

Opinion No. 88-76

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OPINION OF: HAL STRATTON, Attorney General

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TO: James Daily, Acting Director, New Mexico Board of Pharmacy, 4125 Carlisle, N.E., Albuquerque, NM 87107

QUESTIONS

Is the Health and Environment Department required to employ licensed pharmacists to dispense drugs to patients at the department's public health clinics?

CONCLUSIONS

No.

ANALYSIS

We understand and assume the following: The New Mexico Health and Environment Department ("HED") dispenses pre-packaged medication to patients at its forty-four public health clinics throughout the state. The patients generally do not pay for the medication. HED employs one staff pharmacist who directs the packaging and labeling of the medication. Registered nurses at the clinics dispense the medication pursuant to physician prescriptions.

The Pharmacy Act ("Act"), Sections 61-11-1, 61-11-2 and 61-11-4 to 61-11-28 NMSA 1978 (Repl. 1986), regulates the dispensing of dangerous drugs and generally prohibits "persons" that are not licensed pharmacists from dispensing drugs to patients. See Subsections 61-11-24(D) (petty misdemeanor for any person to "allow any other person in his employ or under his supervision to...dispense prescriptions...unless he is pharmacist...or exempted under the provisions of the act"); 61-11-21(C) ("No person shall permit anyone in his employ or under his supervision, except a pharmacist..., to...dispense... prescriptions"); 61-11-21(B) ("No person shall conduct or operate a place used for the... dispensing of drugs...unless... the business being conducted on the licensed premises constantly employs, on a regular basis, a pharmacist"); 61-11-15(D) (no owner or proprietor of a pharmacy shall "dispense dangerous drugs or poisons without being a pharmacist") (emphasis added).

Subsection 61-11-2(L), however, defines "person" for purposes of the Act as "an individual, corporation, partnership or association and, when the context requires, includes a hospital, nursing home or clinic." This definition does not include the State or one of its agencies. In *Southern Union Gas Co. v. New Mexico Pub. Serv. Comm'n*, 82

N.M. 405, 482 P.2d 913 (1971), the New Mexico Supreme Court held that the United States was not a "person" within the meaning of a statute that defined that term to include, generally, individuals and firms: "There are many statutes in which neither the U.S. nor States of the Union are considered as a 'person.' When the legislature has wanted to include sovereigns or other governmental bodies in its statutes, it has known how to do so." Id. at 406, 482 P.2d at 914. In *Rapp v. New Mexico State Highway Dept.*, 87 N.M. 177, 531 P.2d 225 (Ct. App. 1975), the New Mexico Court of Appeals followed *Southern Union Gas Co.* and concluded that the Highway Department was not a "person." The pertinent statute applied generally to firms and associations, but not specifically to governmental entities. HED is a state agency. Therefore, it is not a "person" within the meaning of Subsection 61-11-2(L), and Subsections 61-11-24 (D), 61-11-21(C) and 61-11-21(B) do not apply to it. Similarly, while Subsection 61-11-15(D) requires that a pharmacy "owner" or "proprietor" be a licensed pharmacist, this requirement does not apply to HED, because only natural persons may obtain a pharmacist's license. Section 61-11-9.

Instead, a specific provision of the Act applies to HED. Section 61-11-18 provides:

The board shall issue one license to the health and environment department of the state to cover all of its clinics and other health facilities where dangerous drugs are stored, distributed or dispensed. All such clinics or other health facilities of the department are subject to the provisions of the Pharmacy Act, must keep records of all dangerous drugs and may be inspected by the board.... The license shall permit the health and environment department to:

- A. acquire, possess, store and repackage dangerous drugs for distribution to its clinics and other health facilities, provided it is done under procedures developed by a staff pharmacist of the department...;
- B. receive, possess and store dangerous drugs in any clinic or other health facility of the health and environment department for use in any public health program; and
- C. dispense dangerous drugs in furtherance of any public health program under the supervision of a pharmacist, a consulting pharmacist or a licensed practitioner.

(Emphasis added.) The emphasized language authorizes HED to dispense drugs under a pharmacist's or licensed practitioner's supervision. "Supervision" means "a critical watching and directing" and is synonymous with "oversight." Webster's New Collegiate Dictionary at 1162 (1981). Section 61-11-18, therefore, does not require that a pharmacist or licensed practitioner perform the physical act of "dispensing," and implicitly permits persons who are not pharmacists to dispense drugs at HED's clinics. To the extent it might conflict with other provisions of the Act that require pharmacists to dispense medication, Section 61-11-18, as the more specific statute, controls. See *State v. Keith*, 102 N.M. 462, 464, 697 P.2d 145, 147 (Ct. App.), cert. denied, 102 N.M. 492, 697 P.2d 492 (1985); *Cardinal Fence Co. v. Commissioner of Bureau of Revenue*, 84 N.M. 314, 317, 502 P.2d 1004, 1007 (Ct. App. 1972).¹

Few cases discuss the applicability of a state's pharmacy laws to publicly funded health clinics. In *State v. Schiffler*, 199 N.E.2d 902 (Ohio Mun. Ct. 1964), an employee of a clinic operated by the City of Toledo's health department dispensed free a drug to an indigent patient of the clinic. The State prosecuted the employee on the ground that he was not a registered pharmacist. The court ruled, however, that he did not violate the law, because the Toledo health department did not maintain a "retail drug store." Similarly, in *Love v. Escambia County*, 157 So. 2d 205 (Fla. Ct. App. 1963), a board of pharmacy sought to enjoin a city-county out-patient clinic from operating as a "retail drug establishment" without the immediate supervision of a licensed pharmacist. The clinic's nurses, acting under a physician's supervision, dispensed prescribed, pre-packaged drugs to indigent patients at no charge. The court ruled that the clinic was not a "retail drug establishment," and denied the requested relief.

The New Mexico Pharmacy Act also prohibits unlicensed "persons" from selling drugs on a retail basis. Section 61-11-21. See Att'y Gen. Op. 88-49 (1988) (physicians may charge for drugs that they supply to patients, but Pharmacy Act prohibits them from engaging in retail sales of drugs). As stated above, however, the State and its agencies are not "persons" within the meaning of the Act. And at any rate, HED's clinics generally do not charge a fee for the medication dispensed at clinics. For all of these reasons, we conclude that HED is not required to employ licensed pharmacists to dispense drugs to patients at its public health clinics.

ATTORNEY GENERAL

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GENERAL FOOTNOTES

[n1](#) Section 61-11-7 exempts certain state clinics from the Act:

A. The Pharmacy Act does not prohibit:

(1) Any...state...clinic, without the services of a staff pharmacist, from acquiring and having in its possession any dangerous drug for the purpose of dispensing, provided it is in a dosage form suitable for dispensing, and provided that the...clinic employs a consulting pharmacist.

(2) If the consulting pharmacist is not available, the withdrawal of any drug from stock by a licensed professional nurse on the order of a licensed practitioner in such amount as needed for administering to and treatment of his patient;

B. All prescriptions requiring the preparation of dosage forms or amounts of dangerous drugs not available in the stock of a...clinic or a prescription necessitating compounding shall be either compounded or dispensed only by a pharmacist.

Subsection 61-11-7(A) applies where a state clinic has no staff pharmacist. HED has a staff pharmacist. Subsection 61-11-7(B) requires that a pharmacist dispense drugs at a clinic only where the drugs require preparation of dosage forms or compounding. HED's pre-packaged drugs require neither.