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Before The
State Of Wisconsin
Barbering and Cosmetology Board

In the Matter of the Disciplinary Proceedings

Against **PHUNG K. HUYNH**, Respondent

FINAL DECISION AND ORDER

Order No. 0000 508

Division of Enforcement Case No. 07 BAC 016

The State of Wisconsin, Barbering and Cosmetology 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 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 at Madison, Wisconsin on the 1 day of Nov, 2010.

Member
Barbering and Cosmetology Board



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Disciplinary Proceedings
Against **PHUNG K. HUYNH**, Respondent

PROPOSED DECISION AND ORDER
DHA Case No. DRL-10-0055

Division of Enforcement Case No. 07 BAC 016

The parties to this proceeding for purposes of Wis. Stat §§ 227.47(1) and 227.53 are:

Phung K. Huynh
c/o Da Vi Nails
351 South Washburn Street
Oshkosh, WI 54904

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

Department of Regulation and Licensing, Division of Enforcement, by

Attorney Ryan Donovan
P. O. Box 8935
Madison, WI 53708-8935

PROCEDURAL HISTORY

These proceedings were initiated when the Department of Regulation and Licensing, Division of Enforcement (the "Division") filed a formal Complaint against the respondent, Phung K. Huynh. The Division filed said Complaint with the Division of Hearings and Appeals on August 4, 2010. On the same date, the Division sent a copy of the Complaint and a Notice of Hearing via certified and first class mail to Respondent Huynh at her most recent address on file with the Department of Regulation and Licensing; Da Vi Nails, 551 South Washburn Street, Oshkosh, WI 54904. The Notice of Hearing stated that Respondent Huynh was required to file a written Answer to the Complaint within 20 days, failing which "[she would] be found to be in default and a default judgment [could] be entered against [her] on the basis of the Complaint and other evidence and the Wisconsin Board of Nursing [could] take disciplinary action against [her] and impose the costs of the investigation, prosecution and decision of this matter upon [her] without further notice or hearing."

The above documents were signed for upon delivery on August 6, 2010. To date, no Answer has been filed.

On August 25, 2010, the undersigned Administrative Law Judge (ALJ) of the Division of Hearings and Appeals issued a Notice of Telephone Prehearing Conference that set a telephone conference with Respondent Huynh and Attorney Ryan M. Donovan of the Division of Enforcement for September 8, 2010. This Notice instructed Respondent Huynh to contact the undersigned ALJ to provide the telephone number for which she could be reached for the September 8, 2010, telephone conference, and was sent to the address on file for Respondent Huynh, as provided above.

Respondent Huynh did not contact the undersigned ALJ with a telephone number that she could be reached at for the September 8, 2010, telephone conference, and the telephone conference that was conducted on that date was without the respondent's participation.

At the September 8, 2010, conference, Attorney Donovan made a motion for default pursuant to Wis. Admin. Code § RL 2.14. The undersigned ALJ summarily accepted Attorney Donovan's default motion and issued a Notice of Default instructing Respondent Huynh that she was in default and that findings would be made and an Order entered on the basis of the Complaint and other evidence. The Notice of Default further ordered Attorney Donovan to provide the undersigned ALJ with the Division's written recommendations for discipline and the assessment of costs in this matter by September 16, 2010. It was mailed to Respondent Huynh at the last address on record for her, Da Vi Nails, 351 South Washburn Street, Oshkosh, WI 54904. Attorney Donovan provided the undersigned ALJ with the Division's written recommendations as to discipline and costs on or about March 11, 2010September 14, 2010.

Respondent Huynh has failed to respond to either the Notice of Default issued against her, or the written recommendations provided by Attorney Donovan on September 14, 2010.

FINDINGS OF FACT

On the evidence presented, the undersigned ALJ makes the following findings of fact:

1. Respondent Phung Huynh is licensed in the state of Wisconsin as a Manicurist, license # 85-6005. This license was first granted to her on 03/24/2005 and is current through 03/31/2011.
2. The most recent address on file with the Wisconsin Department of Regulation and Licensing (Department) for Respondent Huynh is 351 S. Washburn St., Oshkosh, WI 54904.
3. On or about February 5, 2007, the Department received a complaint alleging in part that there were unlicensed individuals working at California Nails USA, a manicuring establishment whose name was later changed to Da Vi Nails (license # 71-2654).

4. On June 26, 2008, during the course of the Department's investigation, a Department investigator performed an unannounced inspection of California Nails USA.

5. This inspection and investigation revealed that Ramon Persaud was performing manicuring services on a client on June 26, 2008.

6. The inspection and investigation revealed that Ramon Persaud was not licensed as a manicurist at the time of the June 26, 2008 inspection.

7. The inspection and investigation revealed that Phung K. Huynh was the owner of California Nails USA on June 26, 2008.

CONCLUSIONS OF LAW

1. The Wisconsin Board of Barbering and Cosmetology has jurisdiction over this matter pursuant to Wis. Stat. § 454.

2. Wis. Stat. § 440.03(1) provides that the department (of Regulation and Licensing) may promulgate rules defining uniform procedures to be used by the department... and all examining boards and affiliated credentialing boards attached to the department or an examining board, for... conducting [disciplinary] hearings. These rules are codified in Wis. Admin. Code Ch. RL.

3. Wisconsin Administrative Code § RL 2.08(1) provides in relevant part that "[t]he complaint, notice of hearing, all orders and other papers required to be served on a respondent may be served by mailing a copy of the paper to the respondent at the last known address of the respondent" and that "[s]ervice by mail is complete upon mailing." Because the Complaint and Notice of Hearing, Notice of Telephone Prehearing Conference, and Notice of Default were mailed to Respondent Huynh at her last known address, she was duly served with these papers pursuant to Wis. Admin. Code § RL 2.08.

4. As the licensee, it was Respondent Huynh's responsibility to keep her address on record with the Department of Regulation and Licensing current. Wis. Stat. § 440.11(1).

5. Respondent Huynh has defaulted in this proceeding pursuant Wis. Admin. Code § RL 2.14 by failing to file and serve an Answer to the Complaint as required by Wis. Admin. Code § RL 2.09.

6. Allegations in a complaint are deemed admitted when not denied in an answer. Wis. Admin. Code § RL 2.09. Respondent Huynh has admitted to the allegations of the Complaint by default by not filing an Answer.

7. Pursuant to Wis. Stat. § 454.15(2), the Board of Barbering and Cosmetology has authority to "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 if it finds that the holder or applicant has done any of the following:... (i) [v]iolated this chapter or any rule promulgated under this chapter.¹ Wis. Stat. § 454.15(3) further provides that “[t]he 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.....”

8. Wis. Admin. Code § BC 2.04(1) provides that “[l]icensees may not assist or participate in the unauthorized practice or barbering and cosmetology, aesthetics, electrology or manicuring.”

9. Respondent Huynh has violated Wis. Admin. Code § BC 2.04(1) by allowing an unlicensed individual to perform manicuring services in a manicuring establishment that she owned.

DISCUSSION

Violations of Wisconsin Statute and Administrative Code

By failing to provide an Answer to the Complaint filed against her, Respondent Huynh has admitted that all allegations contained within the Complaint are true. Wis. Admin. Code § 2.09. As such, it is undisputed that Respondent Huynh allowed an unlicensed individual to perform manicuring services in a manicuring establishment that she owned. Such conduct clearly violates Wis. Admin. Code § BC. 2.04(1), which provides that “[l]icensees may not assist or participate in the unauthorized practice or barbering and cosmetology, aesthetics, electrology or manicuring.” The only question that remains is what kind of discipline is appropriate.

Appropriate Discipline

The Division requests that Respondent Huynh’s manicurist license be reprimanded, and that a \$1,000 forfeiture be assessed against her. In support of its recommendation, it provides numerous Barbering and Cosmetology Board decisions in which the respondent manicuring establishment owner was assessed a \$1,000 forfeiture for each unlicensed manicurist in his/her employ.² (*See In the Matter of the Disciplinary Hearings Against Pro Nails and Kathy Lu Lim*, 06 BAC 072, *In the Matter of Disciplinary Proceedings Against Nail First and Peter B. Nguyen*, 03 BAC 092, *In the Matter of Disciplinary Proceedings Against Chanh Si Duong and Gi Gi Nails*, 04 BAC 030, *In the Matter of the Disciplinary Proceedings Against Nini K. Tram and Nini Nails*, 06 BAC 074, *In the Matter of the Disciplinary Proceedings Against Bay Van Duong and Hollywood Nails*, 02 BAC 109, *In the Matter of the Disciplinary Hearings Against Spa Nails, Inc.*, 02 BAC 131). In two of these cases, the respondent owners were additionally reprimanded for their misconduct. (*See In the Matter*

¹ These rules are codified in Wis. Admin. Code Ch. BC.

² The Division further attaches the “relevant page of the Barber and Cosmetology Forfeiture Grid,” which also maintains that the appropriate forfeiture for an owner/manager who assists in unlicensed practice is \$1,000, though the undersigned administrative law judge is unsure of how much authority the Barbering and Cosmetology Board gives this grid.

of the Disciplinary Proceedings Against Kathy Lu Lim, 06 BAC 072 and In the Matter of Disciplinary Proceedings Against Nail First and Peter B. Ngyuen, 03 BAC 092).

In light of the uncontested evidence, the Division's request will be granted.

The purpose of discipline is to (1) to promote the rehabilitation of the licensee; (2) to protect the public from other instances of misconduct; and (3) to deter other licensees from engaging in similar contact. *State v. Aldrich*, 71 Wis. 2d 206 (1976). Respondent Huynh's refusal to participate in these proceedings, despite numerous attempts by the Division to contact her demonstrates that she is unrepentant for her acts. The relief requested by the Division is thus necessary to promote Respondent Huynh's rehabilitation, and to protect the public from future instances of misconduct by her and her business.

Costs

The Division requests that Respondent Huynh be ordered to pay the full costs of its investigation and of these proceedings.

In *In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz* (LS 0802183 CHI), the Chiropractic Examining Board found that:

The ALJ's recommendation and the ... Board's decision as to whether the full costs of the proceeding should be assessed against the credential holder..., is based on the consideration of several factors, including:

- 1) The number of counts charged, contested, and proven;
- 2) The nature and seriousness of the misconduct;
- 3) The level of discipline sought by the parties
- 4) The respondents cooperation with the disciplinary process;
- 5) Prior discipline, if any;
- 6) The fact that the Department of Regulation and Licensing is a "program revenue" agency, whose operating costs are funded by the revenue received from licenses, and the fairness of imposing the costs of disciplining a few members of the profession on the vast majority of the licensees who have not engaged in misconduct;
- 7) Any other relevant circumstances.

The respondent, by nature of her being in default has not presented any evidence regarding any of the above factors that would mitigate the imposition of the full costs of this proceeding. To the contrary, her conduct is of a serious nature. The factual allegations were deemed admitted and proven and there is no argument to apportion any counts that were unproven (being none), or that certain factual findings were investigated and litigated that were unnecessary. Given the fact that the Department

of Regulation and Licensing is a "program revenue," agency, whose operating costs are funded by the revenue received for licensees, fairness here dictates imposing the costs of disciplining the respondent upon the respondent and not fellow members of the chiropractic profession who have not engaged in such conduct."

For many same reasons as cited in the *Buenzli-Fritz* decision, Respondent Huynh should be assessed the full amount of recoverable costs. Her alleged conduct is of a serious nature, she has not cooperated in these proceedings in the least, there is no argument that certain factual findings were investigated and litigated unnecessarily, and given the program revenue nature of the Department of Regulation and Licensing, fairness again dictates imposing the costs of disciplining Respondent Huynh on Respondent Huynh, and not fellow members of the nursing profession who have not engaged in such conduct. Payment of assessed costs will be necessary before the respondent's license could be reinstated pursuant to Wis. Stat. § 441.07(2). If the Board assesses costs against the respondent, these amount of costs will be determined pursuant Wis. Admin. Code § RL 2.18.

ORDER

For the reasons set forth above, IT IS ORDERED that Respondent Phung K. Huynh is **REPRIMANDED**.

IT IS FURTHER ORDERED that Respondent Huynh shall pay a **FORFEITURE** in the amount of **ONE THOUSAND DOLLARS (\$1,000)**.

IT IS FURTHER ORDERED that Respondent Huynh shall pay **ALL RECOVERABLE COSTS** in this matter in an amount to be established pursuant to Wis. Admin. Code § RL 2.18. After the amount is established payment shall be made by certified check or money order payable to the Wisconsin Department of Regulation and Licensing and sent to:

**Department Monitor
Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708-8935
Telephone: (608) 267-3817
Fax: (608) 266-2264**

IT IS FURTHER ORDERED that the above-captioned matter be and hereby is closed as to Respondent Phung K. Huynh.

Dated at Madison, Wisconsin on September 30, 2010.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: 
Amanda Tollefsen
Administrative Law Judge