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Case Number 536,2012

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RANDALL RICHARDSON,	)	No. 536,2012
	)	
Appellant/Appellant-Below	)	
	)	
v.	)	Trial Court Below:
	)	Superior Court of the State
BOARD OF COSMETOLOGY & BARBERING	)	of Delaware
OF THE STATE OF DELAWARE,	)	In and For Kent County
	)	C.A. No. K11A-09-009 JTV
Appellee/Appellee-Below	)	

APPELLANT'S OPENING BRIEF

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Dated: November 13, 2012

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NATURE OF PROCEEDINGS

A. Introduction

This is a case of first impression regarding the newly created position of Hearing Officer in the Delaware Department of State pursuant to House Bill 459 (145th General Assembly), which was codified at 29 *Del. C.* § 8735(t).[1] A-1. Hearing Officers are now permitted to hear certain State Board and Commission matters governed by 29 *Del. C.* § 10121-10129 and make a recommendation based thereon. In the instant action, a Hearing Officer: 1) heard the matter without being appointed to do so; 2) exceeded his authority by delving into license suspension issues governed by 29 *Del. C.* § 10131-10134; 3) failed to consider all mitigating factors regarding the sanction; and 4) recommended a sanction regarding the wrong license. And the Hearing Officer's recommendation was adopted *in toto* by the Board at unrecorded proceedings, and after Board members failed to review the record and the exceptions to the recommendation.

B. The Initiation Of Charges And Board Rejection Of A Consensual Resolution

This matter was commenced pursuant to the filing of a Complaint by the Division of Professional Regulation ("Division") with the Delaware Board of Cosmetology and Barbering (the "Board") in a matter styled *In re: Randall Richardson,* License Number: M5-0000339, Case Nos. 08-55-08 & 08-08-10 on August 25, 2010. A-8 to 11. By letter dated December 3, 2010 from the Division, Randall

[1] This subsection is now § 8735(v).

Richardson ("Richardson") was notified of the Complaint, as well as a hearing to be conducted by the Board on February 28, 2011. A-312 On January 12, 2011, counsel for Richardson communicated with the Division, contesting the charges. A-15.

Richardson and the Department entered into a Consent Agreement to resolve the Complaint. A-17 to 79. The Consent Agreement admitted 1 of the 2 charges contained in the Complaint, constituting a violation of 24 *Del. C.* § 5113(a)(7) and Board Regulation 14. *Id.* The agreed upon penalty was a $750 Fine and a One (1) Year Probation. *Id.*

On February 28, 2011, the Board rejected the Consent Agreement. A-20 and A-25. In addition, the Board scheduled a hearing for April 25, 2010 [sic]. *Id.* According to Board meeting minutes, on Motion of the President, the board decided to "reject the Consent Agreement of Randall Richardson since the sanction was not severe enough… ." A-25.

C. The Amended Complaint And Surprise Hearing Officer Hand-Off

On March 17, 2011, the Department filed an Amended Complaint against Richardson. A-29 to 31. The Amended Complaint made a slight modification regarding 1 of the 2 charges alleged. *Id.*

The Amended Complaint was forwarded to Richardson under cover letter dated March 18, 2011 from a Division Hearing Officer, who purported to have authority to conduct a disciplinary hearing on the matter. A-32. The Hearing Officer did not enclose any document which appointed him to conduct the hearing for the Board. *Id.*

On April 12, 2011, the Hearing Officer notified the parties of the hearing date. A-33. He expressly noted that the procedures governing the conduct of the hearing were contained in the Delaware Administrative Procedures Act, 29 *Del. C.* Ch. 101 (the "APA"), Subchapters III and IV. *Id.*[2]

At a hearing conducted on June 8, 2011 (the "Evidentiary Hearing"), the parties proceeded pursuant to a written Stipulation of Facts, supplemented by legal argument of counsel. A-35 to 37 and A-39 to 68 at pp. 4 and 7. The parties stipulated that Richardson committed a single violation of 24 *Del. C.* § 5113(a)(7) when, as the holder of a shop license for Trilogy Salon pursuant to 24 *Del. C.* § 5118, he knowingly permitted an unlicensed nail technician to lease space. A-36 to 37 at para.14. Richardson's counsel presented facts regarding numerous Mitigating Factors with respect to the single violation. A-52 to 57.

On June 15, 2011, the Hearing Officer issued a written Recommendation (the "Recommendation") which completely failed to list or address the Mitigating Factors which supported a less severe penalty. A-71 to 85. Instead, the Recommendation included a proposed 90-day suspension based solely on one (1) Aggravating Factor: the length of time the nail technician's license was expired. *See* A-83.

[2] Interestingly, the Hearing Officer lacks authority to conduct hearings governed by Subchapter IV under the authorizing enactment, 29 *Del. C.* § 8735(v). This is an admission of legal error.

On June 29, 2011, counsel for Richardson submitted his written Exceptions to the discipline component of the Recommendation (the "Exceptions"). A-86 to 90. The Exceptions challenged: 1) the validity of the process; 2) the failure to consider Mitigating Factors; 3) the lack of consideration of the various steps of discipline severity contained in 24 *Del. C.* § 5114, and the appropriate sanction thereunder for the single violation.; 4) the lack of harm to the public; 5) the fact that Richardson was not the shop owner any longer; and 6) the practical and legal effect: a multi-month suspension. *Id.*

D. The Board's Summary Proceeding

On September 26, 2011, the Board conducted what it called a Review And Deliberation of Hearing Officer Recommendation (the "Penalty Hearing"). The Board's consideration of the matter was brief. *See* A-97. Richardson's counsel was denied the opportunity to address the Board on the Exceptions. Some members spent a few minutes skimming over part of the record, and some did not read much at all. And after a few comments by the Board President, the Recommendation was approved. *See* A-97.

E. The Appeal To Superior Court

An appeal was initiated in the Superior Court pursuant to the filing of a Notice of Appeal on September 26, 2011. On September 27, 2011, the Court issued an Order staying the effectiveness of the 90-day suspension.

On or about January 20, 2012, the Board submitted the record to the Court. The record was devoid of certain important documents, which Richardson's counsel provided to make a complete record.

On August 30, 2012, the Superior Court issued an Order affirming the Board. *Richardson v. Board of Cosmetology & Barbering*, 2012 WL 3834905, Vaughn, P.J. (Del. Super., Aug. 30, 2012). In its Order, the Superior Court held that: 1) the Board did not need to keep a *verbatim* transcript; 2) the Hearing Officer did not need to be appointed as the Board's delegated hearing "subordinate"; 3) the record did not support a conclusion that the Board failed to consider the excessive nature of the penalty imposed in light of numerous mitigating factors; 4) the Board could suspend Richardson's cosmetologist license although the single violation was in his capacity as the shop licensee; and 5) contrary to the APA, the Hearing Officer had the power to recommend suspension of Richardson's license.

F. <u>The Supreme Court Appeal</u>

On September 28, 2012, Richardson filed his Notice of Appeal initiating this appellate proceeding. The same day, this Court issued a briefing schedule. This is Appellant Randall Richardson's Opening Brief.

SUMMARY OF ARGUMENT

I. Reversal Is Warranted Due To Lack Of A Complete Board Hearing Record To Review.

III. The Board Failed To Appoint The Hearing Officer; The Procedure Was Invalid.

III. The Board Failed To Consider Any Mitigating Factors Which Militated In Favor Of A Less Severe Penalty For The Single, First Offense Violation.

IV. The Administrative Procedures Act Bars The Penalty Of Cosmetologist License Suspension Under The Circumstances.

V. The Hearing Officer Is Not Authorized To Conduct Hearings Involving Potential License Suspension.

STATEMENT OF FACTS

A. Background On Primary Basis Of Appeal: No Board Record And No Board Consideration Of Evidentiary Hearing Record, Recommendation Or Exceptions

In this appeal, Richardson challenges the decision of the Board which adopted the Recommendation wholesale. Specifically, Richardson contests the sanction which suspends his Cosmetology License based upon a single, first offense violation committed in his capacity as the registrant for the Shop License. The Board did not actually consider the Recommendation or Exceptions. In addition, the Board did not receive or review the Transcript of proceedings conducted by the Hearing Officer. Instead, copies of the Recommendation and Exceptions were handed out to the Board, which voted just minutes later after virtually no discussion. Many Board members failed to even read the Exceptions.[3]

The only memorialization of the Board's proceedings is its approved minutes. A-97. The sum total of the Board's deliberations are described in one sentence: "After review, a motion was made by Ms. Lord, seconded by Ms. Naftzinger, to approve the recommendations of the Hearing Officer regarding the disciplinary hearing of Randall Richardson." *Id.* No discussion, rationale for the Board's decision, or any other substantive commentary was recounted.

At the Penalty Hearing, the Board President made certain comments regarding her pre-ordained belief that a shop owner who allowed an employee to work unlicensed should receive a severe

[3] Of course there is no record of the Board's proceedings because it failed to keep any audio or stenographic record. But counsel was present to witness what took place.

penalty. In addition, no discussion of the Record, the Recommendation, or the Exceptions occurred. Many Board members did not even review the materials. The lack of a Board hearing record causes the Court to miss a considerable amount of information which questions the validity of the Board's final decision.

B. The Board Was Pre-Disposed to A "Hanging Judge" Mentality

The Board rejected the original Consent Agreement which would have resolved this matter pursuant to the admission by Richardson to a single violation and penalty of Fine and Probation. A-25. The Board President believed that the sanction for Richardson's first offense in his capacity as the holder of the Shop License (not his Cosmetologist License) "was not severe enough." Indeed, the Board President's comments at the Penalty Hearing (not transcribed, and therefore only known to the parties who were present and heard her), confirmed her belief that there should be a *per se* rule of suspension any time a shop owner allows an unlicensed person to provide services. Further, the Board President refused to permit Richardson's counsel to speak on the Exceptions and Penalty. A-97.

The fact that the Board imposed such a punitive and draconian penalty upon Richardson came as no surprise. Board members did not spend much, if any, time reviewing the Recommendation or the Exceptions.[4] Indeed, Board members only received them when they

[4] It is not entirely clear, due to the lack of a Board record, whether Board members ever received or reviewed a transcript of the Evidentiary Hearing or the exhibits in the record of the Evidentiary Hearing. But Board staff only stated that they were handing out the Recommendation and Exceptions.

reached the Richardson item on the Agenda. Richardson's counsel observed that many Board Members did not even look at the Exceptions.

Members of the Board took only a few minutes to skim over the Recommendation and/or the Exceptions. Given the length of the Recommendation and the complicated legal issues raised in the Exceptions, none of the Board members could have even begun to grasp the facts and law which were before them for consideration. And neither Division Staff nor the Board's Deputy Attorney General provided a verbal or written summary or explanation of the contents of the Recommendation and Exceptions. The Board made its decision virtually blind to the legal contentions and provisions.

C. The Mitigating Factors Militating In Favor Of A Lesser Penalty Were Completely Overlooked

At the conclusion of the brief evidentiary hearing conducted by the Hearing Officer, Richardson's counsel presented a rationale for recommending the sanction of a $500 fine and 1 year of probation. A-52 to 57. The Mitigating Factors presented were:

1. Single Offense: The Division of Professional Regulation stipulated with Richardson to the commission of one violation only.

2. First Offense: This was Richardson's first violation in his 18 year career.

3. No Reasonable Likelihood Of A Repeat Violation: Trilogy Salon And Day Spa was no longer operated by Richardson; it had become Trilogy By Alyson, operated by Alyson Nastasi.

4. No Health Or Safety Risk: The unlicensed nail technician was a licensed nail technician for many years, and she promptly ultimately re-instated her license, establishing her competence to provide services during her period of expired licensure.

5. The Shop License Violation Was Not Reflective Of Richardson's Capabilities As A Cosmetologist: The one violation was committed by Richardson in his capacity as Shop License registrant, not in the context of providing cosmetology services to customers.

6. Richardson's Remorse: Richardson indicated that he was sorry for not insuring that the nail technician license of his tenant was kept current, and he accepted responsibility for the one offense. *Id.*

The Division only made two comments regarding the proposed penalty for Richardson's single violation: 1) a $500 Fine was the maximum and was appropriate; and 2) no position on Richardson's recommendation of Probation. A-66 to 68 at pp. 29-31. The Division did not recommend any more severe sanction(s).

Surprisingly, the Recommendation suggested a 90-day suspension, 1 year probation, and a $750 fine. A-85. The Recommendation, however, failed to consider any of the Mitigating Factors which would have supported a lesser penalty. *See* A-71 to 85. The Hearing Officer focused entirely on one Aggravating Factor: the extended period of time that the nail technician operated with an expired license. A-83 to 84.

No weighing process was undertaken whatsoever. The Hearing Officer simply found an egregious length of violation and *ipso facto* concluded that a lengthy suspension period was appropriate.

D. The Exceptions Highlighted The Recommendation's Failure To Consider Mitigating Factors, But The Board Completely Ignored Them

Richardson's counsel submitted Exceptions to the Recommendation in a letter dated June 29, 2011. A-86 to 90. The Exceptions raised both procedural and substantive errors: 1) the Board did not properly appoint the Hearing Officer to conduct the hearing, and therefore should have held the hearing itself (as originally planned); 2) the recommended fine exceeded the $500 maximum permissible by statute; 3) the recommended discipline was overly punitive since Mitigating Factors were not considered; and 4) the highly severe penalty of a 90-day license suspension was not supported or legally permitted.

At the Penalty Hearing, the Board considered Richardson's fate. Few of the Board members read any of the documents submitted. The Board merely took a conclusory vote blindly approving the Recommendation.

ARGUMENT

I. REVERSAL IS REQUIRED DUE TO LACK OF A COMPLETE RECORD

A. Question Presented

Whether the Court should reverse the Superior Court on the grounds that the Board failed to keep a record of the Penalty Hearing? The question was preserved in Appellant's Opening Brief at 10-11.

B. Standard and Scope of Review

This Court reviews State Board decisions "for errors of law and [to] determine whether substantial evidence exists to support the Board's findings of fact and conclusions of law." *Delaware Bd. Of Nursing v. Gillespie*, 41 A.3d 423, 425 (Del. 2012). Questions of law are reviewed *de novo*. *Id.* Otherwise, the standard of review is abuse of discretion. *Id.*

The standard of review for an abuse of discretion is whether the decision was arbitrary or capricious. *Wright v. Wright*, 49 A.3d 1147, 1150 (Del. 2012). And arbitrary and capricious is "that which is unconsidered or which is willful and not the result of a winnowing or sifting process." *Holley Enterprises, Inc. v. City of Wilmington*, 2009 WL 1743726, *3, Strine, V.C. (Del. Ch., June 5, 2009).

C. Argument

The certified record of proceedings handed up to the Superior Court by the Board did not contain any transcript or recording of the Penalty Hearing conducted by the Board on September 26, 2011.

At the conclusion of the Penalty Hearing, the Board made a formal motion and conducted a vote of the members present. A-97. Indeed, the Board's Order issued on October 7, 2011 ("Order") noted that it "reviewed and deliberated on the Recommendation and Mr. Richardson's Exceptions at that time." A-100. Truth be told, however, most Board members never read the Evidentiary Hearing record, the Recommendation, or the Exceptions.

1. The APA Requires A Recording Capable Of Conversion To A Written Transcript, Without Which Appellate Review Is Thwarted

Pursuant to the Delaware Administrative Procedures Act ("APA"), a record from which a verbatim transcript can be prepared shall be made of all hearings in contested cases. 29 *Del. C.* § 10125(d). One purpose of the requirement is to insure that a complete record is available in case of appeal. Without a transcript, the Court lacks a complete record to review.

It is well-settled that the record must clearly show the basis on which an administrative agency acted in order for its exercise of discretion to be properly reviewed by the Court. *Kreshtool v. Delmarva Power*. 310 A.2d 649, 652 (Del. Super. 1973). And where the record clearly indicates that a Board decision is based upon inadequate grounds, its discretion has therefore been abused and judicial reversal is required. *Carrion v. City of Wilmington*, 2006 WL 3502092, *3, Toliver, J. (Del. Super., Dec. 5, 2006). Because appeals from State Boards and Commissions are on the record, "[i]t is manifest that an incomplete record of the evidence makes

impossible a review by this Court." *Ashmore v. Unemployment Compensation Com'n*, 86 A.2d 751, 754 (Del. Super. 1952).

The complete lack of an APA-required transcript of the Penalty Hearing is fatal to the validity of the Order. It deprives the Court of the ability to review the record pursuant to 29 *Del. C.* § 10142 and 24 *Del. C.* § 5116(c). Accordingly, the Court should remand the matter to the Board for further proceedings in order to make a complete record.

2. Statutory Interpretation Reveals That The "Hearing" Includes Board Deliberations

The Board's powers and duties expressly include the authority to "[c]onduct hearings and issue orders in accordance with procedures established pursuant to Chapter 101 of Title 29." 24 *Del. C.* § 5106(9). In addition, § 5106(10) provides that "[w]here [the Board] has determined after a disciplinary hearing that penalties or sanctions should be imposed, [it is authorized to] designate and impose the appropriate sanction or penalty… ." § 5106(10). Thus, a Board "hearing" includes: 1) any "hearing" under the APA; and 2) all disciplinary proceedings preceding its written order. Consequently, the term "hearing" encompasses the Penalty Hearing.

Additionally, the term "hearing" includes the proceeding at which the Board determines to suspend the license of a practitioner regulated by it. Specifically, 24 *Del. C.* § 5113(b) provides:

> **Subject to subchapter IV of Chapter 101 of Title 29, no license shall be restricted, suspended, or revoked by the Board, and no**

> **practitioner's rights to practice shall be limited by the Board, until such practitioner has been given notice, and an opportunity to be heard in accordance with the Administrative Procedures Act, Chapter 101 of Title 29.**

As a result, any proceedings that are conducted pursuant to the APA constitute a "hearing" for purposes of the requirement for the Board to keep a stenographic transcript.

Further, the term "hearing" includes all procedures described in 24 *Del. C.* § 5116, which is entitled "Hearing procedures." Specifically, 24 *Del. C.* § 5516(a) provides:

> **If a complaint is filed with the Board pursuant to § 8735 of Title 29, alleging a violation of § 5113 of this Title, the Board shall set a time and place to conduct a hearing on the complaint. Notice of the hearing shall be given and the hearing shall be conducted in accordance with Chapter 101 of Title 29.**

In addition, § 5516(b) provides that hearings shall be informal without use of Rules of Evidence, and that at such hearing "[i]f the Board finds, by a majority vote of all members, that the complaint has merit, the Board shall take such action permitted under this chapter as it deems necessary." As a consequence, the "hearing" for purposes of the stenographic transcript requirement includes all Board proceedings through and including the oral decision and vote of Board members on a Complaint.

Under 29 *Del. C.* § 8735(v)(1)(d), the Hearing Officer only submits "findings and recommendations" to the Board. Thereafter, the Board must still "make its final decision to affirm or modify the Hearing Officer's recommended conclusions of law and proposed sanctions based upon the written record." *Id.* As a result, the

"hearing" does not end at the conclusion of the Hearing Officer's evidentiary hearing. The "hearing" ends when the Board takes a final vote on a disciplinary Complaint and penalty.[5]

Because the Board failed to keep the legally mandated stenographic transcript, this Court is deprived of the ability to review the record under the substantial evidence and error of law tests. As a result, reversal is necessary.

3. Richardson Is Prejudiced By The Lack Of A Board Hearing Transcript

A transcript of the Penalty Hearing is critical in this case for a number of reasons. ***First***, the record would establish that the Board was not provided with a copy of the Recommendation and Exceptions until minutes before it voted.[6] ***Second***, the Court does not have verified proof of the paucity of any deliberation or discussion by Board members. ***Third***, the Court has no extra-Recommendation rationale for the Board's 90-day suspension of Richardson's Cosmetology License.

Under 29 *Del. C.* § 8735(v)(1)d.[7], the Hearing Officer is only permitted to recommend a penalty; the Board must decide to affirm or

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[5] If the Board modifies the Hearing Officer's recommendation regarding conclusions of law or proposed sanctions, a stenographic transcript is obviously necessary in order for this Court to properly conduct its review.

[6] It would also confirm whether the Board was provided with the Evidentiary Hearing record, including the stipulated facts and the transcript which contained facts and argument regarding the penalty for Richardson's one violation.

[7] The subsection was previously codified as § 8735(t).

modify the proposed sanctions based upon the written record. The Penalty Hearing was the proceeding at which the Board was to decide on Richardson's punishment. Without a transcript of the Penalty Hearing, the Court lacks an adequate record to conduct a complete review.

Because the Board failed to keep a recording of the Penalty Hearing, as mandated by the APA, Richardson has been deprived of his ability to make critical arguments on appeal. Consequently, the Court should remand this matter to the Board for a properly recorded proceeding.

4. The APA Mandates Remand For Further Proceedings

APA § 10125(d) expressly provides:

> **A record from which a verbatim transcript can be prepared shall be made of all hearings in all contested cases. Transcripts shall be made at the request and expense of any party.**

In addition, APA § 10142(c) provides that "[i]f the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record." Consequently, the Board's failure to record or transcribe the Penalty Hearing *ipso jure* requires a remand for new, recorded/transcribed Board proceedings.

ARGUMENT

II. THE BOARD FAILED TO APPOINT THE HEARING OFFICER, AND THEREFORE WAS REQUIRED TO CONDUCT THE HEARING ITSELF

A. Question Presented

Whether the Board's failure to formally appoint the Hearing Officer to conduct an Evidentiary Hearing as required by the APA is fatal to the process? The issue was preserved on appeal in Appellant's Opening Brief at 11-13 and in the Exceptions at 1-2.

B. Standard and Scope of Review

The Standard of Review is set forth in Argument I.B., *supra*.

C. Argument

The Board erred in failing to take the necessary procedural step to formally appoint the Hearing Officer to consider Richardson's charges. The procedural error is fatal to the validity of the Order. The Hearing Officer lacked legal authority to make a valid Recommendation. In turn, the Board could not validly rely upon the Recommendation.

1. The Hearing Officer's Handling Of A Matter Is Optional, And Therefore Requires An Affirmative Designation By The Board

In 2010, the General Assembly adopted House Bill 459, which created the full time position of Hearing Officer within the Delaware Department of State. Notably, however, the new law was not self-enforcing. It only permitted the possibility of hearing officers making Case Decisions under Title 29, Chapter 101,

Subchapter III of the Delaware Code. As a result, the provisions of APA Subchapter III govern the procedure for assigning a matter to a hearing officer.

Under APA § 10125(a), the Board had the option to either: 1) conduct Richardson's hearing itself (as it originally planned); or 2) designate a "subordinate" to conduct a hearing. The term "subordinate" means "[a]ny person or persons designated in writing to act on its behalf." 29 *Del. C.* § 10102(8). But the Board never issued any written designation authorizing the Hearing Officer to serve as its subordinate.

The Order never addressed or rebutted the argument that the Board was required to make a formal written appointment of the Hearing Officer to conduct the Evidentiary Hearing. Instead, the Order merely asserted that it was self-evident that the hearing officer may serve as its subordinate. Not so. The Board erred.

29 *Del. C.* § 8735(v) does not designate the Hearing Officer to serve as the exclusive person(s) to conduct evidentiary hearings for Delaware Boards or Commissions regarding case decisions under APA Subchapter III.. The General Assembly only created the position of Hearing Officer in order to have personnel ready and able to serve upon affirmative appointment. The Delaware Code still permits Delaware Boards and Commissions to conduct hearings and render case decisions entirely on their own. They are not required to utilize the services of the Hearing Officer created by § 8735(v). Consequently, the Board's failure to appoint the Hearing Officer as its subordinate renders the process void *ab initio*.

2. The APA And § 8735(v) Must Be Read *In Pari Materia*

Where express reference to a pre-existing statute is made in a new statutory enactment, the two statutes must be read together. *State Farm Mut. Auto Ins. Co. v. Wagamon*, 541 A.2d 557, 560 (Del. 1988). Under the Doctrine of *In Pari Materia*, statutes on the same subject matter may not be construed in isolation but must be read together. *Watson v. Burgan*, 610 A.2d 1364, 1368 (Del. 1992). Consequently, 29 *Del. C.* § 8735(v)(1) must be construed in conjunction with the APA, in order to provide for one harmonious statutory whole.

The Superior Court clearly read § 8735(v) standing alone, without attempting to harmonize it with the pre-existing provisions contained in the APA. By doing so, the Superior Court erred.

Applying the principle of *In Pari Materia* to the case at bar, the APA fills the void contained in § 8735(v) regarding how a hearing officer is actually designated by the Board in order to conduct an evidentiary hearing regarding an alleged violation committed by a licensee. Specifically, the APA indicates that a formal written designation of the hearing officer is necessary in order for the matter to be properly delegated for conduct of an evidentiary hearing. But in the case *sub judice*, the Board failed to designate the Hearing Officer to conduct the Evidentiary Hearing.

Logically, the hearing officer must be appointed somehow, before he or she can be deemed to be granted authority to conduct an evidentiary hearing. The General Assembly did not include any language in § 8735(v) to establish the method by which a hearing

officer is appointed to hear a matter. Obviously, the General Assembly enacted § 8735(v) knowing that it would work in tandem with the already existing provisions of the APA, which require a written designation to be issued by the Board. Accordingly, it is evident that absent formal written appointment of the Hearing Officer to consider Richardson's violation charge, the Hearing Officer lacked legal authority to proceed.

3. Without A Formal Designation, The Hearing Officer Lacked Authority To Conduct The Evidentiary Hearing

The Hearing Officer that made the Recommendation relied upon by the Board in rendering its Order was never validly authorized to act on its behalf. Richardson's Exceptions expressly raised this legal error. The Board erred in this respect. Accordingly, this Court should reverse the Board and require that it conduct a new APA-compliant hearing.

ARGUMENT

III. THE BOARD FAILED TO CONSIDER THE EXCESSIVELY PUNITIVE NATURE OF THE PENALTY AND THE HEARING OFFICER'S FAILURE TO CONSIDER ALL MITIGATING FACTORS

A. Question Presented

Whether the Board's failure to consider the numerous mitigating factors which militated in favor of a less severe penalty for Richardson's single, first offense violation constituted an abuse of its discretion? The issue was preserved in Appellant's Opening Brief at 13-15 and in the Exceptions at 2-3.

B. Standard and Scope of Review

The Standard of Review is set forth in Argument I.B., *supra*.

C. Argument

The Board ignored Richardson's Exceptions to the Recommendation at the Penalty Hearing. The undersigned counsel personally observed numerous Board members spending little to no time reviewing the Exceptions. The Board members were handed the Exceptions just minutes before they took their vote. Accordingly, it is clear beyond *peradventure* that the Board acted arbitrarily and capriciously and abused its discretion.

1. All Mitigating Factors Supporting A Lesser Penalty Were Ignored

The fact that the Board never considered the Exceptions is confirmed by the written Order entered on October 7, 2011. It only discusses one of the points contained in the Exceptions. A-100 to 103. The Order proves that the Board did not consider Richardson's

argument that the 90-day suspension penalty was excessive based on numerous Mitigating Factors.

The Exceptions pointed out that: 1) the single violation was Richardson's First Offense; 2) No Public Health Or Safety Risk resulted; 3) Richardson was charged as Shop Licensee not Cosmetology Licensee; and 4) the violation was no reflection on Richardson's ability to provide cosmetology services. A-87 to 89.

Additionally, the Board failed to consider the fact that the progressive penalty provisions of 24 *Del. C.* § 5114 indicate an intent by the General Assembly to reserve the most severe penalties of license suspension or revocation for more serious violations, multiple violations, or repeat offenders. The Order is devoid of any discussion or analysis of the appropriateness of the Hearing Officer's recommended penalty. Since the Board totally ignored the Mitigating Factors and Richardson's excessive penalty arguments, the Board's adoption of the Recommendation is erroneous.

The Exceptions also included the following points, which were likewise not considered:

"A. The Discipline Ignores The Lack Of Harm To The Public

Third, the Recommendation completely overlooks the purpose and intent behind the requirement that nail technicians be licensed under Title 24, Chapter 51 of the Delaware Code. The objectives of the Board of Cosmetology and Barbering are set forth in 24 *Del. C.* § 5100:

> **The primary objective of the Board of Cosmetology and Barbering, to which all other objectives and purposes are secondary, is to protect the general public (specifically those**

> persons who are direct recipients of services regulated by the subchapters) from unsafe practices, and from occupational practices which tend to reduce competition or artificially fix the prices of services rendered. (emphasis added).

Given the fact that the customers of Sharon Richardson's nail technician services were not at risk given her considerable amount of experience and qualifications to provide such services, the violation of § 5113(a)(7) is of a technical and administrative nature, not a practitioner competence or public safety matter. Consequently, the Recommendation overlooked the primary purpose of the licensure requirement, and therefore failed to properly take into account the less serious nature of the violation.

B. Mr. Richardson Was Not The Shop Owner In 2011

Fourth, the Recommendation fails to take into account that Mr. Richardson was no longer responsible for Sharon Richardson's operation as a nail technician at the shop in 2011. As noted at the hearing, Mr. Richardson is an employee of the new shop owner. Thus, Sharon Richardson's licensure in 2011 was not Mr. Richardson's legal responsibility.

2. Failure To Consider Mitigating Factors Constitutes Arbitrary Decisionmaking *Per Se*; ***No*** Winnowing Or Sifting Process Occurred

The complete and utter failure to consider numerous Mitigating Factors regarding the penalty to be imposed for Richardson's one, first offense violation is arbitrary and capricious and an abuse of discretion. Neither the Hearing Officer nor the Board performed any winnowing or sifting of the Mitigating Factors versus the

Aggravating Factors and the Progressive Nature of Available Penalties regarding Richardson's penalty; the disregard of all Mitigating Factors and the Progressive Statutory Penalty Provision makes that a foregone conclusion. The Order should be reversed on the grounds that the Board failed to consider Richardson's Exceptions regarding the overly severe nature of the 90-day License Suspension.

ARGUMENT

IV. THE SUSPENSION OF LICENSE PENALTY IS BARRED BY THE APA; A LICENSE RETENTION REQUIREMENT WAS NOT VIOLATED

A. Question Presented

Whether the suspension of Richardson's cosmetologist license was permissible where the single violation he committed was in his capacity as Shop licensee, not Cosmetology licensee? The issue was preserved in Appellant's Opening Brief at 15-17.

B. Standard and Scope of Review

The Standard of Review is set forth in Argument I.B., *supra*.

C. Argument

1. The Board Should Have Suspended Richardson's Shop License, Not His Cosmetology License

The penalty of License suspension is prohibited as a matter of law from being imposed upon Richardson under the circumstances of this case. The fact that his violation was committed in his capacity as the registrant for the Shop License, not under the auspices of his Cosmetologist License, precludes the suspension. The Board was only authorized to suspend his Shop License.

The law governing the practice of cosmetology and barbering is contained at Title 24, Chapter 51 of the Delaware Code. That Chapter contains two separate and discreet types of licensure: 1) Cosmetology License: licenses for permission to practice cosmetology, barbering, etc.; and 2) Shop License: licenses for operating a cosmetology shop. A Cosmetology License is required by

24 *Del. C.* § 5103(a). A Shop License is required by 24 *Del. C.* §§ 5103(d) and 5118.

The Board's discipline process is made expressly subject to the APA. 24 *Del. C.* § 5116(a) provides that the notice and hearing procedure shall be in accordance with the APA. In addition, § 5106(a)(9) requires all hearings and orders of the Board to comply with the APA. Further, § 5113(b) states that "[s]ubject to subchapter IV of Chapter 101 of Title 29, no license shall be...suspended...by the Board...until such practitioner has been given notice and an opportunity to be heard in accordance with the Administrative Procedures Act (Chapter 101 of Title 29)."

Subchapter IV of the APA expressly limits the authority of the Board to suspend a cosmetology license to circumstances where "the licensee fails to comply with the lawful requirements for retention of such license." 29 *Del. C.* § 10134. Richardson's failure as a Shop License holder to insure that a tenant of Trilogy Salon was licensed as a nail technician constitutes a violation of the requirements imposed upon him in his capacity as registrant for the Shop License, not as holder of a Cosmetology License. Richardson stipulated that his violation was as the owner of a beauty salon in leasing space to an unlicensed person who was required to have a nail technician license. Consequently, it is evident that Richardson's violation was *qua*-Shop License holder under § 5118, not *qua*-Cosmetologist License holder pursuant to § 5103(a).

The violation committed by Richardson does not establish lack of compliance with the requirements for his retention of a

Cosmetologist License. Operating under a Shop License in conformance with the law is not a prerequisite to retain a Cosmetologist License. The two (2) types of licenses are separate and distinct. The fact that Richardson allowed a nail technician whose license expired to rent space at the Shop License premises violates a requirement for him to retain the Shop License, not his Cosmetology License. Consequently, 29 *Del. C.* § 10134 barred the suspension of Richardson's Cosmetology License.

2. The Board Confused The Two Types Of Licenses

The Board suspended Richardson's Cosmetologist License for 90 days. But the single violation proven was committed in his capacity as registrant for the Shop License. Specifically, Richardson stipulated that:

> As holder of the shop license and registrant for Trilogy Salon, pursuant to 24 *Del. C.* § 5118 knowingly as the owner or operator of Trilogy Salon did lease space or otherwise entered into a contractual relationship with an unlicensed person, Sharon Richardson, required to hold an unrestricted license to practice any of the professions regulated by this Chapter in violation of 24 *Del. C.* § 5113(a)(7). (emphasis added).

The Board erred by suspending the wrong type of license held by Richardson. The holder of a Shop License need not hold a Cosmetology License, and *vice versa*. And a violation *qua* Shop Licensee is not punishable via suspension of a Cosmetology License. Accordingly, the Court should reverse the Board and remand the matter with instructions that any license suspension be limited to Richardson's Shop License.

The limitation of any suspension to Richardson's Shop License is appropriate. No allegation was made against Richardson regarding his ability to provide cosmetology services directly to customers. Instead, the violation established arose from Richardson's administrative oversight as the shop owner/operator. His failure to insure that the lessee nail technician's license was current should not directly impinge upon his ability to make a living as a qualified and untarnished cosmetologist. As a result, the Court should reverse the Board and remand with instructions to impose the suspension solely against Richardson's Shop License.

ARGUMENT

V. THE HEARING OFFICER IS NOT AUTHORIZED TO CONDUCT HEARINGS INVOLVING POTENTIAL LICENSE SUSPENSION

A. Question Presented

Whether the penalty of license suspension is barred under the circumstances where the Hearing Officer is only authorized to conduct proceedings pursuant to Subchapter III of the APA, but only Subchapter IV permits license suspensions? The issue was preserved in Appellant's Opening Brief at 17-18and in the Exceptions at 1-2.

B. Standard and Scope of Review

The Standard of Review is set forth in Argument I.B., *supra*.

C. Argument

The position of hearing officer created by the General Assembly in 2010 is only authorized to conduct hearings involving certain case decisions. The General Assembly did not grant hearing officers the power to conduct disciplinary hearings where the penalty could include suspension or revocation of a license. Consequently, the Hearing Officer was without legal authority to recommend Richardson's license be suspended, and therefore the Board's adoption of such a recommendation is legally invalid.

1. The Hearing Officer May Not Conduct Hearings Involving License Suspensions

The clear and plain language of § 8735(v)(1), which created the position of Hearing Officer, limits the jurisdiction of a hearing officer to "case decisions arising under Title 29, Chapter

101, subchapter III… ." But hearings relating to licensing, including a proposed suspension of license, are governed by Subchapter IV of the APA, 29 *Del. C.* § 10131 *et seq.*

Additionally, the Board's suspension of any type of license is expressly made "[s]ubject to subchapter IV of Chapter 101 of Title 29… ." 24 *Del. C.* § 5113(b). And 24 *Del. C.* §§ 5106(a)(9) and 5116(a) both require that hearings be conducted by the Board in conformance with the APA, which includes Subchapter IV. But the Hearing Officer was only granted APA Subchapter III jurisdiction. Consequently, the Hearing Officer process is not available for proceedings which may result in the Board imposing the sanction of license suspension.

2. Only The Board May Hold Hearings Involving License Suspensions

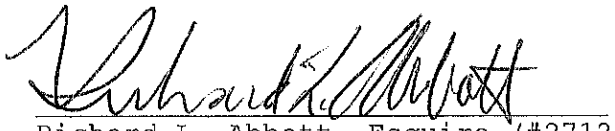
The unambiguous language of 29 *Del. C.* § 8735(v)(1) limits a hearing officer's scope of authority to case decisions under Subchapter III. Because all Board license suspension decisions are subject to Subchapter IV of the APA, however, it is evident that hearing officers are powerless to recommend license suspension and conduct evidentiary hearings which may make such a recommendation.

The portion of the Recommendation which suggests a 90-day license suspension of Richardson's cosmetologist license is an invalid *ultra vires* act; the Board must conduct hearings which result in the imposition of the penalty of license suspension. Accordingly, the Court should reverse the Board's decision on the grounds that it was not based upon a valid recommendation.

CONCLUSION

Based on the foregoing, Appellant Randall Richardson respectfully requests that this Court reverse the Superior Court and the Order of the Board on Cosmetology and Barbering on the grounds that: 1) the Board failed to record its hearing as required by the Administrative Procedures Act; 2) the Board failed to formally appoint the hearing officer in writing as required by the Administrative Procedures Act; 3) the hearing officer Recommendation and Board Order both failed to consider the numerous Mitigating Factors and the Statutory Progressive Penalty Regimen which militated in favor of a far less severe penalty than a 90-day license suspension; 4) the Board could only validly suspend Richardson's Shop License, not his Cosmetology License; and 5) the hearing officer lacked jurisdiction to conduct a hearing under APA subchapter IV.

ABBOTT LAW FIRM



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