1206

STATE BOARD OF COSMETOLOGY—REQUIRING APPLICANTS FOR A COSMETOLOGY SCHOOL LICENSE TO FURNISH A SURETY BOND AS SECURITY FOR CONTINUED OPERATION OF SUCH SCHOOL—IS NOT AUTHORIZED—§§4713.02, 4713.15, 4713.17, R.C.

SYLLABUS:

A rule adopted and promulgated by the state board of cosmetology, requiring applicants for a cosmetology school license to furnish a surety bond as security for continued operation of such school, is not authorized under the provisions of Section 4713.02, Revised Code, setting forth the rule-making authority of the state board of cosmetology, nor by the provisions of Sections 4713.15 and 4713.17, Revised Code, setting forth the qualifications for schools of cosmetology, and is invalid.

Columbus, Ohio, March 24, 1960

Lily C. West, Chairman, State Board of Cosmetology
Columbus, Ohio

Dear Madam:

Your request for my opinion reads in part as follows:

"We will appreciate your interpretation and suggestion concerning a bond in the amount of $15,000 which we are requiring from all new applicants for beauty school operation in accordance with Rule Number 28 (D) of our Rules and Regulations.

"This addition to our Rules was made after all steps of the Administrative Procedure Act in Section 119.01 through 119.13 of the Revised Code of Ohio, had been met and were filed with the Secretary of State's Office with the effective date of July 24, 1959.

"Some bonding companies have contacted this office suggesting that a uniform bond be approved by your office and ours to meet any possible future court question as to why the applicants are bonded.

"By way of explanation this agency has experienced, in the past, much confusion arising from the failure of a privately owned school because the students of said school had paid tuition either partial or in full and because of the failure of the school were then left without a place for instruction or without funds to enroll in a second school."

With you request you also submitted a copy of a suggested bond in this regard.

Rule 28 (D) of the state board of cosmetology, which must be considered in connection with the problem at hand, reads as follows:

> "After compliance with subsections (A), (B), and (C) applicant shall submit financial data. The State Board of Cosmetology shall require an applicant for a school license to furnish a surety bond in the amount of $15,000 that the prospective school owner whether individual, corporation, or whatever name indicated, show a financial worth of at least fifteen thousand dollars ($15,000) to assure the establishment of a school which meets all requirements necessary for a good and continuous teaching of the required subjects of cosmetology for the full term for which the student has contracted. The school shall meet all requirements as to size, equipment, supplies, instructors and all health and sanitary regulations."

The purpose of the quoted rule is plain. In the event a school of cosmetology to which a license has been issued should close down, leaving students with uncompleted course of instruction, for which instruction they have paid full tuition under the terms of contracts with such schools, such students are to receive refunds proportionate with the loss they would otherwise sustain. The surety bond in the amount of $15,000 provided for in Rule 28 (D) is the instrumentality with which this purpose is to be accomplished.

The term "financial worth" in the rule under discussion is apparently used in the sense of "net assets"; that is, moneys, securities, and unencumbered property, real or personal. Whether under the language of the rule the requirement as to the financial status would be satisfied once a school was established, or whether such requirement would continue thereafter is not clear.

The second sentence of the rule is loosely phrased and apparently open to either interpretation. It is also not clear whether the determination regarding the financial worth of an applicant is to be made by the state cosmetology board or by the surety company, or by both. I note that the bond as drafted is conditioned upon the observance of the provisions of the entire Chapter 4713. of the Revised Code and of all the rules and regulations of the board pertaining to the practice of cosmetology. This apparently means that the bond would be avoided in the event a school's license was either suspended or revoked as a result of disciplinary pro-

ceedings by the board. Students who have contracted for a complete course of instruction and paid for it in full are not mentioned in the surety contract. The state of Ohio is designated as the obligee, with the apparent thought that it should act as a trustee for such students and disburse the money received from the bonding company in accordance with the loss each of them had sustained.

This is an unusual situation, with far-reaching legal implications, which impels me to inquire:

(1) What is the authority of the state board of cosmetology in requiring applicants for a cosmetology school license to furnish a surety bond in the sum of $15,000 as a condition for the issuance of such license?

(2) What is the authority of the state board of cosmetology in making the state of Ohio a party to such surety bond and thereby imposing upon it the responsibility of a trustee for the benefit of students of a defunct school of cosmetology?

Section 4713.13, Revised Code, provides:

> "Every person, firm, or corporation desiring to operate a beauty parlor, in which any one, or any combination, of the occupations of a cosmetologist are practiced; and every person, firm, or corporation desiring to conduct or operate a *school of cosmetology*, in which any one, or any combination, of the occupations of a cosmetologist are taught, shall apply to the state board of cosmetology for a license, through the owner, manager, or person in charge, in writing upon blanks prepared and furnished by the board. Each application shall contain proof of the particular requisites for license and shall be verified by the oath of the maker.
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> "Upon receipt by the board of the application, accompanied by the required fee, the board shall issue to the person, firm, or corporation so applying and otherwise qualifying, the required license.
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> "Licenses shall be renewed annually on the first day of July, upon the payment of the required renewal fee.
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> "The annual license fee for a *school of cosmetology* shall be one hundred dollars.
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> "The annual license fee for a beauty parlor shall be five dollars." (Emphasis added)

Requirements for schools of cosmetology set forth in Section 4713.15, Revised Code, are as follows:

"Schools of cosmetology shall fulfill the following requirements:

"(A) They shall maintain a school term of not less than twelve hundred fifty hours for the majority of the practices of cosmetology, and shall maintain a course of practical training and technical instruction equal to the requirements for examination for license as a cosmetologist as set forth in section 4713.06 of the Revised Code;

"(B) They shall possess apparatus and equipment sufficient for the ready and full teaching of all subjects of its curriculum, except manicuring and hairdressing instruments;

"(C) They shall maintain persons licensed as managing cosmetologists as instructors of the theory and practices of cosmetology;

"(D) They shall keep a daily record of the attendance of each student, and a record devoted to the different practices, and shall establish grades, and hold examinations before issuance of diplomas.

"No branch of cosmteology shall be taught in a beauty parlor."

The grounds for refusal to issue or renew, and for suspension or revocation of a license of a school of cosmetology are spelled out in Section 4713.17, Revised Code, which reads:

"The state board of cosmetology shall not issue, or having issued, shall not renew, or may revoke or suspend at any time any license as required by section 4713.20 of the Revised Code, in any one of the following cases:

"(A) Failure of a person, firm, or corporation, operating a beauty parlor or school of cosmetology to comply with the requirements of sections 4713.01 to 4713.21, inclusive, of the Revised Code;

"(B) Failure to comply with the sanitary rules, adopted by the board or by the department of health for the regulation of beauty parlors, schools of cosmetology, or the practice of cosmetology;

"(C) Continued practice by a person knowingly having an infectious or contagious disease;

"(D) Habitual drunkenness or habitual addiction to the use of any habit-forming drug;

"(E) Willful false and fraudulent or deceptive advertising.

> "The board shall not refuse to issue or renew any license as required by section 4713.20 of the Revised Code, or revoke, or suspend any such license already issued, except in accordance with sections 119.01 to 119.13, inclusive, of the Revised Code."

The rule-making authority of the state board of cosmetology is derived from Section 4713.02, Revised Code, where it is stated in part:

> "* * *
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> "The board shall adopt rules for carrying out sections 4713.01 to 4713.21, inclusive, of the Revised Code, for conducting examination of applicants for license, and governing the recognition of, and the credits to be given to, the study of cosmetology, or any branch thereof, in a school of cosmetology, licensed under the laws of this or another state or territory of the United States or the District of Columbia. The board shall adopt such sanitary rules as are authorized by the department of health with particular reference to the precautions to be employed to prevent the creating or spreading of infectious or contagious diseases in beauty parlors or schools of cosmetology, or in the practice of cosmetology. A copy of all sanitary rules thus adopted, shall be furnished to each person, firm, or corporation, to which a license is issued for the conduct of a beauty parlor or school of cosmetology, and to each operator, and manicurist.
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> "* * *

In sum, one who asks for a license for the operation of a school of cosmetology is required to make an application together with the prescribed fee of one hundred dollars (Sec. 4713.11, *supra*), showing that he has complied with the conditions, so far as conditions can be applied in case of a new school, contained in Section 4713.15, *supra*, and that he has not violated any of the applicable provisions of Section 4713.17, *supra*. Nowhere do I find any provision express or implied, whereby an applicant is required to give any sort of security of continued operation as a condition precedent for the issuance of the requested license.

Turning now to the rule-making authority of the state board of cosmetology incorporated in Section 4713.02, *supra*, I note that schools of cosmetology are mentioned therein. The power of the board, however, is clearly limited to rules "*governing* the recognition of, and the credits to be given to, *the study of cosmetology, or any branch thereof*, in a school of cosmetology." In other words, the board is authorized to adopt rules prescribing certain standards of study and instruction which shall govern

such schools, which is not the same thing as making rules governing recognition of such schools.

It must be quite clear, I believe, that the essence of the problem here under discussion involves the authority of the board to adopt the rule in question. I cannot conceive a situation where a public officer, or an agency of government, would have the authority to demand of a person the furnishing of a bond, without express or clearly ascertainable sanction of law. The exercise of such authority would not be unreasonable only but patently unlawful. In *1 Ohio Jurisprudence* (2d), it is stated at page 482:

> "It is essential to the validity of administrative rules and regulations that they be reasonable and *neither arbitrary nor discriminatory.* * * *" (Emphasis added)

It appears, therefore, that Rule 28 (D), being clearly unreasonable, cannot escape the charge that it is also arbitrary and discriminatory, since it does not affect presently licensed operators of cosmetology schools but is to be applied only to those who may wish to operate such a school in the future. An anologous situation was before the court in *Motors Insurance Corporation v. Dressel,* 80 Ohio App., 505, where it is stated in the first paragraph of the headnotes:

> "A rule adopted by the Superintendent of Insurance of Ohio, that no insurance agents' and solicitors' licenses will be issued for new applicants connected with automobile sales business, except for life insurance, is in conflict with the provisions of Section 644, General Code, defining requisite qualifications for insurance agents, and is invalid."

A similar situation was resolved in *State ex rel. Homan v. State, Board of Embalmers and Funeral Directors,* 135 Ohio St., 321, where a rule of the mentioned state board with respect to admission to examination was nullified because it lacked express statutory authorization. See also *State ex rel. Foster v. Evatt,* 144 Ohio St., 65.

In *United States v. Tingey,* 5 Peters 115, 8 L. Ed., 66, a bond for the faithful performance of official duties was the subject of controversy. Noting that the bond there under consideration was authorized by law, it was held in the concluding paragraph of the syllabus:

> "No officer of the government has a right, by color of his office, to require from any subordinate officer as a condition of holding his office, that he should execute a bond with a condition

different from that prescribed by law. *That would be not to execute, but to supersede the requisites of law.* It would be very different where such a bond was, by mistake or otherwise, voluntarily substituted by the parties for the statute bond, without any coercion or extortion by color of office." (Emphasis added)

Pertinent to the question at hand is *32 Ohio Jurisprudence*, page 963, where it is stated:

> "A total want of jurisdiction will destroy the protection usually given to public officers in regard to their official duties. * * * In such cases the presence or absence of malice is of no importance. So an officer who compels the payment of money without authority of law is liable as a trespasser. * * *"
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> "Acquiesence in the action of a person or official board cannot be charged where the person or board taking such action was without power or jurisdiction to act."

In the light of the authorities herein cited, the question regarding propriety or impropriety of the draft of surety bond submitted to the state board of cosmetology need not be determined, for it is crystal clear that a surety bond, in such or any other form, executed as a condition for the issuance of a license here considered, would be without authority in law and therefore unenforceable.

Accordingly, it is my opinion and you are advised that a rule adopted and promulgated by the state board of cosmetology, requiring applicants for a cosmetology school license to furnish a surety bond as security for continued operation of such school, is not authorized under the provisions of Section 4713.02, Revised Code, setting forth the rule-making authority of the state board of cosmetology, nor by the provisions of Sections 4713.15 and 4713.17, Revised Code, setting forth the qualifications for schools of cosmetology, and is invalid.

Respectfully,
MARK MCELROY
Attorney General