

**Opinion No. 66-111**

September 30, 1966

**BY:** OPINION OF BOSTON E. WITT, Attorney General Gary O'Dowd, Assistant Attorney General

**TO:** R. M. Lockhart, O.D., President, State Board of Examiners in Optometry Department of Professional and Vocational Standards, Santa Fe, New Mexico

**QUESTION**

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May the Department of Welfare by regulation establish a fee of \$ 6.00 for an eye examination and refraction with drops and only \$ 4.00 for an eye examination and refraction without drops?

CONCLUSION

Yes.

**OPINION**

{\*150} ANALYSIS

Pursuant to Section 13-1-25, (a) (3) N.M.S.A., 1953 Compilation (P.S.), the State Department of Public Welfare has set the following fees to be paid for examination of the blind seeking public assistance:

Examination and Refraction  
with Drops \$ 6.00

(The \$ 6.00 fee will be  
paid  
only if the invoice states  
that drops were used.)

Examination and Refraction  
without Drops \$ 4.00

We have been asked whether the above fees for eye examinations amount to discrimination by the Welfare Department between Optometrists and Ophthalmologists. We gather that the discrimination that is claimed by the Optometrists arises from the fact that only an Ophthalmologist may use drops when examining eyes.

As pointed out above the Welfare Department followed the provisions of Section 13-1-25 (a) (3), supra, when setting the above fees. That section provides that:

(a) The state department shall:

3. Fix the **fees** to be paid to ophthalmologists and optometrists for examination of applicants, such **fees** to be paid out of funds appropriated to the state department. (Emphasis added.)

First of all it should be pointed out that the Welfare Department did not exceed its statutory authority when it set two different fees for eye examinations. The legislature used the plural, "fees", in the above quoted subsection, rather than the singular and thus, if a legitimate distinction was made in setting the fees, the Welfare Department was acting within its statutory authority when it set two different fees for eye examinations.

The only question then is whether the regulation setting different fees for eye examinations by the Welfare Department is so unreasonable and arbitrary that the regulation should be set aside. The primary responsibility of determining what is reasonable rests upon the administrative agency. It must be assumed that they were actuated by proper motives and *{\*151}* for valid reasons. Furthermore, it is generally held that there must be a plain, clear, flagrant, gross or grave abuse of power or discretion before an administrative regulation will be set aside by the courts. 2 Am. Jur. 2d § 651, p. 507.

With the foregoing in mind, it will be seen that it would be very hard to argue that the regulation involved here should be set aside as unreasonable and arbitrary.

The Welfare Department has set two fees for eye examinations, one for examinations with drops and another fee for examinations without drops. The Welfare Department evidently feels that because of the additional expense involved in the use of drops, one performing such an eye examination should receive \$ 2.00 more than one performing a similar examination without drops. We do not feel that such a determination is so unreasonable and arbitrary that it would be considered as an abuse of power.

Furthermore, we do not see that the regulation discriminates against optometrists. Ophthalmologists do not always use drops when examining eyes. Under the regulation of the Welfare Department drops must be administered before the \$ 6.00 fee is paid, and therefore some ophthalmologists will not receive the \$ 6.00 fee. Thus the distinction is based on the nature of the services performed and not on the particular classification of the examiner.

From the foregoing it is apparent that the fees set for eye examinations by the Welfare Department are not so unreasonable and arbitrary that the regulation should be set aside and further, the regulation does not discriminate between optometrists and ophthalmologists.