

BOARD OF PHARMACY: Board of Pharmacy may make rules and regulations not inconsistent with the provisions of the law, so as to determine one's qualifications for a license as a pharmacist or assistant pharmacist.

4-19  
April 16, 1937.



Mr. Newt Gardner, Secretary,  
Missouri Board of Pharmacy,  
1700 West 39th Street.,  
Kansas City, Missouri.

Dear Mr. Gardner:

This will acknowledge receipt of your request for an opinion, which reads as follows:

"The Board of Pharmacy would like to have your opinion of the prerequisite ruling in regard to the qualifications to become a registered pharmacist in the State of Missouri.

"The former Attorney-General rendered an opinion that the Board of Pharmacy had the right to make rules and regulations inconsistent of law to keep the standard of Missouri on a par with those of other states.

"We have enforced our present ruling so that the pharmacists of Missouri will be on equal basis and believe this to be right. We would greatly appreciate your opinion as to whether or not we have this privilege."

Appended to your request for an opinion are the following proposed requirements of the Missouri Board of Pharmacy, which we have numbered from 1 to 8, inclusive, for the purpose of reference. They read as follows:

"QUALIFICATIONS FOR ASSISTANT PHARMACIST.

1. Applicant for examination as Assistant Pharmacist shall have had two years' practical experience in a retail drug store under the supervision of a Registered Pharmacist. Shall be not less than eighteen years of age, and in addition shall have attended High School for four years, or its equivalent. (THE HIGH SCHOOL REQUIREMENTS MUST BE OBSERVED.) If applicant has not had the advantage of

4/16/37.

attending High School for four years, he shall take an examination given by the Superintendent of Schools of his county or someone whom he may designate, and file this statement with the application for examination. All applications shall be in the hands of the Secretary, together with fee of \$5.00 at least fifteen days previous to date of examination.

2. After the examination given by the Board of Pharmacy in June, 1934, candidates for assistant pharmacist examination will be required to show that they have satisfactorily completed one year of attendance at an accredited college of pharmacy.

3. After June, 1935, two years of attendance will be required; after June, 1936, three years of attendance will be required; after June, 1937, graduation from an accredited college of pharmacy will be required, and such graduates will be eligible for the registered pharmacist examination.

4. It will further be required that all assistant registered pharmacists pass the registered pharmacists' examination prior to the September, 1937, examination or graduate from an accredited college of pharmacy.

#### QUALIFICATIONS FOR REGISTERED PHARMACIST.

5. Applicant for examination for Registered Pharmacist shall have had four years' practical experience in a retail drug store under the supervision of a Registered Pharmacist, and shall have been an Assistant Pharmacist for two years, or hold a Ph. G. degree. Applicant shall be not less than twenty-one years of age. Applications shall be in the hands of the Secretary at least fifteen days previous to date of examination, together, with required fee of \$10.00.

#### RECIPROCITY REQUIREMENTS.

6. Applicants for reciprocity shall have obtained their registration by examination, having made an average grade of 75 per cent and a minimum of 75 per cent in Practical Work, (60 pccent in Practical

4/16/37.

Work is required to those registered prior to June, 1936) and not less than 60 per cent in any one other branch of such examination, and, in addition, their certificates shall have been in effect one year before being allowed the benefits of reciprocity. Application blanks may be obtained from H.C. Christensen, 130 North Wells Street, Chicago, Illinois, Secretary, National Association Boards of Pharmacy, which request for blank shall be accompanied with fee of \$25.00, said sum going to the National Association to be used to extend the benefits of reciprocity.

7. After applicant has filled out blank and all places indicated for him and character witnesses, he may then send to the Secretary, together, with fee of \$15.00, and registration will be issued to him if found correct.

8. It is absolutely necessary to furnish affidavit that he has resided for twelve months in the state where he registered, and was actively engaged in the practice of pharmacy during that period."

We have considered the ruling made by the former attorney general, in which you state the opinion held that the board of pharmacy had the right to make rules and regulations inconsistent with the law, in order to keep the standard of Missouri on a par with those of other states, and have reached a conclusion, after such consideration, that the opinion did not rule the board of pharmacy had the right to make rules and regulations inconsistent with the law in order to keep the standard of Missouri on a par with those of other states.

It has long been universally recognized that it is the right of any person to pursue any lawful trade or business, subject to certain restrictions. Rules respecting the various callings have been many, depending upon the nature of the business. Some occupations have been necessarily regulated because of the dangerous character of the articles used, manufactured and sold. (See Sec. 13152 R.S.Mo. 1929); also strict and severe qualifications have necessarily been imposed upon the parties using, manufacturing and selling such dangerous article. Crowley v. Christman, 137 U.S. 86. So it has been with persons desirous of pursuing the calling of a pharmacist or an assistant pharmacist.

Our Legislature has seen fit to provide a complete scheme for the regulation of druggists (Chap. 94, R.S. Mo. 1929) and created a State Board of Pharmacy. The Legislature has, by Sec. 13148, R. S. Mo. 1929, given the board power to make rules and regulations not inconsistent with law, as may be necessary. It reads in part as follows:

"The board of pharmacy shall have a common seal, and shall have power to adopt such rules and by-laws not inconsistent with law as may be necessary for the regulation of its proceedings and for the discharge of the duties imposed under this chapter, and shall have power to employ an attorney to conduct prosecutions or to assist in the conduct of prosecutions under this chapter."

4/16/37.

In the case of State v Smith, 49 S.W. (2d) 74, l.c. 76, the court discussed the right of the Legislature to enact a law, complete in itself, to authorize certain designated officials to make rules and regulations for the complete operation and enforcement of the law. The court said:

"The Legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose."

In the case of Ex Parte Cavanaugh, 313 Mo. 375, l.c. 380, the court discussed the right of the Legislature to empower certain officers, boards and commissions to carry out the detail of any legislative enactment, and said:

"It may empower certain officers, boards and commissions to carry out in detail the legislative purposes and promulgate rules by which to put in force legislative regulations. It may provide a regulation in general terms and may define certain areas within which certain regulations may be imposed, and it may empower a board or a counsel to ascertain the facts as to whether an individual or property affected come within the general regulation or within the designated area."

In the case of Sawyer v. United States, 10 Fed. (2d) 416, l.c. 420, the United States Circuit Court of Appeals laid down a general proposition of law as follows:

"Authority to make rules and regulations necessary for carrying out the purposes of a legislative act can confer no authority to change the provisions of the act itself, and thereby deprive one of a right by the act."

The Legislature, having given to the Board of Pharmacy the right to make rules and regulations consistent with the law and for the purpose of meeting the complexities which may arise under the law, we now turn in our consideration to Section 13142 R. S. Mo. 1929, relating to the qualifications of pharmacists and assistant pharmacists. it reads as follows:

4/16/37.

"In order to be licensed as a pharmacist within the meaning of this chapter, an applicant shall be not less than twenty-one years of age, and, if his application be filed with the secretary of the board of pharmacy on or after the first day of January, 1912, he shall have been licensed as an assistant pharmacist for not less than two years prior to his application for license as a pharmacist, and he shall present to the board satisfactory evidence that he has had four years' experience in pharmacy under the instruction of a licensed pharmacist, and shall pass a satisfactory examination by or under the direction of the board of pharmacy; Provided, that if the applicant for a license as a pharmacist be a graduate of a school or college of pharmacy, whose requirements for graduation are satisfactory to and approved by the board of pharmacy, it shall not be required that he pass any examination or that he shall have been an assistant pharmacist. In order to be licensed as an assistant pharmacist within the meaning of this chapter, an applicant shall be not less than eighteen years of age, shall have a sufficient preliminary general education, and shall have not less than two years' experience in pharmacy under the instruction of a licensed pharmacist, and shall pass a satisfactory examination by or under the direction of the board of pharmacy; Provided, however, that in the case of persons who have attended a reputable school or college of pharmacy the actual time of attendance at such school or college of pharmacy may be deducted from the time of experience required of pharmacists and assistant pharmacists."

In construing the above statute, we imply (State v. Riedel, 46 S.W. (2d) 131), that the Board of Pharmacy has a right to determine what shall be considered satisfactory evidence an applicant may present, to the end that the applicant has had at least four years' experience in pharmacy, under the instruction of a licensed pharmacist. Likewise, the board has the right to determine what shall be deemed a satisfactory examination.

4/16/37.

You will observe from the first proviso of the statute that if an applicant for a license as a pharmacist be a graduate of a school or college of pharmacy, whose requirements for graduation are satisfactory to and have been approved by the board, such applicant shall not be required to pass any examination, or that such applicant shall have first been an assistant pharmacist. Here again, the statute, by clear implication, leaves the question of the reputableness of the school or college to the determination of the board. In this connection your attention is respectfully directed to the case of *Abbott v. Adcock*, 225 Mo. 335, the court had before it for consideration rules that had been promulgated by the State Board of Health, and particularly a rule which provided in substance and effect that all medical colleges, wherever located, on or before October 1, 1907, should conform to the standard specified in the schedule of minimum requirements adopted by the board on July 11, 1907. The rule further provided that students, upon being graduated from such schools, as in the opinion of the board were deemed accredited and reputable, should be admitted to examination by the State Board of Health, so as to determine their fitness to practice medicine and surgery in the State of Missouri. In passing upon such rule, at page 360, the court said:

"\* \* \* since the act left it to the board to pass upon the reputableness of all medical colleges, whose graduates applied to it for examination, and to determine the character of the evidence by which said fact was to be established, said rules were not only reasonable and just but were also wise and proper.\* \* \*"

In the case of *Ex Parte Whitley*, 144 Cal. 167, 1.c. 180, 181, the Supreme Court of California, in considering an act relating to the practice of dentistry, together with rules promulgated, aptly sets forth the reasons as to why details, with reference to qualifications of applicants, and reputableness of schools or colleges, should be left to the determination of the board. The court said:

"But it must be remembered that the act regulating the practice of dentistry and similar acts are not passed to promote the personal ends of individuals, but as salutary enactments in the exercise of the police power of the state to legislate for the safety, health, and welfare of the people.\* \* \* 'What is reputable in a dental college must necessarily be determined from a standpoint of men of scientific attainments in the line of work it represents, not from that of mere laymen,' and committed the determination of that matter to the state agency it created, consisting of dentists, presumably learned, trained, and eminent in the profession, and obligated, under the law, to deal fairly and justly with all ap-

4/16/37.

plicants and the colleges from which they presented their diplomas. We do not perceive that in so doing any provision of the organic law was violated. The power to determine whether a college was reputable had to be lodged somewhere, and it was properly committed to the only body which could fairly and intelligently determine, not only as to the qualifications of the applicant, but upon the reputation of the college whose diploma he claimed to possess. This is a power which seems to be usually given by the Legislature to boards of examiners, and its commission is sustained by the courts."

In further considering the first proviso of the statute, you will notice the language of the statute; "In order to be licensed as an assistant pharmacist within the meaning of this chapter, an applicant shall be not less than 18 years of age, shall have sufficient preliminary general education, and shall have not less than two years' experience in pharmacy under the instruction of a licensed pharmacist, and shall pass a satisfactory examination by or under the direction of the board of pharmacy."

The words used in the above part of the statute are plain, clear and without ambiguity. The only "detail" the board of pharmacy may determine from this part of the proviso is what shall be deemed to be a "sufficient preliminary general education" and a "satisfactory examination".

In this respect the board has attempted to supply the "detail" by their Rule No. 1, supra, relating to the High School requirements, or the taking of an examination by the Superintendent of Schools of the county wherein the applicant resides, or by someone whom the applicant may designate, so as to be licensed as an assistant pharmacist.

Rules numbered 2, 3 and 4, supra, relating to the qualifications for assistant pharmacists, plainly contravene the letter and spirit of Section 13142, supra, for the statute requires that, in order for a person to be licensed as an assistant pharmacist, such person shall not be less than eighteen years of age, have a sufficient preliminary general education, shall have not less than two years' experience in pharmacy, under the direction of a licensed pharmacist, and shall pass a satisfactory examination by or under the direction of the board of pharmacy.

Rules promulgated as here (2, 3 and 4) express an attempt upon the part of the board of pharmacy to make a law, and blatantly show on their face to be arbitrary and capricious, thus denying to persons qualified under the statute of their lawful right to pursue the calling of pharmacy. Your attention is respectfully directed to Section 13143, which reads in part as follows:

4/16/37.

"If the applicant for license as a pharmacist or assistant pharmacist has complied with all the requirements of the two preceding sections, the board of pharmacy shall enroll his name upon the register of pharmacists or assistant pharmacists and issue to him a license which shall entitle him to practice as pharmacist or assistant pharmacist for a period of one year from the date of said license."

We have considered Rule No. 5, promulgated by the board of pharmacy, relating to the qualifications for a registered pharmacist, and conclude that such rule only reflects the statute itself in different verbiage, and is within the authority of the board to promulgate under Section 13148, supra.

Rules designated 6, 7 and 8 are reasonable and intend to supply the detail respecting reciprocity requirements of persons desiring to be licensed within this state, and are within the authority of the board to promulgate.

#### CONCLUSION

In light of the above, it is the opinion of this Department that the board of pharmacy may make rules or regulations not inconsistent with the provisions of the law, so as to determine one's qualifications for a license as a pharmacist or assistant pharmacist. We further conclude that Rules designated 2, 3 and 4, promulgated by the board of pharmacy, contravene the spirit and letter of the statute; that such rules have for their immediate effect the denying to one qualified under the statute of his or her lawful right to pursue the calling of pharmacy, consequently, such rules are void and should be abrogated.

Very truly yours,

RUSSELL C. STONE,  
Assistant Attorney General

APPROVED:

---

J. E. Taylor  
(Acting) Attorney-General.

JET/LD.