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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 |
| BICHYEN T. TRAN AND | : | LS0606191BAC |
| STEEL MAGNOLIAS SALON, | : | |
| RESPONDENTS. | : | |

Division of Enforcement Case No. 05BAC039

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 10th day of September, 2007.

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. LS0606191BAC**

**BICHYEN T. TRAN and STEEL
MAGNOLIAS SALON,
RESPONDENTS.**

Division of Enforcement Case No. 05 BAC 039

PARTIES

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

Bichyen T. Tran
2239 Branson Road
Oregon, Wisconsin 53575

Steel Magnolias Salon
1922 Parmenter Street
Middleton, Wisconsin 53562

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 and Complaint on June 19, 2006. The hearing was held on August 2, 2006. Closing arguments were filed by December 4, 2006. Atty. Claudia Berry Miran appeared on behalf of the Division of Enforcement. The respondents 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. Steel Magnolias Salon is duly licensed as a barbering and cosmetology establishment in the State of Wisconsin (license #80-31863). This license was first granted on March 11, 2004, and is current through June 30, 2007. The license was expired from July 1, 2005, through May 1, 2006. The last address reported to the Department of Regulation and Licensing (Department) for Steel Magnolias Salon is 1922 Parmenter Street, Middleton, WI 53562.

2. Bichyen T. Tran is licensed as a barbering or cosmetology manager in the State of Wisconsin having license #81-24559. This license was first granted on October 29, 1991 and is current through June 30, 2007. Ms. Tran's last address reported to the Department is 2239 Branson Road, Oregon, WI 53575. Ms. Tran is listed with the Department as the owner and manager of Steel Magnolias Salon (Salon).

3. On August 4, 1997, Ms. Tran was disciplined by the Wisconsin Barbering and Cosmetology examining Board. Ms. Tran was ordered to pay a forfeiture of \$300.00 for allowing an unlicensed person to perform manicuring services, for having no sink in the establishment and for having no disinfectant at the manicuring table. At that time, Ms. Tran was the owner of Nails by Bic, a licensed manicuring establishment located at 2231 Parmenter Street, Middleton, Wisconsin 53562.

4. At some point in time in 2005, Adam Keating filed a complaint with the Barbering and Cosmetology Examining Board in which he complained that an unlicensed person at Steel Magnolias Salon gave him a pedicure and cut his foot while using metal implements to cut away calluses. In addition to the allegations of unlicensed practice, Mr. Keating alleged incompetent practice because of receiving the cut.

5. On November 16, 2005, Kelley Sankbeil, an Investigator with the Department, conducted an unannounced inspection of the Salon. In the Notice of Compliance that Investigator Sankbeil issued, she noted that the Salon was opened Monday-Friday, 9:00 a.m., to 5:00 p.m., and Saturdays, 9:00 a.m., to 5:00 p.m. During her inspection, Investigator Sankbeil found the following:

- a. There were no individual practitioner licenses and no current establishment license posted in the Salon.
- b. Two trash cans were not covered.
- c. Disposable contact equipment (buffers and nail files) were being reused.
- d. Acrylic liquid monomer and acrylic powder were being dispensed from common bowls (rather than by individual quantities).
- e. The barbicide, which is a disinfectant, was not being changed on a daily basis.
- f. Kristy Martinson was found to be working in the Salon as an aesthetician without a license as an aesthetician.
- g. Wei Liang, the individual who gave a pedicure to Adam Keating, as described in paragraph 4 above, was not licensed to practice barber or cosmetology at the time the services were provided.

6. During the November 16, 2005 inspection, and follow-up after the inspection, Investigator Sankbeil found that 4 licensed individuals, besides Ms. Tran, were employed at the Salon. Investigator Sankbeil also found that the Salon's establishment license had expired on July 1, 2005 and remained expired through May 1, 2006.

7. On December 14, 2005, Ms. Tran sent a Notice of Compliance to the Department indicating that all violations had been corrected.

8. On May 1, 2006, Investigator Kelley Sankbeil and Paralegal Ted Nehring inspected Steel Magnolias Salon and found the following:

- a. There was no current establishment license posted in the Salon.
- b. Two trash cans were not covered.
- c. Disposable contact equipment (buffers, nail files and pumice stones) were being reused.

d. Acrylic liquid monomer and acrylic powder were being dispensed from common bowls (rather than by individual quantities).

e. The barbicide, which is a disinfectant, was not being changed on a daily basis.

f. The manicuring stations were not clean to sight and touch.

9. During the May 1, 2006, inspection, Investigator Sankbeil and Paralegal Nehring observed black disposable files and multiple pastel colored pumice stones in a sterilizer.

10. During the May 1, 2006, inspection, Investigator Sankbeil and Paralegal Nehring observed Donna Farrar providing barbering and cosmetology services to a patron. No current license was posted for Ms. Farrar in the Salon. Ms. Farrar explained that she owned a salon in Richland Center which she was in the process of closing, and that her barbering and cosmetology manager license was still posted in her Richland Center salon.

11. During the May 1, 2006, inspection, Investigator Sankbeil and Paralegal Nehring inspected a massage room in the back of the Salon. There were two massage tables in the room. One massage table was covered with a green blanket that was contaminated with white particles, not blanket "fuzzies", but actual white pieces of what appeared to be solid or hard material. The second massage table was covered with a white sheet, a white top sheet and a brown blanket. One of the sheets on the table had brownish-yellow stains on it and pieces of gray and black hard particles on it "almost little mica flakes or something". Investigator Sankbeil and Paralegal Nehring also observed a container of "balancing" crème had finger troughs in it. The balancing crème was being dispensed from a common container (rather than by individual quantities).

12. As the manager and owner of Steel Magnolias Salon, Ms. Tran was, at all times relevant to this proceeding, responsible for compliance with Wis. Stats., ch. 454 and Wis. Admin. Code BC chs. 2, 3 and 4.

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. Respondents, by failing to insure that all practitioner licenses were posted in the Salon, as described in Findings of Fact 5 and 10 herein, violated Wis. Stats., § 454.067.

3. Respondents, by failing to insure that a current establishment license was posted in the salon, as described in Findings of Fact 5 and 8 herein, violated Wis. Stats., § 454.067.

4. Respondents, by failing to provide covers for two trash cans and by reusing disposable contact equipment, as described in Findings of Fact 5 and 8 herein, violated Wis. Adm. Code § BC 4.01 (1).

5. Respondents, by failing to maintain contamination prevention for creams, lotions and powder, as described in Findings of Fact 5, 8 and 11 herein, violated Wis. Adm. Code § BC 4.01 (4).

6. Respondents, by failing to change the disinfectant (barbicide) on a daily basis, as described in Findings of Fact 5 and 8 herein, violated Wis. Adm. Code §§ BC 2.03 (5), 4.01 (1) and 4.10 (2).

7. Respondents, by failing to maintain the establishment and equipment in a clean, sanitary and safe condition, as described in Findings of Fact 5 and 8 herein, violated Wis. Adm. Code § BC 4.01 (1).

8. Respondents, by permitting an unlicensed individual to practice as an aesthetician without a license, as described in Findings of Fact 5 herein, violated Wis. Stats. , § 454.04 (1) (b) and Wis. Adm. Code § BC 2.04.

9. Respondents, by operating Steel Magnolias with an expired establishment license from July 1, 2005 to May 1, 2006, as described in Findings of Fact 1 and 6 herein, violated Wis. Stat. § 454.08 (1) (b) and Wis. Adm. Code § BC 2.045 (1) and 3.01 (1).

10. Respondents, by permitting six individuals (Carla, Kelly, Jason, Eileen, Donna and Kristy) to practice, barbering and cosmetology outside a licensed establishment, as described in Findings of Fact 5, 6 and 10 herein, violated Wis. Stat., § 454.08 (1) (b) and Wis. Adm. Code § BC 2.045 (1) and 3.01 (1).

ORDER

NOW, THEREFORE, IT IS ORDERED that the barbering or cosmetology manager license (#81-24559) of Bichyen T. Tran and the barbering and cosmetology establishment license (#80-31863) of Steel Magnolias Salon be, and hereby are, **SUSPENDED** for a period of not less than 10 working days.

IT IS FURTHER ORDERED that the respondents, Bichyen T. Tran and Steel Magnolias Salon pay, jointly and severally, a forfeiture in the amount of \$7, 650.00 to the Department of Regulation and Licensing as follows: \$1,530.00 on September 1, 2007; \$1,530.00 on December 1, 2007; \$1,530.00 on March 1, 2008; \$1,530.00 on June 1, 2008 and \$1,530.00 on September 1, 2008.

IT IS FURTHER ORDERED that pursuant to Wis. Stats. § 440.22, the cost of this proceeding shall be assessed against respondent, jointly and severally, and shall be payable to the Department of Regulation and Licensing.

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 and Complaint on June 19, 2006. The hearing was held on August 2, 2006. Closing arguments were filed by December 4, 2006. Atty. Claudia Berry Miran appeared on behalf of the Division of Enforcement. The respondents appeared in this matter without legal counsel.

II. Applicable Laws

454.04 Practice. (1) (b) No person may engage in aesthetics unless the person has received training in the areas of service provided and holds a current aesthetician license, barber or cosmetologist license, manager license, temporary permit or training permit issued by the examining board or is an apprentice under s. 454.10 or a student in an aesthetics or barbering or cosmetology course of instruction.

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.

454.08 Establishment licenses. (1) (b) Except as permitted by rule promulgated under par. (a), no person may practice barbering or cosmetology, aesthetics, electrology or manicuring in an establishment unless the establishment is licensed to provide that practice under sub. (2).

(8) The examining board shall furnish a certificate to the owner of a licensed establishment, certifying that the establishment is licensed by the examining board. The owner shall post the certificate in a conspicuous place in the establishment.

454.15 Disciplinary proceedings and actions. (1) Subject to the rules promulgated under s. 440.03 (1), the examining board may make investigations or conduct hearings to determine whether a person has violated this chapter or any rule promulgated under this chapter.

(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 2.03 Practice standards. (1) Services provided by any licensee shall be performed in a manner that is consistent with basic and accepted practice standards and in accordance with all state statutes, board rules and local codes and ordinances.

...

(5) Licensees shall take adequate and necessary precautions to protect the patron from health and safety hazards when performing services. Licensees shall not smoke while performing personal services on a patron.

BC 2.04 Unauthorized practice. (1) Licensees may not assist or participate in the unauthorized or unlicensed practice of barbering and cosmetology, aesthetics, electrology or manicuring.

BC 2.045 Services outside of a licensed establishment. (1) Licensees shall not provide personal care services outside of a licensed establishment except for persons who are unable to leave their homes because of illness or disability or for persons who are in hospitals, nursing homes, correctional institutions or other institutions. Licensees may provide any personal care service for inmates or patients regardless of whether it is done in a designated area or in the personal room of an inmate, patient or infirm person within an institution or private home.

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.

BC 3.01 Establishment requirements. (1) Barbering and cosmetology, aesthetics, electrology, and manicuring shall not be practiced outside the confines of a licensed establishment except as provided in s. BC 2.045. Establishments, including floors, walls, ceilings, furniture, equipment, tools, utensils and instruments, shall at all times be in good repair and maintained in an orderly and sanitary condition.

...

- (13) The establishment license shall be posted in the establishment.

BC 4.01 Equipment and sanitation. (1) All areas of an establishment and the equipment, tools and implements used by licensees for services in an establishment shall be maintained in a clean, sanitary and safe condition.

...

(3) Powder puffs, sponges, and emery boards and other contact equipment that cannot be cleaned with soap or detergent and water shall be disposed of following each use.

(4) All liquids, creams, powders and semi-solid substances shall be dispensed from a container in a manner which will prevent contamination of the unused portion of the substance.

BC 4.10 Manicuring. (1) Prior to use, all reusable manicure instruments shall be disinfected.

...

(2) Disinfectant used for decontamination shall be changed daily and shall be kept in a covered container.

(4) Manicure instruments that cannot be cleaned and disinfected or sterilized shall be disposed of following each use.

III. Summary of Evidence Presented

A. General Overview

Ms. Tran has been licensed as a barbering or cosmetology manager since October 29, 1991. Her manager's license is current through June 30, 2007.

At all times relevant to this action, Ms. Tran was the manager and owner of Steel Magnolias Salon, a barbering and cosmetology establishment that was first licensed on March 11, 2004, and is current through June 30, 2007. The establishment license was expired from July 1, 2005, through May 1, 2006.

B. Testimony of Investigator Kelley Sankbeil

(1) Background

Ms. Sankbeil testified at the request of the Division of Enforcement. Ms. Sankbeil has been employed in the Division as a Consumer Protection Investigator III for 13 years. Her duties include investigations and inspections of a variety of businesses, including the inspection of barbering and cosmetology establishments.

(2) November 16, 2005 Inspection

On November 16, 2005, Ms. Sankbeil made an unannounced visit to the Steel Magnolias Salon. The inspection was performed as a result of a complaint filed by a patron who received a pedicure at Steel Magnolias. The patron complained that an unlicensed person gave him a pedicure and cut his foot while using metal implements to cut away calluses. In addition to the allegations of unlicensed practice, the patron alleged incompetent practice because of receiving a cut.

Ms. Sankbeil testified that when she went to the Salon to perform the inspection, she observed that there were no licenses posted. There were three wall certificates posted, but those are not the same as the actual licenses.

Ms. Sankbeil also testified that while she was conducting her inspection at Steel Magnolias, she noticed there was a woman named Kristy Martinson who was working as an aesthetician. Ms. Martinson told Ms. Sankbeil that she was an aesthetician; that she had been through approximately 600 hours of schooling, but that she had not taken the examination required for licensure. Ms. Martinson initially told Ms. Sankbeil that she was working at Steel Magnolias as an apprentice, but later retracted that statement and said that it was not a formal apprenticeship registered with the Department or anyone else. Ms. Sankbeil said that later, when she checked the Department's records, she found that Ms. Martinson did not have a license at the time of the inspection. She said that a couple of months later Ms. Martinson passed the examination and obtained her license. At some point in time after the inspection, Ms. Martinson informed Ms. Sankbeil that she had stopped working in the Salon as an aesthetician, and that she did reception duties at the Salon until she obtained her license.

Ms. Sankbeil further testified that when she conducted the inspection, she observed the barbicide. She said that it was cloudy and had large white particles in it. She asked Ms. Tran how often it was changed, and Ms. Tran said once a week. Ms. Sankbeil told Ms. Tran that the barbicide had to be changed daily for the days of operation.

Ms. Sankbeil also observed that the manicure stations had used nail files and buffers. She said that in her opinion, the nails and files were substantially used and did not reflect use on just one customer. According to Ms. Sankbeil, one station had 10 and 4 other stations had 15 of the block-style buffers. She said that all of the 25 buffers were in used, contaminated condition. Ms. Tran told Ms. Sankbeil that most customers had a white plastic box that they kept their own implements in and brought them back with them. If a customer should forget or a new customer should come in, she will use a disposable set of implements on them and throw them away. Ms. Sankbeil cited Ms. Tran for reusing nail files and buffers because, in her opinion, the wear reflected on the items was more than would be for a single use. Tr. p. 76-77.

Ms. Sankbeil also cited Ms. Tran for using common acrylic powder and acrylic liquid monomer dispensing bowls. She explained to Ms. Tran that you have to dispense individual quantities per customer and sanitize the bowls between customers.

During the inspection, Ms. Sankbeil also went to the pedicure stations. She said that cleaning procedures for the pedicure stations were adequate. Ms. Sankbeil noticed there was a metal razor on a handle as well as a metal file that resembled a cheese grater. She said that it is thicker and it has holes in it like a cheese grater would. It's not just a flat file. She explained to Ms. Tran that those items could not be used for pedicures because the scope of her license does not allow

the removal of skin by cutting. She said that they discussed the difficulty of getting calluses adequately removed using standard pedicure techniques. Ms. Tran said she doesn't normally use the razor or the metal file on customers until they request it, and, if they request it, she has them sign a waiver.

In reference to problems with the disposal of waste, Ms. Sankbeil testified that there were two uncovered trash cans in the establishment. She asked Ms. Tran about them and Ms. Tran said one of the covers had cracked which was why it was not covered. She didn't offer an explanation for the other uncovered container during that inspection.

Ms. Sankbeil testified that after the inspection, she learned that the establishment license for Steel Magnolia had expired on July 1, 2005. Ms. Sankbeil called Ms. Tran on March 17, 2006, about the expired license. Ms. Tran offered to give Ms. Sankbeil her credit card number over the telephone. Ms. Sankbeil explained that she could not accept it, and provided Ms. Tran with the name and telephone number of a Department staff member to contact regarding the renewal of the establishment license.

C. May 1, 2006 Inspection

At some point in time in April 2006, Ms. Sankbeil received information from a Department staff member that the establishment license for Steel Magnolias still had not been renewed. Ms. Sankbeil, along with other Department staff members, made a decision to revisit the establishment to see if the Salon was, indeed, still operating. At Ms. Sankbeil's request, Ted Nehring accompanied her during the inspection. Mr. Nehring is a Paralegal employed with the Division of Enforcement. Ms. Sankbeil decided to take a digital camera along to take photographs of the establishment. The inspection, which took place on May 1, 2006, was an unannounced visit.

Ms. Sankbeil testified that immediately upon entry to the establishment, she noted that there was a woman, Ms. Farrar, working at a cosmetology station providing a haircut to a client. She said that there was no license posted anywhere in the establishment or at the work station for Ms. Farrar. The other licenses for the employees in the establishment were posted. She asked Ms. Farrar if she was licensed. She said she was, and she dug in her purse to try to locate her wallet copy of her credential. She was not able to do so, but she provided photographic identification, which Ms. Sankbeil used to verify that she had a valid license. Ms. Farrar explained that she owned an establishment, which she was in the process of closing, and that she was working part-time for Ms. Tran. Ms. Farrar said that she must have left her license at her own establishment.

Mr. Sankbeil further stated that, while inspecting Ms. Farrar's stations and the other stations, she noted that the barbicide was very cloudy and contaminated with white particles. She asked Ms. Farrar how often the barbicide was changed, and she said it was changed twice a week. Ms. Tran and Ms. Sankbeil discussed the matter and Ms. Tran said that it was changed every day. Ms. Sankbeil said that she determined that she should go ahead and cite the facility for the cloudy barbicide because the level of cloudiness on the bottom was significant, and it had large white chunks of matter in it as well as hair in at least two of the barbicide containers. Ms. Sankbeil said that in her experience, the barbicide was contaminated enough that it could not have been changed every day.

In addition, Ms. Sankbeil found that Ms. Farrar's station did not have a covered waste basket, and that after Ms. Farrar performed a haircut, she and Mr. Nehring observed Ms. Farrar sweep up the hair clippings and put them in the waste basket. There were actually two uncovered waste baskets in the establishment. Ms. Tran responded that she had told Ms. Farrar to get a cover for her waste basket and that the other waste basket legitimately was not covered because they disposed of foils and cotton and things that are contaminated with chemicals that could become combustible if kept enclosed. Ms. Tran stated that they empty the waste basket after every service in a large trash can in the back of the Salon. So, Ms. Sankbeil

only cited them for having one uncovered trash can. During the inspection, a lid was found for the trash can and put on it. A photograph was taken of the uncovered trash can before it was covered.

Ms. Sankbeil testified that she then inspected the manicuring stations. She noted there was still a large quantity of used files and nail buffers. Ms. Sankbeil and Mr. Nehring took photographs of the buffers. Ms. Sankbeil also took one nail file and two nail buffer blocks into evidence. She cited the respondents for reusing the nail files and buffers. Exhibit 2.

In addition, Ms. Sankbeil observed that all of the manicure stations were covered with a white powdery substance. They were not cleaned to the sight and touch. She asked Ms. Tran about them, and she said that she's the only person that provides manicures but that the other employees and practitioners do sit at the stations and do their own nails. Ms. Sankbeil cited the respondents for the manicure stations not being cleaned to the sight or touch.

Ms. Sankbeil said that she and Mr. Nehring then went into a massage area where there were two massage tables. One massage table was covered with a green blanket that was contaminated with white particles, not blanket "fuzzies", but actual white pieces of what appeared to be solid or hard material. She said that she would not hazard to guess what the white material was, but it was not clean to the sight or touch. There was also a second massage table that was covered with a white sheet, a white top sheet and a brown blanket. The blanket was folded down with the top sheet folded down a little bit so they could see the under sheet. The sheet "had brownish-yellow stains on it and pieces of gray and black hard particles on it like -- almost little mica flakes or something". Ms. Sankbeil said that she did not know what the material was, but it was not clean to the sight or touch. Ms. Sankbeil took photographs of the sheet. Transcript, page 19-20, 24; Exhibit 1.

Also, in the massage room was a container of something called balancing cream. Investigator Sankbeil described the cream as a white, thick cream that was thicker than lotion. She said that the cream had "finger crosses" in it. She said that there was one spot where she could see at least three consecutive finger marks as if someone took three fingers and scooped them out. Ms. Sankbeil said that the finger marks indicated to her that the product was not being dispensed in a sterile manner; that the cream itself was allowed to be contaminated with bacteria from the practitioner's hands, and that the cream was being used on a subsequent client. Ms. Sankbeil cited the respondents for failure to dispense individual quantities in a sanitary manner.

Ms. Sankbeil and Mr. Nehring continued around the Salon in their inspection, and noted there was a sterilizer with a closed lid. Inside of the sterilizer were some pumice stones, not "loofahs", but they were actually like hard volcanic pumice that had been colored to a pastel color. There were also several disposable nail files in the sanitizer. They opened the door to the sterilizer and took photographs. That was part of the citation for reusing disposable contact equipment. According to Ms. Sankbeil, the pumice stones simply cannot be adequately cleaned because they're so porous that you cannot get the particulate matter out of them even if you sterilize them in a heat sterilizer. Also the way the items were stacked in the heat sterilizer, they were stacked so there were several pumice stones on top of each other so there was a surface -- at least one surface, if not two, on each pumice stone that was not directly exposed to the sterilizing heat. However, they are items that cannot be sterilized. They have to be discarded even if they are not labeled as such by the manufacturer.

Ms. Sankbeil also noted that at the manicuring stations there was a white bowl of the powder that is used for acrylic nails and that there was a large quantity of the powder in the bowl. She said that there were multiple brush marks in the powder which indicates that individual quantities were not being dispensed and that the same substance was being reused on subsequent customers. She asked Ms. Tran about this, and Ms. Tran showed her, at her station, some little glasses that are "shot-style glasses" that she dispenses individual quantities into, cleanses between customers and sanitizes. Ms. Sankbeil said that the fact remains that there was a large bowl of powder with multiple brush marks. Ms. Sankbeil cited the respondents for reusing that substance on subsequent customers.

IV. Appropriate Discipline

The evidence presented establishes that the respondents violated numerous laws relating to the practice of barbering and cosmetology.

Having found that the respondents violated statutes and rules relating to the practice of barbering and cosmetology, a determination must be made regarding whether discipline should be imposed, and if so, what discipline is appropriate.

The Barbering and Cosmetology Examining Board is authorized under s. 454.15 (2), Stats., to discipline a licensee for violations of ch. 454, Stats., or any rule promulgated under the statutes. In addition, the Board is authorized under s. 454.15 (3), Stats., to assess a forfeiture of not more than \$1,000 for each violation found under s. 454.15 (2) (a)-(i), Stats.

The purposes of discipline by occupational licensing boards are to protect the public, deter other licensees from engaging in similar misconduct and to promote the rehabilitation of the licensee. *State v. Aldrich*, 71 Wis. 2d 206 (1976). Punishment of the licensee is not a proper consideration. *State v. McIntyre*, 41 Wis. 2d 481 (1969).

The Division of Enforcement recommends that the licenses of both Ms. Tran and Steel Magnolias be concurrently suspended for 10 working days. In addition, the Division recommends that Ms. Tran and Steel Magnolias be assessed, jointly and severally, a forfeiture in the amount of \$8,650.00. The Division calculated the forfeiture as follows:

\$1000 for permitting an unlicensed person (Wei Liang) to practice in the establishment.

\$1000 for permitting an unlicensed person (Kristy Martinson) to practice in the establishment.

\$2000 [\$1000 each inspection] for practicing outside a licensed establishment as an owner or manager.

\$500 [\$100 each] for permitting five persons (Carla, Kelly, Jason and Eileen at the November inspection, Donna at the May inspection) to practice for less than six months in an unlicensed establishment.

\$2000 [\$500 each] for permitting four persons (Kristy, Kelly, Jason and Eileen) to practice for between six months and one year outside a licensed establishment [May visit].

\$250 for failing to change disinfectant on a daily basis, first offense [November visit].

\$250 for reusing disposable contact equipment, first offense [November visit].

\$100 for having uncovered trash cans and waste baskets, first offense [November visit].

\$500 for reusing disposable contact equipment, second offense [May visit].

\$500 for failing to change disinfectant on a daily basis, second offense [May visit].

\$100 for failing to maintain contamination prevention for creams, lotions and powders, second offense [May visit].

\$100 for failing to make required postings, second offense [May visit].

\$100 for failing to maintain the establishment and equipment in a clean, sanitary and safe condition, first offense [May visit].

\$250 for having uncovered trash cans and waste baskets, second offense [May visit].

According to the Division, the length of the suspensions and the amounts of forfeitures are taken from the forfeiture grid adopted by the Barbering and Cosmetology Examining Board on September 12, 2005. The total of the forfeitures is high, but is in line with the forfeitures assessed in other similar cases.

The Administrative Law Judge recommends that Ms. Tran's license to practice barbering or cosmetology and the

establishment license of Steel Magnolia be suspended for a period of not less than 10 working days; that the parties pay a forfeiture in the amount of \$7,650.00 and pay the costs of the proceedings. These measures are designed primarily to assure protection of the public and to deter other licensees from engaging in similar misconduct. Ms. Tran has shown that she is incapable of practicing barbering and cosmetology in a manner that safeguards the interest of the public. Any other measure would not provide adequate protection to the public, and would not deter other licensees from engaging in similar misconduct.

In reference to the amount of the proposed forfeitures, as note previously, the Administrative Law Judge recommends that the Board impose forfeitures in the amount of \$7,650.00. The Division of Enforcement recommends that the Board impose forfeitures in the amount of \$8,650.00. Of the total amount of forfeitures recommended by the Division of Enforcement, \$1,000.00 relates to permitting an unlicensed person (Wei Liang) to practice in the Salon (refer to Findings of Fact (5) (g) herein). However, no allegations of unlicensed practice involving Ms. Liang are contained in the Complaint filed in this matter. As a result, there is no conclusion of law of a violation involving Ms. Liang's unlicensed practice in the Salon. Therefore, the Administrative Law Judge's recommendation does not include a proposed forfeiture for Ms. Liang's unlicensed practice.

V. Costs of the Proceeding

Wis. Stats. § 440.22(2), provides in relevant part as follows:

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.

The presence of the word "may" in the statute is a clear indication that the decision whether to assess the costs of this disciplinary proceeding against the respondent is a discretionary decision on the part of the Board, and that the Board's discretion extends to the decision whether to assess the full costs or only a portion of the costs. The Administrative Law Judge's recommendation that the full costs of the proceeding be assessed is based primarily on fairness to other members of the profession.

The Department of Regulation and Licensing is a "program revenue" agency, which means that the costs of its operations are funded by the revenue received from its licensees. Moreover, licensing fees are calculated based upon costs attributable to the regulation of each of the licensed professions, and are proportionate to those costs. This budget structure means that the costs of prosecuting cases for a particular licensed profession will be borne by the licensed members of that profession. It is fundamentally unfair to impose the costs of prosecuting a few members of the profession on the vast majority of the licensees who have not engaged in misconduct. Rather, to the extent that misconduct by a licensee is found to have occurred following a full evidentiary hearing, that licensee should bear the costs of the proceeding.

This approach to the imposition of costs is supported by the practice of the Wisconsin Supreme Court, which is granted similar discretionary authority by SCR 22.24 to impose costs in attorney disciplinary hearings. The Court acknowledges the logic of imposing the cost of discipline on the offender rather than on the profession as a whole, and routinely imposes costs on disciplined respondents unless exceptional circumstances exist. In the Matter of Disciplinary Proceedings against M. Joanne Wolf, 165 Wis. 2d 1, 12, 476 N.W. 2d 878 (1991); In the Matter of Disciplinary

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 June, 2007.

Respectfully submitted,

Ruby Jefferson-Moore
Administrative Law Judge