

## Opinion No. 53-5865

December 8, 1953

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Mr. F. A. Vigil, Secretary New Mexico Board of Pharmacy 342 Hillside Santa Fe, New Mexico

{\*290} Receipt is acknowledged of your letter dated November 9, 1953, in which you request an opinion on four questions concerning the Pharmacy Board. I will endeavor to answer them in the order in which you have submitted them in your letter.

Your first question is: To what degree does the power of the Inspector extend, such as confiscating a prescription file with forged initials of the registered pharmacist, supposedly filling the prescriptions? You stated that in this particular case the registered man was out of the state and an unregistered man filled these prescriptions.

The statutes that I find are pertinent to this question are, § 51-2908, 1941 Comp., p.s., which reads in part as follows:

"The inspector appointed by the board of pharmacy for the purpose of administering and enforcing {\*291} of this act in complying with his duties, is hereby fixed with the powers and duties of municipal, county and state law enforcement officers."

§ 51-914, 1941 Comp. reads in, part as follows:

"Any member of the Board of Pharmacy is hereby empowered and authorized to demand and inspect any prescription, prescription file or poison register, in any drug store, pharmacy or other store in the State of New Mexico."

§ 71-654, 1941 Comp., p.s., reads in part as follows:

"The board or its duty authorized agent shall have free access at all reasonable hours to any factory, warehouse, or establishment in which drugs, devices, or cosmetics are manufactured, processed, packed, or held for introduction into commerce, or to enter any vehicle being used to transport or hold such drugs, devices, or cosmetics in commerce, for the purpose:

(1) of inspecting such factory, warehouse, establishment, or vehicle to determine if any of the provisions of this act are being violated, and

(2) to secure samples or specimens of any drug, device, or cosmetic after paying or offering to pay for such sample. It shall be the duty of the board to make or cause to be made examinations of samples secured under the provisions of this section to determine whether or not any provision of this act is being violated."

This last statute specifically authorizes the board or their duly authorized agent to have access at all reasonable hours to any factory, warehouse or establishment in which drugs, devices or cosmetics are manufactured, processed, packed, or held for introduction into commerce, or to enter any vehicle being used to transport or to haul such drugs, devices or cosmetics in commerce for the purposes of (1) inspection of such factory, warehouse, establishment or vehicle to determine if any of the provisions of this act, referring to §§ 71-639 -- 71-657, are being violated and (2) to secure samples or specimens of any drug, devices or cosmetics after paying or offering to pay for such samples.

It is therefore the opinion of this office that in view of the above quoted statutes an inspector has all of the authority granted to municipal, county and state law enforcement officers, including the power to obtain search warrants in all cases concerning the violation or violations of the pharmacy laws of the State of New Mexico.

Your second question is divided into two parts, the first being (a) Would it be permissible to make public, through the Pharmaceutical Association drug store bulletin, "El Boticario", an item pertaining to the sale of a legendary drug to a non-drug store?

The pertinent part of § 71-655, 1941 Compilation, p.s., reads as follows:

"(b) The board may also cause to be disseminated such information regarding drugs, devices, and cosmetics as the board deems necessary in the interest of public health and the protection of the consumer against fraud. Nothing in this section shall be construed to prohibit the board from collecting, reporting, {\*292} and illustrating the results of the investigations of the board."

It is the opinion of this office that the above quoted statute authorizes or permits the Pharmacy Board to make public, through the Pharmaceutical Association drug store "El Boticario" an item pertaining to the sale of a legendary drug to a non-drug store, if a conviction or convictions have been obtained in the courts of the State of New Mexico but not otherwise.

In other words, you may publish any violation of the Pharmacy laws that has become a public record.

In answer to the second part of your No. 2 question, as to whether or not the name of the firm mentioned in the item published may be so published without incriminating any board or agency involved; it is the opinion of this office from the language in the above cited statute that the Board is permitted and authorized to disseminate all reports and other information and the fact that the firms, persons or agencies named in said item are published in an outside publication would not incriminate the Board or agency mentioned in all cases where conviction or convictions have been obtained in the courts of this state but not otherwise.

This opinion is further based on § 71-643 (c), 1941 Compilation, p.s., which reads as follows:

"No publisher, radio-broadcast licensee, or agency or medium for the dissemination of an advertisement, except the manufacturer, packer, distributor, or seller of the article to which a false advertisement relates, shall be liable under this section by reason of the dissemination by him of such false advertisement, unless he has refused, on the request of the Board to furnish the Board the name and post office address of the manufacturer, packer, distributor, seller, or advertising agency, residing in the State of New Mexico who cause him to disseminate such advertisement."

In your third question, you desire to know whether the Pharmacy Board has the power to charge druggists or wholesalers with violations of sections carrying penalties, then sit and collect a fine at the meeting. I believe that the following statutes are pertinent in answering this question.

§ 71-645, 1941 Compilation, p.s., reads as follows:

"It shall be the duty of the attorney general and or the various district attorneys of this state to whom the Board reports any violation of this act, to cause appropriate proceedings to be instituted in the proper courts without delay and to be prosecuted in the manner required by law. Before any violation of this act is reported to any such attorney for the institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views before the Board or its designated agent, either orally or in writing, in person, or by attorney, with regard to such contemplated proceedings."

§ 71-646, 1941 Compilation, p.s., reads as follows:

"Nothing in this act shall be construed as requiring the Board to report for the institution of proceedings under this act, minor violations of this act, whenever {\*293} the Board believes that the public interest will be adequately served in the circumstances by a suitable written notice or warning."

Section 51-915, 1941 Compilation, hereinbefore quoted, provides that for the enforcement of the several penalties prescribed by the pharmacy act, same shall be prosecuted by the various district attorneys in the name of the State of New Mexico.

This statute further provides that the Court shall impose the penalty of either a fine, imprisonment or both and to order any defendant or defendants committed to jail until fine and costs are paid to the Court.

§ 71-645, 1941 Compilation, p.s., hereinbefore quoted, provides that all violations of the Food and Drug Act, as this chapter is called, reported by the Board shall be prosecuted by the Attorney General's office and the various district attorneys with a proviso that each accused shall be given appropriate notice and a hearing before the Board and the

right to be represented by counsel. This same statute hereinbefore quoted further provides that the Board may determine not to report minor violations of this Act whenever the Board believes that the public interest will be served and the circumstances being a suitable notice of warning.

In none of the above statutes nor in any of the rules and regulations filed by the Pharmacy Board on January 9, 1952, with the Supreme Court Librarian, do I find any authority or power which the Board has or is given to impose fines or penalties for violation of the Pharmacy laws or the Food and Drug Act.

It is therefore the opinion of this office that the Pharmacy Board has no authority to charge druggists or wholesalers at a meeting of the Board and then set out and collect a fine for any violation or violations of the Pharmacy Laws at said meeting from said druggists or wholesalers.

Your fourth question is whether the Pharmacy Board may make public in their magazine "El Boticario" the names of any druggists or wholesaler that violates the Pharmacy Law.

§ 71-655, 1941 Compilation, p.s., reads as follows:

"(a) The board may cause to be published from time to time reports summarizing all judgments, decrees, and court orders which have been rendered under this act, including the nature of the charge and the disposition thereof."

"(b) The board may also cause to be disseminated such information regarding drugs, devices, and cosmetics as the board deems necessary in the interest of public health and the protection of the consumer against fraud. Nothing in this section shall be construed to prohibit the board from collecting, reporting, and illustrating the results of the investigations of the board."

It is plain from the language in in the discretion of the board members as to whether or not they want to make public any names of a druggists who have been called before the Pharmacy Board for violation or the above quoted statute that it is violations of any and all Pharmacy laws, provided the charges are found to be true.

It is therefore the opinion of this office that it is discretionary with the Board members as to whether they make public in their magazine "El Boticario" the name of any druggist {\*294} or druggists charged with violations of any or all Pharmacy Laws of the State of New Mexico, provided that conviction in every case is obtained first for any violation or violations of the Pharmacy Laws of the State and not otherwise.

Trusting this fully answers your inquiries, I remain,

By: Hilario Rubio

Assist. Attorney General