

LICENSES:
MENTAL HEALTH:

The Division of Mental Health has no authority to return license fees which accompany applications for the licensing of homes for the mentally retarded under H.C.S.H.B. No. 204, 76th General Assembly, Second Regular Session, even though a license is denied. However, in those cases where it is patently clear that the applicant is not required to have a license under such laws and no inspection is necessary, the applicant's fee should not be deposited in general revenue but should be returned to him.

OPINION NO. 134

May 7, 1973

Harold P. Robb, M.D.
Director, Division of
Mental Health
722 Jefferson Street
Jefferson City, Missouri 65101



Dear Dr. Robb:

This opinion is in response to your question asking whether the license application fees required under H.C.S.H.B. No. 204 of the 76th General Assembly, Second Regular Session, respecting licensing of homes for the mentally retarded, must be refunded to the applicant if the license is refused.

Section 2 of the Bill provides:

"The division shall establish a procedure for the licensing of all homes or institutions which accept mentally retarded persons for care, treatment or custody, except those state institutions operated by it. Applications for a license shall be made to the division upon forms provided by it and each application shall contain such information as the division requires, which may include affirmative evidence of ability to comply with the reasonable rules, regulations and standards adopted by the board. Each application for a license, except applications from a governmental unit, shall be accompanied by an annual license fee of seventy-five dollars for establishments which accept less than ten patients, and

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one hundred fifty dollars from establishments which accept ten or more. All license fees shall be paid to the collector of revenue for deposit in the general revenue fund of the state treasury."

The above provisions appear to have been adopted from the language of Section 197.050, RSMo, relative to the licensing of hospitals. By contrast the provisions of subsection 3 of Section 198.031, RSMo, relative to the licensing of nursing homes by the Division of Health requires the payment of the license fee "upon approval" of the application.

There are two different types of fees. One type is a license tax for the privilege of being in a business where there is no regulatory function of the state or political subdivision over the exercising of that business. The other type of fee is that for engaging in a business which is subject to police power regulations. Thus, the key is whether or not the fee is used as money to cover the expense of administering the police power regulation or whether it was just a revenue producing fee. See 53 C.J.S., Licenses, Section 47, and 51 Am. Jur.2d, License and Permits, Section 40.

The statutes in question are of the police power regulatory type and the fee is for covering the expenses of the program. In Honorbilt Products v. City of Philadelphia, 112 A.2d 108, 110 (1955), the Supreme Court of Pennsylvania said that a license fee is applicable only to a type of business or occupation which is subject to supervision and regulation by a licensing authority under its police power, where such supervision and regulation are in fact conducted by the licensing authority, and the payment of the fee is a condition upon which the licensee is permitted to transact his business or pursue his occupation, and the purpose in exacting the charge is to reimburse the licensing authority for the expense of supervision and regulation.

Although the fee in question is denominated a "license fee" and not an inspection fee, it is obvious from the fiscal note to the Bill that the expenditure for personal services required under the Bill greatly exceeds the anticipated income from the licensing fees. It also seems fairly clear in this respect that the initial expenditure of the Division in determining whether or not a license shall issue is perhaps the largest single cost of annual licensing. From this we surmise that the "license fee" is a regulatory fee not conditioned upon whether or not a license ultimately issues.

Further, in this respect, we note that the license fee "shall be paid to the collector of revenue for deposit in the general

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revenue fund of the state treasury." The officer receiving the fee has no authority to put the fee in a separate account or to hold the fee. His duty is to transmit the fee promptly to the state collector.

On the other hand, we wish to point out that some applications accompanied by license fees may patently indicate that an applicant is not subject to the licensing provisions and a license cannot issue. In such a case where a summary determination can be made that an applicant is not required to have a license under such laws and no inspection or processing is necessary, the applicant's fee should not be deposited in general revenue but should be returned to him.

CONCLUSION

It is the opinion of this office that the Division of Mental Health has no authority to return license fees which accompany applications for the licensing of homes for the mentally retarded under H.C.S.H.B. No. 204, 76th General Assembly, Second Regular Session, even though a license is denied. However, in those cases where it is patently clear that the applicant is not required to have a license under such laws and no inspection is necessary, the applicant's fee should not be deposited in general revenue but should be returned to him.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN C. DANFORTH
Attorney General