

STATE OF VERMONT
BOARD OF BARBERS AND COSMETOLOGISTS

Docket No. CO 01-0900

In re Moira Elmendorf
Moira's Hairstyling

} Hearing held at
} Montpelier, Vermont
} August 20, 2001

PRESENT: Gregory Josselyn, Hearing Panel Chair
Dolores Martineau
Emma Pudvah
Josephine Thomas

APPEARANCES: George C. Haegele, IV, Assistant Attorney General
for the State

Leighton C. Detora, Esq.
for Respondent

Moira Elmendorf
Respondent

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter came before the Board of Barbers and Cosmetologists (Board) on a specification of charges filed by the State against Moira Elmendorf and Moira's Hairstyling (respondents). Having heard the evidence on the charges and reviewed memoranda of law submitted by both parties, the Board has determined that the findings of fact and conclusions of law set forth below are supported by the preponderant weight of the evidence.

Findings of Fact

1. Respondent Moira Elmendorf is a cosmetologist licensed by the Board. She holds license number 9-1909. Respondent Moira's Hairstyling holds shop registration number 12-974, issued by the Board. Respondent Moira Elmendorf was the owner of Moira's Hairstyling at all relevant times.

2. Elmendorf was originally licensed by the Board in 1984. She failed to renew her cosmetologist license when it was due to be renewed in 1999 and practiced without a license until the fall of 2000.

3. Moira's Hairstyling was originally registered as a shop by the Board in 1988. Elmendorf failed to renew her shop registration when it was due to be renewed in 1993 and operated the shop without a license until the fall of 2000.

4. By law, each licensee must renew his or her license by the expiration date printed on the license. A license will expire automatically if the renewal application and fees are not returned to the Office of Professional Regulation by the license expiration date. A licensee is responsible for notifying the Office promptly if he or she changes name, mailing address, or business address.

5. Elmendorf routinely brought her dog into her hairstyling shop and allowed one of her employees to bring her dog into the shop routinely. Neither dog was a hearing or seeing eye dog.

6. Elmendorf employed a cosmetologist in her shop, Gail Phelps, who was unlicensed.

7. Elmendorf did not post current licenses for herself or her shop in a location visible to the public. What outdated licenses she did have were displayed in the shop's supply room, where they were unlikely to be seen by customers.

8. Elmendorf claims that she truthfully and correctly answered the Board inspector's questions about how many people worked in her shop or whom she employed. The Board inspector cannot recall precisely how the questions she posed to Elmendorf on the subject were worded. Elmendorf's answers could have varied, depending on how the questions were worded. The evidence on the issue of willfully making a false report or record is too equivocal to substantiate the allegations in Count V of the charges.

9. Elmendorf now understands and acknowledges that it is her responsibility to keep her personal and shop licenses current.

Conclusions of Law

Prior to the August 20 hearing, Elmendorf filed a motion to disqualify the Board hearing panel, based on the Board's alleged refusal to consider imposing a fine on Elmendorf instead of other disciplinary sanction. The panel declined to recuse itself from hearing the case.

Twenty-six V.S.A. § 274 provides for a fine for unauthorized practice. However, unauthorized practice cases are heard in a judicial rather than an administrative forum. See 3 V.S.A. § 127.

Furthermore, 26 V.S.A. § 2052(a)(7) (effective July 1, 1994) shows that, rather than granting fining powers, the Legislature will allow a professional licensing board (in the case of § 2052, the Board of Pharmacy) to impose an "administrative penalty" only if specifically authorized by statute. As a further check, all receipts must be deposited in the state's general fund and not in any fund allocated to a licensing board.

Turning to the charges, Elmendorf failed to renew both her personal license and her shop license. She practiced without these licenses for a number of years. The Board's statutes and rules make it clear that the licensee bears the responsibility to maintain current licenses. See 26 V.S.A. §§ 272(a) and (b), 282(b), 288(1); Board R. 5.1. The evidence does not show that Elmendorf deliberately set out to practice without the required licenses. Nevertheless, through oversight or neglect, she engaged in unauthorized practice and did so for a considerable length of time.

In addition to practicing without a license herself, Elmendorf allowed her employee, Gail Phelps, to practice without a license in derogation of Board statutes. See 3 V.S.A. § 129a(a)(6); 26 V.S.A. § 288(2). As a shop owner, Elmendorf was responsible for ensuring that her employees were properly licensed and should have taken affirmative steps to fulfill that responsibility.

Elmendorf also allowed unsafe and potentially unsanitary conditions to exist in her shop when she routinely permitted dogs on the premises. Board R. 6.3(10) explicitly prohibits presence in a shop of all dogs except hearing and seeing eye dogs. The rule is grounded in common sense: dogs may engage in fighting behavior and are susceptible to infestation by fleas and ticks. Excluding dogs from a cosmetology shop is simply sound, common-sense sanitary practice.

Elmendorf further disadvantaged the public when she failed to post licenses properly in her shop. See 26 V.S.A. § 284(c); Board R. 3.12(B)(4). The statutes and rules requiring conspicuous display of licenses are designed to protect customers by assuring them that individuals providing professional services meet state requirements for training and experience. Elmendorf acted unprofessionally when she disregarded these simple requirements.

Finally, regarding appropriate sanctions, the Board does not take Elmendorf's infractions lightly and will therefore impose a lengthy suspension of her personal cosmetologist license. However, the Board does not believe that Elmendorf's

unprofessional conduct warrants effectively destroying her business. Therefore, the Board will not impose a sanction such as suspension or revocation of her shop license. The sanctions placed on her personal license and shop registration, as set forth below, should adequately address Elmendorf's misconduct and generally comport with sanctions imposed in the companion case to this case, In re M. Gail Phelps, No. CO 04-1200 (Vt. Bd. of Barbers & Cosmetologists, Aug. 20, 2001). If any further misconduct occurs in the future, Elmendorf may expect the Board to impose more onerous sanctions, including possible suspension or revocation of her shop license.

This case is distinguishable from In re Winship, Nos. CO02-1200, CO03-1200 (Vt. Bd. of Barbers & Cosmetologists, Apr. 5, 2001), in which the Board imposed a six-month suspension of both Winship's personal and shop licenses. Winship resulted from a default hearing at which the respondent did not appear and was not represented by counsel.

In Winship, the Board did not hear mitigating testimony on the issue of sanctions. In this case, by contrast, the Board has heard sufficient testimony from Elmendorf to determine that she now comprehends how important it is to keep her licenses current and what may happen to her licenses in the future if she engages in further misconduct. Therefore, a six-month suspension of Elmendorf's personal cosmetologist license, combined with other license conditions, is an appropriate sanction that should serve to prevent future infractions and yet eventually permit Elmendorf to return to practice in her community.

Order

IT IS HEREBY ORDERED by the Board of Barbers and Cosmetologists of the State of Vermont that:

1. On the basis of the Findings of Fact and Conclusions of Law, Count V of the specification of charges is hereby DISMISSED.
2. On the basis of the Findings of Fact and Conclusions of Law, the personal cosmetologist license of Moira Elmendorf is hereby SUSPENDED for a period of six months from the effective date of this order.
3. On the basis of the Findings of Fact and Conclusions of Law, the personal cosmetologist license of Moira Elmendorf is hereby CONDITIONED as follows:

(a) Prior to any reinstatement of her cosmetologist license, Elmendorf shall take and pass the Board's "laws and rules" examination, referenced in Board Rule 3.2(A)(2).

(b) During the period of license suspension, Elmendorf shall not perform cosmetology services in any way. However, she may perform non-cosmetology services in a cosmetology shop, including reception, bookkeeping, or other similar services.

4. On the basis of the Findings of Fact and Conclusions of Law, the shop registration of Moira's hairstyling is hereby CONDITIONED as follows:

(a) Elmendorf's cosmetology shop, Moira's Hairstyling, shall be subject to random, unannounced inspections by the Board or its designee during the period of Elmendorf's license suspension. Thereafter, even if this condition is removed from the registration of Moira's Hairstyling, the shop will continue to be subject to inspection under Board R. 3.13, as would any shop.

5. The disciplinary sanctions imposed by this order shall remain in effect until removed by the Board. Violation of any of the terms or conditions of this order may result in further discipline, including revocation of respondents' licenses.

6. Respondents shall bear all costs of compliance with this order.

7. Pursuant to 3 V.S.A. §§ 129(a)(7) and 131(c)(2)(C), this document is a public record and may be provided to other licensing authorities.

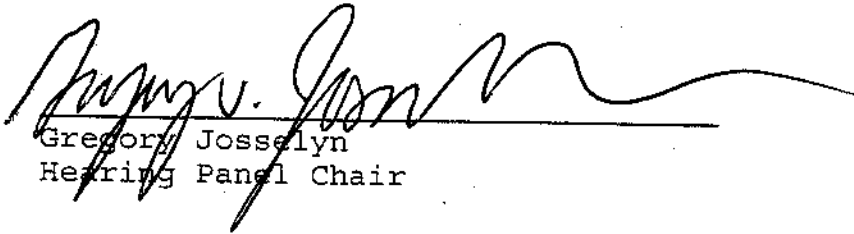
8. This order shall take effect 30 days from the date of entry shown below, to allow for orderly transfer of customers and employees to other cosmetology shops, if necessary.

Appeal Rights

This is a final administrative determination. A party may appeal by filing a written notice of appeal with the Director of the Office of Professional Regulation, Office of the Secretary of State, within 30 days of the effective date of this order.

Dated: 9-20-01

BOARD OF BARBERS AND COSMETOLOGISTS



Gregory Josselyn
Hearing Panel Chair

Date of entry: 10/4/01