



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN 11

GROVER SELLERS
ATTORNEY GENERAL

Honorable George W. Cox
State Health Officer
Texas State Board of Health
Austin, Texas

Dear Sir:

Opinion No. 0-6919

Re: Duties of the Board of Health under Article 4442B, V. A. C. S., concerning the inspection of convalescent homes.

Your letter recites the facts that:

"Article 4442B, Acts of Forty-Ninth Legislature, known as 'Convalescent Homes' provides in part as follows:

"Section 2, defines a convalescent home as any place or establishment where three (3) or more pension or old age assistance recipients are housed, etc. How is the term pension to be applied in determining who would and who would not come within its meaning, insofar as this Act is concerned?

"Section 6 states that these homes shall be inspected by this Department at least once every three (3) months.

"In just what position is this Department placed in carrying out this provision since funds were not made available and sufficient personnel lacking within the Department?"

The Act regulating and licensing convalescent homes, being Chapter 342, p. 577 of the Acts of the 49th (1945) Legislature and carried into Vernon's Annotated Civil Statutes as Article 4442B and in Vernon's Annotated Penal Code as Article 701B, makes it unlawful to establish, operate or maintain a

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convalescent home in Texas without first having obtained from the State Department of Public Health a license for such purpose, (Sec. 1.) Section 2 of the Act defines a convalescent home as any place or establishment where three or more pensioner or old age assistance recipients are housed for hire or profit, and excepts hotels, hospitals, inns or tourist camps. Section 3 is the penalty provision of the Act. Section 4 provides for the licensing of such homes by the State Department of Public Health and provides for a licensing fee of \$1.00 to be charged and collected by the department for each license so issued by it, and provides further that the fees collected "shall be deposited in the State Treasury to the credit of the General Fund."

Section 5 of the Act is as follows:

"Sec. 5. The State Department of Public Health shall make a proper investigation concerning each application for license hereunder, and shall deny a license to any applicant when such investigation so warrants. Said Department is further authorized and empowered to revoke any license issued hereunder at any time, after reasonable notice and hearing, upon satisfactory proof of the existence of unsanitary and/or unwholesome conditions in such convalescent home so licensed."

Section 6 of the Act is as follows:

"Sec. 6. Such convalescent homes shall be open at all reasonable times to inspection by the State Department of Public Health, and each home shall be inspected by said Department at least once every three (3) months. Said Department shall make and file with the Governor of this State during the month of January of each year an annual report concerning the condition of such homes."

You first desire to know "How is the term 'pensioner' to be applied in determining who would and who would not come within its meaning, insofar as this Act is concerned?"

A pensioner has been defined as a regular allowance paid to an individual by a government. (32 Tex. Jur. 769). The use of the term "pensioner" imports respect to the recipient and implies a duty and an obligation upon the State to specifically

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care for such classes of citizenry, (Creighton v. Pope County, (Ill.) 50 N. E. (2d) 984. It is our opinion that the term "pension" as used in the Act means a regular governmental gratuity paid to an individual as distinguished from an allowance made by an individual, such as a relative to another relative.

In your second question, you desire to know "In just what position is this (Health) Department placed in carrying out this provision since funds were not made available and sufficient personnel lacking within the Department?"

The writer of this opinion has checked carefully the appropriations to the State Department of Public Health, Chapter 378, at page 860, Acts of the 49th (1945) Legislature and is unable to find any appropriation specifically providing funds for inspection of "convalescent homes". However, there is no question but that the Legislature meant for your department to enforce Article 4442B and we believe the over-all appropriations to your department are meant to be used in part for its enforcement. Most State departments have duties for which the Legislature does not make specific appropriations in every instance, and this appears to be just such an instance. You will note from a reading of the appropriation bill that there is no specific appropriation for inspection of railroad cars and privies (Article 4477), for day nurseries (Article 4442A), nor for several other inspection duties provided for in the Sanitary Code (Article 4477-1). Nevertheless, we presume these duties are being carried out by the Board of Health or by someone duly authorized by the Board.

We direct your attention to the maintenance and miscellaneous appropriation features of the appropriation act (page 863) where item 97 appropriates \$47,000.00 annually for "traveling expenses, entire department." Also item 100 appropriates annually for "printing and binding" the sum of \$5,000.00; and item 102 appropriates annually the sum of \$7,500.00 for "office supplies and equipment, telephone, telegraph, freight, cartage, express, box rent and contingencies." A reading of the appropriation act will disclose items of similar character.

Insofar as your problem pertaining to lack of sufficient personnel is concerned, we call your attention to Article 4420 allowing inspections by "any person duly authorized" by the State Board of Health and also to Section 2, Subdivision 14 of the appropriation bill reading as follows:

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" . . . No salary for which an appropriation is made herein shall be paid to any person unless such person actually discharges assigned duties. Provided, that it shall be the duty of the head of any department to transfer an employee of his office to any desk or place within his department when necessary to perform the duties of the department and for proper dispatch of business.
(Page 945) (Underlining ours)"

It would seem then, in view of the foregoing, that the Department should use such funds as are available and such personnel as may be available, as above pointed out, to enforce Article 4442B insofar as practicable. Beyond this the Department is not required to go since the law never requires an impossibility; it only requires the exercise of due care in discharging official duties to the extent of the personnel, funds and means supplied.

Yours very truly

ATTORNEY GENERAL OF TEXAS

David Wuntch

By

David Wuntch
Assistant

Woodrow Edwards

By

Woodrow Edwards
Assistant

WE/JCP

APPROVED
[Signature]
31.1946
FIRST ASSISTANT
ATTORNEY GENERAL

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