

BARBERS:  
LICENSING:

Right of Board to waive penalty fees under Section  
10132, R. S. Mo. 1939.

November 18, 1943

11/24



State Board of Barber Examiners  
620 South Kimbrough Avenue  
Springfield, Missouri

Attention: L. N. Dixon, Secretary

Gentlemen:

This will acknowledge receipt of your request for an  
opinion under date of November 14, 1943, which reads as follows:

"Is it possible under the existing law,  
Chapter 67 Sec. 10132 R.S. Mo. 1939 page  
2664 for the State Board of Barber Examin-  
ers or any other person to authorize the  
waiving of the \$5.00 penalty clause for  
failure to renew their State Barber License  
in the require time, even though they pre-  
sent an honorable discharge from the Army  
or other branches of the Armed Service of  
our Country, and swear that because of such  
Service they were unable to renew their  
license in the time allowed."

The section referred to in your letter reads as follows:

"Every person now engaged in the occupation  
of barbering in this state shall, within  
ninety days after the approval of this law,  
file with the secretary of said board a  
written statement, setting forth his name,  
residence and the length of time during  
which and the place where he has practiced  
such occupation, and shall pay to the  
treasurer of said board \$2.00; and a cer-  
tificate of registration entitling him to  
practice the said occupation for the fiscal  
year ending January 31, 1922, thereupon  
shall be issued to him, and the holders of such  
certificates shall, annually, on or before  
the expiration of their respective certifi-  
cates, make application for the renewal of  
same, stating the number of his expiring  
certificate, and shall in each case pay to  
the treasurer of said board the sum of \$2.00  
therefor. For any and every license or

certificate given or issued by the board a fee of \$2.00 shall be paid by the person receiving the same. Should any person holding a certificate of registration as a barber fail to make application for renewal of same within the time prescribed herein, such person shall be required to pay the sum of \$5.00 to the treasurer of said board, in addition to the regular registration fee provided for herein. Any person failing to renew his certificate of registration for a period not exceeding two years may reinstate said certificate of registration upon the payment of \$2.00 for each delinquent year in addition to the \$5.00 reinstatement fee prescribed herein, but, any barber failing to renew his certificate of registration for a period exceeding two years and desiring to be re-registered as a barber in this state will be required to appear before said board and pass a satisfactory examination as to his qualifications to practice said occupation and shall pay to the treasurer of said board the regular examination fee as is prescribed in the following section."

We think the suggestion is splendid that a waiver of such penalty be enforced by the State Board of Barber Examiners for those in the armed forces, however, neither the Governor, the State Attorney General, the State Board of Barber Examiners, nor any other officer or board except the State Legislature has any authority to cause such a waiver to become effective. The above provision provides in part:

"\* \* \* such person shall be required to pay the sum of \$5.00 to the treasurer of said board \* \* \*" (Underscoring ours)

By the use of the word "shall" it is mandatory. See State ex. rel. Stevens v. Wurdeman, 295 Mo. 566.

It is a well established principle of law that any board, bureau or commission, being a creature of statute, shall have only such powers as may be conferred upon said board, bureau or commission by statute. In Aetna Insurance Company v. O'Malley, 124 S. W. (2d) 1164, 1. c. 1166, the court said:

"\* \* \* 59 C.J., section 285, page 172, section 286. In the last citation the author says: 'Public officers have and can exercise only such powers as are conferred on them by law \* \* \* \*'"

This function you inquire about being waived is a mandate from the Legislature and must be carried out to the letter of the law, as stated in *State v. Welsch*, 124 S. W. (2d) 1. c. 639:

"(3-5) It is established law that the purpose of mandamus is to compel the performance of a ministerial duty which one charged with its performance has refused to perform. While mandamus will not lie to correct or control the judgment or discretion of a public officer in matters committed to his care in the ordinary discharge of his official duties, it is nevertheless well established that mandamus will lie to compel the performance of mere ministerial acts or duties imposed by law upon a public officer to do a particular act or thing upon the existence of certain facts or conditions being shown, even though the officer be required to exercise judgment before acting. A ministerial act, as applied to a public officer, is an act or thing which he is required to perform by direction of legal authority upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case. *State ex rel. Jones et al. v. Cook*, 174 Mo. 100, 118, 119, 120, 73 S.W. 489."

Likewise, this is merely a ministerial act to be performed by the State Board of Barber Examiners and it leaves no discretion whatever to the Board but to comply with the said act.

The only possible way that the writer can suggest such can become effective is that a bill be passed by the next General Assembly effectuating such waiver. This is a matter within their sole discretion, and one that we heartily approve and think should be passed.

In some instances laws have been passed tolling certain provisions of the law for the duration of the war so as to not

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penalize those members of our armed forces while serving their country. For instance, I find one example. This particular law, Section 16, p. 663, Laws of Missouri, 1941, provides that any time within one year after the act became effective, upon the payment of a fee amounting to \$25.00, persons having certain stipulated qualifications may be issued a certificate of registration as an architect or engineer without being required to take an oral or written examination. The amendment passed by the Sixty-second General Assembly, and approved on August 2, 1943, merely added the following provision thereto:

"\* \* \* Provided, however, that any architect or professional engineer who has been prevented from obtaining such certificate of registration within the period of one year after the effective date of this act, because of service with the armed forces during such period, shall have one year after the official termination of the war to obtain such certificate, without oral or written examination."

Just such a similar provision could be passed by the General Assembly and thereby waive any such fees, but in the absence of some law amending or repealing the present law requiring the penalty, the Board is forced to comply with same and collect the \$5.00 fee.

#### CONCLUSION

Therefore, we must hold that it is mandatory upon the State Board of Barber Examiners to require a penalty of \$5.00, as provided in Section 10132, supra, regardless of whom the penalty may be assessed against, be he a civilian or a member of the armed forces of this country.

Respectfully submitted,

AUBREY R. HAMMETT, JR.  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

ARH:NH