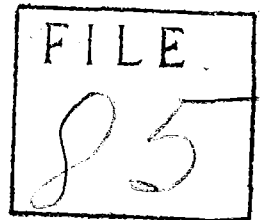


STATE BOARD OF HEALTH: It is the duty to inspect homes for incurable people even though no special appropriation was made for the purpose.

December 1, 1941

Hon. James Stewart, M. D.
The State Board of Health
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion under date of November 28th, 1941, which is as follows:

"Senate Bill #142 provides for the licensing of convalescent nursing and boarding homes for the aged, etc., places the duty on the State Board of Health to carry out the intent of this act, through its personnel.

"It provides for license to operate and the fee shall be collected, said fee to be deposited in the Treasury to the credit of the General Revenue Fund. Apparently there has been no budgetary provisions for the carrying out of this act.

Will you please give us an opinion upon the proper procedure for the State Board of Health to carry out the duties as prescribed in this act. May we have this opinion within the next few days."

Senate Bill No. 142 appears at page 368 in Laws of Missouri 1941. Section 5 of that act reads as follows:

"The State Board of Health is empowered and it is hereby made its duty: (1) to inspect, at least annually and as often as shall be necessary, all convalescent, nursing, shelter, lodging and boarding homes for aged, chronically ill or incurable persons; (2) to grant licenses, for a period not to exceed one year, after inspection, to persons to conduct the occupation defined in this Act and may renew the same when expired and to revoke the license of such persons as fail to obey the provisions of this Act or the rules and regulations made by said Board; (3) to promulgate such rules and regulations as it deems necessary for the proper cleanliness and sanitation of said convalescent, nursing, shelter, lodging and boarding homes and for the care, maintenance and safety of the persons residing therein."

Under the above wording it is mandatory that the State Board of Health carry out the act. It even goes so far as to state the time in which this duty shall be performed. Under the laws of this State it has been held that where the provisions regarding time of doing an act are set out it is mandatory. It was so held in *Dawson v. Hetzler*, 74 S. W. (2d) 488; 230 Mo. App. 737. Also in construing whether an act is directory or mandatory one must consider the intention of the Legislature. In Section 5 the fact that it made it the duty of the State Board of Health to carry out the provisions of the act, there is no question but that it is mandatory.

In your request you stated that no budgetary provisions had been enacted for the carrying out of this act and I pre-

Hon. James Stewart

(3)

December 1, 1941

sume that you mean that no special appropriation had been made.

In the case of officers upon whom a duty is placed in the performance of their official duties, and no consideration or fee has been allowed for the performance of that duty, the courts have construed that the duty must be performed gratuitously. It was so held in State ex rel. Troll v. Brown et al., 146 Mo. 401, l. c. 406. Also in the case of State ex rel. Wm. P. Evans, et al. v. Gordon, 245 Mo. 12, l. c. 37. Also it was so held in King v. Riverland Levee Dist., 270 S.W. 195, l. c. 196.

Also in your request you call attention to the fact that the fees under Section 6 shall be paid by the State Board of Health into the general revenue fund. This money cannot be used for the purpose of carrying out the act on account of the limitations as are set out in Article X, Section 19 and Article IV, Section 43 of the Constitution of Missouri, which prohibits the diversion of money from the State Treasury except by appropriation made by law. The above Constitutional sections were passed upon in the case of State ex rel. Toler Tao, State Game and Fish Commissioner, v. John P. Gordon, State Auditor, 236 Mo. 142, l. c. 157, Para. 1. It was also passed upon in the case of State ex rel. St. Joe Water Co. v. Jacob Geiger, et al., constituting Board of Managers of State Hospital No. 2, 246 Mo. 74, l. c. 92. These facts were also passed upon in the case of State ex rel. Russell, et al. v. State Highway Commission, 42 S. W. (2d) 196, l. c. 203.

As stated in your request, after a careful research, we find no appropriation for the carrying out of the act as set out in Senate Bill No. 142, but it is still the duty for the State Board of Health to carry out the act even though no appropriation has been made.

CONCLUSION

It is the opinion of this department that it is mandatory that the State Board of Health perform its duties as set out in Section 5 of the act as it appears on page 369 of the Laws of Missouri 1941 even though no appropriation has been made for that particular service.

Respectfully submitted

APPROVED:

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