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OPINION	:	No. 80-120
	:	
of	:	<u>May 29, 1980</u>
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SUBJECT: SCHOOLS OF COSMETOLOGY—The Executive Secretary of the State Board of Cosmetology may neither terminate collection of the student enrollment fees in schools of cosmetology that are provided for in section 7396.8 of the Business and Professions Code, nor may he effect the termination of the Board's maintenance of student enrollment records that are provided for in the Board's regulations, without proper authorization from the Board.

The Honorable Ollie Speraw, State Senator, Thirty-First District, has requested an opinion on the following question:

May the Executive Secretary of the State Board of Cosmetology terminate collection of the student enrollment fees in schools of cosmetology that are provided for in section 7396.8 of the Business and Professions Code and terminate collection and maintenance of student enrollment records that are provided for in the Board's regulations, without express authorization from the Board?

CONCLUSION

The Executive Secretary of the State Board of Cosmetology may neither terminate collection of the student enrollment fees in schools of cosmetology that are provided for in section 7396.8 of the Business and Professions Code, nor may he effect the termination of the Board's maintenance of student enrollment records that are provided for in the Board's regulations, without proper authorization from the Board.

ANALYSIS

Article 8 of chapter 10 of division 3 of the Business and Professions Code¹ (to wit, its sections 7390 through 7402) provides for the conduct of schools of cosmetology. (§ 7390k.) Section 7396.8 provides that every student who enrolls in such a school must pay an enrollment fee to the State Board of Cosmetology (hereinafter "the Board") within seven days of the enrollment. That section further provides that upon receipt of the fee and of enrollment certificates filed by the school for the student, the Board must issue a registration card for the course in which the student is enrolled, which entitles the student to pursue the course. The amount of the fee is determined annually by the Board, but may not be more than \$13. The current fee has been set by the Board, by regulation, at \$5. (16 Cal. Admin. Code, § 990(c).)

By administrative regulation the Board has required schools of cosmetology to prepare and maintain records of student enrollment, completion and withdrawal. (16 Cal. Admin. Code, §§ 919.3, 919.7, 919.8; *Cf.* § 919.1.) Pursuant to those regulations the Board receives the originals and a copy or copies of those records; it maintains the original of each, and after validating a copy, sends it back to the school for keeping for five years. (*Ibid.*)

In July 1979, the Governor "blue-pencilled" \$40,000 from the 1979–80 Budget Act for support of the Board of Cosmetology with the following veto message:

"Item 102—For support of Consumer Affairs, Board of Cosmetology. I reduce this item from \$1,430,623 to \$1,390,623 by reducing (a) Personal services from \$536,134 to \$503,254 (b) Operating exp. and equip. from \$894,489 to \$857,369.

"I am reducing this item to eliminate the funding for maintaining duplicate student record files." (Stats. 1979, ch. 259.)

¹ Hereinafter all statutory references are to the Business and Professions Code unless otherwise indicated.

In September 1979, the Board's Executive Secretary announced *pro se* that the Board would no longer collect the student enrollment fees and would no longer issue the enrollment certificates (registration cards), mentioned in section 7396.8. In addition, the Executive Secretary announced that the Board would discontinue its maintaining student records and he imposed new requirements for schools of cosmetology to maintain those records of enrollment, withdrawal, and completion themselves. (Board of Cosmetology, Circular Letters #79/14 (9/25/79), #79/15 (9/25/79), #79/16 (9/25/79), and #79/17 (9/25/79).)²

We are informed that there was no prior Board action directing these changes and we are asked whether the actions of the Executive Secretary were authorized. We conclude that inasmuch as they involved actions which only could have been undertaken by the Board itself, the Executive Secretary was without authority to implement them.

Enrollment Fees and Registration Cards

The obligation of the Board to assess an enrollment fee from and issue registration cards to students enrolling in courses in cosmetology schools³ to enable them to pursue those courses, is statutory. Section 7396.8 provides:

“A student who enrolls in a school of cosmetology or electrology shall within seven days after the date of his enrollment *pay to the board the enrollment fee required by this chapter*. Upon receipt of such fee and upon receipt of the enrollment certificate filed for such student by the school, *the board shall issue to the student a registration card for the course in which he is enrolled* and shall at the same time furnish a copy of such card to the school. Except as otherwise provided in this section, the registration card so issued shall entitle the student to complete the course in which he is enrolled without payment of any further enrollment fee. If the student withdraws from the course for which the fee was paid

² The Executive Secretary's plan, set forth in the Circular Letters issued on September 25, 1979, over his signature, reimposes the obligation of keeping the original records on the individual schools: Original records of withdrawal would now have to be kept for at least three years and original records of completion, kept for at least ten years. (Board Circular Letter 79/17.) The original records of student enrollment would have to be kept on file in the school until replaced by a withdrawal or completion certificate. (Board Circular Letter 79/15.) Copies of all records would have to be given to the student, and the originals would have to be available for Board inspection. (Circular Letter 79/17; *cf.* Circular Letters 79/15, 79/16.)

³ The enrollment fee imposed by section 7396.8 does not apply to students enrolling in courses in cosmetology in the public schools of the state (39 Ops. Cal. Atty. Gen. 127 (1962)). Nor does it apply to students, attending a private cosmetology school under contract entered into pursuant to section 8092 of the Education Code. (62 Ops. Cal. Atty. Gen. 214 (1979).)

and later enrolls in the same or a different course, whether in the same or a different school, or if he transfers from the course for which the fee was paid to a different course, whether in the same or a different school, he shall pay a new enrollment fee for such course in the same manner as required by this section for the original fee and the board shall issue to him a registration card for the new course. If within 20 days after a student has enrolled in a particular course the school has not received a copy of a registration card issued to him for such course in accordance with the provisions of this section, it shall require him to discontinue training and shall not permit him to resume training until it has received from the board a copy of a card so issued.

“This section shall not apply to a person who is an inmate of a correctional institution while such person is confined therein.” (Emphases added.)

Section 7446 provides for the determination of the amount of the enrollment fee as follows:

“The enrollment fee prescribed by Section 7396.8 *shall be set by the Board annually* at not more than thirteen dollars (\$13).” (Emphasis added.)

The question is whether the Board’s Executive Secretary could undertake to waive the student enrollment fee by himself. We believe not. The use of the phrase “shall be set by the Board” in section 7446 indicates that the determination of what fee to impose, can only be made by the Board. (§ 19; *Cf.* 21 Ops. Cal. Atty. Gen. 203, 204 (1953); § 7334; 10 Ops. Cal. Atty. Gen. 85, 86 (1947) (§ 4036).)”⁴ This is consistent with the other sections of the Cosmetology Act dealing with the Board’s composition and the quorum necessary for effective action being taken in its name.

The Board of Cosmetology consists of seven members, four of whom must be “public members” (§ 7301), i.e., they may not be licentiates of the Board (§ 7302). The Board must hold meetings at least four times a year. (§ 7306.) At those meetings effective action may be taken on “any investigation, inquiry, hearing or *proceeding*” by one or more *members*, but the previous written authorization of the Board is necessary before such action may be undertaken by less than the entire membership, and no such action may be

⁴ Until its amendment in 1976 (Stats. 1976, ch. 1147, p. 5198, § 5) section 7446 provided or a legislatively directed minimum as well as a legislatively directed maximum fee. Former section 7446 provided as follows: “The enrollment fee prescribed by Section 7396.8 shall be set by the board annually at not more than five dollars (5\$) nor less than two dollars (2\$).” (Stats. 1961, ch. 2044, p. 4263, § 2.) We do not consider herein the extent of the Board’s authority to waive the fee entirely.

undertaken by a public member only. (§ 7309.)⁵ Although the Board is empowered to appoint an Executive Secretary, he may not be a member of the Board. (§ 7305; *Cf.* § 107; 18 Ops. Cal. Atty. Gen. 144 (1951); *Boyd v. Huntington* (1932) 215 Cal. 473.)

We perceive the determination of how to set or change enrollment fees to be a “proceeding” within the meaning of section 7309. Pursuant to that section, such action to be effective, may only be taken by at least one “industry member” of the Board. Since the Executive Secretary is not, and may not be, a member of the Board (§ 7305), he may not assume to undertake that action in the Board’s name.

Furthermore, the Board, by administrative regulation has currently set the student enrollment fee at \$5. The integrity of the administrative process demands that if that amount is to be changed, it is the Board and not its Executive Secretary who must do it.

The Board is empowered “in accordance with the procedures of the Administrative Procedure Act, [to] adopt, amend or repeal such rules as are reasonably necessary . . . [f]or carrying out the provisions of [the Cosmetology Act].” (§ 7310; *Cf.* § 7313 and Gov. Code, §§ 11501, 11380, 11385.)⁶ The Board has by regulation set the current student fee at five dollars (16 Cal. Admin. Code, § 990(c)) and the Board of course can change that. But if change is to be made it is the Board who must effect it (§ 7310), by action taken in its name by at least one “industry member” (§ 7309). Even then the process of effecting such change must comport with the provisions of the Administrative Procedure Act for the modification (amendment) and repeal of administrative regulations. (§ 7310; Gov. Code, tit. 2, div. 3, ch. 4.5, § 11371 *et seq.*) It cannot be done by circular letter issued by the Board’s Executive Secretary. We therefore conclude that the Executive Secretary may not on his own, terminate the assessed enrollment fees for students enrolling in schools of cosmetology.⁷

⁵ Section 7309 reads in full:

“Any investigation inquiry, hearing or proceeding, which the board may hold or undertake, may be held or undertaken by or before one or more members of the board, and the finding or order of the member or members constitutes the finding or order of the board when approved or confirmed by it.

“No investigation, inquiry, hearing or proceeding shall be held or undertaken by only one member of the board or by less than the entire membership of the board without the previous written authorization of the board.

“No investigation inquiry, hearing or proceeding shall be held or undertaken by or before a public member only.”

⁶ The Board’s Rules and Regulations appear at title 16 of the California Administrative Code, chapter 9, section 900 *et seq.*

⁷ Insofar as the Executive Secretary also undertook to terminate the issuance of student registration cards, his action was patently unauthorized. Even the Board itself could not do

Maintenance of Student Records

The Executive Secretary has also ordered the Board's maintenance of student enrollment, completion and withdrawal records terminated. We conclude that that action was not authorized.

With respect to the student records, the Board as we have seen, has by regulation enacted a scheme whereby the original school records of student enrollments (16 Cal. Admin. Code, § 919.3), completions (*Id.*, § 919.7) and withdrawals (*Id.*, § 919.8) are maintained at the Board's office at Sacramento, with copies being kept by the schools. This system has been in effect for a number of years, and originally was prompted by a desire to provide a reliable and official repository for the original records. (62 Ops. Cal. Atty. Gen. *supra*, at p. 216.) Retrieval of the records when they had been kept by the individual private cosmetology schools themselves, often proved inadequate. (*Ibid.*)

As we have also seen, in July 1979 the Governor reduced the Board's 1979–1980 budget by \$40,000 with a veto message stating that that was being done to eliminate funding for the Board's maintaining duplicate record files. The amount the Board requested for its personal services was reduced by \$32,880, and that for its operating expenses and equipment, by \$7,120. (Stats. 1979, ch. 259, item 102.)⁸

Following the Governor's action it was the Board which was confronted with deciding what action to take to meet its statutory responsibilities with reduced funding. (Bus. & Prof. Code, §§ 7309, 7310(a), 7313; *Cf.* Gov. Code, §§ 11006, 13322, 16351; *Reardon v. Riley* (1938) 10 Cal. 2d 531, 535–536; *Board etc., Commrs. v. Riley* (1924) 194 Cal. 37, 43; 63 Ops. Cal. Atty. Gen. 125.) In that regard of course the Board could look to its staff for proposals. The plan worked out by the Executive Secretary (see fn. 2, *supra*), should have been submitted to the Board for its consideration and action. But as before with the enrollment fees, the Executive Secretary, not being a member of the Board could not assume to take action reserved to it, in its name and his orders purporting to implement his plan in the Board's name without authority from the Board, were void. (*Cf.* §§ 7305,

that since it is unequivocally directed *by statute* “to issue the student a registration card for the course in which he is enrolled . . .” (§ 7346.8.) Without the card the student can not pursue his course of study. (*Ibid.*)

⁸ The reduction at the \$40,000 actually reflected a rejection of increases the Board had requested for its maintaining student records. The Board had sought the additional funds to *increase* its staff by restoring office positions (\$25,848), to correspondingly *increase* staff benefits by \$7,032, and to *increase* operating expenses and equipment by the \$7,120. (Final Change Book, List of Changes to the Governors Budget, Prepared by the Department of Finance, at p. 44.)

7309.)

Moreover, it was for the Board, which by regulation⁹ had created the duplicate student records requirement to create by regulation a viable alternative in light of the Governor's veto and again, any such change would have to follow the strictures of the rule making procedures set forth in the Administrative Procedures Act, i.e., title 2, division 3, chapter 4.5, section 11371 *et seq.* of the Government Code. (§ 7310.) Only in that way could the participation of interested parties in the process of resolving the important issue be secured (Gov. Code, §§ 11423–11425), and only then would any new plan that was devised have the “force of law.” (§ 7431(c)¹⁰; *Cf.* Gov. Code, § 811.6; *Peterson v. City of Long Beach* (1979) 24 Cal. 3d 238, 246.)

Further, any new plan that the Board might devise to replace its maintenance of original student records, must be consistent with the purposes of the Cosmetology Act. (Gov. Code, § 11373; *Wildlife Alive v. Chickering* (1976) 18 Cal. 3d 190, 205; *Cooper v. Swoap* (1974) 11 Cal. 3d 856, 864; *Verdugo Hills Hospital, Inc. v. Department of Health* (1979) 88 Cal. App. 3d 957, 962–963 and 963, fn. 7.) As we recently observed in this regard, “the purpose of section 7396.8 as construed and applied by the Board is to provide for the reliable maintenance of student record files to ensure that proper credit will be allowed for a student's past training.” (62 Ops. Cal. Atty. Gen., *supra*, at p. 217.) That practice and interpretation are persuasive (*Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal. 3d 86, 92–93; *Richfield Oil Corp. v. Crawford* (1952) 39 Cal. 2d 729, 736; *County of Los Angeles v. Frisbie* (1942) 19 Cal. 2d 634, 643–644; *Yosemite*

⁹ Government Code section 811.6 defines regulation as:

“A rule, regulation, order or *standard*, having the force of law, *adopted by an . . . agency* pursuant to authority vested by constitution, statute, to implement, interpret or make specific the law enforced or administered by the . . . agency” (italics added). Government Code section 11371, subdivision (b) states:

“Regulation’ means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agencies. Regulation does not mean or include any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not limitation upon any requirement that a regulation be adopted pursuant to this part line when one is needed to implement the law under which the form is issued.”

¹⁰ 10 Section 7–131 (c) makes the failure to comply with the rules adopted by die Board for the regulation of schools of cosmetology or the practice of cosmetology,” ground for disciplinary actions.

Park & Curry Co. v. Dept. of Motor Vehicles (1960) 177 Cal. App. 2d 448, 454), and the results of the Board's efforts in the area must be consistent with it.

Whatever the ultimate result, the change can only be achieved by Board action through the rule making process. The system established by the present regulations could not be changed by decree issued by the Executive Secretary. As the Supreme Court has said:

“Officers should not have power to determine in each case in accordance with their momentary whims what overall policy they prefer [T]hat is the power that rulemaking should subtract.” (*Peterson v. City of Long Beach, supra*, 24 Cal. 3d at p. 245 quoting Davis, *Administrative Law: Cases-Text-Problems* (6th ed. 1977) p. 509.)

We therefore conclude that the Executive Secretary of the Board of Cosmetology could not terminate the assessment of student enrollment fees (or the Board's issuance of student registration cards) on his own, nor could he himself effect the termination of the system whereby the Board maintained the original records of students attending cosmetology schools.
