CONSTITUTION: Section 338.260 RSMo, Cumulative Supp., 1953,
BOARD OF PHARMACY: can be enforced.
CRIMINAL LAW:

May 24, 1954

Honorable Charles W. Riley, Secretary
State Board of Pharmacy
245 Wilhoit Building
Springfield, Missouri

Dear Sir:

By letter dated April 27, 1954, you requested an official opinion as follows:

> "It has been suggested to us that the above section, (Section 338.260, RSMo, Cumulative Supp., 1953), is unconstitutional and is not capable of enforcement. We would appreciate your opinion as to whether this section can be enforced or not." (Matter in parenthesis added.)

Section 338.260 RSMo, Cumulative Supp., 1953, reads as follows:

> "No person shall carry on, conduct or transact a retail business under a name which contains as part thereof the words 'pharmacist', 'pharmacy', 'apothecary', 'apothecary shop', 'chemist shop', 'drug store', 'druggist', 'drugs', or any word of similar or like import, unless the place of business is supervised by a registered pharmacist."

Section 338.310 RSMo, Cumulative Supp., 1953, makes it a misdemeanor to unlawfully use the words prescribed by Section 338.260. Said Section reads as follows:

> "Every person who violates any provision of sections 338.210 to 338.300 shall, upon conviction thereof, be adjudged guilty of a misdemeanor."

The Legislature has declared that certain terms be not used in the name of a retail business unless that business is supervised by a registered pharmacist. The Legislature has further provided that any person so doing shall be deemed guilty of a misdemeanor. The Legislature has defined what constitutes a crime and made provision for punishment thereof. Therefore, Section 338.260 can be enforced.

There is a strong presumption that every legislative enactment is constitutional. That presumption is stated by the Supreme Court of Missouri in Hickey vs. Board of Education, 256 S.W. (2) 775, l.c. 778 as follows:

> "* * * 'It is a fundamental principle of constitutional law that a State Constitution is not a grant of power as is the Constitution of the United States but, as to legislative power, it is only a limitation; and, therefore, except for the limitations imposed thereby, the power of the State Legislature is unlimited and practically absolute.' Kansas City v. Fishman, 362 Mo. 352, 241 S.W. 2d 377, 379(1,2). Those limitations must be 'expressed in the Constitution or clearly implied by its provisions.' State v. Shelby, 333 Mo. 1036, 64 S.W.2d 269, 271(2). A statute will not be held unconstitutional unless it <u>clearly and undoubtedly</u> contravenes some <u>constitutional provision.</u> State ex rel. Hughes v. Southwestern Bell Telephone Co., 352 Mo. 715, 179 S.W.2d 77, 80(3-5). * * *"

The courts do not look with favor upon a ministerial officer questioning the constitutionality of a statute concerning their official duties. The Supreme Court of Missouri in State ex rel Chicago, R.I. & P. Railway Company vs. Becker, 41 S.W. (2) 188 quoted with approval the following, l.c. 191:

> "'To allow mere ministerial officers, who have no direct personal interest in the matter, to refuse to perform an act clearly pointed out, and made their official duty, by a statute, on the ground that the performance of the act would

> violate the constitution, would be establishing a very dangerous precedent, and one not warranted by the authorities. It would be deciding a constitutional question, affecting the right of third parties, at the instance of officers whose duties are merely ministerial, and who have no direct interest in the question, and cannot, in any event, be made responsible.' Thoreson v. State Board of Examiners, 19 Utah, loc. cit. 31, 57 P. 175, 178."

We suggest, therefore, that your Board should rely upon the strong presumption of constitutionality of the statutes in question, and should leave to persons adversely affected by the enforcement of said statutes the raising of the question of the constitutionality of such statutes.

CONCLUSION

In the premises, therefore, it is the opinion of this office that Section 338.260 RSMo, Cumulative Supp., 1953, can be enforced.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:lvd