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June 21, 1955
Opinion No. 55-150

REQUESTED BY: George W. Marx, Director and Chief Engineer
Bureau of Sanitation
Arizona State Department of Health
Phoenix, Arizona

OPINION BY: ROBERT MORRISON, The Attorney General
H. B. Daniels, Assistant Attorney General

QUESTION: Under the provisions of Section 68-112, ACA, 1939, as amended in 1954 (Par. 4), may the State Board of Health adopt definitions and standards of identity, quality, fill of container, requirements for labeling, and definition of adulteration by reference from the Federal Food, Drug and Cosmetic Act and General Regulations for its Enforcement, or must each item be spelled out in detail in the proposed regulations?

CONCLUSION: The State Board of Health may adopt, as a matter of convenience, definitions and standards of identity, quality, fill of container, requirements for labeling and definition of adulteration from any published source readily available to the public by reference, provided that the above come clearly within the authority conferred by Section 68-112, supra; it may not properly adopt in advance any changes which may be made in such definitions, standards, etc., in the future.

The people and the Legislature constitute the lawmaking power in this State. Allen v. State, 14 Ariz. 458. Neither the people nor the Legislature can delegate their lawmaking power to an agent, executive or administrative body. Tillotson v. Frohmler, 34 Ariz. 394; Loftus v. Russell, 69 Ariz. 245; Statutory provisions control with respect to what rules and regulations may be promulgated by an administrative body. Loftus v. Russell, supra; Associated Dairy Products Co. v. Page, 68 Ariz. 393; Hernandez v. Frohmler, 68 Ariz. 242. Where provisions of a statute are unambiguous and its direction specific, administrative bodies may not amend, alter, add to or change the act by regulation. Koshland v. Helvering, 56 S. Ct. 767, 298 U.S. 441, 80 L. Ed. 1268. In exercising the rule-making power, administrative agencies must act within the limits of the power granted to them. Duncan v. Krull Co., 57 Ariz. 472, 478. In the Krull case, the court said, at page 478:

"* * * The basis for that proposition is, of course, that rules and regulations which have the effect of extending, or which conflict in

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any manner with, the authority-granting statute do not represent a valid exercise of authorized power, but, on the contrary, constitute an attempt by the administrative body to legislate * * *

Examination by this office of the Federal Food, Drug and Cosmetic Act and General Regulations for its Enforcement, Revision Number 4, June, 1953, does not disclose anything regarding definitions, standards, labeling requirements, etc., which would be clearly outside the regulation-making power conferred upon the State Board of Health by Section 68-112, supra. Loftus v. Russell, supra provides sufficient authority for such adoption. Clements v. Hall, 23 Ariz. 2, 201 Pac. 87, says that the Legislature may incorporate matter by reference into a statute. We have not been able to find a definitive case referring to an administrative board's adoption of matter by reference into a regulation legally made, but do not apprehend any reason why such incorporation could not be lawfully accomplished.

In all the cases it is perfectly clear that the Legislature can not enact a statute which will have the effect of making into law that which may be determined by any body not under its direction. This would, of course, include the United States Congress and the United States Secretary of Health, Education and Welfare. What the Legislature can not do, the Board of Health can not do. Consequently, any definitions, standards, etc., adopted by reference by the Board, must be those existing at the time of such adoption.

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