

## **Opinion No. 60-126**

June 27, 1960

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

**TO:** R. D. Sasser, Inspector State Board of Pharmacy P. O. Box 521 Albuquerque, New Mexico

### **QUESTION**

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1. Must a hospital, in which a pharmacy dispenses drugs be licensed and registered under the provisions of Section 67-9-18, N.M.S.A., 1953 Compilation?
2. What powers does the Board of Pharmacy have in regard to the supervision of the handling of drugs within hospitals?
3. What power does the Board of Pharmacy have concerning the filling and dispensing of drugs by hospital pharmacies to patients who are leaving the hospital?
4. What power does the Board of Pharmacy have over hospital pharmacies filling and dispensing of drugs to patients outside the hospital?
5. Define the distinctions between "in-patient" and "outpatient" treatment.

#### **CONCLUSIONS**

1. Yes.
2. Those powers defined in Section 67-9-2 and Chapter 54, Article 6 and particularly Section 54-6-3, N.M.S.A., 1953 Compilation.
3. The same powers as the board exercises over any other licensed and registered pharmacy or drug dispenser.
4. The same powers as the board exercises over any other licensed and registered pharmacy or drug dispenser.
5. See Analysis.

### **OPINION**

{\*501} **ANALYSIS**

The Board of Pharmacy was created under authority of Article 9, Chapter 67, N.M.S.A., 1953 Compilation. In this Chapter are spelled out the powers and duties as well as the manner of creation of the board. It should be noted that our Supreme Court has had occasion to consider the constitutionality of the board and its powers in the case entitled **State v. Collins**, 61 N.M. 184, 297 P. 2d 325. In this case our Supreme Court said the following at page 187 of the New Mexico Reports:

"We regard the business of selling drugs and medicines as so intimately connected with and having such a vital relationship to the health, safety and welfare of the public that there ought not to be any doubt that its regulation falls within the authority of the Legislature in the exercise of its police power."

Therefore, there is no room for doubt that the authority of the board is well founded in the police power of the state and cannot be attacked as being unconstitutional.

In response to the first question it is our opinion that the board may exercise jurisdiction over and require the annual registration of those hospitals in which a pharmacy or dispensary of drugs is operated by the hospital. Section 67-9-18 requires the "annual registration of every pharmacy, drug store, pharmacy department, prescription laboratory, dispensary, apothecary, drug wholesaler and drug manufacturer in this state." It is our opinion that the Legislature in drafting this statute made {\*502} a conscientious effort to include every conceivable dispensary of drugs found within the State of New Mexico. The only exception which would appear to exist would be that provided by Section 67-9-15 which provides that licensed physicians, dentists or veterinarians may maintain emergency supplies of drugs and medicines to provide for the immediate needs of their own patients.

The case of **Paar, et al., v. Spires**, (Fla.) 41 So. 2d 336 had occasion to consider a statute of similar nature to that under which the New Mexico Board of Pharmacy operates with the exception that it limited its licensing to retail drug stores. The Court therein held, insofar as hospitals were concerned, that a small privately operated hospital could dispense drugs without benefit of a license so long as the drugs were personally dispensed by the two physicians owning and operating the hospital or under their immediate, personal supervision and was for the exclusive use of their patients. The obvious implication of the decision in that case is that if the hospital were operating a pharmacy and drug dispensary not under the personal supervision of a licensed physician that it must be duly licensed as a retail drug dispensary. We find that consideration of the New Mexico statute with which we are here concerned, i.e., Section 67-9-18 leads us to the same result. We conclude that hospital pharmacies operated by the hospital as such, must be licensed and registered in accordance with the New Mexico statute. To this end, we are specifically overruling Attorney General Opinion No. 4790, dated September 17, 1945.

In answer to your second question we believe that the Board of Pharmacy exercises the same powers over pharmacies or drug dispensaries operated by a hospital as it does over any other drug store or pharmacy, etc., operated within the state. Specifically we

believe that these powers are those enumerated in the final paragraph of Section 67-9-2, N.M.S.A., 1953 Compilation (P.S.), wherein it is provided as follows:

"It shall be the duty of the board of pharmacy 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 standard of strength and purity."

The same paragraph further provides for the adoption and enforcement of by-laws, rules and regulations necessary for the protection of the public in the field of pharmacy.

Further reference is made to Chapter 54, Article 6 and particularly to Section 54-6-3, which sets forth the authority and powers of the board in relation to certain prohibited acts concerning drugs and traffic in drugs within the State of New Mexico. Of course, further reference must be had to Chapter 67, Article 9 and Chapter 54, Article 6, N.M.S.A., 1953 Compilation to determine the ultimate powers of the board in relation to its authority. It is our belief that the board has the same authority to exercise its jurisdiction over the hospital dispensaries as it does over any of the other retail or wholesale drug dispensaries within the State.

It is our opinion that the answer to your second question also furnishes the answers to questions 3 and 4 as set forth above. It is our view that your board has no greater, nor any less authority over hospital pharmacies than you have over any other drug dispensary in the state and this holds true whether the drugs dispensed are to those persons who are classified as "in-patient" or those who are serviced on an "out-patient" basis.

You asked for a definition of "in-patient" and "out-patient" services. It is believed that the definition promulgated by the New Mexico Department of Public Health in its licensing regulations, Part 1 for Hospitals, etc., expresses the most common distinctions between the two types of service. These definitions found on page A 3 of those regulations are expressed as follows:

"H. "In-patient" shall mean a patient who is given lodging in a hospital, nursing home, infirmary or maternity home while receiving physician, dentist, or allied services in such institution. When used as "inpatient area" it shall refer to that portion of the institution where such patients are admitted and treated."

"M. "Out-patient" shall mean a patient who is not given lodging in a hospital, nursing home, infirmary or maternity home while receiving physician, dentist or allied services in such institution. When used as "out-patient area" it shall refer to that portion of the institution where such patients are admitted and treated."

It is believed that the above definitions are sufficiently self-explanatory as to warrant no further comment.

There are certain other questions raised by you in your request for an opinion but it is believed that the above analysis will sufficiently answer them. If not, we shall be pleased to furnish you with further clarification as to our views of the law insofar as your authority is concerned.

By: Thomas O. Olson

Assistant Attorney General