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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| 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 REPLY BRIEF

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Dated: December 21, 2012

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### I. THE BOARD'S FAILURE TO TRANSCRIBE OR RECORD ITS PROCEEDINGS IS FATAL TO THE VALIDITY OF ITS DECISION

#### A. The "Hearing" For Purposes Of The Transcript Requirement Includes All Board Proceedings

The Board contends that its September 26, 2011 hearing (the "Penalty Hearing") was not actually a "hearing" at all. Answering Brief at 9.[1] Instead, the Board asserts that it merely conducted a "meeting" at which it affirmed the Hearing Officer's recommendation. *Id.* This is a semantics game which worships form over substance. The Board's position is without merit; it alone has the power to conduct a hearing at which it decides whether Richardson committed a violation, and, if so, the appropriate sanction.

The Board also places heavy reliance upon the Superior Court decision. Answering Brief at 7. The sum total of the Superior Court's reasoning was: 1) a record was made by the Hearing Officer in Step 1 of the hearing process; and 2) the Court was "not persuaded that the law requires the Board to create a record from a verbatim transcript can be prepared of the meeting at which it votes where the Board approves the conclusions and recommendations of the Chief Hearing Officer without modification." *Id.* and *Richardson v. Bd. Of Cosmetology & Barbering*, 2012 WL 3834905, *3, Vaughn, P.J. (Del. Super., Aug. 30, 2012). Given the paucity of legal reasoning and legal authority for the Court's conclusion, the Board's reliance

[1] References herein to "Answering Brief" are to the "Answering Brief Of Appellee Board Of Cosmetology And Barbering" dated December 10, 2012.

upon the Superior Court decision is unavailing. Indeed, proper construction of applicable statutory provisions establishes that the Board's Penalty Hearing is in fact Step 2 of the hearing process.

### 1. The Transcript Requirement Was Not Complied With

It is undisputed that the Board failed to record or transcribe the Penalty Hearing. Thus, this Court lacks a complete record to review on appeal. The Board obviously conducted a "hearing"; it found Richardson in violation and imposed sanctions.

The General Assembly has established that the Board must record a hearing. Specifically, 24 *Del. C.* § 5105(d) provides:

> At any hearing where evidence is presented, such hearing shall be recorded by a court reporter and any stenographic transcript requested shall be at the expense of the party making the request.

The term "hearing" is not expressly defined. *See* 24 *Del. C.* § 5101. Thus, the Court must construe applicable statutory sections to glean the General Assembly's intended meaning of the term.

### 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] it 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 portions of disciplinary proceedings occurring prior to the imposition of specific sanctions or penalties. Consequently, the term "hearing" includes all proceedings conducted before a final decision pursuant to 29 *Del. C.* § 10128.

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" in the context of the stenographic transcript requirement 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.

B. The Hearing Officer's Hearing Is Only Step 1 Of A Two (2) Step Hearing Process

Contrary to the Board's assertion, its proceedings conducted pursuant to 29 *Del. C.* § 8735(v)(1) and the Administrative Procedures Act constitute the final hearing for purposes of the stenographic transcript requirement. Indeed, the Hearing Officer process is merely a recommendation, which must subsequently be reviewed, discussed, and voted upon by the Board in order to conclude the "hearing" for purposes of the discipline process.

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." As a result, the "hearing" does not end at the conclusion of the Hearing Officer's evidentiary hearing.

If the Board modifies the Hearing Officer's recommendation regarding conclusions of law or proposed sanctions, a stenographic

transcript is necessary in order for this Court to properly conduct its review. Thus, it is clear that the Penalty Hearing was subject to the transcript requirement.

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.

C. The Administrative Procedures Act Also Establishes That The Board Failed To Keep A Proper Record; Remand Is Appropriate

The APA also supports the conclusion that the Penalty Hearing constituted a separate component of the "hearing" for transcription purposes. 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 a new Board hearing.

D. The Lack Of A Board Hearing Transcript Severely Prejudices Richardson

A tape recording or stenographic transcript of the Penalty Hearing is essential under the circumstances. Such a record of proceedings would establish that: 1) the Hearing Officer's

recommendation and Richardson's exceptions thereto were not given to the Board until minutes before the Board voted at the Penalty Hearing; 2) Richardson's counsel was denied the opportunity to speak to the Board regarding Richardson's exceptions at the Penalty Hearing; 3) both staff and counsel for the Board failed to give a written or verbal summary of the Hearing Officer's recommendation and Richardson's exceptions to the Board; 4) there was virtually no discussion, debate, or questioning by members of the Board before they voted to conclusorily accept the Hearing Officer's recommendation; and 5) members of the Board simply followed the lead of the Board President, who confirmed her pre-ordained penalty, based upon her personal, subjective belief that anyone that allows unlicensed practice should be severely sanctioned.

Since no transcript of the Penalty Hearing exists, Richardson is denied the opportunity to present critical arguments on appeal. Accordingly, the prejudice caused by the Board's complete and utter failure to abide by the requirement to record or transcribe the Penalty Hearing is grounds for reversal and remand.

## ARGUMENT

### II. THE LAW CLEARLY AND PLAINLY REQUIRED THE BOARD TO REFER THE MATTER TO A HEARING OFFICER IN WRITING

The Board argues that it did not have to take any affirmative action in order to designate the Hearing Officer to conduct the evidentiary hearing regarding the Complaint brought against Richardson. Answering Brief at 12-13. The Board's position is based solely and narrowly on the language contained in 29 *Del. C.* § 8735(v)(1) (the "Hearing Officer Statute"). The Board's position is legally erroneous; it is not based on standard precepts of statutory construction.

Once again, the Board places primary reliance on the conclusory Superior Court decision, which is devoid of rationale. Answering Brief at 11-12. Specifically, the Superior Court stated that "I am not persuaded that the statutes relied upon by the appellant require the Board to make a formal designation of the Chief Hearing Officer to hear the case." *Richardson, supra*. Both the Board and the Superior Court ignored the fact that the Hearing Officer Statute fails to indicate how a hearing officer is designated in the place and stead of the Board, which under 24 *Del. C.* Ch. 51 bears the responsibility to conduct all hearings absent some express indication to the contrary. As a consequence, the Board's position is without merit.

A. The Hearing Officer Statute Only Creates The Position; It Does Not Explain How A Hearing Officer Is Substituted In For The Board To Hold A Hearing

In this case of first impression, the Court is presented with the task of construing the new Hearing Officer Statute. Under the Hearing Officer Statute, the General Assembly created "the full-time position of Hearing Officer." In addition, the General Assembly empowered the Hearing Officer to take certain actions "[w]ith respect to case decisions arising under Title 29, Chapter 101, subchapter III." The Hearing Officer is authorized to conduct evidentiary hearings and issue written findings of fact, recommended conclusions of law, and a recommended penalty. Nowhere in the Hearing Officer Statute, however, did the General Assembly provide a procedure for the referral of matters from State Boards and Commissions to a Hearing Officer.

Generally, the Board is tasked with conducting all disciplinary hearings. Pursuant to 24 *Del. C.* § 5116, the Board is mandated by the General Assembly to conduct a hearing based upon a complaint filed with it. No language in the Hearing Officer Statute provides that disciplinary Complaints filed with the Board are automatically referred to the Hearing Officer. Thus, the Board had to affirmatively designate the Hearing Officer to conduct an evidentiary hearing on the Complaint filed against Richardson. But the Board did not. As a consequence, the Hearing Officer lacked legal authority to conduct the evidentiary hearing, and all proceedings based thereon are therefore invalid.

B. Reference To The Administrative Procedures Act Is Required To Fill The Gap In The Hearing Officer Statute

Since the Hearing Officer Statute is devoid of any reference to a referral procedure, the APA must be looked to for guidance. Indeed, the Courts regularly read related statutes in *pari materia* in order to make one harmonious whole of the entire statutory framework. Because the APA is expressly referenced in the Hearing Officer Statute, the two statutes must be read together. *State Farm Mut. Auto. Ins. Co. v. Wagamon*, 541 A.2d 557, 560 (Del. 1988).

The Hearing Officer Statute expressly states that proceedings shall be conducted in conformance with subchapter III of the APA. And the General Assembly's delegation of authority for the Board to conduct disciplinary hearings is conditioned upon compliance with all requirements of the APA. 24 *Del. C.* § 5106(9) and § 5116(a).

Under the APA, the Board was empowered to authorize third parties like the Hearing Officer to consider the Complaint against Richardson as its "subordinate designated for that purpose." 29 *Del. C.* § 10125(a). But in order for the Hearing Officer to be designated as the Board's "subordinate," he must have been "designated in writing to act on its behalf." 29 *Del. C.* § 10102(8)(b). All the Board had to do was: 1) approve a motion at a public meeting designating the Hearing Officer to conduct evidentiary hearings like Richardson's; and 2) have the Board President send a confirming letter to the Hearing Officer. But the Board failed to do so. Consequently, all proceedings are void *ab initio*.

The Hearing Officer Statute merely creates the dormant position of Hearing Officer and establishes its parameters. A Hearing Officer is only pressed into action by the affirmative referral of a Complaint by a State Board or Commission. Because the Board failed to formally designate the Hearing Officer to hear the Complaint against Richardson, the entire process is void as violative of the APA.

## ARGUMENT

### III. THE BOARD IGNORED RICHARDSON'S EXCEPTIONS, INCLUDING NUMEROUS MITIGATING FACTORS; IT MERELY RUBBER-STAMPED THE HEARING OFFICER'S ERRONEOUS RECOMMENDATION

The Board contends that the Court must conclude that it considered Richardson's exceptions merely because it says so. Answering Brief at 14 & 17. Not so. Instead, the Court should consider the evidence presented by Richardson's counsel, which establishes beyond *peradventure* that the Board did not consider Richardson's exceptions.

Yet again, the Board relies primarily upon the Superior Court's conclusory decision. Answering Brief at 15. But the Superior Court expended just one (1) unsupported sentence in deciding the issue: "The Chief Hearing Officer fully explained the reasons for his recommended discipline and they are supported by substantial evidence." *Richardson, supra.* at *3. Accordingly, reliance upon the Superior Court's decision is of no aid to the Board's cause.

#### A. Neither The Hearing Officer Recommendation Nor The Board Considered Any Mitigating Factors Which Militated In Favor Of A Less Severe Sanction

The Board alleges that the Hearing Officer impliedly rejected the mitigating penalty factors presented by Richardson since the Hearing Officer did not recommend a less severe sanction. Answering Brief at 15-16. The dislogic of this posit is evident. Because the recommendation does not mention the mitigating factors, it is only

logical to conclude that the Hearing Officer failed to consider them. Such an oversight is a fatal legal error.

The Hearing Officer's recommendation fails to mention any of the numerous mitigating factors presented by Richardson, which would have supported a sanction of no more than probation and a fine. Richardson committed one, single violation. This was Richardson's First Offense in 18+ years of licensure. The violation occurred in his capacity as shop licensee, not *qua* cosmetologist licensee. No risk of public harm existed; Sharon Richardson had decades of experience as a nail technician and was a long-term nail technician licensee.

The Hearing Officer and the Board ignored these critical Mitigating Factors. Instead, they focused solely on one aggravating factor: the long period of time (years) Sharon Richardson's license was expired. The end result was an overly severe, draconian penalty of cosmetology license suspension for 90 days. This has a real and significant effect on Richardson: he will not be able to work for months, losing tens of thousands of dollars in income. It is virtually self-evident that such a harsh penalty simply does not "fit the crime." Accordingly, reversal is warranted.

The Board President drove the Board's decision by emphasizing her subjective, pre-determined opinion that Richardson should be severely punished.[2] The Board's Order should be reversed.

[2] Of course, the Court does not have the transcript from the Penalty Hearing. But Richardson's counsel is an officer of the Court, and has represented what transpired.

B. The Board Effectively Concedes That The Hearing Officer Overlooked The Fundamental Purpose Of The Cosmetology Act

In its Answering Brief, the Board notes that the primary objective of the Board "is to protect the public from unsafe practices." Answering Brief at 16. This is consistent with 24 *Del. C.* § 5100, which expressly states that "[t]he 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… ." Both the Hearing Officer and the Board, however, ignored the fact that Richardson's violation did not involve any threat to public health and safety.

Sharon Richardson spent decades working as a nail technician before licensing was even required. Once licensing was instituted, Sharon Richardson became a licensed nail technician. Unfortunately, she allowed her license to lapse, but thereafter renewed her license and is today a validly licensed nail technician in the State of Delaware. Since the primary purpose of the Cosmetology Act was not effected by Richardson's single, first offense violation, a 90-day license suspension far exceeds the progressive penalty regimen of 24 *Del. C.* § 5114.

## ARGUMENT

### IV. THE SUSPENSION OF RICHARDSON'S COSMETOLOGIST LICENSE FOR A VIOLATION COMMITTED IN HIS CAPACITY AS BEAUTY SALON LICENSEE IS ERRONEOUS

The Board contends that Richardson generally admitted he violated 24 *Del. C.* § 5113(a)(7). Answering Brief at 19. This contention is false. As a result, the Board's position is clearly erroneous.

Additionally, the Board once more leans heavily on the Superior Court decision. Answering Brief at 19. That decision, however, yet again contains nothing but a conclusory statement which is lacking in legal reasoning. Instead, the Superior Court merely states that after a review of cited statutes it does not accept Richardson's position. *Richardson, supra*. at *3. Consequently, the Board's reliance on the Superior Court is without legal merit.

#### A. Richardson Only Admitted To A Violation In His Capacity As Shop Licensee, Which Is Legally Distinct From His Cosmetology License

Contrary to the Board's assertion, Richardson admitted that "as holder of the shop license and registrant for Trilogy Salon," he committed a violation "as the owner or operator of Trilogy Salon." Specifically, Richardson stipulated that:

> [a]s 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).

A-36 to 37. Richardson did not stipulate that he violated any law in his capacity as a licensed cosmetologist under 24 *Del. C.* § 5111. The two licenses are separate and distinct, and are required by different statutory provisions.

An owner or operator of a beauty salon can obtain a shop license pursuant to 24 *Del. C.* § 5118. A person may obtain a cosmetology license pursuant to 24 *Del. C.* § 5111. A cosmetologist licensed under § 5111 may, as Richardson did, obtain a shop license under § 5118. But the two types of licenses are mutually exclusive; a shop licensee under § 5118 need not likewise be a licensed cosmetologist under § 5111, and *vice versa*. Anyone may be a beauty salon shop owner/licensee.

B. A Shop License Violation Is Not Grounds For A Cosmetology License Suspension

The mere fact that Richardson, the Trilogy Salon shop licensee/registrant, also happened to coincidentally be a licensed cosmetologist does not provide legal grounds to suspend his cosmetology license. Instead, any license suspension penalty should have been imposed against his Trilogy Salon shop license. The offense Richardson was found to have committed occurred solely in his capacity as the Trilogy Salon shop licensee pursuant to § 5118, not in his capacity as a cosmetologist licensee under § 5111.

The record establishes that the sole violation committed by Richardson was in his role as shop licensee, not cosmetologist licensee. The only finding was that Richardson committed an administrative violation as owner/operator of Trilogy Salon, not as

a cosmetologist providing services directly to customers. Consequently, the Court should reverse the Board and remand with instructions to impose any license suspension solely against Richardson's shop license, not his license to practice cosmetology.

### C. Cited Board Regulations Do Not Apply; The Nail Technician Was Not An Employee

Finally, the Board's reliance upon Board Regulations 9.1 and 9.2 is misplaced. *See* Answering Brief at 19. The quoted language regarding each Regulation clearly states that the provisions apply solely to: 1) "employees"; and 2) one who "employs." The record establishes Richardson did not employ the nail technician, but instead leased space to her.

Richardson stipulated that he "did lease space or otherwise entered into a contractual relationship," not that he "employed." Thus, the two Regulations are inapplicable. As a result, the Board's argument lacks any legal merit.

## ARGUMENT

### V. THE STATUTORY LANGUAGE ESTABLISHES THAT THE HEARING OFFICER CANNOT CONDUCT HEARINGS WHICH MAY INVOLVE THE SUSPENSION OF A LICENSE

The Board contends that Richardson's argument that the Hearing Officer lacks authority to consider disciplinary matters which may result in license suspension is an attempt to rely upon statutory headings rather than substantive language. Answering Brief at 21-22. Richardson makes no such argument. Instead, Richardson argues that the statutory language itself fails to delegate authority to the Hearing Officer to consider a matter involving a license suspension. Accordingly, the Board's argument lacks merit.

Not surprisingly, the Board's primary support for its opposition to Richardson's argument is the Superior Court decision. Answering Brief at 22. Once again, however, the Superior Court decision is wholly conclusory, contending that: 1) APA Subchapter IV is not the exclusive procedure for discipline concerning licenses; and 2) APA Subchapter III can be read to govern the procedures in the instant action. *Richardson, supra.* at *3. Therefore, there is no reasoning in the Superior Court decision upon which the Board may rely to rebut Richardson's legal argument.

The Board fails to respond to Richardson's argument that the Hearing Officer was not delegated authority to make recommendations involving Case Decisions under subchapter IV of the APA. That is probably because Richardson's argument is irrefutable; the position of Hearing Officer is only authorized by 29 *Del. C.* § 8735(v)(1) to make recommendations and findings of fact "[w]ith respect to case

decisions arising under Title 29, Chapter 101, subchapter III." But hearings regarding potential license suspensions are governed by subchapter IV of Title 29, Chapter 101.

Notably, the Board's power to discipline licensees in the form of a license suspension is made expressly "[s]ubject to subchapter IV of Chapter 101 of Title 29… ." 24 *Del. C.* § 5113(b). But the Hearing Officer is only vested with authority to conduct hearings pursuant to APA subchapter III. The APA unambiguously establishes that "[h]earings relating to licenses," including "wherever an agency proposes to…suspend…a license…," are governed by APA subchapter IV regarding "Licenses." 29 *Del. C.* § 10131. Accordingly, only the Board possessed legal authority to conduct Richardson's hearing.[3]

If the General Assembly wished to delegate authority to the Hearing Officer to conduct hearings that might involve a license suspension, then it had the ability to do so by either eliminating reference to "subchapter III" or by adding reference to "subchapter IV" in § 8735(v)(1). But it failed to do so. Thus, the General Assembly's obvious intent was to limit the types of disciplinary matters that a Hearing Officer could hear, to the exclusion of charges which might result in suspension of a license. As a consequence, the Board's Order is legally invalid.

[3] One could argue that the Board only needed to conduct the Penalty Hearing, and that the Hearing Officer could conduct the Evidentiary Hearing. But then the Board erred in not recording or transcribing the Penalty Hearing, which is fatal to its decision.

## CONCLUSION

Based on the foregoing, Appellant Randall Richardson respectfully requests that this Court reverse the decisions of the Superior Court and the Board and/or remand the matter for further proceedings consistent with its decision. The Board failed to make a recording or transcript of the Penalty Hearing, preventing this Court from being able to conduct judicial review. In addition, the procedure improperly included a hearing by a Hearing Officer who was not properly designated in writing by the Board, and who lacked authority to consider a matter that might result in license suspension. Further, both the Hearing Officer and the Board failed to consider numerous Mitigating Factors which militated in favor of a lesser sanction for the single, first offense, technical violation. Lastly, the Board improperly suspended Richardson' Cosmetologist License, despite the fact that the sole violation stipulated to was committed in his capacity as Shop Licensee. For these reasons, the Court should reverse the Board and/or remand the matter to the Board for a new hearing.

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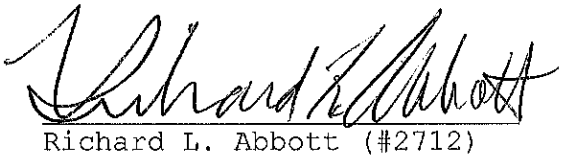

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