

BEFORE THE BOARD OF BARBERS AND COSMETOLOGISTS
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-10-0021-COS REGARDING:

THE PROPOSED DISCIPLINARY)	Case No. 381-2010
TREATMENT OF THE SALON LICENSE)	
OF BURTELLO SALON,)	
License No. 3471.)	
)	

**PROPOSED FINDINGS OF FACT; CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER**

I. INTRODUCTION

The Business Standards Division of the Montana Department of Labor and Industry (BSD) seeks to impose sanctions against the salon license of Gary Burton alleging that he violated Administrative Rule 24.121.2301(1)(p) (which states that it is unprofessional conduct for a licensee to “perform[] services outside the licensee’s area of training, expertise, competence, or scope of practice or licensure unless such services are not licensed or inspected by the State of Montana”).

On December 15, 2009, Hearing Examiner David Scrimm held a contested case hearing in this matter. Anjeanette Lindle, agency legal counsel, represented BSD, and Gary Burton represented himself. At hearing, Gary Burton, Mary McCue, Juanita Mace, and Dr. Paul Simms testified. Exhibits 1, 2, 8, 9, 10, and B were admitted into the record. The parties were permitted to file post-hearing briefs in this matter, the last of which was filed on March 1, 2010. Based on the testimony, exhibits, and parties’ post-hearing briefs, and the relevant law, the hearing examiner finds that BSD has failed to sustain its burden of proof and recommends that the complaint be dismissed, in accord with the following findings and conclusions.

II. FINDINGS OF FACT

I. At all times material to this case, Burton has been a Montana licensed salon owner in Missoula, Montana, holding license 3471.

2. On October 20, 2008, the Board of Barbers and Cosmetologists (Board) discussed the sale of Bleach Bright products in salons after an inspector had raised the issue based on questions he received from salon owners. The Board took no official action at the meeting regarding the sale of Bleach Bright in salons, but expressed “no reason to object to Bleach Bright activities at this time.” At this time, the Board did not view tooth whitening as outside the scope of practice for salon licensees. Burton was not present at this meeting.

3. Burtello Salon sold Bleach Bright to customers and provided a space for them to use the product. It also provided an LED light source that would speed up the whitening process. Neither Burton nor his employees instructed the customers in the use of the Bleach Bright product. Burton would on occasion answer questions about the product. In most instances, the customer would simply read the directions and warnings on the product’s packaging and apply the product to their teeth. Burtello Salon provided a space, a chair, protective eyewear, and the LED light, and the customer did the rest. Burton would check to make sure the customer was not pregnant or nursing, and would check their age by visual observation. Burton did not go over the product warnings, but referred them to the warnings on the packaging. The only times he assisted a customer with the product was when one had difficulty opening the package and another needed help with donning the bib that comes with the product. One customer experienced some gum soreness after administering the product and Burton suggested Sensodyne toothpaste or vitamin E. Neither Burton nor his employees touched the customer or their teeth.

4. On April 27, 2009, the Board, in response to a letter from the “Dental Board”¹ expressing concern that certain tooth whitening products utilized within the salons “*may* fall under the scope of Dentistry,” passed a motion “to prohibit teeth whitening in Salons and for Board Counsel to initiate a rule change.” Ex. 8. Burton was not present for this meeting.

5. On May 1, 2009, Mary McCue, executive director of the Montana Dental Association, filed a complaint dated April 29, 2009, alleging that Gary Burton was advertising and providing tooth whitening services and that such conduct was beyond the scope of his license (Complaint No. 2009-188 COS).

6. Three other complaints filed with the Board were part of this Docket No. CC-10-0021-COS but no evidence regarding them was introduced at hearing (Complaints 2009-214 COS, 2009-215 COS, or 2009-216 COS).

¹ It is unclear as to whether “Dental Board” refers to the Montana Board of Dentistry or the Montana Dental Association.

7. On July 20, 2009, the Board again took up the tooth whitening issue because Board counsel asked for clarification of the Board's intent as to whether tooth whitening did not fall within the scope of practice of any licensee regulated by the Board. A motion was made and seconded that the "board takes the position that teeth whitening does not fall within the scope of practice for any license type within the Cosmetology industry. Licensees should not be allowed to practice teeth whitening under the Board of Barbers & Cosmetology rules and laws." This motion carried. A second motion was also made "to notice a rule amendment to prohibit teeth whitening by licensees." This motion also carried.

8. At the July 20, 2009 Board meeting, Burton was informed that "the rule notice will go through the public comment process and he could comment at that time." Ex. 9.

9. As of the date of this decision, the Board has neither initiated rulemaking to carry out its July 20, 2009 motion to prohibit teeth whitening by its licensees, nor adopted such a rule. The Board has published a rule notice that includes an amendment to the very rule that Board counsel suggested might be the place to put the new rule. That proposed amendment does not include any language that could be construed to be the amendment directed by the Board at its July 20, 2009 meeting.

10. McCue filed a complaint at the direction of the executive officers and board of the Montana Dental Association. McCue is not an expert in the field of dentistry, cosmetology, or beauty salons. Much of her testimony was hearsay and as such cannot be relied upon by the hearing examiner.

11. Juanita Mace is not an expert in the field of dentistry. Mace is a licensed cosmetology educator and has been licensed as a barber and a barber instructor. Mace was qualified as an expert only with regard to cosmetology. Mace was not qualified to give expert opinion testimony regarding any license type other than cosmetology.

12. Burton's salon license allows him to sell over-the-counter cosmetic products. Such products may be applied to the customer.

13. Teeth are not mentioned in the current rules of the Board of Barbers and Cosmetologists.

14. Mont. Code Ann. § 37-31-203 requires the Board to "prescribe rules for generally the conduct of the persons, firms, or corporations affected by this chapter."

III. DISCUSSION²

The Business Standards Division of the Montana Department of Labor and Industry (BSD) seeks to impose sanctions against the salon license of Gary Burton alleging that he violated Admin. R. Mont. 24.121.2301(1)(p) (which defines as unprofessional conduct “performing services outside of the licensee’s area of training, expertise, competence or scope of practice or licensure . . .”). In so doing, BSD further alleges that he violated Admin. R. Mont. 24.121.2301(1)(a) (which defines unprofessional conduct as “failing of a licensee to comply with any statute or rule under the board’s jurisdiction”). BSD further alleges that Burton violated Montana Code Annotated § 37-1-316(18) (which defines as unprofessional conduct “conduct that does not meet the generally accepted standards of practice”).

This matter came about as a result of a complaint about Burton offering tooth whitening services which the Montana Dental Association believed at that time “may be outside the scope of practice” for holders of salon licenses. Ex. 1.

A. The Board has not adopted rules governing the scope of practice for salon licensees.

The right to practice one’s profession is a valuable property right. A state cannot exclude a person from the practice of his profession without having provided the safeguards of due process. *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). *Tuma v. Board of Nursing*, 100 Idaho 74, 77, 593 P.2d 711, 714 (Idaho 1979).

In *Tuma*, the Idaho Supreme Court struck down the Idaho Board of Nursing’s finding that a nurse committed unprofessional conduct by interfering with the doctor-patient relationship because the board had never adopted or revised rules defining unprofessional conduct to include interference with the doctor-patient relationship. 100 Idaho at 77, 593 P.2d at 714.

The Board must further define the scope of practice for salon license holders rather than defining it in an on-going case-by-case basis.

The legislature has obviously recognized that the nurses who comprise the Board can, “from their personal knowledge and experience,” determine the standards of the profession. And accordingly opportunity was afforded the Board to expand upon the statutory

² Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

definition of “unprofessional conduct.” But, says the Board, it is enough that the Board will hear evidence of a licensee’s conduct, and with its expertise then reach a conclusion whether such was or was not unprofessional. We cannot agree. Such a procedure would be an intolerable state of affairs, and not in compliance with requirements of due process. *Tuma*, 100 Idaho at 81, 593 P.2d at 718.

Like the Board of Nursing in *Tuma*, the Board here had an opportunity to adopt rules that would put its licensees on notice that teeth whitening was outside the scope of practice for holders of salon licenses. If it had done so, the Board’s licensees would know what is proscribed and the Board itself would have a standard to apply when a licensee’s conduct is called into question. Here, the Board not only had an opportunity to adopt rules governing the conduct of its licensees, it had a statutory duty to do so.

Section 37-31-203, MCA provides:

Rulemaking powers. The board *shall* prescribe rules for:

...

(6) generally the conduct of the persons, firms, or corporations affected by this chapter. (Emphasis added).

Mont. Code Ann. § 37-31-203(6) which provides that the Board must adopt rules regarding the conduct of persons affected by other provisions of the laws governing the Board (37-31-101 et seq.) is mandatory for two reasons.

First, this statutory provision is more specific than the general statute, Mont. Code Ann. § 37-1-319(5), which provides that *a board may adopt* rules defining unprofessional conduct. A specific rule controls one that is more general, therefore the requirements of Mont. Code Ann. § 37-31-203 control the more general rulemaking provision in Mont. Code Ann. § 37-1-319. Mont. Code Ann. § 1-2-102.

Second, the Montana Supreme Court has held that when a statute includes the term “shall adopt rules” it is a mandatory, not discretionary duty. *Orozco v. Day*, 281 Mont. 341, 354, 934 P.2d 1009 (statute’s use of term “shall adopt rules” mandated rules granting good time for work activity as a credit on an inmate’s sentence); *Common Cause v. Argenbright*, 276 Mont. 382, 390, 917 P.2d 425, 430 (Mont. 1996) (Commissioner of Political Practices did not have discretion to ignore the mandate that he “shall” adopt rules); *Cash v. Otis Elevator Co.*, 210 Mont. 319, 326, 684 P.2d 1041, 1045 (Mont. 1984) (statute with provision

that department “shall adopt rules” relating to the construction of buildings is mandatory); *Nelson v. State*, 2008 MT 336, P22 195 P.3d 293 (the statutory “shall” language in § 37-3-321, MCA, clearly reflects mandatory, nondiscretionary duties). Montana law defines “rule” as follows:

“Rule” means each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency. The term includes the amendment or repeal of a prior rule.
Mont. Code Ann. § 2-4-102(11).

The Montana Attorney General has opined that when an agency adopts new policy:

Article II, section 8 of the 1972 Montana Constitution affords citizens of this State the right to “reasonable opportunity for citizen participation” in affairs of government. The Montana Administrative Procedure Act fulfills this constitutional mandate in the context of a rulemaking proceeding by providing for notice and hearing. *See* § 2-3-104(2), MCA.

38 Op. Atty Gen. Mont. 240 February 28, 1980.

The Board actually recognized its duty to adopt its policy as an administrative rule at both its April 27, 2009 and its July 20, 2009 meetings when it directed Board counsel to begin drafting a rule to prohibit its licensees from offering teeth whitening services. However, as of the date of this decision no rule promulgating the Board’s policy has been initiated or adopted. No rule can be effective until it has gone through the notice and comment rulemaking process laid out in the Montana Administrative Procedure Act (MAPA). *See* Mont Code. Ann. § 2-4-306. *See also* *Hotch v. United States*, 212 F.2d 280 (9th Cir. Alaska 1954); *Hulmes v. Div. of Retirement, Dept. of Admin.*, 418 So.2d 269 (Fla. 1st DCA 1982); *Canal Ins. Co. v. Continental Cas. Co.*, 489 So.2d 136 (Fla. 2d DCA 1986); *Dolese Bros. Co. v. State ex rel. Okla. Tax Comm’n*, 2003 OK 4, 9 (Okla. 2003).

Accordingly, the Board cannot discipline Burton for practicing outside the scope of his practice and thereby committing unprofessional conduct. On this basis alone, Complaint No. 2009-188 COS, Complaints 2009-214 COS, 2009-215 COS, and 2009-216 COS, and any other complaint filed against Burton for offering teeth whitening services before adoption of a rule prohibiting it, should be dismissed.

B. The Board failed to notify Burton of its change in policy regarding tooth whitening.

Even if the Board did not have a statutory mandate to implement rules governing the conduct of its licensees, it must still provide notice that it is changing its unpublished policies before it may enforce those provisions against a licensee. *Lewis v. District of Columbia Com. on Licensure to Practice Healing Art*, 385 A.2d 1148, 1152 (D.C. 1978) (holding due process requires a person will be given prior notice of conduct could form the basis for governmental action against him). “The knowledge that he has erred is of little value to the teacher when gained only upon the imposition of a disciplinary penalty that jeopardizes or eliminates his livelihood.” *Hand v. Board of Examiners*, 66 Cal. App. 3d 605, 621 (Cal. App. 1st Dist. 1977).

The Board sent a clear signal to its licensees at its October 20, 2008 meeting that it was not concerned about the use of Bleach Bright in salons it regulated. BSD counsel argues that the Board did not pass a motion so it is not an official action of the Board and that the discussion was specific to Bleach Bright and not its use in salons. A review of the minutes of the October 20, 2008 meeting speaks otherwise. The topic is in the minutes with the heading “Use of Bleach Bright *in Salons*.” (Emphasis added). At the meeting, the Board’s inspector made statements that “the use of this product may be within the scope of dentistry and would not be appropriate for use in a salon.” While the minutes only express the Board’s informal opinion on the topic, anyone reading the minutes or hearing of the Board’s discussion and statement “through the grapevine” or even from a Bleach Bright representative could reasonably conclude that the use of Bleach Bright in salons was within the scope of practice for holders of salon licenses. It was reasonable for Burton to do so.

Such informal methods of transmitting or receiving information about Board actions may be reasonable for the public. It is not a reasonable notice method for a state agency that is required to publish its policies, especially those which if violated could result in disciplinary action. 38 Op. Atty Gen. Mont. 240 February 28, 1980.

BSD does not argue that the Board notified its licensees after it declared that tooth whitening was outside the scope of practice for cosmetologists, rather it argues that because the issue was on the agenda, noticed to the public, the regulated community had sufficient notice that tooth whitening was outside the scope of practice. However, unless the entire regulated community was either clairvoyant or unbelievably good guessers, no one, including Burton, knew the *outcome* of the Board’s discussion of the issue from the meeting notice alone.

The fatal defect in BSD’s analysis is demonstrated by the record in this case. The Board is considering discipline of a license without a showing that the licensee

was given notice from any governmental agency or other legal source of the required standard of conduct. There is no evidence that Burton had actual knowledge of these “policies.” “Notice of properly promulgated rules is judicially presumed from their proper promulgation, the same does not hold true for policy pronouncements . . .” *Lewis*, 385 A.2d 1148, 1153, citing *Junghans v. Dep’t. of Human Res.*, 289 A. 2d 17 (D.C. App. 1972).

Accordingly, this matter should be dismissed for failure to properly notify Burton of the Board’s change in policy.

C. The Board cannot impose sanctions against Burton’s salon license for practicing outside the scope of practice on a case-by-case basis.

The Board cannot, in these circumstances, determine on a case-by-case basis whether a licensee has committed unprofessional conduct by practicing outside the scope of one’s license. The case law supports boards conducting such case-by-case determinations only when the board does not have a mandatory duty to adopt rules governing unprofessional conduct or the scope of practice for its licensees and when the alleged unprofessional conduct is a professional’s treatment of his patients.³ *Vance v. Fordham*, 671 P.2d 124 (Utah 1983).

Those two factors are not present here. First, the Board has a mandatory duty to adopt rules governing the conduct of its licensees. Second, Burton’s alleged unprofessional conduct is practicing outside of the scope of his salon license, not how he treats his customers. There is no evidence that he harmed a customer or practiced teeth whitening service in an unprofessional manner. There is little, if any, evidence that Burton or anyone in his salon even touched a customer who purchased and applied the Bleach Bright product in the salon. Absent these two factors, the Board is and was without authority to discipline Burton for practicing outside the scope of his salon license.

D. Even if the Board could determine unprofessional conduct on a case-by case basis, BSD did not prove that Burton practiced outside the scope of practice for his salon license.

Assuming arguendo that the Board was not required to properly adopt rules prohibiting its licensees from performing teeth whitening services; did not have to notify its licensees of a change in its policy governing the scope of practice for its licensees before it could discipline their licenses; or could impose sanctions on a

³ The dominant issue in these cases is whether a physician can be disciplined for committing negligence or malpractice involving patient care.

case-by-case basis, BSD failed to prove that Burton committed unprofessional conduct by practicing outside the scope of practice for his salon license.

BSD did prove that teeth whitening was within the scope of practice of dentistry, but did not prove that by being within the scope of dentistry it was outside the scope of practice of Burton's salon license. BSD may also have proved that teeth whitening was outside the scope of practice of cosmetology (provided that expert testimony was sufficient to make this proof). However, the Board seeks to sanction Burton's salon license not his cosmetology license, thus making this evidence irrelevant.

BSD failed to prove that teeth whitening was outside the scope of practice for holders of salon licenses prior to the Board's July 20, 2009 meeting.⁴ Because the May 1, 2009 complaint filed by the Montana Dental Association (MDA) predates the July meeting, Complaint No. 2009-188 COS must be dismissed. Even if the Board's declaration of policy regarding tooth whitening at its April 27, 2009 meeting was enforceable, BSD failed to provide any specific evidence that Burton was conducting teeth whitening services between April 27, 2009 and April 29, 2009, when the MDA submitted its complaint.

BSD failed to prove any violations of statute, rule or standards of professional conduct. While BSD's expert opined that she felt that Burtello Salon was performing services outside of its cosmetologist license in the area of training, expertise, competence, or scope of practice, Burton's cosmetology license was not at issue in this hearing. BSD's expert also opined that she felt that Burton failed to conform to the generally accepted standards of practice for a cosmetologist or any other licensee under the Board. Here again, Burton's cosmetology license was not at issue. Moreover, Mace was not qualified to opine regarding other licenses as she was only qualified by BSD counsel as an expert in the field of cosmetology.

IV. CONCLUSIONS OF LAW

A. The Board did not adopt rules regarding the scope of practice for salon licensees as required by Mont. Code Ann. § 37-31-203.

⁴ The July 20, 2009 date is the earliest that the Board's policy might be enforceable. Mace testified that teeth whitening was not outside the scope of practice before the April 27, 2009 Board meeting and its motion regarding teeth whitening at that meeting was sufficiently unclear as to make it unenforceable.

B. The Board's April 27, 2009 decision regarding teeth whitening was unenforceable.⁵

C. The Board did not notify its licensees of its change in policy regarding tooth whitening. 38 Op. Atty Gen. Mont. 240 February 28, 1980.

D. The Department Has Failed to Demonstrate Any Violation

1. Admin. R. Mont. 24.121.2301(1) provides in pertinent part:

The board defines unprofessional conduct as follows: . . .

. . .

(p) performing services outside the licensee's area of training, expertise, competence, or scope of practice or licensure unless such services are not licensed or inspected by the State of Montana.

2. BSD bears the burden of proof in this proceeding to show by a preponderance of the evidence that the licensee committed an act of unprofessional conduct. Mont. Code Ann. § 37-3-311; *Ulrich v. State ex rel. Bd of Funeral Service* (1998), 289 Mont. 407, 961 P.2d 126.

3. BSD has failed to demonstrate by a preponderance of the evidence that the licensee practiced outside the scope of his salon license. Because BSD failed to prove the underlying violation it could not prove the derivative violations of Admin. R. Mont. 24.121.2301(1)(a) or Mont. Code Ann. § 37-1-316(18).

E. The Failure to Demonstrate a Violation Requires Dismissal

4. If a licensee is found not to have violated any of the provisions of Mont. Code Ann. Title 37, Chapter 1, Part 3, the Department prepares and serves the Board's findings of fact together with an order of dismissal of the charges. Mont. Code Ann. § 37-1-311.

⁵ If the Board's April 27, 2009 declaration of policy regarding tooth whitening was unclear to Board counsel and the Board itself concurred by its act of modifying its declaration, then it follows that its licensees could not be held to comply with an insufficiently articulated policy until either it was clarified at the July 20, 2009 Board meeting or adopted as an administrative rule.

5. Because BSD has failed to demonstrate that the licensee engaged in conduct that violated Title 37, Chapter 1, Part 3, MCA, dismissal of the charges is appropriate.

V. RECOMMENDED ORDER

Based on the foregoing, the hearing examiner recommends that the Board of Barbers and Cosmetologists enter its order dismissing the allegations contained in Docket No. CC-10-0021-COS (Complaint Nos. 2009-188 COS, 2009-214 COS, 2009-215 COS, and 2009-216 COS) as BSD has failed to prove any violation alleged in the complaint.

DATED this 17th day of March, 2010.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
Hearing Examiner