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Final Regulation Agency Background Document

Agency name	Board of Funeral Directors and Embalmers, Department of Health Professions
Virginia Administrative Code (VAC) citation(s)	18VAC65-20-10 et seq.
Regulation title(s)	Regulations of the Board of Funeral Directors and Embalmers
Action title	Permission to embalm and refrigeration of dead human bodies
Date this document prepared	4/17/18

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

At its meeting on January 10, 2017, the Board of Funeral Directors and Embalmers adopted guidance documents on its interpretation of the statutory requirements for express permission to embalm a body and for refrigeration of a dead human body. The amendments in this regulatory action will incorporate the board's guidance on those requirements into its regulations so, if necessary, compliance can be enforced through a disciplinary proceeding.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

N/A

Statement of final agency action

Please provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

On April 17, 2018, the Board of Funeral Directors and Embalmers adopted amendments to 18VAC65-20-10 et seq., Regulations of the Board of Funeral Directors and Embalmers.

Legal basis

Please identify the (1) the agency (includes any type of promulgating entity) and (2) the state and/or federal legal authority for the proposed regulatory action, including the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable. Your citation should include a specific provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

18VAC65-20-10 et seq. Regulations of the Board of Funeral Directors and Embalmers are promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Section 54.1-2400 (6) provides the Board with authority to promulgate regulations to administer the regulatory system:

§ 54.1-2400 -General powers and duties of health regulatory boards

The general powers and duties of health regulatory boards shall be:

...

6. To promulgate regulations in accordance with the Administrative Process Act (§ [2.2-4000](#) et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 (§ [54.1-100](#) et seq.) and Chapter 25 (§ [54.1-2500](#) et seq.) of this title.

Authority for the Board to take disciplinary action for failure to obtain permission to embalm and for refrigeration of human remains is found in:

§ 54.1-2806. Refusal, suspension, or revocation of license.

The Board may refuse to admit a candidate to any examination, refuse to issue a license to any applicant and may suspend a license for a stated period or indefinitely, or revoke any license or censure or reprimand any licensee or place him on probation for such time as it may designate for any of the following causes:

- 1. Conviction of any felony or any crime involving moral turpitude;*
- 2. Unprofessional conduct that is likely to defraud or to deceive the public or clients;*
- 3. Misrepresentation or fraud in the conduct of the funeral service profession, or in obtaining or renewing a license;*

4. *False or misleading advertising or solicitation;*
5. *Solicitation at-need or any preneed solicitation using in-person communication by the licensee, his agents, assistants or employees; however, general advertising and preneed solicitation, other than in-person communication, shall be allowed;*
6. *Employment by the licensee of persons known as "cappers" or "steerers," or "solicitors," or other such persons to obtain the services of a holder of a license for the practice of funeral service;*
7. *Employment directly or indirectly of any agent, employee or other person, on part or full time, or on a commission, for the purpose of calling upon individuals or institutions by whose influence dead human bodies may be turned over to a particular funeral establishment;*
8. *Direct or indirect payment or offer of payment of a commission to others by the licensee, his agents, or employees for the purpose of securing business;*
9. *Use of alcohol or drugs to the extent that such use renders him unsafe to practice his licensed activity;*
10. *Aiding or abetting an unlicensed person to practice within the funeral service profession;*
11. *Using profane, indecent, or obscene language within the immediate hearing of the family or relatives of a deceased, whose body has not yet been interred or otherwise disposed of;*
12. *Solicitation or acceptance by a licensee of any commission or bonus or rebate in consideration of recommending or causing a dead human body to be disposed of in any crematory, mausoleum, or cemetery;*
13. ***Violation of any statute, ordinance, or regulation affecting the handling, custody, care, or transportation of dead human bodies;***
14. *Refusing to surrender promptly the custody of a dead human body upon the express order of the person lawfully entitled to custody;*
15. *Knowingly making any false statement on a certificate of death;*
16. *Violation of any provisions of Chapter 7 (§ 32.1-249 et seq.) of Title 32.1;*
17. *Failure to comply with § 54.1-2812, and to keep on file an itemized statement of funeral expenses in accordance with Board regulations;*
18. *Knowingly disposing of parts of human remains, including viscera, that are received with the body by the funeral establishment, in a manner different from that used for final disposition of the body, unless the persons authorizing the method of final disposition give written permission that the body parts may be disposed of in a manner different from that used to dispose of the body;*
19. *Violating or failing to comply with Federal Trade Commission rules regulating funeral industry practices;*
20. *Violating or cooperating with others to violate any provision of Chapter 1 (§ 54.1-100 et seq.), Chapter 24 (§ 54.1-2400 et seq.), this chapter, or the regulations of the Board of Funeral Directors and Embalmers or the Board of Health;*
21. *Failure to comply with the reporting requirements as set forth in § 54.1-2817 for registered funeral service interns;*
22. *Failure to provide proper and adequate supervision and training instruction to registered funeral service interns as required by regulations of the Board;*
23. *Violating any statute or regulation of the Board regarding the confidentiality of information pertaining to the deceased or the family of the deceased or permitting access to the body in a manner that is contrary to the lawful instructions of the next-of-kin of the deceased;*

- 24. Failure to include, as part of the general price list for funeral services, a disclosure statement notifying the next of kin that certain funeral services may be provided off-premises by other funeral service providers;
- 25. Disciplinary action against a license, certificate, or registration issued by another state, the District of Columbia, or territory or possession of the United States;
- 26. Failure to ensure that a dead human body is maintained in refrigeration at no more than approximately 40 degrees Fahrenheit or embalmed if it is to be stored for more than 48 hours prior to disposition. A dead human body shall be maintained in refrigeration and shall not be embalmed in the absence of express permission by a next of kin of the deceased or a court order; and**
- 27. Mental or physical incapacity to practice his profession with safety to the public.

§ 54.1-2811.1. Handling and storage of human remains.

A. Upon taking custody of a dead human body, a funeral service establishment shall maintain such body in a manner that provides complete coverage of the body and that is resistant to leakage or spillage, except during embalming or preparation of an unembalmed body for final disposition; restoration and dressing of a body in preparation for final disposition; and viewing during any visitation and funeral service.

B. If a dead human body is to be stored for more than 48 hours prior to disposition, a funeral services establishment having custody of such body shall ensure that the dead human body is maintained in refrigeration at no more than approximately 40 degrees Fahrenheit or embalmed. A dead human body shall be maintained in refrigeration and shall not be embalmed in the absence of express permission by a next of kin of the deceased or a court order.

C. If a dead human body is to be stored for more than 10 days prior to disposition at a location other than a funeral service establishment, the funeral service establishment shall disclose to the contract buyer the location where the body is to be stored and the method of storage.

D. Funeral services establishments, crematories, or transportation services shall not transport animal remains together with dead human bodies. Further, animal remains shall not be refrigerated in a unit where dead human bodies are being stored.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The purpose of this regulatory action is to provide clear, enforceable regulations on the meaning of the statutory requirement for “express” permission to embalm and on the requirement to maintain a body in refrigeration at no more than approximately 40 degrees. The Board has received complaints and noted deficiencies on compliance with these requirements. Both the licensees and the public need clarity on these matters so public health and safety is not jeopardized.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both.

Guidance document 65-8 specifies that: Virginia Code §54.1-2806 (26) and §54.1-2811.1 (B) state that a dead human body “shall not be embalmed in the absence of express permission by a next of kin of the deceased or a court order.” The Board interprets “*express permission by a next of kin*” to mean written authorization *to embalm* as a specific and separate statement on a document or contract provided by the facility. Express permission may include direct, verbal authorization *to embalm*, provided it is followed as soon as possible by a written document signed by the next of kin confirming the verbal authorization to embalm and including the time, date, and name of the person who gave verbal authorization.

Guidance document 65-18 specifies that: Virginia Code §54.1-2811.1 (B) states, “if a dead human body is to be stored for more than 48 hours prior to disposition, a funeral services establishment having custody of such body shall ensure that the dead human body is maintained in refrigeration at no more than approximately 40 degrees Fahrenheit or embalmed.” The Board of Funeral Directors and Embalmers interprets this provision as meaning that if a body is to be in the possession of the funeral home or crematory for more than 48 hours from the time the funeral establishment or crematory takes physical possession of the body until embalming, cremation, or burial, the body is to be placed in a mechanical refrigeration unit suitable for storing human remains. The Board does not interpret lowering the air conditioning in a storage room to 40 degrees or packing the body in ice or dry ice as meeting the statutory requirement.

The Board would view evidence of compliance with Virginia Code §54.1-2811.1 (B) as a working refrigeration unit in the funeral home or crematory or a letter of agreement/contract with another funeral establishment, hospital, or morgue to allow the funeral home or crematory to refrigerate in its refrigeration unit. The Board would view evidence of the body being “maintained in refrigeration” as log entries indicating times of placement and removal of a body in refrigeration.

In order to enforce its interpretative statements on permission to embalm and refrigeration of human remains, the Board has incorporated the guidance into its regulations.

Issues

Please identify the issues associated with the proposed regulatory action, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please indicate.

- 1) The primary advantage of the amendments to the public is assurance of proper care of the human remains of their loved ones, so an un-embalmed body is not allowed to deteriorate with refrigeration or conversely, remains are not embalmed without express permission of the next of kin. There are no disadvantages to the public.
- 2) There are no advantages or disadvantages to the Commonwealth, except more clarity in regulation will assist the Board in interpretation of the law.
- 3) The Director of the Department of Health Professions has reviewed the proposal and performed a competitive impact analysis. The Board is authorized under § 54.1-2400 to “*promulgate regulations in accordance with the Administrative Process Act which are reasonable and necessary to administer effectively the regulatory system.*”

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

There are no applicable federal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

There are no localities particularly affected.

Family impact

Please assess the impact of this regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

There is no impact on the family.

Changes made since the proposed stage

Please list all changes that made to the text since the proposed regulation was published in the Virginia Register of Regulations and the rationale for the changes; explain the new requirements and what they

mean rather than merely quoting the proposed text of the regulation. *Please put an asterisk next to any substantive changes.

There were no changes to the text since the proposed regulation was published.

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate. Please distinguish between comments received on Town Hall versus those made in a public hearing or submitted directly to the agency or board.

There was a public comment period from December 25, 2017 to February 23, 2018. A public hearing was held on January 16, 2018 with one question for clarification.

Commenter	Comment	Agency response
Barry Robinson	Supports the proposed regulation and inquired when it might become effective	The regulatory process was explained, and no definitive date given.

All changes made in this regulatory action

Please list all changes that are being proposed and the consequences of the proposed changes. Describe new provisions and/or all changes to existing sections. Explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
510		Sets out requirements for an embalming report.	Subsection A is added to clarify the statutory requirement for express permission to embalm. Express permission must be written authorization as a specific and separate statement on a document or contract provided by the funeral establishment. Express permission may include direct, verbal authorization to embalm, provided it is followed as soon as possible by a written document or statement signed by the next of kin confirming the verbal authorization to embalm and including the time, date, and name of the person who gave verbal authorization. <i>Express permission that is clearly</i>

		<p><i>identifiable protects both the consumer and the funeral establishment. Sometimes a consumer will deny that permission was given and be dissatisfied that a body was embalmed. Verbal authorization is permissible provided it is followed as soon as possible with the written document signed by the next of kin or designee. There are often circumstances in which the decision of whether to embalm has to be made before the next of kin is physically present to sign the paperwork. If the body is to be maintained without embalming, cremation or burial for more than 48 hours, it must be refrigerated – so permission to embalm can be verbally given.</i></p>
	<p>581</p>	<p>Subsection A specifies that if a dead human body is to be in the possession of a funeral establishment or crematory for more than 48 hours from the time the funeral establishment or crematory takes physical possession of the body until embalming, cremation, or burial, the body shall be placed and maintained in refrigeration in a mechanical refrigeration unit suitable for storing human remains in accordance with § 54.1-2811.1(B) of the Code of Virginia.</p> <p><i>The intent of the new subsection is clarity about the statutory requirement for refrigeration. The Code requires refrigeration if a dead human body is to be stored for more than 48 hours prior to disposition; regulations clarify that the 48 hours begins when the establishment or crematory takes physical possession of the body. It also clarifies that “refrigeration” means a mechanical unit capable of storing human remains.</i></p> <p>Subsection B provides that the mechanical refrigeration unit may be located in the funeral establishment or crematory, or the funeral establishment or crematory may enter into an agreement or contract with another funeral establishment, crematory, or other licensed entity for refrigeration in a mechanical refrigeration unit.</p> <p><i>The intent of subsection B is to offer</i></p>

		<p><i>alternatives for smaller funeral homes who do not want to purchase a refrigeration unit to contract with another entity to fulfill the refrigeration requirement. If the body is to be cremated or embalmed with 48 hours, it is not necessary to refrigerate.</i></p> <p>C. Evidence of compliance with the requirement for refrigeration shall be maintained as a log entry or other documentation indicating times of placement in and removal of a body in refrigeration.</p> <p><i>The Board responded to concerns about maintenance of a separate log for refrigeration and included "other documentation" to allow the funeral home to document the times for placement and removal from refrigeration on other records maintained.</i></p>
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