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STATE OF WISCONSIN
BEFORE THE BARBERING AND COSMETOLOGY EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST CAROL BLOCK, LTD., d/b/a CAROL BLOCK, LTD. PERMANENT HAIR REMOVAL, RESPONDENT.	: : : : : : :	FINAL DECISION AND ORDER LS8909111COS

The State of Wisconsin, Barbering and Cosmetology Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Barbering and Cosmetology Examining Board.

The rights of a party aggrieved by this Decision to petition the Board for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 17th day of June, 1991.

Diane N. Bainbridge
V. Chair

STATE OF WISCONSIN
BEFORE THE BARBERING AND COSMETOLOGY EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST	:	
CAROL BLOCK, LTD., d/b/a CAROL BLOCK, LTD. PERMANENT HAIR REMOVAL,	:	PROPOSED DECISION LS8909111COS
RESPONDENT.	:	

The parties to this proceeding for purposes of Wis. Stats., sec. 227.53 are:

Carol Block, Ltd. d/b/a
Carol Block, Ltd. Permanent Hair Removal
326 Center Street
Lake Geneva, WI 53147

Barbering and Cosmetology Examining Board
1400 East Washington Avenue
P.O. Box 8935
Madison, Wisconsin 53708-8935

A hearing was held in the above-captioned matter on February 27, 1990. Steven M. Gloe, Attorney at Law, appeared on behalf of the Department of Regulation & Licensing, Division of Enforcement. Attorney Thomas Skalmoski, Weiss, Berzowski, Brady & Donahue, appeared on behalf of the respondent.

Based upon the record herein, the Administrative Law Judge recommends that the Barbering and Cosmetology Examining Board adopt as its final decision in this matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Carol Block, Ltd. Permanent Hair Removal, 326 Center Street, Lake Geneva, Wisconsin, is duly licensed as an electrologist establishment in the State of Wisconsin. Respondent's license, #14507 was first granted to the above referenced location on May 3, 1982.

2. Carol Block Ltd., 7701 Bull Valley Road, McHenry, Illinois is the owner of Carol Block, Ltd. Permanent Hair Removal.

3. The "D'Plume" method utilized by the respondent for the removal of hair from patrons of the establishment employs a high intensity xenon light which is delivered into a hair follicle by a non invasive fiber optic probe tip placed on the surface of a patron's skin. The optic probe tip does not deliver an electric current to the hair follicle or the papilla.

4. The apparatus used in conjunction with the "D'Plume" method is powered by electricity using a standard current, and consists of a probe tip, a flexible glass fiber optical cable and a foot pedal. The apparatus does not employ an electric needle for the removal of hair from the human body.

5. The "D'Plume" method was developed by Carol Block, Ltd., and has been used exclusively by Carol Block, Ltd.

6. At least from June 10, 1988 and continuing at least to the fall of 1989, respondent's employees used the "D' Plume" method at the Lake Geneva, Wisconsin, electrologist establishment for the removal of hair from patrons of the establishment. Respondent's employees utilized the "D'Plume" method at the instruction and direction of the establishment management.

7. On June 10, 1988, respondent salon was provided with an order to correct from the Department of Regulation and Licensing, Division of Enforcement. The order to correct reads as follows:

Code Sections (s) and Description of Violations(s)

458.01 Definitions. In this chapter:

(2) "Electrolysis salon" is any establishment or place of business wherein electrolysis is practiced.

458.01 (6) "Electrologist" means any person who removes hair from the human body by the use of an electric needle.

8. As a result of the order to correct served on the respondent on June 10, 1988, the respondent ceased utilization of the "D'Plume" method for the remainder of June 10, 1988. Respondent resumed utilization of the "D'Plume" method at its Lake Geneva, Wisconsin office on or about June 11, 1988, and continued utilization of the hair removal method until the fall of 1989.

CONCLUSIONS OF LAW

1. The Barbering and Cosmetology Examining Board has jurisdiction in this matter pursuant to s. 454.15 (2) Wis. Stats.

2. The respondent's conduct in utilizing the D'Plume method for the removal of hair from the human body constituted practice outside of the scope of practice of an electrologist.

3. The respondent's conduct in utilizing the D'Plume method, after June 10, 1988, for the removal of hair from the human body did not constitute a violation of Wis. Stats., ss. 458.01 (2) or (6), 458.14 (2) (b); 454.01 (9), 454.15 (2)(b), or Wis. Adm. Code ss. C 1.03 (1) or C 7.01 (1).

ORDER

NOW, THEREFORE, IT IS ORDERED that the Complaint filed in the above captioned matter, be and hereby is, DISMISSED.

OPINION

I. GENERAL OVERVIEW

The evidence presented at the hearing consisted of 17 exhibits, the deposition testimony of Ms. Elaine McKinney, and the testimony of five witnesses. (Tran. p.143-144). In addition, a stipulation relating to certain facts and exhibits was filed by the parties. Exhibits #1,#2,#3 and a one page document relating to respondent's training manual were received into evidence subject to a protective order issued pursuant to s. 227.45 (7) Stats. (See also, ss. 227.46 (7) and 804.01 (3) Stats; Tran. p. 16-25).

II. LEGAL ANALYSIS

1. In General

The Complaint filed in this matter alleges that the respondent is subject to disciplinary action against its license because: (1) it failed to comply with an order to correct an alleged violation of a rule of the board; and, (2) it continued to practice outside the scope of its licensed activity. Although the order to correct does not allege that the respondent violated any rule of the Board, it is apparent from the Complaint that the complainant is alleging that the respondent violated ss. C 1.03 (1) and C 7.01 (1) Wis. Adm. Code, both of which require compliance with ch. 458 Stats. Section 458.01 (2) Stats., defines "electrolysis salon" to mean any establishment or place of business wherein electrolysis only is practiced, and sec. 458.01 (6) Stats., defines the term "electrologist" to mean any person who removes hair from the human body by the use of an electric needle (Ex. #6).

Similar provisions are reflected in current ch. 454, Stats. Complainant relies upon s. 454.01 (9) Stats., which defines the term "electrology" to mean

> "for compensation, removing hair from the human body by use of an electric needle",

and s. 454.15 (2)(b) Stats., which provides that the board may revoke, limit, suspend or refuse to issue or renew a license or permit, if the holder of a license or permit

> "Failed to correct or take substantial steps approved by the examining board to correct a violation of any sanitary or other rule of the examining board within the time limit stated by the examining board in a notification of violation".

The respondent denies having violated these provisions.

2. Violations of Ch. 458 Stats.

(A) Legal References

The complainant alleges that by failing to comply with an Order to Correct and continued practice outside the scope of its licensed activity, the respondent is subject to disciplinary action against its license, pursuant to ss. 458.01 (2) and (6), and 458.14 (2)(b) Stats., (refer also to similar provisions found in ch. 454 Stats). Subsections 458.01 (2) and (6) Stats., read as follows:

458.01 **Definitions**

(2) "Beauty Salon" embraces and includes any establishment or place of business wherein cosmetology is practiced. "Electrolysis salon" is any establishment or place of business wherein electrolysis only is practiced.

(6) "Electrologist" means any person who removes hair from the human body by the use of an electric needle.

Section 458.14 (2)(b) Stats., reads as follows:

458.14 **Investigations, hearings, reprimands, suspensions nonrenewals and revocations**

(2) The examining board may revoke, limit, suspend or refuse to renew, in accordance with the severity of the violation, any certificate, license or permit issued under this chapter or reprimand the holder of such certificate, license or permit if it finds the holder has:

(b) Failed to correct or take substantial steps approved by the examining board to correct an alleged violation of any valid sanitary or other rule of the examining board within the proper time limit following notification by the examining board of such violation ...

(B) Analysis

The complainant in essence argues that: 1) the respondent's use of the D'Plume method after the order to correct was issued constituted a violation of s. 458.14 (2) (b) Stats., in that the respondent failed to comply with ss. C 1.03 (1) and C 7.01 Wis. Adm. Code, both of which require compliance with ch. 458 Stats., and 2) that the D'Plume method used by the respondent for the removal of hair does not employ an electric needle; therefore, the use of such method constituted practice outside the scope of practice of an electrologist as defined in s. 458.01 (6) Stats., and practice within the scope of practice of cosmetology as defined in s. 458.01 (4) Wis. Stats. The Complaint contains a reference to sec. 458.01 (6) Stats., but it does not refer to the practice of cosmetology or to s. 458.01 (4) Stats. (Note that the discussions set forth herein relating to alleged violations of ch. 458 Stats., also apply to alleged violations of ch. 454 Stats).

The complainant contends, in reference to the scope of practice of an electrologist, that the device used with the D'Plume method for removal of hair from the human body is not electric in that it does not conduct electricity to the patron, and that it is not a needle within the context of the profession or the history of electrology. Complainant concedes that if the Board determines that the D'Plume "probe tip" constitutes an electric needle, within the meaning of ch. 458 Stats., the complainant basically does not have a case. (Tran. p.26-27).

The respondent argues that the Barbering and Cosmetology Examining Board does not have authority to enforce Ch. 458 Stats.; that the order to correct was issued by the Cosmetology Examining Board, not the Barbering and Cosmetology Examining Board; that the order to correct does not allege a violation of a board order, and that the "D'Plume" method used by the respondent for the removal of hair employs an electric needle within the very broad definition set forth in Ch. 458 Stats. (Tran. p. 27-35).

First, in reference to the order to correct, it is clear that to establish a violation of s. 458.14 (2)(b) Stats., the complainant must show that the respondent failed to correct or take substantial steps approved by the Board to correct an alleged violation of a "valid sanitary or other rule" of the Board within the proper time limit following notification of a violation.

In this case, the evidence does not establish that the respondent failed to correct or take substantial steps to correct "an alleged violation of a valid sanitary or other rule" of the Board. As noted previously, although the Complaint contains references to ss. C 1.03 (1) and C 7.01 (1) Wis. Adm. Code, the order to correct issued in this case does not contain a reference to those sections of the code or to any "alleged violation of a sanitary or other rule" of the Board.

Second, in reference to the scope of practice of an electrologist, the evidence establishes that the "D'Plume" device utilized by the respondent for removal of hair from the human body does not employ an electric needle, and that the respondent's use of such device constituted practice outside the scope of practice of an electrologist. However, in this case, it cannot be concluded that the respondent's conduct constituted a violation of s. 458 Wis. Stats. The Complaint alleges a violation of s. 458.01 (6) Stats., which defines the term "electrologist", but it does not allege a violation of s. 458.01 (4) Stats., which defines "cosmetology", nor of s. 458.13 (1) Stats., which prohibits a person from engaging in the practice of cosmetology without a license, (see also similar provisions found in ch. 454 Stats).

It is clear in ss. 458.01 (4), 458.13 (1) Stats., and similar provisions found in ch. 454 Stats., that the removal of hair from the human body, except by use of an electric needle, constitutes the practice of cosmetology (barbering and cosmetology), and that a person must be licensed in order to engage in such practice. Although the evidence indicates that the respondent engaged in the practice of cosmetology/barbering and cosmetology by removing hair from patrons, other than by the use of an electric needle, the Complaint does not allege that the respondent violated any provision of chs. 458 or 454 Stats., in reference to the practice of cosmetology or barbering and cosmetology. Therefore, a legal determination cannot be made at this time regarding whether the respondent's practice of cosmetology or barbering and cosmetology without a license constituted a violation of ch. 458 Stats.

In reference to whether the D'Plume method utilized by the respondent employed an electric needle for the removal of hair from the human body, sec. 458.01 (6) Wis. Stats., defines an electrologist to mean any person who removes hair from the human body by the use of an electric needle.

The phrase "electric needle" is not defined in Wis. Stats., chs. 454, 458, or in chs. C 1 to C 7 Wis. Adm. Code. Complainant interprets the phrase "electric needle" to mean an instrument which is capable of being inserted into a hair follicle of a person and of transmitting an electric current to the hair follicle for purposes of destroying the papilla. Respondent would interpret "electric needle" to mean a non invasive instrument "powered by electricity", which is capable of transmitting a high intensity xenon light, to a hair follicle for purposes of destroying the papilla. Accepted principles of statutory interpretation support complainant's definition. The D'Plume method does not employ an "electric needle" for the removal of hair from the human body.

In construing a statute, the primary source of statutory construction is the language of the statute itself. State v. McKenzie, 139 Wis. 2d 171, 176, 407 N.W.2d 274 (C. App. 1987). When the statutory language is clear and unambiguous, the statute must be interpreted on the basis of the plain meaning of its terms. State v. Wittrock, 119 Wis. 2d 664, 670, 350 N.W. 2d 647, 651.

Section 990.01 (1) Wis. Stats., provides that all words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning.

The phrase "electric needle" has been defined as "a high frequency electrode in the form of a needle, used in surgery to cut through tissue, searing it at the same time to prevent bleeding". The term "electrode" is defined as any terminal that conducts an electric current into or away from various conducting substances in a circuit. Webster's New World Dictionary of the American Language, Second College Edition, 1979, p.449.

The definition of electric needle as noted above is consistent with the description provided by Dr. Schuster of the type of apparatus which has been used by electrologist throughout the history of the practice of electrology. Such devices are generally designed to "pierce the skin" of a person and to emit an electric current to an internal body component, such as, in the case of an electrologist, a hair follicle of a person for purposes of destroying the papilla. Based upon the definition of electric needle noted above, the device utilized by the respondent in the "D'Plume" method would not be considered an electric needle because the device does not "pierce the skin", and it does not emit an electric current to the an internal body component.

If one were to conclude that the phrase "electric needle" is ambiguous, one would then be required to make a determination regarding the legislative intent in reference to the inclusion of such phrase in the statute.

The test for statutory ambiguity is whether the statute is capable of being construed in two different ways by reasonably well-informed persons. State ex rel. Newspapers, Inc. v. Showers, 135 Wis. 2d 77, 398 N.W. 2d 154 (1987); Matter of Condemnation by Redevelopment Authority of City of Green Bay, 120 W. 2d 402, 355 N.W. 2d 240 (1984).

The primary purpose of statutory construction is to determine legislative intent. In determining legislative intent, the courts will first look to the language of the statute itself, and if ambiguous, the courts will examine the scope, history, context, subject matter and object of the statute to discern the legislative intent. State v. Pham, 137 Wis. 2d 31, 403 N.W. 2d 35 (1987).

An analysis of the legislative intent as expressed in previous statutory provisions reveals that the legislature placed emphasis upon the "use of electricity" for purposes of removal of superfluous hair. In this case, prior statutory language supports the complainant's interpretation of the phrase electric needle as a device employed to emit an electric current to a hair follicle, more so than the respondent's interpretation of an electric needle as a device "powered by electricity".

Historically, the practice of electrology was initially encompassed within the practice of cosmetic art, as that practice was defined in 1925 (refer to s. 159.01 (1) Wis. Stats., Laws of Wisconsin, 1925, c. 68, s. 2). Section 159.01 (1) Wis. Stats., defined cosmetic art as follows:

> "Cosmetic art" is the systematic massaging with the hands or mechanical apparatus of the scalp, face, neck, shoulders and hands, the use of cosmetic preparations and antiseptics; manicuring, bobbing, dyeing, cleansing, arranging, waving and marcelling of the hair and the use of electricity for stimulating and for the removal of superfluous hair with the electric needle or by high frequency.

In 1951, the Legislature created s. 159.01 (12), (Laws of Wisconsin, 1951, c. 723, ss. 2 to 7), which defined the term "electrolysist" to mean "any person who removes hair from the human body by the use of electricity".

In 1977, s. 159.01 (12) Wis. Stats., (Laws of Wisconsin, 1977, c. 418 s. 652) was amended to define the term "electrologist" to mean "any person who removes hair from the human body by the use of an electric needle". (Note: Ch. 159 Wis. Stats., was renumbered Ch. 458 by L. 1979, c. 175, ss. 33-34, and c. 221, ss. 676-681).

In reference to the objectives of ch. 458 Wis. Stats., it is clear that the primary purpose of the statute is to provide protection to the public by insuring the competency of individuals who practice as electrologist.

Occupational licensing and regulatory procedures are based upon a legislative determination that public health, safety and consumer protection from incompetent practitioners is necessary. Laufenberg v. Cosmetology Examining Board, 87 Wis. 2d 175, 184 (1979).

The purpose of licensing statutes is not to benefit those persons licensed to practice under the statutes, but rather to protect the public by the requirement of a license as a condition precedent to practicing in a given profession. Gilbert v. Medical Examining Board, 119 Wis. 2d 168, 188 (1984).

(3) Jurisdictional Issues

As noted previously, ch. 458 Stats., was repealed and ch. 454 Stats., was created pursuant to 1987 Act 265, effective November 1, 1988. The Act also abolished the Cosmetology Examining Board and the Barbers Examining Board and created the Barbering and Cosmetology Examining Board.

The respondent argues that the order to correct issued in this case was issued on behalf of the Cosmetology Examining Board; therefore, the Barbering and Cosmetology Examining Board does not have authority to enforce the order or to discipline respondent for any alleged violations of ch. 458 Stats. The complainant argues that the Barbering Cosmetology Examining Board has the authority to enforce ss. C 1.03 and C 7.01 Wis. Adm. Code, based upon provisional language found in 1987 Act 265.

Section 14 (3) of 1987 Act 265 reads as follows:

> Section 14. **Nonstatutory provisions; transition.**
>
> (3) RULES. (a) The barbering and cosmetology examining board may repeal administrative rules of the barber's examining board and the cosmetology examining board. The rules of the barber's examining board and the cosmetology examining board in effect immediately before the effective date of this subsection remain in effect until repealed by the barbering and cosmetology examining board or until the first day of the 24th month beginning after the effective date of this paragraph, whichever is earlier.

In this case, the complainant alleges that the respondent violated ss. C 1.03 (1) and 7.01 (1) Wis. Adm. Code. Those sections of the Code were in effect at the time the respondent is alleged to have violated the rules. The rules of the Cosmetology Examining Board and the Barbers Examining Board were repealed, and the rules of the Barbering and Cosmetology Examining were adopted, effective August 1, 1989. It is clear from the transition provision that the legislature intended that the rules of the Cosmetology Examining Board remain in effect until the time specified, and that the Barbering and Cosmetology Examining Board have the authority to enforce violations of the rules.

In addition, s. 990.04 Wis. Stats., preserved the complainant's right to proceed against the respondent because of its violations which occurred before the repeal of Ch. 458 Wis. Stats.

III. RECOMMENDATIONS

Based upon the evidence presented and the discussions set forth previously herein, the Administrative Law Judge recommends that the Barbering and Cosmetology Examining Board adopt as its final decision in this matter, the proposed Findings of Fact, Conclusions of Law and Order as set forth herein.

Dated at Madison, Wisconsin, this 24th day of May, 1991.

Respectfully submitted,

Ruby Jefferson-Moore

Ruby Jefferson-Moore
Administrative Law Judge

NOTICE OF APPEAL INFORMATION

(Notice of Rights for Rehearing or Judicial Review, the times allowed for each, and the identification of the party to be named as respondent)

The following notice is served on you as part of the final decision:

1. Rehearing.

Any person aggrieved by this order may petition for a rehearing within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period commences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with the State of Wisconsin Barbering and Cosmetology Examining Board.

A petition for rehearing is not a prerequisite for appeal directly to circuit court through a petition for judicial review.

2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon the State of Wisconsin Barbering and Cosmetology Examining Board

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: the State of Wisconsin Barbering and Cosmetology Examining Board.

The date of mailing of this decision is June 19, 1991.