

April 6, 1993

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**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Carmen and Jan:

This letter is in response to your request for an opinion regarding the enforceability of the provisions contained in Idaho Code § 54-812. This statute regulates the endorsement certification procedure for cosmetologists and distinguishes, for reciprocity purposes, between cosmetologists currently licensed in another state who have previously been licensed in Idaho from cosmetologists currently licensed in another state who have never been licensed in Idaho. Because this classification allocates the benefits and burdens of the statute differently among the categories of persons affected, the primary question is whether it violates the equal protection clauses of the U.S. and Idaho Constitutions.

The equal protection clauses of the state and federal constitutions embrace the principle that all persons in like circumstances should receive the same benefits and burdens of the law. Equal protection issues focus upon classifications within statutory schemes that allocate benefits or burdens differently among the categories of persons affected. State v. Reed, 107 Idaho 162, 686 P.2d 842 (Ct. App. 1984). The first step in an equal protection analysis is to identify the classification under attack. The second is to articulate the standard under which the classification will be tested. The third is to determine whether the standard has been satisfied. State v. Breed, 111 Idaho 497, 725 P.2d 201 (Ct. App. 1986).

Cosmetology Statutes

Idaho Code § 54-812 provides in pertinent part as follows:

ENDORSEMENT CERTIFICATION. The board . . . may issue a license without examination to any person who is at least eighteen (18) years of age and of good moral character and temperate habits and who has completed two (2) years of high school or its equivalent and who either:

1. Holds a certificate of qualification or license issued to him by the proper authority of any state . . . provided that the requirements for license under which the certificate was issued are of a standard not lower than those specified in this chapter, or

2. Holds a certificate of qualification or license issued to him by the proper authority of any state . . . and upon proof that said person has practiced the pursuit for which the license is requested for at least three (3) years immediately prior to such application. The board shall evaluate the applications for license by reciprocity. No reciprocal license shall be issued except by the board. This section shall not apply to any individual who is or has been licensed in the state of Idaho.

(Emphasis added.)

Idaho Code § 67-2614 governs the procedure for licensing a cosmetologist who is currently or has previously been licensed in the State of Idaho. It provides in pertinent part as follows:

RENEWAL OR REINSTATEMENT OF LICENSE. All persons required to procure licenses from the bureau of occupational licenses as a prerequisite for engaging in a trade, occupation, or profession must annually renew the same on July first of each year. In case of failure so to renew a license, the bureau shall cancel the same, October first, following the date of delinquency: provided[,] however, that the bureau may reinstate any license cancelled for failure to renew the same on payment of twenty-five dollars (\$25.00), together with all fees delinquent at the time of cancellation and the renewal fee for each year thereafter up to the time of reinstatement.

Provided further, that where a license has been cancelled for a period of more than five (5) years, the person so affected shall be required to make application to the bureau, using the same forms and furnishing the same information as required of a person originally applying for a license, and pay the same fee that is required of a person taking the examination in the particular profession in which said person holds a cancelled Idaho license. Said applicant shall appear in person before the bureau at any regular or special meeting for an examination, the nature of which shall be determined by the bureau. If[,] after an examination, the bureau is of the opinion that the person examined is the bona fide holder of the cancelled license, is of good moral character and, is found capable of again practicing in this state the profession for which the original or cancelled license was granted, the

license shall be reinstated and the holder thereof entitled to practice subject to the laws of this state.

The effect of Idaho Code § 54-812 is that a cosmetologist previously licensed in Idaho, currently licensed in another state, and seeking re-licensing in Idaho is not entitled to the same reciprocity as other cosmetologists currently licensed in another state.

Standard of Review

To determine whether a statutory classification scheme violates the equal protection guarantee, the Idaho Supreme Court has recognized three standards of review. Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977). Where the classification is based upon a suspect classification or involves a fundamental right, the "strict scrutiny" test is employed. Where the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of a lack of relationship between the classification and the declared purpose of the statute, the "means focus" test is applicable. In other cases the "rational basis" test is employed. Olsen v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990) (citing Johnson v. Sunshine Mining Co., 106 Idaho 866, 870, 688 P.2d 268, 271 (1984)).

Clearly, there is neither a suspect class nor fundamental right involved in the question here. Thus, either the "means focus" or the "rational basis" test will apply. The Idaho case of Jones v. State Bd. of Medicine provides guidance in choosing between the "means focus" and "rational basis" tests:

In the usual and ordinary case where a statutory classification is to be tested in the context of equal protection, judicial policy has been, and continues to be, that the legislation should be upheld so long as its actions can reasonably be said to promote the health, safety and welfare of the public. Nevertheless, where the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of a lack of relationship between the classification and the declared purpose of the statute, then a more stringent judicial inquiry [means focus] is required beyond that mandated by McGowen [rational basis].

97 Idaho at 871, 555 P.2d at 411.

A. Means Focus Test

Under this test, two questions are posed. First, whether the statutory classification is discriminatory and, second, whether the legislative means substantially further some specifically identifiable legislative end. Jones, 97 Idaho at 867, 555 P.2d at 407. If the classification is discriminatory and furthers no legitimate legislative end, the classification will be found to be in violation of the Equal Protection Clause.

It is apparent from the face of the statute that a discriminatory classification is created based upon whether a cosmetologist was previously licensed in the State of Idaho. Idaho Code § 54-812 confers a benefit upon those who have never been licensed in the State of Idaho by granting them reciprocity in licensing and burdens those cosmetologists who were previously licensed in Idaho by requiring them to pay additional fees when the license has been cancelled for less than five years, or to make application, pay an examination fee and pass an examination when the Idaho license has been cancelled for more than five years, in order to obtain a current cosmetology license in the State of Idaho.

Idaho Code § 54-812 was amended in 1980 to include, "[t]his section shall not apply to any individual who is or has been licensed in the state of Idaho." 1980 Idaho Sess. Laws 168. The statement of purpose for this amendment provides no information explaining the purpose of the amendment, other than "to improve the administration of the Cosmetology Laws."

Although there is no statement of legislative purpose concerning excluding application of Idaho Code § 54-812 to cosmetologists previously licensed in Idaho, it is patent that the principal concern of the legislature in enacting the statute was for the protection of the health, safety and welfare of the public. Such an interpretation of legislative intent finds support in language found in Idaho Code § 54-801, which delineates the state's objective in enacting title 54, chapter 8, of the Idaho Code:

In order to safeguard the public health, safety and welfare, every person practicing or offering to practice cosmetology, as hereinafter defined, shall submit evidence of his qualifications and be licensed as hereinafter provided

There is no information indicating that granting a reciprocal license to cosmetologists previously licensed in the state of Idaho threatens the health, safety or welfare of the public. In the absence of some showing that a safety factor or other exigency requires such a distinction, the distinction is arbitrary, unreasonable and without a substantial relation to the purpose of protecting the health, safety and welfare of the public. Therefore, the statutory classification violates art. 1, §§ 2 and 13, of the Idaho Constitution, and the Fourteenth Amendment of the U.S. Constitution. Sterling H. Nelson & Sons, Inc. v. Bender, 95 Idaho 813, 816, 520 P.2d 860, 863 (1974).

B. Rational Basis Test

If for any reason a court should find an analysis under the "means focus" test inappropriate and apply the rational basis test, the same conclusion would result.

The rational basis test is generally used when reviewing statutes which impact social or economic areas. In Stucki v. Loveland, 94 Idaho 621, 495 P.2d 571 (1972), the Idaho Supreme Court stated that the "rational basis" test, under the Fourteenth Amendment to the United States Constitution and under art. 1, § 2, of the Idaho Constitution, contains two elements. The court found that a statutory classification will fail the "rational basis" test if it cannot be construed to reflect a reasonably conceivable, legitimate public purpose, or if it fails to reasonably relate to the ascribed purpose. Stucki, 94 Idaho at 623, 495 P.2d at 573.

The classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. Thompson v. Hagan, 96 Idaho 19, 21, 523 P.2d 1365, 1367 (1974). The Equal Protection Clause is offended if the classification is based solely on reasons unrelated to the pursuit of the state's goals and only if no grounds can be advanced to justify those goals. Olsen, 117 Idaho at 717, 791 P.2d at 1289.

As discussed above, this statutory classification between cosmetologists previously licensed in Idaho and cosmetologists who have never been licensed in Idaho does not further any legitimate legislative purpose or reasonably relate to the ascribed purpose of protecting the health, safety and welfare of the public. The statutory classification contained in Idaho Code § 54-812 violates the Equal Protection Clause under the rational basis test as well.

Severability

Idaho Code § 52-825 provides:

Severability. If any section, subdivision, sentence or clause of this chapter is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this chapter.

In Lynn v. Kootenai County Fire Protective Dist. #1, 97 Idaho 623, 550 P.2d 126 (1976), the Idaho Supreme Court was presented with a similar situation. The court found an amendment to a statute to be unconstitutional and addressed the issue of severability as to that portion:

This court in the absence of evidence of contrary legislative intent, can presume that the legislature intended the previously enacted severability clause to apply to the amendments. Where possible, this court will recognize the legislative intent expressed by the severability clause.

97 Idaho at 627, 550 P.2d at 130 (citation omitted).

If the unconstitutional section does not in and of itself appear to be an integral or indispensable part of the chapter, then it may be stricken. Lynn, 97 Idaho at 625, 550 P.2d at 128. Striking the offending portion of Idaho Code § 54-812 leaves the statute as it was before the amendment. The requirements for reciprocity in licensing would apply equally among all cosmetologists currently licensed out of state. Because this statute was valid before the amendment, this section is not indispensable to the act.

The 1980 amendment to Idaho Code § 54-812 stating, "[t]his section shall not apply to any individual who is or has been licensed in the state of Idaho," should be severed from Idaho Code § 54-812 and the remaining portion of the statute given effect.

Very truly yours,

TERRY B. ANDERSON
Chief, Business Regulation
and State Finance Division