STATE BOARD OF HEALTH:

PHYSICIANS AND SURGEONS: Procedure for revocation of license.

1-29

January 24, 1936

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E. T. McGaugh, M. D.
State Health Commissioner
State Board of Health
Jefferson City, Missouri

Dear Sir:

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

> "In Re: MUENCH BABY CASE
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> "At the Board meeting of January 6, 1936, after reviewing the Court's findings in the Muench baby case, motion was made, seconded and carried that the question of citing Dr. Ludwig O. Muench to appear before the Board for signing a fraudulent birth certificate be referred to the Attorney General for his opinion as to what procedure the Board should follow.
>
> "Will you kindly advise us as to your opinion and recommendation in regard to proper procedure with reference to the Dr. Muench case."

If the State Board of Health desire to institute proceedings to determine whether or not Dr. Ludwig O. Muench's license to practice medicine should be revoked, they should, of course, proceed as in any other case. The Board has for the past several years instituted many such proceedings and conducted numerous hearings to revoke licenses to practice medicine. In view of this, it appears to us that your re-

quest is unnecessary. The responsibility rests with the Board to determine whether or not theinformation at hand is sufficient to justify the institution of the proceeding. For the Board to cite every doctor against whom a whispered suggestion of unprofessional conduct is made would be unthinkable. The Board, in performing the duties placed upon it by law, must determine which cases justify further proceeding. No duty rests on this office to recommend that action be taken in any given case. However, it becomes our duty upon your request to point out the proper procedure for the Board to follow in instituting proceedings and conducting hearings.

Section 9120, Revised Statutes Missouri 1929, gives the Board authority to revoke licenses. This section reads as follows:

> "The board may refuse to license individuals of bad moral character, or persons guilty of unprofessional or dishonorable conduct, and they may revoke licenses, or other rights to practice, however derived, for like causes, and in cases where the license has been granted upon false and fraudulent statements, after giving the accused an opportunity to be heard in his defense before the board as hereinafter provided. Habitual drunkenness, drug habit or excessive use of narcotics, or producing criminal abortion, or soliciting patronage by agents, shall be deemed unprofessional and dishonorable conduct within the meaning of this section. At least twenty days prior to the date set for any such hearing before the board for the revocation of such license, the secretary of the board shall cause written notice to be personally served upon the defendant in the manner prescribed for the serving of original writs in civil actions. Said notice shall contain an exact statement of the charges and the date and place set for the hearing before the board. If the party thus notified fails to appear, either in person or by counsel, at the time and place

designated in said notice, the board shall, after receiving satisfactory evidence of the truth of the charges and the proper issuance and service of notice, revoke said license. If the licentiate appear either in person or by counsel, the board shall proceed with the hearing as herein provided. The board may receive and consider depositions and oral statements and shall cause stenographic reports of the oral testimony to be taken and transcribed, which, together with all other papers pertaining thereto, shall be preserved for two years. If a majority of the board are satisfied that the licentiate is guilty of any of the offenses charged, the license shall be revoked for such period of time as may be agreed upon. Any person whose license has been or shall be revoked by the board shall have the right to have the proceedings of said board revoking his license and all the evidence therein reviewed, on a writ of certiorari, by the circuit court of the county in which said board held its session when said license was revoked. Said writ shall issue upon the petition of the person whose license shall have been revoked to said court or to the clerk thereof in vacation at any time within ninety days after such revocation, and shall command the said board and the secretary thereof to certify to said court the record and proceedings of said board, and a complete transcript thereof, and of all the evidence therein pertaining to the revocation of said license. The petitioner for the writ of certiorari shall set forth the rights of the petitioner and the injuries complained of by him and shall be verified by him. If the proceedings of the board shall be sustained or upheld by the circuit court, its orders, decisions

> or judgments revoking said license shall remain and continue in full force and effect.And any such license so revoked by the board shall, pending said review on certiorari, stand revoked and so remain until the proceedings of the board relating thereto shall be quashed or otherwise annulled by the circuit court on said writ of certiorari. Testimony may be taken by deposition,to be used in evidence on the trial of such charges before the board in the same manner and under the same rules and practice as is now provided for the taking of depositions in civil cases."

Although the foregoing statute specifies certain causes for which licenses may be revoked, yet the enumeration there contained is not exclusive. This is recently held in the case of State ex rel. Lentine v. State Board of Health 65 S. W. (2d) 943. At page 950 the Court stated in the course of that opinion as follows:

> "In particularizing that habitual drunkenness, drug habit, or excessive use of narcotics, criminal abortion, and soliciting patronage by agents shall be deemed unprofessional and dishonorable conduct, we do not, in view of the broad intendments found in the preceding general language, think that the Legislature intended to thereby exclude all other acts or conduct affecting the practice of medicine and the moral conduct of the physician, in that connection, which by common opinion and fair judgment are found to be in their very nature unprofessional and dishonorable, as grounds or cause for revocation of a license. Rather upon a showing of any of the things enumerated the board of health, and the court upon review, is not called upon in its sound discretion to determine whether such conduct is such as in common judgment is deemed unprofessional and dishonorable, for the statute has expressly declared it so to be. It would not be practicable to

> the carrying out of the wholesome purpose of the statute to undertake to catalogue, list, or specify each and every act or course of conduct which would, or under what circumstances, constitute bad moral character or unprofessional and dishonorable conduct, and we do not think the Legislature intended to do so. The amendment of 1919, as we have observed, might logically be taken to indicate a purpose to be rid of the seeming restriction and limitation which the court had placed upon the statute in its construction of the language stricken out and to permit the statute to operate as to acts other than those named which in their nature are, and by common opinion deemed, unprofessional and dishonorable. So far as State ex rel. Spriggs v. Robinson, supra, is not in accord with what is said herein, it should no longer be followed."

Likewise, it has been held that although the act charged may constitute a violation of the criminal code, a prosecution under such code is not a legal prerequisite to a proceeding by the board to revoke the license. Such was the holding in the case of State ex rel. Conway v. State Board of Health, 266 Mo. 244, l. c. 269:

> "It needs no citation of authorities to demonstrate that appellant's conduct aforesaid, as disclosed by the undisputed facts in the record, was both unprofessional and dishonorable. In addition to the foregoing, every prescription of the above character which appellant signed as physician and delivered, and upon which whiskey was obtained as a beverage, constituted a crime against this State.

Section 5784,Revised Statutes 1909, reads as follows:

> 'Any physician, or pretended physician, who shall make or issue any prescription to any person for intoxicating liquors in any quantity, or for any compound of which such liquors shall form a part, to be used otherwise than for medicinal purposes, or who shall issue more than one prescription at the same time to any one, for intoxicating liquors, or for any compound of which such liquors shall become a part, or who shall make or issue any prescription contrary to any existing law, shall be deemed guilty of a misdemeanor, and upon conviction be punished by a fine of not less than forty nor more than two hundred dollars.'

> While appellant might have been successfully prosecuted under the statute last quoted, it does not militate in the least against the right of the State Board of Health, under the circumstances detailed in this record to revoke his license."

It is plain from a reading of Section 9120, supra, that a jurisdictional requirement is the service of written notice upon the licensee at least twenty days before the hearing is held. Such notice must be served in the manner prescribed for the serving of writs in civil actions and must contain an exact statement of the charges made and the date and place of the hearing. If the party fails to appear pursuant to the notice the board may proceed to hear the evidence so as to determine the truth of the charges, being first satisfied that proper notice has been served. If the evidence is, in the judgment of the Board, sufficient to warrant a revocation of the license, the Board may so order. If the licensee appear, either in person or by counsel, the Board shall proceed with the hearing. The Board may receive and consider depositions, oral statements and documentary evidence, and cause a stenographic report of the' proceeding to be taken and preserved.. If a majority of the Board are satisfied that the licensee is guilty of any of the offenses charged, the license shall be revoked for such period of time as may be agreed upon. The Board has no power to

subpoena witnesses, but testimony may be taken by depositions and used in evidence on the trial of such charges before the Board.

In an opinion given to you, under date of January 13, 1936, this department ruled that the State Board of Health may institute proceedings to revoke a license to practice medicine on the complaint of any citizen. We ruled further that the State Board of Health may institute proceedings to revoke a license upon any information they may have obtained, regardless of from whom received or how communicated, and that it was not a prerequisite that a complaint be filed. We ruled further that it was sufficient if the licensee against whom the charges are made is served with the written notice provided for in Section 9120, supra, and that such notice contain an exact statement of the charges against such licensee. In construing this provision, the Supreme Court stated, in the case of State v. Landwehr 32 S. W. (2d) l. c. 85:

> "Section 7336 provides that, in a proceeding to revoke a physician's license, the notice served on him shall be in writing, and shall contain an exact statement of the charges and the place and date set for the hearing. The statute is to be interpreted as denying the board the right or power to revoke a physician's license, except upon notice and hearing and with an opportunity to defend. Blunt v. Shepardson, 286 Ill. 84, 121 N. E. 263; People v. McCoy, 125 Ill. 289, 17 N. E. 786; State v. Schultz, 11 Mont. 429, 28 P. 643; People v. Reid, 151 App. Div. 324, 136 N.Y. S. 428."

The State Board of Health is not a judicial body and the technical rules of procedure applicable to a judicial trial need not be followed by the Board in conducting a hearing. The Supreme Court so held in the case of State ex rel. Ball v. State Board of Health 26 S. W. (2d), l. c. 777:

> "In addition to the foregoing, it may be said that an investigation by the State

> Board of Health is not a lawsuit,and the technical rules of procedure applicable to a judicial trial need not be followed. In State ex rel.Goodier, 195 Mo. 551, 559, 93 S. W. 928, 929, we said:'The state board of health is not a court - is not a judicial tribunal. It can issue no writ. It can try no case - render no judgment. It is merely a governmental agency, exercising ministerial functions. It may investigate and satisfy itself from such sources of information as may be attainable as to the truth or falsity of charges of misconduct against one holding one of its certificates, but its investigation does not take on the * * * character of a judicial trial. * * * To guard and protect the health and welfare of its people the state must have its ministerial agents or officers and intrust them with power; if every administrative act that looks to the enforcement of the law should be required to be reduced to the compass of a law suit and be put into effect only after a court had at the end of a formal trial stamped its judgment upon it."

The Board should, however, be governed by the rules of legal evidence in admitting and passing upon testimony at such hearings.

In the case of State ex rel. Johnson v. Clark 232 S.W. l. c. 1034, the Court said:

> "Moreover, respondents cannot act arbitrarily, nor against the rules of evidence. State ex rel. McCleary v. Adcock, 206 Mo. loc. cit. 558, 105 S. W. 270, 121 Am. St. Rep. 681. The declaration attributed to the deceased young woman was not made under an impression of impending

and immediate death, as is evidenced by the decisively negative answer of Dr. Jose to the question:

" 'Say anything about that she realized the end was near, or say anything about dying,'

"That being true, the statement would unquestionably, under the rules of evidence, have been inadmissible in a criminal proceeding before a court.* * *. And we see no just reason and find no precedent to the contrary in this state, as to why a similar rule should not prevail in a hearing before the State Board of Health, when a valuable privilege, if not a property right, depends upon the outcome of that hearing. To let down the bars and admit uncorroborated hearsay testimony, which the record here discloses constitutes the only possible positive evidence upon which the order of the board can be predicated, is not consistent with the practice which should be followed in inquiries of even a quasi judicial nature."

CONCLUSION

In view of the above we summarize our conclusions as follows:

In instituting a proceeding to revoke a license to practice medicine at least twenty days' written notice must be personally served upon the licensee, in the manner prescribed for the serving of original writs in civil actions. The notice must contain an exact statement of the charges against the licensee and the date and place set for the hearing. The Board may institute such proceedings on the complaint of any citizen, or on information they have obtained, regardless

of from whom received or how communicated. At the hearing the licensee has a right to appear and defend against the charges made against him. He is entitled to appear, in person and by counsel, to cross-examine the witnesses against him and to introduce evidence in his own behalf. The State Board of Health is not a judicial body and the technical rules of procedure applicable to a judicial trial need not be followed in conducting a hearing. However, the Board should be governed by the rules of evidence in admitting and passing upon testimony at such hearings. If the licensee, after being duly cited, fails to appear before the Board at the time and place designated, or does appear in person or by counsel, a majority of the Board may, if there is satisfactory evidence of the truth of the charges, revoke said license for such period of time as they may agree upon.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

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