

BOARD OF PHARMACY: The Governor and Attorney-General, when reviewing decision of Board, must affirm or overrule in toto, cannot modify.

February 12, 1942



Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Honorable Roy McKittrick
Attorney-General
Jefferson City, Missouri

Gentlemen:

By Section 10007, R. S. Missouri, 1939, the Governor and Attorney-General of Missouri are constituted the officers to whom appeals lie, with respect to the disciplinary action that may be taken by the State Board of Pharmacy relative to licensed pharmacists. The Board of Pharmacy is authorized to "refuse to grant a license" and to "revoke a license" granted, for certain specified reasons. Section 10007 provides in part:

"* * * An appeal from the action of the board in refusing to grant or in revoking a license for such cause may be taken to the governor and attorney-general the decision of which officers, either affirming and overruling the action of the board shall be final."

The question has arisen as to the scope of the authority of the Governor and Attorney-General under this statute. This is: Must they "affirm or overrule" or may they modify?

It will be noted that the only authority granted the Board of Pharmacy is to refuse to grant or to revoke a license theretofore issued, and we do not feel that on the original hearing by such board that it could take any action except

Hon. Forrest C. Donnell
Hon. Roy McKittrick

(2) February 12, 1942

outright refusal to grant or absolute revocation of a license.

The reason for this view is apparent. The Board of Pharmacy is a creature of statute (Sec. 10010, R. S. Mo. 1939), and as such has only such powers as are conferred upon it by statute. This rule has been repeatedly stated by the courts. In *Wright v. Board of Education*, 246 S.W. 43 (Mo. Sup.), it is said of the powers of a school board, l.c. 45:

"* * * Under a well-recognized canon of construction, such powers, * * * can only be exercised as are clearly comprehended within the words of the statute or that may be derived therefrom by necessary implication; * * *."

Again, in *Consolidated School District No. 6 v. Shawhan*, 273 S. W. 182 (Mo. App.) it is said, l.c. 184:

"Plaintiff district is a corporation created by statute; its board of directors is what the statute makes it, having only such powers and functions as are expressly delegated to it. * * *."

The authority to refuse to grant or to revoke a license is expressly conferred upon the Board of Pharmacy. No other power exists by implication for the reason that, that rule is only invoked where necessary to make effective powers granted. Here the power granted is to prevent the unqualified or unfit from becoming pharmacists or to remove the unfit from that profession. The power to refuse or revoke licenses renders that power completely effective, and therefore no additional powers can be implied.

Also, another rule of construction is pertinent. In *State ex rel. Barlow v. Holtcamp*, 14 S. W. (2d) 646 (Mo. Sup.)

Hon. Forrest C. Donnell
Hon. Roy McKittrick

(3)

February 12, 1942

it is said, l. c. 650:

"Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, namely, that the thing shall not be done otherwise."

This is nothing more than the well known rule that the expression of one thing is the exclusion of another. *State v. Sweaney*, 270 Mo. 685.

Under these rules of construction and because "public policy requires that all officers be required to perform their duties within the strict limits of their legal authority" (*Lamar Township v. City of Lamar*, 261 Mo. l. c. 189), it necessarily follows that we are correct in asserting that the Board of Pharmacy is only authorized to refuse outright a license or to absolutely revoke a license. There can be no middle ground such as suspension or conditional grant of the same.

With this understanding of the background we take up the immediate question.

Webster's New International Dictionary, 2d Ed. defines the word "affirm" to mean: To confirm or ratify. To assert as valid an order brought before an appellate court for review. To maintain as true.

The same authority defines "overrule" to mean: To rule or determine in a contrary way; to decide or rule against. To set aside or reverse a previous decision.

In the construction of statutes, words in common use are construed in their natural and ordinary meaning (*Betz v. Kansas City S. Ry. Co.*, 284 S. W. 455), and we think the above definitions so reflect the ordinary accepted meaning of the words "affirm" and "overrule." Such meanings do not admit of a construction that either means "modify."

Hon. Forrest C. Donnell
Hon. Roy McKittrick

(4)

February 12, 1942

The powers of the Governor and Attorney-General here, are subject to the same rules of construction previously set out relative to the powers of the Board of Pharmacy. They are acting under the statute and not in their capacity as constitutional officers. The statute uses the words "affirming or overruling" and thereby negatives the idea that it can mean "modify." While it is true that such terms are the alpha and omega of the authority that might have been granted, nevertheless this does not mean that all the authority that lies between such terms was also meant to be included. Such would completely ignore the rule that mention of one power excludes the exercise of another.

Further, to say that such terms include the word "modify", and that therefore the Governor and Attorney-General may modify an order of the Board of Pharmacy refusing to grant or revoking a license, would be to confer on these two officers greater authority than the body whose action they are reviewing. Such conception of the authority of a reviewing tribunal is completely foreign to the judicial mind. Appellate courts cannot even grant relief or take action that could not have been taken by the tribunal whose action is under review. And the fact that appellate courts exercise power to modify judgments does not sanction its exercise here. The jurisdiction and scope of a court's action has a constitutional origin and the statute (Section 1229, R. S. Missouri, 1939) expressly provides that appellate courts may "award a new trial, reverse or affirm * * * * * or give such judgment as * * * ought to have (been) given."

A somewhat analogous situation exists in connection with appeals to circuit courts from decisions striking persons from the Old Age Assistance rolls. The statute granting such right of appeal (Section 9411, R. S. Missouri, 1939) provides:

"* * * the circuit court shall determine whether or not a fair hearing has been granted the individual. If the court shall decide for any reason that a fair hearing and determination of the applicant's

Hon. Forrest C. Donnell
Hon. Roy McKittrick

(5)

February 12, 1942

eligibility and rights under this law
was not granted the individual * * * * *
the court shall, in such event, remand
the proceedings for redetermination of
the issues by the State Commission.
C * * * *

Under this section, if the court finds there was a fair hearing and determination of the applicant's rights, such is an affirmance of the Commission's decision. If the court finds otherwise, such is an overruling of the Commission's decision. (Here the analogy ends because of the difference in the statute on what shall occur after the appellate tribunal has acted.)

In Hewlett v. Social Security Commission, 149 S. W. (2d) 806 (Mo. Sup.) the circuit court remanded an old age assistance appeal for "redetermination in accordance with this (the circuit court's) decision." On appeal it was contended that such a remand exceeded the power given to the court, because the above statute provides only for a remand for "redetermination" and does not permit the circuit court to control such redetermination by requiring it to be in accordance with the circuit court's decision. The court said, l. c. 809:

"The power and jurisdiction of a court upon such appeal is limited to that granted by the terms of the statute which creates the right."

The court then held that the words of the circuit court judgment "in accordance with this decision", might be treated as surplusage, and that it was nothing more than a simple remand to follow the law on such redetermination, which the Commission would have to do anyway. The court then said, l. c. 810:

Hon. Forrest C. Donnell
Hon. Roy McKittrick

(6)

February 12, 1942

"* * * the trial court may not be reversed for the sole reason that it exceeded its statutory or constitutional powers in the manner in which it framed its judgment in this case."

As we read the above case, the court held that had the judgment of the trial court been an attempt to control the redetermination as to the facts, or as a direction to make a particular finding, it would have been void because not authorized by the statute.

Applying the above to the instant question, we think it points conclusively to the result that in Section 10007 "affirming or overruling" cannot be held to permit a modification of the Board of Pharmacy's decision.

Another reason that sustains our view is the fact that nothing in the act regulating pharmacists prevents a person whose application for a license has been refused or whose license has been revoked from making application for another license. If this is done, and the applicant is refused by the board, on appeal the Governor and Attorney-General, by overruling such decision, could, if they felt the man had made atonement for his sins, cause a license to be issued. Thus, since the law clearly permits a man to be punished by revocation of his license, and also permits him to be reinstated by issuance of a new license, there exists no reason why the Board of Pharmacy should have power to do anything other than refuse to grant or revoke a license and no reason exists why the Governor and Attorney-General should have power to do anything other than affirm or overrule the decision of the Board of Pharmacy.

CONCLUSION.

It is, therefore, our opinion that the Governor and Attorney-General, when reviewing a decision of the Board of

Hon. Forrest C. Donnell
Hon. Roy McKittrick

(7)

February 12, 1942

Pharmacy relative to issuance or revocation of a license,
have only the authority to affirm or overrule, in toto,
said decision.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

~~HARRY H. KAY~~
(Acting) Attorney General

LLB/rv