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STATE OF WISCONSIN
BEFORE THE BARBERING AND COSMETOLOGY EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	FINAL DECISION
	:	AND ORDER
MICHAEL D. ENDRES,	:	LS0706132BAC
RESPONDENT.	:	

Division of Enforcement Case No. 06 BAC 101

The State of Wisconsin, Barbering and Cosmetology Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, make the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Barbering and Cosmetology Examining Board.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 7th day of April, 2008.

Jeannie M. Bush
Member of the Board
Barbering and Cosmetology Examining Board

**STATE OF WISCONSIN
BEFORE THE BARBERING AND COSMETOLOGY EXAMINING BOARD**

**IN THE MATTER OF THE DISCIPLINARY
PROCEEDINGS AGAINST**

**PROPOSED DECISION
Case No. LS0706132BAC**

**MICHAEL D. ENDRES,
RESPONDENT.**

Division of Enforcement Case No. 06 BAC 101

PARTIES

The parties in this matter under Wis. Stats. § 227.44 and for purposes of review under Wis. Stats. § 227.53 are:

Michael D. Endres
4481 North 76th Street
Milwaukee, Wisconsin 53 218

Barbering and Cosmetology Examining Board
P.O. Box 8935
Madison, WI 53708-8935

Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, Wisconsin 53708

This matter was commenced by the filing of a Notice of Hearing on June 13, 2007. The hearing in this matter was held on July 30, 2007. Closing arguments were filed by September 24, 2007. Atty. Claudia Berry Miran appeared on behalf of the Division of Enforcement. The respondent, Michael D. Endres appeared in this matter without legal counsel.

Based upon the record herein, the Administrative Law Judge recommends that the Barbering and Cosmetology Examining Board adopt as its final decision in this matter, the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Michael D. Endres is duly licensed as a Barber or Cosmetologist (license #77278), which was first granted on January 2, 1998. Mr. Endres' last address reported to the Department of Regulation and Licensing is 4481 North 76th Street, Milwaukee, WI 53218.

2. At least on February 23, 2007, Mr. Endres provided barbering or cosmetology services at New Waves Hair Styling Studio (referred to herein as "Salon"), a licensed barber or cosmetologist establishment, located at 4481 N. 76 Street, in Milwaukee, Wisconsin.

3. On February 23, 2007, Douglas Austin, an Investigator with the Department of Regulation and Licensing, Division of Enforcement, met with the owner of the Salon, Veronica E. Harrison. He informed Ms. Harrison there was a complaint that an apprentice, Celena Woods, had been working at the Salon without a licensed manager. He also informed Ms. Harrison that he would be performing a complete inspection of the Salon while he was there.

4. Mr. Austin arrived at the Salon around 11:30 a.m. He completed his visit sometime between 12:30 and 1:00 p.m. Mr. Endres arrived at the Salon around 3:00 p.m. His first appointment that day was scheduled for 3:30 p.m. During his inspection, Mr. Austin spoke with other licensees who were in the Salon at the time of his visit, but did not obtain the names of those licensees. As a result of his inspection, Mr. Austin issued citations against several licensees, including Mr. Endres, for

violations relating to failure to change the disinfectant on a daily basis; failure to clean shampoo bowls after each use, and failure to post licenses in the establishment.

5. On April 12, 2007, Mr. Austin went back to the Salon to obtain the names of the licensees who were working in the Salon at the time he conducted his inspection. When he returned to the Salon, he found that all the certificates had been posted and that "things had been corrected".

6. On April 17, 2007, Mr. Austin issued three separate Citations for Administrative Forfeiture involving Mr. Endres relating to the following violations that he found during his February 23, 2007, inspection of the Salon:

a. The disinfectant used for decontamination was not changed on a daily basis, in violation of Wis. Admin. Code, § BC 4.02 (5).

b. All shampoo bowls were found with hair in them. They were not cleaned after previous customers and after each use. Each licensee is responsible for compliance with precautions and rules contained in ch. BC 4, in violation of Wis. Admin. Code, § BC 4.01 (5).

c. Mr. Endres' license or certificate was not posted anywhere in the establishment, in violation of Wis. Stats., § 454.06 (7).

7. At the time of the inspection conducted on February 23, 2007, Mr. Endres' practice was to change his disinfectant on a daily basis. On the day of the inspection, Mr. Endres did not provide barbering or cosmetology services at the Salon until after Mr. Austin completed his inspection.

8. At the time of the inspection conducted on February 23, 2007, Mr. Endres' practice was to clean his shampoo bowl after each use. On the day of the inspection, Mr. Endres did not provide barbering or cosmetology services at the Salon until after Mr. Austin completed his inspection.

9. At the time of the inspection conducted on February 23, 2007, and during the 10-year period prior to the inspection, Mr. Endres' practice was to post his certificate on the mirror at his work station. On the day of the inspection, Mr. Endres' certificate was posted on the mirror at his work station.

10. The Citations for Administrative Forfeiture involving Mr. Endres that Mr. Austin issued on April 17, 2007, included the following notices (with a dollar amount stated in each Citation):

Pursuant to Wis. Stats. § 454.15 (3), the licensing authority is authorized to impose a forfeiture in lieu of or in addition to other disciplinary action against your license.

PLEASE TAKE NOTICE THAT THE CREDENTIAL HOLDER MAY DEPOSIT A FORFEITURE AND COSTS IN THE AMOUNT \$_____ BY MAILING A CHECK OR MONEY ORDER NO LATER THAN TWENTY (20) DAYS FROM THE DATE OF THIS CITATION, TOGETHER WITH THE SIGNED COPY OF THIS FORM TO: DEPARTMENT OF REGULATION AND LICENSING, DIVISION OF ENFORCEMENT, 1400 EAST WASHINGTON AVENUE, P. O. BOX 8935, MADISON, WI 53708. PAYMENT SHALL BE TREATED AS A PLEA OF NO CONTEST TO THE VIOLATION CITED ABOVE AND CONSENT TO AN ORDER OF FORFEITURE PLUS COSTS, NOT TO EXCEED THE AMOUNT OF THE DEPOSIT.

Please reference "Notice of Right to Contest" on backside of pink copy.

11. The Citation for Administrative Forfeiture relating to failure to change the disinfectant on a daily basis contained forfeiture and cost in the amount of \$130.00. The Citation relating to failure to clean the shampoo bowls after each use contained forfeiture and costs in the amount of \$30.00. The Citation relating to failure to post a license contained forfeiture and costs in the amount of \$30.00. The total forfeiture and costs imposed on Mr. Endres as a result of Mr. Austin's February 23, 2007, inspection was \$190.00.

CONCLUSIONS OF LAW

1. The Barbering and Cosmetology Examining Board has jurisdiction in this matter pursuant to Wis. Stats., §§ 454.06, 454.08 and 454.15.

2. Respondent's conduct, as described in Findings of Fact 7 herein, does not constitute a violation of Wis. Admin. Code, § BC 2.08 or BC 4.02 (5).

3. Respondent's conduct, as described in Findings of Fact 8 herein, does not constitute a violation of Wis. Admin. Code, § BC 2.08 or BC 4.01 (5).

4. Respondent's conduct, as described in Findings of Fact 9 herein, does not constitute a violation of Wis. Stats., § 454.06 (7).

ORDER

NOW, THEREFORE, IT IS ORDERED that the Citations for Administrative Forfeitures issued in this matter be, and hereby are, DISMISSED.

This order is effective on the date on which it is signed by a designee of the Barbering and Cosmetology Examining Board.

OPINION

I. Procedural History

This matter was commenced by the filing of a Notice of Hearing on June 13, 2007. The hearing was held on July 30, 2007. Closing arguments were filed by September 24, 2007. Atty. Claudia Berry Miran appeared on behalf of the Division of Enforcement. Mr. Endres appeared in this matter without legal counsel.

II. Applicable Laws

454.06 Licensure. (7) POSTING OF LICENSE CERTIFICATES. The examining board shall furnish a certificate to each licensee, certifying that the holder is licensed to practice barbering or cosmetology, aesthetics, electrology or manicuring or is a licensed manager. The licensee shall post the certificate in a conspicuous place in the licensed establishment.

454.15 Disciplinary proceedings and actions. (2) Subject to the rules promulgated under s. 440.03 (1) and this chapter, the examining board may revoke, limit, suspend or refuse to issue or renew, in accordance with the severity of the violation, a license or permit issued under this chapter or reprimand the holder of a license or permit issued under this chapter if it finds that the holder or applicant has done any of the following:

...

(i) Violated this chapter or any rule promulgated under this chapter.

(3) The examining board may, in addition to or in lieu of a reprimand or revocation, limitation, suspension or denial of a license or permit, assess against a person who has done any of the things under sub. (2) (a) to (i) a forfeiture of not more than \$1,000 for each separate offense. Each day of continued violation constitutes a separate offense.

BC 2.08 Responsibilities of licensees. (1) Licensees holding current licenses or permits granted under ch. 454, Stats., shall:

(a) Be responsible for compliance with the sanitation and safety precautions contained in ch. BC 4.

(b) Be responsible for their own professional practice, conduct and compliance with ch. BC 2.

BC 4.01 Equipment and sanitation. (5) Shampoo bowls and basins shall be drained after each use and kept in a sanitary and safe condition.

BC 4.02 Disinfection. (5) Disinfectant used for decontamination shall be changed daily and shall be kept in a covered container.

III. Summary of Evidence

A. General Overview

Mr. Endres has been licensed as a barber or cosmetologist since January 2, 1998. At least on February 23, 2007, Mr. Endres was a practitioner at New Waves Hair Styling Studio (referred to herein as "Salon"), which is located at 4481 N. 76 Street, in Milwaukee, WI. Tr. p. 33; Exhibit 5.

On February 23, 2007, Douglas Austin, an Investigator with the Department of Regulation and Licensing, Division of Enforcement, met with the owner of the Salon, Veronica E. Harrison. He informed Ms. Harrison there was a complaint that one of the apprentices had been working at the Salon without a licensed manager. He also informed Ms. Harrison that he would be performing a complete inspection of the Salon while he was there.

Mr. Austin arrived at the Salon around 11:30 a.m. He completed his visit sometime between 12:30 and 1:00 p.m. Mr. Endres arrived at the Salon around 3:00 p.m. His first appointment that day was scheduled for 3:30 p.m. During his inspection Mr. Austin spoke with other licensees who were in the Salon at the time of his visit, but did not obtain the names of those licensees. As a result of his inspection, Mr. Austin found numerous violations of the statutes and rules relating to the practice of barbering or cosmetology.

On April 12, 2007, Mr. Austin went back to the Salon to obtain the names of the licensees who were working in the Salon at the time he conducted his inspection. When he returned to the Salon, he found that all the certificates had been posted and that "things had been corrected". Tr. p. 16.

On April 17, 2007, Mr. Austin issued three separate Citations for Administrative Forfeiture involving Mr. Endres. Mr. Austin found the following violations during his February 23, 2007, inspection of the Salon [Exhibits 2, 3 and 4]:

a. The disinfectant used for decontamination was not changed on a daily basis, in violation of Wis. Admin. Code, § BC 4.02 (5).

b. All shampoo bowls were found with hair in them. They were not cleaned after previous customers and after each use. Each licensee is responsible for compliance with precautions and rules contained in ch. BC 4, in violation of Wis. Admin. Code, § BC 4.01 (5).

c. Mr. Endres' license or certificate was not posted anywhere in the establishment, in violation of Wis. Stats., § 454.06 (7).

The three Citations for Administrative Forfeiture that Mr. Austin issued on April 17, 2007 contained the following notices (with a specific dollar amounts stated in each Citation):

Pursuant to Wis. Stats. § 454.15 (3), the licensing authority is authorized to impose a forfeiture in lieu of or in addition to other disciplinary action against your license.

PLEASE TAKE NOTICE THAT THE CREDENTIAL HOLDER MAY DEPOSIT A FORFEITURE AND COSTS IN THE AMOUNT \$ _____ BY MAILING A CHECK OR MONEY ORDER NO LATER THAN TWENTY (20) DAYS FROM THE DATE OF THIS CITATION, TOGETHER WITH THE SIGNED COPY OF THIS FORM TO: DEPARTMENT OF REGULATION AND LICENSING, DIVISION OF ENFORCEMENT, 1400 EAST WASHINGTON AVENUE, P. O. BOX 8935, MADISON, WI 53708. PAYMENT SHALL BE TREATED AS A PLEA OF NO CONTEST TO THE VIOLATION CITED ABOVE AND CONSENT TO AN ORDER OF FORFEITURE PLUS COSTS, NOT TO EXCEED THE AMOUNT OF THE DEPOSIT.

Please reference "Notice of Right to Contest" on backside of pink copy.

The Citation for Administrative Forfeiture relating to failure to change the disinfectant on a daily basis contained forfeiture and cost in the amount of \$130.00. The Citation relating to failure to clean the shampoo bowls after each use contained forfeiture and costs in the amount of \$30.00. The Citation relating to failure to post a license contained forfeiture and costs in the amount of \$30.00. The total forfeiture and costs imposed on Mr. Endres as a result of Mr. Austin's February 23, 2007 inspection was \$190.00.

B. Testimony of Douglas Austin

1. Background

Douglas Austin testified at the request of the Division of Enforcement. Mr. Austin is an Investigator with the Department of Regulation and Licensing, Division of Enforcement. Part of his duties includes the inspection of barber or cosmetologist establishments. Typically inspections are unannounced. Mr. Austin's general procedure during an inspection is to announce himself when he goes into a salon; asks to see the owner or the manager and then lets the manager know what he is there for. He asks to see the establishment license. Usually he uses the self-inspection form to make sure that he does not miss anything during the inspection. Exhibit #3.

2. February 23, 2007 Inspection

On February 23, 2007, Mr. Austin made an unannounced visit to New Waves Hair Styling Studio, which is located at 4481 N. 76 Street, in Milwaukee, Wisconsin. Mr. Austin arrived at the Salon at approximately 11:30 a.m. He was at the establishment at least an hour to an hour and a half. When he arrived at the Salon, he asked for and met the owner of the Salon, Veronica Harrison. He said that there were a number of other employees or licensees in the establishment, but he did not write down their names because the primary reason for his visit was to investigate Ms. Harrison (the owner of the Salon), and Ms. Woods (the apprentice who had been working at the Salon without a licensed manager). Tr. p. 13-14; Exhibit 4.

Mr. Austin testified that during the inspection, he found violations of the statute and rules that relate to the practice of barbering or cosmetology. First, the establishment license was not posted. It was in the manager's office in a broken frame under a number of papers. Second, after talking to Ms. Harrison, Mr. Austin found that there had not been a manager of record for approximately 12 years. Third, Mr. Austin testified that he did not find any licenses posted anywhere. As he asked the various licensees that were in the Salon at the time of the inspection, they pulled the licenses out of their pocketbook, from behind other items. All of the licensees were all able to establish that they were licensed, but the licenses were not clearly

posted. Fourth, Mr. Austin testified that through questioning the licensees, he learned that no one was changing their barbercide or disinfectant on a daily basis. He asked every person that was there working, and the closest he got to a correct answer was one week. "It varied from one week to two to three months, even people that had a manager's license. One lady that is now the manager of record stated two to three months that she changes it." Fifth, Mr. Austin testified that he observed that the shampoo bowls out in the main Salon, had hair in them that had not been removed from previous customers.

Mr. Austin told Ms. Harrison what needed to be corrected, and told her that he would be writing up citations. He also mentioned to her that he would be going back to his office and writing up a compliance inspection form and sending it to her. She would have to fill out exactly what she had done to bring everything up to code and what corrections she made.

In reference to Mr. Endres, Mr. Austin was asked why he cited him for violations that occurred during hours when he was not at the Salon. Mr. Austin testified that he ticketed everyone that had some role in the Salon. When Mr. Endres asked why he was cited for not changing the disinfectant on a daily basis when he had not been in the Salon the morning of the inspection, Mr. Austin stated that when he asked everyone in the Salon how often they changed the disinfectant, everyone answered a week or more, then he assumed no one changed it on a daily basis. Mr. Austin also said he could not testify that he specifically saw a jar of disinfectant at Mr. Endres' work station.

In reference to the shampoo bowls that Mr. Endres used, Mr. Austin testified that there were no shampoo bowls in the area where Mr. Endres worked. Mr. Endres would have had to take the patron over to another area. Mr. Austin said that the bowls that he observed were all filled with hair. He observed other licensees with patrons and he observed them washing hair in the bowls. Finally, in reference to posting certificates, Mr. Austin was asked what constitutes a "clearly posted" license. Mr. Austin's response was that "in looking at the area, if I don't see them on the wall, I don't consider them clearly posted".

IV. Analysis of Evidence

In my opinion, the evidence presented does not establish that Mr. Endres failed to change his disinfectant on a daily basis; that he failed to clean his shampoo bowl after each use, or that he failed to post his license in a conspicuous place in the Salon.

On April 17, 2007, Mr. Austin issued three separate Citations for Administrative Forfeiture relating to the following violations that he found during his February 23, 2007, inspection of the Salon [Exhibits 2, 3 and 4]:

A. Failure to change the disinfectant on a daily basis

First, Mr. Austin found that the disinfectant used for decontamination was not changed on a daily basis.

In reference to the disinfectant at Mr. Endres' work station, Mr. Austin testified that the other licensees told him that they changed it on a weekly or monthly basis. He asked the other licensees "Is this pretty much standard? Everyone does it pretty much the same?" The answer was "yes". Mr. Austin said that that he could not testify whether or not he specifically saw a jar of disinfectant at Mr. Endres' work station.

As noted previously, Mr. Austin conducted his inspection of the Salon between 11:30 and 1:00 p.m. Mr. Endres testified that he did not arrive at the Salon until around 3:00 p.m., that day and that he had not had a chance to change his disinfectant prior to Mr. Austin's visit. Mr. Endres said that he changes his disinfectant on a daily basis, and that he usually arrives at the Salon a little early to prepare a few things, such as changing the disinfectant. Tr. p. 21, 23, 33, 41.

B. Failure to clean the shampoo bowls

Second, Mr. Austin found hair in all of the shampoo bowls. He said that the bowls were not cleaned after previous customers or after each use and that each licensee is responsible for compliance with precautions and rules contained in ch. BC 4.

In reference to the shampoo bowls that Mr. Endres used, Mr. Austin testified that there were no shampoo bowls in the area where Mr. Endres worked. He would have had to take the patrons over to another area. Since Mr. Endres was not at the salon at the time of the inspection, Mr. Austin did not observe Mr. Endres using a bowl. He observed the other licensees with patrons washing hair in the bowls. He said that no one specifically told him that Mr. Endres had left hair in a bowl.

As noted previously, Mr. Endres testified that he arrives early for his appointments so that he can prepare a few things, such as removing hair from the shampoo bowls. He said that he removes hair every time that he uses a bowl. He sends his client away while he rinses out the bowl and pulls out the hair that is in the bottom of the bowl. He said that out of respect for the other people, he constantly takes the hair out of the bowl. Tr. p. 24-25; 33-34.

C. Failure to Post License or Certificate

Third, during his inspection, Mr. Austin found that Mr. Endres' license or certificate was not posted anywhere in the establishment.

Mr. Austin testified that it was possible that Mr. Endres' license was posted at his work station. He would not say that the license was not there, but that he did not remember seeing it. Mr. Endres testified that he has posted his license on his mirror for past ten years, and that his license was on the mirror when he arrived at the Salon the afternoon of the inspection. Tr. p. 34, 48.

V. Responsibilities of Licensees under Wis. Adm. Code BC 2.08

In its Closing Arguments, the Division of Enforcement ("Division) argues that Mr. Endres is in violation of Wis. Admin. Code, §§ BC 4.01 (5) and 4.02 (5), not because of his own conduct, but because of the conduct of the other licensees in the Salon who allegedly violated those provisions. The Division cites to Wis. Admin. Code, § BC 2.08 (1) (a), which reads as follows:

BC 2.08 Responsibilities of licensees. (1) Licensees holding current licenses or permits granted under ch. 454, Stats., shall:

(a) Be responsible for compliance with the sanitation and safety precautions contained in ch. BC 4.

The Division interprets this provision to mean that the Board's intent is to hold a licensee responsible for making sure that all licensees in an establishment comply with the sanitation and safety precautions contained in ch. BC 4, not just be responsible for his or her own conduct. In my opinion, there is no legal basis for this interpretation.

First, in my opinion, the rule is clear and unambiguous. It states that licensees holding current licenses or permits granted under ch. 454, Stats., shall be responsible for compliance with the sanitation and safety precautions contained in ch. BC 4. On its face, the rule does not state that a licensee is responsible for making sure that other licensees in an establishment comply with ch. BC 4.

Second, even if one concluded that the rule is ambiguous, the Division did not provide any information indicating that its interpretation reflects the Board's intent. No information was submitted relating to the Board's intent, as reflected in the

history of its rule; in opinions issued by the Board to licensees; in informational materials provided to licensees, or in disciplinary actions taken by the Board. The statement is merely the Division's opinion that the interpretation reflects the Board's intent.

Finally, there are no references to Wis. Admin. Code, § BC 2.08 (1) (a) in the Citations for Administrative Forfeitures or in the Notice of Hearing. This issue was first raised at the hearing, and in the Division's Closing Arguments. Mr. Endres was not provided with adequate notice that the Division would be alleging that he was responsible for the conduct of other licensees in the establishment.

Based upon the record herein, the Administrative Law Judge recommends that the Barbering and Cosmetology Examining Board adopt as its final decision in this matter, the proposed Findings of Fact, Conclusions of Law and Order as set forth herein.

Dated at Madison, Wisconsin this 15th day of February, 2008.

Respectfully submitted,

Ruby Jefferson-Moore
Administrative Law Judge