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April 27, 2010

Paula Kurczak, President
West Virginia Board of
Barbers and Cosmetologists
1201 Dunbar Avenue
Dunbar, West Virginia 25064

RE: Applicability of the WV Division of Personnel's Full Time Equivalent Fee and Mandated Participation in a Reclassification Study to the Board of Barbers and Cosmetologists

Dear Ms. Kurczak:

On March 9, 2010, you requested an opinion of the Attorney General on the following legal issues:

(1) the applicability of the Division of Personnel's Full Time Equivalent (FTE) fee specifically with regard to employees of the West Virginia Board of Barbers and Cosmetologists, and (2) whether the West Virginia Board of Barbers and Cosmetologists are required to participate in the reclassification study.

This Office declines to issue a formal opinion regarding these questions; however offers the following as advice as to these questions.

WV Division of Personnel's Full Time Equivalent Fee

Pursuant to W. Va. Code § 29-6-23, "[e]ach agency, department, division or unit of state or local government **served by the division of personnel** is hereby authorized and directed to transmit to the division for deposit in said special fund the charges made by the division of personnel for personnel services rendered." Emphasis supplied. Moreover, W. Va. Code § 30-27-5(b)(9), states that the board shall "[m]aintain an office, and hire, discharge, establish the job requirements and fix the compensation of employees, investigators/inspectors and contracted employees necessary to enforce the provisions of this article. . ."

The Board is currently composed of eight employees of which four positions are exempt, and the remaining five positions are considered classified positions for investigators/inspectors.¹ The Board as with most licensing boards created by Chapter 30 is funded solely through licensing fees collected by the Board. *See* W. Va. Code § 30-27-7. The Board receives no financial assistance from the State of West Virginia, and any monies it receives are deposited into a special revenue fund from which it exists with the exception of any fines collected by the Board of which are deposited in the General Revenue Fund. *See* W. Va. Code § 30-27-7. So even though the Board employees are considered state employees who receive the same state benefits of state employees, their positions are dependent upon the Board's existence and its authority.

As noted in an earlier West Virginia Attorney General's Opinion,

In 2005, the Legislature created eight executive branch departments currently under the control of the Governor. Each department is headed by a secretary who is appointed by the Governor with the advice and consent of the Senate, and who serves at the will and pleasure of the Governor. Moreover, the Legislature listed the specific agencies and boards which have been placed under the control of the eight executive branch departments. The Legislature did not include any Chapter 30 boards within this structure; as a result, Chapter 30 boards do not report to an agency head, a cabinet secretary or the Governor.

See W. Va. Op. Att'y Gen. dated July 16, 2008 (footnotes omitted).

However, pursuant to W. Va. Code § 30-27-5(b)(9), it goes on to state that “[p]rovided, [t]hat any investigator/inspector employed by the board on July 1, 2009, shall retain their coverage under the classified service including job classification, job tenure and salary, until that person retires or is dismissed. . . .” In other words, the five investigator/inspector positions still remain classified positions while the other remaining four positions in the Board office are exempt positions. Thus, the Board has some positions that are within the classified service for which DOP has authority and some that are not within the classified service for which DOP has no authority.

Participation in the Reclassification Study

As noted, DOP is undertaking a project to update its classification plan and modernize its compensation plan through a project entitled “PLANS.” The project has mailed out questionnaires to all agencies within the Executive Branch of state government. The project is to cover all classified and classified-exempt positions. The general purpose of the classification plan is attract the highest quality employee to the service of the state of West Virginia. *See* W. Va. Code 29-6-1. “All employment positions not in the classified service, with the exception if the board of regents, are

¹Please note that one of the investigator/inspector positions is currently vacant.

included in a classification plan known as classified-exempt service.” See W. Va. Code § 29-6-1. “The classified service includes all positions covered by the civil service system. . . .” See W. Va. Code § 29-6-3. At the time of the creation of the classified service, DOP was created as well to administer the classified service. See W. Va. Code § 29-6-5.

However, pursuant to W. Va. Code § 29-6-4(c), “[t]he following offices and positions are exempt from coverage under the classified service: . . . (5) [m]embers of boards and commissions and heads of departments appointed by the governor or such heads of departments selected by commissions or boards when expressly exempt by law or board order; . . . “ In the instant matter, the Board still retains four positions filled by classified employees as investigators/inspectors, and as such, those positions shall participate in the reclassification study.

Moreover, the other four positions held within the Board office are considered exempt from any type of classified service plan by the Board wherein the Board retains sole authority over the hiring and firing of these positions along with the job requirements and compensation for such positions. See W. Va. Code § 30-27-5(a)(9).

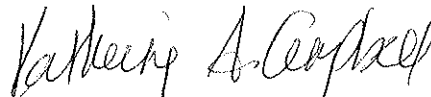
Conclusion

In conclusion, it is my advice that the West Virginia Board of Barbers and Cosmetologists abide by the FTE fee collected by DOP as to its classified positions, and also participate in the reclassifications study conducted by DOP as to its classified positions as well.

For the remaining positions which are not part of the classified service nor the classified-exempt service, these positions need not participate in the reclassification study since the study does not apply to these positions. Moreover as to the FTE fee collected by DOP for these positions, the fee is inappropriate since DOP renders no services with regard to these positions.

Should you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,



KATHERINE A. CAMPBELL
ASSISTANT ATTORNEY GENERAL