

ADMINISTRATIVE LAW AND PROCEDURE: Rule of the State Board of Cos-
STATE BOARD OF COSMETOLOGY: metology requiring a holder of
a Missouri license to pay a fee
of \$5.00 for certification in
order to become licensed in
another state by reciprocity
is invalid and beyond the power
granted them by the Legislature.

November 17, 1949

Mrs. Lucile Gregory
Executive Secretary
State Board of Cosmetology
Jefferson City, Missouri



Dear Mrs. Gregory:

I.

We received the following request for an opinion from you:

"Was the following rule, adopted by the
State Board of Cosmetology, within their
power and enforceable?

'Applicant holding current Missouri
license applying for reciprocity in
another state will be required to
pay a clearing fee to the State Board
of Cosmetology of Missouri. Fee--\$5.00.'

II.

We understand this certification requires an examination of
your records to determine the number of years the license holder
has been licensed by the State of Missouri and that said person
is in good standing at the time of the issuance of the certificate.

The State Board of Cosmetology was created for the purpose of
licensing and registering all persons engaged in the practice of
hair dressing, cosmetology and manicuring in this state.

Laws of Missouri, 1945, at page 738, Sections 1 and 4, provide
as follows:

"Section 1. Authority for establishment of
board--powers and duties.--There is hereby
created and established a state board of

cosmetology for the purpose of licensing and registering all persons engaged in the practice of hairdressing, cosmetology and manicuring in this state, which board shall have such other powers and duties as have heretofore been vested in the state board of health as they relate to the practice of cosmetology, hairdressing and manicuring."

"Section 4. Powers of board.--The said state board of cosmetology is hereby authorized to conduct examinations of applicants for license to practice; to issue licenses and certificates of registration, to provide for the inspection of shops by licensed cosmetologists and to appoint the necessary inspectors therefor and to appoint examining assistants, if necessary."

Section 9814, Laws of Missouri, 1945, page 960, provides as follows:

"The control, supervision and enforcement of the terms and provisions of this article shall be under the State Board of Cosmetology."

The State Board of Health was not empowered to issue rules and regulations establishing a charge for any of its services or for the amount to be charged for any license issued by the State Board of Health. Therefore, the granting to the State Board of Cosmetology the powers and duties heretofore vested in the State Board of Health as they relate to the practice of cosmetology did not give the State Board of Cosmetology the power to make rules requiring the payment of any licenses or fees.

The Legislature has not granted to the State Board of Cosmetology the power to fix the amount of fees it may charge nor the amount to be charged for the various licenses it may issue. A careful study of the acts creating the State Board of Cosmetology and the laws regulating this profession clearly show that the Legislature has fixed the amount of the fees and licenses to be charged for all certificates and licenses issued by the State Board of Cosmetology. Such fees are fixed by Sections 9815 and 9821 (Laws of Mo. 1945, Page 959) and Section 9829 (Laws of Mo. 1947, page 321). It is true that Section 9813 allows the State Board of Cosmetology to set the amount of the annual registration fee for schools but places a limit of \$100.00 on such a fee.

The fact that the Legislature fixed the fees to be charged for all licenses and services by the State Board of Cosmetology shows

that they have not delegated their power to fix such charges to the State Board of Cosmetology.

The power to fix the amount of licenses to be charged by the state or any of its agencies is a legislative power.

42 Am. Jur., Section 36, Page 329, says:

"Legislative power is the power to make, alter, or repeal laws or rules for the future. To make a rule of conduct applicable to an individual who but for such action would be free from it is to legislate. * * * Administration has to do with the carrying of laws into effect, their practical application to current affairs by way of management and oversight including investigation, regulation, and control, in accordance with and in execution of the principles prescribed by the lawmaker."

In the case of Ex Parte Williams, 345 Mo. 1121; 139 S.W.(2d) 485, at page 1130 the court says:

"'A legislative body cannot delegate its authority, but alone must exercise its legislative functions. (12 C.J. 839; 6 R.C.L. 175.) It may empower certain officers, boards, and commissions to carry out in detail the legislative purposes and promulgate rules by which to put in force legislative regulations. It may provide a regulation in general terms, and may define certain areas within which certain regulations may be imposed and it may empower a board or a council to ascertain the facts as to whether an individual or property affected come within the general regulation or within the designated area.' (Cavanaugh v. Gerk, 313 Mo. 375, 280 S.W. 51, 1.c. 52.)"

42 Am. Jur., Section 53, at page 358, says:

"The scope and extent of the power of administrative authorities to enact rules and regulations is limited by the Federal and state Constitutions and the statutes granting them such power. In many cases the power to make rules and regulations on a particular subject is a limited power, having respect to mode and form and time and circumstance,

and not to substance. But in other cases the power is much more extensive and substantial and may be understood to give plenary control over those subjects. The rule of construction as to the extent of the power granted depends, at least in some sort, upon the nature of the subject matter. The extent of the power must be determined by the purpose of the act and the difficulties its execution might encounter. Since the power to make regulations is administrative in nature, legislation may not be enacted under the guise of its exercise by issuing a 'regulation' which is out of harmony with, or which alters, extends, or limits, the statute being administered, or which is inconsistent with the expression of the law-makers' intent in other statutes. The administrative officer's power must be exercised within the framework of the provisions bestowing regulatory powers on him and the policy of the statute which he administers. He cannot initiate policy in the true sense, but must fundamentally pursue a policy predetermined by the same power from which he derives his authority. * * *

Sutherland Statutory Construction, Section 6603, says:

"Administrative agencies are purely creatures of legislation without inherent or common-law powers. The general rule applied to statutes granting powers to administrative boards, agencies or tribunals is that only those powers are granted which are expressly or by necessary implication conferred, and the effect usually has to accomplish a rather strict interpretation against the exercise of the power claimed by the administrative body. The rule has been variously phrased, including language to the effect that a power must be 'plainly' expressed; that a power is not to be 'inferred' or taken by 'implication'; or that the jurisdiction of an administrative agency is not to be 'presumed.'"

We cannot find any statute enacted by the Missouri Legislature granting the power to the State Board of Cosmetology to issue or promulgate a rule requiring the payment of a clearing fee for certification by said Board of the holder of a Missouri license

so that such licensee may apply for a cosmetology license in another state under reciprocity agreements. The Supreme Court of Missouri on October 3, 1949, in the case of Howell et al. v. Division of Employment Security, Department of Labor, 222 S.W.(2d) 953, held:

"* * *The decision of the Commission on March 10, 1944, that plaintiffs were subject to the payment of contributions was the same as levying a tax in the amount of the contributions required. The levying of a tax is a legislative function and may be exercised only when clear and express statutes have been enacted for that purpose. Such statutes operate in invitum and should be strictly construed. State ex rel. American Cent. Ins. Co. v. Gehner, 315 Mo. 1126, 280 S.W. 416. In the pungent words of Judge Lamm, in Leavel v. Blades, 237 Mo. 695, loc. cit. 700, 141 S.W. 893: 'When the tax gatherer puts his finger on the citizen, he must also put his finger on the law permitting it.' 61 C.J. p. 81, sec. 10; Am. Jur. p. 71, sec. 42, p. 74, sec. 44."

III.

CONCLUSION

The State Board of Cosmetology does not have power to promulgate a rule requiring the payment of a fee by holder of a Missouri license from said Board for certification of the records of said Board in regard to such license holder who wishes to apply for a license in another state and establish the fact that he or she has been licensed by the State of Missouri for a certain number of years and that the issuance of such a rule is beyond the power granted said Board by the Legislature and therefore the rule so adopted is invalid and nonenforceable.

Respectfully submitted,

APPROVED:

STEPHEN J. MILLET
Assistant Attorney General

J. E. TAYLOR
Attorney General