

Opinion No. 49-5219

May 25, 1949

BY: JOE L. MARTINEZ, Attorney General

TO: Murray A. Hintz State Director Department of Public Welfare Santa Fe, New Mexico

{*44} I have your letter of April 14, 1949, asking my opinion on eight questions regarding the application and effect of Chapter 169 of the Laws of 1949. In general this Act provides that persons who are 65 years of age or over, who are not inmates of public institutions, who do not have a husband or wife able and responsible to furnish support in the amount of \$ 50.00 a month or more, and who have not made voluntary assignments of property for the purpose of qualifying for aid are eligible for assistance. The amount of assistance is set forth in Section 2 of the Act which provides as follows:

"Section 2. Amount of Assistance. The amount of aid to be paid out of funds appropriated for Public Welfare for Old Age Assistance to which any applicant for old age assistance shall be entitled is no less than, when added to the income (including the value of currently used resources, but excepting causal income and inconsequential resources) of the applicant from all other sources, Fifty (\$ 50.00) Dollars per month; provided, where a husband or wife are granted assistance under this act, the second grant shall not exceed Thirty (\$ 30.00) Dollars per month. In the event revenues are insufficient to pay the full amount, the funds available shall be prorated equally on the basis to which each recipient is entitled.

"The amount of assistance which any applicant eligible under this act shall receive, after being determined by the Department of Public Welfare, shall not be changed, unless the circumstances of the recipient are changed, and then only after investigation by the Department and a determination that such change in the amount of assistance is justified. No discrimination between persons eligible, after income and currently used resources are considered, shall be permitted."

The answers to the majority of these questions necessitate a decision as to whether the act requires a flat pension of \$ 50.00 or as much thereof as is available to all aged persons who are also needy. It should be noted that Section one of this act provides that assistance is to be granted to persons meeting the requirements of the act, and also the requirements of Section 73-111 to 73-121 of the New Mexico 1941 Compilation.

Section 73-115 of the 1941 Compilation provides as follows:

"The amount of assistance which any person shall receive, shall be determined by the department with due regard to the resources and necessary expenditures of the case, and the conditions existing in each case and in accordance with the rules and regulations made by the state department, and shall be sufficient, when added to all

other income and support {*45} available to the recipient, **To provide such person with a reasonable subsistence compatible with decency and health."**

Since the above quoted section requires that the amount of subsistence to be paid shall provide the recipient with a subsistence compatible with decency and health, we feel that the 1949 Act merely establishes another category of eligible persons and that we now have two categories: (a) Persons 65 years of age or over who are not inmates of public institutions and who actually are in need of assistance, and (b) Persons who in addition to meeting the requirements of (a) are also ill and need medical assistance in addition to the assistance necessary for food, clothing and shelter.

Having construed the act in this manner, we will proceed to answer the questions presented.

(1) Under this new act might the second grantee (spouse) be given more than \$ 30.00 per month in case of special need, such as expensive nursing or medical service either in a hospital or nursing home?

Since we have decided that special need for health purposes places the recipient in a separate and distinct category, the \$ 30.00 limitation upon aid to the spouse is not applicable and such aid as is necessary for medical purposes may be given to the second grantee.

(2) Does the \$ 30.00 maximum refer to the sum of the State and Federal funds or to the State funds only?

Since Federal funds are turned over to the State and are then appropriated by the State for the purpose, in addition to the State funds, the \$ 30.00 maximum would refer to the total of State and Federal funds.

(3) The law states that a recipient "shall be entitled to no less than . . . \$ 50.00". If, in order to meet actual need, as in bedridden cases, it becomes necessary to pro-rate all cases so that some will get less than \$ 50.00 and others more than \$ 50.00, will the Department be accused of discrimination and will the letter of the spirit of the law be violated?

As we have decided that the health cases come under a separate category not covered by Chapter 169 of the Laws of 1949, the Welfare Department may pro-rate any and all cases so that those who do not need assistance for health purposes may receive less than \$ 50.00, while those who do need aid for health purposes may receive whatever amount is necessary.

(4) If the first grantee needs \$ 50.00 and has no income and the second grantee needs \$ 50.00 and has a \$ 20.00 regular income, would the second payment be \$ 30.00 or \$ 10.00?

In considering this question we must bear in mind that New Mexico is a community property state and that any income received by either the husband or the wife is subject to a present vested interest of 50% thereof in the other spouse. Therefore, in the problem presented, if one spouse has a \$ 20.00 regular income and the other spouse has none, and both need \$ 50.00, the \$ 20.00 received by one spouse could be divided between them and the first spouse would receive \$ 40.00 and the second \$ 20.00.

(5) Does the "no less than \$ 50.00" mean that everyone except second recipients shall get at least \$ 50.00 and some \$ 60.00 or \$ 70.00 or more according to budgetary need, or does it mean that when there is enough money they shall all get at least \$ 50.00 plus a pro-rate increase but no individual {*46} or varying increases? Would action based on the interpretation in the first part of this question result in the type of discrimination forbidden under the last sentence of Section 2 of the Act?

Based on the dual category interpretation of old age assistance in the state, pro-ration could be made at the discretion of the Department of Public Welfare. It is obvious that there is not sufficient money to pay all persons over 65 who are needy \$ 50.00 a month with additional payments to those who need special medical care. We feel that the provisions of Section 2 of the 1949 Act only necessitate proration in those cases where there is not enough money available to pay \$ 50.00 per month to those not needing medical payments. Therefore, those needing medical payments could receive whatever amount is necessary for that purpose with the remainder of those receiving assistance being prorated according to the amount of money available. Assuming that there might be even less money available, it might also be necessary for the Department to prorate those needing medical payments. This pro-ration could be made without regard to those under the flat \$ 50.00 provision of the 1949 Act. The discrimination referred to in Section 2 of the Act, in our opinion, refers only to discrimination among persons covered by the 1949 Act and does not apply to differences in payments made between such people and those entitled to additional money for medical payments.

(6) If a man is receiving assistance and he has resources in the amount of \$ 25.00, his actual grant would be \$ 25.00. If he has a wife only sixty-four, may her needs be included in the grant up to the amount of budgetary need which may be over \$ 50.00?

In answering this question, we must also remember that the resources of the husband might be community property and would be subject to the interpretation given in the answer to question (4) above. The wife, of course, is not entitled to payments under the Act if she is not at least 65 years of age. However, if a payment to the husband for services to be rendered to him in lieu of nursing services or other necessary services would in fact obviate the necessity for such services, such a payment could be made.

(7) Does the wording "no less than \$ 50" mean that everyone who is eligible is entitled to \$ 50.00, but those who need more may receive grants according to actual budgetary needs? If a person received more than \$ 50.00, at what point shall pro-rating begin? That is, shall it be on the \$ 50.00 level or at the budgetary need level?

As stated in the answer to question (5), pro-ration would apply only to those receiving grants for other than medical payments. This act, however, would probably prevent payments of more than \$ 50.00 for needs other than health or medical reasons, unless every other needy person who is 65 or more was receiving payments of an identical amount.

(8) If, according to the act, assistance shall be granted if a person does not make a voluntary assignment or transfer of property for the purpose of qualifying for such aid, does this supersede the last law which limits this to two years, or does this mean that if a person makes such a transfer to qualify for assistance, that he would never be eligible for assistance?

The provision of Section 1(d) of the 1949 Act is inconsistent with the two-year provision of the prior law. However, it does not seem {*47} logical to say that the Legislature intended that a person who transferred property in the value of say \$ 100.00 for the purpose of receiving assistance should be forever barred from receiving the same. It would be within the power of the Department of Public Welfare to make a regulation taking into consideration the amount of money transferred and the length of time which that amount would support the applicant under the assistance scale being used by the Department of Public Welfare. Thus, if the applicant had transferred \$ 500.00 and assistance was being paid at the rate of \$ 50.00 per month, such an applicant should be denied assistance by the Department for a period of ten months.

Trusting the foregoing sufficiently answers your inquiries, and with kind personal regards, I am