

BILL ANALYSIS

Senate Research Center

H.B. 1538
By: Chisum (Shapleigh)
Government Organization
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Engrossed

DIGEST AND PURPOSE

The Texas Funeral Service Commission (TFSC) regulates the funeral industry to protect the public from deceptive funeral practices. To accomplish its mission, TFSC licenses about 5,000 funeral directors and embalmers, and ensures compliance with continuing education requirements; inspects and licenses 1,280 funeral homes and commercial embalming establishments; registers approximately 200 cemeteries and crematories; and investigates and resolves complaints regarding the industry from consumers. In fiscal year 2002, TFSC, which employs 12 people in Austin, operated on a \$1 million budget and collected \$1.2 million in revenue from industry fees. H.B. 1538 continues the TFSC until 2015 and establishes the framework for industry specific issues, including regulating cemetery and crematory services, public participation in the rulemaking process, cemetery inspections, developing technology solutions to improve TFSC's efficiency, a provisional license program, establishing a cemetery, voluntary disclosure, and enforcement of TFSC rules and regulations.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Finance Commission of Texas in SECTION 33 (Section 711.012, Health and Safety Code) of this bill.

Rulemaking authority is expressly granted to the Texas Funeral Service Commission in SECTION 31 (Section 711.004, Health and Safety Code) and SECTION 33 (Section 711.012, Health and Safety Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 651.001, Occupations Code, by adding Subdivision (12-a) to define "perpetual care cemetery."

SECTION 2. Amends Section 651.002, Occupations Code, to change this chapter's expiration date from September 1, 2003, to September 1, 2015.

SECTION 3. Amends Section 651.003(a), Occupations Code, to provide that this chapter does not affect the authority of the Texas Department of Banking to enforce Chapter 154, Finance Code, or to regulate perpetual care cemeteries.

SECTION 4. Amends Subchapter A, Chapter 651, Occupations Code, by adding Section 651.004 to read as follows:

Sec. 651.004. REGULATION OF CEMETERY AND CREMATORY SERVICES. (a) Requires the Texas Funeral Service Commission (TFSC) to regulate cemetery and crematory services as provided by this chapter and Chapter 716, Health and Safety Code.

(b) Prohibits TFSC from regulating cemetery or crematory services that occur after burial or inurnment, unless the services relate to the care and treatment of the remains in an urn, casket, or outer enclosure.

SECTION 5. Amends Sections 651.057(a) and (b), Occupations Code, as follows:

(a) Requires the governor to designate one member, rather than one public member, of TFSC as the presiding officer of TFSC to serve in that capacity at the pleasure of the governor.

(b) Makes a conforming change.

SECTION 6. Amends Section 651.151(a), Occupations Code, to include ethics in the list of areas for which TFSC is required to establish standards for individuals issued a license under this chapter, rather than for funeral directors and embalmers.

SECTION 7. Amends Section 651.152, Occupations Code, to require, rather than authorize, TFSC to adopt rules, establish procedures, and prescribe forms necessary to administer and to enforce this chapter and Chapters 714 and 715, Health and Safety Code.

SECTION 8. Amends Subchapter D, Chapter 651, Occupations Code, by adding Section 651.1525, as follows:

Sec. 651.1525. EARLY PARTICIPATION IN RULEMAKING PROCESS; GUIDELINES. (a) Requires TFSC, before publishing a proposed rule for public comment, to seek advice and opinions from persons who will be most affected by the rule. Requires, at a minimum, those persons to include consumer groups and trade associations that represent persons from each group regulated by TFSC, including funeral directors and cemetery and crematory operators.

(b) Requires TFSC to develop guidelines to implement this section that establish a method to determine who will be most affected by a proposed rule.

SECTION 9. Amends Section 651.154, Occupations Code, by amending Subsection (a) and adding Subsection (c), as follows:

(a) Requires TFSC to set the cemetery or funeral establishment license fee in amounts reasonable and necessary to administer this chapter in addition to other fees.

(c) Prohibits TFSC from charging a fee to a perpetual care cemetery, including a fee for issuing or renewing a license issued under this chapter.

SECTION 10. Amends Section 651.157, Occupations Code, as follows:

Sec. 651.157. New heading: INSPECTION OF CEMETERY, CREMATORY, OR FUNERAL ESTABLISHMENT. (a) Requires a licensed cemetery, crematory, or funeral establishment, except as provided by Subsection (b), to be inspected at least once every two years by an agent of TFSC or by an agent of the state or a political subdivision authorized by TFSC to make inspections on its behalf.

(b) Requires TFSC, if it finds a violation of this chapter or of Chapter 193, 361, 711, 714, 715, or 716, Health and Safety Code, to inspect the cemetery, crematory, or funeral establishment annually until TFSC determines that the establishment is free of violations.

(c) No changes to this subsection.

(d) Makes a conforming change.

(e) Requires a premises on which funeral directing, interment, cremation, or embalming is practiced to be open at all times to inspection for any violation of this chapter or of Chapter 193, 361, or 716, Health and Safety Code, by certain persons.

(f) Makes a conforming change.

SECTION 11. Amends Subchapter D, Chapter 651, Occupations Code, by adding Section 651.1571, as follows:

Sec. 651.1571. INSPECTION REQUIREMENTS FOR CERTAIN CEMETERIES; EXCEPTION FOR PERPETUAL CARE CEMETERIES. (a) Provides that this section and Section 651.157 do not apply to perpetual care cemeteries.

(b) Prohibits a cemetery from being inspected except under certain circumstances and requires TFSC to give lower priority to an inspection of a cemetery than to an inspection of a crematory or funeral establishment, except as provided by Section 651.157(b).

SECTION 12. Amends Section 651.164, Occupations Code, as follows:

Sec. 651.164. New heading: LICENSE EXPIRATION. Makes conforming changes.

SECTION 13. Amends Subchapter D, Chapter 651, Occupations Code, by adding Sections 651.166 and 651.167, as follows:

Sec. 651.166. USE OF TECHNOLOGY. Requires TFSC to develop and implement a policy requiring the executive director and TFSC employees to research and propose appropriate technological solutions to improve TFSC's ability to perform its functions. Sets forth the requirements of the technological solutions.

Sec. 651.167. NEGOTIATED RULEMAKING AND ALTERNATIVE DISPUTE RESOLUTION PROCEDURES. (a) Requires TFSC to develop and implement a policy to encourage the use of certain rulemaking and alternative dispute resolution procedures.

(b) Requires TFSC's procedures relating to alternative dispute resolution to conform, to the extent possible, to any model guidelines issued by the State Office of Administrative Hearings for the use of alternative dispute resolution by state agencies.

(c) Requires TFSC to designate a trained person to perform certain duties.

SECTION 14. Amends Sections 651.202(a) and (b), Occupations Code, to make conforming changes.

SECTION 15. Amends Section 651.2595(d), Occupations Code, to change the time frame in which TFSC is required to approve or deny a provisional license holder's application for a license from the 180th day after the date on which the provisional license is issued, to the second anniversary of the date on which the provisional license is issued. Makes a conforming change.

SECTION 16. Amends Section 651.261, Occupations Code, to require a license holder to conspicuously display the holder's license in each place of business at which the license holder practices, deleting text referring to funeral directing or embalming.

SECTION 17. Amends Sections 651.267(a) and (d), Occupations Code, as follows:

(a) Authorizes TFSC, on application, to reissue a license issued under this subchapter, rather than a funeral director's or embalmer's license, to a person whose license has been suspended or revoked.

(d) Authorizes a license that has been revoked or suspended for a period of five years or more to be reinstated only after the applicant passes the applicable examination. Deletes text specifying a written embalming or funeral directing exam.

SECTION 18. Amends Sections 651.302(a) and (b), Occupations Code, as follows:

(a) Includes enrollment in an accredited school or college of mortuary science and employment by a funeral director to learn funeral directing or embalming under the instruction and supervision of the funeral director in the prerequisites for TFSC to issue a provisional license. Deletes text referring to taking the written examination given by TFSC.

(b) Redesignates Subdivisions (5) and (6) as Subdivisions (4) and (5). Makes conforming and nonsubstantive changes.

SECTION 19. Amends Section 651.303(b), Occupations Code, to set as the minimum and maximum service by the provisional license holder in the terms of employment at 17 hours a week or 73 hours a month.

SECTION 20. Amends Subchapter G, Chapter 651, Occupations Code, by adding Section 651.3035, as follows:

Sec. 651.3035. MORTUARY COLLEGE CREDIT FOR PROVISIONAL LICENSE PROGRAM. (a) Authorizes a case completed under Section 651.303(d) to serve as credit for both mortuary school or college and the provisional license holder program.

(b) Authorizes a mortuary school or college to designate a funeral director or embalmer who is supervising a provisional license holder under Section 651.303 as a clinical instructor for the provisional license holder.

SECTION 21. Amends Section 651.304(b), Occupations Code, to include in the required content of the provisional license holder's report a list of any credit earned for mortuary school or college under Section 651.3035. Redesignates Subdivision (3) as Subdivision (4).

SECTION 22. Amends the heading to Subchapter H, Chapter 651, Occupations Code, to read as follows:

**SUBCHAPTER H. LICENSE REQUIREMENTS: CEMETERY, FUNERAL, AND
COMMERCIAL EMBALMER ESTABLISHMENTS**

SECTION 23. Amends Subchapter H, Chapter 651, Occupations Code, by adding Section 651.353, as follows:

Sec. 651.353. CEMETERY ESTABLISHMENT REQUIREMENTS. (a) Prohibits a cemetery from conducting a cemetery business unless the facility is licensed by TFSC.

(b) Provides that this chapter does not require a cemetery to be owned by a person licensed under this chapter.

(c) Requires an applicant, to obtain an initial cemetery license, to apply for a license and pay the licensing fee. Requires TFSC to issue an initial cemetery license on determining that the applicant satisfies the requirements of this chapter.

(d) Sets forth the entities to which this section does not apply.

SECTION 24. Amends Section 651.354, Occupations Code, as follows:

Sec. 651.354. New heading: RENEWAL OF CEMETERY OR FUNERAL ESTABLISHMENT LICENSE. (a) Makes a conforming change and includes a reference to exceptions provided by Subsection (d).

(b) and (c) Make conforming changes.

(d) Requires the cemetery, to renew a license for a perpetual care cemetery, to submit a renewal on a form prescribed by TFSC. Provides that the license is

renewed on receipt of the form by TFSC.

SECTION 25. Amends Section 651.4065(c), Occupations Code, to require the operator of, rather than the registrant for, a cemetery to sign a purchase agreement for a cemetery. Deletes text referring to a crematory.

SECTION 26. Amends Section 651.455(a), Occupations Code, provide that a person regulated by TFSC violates this chapter if the person uses a statement that misleads or deceives the public, including a fraudulent statement or any other type of a false or misleading statement regarding certain issues, including the licenses held by the personnel in the operation of the cemetery, crematory, or funeral establishment or an activity regulated under this chapter, including the sale of funeral-related goods or services.

SECTION 27. Amends Section 651.456, Occupations Code, include violating any state law governing the transportation, storage, refrigeration, inurnment, interment, or disinterment of a dead human body as a violation of this chapter.

SECTION 28. Amends Section 651.459(a), Occupations Code, to include wilfully making a false statement a death certificate, including forgery of a physician's signature a document required by this chapter or a rule adopted under this chapter, as a violation of this chapter. Makes nonsubstantive changes.

SECTION 29. Amends Subchapter K, Chapter 651, Occupations Code, by adding Section 651.5026, as follows:

Sec. 651.5026. TEMPORARY LICENSE SUSPENSION OR RESTRICTION; DISCIPLINARY PANEL. (a) Requires the presiding officer of TFSC to appoint a three-member disciplinary panel composed of two funeral industry members and one public member of TFSC to determine whether a funeral director's or embalmer's license should be temporarily suspended or restricted.

(b) Provides that Chapter 551, Government Code, does not prohibit the disciplinary panel from holding a meeting by telephone conference call if convening the panel at one location is inconvenient for any member of the panel.

(c) Requires the disciplinary panel to temporarily suspend or restrict the license if the panel determines from the information presented to it with or without a hearing, that the license holder has violated this chapter or a rule adopted under this chapter and would, by the license holder's continued unrestricted activity, constitute a continuing threat to the public welfare.

(d) Authorizes the suspension or restriction to be without notice or hearing under certain circumstances.

(e) Requires TFSC, if the disciplinary panel affirms the temporary suspension or restriction at a hearing, to schedule an informal compliance meeting that meets the requirements of Section 2001.054(c), Government Code, and this chapter to be held as soon as practicable except in certain circumstances.

(f) Requires TFSC, if the funeral director or embalmer is unable to show compliance at the informal meeting under Subsection (e), to file a formal complaint under this chapter as soon as practicable.

(g) Prohibits the facts that were the basis for the temporary suspension or restriction, if the disciplinary panel does not temporarily suspend or restrict the license after considering the information presented to it at a hearing under Subsection (c), from being the sole basis of another proceeding to temporarily suspend or restrict the funeral director's or embalmer's license. Authorizes TFSC to use those same facts in a later investigation to obtain new information that may

be the basis for the temporary suspension or restriction of a funeral director's or embalmer's license, including facts presented to the disciplinary panel and facts known to TFSC at the time evidence was presented to the disciplinary panel.

SECTION 30. Amends Subchapter M, Chapter 651, Occupations Code, by adding Section 651.603, as follows:

Sec. 651.603. VOLUNTARY DISCLOSURE; IMMUNITY. (a) Provides that except as provided by this section, a person who makes a voluntary disclosure of a violation of this chapter is immune from an administrative or civil penalty for the violation disclosed.

(b) Sets forth the conditions under which a disclosure is voluntary.

(c) Provides that a disclosure is not voluntary for purposes of this section if it is a report to TFSC required solely by a specific condition of an enforcement order or decree.

(d) Provides that the immunity established by Subsection (a) does not apply and authorizes an administrative or civil penalty to be imposed under applicable law under certain circumstances.

(e) Provides that a penalty imposed under Subsection (d) should, to the extent appropriate, be mitigated by certain factors.

(f) Provides that in a civil or administrative enforcement action brought against a person for a violation for which the person claims to have made a voluntary disclosure, the person claiming the immunity has the burden of establishing a prima facie case that the disclosure was voluntary. Provides that after the person claiming the immunity establishes a prima facie case of voluntary disclosure, other than a case in which under Subsection (d) immunity does not apply, the enforcement authority has the burden of rebutting the presumption by a preponderance of the evidence or, in a criminal case, by proof beyond a reasonable doubt.

(g) Requires a person conducting an audit under this section, in order to receive immunity under this section, to give notice to TFSC of the fact that the person is planning to commence the audit. Requires the notice to specify the facility or portion of the facility to be audited, the anticipated time the audit will begin, and the general scope of the audit. Authorizes the notice to provide notification of more than one scheduled audit at a time.

(h) Provides that the immunity under this section does not apply if a court or administrative law judge finds that the person claiming the immunity has repeatedly or continuously committed significant violations and has not attempted to bring the facility or operation into compliance, so as to constitute a pattern of disregard of this chapter.

(i) Defines "pattern."

(j) Requires a violation that has been voluntarily disclosed and to which immunity applies to be identified in a compliance history report as being voluntarily disclosed.

SECTION 31. Amends Section 711.004(f), Health and Safety Code, to authorize the Texas Funeral Service Commission, rather than the Board of Health, to adopt rules to implement this subsection.

SECTION 32. Amends Section 711.007(b), Health and Safety Code, to authorize TFSC to bring a proceeding, in addition to other entities and persons authorized to do so. Redesignates

Subdivision (6) as Subdivision (7).

SECTION 33. Amends Subchapter A, Chapter 711, Health and Safety Code, by adding Section 711.012, as follows:

Sec. 711.012. RULES. (a) Authorizes the Finance Commission of Texas (finance commission) to adopt rules to enforce and administer Sections 711.003, 711.008, 711.021-711.024, 711.032-711.035, 711.038, 711.040-711.042, 711.052, 711.061, and 711.062 relating to perpetual care cemeteries.

(b) Authorizes TFSC to adopt rules, establish procedures, and prescribe forms to enforce and administer Sections 711.003, 711.008, 711.010, 711.011, 711.021-711.035, 711.038, 711.041, 711.042, 711.061, and 711.062 relating to cemeteries that are not perpetual care cemeteries.

SECTION 34. Amends Subchapter D, Chapter 711, Health and Safety Code, by adding Sections 711.053-711.056, as follows:

Sec. 711.053. DEFINITION. Defines "commissioner."

Sec. 711.054. ENFORCEMENT BY FINANCE COMMISSION OF TEXAS. Authorizes the finance commission to use remedies available under Chapter 712 to enforce a section listed under Section 711.012(a) relating to perpetual care cemeteries.

Sec. 711.055. ENFORCEMENT BY COMMISSIONER. (a) Provides that Chapter 2001, Government Code, applies to a proceeding under this section.

(b) Authorizes the banking commissioner (commissioner), after notice and opportunity for hearing, to impose an administrative penalty on a person who violates this chapter or a final order of the commissioner or rule of the commission and does not correct the violation before the 31st day after the date the person receives written notice of the violation from the Texas Department of Banking, or engages in a pattern of violations, as determined by the commissioner.

(c) Prohibits the amount of the penalty for each violation from exceeding \$1,000 for each day the violation occurs.

(d) Requires the commissioner, in determining the amount of the penalty, to consider the seriousness of the violation, the person's history of violations, and the person's good faith in attempting to comply with this chapter. Authorizes the commissioner to collect the penalty in the same manner that a money judgment is enforced in district court.

(e) Authorizes the commissioner, in addition to any penalty that may be imposed under Subsection (b), to bring a civil action against a person to enjoin a violation described in Subsection (b) that has not been corrected within 30 days after receipt by the person of written notice of the violation from the commissioner. Authorizes the civil action to be brought in the district court of the county in which the cemetery is operated.

(f) Authorizes the commissioner to issue an order to cease and desist if a violation described in Subsection (b) has not been corrected within 30 days after receipt by the person of written notice of the violation from the commissioner. Requires any order proposed under this subsection to be served on the person, to state the grounds for the proposed order with reasonable certainty, and to state the proposed effective date, which is prohibited from being less than 15 days after receipt by the person. Provides that unless the person requests a hearing within 15 days after the receipt, the order is effective as proposed.

Sec. 711.056. PATTERN OF WILFUL DISREGARD. (a) Requires the trier of fact, if after a hearing conducted as provided by Chapter 2001, Government Code, the trier of fact finds that a violation of this chapter or a rule of the finance commission establishes a pattern of wilful disregard for the requirements of this chapter or rules of the finance commission, to recommend to the commissioner that the maximum administrative penalty permitted under Section 711.055 be imposed on the person committing the violation, or that the commissioner cancel or not renew the person's permit under Chapter 154, Finance Code, if the person holds such a permit.

(b) Authorizes, for the purposes of this section, violations corrected as provided by Section 711.055 to be included in determining whether a pattern of wilful disregard for the requirements of this chapter or rules of the finance commission exists.

SECTION 35. Amends Section 712.002, Health and Safety Code, to make conforming changes.

SECTION 36. Amends Section 715.003, Health and Safety Code, to include the TFSC in the list of necessary parties to the action on which citation is required to be served under Section 715.006

SECTION 37. Amends Section 715.006(a), Health and Safety Code, to make a conforming change and redesignate Subdivision (4) as Subdivision (5).

SECTION 38. Repealer: Section 651.1575 (Inspection of Cemetery or Crematory), Section 651.302(c) (Application; Issuance of Provisional License), Section 651.455(b) (Retail Price List; Cemetery or Crematory), and Section 651.506(j) (Disciplinary Proceedings; Hearing Proceedings), Occupations Code.

SECTION 39. Provides that on September 1, 2003, all functions and activities related to Chapter 711, Health and Safety Code, performed by the Texas Department of Health (TDH) immediately before that date are transferred to TFSC; a rule or form of TDH related to Chapter 711, Health and Safety Code, is a rule or form of TFSC and remains in effect until amended or replaced by TFSC; a reference in law or an administrative rule to TDH that relates to Chapter 711, Health and Safety Code, means TFSC; and a complaint, investigation, or other proceeding before TDH that is related to Chapter 711, Health and Safety Code, is transferred without change in status to TFSC, which assumes, as appropriate and without a change in status, the position of TDH in an action or proceeding to which TDH is a party.

SECTION 40. Repealer: Subchapter N, Chapter 651 (Registration Requirements; Cemeteries and Crematories), Occupations Code, effective March 1, 2004.

SECTION 41. Provides that a cemetery is not required to hold a license under Chapter 651, Occupations Code, as amended by this Act, until March 1, 2004.

SECTION 42. Effective date: September 1, 2003.