

## WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES



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STATE OF WISCONSIN  
BEFORE THE COSMETOLOGY EXAMINING BOARD

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In the Matter of the Disciplinary Proceedings  
Against **GRACE SCHUMACHER**, Respondent

FINAL DECISION AND ORDER  
WITH VARIANCE

DHA Case No. SPS-12-0063  
Order No. 2368

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

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

Grace Schumacher  
3609 Kingsberry Street  
Racine, WI 53406

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

Attorney Laura M. Varriale  
Attorney Aloysius Rohmeyer  
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 (Department), Division of Legal Services and Compliance (Division), served a formal Complaint upon Respondent Grace Schumacher, alleging that Ms. Schumacher's barber and cosmetology license was subject to disciplinary action.<sup>1</sup> A telephone prehearing conference was held on September 18, 2012, at which the matter was set for hearing. A hearing

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<sup>1</sup> The Division of Hearings and Appeals did not receive an Answer to the Complaint from Ms. Schumacher. Presumably, the Division of Safety and Professional Services did receive an Answer as it did not move for default.

was held on December 11, 2012 and the hearing transcript was received by the administrative law judge (ALJ) on December 18, 2012.

The ALJ issued a Proposed Decision and Order on January 17, 2013 imposing discipline, assessing a forfeiture and imposing costs. The ALJ found that the Respondent had violated Wis. Stat. § 454.08(1)(b) and Wis. Admin. Code § BC 2.045(1) because she was practicing outside of a licensed establishment. The ALJ further found that the Respondent had violated Wis. Admin. Code §§ BC 4.01 and 4.02 as a result of sanitary violations. The ALJ concluded that the Respondent did not violate Wis. Admin. Code § BC 3.02(2)(b) because there was not a lease agreement for a chair or booth between Quick Time and the Respondent. The Cosmetology Examining Board (Board) adopted the ALJ's Proposed Decision and Order as the Final Decision and Order in this matter on April 1, 2013 (the April 1, 2013 Final Decision and Order in Case No. 11 BAC 029, Order No. 0002368, is attached to this decision). The Respondent appealed the Board's Final Decision and Order to Racine County Circuit Court (Circuit Court) on the basis that there is no statutory or regulatory requirement for her to have an establishment license separate from that of Quick Time Hair Salon, that the ALJ's legal conclusion that Grace Schumacher was an independent contractor was erroneous, and that she was denied due process. The Respondent did not appeal any findings of fact. The Respondent did not appeal the legal conclusions of the April 1, 2013 Final Decision and Order finding that the Respondent violated Wis. Admin. Code §§ BC 4.01 and 4.02.<sup>2</sup> Neither the Respondent nor Department appealed the ALJ's finding that the Respondent did not violate Wis. Admin. Code § BC 3.02(2)(b) because there was not a lease agreement for a chair or booth between Quick Time and the Respondent. The Circuit Court issued a Decision and Order on November 11, 2013 reversing the conclusion of law that the Respondent was an independent contractor. The Circuit Court found that the

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<sup>2</sup> Wisconsin Admin. Code chs. BC were renumbered as chs. COS as of March 1, 2013.

Respondent had not violated Wis. Stats. § 454.08(1)(b) and Wis. Admin. Code § BC 2.045(1). However, the Circuit Court affirmed the conclusion of law that the Respondent violated Wis. Admin. Code §§ BC 4.01 and 4.02 and affirmed the discipline imposed for those violations.

The Circuit Court remanded to the Department to determine if the Respondent was an employee or an independent contractor, applying a factors test, if the Department wished to pursue that issue further. The Department decided not to pursue the issue of whether the Respondent was an employee or independent contractor relative to her work experience at Quick Time. The Department recommended to the Board that costs associated with this matter not be assessed against the Respondent in light of the Circuit Court's decision. The Department asked the Board to rescind the April 1, 2013 Final Decision and Order and to issue anew a Final Decision and Order with Variance as follows: That the conclusion of law that the Respondent violated Wis. Admin. Code §§ BC 4.01 and 4.02, as found by the ALJ and Circuit Court be adopted; that the findings of fact related to the violations of Wis. Admin. Code §§ BC 4.01 and 4.02 be adopted; that a forfeiture in the amount of \$200 be adopted; that any legal findings or conclusions that the Respondent violated Wis. Stat. § 454.08(1)(b) and Wis. Admin. Code § BC 2.045(1) be removed from the Final Decision and Order; and, that any assessment of costs against the Respondent be removed from the Final Decision and Order.

On April 15, 2014, the Board considered the Circuit Court's decision, the ALJ's Proposed Decision and Order dated January 17, 2013, and the Department's recommendations as recited above. The Board adopts the Findings of Fact in the ALJ's Proposed Decision and Order dated January 17, 2013 except to note that in paragraph no. 1, the Respondent's license is current through March 31, 2015 per Department records. The Board varies the ALJ's Proposed Decision and Order relative to the "Discussion and Conclusions of Law, Discipline, Costs, and Order"

sections. The varied language and explanation for variance are detailed below under the appropriate headings.

### **FINDINGS OF FACT**

1. Ms. Schumacher is licensed in the State of Wisconsin as a barbering or cosmetology practitioner, license number 82-59165. The license was first granted to Ms. Schumacher on December 7, 1981 and expires on March 13, 2013 (Complaint; Transcript (Tr.), p. 29). The Respondent renewed her license after the issuance of the ALJ's proposed decision. Her license is current through March 31, 2015.

2. Ms. Schumacher began working at Quick Time Hair Salon (Quick Time) on October 16, 2010 and worked there during the events that are the subject of this disciplinary proceeding, including on June 8, 2011 (Tr., p. 71).

3. Quick Time came to be investigated because of allegations that people who worked there were being paid as independent contractors and were being given 1099s rather than wage statements (Tr., p. 32).

4. On June 8, 2011, Candace Bloedow, a consumer protection investigator at the Department since 1991, conducted an inspection of Quick Time. During the inspection, she talked to the owner, Zemfira Alushaj, and asked how Ms. Alushaj characterized the people working for her. Ms. Alushaj responded that they were employees (Tr., pp. 33-34).

5. Ms. Bloedow asked Ms. Alushaj if she gave the workers at Quick Time wage statements or 1099s and Ms. Alushaj stated that she gave them 1099s (Tr., pp. 34, 53-54). Ms. Bloedow informed Ms. Alushaj that if they were employees, they need to be issued W-2s, that 1099s were for independent contractors, and that if she was characterizing the workers as independent contractors, they needed to be their own businesses (Tr., pp. 34, 56-58). She further

told Ms. Alushaj that if they were their own businesses, they needed to license their chairs as businesses and would therefore need a business establishment license and would also need to have a manager run their businesses for them (*Id.*). According to Ms. Bloedow, business owners can either hire a manager or, in a booth rental situation where there is only one person in the business, the owner would be required to hold a manager license (Tr., p. 34).

6. During the June 8, 2011 inspection of Quick Time, Ms. Bloedow observed Ms. Schumacher working (Tr., p. 35). She observed that Ms. Schumacher did not wash her hands in between clients and that she used the same comb on several different patrons, which was not clean (Tr., p. 36). She sprayed the comb with what appeared to be Kool Care, which is a disinfectant spray often used in the business (*Id.*). She had clipper guards out in the open on a mat at her work station. (*Id.*) This mat was a rubber mat with little holes in between the pieces which can collect hair clippings and other debris. (*Id.*) Ms. Bloedow testified that clean combs and clipper guards are required to be kept in a closed container after they are disinfected and that anything kept in the open is liable to contamination by debris floating around in the air, including hair clippings (Tr., pp. 36-37). She did not use a neck strip or towel when draping each client, which Ms. Bloedow stated is required to be done because that is what touches the patron and needs to be clean (Tr., p. 37).

7. Exhibit 3 is Ms. Bloedow's June 9, 2011 correspondence memorandum of the inspection that she performed (Tr., p. 35; Ex. 3). As is her usual practice, Ms. Bloedow typed the inspection memoranda the next business day after the inspection, using the handwritten notes that she took during the inspection (Tr., pp. 35-36). The information contained in the memorandum is consistent with the information testified to by Ms. Bloedow at hearing.

8. Ms. Schumacher's 2010 federal income tax return includes a 1099 miscellaneous form issued by Quick Time to Ms. Schumacher and shows an amount of \$3,105.50 in "nonemployee compensation" (Ex. 5; Tr., pp. 40-41). Also included in her 2010 income tax returns is a Schedule C-EZ, entitled, "Net Profit From Business (Sole Proprietorship)" (Ex. 5; Tr., p. 42). Part II, Line 1 of Schedule C-EZ reflects gross receipts of \$3,106 and Line 2 shows expenses in the amount of \$1,738 claimed against the gross receipts amount of \$3,106, leaving a net profit in Line 3 of \$1,368 (*Id.*). The business name on line C of Schedule C-EZ is Spring Street Barbers with an address of 416 Spring Street, Racine, WI. The address for Spring Street Barbers is different from the address listed as Ms. Schumacher's home address on her tax return (Ex. 5; Tr., p. 42). Also included in Ms. Schumacher's 2010 tax return is a Schedule SE form entitled, "Self-Employment Tax," which reflects a net profit of \$1,368, which was the amount used to calculate Ms. Schumacher's "self-employment tax" on Line 5 (Ex. 5).

9. Ms. Schumacher's 2011 federal income tax return also includes a 1099 miscellaneous form issued by Quick Time to Ms. Schumacher and shows an amount of \$14,335 in "nonemployee compensation" (Ex 6; Tr., pp. 42-43). Her 2011 federal tax returns also include a Schedule C-EZ, "Net Profit From Business (Sole Proprietorship)" (Ex. 5; Tr., p. 43). Part II, Line 1 of Schedule C-EZ reflects gross receipts of \$14,335, and Line 2 shows expenses in the amount of \$527 claimed against the gross receipts, leaving a net profit in Line 3 of \$13,808 (*Id.*). As with the 2010 tax returns, the business name listed is Spring Street Barbers, with an address of 416 Spring Street, Racine, WI. (*Id.*). Also included in Ms. Schumacher's 2010 tax return is a Schedule SE form entitled, "Self-Employment Tax," which reflects a net profit of \$13,808, the amount used to calculate Ms. Schumacher's "[s]elf-employment tax" on Line 5 (Ex. 5).

10. Ms. Schumacher never had an establishment license for Spring Street Barbers (Tr., pp. 29, 43). A credential had been issued to that business entity some time ago, but it has been expired since 2001 (Tr., p. 29). Ms. Schumacher was never the owner of Spring Street Barbers (*Id.*).

11. Ms. Schumacher signed both tax returns under penalties of perjury, declaring that she examined the returns and that “to the best of [her] knowledge and belief, they are true, correct, and complete.” (Ex. 5; Tr., p. 44). The returns state that they were self-prepared (Ex. 5; Tr., p. 44).

12. According to Ms. Bloedow, Ms. Schumacher’s returns indicate that she was operating a barbering or cosmetology business (Tr., p. 45). Although Quick Time had an establishment license during the time period at issue, according to Ms. Bloedow, it would not be acceptable for Ms. Schumacher to operate as a sole proprietorship under the establishment license of Quick Time (Tr., pp. 45, 50). Rather, as a separate business, Ms. Schumacher’s business must be separately licensed, and while operating at Quick Time, Ms. Schumacher would need to rent a booth or chair, which requires not only a separate business license, but also a written lease (Tr., pp. 45-46).

13. There was no written lease agreement between the owner of Quick Time and Ms. Schumacher (Tr., pp. 52, 71).

14. Ms. Bloedow did not know who set the prices at Quick Time and did not know if all of the stylists charged the same prices for like services (Tr., pp. 58-59).

15. It appeared that when customers entered Quick Time, they went to whichever stylist was available next, although some stylists appeared to have their own clientele or at least to know the people with whom they were working (Tr., p. 59).



16. Customers of Quick Time paid a central station cash register (Tr. pp. 59-60).

17. Ms. Schumacher testified that her agreed-upon compensation with Quick Time was 50 percent commission and that she was paid weekly by a company check (Tr., p. 71).

18. Ms. Schumacher further testified that by looking at the check, it could not be determined whether she was being paid as an employee or an independent contractor (Tr., p. 71). She stated she did not receive her first 1099 form until early February of 2011, nearly four months after she started working, and that up until that time, it was obvious to her that she was an employee. She stated she was not her own boss; had little or no control over her work, her hours, or the prices charged; and that her customers were determined by the owner (Tr., pp. 71-72). She further testified that the owner inspected her work on occasion and that she was assigned duties in addition to haircutting, such as cleaning the restroom, sweeping and mopping the floor and taking out the trash (Tr., p. 72).

19. Ms. Schumacher testified that when she received the 1099 form, she initially did not know what it was (*Id.*). Her husband told her it was the wrong form and that the compensation form was incorrect (*Id.*). She asked the owner about the form and the owner told her she (the owner) would have to check with her accountant (*Id.*) Several weeks later the owner informed Ms. Schumacher that the forms were correct, as were the dollar amounts indicated (*Id.*). She accepted the form because she and her husband needed to file their tax returns, they assumed that the error would eventually be corrected, and her husband told her there was no tax advantage to them (*Id.*).

20. Ms. Schumacher admitted that for several months in 2011 after she received the forms in February of 2011, she was aware that she was being paid as an independent contractor.

Moreover, sometime after December 31, 2011, she received another 1099 form from Quick Time and filed her taxes for 2011 using that form (Tr., p. 73; Ex 5).

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **Burden of Proof**

The burden of proof in disciplinary proceedings is on the Department to show by a preponderance of the evidence that the events constituting the alleged violations occurred. Wis. Stat. § 440.20(3). To prove by a preponderance of the evidence means that it is “more likely than not” that the examined action occurred. *See State v. Rodriguez*, 2007 WI App. 252, ¶ 18, 306 Wis. 2d. 129, 743 N.W.2d 460, citing *United States v. Saulter*, 60 F.3d 270, 280 (7th Cir. 1995).

### **Violations of Wisconsin Statutes and Administrative Code**

#### **Violation of Wis. Admin. § BC 3.02(2)(b)**

Ms. Schumacher’s conduct did not constitute a violation of Wis. Admin. Code § BC 3.02(2)(b), which states, in relevant part:

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

**(b)** The lessee of a chair or booth shall be responsible for ensuring that the leased chair or booth operates in compliance with ch. 454, Stats., and the rules of the board, and the lessee shall hold a manager's and an establishment license.

The facts do not establish that the owner of Quick Time leased a chair or booth to Ms. Schumacher. Therefore, because Ms. Schumacher was not a “lessee,” as required by Wis. Admin. Code § BC 3.02(2)(b), she was not required under that provision to ensure that a “leased” chair or booth complied with Chapter 454 or the rules of the Cosmetology Examining Board (Board), nor was she required to hold a manager’s and establishment license as a “lessee” of a chair or booth.

Violation of Wis. Admin. Code §§ BC 4.01(2) and (6), and BC 4.02(1), (3) and (4)

While testifying, Ms. Schumacher never disputed any of the allegations related to sanitation requirements nor did she submit any other evidence disputing these allegations. Following the close of evidence and closing arguments at hearing, Ms. Schumacher's husband stated that Ms. Schumacher did not dispute the sanitation allegations (Tr., p. 92). When the ALJ asked Ms. Schumacher if that was true, she stated, "I wanted to say that I did not use the same comb on every customer." (*Id.*). Further, when Ms. Bloedow testified that she "watched her use the same comb in between on several different patrons" and that Ms. Schumacher "did not use a clean comb for each patron," Ms. Schumacher interjected (before she was sworn in as a witness), "Not true." (Tr., p. 36). Nothing further was presented to dispute any of the sanitation allegations. Ms. Bloedow's testimony and her report indicate that during her June 8, 2011 inspection of Quick Time, she observed that Ms. Schumacher did not wash her hands in between clients and that she used the same comb on several different patrons, only spraying it with what appeared to be Kool Care. Ms. Bloedow also observed that Ms. Schumacher had clipper guards out in the open on a mat at her work station and did not use a neck strip or towel when draping each client.

By not washing her hands prior to serving each patron and not using clean towels and neck strips for each client, Ms. Schumacher violated Wis. Admin. Code § BC 4.01(2) and (6), which state:

**BC 4.01 Equipment and sanitation.**

...  
(2) Licensees shall wash their hands thoroughly with soap and running water prior to serving each patron and following removal of gloves. Waterless hand washing agents with

alcohol as an active ingredient with a concentration of at least 70% are an acceptable substitute for washing hands that are not visibly soiled with soap and running water.

...

(6) Clean towels shall be used for each patron. A neckstrip or towel shall be placed around the neck of the patron to prevent contact with the cape. The head rest of any operating chair shall be covered with fresh linen or paper for each patron.

The Department also alleges that by not disinfecting combs and contact equipment properly and by not keeping them in covered containers, Ms. Schumacher violated Wis. Admin. Code § BC 4.02 (1), (3) and (4), which provide, in relevant part:

#### **BC 4.02 Disinfection**

(1) Unless sterilized, disinfection is required prior to reuse on another patron of any personal care instruments, including scissors, razors, clipper blades and tweezers, excluding tweezers used in electrolysis.

...

(3) Disinfection for combs, lifts, brushes, rollers and any other contact equipment shall consist of cleaning with soap and water to remove all organic material, spraying with a tuberculocidal disinfectant as defined in s. BC 1.01, and air-drying.

(4) Clean and disinfected contact equipment shall be placed in one or more covered containers. One or more separate containers shall be provided for the immediate storage of soiled contact equipment until cleaned and disinfected.

The facts establish that by not disinfecting combs with soap and water, Ms. Schumacher violated Wis. Admin. Code § BC 4.02 (1) and (3)<sup>3</sup> and that by keeping clipper guards out in the open on a mat at her work station rather than in a covered container, Ms. Schumacher violated Wis. Admin. Code § BC 4.02(4). Although Ms. Schumacher stated her disagreement with the suggestion that she used the same comb on patrons, her objection did not constitute evidence, nor technically did her statement made after the close of her testimony and of the evidence. However, even if Ms. Schumacher's statements were considered as evidence, Ms. Bloedow's

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<sup>3</sup> Subsection (3) of Wis. Admin. Code § BC 4.02 requires that in addition to using soap and water on combs, a "tuberculocidal disinfectant" must be used. Ms. Bloedow testified that Kool Care, used by Ms. Schumacher, is a disinfectant but did not state during her testimony or in her report whether Kool Care is a "tuberculocidal" disinfectant. Therefore, it can only be concluded based on this record that Ms. Schumacher failed to use soap and water on combs, not that she failed to use a tuberculocidal disinfectant.

testimony was more credible on that point, particularly given that both Ms. Bloedow's hearing testimony and her written report acknowledge that Ms. Schumacher did use Kool Care on the combs.

As a result of all 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 Department requests that Respondent be reprimanded and that a forfeiture of \$200 be imposed against her. The recommended forfeiture is based on the Board's disciplinary grid, which was last revised by the Board in January 2011 and was sent via email to the ALJ and to Ms. Schumacher on January 15, 2013.

With regard to the sanitation violations found here, the Department requests a total of \$200 in forfeitures for all of the conduct. The grid establishes a forfeiture of \$100 for each first offense violation for the four violations found here, which were not washing hands between patrons, Wis. Admin. Code § BC 4.01(2); not using a clean towel or neckstrip for each patron, Wis. Admin. Code § BC 4.01(6); not washing the comb with soap and water between patrons, Wis. Admin. Code § BC 4.02(1) and (3); and not keeping clipper guards in a closed container, Wis. Admin. Code § BC 4.02(4).

Wisconsin Stat. § 454.15(3) allows the Board to assess against a person who has violated this subchapter or any rules promulgated under this subchapter, a forfeiture of not more than \$1000 for each separate offense.

Based on the facts of this case and the factors set forth in *Aldrich*, a reprimand and the forfeiture requested are appropriate. Ms. Schumacher's actions and disregard for the law exemplify the need for rehabilitation and discipline in this case. A reprimand and forfeiture in the amount of \$200 will serve to deter Ms. Schumacher and other licensees from engaging in similar conduct in the future.

Accordingly, Ms. Schumacher will be reprimanded and a forfeiture of \$200 will be imposed.

### **Costs**

The Department and/or the Board have the authority to assess costs, *and discretion to choose not to assess costs*, pursuant to Wis. Stat. § 440.22. The Department requests that Respondent not be assessed costs in this matter in light of the Circuit Court's decision. The Board agrees with the Department's request. Accordingly, costs are not assessed against the Respondent in this matter.

### **ORDER**

1. Respondent Grace Schumacher is hereby REPRIMANDED.
2. Within 90 days of the effective date of this Order, Ms. Schumacher shall pay a FORFEITURE in the amount of \$200.
3. Payment of the forfeiture 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**

4. 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 Ms. Schumacher'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 Ms. Schumacher fails to timely submit payment of the forfeiture as ordered, Ms. Schumacher's license may, in the discretion of the Board or its designee, be SUSPENDED, without further notice or hearing, until Ms. Schumacher has complied with payment of the forfeiture.

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

#### **EXPLANATION OF VARIANCE**

The Board has the authority to modify the ALJ's proposed decision. *See* Wis. Stat. § 227.46(2). "If an agency's decision varies in any respect from the decision of the hearing examiner, the agency's decision shall include an explanation of the basis for each variance." *Id.* The Board adopted the ALJ's Findings of Fact in their entirety except for paragraph no.1 related to the current status of the Respondent's license. The Board modified the expiration date of Respondent's license from March 13, 2013 to March 31, 2015 due to the renewal of Respondent's license after the ALJ issued her proposed decision. The Board did not remove the findings of fact related to whether or not the Respondent was an employee or independent contractor as the Respondent did not appeal to the Circuit Court, any of the findings of fact. The Board modified the ALJ's "Discussion and Conclusions of Law" to remove any reference to a violation of Wis. Stat. § 454.08(1)(b) and Wis. Admin. Code § BC 2.045(1) as a result of the

Circuit Court's decision and the Department's decision not to pursue further investigation of the employee/independent contractor issue. The Board modified the ALJ's "Discipline" to reflect that no discipline shall incur to the Respondent connected with Wis. Stat. § 454.08(1)(b) and Wis. Admin. Code § BC 2.045(1) since no violation of such sections was found by the Circuit Court and Board. The Board modified the ALJ's "Costs" to reflect the Department's recommendation that no costs incur to the Respondent as a result of the Circuit Court's decision and Board's agreement with the Department's recommendation.

Dated May 12, 2014.

COSMETOLOGY EXAMINING BOARD

BY Gerri Renteria  
MEMBER OF THE BOARD





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

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In the Matter of the Disciplinary Proceedings  
Against **GRACE SCHUMACHER**, Respondent

PROPOSED DECISION AND ORDER  
DHA Case No. SPS-12-0063

*Order 2368*

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**Division of Legal Services and Compliance<sup>1</sup> Case No. 11 BAC 029**

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

Grace Schumacher  
3609 Kingsberry Street  
Racine, WI 53406

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 (Department), Division of Legal Services and Compliance (Division), served a formal Complaint upon Respondent Grace Schumacher, alleging that Ms. Schumacher's

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<sup>1</sup> The Division of Legal Services and Compliance was formerly known as the Division of Enforcement.

barber and cosmetology license was subject to disciplinary action.<sup>2</sup> A telephone prehearing conference was held on September 18, 2012, at which the matter was set for hearing. A hearing was held on December 11, 2012 and the hearing transcript was received by the administrative law judge (ALJ) on December 18, 2012.

### **FINDINGS OF FACT**

1. Ms. Schumacher is licensed in the State of Wisconsin as a barbering or cosmetology practitioner, license number 82-59165. The license was first granted to Ms. Schumacher on December 7, 1981 and expires on March 13, 2013 (Complaint; Transcript (Tr.), p. 29).

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<sup>2</sup> The Division of Hearings and Appeals did not receive an Answer to the Complaint from Ms. Schumacher. Presumably, the Division of Safety and Professional Services did receive an Answer as it did not move for default.

independent contractors, they needed to be their own businesses (Tr., pp. 34, 56-58). She further told Ms. Alushaj that if they were their own businesses, they needed to license their chairs as businesses and would therefore need a business establishment license and would also need to have a manager run their businesses for them (*Id.*). According to Ms. Bloedow, business owners can either hire a manager or, in a booth rental situation where there is only one person in the business, the owner would be required to hold a manager license (Tr., p. 34).

6. During the June 8, 2011 inspection of Quick Time, Ms. Bloedow observed Ms. Schumacher working (Tr., p. 35). She observed that Ms. Schumacher did not wash her hands in between clients and that she used the same comb on several different patrons, which was not clean (Tr., p. 36). She sprayed the comb with what appeared to be Kool Care, which is a disinfectant spray often used in the business (*Id.*). She had clipper guards out in the open on a mat at her work station. (*Id.*) This mat was a rubber mat with little holes in between the pieces which can collect hair clippings and other debris. (*Id.*) Ms. Bloedow testified that clean combs and clipper guards are required to be kept in a closed container after they are disinfected and that anything kept in the open is liable to contamination by debris floating around in the air, including hair clippings (Tr., pp. 36-37). She did not use a neck strip or towel when draping each client, which Ms. Bloedow stated is required to be done because that is what touches the patron and needs to be clean (Tr., p. 37).

7. Exhibit 3 is Ms. Bloedow's June 9, 2011 correspondence memorandum of the inspection that she performed (Tr., p. 35; Ex. 3). As is her usual practice, Ms. Bloedow typed the inspection memoranda the next business day after the inspection, using the handwritten notes that she took during the inspection (Tr., pp. 35-36). The information contained in the memorandum is consistent with the information testified to by Ms. Bloedow at hearing.

8. Ms. Schumacher's 2010 federal income tax return includes a 1099 miscellaneous form issued by Quick Time to Ms. Schumacher and shows an amount of \$3,105.50 in "nonemployee compensation" (Ex. 5; Tr., pp. 40-41). Also included in her 2010 income tax returns is a Schedule C-EZ, entitled, "Net Profit From Business (Sole Proprietorship)" (Ex. 5; Tr., p. 42). Part II, Line 1 of Schedule C-EZ reflects gross receipts of \$3,106 and Line 2 shows expenses in the amount of \$1,738 claimed against the gross receipts amount of \$3,106, leaving a net profit in Line 3 of \$1,368 (*Id.*). The business name on line C of Schedule C-EZ is Spring Street Barbers with an address of 416 Spring Street, Racine, WI. The address for Spring Street Barbers is different from the address listed as Ms. Schumacher's home address on her tax return (Ex. 5; Tr., p. 42). Also included in Ms. Schumacher's 2010 tax return is a Schedule SE form entitled, "Self-Employment Tax," which reflects a net profit of \$1,368, which was the amount used to calculate Ms. Schumacher's "self-employment tax" on Line 5 (Ex. 5).

9. Ms. Schumacher's 2011 federal income tax return also includes a 1099 miscellaneous form issued by Quick Time to Ms. Schumacher and shows an amount of \$14,335 in "nonemployee compensation" (Ex 6; Tr., pp. 42-43). Her 2011 federal tax returns also include a Schedule C-EZ, "Net Profit From Business (Sole Proprietorship)" (Ex. 5; Tr., p. 43). Part II, Line 1 of Schedule C-EZ reflects gross receipts of \$14,335, and Line 2 shows expenses in the amount of \$527 claimed against the gross receipts, leaving a net profit in Line 3 of \$13,808 (*Id.*). As with the 2010 tax returns, the business name listed is Spring Street Barbers, with an address of 416 Spring Street, Racine, WI. (*Id.*). Also included in Ms. Schumacher's 2010 tax return is a Schedule SE form entitled, "Self-Employment Tax," which reflects a net profit of \$13,808, the amount used to calculate Ms. Schumacher's "[s]elf-employment tax" on Line 5 (Ex. 5).

10. Ms. Schumacher never had an establishment license for Spring Street Barbers (Tr., pp. 29, 43). A credential had been issued to that business entity some time ago, but it has been expired since 2001 (Tr., p. 29). Ms. Schumacher was never the owner of Spring Street Barbers (*Id.*).

11. Ms. Schumacher signed both tax returns under penalties of perjury, declaring that she examined the returns and that “to the best of [her] knowledge and belief, they are true, correct, and complete.” (Ex. 5; Tr., p. 44). The returns state that they were self-prepared (Ex. 5; Tr., p. 44).

12. According to Ms. Bloedow, Ms. Schumacher’s returns indicate that she was operating a barbering or cosmetology business (Tr., p. 45). Although Quick Time had an establishment license during the time period at issue, according to Ms. Bloedow, it would not be acceptable for Ms. Schumacher to operate as a sole proprietorship under the establishment license of Quick Time (Tr., pp. 45, 50). Rather, as a separate business, Ms. Schumacher’s business must be separately licensed, and while operating at Quick Time, Ms. Schumacher would need to rent a booth or chair, which requires not only a separate business license, but also a written lease (Tr., pp. 45-46).

13. There was no written lease agreement between the owner of Quick Time and Ms. Schumacher (Tr., pp. 52, 71).

14. Ms. Bloedow did not know who set the prices at Quick Time and did not know if all of the stylists charged the same prices for like services (Tr., pp. 58-59).

15. It appeared that when customers entered Quick Time, they went to whichever stylist was available next, although some stylists appeared to have their own clientele or at least to know the people with whom they were working (Tr., p. 59).

16. Customers of Quick Time paid a central station cash register (Tr. pp. 59-60).

17. Ms. Schumacher testified that her agreed-upon compensation with Quick Time was 50 percent commission and that she was paid weekly by a company check (Tr., p. 71).

18. Ms. Schumacher further testified that by looking at the check, it could not be determined whether she was being paid as an employee or an independent contractor (Tr., p. 71). She stated she did not receive her first 1099 form until early February of 2011, nearly four months after she started working, and that up until that time, it was obvious to her that she was an employee. She stated she was not her own boss; had little or no control over her work, her hours, or the prices charged; and that her customers were determined by the owner (Tr., pp. 71-72). She further testified that the owner inspected her work on occasion and that she was assigned duties in addition to haircutting, such as cleaning the restroom, sweeping and mopping the floor and taking out the trash (Tr., p. 72).

19. Ms. Schumacher testified that when she received the 1099 form, she initially did not know what it was (*Id.*). Her husband told her it was the wrong form and that the compensation form was incorrect (*Id.*). She asked the owner about the form and the owner told her she (the owner) would have to check with her accountant (*Id.*) Several weeks later the owner informed Ms. Schumacher that the forms were correct, as were the dollar amounts indicated (*Id.*). She accepted the form because she and her husband needed to file their tax returns, they assumed that the error would eventually be corrected, and her husband told her there was no tax advantage to them (*Id.*).

20. Ms. Schumacher admitted that for several months in 2011 after she received the forms in February of 2011, she was aware that she was being paid as an independent contractor.

Moreover, sometime after December 31, 2011, she received another 1099 form from Quick Time and filed her taxes for 2011 using that form (Tr., p. 73; Ex 5).

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **Burden of Proof**

The burden of proof in disciplinary proceedings is on the Division to show by a preponderance of the evidence that the events constituting the alleged violations occurred. Wis. Stat. § 440.20(3). To prove by a preponderance of the evidence means that it is “more likely than not” that the examined action occurred. *See State v. Rodriguez*, 2007 WI App. 252, ¶ 18, 306 Wis. 2d. 129, 743 N.W.2d 460, citing *United States v. Sautler*, 60 F.3d 270, 280 (7th Cir. 1995).

### **Violations of Wisconsin Statutes and Administrative Code**

*Violation of Wis. Stat. § 454.08(1)(b), Wis. Admin. Code § BC 2.045(1), and Wis. Admin. Code § BC 3.02(2)(b)*

The owner of Quick Time was paying Ms. Schumacher as an independent contractor and issuing 1099s rather than W-2 tax forms. Ms. Schumacher not only accepted these forms in both 2010 and 2011 but, in filing her taxes, actively represented that she had her own business, Spring Street Barbers, a business which has not had a credential since 2001 and which was never under Ms. Schumacher’s name. Her business expenses were deducted from the wages provided by Quick Time in both 2010 and 2011. Ms. Schumacher 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 alleges that because she was being paid and filed her taxes as an independent contractor but did not have an establishment license for a booth, Ms. Schumacher

was practicing outside of a licensed establishment, in violation of Wis. Stat. § 454.08(1)(b), Wis. Admin. Code § BC 2.045(1), and Wis. Admin. Code § BC 3.02(2)(b).

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 . . . .” The Division has met its burden of establishing that it is more likely than not that Ms. Schumacher was running her own separate business while providing barbering or cosmetology services at Quick Time and that she was therefore required to have an establishment license for that separate business. Because she did not have an establishment license for her own business, she was practicing outside of a licensed establishment in violation of Wis. Stat. § 454.08(1)(b) and Wis. Admin. Code § BC 2.045(1).

However, Ms. Schumacher’s conduct did not constitute a violation of Wis. Admin. Code § BC 3.02(2)(b), which states, in relevant part:

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

**(b)** The lessee of a chair or booth shall be responsible for ensuring that the leased chair or booth operates in compliance with ch. 454, Stats., and the rules of the board, and the lessee shall hold a manager's and an establishment license.

The facts do not establish that the owner of Quick Time leased a chair or booth to Ms. Schumacher. Therefore, because Ms. Schumacher was not a “lessee,” as required by Wis. Admin. Code § BC 3.02(2)(b), she was not required under that provision to ensure that a “leased” chair or booth complied with Chapter 454 or the rules of the Cosmetology Examining Board (Board), nor was she required to hold a manager’s and establishment license as a “lessee” of a chair or booth.



Violation of Wis. Admin. Code §§ BC 4.01(2) and (6), and BC 4.02(1), (3) and (4)

While testifying, Ms. Schumacher never disputed any of the allegations related to sanitation requirements nor did she submit any other evidence disputing these allegations. Following the close of evidence and closing arguments at hearing, Ms. Schumacher's husband stated that Ms. Schumacher did not dispute the sanitation allegations (Tr., p. 92). When the ALJ asked Ms. Schumacher if that was true, she stated, "I wanted to say that I did not use the same comb on every customer." (*Id.*). Further, when Ms. Bloedows testified that she "watched her use the same comb in between on several different patrons" and that Ms. Schumacher "did not use a clean comb for each patron," Ms. Schumacher interjected (before she was sworn in as a witness), "Not true." (Tr., p. 36). Nothing further was presented to dispute any of the sanitation allegations. Ms. Bloedow's testimony and her report indicate that during her June 8, 2011 inspection of Quick Time, she observed that Ms. Schumacher did not wash her hands in between clients and that she used the same comb on several different patrons, only spraying it with what appeared to be Kool Care. Ms. Bloedow also observed that Ms. Schumacher had clipper guards out in the open on a mat at her work station and did not use a neck strip or towel when draping each client.

By not washing her hands prior to serving each patron and not using clean towels and neck strips for each client, Ms. Schumacher violated Wis. Admin. Code § BC 4.01(2) and (6), which state:

**BC 4.01 Equipment and sanitation.**

...  
(2) Licensees shall wash their hands thoroughly with soap and running water prior to serving each patron and following removal of gloves. Waterless hand washing agents with alcohol as an active ingredient with a concentration of at least 70% are an acceptable substitute for washing hands that are not visibly soiled with soap and running water.  
...

(6) Clean towels shall be used for each patron. A neckstrip or towel shall be placed around the neck of the patron to prevent contact with the cape. The head rest of any operating chair shall be covered with fresh linen or paper for each patron.

The Division also alleges that by not disinfecting combs and contact equipment properly and by not keeping them in covered containers, Ms. Schumacher violated Wis. Admin. Code § BC 4.02 (1), (3) and (4), which provide, in relevant part:

**BC 4.02 Disinfection**

(1) Unless sterilized, disinfection is required prior to reuse on another patron of any personal care instruments, including scissors, razors, clipper blades and tweezers, excluding tweezers used in electrolysis.

...

(3) Disinfection for combs, lifts, brushes, rollers and any other contact equipment shall consist of cleaning with soap and water to remove all organic material, spraying with a tuberculocidal disinfectant as defined in s. BC 1.01, and air-drying.

(4) Clean and disinfected contact equipment shall be placed in one or more covered containers. One or more separate containers shall be provided for the immediate storage of soiled contact equipment until cleaned and disinfected.

The facts establish that by not disinfecting combs with soap and water, Ms. Schumacher violated Wis. Admin. Code § BC 4.02 (1) and (3)<sup>3</sup> and that by keeping clipper guards out in the open on a mat at her work station rather than in a covered container, Ms. Schumacher violated Wis. Admin. Code § BC 4.02(4). Although Ms. Schumacher stated her disagreement with the suggestion that she used the same comb on patrons, her objection did not constitute evidence, nor technically did her statement made after the close of her testimony and of the evidence. However, even if I were to consider such statements from Ms. Schumacher as evidence, Ms. Bloedow's testimony was

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<sup>3</sup> Subsection (3) of Wis. Admin. Code § BC 4.02 requires that in addition to using soap and water on combs, a "tuberculocidal disinfectant" must be used. Ms. Bloedow testified that Kool Care, used by Ms. Schumacher, is a disinfectant but did not state during her testimony or in her report whether Kool Care is a "tuberculocidal" disinfectant. Therefore, it can only be concluded based on this record that Ms. Schumacher failed to use soap and water on combs, not that she failed to use a tuberculocidal disinfectant.

more credible on that point, particularly given that both Ms. Bloedow's hearing testimony and her written report acknowledge that Ms. Schumacher did use Kool Care on the combs.

As a result of all 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 \$1,200 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 was sent via email to the ALJ and to Ms. Schumacher on January 15, 2013.

For practicing outside of an establishment by an owner, in violation of Wis. Stat. § 454.08(1)(b) and Wis. Admin. Code § BC 2.045(1), which was found here, the grid provides that for a first time offense, the fine should be \$1,000.

With regard to the sanitation violations found here, the Division requests a total of \$200 in fines for all of the conduct. The grid establishes a fine of \$100 for each first offense violation for the four violations found here, which were not washing hands between patrons, Wis. Admin. Code § BC 4.01(2); not using a clean towel or neckstrip for each patron, Wis. Admin. Code § BC 4.01(6); not washing the comb with soap and water between patrons, Wis. Admin. Code § BC 4.02(1) and (3); and not keeping clipper guards in a closed container, Wis. Admin. Code § BC 4.02(4).

Based on the facts of this case and the factors set forth in *Aldrich*, a reprimand and the costs requested are appropriate. Ms. Schumacher's actions and disregard for the law exemplify the need for rehabilitation and discipline in this case. A reprimand and fines in the amount of \$1,200 will serve to deter Ms. Schumacher and other licensees from engaging in similar conduct in the future.

Accordingly, Ms. Schumacher will be reprimanded and a fine of \$1,200 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, although the Division did not establish that Ms. Schumacher's conduct constituted a violation of one of the provisions alleged, Wis. Admin. Code § BC 3.02(2)(b), the Division did prove all of the conduct alleged, which resulted in multiple violations. 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 Ms. Schumacher to pay the full costs of the investigation and of these proceedings.

**ORDER**

1. Respondent Grace Schumacher is hereby REPRIMANDED.
2. Within 90 days of the effective date of this Order, Ms. Schumacher shall pay a FORFEITURE in the amount of \$1,200.
3. Full costs shall be assessed against Ms. Schumacher 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:

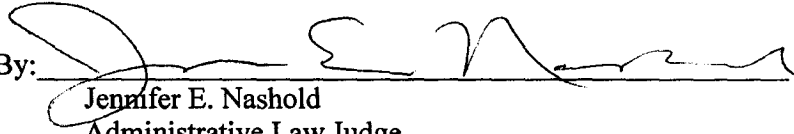
**Department Monitor  
Division of Legal Services and Compliance  
Department of Safety and Professional Services  
P.O. Box 8935  
Madison, WI 53708-8935  
Fax: (608) 266-2264**

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 Ms. Schumacher'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 Ms. Schumacher fails to timely submit payment of the forfeitures and costs as ordered, Ms. Schumacher's license may, in the discretion of the Board or its designee, be SUSPENDED, without further notice or hearing, until Ms. Schumacher 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 17, 2013.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705  
Telephone: (608) 266-7709  
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By:   
Jennifer E. Nashold  
Administrative Law Judge

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