STATE BARBER BOARD - Rules and regulations requiring barber lather brushes to be replaced with mechanical appliances in cities over 20,000, are reasonable if a necessity exists to safeguard public health.

January 5, 1942

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Mr. L. N. Dixon
Secretary
State Board of Barber Examiners
Princeton, Missouri

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Dear Sir:

We are in receipt of your recent request for an official opinion, which reads as follows:

> "I have been requested by Harry G. Sloan, Pres. and William J. Kloppenberg, Treas. of the State Barber Board; also Dr. Stewart, to get an opinion from your office in regard to the following:
>
> "Would it be constitutional or legal under our Sanitary Rules and Regulations to insert a rule requiring all barbers to install and use electric lather mixers in cities of the first and second class and those cities operating under special charter; or in cities with a population of 20,000 or more?
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> "It was suggested that all barbers be required to do away with the lather brush and mug and install lather mixers. I insisted that the country barbers didn't have the money to buy them as they cost from $20.00 to $35.00. Dr. Stewart agreed with me on this, and then the other plan was suggested and they asked me to write for an opinion."

Also, your request for additional information under date of December 19, 1941, which reads as follows:

"Your letter of the tenth just received today as I have been in the southern part of the state since December 7.

"The equipment referred to in my letter is operated by electricity.

"There a number of shops in the state that do not have electric current. In addition to the above under our present war status, it would not be possible for the manufacturer to supply the lather mixers to a great extent and the cost which would average about $30.00 would be hard for the average barber to meet."

Section 10128 R. S. Missouri, 1939, provides in part as follows:

"* * * Said board shall, with the approval of the State Board of Health, prescribe such sanitary rules as it may deem necessary, with particular reference to the precautions necessary to be employed to prevent the creating and spreading of infectious or contagious diseases. * * * "

It will be noted from reading the excerpts, which are pertinent in furnishing you the information requested by you, that the State Board of Barber Examiners, may prescribe sanitary rules, with reference to the precautions necessary to be employed to prevent the creating and spreading of infectious and contagious diseases. However, such rules, if made under the authority of Section 10128, supra, must be approved by the State Board of Health. This being the case, we think the law applicable to the powers and duties of the State Board of Health must be followed. We therefore call attention to the case of State v. Clark, 9 S. W. (2d) 635, wherein the court sets forth the following, at l. c. 638:

> " * * * Nevertheless it is a wholesome and well-recognized rule of law that powers conferred upon boards of health to enable them effectually to perform their important functions in safeguarding the public health should receive a liberal construction. 29 C. J. Sec. 30, p. 248, also section 6, p. 243. While boards of this character cannot act arbitrarily, or without substantial evidence (State ex rel. v. Adcock, 206 Mo. 550, loc. cit. 558, 105 S. W. 270, 121 Am. St. Rep. 681), yet, when any act, requiring the exercise of judgment and the employment of discretion, is within the scope of the exercise of a reasonable discretion, it will not be inferfered with. State ex rel. Granville v. Gregory, 83 Mo. 123, loc. cit. 136, 53 Am. Rep. 565. * * * "

The State Board of Health has widespreading powers in safeguarding the public health, and, as was pointed out in the above excerpt, if there is any substantial evidence or reasonable necessity upon which to base a rule of the Board of Health, then it cannot be said to have acted arbitrary and unreasonable in making the rule.

We are confronted in this opinion, first, with the situation that Chapter 67 R. S. Missouri, 1939, does not provide for a rule in one community and a more lax rule in another. In other words, the legislature has not seen fit to inaugurate legislation which confers greater powers upon the Barber Board in municipalities. In this connection we call attention to 7 Amer. Jur., Par. 6, at page 616, which reads, in part, as follows:

> "It is competent for the legislature to classify barbers according to the population of the communities within which they conduct their business and, as classified, to prescribe different

> regulations governing their occupation. Such a law does not violate constitutional requirements that laws of a general nature shall have uniform application throughout the state. One reason for permitting such classification is that the spread of disease by insanitary barbers or barbershops affects more people in large towns or cities than in small ones; another is that the character of barbers and barbershops is more generally known in villages than in large towns. * *" (Cases cited).

The legislature would have the right to pass legislation giving greater power to the Barber Board to make rules and regulations governing municipalities, if it saw fit, but the court, in the case of International Harvester Co. v. Missouri, 234 U. S. 199, l. c. 212,215, said:

> "* * * This court has decided many times that a legislative classification does not have to possess such comprehensive extent. Classification must be accommodated to the problems of legislation, and we decided in Ozan Lumber Co. v. Union County Bank, 207 U. S. 251, that it may depend upon degrees of evil without being arbitrary or unreasonable. * * * * * * * * * * *
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> "* * Such power, of course, cannot be arbitrarily exercised. The distinction made must have reasonable basis. (Cases cited.) * * * "

At the present time we find that the legislature has not made this discrimination but that the powers and duties conferred upon the Barber Board are of a general nature and apply equally to the State as a whole. No doubt the legislature

in its inauguration of Section 10128, supra, wherein it provided that the State Board of Health should first approve the sanitary rules intended that it should be a safeguard against an arbitrary and unreasonable rule being invoked in some particular community. On the other hand, it is easy to visualize where a condition or pestulance might develope and the assistance of the State Board of Health would be of much benefit to the State Board of Barber Examiners, in enforcing and carrying out some measure. The determination whether or not the State Board of Barber Examiners, with the approval of the State Board of Health, would have the right under Section 10128, supra, to inaugurate a rule or sanitary measure invoking upon the barbers of the State of Missouri the absolute duty to purchase and use exclusively a lather mixer, as described in your opinion request of November 22, devolves upon the sole question of whether or not such rule, if so made would be a reasonable rule. It is easy to visualize a situation where some pestulance would develope which could be transmitted through the use of a barber brush. Should this situation arise, then no doubt there would be substantial evidence,or reasonable necessity would exist, to sustain a rule requiring all barbers of the State of Missouri to purchase the mixer, or one similar.

However, in your letter of December 19, supra, we find that there are barber shops in the State of Missouri which do not have electricity, which, of course, is essential to the operation of a lther mixer, and further, that on account of the present war it would be utterly impossible to supply all of the barbers of the State of Missouri.

We call attention to amendment XIV of the United States Constitution, which reads as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

In the case of Spielman Motor Sales Co. v. Dodge, 8 F. Supp. 437, l. c. 440:

> "'It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. Wolff Packing Co. v. Industrial Court, 262 U. S. 522, 535, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280. * * * * *"

Also, at page 442 of this case the court said:

> "* * * But a business which is of little public consequence to-day may become affected with public interest in later years, and a business vital to-day may well become obsolete tomorrow. Thus the regulation may be valid for business of one sort in given circumstances and invalid for another sort or for the same sort of business in different circumstances. The test has always been one of reasonableness, * * * * * *."

In the case of Duncan v. Missouri, 152 U. S. Reports 377, l. c. 382, the court said:

> "* * * But the privileges and immunities of citizens of the United States, protected by the Fourteenth Amendment, are privileges and immunities arising out of the nature and

> essential character of the Federal government, and granted or secured by the Constitution; and due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government; * * * "

From a reading of the cases supra it willbe noted that the Board of Health has widespreading powers in the making and enforcing of rules and regulations to safeguard the public health. Therefore, if the State Barber Board and Board of Health found that a necessity existed for the eradication of the use of the barber brush in cities having a population greater than 20,000, and made a rule requiring that some practical appliance be used instead of the barber brush, and such appliance would be available to all barber shops, then we believe that such rule would not be unreasonable and arbitrary and could be enforced.

CONCLUSION

We are of the opinion that if the State Barber Board and State Board of Health found a necessity to exist for the eradication of the use of barber brushes in cities over 20,000 population that such rule would be reasonable if adequate appliances could be procured in accordance with the rule.

Respectfully submitted

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

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