Opinion No. 76-19

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BY: OPINION OF TONEY ANAYA, Attorney General Nicholas R. Gentry, Assistant Attorney General

TO: Mrs. Olive Vaughn, Chief Administrator, Board of Pharmacy, 505 Marquette, NW, Albuquerque, New Mexico

QUESTIONS

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Is a drug dispensing clinic which orders dangerous drugs and controlled substances from state wholesale outlets, and which is operated by a private firm on contract to the federal government, subject to state licensure or is it exempt by federal legislation?

CONCLUSION

See analysis.

OPINION

*{*84}* ANALYSIS

The clinic in question is operated by Lockheed Electronics, which is on contract with the federal government in connection with the NASA site near Las Cruces, New Mexico. The clinic is ordering both dangerous drugs and controlled substances from private wholesale outlets within the state, rather than from federal facilities or suppliers. *{*85}* The clinic then dispenses the drugs in dosage form.

In answering this question, it is necessary to first consider the provisions of the Pharmacy Act, Sections 67-9-33 et seq., NMSA 1953 Comp. According to Section 67-9-37, **supra,** the Board of Pharmacy shall:

"E. provide for the licensing of retail pharmacies, wholesale drug dealers, drug manufacturers, hospital pharmacies and the drug rooms of hospitals, nursing home drug facilities, **industrial and public health clinics and all places where dangerous drugs are dispensed** and provide for the inspection of their facilities and activities." (Emphasis added.)

Section 67-9-45, **supra,** deals with such licensure and requires that:

"Any person desiring to operate or maintain the operation of a pharmacy or drug distribution business in this state shall apply to the board for the proper permit or license

and shall meet the requirements of the board and pay the annual fee for such permit or license and its renewal."

The term "pharmacy" is broadly defined as "any store, shop, laboratory or place of business where drugs are sold at retail or where physicians' prescriptions are compounded or dispensed, or both." See Section 67-9-34(N), NMSA 1953 Comp. This definition would certainly place the clinic in question within the licensing requirements of the Pharmacy Act.

Examination of the New Mexico Drug and Cosmetic Act, Sections 54-6-26 et seq., NMSA 1953 Comp., reveals further licensing requirements. Section 54-6-41(A) (2), **supra,** states that:

"It is unlawful for any person to sell, dispose of or possess any 'dangerous drugs', unless they are:

* * * *

(2) distributors, hospitals, nursing homes, **clinics** or pharmacies and other authorized retailers of dangerous drugs in this state **licensed by the board** and appropriate records of dangerous drugs receipt and disposition are kept. * * * *" (Emphasis added.)

This statute clearly states that a clinic which sells, disposes of or possesses any dangerous drugs must be licensed by the Board of Pharmacy.

There are also some relevant provisions within the Controlled Substances Act, Sections 54-11-1 et seq., NMSA, 1953 Comp. According to Section 54-11-12(A), **supra:**

"Every person who manufacturers, distributes or dispenses any controlled substance or who proposes to engage in the manufacture, distribution or dispensing of any controlled substance must obtain annually a registration issued by the board in accordance with its regulations."

This section requires the clinic to obtain an annual registration from the Board of Pharmacy in order to legally distribute or dispense controlled substances. However, the Board under Section 54-11-12 (D), **supra,** does have the authority to waive by regulation the registration requirement for certain manufacturers, distributors or dispensers, if consistent with the public health or safety.

Mention should also be made of Section 54-11-19, **supra,** which states that a registered manufacturer *{*86}* or distributor may distribute controlled substances only to a registered manufacturer, pharmacy, distributor, practitioner, hospital or clinic or a person in charge of a registered laboratory. Thus, as far as controlled substances are concerned, the clinic in question must be registered in order to dispense, and the wholesaler or distributor may not distribute to the clinic unless it is so registered.

In summary, New Mexico law requires the clinic to be licensed by the Board of Pharmacy according to the provisions of both the Pharmacy Act and the New Mexico Drug and Cosmetic Act and the clinic must obtain the proper registration from the Board as specified in the Controlled Substances Act, unless such registration is waived by the Board.

There is no mention in any of the pertinent state statutes of any exemption or exclusion from these licensing requirements for federally related facilities such as the clinic in question. Nor is there any indication in the federal law that such a clinic would be exempt from state licensing, or that Congress has intended to preempt this area of the law to the exclusion of state regulation or control. Under the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C.A. Sec. 801 et seq., which deals with, among other things, registration of distributors and dispensers of controlled substances, it is expressly stated:

"No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together." Section 903.

A review of the relevant federal and state statutes dealing with licensing and registration reveals no positive conflict such that the two statutory schemes cannot stand concurrently. See **State v. McHorse,** 85 NM 753, 517 P.2d 75 (Ct. App. 1973). Even in the absence of the intent provision, the regulation of drugs is a state concern with unique state problems requiring exercise of the state's police power. In addition, drug regulation fails to meet any of the three standards of federal preemption: 1) the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for states to supplement it; 2) the field is one in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject; and 3) enforcement of state laws concerning drugs presents a serious danger of conflict with the administration of the federal program. See **Pennsylvania v. Nelson,** 350 U.S. 497, 76 S. Ct. 477, 100 L. Ed. 640 (1956).

In conclusion, it appears that the clinic must be licensed by the Board and it must obtain an annual registration from the Board, unless such registration is waived. Wholesalers may not distribute to the clinic, until it is so registered. There is no exclusion or exemption in either state or federal law applicable to this clinic, nor does federal law preempt state licensing or regulation in this area.