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December 12, 2014

ATTORNEY GENERAL OPINION NO. 2014- 19

Bob Zook
Administrator
Kansas Board of Barbering
700 S.W. Jackson Street, Suite 1002
Topeka, Kansas 66603

Re: Public Health—Examination, Registration and Regulation of Barbers—
Practice of Barbering Regulated by Act; Definitions; Exemptions

Public Health—Licensure of Entities by State Board of Cosmetology—
Definitions; Exclusions from Act

Synopsis: The language “temporary hair removal from the face or any part of the body by use of the hands or mechanical or electrical appliances” in K.S.A. 2014 Supp. 65-1901(d)(1) does not permit a cosmetologist to shave with a professional grade razor, such as a straight razor. Cited herein: K.S.A. 65-1808; 65-1809; 65-1812; 65-1813; 65-1816; K.S.A. 2014 Supp. 65-1901; 65-1902; L. 1913, Ch. 292, § 8; L. 1927, Ch. 245, § 2; L. 1983, Ch. 212, § 1; L. 2008, Ch. 108, § 1.

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Dear Mr. Zook:

As Administrator for the Kansas Board of Barbering, you ask for our opinion on whether a person licensed as a cosmetologist under K.S.A. 65-1901 *et seq.* can provide professional shaving services using professional grade razors, such as a straight razor.

The practice of barbering is governed by K.S.A. 65-1808 *et seq.* (barbering act) and the practice of cosmetology is governed by K.S.A. 65-1901 *et seq.* (cosmetology act). Barbers and cosmetologists must be licensed to practice their occupations.¹

¹ K.S.A. 65-1812 and 65-1813 (barbers) and K.S.A. 2014 Supp. 65-1902(a) (cosmetologists).

The practice of barbering is defined in K.S.A. 65-1809(f) as:

Any one or any combinations of the following practices (when done upon the upper part of the human body for cosmetic purposes and not for the purpose of diseases or physical or mental ailments, and when done for payment either directly or indirectly, or without payment, for the public generally, upon male or female): *Shaving or trimming the beard* or cutting the hair, giving facial or scalp massages or treatments with oils, creams, lotions or other preparations, either by hand or mechanical appliances, singeing, shampooing or dyeing, arranging, perming or waving the hair, or applying tonics; applying cosmetic preparations, antiseptic powders, oils, clays, or lotions to the scalp, face, neck or upper part of the body.²

Under the above definition of the practice of barbering, a licensed barber is authorized to *shave the beard* for payment, or for the public generally without payment. The barbering act makes it unlawful for a person who has not obtained a barber license to engage in the practice of barbering.³ The barbering act, however, exempts a licensed cosmetologist from obtaining a barbering license “while engaged in the discharge of their professional duties.”⁴ Therefore, we must consider whether shaving the beard is within the scope of the practice of cosmetology.

The practice of cosmetology is defined in K.S.A. 2014 Supp. 65-1901(d)(1) as:

(A) Arranging, dressing, permanently curling, curling, waving, cleansing, temporarily or permanently coloring, bleaching, relaxing, conditioning or cutting the hair;

(B) cleansing, stimulating or performing any other noninvasive beautifying process on any skin surface by means of hands or mechanical or electrical appliances, other than electric needles, provided for esthetic rather than medical purposes;

(C) temporary hair removal from the face or any part of the body by use of the hands or mechanical or electrical appliances other than electric needles;

(D) using cosmetic preparations, antiseptics, lotions, creams or other preparations in performing any of the practices described in paragraphs (A), (B) and (C) of this subsection (d)(1); or

(E) manicuring, pedicuring or sculpturing nails.

The Kansas Board of Cosmetology points out that the cosmetology act does not prohibit a cosmetologist from shaving with a razor. That argument ignores an established legal

² Emphasis added.

³ K.S.A. 65-1808.

⁴ K.S.A. 65-1816. A similar exemption exists for barbers in the cosmetology act. See K.S.A. 2014 Supp. 65-1902(b)(1).

principle. “[A]dministrative agencies are creatures of statute and their power is dependent upon authorizing statutes; therefore, any exercise of authority claimed by the agency must come from within the statutes either expressly or by clear implication. There is no general or common-law power that can be exercised by an administrative agency.”⁵ Thus, the Kansas Board of Cosmetology cannot license a cosmetologist to provide a service not authorized by a statute in the cosmetology act.

Unlike K.S.A. 65-1809, K.S.A. 2014 Supp. 65-1901 does not use the word “shaving.” However, the Kansas Board of Cosmetology also contends the phrase “temporary hair removal” in paragraph (d)(1)(C) authorizes a licensed cosmetologist to shave with a professional grade razor. Because that language is not defined in the cosmetology act, it is ambiguous whether it includes shaving with a professional grade razor.

Your question requires interpretation of K.S.A. 2014 Supp. 65-1901(d)(1)(C). To do so, we follow the rules of statutory construction and interpretation used by appellate courts.

The most fundamental rule of statutory interpretation and construction is that the intent of the legislature governs if that intent can be ascertained. We first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. When a statute is plain and unambiguous, we do not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it. Where there is no ambiguity, we need not resort to statutory construction. Only if the statute’s language or text is unclear or ambiguous do we use canons of construction or legislative history or other background considerations to construe the legislature’s intent. In doing so, we may look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under the various constructions suggested. We cannot delete provisions or supply omissions in a statute. No matter what the legislature may have really intended to do, if it did not in fact do it, under any reasonable interpretation of the language used, the defect is one that the legislature alone can correct.⁶

The barbering act has included the services of “shaving” since its first enactment in 1913.⁷ Ten years later, *Keith v. State Barber Board*⁸ was the first appellate case interpreting the barbering act.

In *Keith*, the Kansas Barber Board contended the statutes regulating barbers and barber shops applied to a proprietor operating a “Hairdressing and Beauty Parlor” that engaged in “cutting hair, massaging, clipping hair with barber clippers, singeing the hair, giving tonics,

⁵ *State ex rel. Secretary of S.R.S. v. Fomby*, 11 Kan. App. 2d 138, 141 (1986) (citing *Pork Motel, Corp. v. Kansas Dept. of Health & Environment*, 234 Kan. 374, 378 (1983); *Woods v. Midwest Conveyor Co.*, 231 Kan. 763, 770 (1982); and 1 Am.Jur.2d, Administrative Law § 70, p. 866).

⁶ *State v. Prine*, 297 Kan. 460, 474-75 (2013) (internal citations omitted).

⁷ See L. 1913, Ch. 292, § 8 (An applicant for licensure as a barber must possess “the requisite skill . . . to properly perform all of the duties thereof, including his ability in shaving, hair cutting, preparation of tools, and all duties and services incident thereto.”).

⁸ 112 Kan. 834 (1923).

shampooing, and manicuring, *but not shaving the face.*⁹ The Kansas Supreme Court noted that hairdressing and beauty specialist businesses were in existence when the barbering statutes were enacted but were not included in the term “barber shop” and that the Board had never attempted to enforce the barbering statutes against such businesses. The Court concluded:

If persons who do work similar to that of barbers, *but do not undertake to shave customers*, are to be brought within the discipline of a regulating board, it should be by virtue of new legislation rather than by an extension of the scope of the existing law by interpretation.¹⁰

Four years after the *Keith* decision, the legislature enacted the cosmetology act.¹¹ Most notably, the legislature did not expressly authorize “shaving or trimming the beard” in the cosmetology act as it did in the barbering act. The original cosmetology act also did not refer to “temporary hair removal;” instead, it authorized “removing superfluous hair from the face or any part of the body.”¹² Three years after the enactment of the cosmetology act, the Kansas Supreme Court addressed both the cosmetology act and the barbering act.

In *State ex rel., v. Cavender*,¹³ a licensed barber owned a barber shop, a portion of which was partitioned off for a beauty parlor where licensed cosmetologists performed cosmetology services. The barber also gave permanent waves to hair, bobbed hair, and provided facials in the beauty shop. The State argued the barber was engaging in the practice of cosmetology and should be enjoined.¹⁴ The Kansas Supreme Court stated:

The barber act makes requirements respecting learning the barber trade, and provides for examination of applicants for certificates, to determine qualifications. In doing this, things were specified with respect to which the applicant must possess requisite skill. The cosmetology act makes requirements respecting learning the trade of cosmetologist, and provides for examination of applicants for certificates, to determine qualifications. This act defines the term ‘cosmetologist,’ and in doing so specifies things which fall within the scope of a cosmetologist’s practice. *In these ways the statutes indicate activities which each occupation embraces.*

*A barber may do the characteristic acts of shaving and trimming the beard. The cosmetologist statute does not mention performance of these acts.*¹⁵

The Court next summarized the activities that the barbering act permitted a barber to do and that the cosmetology act permitted a cosmetologist to do.¹⁶ Afterwards, it stated:

⁹ 112 Kan. at 834, Syl. (emphasis added).

¹⁰ *Id.* at 836 (emphasis added).

¹¹ L. 1927, Ch. 245, §§ 1 – 15.

¹² *Id.* at § 2 (A “[c]osmetologist is a person who [practices] removing superfluous hair from the face or any part of the body, or other beautifying process on any person.”).

¹³ 131 Kan. 577 (1930).

¹⁴ *Id.* at 578.

¹⁵ *Id.* at 579. Emphasis added.

Analysis of the statutes discloses that the two occupations have a common field of practice. A barber may do things which a cosmetologist may do, and a cosmetologist may do things which a barber may do. So far as the two fields are distinct, the services rendered are kindred personal services for improvement of the health, comfort and appearance of men and women, and the two statutes are essentially *in pari materia*.¹⁷

In other words, there are services that are permitted by both the barbering act and the cosmetology act, but if a specific service is authorized under only one of those acts, then a person licensed under the other act is prohibited from providing that specific service. In determining whether a barber could engage in permanent waving, the Court concluded:

It is a matter of common knowledge that permanent waving, by methods and appliances adapted to the purpose, was practiced when the statutes were enacted, and long before the statutes were enacted. [T]he legislature knew of the practice, but the statute did not specifically assign permanent waving to cosmetologists to the exclusion of barbers. Presumably the legislature knew about the use of mechanical and electrical appliances, but the statute referred to them only in connection with massage. . . . The word “wave” was plainly used in the same sense in both statutes—as an unqualified term covering the subject of waving hair. If the subject of permanent waving of hair requires further regulation in the interest of the public welfare, the regulation must be made by the legislature and not by judicial interpretation.¹⁸

In 1983, the legislature amended the cosmetology act. Pertinent to our analysis, K.S.A. 65-1901 was amended to read: “Cosmetology’ means the profession of: . . . removing superfluous hair from the face or any part of the body by use of either the hands or mechanical or electrical appliances.¹⁹ There was no hearing on the amendments or discussion regarding this provision.²⁰ Rather, the House committee considering the bill was advised that the amendments were to bring the act “up to date” by including “sculptured nails and facials, as well as continuing education,” and a provision “grandfathering out people who have been practicing since 1969.”²¹

The current language in K.S.A. 2014 Supp. 65-1901(d)(1)(C) was enacted by the legislature in 2008.²² When explaining the 2008 amendments, the then Executive Director of the Kansas Cosmetology Board testified that the amendment:

¹⁶ *Id.* at 579.

¹⁷ *Id.* at 580-81.

¹⁸ *Id.* at 581.

¹⁹ L. 1983, Ch. 212, § 1(d)(3).

²⁰ Minutes, House Committee on Federal and State Affairs, March 28, 1983, and Minutes, Senate Committee on Federal and State Affairs, April 20, 1983.

²¹ Minutes, House Committee on Federal and State Affairs, March 28, 1983.

²² L. 2008, Ch. 108, § 1.

[i]ncludes language to more adequately define the practices of the cosmetology professions. For instance, on page one the word ‘temporary’ is inserted when referring to hair removal. This change more clearly defines the practice of hair removal for cosmetology and esthetics, but it is a proactive means to inform the practitioner of their standard of practice.²³

One proponent testified that “[s]ince the mid-1990s, cosmetic procedures, including hair removal, have undergone a revolution, with new light-based, non-invasive technologies dramatically expanding the range of available options to consumers and enhancing the safety of such services.”²⁴ The testimony never indicated that deleting the phrase “removing superfluous hair” and adding the phrase “temporary hair removal” was meant to authorize shaving by licensed cosmetologists.

Nothing in the legislative history of K.S.A. 2014 Supp. 65-1901(d)(1) indicates that the legislature intended to authorize cosmetologists to engage in shaving. Applying the Court’s analysis in *Keith* and *Cavender*, when the legislature enacted the cosmetology act in 1927 and amended it in 1983 and 2008, it was a matter of common knowledge that shaving was a common service authorized by the barbering act, but the legislature did not include “shaving” as a common service authorized by the cosmetology act. If the subject of shaving by cosmetologists requires further regulation, the regulation must be made by the legislature rather than by an extension of the scope of the existing law by interpretation.

Based upon the above analysis, we conclude that the language “temporary hair removal from the face or any part of the body by use of the hands or mechanical or electrical appliances” in K.S.A. 2014 Supp. 65-1901(d)(1) does not permit a cosmetologist to shave with a professional grade razor, such as a straight razor.

Sincerely,

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DS:AA:JLA:sb

²³ Minutes, House Committee on Health and Human Services, February 20, 2008, Attachment 4.

²⁴ *Id.* at Attachment 2.