Opinion No. 44-4448

January 28, 1944

BY: EDWARD P. CHASE, Attorney General

TO: Captain R. F. Poston, Director, Division of Sanitary Engineering and Sanitation, Department of Public Health, Santa Fe, New Mexico

We are in receipt of your letter of January 25, 1944, in which you ask the following questions:

1. "Can the regulation be legally construed as applicable to apartment houses? We are defining an apartment house as any housing establishment containing two or more individual family dwelling units that are for rent or lease.

2. "The regulation specifically covers auto courts. In case the auto court is rented on a monthly or more or less permanent basis; some of our District Attorneys have held that our regulations do not apply as they then must be considered as an apartment. Is this correct?

3. "In a case where a representative of the State Health Department approves, in writing, of gas installations that are in direct violation of the regulations, are we at any time in the future, able to request compliance with the regulations?"

4. "In paragraph 2, the word, 'shall' appears. Can this be construed to have the same meaning as 'must', in other words, if a heater is found to be inadequately vented, can we prosecute, or do we have a weak case because the word 'shall', has been used in the regulations?

In answer to your first two questions please find inclosed Opinion No. 4301, previously given to your office. I am very sorry, but I do not feel that I can go any further than I went in this opinion. You of course realize that various courts in various states reach different conclusions on matters of this nature. I therefore renew the suggestion made by me in my former opinion -- that the Department of Public Health amend its regulations so as to specifically cover such establishments as they think proper under Section 71-113 of the 1941 Compilation. The Department has ample authority to specifically cover apartment houses and thereby eliminate questions of the nature asked by you.

In answer to your third question, please be advised that I have examined your regulations governing heating. These regulations specifically provide how gas installations shall be made. They also provide that all gas-fired heating equipment must be approved by the District Health Officer. Nowhere in the regulations or in our statutes do I find any authority for a representative of the State Health Department to exercise any discretion or waive any requirement. Therefore, as a legal matter, a representative

of the Health Department would not have any authority to approve installations made in violation of the regulations, so that the Health Department would not be bound by such action.

In answer to your fourth question reference is made to 59 C. J. 1079, wherein the author says:

"As a general rule * * * the word 'shall' is imperative, operating to impose a duty which may be enforced. Of similar effect and import with 'shall' is the word 'must'."

It is my opinion that this statement is a correct statement of the law in that the word "shall" is considered mandatory unless the context of the statute as a whole requires some other construction, which does not appear to be true in paragraph 2 of your heating regulations.

By ROBERT W. WARD,

Assistant Attorney General