STATE BOARD OF HEALTH: 1) Present and Acting Board has no jurisdiction or authority to entertain a petition to reinstate license "Permanently revoked" by predecessor board.
2) "Revoke" as used in Section 9990 R.S. Mo. 1939, means permanent revocation where no definite period of time is stated.
3) Revocation of license by predecessor board does not prevent a subsequent board from granting a license based on new application.

October 6, 1943

11/29 FILED 85

Dr. James Stewart
State Health Commissioner
State Board of Health
Jefferson City, Missouri

Dear Sir:

We are in receipt of your opinion request of September 30, 1943, which reads as follows:

> "The records of the State Board of Health reflect that on the tenth day of March, 1937, the following entry was made:
>
> " ' DR. SMITH: THE BOARD WILL NOW CONSIDER THE COMPLAINT FILED AGAINST DR. LUDWIG ORLANDO MUENCH:
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> "Dr. Ludwig Orlando Muench having been duly notified appeared by council, George B. Calvin. Mr. Calvin made an oral motion that the hearing be continued until such time as Dr. Muench could be present in person, which motion was overruled by the Board. Evidence having been introduced in support of the complaint filed against the said Ludwig O. Muench and argument of council for Dr. Muench having been heard it was moved by Dr. Brandon and seconded by Dr. Bailey that the Board go into executive session, which motion was duly carried.
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> "The Board in executive session, after considering the evidence introduced in support of the charges filed against Dr. Muench on motion of Dr. Bailey seconded by Dr. Brandon, which motion was unanimously carried, found that Dr. Ludwig Orlando Muench was guilty of unprofessional and dishonorable conduct as charged in the complaint filed with the State Board of Health against him and ordered that his license to practice the profession of medicine and surgery in the State of Missouri be PERMANENTLY REVOKED.'

> "Will you please advise me if the present State Board of Health has the jurisdiction or authority to entertain a petition of Dr. Ludwig Orlando Muench for the purpose of restoration of his license to practice medicine and surgery. In other words do the words, "permanently revoked," deprive the present Board of jurisdiction.
>
> "Thanking you very much I remain,"

Your opinion request has to do with the interpretation and construction to be placed on Article 1, Chapter 59, R.S. Mo. 1939, and particularly Section 9990 of which 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. ***"

We shall divide your question into two parts to wit:

1) "Will you please advise me if the present State Board of Health has the jurisdiction or authority to entertain a petition of Dr. Ludwig Orlando Muench for the purpose of restoration of his license to practice medicine and surgery."

2) "In other words do the words, 'permanently revoked', deprive the present Board of jurisdiction."

We shall first take the second portion of your question. In the case of State ex rel. Ball v. State Board of Health et al, 26 S.W. (2d) 773, l.c. 777, paragraph 7-9, wherein the court had this to say:

> "* * *For the reasons stated, we hold that it was not necessary for the record to affirmatively show that the board found relator guilty of the offense charged, as a prerequisite to the order revoking the license. Neither do we think that the order revoking the license is void because it does not state a period of time for which the license was revoked. The statute provides that the license shall be revoked for such period of time as may be agreed upon. The members of the board may agree to revoke for a limited period of time or for all time, and where, as here, the order revoking the license does not name any specified period of time, it necessarily means a permanent revocation for all time."

From the reading of the aforesaid case we must conclude that it made no difference whether the Board in the order of March 10, 1937, used the words "permanently revoked" or had merely used the word "revoked".

Now turning to the first portion of your question which reads as follows:

> "Will you please advise me if the present State Board of Health has the jurisdiction or authority to entertain a petition of Dr. Ludwig Orlando Muench for the purpose of restoration of his license to practice medicine and surgery."

From the reading of the question of aforesaid we observe that the petition referred to in the question, is a petition to reinstate the license that was revoked by your Board on March 10, 1937, and said question will be considered in that light throughout this opinion. In making this determination we should decide whether or not the order of your Board on the 10th day of March, 1937, was judicial, quasi judicial or merely ministerial in character. In the case of the State ex rel. McCleary v. Adcock et al., Constituting State Board of Health, 206 Missouri, page 550, l.c. 557, the court had this to say:

> "* * *Grant it, for the purposes of this case, that these boards are clothed with discretionary powers, yet an unwarranted exercise of that discretion is a subject-matter for review. They are not judicial bodies."

And in the case of the State ex rel. McAnally v. Goodier et al, 195 Missouri, page 551, l.c. 559, the court had this to say:

> "* * * 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; * * *"

and on page 560, the court had this to say:

> "* * *The statute above quoted says the board may refuse to issue the certificate, or may revoke it after it has been issued, if the man is unworthy; this implies that the board may have had some information of misconduct of an applicant which would justify a refusal to issue the certificate, or after the certificate

> is issued that would justify its recall, and in either case the board is authorized to act 'after giving the accused an opportunity to be heard.' Those are the only words that suggest a trial and they fall far short of a judicial trial.* * *"
>
> "* * * The duties of the board are of an administrative or ministerial character, and therefore as long as its acts are within the scope of the exercise of a reasonable discretion it is free to act."

on page 563 the court had this to say:

> "In the case now before us for judgment we hold that the State Board of Health is not a judicial body, that it has the power to revoke a license or certificate issued by it if after investigation in which the licensee is afforded an opportunity to be heard it is satisfied that he has been guilty of unprofessional or dishonorable conduct, and that in conducting such investigation (or trial if that term is preferred) it is not assuming to exercise a judicial function; * * *"

The Goodier Case supra, has been reaffirmed in the case of the State ex rel. Ball supra, l.c. 777, and State ex rel. Johnson v. Clark et al, 232 S.W., page 1031, l.c. 1034:

> "As authority for such insistence the Attorney General cites State ex rel. McAnally v. Goodier, 195 Mo. 551, 93 S.W. 928. That case was an original proceeding in prohibition, brought against the State Board of Health to prohibit it from proceeding with a hearing upon charges preferred against the relator. This court there held that prohibition would not lie as the Board of Health is not a judicial body, but merely exercises ministerial functions.* * *"

Having determined that the order of March 10, 1937, was purely ministerial in character, we shall next determine whether or not your present Board has authority and jurisdiction to set aside or modify said order, and if so, to what extent, if your Board in its decision determines that it so desires. In 34 C. J., Section 1293, we find this statement:

> "Only decisions made in a judicial capacity operate as res judicata."

In the case of State ex rel. Plunkett et al v. Miller, 137 So. page 737, l.c. 738, the court had this to say:

> "In the case of Moreau v. Grandich 114 Miss. 560, 75 So. 434, we held that under the school law an appeal from the trustees to the superintendent is not an exclusive remedy; that the right to admission to the public schools of the state is a valuable right upon which litigants have a right to judicial determination, that the school trustees and superintendent are administrative bodies, and that the appeals provided from them are administrative appeals, and do not constitute res adjudicata."

Financial Aid Corp. v. Ross Wallace et al, 125, A.L.R. page 736, l.c. 741, wherein the court said:

> "* * *An administrative officer charged with the administration of the laws enacted by the General Assembly necessarily exercise a discretion partaking of the characteristics of the judicial department of the government but does not have the force and effect of a judgment. Unless an administrative officer or department is permitted to make reasonable rules and regulations, it would be impossible in many instances to apply and enforce the legislative enactments, and the good to be accomplished would be entirely lost.* * *"

In the case of Cornet et al. v. St. Louis County, 240 S.W. page 107, l.c. 112, the court had this to say:

> "* * *While the Legislature may, perhaps, under some circumstances, impose upon the courts governmental or administrative duties for which their organization is peculiarly fitted, and while, in such matters, they may properly use their process to facilitate the performance of such duties, it is plain that the rendition of a judgment having all the incidents of judicial finality, while acting simply as a legislative agent in the levy of a tax, would be within the constitutional prohibition to which we have referred. Its act could have no other or greater force in such a case than would the act of a nonjudicial agent of the legislative department, and its failure to follow the legislative direction would have the same vitiating effect as the like failure of an administrative officer or agent charged by law with the same duty.* * *"

Rockwell Lime Co. et al. v. Illinois Commerce Commission et al, 26 N.E. (2d) page 99, l.c. 107, wherein the court said:

> "* * *It may be observed, however, that a sufficient reason for not making a specific finding with respect to the defense of res judicata is that the Commerce Commission is a judicial tribunal and its orders are not judgments which are res judicata, but are subject to change by the commission when changed conditions warrant. Illinois Power & Light Corp. v. Commerce Comm., 320 Ill, 427, 151 N.E. 236."

In the case of Duel vs. State Farmers Mutual Automobile Company 1 N.W. (2d) 887, l.c. 895, the court said:

> "* * *We do not consider that the doctrine of these cases goes any further than the following statement from the Penrose case, supra, indicates: '* * * no one will contend that a succeeding Commissioner could overrule or ignore the decisions of his predecessor, unless such decision were in law erroneous or tainted with fraud (mistake). Any other conclusion would bring chaos in governmental administration and cause untold annoyance to our citizens'.
>
> "The extent of the power of an administrative body or agency to reconsider its own findings or orders has nothing to do with res adjudicata; the latter doctrine applies solely to courts. (Cases cited) Whatever limitations there are upon the right of an administrative agency to reconsider issues of fact involved in granting a license, a subsequent commissioner is not foreclosed from entertaining a different view of the law from that held by his predecessor. That is the situation here."

From the reading of the last cases supra, we see that the courts have been very reluctant to allow an administrative body to set aside or modify an order made by a predecessor board and have done so as far as we can find, only in cases where such decisions "were in law erroneous or tainted with fraud (mistake)". Duel vs. State Farmers Mutual Automobile Company supra. Or the Board has determined that there is a changed condition. Rockwell Lime Company et al, vs. Illinois Commerce Commission supra.

Now we shall view Section 9990 of which we have set out verbatim heretofore in this opinion, an attempt to ascertain the scope of authority given to the now present Board in the light of the instant question presented in your request. At the out-set it will be observed that the wording of the statute is very broad in that it empowers the Board through the use of the word "may" (which word is directive in meaning) with either discretion to"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, * * *" We observe that said section uses the word "revoke" and does not at any place use the word "suspend" even though said section provides that:

> "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. * * *"

It is our view that in cases where a Board fixes a definite period of time that said license may be held, the word "revoke" would be synonymous with the word "suspend", but in the order of March 10, 1937, we find that the Board in their discretion provided that the license should be "permanently revoked". Therefore, we must conclude that the Board no doubt intended that the word "revoke" should carry its regular definition meaning:

> "Revoke: To call back; to recall; to annul an act by calling or taking it back." (Black's Law Dictionary)

However, we take occasion to quote from the case of Burns vs. State, 76 S.W. (2d) page 172; l.c. 173, the court had this to say:

> "In view of the above, we naturally expect and do find it universally held that the disbarring of an attorney from the practice of law does close the door to his practice of law, but does not seal it. The prime object is to protect the people. Scott v. State, 86, Tex. 321, 24 S.W. 789, 790. It is a question of policy as to what will best aid in the administration of justice to the public. Almost all our common-law courts express the belief that the hope the disbarred attorney for restoration to the privileges of his profession, the realization that the government, which stripped his honors from him, desired him to shake off the shackles of his evil deeds, is consistent with and promotive of the

> best government by the people as well as consonant with human happiness. The quality of such mercy 'blesseth him that gives and him that takes." (Cases cited)
>
> "It is argued that the judgment of 1929 is res adjudicata of the relief prayed for. It is true that, as respects pleading and jurisdiction and supersedeas and in general such procedural matters, a disbarment suit is a civil suit. (Cases cited). Its object is not punishment but rather to keep clean and efficient the machinery of government, machinery which, as far as differences of private citizens are concerned, is furnished by the government for the settlement of those differences. The interest of the government in such machinery is therefore different from the results of the operation thereof. So the reason for applying the rule of res adjudicata as the same exists in litigation of purely private rights not fraud, error, or mistake does not exist here. When the reason fails, the rule should fail. It is more analogous to those matters of public interest, such as welfare of children, insanity, etc., which the law allows to be relitigated as often as changed conditions make a different result probable."
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> " * * *Article 316, Rev. Statutes, says the judgment on disbarment may "revoke" the license 'entirely.' Revoke means to 'annul by taking back.' The license was taken back to its source, the Supreme Court. It could therefore by statute be issued only by the Supreme Court."

We have set out a lengthy quotation from the Burns vs. State case, supra, but wish to make the observation that in orders disbarring attorneys are generally made by courts or their agents and are distinguishable from an order made by ministerial agencies as in the instant case, for the reason that the courts have as a matter of law, certain inherent powers which do not exist in the case of the State Board of Health, and for that reason the effect of such orders are distinguishable, so it is our view that the reasoning used in the Burns Case, supra, would not be controlling in a situation as is presented in this opinion. However, it is our view that the definition given to the word "revoked" does afford some guidance, for it may be pointed out that the court in the Goodier Case, supra, made the word "revoke" by inference if not by direct statement synonymous with the word "recall". So if we are to give the word "revoke" in Section 9990 where a Board has "revoked" a license without stating a period of time then we must conclude that such license is for all intents and purposes "recalled" by the Board and the Board does not intend to

have any supervisory control of any character over the person or his actions who had previously enjoyed the privilege of a license. Therefore, it is our view that even if it were conceded that the order of March 10, 1937, would not act as a res judicata against the present Board, for the reason that the order of March 10, 1937, was purely "ministerial" as distinguished from "judicial" or "quasi judicial" and it must be conceded that the present Board entertains no doubt that the order of its predecessor Board was in law erroneous or tainted with fraud (mistake), and we have concluded heretofore in this opinion that it was our view that the Board after making the order "revoking" or "permanently revoking" the license, that they did not intend to exercise any further jurisdiction or control over the licensee, which would preclude in our opinion, any thought that the present Board had sufficient supervision to reinstate the old license on the theory that a changed condition had come about. Lastly, we make the observation that Section 9990 supra, that no place in said section contains any provision directly or indirectly, empowering a Board to reinstate a license which has been "revoked" in a sense of permanent revocation.

We wish to call attention to the definition of the word "license"

> "A permit or authorization to do that what, without a license, would be unlawfull." 15 R.C.L. 247.
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> "To license means to confer upon a person the right to do something which otherwise he would not have the right to do."
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> "A license is in the nature of a special privilege, and not a right common to all." 17 R.C.L.474.

From a review of the authority and what we have heretofore said in this opinion, we see nothing to prevent Ludwig Orlando Muench from filing an application or petition original in character asking for a license to practice medicine. It is our view that the present Board would have the authority to treat his application or petition the same it would in the case of any other applicant or petitioner. In which event he would be governed and subjected to the same rules and regulations of the Board as any other applicant. The Board upon such application, would determine whether in their discretion he had met all of the requirements laid down by the Board and whether or not in their discretion he should be granted a license. If the Board saw fit to grant a license then such license would date from the time of granting same.

CONCLUSION

1) It is the opinion of this Department that the now present State Board of Health does not have jurisdiction and authority to entertain a petition for the purpose of reinstating the license to practice medicine and surgery which was "revoked" in the order of March 10, 1937, by the then Acting Board.

2) The use of the word "permanently" in connection with the word "revoke" in the order of March 10, 1937, was merely surplusage, for the word "revoke" must be construed to mean "a permanent revocation for all times". Ball vs. State Board of Health supra.

3) A permanent revocation of a license by a predecessor board does not prevent the present board, whose functions are ministerial in character, from entertaining an application for an examination and granting a new license if the applicant successfully passes such examination and otherwise qualifies. However, the applicant must conform to all present laws and rules and regulations of the board promulgated thereunder at such time existing. Such license, if any be granted, would be effective as of the date of its issuance.

Respectfully submitted,

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APPROVED:

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