

Opinion No. 66-128

December 5, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General George Richard Schmitt,
Assistant Attorney General

TO: J. E. Kleck, D.V.M., Staff-Veterinarian, Cattle Sanitary Board of New Mexico, P. O.
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QUESTION

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Does the Cattle Sanitary Board have the legal authority to charge slaughtering establishments an overtime inspection fee for furnishing its meat inspectors on holidays and for work over 8 hours per day and 40 hours per week?

CONCLUSION

No.

OPINION

{*171} ANALYSIS

Rule 9 of the Cattle Sanitary Board, **Rules and Regulations For the Enforcement of a Meat Inspection Service**, says there must be "an assigned inspector on the premises [of a slaughtering establishment] during all periods of slaughter." The fees required to be paid to the Cattle Sanitary Board for this service from licensed New Mexico slaughter houses are provided in Rule 4 of these regulations. Such rule authorizes the Board to collect the fees which are set forth in Section 47-20-2 and Section 47-20-3, N.M.S.A., 1953 Compilation, as amended. The cited sections of the law require that slaughter houses acquire and pay a yearly license fee, and a bond together with a bond filing fee to the Cattle Sanitary Board. No further fee is required in this Act (Section 47-20-1 through Section 47-20-13, N.M.S.A., 1953 Compilation) which deals expressly with the licensing and inspection of Abattoirs, Meat Dealers and Storage Plants.

Because of the absence of statutory authority, as noted above, we do not believe you can establish a rule which would allow you to charge overtime inspection fees to slaughter houses. A state agency should be expressly authorized and empowered by the Legislature to charge for the services it renders. 73 C.J.S., "Public Administrative Bodies and Procedure", Section 24, page 318; 44 C.J.S., "Inspection", Section 12, page 403; **O'Dowd's Dairy v. Hoffman**, 52 N.J. Super. 135, 145 A. 2d 40, 43 (1958). In the above cited case the New Jersey Supreme Court refused to allow a state milk director the right to impose penalties and assess costs for a violation of an administrative order,

because of an absence of proper statutory authority to do so. In announcing the decision the Court declared that:

"In every case that has been brought to our attention in which the costs or expenses of an investigation by an administrative body have been assessed against the corporation involved, it has been done under the express terms of a statute. 73 C.J.S. Public Administrative Bodies and Procedure § 24, p.318; § 91, p. 410, Cf. Malbie v. Comprehensive Omnibus Corp., 190 Misc. 1017, 75 N.Y.S. 2d 260 (Sup. Ct. 1947)."

Furthermore, we have been unable to find any decisions which have upheld the right of a state agency to charge fees on the basis of implied authority from the Legislature, (See 1 Am.Jur., 2d Section 74, "Administrative Law" page 870). Any rule which you might promulgate in order to charge inspection fees to slaughter houses would appear to be what some legal scholars and courts like to call a "legislative rule," 1 Cooper "State Administrative Law" page 175; 1 Davis, "Administrative Law Treatise" page 299, page 121 (P.S.). This type of regulation creates law rather than just interpreting it, (Cooper, page 175, supra) and an agency may not issue legislative rules in the absence of legislative authority to do so (Cooper 176; {172} **Brooklyn Hospital v. Donlon**, 309 N.Y. 520, 524, 132 N.E. 2d 489 (1956)).

Thus, we are extremely reluctant to hold that the Board may charge any inspection fees to slaughter houses that are not authorized expressly by statute. To advise otherwise might also put the Board in possible criminal jeopardy in view of Section 40A-23-1 of the State Criminal Code, N.M.S.A., 1953 Compilation. The statute is set forth as follows:

"DEMANDING ILLEGAL FEES. -- Demanding illegal fees consists of any public officer or public employee knowingly asking or accepting anything of value greater than that fixed or allowed by law for the execution or performance of any service or duty.

Whoever commits demanding illegal fees is guilty of a petty misdemeanor."

In conclusion, we can only advise the obvious. This is a problem which you should take directly to the Legislature for its consideration.