

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 96-0364
)	
KELLY CARTER d/b/a)	
REFLECTIONS OF YOU,)	
)	
Respondent.)	
<hr/>)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on May 29, 1996, in Tallahassee, Florida, before the Division of Administrative Hearings, by its designated Hearing Officer, Diane Cleavinger.

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: No appearance

STATEMENT OF THE ISSUE

The issue in this case is whether any disciplinary action should be taken against Respondent's cosmetology salon license.

PRELIMINARY STATEMENT

On December 28, 1994, while conducting an inspection of cosmetology salons in the Tallahassee area, an inspector for the Petitioner entered Reflections of You and conducted a routine inspection. During the course of that inspection it was discovered that Respondent, although the new owner of the salon, had not obtained a new salon license from the Board of Cosmetology indicating her as the new owner.

After the inspection was completed, a citation was issued to the Respondent charging her with owning or operating a salon without obtaining a new salon license from the Board of Cosmetology, in violation of Section 477.025(7), Florida Statutes. The citation was issued through Rule 61G5-30.004(6)(b), Florida Administrative Code. The citation provides for a 30 day period in which Respondent can choose to either pay the fine or dispute the allegations contained within the citation. Respondent did not pay the citation within 30

days after service was accomplished as provided for by rule, nor did she dispute the allegations contained within the citation. On February 1, 1995, the citation became a Final Order of the Board of Cosmetology.

Thereafter, the Petitioner filed an Administrative Complaint on September 29, 1995, charging the Respondent with violating Section 477.029(1)(i), Florida Statutes, in that it is unlawful for any person to violate or refuse to comply with any provision of Chapter 477 or a rule or a final order of the Board. Respondent requested a formal hearing in the matter.

At the hearing, Petitioner called two witnesses to testify and offered three exhibits into evidence. Respondent did not appear at the hearing.

By Notice of Supplemental Filing, the Petitioner requested the Hearing Officer to take official notice of Chapter 477, Florida Statutes, and Chapter 61G5, Florida Administrative Code, which govern the practice of cosmetology. The Hearing Officer recognized Chapter 477, Florida Statutes, and Chapter 61G5, Florida Administrative Code.

After the hearing Petitioner filed a proposed recommended order on August 7, 1996. The Petitioner's proposed findings of fact have been utilized in the preparation of this recommended order. Specific rulings on Petitioner's proposed findings of fact are contained in the appendix to this recommended order.

FINDINGS OF FACT

1. Respondent is the owner and operator of a cosmetology salon known as "Reflections of You" located in Tallahassee, Florida.

2. Respondent had purchased the salon from the previous owners.

3. Randall Smith was an inspector for the Department of Business and Professional Regulation, whose duties included the inspections of cosmetology salons.

4. On December 24, 1994, Inspector Randall Smith conducted a routine inspection of Reflections of You. The salon was open to the public, and employees were present.

5. Respondent was present during the inspection.

6. During the inspection Respondent admitted to having problems with the previous owners on the purchase of the salon and thought that her lawyer had taken care of all the necessary requirements to own the business. Respondent believed that the transfer included the proper transfer of the salon license.

7. However, Respondent had not been issued a new salon license listing her as the new owner after her purchase.

8. After concluding his discussion with a representative from the Cosmetology Board office, Inspector Randall Smith wrote a Uniform Citation and served it on the Respondent by hand delivery.

9. The Uniform Citation served on the Respondent indicated a fine in the amount of five hundred (500.00) dollars for failure to have a proper salon license.

10. Respondent neither paid the citation nor challenged the fine contained in the citation.

11. The citation therefore became a Final Order of the Board of Cosmetology on February 1, 1995 by operation of law.

12. In mitigation of her failure to transfer her license, Respondent applied and paid fifty-five (55) dollars for a new salon license on December 24, 1994, the day after the inspection by Randall Smith, and was issued a new salon license. Presumably, Respondent's cosmetologist license was current.

CONCLUSIONS OF LAW

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

14. Pursuant to Section 477.025(7), Florida Statutes, no license for operation of a cosmetology salon or specialty salon may be transferred from the name of the original licensee to another.

15. On the date of inspection of Reflections of You, Respondent did not have a valid salon license reflecting herself as the owner of the salon as required in Chapter 477, Florida Statutes.

16. Respondent was issued Citation Number 003142 for not having a valid license.

17. Respondent did not pay or dispute the citation that was issued to her.

18. Citation Number 003142 became a Final Order of the Board of Cosmetology 30 days after it was served on the Respondent. Rule 61G5-30.004, Florida Administrative Code.

19. In a disciplinary action such as this proceeding, the burden is on the regulatory agency (Petitioner) to establish the facts upon which its allegations of misconduct are based. *Balino v. Department of Health and Rehabilitative Services*, 348 So. 2d 349 (Fla. 2nd DCA 1977). The Petitioner must prove its allegations by clear and convincing evidence. *Ferris v. Turlington*, 570 So. 2d 292 (Fla. 1987); *Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company*, 670 So. 2d 932 (Fla. 1996).

20. In this case the Petitioner has carried its burden of proof, since Respondent did not pay or dispute the allegations contained within the citation. Therefore, she is in violation of a Final Order issued by the Board of Cosmetology, pursuant to Section 477.029(1)(j), Florida Statutes.

21. The evidence also demonstrated that the Respondent is guilty of violating Section 477.025(7), Florida Statutes, for not obtaining a new salon license after transferring ownership of the salon into her name. These facts were the underlying facts of the charges contained in the original citation and should not result in an additional penalty.

22. The Disciplinary Guidelines contained in 61G5-30.001(1)(b)1., Florida Administrative Code, in addition to other administrative penalties, provide for an administrative fine of five hundred (500.00) dollars, for owning or operating

a salon which is not duly licensed. 61G5-30.000(1)(b)(2), It does not contain a range of any penalties. 1/ However, the guidelines also provide a fine of fifty (50.00) dollars for failing to transfer a license to a new owner. This fine more closely fits the facts of this case and the fine imposed in the citation would appear to be in error. Therefore, Respondent should be fined fifty (50.00) dollars.

RECOMMENDATION

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

RECOMMENDED:

That the Board of Cosmetology enter a Final Order finding Respondent guilty of violating Section 477.029(1)(i), Florida Statutes and guilty of violating Section 477.025(7), Florida Statutes and imposing a fifty (50.00) dollar fine for the two violations.

DONE and ENTERED this 26th day of August, 1996, in Tallahassee, Leon County, Florida.

DIANNE 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 26th day of August, 1996.

ENDNOTE

1/ The Board should note that the rule on discipline is a guideline only. The fact that a range of penalties is not provided under those guidelines does not mean that the listed penalty cannot be varied given appropriate aggravating or mitigating circumstances. The Board is required to consider such circumstances in assessing an appropriate penalty. See Chapter 455 and 477, Florida Statutes.

APPENDIX

The facts contained in paragraphs 1 through 23 of Petitioner's proposed findings of fact are adopted in substance, in so far as material.

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.