



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**WAGGONER CARR
ATTORNEY GENERAL**

October 16, 1964

Mrs. Bess Blackwell
Executive Secretary
State Board of Hairdressers
and Cosmetologists
Austin, Texas

Opinion No. C-333

Re: Whether the proposed rules
are within the authority
of the Board of Hairdressers
and Cosmetologists to
promulgate under Article
734b, Vernon's Penal Code.

Dear Mrs. Blackwell:

You have requested the opinion of this office as to whether the Board of Hairdressers and Cosmetologists may lawfully promulgate the following rules:

(1) "Each school, day student may be absent for non-extenuating circumstances during the six (6) months training period for a period aggregating not more than five (5) days. Each school, night student may be absent for non-extenuating circumstances during the twelve (12) month training period for a period aggregating not more than ten (10) days. The Board will, in the event of extenuating circumstances and where the period of interruption is for more than thirty (30) school days and upon written application duly verified setting such circumstances, permit a school student, upon reregistration, to re-enter and continue training, and in such event such school student may receive credit for two-thirds (2/3) of the hours of training completed prior to such interruption of training, but no such school student may attend school less than sixty days upon such reregistration, nor shall such school student be permitted to re-enter and reregister in a school more than one time. An application will only be considered if filed within one year from the date of such interruption. In those cases where the interruption of training is due to extenuating circumstances, the school and the school student shall immediately notify the board of such interruption, and failure to give such notice shall preclude reregistration.

(2) "Any student who wishes to remain in school longer than the required time, (six months for Day Students---twelve months for Night Students) may

make application for additional training and remain in school for a period not to exceed one month.

(3) "Nothing in these Board rulings should be construed to include cosmetology students enrolled in a tax supported school, provided further that where a student is enrolled in a licensed beauty school, the course of instruction may be extended beyond the regular training period.

(4) "The Board may authorize transfer from one school to another for the purpose of completing the training period upon application and written permission of schools involved and for good cause shown.

(5) ". . . Enrollment date for the cosmetology schools shall be the first Tuesday and third Tuesday of each month.

(6) "Each school shall keep a daily attendance and performance record on each student, which will be available for inspection by Inspectors or members of the Board at all times, showing in detail the theoretical instruction and practice training and the work performed and accomplished by each student each day during the course of study.

(7) "Any person, firm or corporation may establish a school for the teaching of cosmetology upon complying with the rules and specifications set up by the Board and filing a financial statement showing the applicant to possess property of a minimum value of \$20,000.00 over and above all legal exemptions and liabilities."

Primary responsibility for fixing requirements for a license is in the Legislature. Once the Legislature has prescribed the standards a board is limited to promulgation of the rules that implement such standards. Margolin v. State, 151 Tex.Crim.R. 132, 205 S.W.2d 775 (1947). In the case of the Cosmetology Board the Legislature designated the total number of hours, maximum hours per day, maximum days per week, and minimum number of months to qualify for a license to practice cosmetology.

Section 5(b) of Article 734b, Vernon's Penal Code reads as follows:

"No school of beauty culture shall be granted a license or certificate of registration unless it shall maintain a sanitary establishment and employ and maintain on its staff not less than two (2) full-time instructors who have been duly licensed as instructors by the Texas State Board, and shall keep a daily record of attendance of students, and shall maintain a regular class and regular instruction hours, establish grades and hold examinations before issuing diplomas, and shall require a school term of not less than six (6) months, and not less than one thousand (1,000) hours of instruction for a complete course of the practice of hairdressing and cosmetology, and shall require a school term of not less than six (6) weeks, and not less than one hundred and fifty (150) hours instruction for a complete course in manicuring; and no student shall work or be instructed or receive credit for more than eight (8) hours of instruction in any one (1) day, exclusive of the lunch period, or for more than six (6) days in any one (1) calendar week, and no public high school student shall be instructed or receive credit for more than six (6) hours of instruction in any one (1) day, exclusive of the lunch period, or for more than five (5) days in any one (1) calendar week."

The Act is not broad enough to permit the Board the discretion to authorize the proposed rules; the Legislature set forth the criteria wherein it drew explicit boundaries within which the Board must operate. To do otherwise would violate Section 1, Article 2 of the Constitution of the State of Texas. Quoting from Reynolds v. Dallas County, 203 S.W.2d 320 (Tex.Civ.App., 1947):

" . . . It is a long and well-settled rule of constitutional law that the legislature cannot delegate to the people or any board, bureau, commissioners court or other administrative or legal body or institution its authority to make laws;"

Your last proposed rule is as follows:

"Any person, firm or corporation may establish a school for the teaching of cosmetology upon complying with the rules and specifications set up by the Board and filing a financial statement showing the applicant to possess property of a minimum value of \$20,000.00, over and above all legal exemptions and liabilities."

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Section 5(a) of Article 734b, Vernon's Penal Code reads as follows:

"Any person, firm, association or corporation applying to the Board for an original certificate of registration or license, as a school of beauty culture, shall make such application in the form prescribed by the Board, giving data and information required by the Board. The Board shall, in such applications, require such data, information and facts as it deems necessary to determine such applicant's compliance with this Act and his or its fitness to conduct and maintain such school. No applicant for an original school license shall hereafter be granted an original certificate of registration or license unless it shall have a building approved by the Board, . . . , and shall have not less than two (2) modern, sanitary toilets . . . and shall possess and have installed the minimum equipment and apparatus . . . and such schools shall thereafter maintain the premises and minimum equipment and apparatus; and such applicants shall furnish a good and sufficient surety bond payable to the State of Texas, conditioned to refund any unused portion of tuition paid if such school closes or ceases operation before courses of instruction have been completed. . . ."

The recent case of Kelly v. Industrial Accident Board, 358 S.W.2d 874 (Tex.Civ.App. 1962, error ref., n.r.e.) held:

". . . It is recognized that the Legislature may delegate to State officers, agencies or administrative bodies the power to enact or promulgate rules and regulations in aid of statutory authority conferred upon such administrative body, 1 Tex.Jur.2d "Administrative Law", Sec. 11. But the rules and regulations so enacted by the administrative body may not impose additional burdens, conditions or restrictions in excess of or inconsistent with the statutory provisions. . . ."

No financial statement is required in Section 5(a) of Article 734b, Vernon's Penal Code. To add such a requirement would usurp the Legislature's function and impose an additional burden on the applicant.

It is therefore the opinion of this office that the proposed rules are beyond the authority of the Board with the exception of daily attendance records. The latter are required by the specific

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language of Section 5(b) of Article 734b, Vernon's Penal Code:

"No school of beauty culture shall be granted a license or certificate of registration unless it shall....keep a daily record of attendance of students. . . ."

SUMMARY

The Board of Hairdressers and Cosmetologists are without authority to pass the proposed rules concerning absenteeism, reregistration, transfers from one school to another, performance records, or financial statements as a prerequisite for a license.

The Board is under a positive duty to see that daily attendance records are maintained under Section 5(b) of Article 734b, Vernon's Penal Code.

Very truly yours,

WAGGONER CARR
Attorney General

Wade Anderson

By
Wade Anderson
Assistant

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APPROVED:
OPINION COMMITTEE

W. V. Geppert, Chairman
Malcolm Quick
Gordon Houser
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APPROVED FOR THE ATTORNEY GENERAL
By: Roger Tyler