

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
BOARD OF COSMETOLOGY,)
)
Petitioner,)
)
vs.) CASE NO. 94-6346
)
MIRIAM VIERA,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held before the Division of Administrative Hearings by its duly designated Hearing Officer, Diane Cleavinger, on Tuesday, March 19, 1996, in Pensacola, Florida.

APPEARANCES

For Petitioner: James E. Manning, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399-0792

For Respondent: Thomas F. McGuire, Esquire
Northwest Florida Legal Services, Inc.
24 West Governmental Street
Pensacola, Florida 32501

STATEMENT OF ISSUE

The issue in this case is whether any disciplinary action should be taken against Respondent for alleged non-compliance with the graduate exemption provision of Chapter 477, Florida Statutes, and the Rules pertaining to graduates of cosmetology schools as contained in Chapter 61G5, Florida Administrative Code.

PRELIMINARY STATEMENT

On June 30, 1994, Petitioner filed an Administrative Complaint charging the Respondent, Miriam Viera with violating Section 477.029(1), Florida Statutes, by violation of Section 477.0135(g), Florida Statutes. Specifically, the Administrative Complaint alleged that Respondent practiced cosmetology without a license by working as a cosmetologist after graduation from cosmetology school and not meeting the requirements for the temporary graduate exemption for licensure.

At the hearing, the Petitioner called two witnesses to testify and offered five exhibits into evidence, including the deposition testimony of Stacy Merchant. The Respondent testified in her own behalf and offered three exhibits into evidence.

FINDINGS OF FACT

1. Respondent, Miriam Viera, is of Hispanic origin. Her native language is Spanish. Ms. Viera and her children are the recipients of welfare in Escambia County. Specifically, Ms. Viera and her family receive money from Aid to Family with Dependent Children and food stamps. She has always wanted to be a cosmetologist and in 1994 was able to pursue her goal of becoming a licensed cosmetologist and also attempted to get off welfare.

2. In order to become a licensed cosmetologist Ms. Viera was required to, (1) be 16 years of age, (2) graduate from an approved school of cosmetology, (3) have completed 1200 hours of training in cosmetology, (4) complete an application for licensure thereby applying to the Board of Cosmetology to sit for the cosmetology exam and, (5) pay the required licensure and examination fees. The application to the Board of Cosmetology required that Ms. Viera's 1200 hours of training be certified by the school where she took her training and that a certificate of completion of an approved HIV/AIDS training course accompany the application. Failure to meet any one of these requirements would cause Ms. Viera to be ineligible to take the cosmetology examination, as well as ineligible for licensure.

3. On January 29, 1994, Respondent graduated from RTI Technical Institute in Pensacola by completing 1200 hours of training in cosmetology.

4. RTI is a State approved cosmetology school. However, RTI does not offer an HIV awareness course. The course was offered at one of the local Pensacola hospitals.

5. After graduation Respondent decided to take approximately two weeks off. On February 17, 1994, Respondent completed her training for HIV/AIDS awareness. During this time period, Respondent had also picked up an application to take the cosmetology examination and licensure from RTI. The form the school supplied to Ms. Viera did not contain the cover letter/instruction sheet for the application. As a consequence Ms. Viera was told that the application fee would be \$75.00.

6. On February 17, 1994, Respondent secured a \$75.00 money order and presented a completed application to the office of Larry Bryant, the president of RTI Cosmetology School. The application was left with Mr. Bryant so that he could certify to the Board of Cosmetology, on behalf of RTI that Ms. Viera had completed 1200 hours of cosmetology training at the school. After Mr. Bryant completed the school's part of the application, he was to send the application and the money order on to the Board of Cosmetology.

7. Respondent indicated on her application that she wanted to take the examination in Spanish. Such a request is authorized by the Board. There was no evidence that this request was fraudulent. The fee to take the examination in Spanish was an additional of \$30.00. However, Respondent was unaware of the requirement for additional money because she had not received the applications's cover letter/instruction sheet with her application. Until Respondent paid the additional \$30.00 she was not eligible to take the cosmetology examination.

Likewise, the cosmetology examination was not available to Ms. Viera until the additional \$30.00 application fee was paid.

8. For unknown reasons over which Ms. Viera had no control, Mr. Bryant did not complete the school's part of the application until about March 2, 1994. Consequently, Ms. Viera's application was not mailed to the Board of Cosmetology until March 2, 1994. Ms. Viera had assumed that Mr. Bryant had completed and mailed her application within a couple days of her leaving it with him. She was unaware that Mr. Bryant had not done so. Again, Ms. Viera was not eligible to take the cosmetology examination until the certification from the school was accomplished and the application received by the Board. Likewise the cosmetology examination was not available to her until the application was completed by the school and received by the Board.

9. In the meantime, around March 1, 1994, Respondent had begun practicing cosmetology at Lee's Family Affair Studio in Pensacola, Florida. Ms. Viera had been referred to the salon by the school. Ms. Viera needed to work because, being on welfare her funds were extremely short and she had to make up the money she had used to pay the \$75.00 application fee.

10. Normally, applicants who have met all the requirements for taking the cosmetology examination are admitted to take the examination scheduled approximately 10 to 15 days after the Board of Cosmetology has received and reviewed the application.

11. The application of Respondent was received by the office of the Cosmetology Board on March 9, 1994. Based upon this date, the next examination was offered on April 21, 1994 had the entire examination fee of \$105.00 been paid. Except for the fee, Respondent's application was complete in all respects as required by Rule 61G5-18.002, Florida Administrative Code.

12. The Board sent a letter to Respondent dated March 15, 1994, advising her that her application was not complete because she did not pay the additional \$30.00 fee for the Spanish version of the cosmetology examination and that she was not eligible to sit for any examination until the fee had been paid. The letter was received by Respondent around April 6, 1994. The Board's deficiency letter was the first indication Respondent had that she owed the Board more money and that she was not eligible for the examination scheduled for April 21, 1994 and that the examination was not available to the Respondent.

13. Lutrel Raboteaux, an inspector for the Department of Business and Professional Regulation, conducted a routine inspection of Lee's Family Affair Studio, on April 6, 1994.

14. During the course of the inspection, the salon was open to the public, employees were present, and cosmetology services were being performed on customers.

15. Inspector Raboteaux discovered that the Respondent was an employee of the salon, and asked the salon owner to see her license. Respondent was not initially at the salon when Mr. Raboteaux began his inspection. She arrived shortly thereafter.

16. Respondent admitted to Inspector Raboteaux that she was employed by the salon, had been working there since around the first week of March and had charged about \$20.00 for a haircut.

17. Respondent further admitted that she had sent in her application to sit for the next available examination sometime in early March, 1994, but did not have a license.

18. Mr. Raboteaux conferred with the manager of the salon, Daniel Lee, as to the location of Respondent's license, if any. Mr. Lee informed Inspector Raboteaux that Respondent was working under the graduate exemption from cosmetology licensure.

19. Mr. Raboteaux asked to see documentation which would prove that the Respondent was a cosmetology school graduate i.e., the application for licensure, copy of the money order or check to pay for the exam, and a copy of the receipt indicating payment that the Board of Cosmetology sends to the graduate.

20. No documents were posted at Respondent's workstation nor were any documents produced for Inspector Raboteaux.

21. Inspector Raboteaux completed his inspection of the salon, and noted on the salon's inspection report that Respondent's graduate exemption was subject to further investigation.

22. Later, Inspector Raboteaux contacted the Board of Cosmetology in Tallahassee and spoke with Ms. Stacy Merchant, an employee of the Board whose duties for the Board include processing and determining eligibility of cosmetology school graduates to sit for the cosmetology exam.

23. Ms. Merchant informed Inspector Raboteaux that the Respondent was not eligible for the graduate exemption. Ms. Merchant based her conclusion on her understanding of Chapter 477 and the Rules promulgated thereunder.

24. Based on Ms. Merchant's representation, Inspector Raboteaux completed a Uniform Citation and served it on the Respondent by United States Mail -- Restricted Delivery. The Uniform Citation served on the Respondent indicated she was charged with practicing without a license for which the Board's fine was \$500.00.

25. Because Ms. Viera was a welfare recipient she did not have the money to pay the additional \$30.00 fee, let alone a \$500.00 fine which she disputed. As a consequence, Ms. Viera could not take the April 21, 1994 cosmetology examination.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding action pursuant to Section 120.57(1), Florida Statutes.

27. In a license disciplinary action the burden is on the Petitioner to establish the facts upon which its allegations of misconduct are based. The Petitioner must prove its allegations by clear and convincing evidence. *Ferris v. Turlington*, 570 So. 2d 292 (Fla. 1987).

28. Respondent was charged with violating Section 477.029(1)(a), Florida Statutes. Section 477.029(1)(a), Florida Statutes, states:

- (1) It shall be unlawful for any person to:
 - (a) Hold himself out as a cosmetologist or specialist unless duly licensed or registered as provided in this chapter.

29. Pursuant to Section 477.0135(1)(g), Florida Statutes (1993), an exemption from the licensure requirements is permitted under certain circumstances. The statute states the following in pertinent part:

- (1) This chapter does not apply to the following persons when practicing pursuant to their professional or occupational responsibilities and duties:

* * *

- (g) Graduates of licensed cosmetology schools or cosmetology programs offered in public school systems, which schools or programs are certified by the Department of Education, pending the result of the first licensing examination for which such graduates [are] eligible following graduation, provided such graduates shall practice under the supervision of a licensed cosmetologist in a licensed cosmetology salon. [emphasis supplied]

30. Clearly, this exemption is temporary. However, it should be noted that the statute does not require a graduate take the first examination after graduation. The statute requires a graduate take the first available examination for which the graduate is eligible. This is the only interpretation of the relatively clear statutory language which gives meaning to all the words used in defining the graduate exemption.

31. Section 477.019, Florida Statutes, sets forth the eligibility requirements for taking the cosmetology examination. The statute states in pertinent part:

- (1) A person desiring to be a licensed as a cosmetologist shall apply to the department for licensure.
- (2) An applicant shall be entitled to take the licensure examination to practice cosmetology if the applicant:
 - (a) Is at least 16 years of age or has received a high school diploma;
 - (b) Pays the required application fee; and
 - (c) 1. . . .
 - 2. Has received a minimum of 1200 hours of training. . . at one of the following:
 - a. A school of cosmetology licensed pursuant to chapter 246.
 - b. A cosmetology program within the public school system.

* * * *

32. In this case, Respondent graduated on January 29, 1994. She was therefore qualified to engage in cosmetology as long as she took the first available examination for which she was eligible.

33. On April 6, 1994, the date of inspection of Lee's Family Affair Studio, Respondent admitted she cut, shampooed, and styled hair in return for compensation, and had done so for over a month.

34. However, Respondent was never eligible for admission to the cosmetology examination initially because her application was held up by RTI and finally because she had not paid the required application/examination fee. Because Respondent is poor she could not get together the additional \$30.00 demanded by the Board and therefore could not take the examination scheduled on April 21, 1994. Since Respondent was never eligible to take the cosmetology examination she was entitled to graduation exemption status until she paid the additional \$30.00 fee after which she would be required to take the next available examination or lose the graduation exemption. The evidence did not establish that Respondent did not take the first available examination after she was eligible for the same. Therefore, Respondent is not guilty of violating any provisions of Chapter 477, Florida Statutes, and the Administrative Complaint should be dismissed. 1/

RECOMMENDATION

Based upon the findings of fact and the conclusions of law, it is,

RECOMMENDED:

That Respondent be found not guilty of violating Section 477.029(1)(a), Florida Statutes (1993) through a violation of Section 477.0135(g), Florida Statutes (1993) and the Administrative Complaint be dismissed.

DONE and ENTERED this 12th day of July, 1996, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675 SunCom 278-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of July, 1996.

ENDNOTE

1/ The Hearing Officer is cognizant of Rule 61G5-20.008, Florida Administrative Code, which appears to require that the future applicant have applied for the first examination after graduation. However, this Rule applies only to salon owners and their employment practices. The Rule does not apply to Respondent. More importantly, however, this Rule appears to go beyond the clear statutory language of Section 477.0135(1)(g), Florida Statutes, to the extent that it can be interpreted as adding requirements for the graduation exemption. Specifically, that the graduate must apply for and be eligible for the first examination after graduation. The statute simply contains no such requirement

especially where, as here, a good faith effort has been made to comply with the law regarding cosmetology and only poverty has prevented eligibility.

APPENDIX

1. The facts contained in paragraphs 1, 2 and 3 of Respondent's Proposed Findings of Fact are adopted.

2. The facts contained in paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of Respondent's Proposed Findings of Fact are subordinate.

3. The facts contained in paragraphs 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 of Petitioner's Proposed Findings of Fact are adopted.

4. The facts contained in paragraphs 3, 12, 13 and 15 of Petitioner's Proposed Findings of Fact are subordinate.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.