

WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES



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Before The
State Of Wisconsin
COSMETOLOGY EXAMINING BOARD

In the Matter of the Disciplinary Proceedings
Against **MICHAEL SHAFFER**, Respondent

FINAL DECISION AND ORDER
Order No. **0002235**

Division of Legal Services and Compliance Case No. 10 BAC 080

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

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, 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 at Madison, Wisconsin on the 26th day of December, 20 12.

151 Jeff Patterson / MH
Member
Cosmetology Examining Board



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Disciplinary Proceedings
Against **MICHAEL SHAFFER**, Respondent

PROPOSED DECISION AND ORDER
DHA Case No. SPS 12-0046
ORDER 0002235

Division of Legal Services and Compliance¹ Case No. 10 BAC 080

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

Michael Shaffer
P.O. Box 16830
Milwaukee, WI 53216-0830

Wisconsin Cosmetology Examining Board²
P.O. Box 8935
Madison, WI 53708-8935

Department of Safety and Professional Services, Division of Legal Services and
Compliance, by

Attorney Laura M. Varriale
Department of Safety and Professional Services
Division of Legal Services and Compliance
P.O. Box 8935
Madison, WI 53708-8935

PROCEDURAL HISTORY

These proceedings were initiated when the Department of Safety and Professional Services, Division of Legal Services and Compliance (then the Division of Enforcement) (Division), filed a formal Complaint against Respondent Michael Shaffer (Respondent), alleging that Respondent's barber and cosmetology manager license was subject to disciplinary action

¹ The Division of Legal Services and Compliance was formerly known as the Division of Enforcement.

² On July 1, 2012, the Barbering and Cosmetology Examining Board became the Cosmetology Examining Board.
See 2009 Wis. Act 190.

pursuant to Wis. Stat. § 454.15(2)(i) and (3).³ Respondent failed to file an Answer to the Complaint, as required by Wis. Admin. Code § SPS 2.09. Respondent appeared at two separate telephonic prehearing conferences but failed to appear at a third telephonic conference held before the Division of Hearings and Appeals on August 23, 2012. At that status conference, counsel for the Division moved for default based on Respondent's failure to appear.

FINDINGS OF FACT

Findings Related to the Alleged Violations

Findings of Fact Nos. 1-8 are taken from the Division's Complaint filed in this matter.

1. Respondent Michael Shaffer (DOB 2/18/1969) is licensed in the State of Wisconsin as a Barber or Cosmetologist Manager, having license number 32182-81, first issued on March 7, 2008 and expired on March 31, 2011. Respondent's most recent address on file with the Wisconsin Department of Safety and Professional Services (Department) is P.O. Box 16830, Milwaukee, WI 53216-0830.

2. Respondent is listed in Department records as the responsible manager for Elite Studios, a barbering and cosmetology establishment holding license number 36846-80, even though his license expired March 31, 2011. Elite Studios is no longer operating at that location.

3. On February 18, 2011, Respondent, as well as Coolcuts' owner, Jumarrow Stanton, Sr., told a Department investigator that Respondent was the responsible manager for Coolcuts, a barbering and cosmetology establishment holding license number 37552-80, located at 6807 W. Hampton Ave., Milwaukee, WI 53218.

³ Provisions contained in Chapter 454 of the Wisconsin Statutes were revised, effective July 1, 2012. See 2011 Wis. Act 190. All references to provisions in this chapter are from the 2009-2010 statutes, as Respondent's conduct occurred in 2011.

4. Mr. Stanton also stated that there were four men working at Coolcuts that were barbering or cosmetology apprentices, including Larry Hanson, Courtney Vaughn and two unidentified men.

5. The Department has no record of apprentice permits issued to Larry Hanson, Courtney Vaughn or anyone else at Coolcuts.

6. On June 22, 2011, Coolcuts was again visited by a Department investigator. Respondent identified himself as the manager. Both Respondent's license and the establishment license for Coolcuts were expired as of April 1, 2011.

7. Respondent's license remains in expired status.

8. There were several men at Coolcuts cutting hair. The investigator was told by Mr. Stanton that those men had finished their schooling but had not yet gotten their licenses.

Facts Related to Default

9. The Complaint and Notice of Hearing in this matter were served on Respondent on May 1, 2012, by both certified and regular mail, to his address on record with the Department consistent with Wis. Admin. Code § SPS 2.08. The Notice of Hearing advised Respondent: "If you do not provide a proper Answer within 20 days, you will be found to be in default, and a default judgment may be entered against you on the basis of the Complaint and other evidence. In addition, the Board may take disciplinary action against you and impose the costs of the investigation, prosecution and decision of this matter upon you without further notice or hearing."

10. Respondent failed to file an Answer as required by Wis. Admin. Code § SPS 2.09(4).

11. Respondent appeared at two prehearing conferences.

12. A scheduling order was issued by the undersigned Administrative Law Judge (ALJ) on July 10, 2012, memorializing the hearing schedule agreed to by the parties and ALJ at the prehearing conference that morning. The order required the parties to file and serve their witness and exhibit lists by August 13, 2012, and set the date for the contested case hearing for September 13, 2012, at 10:00 a.m. Respondent failed to file and serve a witness or exhibit list.

13. The Division filed a Request for Adjournment on August 14, 2012.

14. By Notice issued August 15, 2012, the ALJ scheduled a telephone status conference for August 23, 2012 at 10:00 a.m. Notice of this status conference was sent to both parties.

15. On August 23, 2012, at approximately 10:00 a.m., the ALJ called Respondent at the telephone number previously provided by Respondent. Respondent failed to answer the telephone. The ALJ left a message giving Respondent 15 minutes to call her back. Respondent failed to contact the ALJ.

16. Based on Respondent's failure to file an Answer to the Complaint and failure to make himself available for the status conference in this matter, the Division moved for default pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c).

DISCUSSION AND CONCLUSIONS OF LAW

Default

Wisconsin Admin. Code § SPS 2.14 provides that "[i]f the respondent fails to answer as required by s. SPS 2.09 or fails to appear at the hearing at the time fixed therefor, the respondent is in default and the disciplinary authority may make findings and enter an order on the basis of the complaint and other evidence." An Answer to a Complaint must be filed within 20 days of service of the Complaint. *See* Wis. Admin. Code § SPS 2.09(4). Service of the Complaint may be made by mailing a copy of the complaint to the respondent at his last known address. *See*

Wis. Stat. § 440.11(2); Wis. Admin. Code § SPS 2.08(1). “Service by mail is complete upon mailing.” Wis. Admin. Code § SPS 2.08(1).

On May 1, 2012, the Division served Respondent with the Complaint by mailing a copy of the Notice of Hearing and Complaint to his most recent address on file with the Department. Pursuant to Wis. Admin. Code §§ SPS 2.08(1) and 2.09(4), Respondent was required to file an Answer by May 21, 2012. Respondent failed to do so. Accordingly, Respondent is in default and an order may be entered against Respondent on the basis of the Complaint and other evidence. *See* Wis. Admin. Code § SPS 2.14.

Wisconsin Admin. Code § HA 1.07(3)(c) provides, in pertinent part: “For a telephone . . . prehearing, the administrative law judge may find a failure to appear grounds for default if any of the following conditions exist for more than ten minutes after the scheduled time for . . . prehearing conference: . . . (2) the failure to answer the telephone” At the prehearing conference held on August 23, 2012, the ALJ called the most recent telephone number on file with the Department for Respondent, the telephone number he had previously used for his appearances, and was unable to reach Respondent at that number. The ALJ left a voicemail message for Respondent but Respondent never returned the ALJ’s telephone call. Accordingly, Respondent is in default and the Division is entitled to a default judgment on the basis of the Complaint and other evidence. *See* Wis. Admin. Code § HA 1.07(3)(c).

Violations of Wisconsin Statutes and Administrative Code

Under Wis. Stat. § 454.04(1)(a) “no person may engage in barbering or cosmetology unless the person . . . holds a current barber or cosmetologist license [or] manager license” “Barbering or cosmetology” is specifically defined Wis. Stat. § 454.01(5) (2009-10). The Complaint filed in this matter and incorporated into the Findings of Fact above does not

specifically show that Respondent engaged in any of the specific acts that constitute “barbering or cosmetology” under Wis. Stat. § 454.01(5). Rather, the facts show that he acted as a cosmetology or barbering manager. Because “manager” is defined in part under Wis. Stat § 454.01(12) as “a person who practices barbering or cosmetology,” and because Respondent has not argued otherwise, it is assumed that Respondent, who acted as a manager, engaged in barbering or cosmetology during the time period in question. That assumption is further supported by the fact that there is not a separate provision prohibiting the unlicensed practice of barbering or cosmetology *management* comparable to Wis. Stat. § 454.04(1) which prohibits engaging in barbering or cosmetology without a license, and the fact that Wis. Stat. § 454.04(1) allows a person to engage in barbering or cosmetology if that person has a barbering or cosmetology license *or* a “manager license.” Based on the Findings of Fact set forth above, Respondent engaged in barbering or cosmetology management without a license and therefore engaged in barbering or cosmetology without a license in violation of Wis. Stat. § 454.04(1).

In addition, pursuant to Wis. Admin. Code § BC 2.04(1), “Licensees may not assist or participate in the unauthorized or unlicensed practice of barbering and cosmetology” Wisconsin Admin. Code § BC 1.01(10) defines “licensee” as “a person who holds a license, permit, certificate or registration issued by the board *or who has the right to renew a license, permit, certificate or registration issued by the board.*” (Emphasis added.) Wisconsin Stat. § 440.08(3)(a) allows the holder of a credential to restore the credential even after expiration by just paying the applicable renewal fee plus a late renewal fee of \$25. Under subparagraph (b), the boards are empowered with the ability to promulgate rules requiring credential holders who have failed to renew the credential for five years to complete additional requirements to renew their licenses. Read together, these provisions are interpreted to mean that credential holders

have a right to automatically renew their credentials by just paying the fees. Therefore, Respondent has until March 31, 2016 to renew his license. Therefore, Respondent is a "licensee" under Wis. Admin. Code §§ BC 1.01(10) and 2.04(1), and was prohibited from assisting or participating in the unauthorized or unlicensed practice of barbering and cosmetology. By allowing numerous men to work at Coolcuts without valid barbering or cosmetology licenses, temporary licenses, or apprenticeship permits and contracts, Respondent violated Wis. Admin. Code § BC 2.04(1).

Pursuant to Wis. Stat. § 454.08(1)(b), "no person may practice barbering or cosmetology . . . in an establishment unless the establishment is licensed to provide that practice" Wisconsin Admin. Code § BC 2.045(1) likewise provides, in relevant part: "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." Wisconsin Admin. Code § BC 3.01(1) covers the same ground, stating, "Barbering and cosmetology . . . shall not be practiced outside the confines of a licensed establishment except as provided in s. BC 2.045." As stated above, Respondent was practicing barbering or cosmetology at Coolcuts during the time period in question. The facts further establish that the establishment license for Coolcuts was expired during that same time period. Thus, by practicing at Coolcuts after the establishment license expired, Respondent violated Wis. Stat. § 454.08(1)(b), and Wis. Admin. Code §§ BC 2.045 and 3.01(1).

The Division asserts that Respondent's conduct also constituted a violation of Wis. Admin. Code § BC 2.07(1), which provides: "The licensed manager of a barbering and cosmetology establishment shall be responsible for the daily operations of an establishment and

ensure that the establishment is in compliance with ch. 454, Stats. . . .” It is not clear, however, that Respondent was a “licensed manager” during the time period in question. Although the term “licensee” is specifically defined to include those who have the right to renew their manager licenses, it is unclear whether “licensed” has the same meaning as “licensee.” Further, a violation of Wis. Admin. Code § BC 2.07(1) was not alleged in the Complaint. Therefore, I decline to find a violation of this particular provision.⁴

Discipline

The undisputed evidence shows that Respondent is subject to discipline pursuant to Wis. Stat. § 454.15(2)(i) and (3). The three purposes of discipline are: (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 conduct. *State v. Aldrich*, 71 Wis. 2d 206, 237 N.W.2d 689 (1976).

The Division requests that Respondent be reprimanded and that a fine of \$2,000 be imposed against him. Even though Respondent’s license is currently expired, it is appropriate and necessary to discipline Respondent and his license. As stated above, Respondent has the right to renew his license until March 31, 2016 by just paying the applicable renewal fee plus a late renewal fee of \$25.

The same reasons justifying discipline in cases in which the respondents are currently licensed apply to this case as Respondent may renew his license at any time. See e.g., *In the Matter of Disciplinary Proceedings Against Paul S. George, Dean K. George, and George Auction Services*, LS-9804151-AUC (Nov. 18, 1999), and *In the Matter of the Application for a*

⁴ A violation of Wis. Admin Code § BC 2.07(1g) was alleged in the Complaint but was not argued in the briefing or recommended proposed decision and order in this matter. Therefore, it is not addressed here.

Renewal License to Practice as a Funeral Director of Neil F. Wienke, LS9705231FDR (Oct. 1, 1997).

Respondent's actions and disregard for the law exemplify the need for discipline in this case. A reprimand and fines will serve to deter Respondent and other licensees from engaging in similar conduct in the future. Further, a reprimand is in line with recent Department precedent and the Cosmetology Examining Board (Board) Forfeiture Grid. *See <http://drl.wi.gov/profdetail.asp?pdetailid=2616&profid=75&locid=0>*. The Board has adopted a disciplinary forfeiture grid. The most recent grid was approved on November 1, 2010. This grid shows that violations of Wis. Admin. Code § BC 2.04(1) result in a \$1,000 forfeiture for the first offense.

In 2011, Respondent was practicing with an expired license. Because Coolcuts' establishment license was expired, he was also practicing outside a licensed establishment. According to the Division, these are first offenses for Respondent. For violations of Wis. Admin. Code §§ BC 2.045(1) and 3.01, the forfeiture for the first offense is \$1,000 on the disciplinary grid. The establishment license was not licensed, which also results in a forfeiture of \$1,000. No facts have been argued which would justify deviating from the Board's express written and published disciplinary grid. Further, the entire forfeiture is usually split and assessed half to the manager and half to the establishment.⁵ *See In the Matter of the Disciplinary Proceedings Against Yolanda Eason, Order 0000645 (Jan. 31, 2011).*

In view of the foregoing, a reprimand of Respondent and a forfeiture of \$2,000 are ordered in accordance with the authority granted under Wis. Stat. § 454.15(2)(i) and (3).

⁵ Coolcuts has been assessed \$2,000. *See In the Matter of Disciplinary Proceedings Against Coolcuts, Order 0002028 (Sept. 10, 2012).*

Costs

Finally, the Department has the authority to assess costs pursuant to Wis. Stat. § 440.22. The Division requests that Respondent be ordered to pay the full costs of its investigation and of these proceedings. The factors to be considered in assessing costs are: (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 prosecutor; (4) the respondent's cooperation with the disciplinary process; (5) prior discipline, if any; (6) the fact that the Department of [Safety and Professional Services] 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; and (7) any other relevant circumstances. *See In the Matter of Disciplinary Proceedings Against Elizabeth Buenzli-Fritz*, LS0802183CHI (Aug. 14, 2008). In this case, the Division has proven the conduct alleged, although it did not establish that the conduct constituted a violation of one of the provisions alleged, Wis. Admin. Code § BC 2.07(1). Furthermore, it would be unfair to impose the costs of pursuing discipline in this matter on those licensees who have not engaged in misconduct. Accordingly, and in light of the facts set forth above, it is appropriate for Respondent to pay the full costs of the investigation and of these proceedings.

ORDER

1. Respondent Michael Shaffer is hereby REPRIMANDED.
2. Within 90 days of the effective date of this Order, Respondent shall pay a FORFEITURE in the amount of \$2,000.
3. Costs shall be assessed against Respondent in accordance with Wis. Admin. Code § SPS 2.18.

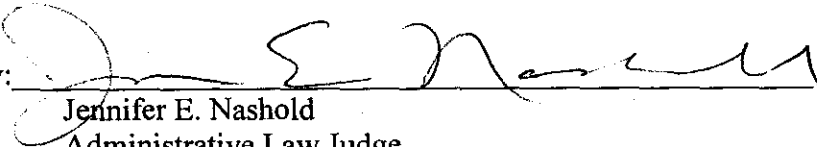
4. Payment of forfeiture and costs shall be made payable to the Wisconsin Department of Safety and Professional Services and sent to the Department Monitor at the address below:

**Department Monitor
Division of Legal Services and Compliance
Department of Safety and Professional Services
P.O. Box 8935
Madison, WI 53708-8935
Fax: (608) 266-2264**

5. The terms of this Order are effective the date the Final Decision and Order is signed by the Board.

Dated at Madison, Wisconsin on November 5, 2012.

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: 
Jennifer E. Nashold
Administrative Law Judge

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