

Fund is really a trust fund in which the public has no direct interest; and

A warrant may be legally drawn thereon to pay the expenses of one who is not a representative of the State Board of Health and not on the State payroll, but who acted in a personal capacity representing the State Association of Embalmers, a private association, as a representative to the Embalmers Convention held outside the State of Montana.

January 25, 1934.

So much of your communication to us of recent date as is relevant here is as follows:

"Your opinion is respectfully requested as to whether a warrant may be legally drawn from the Embalmers License Fund for an amount of \$171.25 on a claim wherein it is set forth that the expenditures are in excess of \$4.00 per day, and shall include the cost of sending a representative to the Embalmers Convention held outside the State of Montana.

"The claim is filed by one not a representative of the State Board of Health or one on the State payroll, but by one who acted in a personal capacity representing the State Association of Embalmers, a private association.

"The 1933 Legislative Assembly appropriated from the Embalmers License Fund 'all fees and earnings to carry out the provisions of Section 2456, R. C. M. 1921.'

"Section 2456, R. C. M. 1921, provides 'The State Board of Health shall make all needful rules and regulations for the transportation of dead bodies, \* \* \* and to this end they may establish a system of licensing embalmers and undertakers.'

"It appears that, pursuant to Section 2456, supra, the State Board of Health has created and established a board to be known as the State Board of Embalmers of the State of Montana (Regulation 1, State Board of Health governing embalming, transportation of dead, and registration of deaths).

"It would further appear as if one member of the State Board of Health is a member of the so created Embalming Board, and two members of the said Board are appointed to membership on the Board by the members

**Opinion No. 428.**

**Embalmers' License Fund—Claim for Expenses of Representative to Convention.**

**HELD:** The Embalmers' License

of the State Board of Health (Regulation VII, Supra).

"The monies received from embalmers licenses is to be transmitted to the State Treasurer and credited to the licensed Embalmers Fund, and it appears that the said fund 'shall be used for the purpose of defraying expenses of the State Board of embalmers, including the expenses of a delegate to the annual meeting of the National Funeral Directors Association and membership in the same, and on recommendation of the licensed Embalmers Board, may be used for educational purposes' (Regulation XI, Supra).

"It does not appear as if the licensed Embalmers Fund was created by the Legislature, but was created by the regulations of the State Board of Health under the above cited regulations. \* \* \*

"The question then arises in this fund subject to Code provisions providing for \$4.00 per diem to those drawing per diem allowances from the State, and may it be spent under the regulations of the Board, and is the appropriation made by the 1933 Legislative Assembly broad enough to permit of the expenditures as set forth in the regulations of the Board created by a Board."

The legislature has authorized the State Board of Health to license undertakers and embalmers (Section 2456, Revised Codes 1921), but it has not undertaken to fix any license fee to be paid by undertakers and embalmers. Moreover, it has not attempted to confer any express power on the State Board of Health so to do. Indeed, the fixing of license fees or occupation taxes is peculiarly a legislative function which cannot be delegated to any state board or bureau. (State v. Camp Sing, 18 Mont. 128; State ex rel. Carter v. Kall, 53 Mont. 162; 12 C. J. 839.)

It appears the Embalmers' License Fund, so-called, is made up of moneys voluntarily paid by persons seeking a license from the State Board of Embalmers to engage in the occupation of embalming human bodies and of moneys annually paid by persons who regularly follow such an occupation. The deposit is really a trust fund in which the public has no direct interest and need not have been covered into the state treasury at all, and the proviso

to Section 193, Revised Codes 1921, may well apply to the disbursement of the same. (State ex rel. Koch v. Barrett, 26 Mont. 62; State ex rel. Sherman v. Pape, 174 Pac. 468; State v. Board of Regents, 264 S. W. 698; Riley v. Forbes, 227 Pac. 768; State ex rel. Ledwith v. Brian, 120 N. W. 916; 59 C. J. 228, 240.)

It is true that the legislature in the regular sessions of 1931 and 1933 took cognizance of the Embalmers' License Fund to the extent of appropriating therefrom in general terms all fees and earnings to enable the Board of Embalmers' Examiners to carry out the provisions of Section 2456, Revised Codes 1921, but we do not think that that materially affects the situation here existing.

As the individual who filed the claim was not at the time he incurred the expenses, on which the claim is based, engaged in any service to the State of Montana, but was merely the representative of the State Association of Embalmers, it cannot be said that Chapter 40, Laws of 1933, has any application.

The fund being a trust fund created partly to meet a claim of the kind here presented, we advise that you draw a warrant upon the same for the sum of \$171.25 in favor of the claimant. In so advising we assume, of course, that the claim reached your office in the regular way and has had the approval of the Board of Examiners.