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from being paid a survivor annuity even though she had not been married to him at least three years before his death.

OFFICIAL OPINION NO. 58

November 7, 1961

A. C. Offutt, M. D.
State Health Commissioner
Indiana State Board of Health
1330 West Michigan Street
Indianapolis, Indiana

Dear Dr. Offutt:

This is in response to your recent request for an Official Opinion concerning the professional membership on the various types of local boards of health. Your questions are directed, in part, toward Acts of 1949, Ch. 157, Sec. 609, as amended by Acts of 1961, Ch. 14, Sec. 2, as found in Burns' (1961 Supp.), Section 35-810.

Your specific questions are as follows:

- "1. In the event no member of the specified professions residing within the official health jurisdiction is willing to serve as an official member of the Board of Health, should the County Commissioners appoint a seven member Board of Health omitting representation from the particular professions in which no member is willing to serve, or should the County Commissioners leave unfilled those memberships to the official Board of Health for which a properly qualified individual cannot be obtained?
- "2. Would a Board of Health established by either of the above alternatives constitute a legal body?"

In a consideration of your questions the following statutory provisions are set forth as indicated:

35-810 "Each county full-time health department provided for in this act shall be managed by a board of health of seven [7] members appointed by the

county commissioners * * *. All members shall be chosen for their special fitness for membership on the board and shall be residents within the county. *At least two [2] members of each board of health for single county health departments shall be physicians holding an unlimited license to practice medicine in Indiana, one shall be a licensed dentist, one member shall be a licensed veterinarian, and one member shall be a school superintendent.* Such board shall have the powers and duties herein prescribed for full-time health boards. (Our emphasis)

35-835 "The provisions of sections 500 [§ 35-605], 609 [§ 35-810], 610 [§ 35-811], 614 [§ 35-815] and 618 [§ 35-819] of Chapter 157 of the Acts of 1949, as amended, as said sections require the appointment of licensed veterinarians on public health boards, shall not apply to those counties and cities in which there is no resident licensed veterinarian."

Your question No. 1 may be restated as follows:

- (a) In the event no member of the specified professions is willing to serve, should the county commissioners appoint a seven member board of health omitting representation from the particular professions in which no member is willing to serve, or
- (b) should the county commissioners leave unfilled those memberships for which qualified professional representatives cannot be obtained?

Your question No. 2 asks whether a board of health created by either alternative would constitute a legal body.

It is axiomatic that the primary object of statutory construction is to ascertain and effectuate the intent of the Legislature as shown by the whole act. It is equally well settled that rules of statutory construction should not be invoked except when necessary to give effect to the legislative intent. See: Indiana Law Encyclopedia, Vol. 26, Statutes, §§ 111, 113.

The particular language employed in Burns' 35-810, *supra*, which is pertinent to your questions, is as follows:

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“* * * *At least two [2] members of each board of health for single county health departments shall be physicians holding an unlimited license to practice medicine in Indiana, one shall be a licensed dentist, one member shall be a licensed veterinarian, and one member shall be a school superintendent.* * * *” (Our emphasis)

The wording set forth above appears clear and unequivocal. It will be noted that immediately preceding each designation of a professional requirement for membership the word “shall” is used. In the case of *Blackburn et al. v. Koehler* (1957), 127 Ind. App. 397, 399, 140 N. E. (2d) 763, the Court said, in part:

“* * * As a general rule of statutory interpretation, the presumption is that the word, ‘shall,’ as used in any given law, is to be construed in an imperative sense, rather than directory, and this presumption will control, unless it appears clearly from the context, or from the manifest purpose of the Act as a whole that the Legislature intended in the particular instance that a different construction should be given to the word.
* * *”

The legislative intent to require highly qualified membership on each county board of health is further evidenced in *Burns’ 35-810, supra*, by the use of the following words:

“* * * All members shall be chosen for their special fitness for membership on the board * * *.”

The Acts of 1949, Ch. 157, Sec. 609, as originally passed, provided “At least *three* members * * * shall be physicians * * *” and made no requirement for membership by a licensed veterinarian. Otherwise, board membership requirements were the same as at present. However, the 1961 Legislature by the amendment in Acts of 1961, Ch. 14, Sec. 2, as found in *Burns’ 35-810, supra*, reduced the required number of physicians from three [3] to two [2] and added the requirement that one member be a licensed veterinarian. It is also interesting to note that the 1961 Legislature in the same Chapter 14, which added a *veterinarian* by Sec. 2, *supra*, also provided in Sec.

6 thereof, as found in Burns' (1961 Supp.), Section 35-835, *supra*, that the requirements for the appointment of licensed veterinarians "*shall not apply to those counties * * * in which there is no resident licensed veterinarian.*" It is particularly significant that the exemption is only applicable to such instances as where there is "no resident licensed veterinarian" as distinguished from there being a resident licensed veterinarian who declines to serve as a member of such county board of health.

It is also significant that the 1961 Legislature did consider the professional membership requirements for physicians and did reduce the required number on county boards of health from *three* to *two*.

Your questions seek an answer as to what action should be taken by the county commissioners *where no member of the specified professions is willing to serve*. The premise of your questions is thus conditioned upon unwillingness to serve rather than lack of sufficient numbers of the specified professions resident in the county.

A reading of Burns' 35-810, *supra*, clearly indicates that the Legislature did not provide for any contingency such as an unwillingness of specified professional individuals to serve on a board of health. In this connection it is well to note the language of the Supreme Court in the case of Poyser v. Stangland (1952), 230 Ind. 685, 689, 106 N. E. (2d) 390, wherein it is said:

"* * * We cannot under the guise of construction, put something into a statute that the legislature apparently designedly omitted. The general rule has been stated, thus:

"The general rule is that nothing may be read into a statute which is not within the manifest intention of the legislature as gathered from the act itself, and that a statute should not be construed any more broadly or given any greater effect than its terms require. Where the language of the statute is clear in limiting its application to a particular class of cases and leaves no room for doubt as to the intention of

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the legislature, there is no authority to transcend or add to the statute which may not be enlarged, stretched, or expanded, or extended to cognate or related cases not falling within its provisions.' 50 Am. Jur. Statutes, § 229, pp. 214, 215, 216. See also 59 C. J. Statutes, § 569, pp. 953 to 958. *Bettenbrock v. Miller* (1916), 185 Ind. 600, 606, 112 N. E. 771."

In 1944 O. A. G., pages 81, 84, No. 22, it is stated:

"If certain provisions of an act make it unworkable or impossible of performance, such provisions are void and of no effect. *Keane v. Remy* (1929), 201 Ind. 286. If such provisions later become possible of performance, they come into effect at such later time, but during the time of impossibility they are suspended or held in abeyance. *Board of Education v. Morgan* (1925), 147 N. E. 34 (Ill.)."

In the instant case there is no showing that the limitations contained in Burns' 35-810, *supra*, are unworkable or impossible of performance. The only reason advanced for difficulty in filling board memberships is that of unwillingness to serve. It will be observed that since the original enactment of these professional requirements in 1949, the Legislature has convened six times and the only change they have seen fit to make in professional requirements of membership has been to reduce the required number of physicians from three to two.

The formation and operation of a capable and efficient county board of health is of the utmost importance to the health and welfare of any county. The Legislature was cognizant of this and every effort should be exerted to comply fully with their clearly expressed intent.

Therefore, in answer to the first alternative of your question No. 1, in my opinion, no authority exists for the formation of a seven [7] member county board of health by filling the membership with anyone not possessing the professional qualifications set forth in Burns' 35-810, *supra*, with the single exception of those counties and cities where there is no resident veterinarian. In answer to the second alternative of your

question No. 1, it is my opinion, that the county commissioners should leave unfilled those memberships, for which qualified professional representatives cannot be obtained; however, a nonprofessional representative may be appointed where there is no resident veterinarian.

In answer to your question No. 2, I have answered the question of legality in regard to your first alternative, namely, that a seven [7] member county board of health, would not constitute a legal body if the designated professional memberships are filled by appointment of persons without the statutory qualifications.

Let us now look to the second alternative of question No. 2, namely, legality of the board in the event the county commissioners leave unfilled any memberships, for which representatives with the statutory qualifications cannot be obtained. In this instance we must first consider the necessity of having a *quorum* present for the legal transaction of business. Our statutes are silent as to what shall constitute a quorum for a county board of health. Therefore, it is necessary to look to the generally accepted definitions of the word "*quorum*." In Words and Phrases, Perm. Ed., Vol. 35, Quorum, pp. 672, 673, it is said:

"A majority always constitutes a 'quorum' of a deliberative body, in absence of some legal requirement fixing different number, and can take any action within power of body to transact. *Herring v. City of Mexia, Tex.*, 290 S. W. 792, 794.

* * *

"The general rule is that to make a quorum of a select and definite body of men, possessing the power to elect, a majority, at least, must be present, and then a majority of the quorum may decide. *Ex parte Willcocks, N. Y.*, 7 Cow. 402, 409, 17 Am. Dec. 525.

"A 'quorum' is such a number of the officers or members of any body as is competent by law or constitution to transact business, and it is a general rule that a majority of any board, or like governmental organizations may constitute a 'quorum' though there may be a vacancy on the board brought about by death, resig-

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nation, failure to qualify or other cause. *West v. Stephenson*, 151 S. E. 853, 855, 108 W. Va. 545.

* * *

“Where a statute creating a board does not specify the number of members constituting a quorum, the common-law rule that a majority of the members may exercise the powers of the board prevails. *Borough of Oakland v. Board of Conservation and Development of New Jersey*, 122 A. 311, 315, 98 N. J. L. 806.”

Therefore, in answer to the second alternative of your question No. 2, it is my opinion, that inasmuch as four [4] members will constitute a quorum for a county board of health, a membership of such board, with this minimum number, would constitute a legal body for the transaction of business providing *all four* were present.

In summary, it is my opinion that:

- (a) The county commissioners do not have authority to appoint a seven [7] member county board of health by omitting representation by physicians, a dentist, a superintendent of schools and a licensed veterinarian (where one is a resident of the county).
- (b) A minimum of four [4] members of a county board of health, must be present at any meeting to constitute a quorum and thus make possible the legal transaction of business at such meeting. Therefore, the maximum number of unfilled vacancies, at any time, is limited to three [3]. It is emphasized, however, that the legislative intent, clearly expressed, is to have a seven [7] member board with all the designated professional representatives included.