

COSMETOLOGY: Proper procedure to invoke against shops carrying on
LICENSE: the practice of cosmetology without obtaining a certifi-
CRIMINAL LAW: cate of registration or renewal thereof. Revocation or
suspension of operator's certificate practicing in such
shops.

March 12, 1956



Board of Cosmetology
State of Missouri
Jefferson Building
Jefferson City, Missouri

Attention: Miss Jakaline McBrayer, Secretary.

Gentlemen:

This will acknowledge receipt of your request for an opinion,
which reads:

"Will you please render an opinion to the State
Board of Cosmetology as to what may be done when
a shop owner refuses to pay the annual registra-
tion fee provided for under Section 329.041,
MoRS Cum. Supp. 1955.

Furthermore, does said Board have authority to revoke or
suspend an individual operator's license who is continuing to
practice cosmetology in such unlicensed shop."

Section 329.041, MoRS Cum. Supp. 1955, reads:

"Every shop or establishment in which the
occupation of hairdressers, cosmetologists or
manicurists is practiced shall be required to
obtain a certificate of registration from the
state board of cosmetology. The registration
year shall be from July first to June thirtieth
of each year. Every shop or establishment so
required to register shall pay to the state
an annual fee of five dollars for the first
three licensed operators in such shop or
establishment and an additional fee of one
dollar for each additional licensed operator
or apprentice. Such fee shall be due and
payable on June thirtieth of each year and
for each thirty days thereafter that such fee

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remains unpaid there shall be added a penalty of five dollars. The certificate of registration shall be kept posted in plain view within the shop or establishment."

Ever since the foregoing statute was enacted in 1951, shops in which cosmetology is practiced have been required to obtain a certificate of registration and to thereafter renew same annually. The same statute also fixes a penalty for failure to obtain such certificate of registration which shall become due and payable on June 30th of each year and for each 30 days thereafter that the registration fee remains unpaid there shall be added a penalty of \$5.00.

In view of the foregoing statute there can be no question that any such shops carrying on the practice of cosmetology are required to obtain a certificate of registration and renew same annually.

In case such shops positively refuse to apply for a certificate of registration or renew such registration annually as provided by law, your recourse is to recover the penalty provided under Section 329.041, supra, in a civil action at law.

There is another statute that makes said shop owner subject to prosecution when refusing to obtain a certificate of registration, or renewal of said registration, as the case may be, and that is Section 329.250, MoRS Cum. Supp. 1955, which statute provided, among other things, that anyone maintaining such a shop without a certificate as required by law, or who violates any provision of said chapter upon conviction shall be adjudged guilty of a misdemeanor. Section 329.250, reads:

"Anyone who shall practice any of the occupations, maintain a shop or establishment or school in which anyone is employed who does not have a certificate as required by this chapter, or who shall act in any capacity, wherein a certificate is required, without a certificate, or who shall violate any provision of this chapter, shall, upon conviction, be adjudged guilty of a misdemeanor. Each and every day of such violation shall constitute and be a separate offense."

The imposition of a penalty amounting to \$5.00 for every thirty days the certificate of registration remains unpaid under Section 329.041, supra, is not tantamount to a crime but as hereinabove stated can only be recovered by civil action at law. However, to maintain a shop and violate any of the provisions of Chapter 329, supra, upon conviction, does constitute a crime and makes the offender guilty of a misdemeanor.

We see no reason why any such shop owner, employing licensed operators under Chapter 329, supra, without said shop owner having

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obtained a certificate of registration or renewal thereof, cannot be both sued for the penalty and prosecuted for having violated the provisions of said chapter as hereinabove provided.

In *Kenney vs. Commissioner of Internal Revenue*, 111 Fed. 2d 374, 376, it was held that the imposition of civil fraud penalties being a civil matter, cannot place a defendant in double jeopardy.

In *Mauch vs. Commissioner of Internal Revenue*, the court held that an acquittal by a jury on an indictment for income tax fraud does not prevent one subsequently being sued for deficiency and fraud penalties under the doctrine of double jeopardy.

In *Helvering v. Mitchell*, 303 U.S. 391, 1.c. 397, 398, Mr. Justice Brandeis delivered the opinion of the court and said, in part:

"The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of res judicata. The acquittal was 'merely . . . an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.' Lewis v. Frick, 233 U.S. 291, 302. It did not determine that Mitchell had not wilfully attempted to evade the tax. That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled. Stone vs. United States, 167 U.S. 178, 188; Murphy vs. United States, 272 U.S. 630, 631, 632. Compare Chantangco vs. Abaroa, 218 U.S. 476, 481, 482. Where the objective of the subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or a conviction. Murphy v. United States, 272 U.S. 630, 632."

As to your last question, can the Board suspend or revoke the certificate of the individual operator in any such unlicensed shop simply because the shop owner refuses to obtain or renew a certificate of registration, Section 329.140, MoRS Cum. Supp. 1955, specifically sets out the grounds for said Board refusing a certificate to practice any of the occupations provided for in said chapter. Subsection 2 thereunder further provides said Board shall have the power to revoke or suspend certificates for anyone of the foregoing grounds. None of

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the grounds mentioned therein relate to revocation or suspension of an individual operator's certificate for the reason the shop in which they practice is not licensed. However, we are of the opinion that if the shop owner were a licensed operator under the Cosmetology Act, his failure to obtain a certificate of registration for the shop, as required under Section 329.041, supra, would be sufficient grounds to revoke or suspend his operator's certificate under and by virtue of part one, subsection 7, and paragraph two of the foregoing mentioned statute.

Unable to find any statutory inhibition against any such individual licensed operators carrying on such a profession in the absence of some similar statutory authority penalizing or prohibiting such practice in such shops, our answer to your latter question must be in the negative, with the one exception hereinabove mentioned, and that is where the owner of the shop might also be a licensed operator. In such case where the shop owner is operating without a certificate, his operator's certificate is subject to suspension or revocation.

CONCLUSION

Therefore, it is the opinion of this department that any shops referred to in Section 329.041, MoRS Cum. Supp. 1955, violating the provisions of said section may be sued in a civil action for recovery of penalties provided therein, and in addition thereto said shop owner may be prosecuted for having violated the provisions of Chapter 329, Section 329.250, MoRS Cum. Supp. 1955.

It is further the opinion of this department that there is no statutory provision for revoking or suspending the certificate of any individual licensed operator practicing cosmetology in such shops merely because they are working in said shop, which has not obtained a certificate of registration, or renewal, as the case may be, except when said shop owner is also a licensed operator, in such instance his operator's certificate is subject to suspension or revocation by the Board.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett.

Yours very truly,

John M. Dalton
Attorney General

ARH:mw