

Opinion No. 88-63

October 5, 1988

OPINION OF: HAL STRATTON, Attorney General

BY: Kathrine Kinzer-Ellington, Assistant Attorney General

TO: Francis J. Duffy, Jr., O.P. Secretary Treasurer, New Mexico Board of Optometry, Albuquerque, NM 87107

QUESTIONS

May the Regulation and Licensing Department withdraw money from the optometry fund without approval from the Board of Optometry?

CONCLUSIONS

No.

ANALYSIS

Section 61-2-7 of the Optometry Act, Sections 61-2-1 through 61-2-18 NMSA 1978 provides, in part:

A. There is created the "optometry fund."

B. All funds received by the board and money collected under the Optometry Act shall be deposited with the state treasurer, who shall place the same to the credit of the optometry fund.

C. All payments out of the optometry fund shall be made on vouchers issued and signed by the secretary-treasurer of the board upon warrants drawn by the department of finance and administration in accordance with the budget approved by that department.

D. All amounts in the optometry fund shall be subject to the order of the board and shall be used only for the purpose of meeting necessary expenses incurred in:

(1) the performance of the provisions of the Optometry Act and the duties and powers imposed thereby; and

(2) the promotion of optometric education and standards in this state within the budgetary limits.

E. All funds which may have accumulated to the credit of the board under any previous law shall be transferred to the optometry fund and shall continue to be available for use

by the optometry board in accordance with the provisions of the Optometry Act. All money unused at the end of the fiscal year shall not revert, but shall remain in the optometry fund for use in accordance with the provisions of the Optometry Act.

In 1983, the Legislature passed the Regulation and Licensing Department Act ("RLD Act"). 1983 N.M. Laws, ch. 297, §§ 17-34 (codified as Sections 9-16-1 to 9-16-13 NMSA 1978). Section 30 of the RLD Act, which was not codified, provides as follows:

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.

Thus, Section 30 authorized the Governor to consolidate by executive order the administrative functions of certain boards, including the Board of Optometry, under the supervision of the Regulation & Licensing Department ("RLD"), and provided for the transfer of funds belonging to the consolidated boards to RLD.

In Attorney General Opinion 87-58 (1987), we considered whether RLD unilaterally could decrease the Veterinary Board's executive director's salary from \$22,000, as previously set by the Board, to \$5,000. In reducing the salary, RLD intended to eliminate the position. We compared Section 30 to Section 61-14-5E¹ of the Veterinary Practice Act, Sections 61-14-1 to 61-14-20 NMSA 1978, which creates and governs the Veterinary Board. We concluded that the RLD Act does not supersede the Veterinary Practice Act. Rather, the Veterinary Board is an autonomous entity that the Legislature created to carry out veterinary licensing functions and all duties incidental thereto. The plain language of Section 30(C) directs RLD to perform administrative services for the boards at the boards' direction. We stated:

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.

Id. at 8.

We understand that, even subsequent to Opinion 87-58, RLD has exercised control over the budgetary and expenditure functions of all boards administratively attached to it pursuant to executive order. In particular, RLD has "authorized" the transfer of "indirect cost" assessments from boards' accounts to the working capital account of RLD's Boards and Commissions Division ("BCD") without first obtaining the boards' consent. RLD also has "authorized" transfers from boards' accounts to its working capital account for expenses that purportedly are directly attributable to each board, including travel, liaison travel, costs incurred in the purchase, administration and grading of examinations, printing of licenses, and litigation costs, again without the boards' consent.

We understand that RLD has purported to exercise this unilateral control over board budgetary and expenditure functions pursuant to the language of Section 30(B), and pursuant to the language of the General Appropriations Act. In this and previous fiscal years, the General Appropriation Act has appropriated no money from the general fund, and instead has provided that BCD's appropriation shall come from "other state funds."² Neither RLD nor BCD generate revenue and therefore these funds must come from a source outside the agency. RLD has looked to the boards under its administrative supervision as the source of these funds. Thus, the legal questions presented are: (1) whether Section 30 overrides Section 61-2-7 and thereby authorizes RLD to control the optometry fund and (2) whether RLD's appropriation in the General Appropriation Act authorizes RLD to control the optometry fund and thereby supersedes Section 61-2-7.

(1) We grounded our conclusion in Opinion 87-58 that Section 30 did not supersede Section 61-14-5, and thus did not give RLD authority unilaterally to reduce the salary of the Veterinary Board's executive director, principally on the separation of powers doctrine. The Legislature could not, consistent with Article III, Section 1³ of the New Mexico Constitution, delegate to the Governor or RLD this power to repeal the organic statutes of each board and commission. We also relied on fundamental rules of statutory construction:

[W]e 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. Davidson*, 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 statute 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).

Att'y Gen. Op. 87-58, at 6-7 (1987).

The same analysis leads us to conclude that Section 30 does not supersede Section 61-2-7, and that RLD may not transfer money out the optometry fund, for any purposes, without first obtaining the Optometry Board's consent. Section 61-2-7 mandates that the Optometry Board shall deposit all funds that it collects into the optometry fund, that the fund shall be subject to the Optometry Board's order, and that it shall be used only for optometric education or for carrying out the provisions of the Optometry Act. Section 30 provides only that funds belonging to consolidated boards shall be transferred to RLD. A construction of Section 30 that authorized RLD unilaterally to transfer money out of the optometry fund would result in a unconstitutional delegation of the Legislature's authority to repeal Section 61-2-7. Also, such an interpretation would violate the rules of statutory construction that we noted in Opinion 87-58. The courts do not favor an

implied repeal of Section 61-2-7; a construction of Section 30 to give RLD unilateral power over funds would have the absurd result of depriving the Optometry Board of any purpose; the specific language of Section 61-2-7 prevails over the general language of Section 30; and these two statutes, when construed in pari materia, require RLD to administer the optometry fund subject to the Optometry Board's direction.

(2) Article IV, Section 16 of the New Mexico Constitution states, in part:

General appropriation bills shall embrace nothing but appropriations for the expense of the executive, legislative and judicial departments, interest, sinking funds, payments on the public debt, public schools and other expenses required by existing laws; but if any such bill contain any other matter, only so much thereof as is hereby forbidden to be placed therein shall be void. All other appropriations shall be made by separate bills.

In *State ex rel. Lucero v. Marron*, 17 N.M. 304, 314, 128 P. 485, 488 (1912), the Supreme Court enunciated this section's purpose:

The primary object was undoubtedly to protect the state treasury against legislative raids by the insertion of special appropriations for new purposes in a general appropriation bill where they might pass unnoticed, when possible, careful scrutiny and examination of such items upon their merits if presented separately, would result in their defeat.

See also *Whittier v. Safford*, 28 N.M. 531, 534, 214 P. 759, 760 (1923).

In *State ex rel. Lucero v. Marron*, the Supreme Court also identified the types of additional language the Legislature legitimately may include in the General Appropriation Act:

When an appropriation is made, why should not there be included with such appropriation matter germane thereto and directly connected with it, such as provisions for the expenditure and accounting for the money, and the means and methods of raising it, whether it by taxation, or by some other method? What valid objection can be interposed to such a course, so long as the legislature confines the incidental provisions to the main fact of the appropriation, and does not attempt to incorporate in such act general legislation, not necessarily or directly connected with the appropriation legally made, under the restrictions of the section in question?

17 N.M. at 315-16, 128 P. at 489. When the details of expending appropriated money are necessarily connected with, incidental to, and related to the matter of providing the expense, their inclusion in the General Appropriation Act does not violate Article IV Section 16. See also *National Building v. State Bd. of Education*, 85 N.M. 186, 189, 510 P.2d 510, 513 (1973); *State ex rel. Holmes v. State Bd. of Finance*, 69 N.M. 430, 437, 367 P.2d 925, 929 (1961); *State ex rel. Peck v. Velarde*, 39 N.M. 179, 183, 43 P.2d 377, 380 (1935). However, appropriation bills may not articulate new, permanent policy, *State ex rel. Delgado v. Sargent*, 18 N.M. 131, 137-38, 134 P. 218, 220 (1913).

The General Appropriation Act simply provides that RLD's appropriation shall come from "other state funds." It does not specify the sources of the money. We see no basis for concluding that these three words grant RLD control over the optometry fund. Moreover, to construe the General Appropriation Act in this manner would go beyond articulating an intended method of expenditure, accounting, or raising of funds, and effectively would allow the language of the General Appropriation Act to supersede and declare void Section 61-2-7 NMSA 1978. This is precisely what Article IV, Section 16 of the Constitution prohibits. "The General Appropriation Act may not be used as a vehicle by which to nullify general legislation. The legislature is not free to override or repeal general legislation in this fashion." State ex rel. Coll v. Carruthers, 27 N.M. Bar Bull. 35, 521 (Sept. 1, 1988).

We conclude that the language of Section 30, does not supersede the language of Section 61-2-7. Section 30 provides that RLD is to perform administrative services at the request or direction of the Optometry Board, and Section 61-2-7 gives the Optometry Board exclusive control over the optometry fund. Additionally, the Appropriation Bill does not grant RLD authority unilaterally to utilize the optometry fund.

ATTORNEY GENERAL

HAL STRATTON Attorney General

GENERAL FOOTNOTES

[n1](#) Section 61-14-5E provides, in part: "The board shall employ personnel necessary to carry out its duties."

[n2](#) For example, the 1988 appropriation for BCD is as follows.

Other Intrnl Svc	General State Funds/Inter- Federal	Item Fund Funds Agency Trnsf Funds Total

(5) Boards and commissions division:		
(a) Personal services	1,059.3	1,059.3
(b) Employee benefits	331.9	331.9
(c) Travel	15.9	15.9
(d) Maintenance and repairs	23.8	23.8
(e) Supplies and materials	53.2	53.2
(f) Contractual services	355.4	355.4
(g) Capital outlay	53.5	53.5
(h) Out-of-state travel	.9	.9

Authorized FTE: 50.00 Permanent: 10.00 Term 1988 N.M. Laws, ch. 13, lines 144-45.

[n3](#) Article III, Section 1 provides: 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.