

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
BARBERS' BOARD,)
)
Petitioner,)
)
vs.) Case No. 09-0974PL
)
ELVIS O'NEIL CROOKS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, this cause was heard by Linda M. Rigot, the assigned Administrative Law Judge of the Division of Administrative Hearings, on April 2, 2009, by video teleconference with sites in Tampa and in Tallahassee, Florida.

APPEARANCES

For Petitioner: Philip F. Monte, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

For Respondent: Elvis O'Neil Crooks, pro se
7117 Wrenwood Circle
Tampa, Florida 33617

STATEMENT OF THE ISSUE

The issue presented is whether Respondent is guilty of the allegations in the Amended Administrative Complaint filed

against him, and, if so, what disciplinary action should be taken against him, if any.

PRELIMINARY STATEMENT

On October 27, 2008, Petitioner Department of Business and Professional Regulation filed an Administrative Complaint against Respondent Elvis O'Neil Crooks, alleging that he had violated a statute regulating his conduct as a barber. Respondent timely requested an administrative hearing regarding the allegations in that Administrative Complaint, and Petitioner transferred this matter to the Division of Administrative Hearings to conduct the evidentiary proceeding.

On February 25, 2009, Petitioner requested leave to file an amended administrative complaint to correct a scrivener's error and represented that Respondent had no objection. Petitioner's motion was granted by order entered March 3, 2009, and the Amended Administrative Complaint filed February 25, 2009, became the charging document in this cause as of the date of that Order.

Petitioner presented the testimony of Dana Ewaldt. Respondent testified on his own behalf. Additionally, Petitioner's Exhibits numbered 1 and 3-6 were admitted in evidence.

The Transcript of the final hearing was filed on April 13, 2009. Respondent waived his right to submit a proposed

recommended order, and Petitioner filed its Proposed Recommended Order on April 21, 2009. Those documents have been considered in the entry of this Recommended Order.

FINDINGS OF FACT

1. At all times material hereto, Respondent has been licensed as a restricted barber and operating under the name of Miracles in Motion, located in Tampa, Florida.

2. On May 9, 2006, the Department issued a Uniform Disciplinary Citation against Respondent in case numbered 2006030590 in the amount of \$400. The fine, due to be paid by July 9, has not been paid.

3. On October 13, 2006, the Department issued a Uniform Disciplinary Citation against Respondent in case numbered 2006058259 in the amount of \$250. The fine, due to be paid by December 24, has not been paid.

4. Also on October 13, 2006, the Department issued a Uniform Disciplinary Citation against Respondent in case numbered 2006058271 in the amount of \$250. The fine, due to be paid by December 24, has not been paid.

5. On October 24, 2006, the Department issued a Uniform Disciplinary Citation against Respondent in case numbered 2006063364 in the amount of \$400. The fine, due to be paid by December 24, has not been paid.

6. Respondent did not dispute the facts contained in these four Citations. Under the terms of the Citations, they, therefore, automatically became final orders 30 days after they were issued. Since Respondent has not paid those fines, he fails to be in compliance with four final orders of the Department.

7. The total amount of fines not paid by Respondent pursuant to the four Citations involved in this proceeding is \$1,300.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the subject matter hereof and the parties hereto. §§ 120.569 and 120.57(1), Fla. Stat.

9. The Amended Administrative Complaint filed in this cause alleges that Respondent violated Section 476.204(1)(i), Florida Statutes, by failing to comply with four final orders.

10. In this proceeding, the Department has the burden of proving its allegations against Respondent by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The Department has met its burden factually but failed to meet its burden legally.

11. Section 476.204(1)(i), Florida Statutes, authorizes disciplinary action against a licensee who refuses or fails to comply with a final order of the board. It does not authorize

the Barbers' Board to take disciplinary action against a licensee who refuses or fails to comply with a final order of the Department.

12. Although Respondent testified that he paid the fines in question, he offered no documentary evidence that he did so. He testified that he only retains business records for one year. He also testified that he made no attempt to obtain copies of his cancelled checks from his bank, and, although encouraged to do so at the conclusion of the final hearing by both the undersigned and the Department's attorney, submitted no documentation showing payment through the time that the Department filed its Proposed Recommended Order.

13. A computer print-out of Respondent's history of citations provided by the Department and admitted in evidence without objection reflects that the Department has issued ten citations to Respondent and that the fines imposed by six of them have been paid. The six paid citations may well be the ones that Respondent recalls paying. Accordingly, the evidence is clear and convincing that Respondent failed to pay the fines imposed by the four Citations involved in this proceeding.

14. Section 455.224, Florida Statutes, establishes the authority to issue citations and provides in Subsection (1) that if the subject of the citation does not dispute the matter in the citation "with the department" within 30 days after it was

served, the citation becomes a final order. Accordingly, by operation of law the four Citations issued by the Department in this case became final orders, but they became final orders of the Department, not of the Board, since they were issued by the Department and not by the Board.

15. The determination that the Citations became final orders of the Department and not of the Board is the only permissible conclusion because no evidence was offered that the Board adopted the Department's final orders as its own and because no statute which automatically converts the Department's final orders into final orders of the appropriate board has been found. Further, this is more than a technical nuance because the underlying statute Respondent is charged with violating in the Amended Administrative Complaint filed in this cause which proscribes violating a final order of the Board is strictly construed. Childers v. Department of Environmental Protection, 696 So. 2d 962 (Fla. 1st DCA 1997); Rush v. Department of Professional Regulation, Board of Podiatry, 448 So. 2d 26 (Fla. 1st DCA 1984).

16. Accordingly, the Department has failed to prove by even a preponderance of the evidence that Respondent is guilty of violating Section 476.204(1)(i), Florida Statutes, the only statutory violation alleged in the Amended Administrative Complaint.

17. Even had the Department proven that Respondent failed to comply with final orders of the Board, the relief sought by the Department in this proceeding is not authorized. The Department seeks in this proceeding that Respondent be reprimanded, be fined \$1,300, and be required to pay costs.

18. The Barbers' Board has established the range of penalties permissible for violations of the statutes within its jurisdiction. Florida Administrative Code Rule 61G3-21.001(13) provides that upon proof that a licensee has violated Section 476.204(1)(i), the Board may impose a fine ranging from \$250 to \$500. Interestingly, the Rule attempts to avoid the distinction between final orders of the Department and final orders of the Board by characterizing Section 476.204(1)(i), Florida Statutes, as prohibiting "failing to pay a citation within 30 days or violating a final order." The notices of legal rights attached to the Citations involved in this case specifically provide that Respondent had 60 days to pay each Citation, and Section 476.204(1)(i) limits failure to comply with final orders to only final orders of the Board.

19. Petitioner has not proven that Respondent violated the description of the statute contained in the rule. However, even if Petitioner had proven the statutory violation as described in the statute, the Amended Administrative Complaint filed in this cause contains only one count alleging a single violation of

Section 476.204(1)(i) although four Citations were factually alleged. Accordingly, there can only be, pursuant to the Board's penalty guidelines Rule, one fine imposed and it must be in the range of \$250 to \$500.

20. In its Proposed Recommended Order, the Department offers no explanation for how it determined that a reprimand and a \$1,300 fine would be an appropriate penalty. Florida Administrative Code Rule 61G3-21.001(13) does not provide for a reprimand for a violation of Section 476.204(1)(i), Florida Statutes. The requested fine of \$1,300 is, perhaps coincidentally, the amount of the unpaid Citations but is far in excess of the amount of fine allowed by Rule 61G3-21.001(13). It would appear that the Department is attempting in this proceeding to enforce its final orders resulting from the unpaid Citations, but the Division of Administrative Hearings has no jurisdiction to enforce final orders.

21. As to the Department's desire to have its costs paid by Respondent, even if the Department had prevailed in this proceeding, no evidence was offered as to what costs were expended so that the relevance and reasonableness of each item of cost could be determined in this Recommended Order.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered finding that Respondent is not guilty of violating Section 476.204(1)(i), Florida Statutes, and dismissing the Amended Administrative Complaint filed against him.

DONE AND ENTERED this 11th day of May, 2009, in Tallahassee, Leon County, Florida.

Linda M. Rigot

LINDA M. RIGOT
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of May, 2009.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.