

OPINION NO. 94-083**Syllabus:**

1. As used in R.C. 3719.44(K), the phrase "by rule" means "through the adoption of a rule."
2. Pursuant to R.C. 3719.44(K), the State Board of Pharmacy may except a drug product containing ephedrine from inclusion as a Schedule V controlled substance only by adopting, in accordance with R.C. Chapter 119, a rule that names the particular drug product that is granted the exception.

To: Ruth A. Plant, R.Ph, President, State of Board of Pharmacy, Columbus, Ohio
By: Lee Fisher, Attorney General, November 29, 1994

You have requested an opinion concerning the procedure the State Board of Pharmacy must follow when exempting drug products from Schedule V status pursuant to R.C. 3719.44(K). Your specific question is whether the Board must "promulgate a rule each time a request is presented for a drug to be excepted from being included as a schedule V controlled substance."

R.C. 3719.44(K)

In its recent amendment of R.C. 3719.41, the General Assembly named ephedrine, together with its salts and isomers, as a Schedule V controlled substance, except as provided in

R.C. 3719.44(K). R.C. 3719.41; *see* Sub. H.B. 391, 120th Gen. A. (1994) (eff. July 21, 1994). R.C. 3719.44(K) lists certain drug products containing ephedrine that are not considered schedule V controlled substances and goes on to state:

At the request of any person, the board may except any other drug product containing ephedrine from being included as a schedule V controlled substance if it determines that the product does not contain any other controlled substance. *The board shall make the determination* in accordance with this section and *by rule* adopted in accordance with Chapter 119. of the Revised Code.

R.C. 3719.44(K) (emphasis added).

Your question is whether R.C. 3719.44(K) requires that the Board adopt each additional exception of a drug product containing ephedrine by the enactment of a rule naming that particular drug product. The alternative proposed interpretation would permit the Board to adopt a rule setting forth criteria and procedures to be followed when a person requests that a product be excepted, and would allow the Board to determine to except a drug product by complying with that rule and without adopting an additional rule that specifically names the product granted the exception.¹

Making a Determination "By Rule"

R.C. 3719.44(K) states that the Board shall make the determination "in accordance with [R.C. 3719.44] and by rule adopted in accordance with [R.C. Chapter 119]." Therefore, it is clear that any determination must comply with the provisions of R.C. 3719.44 and that a rule adopted to implement R.C. 3719.44(K) must comply with R.C. Chapter 119. Your question concerns the meaning of the phrase "by rule."

In common usage, the word "by" is used to express "*means or agency: through the means, work, or operations of [gained by fraud, made by hand, poems by Dryden].*" *Webster's New World Dictionary* 194 (2nd college ed. 1978) (definition 5). This is the sense in which the word "by" is apparently used in R.C. 3719.44(K) -- that is, to indicate that the means by which the Board must make the determination is by adopting a rule. This meaning is consistent with an ordinary reader's understanding of the language. *See, e.g., Kiefer v. State*, 106 Ohio St. 285, 289, 139 N.E. 852, 854 (1922) ("[t]he legislature must be presumed to have used the term it used in its clear, unambiguous, and generally accepted meaning, unless there appears something in the context or surrounding circumstances clearly justifying a different use or meaning").

The word "by" can also be used to express "*manner or mode: a) according to; with reference to [to go by the book].*" *Webster's New World Dictionary* 194 (2d college ed. 1978) (definition 6). If this meaning were applied to R.C. 3719.44(K), the statute would require the

¹ The State Board of Pharmacy has adopted an emergency rule setting forth the information that must be included in a petition requesting that a drug product containing ephedrine be excepted from Schedule V and has also adopted an emergency rule identifying particular products that, pursuant to R.C. 3719.44(K), are declared to be exempt from classification as Schedule V controlled substances. *See* [1994-1995 Monthly Record, vol. 1] Ohio Admin. Code 4729-12-08 to -09, at 234-35. You have raised no questions concerning these rules and the rules are not addressed in this opinion.

Board to make the determination "in accordance with [R.C. 3719.44] and [in accordance] with rule adopted in accordance with [R.C. Chapter 119]." This reading of the statute is inconsistent with the general principal of statutory construction that, when different words are used, different meanings are intended. *See, e.g., Kiefer v. State*. The phrase "in accordance with" appears twice in the sentence in question. Had the intent been that a determination be made "in accordance with" a rule, language to that effect could easily have been used in that context as well. Instead, the General Assembly stated that the determination must be made *by* rule. The clear implication is that "by" means something other than "in accordance with." In this case, the most obvious and direct meaning of "by" is "through the means of."

In addition, an interpretation of "by rule" to mean "through the adoption of a rule" is consistent with the interpretation that the courts have given similar language appearing in the same statute. The initial paragraph of R.C. 3719.44 states:

Pursuant to this section, and *by rule* adopted pursuant to Chapter 119. of the Revised Code, the state board of pharmacy may do any of the following with respect to schedules I, II, III, IV, and V established in section 3719.41 of the Revised Code

R.C. 3719.44(A) (emphasis added). The statute goes on to permit the State Board of Pharmacy to add items to the schedules, transfer items from one schedule to another, or remove from a schedule an item that the Board previously added to the schedule. R.C. 3719.44(A) has been construed as requiring that, in order to change a schedule, the Board must use the procedure of R.C. Chapter 119 to adopt a rule that sets forth the changes. The courts have upheld the validity of the statute as so construed. *See Sterling Drug, Inc. v. Wickham*, 63 Ohio St. 2d 16, 406 N.E.2d 1363 (1980) (upholding the validity of a rule adopted pursuant to R.C. Chapter 119 that added a previously unscheduled drug to Schedule II); *State v. Reed*, 14 Ohio App. 3d 63, 470 N.E.2d 150 (Ross County 1983) (upholding the constitutionality of R.C. 3719.44 and stating that the Board of Pharmacy must follow R.C. Chapter 119 in amending a schedule);² *see also*

² The requirement that schedule changes be made by rule has the additional effect of making the schedules accessible to the public. As has been stated:

R.C. 119.03 *et seq.* which must be followed by the Board of Pharmacy in amending a schedule requires public notice and public hearing and a delay in setting an effective date until certain filing requirements under R.C. 119.04 are met. Further, since the enactment of Sub. H.B. 25, effective November 4, 1977 (137 Ohio Laws 1749), the adopted rule is required by R.C. 111.15 to be filed with the Ohio Secretary of State and each rule is a public record open to public inspection. R.C. 103.05 provides for publication in the Ohio Administrative Code....

Although drugs scheduled by the State Board of Pharmacy do not appear in the statutes, a reasonable person reading the relevant statutes would be aware that he would also have to ascertain the regulations adopted by the State Board of Pharmacy. We deem the notice requirement in adopting a rule of schedule amendments, coupled with the public record requirements, are sufficient to satisfy the due process notice requirements of the state and federal Constitutions.

State v. Reed, 14 Ohio App. 3d 63, 68, 470 N.E.2d 150, 155 (Ross County 1983).

State v. Klinck, 44 Ohio St. 3d 108, 541 N.E.2d 590 (1989); *State v. Ingram*, 64 Ohio App. 3d 30, 580 N.E.2d 508 (Hamilton County), *motion for leave to appeal overruled*, 47 Ohio St. 3d 711, 548 N.E.2d 241 (1989). The appropriate interpretation of the phrase "by rule" in R.C. 3719.44(K) is one that makes it consistent with that same language as construed in R.C. 3719.44(A). See, e.g., *Rhodes v. Weldy*, 46 Ohio St. 234, 234, 20 N.E. 461, 461 (1889) (syllabus, paragraph 2) ("[w]here the same ... phrase is used more than once in the same act in relation to the same subject-matter and looking to the same general purpose, if in one connection its meaning is clear and in another it is otherwise doubtful or obscure, it is in the latter case to receive the same construction as in the former, unless there is something in the connection in which it is employed, plainly calling for a different construction").

Your letter suggests that various individuals, including a state senator and a staff attorney for the Ohio Legislative Service Commission, would construe R.C. 3719.44(K) to permit the exception of particular products upon compliance with rules establishing a procedure for making determinations, but without the adoption of rules naming the particular products. The summary prepared by the Ohio Legislative Service Commission supports such an interpretation by stating: "The Board [of Pharmacy] is required to make the determination in accordance with continuing law and rules adopted under the Administrative Procedure Act [R.C. Chapter 119]." Ohio Legislative Service Commission, Sub. H.B. 391 (Preliminary Summary), at 4 (July 22, 1994). For the reasons discussed above, however, such an interpretation is not supported by the language of the statute and must be rejected.

Conclusion

For the reasons discussed above, it is my opinion and you are advised:

1. As used in R.C. 3719.44(K), the phrase "by rule" means "through the adoption of a rule."
2. Pursuant to R.C. 3719.44(K), the State Board of Pharmacy may except a drug product containing ephedrine from inclusion as a Schedule V controlled substance only by adopting, in accordance with R.C. Chapter 119, a rule that names the particular drug product that is granted the exception.