
Austin, Texas

Dear Sir:

Opinion No. 0-720

Re: Requirement of section 4 (a)
of Midland City Ordinance
that barbers undergo a blood
test.

Your request for an opinion as to whether or not the barbers of Midland can be required to have a blood test to practice their trade in that city when the state law requires only a health certificate, has been received by this department. Our answer to your inquiry is confined to our construction of section 4 (a) of the Midland City Ordinance quoted in your request as follows:

"Owners of barber shops and/or beauty parlors shall employ no barbers, cosmetologists or other persons, including porters or assistants, who handle tools, supplies, or other things in said shops or parlors, or permit them to work in said shops or parlors unless said barber or cosmetologist or other person has had a blood test showing freedom from infectious or communicable disease and has in his possession a Registration and Identification Certificate mentioned in said Health Certificate Ordinance; nor shall any barber, cosmetologist or such other person work in a barber shop or beauty parlor or

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pursue his trade in connection with barbering or cosmetology in said City unless he has had said blood test and has in his possession such registration and Identification Certificate. Such certificate shall be valid for six months only from date of issuance."

We assume your doubt of the force of the above section rests on the constitutionality of the attempted regulation.

The power to regulate for the protection of public health in this day of prophylaxis is established beyond doubt. The constitutional authority of a municipal corporation in Texas to regulate the profession of barbers from a sanitary or health standpoint has been established in the case of Hanzal v. City of San Antonio, 221 SW 237, Court of Civil Appeals (error refused). See also 20 A.L.R., page 1108.

In the instant opinion we have before us the right of a municipal corporation to regulate an occupation after the state has exercised the legislative control over that occupation. The courts of this state have held that a business or occupation licensed by state law may be regulated within a reasonable limit, by municipal ordinance, if the regulation does not impair the right under the state license. See "Ex Parte Brewer," 152 SW 1068, a Texas case.

Let us consider our state regulation of barbers and cosmetologists with reference to physical examination. Our Texas Barber Law, article 734a, section 21, subsection (1) of our Penal Code reads as follows:

"No certificate shall be issued or

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renewed unless and until each applicant shall present a health certificate from a regular practicing medical doctor showing that the applicant is free from any kind of infectious or contagious diseases, tuberculosis, communicable diseases, free from the use of any kind of morphine, cocaine, or other habit-forming drug, or a habitual drunkard and that said applicant shall make affidavit to said medical examination that all of said facts are true."

The above section requires an examination once a year and a health certificate is the requirement of the applicant. Thus, a blood test is not necessary to comply with the state statute, however, a certificate evidencing a blood test would satisfy the state requirement. The city of Midland, a home rule city, has attempted to strengthen the requirement as to the physical condition of barbers and cosmetologists. In order to comply with the city ordinance it will be necessary for a barber to have two or not more than three blood tests a year, one of which may also be used to qualify for a state license.

Our state law on hairdressers and cosmetologists, article 734b, section 10, subsection (b) of our Penal Code reads as follows:

"All applications for examination and for license shall be accompanied by a health certificate by a regularly licensed doctor of medicine, showing the applicant to be free from any contagious or infectious diseases as determined by a general examination and Wasserman blood test."

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The persons following that profession are presently required to have a Wasserman blood test once a year. The Midland Ordinance will require another such test six months from the date of the last one.

The courts of this and other states are wont to sustain any reasonable municipal regulation for the protection of health and the preservation of the lives of our citizens. This is true, though the municipal regulation goes further than state regulation. See 43 Corpus Juris p. 220 and Gulf C. & S. F. R. Co. v. Calvert, 32 SW 246, error refused. For other authorities holding that a city may enlarge the requirements of a statute where the regulation moves in the same direction and not counter to the state law, and that such regulation is consistent with the state law, see Olson v. Plattville 91 A.L.R. 308 and Spittler v. Town of Munster 115 A.L.R. 1395.

In our opinion the attempted regulation is consistent with the purpose of the legislature to protect the public health from the dangers of skin infections, scalp diseases or any other contagious diseases. It goes further than the state law, but moves in the same direction, not counter to it, and has a commendable purpose.

While our state laws have not undertaken to regulate porters, they do regulate assistants to barbers and cosmetologists and require physical examinations of those persons. This attempted regulation is a health measure and the requirement of blood tests of porters handling the tools or supplies of a shop is a reasonable one. It should be a stimulus to the present efforts of State Health Authorities, to eradicate social diseases.

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We are faced with another test of this attempted regulation. Does it invade a field reserved to itself by our legislature by reason of state legislation upon this matter?

The ordinance under consideration is designed as a health measure. The power of a city to pass ordinances for the protection of health after the state has passed similar laws seems to rest upon their conformity with the state law upon the same subject. See Mantel v. State, 117 SW 855.

The city of Midland has imposed no sort of tax upon the barbers or cosmetologists; it makes no requirement of moral character or of the trade name used and it does not attempt to pass upon the competency of the person to practice the profession. Those matters are left to the controlling State Boards authorized by statute to determine those facts. We do not believe that the legislature by enacting article 734a and article 734b of our Penal Code intended to or did usurp the exclusive power to protect the public health in barber and beauty shops. The attempted regulation is not violative of state regulation, but is in harmony with it.

It is the opinion of this department that section 4a of the City Ordinance of Midland, Texas as submitted in your letter of April 27, 1939 is a valid regulation and is obligatory upon the persons named therein.

Yours very truly

ATTORNEY GENERAL OF TEXAS

(Signed)

Morris Hodges
By Morris Hodges
Assistant

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APPROVED:

Gerald C. Mann
Gerald C. Mann (Signed)
ATTORNEY GENERAL OF TEXAS