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Adopted January 6, 2003

MINUTES BOARD MEETING NOVEMBER 5, 2002 (*Minutes are in Italics*)

1. Pursuant to Chapter 551 of the Texas Government Code, call to order and roll call by William H. Kuykendall, J. D., Chairman, Texas State Board of Barber Examiners (TSBBE).

Chairman Kuykendall called the meeting to order at 9:10 a.m. Board members in attendance were Janis Wiggins, Ronald Brown, Janie Garza, and Wayne Moore. Mr. Hollister was absent. Also in attendance were Douglas A. Beran, Executive Director, Joe Pitner, Assistant Attorney General, Mary Feys, Administrative Technician II, and visitors Joe Shirley, Diane Roberts, Lucy Young, Thuy Tu, Becky Ju, Richard Bundy, and Brad Bundy.

2. Recognize Board Member Janie C. Garza for her appointment to the Council on Occupational Education.

Chairman Kuykendall recognized Mrs. Garza for her appointment to the Council on Occupational Education. Mrs. Garza gave a brief overview of the Council and agreed with Mr. Kuykendall's request to keep the Board apprised of any national issues that come before the Council that would be of interest to the Board.

3. Recognize J. L. Dyer upon his retirement at age 69 after more than 47 years of service to the barber profession and community. Recognize Concepcion Cortez at age 82 for more than 54 years of service to the barber profession and community.

Chairman Kuykendall recognized Mr. Dyer and Mr. Concepcion and Board members signed the certificates of appreciation that will be forwarded to Mr. Dyer and Mr. Concepcion

4. Public comment.

Chairman Kuykendall asked Mr. Shirley if he had any public comment. Mr. Shirley said he did not at this time.

After approval of the September 9 minutes, Chairman Kuykendall returned to public comment and introduced Thuy Tu and Becky Ju, students at the University of Texas at Austin. They distributed and explained layouts of the Board's new web site the students have been working on and explained how the site can be searched for individuals, barbershops, and infractions by licensees.

Chairman Kuykendall and Assistant Attorney General Pitner discussed what information about resolved and pending infractions is discoverable under public information. Mr. Kuykendall requested Mr. Pitner to send a letter to the Board stating that resolved infractions are discoverable; therefore, if a request for information about a resolved infraction is received, then time will not be spent seeking an Attorney General's opinion on that issue. Mr. Kuykendall, Mr. Pitner, and Dr. Beran agreed an infraction is resolved upon the Board's issuance of a final order.

Chairman Kuykendall recessed the meeting so the UT students to take the Board members' pictures for posting on the new web site.

Mr. Kuykendall reconvened the meeting at 9:40 a.m. and read his letter of November 5, 2002 (attached), into the record.

The Board received public comment from Mr. Brad Bundy and Mr. Richard Bundy regarding agenda item #18. Brad Bundy requested that the Board, under rule 51.5, consider that a student who has left a school with unpaid tuition to be not in good standing with the Board and to withhold the student's license even after passing the examination.

The Board discussed with Brad Bundy and Richard Bundy some administrative procedures and paperwork to carry out their request and to resolve any disputes between the schools and the students. Other topics discussed were as follows:

- *School association members should discuss this among each other.*
- *One school could call another school to find out if a transfer student has paid the former school for tuition.*
- *The Cosmetology Commission addresses this problem through statute (1602.455 Transfer of Hours of Instruction) and rule (§89.30 Examination Applications)*
- *Exceptional circumstances would be deferred to the Executive Director.*
- *The Board would maintain the authority to determine good standing and to issue a license or deny licensure to someone with an unpaid balance under the circumstances but would not have the authority to waive any unpaid balance; penalty and interest would not accrue on unpaid balances; the unpaid balance would be only for the contracted amount.*
- *Barber statute §1601.558 prevents a barber school from withholding a student's hours for any reason but a school could prevent accrual of hours until the balance is paid.*
- *Under rule §51.5, not in good standing should not be limited to default in child support payment and Texas Guaranteed Student Loan and should include an unpaid balance to a school.*
- *The administrative workload to account for transfer students in dispute with their schools at the time of examination, the possibility of administrative error, not treating each student fairly, the schools serving as the first line of defense, and assisting the Board in addressing the issue.*

Diane Roberts asked questions about barbers that work in cosmetology salons. Mr. Moore explained the law regarding the display of barber poles and the regulations regarding barbers working in cosmetology shops. Mr. Kuykendall, Mr. Moore, and Dr. Beran explained how inspectors work and the investigative process that follows a complaint. Ms. Roberts expressed her concern about the "slipping" of the barber industry. Mr. Kuykendall asked Ms. Roberts for any suggestions for the "slippage" of the barbering industry. She suggested a full-time inspector for the Austin area. Mr. Kuykendall responded that funding is the problem. Mr. Kuykendall encouraged Ms. Roberts to communicate with agency staff and the Board at future meetings.

After discussion with Diane Roberts, Chairman Kuykendall recessed the meeting for a short break. He reconvened the meeting at 10:45 a.m.

5. Consider and possibly approve Board Minutes of September 9, 2002.

Mr. Moore made the motion to approve the minutes, seconded by Mrs. Wiggins. The motion carried unanimously.

6. Consider for possible action Proposals for Decision from the State Office of Administrative Hearings (August 12, 2002) in disciplinary cases.

Chairman Kuykendall introduced the item and deferred to Dr. Beran who explained the proposed penalties pursuant to Board rules and the administrative costs for default. Mr. Moore made the motion to approve the proposals for decision, seconded by Mrs. Wiggins. The motion carried unanimously.

7. Consider for possible ratification the Agreed Orders in the Matter of Assessment of an Administrative Penalty Against Certain Licensees in Cases Brought for Informal Hearings before the Executive Director (September 16, 2002).

Chairman Kuykendall introduced the item and deferred to Dr. Beran who explained the procedures for assessing fines in agreed orders. Mr. Moore made the motion to accept the assessed penalties, seconded by Mr. Brown. The motion carried unanimously.

8. Consider the Agency's administrative fine report 08/01/2002 - 10/31/2002.

Chairman Kuykendall introduced the item and deferred to Dr. Beran who, in turn, deferred to Mary Feys, the Board's enforcement officer. Mary Feys gave an overview of the administrative fines and penalties report and responded to questions from the Board members. She noted the Dallas and Houston are the regions with the most frequent violations

9. Consider for possible action the adoption of proposed amendments (shown by parentheses) to §51.141(5)(A):

The use of any blade or cutting tool for the purpose of removing (any or all) corns or calluses is considered a medical practice and is prohibited. (The possession or storage of any blade or cutting tool for the purpose as contemplated by the rule is *prima facie* evidence of use.)

Chairman Kuykendall introduced the item. Mr. Moore made the motion, seconded by Mrs. Wiggins, to adopt the proposed amendments. The motion carried unanimously.

10. Consider for possible action the adoption of proposed amendments to §51.3 Administrative Fines (in Board members' packets). The proposed amendments are pursuant to the recodification (Acts 1999, 76th Legislature, Chapter 388, effective September 1, 1999) of the former Texas Barber Law, Texas Civil Statutes, Article 8401 - Article 8407a into the Texas Civil Statutes, and the subsequent amendments to Chapter 1601 (Acts 2001, 77th Legislature Chapters 246 and 1420, effective September 1, 2001), and to update references to the Texas Occupations Code as the authority to issue administrative fines for practice and procedure violations.

Chairman Kuykendall introduced the item and deferred to Dr. Beran. After discussion, Mr. Moore made the motion, seconded by Mrs. Wiggins, to adopt the proposed amendments. The motion carried unanimously.

11. Consider for possible action the adoption of a new rule §51.59 Student Violation Prior to the Examination:

A student who has been issued a citation for a violation of the Texas Occupations Code, Chapter 1601 or rules of the Barber Board may not take the examination for licensure until final resolution of the citation.

Chairman Kuykendall introduced the item and deferred to Dr. Beran who explained the proposed new rule. Mr. Moore made the motion, seconded by Mr. Brown, to adopt the new rule. Mr. Moore gave the history that brought about the new rule. The motion carried unanimously.

12. Consider for possible approval for publication and public comment the following proposed amendment to rule §51.93 Sanitation Rules for Barber Shops and Barber Schools and Colleges.

51.93(b)(5): Washing facilities to be provided. Every such establishment shall be provided with suitable and adequate washing facilities for barbering services. Sinks or wash basins must be of nonabsorbent material and properly trapped, with not less than one sink per three (rather than two) chairs.

Chairman Kuykendall introduced the item. Mrs. Wiggins made the motion, seconded by Mr. Moore, to accept the proposed rule. Discussion then followed regarding whether or not the proposed amendment affects barber colleges and well as barbershops and whether or not it conflicts with the Texas Occupations Code, 1601.353(4) "a lavatory behind every two barber chairs" in barber schools.

After discussion, Mr. Moore made the motion, seconded by Mrs. Wiggins, to publish the proposed amendment with the following modifications:

51.93(b)(5): Washing facilities to be provided. Every such establishment shall be provided with suitable and adequate washing facilities for barbering services. Sinks or wash basins must be of nonabsorbent material and properly trapped, with not less than one sink per **three (rather than two) chairs for barbershops and one sink per two chairs for barber schools/colleges.**

The motion carried unanimously.

13. Consider for possible approval an enforcement policy based upon an interpretation of Texas Occupations Code, Chapter 1601.267 Reciprocal License or Certificate and rule §51.84 Reciprocal Licensing Policy, which require "substantially equivalent" standards for Texas licensure.

Chairman Kuykendall introduced the item and deferred to Dr. Beran who, with Mr. Moore, Beverly Williamson, and Margie Weaver, gave the history that brought this item before the Board: that individuals licensed in Alabama, which does not have licensing requirements substantially equivalent to Texas, have obtained Louisiana licenses by reciprocity with Alabama, and then have obtained Texas licenses by reciprocity with Louisiana.

The Board discussed if and how it should reach beyond states that have licensing requirements substantially equivalent to Texas (e.g., Louisiana) to those states that do not have substantially equivalent requirements (e.g., Alabama) when determining whether or not to issue a Texas license by reciprocity.

After discussion, Mr. Moore made the motion, seconded by Mrs. Wiggins, to adopt the following reciprocal licensing policy. Mr. Brown, Mrs. Garza, Mr. Moore, and Mrs. Wiggins voted to adopt the policy. Mr. Kuykendall abstained.

Policy: The Texas State Board of Barber Examiners shall require that any licensee from another state shall have held the license for one year or can prove through transcripts or other documents that he/she has obtained substantially equivalent hours or training required in Texas.

Chairman Kuykendall recessed the meeting at 12:15 p.m. and reconvened the meeting at 12:48 p.m.

14. Review administrative procedures concerning the renewal of licenses of individuals released from prison.

Chairman Kuykendall introduced the item and deferred to Dr. Beran who, in turn, asked Beverly Williamson to brief the Board on the historical policy and procedures followed by staff to renew licenses of individuals released from prison, i.e., pay the current license fee without late penalties to renew the license or submit to re-examination.

The Board's consensus was that staff should continue with its current policy and procedures.

15. Consider for possible approval a policy that sets forth the fee the TSBBE shall collect from each barber school pursuant to 1601.3571 Barber School Tuition Protection Account.

Chairman Kuykendall introduced the item and deferred to Dr. Beran, who noted the Assistant Attorney General maintains \$25,000 is the maximum the Board can collect whereas the Comptroller of Public Accounts maintains the Board can collect more than \$25,000. Mr. Kuykendall and Dr. Beran identified three issues before the Board: (1) Does the Board want to increase the amount in the fund predicated upon the future that a school may drop out and the fund would have to be accessed to refund the students? (2) If the Board leaves the fund at \$25,000, how would it be replenished if it were accessed? (3) Should the original school owners be reimbursed as new schools open and have the new school owners contribute to the fund? Mr. Pitner stated the statute doesn't provide for reimbursement to the schools and the Comptroller controls the fund and if the Comptroller maintains the fund is not capped at \$25,000, the additional amounts can be collected if the Board requires that of the new schools. The Board discussed whether or not to collect more than \$25,000 and discussed methods on how to establish parity for all schools (new and old).

After discussion, the Board's consensus was to table the item for further discussion at a time to be determined.

16. Consider and review the Barber Board's proposed changes to the Texas Occupations Code, Chapter 1601 and 1601.303 that are in addition to those approved by the Board on August 6, 2002.

(a) Consolidate the following sections into one section [1601.301. Permit Required]:

1601.301 Permit Required
1601.302 Temporary Barbershop Permit
1601.310 Relocation of Specialty Shop
1601.503 Notification of Change of Location

(b) Consolidate the following sections into one section [1601.501. Display of Barbershop or Specialty Shop Permit]:

1601.311 Display of Specialty Shop Permit
1601.501 Display of Barbershop Permit

(c) Review proposed changes [in brackets] to §1601.303. Issuance of Barbershop Permit:

[(a)] The board shall issue a barbershop permit to an applicant if:

- (1) the applicant holds a Class A barber certificate;
- (2) the applicant has practiced barbering for at least 12 months [and is an owner or practicing barbering at the shop]; and
- (3) the shop meets the minimum health standards for barbershops set by the board and all other rules of the board.

[(b) If a barber is not the owner of the barbershop, the shop owner's name must also appear on the barbershop permit].

(d) Consider other possible changes that were proposed after posting the November agenda in the Texas Register.

Chairman. Kuykendall introduced items 16(a) and 16(b) and deferred to Mr. Moore and Dr. Beran, who briefed the Board on agenda item 16(a). They noted the intent of the identified proposed changes were to consolidate sections to eliminate redundancy and excess verbiage. Mr. Kuykendall noted that the intent of agenda item 16(b) was to consolidate two sections into one section. Mrs. Wiggins made the motion, seconded by Mr. Moore, to accept the consolidations in 1601.301 and 1601.501. The motion carried unanimously.

Chairman Kuykendall introduced item 16(c). Mrs. Wiggins made the motion that the Board accept the proposed changes, seconded by Mrs. Garza. The Board then discussed the history of the 12-month requirement, some of its benefits and difficulties, and other changes proposed for §1601.303. After Board discussion, Mr. Moore made the motion, seconded by Mrs. Wiggins, approved unanimously by the Board that the proposed changes to §1601.303 read as follows:

§1601.303. Issuance of Barbershop Permit

(a) The board shall issue a barbershop permit to an applicant if:

- (1) the applicant holds a Class A barber certificate ~~[(2)]~~ and is an owner or practicing barbering at the shop
- ~~[(2) the applicant has practiced barbering for at least 12 months]~~ ;and
- ~~[(3)]~~ the shop meets the minimum health standards for barbershops set by the board and all other rules of the board.

(b) If a barber is not the owner of the barbershop, the shop owner's name must also appear on the barbershop permit.

Chairman Kuykendall then asked Mr. Pitner to comment on agenda item #18 because Mr. Pitner had to depart.

Mr. Kuykendall requested that voluntary continuing education be added to the Board's legislative package so the Board would have the authority to engage in continuing education should the Board identify an area for continuing education. Mr. Kuykendall suggested the Board embrace the language of the Cosmetology Commission regarding voluntary continuing education (§1602.354). He read that language to the Board and suggested that language -- with appropriate modifications -- be incorporated into the barber statute where appropriate. After discussion amongst Board members and with comments from Mr. Shirley, Mrs. Garza made the motion, seconded by Mrs. Wiggins, to provide for voluntary

continuing education in the statute. Mr. Kuykendall, Mr. Brown, Mrs. Garza, and Mrs. Wiggins voted in favor; Mr. Moore was opposed.

17. Consider a program proposed by Jimmy Wallace for teaching barbering to public school students.

Chairman Kuykendall introduced the item and deferred to Mr. Moore. He stated Mr. Wallace will open a barber school in Lewisville and the Lewisville High School has contracted with him to teach the barber course to 20 high school students for four hours a day for two years (four semesters) as part of the students' high school curriculum. The program will begin in January. The school district will pay the tuition through a grant from the Texas Education Agency. This is a new initiative. Mr. Moore stated Mr. Wallace will try to speak to the other school owners through the School Association to inform them on how he progressed with the program.

Mr. Wallace will have regular barber school students with high school students outsourced to him from the high school. There are five high schools in Lewisville and there were 64 applicants from one high school but Mr. Wallace can accommodate only 20.

Mr. Moore stated he told Mr. Wallace that the Board is receptive to his initiative and that Mr. Wallace should contact the Board for any assistance he may need. Mr. Kuykendall requested that Mr. Moore ask Mr. Wallace to contact Dr. Beran to keep the Board apprised of his progress.

18. As requested by Richard Bundy and Brad Bundy (Texas Barber College, Dallas and Houston), consider for possible approval an enforcement policy -- based upon an interpretation of the rule language shown below (**in parentheses**) -- that a student is not in good standing for license issuance if he/she has not paid the school for tuition, fees, tools, books, etc.

Rule 51.5 Good Standing Required for License Renewal

No license or permit shall be issued or renewed unless the licensee is in good standing with the Board. Good standing includes, (**but is not limited to**), compliance with Barber Law and Board Rules, no default on a student loan with the Texas Guaranteed Student Loan Corporation, no default on court ordered child support payments, and payment in full of all administrative penalties assessed against the licensee. The Executive Director has the discretion to waive the payment in full of all administrative penalties requirement for license renewal.

Assistant Attorney General Joe Pitner stated the Board does not have statutory authority to accommodate this request on behalf of the Bundys and the other schools. The Cosmetology statute that supports their argument states that before school credits can be transferred from one school to another, the Executive Director shall determine that all tuition is current and paid. Mr. Pitner stated the Barber Board has no such statutory authority from the legislature in the barber law so the Board could not even restrict transfers. He noted the Bundys also wanted the Board to rely on the good standing rule with a slight modification of the rule to say a part of good standing is that all tuition and fees should be paid to the schools. Mr. Pitner stated the good standing rule means in good standing with the State of Texas and with the Barber Board, not good standing with the schools. Mr. Pitner added there also are due process concerns. It gives too much power to the schools to enlist the State of Texas through the Barber Board to require students to prove they have paid all fees and tuition. That is not the way the system of justice works because when a person files a complaint, that complaint is not taken as true. But, in this particular instance, if a school files a complaint against the student that he has not paid his fees, then that complaint would be taken as true and would put the burden on the student to show he had paid all fees. That creates a due process problem. Mr. Pitner stated he Board should not be in the bill-collecting business. The problem with the schools not being paid for tuition is a real, sincere problem, but it is a private problem that ought to be solved through cooperation with the schools. If the problem is not important enough for the schools to get together to solve, then it's not important enough for the Board to be involved.

Mr. Kuykendall asked Mr. Pitner if the Board were to amend legislation to allow schools to withhold certification of completion of training of course of study, would that be reasonable? Mr. Pitner agreed it would be reasonable for the legislature to provide schools with authority to withhold credits if not paid. This would not deny the students the opportunity to go before the Board or go to court. Mr. Kuykendall added it would give students a legal basis to challenge a wrongful denial. Mr. Pitner agreed that students could sue for damages and other remedies available in court of law. That would be much more desirable as a solution than the one proposed by the Bundys.

The Board then returned to agenda item #16 and considered whether to amend the legislative package to incorporate these concepts.

The Board agreed to not amend the legislative package to accommodate the concepts set forth in agenda item #18. The Board directed the Executive Director to write a letter to schools identifying the problem and encouraging them to visit to address the problem amongst themselves and report back to the Board of progress made. Currently there are things the schools could do but have not done that could go a long way to remedy the problem. The letter should be for Mr. Kuykendall's signature and should identify all thoughts of general counsel. The Board agreed this would be better than trying to legislate something. The Board agreed another option would be for the schools to have signed contracts with their students that hours will not transfer if students owed money.

19. Status report from Mr. Ronald Brown on the review and revision to the student teacher written examination.

Chairman Kuykendall introduced Mr. Brown. Mr. Brown distributed copies of his draft questions for the written examination and requested Board members to review the draft questions and give input to him by the December examinations as to which questions to ask and not ask so he can prepare a second draft and then a final draft.

20. Consider a request from an applicant for a new school to be open four days a week (10 hours per day) rather than the traditional five days a week (8 - 9 hours per day).

Chairman Kuykendall introduced the item and deferred to Dr. Beran who stated the fundamental question before the Board: Can Lucy Young's school be open four days a week and teach 10 hours a day? He identified three documents related to the question

[1] Ms. Young's letter requesting to operate her school four days a week;

[2] the Barber statute regarding the number of days per week a barber school shall be open (§1601.558);

[3] Will Brown's memorandum (02/29/00) regarding the maximum number of student hours per five-day workweek.

After discussion amongst Board members and with comments from Ms. Young, and Mr. Shirley, the Board agreed Ms. Young can operate a four-day workweek and provide 5 hours of theory instruction per week.

21. Consider the agency's budget for 09/01/02 - 10/31/02.

Chairman Kuykendall introduced the item and deferred to Dr. Beran who presented the budget and responded to questions from Board members.

22. Consider updates to TSBBE's web site (license verification and disciplinary action).

Chairman Kuykendall noted this item was addressed under Public Comment (Agenda Item #4).

23. Consider the agency's response to Gov. Perry's request that state agencies inform him of the impact on their performance measures at 95% and 97% funding levels.

Chairman Kuykendall introduced this item and deferred to Dr. Beran who discussed with Board members the Executive Director's letter to Gov. Perry that was in the Board member's packets.

Chairman Kuykendall adjourned the meeting at 3:25 p.m.