



IN THE SUPREME COURT OF THE STATE OF DELAWARE

RANDALL RICHARDSON, : C. A. No.: 536, 2012
: :
Appellant, : :
: : SUPERIOR COURT OF THE STATE
: : OF DELAWARE
V. : : IN AND FOR KENT COUNTY
: : C. A. No.: K11A-09-009 JTV
BOARD OF COSMETOLOGY AND : :
BARBERING, : :
: :
Appellee. : :

**CORRECTED ANSWERING BRIEF OF
APPELLEE BOARD OF COSMETOLOGY AND BARBERING**

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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NATURE AND STAGE OF PROCEEDING

Randall Richardson ("Richardson") is the Appellant in this matter. The Delaware Board of Cosmetology and Barbering ("Board") is the Appellee.

On June 6, 2011, the Chief Hearing Officer of the Division of Professional Regulation conducted a hearing on the allegations made in the State's formal complaint. On June 15, 2011, the Chief Hearing Officer issued his 15-page written Recommendation to the Board containing his findings of fact, conclusions of law, and recommended penalty.

On June 29, 2011, Richardson submitted to the Board his written Exceptions to the Chief Hearing Officer's Recommendation.

On September 26, 2011, at its regularly scheduled meeting, the Board considered the Recommendation of the Chief Hearing Officer and Richardson's Exceptions. Following public deliberations the Board unanimously affirmed the conclusions of law and penalty recommended by the Chief Hearing Officer.

On September 26, 2011, prior to the Board issuing its written Order, Richardson filed his appeal of the Board's Order. On September 27, 2011, prior to the Board issuing its written Order, the Superior Court granted Richardson's Motion to Stay the Discipline of the Board.

On October 7, 2011, the Board issued an Order adopting the findings of facts, conclusion of law, and discipline recommendation of the Chief Hearing Officer. The Board suspended Richardson's cosmetology license for 90 days followed by probation for one year. The Board also ordered Richardson to pay a civil penalty in the amount

of \$750.

On August 30, 2012, the Superior Court affirmed the decision of the Board. *Richardson v. Board of Cosmetology & Barbering*, 2012 WL 3834905 (Del. Super. St. August 30, 2012)

Richardson filed his Opening Brief on November 13, 2012. This is the Board's Answering Brief.

SUMMARY OF ARGUMENT

- I. REVERSAL IS WARRANTED DUE TO LACK OF A COMPLETE BOARD HEARING RECORD TO REVIEW

RESPONSE: Denied. A complete record was made of the proceedings below such that reversal is not warranted.

- II. THE BOARD FAILED TO APPOINT THE HEARING OFFICER; THE PROCEDURE WAS INVALID

RESPONSE: Denied. The hearing officer was properly designated to hear the matter below pursuant to the provisions of 29 Del.C. § 8735 and Chapter 101 of Title 29 such that the procedure was not 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.

RESPONSE: Denied. The penalty imposed by the Board and affirmed by the Superior Court was appropriate for Richardson's ongoing violation of the law in permitting his wife to work as an unlicensed nail technologist in his salon for seven years in violation of 24 Del.C. § 5113(a) (7).

- IV. THE ADMINISTRATIVE PROCEDURES ACT BARS THE PENALTY OF COSMETOLOGIST LICENSE SUSPENSION UNDER THE CIRCUMSTANCES.

RESPONSE: Denied. Pursuant to the provisions of 24 Del.C. §§ 5114 and Chapter 51 of Title 24, the suspension imposed by the Board and affirmed by the Superior Court was authorized and appropriate for Richardson's ongoing violation of the law in permitting his wife to work as an unlicensed nail technologist in his salon for seven years in violation of 24 Del.C. § 5113(a) (7).

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

RESPONSE: Denied. Pursuant to the provisions of 29 *Del.C.* § 8735(v)(1), the Chief Hearing Officer was authorized to conduct this hearing.

STATEMENT OF FACTS

At the hearing before the Chief Hearing Officer, the parties submitted a signed Stipulation of Facts which included the following:

1. During all relevant times, Richardson was the owner, operator and manager of the Trilogy Salon and Day Spa ("Trilogy") in Newark;

2. During all relevant times, Richardson was the licensee and registrant for Trilogy;

3. Richardson had been licensed as a cosmetologist since 1993;

4. Richardson's wife, Sharon Richardson, leased space in and worked at Trilogy as a nail technician between 2002 and 2008 and between December 31, 2010 and March 9, 2011 when she did not have an active license from the Board to offer or perform nail technician services;

5. In 2008, Richardson was specifically advised by the investigator from the Division of Professional Regulation that Sharon Richardson did not have a license to perform services as a nail technician;

6. Richardson violated the provisions of 24 DeL.C. § 5113(a)(7) in that he knowingly leased space to an unlicensed person, Sharon Richardson, to perform nail technician services at Trilogy. (A-35-37)¹

As is evident from Richardson's Opening Brief, the facts in this case and the Chief Hearing Officer's Findings of Fact are not in dispute.

¹ All references to "A" are to pages contained in Appellant Richardson's Appendix filed with his Opening Brief.

ARGUMENT I

I. THE RECORD BELOW IS ADEQUATE FOR THE COURT TO DETERMINE THAT THE BOARD DID NOT ERR AS A MATTER OF LAW OR ABUSE ITS DISCRETION IN FINDING THAT RICHARDSON VIOLATED 24 DEL.C. § 5113(a) (7) AND IN IMPOSING DISCIPLINE

Question Presented

Was the record below complete such that reversal is not warranted? The Board preserved this issue on appeal in the Answering Brief filed with the Superior Court at pages 4 through 7.

Scope of Review

"On appeal from a decision of an administrative agency the reviewing court must determine whether the agency ruling is supported by substantial evidence and is free from legal error." *Stoltz Management Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992), citing *State, Dept. of Labor v. Medical Placement Services, Inc.*, 457 A.2d 382, 383 (Del. Super. Ct. 1982), *aff'd*, 467 A.2d 454 (Del. 1983) (See also, 29 Del.C. § 10142(d)) "Substantial evidence is more than a scintilla and less than a preponderance." *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981). The Court does not weigh the evidence, determine credibility or draw its own factual findings or conclusions. Rather the Court determines "if the evidence is legally adequate to support the Board's factual findings." *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965) If there is substantial evidence and no mistake of law, the Board's decision must be affirmed. *City of Newark v. Unemployment Ins. Appeal Bd.*, 802 A.2d 318, 323 (Del. Super. Ct. 2002)

Merits of Argument

Pursuant to the provisions of 29 Del.C. § 8735(t)(1)(d), "the findings of fact made by a hearing officer on a complaint are binding upon the board..." Richardson has not appealed the Board's decision concerning the findings of fact made by the Chief Hearing Officer. Accordingly, the Board does not present any argument concerning the findings of fact.

Richardson based all of his arguments on appeal on his contention that the process below was flawed. His first contention was that the record below was inadequate for this Honorable Court to determine if the Board erred as a matter of law or abused its discretion in finding that he violated the provisions of 24 Del.C. § 5113(a)(7) because there was no transcript or record of the Board's "hearing" on September 26, 2011. Richardson's argument is without merit.

Richardson's first contention was rejected by the Superior Court who found that "a complete record was made before the Chief Hearing Officer." *Richardson v. Board of Cosmetology & Barbering*, 2012 WL 3834905 *2 (Del. Super. Ct. August 30, 2012) As noted by the Court, included in the record was "a transcript of the testimony taken, exhibits received, and the Chief Hearing Officer's fifteen page findings, conclusions and recommendations." *Id.* The Court found "that the record created by the Chief Hearing Officer satisfies the requirements of making a record." *Id.* The Court was "not persuaded that the law requires the Board to create a record from which 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.*

As explained by the Board in its Order, subsection (t)² of 29 Del.C. § 8735 which became effective on September 1, 2010, provided as follows:

(t)(1) There is hereby created within the Department of State the full-time position of hearing officer. With respect to case decisions arising under Title 29, Chapter 101, subchapter III, the hearing officers shall have:

a. All powers and duties conferred or imposed upon such hearing officers by law or by the Rules of Procedure for any board or commission under Titles 23, 24, and 28;

b. The power to administer oaths and affirmations;

c. The power to hear and determine any prehearing matter pending before any board or commission under Titles 23, 24, and 28. In such circumstances, the hearing officer's decision has the same authority as a decision of the board or commission and is subject to judicial review on the same basis as a decision of the board or commission;

d. The power to conduct hearings, including any evidentiary hearings. The testimony or evidence so taken or received shall have the same force and effect as if taken or received by the board or commission. Upon completion of such hearing or the taking of such testimony and evidence, the hearing officer shall submit to the board or commission findings and recommendations thereon. The findings of fact made by a hearing officer on a complaint are binding upon the board or commission. The board or commission may not consider additional evidence. When the proposed order is submitted to the board or commission, a copy shall be delivered to each of the other parties, who shall have 20 days to submit written exceptions, comments and arguments concerning the conclusions of law and recommended penalty. The board or commission shall make its final decision to affirm or modify the hearing officer's recommended conclusions of law and proposed sanctions based upon the written record.

² Subsection (t) now appears as Subsection (v) following the July 27, 2012 amendment of the statute. 78 Del. Laws, c. 376, § 7

(2) Hearing officers shall be appointed by the Secretary of State and shall serve for a term of 5 years; provided however, that the initial hearing officers may be appointed to terms shorter than 5 years, but not less than 3 years, to ensure staggered term expirations. Appointees shall be residents of the State, shall be duly admitted to practice law before the Supreme Court of this State and shall not engage in the practice of law nor any business, occupation or employment inconsistent with the expeditious, proper and impartial performance of their duties. Individuals appointed as hearing officers under this section shall take the oath or affirmation prescribed by Article XIV, § 1 of the Delaware Constitution before they enter upon the duties of their office.

29 Del.C. § 8735 (A-101-102)

Section 8735(t)(1)(d) of Title 29 mandated that the "board or commission shall make its final decision to affirm or modify the hearing officer's recommended conclusions of law and proposed sanctions based upon the written record." In this case, the Board did not conduct a "hearing" on September 26, 2011. Rather, during its regularly scheduled meeting, the Board considered the 15-page written Recommendation of the Chief Hearing Officer and Richardson's 5-page written Exceptions. Following public deliberations, the Board unanimously affirmed the Chief Hearing Officer's conclusions of law and imposed the recommended penalty. On October 7, 2011, the Board issued its 4-page written Order. (A-103)

Without providing any legal precedent, Richardson maintained that the September 26 meeting was a "hearing" such that a "verbatim transcript" was required pursuant to 29 Del.C. § 10125(d). Richardson was incorrect as the § 10125 "hearing" was conducted by the Chief Hearing Officer on June 6, 2011. The only proceeding before the Board on September 26 was the review of and deliberation on the Chief

Hearing Officer's Recommendation and Richardson's Exceptions. As a hearing was not conducted on September 26, the proceedings were not required to be recorded or transcribed.

Under the *Delaware Administrative Act*, the record for case decisions must include: "all notices, correspondence between the agency and the parties, all exhibits, documents and testimony admitted into evidence and all recommended orders, summaries of evidence and findings and all interlocutory and final orders of the agency..." 29 *Del.C.* § 10127 As the deliberations of the Board members are not part of the record, deliberations are not recorded.

In its Order of October 7, 2011, the Board set forth the basis for affirming the conclusions of law and recommended penalty of the Chief Hearing Officer. The Board's 4-page Order and the Chief Hearing Officer's 15-page Recommendation provided an adequate record for the Superior Court and this Honorable Court to determine that the Board did not err as a matter of law or abuse its discretion in this case. As Board did not err as a matter of law or abuse its discretion, the Board's decision should be affirmed. *Stoltz Management Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992) (Cites omitted)

ARGUMENT II

II. THE BOARD WAS NOT REQUIRED TO FORMALLY APPOINT THE CHIEF HEARING OFFICER TO CONDUCT THE HEARING SUCH THAT THE BOARD DID NOT ERR AS A MATTER OF LAW OR ABUSE ITS DISCRETION IN FINDING THAT RICHARDSON VIOLATED 24 DEL.C. § 5113(a) (7) OR IN IMPOSING DISCIPLINE

Question Presented

Was the hearing officer properly designated to hear the matter below pursuant to the provisions of 29 Del.C. § 8735 and Chapter 101 of Title 29? The Board preserved this issue on appeal in the Answering Brief filed with the Superior Court at pages 7 and 8.

Scope of Review

"On appeal from a decision of an administrative agency the reviewing court must determine whether the agency ruling is supported by substantial evidence and is free from legal error." *Stoltz Management Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992), citing *State, Dept. of Labor v. Medical Placement Services, Inc.*, 457 A.2d 382, 383 (Del. Super. Ct. 1982), *aff'd*, 467 A.2d 454 (Del. 1983). (See also, 29 Del.C. § 10142(d)) "Substantial evidence is more than a scintilla and less than a preponderance." *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981). The Court does not weigh the evidence, determine credibility or draw its own factual findings or conclusions. Rather the Court determines "if the evidence is legally adequate to support the Board's factual findings." *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965) If there is substantial evidence and no mistake of law, the Board's decision must be affirmed. *City of Newark v. Unemployment Ins. Appeal Bd.*, 802 A.2d 318, 323

(Del. Super. Ct. 2002)

Merits of Argument

Richardson next contended that the "Board erred in failing to take the necessary procedural step to formally appoint the Hearing Officer to consider Richardson's charges." (Opening Brief at 18) The Superior Court rejected Richardson's second contention. As there is no provision in Title 29, Title 24, or any other section of the Delaware Code requiring a Title 24 Board to "formally appoint" a hearing officer, Richardson's argument is without merit.

As explained by the Superior Court:

[t]he statute creating the office of Chief Hearing Officer and describing his powers and authority does not contain any requirement that the hearing officer be formally designated to hear the case...[and]...appears to give the Chief Hearing Officer broad authority to conduct hearings for boards and commissions."

Richardson v. Board of Cosmetology & Barbering, 2012 WL 3834905

*2 (Del. Super. Ct. August 30, 2012)

In the absence of a statutory requirement, the Court held that the administrative process designating the Chief Hearing Officer to hear a case did not require a document formally assigning the case to the Chief Hearing Officer. *Id.*

In § 8735(t)(1)(d), the General Assembly granted hearing officers appointed by the Secretary of State, "the power to conduct hearings, including any evidentiary hearings. The testimony or evidence so taken or received shall have the same force and effect as if taken or received by the board or commission." 29 Del.C. § 8735(t)(1)(d)

Delaware Courts have long held that "[u]nless a legislative intent to have a statute read in a certain manner is ascertainable from other parts of a statute, courts proceed with great caution in supplying omissions therein." *Wilmington Trust Co. v. Barry*, 338 A.2d 575, 578 (Del. Super. Ct. 1975) (Cites omitted) "Words will not be added except to conform to the obvious intent of the Legislature and cannot be added when the words may have been purposely omitted from the statute." *Jacobs v. Metropolitan Life Ins. Co.*, 1 A.2d 601, 603 (Del. Super. Ct. 1937) "In the absence of any ambiguity, the language of the statute must be regarded as conclusive of the General Assembly's intent. The judicial role is then limited to an application of the literal meaning of the words." *State v. Cooper*, 575 A.2d 1074, 1076 (Del. 1990)

Richardson has not pointed to any ambiguity in 24 Del.C. § 8735 but merely contended that the wording of § 10125(a) of Title 29 required formal appointment of the Chief Hearing Officer by the Board. As explained by the Board in its Order, "[a]ccording to generally accepted principles of statutory construction, to the extent of any conflict, the more specific, later-enacted statute controls. See *State v. Fletcher*, 974 A.2d 188, 193 (Del. 2009)." (A-102) Therefore, if there was a conflict between 29 Del.C. § 10125 which was last amended in 1980, and 24 Del.C. § 8735(t) which was enacted in 2010, the provisions of § 8735(t) would control because it was enacted thirty years after § 10125. However, there is no conflict between § 10125 and § 8735(t) requiring the Court to interpret the statutes.

In addition, there is no requirement, express, implied, or inferred that a hearing officer must be appointed by a board to conduct a hearing. Rather, the language of § 8735(t)(2) is clear and unambiguous as "[h]earing officers shall be appointed by the Secretary of State." In this case, as the Secretary of State, not the Board, duly appointed the Chief Hearing Officer, the Board did not err as a matter of law or abuse its discretion and the Board's decision should be affirmed. *Stoltz Management Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992) (Cites omitted)

ARGUMENT III

II. THE BOARD DID NOT IGNORE RICHARDSON'S EXCEPTIONS AND DID NOT ERR AS A MATTER OF LAW OR ABUSE ITS DISCRETION IN FINDING THAT RICHARDSON VIOLATED 24 DEL.C. § 5113(a)(7) OR IN IMPOSING DISCIPLINE

Question Presented

Was the penalty imposed by the Board and affirmed by the Superior Court appropriate in light of any alleged mitigating factors for Richardson's ongoing violation of the law in permitting his wife to work as an unlicensed nail technologist in his salon for seven years in violation of 24 Del.C. § 5113(a)(7)? The Board preserved this issue on appeal in the Answering Brief filed with the Superior Court at pages 9 through 11.

Scope of Review

"On appeal from a decision of an administrative agency the reviewing court must determine whether the agency ruling is supported by substantial evidence and is free from legal error." *Stoltz Management Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992), citing *State, Dept. of Labor v. Medical Placement Services, Inc.*, 457 A.2d 382, 383 (Del. Super. Ct. 1982), *aff'd*, 467 A.2d 454 (Del. 1983). (See also, 29 Del.C. § 10142(d)) "Substantial evidence is more than a scintilla and less than a preponderance." *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981). The Court does not weigh the evidence, determine credibility or draw its own factual findings or conclusions. Rather the Court determines "if the evidence is legally adequate to support the Board's factual findings." *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965) If there is substantial

evidence and no mistake of law, the Board's decision must be affirmed. *City of Newark v. Unemployment Ins. Appeal Bd.*, 802 A.2d 318, 323 (Del. Super. Ct. 2002)

Merits of Argument

Richardson next contended that the Board ignored his Exceptions to the Chief Hearing Officer's Recommendation despite the Board's express statement in the October 7, 2011 written Order that, "the Board reviewed and deliberated on the Recommendation and Richardson's Exceptions." (A-100-101)

In addition, the Chief Hearing Officer clearly stated in his Recommendation that he considered and rejected Richardson's arguments as to alleged mitigating factors. The Chief Hearing Officer noted that counsel for Richardson argued that the penalty should reflect a number of alleged mitigating factors and requested a recommendation to the Board that Richardson "be assessed a \$500 monetary fine and be placed on one year's probation with no special conditions." (A-77)

The Superior Court rejected Richardson's contention that the Board failed to consider the allegedly excessive nature of the penalty and that the Board and Chief Hearing Officer failed to consider all mitigating factors. The Court held that Richardson's contention was "not supported by the record..." as the Chief Hearing Officer "fully explained the reasons for his recommended discipline and they are supported by substantial evidence." *Richardson v. Board of Cosmetology & Barbering*, 2012 WL 3834905 *3 (Del. Super. Ct. August 30, 2012)

The Chief Hearing Officer considered and addressed counsel's arguments that Richardson had been a licensed cosmetologist for 18 years, that this was his first violation, that he would not be a "repeat violator" as he no longer operated Trilogy, that there was no risk to the public health, and that the violation did not reflect on his skills and abilities as a cosmetologist. (A-77)

The Chief Hearing Officer concluded as a matter of law that because Richardson had been licensed as a cosmetologist for 18 years, he was well aware that licenses must be renewed biennially and that his wife, Sharon Richardson, could not practice as a nail technician when she did not have a valid license. The Chief Hearing Officer stated that "the focus of this case is the capacity in which [Richardson] was working at Trilogy during the investigation of this matter, and not his status today." (A-85) The Chief Hearing Officer found that Richardson's conduct in allowing his wife to work at Trilogy for seven years without a license was not a mistake or oversight. Rather, he found that, "[t]he egregious length of time during which his spouse was engaged in unlicensed practice suggests a pattern of noncompliance with state law which [Richardson] had approved. (A-84-85)

As stated by the Chief Hearing Officer, the primary objective of the Board "is to protect the public from unsafe practices" and one of the purposes of the Board "is to maintain minimum standards of practitioner competency and to maintain standards in the delivery of services to the public. 24 Del.C. § 5100." (A-80) In permitting his unlicensed wife to work in his salon without a license for seven

years, Richardson "acted cavalierly in regard to his clear legal obligations." (A-84) Unlicensed practice is a violation of 24 Del.C. § 5103 and Richardson admitted that his conduct in permitting his unlicensed wife to work at his salon violated § 5113(a)(7).

Richardson contended that suspension of his license for 90 days was "overly severe." The Chief Hearing Officer explained that in his opinion, "the imposition of discipline by professional boards in Delaware should be proportional." (A-82) He noted that under the unique circumstances of this case, "the prolonged nature of the offense and the actions (or inactions)" of Richardson and his cavalier regard to his clear legal obligations warranted a suspension. (A-83-84)

After reviewing the Recommendation and Richardson's Exceptions, the Board found "that the Chief Hearing Officer's Recommendation is not contrary to state or federal law or regulation, and is supported by substantial evidence, and is not arbitrary or capricious." (A-103) Therefore, the Board affirmed the Chief Hearing Officer's conclusions of law and imposed the recommended 90-day suspension. (A-103)

As the Board did not err as a matter of law or abuse its discretion, the Board's decision should be affirmed. *Stoltz Management Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992) (Cites omitted)

ARGUMENT IV

IV. THE BOARD DID NOT ERR AS A MATTER OF LAW OR ABUSE ITS DISCRETION IN SUSPENDING RICHARDSON'S COSMETOLOGY LICENSE

Question Presented

Was the penalty of suspension imposed by the Board and affirmed by the Superior Court authorized and appropriate for Richardson's ongoing violation of the law in permitting his wife to work as an unlicensed nail technologist in his salon for seven years in violation of 24 Del.C. § 5113(a)(7)? The Board preserved this issue on appeal in the Answering Brief filed with the Superior Court at pages 11 and 12.

Scope of Review

"On appeal from a decision of an administrative agency the reviewing court must determine whether the agency ruling is supported by substantial evidence and is free from legal error." *Stoltz Management Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992), citing *State, Dept. of Labor v. Medical Placement Services, Inc.*, 457 A.2d 382, 383 (Del. Super. Ct. 1982), *aff'd*, 467 A.2d 454 (Del. 1983). (See also, 29 Del.C. § 10142(d)) "Substantial evidence is more than a scintilla and less than a preponderance." *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) The Court does not weigh the evidence, determine credibility or draw its own factual findings or conclusions. Rather the Court determines "if the evidence is legally adequate to support the Board's factual findings." *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965) If there is substantial evidence and no mistake of law, the Board's decision must be affirmed.

City of Newark v. Unemployment Ins. Appeal Bd., 802 A.2d 318, 323

(Del. Super. Ct. 2002)

Merits of Argument

Richardson contended that his cosmetology license should not be suspended as his violation of the law involved only his shop's license and that as of 2011, he was no longer the owner of the shop.

According to Richardson, since he divested himself of the ownership of the shop, he was not subject to discipline as a consequence of having permitted unlicensed practice in his shop for seven years.

The Superior Court rejected Richardson's contention. The Court concluded that the provisions of Chapter 51 of Title 24 including §§ 5113 and 5114, "permits the Board to suspend all licenses issued pursuant to that chapter if grounds for discipline under the chapter are established." *Richardson v. Board of Cosmetology & Barbering*, 2012 WL 3834905 *3 (Del. Super. Ct. August 30, 2012)

Richardson admitted in the Stipulation of Facts submitted to the Chief Hearing Officer that he violated the provisions of 24 Del.C. § 5113(a)(7). (A-36-37) Section 5113(a)(7) subjects a licensee to discipline if the Board finds that he:

... knowingly employed or cooperated in the hiring or contracting for the services of, or, as the owner or operator of a beauty salon or aesthetics shop, leased space or otherwise entered into a contractual relationship with, any unlicensed person or persons required by this chapter to hold an unrestricted license to practice any of the professions regulated by this chapter."

24 Del.C. § 5113(a)(7)

In addition, Board Regulation 9.1 provides that: "[e]ach licensee licensed by the Board and each person...operating a cosmetology

shop...shall be responsible for ensuring that all of its employees requiring licenses are licensed in Delaware prior to the commencement of employment." Board Regulation 9.2 provides that, "[a]n individual, licensee or licensed shop who employs unlicensed individuals may be subject to discipline pursuant to 24 Del.C. §5113(a)(7)." Therefore, Richardson's individual license was subjected to discipline based on his admitted conduct in permitting unlicensed practice in his shop.

Richardson admitted that he violated 24 Del.C. § 5113(a)(7) in the Stipulation of Facts and that he entered into the Stipulation, "freely, knowingly, voluntarily, and after having received or having been afforded the opportunity to receive the advice of counsel." (A-36-37)

As the Board did not err as a matter of law or abuse its discretion, the Board's decision should be affirmed. *Stoltz Management Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992) (Cites omitted)

ARGUMENT V

V. THE BOARD DID NOT ERR AS A MATTER OF LAW OR ABUSE ITS DISCRETION IN AFFIRMING THE CONCLUSIONS OF LAW AND RECOMMENDED PENALTY OF THE CHIEF HEARING OFFICER

Question Presented

Was the Chief Hearing Officer authorized to conduct the hearing below pursuant to the provisions of 29 Del.C. § 8735? The Board preserved this issue on appeal in the Answering Brief filed with the Superior Court at pages 12 and 13.

Scope of Review

"On appeal from a decision of an administrative agency the reviewing court must determine whether the agency ruling is supported by substantial evidence and is free from legal error." *Stoltz Management Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992), citing *State, Dept. of Labor v. Medical Placement Services, Inc.*, 457 A.2d 382, 383 (Del. Super. Ct. 1982), *aff'd*, 467 A.2d 454 (Del. 1983) (See also, 29 Del.C. § 10142(d)) "Substantial evidence is more than a scintilla and less than a preponderance." *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) The Court does not weigh the evidence, determine credibility or draw its own factual findings or conclusions. Rather the Court determines "if the evidence is legally adequate to support the Board's factual findings." *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965) If there is substantial evidence and no mistake of law, the Board's decision must be affirmed. *City of Newark v. Unemployment Ins. Appeal Bd.*, 802 A.2d 318, 323 (Del. Super. Ct. 2002)

Merits of Argument

Without providing any legal authority, Richardson contended that the General Assembly did not grant the hearing officers the power to conduct disciplinary hearings where the penalty could include suspension or revocation of a license. Richardson's contention was based solely on the section headings of the *Administrative Procedures Act*. In so doing, Richardson ignored the specific and long-standing declaration of the General Assembly that:

[t]he classification and organization of the titles, parts, chapters, subchapters, and sections of this Code, and the headings thereto, are made for the purpose of convenient reference and orderly arrangement, and no implication, inference or presumption of a legislative construction shall be drawn therefrom."

1 *Del.C.* 305; See also, *Powell v. Powell*, 516 A.2d 483 (Table), 1986 WL 17839 (Del. 1986)

The Superior Court rejected Richardson's fifth contention. The Court held that the provisions of Subchapter IV of Chapter 101 of Title 29 while setting:

...forth a number of provisions regarding granting, revoking, withholding, suspending, or otherwise acting upon licenses...does not set forth a sole and exclusive procedure for discipline concerning licenses. The definition of a Subchapter III case decision in the statute is broad enough to include the proceeding which took place here...

Richardson v. Board of Cosmetology & Barbering, 2012 WL 3834905 *3 (Del. Super. Ct. August 30, 2012)

As the Board did not err as a matter of law or abuse its discretion, the Board's decision should be affirmed. *Stoltz Management Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992) (Cites omitted)

CONCLUSION

For the reasons stated herein, the Board of Cosmetology and Barbering respectfully requests that its Decision and Order be affirmed.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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