Opinion No. 57-245

September 26, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Howard M. Rosenthal, Assistant Attorney General

TO: Mr. Paul W. Robinson, District Attorney, Second Judicial District, Second Floor Court House, Albuquerque, New Mexico

QUESTION

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1. Can the New Mexico State Barbers Board require that instructors in Barbers Colleges in New Mexico have ten hours teaching credits in or at an accredited college or university?

2. Can said Barbers Board prohibit charges by a Barber College for hair cuts and other services performed by their staff or student personnel?

CONCLUSIONS

1. No.

2. No.

OPINION

ANALYSIS

The Barber Board Act is Article 14, Chapter 67 of the N.M.S.A., 1953. A brief summary of the pertinent sections and parts thereof regarding these two questions would here be in order.

Section 67-14-3, in toto, deals with detailed regulation of barber schools, but nowhere in this section is authority vested in the Board, either specifically or by implication, to set up the requirement on the part of barber school faculty members that they have teaching credits at an accredited college etc., nor is mention made of barber school prices.

Section 67-14-14 details reasons for suspension and revocation of certificates, none of the thirteen enumerated appearing to pertain to these two questions.

Section 67-14-23 provides for inspections but no authority appears given or is necessarily implied regarding either the first question nor the second one.

Section 67-14-24 provides nine rules for sanitation in barber shops, but again no authority as to these two questions appears vested. Although minimum charges have been judicially pronounced as having relationship to sanitation in Arnold v. Board of Barber Examiners, 45 N.M. 57, 109 P. 2d 779, it is quite obvious that a pronouncement by the Court that a minimum charge is necessary in order that the barber may observe sanitation rules quite definitely excludes a statement that no charge at all will promote sanitation. Such contradictory position has not been adopted by the Courts and in the opinion of this office will not be.

Section 67-14-25 provides for the legislative finding wherein minimum prices for barber services are justified -- such section can hardly form the basis of justification for the Barber Board doing precisely the opposite -- insisting on no charges. Again, no indication by the Legislature is suggested that the Barber Board is authorized to set up teaching credit requirements for barber school faculties.

Section 67-14-27 vests authority in the Barber Board "for the purpose of administering this law (67-14-25 to 67-14-38), and is hereby extended such specific powers as are necessary for the purpose of administering and enforcing same", but this does not include authority to administer that which is beyond the announced scope of the law, and is merely a rule or regulation in no way connected with the purpose of the Barber Act.

Section 67-14-28 vests general authority in the Board "to be the instrumentality of the state for the purpose of attaining the ends recited in the above legislative finding, statement of policy and application of facts".

Much needs to be said concerning this conferment of power. Volume 42, page 317 of Am. Jur. recites:

"General language describing the powers and functions of an administrative body may be construed to extend no further than the specific duties and powers conferred in the same statute." Potts v. Breen, 167 Ill. 67, 47 NE 81, 39 LRA 152.

We subscribe to this in this matter. If the Legislature is deemed to have made the Barber Board "its instrumentality", such interpretation would be unconstitutional as a delegation of legislative power -- and, we will not belabor with citations the point that the constitutional interpretation of a statute will be given in preference to one that is unconstitutional. Hence we limit this seemingly limitless grant of power to that required to accomplish the announced legislative design. Also, (page 336, Volume 42, Am. Jur.):

"In considering the true test as to whether a power is strictly legislative or whether it is administrative and merely relates to the execution of the law, the true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, (see forty citations in footnote 9) and the conferring of authority or discretion as to its execution, . . . The first cannot be done . . ."

The Board may make rules and regulations to accomplish the objectives set forth in the Barber Act, but only within the framework thereof -- briefly, to accomplish the health, safety, sanitation, etc. purposes expressed. While it might be true that the State Legislature could require ten, fifteen or thirty hours of teaching credits at an accredited university for barber school faculties -- or even a teaching certificate and medical school diploma, (we are not here passing upon the discriminatory aspects or the unreasonableness of such assumed legislation) it does not follow that it may confer the same authority on the Board. Nor, do we believe that it has tried to do so.

Further, we do not believe that a relationship can be implied from "ten hours teaching credits, etc.", and the legislative purpose (§ 67-14-25) as to warrant the rule and regulation, nor can **prohibiting** charges be construed as furthering the legislative intent, for example, in sanitation. It is incomprehensible to us that a minimum charge can be legally justified on sanitative grounds by the Supreme Court (Arnold case) and that **prohibition** of charges be justified on the same or similar grounds. If it be said that the State is attempting to guarantee barbers against competition by the schools so as to assure barbers a monopoly status for financial reasons, we believe such attempt is unconstitutional.

Section 67-14-36 authorizes the fixing of minimum prices, but **not the prohibiting of any price,** which appears to be the design of question 2, and is directly opposed to the purpose to be accomplished for the public by setting minimum prices.

Some pertaining quotations of general value in statutory interpretation are here appended in order to further clarify the position of this office, all from Volume 42, Am. Jur. Citations will here be omitted although they will be found in plenitude in the footnotes. On page 339, "In order to avoid a delegation of essentially legislative power to administrative authorities, a statute vesting power in such officers must be complete in all its terms and provisions so that nothing in the matter of determining what the law may be is left to the judgment of the appointee or delegate of the power." Also, "There is no unconstitutional delegation of power where the legislature acts upon a subject as far as is reasonably practicable but, from the necessities of the case, leaves to executive officials the duty of bringing about the result pointed out by the statute, or where a statute sufficiently indicates the legislative purpose and merely leaves the administrative details to some agency. However, as a general rule, to avoid an unlawful delegation of power, the legislature must declare the policy or purpose of the law and fix the legal principles which are to control in given cases by setting up standards or guides to indicate the extent, and prescribe the limits, of the discretion which may be exercised under the statute by administrative officers. Otherwise, the law may be construed as vesting an uncontrolled discretion and held to violate the inhibition against delegation of legislative powers, . . . If the legislature fails to prescribe with reasonable clarity the limits of the power delegated, or if those limits are too broad, the attempt to delegate is a nullity." Also, on page 342, "It is a fundamental principle of our system of government that the rights of men are to be determined by the law itself, and not by the let or leave of administrative officers or bureaus. This principle ought not to be surrendered for convenience, or in effect nullified for the sake of expediency."

Hence our negative answer to both questions.