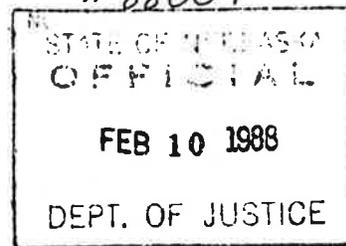


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509

#88007



ROBERT M. SPIRE  
Attorney General  
A. EUGENE CRUMP  
Deputy Attorney General

DATE: February 10, 1988

SUBJECT: Constitutionality of LB 350, an Act to Regulate the Shipping or Mailing of Prescription Drugs into the State of Nebraska

REQUESTED BY: Senator Chris Abboud  
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General  
Dale A. Comer, Assistant Attorney General

You have requested our opinion as to the constitutionality of certain portions of LB 350, the Mail Service Prescription Drug Act. Specifically, you question whether §2(1)(c) of the Act, which provides that a person operating outside the State of Nebraska may not mail or deliver prescription drugs into the state unless that person is operating in a state in which the requirements and qualifications for obtaining and maintaining a pharmacy license are substantially equivalent to those of Nebraska, is constitutional under the Commerce Clause of the United States Constitution. We have reviewed the applicable law in light of the question which you raised, and it is our view that §2(1)(c) is pre-empted by the existing Federal law in this area, and therefore unconstitutional under the Federal constitutional provision which you cited.

This opinion is the third in a series of opinions which this office has produced in connection with several various bills attempting to regulate the interstate sale of prescription drugs through the mail. In our opinion number 57, dated April 9, 1985, we considered the constitutionality of LB 578 which provided that pharmacies operating outside of the State of Nebraska which sold or mailed prescription drugs into the state must hold a pharmacy license issued by the Nebraska Department of Health and must comply with Nebraska law, rules and regulations governing the practice of pharmacy. We determined that LB 578 was unconstitutional under the Commerce Clause of the United States Constitution because the state's regulatory interest in policing mail order drug sales was not great enough to justify the burden which the bill would place on interstate commerce, particularly

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given the extensive system of Federal statutes governing the same industry. In our opinion number 86016, dated February 14, 1986, we considered the constitutionality of a version of LB 578 which would have required all out-of-state pharmacies dispensing prescription drugs into the state to hold a pharmacy permit issued by the Department of Health in Nebraska, but which would have exempted any out-of-state pharmacies holding a pharmacy permit in the state where they were located if the requirements and qualifications for such permit were substantially equivalent to those contained in specific portions of the Nebraska statutes. In that opinion, we questioned the propriety of attempting to police another state to assure that an applicant for a permit complied with Nebraska law based upon the notion that each state's sovereign power ends at its boundaries. We suggested that the exemption proposed for LB 578 become the general rule; that is, all out-of-state pharmacies dispensing prescription drugs into the state should hold a pharmacy permit from the state in which the pharmacy is located.

LB 350, the current attempt to regulate the delivery of prescription drugs in Nebraska by out-of-state pharmacies, provides that no person operating outside the State of Nebraska shall mail or in any manner deliver dispensed prescription drugs into the state unless such person: a. is licensed as a pharmacist in the United States, b. has filed with the Department of Health evidence of a pharmacy license or permit issued by and valid in the state in which the person is located and from which such prescription drugs will be shipped, c. is located and operating in a state in which the requirements and qualifications for obtaining and maintaining a pharmacy license or permit are considered by the Department of Health, with the approval of the Board of Examiners in Pharmacy, to be substantially equivalent to the requirements imposed upon Nebraska pharmacists under the pertinent statutes, and d. has designated the Secretary of State as his agent for service of process in Nebraska. You are concerned with section c requiring substantially equivalent qualifications for obtaining a pharmacy license.

As we pointed out in our 1985 opinion, LB 350 involves an attempt by the State of Nebraska to regulate a form of interstate commerce since it would apply to pharmacies outside the state which ship or otherwise deliver dispensed prescription drugs into the state. Any attempt to regulate interstate commerce by a state must be tested under the Commerce Clause of the United States Constitution. The Commerce Clause gives the United States Congress full plenary power to regulate interstate commerce, and therefore, Federal statutes passed by Congress and Federal administrative rules and regulations passed under proper authority from Congress are capable of pre-empting any state legislation or regulation of the same subject. In Re Rules and

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Regulations Nos. 31 and 32, 193 Neb. 59, 225 N.W.2d 401 (1975); 81A C.J.S. States §24. Consequently, the threshold question in the present case concerns whether there is any Federal legislation which has pre-empted any portion of LB 350.

As we noted in our previous opinions, Congress passed the Drug Abuse Prevention and Control Act, 21 U.S.C. §§801 et seq., in 1970. The various provisions of that Act comprehensively regulate the distribution and dispensing of controlled substances in interstate commerce throughout the United States. Section 903 of the Act, 21 U.S.C. §903, states:

No provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

As a result, under §903 of the Act, the Federal legislation would not pre-empt LB 350 unless provisions of that bill and the Federal statute are in positive conflict.

LB 350 requires a person delivering dispensed prescription drugs into the State of Nebraska to be licensed as a pharmacist in the United States, and further provides that the person holding the pharmacy license or permit must operate in a state where the requirements and qualifications for obtaining the license or permit are substantially equivalent to those of Nebraska. Under the provisions of the bill, it is therefore possible that a person holding a pharmacy license in a particular state would not be allowed to dispense prescription drugs into the State of Nebraska if there was a determination that the requirements for obtaining a pharmacy license in the particular state were not substantially equivalent to those in Nebraska.

In contrast to LB 350, §802(21) of the Federal Act, 21 U.S.C. §802(21), defines the term "practitioner" (which includes a pharmacist along with physicians, dentists, and so forth) to include persons licensed, registered or otherwise permitted by the jurisdiction in which they practice to distribute or administer a controlled substance in the course of professional practice. Moreover, in the duly enacted regulations concerning the Federal Act established by the United States Department of Justice, the term "pharmacist" means: "Any pharmacist licensed by a State to dispense controlled substances, and shall include any other person (e.g. a pharmacist intern) authorized by a State

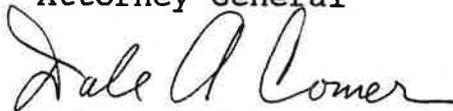
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to dispense controlled substances under the supervision of a pharmacist licensed by such State." The Federal statutes and regulations allow pharmacists to fill prescriptions and otherwise dispense prescription drugs.

As a result, the Federal statutes and regulations require only that an individual be licensed or permitted to dispense prescription drugs in a given jurisdiction or a state so as to be entitled to do so under Federal law. In contrast, LB 350 would require out-of-state pharmacists dispensing drugs into Nebraska by mail to not only have a pharmacy license from another state, but also to be licensed in a state with requirements substantially identical to those of Nebraska. This latter state standard is more stringent than that established by the Federal statute and regulations. It appears to us to be in direct conflict with those portions of the Federal law which allow anyone holding a pharmacy license to dispense prescription drugs. Moreover, our Supreme Court has indicated that no state law can hinder or obstruct the free use of a license granted under an act of Congress. ATS Mobile Telephone, Inc. v. General Communications Co., Inc., 204 Neb. 141, 282 N.W.2d 16 (1979). Therefore, it appears that §2(1)(c) of LB 350 which you questioned in your opinion request letter is pre-empted by the existing Federal statutes in this area. The state may properly require a pharmacist dispensing prescription drugs into the state by mail to possess a pharmacy license from another state. It may not impose additional, more stringent requirements concerning the nature of that pharmacy license itself.

Sincerely yours,

ROBERT M. SPIRE  
Attorney General

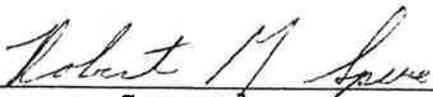


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Clerk of the Legislature

APPROVED BY:

  
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