

## Opinion No. 65-193

October 8, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

**TO:** Honorable Jack M. Campbell, Governor of New Mexico, State Capitol Building, Santa Fe, New Mexico

### QUESTION

#### QUESTION

May the State Board of Pharmacy license handlers of narcotic drugs and assess license fees under the Uniform Narcotics Act (Section 54-7-1, et seq.)?

#### CONCLUSION

Yes, only in instances and under the conditions set forth herein.

### OPINION

#### {\*313} ANALYSIS

By Chapter 193, Laws 1965, the {\*314} administration of the Narcotics Act was transferred from the State Board of Public Health to the State Board of Pharmacy.

The question has now arisen as to the authority of the Board of Pharmacy to assess license fees, and if it has such authority, who is to be licensed.

The 1965 legislation made no change in Section 54-7-3, N.M.S.A., 1953 Compilation; it still reads the same as it did when enacted in 1935. It provides in pertinent part as follows:

"The Board is hereby authorized, empowered and directed to make such rules and regulations consistent with the provisions of this act and to provide such fees for licenses as it may deem proper to promote the enforcement of the same, and additions thereto and amendments thereof, for the treatment of drug addicts within the state."

The first question is whether the discretion granted to the Board to set the **amount** of license fees is an unconstitutional delegation of legislative authority.

Our research discloses that the courts have generally ruled that the grant to an administrative agency of uncontrolled discretion to set the amount of a **penalty** is invalid. The legislation must set reasonable standards governing the administrator's

action in fixing penalties. **Broadhead v. Monaghan**, Miss., 117 So. 2d 881; *Howard v. State*, Ark., 242, S.W. 818.

However, the general rule is otherwise as to the fixing of fees. The statute involved in the case of **State v. Turner**. N.D. 164 N.W. 924 granted to the Commissioner of Railroads the authority to fix the fees for grading, inspecting, and marketing at a sum sufficient to make the state grading and inspecting department self-sustaining. In meeting the contention that the Department might employ unnecessary inspectors and thus make the fees too large the court had this to say:

"The act is a license and inspection act, and it is elementary that no fees for inspection can be extracted which are in excess of the sum reasonably necessary for the expenses of enforcement."

The same is true under the Act in question since the section with which we are involved states that the Board may provide such fees for licenses as it may deem proper to promote the enforcement of the Act.

In the case of **Chesapeake & Potomac Telephone Co. vs. State Board of Forestry**, Md., 94 Atl. 322 the statute delegated to the State Board of Forestry the power to fix the charges for inspection of roadside trees to determine the conditions under which permits for cutting and trimming them should be issued.

It was argued that this was an improper delegation of legislative authority. The court held otherwise, stating as follows in its opinion:

"There is no averment that the board of forestry has established rates which are unreasonable or excessive. The power complained of was doubtless committed to the board because a more detailed knowledge of local conditions, and more frequent opportunities for revision than the Legislature possessed would be necessary to a determination of the proper amounts to be charged from time to time for the service rendered."

The court went on to note that it is to be presumed that the authority conferred is being exercised with a fair and just regard for the interests affected.

We feel that the delegation of authority to the Board of Pharmacy {315} was not improper but that the Board must set reasonable license fees which are necessary for the enforcement of the Narcotics Act.

We next come to the equally difficult question of who may be required to be licensed. Section 54-7-4 N.M.S.A., 1953 Compilation specifically provides that only **wholesalers and manufacturers** of narcotic drugs are to be licensed. If all others who handle narcotic drugs may be licensed by the Board, the authority therefor must be found in Section 54-7-3, supra, That section authorizes the Board to make rules and regulations "to provide such fees for licenses." This allows the Board to set fees for licenses

provided for in the Act, i.e., manufacturers and wholesalers; it does not, in our opinion, authorize the Board to decide who is to be licensed.

We find support for this conclusion in the fact that we are here dealing with a uniform act. As Section 54-7-49, N.M.S.A., 1953 Compilation states:

"This act may be cited as the Uniform Narcotic Drug Act, and shall be so interpreted and construed as to effectuate its general purpose, to make uniform the laws of those states which enact it."

And the Uniform Narcotics Drug Act, adopted by the Commissioners on Uniform State Laws in October 1932, requires only the licensing of manufacturers and wholesalers of narcotic drugs. This uniform act has been adopted by forty-eight states, as well as the District of Columbia and Puerto Rico. We do not think that the legislature intended to deviate from the Uniform Act in its licensing provisions.

We are aware that the State Board of Pharmacy was advised otherwise by letter dated August 10, 1965. However, our additional study and research convince us that under our Narcotics Act only manufacturers and wholesalers of narcotic drugs may be licensed by the State Board of Pharmacy.

65-193

October 8, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General

**TO:** Honorable Jack M. Campbell Governor of New Mexico State Capitol Building Santa Fe, New Mexico

### **QUESTION**

QUESTION

May the State Board of Pharmacy license handlers of narcotic drugs and assess license fees under the Uniform Narcotics Act (Section 54-7-1, et seq.)?

CONCLUSION

Yes, only in instances and under the conditions set forth herein.

### **OPINION**

{\*13} **ANALYSIS**

By Chapter 193, Laws 1965, the administration of the Narcotics Act was transferred from the State Board of Public Health to the State Board of Pharmacy.

The question has now arisen as to the authority of the Board of Pharmacy to assess license fees, and if it has such authority, who is to be licensed.

The 1965 legislation made no change in Section 54-7-3. N.M.S.A., 1953 Compilation; it still reads the same as it did when enacted in 1935. It provides in pertinent part as follows:

"The Board is hereby authorized, empowered and directed to make such rules and regulations consistent with the provisions of this act and to provide such fees for licenses as it may deem proper to promote the enforcement of the same, and additions thereto and amendments thereof, for the treatment of drug addicts within the state"

The first question is whether the discretion granted to the Board to set the amount of license fees is an unconstitutional delegation of legislative authority.

Our research discloses that the courts have generally ruled that the grant to an administrative agency of uncontrolled discretion to set the amount of a penalty is invalid. The legislation must set reasonable standards governing the administrators action in fixing penalties. **Broadhead v. Monaghan**, Miss., 117 So. 2d 881; **Howard v. state**, Ark., 242, S.W. 818.

However, the general rule is otherwise as to the fixing of fees. The statute involved in the case of **State v. Turner**, N.D. 164 N.W. 924 granted to the Commissioner of Railroads the authority to fix the fees for grading, inspecting, and marketing at a sum sufficient to make the state grading and inspecting department self-sustaining. In meeting the contention that the Department might employ unnecessary inspectors and thus make the fees too large the court had this to say:

"The act is a license and inspection act, and it is elementary that no fees {<sup>\*14</sup>} for inspection can be extracted which are in excess of the sum reasonably necessary for the expenses of enforcement."

The same is true under the Act in question since the section with which we are involved states that the Board may provide such fees for licenses as it may deem proper to promote the enforcement of the Act.

In the case of **Chesapeake & Potomac Telephone Co. vs. State Board of Forestry**, Md., 94 Atl. 322 the statute delegated to the State Board of Forestry the power to fix the charges for inspection of roadside trees to determine the conditions under which permits for cutting and trimming them should be issued.

It was argued that this was an improper delegation of legislative authority. The court held otherwise, stating as follows in its opinion:

"There is no averment that the board of forestry has established rates which are unreasonable or excessive. The power complained of was doubtless committed to the board because a more detailed knowledge of local conditions, and more frequent opportunities for revision than the Legislature possessed would be necessary to a determination of the proper amounts to be charged from time to time for the service rendered."

The court went on to note that it is to be presumed that the authority conferred is being exercised with a fair and just regard for the interests affected.

We feel that the delegation of authority to the Board of Pharmacy was not improper but that the Board must set reasonable license fees which are necessary for the enforcement of the Narcotics Act.

We next come to the equally difficult question of who may be required to be licensed. Section 54-7-4 N.M.S.A., 1953 Compilation specifically provides that only wholesalers and manufacturers of narcotic drugs are to be licensed. If all others who handle narcotic drugs may be licensed by the Board, the authority therefor must be found in Section 54-7-3, **supra**. That section authorizes the Board to make rules and regulations "to provide such fees for licenses." This allows the Board to set fees for licenses provided for in the Act., i.e., manufacturers and wholesalers; it does not, in our opinion, authorize the Board to decide who is to be licensed.

We find support for this conclusion in the fact that we are here dealing with a uniform act. As Section 54-7-49, N.M.S.A., 1953 Compilation states:

"This act may be cited as the Uniform Narcotic Drug Act, and shall be so interpreted and construed as to effectuate its general purpose, to make uniform the laws of those states which enact it."

And the Uniform Narcotics Drug Act, adopted by the Commissioners on Uniform State Laws in October 1932, requires only the licensing of manufacturers and wholesalers of narcotic drugs. This uniform act has been adopted by forty-eight states, as well as the District of Columbia and Puerto Rico. We do not think that the legislature intended to deviate from the Uniform Act in its licensing provisions.

We are aware that the State Board of Pharmacy was advised otherwise by letter dated August 10, 1965. However, our additional study and research convince us that under our Narcotics Act only manufacturers and wholesalers of narcotic drugs may be licensed by the State Board of Pharmacy.

By: Oliver E. Payne

Deputy Attorney General