2003

BEAUTY SHOP—LICENSED—MOVED TO NEW LOCATION—OWNER MUST APPLY FOR ANOTHER SHOP LICENSE—SECOND BRANCH OF SYLLABUS, OPINION 4416, OPINIONS ATTORNEY GENERAL, 1935 PAGE 801, OVERRULED.

SYLLABUS:

If a licensed beauty shop is moved to a new location the owner of the shop must apply for another shop license. (Second branch of syllabus, Opinion 4416, Opinions Attorney General, 1935, page 801, overruled.)

Columbus, Ohio, June 25, 1947

Mr. Howard L. Shearer, Chairman, State Board of Cosmetology
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion, which reads as follows:

"In re: AGO 4416
July 13, 1935
Beauty Shop License

The board respectfully requests that you review and reconsider the above opinion insofar as relates to the second question, which reads:

'If a licensed beauty shop is moved to a new location, is the owner required to apply for another shop license?'

We hope to be able in the very near future to issue a rule that no beauty shop license can be transferred from one location to another, and instead to require that a person who discontinues at a location which has been approved and licensed and opens a beauty shop at a new location shall apply for a new license as before and pay another shop license fee, since the new location must be inspected in the same manner and at as great a cost to the state as the first one. In many cases, a shop license is transferred to a new location three or four times, requiring four or five original inspections and all had on the original fee.

The board, for all practical purposes, loses much of its control over sanitary conditions as many holders of such license move

from store and office rooms into living quarters or other very undesirable locations and continue to display the same license.

Under Section 1082-1-23, a beauty shop license may be issued to a corporation or natural persons who are, however, not licensed to practice under the act. A beauty shop license is for all practical purposes a PERMIT to use certain limited and clearly defined room space for the practice of cosmetology, the issuance of such license or permit being predicated upon an inspection by the board or its agents of the plumbing, ventilation, lighting, and other sanitary conditions existing in this exact location, and all rights under such license should cease when the holder thereof abandons said location.

May we urge your prompt review of this opinion that the board may proceed with its proposed rule to discontinue such transfers without being in conflict with this opinion."

Section 1082-20, General Code, is concerned with the issuance, renewal, revocation and suspension of licenses by the State Board of Cosmetology and reads in part as follows:

"The board shall not issue, or having issued, shall not renew, or may revoke or suspend at any time any license as required by the provisions of Section 1082-2 hereof, 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 this act.

(b) Failure to comply with the sanitary rules, adopted by the board or by the state department of health for the regulations of beauty parlors, schools of cosmetology, or the practice of cosmetology. * * *"

That a license to operate a beauty parlor is a license required by the provisions of Section 1082-2, General Code, is apparent from the following language of that section:

Section 1082-2.

"* * * every person, firm or corporation who shall conduct or operate a beauty parlor * * * without license, issued as herein provided, * * * shall be fined not less than ten dollars ($10.00) nor more than one hundred dollars ($100.00). * * *"

Accordingly it is clear that before issuing a license to operate a beauty parlor the State Board of Cosmetology must be satisfied that the

applicant for such license has complied with the requirements of the Cosmetology Act, Sections 1082-1 to 1082-23, inclusive, General Code, and the sanitary rules adopted by the board or by the State Department of Health for the regulation of beauty parlors.

The requirements of the Cosmetology Act relating to procedural prerequisites to the issuance of a license to operate a beauty parlor are found in Section 1082-16, General Code, which reads in part as follows:

> "Within 60 days after the appointment of the board as provided in Section 3 of this act, and annually thereafter during the month of June, every person, firm or corporation conducting or operating or desiring to operate a beauty parlor, in which any one, or any combination of the occupations of a cosmetologist are practiced; * * * shall apply to the board 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 provided for this act 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 under this act, the required license. * * *
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> The annual license fee for a beauty parlor shall be five dollars ($5.00)."

Sanitary rules for the regulation of beauty parlors are to be promulgated by the State Board of Cosmetology under the mandate of Section 1082-3, General Code, the pertinent part of which reads as follows:

> "* * * It shall be the duty of the board * * * to adopt such sanitary rules as may be authorized by the state 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 * * *"

Your letter suggests, and since it was received I have been informed that the State Board of Cosmetology has adopted rules relating to plumbing, ventilation and lighting in beauty parlors. It is difficult for me to escape the conclusion that compliance with these sanitary rules is of the greatest importance in the matter of qualifying for the issuance of a license to operate a beauty parlor. What other requirements in the law relating to the regulation of beauty parlors so directly affect the health

and safety of patrons of such establishments? If there is any reason at all to require the regulation by license of beauty parlors it must be to insure the practice of cosmetology in a sanitary place. Without this the purpose of the entire Cosmetology Act, Sections 1082-1 to 1082-23, inclusive, General Code, is defeated, for the benefits that inure to the public when the right to practice cosmetology is limited to those who have proved upon examination to be skilled in the safe and sanitary methods of the trade are lost when that practice is permitted in an insanitary place.

Generally speaking the Cosmetology Act makes provision for two types of licenses. The issuance of one type, a license to practice cosmetology either as manager, operator or manicurist, is based upon requirements relating to the skill, health, age, experience and character of the applicant. The other type, a license to conduct or operate a beauty parlor, is the one with which your inquiry is concerned. It does not grant the privilege to engage in the practice of cosmetology but merely extends the right to operate a place wherein that practice may be carried on by persons licensed to engage in the practice. In order for such a license to issue, the nature of the place, rather than any personal characteristics of the applicant, must meet the requirements of the law. It must follow then that a license to operate a beauty parlor is a license to operate a beauty parlor at a particular and specified place, that place which upon actual inspection of its physical characteristics has been determined to be in conformance with rules laid down under the authority of law.

The second branch of the syllabus of the opinion to which you refer, to wit, No. 4416, rendered July 13, 1935 (1935 Opinions of the Attorney General, page 801), reads as follows:

> "2. If a person operating a licensed beauty shop or a licensed school of cosmetology moves to a new location during the licensing year, he is not required to obtain a new license, but such person may by rule of the State Board of Cosmetology, be required to obtain the consent of the board to such transfer before operating the beauty shop or school of cosmetology at the new location."

It may be noted, without deciding whether the rule suggested in the syllabus just quoted may properly be promulgated, that this syllabus permits the assumption of the absence of a rule requiring consent before transfer. In such a case, without a rule requiring consent, according to

this opinion a person operating a licensed beauty shop may during the license year move that shop at will from one place to another without obtaining a new license. Since there is no provision in the Cosmetology Act, Sections 1082-1 to 1082-23, inclusive, General Code, requiring an operator of a licensed beauty shop to notify the board of the removal of his shop from one location to another, the conclusion reached in said Opinion No. 4416 could result in the practice of cosmetology being carried on under legal authority in places not known to the persons granting that authority, the State Board of Cosmetology. In the face of this tremendous obstacle to proper enforcement, to make rules regarding sanitation would be a vain and empty gesture.

It might be asserted that ultimately the board will obtain notice of removal, although indirectly, by virtue of the requirements of Section 1082-18, General Code, reading in part as follows:

> "* * * Every licensed cosmetologist shall within thirty days after changing his or her place of business, as designated on the books of the board, notify the secretary thereof of his or her new place of business, and upon receipt of said notification the secretary shall make the necessary change in the register."

This section applies only to those persons who are licensed to perform services in a beauty parlor and does not reach a firm or corporation conducting a beauty shop; nor does it affect an individual not licensed to practice cosmetology who engages licensed cosmetologists to work in a beauty shop which he operates. It is true that a constant and careful comparison with the register of licensed beauty shops of the new places of business indicated on the notices required by Section 1082-18, supra, will indirectly give notice to the board of the removal of a beauty shop. But it is also true that even with this a licensed shop may be conducted for as long as twenty-nine days without the board knowing its location.

Undoubtedly at the time the opinion under consideration was rendered it was recognized that a situation such as I have described might arise as a consequence of its conclusion. To ward off the disastrous results of that conclusion there is volunteered the suggestion that the board may by rule require that its consent be obtained before a complete transfer is effected. The suggestion is a good one, but it certainly is not necessary if the conclusion which prompts it is not in order.

That conclusion is predicated in part upon the case of Drew v. City of Mt. Hope, 171 S.E. 743 (W.Va.). That case was an original proceeding in mandamus wherein the relator, among other things, sought to compel the respondents, a city and its officers, to transfer licenses previously granted him to operate a restaurant, soft drink stand, sell and dispense cigars, cigarettes and other preparations of tobacco to another building from that he occupied at the time the licenses were granted. The second branch of the court's syllabus of the opinion in that case reads as follows:

> "2. A case in which the relator, under existing circumstances, is entitled to a transfer of certain existing licenses to his new place of business."

The court's opinion indicates that the case turned on the failure of the city council to base its refusal to issue a license on legal evidence. At a statutory hearing on the question why council had refused to transfer and issue licenses as requested certain affidavits were, over objection, improperly read in evidence.

The question whether under the law council had a right to transfer licenses, although suggested in the answer, was not discussed in the opinion, perhaps not inadvertently inasmuch as the case involved not only the transfer of licenses to a new place of business but also the original issuance of similar licenses at the same location.

The case clearly is not directly in point and complicated as it is with so many elements completely unrelated to the present inquiry, should not be permitted to control the determination of the question with which we are concerned.

In addition to the ruling in the case which I have just considered, one other reason is advanced in said Opinion No. 4416 in support of the conclusion reached. That reason is that "much difficulty would be encountered" if owners were compelled to obtain new licenses. It is implied that this difficulty would arise from the necessity of paying a fee of five dollars for a new license.

As you have suggested in your request for my opinion a fee of five dollars is not out of proportion with the cost necessarily incurred in an inspection of a proposed beauty shop location. In good conscience upon whom should this cost ultimately be made to fall? On the taxpayers gen-

erally, or on that person who stands to reap the most immediate and direct benefits from the inspection and who motivates it? Certainly, it is the latter. Again the reason fails.

In view of the possible consequences of the second syllabus of said Opinion No. 4416, which I have hereinbefore pointed out, and after examining and testing the authority upon which it is based, I can not concur in that syllabus.

As I have already pointed out, a license to operate a beauty shop is a license to operate a beauty shop at a particular and specified place. The Cosmetology Act, Sections 1082-1 to 1082-23, inclusive, General Code, is completely devoid of any provision granting to the State Board of Cosmetology the power or authority to transfer a shop license once issued to another location. There exists no need to imply such authority, for a person desiring to move a beauty shop from one location to another is free to apply for a license to operate a shop at the new location. If the power to transfer a shop license is neither expressly delegated to the State Board of Cosmetology nor necessarily implied, it does not exist. See 32 O. Jur., Public Officers, Paragraph 74, and cases cited therein.

Accordingly, in specific answer to your inquiry, it is my opinion that if a licensed beauty shop is moved to a new location the owner of the shop must apply for another shop license.

Respectfully,

HUGH S. JENKINS,
Attorney General.