

BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE DENIAL	:	
OF THE RENEWAL OF THE LICENSE OF	:	ORDER
MELANIE LEA GARDNER TO PRACTICE AS A	:	
COSMETOLOGIST/BARBER	:	Case No. DOPL-2010-122
IN THE STATE OF UTAH	:	

The attached Findings of Fact, Conclusions of Law and Recommended Order are hereby adopted by the Regulatory and Compliance Officer of the Division of Occupational and Professional Licensing of the State of Utah.

Dated this 10TH day of June, 2010.

W. Ray Walker

W. Ray Walker
Regulatory and Compliance
Officer



Agency review of this Order may be obtained by filing a request for agency review with the Executive Director, Department of Commerce, within thirty (30) days after the date of this Order. The laws and rules governing agency review are found in Section 63G-4-301 of the Utah Code, and Section R151-46b-12 of the Utah Administrative Code.

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OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE DENIAL	:	FINDINGS OF FACT
OF THE RENEWAL OF THE LICENSE OF	:	CONCLUSIONS OF LAW
MELANIE LEA GARDNER	:	AND RECOMMENDED ORDER
TO PRACTICE AS A COSMETOLOGIST/ BARBER IN THE STATE OF UTAH	:	Case No. DOPL-2010-122

APPEARANCES:

Applicant Melanie Lea Gardner participated by telephone
Valerie Shephard present on behalf of Applicant
Laurie Noda for the Division of Occupational and
Professional Licensing

BY THE BOARD:

A May 3, 2010 hearing was conducted in the above-entitled proceeding before J. Steven Eklund, Administrative Law Judge for the Department of Commerce, and the Barber, Cosmetology/Barbering, Esthetician, Electrology, and Nail Technology Licensing Board.

Board members present were Marti Frasier, Lyle G. Ferguson, Fran Brown, Holly A. Murphy, Carlotta Vesay and Annette Bergstrom. The remaining Board members (Dianne Niebuhr, Sunny Smith and Carol Peterson) were absent.

Mark B. Steinagel, Director of the Division of Occupational and Professional Licensing, was also absent. However, Mr.

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Steinagel had designated W. Ray Walker (Regulatory and Compliance for the Division) as a substitute presiding officer in this proceeding to thus act on behalf of the Division.

Thereafter, evidence was offered and received. The hearing concluded on May 3, 2010. The Board then took the matter under advisement and conducted initial deliberations in this case with the expectation that the Court would prepare a draft of the Board's Findings of Fact, Conclusions of Law and Recommended Order and submit that draft to the Board for its review and action.

The Board reviewed the draft and resumed its deliberations in this proceeding. The Board now enters its Findings of Fact and Conclusions of Law, and submits the following Recommended Order to the Division for its review and action:

FINDINGS OF FACT

1. Applicant is, and at all time relevant to this proceeding has been, licensed to practice as a cosmetologist/barber in this state. Applicant became so licensed on April 28, 1999.

2. Sometime prior to February 3, 2010, Applicant filed a request with the Division to obtain a renewal of her license. Pursuant to a February 3, 2010 letter, the Division notified Applicant that she did not meet the qualifications for license renewal and her application was thus denied.

3. The Division denied Applicant's request for renewal of her license based on a lack of good moral character and her criminal conviction involving a controlled substance. The February 3, 2010 letter informed Applicant that she could challenge the denial of her request for licensure renewal by filing a request for agency review.

4. Pursuant to an undated letter, which was received by the Department of Commerce on February 6, 2010, Applicant notified the Division that she disputes the denial of her renewal application. Applicant then requested the Division to reconsider its decision to deny that application.

5. Pursuant to a March 8, 2010 letter, the Division reaffirmed its denial of Applicant's request for license renewal. However, the Division notified Applicant that she could request a hearing before the Division - rather than seek agency review - as to the denial of her renewal application.

6. Applicant submitted a March 15, 2010 letter, which was received by the Division on March 18, 2010. Applicant thus requested a hearing before the Division to challenge the denial of her application.

7. Pursuant to an April 13, 2010 Notice, the Division informed Applicant that a May 3, 2010 hearing would be conducted in this proceeding. The April 13, 2010 Notice also recites

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Applicant's license was conditionally renewed during the pendency of this matter.

8. Sometime in 2001, Applicant was prescribed Oxycodone by her primary care physician. She was taking thirty (30) of those pills on a monthly basis. Applicant eventually became addicted to that pain medication.

9. Applicant was charged in Fourth Judicial District Court criminal proceedings with Illegal Possession/Use of a Controlled Substance, a Second Degree felony. Applicant pled guilty to that charge on December 29, 2006. That criminal proceeding was prompted when Applicant purchased pain medication, consisting of four (4) pills, from an informant. Applicant's guilty plea in that criminal proceeding was held in abeyance.

10. Applicant was placed on probation relative to the just described criminal proceeding. Applicant was required to attend drug court while on criminal probation. She was also subject to random drug testing.

11. Applicant elected - at some point - to cease her participation in the drug court program. Applicant admits she had a positive drug test result in either October 2007 or November 2007. Applicant's last contact with her primary care physician occurred in March 2008. There is no sufficient evidence to find Applicant's work performance was adversely impacted by her use of pain medications.

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12. Based on the substantial, credible and uncontroverted evidence presented, Applicant has not used any pain medications since September 10, 2009. An Order to Show Cause proceeding was conducted in Fourth Judicial District Court as to whether Applicant had violated the terms of her criminal probation. Pursuant to a September 23, 2009 Post Sentencing Judgment/Commitment, Applicant's criminal probation was revoked and she was ordered to serve a term of 1-5 years in the Utah State Prison.

13. The Post Sentencing Judgment/Commitment recites the Court would recommend to the Board of Pardons that Applicant receive credit for time served. The Court would also recommend that Applicant enroll in drug treatment as soon as possible.

14. During her prison incarceration, Applicant has been subject to random drug testing 1-3 times each week. Commencing February 2010, Applicant has participated in a drug program offered through the prison. Applicant is presently scheduled to be released from incarceration on August 31, 2010.

CONCLUSIONS OF LAW

Applicant contends that, while she has been incarcerated, she has acquired new coping skills and better means to deal with stress. Applicant asserts she is no longer in pain and, upon her release from prison, she expects to attend an LDS addiction program.

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Applicant acknowledges she is not scheduled for release from prison before August 31, 2010. However, Applicant requests that the Board recommend the renewal of her license on a probationary basis, subject to terms and conditions which would include random drug testing and counseling from a mental health therapist.

Applicant also requests that she not be required to attend Alcoholics or Narcotics Anonymous meetings for a period of time. Applicant contends her prior participation in such meetings was counterproductive as it brought her in contact with other drug offenders and thus tended to reinforce her prior unauthorized use of controlled substances. Applicant further asserts that, if her request for license renewal is denied at this time, she will reapply for such licensure upon her prison release.

The Division contends Applicant's criminal probation violation reveals the serious extent of her controlled substance addiction. The Division thus asserts Applicant should be subject to various terms and conditions to adequately address her history of substance abuse and promote ongoing efforts to consistently and continuously obtain ongoing rehabilitation. The Division suggests it can not license Applicant while she is still incarcerated.

Utah Code Ann. §58-1-401(1) provides the Division shall refuse to issue a license to an applicant who does not meet the qualifications for licensure under that title. §58-1-401(2) also

provides the Division may refuse to renew a license for a licensee who has engaged in unprofessional conduct, as defined by statute or rule under that title. §58-1-501(2)(a) defines unprofessional conduct by a applicant or licensee to include:

. . . violating any statute, rule or order regulating an occupation or profession under this title. . .

§58-11a-302(4)(b) provides an applicant for licensure as a cosmetologist/barber shall be of good moral character. R156-11a-302(3) further provides an applicant who has a criminal conviction for a felony involving a controlled substance may be considered ineligible for licensure.

The Board readily finds and concludes Applicant has engaged in unprofessional conduct, as defined in §58-1-501(2)(a) based on Applicant's conviction of Illegal Possession/Use of a Controlled Substance. Accordingly, the Board concludes a proper factual and legal basis exists to enter appropriate action in this proceeding.

The Board duly notes Applicant's failure to comply with the terms of her criminal probation prompted a revocation of that probation with her resulting incarceration. Commendably, Applicant participated in a drug treatment program for a period of time, yet she elected to cease participation in the drug court program and she also reverted to unauthorized controlled substance use.

The Board recognizes Applicant will remain incarcerated until August 31, 2010 and whether her license is renewed on a probationary basis prior to her release from incarceration will have minimal practical effect. Nevertheless, the Board concludes the question whether Applicant's license should be renewed is squarely presented at this time and it is more appropriate to resolve that matter now rather than postpone a licensure decision until Applicant is released from prison.

Based on the foregoing, the Board concludes the Recommended Order set forth below is warranted to adequately protect the public health, safety, and welfare and also promote Applicant's ongoing efforts toward recovery and rehabilitation. Significantly, it appears Applicant is committed to ongoing remedial efforts which may, if successful, result in the issuance of an unrestricted license to her to practice as a cosmetologist/barber.

RECOMMENDED ORDER

WHEREFORE, IT IS ORDERED Applicant's request to renew her license to practice as a cosmetologist/barber in this state is granted.

It is also ordered that, concurrent with the renewal of Applicant's license, that license shall be suspended until Applicant is released from prison incarceration.

It is also ordered that, upon such release, Applicant's

license shall be placed on probation, subject to the following terms and conditions:

1. Applicant shall meet with the Board during its next regularly scheduled meeting to be conducted on September 13, 2010. The Board will thus review Applicant's ongoing efforts toward rehabilitation while incarcerated. During that meeting, Applicant shall submit documentation to the Board which reflects the frequency and results of drug testing conducted from May 3, 2010 until Applicant's release from prison.

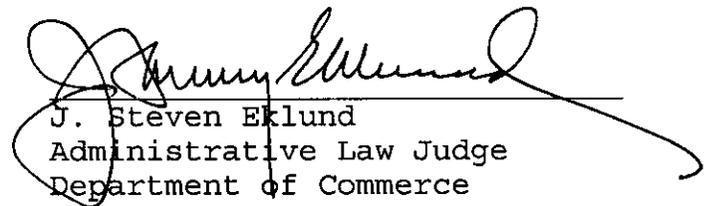
2. Within ten (10) days after Applicant's release from prison, Applicant shall provide written notice of that release to the Division. Applicant shall similarly contact the Division and register to participate in the drug testing program administered for the Division through Compass Vision, its authorized agent for that purpose. Applicant shall thereafter be subject to drug testing, consistent with the requirements generally applicable to required participation in that program. Applicant shall bear the cost of such testing.

3. Applicant shall identify a counselor or therapist to conduct an evaluation of Applicant and then recommend any treatment based on that evaluation. During Applicant's September 13, 2010 meeting with the Board, she shall identify the proposed counselor or therapist for Board review and approval. Upon such approval, Applicant shall be evaluated and the evaluation report shall be submitted to the Division within thirty (30) days after September 13, 2010.

Should Applicant fail to comply with the terms and conditions set forth herein, or otherwise violate any statute which governs her license to practice as a cosmetologist/barber in this state, further proceedings shall be conducted and a

determination made whether a greater disciplinary sanction than set forth herein is warranted.

On behalf of the Barber, Cosmetology/Barber, Esthetician, Electrology and Nail Technology Licensing Board, I hereby certify the foregoing Findings of Fact, Conclusions of Law and Recommended Order were submitted to W. Ray Walker, Regulatory and Compliance Officer of the Division of Occupational and Professional Licensing, on the 9th day of June 2010 for his review and action.


J. Steven Eklund
Administrative Law Judge
Department of Commerce