

include the miscreancies the plaintiff was found guilty of by the Board. Neither was there any opportunity for the plaintiff to present a defense to or argue against the newly impressed issues to the board.

3. As a result of the miscreancies found by the board, the board entered discipline against the plaintiff. The plaintiff appealed in a timely manner.

4. The plaintiff's claims the board erred by finding violation of K.S.A. 65-1637(a) on three counts for failing to immediately reduce the prescriptions to writing. The plaintiff claims, and rightly so, that 65-1637(a) does not concern the reduction of prescriptions to writing. K.S.A. 65-1637(a) concerns strict conformity with any directions of the prescription. K.S.A. 65-1637(c) requires the immediate or prompt reduction to writing. K.S.A. 65-1637(c) violations were not mentioned in the original petition before the board.

5. Though objected to by the defendant and though perhaps not artfully presented, the plaintiff's petition for review does raise the issues of due process in notification of the allegations of wrongdoing he was required to defend against. This is inherent when findings of violation did not have anything to do with the original allegations in the petition and statute cited therein.

The petition for review complained of K.S.A. 65-1637(a) having nothing to do with reduction of prescriptions to writing.

CONCLUSIONS:

1. K.S.A. 65-1627(e) states that action on the license of the plaintiff shall be subject to the provisions of the Kansas Administrative Procedure Act.

2. K.S.A. 77-512 of the Kansas Administrative Procedure Act states in part that:

A state agency may not revoke, suspend, modify, annul, withdraw, refuse to renew, or amend a license unless the state agency first gives notice and an opportunity for a hearing in accordance with this act. (emphasis added)

3. K.S.A. 65-1627c, as it relates to the form of the petition before the board, in part states:

The following rules shall govern the form of the petition . . . (b) The charges against the person who holds the license, registration or permit shall be stated with reasonable definiteness, (c) Amendments may be made as in ordinary actions in the district court. . . (emphasis added)

4. K.S.A. 60-215, as it relates to the district court and subsection (c) of K.S.A. 65-1627c cited above, states in part that when issues are not raised by the pleadings but are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleadings.

5. K.S.A. 60-215 and reported opinions further gives the court great discretion in granting an actual motion to amend. In this

case, however, there was no motion to amend made by any party. It is further clear from the transcript that the issue of whether or not the prescriptions were immediately or promptly reduced to writing was not an issue tried and contested by the parties. If the issue arose at all it was only incidental to the factual scenario. No party to this action even argued the applicability of K.S.A. 65-1637(c) to the proceedings before the board. The issue, if any thing, was raised completely *sui sponte* by the board in its closed door deliberations without argument or request from counsel of either party.

6. In *Balhorst v. Hahner-Foreman-Cale, Inc*, 207 Kan. 89, 92, 484 P.2d 38 (1971), concerned with the present statute, citing *Collins v. City Cab Co.*, 192 Kan. 394, Syl. ¶ 1., 388 P.2d 597, the Kansas Supreme Court stated:

Under the provisions of G.S. 1949, 60-759, as construed by many decisions of this court, a trial court is given broad discretionary powers as to the amendment of pleadings, and its action with respect thereto will not constitute reversible error unless it affirmatively appears the amendment allowed or denied is so material that it affects the substantial rights of the adverse party and constitutes a clear abuse of judicial discretion.

7. The substantial right of the plaintiff affected by the board's *sua sponte* defacto amendment with their decision was his right to fundamental procedural due process. This right includes the right to be notified with reasonable definiteness of the allegations against him and the opportunity to be heard on those allegations. This right is granted to the plaintiff generally by the

constitutions of the State of Kansas and the United States and specifically by K.S.A. 65-1627c (form of petition), 65-1627e (notice of filing and hearing), and 77-512 (Orders affecting licensure).

8. It does not require a great deal of legal research to determine that it was an abuse of discretion and denial of due process on the part of the board to try the plaintiff on one set of charges and find him in violation of another set of charges. The board could not seriously argue that charging a license holder with violation of K.S.A. 60-1637(a) gives notice of a violation of K.S.A. 65-1637(c) or of any of the other eight enumerated prescription proscriptions and requirements contained in 65-1637.

9. The other issue raised by the plaintiff as to whether the term "immediate" is an unconstitutionally indefinite term is moot and inconsequential.

10. Further, the mere fact that the board in its decision, erroneously referred to K.S.A. 65-1637(a) as the basis for its findings of violation for no immediate reduction to writing rather than the appropriate 65-1637(c) has no material bearing on the issues presented. This was an obvious error in the nature of a mere clerical error.

11. The decision of the board should be set aside in that the decision of the board was arbitrary and capricious as it was in total disregard of the statutory and constitutional protection afforded the plaintiff and had no relation to the charges upon which the plaintiff was tried.

12. The decision of this court shall be entered by judgement form pursuant to K.S.A. 60-258.

JUDGMENT FORM
(K.S.A. 60-258)

On this 26th day of March, 1996, judgment is entered as follows:

The decision of the State Board of Pharmacy entered on the 15th day of September, 1995, finding Arthur M. Hall, License No. 1-08749, to be in violation of K.S.A. 65-1637(a), altering his license to not allow him to serve as a Pharmacist in Charge for a period of two years, and ordering him to pay costs, is set aside and held for naught.

IT IS SO FOUND AND ORDERED.

ORIGINAL SIGNED
BY
PHILIP C. VIEUX

PHILIP C. VIEUX
District Judge

FILED DISTRICT COURT
PALLEY COUNTY, KANSAS

CLERK

1996 MAR 26 P 1:51

Certificate of Mailing

I, Philip C. Vieux, District Judge, hereby certify that I filed the original of the above and foregoing MEMORANDUM DECISION with the Clerk of the District Court of Finney County, Kansas, and that I served a true and correct copy of the above and foregoing MEMORANDUM DECISION and JUDGEMENT FORM by depositing same in the United States mail, first class postage prepaid, on the 26th day of March, 1996, to:

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ORIGINAL SIGNED
BY
PHILIP C. VIEUX

PHILIP C. VIEUX
District Judge