

## **Opinion No. 61-85**

September 12, 1961

**BY:** OPINION OF EARL E. HARTLEY, Attorney General Boston E. Witt, First Assistant Attorney General

**TO:** Honorable Fabian Chavez, Jr., State Senator, Santa Fe County, P.O. Box 122, Santa Fe, New Mexico

### **QUESTION**

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"It has come to my attention that the New Mexico Board of Pharmacy has issued a new regulation effective August 17, 1961 to the effect that a registered pharmacist must be on duty in a drug store from the opening hour of the drug store until the closing hour. It is quite obvious that this places a considerable burden on pharmacists throughout the state, especially in smaller communities where the number of registered pharmacists is quite limited.

Therefore would you please render your opinion on the following questions:

1. Does the Board have the authority to promulgate this regulation?
2. Is this regulation void as being arbitrary and capricious and having no reasonable relation to the protection of public health and safety in New Mexico?
3. If the regulation is valid does it mean that the entire drug store must be closed when no registered pharmacist is on duty, or may only the pharmacy portion of the drug store be closed when no pharmacist is available?

#### **CONCLUSION**

1. Yes.
2. See analysis.
3. See analysis.

### **OPINION**

#### **ANALYSIS**

The Board of Pharmacy derives its power to enforce certain laws of this State and to enact rules and regulations pursuant thereto from Sec. 67-9-2, N.M.S.A., 1953 Comp. (PS), which provides in part 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, the production, sale, or distribution of drugs, chemicals, or poisons, used in the compounding of prescriptions and to their standard of strength and purity. The board of pharmacy shall have the power to make bylaws and rules and regulations necessary for the protection of the public in the field of pharmacy, \* \* \*".

Your first question is whether under this grant of authority cited above, the Board has the authority to enact a regulation such as the one it has. That regulation reads as follows:

"A registered pharmacist duly registered in the State of New Mexico must be on duty from the opening hour of the drugstore until the closing hour."

We are convinced that under the broad grant of authority given the Board in the above-cited statute to enforce the practice of pharmacy within this State for the protection of public health and welfare, the Board has the authority to promulgate a regulation such as this.

We will discuss your question 2 and 3 together. In determining whether a regulation is void, we must determine (1) whether the rule is reasonable and (2) whether it was issued pursuant to proper procedure. **Davis on Administrative Law**, § 5.05. It can generally be said without fear of contradiction that a regulation must be in harmony with and must not alter, extend, or limit the statute being administered. **Manhattan General Equipment Co. v. Commissioner of Internal Revenue**, 297 U.S. 127; **Miller v. U.S.**, 294 U.S. 435; **Campbell v. Galeno Chemical Co.**, 281 U.S. 599; **Helvering v. Powers**, 293 U.S. 214. It is equally true that a rule or regulation must be reasonably adapted to secure the purpose for which it was authorized to be made. **Thompson v. Consolidated Gas Utilities Corporation**, 300 U.S. 55. If we construe this regulation as meaning that the entire drugstore must be closed during the time a registered pharmacist is not present on the premises, then we conclude that such regulation is arbitrary and unreasonable and, therefore, void. We must give recognition to the fact that in today's society the apothecary of yesteryear is almost nonexistent. Today's modern drugstores sell a great many more items than merely drugs. Many of them resemble department stores rather than drugstores. This being true, we conclude that it would be entirely arbitrary to force these modern type drugstores to shut down their entire operation merely because a licensed pharmacist is not on the premises. To require a licensed pharmacist on the premises to sell cigarettes, cosmetics, liquor, fishing equipment, etc., is obviously unreasonable.

It is fundamental law that the courts will construe a statute, and for that matter a regulation, so as to make it constitutional and valid. In following this rule, we therefore,

construe this regulation as meaning that so long as a registered pharmacist is not present upon the premises, the drug prescription department of the drugstore must be closed. This does not mean that the remainder of the store operation must be closed. Construed in this light, we think the regulation requiring the prescription department of a drugstore to be closed so long as a registered pharmacist is not present is entirely reasonable and has a direct relation to the public health and welfare.

There is considerable authority for our conclusion. Other states have had this problem arise and have concluded that it is not a violation of Pharmacist regulatory statutes to keep a drugstore open without a pharmacist on duty so long as no drugs are dispensed. See **Ernest v. State**, 162 Tenn. 247, 36 S.W. 2d 438; **State v. Levina**, 173 Minn. 322, 217 N.W. 342; and generally 74 ALR 1081.

On this basis, we conclude that the regulation is not void and that it is reasonable since, as we construe it, it would require the closing only of the prescription department, not the entire store. As we pointed out above, to construe it in any other manner would render it void.