

nor in any manner interfere with, the business of a general merchant in selling any of the following articles, to wit: Medicines of secret composition, and which are advertised to the general public, and particularly known as Patent or Proprietary Medicines, providing said medicines are not poisonous. Also concentrated lye, sodium carbonate, sodium bicarbonate, tobacco, spices, perfumes, flavoring extracts, borax and the following articles in original and unbroken packages, bearing the label of a known pharmaceutical manufacturer, wholesale druggist, or of a registered pharmacist, to wit: Paregoric, hive syrup, spirit of camphor, tincture of arnica, epsom salt, quinine sulphate, compound cathartic pills, paris green, london purple, white hellebore and such insecticides, disinfectants, dyestuffs and other chemicals as may be allowed by the board of pharmacy." (Our emphasis.)

The above statute is specific in authorizing the Indiana Board of Pharmacy to regulate the sale of poisonous insecticides, disinfectants and other chemicals by restricting the sale thereof at retail to a store or pharmacy in charge of a registered pharmacist, or a registered assistant pharmacist serving during the temporary absence of the registered pharmacist. Therefore the Board would have the authority by duly enacted rule and regulation to so restrict the sale of D. D. T. in the State of Indiana.

OFFICIAL OPINION NO. 102

September 13, 1945.

Brig.-Gen. Elmer W. Sherwood, ISG,
The Adjutant General,
State of Indiana,
State House,
Indianapolis 4, Indiana.

My dear General:

Your letter of July 20, 1945, received in which you request an official opinion as to whether or not members of the Indiana

State Guard may personally own and use on official duty weapons personally owned by such members for whom no issue weapons are currently available. You further desire to know if a guardsman kills or wounds, with a non-issue personally owned pistol, a disorderly person in a situation in which the guard has been placed on active duty to deal with, would the fact such weapon was not issued by the Adjutant General increase the State's or guardsman's liability for such act.

Chapter 134 of the Acts of 1945 creates the Indiana State Guard, contained an emergency clause and was in full force and effect when approved by the Governor on March 3, 1945. Section 1 of said Act provides as follows:

“That whenever any part of the National Guard of this State is in active federal service, the governor is hereby authorized to organize and maintain within this state such military forces as the governor may deem necessary to defend this state. Such forces shall be composed of officers commissioned or assigned, and such able-bodied male citizens of the state as shall volunteer for service therein, supplemented, if necessary, by men of the sedentary militia enrolled by draft or otherwise as provided by law. Such forces shall be additional to and distinct from the National Guard and shall be known as the Indiana State Guard. Such forces may be uniformed.”

Section 2 of said Act provides in part as follows:

“The governor is hereby authorized to prescribe rules and regulations not inconsistent with the provisions of this act governing the enlistment, organization, administration, equipment, maintenance, training and discipline of such forces: *Provided, however,* That such rules and regulations, *insofar as he deems practicable and desirable,* shall conform to existing laws governing and pertaining to the National Guard and the rules and regulations promulgated thereunder and under such regulations as the secretary of war of the United States may prescribe for the organization, standard of training, instruction and discipline.

* * *” (Last emphasis ours.)

Section 3 of said Act provides as follows:

“The adjutant general shall determine and pay for administration, operation, training and all expenses incidental thereto which may be necessarily incurred in carrying out the provisions of this act.”

Section 4 of said Act provides in part as follows:

“For the use of such forces, the governor is hereby authorized to requisition from the secretary of war such arms, ammunition, clothing and equipment as the secretary of war in his discretion and under regulations determined by him, is authorized to issue; and to make available to such forces the facilities of state armories and their equipment and such other state premises and property as may be available.”

Section 18 of said Act provides as follows:

“The Indiana State Guard as now constituted under this act, or its successor, by whatever title, shall be the active Militia of the State of Indiana; and that all Acts, Laws and Regulations heretofore enacted and in force on this date applicable to and making reference in any way to the State Militia, Militia, Active Militia, National Guard, National Guard of Indiana, Naval Militia, Naval Forces, and the Military Force or Forces of Indiana shall be applicable to the Indiana State Guard and its successors.”

In addition to the provisions of Section 18, *supra*, it is pointed out that Chapter 14 of the Acts of 1945 contained an emergency clause and was in full force and effect when approved by the Governor on February 13, 1945. Section 1 of Chapter 14 of the Acts of 1945 provides as follows:

“That whenever in any Act of the General Assembly of the State of Indiana, any board, bureau, commission, division, department, officer, agency, authority, or instrumentality of state government, or any political subdivision thereof, shall be designated by name, which name is incorrectly stated, or at the time of the effect-

ive date of such act, or subsequently thereto, the rights, powers, duties, or liabilities placed with such board, bureau, commission, division, department, officer, agency, authority or instrumentality were transferred to a different board, bureau, commission, division, department, officer, agency, authority or instrumentality, then such named board, bureau, commission, division, department, officer, agency, authority, or instrumentality, whether correctly named in said act at the time of its effective date or not, shall mean and be construed to mean the properly or correctly named or designated board, bureau, commission, division, department, officer, agency, authority or instrumentality, or the one to which such rights, powers, duties and liabilities were transferred.”

An examination of the statutes pertaining to the Indiana National Guard reveals that under Sub-section 7 of Section 45-604 Burns' 1940 Replacement, same being Section 27, Chapter 142, Acts 1923, as amended by Section 2, Chapter 194, Acts 1935, military equipment issued to such Indiana National Guard shall be purchased by the Adjutant General of the State under the direction and supervision of the Governor, under the procedure specifically outlined in said Sub-section of said statute.

Under Sub-section 8 of the last referred to statute it is provided in part as follows:

“The adjutant-general of the state, upon the approval of the Governor, may sell to officers of the active militia for their official use and to organizations or units of the active militia, any military or naval property which is an article of issue by the state at its cost price. Such sale shall be for cash, or if to an organization or unit, the price may be charged to and deducted from its military fund. * * *”

Your attention is further called to the fact that under the Uniform Fire-arms Act of Indiana of 1935, being Chapter 63, Acts of 1935, same being Section 10-4736 *et seq.*, Burns' 1942 Replacement, it is provided under Section 1 of said Act, same being Section 10-4736, Burns' 1942 Replacement, as follows:

"No person shall carry a pistol in any vehicle or on or about his person, except in his place of abode or fixed place of business, without a license therefor as hereinafter provided."

Section 2 of said statute, same being Section 10-4737, Burns' 1942 Replacement, provides in part as follows:

"The provisions of the preceding section shall not apply to marshals, sheriffs, prison or jail wardens or their deputies, judicial officers, policemen or other law-enforcement officers, or to members of the army, navy or marine corps of the United States *or of the national guard or organized reserves when on duty.* * * *"
(Our emphasis.)

1. In answer to your first question, I am of the opinion that from a consideration of the foregoing statutes, the proper military authorities of the state have the authority to determine what shall be considered issue weapons, and what weapons shall be authorized for use when on active duty. In the absence of any order or regulation by the military restricting the use of non-issue weapons, the use of such non-issue weapons would not be prohibited.

2. In answer to your second question, I am of the opinion there would be no increase in the civil or criminal liability, if any, of the State of Indiana or such guardsman in wounding or killing a disorderly person, with a non-issue revolver personally owned by such guardsman, while acting in the performance of his duties under conditions of riot or insurrection. The determining factor would not be the weapon used but would be the right to shoot such disorderly individual under the particular circumstances with which such guardsman was required to cope in the particular instance.