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OPINION 18-0068

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108-A STATE BOARD OF EMBALMING & FUNERAL  
DIRECTING

La Const Art. II, Sec 2  
La R S 37.831, *et seq*  
La R S 37.840  
La R S 37.842  
La R S 37.846

The Louisiana Board of Embalming and Funeral Directing has broad authority by its delegation of rulemaking power from the Legislature in La. R.S. 37:840(A)(1) to create new regulations, but that power is not absolute and cannot be used to expand its legislatively-granted authority.

Dear Ms. Alexander:

On behalf of the Louisiana State Board of Embalmers and Funeral Directors ("the Board"), you have asked for this Office's opinion on the Board's regulatory authority. More specifically, you have asked whether the Board's rulemaking authority under La. R.S. 37:840(A)(1) is limited to creating regulations on topics explicitly delegated to the Board by statute or whether, because "the Board is charged with administering and enforcing the provisions of the statutes under its authority,"<sup>1</sup> it can undertake rulemaking to accomplish this broader legislative goal.

In a broad sense, the Louisiana Second Circuit Court of Appeal has held in *Louisiana State Bd., of Embalmers & Funeral Dirs. v. Caskets Direct* ("Caskets Direct"),<sup>2</sup> that, under the provisions of La. R.S. 37:840, the Board possesses all powers necessary for administering and enforcing the provisions of Title 37, Chapter 10 of the Louisiana Revised Statutes.<sup>3</sup> However, though the courts have recognized this administration and enforcement authority, that authority is not unfettered. In fact, the *Caskets Direct* case examined the authority of the Board to issue and enforce subpoenas duces tecum (which the court upheld), thus reinforcing the enforcement authority of the Board.

More to the point of your specific request, this Office has recently issued several opinions on the Board's authority to promulgate certain regulations. In La. Atty. Gen. Op. No. 16-0024, we examined the question of whether the Board has the statutory authority to implement a policy or to adopt rules and regulations that impose additional licensure requirements on applicants or interns. In that opinion, we observed that, because the Board is an administrative agency, it cannot, on its own authority, enlarge

<sup>1</sup> Although this quoted language is taken from your opinion request, it is a paraphrasing of the Board's directive from the Legislature under La. R.S. 37:840(A), which states that "[t]he board shall have all the powers necessary for administering and enforcing the provisions of this Chapter."

<sup>2</sup> 30,861-CA (La.App. 2 Cir. 08/19/98), 716 So. 2d 943, 946.

<sup>3</sup> *Id.*

the powers delegated to it by the Legislature.<sup>4</sup> In La. Atty. Gen. Op. No. 16-0024, we concluded La. R.S. 37:840 only authorizes the Board to promulgate rules to administer and enforce the qualifications of licensure already established by La. R.S. 37:842 and that the Legislature did not grant the Board the power to impose additional duties or requirements for qualification for licensure.<sup>5</sup>

In another recent opinion issued to the Board, this Office has observed that the Board is a licensing and regulatory agency having its powers conferred under the provisions of La. R.S. 37:831, *et seq.*,<sup>6</sup> and that the Board has the power to refuse to grant or renew licenses as well as to revoke or suspend such licenses.<sup>7</sup> Further, that opinion notes that the Board has been given the power to enjoin persons or establishments from practicing the science of embalming, conducting the business of funeral directing, or operating a funeral establishment, as well as having the power to provide penalties for such violations.<sup>8</sup>

From the above-reviewed jurisprudence and opinions, it is clear that the Board has enforcement authority over those engaged in the practice of embalming, conducting the business of funeral directing, or operating a funeral establishment.<sup>9</sup> However, your specific request is whether the Board "...has the authority to create rules to enhance, but not contradict, the statutes under its authority...." This request is broader than the enforcement analyses presented above.

Regulations promulgated by administrative agencies clarify and interpret statutes.<sup>10</sup> Indeed, such agencies are granted broad latitude in the interpretation of their organic legislation and the translation of that legislation into practical regulations.<sup>11</sup> While broad latitude is often granted an agency in the interpretation of its organic legislation, "an administrative agency of the State, could not on its own authority enlarge the powers delegated to it by the Legislature."<sup>12</sup> However, more recently the Louisiana Supreme Court, in *Coastal Drilling Co., L.L.C. v. Dufrene*,<sup>13</sup> held that,

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<sup>4</sup> La. Atty. Gen. Op. No. 16-0024; La. R.S. 37:842(B)(4).

<sup>5</sup> La. Atty. Gen. Op. No. 16-0024.

<sup>6</sup> La. Atty. Gen. Op. No. 05-0111.

<sup>7</sup> *Id.*; La. R.S. 37:846.

<sup>8</sup> La. Atty. Gen. Op. No. 05-0111.

<sup>9</sup> *Accord Louisiana Undertaking Co. v. Louisiana State Bd. of Embalmers*, 58 So. 2d 303 (La.App. Orl. Ct. 1952).

<sup>10</sup> *Ford v. State*, 2014-1262 (La.App. 1 Cir. 3/6/15), 166 So. 3d 332, 337 ("A reviewing court should afford considerable weight to an administrative agency's construction and interpretation of its rules and regulations adopted under a statutory scheme that the agency is entrusted to administer, and its construction and interpretation should control unless the court finds it to be arbitrary, capricious, or manifestly contrary to its rules and regulations.")

<sup>11</sup> *In re Recovery I*, 93-0441 (La.App. 1 Cir. 4/8/94), 635 So. 2d 690, 696 ("Considerable weight should be afforded to an administrative agency's construction of a statutory scheme that it is entrusted to administer and deference must be awarded to its administrative interpretations." *Citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)).

<sup>12</sup> *Realty Mart, Inc. v. Louisiana Board of Tax Appeals*, 336 So.2d 52, 54 (La.App. 1 Cir. 1976).

<sup>13</sup> 2015-1793 (La. 3/15/16), 198 So.3d 108.

[a] regulation can be struck down as being unconstitutional only (1) if the regulation exceeded the authority delegated to the administrative body by the legislature or (2) it exceeded the scope of the statute under which it was promulgated, as evidenced by a construction that is contrary to the statute's purpose.<sup>14</sup>

While the delegation of legislative authority can be a violation of separation of powers and a violation of La. Const. Art. II, Sec. 2, the delegation of administrative authority is not unconstitutional.<sup>15</sup> In *State v. All-Pro Paint & Body Shop, Inc.*, the Louisiana Supreme Court explained how delegation cases are traditionally "distinguished between delegations of purely *legislative* authority, which necessarily violate the separation of powers, and delegations of *ministerial or administrative* authority, which do not."<sup>16</sup> Louisiana jurisprudence has established a precedent whereby executive boards may be delegated authority to assess or evaluate certain facts to determine the applicability of a certain law or statute.<sup>17</sup>

Over time, Louisiana courts have refined the analysis of the delegation of regulatory authority discussed in *Schwegmann Brothers Giant Super Markets v. McCrory*,<sup>18</sup> and have developed a three-prong test to determine if delegation of authority conferred upon a board is authorized. According to the *Schwegmann* three-prong test, "a delegation of authority to an administrative agency is constitutionally valid if the enabling statute (1) contains a clear expression of legislative policy, (2) prescribes sufficient standards to guide the agency in the execution of the policy, and (3) is accompanied by adequate procedural safeguards to protect against abuse of discretion by the agency."<sup>19</sup>

It is thus our opinion that when seeking to enact new regulations, the Board has broad authority by its delegation of rulemaking power from the Legislature in La. R.S. 37:840(A)(1), but that power is not absolute. When promulgating new regulations, the Board must endeavor to ensure that it does not "enlarge the powers delegated to it by the Legislature."<sup>20</sup> Further, as cautioned by at least two courts, the Board "is not free to pursue any and all ends, but can assert authority only over those ends that are connected to the task delegated by the" Legislature.<sup>21</sup> Within those limitations, we suggest that each newly proposed regulation by the Board be analyzed using the two-part test noted above as set forth in the *Dufrene* case prior to promulgation to ensure that the Board will not exceed its statutory authority with the promulgation of the new rule. We further suggest that the three-part test articulated in the *All Pro Paint* case be

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<sup>14</sup> *Id.* at 114.

<sup>15</sup> See *State v. All Pro Paint & Body Shop, Inc.*, 93-1316 p. 5 (La. 7/5/94), 639 So.2d 707, 711.

<sup>16</sup> *Id.* (emphasis added).

<sup>17</sup> *Id.*

<sup>18</sup> *Schwegmann Brothers Giant Super Markets v. McCrory*, 237 La. 768, 787-788 (La.1959).

<sup>19</sup> *All Pro Paint*, 639 So.2d at 712.

<sup>20</sup> *Realty Mart, Inc.*, 336 So.2d at 54.

<sup>21</sup> *Piazza's Seafood World, L.L.C. v. Odem*, 2007-2191 (La.App. 1 Cir. 12/23/08), 6 So.3d 820, 828. See also *Department of Children & Family Serv. ex. rel. A. L. v. Lowrie*, 2014-1025 (La. 5/5/15); 167 So.3d 573, 587.

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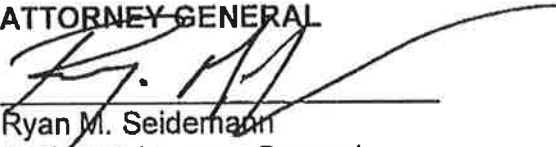
applied to any proposed regulations to further ensure that the Board's proposed regulatory action is not a violation of the delegation granted by the Legislature.

We trust this adequately responds to your request. However, if our office can be of further assistance, please do not hesitate to contact us.

Yours very truly,

**JEFF LANDRY**  
**ATTORNEY GENERAL**

By:



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JL/RMS/tp