

**State Board of Health, Authority Of. Board of Health, Authority Of. Rules, Board of Health. Health Officer, Assistant For. Disinfection, Fumigation, Etc., by Health Officer.**

1. A health officer cannot create the office of assistant, but may employ persons to aid him in the discharge of his duties.

2. A person exposed to contagious disease on a railway car may be detained in such car until the same has reached a point where clothing, car, etc., may be fumigated and disinfected.

3. A person afflicted with scarlet fever, diphtheria, etc., may be removed from a railway car when in transit.

4. Employer, foreman, etc., in charge of a camp employing a large number of men may be compelled, in certain cases, to furnish accomodation for quarantine when required by Board of Health.

5. Money received by Board of Health from undertakers who apply for licenses may be, with certain limitations, used by the Board in defraying expenses of examination of undertakers, and in defraying incidental expenses connected therewith.

Helena, Montana, April 30, 1907.

Hon. Thomas D. Tuttle,  
Secretary, State Board of Health,  
Helena, Montana.

Dear Sir:—

I beg to acknowledge receipt of a copy of the rules recently prepared by the State Board of Health, with reference to which you have verbally requested an opinion of this office as to the power and authority of the Board, under the provisions of Chap. 110 of the Laws of 1907, to make certain rules therein contained.

The inquiries made by you involve certain propositions of law which will be stated and answered in their order.

1. Can a county health officer appoint an assistant, as provided in Rule 2, revised.

This rule 2 states in substance that when any contagious or infectious disease shall appear in a remote locality in a county, and when the cost of transportation to and from such locality would be more than the cost necessary to secure an assistant, that a local officer may appoint an assistant to represent him in such case, and that the remuneration of such assistant shall be paid by the county in lieu of traveling expenses of the health officer; provided that the health officer shall be responsible for the faithful performance of the duties imposed on such assistant. The Act in question (Chap. 110, Laws 1907) does not authorize the appointment of an assistant in the sense of creating an office; hence a local health officer cannot create the office of "Assistant Health Officer." But, subject to the limitations prescribed in said rule

2. a local health officer may employ some suitable person to assist him in the discharge of his duties, but it must also be borne in mind that there are certain duties which the law requires a health officer to "personally supervise". (Sec. 16).

2. Can a person who has been exposed to a contagious disease in a railway car be detained in such car until the same has reached a point where clothing, car, etc., may be fumigated and disinfected?

3. Can a person afflicted with scarlet fever, diphtheria, etc., be removed from a railway car when in transit?

Questions 2 and 3 involve the same propositions of law and are provided for by your rules 45 and 45-A. Section 25 of Chapter 110 confers specific authority upon the State Board of Health "to issue and enforce reasonable rules for the restriction and prohibition of any person or persons suffering from communicable, infectious or contagious disease traveling on public conveyances, and shall issue reasonable rules and regulations for the disinfection of the passenger cars or any other public conveyances in which any person or persons suffering from contagious, infectious or communicable disease has been traveling."

The power of the Board to guard the public health in such matters has been directly recognized by the following authorities:

- Lake Shore, etc. Ry. Co. vs. Ohio, 173 U. S. 298.
- Morgan Steamship Co. vs. Louisiana, 118 U. S. 455.
- 11 Notes U. S. Rep. 183.
- Minn. St. P. & S. S. Ry. Co. vs. Milner, 57 Fed 276.
- 21 Cyc. 394.
- 23 Am. & Eng. Ency. Law, 536.
- 7 Cyc. 467.
- Highland vs. Shulte 123 Mich. 360.
- Fraud Police Power, Sec. 123.
- Commerce Clause by Prentice & Egan, 757.

The chief objection that has been made to state or local board of health exercising the authority now under discussion, has been that it was an unwarranted interference with the Inter-State Commerce Clause of Constitution of the United States, and was an invasion of the power of Congress to enact laws for the regulation of inter-state and foreign commerce. But as early as the case of *Brown vs. Maryland*, 13 Wheaton, 419, Chief Justice Marshall recognized that the removal or destruction of infectious or unsound articles was undoubtedly an exercise of the police powers of the State, and an exception to the prohibition resulting from the exclusive power of Congress to regulate the operations of foreign and inter-state commerce, and that the laws of the United States expressly sanction the health laws of the several states. And in the *License Cases*, 5 How. 504, 576, Chief Justice Taney declared that:

"It must be remembered that disease, pestilence and pauperism are not subjects of commerce, although sometimes among the attendant evils. They are not things to be regulated and trafficked in, but to be prevented as far as human foresight or human means can guard against them."

And in *Crutcher vs. Ky.* 141 U. S. 47, Justice Bradley, with great clearness and force, stated the distinction between an exercise of police power by a state, and an attempt to legislate upon matters of interstate or foreign commerce which are exclusively within the power of the Federal Government. The preservation of health being paramount to all things else, the United States has universally recognized the right and authority of the several states to enact and enforce reasonable and necessary laws and rules for the accomplishment of that purpose.

It may not be improper, however, to remark that the stoppage of railway trains or cars, or the detention of travelers, or the removal of afflicted persons from a train, should only be resorted to in extreme cases, and then exercised with caution so as to entail as little delay and inconvenience as possible. And passengers detained within an infected coach should not be carried beyond their places of destination unless it is absolutely necessary to prevent the spread of the disease. In all of these matters the circumstances attendant upon each particular case must be a guide; and as these rules will most probably be enforced by the local and county boards of health, it may be well for your Board to give specific instruction to such health officers with reference to these matters.

4. Can an employer, foreman, etc., in railway construction and other camps employing a large number of men, be compelled to furnish accommodations for quarantine in case of the prevalence of contagious disease in the camp?

This rule is so obviously just as to require no further comment than its mere statement. Of course, it cannot be made to apply to every employment of a few men either in temporary or permanent camps, but would apply particularly to permanent camps, as for railway construction, etc., where large numbers of men not residents of the State have been brought in, and who will depart as soon as their work is completed. For it is a known fact ordinarily in such cases a hospital fee is retained from the wages of the men so employed.

5. Can the money received by the board from undertakers who apply for licenses be used by the board in defraying the expenses of examination of undertakers, or printing shipping blanks, licenses, and other incidental expenses, and in carrying out the rules regarding the burial of the dead by a licensed embalmer?

The law does not fix any fee to be paid by undertakers, but the Board, in the exercise of its authority, and by rule 61, requires undertakers to pass an examination and to obtain a license and to pay a small fee therefor. The money so received may be used by the Board to defray the expenses of such examination, the printing of licenses shipping blanks, and other necessary incidental expenses incurred in carrying out the rules requiring the burial of the dead by licensed embalmers, and not specifically provided for in the law itself.

However, it is within the province and jurisdiction of the Governor and the State Board of Examiners to make specific inquiry into all receipts and disbursements, and the Board of Health should therefore,

at least semiannually, on the 30th of May and the 30th of November in each year, make report to the State Board of Examiners, containing an itemized statement of all receipts and disbursements, and the said statement should also be included in any report made to the Governor of the State.

Respectfully submitted,

ALBERT J. GALLEN,

Attorney General.