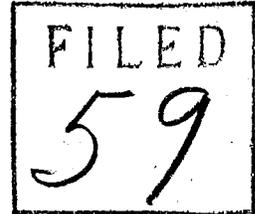


BOARD OF PHARMACY: May not make rules to prevent compounding and dispensing of drugs by a person issued a permit to conduct a drug store or pharmacy in village of less than five hundred inhabitants; but may refuse to grant permit, in its sound discretion.

March 9, 1945



Mr. W. C. McGreevy, Secretary
State Board of Pharmacy
220 East Walnut
Springfield, Missouri

Dear Mr. McGreevy:

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

"Under Section 10005, Chapter 60, R. S. Missouri 1939, provision is made for issuance, by the Board of Pharmacy, to any person who has had one year's experience under the supervision of a registered pharmacist, a permit to conduct a drug store or pharmacy in any village of less than five hundred inhabitants where there is no person licensed as a pharmacist within less than two miles of such village.

"May the holder of such permit compound and dispense a physician's prescription?"

"Would the Board of Pharmacy be within its rights to rule on this matter?"

Our legislature has seen fit to provide a complete scheme for the regulation of druggists and pharmacists by Chapter 60, R. S. Mo. 1939, and has created a State Board of Pharmacy. The legislature has, by Section 10012, R. S. Mo. 1939, given the board power to make rules and regulations as may be necessary, not inconsistent with law. It reads, in part, as follows:

"The Board of Pharmacy shall have a common seal, and shall have power to adopt such rules and by-laws not inconsistent with law as may be necessary for the regulation of its proceedings and for the discharge of the duties imposed under this chapter, * * * * *"

In the case of State v. Smith, 49 S. W. (2d) 74, 1. c. 76, the court discussed the right of the legislature to enact a law, complete in itself, to authorize certain designated officials to make rules and regulations for the complete operation and enforcement of the law. The court said:

"The Legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose."

In the case of Sawyer v. United States, 10 Fed. (2d) 416, 1. c. 420, the United States Circuit Court of Appeals laid down a general proposition of law as follows:

"Authority to make rules and regulations necessary for carrying out the purpose of a legislative act can confer no authority to change the provisions of the act itself, and thereby deprive one of a right by the act."

The legislature having given to the Board of Pharmacy the right to make rules and regulations consistent with the law, and for the purpose of meeting the complexities which may arise under the law, we now turn in our consideration to Section 10005, R. S. Mo. 1939, making it unlawful to conduct a drug-store except as therein provided, which reads as follows:

"It shall be unlawful for any person not licensed as a pharmacist within the meaning of this chapter to conduct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding or dispensing of any drugs, medicines, chemicals or poisons, or for the compounding of physicians' prescriptions, or to keep exposed for sale, at retail, any drugs, medicines, chemicals or poisons, except as hereinafter provided, or for any person not licensed as a pharmacist within the meaning of this chapter to compound, dispense or sell at retail any drug, chemical, poison or pharmaceutical preparation upon the prescription of a physician, or otherwise, or to compound physicians' prescriptions, except as an aid to or under the supervision of a person licensed as a pharmacist under this chapter. And it shall be unlawful for any owner or manager of a pharmacy or drug store, or other place of business, to cause or permit any other than a person licensed as a pharmacist to compound, dispense or sell, at retail, any drug, medicine or poison, except as an aid to or under the supervision of a person licensed as a pharmacist: Provided, however, that nothing in this section shall be construed to interfere with any legally registered practitioner of medicine or dentistry in the compounding or dispensing of his own prescriptions, nor with the exclusively wholesale business of any dealer who shall be licensed as a pharmacist or who shall keep in his employ at least one person who is licensed as a pharmacist, nor with the sale of poisonous substances which are sold exclusively for use in the arts, or for use as insecticides, when such substances are sold in unbroken packages bearing a label having plainly printed upon it the name of the contents, the word poison and the names of at least two readily obtainable antidotes: Provided further, that in any village of not more than five hundred inhabitants, where there is no person licensed as a pharmacist within less than two miles of such village, the board of pharmacy may grant to any person who has had one year's experience under the supervision of a registered pharmacist a permit to conduct a drug

store or pharmacy in such village, which permit shall not be valid in any other village than the one for which it was granted, and shall cease and terminate when the population of the village for which such permit was granted shall become greater than five hundred: * * * * *

(Italics ours.)

Statutes similar to Section 10005, supra, providing an exception permitting the operation of a drug store or pharmacy in small villages, and where there is no person licensed as a pharmacist within one or two miles of such village, have been held constitutional.

A Wisconsin statute prohibited the dispensing of drugs in any town having five hundred inhabitants or more, except under the charge of a registered pharmacist, while in towns of less than such population similar acts are prohibited except by a pharmacist or registered assistant pharmacist. It was held that this exception did not violate the Fourteenth Amendment to the Federal Constitution, guaranteeing equal protection of the laws. State v. Evans, 110 N. W. 241.

A similar statute was upheld in State v. Donaldson, 41 Minn. 74, and People v. Roemer, 153 N. Y. Supp. 323.

Section 13140, R. S. Mo. 1929, preceded Section 10005, R. S. Mo. 1939, supra, and was amended and reenacted in the Session Acts of 1939, page 368. Prior to its amendment the statute provided as an exception for villages of five hundred inhabitants or less, as follows:

"* * * Provided further, that in any village of not more than five hundred inhabitants, where there is no person licensed as a pharmacist within less than two miles of such village, the board of pharmacy may grant to any person who is licensed as assistant pharmacist a permit to conduct a drug store or pharmacy in such village, which permit shall not be valid in any other village than the one for which it was granted, and shall cease and terminate when the population of the village for which such permit was granted shall become greater than five hundred: * * * * *

The amendment of 1939 deleted the words "or assistant pharmacist" which appeared after the word "pharmacist," and substituted the words "who has had one year's experience under the supervision of a registered pharmacist" for "who is licensed as assistant pharmacist."

The plan of the legislature in 1939 was to do away with the licensing of assistant pharmacists as a class in Missouri. There is nothing in the 1939 amendment that would indicate the legislature intended to withdraw the exception granted previously in allowing the conduct of a drug store or pharmacy in towns or villages of five hundred or less inhabitants, by other than a registered pharmacist, the experience required of a permittee being similar to the experience that was previously required in licensing an assistant pharmacist.

In discussing the distinction between a druggist and a pharmacist, the Kansas City Court of Appeals, in *State v. Chipp*, 97 S. W. 236, 121 Mo. App. 556, said:

"This statute was first enacted in 1881, prior to which, from time immemorial, there had been both druggists and pharmacists. It was enacted for the purpose of protecting the public against the danger attendant upon the compounding and dispensation of physicians' prescriptions, and the selling and dispensation of poisons by ignorant and inexperienced pharmacists. Its purpose was one of regulation merely. It left the druggist as it found him except in two respects only: First, as such druggist he was prohibited from compounding or dispensing the prescriptions of physicians; second, selling or dispensing poisons for medical use, unless he had in his employ such registered pharmacist or he was such himself. The statute does not even prohibit him from selling poison; it is only when it is sold for medical use that he commits a violation of law. He can sell patent medicines and every kind of drug that in its nature is free from poison. We confess our limited ability to enumerate the almost countless number of things that go to make a complete drug store: an experienced druggist alone might say how many there are. But common observation teaches that the duties of a pharmacist in most instances

March 9, 1945

pertains to a small part of the business carried on by a druggist. We find no difficulty in arriving at the conclusion that an individual may be a druggist or a dealer in drugs without being or having in his employ a pharmacist."

Section 10005, supra, in excepting small towns and villages of less than five hundred population allows the granting of a permit to conduct a drugstore or pharmacy. Therefore, the sphere that a permittee may operate in is very small indeed. First, there must be no person licensed as a pharmacist within less than two miles of the village. Second, the permittee cannot use the permit in any other village than the one for which it was granted. The exception in Section 10005, supra, further provides: "The board of pharmacy may grant to any person who has had one year's experience * * *." The word "may" is not mandatory and suggests that the Board of Pharmacy may exercise its experience and sound discretion in granting a permit to any person who has had one year's experience under the supervision of a registered pharmacist and should take into account the applicant's ability and the possible danger that might result in his compounding and dispensing a physician's prescription even though his acts are going to be restricted to a certain small village.

CONCLUSION

Therefore, it is the opinion of this department that the holder of a permit to conduct a drugstore or pharmacy in any village of less than 500 inhabitants where there is no person licensed as a pharmacist within less than two miles of such village may compound and dispense a physician's prescription.

That it is discretionary with the Board of Pharmacy whether or not they issue the permit, but after the Board of

Mr. W. C. McGreevy

(7)

March 9, 1945

Pharmacy has acted and issues a permit to conduct a drugstore or pharmacy in a village of less than five hundred inhabitants, there being no person licensed as a pharmacist within less than two miles of such village, the Board cannot, by rules, prevent the permit holder from compounding and dispensing a physician's prescription.

Respectfully submitted,

A. V. OWSLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AVO:CP