

Opinion No. 80-09

April 8, 1980

OPINION OF: Jeff Bingaman, Attorney General

BY: Douglas Meiklejohn, Deputy Attorney General

TO: The Honorable Bruce King, Governor, State of New Mexico, State Capitol, Santa Fe, New Mexico 87501

BOARDS, COMMISSIONS, COUNCILS

The Governor does not have the authority to establish, by executive order or other means, a massage board which can license under the provisions of the Massage Act, Sections 61-25-1 **et seq.**, NMSA 1978.

QUESTIONS

Does the Governor have the authority to establish, by executive order or other means, a massage board which can license under the provisions of the Massage Act, Sections 61-25-1 **et seq.**, NMSA 1978?

CONCLUSIONS

No.

ANALYSIS

The New Mexico Massage Board was established pursuant to the legislature's enactment of Chapter 252 of the Laws of 1971 (codified at Sections 61-25-1 **et seq.**, NMSA 1978). By that Act, the legislature gave the Board the authority to license massage practitioners pursuant to the Act (Section 61-25-5 NMSA 1978), which authority the Board had until it was abolished by the legislature effective July 1, 1978 under the New Mexico Sunset Law (Section 12-9-4(R) NMSA 1978).

OPINION

The power to re-establish the Massage Board or to establish another such board which could license massage practitioners under the Massage Act is a legislative power, which can be exercised only by the legislature. Article III, Section 1 of the New Mexico Constitution provides:

"The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall

exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted."

The New Mexico Supreme Court has determined on several occasions that the legislature has the power to establish administrative agencies and to delegate to them the enforcement of statutes regulating the conduct of professions. The Court has held constitutional legislative enactments establishing, and delegating such authority to, the New Mexico Real Estate Board (**State v. Spears**, 57 N.M. 400, 259 P.2d 356 (1953)); the New Mexico State Board of Registration for Professional Engineers and Land Surveyors (**Hatfield v. New Mexico State Board of Registration**, 60 N.M. 242, 290 P.2d 1077 (1955)); and the New Mexico Dry Cleaning Board (**State ex rel. New Mexico Dry Cleaning Board v. Cauthen**, 48 N.M. 436, 152 P.2d 255 (1944)).

{*121} The legislature has the authority to determine whether and in what manner professions shall be regulated, and it has exercised that authority with regard to the regulation of massage practitioners. The legislature enacted the Massage Act, establishing the Massage Board and delegating to it the regulation of massage practitioners. The legislature then terminated the Board pursuant to the Sunset Law, and determined that the Board should not be continued pursuant to the renewal provision of the Law (Section 12-9-8 NMSA 1978).

The Governor's authority, on the other hand, is executive. Article V, Section 4 of the New Mexico Constitution provides:

"The Supreme executive power of the state shall be vested in the Governor, who shall take care that the laws be faithfully executed. He shall be commander in chief of the military forces of the state, except when they are called into the service of the United States. He shall have power to call out the militia to preserve the public peace, execute the laws, suppress insurrection and repel invasion."

The Governor is not authorized to legislate, and the Supreme Court has determined that the Constitution limits each branch of government to the exercise of the power specifically delegated to it. **State ex rel. Hovey Concrete Products Co. v. Mechem**, 63 N.M. 250, 316 P.2d 1069 (1957). The Court has also pointed out, in another context, that the legislature possesses the "sole power of enacting law" (**State v. Armstrong**, 31 N.M. 220 at 255, 243 P. 333 at 347, **on rehearing** (1924)), and has indicated that officers such as the members of the Massage Board are controlled by the legislature. In **State ex rel. Gomez v. Campbell**, 75 N.M. 86, 400 P.2d 956 (1965), the Court ruled that Article V, Section 1 of the Constitution did not require that various state boards and commissions have their offices in Santa Fe. The Court considered the nature of those boards and commissions, and observed that:

"there is an obvious distinction between officers created under the constitution itself and executive officers created by statute. The latter are creatures of the legislature, and even though operating as a part of the executive department, may have their duties

changed or their offices abolished at any time the legislature so desires. (75 N.M. at 96, 400 P.2d at 963)."

Article III, Section 1 of the Constitution prohibits each department of government from exercising the functions of any other department. **State ex rel. State Corporation Commission v. McCulloh**, 63 N.M. 436, 321 P.2d 207 (1957). The Governor does not have the authority to legislate regulation of massage practitioners, and an attempt by him to do so would violate the separation of powers provision contained in Article III, Section 1. Since he can not exercise that authority himself, he also can not delegate it to a massage board.

Finally, any attempt to regulate massage practitioners by the Governor would specifically violate the requirement in Article V, Section 4 of the Constitution that he "take care that the laws be faithfully executed." By terminating the Massage Board under the Sunset Law, the legislature determined that there would not be a massage board which could license under the provisions of the Massage Act. The Governor is required by Article V, Section 4 to insure that the provisions of the Sunset Law be enforced. { *122 } He therefore can not circumvent the provisions of that Law by either reconstituting the Massage Board or establishing a new board to license massage practitioners under the Massage Act.

ATTORNEY GENERAL

Jeff Bingaman, Attorney General