

Opinion No. 87-58

September 28, 1987

OPINION OF: HAL STRATTON, Attorney General

BY: Sarah Alley, Assistant Attorney General

TO: Donald Reif, D.V.M., Board of Veterinary Examiners, 4125 Carlisle N.E.,
Albuquerque, New Mexico 87107

QUESTIONS

Does the Regulation and Licensing Act supersede the rules and statutes of the Board of Veterinary Examiners?

CONCLUSIONS

No. The legislature created the Regulation and Licensing Department to provide general administrative services to the Board of Veterinary Examiners with respect to its licensing functions. Neither the Regulation and Licensing Department Act, nor any rules and regulations that it has promulgated pursuant to that Act, supersede the specific statutory powers and duties that the legislature has given to the Board of Veterinary Examiners pursuant to the Veterinary Practice Act.

ANALYSIS

In 1983, the New Mexico legislature promulgated the Regulation and Licensing Department Act, which created the Regulation and Licensing Department ("RLD"). Section 17 through 34, Chapter 297, Laws of 1983 (codified as Sections 9-16-1 through 9-16-13 NMSA (1978)). Section 30 of the session laws, which was never codified into the annotated statutes, authorized the governor to consolidate the administrative licensing functions of the various boards and commissions into one administrative agency, RLD:

Section 30. TEMPORARY PROVISION----CERTAIN LICENSING FUNCTIONS----
EXECUTIVE ORDER TRANSFER.----

A. The control of the professional and occupational licensing functions of the executive branch of state government may be consolidated under the supervision of the regulation and licensing department upon executive order issued by the governor, and the executive order shall provide for such advisory committees as are deemed necessary or appropriate.

B. In the event an executive order is issued by the governor pursuant to Subsection 4 of this section, all records, physical properties and money pertaining to professional and

occupational licensing functions transferred to the regulation and licensing department shall be transferred to that department.

C. It is the express purpose of the legislature to authorize the consolidation of professional and occupational licensing functions in the regulation and licensing department so as to effect the more economical use and expenditure of public money by eliminating the duplication of services, operations and administration of the various professional and occupational licensing functions for the benefit of the citizens of the state.

Between September 23, 1983, and April 24, 1986 former Governor Toney Anaya issued five executive orders wherein he transferred the licensing functions of twenty-four policy-making boards and commissions to RLD.¹ Executive order 85-34 transferred the administrative licensing functions of the Board of Veterinary Examiners (the "board") to RLD.

RLD has interpreted Governor Anaya's executive orders as granting to RLD the power to supersede the numerous individual statutes that created and govern the various boards and commissions. Thus, RLD over the past several years, has asserted that its authority included the power to hire, fire, or eliminate the Board's executive secretary and to prepare and control the Board's budget. This interpretation of the RLD Act in effect would allow RLD to supersede the statutory power granted to each individual board and commission. The question arises whether the legislature intended to delegate to the governor or any executive agency the power to supersede the enabling statutes of the individual boards and commissions.

Section 9-16-6 of the RLD Act sets forth the specific duties of the superintendent of RLD. Subsection B specifically provides: "the superintendent has every power expressly enumerated in the laws, whether granted to the superintendent or the department or any division of the department, except where authority conferred upon any division is explicitly excepted from the superintendent's authority by statute." Section 9-16-6 NMSA (1978). Subsection B(9) of section 9-16-6 provides that the superintendent of RLD is to provide cooperation, **at the request of the administratively attached agencies**, to: "(a) minimize or eliminate duplication of services or jurisdictional contracts; (b) coordinate activities and resolve problems of mutual concern; and (c) resolve by agreement the manner and extent to which the department shall provide budgeting, record-keeping and related clerical assistance to administratively attached agencies." (Emphasis added). Cooperation does not equate to control by RLD. The Board has not requested that RLD assume control over its budget and employment decisions.

Sections 61-14-1 through 61-14-20 NMSA (1978) create and govern the Board. Section 61-14-5 specifically empowers the Board to hire personnel to carry out the Board's duties, which includes the inspection of veterinary hospitals. In addition to section 61-14-5, the Veterinary Practice Act includes section 61-14-4(E), which empowers the Board to collect fees and use such fees for the Board's operation.

The New Mexico Constitution divides the state government into the judicial, legislative, and executive branches. Article III, section 1 of the New Mexico Constitution specifically prohibits each branch from exercising any other branch's functions:

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.

This separation of powers does not exist merely as a matter of convenience or as a governmental mechanism, but serves to prevent concentration of too much power in one branch. The separation effects a measure of equilibrium according to the classic concept of checks and balances, and defines and identifies authority between the different branches. L. Southerland, *Statutory Construction* § 3.02, at 44 (4th ed. 1985). Accordingly, New Mexico has recognized through numerous judicial decisions, a strong separation-of-powers doctrine. See e.g., *State ex rel. Chapman v. Truder*, 35 N.M. 49, 289 P. 594 (1983); *State ex rel. Hovey Concrete Products Co. v. Mechem*, 63 N.M. 250, 252, 316 P.2d 1069, 1970 (1957); *State ex rel. State Corp. Comm'n. v. McCulloh*, 63 N.M. 436, 438, 321 P.2d 207, 208 (1957); Note, *Separation of Powers Doctrine in New Mexico*, 4 *Nat. Resources J.* 350 (1964).

Incident to the separation-of-powers doctrine, the delegation-of-powers doctrine provides that no branch of state government may exercise legislative power except the legislature. *State v. Spears*, 57 N.M. 400, 405, 259 P.2d 356, 359 (1953); *State v. Roy*, 40 N.M. 397, 418, 60 P.2d 646, 659 (1936); N.M. Const. Art. IV, § 1. Although New Mexico's constitution clearly sets forth the delegation-of-powers doctrine, when necessary, the legislature may delegate its responsibility to executive or administrative officers, but only in applying the law and carrying it into effect. *State v. Spears*, 57 N.M. at 406, 259 P.2d at 360; *Daniels v. Watson*, 75 N.M. 661, 410 P.2d 193 (1966) *State ex rel. Charlton v. French*, 44 N.M. 169, 177, 99 P.2d 715, 720 (1940).

Thus, New Mexico's courts have reviewed the legislature's delegation of power to determine whether the legislature attempted to delegate its power to make a law or merely its power to carry into effect the law's purpose; the latter is delegable while the former is not. *State v. Spears*, 57 N.M. at 406. An early edition of Southerland's *Statutory Construction*, provided a criteria for determining whether the legislature's delegation of its power was administrative or legislative:

[T]he true test and distinction whether a power is strictly legislative or whether it is administrative and merely statute law, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law.

L. Southerland, *Statutory Construction*, § 89, at 149 (2d ed 1956).

Accordingly, the answer to your question depends upon whether the legislature's promulgation of section 30 of the RLD Act, delegating to the governor the power to administratively attach the various state boards and commissions to RLD, was a delegation of lawmaking power or a delegation of administrative duties. When the courts determine the constitutionality of a legislative act, there is a presumption that the legislature performed its duty and kept within the boundaries that the constitution fixed. *Seidenberg v. New Mexico Board of Medical Examiners*, 80 N.M. 135, 138, 452 P.2d 469, 472 (1969). Moreover the legislature's acts should not be held unconstitutional unless no other conclusion reasonably can be reached; all doubts must be resolved in favor of constitutionality. *Peyton v. Nord*, 78 N.M. 717, 725, 437 P.2d 716, 723 (1968).

Under the doctrines of separation-of-powers and of delegation-of-duties, "the executive cannot discharge the functions of the legislature in any manner by so acting in his official capacity that his conduct is tantamount to a repeal, enactment, variance or enlargement of legislation." 16 Am.Jur. 2d, Constitutional Law § 305, at 822; *Youngstown Sheet Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *Henry v. State*, 136 P. 982, 989 (Okla. Crim. 1913). *Whitecomb Hotel, Inc. v. California Employment Com.*, 151 P.2d 233, 236 (Cal. 1944). We must presume the legislature did not delegate to the governor in section 30 of the Act its power to repeal the statutes governing the individual boards and commissions. Such an act would be in contravention of article III section 1 of the New Mexico Constitution, and we will not presume that the legislature intended to contravene the constitution.

We do not believe that the legislature intended to delegate to the governor the authority to take statutory power and autonomy away from any of the individual boards and commissions. Prior legislative enactments that have the same force of law as the RLD Act have specifically conferred that power and authority to the individual boards and commissions. The more reasonable interpretation of the RLD Act, which does not contravene New Mexico's constitution, is that the legislature merely delegated to RLD administrative or ministerial duties with respect to licensing functions of the autonomous boards. Moreover, in Section 30 the legislature intended to give to the governor the opportunity to select initially which boards would have RLD administer their licensing functions. This intent is supported by the fact that the legislature itself transferred five boards from the Health and Environment Department in the 1987 legislative session without the governor issuing any executive orders.

In support of our opinion that the legislature did not intend to delegate to the governor nor to RLD the power to repeal the statutes of each board and commission we have considered the well-accepted rule of statutory construction that the absence of a repealing clause in a new statute, expressly designating that prior enactments are intended to be abrogated, will preclude the statute from sweeping away existing legislation. *Wilborn v. Territory*, 10 N.M. 402, 408, 62 P. 968, 970 (1900). Moreover, repeals of statutes by implication are not favored and will not be held to exist where any other reasonable construction can be made. *State v. Davisson*, 28 N.M. 653, 664, 217 P. 240, 245, (1923). In the RLD Act, no clause exists that specifically repeals any of the

statutes that govern the individual boards and commissions, nor does the RLD Act repeal by implication any of the boards' and commissions' statutes.

The courts in New Mexico as well as the Attorney General have long noted that statutes are to be construed so as to prevent any absurdity. *State v. Herrera*, 86 N.M. 224, 226, 522 P.2d 76, 78 (1974); *Op. Att'y. Gen. No. 60-61* (1960). It would not make sense to interpret the RLD Act as repealing or superseding the statutes governing the individual boards and commissions; the effect of such a construction would be to empower RLD with control over each autonomous board. The boards would no longer have any purpose nor any statutes by which to govern themselves. The RLD Act and the individual statutes of each board and commission must be construed together and harmoniously. We believe this construction expresses the legislative intent underlying the RLD Act.

It is a maxim of statutory law in New Mexico that when two or more statutes are enacted by the legislature covering the same matter, one of them in general terms and the other in a more detailed way, the statutes must be harmonized. This is especially true when the later statute is in general terms and the earlier one is more specific. *State v. Rue*, 72 N.M. 212, 216, 382 P.2d 697, 700 (1963). An analysis of the statutes governing the Board and an analysis of the general language of the RLD Act indicates that the Veterinary Practice Act governs specific matters, while the RLD Act is a broad general statute that must be harmonized with the Veterinary Practice Act.

Moreover, under the general rule of *in pari materia*, when two or more statutes deal with the same subject matter, they must be construed together. *Allen v. McClellan*, 75 N.M. 400, 402, 405 P.2d 405, 406 (1965). The purpose of the "*in pari materia*" rule is to carry into effect the legislature's intention. *State v. Chavez* 77 N.M. 79, 82, 419 P.2d 456 457 (1966). That a later statute makes no reference to the former statute does not affect the rule, because the legislature is presumed to have had the former statute in mind without expressly referring to it. *State v. Cleveland*, 47 N.M. 230, 243, 141 P.2d 192, 201 (1943); *State Ex Rel. Red River Valley Co. v. District Court of the Fourth Judicial District*, 39 N.M. 523, 530, 51 P.2d 239, 243 (1935).

The Board has hired annually an administrative director who is a licensed Doctor of Veterinary Medicine. The Board, in planning for fiscal year 76, voted to hire a director who received a \$22,000 salary, and whose specific responsibility included inspecting veterinary hospitals throughout the state. Section 61-14-5E provides that the board shall "employ personnel necessary to carry out its duties."

We understand that RLD has attempted to assume control over the Boards' budget. RLD determined the budget of the Board for 1987 (fiscal year 76) and submitted a consolidated budget for all boards under RLD to the Department of Finance and Administration. RLD asserts that the Legislative Finance Committee ("LFC") recommended a reduction of the executive director's salary to \$5,000. Nevertheless an LFC recommendation is not the law. The General Appropriations Act of 1987, Laws of 1987, Chapter 355, does not have a line-by-line appropriation to any of the boards.

The effect of RLD's involvement in the board's budget planning is to terminate the executive director's position, because a \$5,000 salary is insufficient to allow the Board to fill this position. In *Thompson v. Legislative Audit Commission*, 79 N.M. 693, 696, 448 P.2d 799, 802 (1969), our state supreme court found that the legislature could not eliminate the State Auditor's Office by promulgating a statute that provided the auditor with a one dollar salary, where the legislature previously had appropriated a salary of \$5,100 for the same year. By analogy, we do not believe RLD could supersede the Veterinary Practice Act and preclude the Board from hiring an executive secretary where the legislature empowered the Board to raise fees and use such fees to hire employees.

From our analysis of the RLD Act, and the aforesaid provisions in the Veterinary Practice Act, it is our opinion that RLD has no authority to preempt the board's direct hiring of an executive director or exercise any authority over the board's budgetary appropriations from the license fees raised. The Veterinary Practice Act gives the board control over all of its licensure funds pursuant to section 61-14-4(E), which specifically requires approval of all expenditures by the Veterinary Board:

"... expenses involved in carrying out the Veterinary Practice Act shall be paid exclusively from fees received under the Veterinary Practice Act. The Board shall deposit all fees received under the Veterinary Practice Act with the state treasurer for the exclusive use of the board and money shall be expended only upon vouchers certified by majority of the board."

The language of section 30 of the RLD Act provides that RLD is to eliminate the duplication of services, operation, and administration of the various boards and commissions. This authority does not extend to the Board's specific statutory authority to hire its own personnel or control its budget. The legislature has obviously determined that expenditure of its budget is a policy consideration solely for the Board of Veterinary Examiners.

Indeed, we believe that the RLD Act and the Veterinary Act can be harmonized if we look to the plain language of the RLD Act. Section 30(c)'s plain language directs RLD to administer the licensing functions, which would include mailing out licensure notices, maintaining files, collecting fees, directing public inquiries to the proper board, and such other duties as the individual boards or commissions recommend to RLD.

In conclusion, RLD may not exercise any power the legislature did not delegate specifically to it, or has specifically delegated to the Board. To remain within the constitutional confines of the legislature's delegation powers, RLD only should perform clear administrative duties. The Board is an autonomous entity, to which the legislature granted broad statutory authority to carry out its specific purposes. Therefore, it is our opinion that the Board as part of its policy-making functions, has the statutory power to hire an executive director at a salary that the Board determines. The RLD Act does not in any way supersede the Veterinary Practice Act, especially with respect to personnel or budgetary decisions.

ATTORNEY GENERAL

HAL STRATTON Attorney General

GENERAL FOOTNOTES

[n1](#) Executive Order 83-69; Amended Executive Orders 85-34; 85-36; 86-09; 86-10.