

lic Welfare, as successor to the County Board of Children's Guardians under the provisions of Section 22-2805, Burns' 1933, *supra*.

I am therefore of the opinion the appointment of the employees of a county children's home, operated by the County Department of Public Welfare, as successor to the County Board of Children's Guardians under the provisions of Section 22-2805, Burns' 1933, are to be made by the County Department of Public Welfare, subject to the approval of the court of such county having juvenile jurisdiction, and that such appointments are not controlled by either the State Personnel Act or the Merit provisions of the Public Welfare Act.

OFFICIAL OPINION NO. 17

March 17, 1945.

Hon. Thurman B. Rice, M. D.,
Acting Secretary, Indiana State Board of Health,
1098 West Michigan Street,
Indianapolis 7, Indiana.

Dear Dr. Rice:

Your letter of January 26, 1945, received as follows:

"The official opinion of the State Attorney General is requested on the questions listed below on Chapter 264, Acts of 1943, known as the Cold Storage Locker Plant Law.

"1. Is the license issued to the locker plant or to the individual operating the plant, and if to the plant, is the license transferable?

"2. Shall a license be issued on an annual or calendar year basis? If on an annual basis, is it within the authority of the board to promulgate regulations to place it on a calendar year basis? Section 19 states that the board may make reasonable rules and regulations necessary or expedient to carry out the provisions of the act. It would definitely save considerable time and money by placing it on a calendar year basis.

"3. May refunds of unexpired license fees be made in the event the locker plant is discontinued?

"4. In the event the locker plant changes ownership, may the unexpired license fee of the former owner be credited to the new owner?

"5. In the event the number of lockers is increased during the term of the license, may a supplementary license for the additional lockers be issued, covering the unexpired term, or should a new license be issued for a period of twelve months, giving credit to the unexpired value of the former license?

"6. In the event the number of lockers is reduced during the term of the license, may a refund be made?

"7. Should the license be dated and fees charged beginning as of the date the license is issued, the date the plant is inspected, or the date the plant started operating?"

1. In answer to your first question I wish to advise Section 2, Chapter 264, Acts of 1943, same being Section 35-1510 Burns' 1943 Supplement, provides as follows:

"On and after July 1, 1943, or such further period of time not exceeding ninety (90) days as the board by general rule may prescribe, it shall be unlawful for any person, firm or corporation to operate a locker plant or branch locker plant in this state *unless such person has secured a license therefor* from the board as hereinafter provided and has otherwise complied with the provisions of this Act. A separate license shall be secured for each locker plant or branch locker plant. The application for such license shall be in writing in forms prescribed and furnished by the board. Such application shall be accompanied by the required license fee." (Our emphasis.)

Section 5 of Chapter 264 of the Acts of 1943, same being Section 35-1513, is as follows:

"The license issued hereunder shall be in such form as the board shall prescribe but shall be under the seal of the board and *shall set forth the name of the*

licensee, the location for which the license is issued, the type of operation, the period of the license and such other information as the board may determine. Licenses shall be for a term of one (1) year and shall be renewed annually upon like application and the payment of a like fee as in the case of the original license. The original license or a certified copy thereof shall be conspicuously displayed by the licensee in locker plant.” (Our emphasis.)

In 37 Corpus Juris, Page 245, Section 107, the following principle of law stated:

“Unless a transfer is permitted by the license statute or ordinance, a license is generally regarded as a special privilege of personal trust and confidence which cannot be assigned or transferred without the consent of the licensing authorities, * * *.” (Citing cases.)

From the provisions of each of the foregoing Sections of the statute it is my opinion the license is issued to the person operating the plant, rather than to the plant. There being no provision in said statute permitting a transfer of such license the same could not be transferred from one person to another.

2. In answer to your second question I wish to advise Section 4 of said Act, same being Section 35-1512 Burns' 1943 Supplement, provides in part as follows:

“Upon receipt of the application for a license accompanied by the required fee, the board shall inspect the plant to be licensed *and if it finds that* such plant, its equipment, facilities and the surrounding premises and its operations comply with the provisions of law and the rules and regulations of the board applicable thereto, *the board shall issue such license.* * * *”
(Our emphasis.)

From the consideration of the last quoted Section of the 1943 statute together with Section 5 of said Act, Section 35-1513, Burns' 1943 Supplement, *supra*, it is clear that under the 1943 statute the license is issued after the inspection is made and is for a term of one (1) year renewable annually.

I am therefore of the opinion under this statute the renewal must be on an annual rather than on a calendar year basis.

3. In answer to your third question it is submitted Section 21, Chapter 264, Acts 1943, same being Section 35-1529 Burns' 1943 Supplement, provides as follows:

"All license fees accrued to the board as provided in this act, shall be paid into the state treasury monthly and all expenses incurred and all compensation paid by the board in the administration of this act shall be paid out of the general fund in the same manner as other state expenses and compensation are paid."

It is clear that no refunds of license fees are specifically authorized and that said fees when so paid are part of the state treasury. Therefore, no refunds on unexpired license fees could be made under said act. On this question see 1938 O. A. G. 131, 133, 134, and 1936 O. A. G. 222, holding unexpired license fees may not be refunded unless specific authority for the same is contained in the statute.

4. Your question number four (4) has been answered by the answers given to questions number one (1) and three (3), *supra*, for if said license is not subject to transfer, and said unexpired license fees are not subject to refund, the unexpired license fee of the former owner of the plant could not be credited to the new owner.

5. In answer to your question number five (5) it is first necessary to determine if the Indiana State Board of Health has authority to issue a supplementary license under said statute.

Where an office is created by statute, public officers may exercise only such powers as are expressly authorized by statute.

State, *ex rel.* v. Goldthait (1909), 172 Ind. 210, 216, 217;

State *ex rel.* v. Home Brewing Company (1914), 182 Ind. 75, 91, 92;

The State v. The Portsmouth Savings Bank (1886), 106 Ind. 435, 451;

Department of Insurance v. Church Members Relief Association (1940), 217 Ind. 58, 60.

An exception to the above general rule is recognized where certain incidental powers are implied for the purpose of carrying out the express powers given a public officer.

43 Am. Jur., Public Officers, Section 250;
State, *ex rel.* v. Goldthait (1909), 172 Ind. 210,
216, 217.

I do not find any authority given the Indiana State Board of Health to issue a supplementary license under the above Act, and such right to issue such supplementary license cannot be inferred from any express authority given said Board under any other provisions of said Act.

An examination of Section 35-1510 Burns' 1943 Supplement, *supra*, reveals that a separate license must be issued such applicant for each locker plant or branch locker plant and that "such application shall be accompanied by the required license fee." The required license fee referred to is set out under Section 35-1511 Burns' 1943 Supplement, same being Section 3, Chapter 264, Acts 1943, which in part reads as follows:

"The license fee for a locker plant or branch locker plant shall be \$15.00 for a plant having 200 individual lockers or less and an additional \$2.00 for each 100 lockers or fraction thereof in excess of 200, except that in no case shall such fee exceed \$25.00. * * *"

Section 35-1512 Burns' 1943 Supplement provides in part as follows:

"Upon receipt of the application for a license accompanied by the required fee, the board shall inspect the plant to be licensed and if it finds that such plant, its equipment, facilities and the surrounding premises and its operations comply with the provisions of law and the rules and regulations of the board applicable thereto, the board shall issue such license. * * *"

From a consideration of the provisions of the last three (3) referred to sections of the statute it is apparent the application for this locker plant must be made for the plant as a unit as it then exists, and is to be accompanied by the required

license fee. Such locker plant is then inspected as to its equipment, facilities and surrounding premises to determine if the operation thereof would comply with the provisions of law and the rules and regulations of the board applicable thereto. An enlargement of the plant after an original license has been issued could very easily change the setup of such plant to such an extent as to cause such locker plant to fail to meet the requirements of the provisions of law applicable thereto or the rules and regulations of the board duly promulgated and applying to such locker plants.

In answer to your fifth question I am therefore of the opinion that where an applicant enlarges such locker plant by the installation of additional lockers, a new application must be presented to the board accompanied by the required license fee for such locker plant as it then exists, and that a new inspection is necessary to determine if it meets the requirements of the law applicable thereto and the rules and regulations of the board made and provided in such cases. There being no authority given the board to grant a rebate for the unexpired period of time the original application was in force, as has been previously pointed out in this opinion, such applicant in such case would not be entitled to a rebate or credit for the pro rata value of the unexpired term of the former license.

6. Your question number six (6) has been answered by the answer given to your question number three (3). There being no provision in the statute for a refund, there could be no refund whether the plant partially ceased operation or entirely ceased operation.

7. In answer to your question number seven (7) it is to be noted that under the quoted part of Section 4, Chapter 264, Acts of 1943, being Section 35-1512 Burns' 1943 Supplement, *supra*, said statute provides the license shall be issued upon the payment of the fee prescribed and the completion of the inspection by the State Board of Health. This section of the statute requires the application for a license to be accompanied by the required fee. The payment of the fee and the inspection of the premises are a condition precedent to the issuance of the license, and the license should be dated as of the date said license is issued.