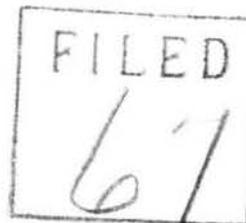


STATE BOARD OF HEALTH: Various questions concerning duties, funds, Commissioner of Health, chiropody, cosmetology etc.

October 19, 1934.



Dr. Emmett P. North,  
President,  
State Board of Health,  
3511 Washington,  
St. Louis, Missouri.

Dear Dr. North:

This is to acknowledge the request of the State Board of Health for an opinion upon various subjects hereinafter set out and discussed.

I.

Please inform us whether the Act of the Fifty-seventh General Assembly in repealing Section 9024, R. S. Mo. 1929, and placing the appointment of Commissioner of Health in the Governor, by and with the advice and consent of the Senate, has changed the position of Commissioner of Health as an administrative officer to perform such duties as may be prescribed by the State Board of Health and the Statutes?

For a better understanding of our present statutes relating to the State Board of Health, we briefly sketch the history of same.

On Friday, January 5, 1883, the following message was received by the State Senate from his Excellency, Governor T. T. Crittenden, with reference to the State Board of Health:

"There should be a Board of Health established in this State, with its headquarters at St. Louis. It should consist of five physicians, selected from the different reputable Schools of Medicine; the Board to have

charge of the State sanitation and to act as a Board of Censors in the regulation of the practice of medicine and surgery. The State is full of medical quacks who are killing annually, through their criminal ignorance, more men, women and children than die from natural causes. The Legislature should give this question serious consideration as it is one involving the lives of the people and the reputation of the State."

Laws of Missouri, 1883, Section 3, page 95, provides in part as follows:

"The State Board of Health shall have general supervision over the health and sanitary interests of the citizens of the State. \* \* \* \* \*"

Revised Statutes of Missouri, 1929, Section 9015, provides in part as follows:

"It shall be the duty of the state board of health to safeguard the health of the people in the state, counties, cities, villages and towns. \* \* \* \* \*"

Aside from the wording of the statute, we find no change in the duty of the State Board of Health to safeguard the health and sanitary interests of the citizens of the State from 1883 to the present time.

Laws of Missouri, 1883, Section 13, page 97, reads in part as follows:

"\* \* \* \* \* They shall choose from their number a president, vice president and a secretary and they may adopt rules and by-laws for their government, subject to the provisions of this act."

Revised Statutes of Missouri, 1929, Section 9019, reads in part as follows:

"\* \* \* \* \* They shall choose from their number a president, vice president and

and a secretary and they may adopt rules and by-laws for their government subject to the provisions of this article."

Laws of Missouri, 1883, Section 14, page 97, reads in part as follows:

"The secretary shall perform such duties as may be prescribed by the board and this act; \* \* \* \* \*."

Revised Statutes of Missouri, 1929, Section 9020, reads in part as follows:

"The secretary shall perform such duties as may be prescribed by the board and this article; \* \* \* \* \*."

As late as the year 1929, no important changes appear in the organization and duties of the secretary of the State Board of Health. He is still a member of the Board, chosen from their number and purely an administrative officer for he performs such duties as may be prescribed by the Board.

In 1919, the Fiftieth General Assembly created a Commissioner of Health. Section 6654, Laws of Missouri, 1919, page 373, reads as follows:

"A commissioner of health may be selected by the board who shall be a physician skilled in sanitary science and experienced in public health administration. It shall be his duty to enforce the rules and regulations of the board and he shall submit to the state board of health an annual report with his recommendations."

The same section appears in the Revised Statutes of Missouri, 1929, Section 9024, without any change, and by virtue of such the Commissioner of Health (prior to 1933) was selected by the Board and his duties consisted of enforcing the rules and regulations of the State Board of Health. And in 1933 the Legislature provided that "The Commissioner of Health shall perform such duties as may be

prescribed by the board and this article." Section 9020, Laws of Missouri, 1933, page 269. However, observe the change made, with reference to the appointment of the Commissioner of Health, in 1933 by the Legislature, found in Laws of Missouri, 1933, Section 9024, pp. 269-270, which provides in part as follows:

"The Governor, by and with the advice and consent of the Senate, shall appoint a Commissioner of Health, \* \* \* \* \*. The Commissioner of Health as hereby constituted shall assume all the rights, powers, privileges and duties heretofore conferred by law upon the Secretary of State Board of Health heretofore authorized by law, which office is hereby abolished. Where any law refers to the Secretary of the State Board of Health as heretofore constituted, same shall, after the passage of this Act, be construed as referring to and meaning the Commissioner of Health as hereby and herein constituted. \* \* \* \* \*."

Under Section 9024, R. S. Mo. 1929 (repealed in 1933), the Commissioner of Health was selected by the Board but (Section 9204, Laws 1933) he is now appointed by the Governor by and with the advice and consent of the Senate. However, he is still a Member of the Board and must perform such duties as they prescribe for him and as set out in the statutes.

From the foregoing, we are of the opinion that since the creation of the State Board of Health in 1883, it has been the intention of the Legislature to center the power of authority over health matters in the State Board of Health. And although under the present statute the power to appoint a Commissioner of Health has been taken away from the Board of Health, as likewise its power to appoint a secretary, same now provided by appointment by the Governor, so that the Secretary and the Commissioner of Health are one and the same person and the Secretary designated as Commissioner of Health and a member of the Board, he is merely an administrative officer and must perform only the duties as are prescribed by the Board and the statutes regardless of the fact that he is appointed by the Governor and not by the Board. He is responsible to the Board. In other words, the position of the Commissioner of Health is that of an administrative officer.

II.

Please advise us how representatives, and by what authority, may be sent to public health conferences.

Section 9015, R. S. Mo. 1929, sets out the powers and duties of the State Board of Health pertaining to the subject matter, and provides in part as follows:

"\* \* \* \* \* It may send representatives to public health conferences when deemed advisable, and the expenses of such representatives shall be paid by the state as provided in this chapter for expenses of the members of the state board of Health."

Laws of Missouri, 1933, pages 83 and 84, Section 33, is the appropriation made to the State Board of Health to cover such expenses; said section in part provides:

"General expenses: consisting of communication, printing and binding, travel; etc., . . . . . \$12,375."

Discretion and power to send representatives to public health conferences lies only with the State Board of Health and no individual member can assume the responsibility of sending representatives. The Commissioner of Health is a member of the Board and he cannot direct travel to such conferences solely by his authority. Neither is he permitted to attend without authorization by the Board. If attendance is occasioned by anyone without authority by the Board, then the expenses of such cannot be paid until authorized by the Board.

III.

How are the members of the Board of Health and the Commissioner of Health to receive reimbursement for traveling and other expenses in the performance of their official duties?

Laws of Missouri, 1933, Section 9020, page 269, provides in part as follows:

"\* \* \* \* \* The president of the board shall certify the amount to the Commissioner of Health, and the traveling and other expenses of members, and on presentation of his certificate the auditor of state shall draw his warrant on the state treasurer for the amount."

The Legislature in 1933, Laws of Missouri, 1933, pages 83 and 84, appropriated money to pay for the expenses. Thus, there is a statute providing that the expenses shall be paid and an appropriation out of which to pay them.

From the foregoing it is our opinion that before any payment or reimbursement can be made to any member of the State Board of Health for traveling and other expenses while employed on the business of the Board, a voucher or claim for expenses must be signed by the President of the Board and by the Commissioner of Health. Upon presentation of this certificate the State Auditor shall draw his warrant on the State Treasurer for the amount.

Section 9019, R. S. Mo. 1929, provides in part as follows:

"\* \* \* \* \* they may adopt rules and by-laws for their government, subject to the provisions of this article."

Laws of Missouri, 1933, Section 9020, page 269, provides in part as follows:

"The Commissioner of Health shall perform such duties as may be prescribed by the Board and this article. \* \* \* \* \*"

Laws of Missouri, 1933, Section 9024, page 269, provides in part as follows:

"\* \* \* \* \* He shall also receive traveling and other expenses necessarily incurred in the performance of his duties. The Commissioner of Health as hereby constituted shall assume all the rights, powers, privileges and duties heretofore conferred by law upon the Secretary of State Board of Health heretofore authorized by law, which office is hereby abolished. \* \* \*"

The question arises whether the Commissioner of Health, who is also a member of the State Board of Health, must obtain the signature of the President of the State Board of Health before any payment or reimbursement can be made to him for traveling and other expenses while employed on the business of the Board.

Laws of Missouri, 1933, Section 9020, supra, provides that the President of the Board shall certify the amount to the Commissioner of Health, and we are of the opinion that, inasmuch as the Commissioner is a member of the Board and is to perform such duties as may be prescribed by the Board and the provisions of the statutes, it is necessary that he obtain the signature of the President of the Board before presenting such certificate to the State Auditor for a warrant on the State Treasurer for the amount. Also, by virtue of Section 9019, supra, we are of the opinion that the State Board of Health may adopt rules and by-laws requiring him to secure the signature of the President for, as set out in Laws of Missouri, 1933, Section 9020, supra, "the Commissioner of Health must perform such duties as may be prescribed by the board and this article."

#### IV.

Is the Commissioner of Health limited to funds appropriated to his office or may he also draw upon funds appropriated to the State Board of Health?

Laws of Missouri, 1933, pages 83 - 84, is an appropriation in the amount of \$30,000 to the "board of health fund" to pay for expenses entailed by the State Board of Health. It is the only fund appropriated for the use of the State Board of Health. Hereinbefore we have shown that this fund is to be used by the State Board of Health and withdrawn only when certified by the President to the Commissioner of Health. See section III of this opinion.

The Constitution of Missouri provides, "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law \* \* \* ." --Article X, Section 19.

The above provision was construed by the Supreme Court in the case of State ex rel. v. Gordon, 236 Mo. 142, l. c. 158, wherein it was said:

"The language of the foregoing provisions of the Constitution is clear and explicit and forbids the payment of money from the State treasury 'received from any source whatsoever' or 'of any funds under its management' except in pursuance of regular appropriations made by law."

And in the case of State v. Seibert, 103 Mo. 401, the court held that the Laws of 1889, page 16, making appropriation "for the purpose of paying the cost of assessing and collecting the revenue for the years 1889 and 1890, including the contingent expenses of the State Board of Equalization" did not authorize the payment from the fund so appropriated for the compensation of a member of the Board of Equalization for services rendered during the years 1876 to 1886, as the appropriation applies only to the years 1889 and 1890.

It is our opinion that the Commissioner of Health is limited to the funds appropriated to his office and he may not draw upon or use the funds appropriated to the State Board of Health. That is to say, if the Commissioner of Health performs duties for his office and not for the State Board of Health, then the Commissioner's expenses must be borne from the appropriation made to his office and not pay such expenses from the fund of the State Board of Health.

Laws of Missouri, 1933, pages 82-83, Section 32, appropriates the amount of \$41,250 for "general expenses, communication, printing and binding, transportation of things, travel, other general expense" chargeable to the state revenue fund, for "the departments of the state board of health of Missouri or its legal successor." It is out of this fund that the Commissioner of Health receives reimbursement for expenses entailed when performing duties pertaining to his office, and not out of the "Board of Health Fund." In other words, there are two funds provided for the payment of expenses, (1) Board of Health Fund, and (2) Department of Health fund. The board members, including the Commissioner, when performing duties for the Board are paid out

of the first fund, and the Commissioner of Health when performing duties not for the Board of Health is paid out of the second fund.

V.

Please advise us from what source the Board of Health collects fees and into what fund such are placed.

The State Board of Health receives the following fees, which are paid into the "State Board of Health Fund":

1. Water Analysis Fees -- Section 9032, which provides:

"The analysis of all waters required by this article shall be made at the state board of health laboratories at Jefferson City, Missouri. The fees collected by the state board of health under this article shall be turned over to the state treasurer, who shall place them in a special fund to be known as the state board of health water and sewage fund and as much as is necessary of this fund shall be used for maintaining the division of the state board of health to be known as the division of water and sewage and said fund is hereby appropriated for said purpose, and the state auditor shall draw his warrant for claims against this fund after such claims have been approved by the secretary of the state board of health: Provided, no fees under this section shall be paid by any city or municipality except when the waterworks is owned and operated by said city or municipality."

This fund is appropriated to the use of the Board by virtue of Section 33, Laws of Missouri, 1933, page 83, supra, to-wit, "and fees for water analysis \$15,000".

2. Fees for Licensing Persons to Practice Chiropractic -- Article 4, Chapter 52, R. S. Mo. 1929.

3. Fees for Licensing Persons to Practice Medicine and Surgery -- Chapter 53, R. S. Mo. 1929.
4. Fees for Licensing Persons to Practice Midwifery.

The following fees are collected, which are paid into the General Revenue Fund:

1. Registration of Vital Statistics -- Section 9054a, page 230, Laws of Missouri, 1931.
2. Fees for Licensing Cosmetologists, Hairdressers and Manicurists -- Article 5, Chapter 52, R. S. Mo. 1929.

VI.

What compensation is allowed to the Members of the Board of Health pertaining to chiropody, if any?

Section 9020, Laws of Missouri, 1933, page 269, provides in part as follows:

"\* \* \* The members of the board shall receive no compensation for their services, but their traveling and other expenses while employed on the business of the board shall be paid. \* \* \*"

The above statute is unambiguous and in no uncertain terms says that no compensation is to be received by the members of the Board. It is well settled in this State that a public officer must point to the statute authorizing payment for services, and absent such statute he is presumed to render his services gratuitously. King v. Riverland Levee District, 279 S. W. 195. However, in matters pertaining to "Chiropody" the Legislature has specifically provided that the members shall receive ten dollars per diem for every day actually spent in the performance of duties pertaining thereto. We quote Section 9086, R. S. Mo. 1929, as follows:

"Each member of the board shall receive ten dollars for every day actually spent in the performance of his duties in connection with the provisions of this article, and the necessary traveling expenses actually incurred, not exceeding three cents per mile each way. The said compensation and traveling expenses, and any incidental expenses necessarily incurred by the board or any member thereof, shall, if approved by the board, be paid from the treasury of the state, but only from the fees received under the provisions of this article and paid into the said treasury of the board."

Thus, two statutes are found which are incapable of harmonizing, namely, Section 9020, supra, providing that the members shall receive no compensation, and Section 9086, supra, providing that the members shall receive ten dollars per diem.

In view of the fact that there is a special law pertaining to "Chiropody", it is our opinion that the special law prevails over the general law. That is to say, that when the members perform duties in connection with "Chiropody", then Section 9086 prevails and the members of the Board are entitled to the per diem of ten dollars per day for each day actually spent in the performance of duties in connection with "Chiropody". The Legislature evidently had this section in mind when they appropriated money for the payment of same because Section 33, Laws of Missouri, 1933, page 83 provides in part as follows:

"The per diem of the members of the board  
and consultant; \* \* \*"

Thus, the Legislature has enacted a statute to which the members of the Board may point to as authority for payment for such services, and also to an appropriation act appropriating the moneys for payment for such services.

As to the grading of examination papers, it is our opinion that the members of the Board are not permitted to receive compensation therefor.

We are attaching hereto copy of opinion rendered on August 10th, 1934, to Honorable Forrest Smith, State Auditor, which is the opinion of this Department concerning same.

In this connection, we also call attention to the fact that recently the Supreme Court of Missouri has sustained said ruling in the case of State ex rel. Davis v. Smith (not yet reported) and commonly referred to as the "Barber Board Decision."

VII.

Please state the duties of the Board of Health pertaining to cosmetology.

Article 5, Chapter 52, R. S. Mo. 1929, pertains to "Cosmetologists, Hairdressers and Manicurists."

Section 9093 of said article and chapter provides:

"The control, supervision and enforcement of the terms and provisions of this article shall be under the state board of health, or by whatever name said board may hereafter be designated."

Section 9089, R. S. Mo. 1929, provides:

"It shall be unlawful for any person in this state to engage in the occupation of hairdresser or cosmetologist or manicurist, or to conduct a hairdressing or cosmetologist's or manicurist's establishment or school, unless such person shall have first obtained a certificate of registration as provided by this article."

Section 9096, R. S. Mo. 1929, provides:

"If said state board of health finds the applicant has submitted the credentials required for admission to the examination and has paid the required fee, said board shall admit such applicant to examination or registration."

Section 9099, R. S. Mo. 1929, provides:

"The state board of health shall have supervision over the matter of inspection of the sanitary conditions of the establishments referred to in this article."

Section 9106, R. S. Mo. 1929, provides:

"The fees for examination and certificate as provided in this article shall be paid in advance to the secretary of the state board of health and by him paid each month into the state treasury to the credit of the general revenue fund. On failure to pass an examination the fees shall not be returned to the applicant, but he or she may present himself or herself within one year after such failure and be re-examined without payment of an additional fee."

Section 9098, R. S. Mo. 1929, provides in part as follows:

"If an applicant for examination for operator passes such examination to the satisfaction of the examining board and has paid the fee required and complied with the requirements pertaining to instructors provided in this article, the state board of health shall issue a certificate to that effect, signed by the president and secretary and attested by its seal. \* \* \* \* \*"

A mere reading of the above sections shows that cosmetologists, hairdressers and manicurists are under the direct supervision and control of the State Board of Health and no person shall engage in the occupation of such until a certificate is issued, signed by the president and secretary and attested by the seal. In other words, the Board of Health examines into the qualifications of cosmetologists, hairdressers and manicurists and finding such to

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be qualified under the law formally issue a certificate signed by the president and the secretary and attested by its seal. This certificate must be displayed in the office of the person practicing his business or employment. Section 9098, R. S. Mo. 1929.

We will not further lengthen this opinion on the discussion of the duties of the Board pertaining to cosmetologists, etc., because the statutes very plainly and conclusively show that the Board of Health has sole supervision over same.

We conclude this opinion by calling attention to a previous opinion rendered to the State Board of Health on May 3rd, 1934, and respectfully request that said opinion be read in conjunction with this opinion.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

MW:

JLH:EG

Enc.