

BOARD OF PHARMACY: It is illegal to use the words "Drug Sundries" as a sign without licensed pharmacists in charge; a license cannot be reinstated when revoked, but applicant may apply for new license. (26)

September 19, 1941

Honorable Charles R. Bohrer, Secretary  
State Board of Pharmacy  
West Plains, Missouri



Dear Sir:

Sometime ago you submitted to this department for an official opinion two questions pertaining to the Board of Pharmacy. The facts relating to your first question are as follows:

"Throughout the state, we have a number of stores operating as Drug Sundry Stores. In some instances, their signs do not stress the word 'Drug' over any other word in the sign, while in a number of instances the word 'Drug' appears in much larger letters than the other words on the sign. One instance of this is in Excelsior Springs where a man operates a store of this type on the front of which he has a Neon sign carrying the words 'Adams Drug Sundries,' with the 'Adams' above the word 'Drug' and 'Sundries' below the word 'Drug'. Both the top and lower words are in small characters, and are not very brilliantly illuminated, while the word 'DRUG' is in much larger letters, and is very brilliantly lighted, so that at a distance all of these words that are readable is the word 'Drug.' We have had considerable trouble with stores of this type, and quite a few complaints from legitimate drug stores concerning this type of advertising, and we would like an opinion from your department as to whether or not the use of the word 'Drug Sundries' is in any way a violation

of the Pharmacy Law. Also as to the use of this term, when the word 'Drug' does stand out over any other word in the term.

"We find that in most stores of this type they are selling some items in violation of the Pharmacy Law, and, of course, we insisted that they discontinue these practices, and at the present we have been successful in this regard."

We have made diligent search of the statutes, independent of the chapter and article relating solely to the Board of Pharmacy, and we find no statute under Crimes and Punishments that prohibits the using of signs such as "Adams Drug Sundries" in the manner in which you outline in your letter. The only section which we shall consider, and which might be relevant, is Section 10020, R. S. Mo. 1939, which is as follows:

"It shall be unlawful for any person not legally licensed as a pharmacist to take, use or exhibit the title of pharmacist, or licensed or registered pharmacist, or the title druggist or apothecary, or any other title or description of like import."

This section has never been construed by the courts, but we find a somewhat similar section in purport in the State of New York. (People v. Bernstein, 261 N. Y. S. 381) The section in that state reads as follows, l. c. 382:

"No person or corporation shall hereafter carry on, conduct or transact business under a name which contains as a part thereof the words 'drugs', 'medicines', 'drug store' or 'pharmacy',

or similar terms or combinations of terms, or in any manner by advertisement circular, poster, sign or otherwise describe or refer to the place of business conducted by such person or corporation by the terms 'drugs', 'medicines', 'drug store' or pharmacy.'

\* \* \* \* \*

Section 10020, quoted supra, which was formerly Section 13154, R. S. Mo. 1929, was amended in 1939, Laws of Missouri, 1939, page 375. We do not find that it was amended in such a manner as would have any effect on the question which you present.

In the decision of People v. Bernstein, 261 N. Y. S. 381, the statute quoted above was under consideration. Due to the fact that the wording of the Missouri statute and the New York statute was so vastly different, it will not aid us materially in the question under consideration except in so far as the word "sundries" may be concerned. In discussing the word "sundries," the court said, l. c. 384:

"While these articles may be sold by an unlicensed person, they may not be advertised for sale under the generic terms interdicted by section 1355. They may not, therefore, be advertised under the generic words 'drugs' or 'medicines.' The placing of the word 'sundries' after the word 'drug' does not save from the inhibition of the statute. The statute prohibits the use of the word 'drugs' or 'medicines' 'in any manner by advertisement.' Moreover, the word 'sundries' means miscellanies or various items which may be considered together, without being separately specified or identified. The statutory violation is made more clear by transposing the words 'drug sundries.' They would then, in meaning advertise 'various miscellaneous unspecified drugs', a form of advertising within the ban of the statute in a store conducted by an unlicensed person."

And again, at l. c. 385:

"This unlicensed defendant violated Section 1355 in his advertisement which used the word 'drugs' in the phrase 'drug sundries,' even though he be referring to articles which he is permitted to sell under the statute, but which statute limits his privilege to sell them by requiring him to avoid the use of the word 'drug' so that the public may not be misled into thinking that he is a licensed pharmacist or druggist. The statute confines him to the advertising of the sale of these articles in schedule C of section 1364 by their individual names."

The statute prohibits anyone unlicensed as a pharmacist to use or exhibit the title of "Druggist." It is possible that by the term "drug sundries," the public might be misled to think that such a person is a licensed pharmacist or druggist, and hence the same would constitute a violation of Section 10020.

As stated above, the courts have not passed on Section 10020, but we are of the opinion that the statute is broad enough to cover the situation as you present it as it contains the further provision "or description of like import."

## II.

Your second question relates to the following matters:

"The other matter concerning which we would like to have an opinion is that of the power of the Board to take action in reinstating a pharmacist whose license has been revoked by the Board. It is

presumptive that the Board having power to revoke a license, they should have the power to reinstate such licenses, and we find some record of the Board having done this in the past, but cannot find any specific authority to take action along this line. We have recently had a request from a man whose license was revoked 9 years ago, for a hearing before the Board to request reinstatement of his license. We informed this man that we would check the matter to your office, and act according to your advice in this matter.

"Should it be within the province of the Board to hold such a hearing, we presume that it should be necessary for him to offer competent evidence of such a nature that the Board should be convinced of the fact that this new evidence was materially in his favor before we could act favorably on his case, or could the Board arbitrarily reverse the decision, either made by itself or by a former Board, if they were convinced that the public health would be properly protected by reinstating such a person as a pharmacist? Should the Board be able to follow this course and reinstate a man whose license has been revoked, what fees would be collectible by the Board? For example, this man mentioned previously, had his license revoked 9 years ago, and it hardly seems fair to pharmacists who have been paying their renewal fees over that period to reinstate him, if possible, without payment of the renewal fees covering that period of time.

"If there are any other angles to either of these questions, of which we should be informed, we would appreciate such advice as you can give us."

We think it necessary to distinguish between power of the Board to reinstate licenses and granting to an applicant a new license.

There is a principle of law laid down in the decision of *Garfield v. United States ex rel. Goldsby*, 30 App. Cases (D. C.) 177, 1. c. 183, as follows:

"It is \* \* well settled \* \*, when the judgment or discretion of an executive officer has been completely exercised in the performance of a specific duty, the act performed is beyond his review or recall, unless power to that extent has also been conferred upon him."

Considering the provisions of Section 10007, R. S. Mo. 1939, we find that the Board of Pharmacy has authority to revoke licenses for certain reasons and under certain conditions, but the statute is silent as to reinstating a license once it is revoked. Therefore, applying the principle mentioned in the *Garfield* decision above, it would appear that the authority of the Board to reinstate a license, once it has been revoked, is beyond the review or recall of the Board.

The specific instance which you give of a former licensee having had his license revoked nine years ago wishing to have a hearing before the Board for reinstatement, in our opinion cannot be granted, but there is nothing in the statute to prevent the former licensee from applying for a new license, and we think the Board would have authority to proceed in its discretion to consider former licensee's application for a license as pharmacist under the first portion of Section 10007. If the Board now finds that none of the disqualifications of the former licensee, as contained in the statute, exist, he may be granted a license.

The provisions of the statutes relating to the revoking of a license of an intoxicating liquor dealer state that such revocation is final, and that a licensee is precluded from obtaining another license for two years.

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But, as stated hereinbefore, we think the Board of Pharmacy has such authority as outlined above due to the fact that there is no prohibition in the statute.

As to the fees, having held that you cannot reinstate the former licensee and having pointed out the procedure in event he files a new application, we think the fee question is eliminated and that he should only pay the fees which are necessary to be paid by a new applicant.

Respectfully submitted,

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APPROVED:

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