people in Const 1963, art 9, § 7, that the income tax shall not be graduated as to rate or base.

Therefore, in response to your first question, it is my opinion that a board of education of a school district is presently without statutory authority to levy an income tax or other excise taxes.

The answer to your first question makes an answer to your second question unnecessary.

FRANK J. KELLEY,
Attorney General.

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MORTUARY SCIENCE, State Board of Examiners in: Rule making power.

Administrative rule requiring advertising to disclose name of licensee in charge of each funeral establishment operating under an assumed or fictitious name is valid. Branch establishments are subject to the rule.

Opinion No. 4756 February 26, 1973.

Board of Examiners in Mortuary Science
1116 South Washington Avenue
Lansing, Michigan 48926

You have requested my opinion as to the validity and applicability of a rule promulgated by the state board of examiners in mortuary science dealing with advertising by persons licensed under 1949 PA 268, as amended, being MCLA 338.861 *et seq*; MSA 14.509(1) *et seq*.

The rule under discussion is 1954 AC R338.864, which reads as follows:

> "No person who has received a funeral director's license, an embalmer's license, or a mortuary science license, under the provisions of the Michigan law, shall either by himself or in connection with others, advertise in any newspaper, magazine, or on any sign, stationery, billhead, or other printed matter, the name of any person who is not a licensed funeral director, embalmer, or mortuary science licensee.
>
> "Whenever a funeral establishment is conducted under an assumed or fictitious name, or under the name of a deceased licensee, the name of the licensed funeral director, or mortuary science licensee, in charge must appear in all advertising and printed matter related to that establishment as being in charge of such establishment, and the name of the licensed funeral director, or mortuary science licensee, must appear on the establishment."

The legislature granted rule making authority to the board in section 2 of Act 268, *supra*, by the following language:

> ". . . Said board is authorized to . . . adopt and promulgate such rules and regulations for the transaction of its business and the betterment and promotion of the standards of service and practice to be followed in the profession of mortuary science in the state of Michigan,

as it may deem expedient and consistent with the laws of the state. . . ." MCLA 338.862; MSA 14.509(2)

Thus, it is apparent the board has broad rule-making authority conditioned upon its promulgated rules being consistent with the laws of the state.

Advertising is discussed in sections 5 and 10(3b) of Act 268. Section 5 reads in pertinent part:

> "Any individual whose name appears in connection with that of a funeral establishment shall be considered as actively engaged in the profession of funeral directing or the practice of mortuary science and must hold a funeral director's license or a license to practice mortuary science. If such funeral establishment is a corporation or partnership, then all active members of said corporation or partnership, together with those individuals whose names shall appear or be used in connection with the name of the corporation or partnership shall also be licensed funeral directors or be licensed to practice mortuary science: . . ." MCLA 338.865; MSA 14.509(5)

Section 10(3b) defines unprofessional conduct as including:

> "b. False or misleading advertising as a funeral director, advertising or using the name of an unlicensed person in connection with that of any funeral establishment; . . ." MCLA 338.870; MSA 14.509(10)

The above cited sections are re-enactments without substantial change of the comparable sections of the predecessor act, 1939 PA 229, as amended.

In OAG 1943-1944, No 24653, p 112 (October 1, 1942), the issue was whether certain advertising of a funeral home published in a daily newspaper violated the 1939 act. The advertising contained pictures of not only licensed embalmers employed by the firm, but also of other employees. In deciding that this advertising did not violate the statute, the opinion concluded:

> "In our opinion the above quoted provision of said Section 5 of Act 229, Public Acts of 1939 was enacted to prevent misrepresentation and to prevent the perpetration of fraud and to assure that all persons actively engaged in directing at funerals are actually licensed funeral directors.
>
> "We do not believe that the advertisement referred to in your letter violates the spirit of the provision quoted above because from the ad itself it is apparent that the persons referred to have duties which no way relate to the actual directing at funerals." (p 113)

The reasoning of the attorney general is applicable to the present act in considering both of the advertising sections. The court stated in *City of Grand Rapids* v *Crocker,* 219 Mich 178 (1922):

> " 'Where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout.' 36 Cyc. p. 1132." (p 187)

The statutory advertising prohibitions are designed to protect the public from those who would hold themselves out to perform the mortuary science services without benefit of licensure.

Since the rule-making power of the board is conditioned upon the rule being "consistent with the laws of the state," any regulations of advertising must be consistent with the mortuary science law. *G. F. Redmond & Co* v *Michigan Securities Comm,* 222 Mich 1 (1923), contains an often cited discussion by our Supreme Court of the powers of administrative agencies. The court states:

> ". . . The ambit of the power of the commission is in a field, meted and bound by the express provisions of the law. The law under which the commission acted designates with as much particularity as is consistent with public policy and the rights of all concerned, the power vested in the commission and the reasons for exercising the same. While the police power, inherent in the State, is incapable of being defined and subjected to limitations in the abstract, its exercise in any given direction, such as the regulation of trades, occupations and professions, is capable of definite expression, and must, if delegated to a commission or administrative board, define its purpose and the means of attainment thereof, and do this in language leaving no wide administrative discretion, and no discretion at all of a legislative nature. The power to carry out a legislative policy enacted into law under the police power may be delegated to an administrative board under quite general language, so long as the exact policy is clearly made apparent, and the administrative board may carry out in its action the policy declared and delegated, but it cannot assume it has been vested with power beyond expressed legislative delegation, and must ever seek its way in the light shed by the legislative mandate. . . ." (pp 4-5)

The legislature, in sections 5 and 10(3b), *supra,* clearly indicated that the agency charged with the enforcement of the statute be concerned with advertising by its licensees. It is equally clear that 1949 PA 268, as amended, *supra,* is a valid exercise of the state's police power designed to safeguard the public health, safety and welfare. In *Glicker* v *Michigan Liquor Control Comm,* 160 F2d 96 (1947), the court stated:

> ". . . The rule was well stated in Francis v. Fitzpatrick, 129 Conn. 619, 30 A.2d 552, 554, 145 A.L.R. 505, 507, as follows: 'The business being one which admittedly may be dangerous to public health, safety and morals (cases cited) the scope of the legislature's power to regulate it is much broader than in the case of its regulation of an ordinary lawful business essential to the conduct of human affairs. "In the one business no citizen has an absolute right to engage; in the other all citizens have the right, and an equal right, to engage. The difference is vital". (Cases cited.) Nevertheless, the police power of the state, like other governmental authority, is to be used for the common welfare, impartially and without unreasonable discrimination. (Cases cited.) Accordingly, while as between liquor selling and other callings less potentially harmful to the public the legislature may discriminate, there is no warrant for unjustly discriminating between

those persons who may be, or may desire to become, engaged in the same calling of selling liquor.' . . ." (p 101)

Therefore, we must determine if the rule in question treats all licensees equally. In the case of a funeral establishment operating as a sole proprietorship, or as a partnership using the partners' names, these business forms would satisfy the act and the first paragraph of the rule, *supra,* by the mere use of the name in the advertisements.

When a funeral establishment chooses to operate under an assumed name, or as a corporate entity, but for the second paragraph of the rule, the public would have no way of reasonably knowing, without further inquiry, with whom they were actually dealing or whether such persons were licensed. Thus, the burden of identifying licensees in advertising by funeral establishments is equally shared by all of the available business firms.

In *Lane* v *Department of Corrections, Parole Board,* 383 Mich 50 (1970), the Supreme Court of Michigan cited with approval a long standing rule of statutory construction:

> "In *Roosevelt Oil Company* v. *Secretary of State* (1954), 339 Mich 679, we said (p 694):
>
> " 'It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently given to a statute by the executive department charged with its administration. . . . And such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required.' " (p 56)

An administrative agency construes its enabling legislation through the promulgation of administrative rules. The state board of examiners in mortuary science has interpreted sections 5 and 10(3b), *supra,* through 1954 AC R338.864. The rule applies equally to all licensees, no matter what their business form, and serves the proper purpose of requiring that the public be informed of the licensed person with whom they are dealing in each establishment.

Therefore, it is my opinion that 1954 AC R338.864 is a proper exercise of the board's rule making power and is consistent with the laws of the state. The mere inclusion in an advertisement of the names or pictures of persons other than licensees, however, will not violate the rule if it is apparent that these persons do not have duties requiring a license. (OAG 24653, *supra.*)

FRANK J. KELLEY,
Attorney General.