

Opinion No. 54-5943

April 21, 1954

BY: RICHARD H. ROBINSON, Attorney General

TO: Dr. M. K. Wylder, Chairman State Board of Health Medical Arts Square NE
Albuquerque, New Mexico

{*394} On the 30th day of March, 1954, you addressed an inquiry to this office concerning the legality of a proposed merger of the Department of Public Health into the Department of Public Welfare. At the time your letter was received, we did not feel that we were in possession of sufficient information in regard to the duties of the proposed plan to render an opinion. Consequently, on March 31, this office addressed a letter to Governor Edwin L. Mechem, with copies to Mr. Richard Strahlem and Mr. Edward M. Hartman. We received a letter from the Governor and a letter and legal memorandum from Mr. Strahlem's office, and also had a conference with Mr. Fred Comstock of Mr. Strahlem's office on the matter.

The original plan submitted to us indicated that a full and complete merger of the two offices was contemplated. The conferences and the letters to us indicated that the merger idea had been abandoned and that a consolidation was then in contemplation. Black's Law Dictionary defines "merger" of corporations as:

"A merger of corporations consist in the uniting of two or more corporations by the transfer of property of all to one of them, which continues in existence, the others being swallowed up or merged therein. In regard to the survivorship of one of the constituent corporations, it differs from a 'consolidation' wherein all the consolidating companies surrender their separate existence and become parts of a new corporation."

and "consolidation" of corporations as:

"The union into one corporate body of two or more corporations which had been separately created for similar or connected purposes. In England this is termed 'amalgamation.' When the rights, franchises, and effects of two or more corporations are, by legal authority and agreement of the parties, combined and united into one whole, and committed to a single corporation, the stockholders of which are composed of those (so far as they choose to become such) of the companies thus agreeing, this is in law, and according to common understanding, a consolidation of such companies, whether such single corporation, called the consolidated company, be a new one then created, or one of the original companies, continuing in existence with only larger rights, capacity and property."

It should be noted that both the Department of Public Health and the Department of Public Welfare are public corporations. Sec. §§ 71-103 and 73-103, N.M.S.A., 1941 Comp.

The Department of Public Welfare was created originally by the Laws of 1919, Chapter 147, and created in its present form by Chapter 18, Laws of 1937. Chapter 117 of the Laws of 1921 created a Bureau of Public Health within the Department of Public Welfare. Chapter 39 {*395} of the Laws of 1937 created the Health Department in its present form. Section 17, Chapter 39 of the Laws of 1937, reads as follows:

"Transfer of duties. -- In all acts or parts of acts not hereby specifically repealed relating to public health in which the 'department of public welfare,' the 'Bureau of public health' or the 'board of health' are referred to shall hereafter be deemed to refer to the state department created hereunder and all powers and duties imposed by any such acts or parts of acts upon said 'department of public welfare,' 'bureau of public health' or 'board of health' relating to public health shall hereafter be vested in said 'state department'."

Thus, the two departments had a common head from 1921 until 1937, at which time the Legislature severed the two departments and created a Department of Public Welfare and a separate Department of Public Health. The Legislature, as noted above, made both of these departments separate public corporations.

In 67 CJS 120, the question of consolidation or merger of two or more public offices is treated as follows:

"The governmental authority which possesses the power to create an office has, in the absence of some provision of law passed by a higher authority, the applied power to abolish such office, **or to consolidate two or more offices** which it has created. Thus, in the absence of constitutional restriction, an office created by the legislature may be abolished by it." (Emphasis supplied).

Thus, the Legislature, having the power to create the Department of Public Health and the Department of Public Welfare, is the sole authority, short of a constitutional amendment by the people, authorized to abolish, merge or consolidate two departments. *Byrd et al. v. State ex rel. Colquett et al.*, (Ala.), 102 So. 223; *Higgenbotham v. City of Baton Rouge*, 59 S. Ct. 705, 306 U.S. 535, 83 L. 7d. 968. Therefore, the consolidation or merger of the two departments must be effectuated by an act of the Legislature.

The two departments, and the boards thereof, are given certain duties which appear to endow the Department of Public Health with a duty of control over at least some of the functions of the Department of Public Welfare. Section 1 of Chapter 67 of the Laws of 1953 requires the Department of Public Health to "license any public or private institutions, child care facilities, and other agencies providing assistance care, or other services to children who are crippled, neglected, delinquent, or dependent, or to the aged, blind, feeble-minded, and other dependent persons." Also a duty imposed by the same section, chapter and law requires the Department of Public Health to bring an action in court for the enforcement of health laws and the rules, regulations and orders promulgated by the State Board of Public Health. The Department of Public Welfare is charged with the duty of the care for the aged, blind, feeble-minded, dependent children

and other dependent persons, and maintains institutions throughout the State for the effectuation of such duties. Thus, the Department of Public Health is required to license the institutions maintained by the Department of Public Welfare.

The Legislature could place these duties within the Department of Public {396} Welfare and such would not be an unconstitutional action, but by mere Executive Order, after the Legislature has acted to separate the two, it would appear that the action would create a conflict without legislative sanction and thus would be a violation of the principle enunciated in the case of Haymaker vs. State ex rel. McCain, 22 N.M. 400, 163 P. 248, LRA 1917D 210, wherein the court held that where there was a conflict between the duties of two positions, particularly where the duty of one position is subservient to that of the other.

Section 71-107, N.M.S.A., 1941 Comp., as amended, Cumulative Pocket Supplement, reads as follows:

"Director of health department. -- The state board shall appoint a director of public health who shall continue in office at the pleasure of the board and said director shall be a person having a degree of Doctor of Medicine, licensed or eligible for licensure in the state of New Mexico and having recognized experience and special training in sanitary science and public health administration and whose salary shall be \$ 6,000.00 per annum, and shall be allowed traveling and other expenses as provided by law. The director of public health shall be the administrative head of the state department of public health, custodian of its property and records, shall maintain his office at the seat of the state government, and devote his entire time to his official duties.

"After the state board of public health shall have determined what positions of employment are necessary to carry out the provisions of this act and the salaries to be paid each, the state director, with the approval of the state board, may employ and discharge such assistants."

Thus, it can be seen that the Director of Public Health is the administrative head of the Department of Public Health and can be answerable only to the Board of Public Health. Any action to place under another person, regardless of the title of that person, the "property and records" of the Department of Public Health would be an illegal action and violative of the above section.

In connection with the maintenance of records in the Department of Public Health, we wish to call your attention to § 13-501, N.M.S.A., 1941 Comp., as amended, Cumulative Pocket Supplement, which reads as follows:

"Citizens authorized to inspect public records -- Exceptions. -- Every citizen of this state has a right to inspect any public records of this state except records pertaining to physical or mental examinations and medical treatment of persons confined to any institutions and except as otherwise provided by law."

By reason of this statute, the records of the Director of the Department of Public Health are, in some instances, not open to public inspection, and the duty of the custodian of those records, to-wit, the Director of Public Health, in the maintenance of the secrecy of those records, would prohibit him, the Governor, or any other person, from transferring the duty as custodian of the records to any other person.

Of course, the two departments may cooperate in the fulfillment of certain administrative functions, i.e. office space in the Capitol, telephone service, office space in the various {*397} counties, etc., but the power of the Director of Public Health to employ and discharge personnel within the limits prescribed by the Merit System and the power to maintain complete administrative control over all of the functions given the Department of Public Health by law can be abrogated only by legislative action or by a constitutional mandate.

We sincerely hope that this answers your inquiry.