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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
EARLEAN ADWAY,	:	LS0706133BAC
RESPONDENT.	:	

Division of Enforcement Case No. 06BAC101

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, makes 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. LS0706133BAC**

**EARLEAN ADWAY,
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:

Earlean Adway
4535 North 70th Street
Milwaukee, Wisconsin 53218

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 was held on July 30, 2007. Closing arguments were filed by September 12, 2007. Atty. Claudia Berry Miran appeared on behalf of the Department of Regulation and Licensing (Department). The respondent, Earlean Adway, 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. Earlean Adway is duly licensed as a Barber or Cosmetologist Manager (license #14241), which was first granted on April 7, 1978. Ms. Adway's last address reported to the Department is 4535 North 70th Street, Milwaukee, WI 53218.
2. At least on February 23, 2007, Ms. Adway 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. He spoke with at least seven or eight other licensees who were in the salon at the time of his visit, including Ms. Adway. He did not obtain the names of the other licensees. He informed Ms. Harrison of the violations that he found and he marked the violations on his compliance inspection form. When he returned to the Department, he told the attorney assigned to the case of

the violations that he found at the salon. Mr. Austin's initial thought was to only cite the owner of the establishment for all the violations, but the attorney asked him to go back and get the names of everyone that was present and issue citations for all the violations to each individual licensee. On April 5, 2007, approximately 6 weeks later, Mr. Austin prepared a "memo to file folder" that summarized the result of his findings during his inspection.

5. On April 12, 2007, 7 weeks after the inspection, 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 "things had been corrected". The barbercide or disinfectant was being changed on a daily basis, and the licenses were posted.

6. On April 17, 2007, Mr. Austin issued 3 Citations for Administrative Forfeiture involving Ms. Adway for violations that he found during his February 23, 2007, inspection of the salon. The violations cited were:

- a. The disinfectant used for decontamination was found not to be changed on a daily basis as is required.
- 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.
- c. During my inspection, it was noted that this individual's license or certificate was not posted anywhere in the establishment.

7. At the time of the inspection conducted by Mr. Austin on February 23, 2007, Ms. Adway's practice was to change her disinfectant every other day.

8. At the time of the inspection conducted by Mr. Austin on February 23, 2007, Ms. Adway's practice was to clean her shampoo bowl after each use.

9. At the time of the inspection conducted by Mr. Austin on February 23, 2007, Ms. Adway's practice was to post her license certificate on the mirror at her work station.

10. The Citations for Administrative Forfeiture involving Ms. Adway 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 Ms. Adway 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, by failing to change her disinfectant on a daily basis, as described in Findings of Fact 7 herein, violated Wis. Admin. Code, § 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 practice of posting her license certificate on the mirror at her work station, 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 Citation for Administrative Forfeiture issued by the Board, dated April 17, 2007, relating to the respondent's failure to change her disinfectant on a daily basis be, and hereby is, **AFFIRMED**.

IT IS FURTHER ORDERED that:

1. The Citations for Administrative Forfeiture issued by the Board, dated April 17, 2007, relating to the respondent's failure to clean her shampoo bowl after each use, and failure to post her license be, and hereby are, **Dismissed**.
2. Respondent shall pay a forfeiture in the amount of one hundred thirty dollars (\$130.00) to the Department of Regulation and Licensing for violation of Wis. Admin. Code § BC 4.02 (5) [failure to change disinfectant on a daily basis].

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 Department of Regulation and Licensing, Division of Enforcement. Ms. Adway 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

Ms. Adway has been licensed as a barber or cosmetologist manager since April 7, 1978. At least on February 23, 2007, Ms. Adway 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. 14-17; Exhibit 1.

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. When he arrived at the salon, he asked for and met the owner of the salon, Veronica Harrison. He said that there were probably at least 7 or 8 other licensees in the salon at that time, including Ms. Adway. Mr. Austin said that he spoke with all of the licensees who were in the salon at that time, but he did not write down their names. He said that 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. 7-8, 11-12; Exhibit 4.

In reference to the violations that he found, Mr. Austin testified that the first one that he found was that the establishment license was not posted. In speaking to Ms. Harrison in

her office, it was determined that the license was in a broken frame under a pile of papers on her desk. In addition, Mr. Austin asked each individual licensee for their license because he did not observe that they were posted. He said that every licensee either pulled his or her license out from one place or another, under a stack of papers or "behind this", or out of their wallets. None of the licenses were posted. Second, in reference to the shampoo bowls that were being used, none of them were clean. They had hair left over from previous customers. Third, he asked every licensee about how often they changed their barbercide. The response ranged from one week to two to three months.

Mr. Austin informed Ms. Harrison of the violations that he found. He marked the violations on his compliance inspection form. When he returned to the Department, he told the attorney assigned to the case of the violations that he found at the salon. Mr. Austin said that his initial thought was to only cite the owner of the establishment for all the violations, but the attorney asked him to go back and get the names of everyone that was present and issue citations for all the violations to each individual licensee. On April 5, 2007, approximately 6 weeks after the inspection, Mr. Austin prepared a "memo to file folder" that summarized the result of his findings during his inspection. Tr. p. 9; Exhibits 2, 3.

On April 12, seven weeks after the inspection, Mr. Austin went back to the salon to obtain the names of the licensees who were present during the February inspection. When he returned to the salon in April, he spoke to Ms. Harrison. He told her that he would be issuing citations. He also told her that she needed to name a new manager of record. Then he went to every station that he had been to in February and wrote down the names of all the licensees.

When asked what he found during his second return visit as far as violations, Mr. Austin testified that all the problems had been corrected. The disinfectant was being changed on a daily basis and the licenses were posted.

On April 17, 2007, Mr. Austin issued three separate Citations for Administrative Forfeiture involving Ms. Adway. 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 found not to be changed on a daily basis as is required.
- 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.
- c. During my inspection, it was noted that this individual's license or certificate was not posted anywhere in the establishment.

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 Ms. Adway 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; ask to see the owner or the manager and then let 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 probably at least 7 or 8 other licensees in the salon, including Ms. Adway. Mr. Austin said that he spoke with all of the licensees who were in the salon at that time, but he did not write down their names. He said that 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. 7-8, 11-12; Exhibit 4.

Mr. Austin testified that during the inspection, he found numerous violations. 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 said that he spoke to every licensee in the establishment. He said that he asked every licensee about how often they changed their barbicide. Their response ranged from one week to 3 months. 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. Tr. p. 8; Exhibit 2, 4.

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 had made. On April 5, 2007, approximately 6 weeks after his inspection, Mr. Austin prepared a "memo to file folder" that summarized the result of his findings during his inspection.

On April 12, 2007, seven weeks after his inspection, Mr. Austin went back to the salon to obtain the names of the licensees who were present during the February inspection. When he returned to the salon in April, he spoke to Ms. Harrison. He told her she needed to name a new manager of record. He also told her that he would be issuing citations. Then he went to every station that he had been to in February and wrote down the names of all the licensees. When asked what he found during his second return visit as far as violations, Mr. Austin testified that all the problems had been corrected. The barbercide or disinfectant was being changed on a daily basis, and the licenses were posted.

In reference to failure to change the disinfectant on a daily basis, Ms. Adway asked Mr. Austin the following during cross-examination:

Q Mr. Austin, do you not remember me telling you that we didn't really use the barbercide? We used the bleach and we used the Lysol disinfectant spray sitting near our shampoo bottles next to our area?

A No. The one thing I remember you saying is how often you change your barbercide, and you stated once every two to three months.

Q Yes. That was because I discontinued using it.

A I don't remember you stating that.

Q I remember telling you we had the bleach and the Lysol that we used underneath our shampoo bowl. Did you not see the combs and disinfectant underneath the shampoo bowl?

A It's been a number of months. No, I don't remember seeing that.

In reference to failure to post her license, Ms. Adway asked Mr. Austin the following during cross-examination:

Q Do you not remember that Ms. Malone and I -- Mike was not there. Ms. Malone and I had our licenses posted on our work mirrors. Do you not remember me pointing out our licenses?

A To be truthful -- and I'm not doubting you, but it's been since April. I do not remember seeing your license there. That's why my notes reflect that I asked people for their licenses, and I did not find any licenses posted in the salon.

Testimony of Earlean Adway

Ms. Adway has been a licensed Barber or Cosmetologist Manager since April 7, 1978. At least on February 23, 2007, Ms. Adway 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. Ms. Adway was at the salon at the time that Mr. Austin conducted his inspection on February 23, 2007.

In response to the violations that Mr. Austin testified that he found during his inspection, Ms. Adway said that she has always posted her license ever since she knew that it was supposed to be posted. In reference to cleaning the shampoo bowls, she said that she is an "habitual cleaner of hair out of the shampoo bowls and sanitizing it" and that "I can't stand hair in a shampoo bowl. I usually go around to all the other ones and clean the hair out of them too, even lifting up the cup to get the hair that's trapped down in there". In reference to the disinfectant, Ms. Adway said that at that time she was using Clorox and Lysol spray. She did have the container with the barbercide in it, but she had not been using it for so long. She said that when

Mr. Austin asked her that question, she did not know why she said that she was using the barbercide. She further stated: "Maybe I just wanted to come up with an answer, but I had not been using that. That's why it looked so old. I stopped using it, and I had just not taken it down. That's the truth as I know it. Our licenses were posted, and we did have the disinfectant and stuff. Maybe our side was overlooked because of all the other ones. By me being the elder there, I always try to keep that section decent and in order to the best of my ability. So that's it". Tr. p. 22-25.

During cross-examination, Ms. Adway was asked how often she changed her disinfectant before Mr. Austin's inspection. She said that she changed the Clorox at least once every other day. When asked if she was aware that the rules require her to change the disinfectant daily, Ms. Adway said that she was not aware of that requirement. Tr. p. 24-25.

IV. Analysis of Evidence

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

The evidence presented establishes that Ms. Adway failed to change her disinfectant on a daily basis.

During his inspection, Mr. Austin found that the disinfectant used for decontamination was not changed on a daily basis. He said that he spoke to every licensee in the establishment at the time of his inspection and that he asked every licensee about how often they changed their barbicide. Their response ranged from one week to 3 months. He specifically remembers Ms. Adway saying that she changed her barbicide once every 2-3 months.

Ms. Adway said that at that time she was using Clorox and Lysol spray. She did have the container with the barbercide in it, but she had not been using it for so long. She said that when Mr. Austin asked her that question, she did not know why she said that she was using the barbercide. She further stated: "Maybe I just wanted to come up with an answer, but I had not been using that. That's why it looked so old. I stopped using it, and I had just not taken it down. That's the truth as I know it." During cross-examination, Ms. Adway admitted that she changed the Clorox that she used as a disinfectant, every other day. She said she was not aware of the requirement that she change the disinfectant on a daily basis. Tr. p. 14 17-18, 24-252; Exhibit 1.

B. Failure to clean the shampoo bowls

The evidence presented does not establish that Ms. Adway failed to clean her shampoo bowl after each use.

Mr. Austin said that, during his inspection, he found hair in all of the shampoo bowls. He said that the bowls were not cleaned after previous customers or after each use. In the Citation for Administrative Forfeiture, Mr. Austin stated that each licensee is responsible for compliance with precautions and rules contained in ch. BC 4. Tr. p. 8; Exhibits 1-5.

Ms. Adway said that she habitually cleans hair from her shampoo bowl because she "can't stand hair in a shampoo bowl". In addition, Ms. Adway submitted a statement signed by several of her patrons indicating that she removed hair from her shampoo bowl. Tr. p. 22-23; Exhibit 5.

Mr. Austin initially stated that he found hair in all of the shampoo bowls. Later, while testifying, he stated that he found hair in some of the shampoo bowls. He also could not state whether the shampoo bowl that Ms. Adway used had hair in it. When asked specifically about which shampoo bowls had hair in them, Mr. Austin testified as follows [Tr. p. 18-19]:

THE COURT: Then would you point out the shampoo bowls that had hair in them?

THE WITNESS: I specifically remember these had hair in them, and I cannot honestly say

if there was hair in these bowls or not.

THE COURT: The last set of bowls that you're referring to are the ones on the side where Ms. Adway is --

THE WITNESS: That's correct. All I said in my notes is that shampoo bowls have hair in them. I didn't specifically say the right side or the left side. I just said shampoo bowls have hair in them.

Mr. Austin further testified as follows regarding the shampoo bowls [Tr. p. 27-28]:

THE COURT: Okay. I want to recall Mr. Austin. Just a question about the area with the shampoo bowls. Could you go with the chart again, and let me know which station or which bowl had hair in it?

THE WITNESS: For sure all three of these did. I cannot attest to the fact that these -- I believe these had hair in them as well, but I can't say without doubt that they did. So it's possible they did not, but I believe they did. According to my notes, it just simply said all shampoo bowls had hair in them.

THE COURT: Was anyone working at that time? I mean, were there patrons --

THE WITNESS: There were patrons here. I don't remember if there were people working at these stations at those shampoo bowls.

THE COURT: Okay. Which station was she at? The second one?

THE WITNESS: This one right here, uh-huh.

THE COURT: Do you recall specifically speaking with her?

THE WITNESS: Oh, yes.

THE COURT: You testified to that earlier?

THE WITNESS: Uh-huh.

THE COURT: Did you ask her about the shampoo bowl?

THE WITNESS: I don't have anything in

my notes that I asked her specifically about that. I just observed the shampoo bowls.

It should also be noted that Mr. Austin did not identify any specific licensee in his Compliance Inspection Report or in his "memo to file folder", dated April 5, 2007, as a person who failed to remove hair from his or her shampoo bowl after each use. There are no references to Ms. Adway in either of the reports. Ms. Adway's name is only mentioned in the Citation, which includes a statement that "all shampoo bowls were found with hair in them" and states that each licensee is responsible for compliance with precautions and rules contained in ch. BC 4. Also, the Citation was issued almost 2 months after the inspection, which raises some questions regarding Mr. Austin's recollection of the events that occurred during the inspection. Exhibits 2, 3, 4.

C. Failure to post license or certificate

The evidence presented does not establish that, at the time of the inspection, Ms. Adway's license was not posted in the salon.

Mr. Austin said that, during his inspection, it was noted that this individual's license or certificate was not posted anywhere in the establishment. He asked each individual licensee for their license because he did not observe that they were posted. He said that every licensee either pulled his or her license out from one place or another, under a stack of papers or "behind this", or out of their wallets. None of the licenses were posted. Tr. p. 8, 28-29; Exhibits 2, 3, 4.

Ms. Adway said that she has been posting her license ever since she found out there was a requirement to post it. She said that her license was posted on her mirror at her work station. Tr. p. 22; Exhibit 1, 5.

Mr. Austin initially stated that Ms. Adway's license was not posted anywhere in the establishment. During cross-examination, Mr. Austin expressed some uncertainty about his finding. Ms. Adway asked Mr. Austin the following [Tr. p. 22]:

Q Do you not remember that Ms. Malone and I -- Mike was not there. Ms. Malone and I had our licenses posted on our work mirrors. Do you not remember me pointing out our licenses?

A To be truthful -- and I'm not doubting you, but it's been since April. I do not remember seeing your license there. That's why my notes reflect that I asked people for their licenses, and I did not find any licenses posted in the salon.

It should also be noted that Mr. Austin did not identify any specific licensee in his Compliance Inspection Report or in his "memo to file folder", dated April 5, 2007, as a person who failed to post his or her license in the establishment. There are no references to Ms. Adway in any either of these reports. Ms. Adway's name is only mentioned in the Citation, which is dated April 17, 2007, almost 2 months after the inspection. Exhibits 2, 3, 4.

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

In its closing arguments, the Division of Enforcement (Division) argues that Ms. Adway is in violation of Wis. Admin. Code, §§ BC 4.01 (5) and 4.02 (5), because of her own conduct, as well as 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 Wis. Admin. Code, 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 as it relates to §§ BC 4.01 (5) and BC 4.02 (5). This issue was first raised in the Division's closing arguments. Ms. Adway was not provided with adequate notice that the Division would be alleging that she was responsible for the conduct of other licensees in the establishment in which she worked.

VI. Assessment of Forfeitures and Costs

A. In General

Having found that Ms. Adway violated Wis. Admin. Code, § BC 4.02 (5), by failing to change her disinfectant on a daily basis, a determination must be made regarding the appropriateness of imposing forfeitures and costs.

In the Citation for Administrative Forfeiture, dated April 17, 2007, the Board informed Ms. Adway that she could deposit forfeiture and costs in the amount of \$130.00, by mailing a check or money order no later than 20 days from the date of the Citation, together with the signed copy of the Citation. The Notice states that payment shall be treated as a plea of no contest to the violation cited and consent to an Order of Forfeiture plus costs, not to exceed the amount of the deposit. Although page 2 of the Citation for Administrative Forfeiture was not entered into the record as part of Exhibit 2, one can assume that, based upon the form Citation found in Appendix I to Wis. Adm. Code, ch. BC 10, the Citation served on Ms. Adway contained the following statement:

FURTHER NOTICE that within twenty (20) days of the date of service of this citation, the licensee may enter a plea contesting the violation(s) cited and request a hearing on the alleged violation (s). Submission of a plea contesting violations and requesting a hearing shall be in writing and submitted to the Department of Regulation and Licensing Division of Enforcement, 1400 East Washington Avenue, PO Box 8935, Madison, WI 53708.

If the credential holder does not make a deposit or otherwise respond to the citation in a

timely fashion, the disciplinary authority may without further proceedings issue an order of default against the credential holder. A default order issued under this section may impose forfeiture and costs, not to exceed the amount identified in the citation. Violation of an order issued pursuant to this section may result in a refusal to renew credentialing or additional disciplinary action.

If the credential holder requests a hearing but fails to appear at the hearing at the time fixed therefor, the credential holder is in default and the disciplinary authority may make findings and enter an order on the basis of the citation.

In this case, Ms. Adway elected not to pay the \$130.00 forfeiture and costs and made a request for a hearing in a timely manner.

B. Assessment of Forfeitures

Initially, there were some questions regarding whether the Board has the authority to assess forfeitures in conjunction with the issuance of a Citation for Administrative Forfeiture. After further review of the Board's authority in Wis. Stats., § 454.15 and Wis. Adm. Code, ch. BC 10, it is clear that the Citation procedures sufficiently mirror the provisions contained in Wis. Admin. Code, ch. RL 2, which governs disciplinary proceedings, to alleviate any concerns or questions. In addition, this conclusion also alleviates any questions regarding whether the Board has the authority to issue Citations in the first instance.

The Board's authority to assess forfeitures is contained in Wis. Stats., § 454.15, which reads, in part, as follows:

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.

The procedure established by the Board for assessment of forfeitures is contained in Wis. Adm. Code, ch. BC 10.

Subsection BC 10.01 (3) states that the citation form provided by that section may serve as the initial pleading for a disciplinary action and is adequate process to give the Board jurisdiction over the credential holder, if the citation is served upon the credential holder and filed with the Board. Subsection BC 10.02 (2) states that a citation shall be substantially in the form shown in ch. BC 10, Appendix I.

Subsection BC 10.05 states that the credential holder may deposit the amount of forfeiture identified in the citation by mailing the deposit and a copy of the citation to the division. Payment shall be treated as a plea of no contest and submission to an order of forfeiture plus costs, not to exceed the amount of the deposit. Subsection BC 10.06 states that within 20 days of the date of service of the citation, the licensee may enter a plea contesting the violation cited and request a hearing on the alleged violation cited. Submission of a plea contesting violations and requesting a hearing shall be in writing and submitted to the division.

Finally, § BC 10.07 (1) states that if the credential holder does not make a deposit or otherwise respond to the citation in a timely fashion, the board may without further proceedings issue an order of default against the credential holder. A default order issued under this section may impose forfeiture and costs, not to exceed the amount identified in the citation. Violation of an order issued under this section may impose forfeiture and costs, not to exceed the amount identified in the citation. Violation of an order issued pursuant to this section may result in a refusal to renew credentialing or additional disciplinary action. Subsection BC 10.07 (2) provides that if the credential holder requests a hearing pursuant to s. BC 10.05 but fails to appear at the hearing at the time scheduled, the credential holder is in default and the board may make findings and enter an order on the basis of the citation. The board may, for good cause, relieve the respondent from the effect of such findings and permit the respondent to answer and defend at any time before the board enters an order or within a reasonable time.

In this case, the Citations issued against Ms. Adway served as the initial pleading for commencement of a disciplinary proceeding. The Citations contain a provision which offered Ms. Adway an opportunity to pay forfeitures and costs, in essence settle the matter, without a hearing. The Citations also contained a provision which offered Ms. Adway an opportunity for a hearing, and provided notice that failure to pay the forfeitures or request a hearing could result in the issuance of an order of default.

In reference to whether Ms. Adway should be ordered to pay forfeitures in conjunction with this proceeding, in my opinion, the answer is yes. The evidence presented establishes that Ms. Adway failed to change her disinfectant on a daily basis. The Citation for Administrative Forfeiture issued against Ms. Adway contains a provision assessing forfeiture and costs in the amount of \$130.00 for failure to change disinfectant on a daily basis. The Citation does not specify the percentage of the \$130.00 that was assessed as forfeitures or the amount assessed as costs. The Board is authorized under Wis. Stats., § 454.15 (3), to assess a forfeiture of not more than \$1,000 for each separate offense. In my opinion, based upon the evidence presented, the assessment of forfeiture in the amount of \$130.00 is adequate to assure protection of the public.

C. Collection of Forfeitures

Initially, there were some questions regarding whether the Board has the authority to collect forfeitures in conjunction with the issuance of a Citation for Administrative Forfeiture. After further review of the Board's authority in Wis. Stats., § 454.15 and Wis. Adm. Code, ch. BC 10, it is clear that the Citation procedures are designed to assess, not collect, costs.

In this case, if Ms. Adway had paid the forfeitures assessed in the Citations issued against her, she would have made the payments voluntarily. Since she did not pay the forfeitures, if the Board assesses forfeitures and Ms. Adway does not voluntarily pay the forfeitures, the Board will still need to collect the forfeitures through a court action.

D. Assessment of Costs

In this case, the Citations for Administrative Forfeiture issued against Ms. Adway contained a provision assessing forfeitures and costs in the amount of \$190.00. There is no evidence in the record regarding what part of the \$190.00 constitutes forfeiture and what part constitutes costs.

In my opinion, the Board may assess costs in conjunction with a Citation for Administrative Forfeiture only in an instance in which the Board also limits, suspends, or revokes a licensee's credential or reprimands a licensee.

The procedures for assessment of costs are set forth in Wis. Stats., § 440.22 (2), which read as follows:

(2) In any disciplinary proceeding against a holder of a credential in which the department or an examining board, affiliated credentialing board or board in the department orders suspension, limitation or revocation of the credential or reprimands

the holder, the department, examining board, affiliated credentialing board or board may, in addition to imposing discipline, assess all or part of the costs of the proceeding against the holder. Costs assessed under this subsection are payable to the department. Interest shall accrue on costs assessed under this subsection at a rate of 12% per year beginning on the date that payment of the costs are due as ordered by the department, examining board, affiliated credentialing board or board. Upon the request of the department of regulation and licensing, the department of justice may commence an action to recover costs assessed under this subsection and any accrued interest.

It is clear from reading Wis. Stats., § 440.22 (2), that the Board may impose costs only in instances in which it issues an order of suspension, limitation or revocation of a credential, or in which it reprimands a credential holder.

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 5th day of March, 2008.

Respectfully submitted,

Ruby Jefferson-Moore
Administrative Law Judge