6379 Library

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

October 20, 1997

The Honorable Warren K. Giese
Senator, District No. 22
P. O. Box 142
Columbia, South Carolina 29202

Re: Informal Opinion

Dear Senator Giese:

You note that there "has been some question regarding current statutes concerning licenses for rental of booths in beauty salons." You ask whether "the current statute[s] allow the Board of Cosmetology to require an independent contractor's license of a registered cosmetologist leasing a booth in a licensed sale. S.567, the Cosmetology Practice Act, of which Senator Joe Wilson and I are co-sponsors, would allow this." However, you state "that bill has not passed the General Assembly and I do not think its contents can be taken into consideration at this time."

We have received a copy of a letter to you from Chairman David E. Bagwell, Chairman of the South Carolina State Board of Cosmetology which explains its position on this issue. Such letter states as follows:

> [a]s Chairman of the State Board of Cosmetology, I have been requested to provide you with additional information concerning booth rental licensing. The practice act § 40-13-10(7), "Place of Cosmetology" or "Beauty Salon", or "Hairdressing Establishment", hereinafter called "Salon" means any building, or any place or part thereof, in which cosmetology or any of its practices are performed on the general public for compensation. Regulations 35-15 and 35-16, passed by the House last year, further clarifies this Statute.

Request Letter

Regulations 35-15 and 35-16, passed by the House last year further clarifies this Statute. Regulation 35-15. "Licensure of Cosmetology, Manicuring and Esthetics Salons. A. Application for Licensure. 1. For the purposes of this regulation, a salon is defined as either a separate salon or an independent contractor. At least one of the requirements for qualifying as an independent contractor is that each such person hold a separate salon license issued by the S.C. Board of Cosmetology. 2. The applicant shall designate a manager of the salon who will be responsible for compliance with this chapter and responsible for all personnel physically located in the salon." Regulation 35-16. "Salon Equipment Requirements. A. Salons offering services in all phases of cosmetology shall maintain or have direct access to equipment."

Booth rentals/independent contractors, is a recent phenomenon in our industry. The booth renter rents a portion or a part of the salon owner's space. The I.R.S. and South Carolina Tax Commission definitions: The booth renter must be totally responsible for his rented portion or part of the building, hours, supplies, appointments, money, dress and all other phases of his business. The salon owner can not have any control, whatsoever, over that rented portion of his space. When a sanitation, public health and welfare violation is discovered in a rented space, the inspector must charge the salon owner, who holds the state salon owner license, although the salon owner can not have any control over the rented space. This hardly seems fair or just. The State must have the right to cite, fine or discipline the violator, not the salon owner.

This Rule and Regulation is supported by the entire profession, all seven associations, the State Board of Cosmetology, and LLR. It certainly better serves the public by being able to better regulate the sanitary practices of a profession which actually touches the public. The booth renter is better served by being made responsible for his part of the salon.

Law / Analysis

The Cosmetology Practice Act is codified at S.C. Code Ann. Sec. 40-13-10 et seq. As noted above, § 40-13-10(7) defines a "salon" as "any building, or any place or part thereof in which cosmetology or any of its practices are performed on the general public for compensation." (emphasis added). Section 40-13-20 prohibits any person from the practice of cosmetology or "operat[ing] a salon without having first obtained a license from the State Board of Cosmetology." Section 40-13-170(1) states that "[a]ny person, firm, corporation or association may apply to the board for licensing of a salon ...." Subsection (3) of Section -170 requires that "[a]ny salon shall fully comply with all provisions of this chapter applicable thereto and with all rules and regulations promulgated by the board." Section 40-13-80(2) authorizes the Board to "[a]dopt and revise regulations consistent with this chapter, as may be necessary to carry out the provisions of the chapter." Thus, the issue which you raise is whether Regulations 35-15 and 35-16 which interpret and define a "salon" to include either a "separate salon or an independent contractor" are consistent with the Cosmetology Practice Act and are within the authority of the Board of Cosmetology.

We begin with the proposition that an administrative body cannot make a rule which would materially alter or add to the law, but to be valid, a rule must only implement the law. Banks v. Batesburg Hauling Co., 202 S.C. 273, 24 S.E.2d 496 (1943). On the other hand, administrative agencies may be authorized to fill up details by prescribing rules and regulations for complete operation and enforcement of law within its expressed general purpose. Young v. S.C. Dept. of Highways and Public Transp., 287 S.C. 108, 336 S.E.2d 879 (S.C. App. 1985). Thus, an administrative regulation is valid as long as it is reasonably related to the purpose of the enabling legislation. Hunter and Welden Co., Inc. v. S.C. State Licensing Bd. for Contractors, 272 S.C. 211, 251 S.E.2d 186 (1978). Moreover, an agency's regulations are presumed valid until challenged. Op. Atty. Gen., November 27, 1995, referencing U.S.C. v. Batson, 271 S.C. 242, 246 S.E.2d 882 (1978) (Littlejohn, J. concurring). And this Office possesses "no authority to declare either a statute or administrative regulation invalid. At most, we may simply comment upon and point to any constitutional or legal problems which may be encountered as a result of the enforcement of such laws." Id.

Further, Regulations 35-15 and 35-16 can be viewed as so-called "interpretive rules." In Op. Atty. Gen., Op. No. 90-40 (May 1, 1990) this Office commented at length upon the deference given by the courts of interpretive rules. We stated as follows:

> [a]n interpretive rule is a rule which is promulgated by an administrative agency to interpret, clarify or explain the

> statutes or regulations under which the agency operates. Young v. South Carolina Department of Highways and Public Transportation, 287 S.C. 108, 112, 336 S.E.2d 879 (S.C. App. 1985). The Courts of this state hold that "interpretive rules are 'entitled to great respect by the courts but [are] not binding on them.' Faile v. South Carolina Employment Security Commission, 267 S.C. 536, 540, 230 S.E.2d 219, 221 (1976)." Young, 287 S.C., at 112. Moreover,
>
> > [c]onstruction of a statute by the agency charged with executing it is entitled to the most respectful consideration [by the courts] and should not be overruled absent cogent reasons.
>
> Logan v. Leatherman, 290 S.C. 400, 351 S.E.2d 146, 351 S.E.2d 146, 148 (1986); Welch v. Public Service Commission, _____ S.C. _____, 377 S.E.2d 133 (S.C. App. 1989). And in those situations where the administrative interpretation has been formally promulgated as an interpretive regulation or has been consistently followed, this required deference is highlighted and the administrative interpretation is entitled to great weight. Marchant v. Hamilton, 279 S.C. 497, 309 S.E.2d 781 (S.C. App. 1983).

The Opinion also recognized that while the agency's interpretation might not be the only reasonable one, the courts were generally required to defer to the agency's construction so long as it was reasonable. We stated in this regard that

> [t]his is not to say that the Commission's Regulation captures the only reasonable interpretation of the subject language or that the courts would have adopted the same interpretation ... . Moreover, I do not suggest that the present Commission's belief that the statute would be applied more broadly than suggested by the Regulation is not a reasonable interpretation of Section 61-3-440 ... but again, such speculation is irrelevant since the courts would be constrained to defer to the construction embellished in the Regulation.

Based upon my research, I cannot say that the Regulations in question are not a reasonable interpretation of the word "salon" as used in the Cosmetology Practice Act.

First of all, as noted, Section 40-13-10(7) defines a "salon" as including "any place or part thereof, in which cosmetology or any of its practices are performed on the general public for compensation." Moreover, there is case law which emphasizes the discrete nature of a situation involving cosmetologists who lease a booth or chair from an operator of a salon. For example, in Ren-Lyn v. United States of America, 968 F.Supp. 363 (N.D. Ohio Eastern Division), the Court concluded that cosmetologists who leased chairs in a salon were not the operator's employees for employment tax purposes. The Court applied an extensive common law agency test to determine whether or not an employer-employee relationship existed and concluded it did not. The Court presented this analysis:

> [i]n the Sixth Circuit, the following nine factor test has been utilized to determine whether a worker is an employee or an independent contractor.
>
> (a) Control, skill and permanency of the relationship;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is part of the regular business of employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Lanigan Storage & Van Co. v. United States, 389 F.2d 337, 342 (6th Cir. 1968); Henry v. United States, 452 F.Supp. 253, 254 (E.D. Tenn. 1978) (applying test to beautician chair lease arrangement). While the Court thought the case a close one, it found the relationship to be more one of independent contractor rather than employer-employee for tax purposes.

Also somewhat instructive is an Opinion of the Texas Attorney General, Op. No. LO-90-87 (November 2, 1990). There, the same question which you have presented here was raised. The Attorney General of Texas concluded that the issue was primarily fact specific; however, the opinion found that certainly a person who was an independent contractor leasing space in a salon could be subject to the licensure requirement of Texas law even though the Texas statute did not specifically so state. Thus, the Opinion concluded:

> Whether he [independent contractor] is "maintaining an establishment" under section 19 would, we think, depend rather on the nature of his arrangements with the shop. Relevant factors would include who has the responsibility for "maintaining" the area in which he works and the equipment and materials he uses, how he is remunerated for his work, who makes the appointments for his clients, and whether the shops clients -- walk-in or otherwise -- are assigned to him. While he may be an independent contractor, in that he is not subject to the control of the shop in the details of his performance of cosmetology, it may be that it is the operators of the shop, and not he, who maintains the establishment, including the booths which it rents out.

The factors which the Texas Attorney General enumerated are, of course, some of the same factors mentioned in the Ren-Lyn case for determining whether the individual renting the booth is truly an "independent contractor."

As stated, considerable deference must be afforded to Regulations 35-15 and 35-16. Such Regulations have been, as I understand it, approved by the General Assembly. Moreover, as indicated, there is authority supporting the fact that where an individual leasing space in a salon is truly an independent contractor, such person may well be considered to "operate a salon" within the intent of § 40-13-20. Thus, a court would likely conclude that the Board's interpretive Regulations [35-15 and 35-16] so defining

the "operation of a salon" appear reasonably related to the intent of the General Assembly. Accordingly, such Regulations, which require a license from the Board for an independent contractor leasing space in a salon, are legally defensible as valid and binding.

Notwithstanding the fact that the Regulations are legally defensible, legislative clarification in the form of S.567 is probably still warranted. The proposed Bill defines "salon" to include "a rental booth." Such would thus clarify the law in this regard and interpretation of the present statute would no longer be required. I would thus recommend that such clarification be made in the form of your proposed statutory amendments.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an