

Opinion No. 56.

Cosmetology—Beauty Culturist, Student Fees—Civilian Rehabilitation, Student Beauty Culturists.

HELD: The State Examining

Board of Beauty Culturists is not authorized to require payment of a registration fee by students who enter a beauty school for training since such students are not practicing or teaching cosmetology.

March 9, 1935.

Mr. Leif Fredericks
Supervisor, Civilian Rehabilitation
The Capitol

This will acknowledge receipt of your letter of February 8, which is as follows:

"I have learned that the State Examining Board of Beauty Culturists recently issued an order requiring that a registration fee of \$15 must be paid to the Board by all persons wishing to enter a Beauty School for training, before their enrollment will be permitted. It seems to me that this is a usurpation of authority neither granted nor implied by the state law regulating the practice of cosmetology, and I would like a ruling by your office on the legality of the Board's action.

"The Rehabilitation Bureau provides training for this trade or profession to a number of persons each year, and the imposition of this fee will result in additional and unwarranted training costs. In its efforts to restore handicapped men and women to economic usefulness, the Bureau avails itself of the instructional facilities of numerous schools and educational institutions. Never before, in my experience, has a State Board assessed what amounts to a filing fee against a person wishing to prepare himself for a gainful occupation in a trade school.

"Another questionable regulation promulgated by the Board is one limiting to ten the number of students to an instructor in a beauty school, and setting a definite time or date for enrollment. The operation of this rule or order may conceivably interfere with expeditious training, when such is important, and cause considerable inconvenience."

Section 15 of Chapter 104, Laws of Montana, 1929, provides: "Each applicant for examination and applicant

for admission without examination by virtue of a license issued in another jurisdiction, shall pay at the time of such application a fee of Ten Dollars (\$10.00). Each person engaged in any of the practices defined herein shall pay a fee of Five Dollars (\$5.00) for the issuance of the license certificate and each renewal thereof. Each person conducting a school referred to herein shall pay an annual fee of Twenty Five Dollars (\$25.00). Such fees shall be paid in advance to the Secretary of the Board, and no moneys shall be paid out of the funds of the Board except upon warrant authorized by majority vote of the Board and signed by the President and Secretary of the Board."

Section 15, supra, is the only provision which we have found authorizing the Montana State Examining Board of Beauty Culturists to assess or collect fees, and its authority to collect a registration fee of \$15.00 from all persons matriculating in a school of beauty culture, must be found in that section.

"Where fees cannot be exacted by an officer for the purposes prescribed in the statute authorizing them, they cannot be exacted at all, and, if collected without authority, can be recovered by the person from whom they are exacted unless he is otherwise barred." (State v. Dunbar, 53 Ore. 45, 98 Pac. 878, 20 L. R. A. (U. S.) 1015).

With this general observation in mind, when we analyze Section 15, supra, we are unable to understand by what distortion of language it could be said that this section gives the board authority to adopt the rule to which you refer. The board may exact fees from three classes of persons—applicants for admission to practice (\$10.00), persons engaged in the practice or teaching of cosmetology (\$5.00 per year), and persons conducting a school of beauty culture (\$25.00 per year)—and from no others.

Clearly, students enrolling in a school of beauty culture, are not persons applying for admission to practice and are not persons conducting a school of beauty culture. Are they persons engaged in the practice or teaching of cosmetology? We think not.

We understand that it is sometimes the practice for schools of beauty culture to solicit patrons and for students enrolled therein to "practice" upon such patrons under the supervision of a teacher. It is not infrequent for the schools to charge such patrons for the service thus rendered, which charge, we are told, is usually sufficient to pay for the cost of materials used on the patron and other costs, but is less than the charge usually asked for by licensed practitioners. The same practice is followed by many reputable medical and dental colleges and recently, even in law schools. But we have been unable to find any statutory or judicial expression to the effect that internes or students employed in dental or legal clinics are engaged in the practice of medicine, dentistry or law. On the contrary, the authorities we have seen are all the other way. (Beaver Brook Resort Co. v. Stevens, 230 Pac. 121; State v. Faatz, 76 Atl. 295.) By the same token we do not feel that the courts would hold that students studying in a school of beauty culture could be said to be "engaged in the practice of cosmetology".

"To practice a profession is to hold one's self out as following that profession as a calling as one's usual business." (Beaver Brook Resort Co. v. Stevens, supra.)

In State v. Faatz, supra, it was held that the fact that an unregistered assistant or student employee of a licensed dentist filled a tooth for a patron and thereafter collected a fee which he paid over to his employer, did not constitute practicing dentistry without a license. The court in that case made this apt distinction: "A young man may be preparing to enter the dental profession; but he cannot, within the meaning of the statute, be said 'to engage in the practice of dentistry' until he embarks in it, until he holds himself out as a dentist, either by a series of continuous acts, covert or open, or by advertising himself in some way as a dentist, or as a doctor of dental surgery. If he hold himself out to the public as a duly qualified dentist, embarked in the profession, and offer to practice as such, this would be engaging in the practice of dentistry

within the true sense and meaning of this act, even though his first patient had not yet called."

Again, it must be remembered that Chapter 104, supra, as amended, is a penal and not a remedial statute. Anyone violating its provisions is guilty of a crime. (Section 17, as amended by Chapter 13, Laws of 1931.)

Section 2 of this Act says that "the practice and teaching of cosmetology is defined to be and includes any or all work generally and usually included in the term 'Hairdressing' and 'Beauty Culture' and performed in so-called hairdressing and beauty shops, which work is done for the embellishment, cleanliness and beautification of the hair, scalp, face, arms or hands."

Such a definition may not be strained by construction to include terms and restrictions not intended by the legislature, as that intent is manifested by the language used. The question is not what the legislature actually meant to say but what is the meaning of what the legislature has said. The definition quoted is expressly limited to "any or all work * * * performed in so-called hairdressing and beauty shops." It does not extend to work performed in cosmetology or beauty schools.

Again, the authority asserted by the board in adopting the rule we are considering would seem to contravene certain express provisions of the act. If it be contended that students of so-called beauty schools are engaged in the practice of cosmetology and therefore liable to pay fees assessed by the board then such students should first be required to comply with Section 3 of Chapter 104, supra, as amended by Chapter 14, Laws of Montana, 1931, which sets forth the requirements to teach or to practice cosmetology, and Section 8, relating to the examination of applicants for admission to practice.

Even if all that has been said herein is incorrect and the courts should hold that the students of a school are engaged in the practice of cosmetology and must pay the fee required of practitioners, that fee is fixed by Section 15 at \$5.00 per year and the legislature alone can change it.

We also wish to call your attention to the following provision of Chapter

85, Laws of Montana, 1935, which became law on March 5, when it was approved by the Governor: "Provided that physically handicapped persons trained for cosmetology under the State Bureau of Vocational Rehabilitation shall, for a period of one year immediately following their graduation, be exempted from this examination and the fees described in Section 15 of this Act. Upon certification from the State Supervisor of Rehabilitation that a Bureau beneficiary has successfully completed the required apprenticeship or training in a shop or beauty school, the Secretary of the State Board shall issue to such person the necessary certificate or license to practice the profession in Montana."

We believe that it was the intention of the legislature, in adopting this benign provision, to exempt those physically handicapped persons trained by your department from the payment of all fees until they have been practicing as cosmetologists for a period of one year.

You also question the authority of the board to adopt a rule requiring an inspector for every ten students enrolled in a school of beauty culture, and setting a definite time or date for enrollment. We have been advised that the validity of this rule has been attacked in an action pending before the court in the Thirteenth Judicial District, in and for the County of Yellowstone. That being true, it would be improper for this office to discuss the matter.