

ADMINISTRATIVE LAW:
ADMINISTRATIVE AGENCIES:
ADMINISTRATIVE RULES:
PHARMACISTS:
PHARMACY:
PHARMACY BOARD:
REGULATIONS:

Pharmacy Board may not by regulation require drug stores to have a licensed pharmacist present at all times when they are open for business.

December 8, 1961



Honorable George Allen
Representative, Howard County
303A West Morrison Street
Fayette, Missouri

Dear Mr. Allen:

We are in receipt of your request for an opinion of this office which reads as follows:

"I would appreciate an opinion from your office answering the following questions:

"1. May a drug store operating in the State of Missouri keep open its other departments after the pharmacist has left the premises for the evening, although the pharmacist is on call at his home to fill any necessary prescriptions?

"2. Also, would the statutes be complied with by merely drawing a curtain over the drug section of a drug store during the time a pharmacist is not present on the premises and allowing the other departments of the drug store such as food, cosmetics, tobacco and sundry departments to remain open?

"I refer you to Sections 338.010 through 338.190 and Sections 338.210 through 338.310 of the Revised Statutes of Missouri. Under Section 338.240, subsection (4), it is provided that the manager of said pharmacy must be under

the supervision of a registered pharmacist, or an owner, or employee of the owner, who has at his place of business a registered pharmacist employed for the purpose of compounding physicians prescriptions in the event any such prescriptions are compounded or sold. Under those statutes it is also provided that the Missouri State Board of Pharmacy may make rules and regulations not inconsistent with the law.

"I understand that the Missouri State Board of Pharmacy has adopted as part of their rules and regulations that 'it shall be unlawful for any person or persons, firm, or business to operate or conduct a drug store, pharmacy, apothecary shop, chemist shop, etc. unless there shall be on duty at all times a pharmacist legally registered in the State of Missouri when such place is open for business.'

"The question then essentially is whether or not a drug store must have a pharmacist inside the place of business at all times that the store is open, so long as a pharmacist is employed and is in charge on a full time basis.

"Additional legislation may be needed in this area and I would appreciate your opinion in this matter."

There can be no doubt that the regulations of the Pharmacy Board quoted in your request (which is in fact Paragraph 2 of Vol. I of the rules and regulations of the Missouri Board of Pharmacy) requires that a registered pharmacist be on duty at all times when a drug store is open for business. The answer to the question posed in your request depends, therefore, on the validity of that regulation.

Sections 338.010 to 338.190, RSMo 1959, concern the regulation of the profession of pharmacy. Section 338.140, paragraph 1, reads as follows:

"1. The board of pharmacy shall have a common seal, and shall have power to adopt such rules and bylaws not inconsistent with law as may be necessary for the regulation of its proceedings and for the discharge of the duties imposed under sections 338.010 to 338.190, and shall have power to employ an attorney to conduct prosecutions or to assist in the conduct of prosecutions under sections 338.010 to 338.190."

Sections 338.210 to 338.310, RSMo 1959, concern the regulation of pharmacies. A pharmacy is defined in Section 338.210 as follows:

"As used in sections 338.210 to 338.300 'pharmacy' shall mean any pharmacy, drug, chemical store, or apothecary shop, conducted for the purpose of compounding, and dispensing or retailing of any drug, medicine, chemical or poison when used in the compounding of a physician's prescription."

Section 338.280, RSMo 1959, authorizes the Missouri Board of Pharmacy to promulgate rules and regulations concerning the conduct of pharmacies. It reads as follows:

"1. The Missouri board of pharmacy may make such rules and regulations, not inconsistent with law, as may be necessary to carry out the purposes and enforce the provisions of sections 338.210 to 338.300.

"2. And such board is hereby authorized and empowered, after due notice and opportunity given for hearing, to revoke any permit or renewal thereof, when examination or inspection of a pharmacy shall disclose to such board that such pharmacy is not being operated or conducted according to such legal rules and regulations and the laws of Missouri with respect thereto.

"3. Rules or regulations made by the Missouri board of pharmacy under the provisions of sections 338.210 to 338.300, shall be adopted and become of force and effect, only after the

affirmative vote of a majority of the full membership of such board."

The regulation mentioned in your request purports to regulate pharmacies, in that it establishes a requirement with which pharmacies must comply in order to remain open for business. The authority of the Missouri Board of Pharmacy to promulgate such a regulation must therefore come, if at all, from the above quoted section 338.280, RSMo 1959. The validity of the regulation must be determined in light of the provisions of the general law governing administrative regulations and in the light of the statutory sections enacted by the legislature for the regulation of pharmacies.

The limitation on the power of administrative bodies entrusted with rule making powers are stated in Volume 73, CJS, Public Administrative Bodies, Section 94, page 414, as follows:

"* * *A public administrative body may make only such rules and regulations as are within the limits of the powers granted to it and within the boundaries established by the standards, limitations, and policies of the statute giving it such power, and it may go no further than to make administrative rules and regulations which fill in the interstices of the dominant enactment. It may make only rules and regulations which effectuate a law already enacted, and it may not make rules and regulations which are inconsistent with the provisions of a statute, particularly the statute it is administering or which created it, or which are in derogation of, or defeat, the purpose of a statute, and it may not, by its rules and regulations, amend, alter, enlarge, or limit the terms of a legislative enactment."

A similar statement may be found in Volume 42, Am. Jur. Public Administrative Law, Section 53, page 358, as follows:

"* * *Since the power to make regulations is administrative in nature, legislation may not be

enacted under the guise of its exercise by issuing a 'regulation' which is out of harmony with, or which alters, extends, or limits, the statute being administered, or which is inconsistent with the expression of the lawmakers' intent in other statutes, * * *"

Section 338.240, RSMo 1959, states:

"Upon evidence satisfactory to the said Missouri board of pharmacy:

"(1) That the pharmacy for which a permit, or renewal thereof, is sought, will be conducted in full compliance with sections 338.210 to 338.300, with existing laws, and with the rules and regulations as established hereunder by said board;

"(2) That the equipment and facilities of such pharmacy are such that it can be operated in a manner not to endanger the public health or safety;

"(3) That such pharmacy is equipped with proper pharmaceutical and sanitary appliances and kept in a clean, sanitary and orderly manner;

"(4) That the management of said pharmacy is under the supervision of either a registered pharmacist, or an owner or employee of the owner, who has at his place of business a registered pharmacist employed for the purpose of compounding physician's prescriptions in the event any such prescriptions are compounded or sold;

"(5) That said pharmacy is operated in compliance with the rules and regulations legally prescribed with respect thereto by the Missouri board of pharmacy, a permit or renewal thereof shall be issued to such persons as the said board of pharmacy shall deem qualified to conduct such pharmacy."

In the above section the legislature has stated definite requirements regarding the supervision of pharmacies and drug stores by registered pharmacists. It has said that a drug store may be issued a permit to transact business if its management is under the supervision of either a registered pharmacist or of an owner or agent of the owner who has employed a pharmacist at his place of business for the purpose of compounding prescriptions "in the event any such prescriptions are compounded or sold . . ." However, the regulation fails to qualify its requirement that a pharmacist be present in the store at all times when it is open for business.

In view of the fact that most modern day drug stores engage not only in the business of filling prescriptions, but in such unrelated endeavors as the sale of hardware, clothing, and sporting goods, we must hold that the regulation exceeds the authority granted to the Board insofar as the regulation purports to require the presence of a pharmacist during the conduct of business other than that of compounding and selling prescriptions. A regulation of this nature would be an extension of the requirement imposed by the legislature, and therefore would be invalid insofar as it purports to enlarge the requirement of the statute.

CONCLUSION

Paragraph 2, Volume I, of the Rules and Regulations of the Board of Pharmacy, which purports to require the presence of a registered pharmacist at all times that a drug store is open for business, is invalid insofar as it enlarges the requirements of Section 338.240, RSMo 1959, that the management of a pharmacy be under the supervision of a registered pharmacist or an owner or employee of the owner who has a pharmacist employed for the purpose of compounding prescriptions in the event any prescriptions are compounded and sold. Inasmuch as the legislature has seen fit to require the presence of a pharmacist only at times when prescriptions are compounded or sold, the Board

Honorable George Allen -7-

may not make the additional requirement that a pharmacist will be present at all times. Therefore, a drug store may remain open for business other than the compounding or selling of prescriptions even though there be no pharmacist on duty at the time such other business is conducted.

This opinion which I hereby approve was prepared by my assistant, Ben Ely, Jr.

Yours truly,

THOMAS F. EAGLETON
Attorney General

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