

COUNTY COURTS: Right to fill office of Deputy State Commissioner of Health under amended law.

OSTEOPATHIC PHYSICIANS: Eligibility as Deputy State Commissioner of Health.

February 13, 1934.

3-14



Honorable W. W. Crockett
Prosecuting Attorney
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New London, Missouri

Dear Sir:

I hereby acknowledge your request for an opinion dated January 18, 1934. Your request reads as follows:

"I would like an opinion relative to the following legal propositions, to-wit:

1st, A local M. D. was appointed in February, 1932 under section 9025 R. S. Mo. 1929, the Legislature for the year 1933 as shown at page 271 of session acts repealed said section, the question is shall the M. D. so appointed in 1932 hold office another year or shall the County Court appoint a man under new Section 9025 for a period of one year?

2nd, Is an Osteopathic Physician eligible under said section to hold said office if appointed?

You will observe in section 9024 at page 269 of said Session Acts what is said as to "different systems of medicine". Is Osteopathy a system of medicine?

I cite you to State ex rel Attorney general 44 Mo. 129 and State vs Gardner 265 S. W. page 998, l. c. on the first proposition.

You have heretofore asked my opinion in writing you. From the above it seems that we should appoint a man under section 9025 this February altho it seems to me that the English view of the matter is better than ours. I understand that Osteopathic Physicians are holding the office under section 9025 R. S. Mo. 1929 and as coroners in several counties over the state. I think it is likely that an Osteopath can prescribe medicine and do about anything that an M. D. can under the present status of the law. Is that correct? if so they can be holders of any office that an M. D. can hold. Better quit before I ask you too many questions?"

Section 9025 R. S. Mo. 1929 provides as follows:

"At the first regular February term of the county court in each county of the state after this article becomes effective and at the regular February term of said county court every third year thereafter said court shall appoint a reputable physician as a deputy state commissioner of health for that county for a term of three years. In case of a vacancy in the office of the deputy state commissioner of health of a county, the county court shall at its next regular term of court appoint a reputable physician for the unexpired term. If the county court fails to appoint a deputy state commissioner of health as above provided at the February term of said court or at the next term following a vacancy, the state board of health shall appoint a reputable physician as deputy state commissioner of health for that county who shall serve until the county court of such county makes such appointment. The county court of any county upon appointing a physician as deputy health commissioner shall confer with such physician and agree with him as to his compensation and expenses for the performance of his duties as deputy state health commissioner of that county and such compensation and expenses shall be paid to him out of the county treasury of that county. If it becomes necessary for the state board of health to appoint a deputy state health commissioner, as above provided, said state board of health shall fix a reasonable compensation for such deputy state health commissioner and shall designate what shall be his reasonable expenses, all of which shall be paid out of the county treasury of the county of which he is deputy state health commissioner."

Section 9025 Laws of 1933, page 271, after repealing the above law, provides as follows:

"At the first regular February term of the county court in each county of the State after this article becomes effective and at the regular February term of said

county court every year thereafter, said court may appoint a reputable physician, as a Deputy State commissioner of health for a term of one year. In case of a vacancy in the office of the Deputy State Commissioner of Health of the county, the county court may at its next regular term of court appoint a reputable physician for the unexpired term. But the power of deciding whether or not such a deputy state health commissioner will be appointed shall be vested in the county court. If a county court of any county decides to appoint a deputy health commissioner, as empowered in this act, it shall agree with said commissioner as to the compensation and expenses to be paid for such services which amount shall be paid out of the county treasury of the county."

Thus we see that the M. D. who was appointed under the law before its repeal, was appointed for a three year term. With the repeal of the law authorizing his office, the question presented in your first query is: Does this M. D. who in the first instance was a bona fide office holder by appointment, have the rights to the honor and emoluments of said office for another year by virtue of the amended laws of 1933? If not, then how may a County Court, in a county desiring to employ a deputy State Health Commissioner, proceed to legally employ one?

In the case of Sanders v. Kansas City, 162 S. W. 663, 1. c. 665, 175 Mo. Appeals 367, the appellate court stated the law thus:

"In this State our courts always have recognized and applied the doctrine supported by the great weight of authority in America that no one can acquire a vested right in an office established by the legislative department of a State or municipality. All offices are created for the public good and the rights of their incumbents are subordinate and inferior to that prime object. The power to create, unless restrained by law, includes the power to abolish and an officer elected or appointed even for a definite term, takes office with the implied understanding that the power which created the office may abolish it before the expiration of his term, in which event he will find himself out of office."

In an early case of State v. Gordon, 139 S. W. 403, l. c. 407, 236 Mo. 142, our Supreme Court said:

"There is no doubt of the power of the Legislature to refuse to make an appropriation for the payment of the salary and expenses of any public officer holding office under the Constitution or laws of this State. Neither is there any doubt as to its power to abolish any office not provided for by the Constitution."

Again the Supreme Court said in State ex rel v. Davis, 44 Mo. 129, l. c. 131:

"A mere legislative office is always subject to be controlled, modified, or repealed by the body creating it."

It is our opinion that by virtue of the new act repealing Section 9025 ^{18/1929} that one who rightfully claimed title by appointment under the old law is by the new act legislated out of office, and is not entitled to the honor and emoluments of the new office unless he receive his appointment under the provisions of the new law. Under the new law, it is not compulsory for any county court to employ a deputy State Commissioner of Health. In counties where the Court deems such an officer necessary, the Court has to follow the provisions of the new act.

It is to be noted that Section 9025, as amended in Laws of 1933, in express words says, "said court may appoint a reputable physician" and the term "reputable physician" appears once again in this Section. If an Osteopathic Physician is a reputable physician, then, you ask in your second question, is he eligible as an appointee to the office of Deputy State Commissioner of Health, under this section? Our answer must be determined upon what the Legislature meant when they used the term "physician," within this section.

In Section 9024, as amended in Laws of 1933, page 269, which section should be construed along with section 9025 as amended in Laws of 1933, page 271, the Legislature said:

"The Governor, by and with the advice and consent of the Senate, shall appoint a Commissioner of Health, who shall hold his office for a term of four years, and who shall be a physician in good standing and of recognized professional and scientific knowledge and a graduate of a reputable medical school, and shall have been a resident of the State for at least five years next preceding his appointment, and in making such appointment there shall be no discrimination made against the different systems of medicine that are recognized as reputable by the laws of this State. The Commissioner of Health shall be subject to removal from office for cause by the Governor at his pleasure. The compensation of the Commissioner of Health shall be five thousand dollars (\$5000) per annum. 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. 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."

Thus we see that in the appointment of the Commissioner of Health, the law provides that there shall be no discrimination made between the different schools of medicine that are recognized as reputable by the laws of this State. The Legislature, no doubt, intended that the Commissioner of Health and his subordinates, be practitioners from any of the different schools of medicine that are recognized as reputable, by the laws of this State.

Section 13514 R. S. Mo. 1929 provides as follows:

"The system, method or science of treating diseases of the human body, commonly known as osteopathy, and as taught and practiced

by the American school of osteopathy of Kirksville, Missouri, is hereby declared not to be the practice of medicine and surgery within the meaning of article 1 of chapter 53 and not subject to the provisions of said article."

Section 9111 R. S. Mo. 1929, provides as follows:

"It shall be unlawful for any person not now a registered physician within the meaning of the law to practice medicine or surgery in any of its departments, or to profess to cure and attempt to treat the sick and others afflicted with bodily or mental infirmities, or engage in the practice of midwifery in the state of Missouri, except as hereinafter provided."

The act establishing osteopathy in this State recognized osteopathy as a school of medicine, for Section 13529 R. S. Mo. 1929 provides:

"Every person holding a certificate from the state board of examination and registration shall have it recorded in the office of the county clerk in the county in which he expects to practice, and in the cities of St. Louis, Kansas City and St. Joseph they shall record the same with the same official which records the certificate of graduates of any other school of medicine, and the date of the recording shall be indicated thereon. Until such certificate is filed for record the holder shall exercise none of the rights or privileges conferred therein. The county clerk or city health commissioner shall keep, in a book provided for the purpose, a complete list of all certificates recorded by him, with the date of the recording of such certificates. Each holder of a certificate shall pay to the official a fee of one dollar for making such record."

In the case of Grainger v. Still, 187, Mo. 197, 1. c. 224, 85 S. W. 1114, our Supreme Court said:

"It is said that allopaths are 'antis' and homeopaths are 'similias,' but that

osteopaths are neither. This may be true, but the terms relate rather to the treatment or remedies employed to cure disease, than to the diagnosis of the disease. The disease is the same no matter which school of medicine the attending physician belongs to."

In the Grainger case our Supreme Court reasons that osteopathy may be a school of medicine, although differing from the schools of medicine described in Section 9111 above set out and referred to in Section 13514 defining osteopathy as not to include the schools of medicine licensed under Section 9111.

Again in *Atkinson v. School of Osteopathy*, 240 Mo. 338, 1. c. 353, 144 S. W. 816, our Supreme Court said:

"Our statute, already referred to (R. S. 1899, secs. 8537-8539), expressly recognizes osteopathy as 'a system, method or science of treating disease of the human body,' and the defendant's school as the exponent of its method and practice. It also expressly authorizes persons having diplomas from that or any other legally chartered and regularly conducted school of osteopathy to treat diseases of the human body according to such method. In so doing it necessarily permits and authorizes persons to contract for such treatment. It is true that section 8537 provides that osteopathy is 'not to be the practice of medicine and surgery within the meaning of article 1 of this chapter, and not subject to the provisions of said article;' but the purpose so expressed is simply to segregate this particular system from those for the regulation of which article 1 was enacted.

All these systems, methods or sciences are directed to the treating of diseases of the human body, and each stands upon the merits of its own system."

For the definition of the term physician as used in Section 9025 as amended in Laws of 1933, we look to the content of the section and to the decisions of our courts in forming our opinion. Noah Webster defines the term physician thus:

"A person skilled in physics or the art of healing."

The section does not prescribe what school to which said physician must profess. The terms "homeopath", "allopath", "Hydropath" or "osteopath" are not used in the section. To construe the term "physician" technically, to the exclusion of other schools of healing or medicine would be against the content of the section and repugnant to the intention of the Legislature, when they made it possible for the inhabitants of a county, through their county court, to employ a Deputy State Health Commissioner, whose duties were to look after health measures in the county, under the supervision of the State Commissioner of Health. The will of the taxpayers who are paying for this service can legally be expressed in the "pathy" of the physician they appoint in their respective counties, so long as said school of medicine be recognized by the laws of Missouri. The section providing for the appointment of a Deputy State Health Commissioner, was not intended to promote the welfare of any medic profession to the exclusion of another, and at the expense of the taxpayers.

The regulations of the Federal Government, approved April 1, 1931, by the Secretary of the Treasury and Attorney General of the United States, permit osteopathic physicians to qualify on the same basis as "physicians of other schools of medicine" for permits to prescribe the use of intoxicating liquors for medicinal purposes.

As to your second question, it is our opinion that a reputable osteopathic physician is eligible as an appointee to the office of Deputy State Commissioner of Health.

Respectfully submitted

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Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H