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Before The
State Of Wisconsin
COSMETOLOGY EXAMINING BOARD

In the Matter of the Disciplinary Proceedings
Against **ANGELA GRUBER**, Respondent

FINAL DECISION AND ORDER
Order No. **0002367**

Division of Legal Services and Compliance Case No. 11 BAC 029

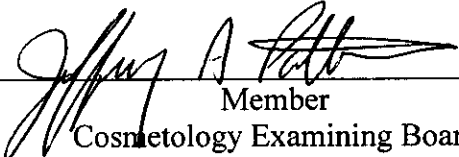
The State of Wisconsin, Cosmetology Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, make the following:

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 1 day of April, 2013.



Member
Cosmetology Examining Board



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

In the Matter of the Disciplinary Proceedings
Against **ANGELA GRUBER**, Respondent

PROPOSED DECISION AND ORDER
DHA Case No. SPS-12-0062

Division of Legal Services and Compliance¹ Case No. 11 BAC 029

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

Angela Gruber
280 South Pine Street, Apt. A
Burlington, WI 53105

Wisconsin Cosmetology Examining Board
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 SUMMARY

These proceedings were initiated on August 9, 2012, when the Department of Safety and Professional Services, Division of Legal Services and Compliance served a formal Complaint upon Respondent Angela Gruber (Respondent), alleging that Respondent's barber and cosmetology license was subject to disciplinary action. Respondent failed to file an Answer to

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

the Complaint, as required by Wis. Admin. Code § SPS 2.09, and also failed to appear at a telephone prehearing conference scheduled before the Division of Hearings and Appeals' Administrative Law Judge (ALJ) on September 18, 2012. At that prehearing conference, counsel for the Division moved for default. On September 18, 2012, the ALJ issued a Notice of Default, finding Respondent in default for failing to file an Answer and failing to appear at the prehearing conference or provide a telephone number at which she could be reached for the conference. Respondent did not respond to the Notice of Default.

FINDINGS OF FACT

Findings Related to the Alleged Violations

Findings of Fact Nos. 1-5 are taken from the Division's Complaint filed in this matter.

1. Respondent Angela Gruber is licensed in the State of Wisconsin as a barbering and cosmetology practitioner, license number 82-88571. This license was first granted to Respondent on May 1, 2008 and expires on March 31, 2013. Respondent's license was in expired status from April 1, 2011 until June 14, 2011.

2. On June 8, 2011, a Department investigator visited the Quick Time Hair Salon where Respondent was working. Respondent worked at Quick Time Hair Salon from March 2011 until August 2011.

3. The owner of Quick Time Hair Salon was paying Respondent as an independent contractor and issuing 1099s rather than W-2 tax forms and Respondent accepted these. The owner was not withholding taxes. The owner maintains Respondent was not an employee.

4. Respondent did not have a chair or booth rental contract, did not have an establishment license, and did not have a barbering and cosmetology manager license.

5. On June 8, 2011, the Department investigator observed Respondent's workstation. The following violations were observed: (1) Respondent did not have her license posted; and (2) Respondent had hair clippings in with clean equipment in the drawer stacker at her station.

Facts Related to Default

6. Consistent with Wis. Admin. Code § SPS 2.08, on August 9, 2012, the Department served the Complaint and Notice of Hearing on Respondent by both certified and regular mail to her address then on record with the Department, which was 422 Shervin Drive, Burlington, WI 53105. 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." The certified mailing was returned to the Department as undeliverable on September 17, 2012. On September 11, 2012, the Complaint and Notice of Hearing were sent by both certified and regular mail to Respondent at her new address which the Department then had on file, 280 South Pine Street Apt. A, Burlington, WI 53105. The certified mailing was returned to the Department as undeliverable on October 2, 2012. The record does not indicate whether either of the copies sent by regular mail was returned to the Department.

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

8. After expiration of the 20-day time period in which to file an Answer, the ALJ scheduled a telephone prehearing conference for September 18, 2012, at 10:30 a.m. by issuing a Notice sent to Respondent at the Shervin Drive address. The Notice was returned to the Division of Hearings and Appeals (DHA) as undeliverable on September 10, 2012. After receiving

notification of the Pine Street address from the Department, DHA sent a copy of the Notice to Respondent at the Pine Street address on September 11, 2012, which was not returned to DHA. The Notice sent to the two addresses required Respondent to provide a telephone number at which she could be reached for the conference no later than September 14, 2012. The Notice also stated: "A respondent's failure to appear at a scheduled conference or hearing may result in default judgment being entered against the respondent."

9. On September 18, 2012, at approximately 10:30 a.m., the ALJ called Respondent at a telephone number provided by the Division during the prehearing conference which the Department had in its system for Respondent. The ALJ left a voicemail for Respondent with the ALJ's telephone number, requesting that Respondent contact the ALJ within 15 minutes. Respondent never contacted the ALJ, and the Division moved for default.

10. On September 18, 2012, the ALJ issued a Notice of Default, which was sent to Respondent at the Pine Street address, finding her in default for failure to file an answer, provide a telephone number at which she could be reached for the prehearing conference and make herself available for the prehearing conference. Respondent did not respond in any way to the Notice of Default.

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 her 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 August 9, 2012, the Division served Respondent with the Complaint by mailing a copy of the Notice of Hearing and Complaint to her 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 within 20 days but 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.

Respondent is also in default for failing to appear at the telephone conference and failing to provide a telephone number at which she could be reached for the conference. 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: (1) The failure to provide a telephone number to the division after it had been requested; (2) the failure to answer the telephone or videoconference line; . . . (4) the failure to be ready to proceed with the hearing or prehearing conference as scheduled.”

The Notice setting the prehearing conference required Respondent to provide a telephone number at which she could be reached for the conference no later than September 14, 2012. Respondent failed to do so. At the prehearing conference on September 18, 2012, the Division provided the ALJ with a telephone number which it had on file for Respondent, but Respondent failed to answer the telephone or return the ALJ’s call within the 15-minute time period the ALJ

allowed. 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

According to the Complaint, the owner of Quick Time Hair Salon was paying Respondent as an independent contractor and issuing 1099s rather than W-2 tax forms. Respondent accepted these. The owner was not withholding taxes and maintains Respondent was not an employee. Respondent did not have a chair or booth rental contract, did not have an establishment license, and did not have a barbering and cosmetology manager license.

The Division's Complaint alleged that this conduct violated Wis. Stat. § 454.08(1)(b) and Wis. Admin. Code § BC 2.045(1). Wisconsin Stat. § 454.08(1)(b) states that "no person may practice cosmetology . . . in an establishment unless the establishment is licensed to provide that practice. . . ." Wisconsin Admin. Code § BC 2.045(1) provides that "[l]icensees shall not provide personal care services outside of a licensed establishment" By being paid and accepting payment as an independent contractor at Quick Time Hair Care without having an establishment license for a booth or chair at those premises, Respondent was practicing outside of a licensed establishment in violation of Wis. Stat. § 454.08(1)(b) and Wis. Admin. Code § BC 2.045(1).

The Division's Complaint also alleged that by not having a written agreement for a chair or booth rental, Respondent violated Wis. Admin. Code § BC 3.02(2)(a), which states, in relevant part:

(2) CHAIR OR BOOTH LEASING. An owner may lease a chair or booth to a licensed individual as follows:

(a) A lease agreement shall be in writing.

The facts alleged in the Complaint and accepted as true do not establish that the owner leased a chair or booth to Respondent. Therefore, no written lease agreement was required, and the Division has not established a violation of this provision.

The Division's Complaint also alleged that Respondent violated Wis. Stat. § 454.04(1)(a) and Wis. Admin. Code § BC 2.04(1) by practicing as a barber or cosmetologist while her license was expired from April 1, 2011 until June 14, 2011. It is undisputed that Respondent's license was in expired status from April 1, 2011 until June 14, 2011. Respondent worked at Quick Time Hair Salon from March 2011 until August 2011 and the Department investigator observed Respondent working as a barber or cosmetologist there on June 8, 2011.

Wisconsin Stat. § 454.04(1)(a) provides that "no person may engage in cosmetology unless the person . . . holds a current cosmetologist license or cosmetology manager license issued by the examining board that is not an inactive license" ("Cosmetology" includes "barbering." Wis. Stat. § 454.01(7m).) Wisconsin Admin. Code § BC 2.04(1) states that "[l]icensees may not assist or participate in the unauthorized or unlicensed practice of barbering and cosmetology. . . ." In working as a barber or cosmetologist from April 1, 2011 through June 14, 2011 with an expired license, Respondent violated Wis. Stat. § 454.04(1)(a) and Wis. Admin. Code § BC 2.04(1).

The Complaint further alleged that Respondent violated Wis. Stat. § 454.06(7) by not posting her license and violated Wis. Admin. Code § BC 4.01(7) by having hair clippings in with clean equipment in the drawer stacker at her station.

The Department investigator who observed Respondent's workstation noted that Respondent did not have her license posted and had hair clippings in with clean equipment in the drawer stacker at her station. By not posting her license in a conspicuous place, Respondent

violated Wis. Stat. § 454.06(7), which states that the licensee shall post the certificate issued by the Board to licensees “in a conspicuous place in the licensed establishment.” In having hair clippings in with clean equipment in the drawer stacker at her station, Respondent violated Wis. Admin. Code § BC 4.01(7) which states that all “equipment and instruments shall be clean to sight and touch.”

As a result of the above violations, Respondent is subject to discipline pursuant to Wis. Stat. § 454.15(2)(i) and (3).

Discipline

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 \$2,100 be imposed against her. The recommended fine is based on the Board’s disciplinary grid, which was last revised by the Board in January 2011 and which is attached to the Division’s October 2, 2012 letter to the ALJ regarding discipline and costs. No facts have been argued which would justify deviating from the Board’s express disciplinary grid.

For violation of Wis. Stat. § 454.08(1)(b) and Wis. Admin. Code § BC 2.045, practice outside of an establishment by an owner, which was found here, the grid provides that for a first time offense, the fine should be \$1,000. For violation of Wis. Stat. § 454.04(1)(a) and Wis. Admin. Code § BC 2.04(1), practicing without a valid license, first offense, the fine for an owner is \$1,000, and for a practitioner, \$500. The Division asserts that the fine should be based on Respondent’s status as an owner because she was an independent contractor. However, for the following reasons, I conclude that imposing the fine for unauthorized practice as a practitioner is

more appropriate than imposing the fine for unauthorized practice as an owner. First, the Complaint alleged that “Respondent violated Wis. Stat. § 454.04(1)(a) and Wis. Admin. Code § BC 2.04(1) by practicing without a valid current license from 4/01/2011 to 6/14/2011,” indicating that the violation was for practicing as a barber or cosmetologist without a license, not for practicing as an owner without a license, and the allegation was based on a temporary expiration of her regular license, not an establishment license. Moreover, the grid setting forth the \$1,000 fine for an owner describes that violation as “*Assist in unlicensed practice – by owner &/or manager*” (emphasis added), which does not appear to apply here as there was no one for Respondent to assist, whereas the description for a practitioner is “participate in unlicensed practice – by practitioner. . . ,” which more aptly describes Respondent’s situation. Therefore, I impose \$500 for this violation rather than \$1,000.

The remaining \$100 in fines requested by the Division is for violation of Wis. Admin. Code § BC 3.02((2), not having the chair lease agreement in writing, which, as set forth above, was not found here. Therefore, the requested \$100 fine is inapplicable.

Although no arguments in support of a reprimand have been provided by the Division, I conclude that it is appropriate here, given the factors set forth in *Aldrich* and the facts of this case. Respondent’s actions and disregard for the law exemplify the need for rehabilitation and discipline in this case. A reprimand and fines will serve to deter Respondent and other licensees from engaging in similar conduct in the future.

Accordingly, Respondent will be reprimanded and a fine of \$1,500 will be imposed.

Costs

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 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 3.02(2)(a). 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 Angela Gruber is hereby REPRIMANDED.
2. Within 90 days of the effective date of this Order, Respondent shall pay a FORFEITURE in the amount of \$1,500.
3. Full costs shall be assessed against Respondent in accordance with Wis. Stat. § 440.22 and Wis. Admin. Code § SPS 2.18.
4. Payment of forfeitures 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. Violation of any of the terms of this Order may be construed as conduct imperiling public health, safety and welfare and may result in a summary suspension of Respondent's license. The Board in its discretion may in the alternative impose additional conditions and limitations or other additional discipline for a violation of any of the terms of this Order. In the event Respondent fails to timely submit payment of the forfeitures and costs as ordered, Respondent's license (no. 82-88571) may, in the discretion of the Board or its designee, be **SUSPENDED**, without further notice or hearing, until Respondent has complied with payment of the forfeitures and costs.

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

Dated at Madison, Wisconsin on January 11, 2013.

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