

Opinion No. 53-5776

July 6, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. F. A. Vigil, Secretary New Mexico State Board of Pharmacy P. O. Box 1411
Santa Fe, New Mexico

{*176} On June 29th you addressed a request to this office for an opinion concerning the combination of the State Board of Pharmacy with the State Pharmaceutical Association. In that letter you set out a resolution asked at the last Pharmaceutical Association meeting. The resolution is as follows:

"Whereas, our Executive Secretary, Max Hood, has tendered his resignation, and in view of the fact that no individual for this position is under consideration at this time, be it therefore

{*177} RESOLVED, That the New Mexico Pharmaceutical Association go on record instructing the Board of Directors to meet with the members of the State Board of Pharmacy for the purpose of selecting an individual to serve as Executive Secretary for both the New Mexico Pharmaceutical Association and the New Mexico State Board of Pharmacy. And, be it further

RESOLVED, That the Board of Pharmacy and the Pharmaceutical Association's offices be combined for efficient and economical operation. And, be it further

RESOLVED, That the New Mexico Pharmaceutical Association through its Board of Directors consider favorably retaining the services of Miss Nelda Grogan who has served the organization so efficiently during the past four years."

First, we will direct our attention to the provisions in the resolution and then discuss the law applicable to the State Board of Pharmacy. The first provision concerning the consideration of the replacement of Mr. Max Hood as executive secretary, of course, does not involve the Board of Pharmacy whatsoever. The resolution below the statement of the resignation of Mr. Hood to the effect that the Board of Directors of the Pharmaceutical Association and the State Board of Pharmacy, meeting together in selecting an individual to serve as executive secretary of the New Mexico Pharmaceutical Association and New Mexico State Board of Pharmacy is perfectly permissible under the law if the State Board of Pharmacy desires that person to be the executive secretary. The law (§ 51-901 et seq. N.M.S.A., 1941 Comp.) concerning the secretary provides as follows:

"The said board shall organize within thirty days from and after their appointment and annually thereafter, by election of a president and a treasurer **from its membership**

and a secretary, who may or may not be a member. The secretary shall receive a salary to be fixed by the board and all necessary expenses in the performance of his duties."

By the reading of this language it is apparent that the Board of Pharmacy may select whomever it chooses as its secretary. There is no compulsion that the secretary so chosen be required to have only that job; consequently the State Pharmaceutical Association can appoint the same man or woman if it so chooses.

The second resolution contained in the document of resolutions sent to us concerns the combination of the Board of Pharmacy and the Pharmaceutical Association's offices. The Law (51-901, et seq.) does not express anything concerning the setting up of offices by the State Board of Pharmacy, but does, however, provide the Board of Pharmacy shall have the duty to "enforce the provisions of all laws of the state which pertain to the practice of pharmacy, the manufacture, production, sale, or distribution of drugs, chemicals or poisons, used in the compounding of prescriptions and to their standards of strength and purity." The Board of Pharmacy shall have the power to make by-laws, rules and regulations necessary for the protection of the public in the field of pharmacy and may employ chemists, inspectors, agents and clerical administrative help for the proper conduct of its business.

The reading of the above cited provisions makes it quite apparent that it is contemplated that the operations be set up by the State Board of Pharmacy. There would be nothing {^{*178}} illegal in the expenditure of moneys for such purpose. The Pharmaceutical Association and the State Board of Pharmacy could, quite conceivably, maintain offices under the same roof and within the same office space; however, the Pharmacy law requires that disbursements by the State Board of Pharmacy be made according to the law applicable and audited by the State Auditor. The Pharmaceutical Association and the State Board of Pharmacy would, by necessity, be required to separate their expenditures for rent and clerical help and the assumption by the State Board of Pharmacy of the full time services and the full pay of any help, clerical or otherwise, who did not spend the time for which he or she is paid would be in violation of the so-called "deadhead" statute of this state. Therefore, it would be permissible for the State Board of Pharmacy and the Pharmaceutical Association to divide the office space and the clerical help, but the division must be a realistic one and the State Board must only pay for the services rendered directly to that board, thus the problem involving the combination of office space is not a legal one but one of administration.

The third resolution passed by the New Mexico Pharmaceutical Association concerns the consideration of one Nelda Grogan and her services as being satisfactory and the recommendation that she be retained. If this is agreeable with the members of the State Board of Pharmacy the services of Miss Grogan or any other individual may be retained; however, in any such combination of office space and of personnel the dictates of the State Board of Pharmacy must by law govern. The Pharmaceutical Association does not have any official standing in the law and therefore any combination or any working agreement worked out between the association and the

board must be completely dependent upon the dictates and the judgment of the State Board of Pharmacy.

In your letter you called to our attention the fact that the Board of Pharmacy has a rule that "The Secretary of the Board of Pharmacy shall be chosen and elected from one of its own members." This provision is permissible under the law, as the State Board may make any rules which it deems advisable in the enforcement of the provisions of the Board of Pharmacy Act. This rule can be changed at the will of the board, however, and is enforceable only so long as the board shall choose to enforce it. The Pharmaceutical Association would have no standing to question the rule and if the members of the Board of Pharmacy so desire that rule must stand paramount over any of the desires or wishes of the Pharmaceutical Association.

The New Mexico Board of Pharmacy must, under the law, deposit all moneys collected with the State Treasurer. All collections are set out by statute and expended only from an approved budget approved by the State Auditor, the Budget Auditor and the State Board of Finance. All expenses are vouchered for and paid by warrant, signed by the State Auditor. All moneys collected by the Board of Pharmacy become state funds and are subject to budgeting, appropriation and other controls by the Legislature of the State of New Mexico. The New Mexico Pharmaceutical Association, in contrast, is a voluntary association. Its membership is voluntary. The association collects dues from its members and the association and its board of directors has the full discretion concerning expenditures, amount of dues, etc. The Pharmaceutical Association is not bound by any statute other than the statutes governing any and all {^{*}179} trade organizations.

The State Auditor, after any merger, would be justified in requiring substantial proof that the moneys expended were expended by the State Board of Pharmacy and for the purposes set out in the act governing the State Board of Pharmacy and that the moneys expended were not in any way expended for the purposes of the New Mexico Pharmaceutical Association.

We sincerely hope that this answers your inquiry.

By: Fred M. Standley

Assist. Attorney General Division I