

CONSTITUTIONAL LAW: That part of Section 337.060, RSMo 1949, which
OSTEOPATHS: gives the Missouri Association of Osteopathic
RENEWAL LICENSES: Physicians and Surgeons the power to determine
PROFESSIONS: the educational programs which will be necessary for renewal licenses of osteopaths of Missouri, is unconstitutional and void.



August 9, 1955

Honorable Joseph W. Martino
Representative, 8th District
City of St. Louis
2162 Allen
St. Louis, Missouri

Dear Mr. Martino:

In your letter to us you request an opinion as follows:

"I respectfully request that you furnish me an opinion as to whether the following practice is a proper or an improper one under the law:

"Section 337.060, V. A. M. S., provides for annual renewal of osteopaths' licenses to practice in this State. The renewal is under the jurisdiction of the state board of osteopathic registration and examination. The statute contains a proviso, in these words:

".....provided that satisfactory evidence is presented to the board that the said licensee in the year preceding the application for renewal attended at least one of the two-day educational programs as conducted by the Missouri Association of Osteopathic Physicians and Surgeons, or its equivalent as approved by the Missouri Association of Osteopathic Physicians and Surgeons".

"The Missouri Association of Osteopathic Physicians and Surgeons is a private, pro forma decree corporation. It was formed on January 11, 1921, in the Circuit Court of Macon County, Missouri. Article III of its constitution provides, in its entirety, that:

"Those eligible for membership shall be the present members of "The Missouri Osteopathic Association", members of "The American

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Osteopathic Association", and such other members as shall be elected in accordance with the By-Laws'.

"Exercising the power delegated it by Section 337.060, the Missouri Association of Osteopathic Physicians and Surgeons approves the following activities for which annual educational credit may be taken by osteopaths in renewing their licenses:

1. Its own state convention.
2. The American Osteopathic Association convention.
3. The Kansas City Child's Health Conference.
4. The Kirksville Refresher Course.

"In connection with the granting of approval of these courses, the Missouri Association of Osteopathic Physicians and Surgeons requires that the applicant for license renewal must join the Association and pay dues (which vary, but which are presently \$75.00 a year), or, in the alternative, pay a penalty equal to the amount of such dues.

"More particularly, should the licensee attend the state convention above, he must be a member of the Association. Should he elect the American Osteopathic Association convention, he is not eligible to attend unless he is a member of a Divisional Society, such as the Missouri Association of Osteopathic Physicians and Surgeons. Should he attend, either, the Kansas City Child's Health Conference or the Kirksville Refresher Course, he is required by the agency conducting the course, first, to pay a registration fee of \$10.00 or \$15.00 and, second, to show either evidence of membership in the Missouri Association of Osteopathic Physicians and Surgeons or pay an additional sum equal to that Association's annual dues. What is done with the monies so collected in lieu of the yearly dues is not known, at least to me, and I think is not known to the average osteopathic practitioner.

"Magazine advertising outlining this requirement and showing the dues (or penalty) to be \$75.00 in 1955 and \$85.00 in 1953, is attached.

"It may or may not be a factor in your determination, however, I know that it is not required that an osteopath

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applying for license renewal attend these approved courses. The Missouri Association of Osteopathic Physicians and Surgeons announces that there is no such requirement. The only things which are strictly enforced at these courses is the payment of the two fees as stated above or the proof of membership in the Missouri Association of Osteopathic Physicians and Surgeons, as I have described in the next-to-last preceding paragraph.

"It has been complained to me that this statute should be repealed or amended. The complainants are osteopaths who protest (a) that they receive no benefits from the Missouri Association of Osteopathic Physicians and Surgeons, or so slight benefits that they do not wish to be members; (b) that they regard the Association's combination of dues and assessments as exorbitant; (c) that they believe this statutory system to be improper or that the system is an unlawful misuse of the powers under the statute; and (d) that there are many courses of educational study within and without Missouri, more worthy of attendance, which they are denied, in effect, because they are not usable for credit on license renewal.

"I do not mean to add information and authorities useless to you. However, I would like to state some rules which I have attempted to follow in considering similar matters, for I would like to know that such rules are correct. It has been my understanding that a law enacted by the General Assembly may not confer unreasonable or arbitrary power to grant or refuse licenses--and that a board or officer so vested with a power to grant or refuse licenses may prescribe rules and regulations only insofar as they are reasonable. It has been my further understanding that rules as to an applicant's qualifications for license are reasonable so long as they pertain to his suitability to perform the acts for which the license is sought (Gandy v. Borrás, 154 So. 248, 114 Fla. 503).

"For example, an applicant may properly be required to meet certain minimum standards, as to age (Garman v. Myers, 80 P. 2d 624, 183 Okla. 141), education (Barbers Commission of Mobile County v. Hardeman, 21 So. 2d 118, 31 Ala. App. 626), experience (Pincourt v. Palmer, 190 F. 2d 390, C. A.), financial responsibility (Mosesian v. Parker, 112 P. 2d 705, 44 Cal. App. 544), passing grade on examination (State ex rel Sill v. Examining Board of Master Electricians, 129 So. 427,

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14 La. App. 17), good moral character (Murray v. Williams, 60 A. 2d 402, 162 Pa. Super. 633), etc. I have not understood that an association delegated by law to participate in licensing can reasonably require the applicant to join the association or pay a penalty for not doing so."

In 70 C. J. S., Physicians and Surgeons, at page 826, it is stated:

"In so far as practice within a particular state is concerned, the legislature thereof has power to require a license or certificate for the practice of medicine, surgery, dentistry, or other healing art, * * *."

And also in 70 C. J. S., Physicians and Surgeons, at page 913, it is stated:

"In general, statutes have been held valid which provide for the issuance of annual licenses to persons practicing specified branches of the healing arts and require those licensed to obtain annual renewals, or which require those who have been licensed in the state, but who have left the state and permitted their license to expire, to make a satisfactory showing before a state board in order to obtain a renewal, or which require practitioners to complete specified educational work during each year as a prerequisite or condition to the right to practice their profession or to have their licenses renewed, provided they either fix the standard of the educational work required or delegate to a board the authority to set a required standard; and a requirement for the payment of annual renewal fees is not invalid. * * *."

In 33 Am. Jur., Licenses, page 336, it is stated:

"It is well settled that the state under its police power has the right to regulate any business, occupation, trade, or calling in order to protect the public health, morals, and welfare, subject to the restrictions of

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reasonable classification. This power to regulate includes the power to license; and it is the settled general rule that to protect the health, morals, and welfare of the public a state can license an occupation, trade, or calling. * * *."

Thus, it can be seen from the above cited authorities that such a delegation of authority as we have here by the State Legislature, must be within the constitutional limits of the Constitution of Missouri, 1945.

Section 337.060, RSMo 1949, authorizes the State Board of Osteopathic Registration and Examination to issue a renewal license to a licensed osteopath in the State of Missouri on the payment of a \$2.00 fee and when "satisfactory evidence is presented to the board that the said licensee in the year preceding the application for renewal attended at least one of the two-day educational programs as conducted by the Missouri Association of Osteopathic Physicians and Surgeons, or its equivalent as approved by the Missouri Association of Osteopathic Physicians and Surgeons."

From this statute, it is seen that the State Legislature has delegated to a private association or organization the power to determine arbitrarily and with uncontrolled discretion where, when and how the educational courses are to be attended by the osteopaths seeking a renewal license, and the amount to be paid for such courses. Such delegation of uncontrolled discretion to a private organization is unconstitutional and void. This is on the ground that it is a delegation of power to a private organization or association to determine the rules and regulations that will control an osteopath of Missouri in attending refresher courses that are mandatory in order to obtain a renewal license.

In an opinion rendered by this office on December 31, 1954, to the Honorable L. A. Hansen, D.S.C., Secretary, Missouri State Board of Chiropractic, concerning a proposed statute on the regulation of chiropractors, this office stated that the enactment of a provision by the State Legislature that would give to private organizations the power to determine what acts or omissions by chiropractors could authorize revocation of a license granted by the State of Missouri would be an unconstitutional delegation of legislative power to the private organizations. Also in the case of State vs. Crawford,

104 Kan. 141, 177 P. 360, l.c. 361, it was stated:

"But none of the cases cited has ventured so far afield as to intimate that the legislature might delegate to some unofficial organization of private persons, like the National Fire Protective Association, the power to promulgate rules for the government of the people of this state, or for the management of their property, or that the legislature might prescribe punishment for breaches of these rules. We feel certain that no such judicial doctrine has ever been announced."

Also see the case of State ex rel. Week et al. vs. Wisconsin State Board of Examiners in Chiropractic et al., 30 N.W. (2d) 187. This case is almost directly in point with the problem here involved. In that case the Wisconsin Legislature by statute provided the following, l.c. 188:

"(7) All licenses issued by the board shall expire on the thirty-first day of December following the issue thereof, except that any holder of a license may have the same renewed from year to year by the payment of an annual fee of five dollars; provided, that satisfactory evidence is presented to the board that said licensee in the year preceding the application for renewal has attended at least one of the two-day educational programs conducted, supervised and directed by the Wisconsin Chiropractic Association and exemption from this requirement shall be granted only upon showing satisfactory to said board that attendance at said educational programs was unavoidably prevented."

The Supreme Court of Wisconsin held that such delegation by the Legislature of Wisconsin was unconstitutional in that it did not fix any standard for the program to be offered. The Court stated at page 189:

"* * * The difficulty is that the legislature has fixed no standard of a program which must be attended nor has it delegated to any board the authority to approve the program to be offered. It has merely provided by whom the

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program shall be given. In Ex parte G. B. Gerino, 1904, 143 Cal. 412, 77 P. 166, 66 L.R.A. 249, where the statute provided the State Board of Medical Examiners should be elected from three certain medical societies, while upholding the statute the court said it 'could not be upheld at all if it were put upon the ground that in so doing the state is acting for the benefit of any one or all of the medical societies or schools of medicine existing in the state.' We conclude here the state was acting for the benefit of the association primarily, which is not within the legitimate exercise of police power. See 11 Amer. Jur. 1093." (Underseoring ours).

Thus, it would seem that the reasoning in this opinion cited above and the cases cited above, that the part of the statute here in question which gives the Missouri Association of Osteopathic Physicians and Surgeons the arbitrary power to determine what educational programs shall be necessary in order for an osteopath to receive a renewal license is unconstitutional and void as in violation of Article III, Section 1, Constitution of Missouri, 1945, which states:

"The legislative power shall be vested in a senate and house of representatives to be styled 'The General Assembly of the State of Missouri'."

Thus, this delegation of authority to the Missouri Association of Osteopathic Physicians and Surgeons is unconstitutional and void. It is as if never enacted and it gives no authority to the Missouri Association of Osteopathic Physicians and Surgeons. This rule is thus stated in City of St. Louis vs. Polar Wave Ice & Fuel Co., cited supra, at page 998 as follows:

"When a statute is adjudged unconstitutional, it is as if it had never been, rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in toto is true as to any part of an act which is found to be unconstitutional and which consequently is to be regarded as

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having never at any time, possessed any legal force."

CONCLUSION

It is the opinion of this office that that part of Section 337.060, RSMo 1949, which gives the Missouri Association of Osteopathic Physicians and Surgeons the power to determine what educational programs shall be necessary for an osteopath to attend in order to obtain a renewal license is unconstitutional and void, and that the Missouri Association of Osteopathic Physicians and Surgeons has no authority to act under such section since it is unconstitutional and void.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Harold L. Volkmer.

Very truly yours,

JOHN M. DALTON
Attorney General

HLV:irk:gm