

Opinion No. 60-08

January 20, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Dr. John Mason Director Division of Communicable Disease Control New Mexico
Department of Public Health Santa Fe, New Mexico

QUESTION

QUESTIONS

1. On the basis of the existing state statutes, can this Department compel tuberculosis patients who are considered a danger to the community to be hospitalized?
2. If we can, what legal steps would have to be taken to bring about the compulsory hospitalization of a tuberculosis patient?
3. If a person with tuberculosis could be sent to a hospital by court order, would hospitalization be limited to the State Tuberculosis Hospital, or could a person be sent to a VA hospital, or to a Public Health Service Hospital, for example?
4. Would compulsory hospitalization apply also to Indians living on reservations?
5. What legal action would have to be taken if a tuberculosis patient sent to a hospital by court order were to leave the hospital against medical advice?
6. Can this Department require a person suspected of having tuberculosis to submit to certain examinations, such as chest x-ray and sputum examinations, to determine whether the person has tuberculosis and should be isolated or hospitalized?
7. On the basis of existing statutes, does the State Board of Public Health have the right to adopt regulations to carry out compulsory hospitalization of recalcitrant tuberculosis patients?

CONCLUSIONS

1. Yes, see analysis.
2. See analysis.
3. See analysis.
4. See analysis.

5. See analysis.

6. Yes, see analysis.

7. Yes, see analysis.

OPINION

{*343} ANALYSIS

The Constitution of New Mexico contains no provisions which are pertinent to the questions involved herein.

The statutes of New Mexico which have some degree of pertinence are:

"12-3-1F (P.S.) -- Any health authority, upon receiving notice that any person is infected with disease dangerous to the public health, shall secure his voluntary isolation or file a complaint with any justice of the peace or judge of the district court having jurisdiction over the infected person. The complaint shall state the facts as related, under oath, by the health authority or the facts according to his information and belief. Any justice of the peace or judge of the district court having jurisdiction may upon proper complaint issue a warrant under his hand directed to the sheriff or any constable of his county, requiring the sheriff or constable under the direction of the complaining health authority, to remove and isolate the person complained of, and to take possession of convenient houses or lodgings and to produce other necessaries for the accommodation and relief of such person and the safety of the public health."

"12-1-3(11). To bring action in court for the enforcement of health laws and the rules, regulations and orders promulgated by the state board of public health."

"12-1-4. The state department shall be responsible for the administration of the public health activities of the state as hereinafter provided, and in that respect shall:

(1) Supervise the health of the people of the state.

* * * *

(5) Establish, maintain and enforce isolation and quarantine.

* * * *

(19) Establish, maintain and enforce such rules and regulations as may be necessary to carry out the intent of this act and to publish same."

"12-1-6. * * * It shall also be the duty of the state board to make, promulgate and enforce such rules and regulations as are necessary to carry out the provisions of this act."

Section 12-2-10 defines the jurisdiction of the district health officers.

"12-3-19. QUARANTINE PROVISIONS -- REMOVAL OF PATIENT TO SEPARATE HOUSE. -- When any person coming from abroad, or residing within any county of this state shall lately before have been infected with smallpox, bubonic plague, diphtheria, or other sickness, dangerous to the public health, the board shall make effectual provisions, in the manner which they shall judge best, for the safety of the public health, by removing such sick or infected person to a separate house, and providing for the keeping of such person or persons there, until danger of contagion is past: Provided, however, that unless such person is indigent the expense of enforcing this section shall be borne by the infected person or persons so isolated."

In view of the complete lack of case law in New Mexico relating to the precise questions you have raised, we have found it necessary to resort to the legal encyclopedias and case law of other jurisdictions. Our research has disclosed that it is generally concluded that the preservation of the public health {**344*} is one of the duties devolving upon the State as a sovereign power and that the enactment and enforcement of health measures find ample support in the police power which is inherent in the State and which the latter cannot surrender. **25 Am. Jur., Health, Sec. 3, p. 287.** Further, the general rule is that statutes delegating to subordinate governmental agencies and authorities the power to enact and enforce health regulations are to be liberally construed in order to effectuate the purpose of their enactment. **25 Am. Jur., Health, Sec. 8, p. 291.** So long as such regulations are reasonable and impartial and not against the general policy of the State, they must be submitted to by individuals for the good of the public. Regulations by an agency authorized to promulgate them will be sustained if upon a reasonable construction there appears to be some substantial reason why they will promote the public health and if they are reasonably adapted to or tend to accomplish the result sought. To this end, the constitutional guarantees of due process and equal protection of the laws were not intended to limit the subjects from which the police power of a state may lawfully be exerted. **25 Am. Jur., Health, Sec. 21, pp. 299, 300.**

An abundance of cases on the subject have been decided by the highest appellate courts of the several states of the Union. These cases uniformly hold that health authorities are possessed of almost unlimited authority to protect the public health by the exercise of the police powers of the states.

It verges on the incomprehensible that questions of the character propounded in the letter which called forth this opinion should of necessity be asked in this year 1960. It would seem that adequate laws and regulations would have been enacted and cases decided during the days when the great Southwest was a haven of refuge for thousands of "consumptives" who came here in the hope that the brilliant sunshine, the high dry air

and the generally salubrious climate would check the ravages of the dread disease and restore the afflicted ones to some measure of health.

Despite the fact that greatly improved techniques have very considerably reduced the incidence of tuberculosis, it is very apparent from your county by county New Mexico tubercular statistics that the disease is far from having been eradicated.

This office desires to acknowledge receipt from your department of copies of the pertinent statutes of some 37 states. Likewise, we acknowledge receipt of the Attorney General's opinions of Colorado, Arizona and California. It is significant that a considerable number of the 37 states have, more or less recently and perhaps rather belatedly, recognized the problem posed by the "recalcitrant tubercular" by passing laws to control the situation.

Many of said laws and regulations of the other states are even yet little more than a "hodgepodge" which would require attorney general's opinions and court decisions ad infinitum to effect a practical and workable approach to the problem posed by the "recalcitrant tubercular".

Opinion No. 56-103 of the Arizona Attorney General states that exposing one's self to the public while having a contagious disease is a public offense, and that the county attorney has the duty to institute proceedings before a magistrate for the arrest of such person charged with or suspected of such offense. The court has the responsibility of determining the guilt or innocence of the accused, and may impose a jail sentence not to exceed six months, a fine not to exceed \$ 300.00 or both.

On May 8, 1958 an opinion was rendered by the Attorney General of Colorado on the subject "Recalcitrant Persons" afflicted with tuberculosis.

{*345} In answer to the question, "Does the state, county or local health departments and boards have the power to confine and hold recalcitrant persons afflicted with active tuberculosis," the conclusion was Yes.

Elaborating on the questions hereinabove listed, we hold:

1. That on the basis of existing state statutes your department can compel tuberculosis patients who are considered a danger to the community to be hospitalized. We cite Paragraph H, Section 12-3-1 (P.S.) N.M.S.A., 1953 Comp., supra; Par. 5 of Section 12-1-4, N.M.S.A., 1953 Comp., supra, and Section 12-3-19, N.M.S.A., 1953 Comp., supra.
2. The legal steps necessary to compel the compulsory hospitalization of a tubercular patient are set out in paragraph F of Section 12-3-1 (P.S.), supra. This statute was passed in 1959 and is the last word of our legislature on the subject.

A complaint can be made by a health authority against any person infected with disease dangerous to the public health, to compel the isolation of such person. This complaint

shall state the facts under oath by the health authority or by such authority upon information and belief. The complaint can be filed either with a justice of the peace or in a district court. Upon a proper complaint being filed, a justice of the peace or judge may issue a warrant directed to the sheriff or any constable of his county, requiring the sheriff or constable, under the direction of the complaining health authority to isolate the person complained of and provide for his lodging and maintenance.

The aforementioned section makes no mention or provision for a trial of any kind. It is our belief that the district attorney should act as the prosecuting legal officer.

3. It is our further belief that although Paragraph F, Section 12-3-1 (P.S.) does not mention the word "hospital", a patient such as described in the preceding answer could be hospitalized in a state tubercular hospital but could not be committed summarily to a Veteran's Administration Hospital or a Public Health Service Hospital. Both of the latter class of hospitals are governed by laws, rules and regulations of agencies of the United States Government. Such patients could not be admitted except by agreement between agencies of the Federal and State governments.

4. State laws may not be enforced against Indians for conduct on the reservation. **State v. Begay**, 63 N.M. 409. However, State laws may be enforced against reservation Indians for acts done off the reservation. **Cohen's Handbook of Federal Indian Law**, pp 119, 120, 146, 253. Therefore, our conclusion is that if you can show that the tubercular Indian is violating the statute in question off the reservation, he is subject to the exercise of jurisdiction by the State.

5. We again refer to Paragraph F, Section 12-3-1 (P.S.). It would seem (although not so stated in said statute) that the same court, either justice of the peace or district judge, who had originally ordered the isolation of the recalcitrant tubercular, could upon motion of a health authority acting through the district attorney, upon a proper showing, hold the recalcitrant tubercular in contempt for violation of the order of said court. In the alternative, which procedure would probably be better from a legal standpoint, the same procedure as originally followed for the isolation of the recalcitrant under Paragraph F, Section 12-3-1 (P.S.) could be repeated.

6. No New Mexico statute specifically states that your department can require (compel) a person suspected of having tuberculosis to submit to certain examinations to determine whether the person has tuberculosis and should be isolated or hospitalized. It is our belief, {*346} however, that paragraphs (5) and (9) of Section 12-1-3 and Section 12-1-4, give your department the authority to compel a suspected person to submit to such tests as are necessary. The authority to enforce isolation granted in Section 12-3-1 (P.S.), Paragraph F, would be utterly meaningless if your department were unable to make the necessary tests. Action by a health authority represented by the district attorney would subject the offender to the penalties provided by Paragraph A of Section 12-3-1 (P.S.).

7. On the basis of existing state statutes the State Board of Public Health has the right to adopt any reasonable regulation or regulations to carry out compulsory hospitalization of recalcitrant tubercular patients. This conclusion is obvious from our conclusions in response to your previous questions and our analysis generally and we will not elaborate further.

By: Carl P. Dunifon

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