

WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES



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STATE OF WISCONSIN
BEFORE THE COSMETOLOGY EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST

FINAL DECISION AND ORDER
WITH VARIANCE

JOSELYN J. WINTER and
JOSIE'S STUDIO ONE SALON,
RESPONDENTS.

DHA Case No. SPS-14-0038
DLSC Case No. 12 BAC 104

0003571

BACKGROUND

On September 19, 2014, Administrative Law Judge Jennifer Nashold (ALJ), Division of Hearings and Appeals, issued a Proposed Decision and Order (PDO) in the above referenced matter. The PDO was mailed to all parties. No objections to the PDO were filed. On November 17, 2014, the Cosmetology Examining Board (Board) met to consider the merits of the PDO. The Board voted to approve the PDO with variance. The PDO is attached hereto and incorporated in its entirety into this Final Decision and Order with Variance (Order).

VARIANCE

Pursuant to Wis. Stat. §§ 440.035(1) and 454.15, the Board is the regulatory authority and final decision maker governing disciplinary matters of those credentialed by the Board. The matter at hand is characterized as a class 2 proceeding pursuant to Wis. Stat. § 227.01(3). The Board may make modifications to a PDO, a class 2 proceeding, pursuant to Wis. Stat. § 227.46(2).

In the present case, the Board adopts the PDO in its entirety except for amendments to the sections titled, "**Appropriate Discipline**" and "**ORDER**" found on pages six through eight of the PDO. The section titled "**Appropriate Discipline**" is amended as follows. On page six, the second paragraph following the title, "**Appropriate Discipline**" is deleted and the following is substituted in its place:

The Division recommends that Respondents' licenses be revoked and that they not be permitted to re-apply for licenses for five years. In general, the discipline recommended by the Division is warranted with the following exception. Respondent Josie's Studio One Salon's license expired March 31, 2013 and has not been successfully renewed. As

such, there is no license to revoke. Instead, Josie's Studio One Salon's right to renew will be revoked.

The section titled "ORDER" is amended as follows. On page eight, number 1 (one) is amended to read:

1. The cosmetology license issued to Respondent Winter is REVOKED. The right to renew attaching to Josie's Studio One Salon is REVOKED.

Dated at Madison, Wisconsin this 24 day of November, 2014.

By: Terri Reuter
A Member of the Board



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Disciplinary Proceedings
Against JOSELYN J. WINTER and JOSIE'S
STUDIO ONE SALON, Respondents

DHA Case No. SPS-14-0038
DLSC Case No. 12 BAC 104

0003571

PROPOSED DECISION AND ORDER

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

Joselyn J. Winter
3702 Pheasant Branch Road
Middleton, WI 53562

Wisconsin Cosmetology Examining Board
P.O. Box 8366
Madison, WI 53708-8366

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

Attorney Al Rohmeyer
Department of Safety and Professional Services
Division of Legal Services and Compliance
P. O. Box 7190
Madison, WI 53707-7190

PROCEDURAL HISTORY

These proceedings were initiated when the Department of Safety and Professional Services, Division of Legal Services and Compliance (Division), filed a formal Complaint against Respondents Joselyn Winter and her business, Josie's Studio One Salon. The Division served Respondents on April 28, 2014, by sending copies of the Notice of Hearing and Complaint to Respondents' last known addresses. Respondents failed to file an Answer to the Complaint within the 20-day time period required by Wis. Admin. Code § SPS 2.09.

By Notice dated May 19, 2014, a telephone prehearing conference was held on May 29, 2014, at which the parties appeared. The administrative law judge (ALJ) extended the time for Respondents to file an Answer to the Complaint to June 5, 2014. By Notice dated May 29, 2014,

an additional prehearing conference was set for June 10, 2014 and Respondents were ordered to file an Answer by June 5, 2014. Respondents filed a letter on June 5, 2014.

On June 10, 2014, an additional telephone prehearing conference was held at which the parties again appeared. The parties agreed on a hearing date and related deadlines, and, pursuant to such discussions, a scheduling order was issued on June 10, 2014, setting the hearing for August 14, 2014. Consistent with the June 10, 2014 scheduling order, on August 1, 2014, the Division filed its witness and exhibit lists and exhibits. Respondents did not file any witness or exhibit list or exhibits.

At the time set for hearing on August 14, 2014, Respondents did not appear. The ALJ waited fifteen minutes for Respondents' appearance, whereupon the ALJ went on the record, and the Division moved for default based on Respondents' failure to appear. The motion was granted. The Division then made arguments on the issues of discipline and costs and had admitted the Division's Exhibits 1-8. The Division requested revocation of Respondents' licenses, that they be prohibited from reapplying for licenses for five years, and that full costs be imposed against Respondents for these proceedings.

FINDINGS OF FACT

Facts Related to the Alleged Violations

Findings of Fact 1-9 are taken from the Division's Complaint against Respondent filed in this matter.

1. Respondent Joselyn J. Winter (Winter) is licensed in the State of Wisconsin as a Cosmetology Practitioner, having license number 71333-82, first issued on June 3, 1991 and current through March 31, 2015.
2. Respondent Josie's Studio One Salon (Studio One) is licensed in the State of Wisconsin as a Cosmetology Establishment, having license number 28318-80, first issued on June 9, 1999 and expired on March 31, 2013.
3. The most recent address on file with the Wisconsin Department of Safety and Professional Services (Department) for Respondent Winter is 3702 Pheasant Branch Rd., Middleton, Wisconsin 53562.
4. The most recent address on file with the Department for Respondent Studio One is 1 S. Pinckney St., Madison, Wisconsin 53703.
5. Respondent Winter is listed in Department records as the owner of Respondent Studio One.
6. On December 5, 2011, Respondents were disciplined by the Wisconsin Barbering and Cosmetology Examining Board (Board) for leasing cosmetology booths to individuals who did

not hold manager and establishment licenses. Respondents were each reprimanded, fined \$250.00 and assessed the costs of investigating and prosecuting the matter.

7. On or about October 10, 2012, the Department received a complaint that Respondents had engaged in false and misleading advertising and that Respondent Winter was operating a cosmetology establishment out of her residence located at 3702 Pheasant Branch Rd., Middleton, Wisconsin 53562.

8. Division of Legal Services and Compliance Case No. 12 BAC 104 was subsequently opened for investigation.

9. The Department's investigation of the complaint revealed the following:

- a. Prior to September 2012, Respondents advertised with Groupon in order to promote the cosmetology services available at Respondent Studio One, 1 S. Pinckney St., Madison, WI 53703.
- b. In September 2012, a consumer purchased a Groupon voucher valued at \$99.00 for cosmetology services at Respondent Studio One.
- c. The voucher clearly indicated that it was to be redeemed at Respondent Studio One, 1 S. Pinckney St., Madison, WI 53703.
- d. The consumer attempted to redeem her Groupon voucher on numerous occasions but was instructed by Respondent Winter that the cosmetology services would need to take place at her private residence in Middleton, Wisconsin and not at Studio One Salon located at 1 S. Pinckney St., Madison, Wisconsin 53703.
- e. The consumer was not able to redeem her voucher.
- f. The lower level of Respondent Winter's private residence has been converted into a cosmetology establishment, which contains a shampoo bowl, barber-style chair, waiting area for customers, and various other cosmetology instruments and products.
- g. There is no licensed cosmetology establishment located at 3702 Pheasant Branch Road, Middleton, Wisconsin 53562.
- h. On March 3, 2008, Respondent Winter was charged with two counts of Felony Identity Theft – Financial Gain and five counts of Felony Uttering a Forgery in Dane County Circuit Court Case No. 2008CF000565.
- i. The State's Criminal Complaint alleged that Respondent Winter committed these crimes against three of her cosmetology clients.

- j. On October 3, 2008, Respondent Winter was convicted of two counts of Felony Misappropriate ID Info-Obtain Money and one count of Felony Forgery-Uttering.
- k. Respondents Winter and Studio One failed to notify the Department of Respondent Winter's criminal convictions.

The following facts are taken from the Division's exhibits admitted at the August 14, 2014 hearing.

10. The facts which form the basis of the felony convictions and criminal complaint in Dane County Circuit Court Case No. 2008CF000565, are that Respondent Winter stole credit cards and checks from three separate clients and used them for seventeen personal purchases totaling in excess of \$7,000 over approximately a two-week period, until law enforcement confronted her regarding these thefts. (Exs. 2 and 3)

Facts Related to Default

11. Pursuant to discussions held with the parties at a June 10, 2014 prehearing conference, and following due Notice, a hearing was scheduled on August 14, 2014. Respondents failed to appear. 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: "If the respondent . . . 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." Wisconsin Admin. Code § HA 1.07(3)(b) further states that if a Respondent fails to appear at a hearing following due notice, the ALJ may "take the allegations in an appeal as true as may be appropriate. . ."

Respondents are in default for failing to appear at the contested case hearing on August 14, 2014. Accordingly, the ALJ may take the Division's allegations as true and an order may be entered against Respondents on the basis of the Complaint and other evidence. Wis. Admin. Code § SPS 2.14; Wis. Admin. Code § HA 1.07(3)(b) and (c).

Violations of Wisconsin Statute and Administrative Code

The Division has alleged that Respondents are subject to discipline pursuant to Wis. Stat. § 454.15(2)(c), (d), (f), and (i). Under these provisions, the Board may discipline a cosmetology licensee when the licensee has: "[e]ngaged in conduct in the practice of . . . cosmetology . . . that evidences a lack of knowledge or ability to apply professional principles or skills," Wis. Stat. § 454.15(2)(c); "been convicted of a felony committed while engaged in the practice of . . .

cosmetology . . .” (subject to provisions requiring that the crimes be “substantially related” to the profession of cosmetology), Wis. Stat. § 454.15(2)(d);¹ “[a]dvertised in a manner which is false, deceptive or misleading,” Wis. Stat. § 454.15(2)(f); or “[v]iolated this subchapter or any rule promulgated under this subchapter,” Wis. Stat. § 454.15(2)(i). Consistent with these provisions, the Division has also alleged additional administrative and statutory violations, discussed below. As shown below, all of the violations alleged by the Division fall within the grounds for discipline set forth in Wis. Stat. § 454.15(2)(c), (f) and (i).

Wisconsin Stat. § 454.08(1)(b) provides that except as permitted in certain circumstances inapplicable here, “no person may practice cosmetology . . . in an establishment unless the establishment is licensed to provide that practice. . . .” Likewise, Wis. Admin. Code § BC² 2.045(1) provides that licensees “shall not provide personal care services outside of a licensed establishment,” except in situations which are inapplicable here. As set forth in paragraph 9 of the Findings of Fact, above, Respondent Winter violated Wis. Stat. § 454.08(1)(b) and Wis. Admin. Code § BC 2.045(1) by practicing cosmetology outside of a licensed establishment in that she practiced cosmetology from her private residence, which was unlicensed.

Pursuant to Wis. Stat. § 454.15(2)(f), cosmetology licensees may be disciplined if they have “[a]dvertised in a manner which is false, deceptive or misleading.” Likewise, Wis. Admin. Code § BC 2.05(1) provides that “[a]dvertising by licensees shall be truthful and accurate and may not mislead the public.” As set forth in paragraph 9 of the Findings of Fact, above, Respondents Winter and Studio One violated Wis. Stat. § 454.15(2)(f) and Wis. Admin. Code § BC 2.05(1) by engaging in misleading and false advertising by substantially changing the terms of the Groupon voucher which was advertised and purchased, and making the Groupon irredeemable to the consumer.

Wisconsin Admin. Code § BC 3.06(2) provides:

Cos 3.06 Change of ownership or location.

...

(2) Change of location of any establishment constitutes the creation of a new establishment and requires submission of an application for a new establishment license. Relocation of a leased chair or booth which is licensed as an establishment and housed within a lessor establishment requires only written notification to the department identifying the change of chair or booth.

¹ Although the Division cites subsection (d) when discussing the provisions under which Respondents are subject to discipline, it did not specifically allege, either in the Complaint or at hearing, that Respondent Winter was convicted of a felony (substantially related to cosmetology) which was committed while engaged in the practice of cosmetology. Therefore, this decision does not address that particular violation and concludes that it is not a basis for discipline.

² Wis. Admin. Code ch. BC was renumbered as Wis. Admin. Code ch. Cos as of March 1, 2013.

As set forth in paragraph 9 of the Findings of Fact, above, Respondents Winter and Studio One violated Wis. Admin. Code § BC 3.06(2) by failing to submit an application for a new establishment license prior to services being rendered at a new location.

Wisconsin Admin. Code § SPS 4.09 provides:

Credential holder charges or convictions.

...

(2) A holder of any of the credentials set forth in s. SPS 4.07 who is convicted of a felony or misdemeanor in this state or elsewhere shall notify the department in writing of the date, place and nature of the conviction or finding within 48 hours after the entry of the judgment of conviction. . . . Notice shall include a copy of the judgment of conviction and a copy of the complaint or other information which describes the nature of the crime and the judgment of conviction in order that the department may determine whether the circumstances of the crime of which the credential holder was convicted are substantially related to the practice of the credential holder.

Respondent Winter violated Wis. Admin. Code § SPS 4.09(2) by failing to notify the Department in writing within 48 hours of being convicted of felonies.

As a result of the above conduct, Respondents Winter and Studio One are subject to discipline pursuant to Wis. Stat. § 454.15(2)(c), (f), and (i).

Appropriate 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 recommends that Respondents' licenses be revoked and that they not be permitted to re-apply for licenses for five years. The discipline recommended by the Division is warranted.

Respondent Winter was convicted in 2008 of three Class H felonies for stealing credit cards and a checkbook from multiple clients while she was providing cosmetology services to them. Using her clients' cards or checks, she either charged or uttered checks in amounts in excess of \$7,000 during a very short period of time and, from all indications, only stopped such behavior because she was confronted by police. Respondent Winter failed to disclose her felony convictions to the Department. She continued her unethical behavior toward clients in 2012, when she falsely advertised a Groupon Voucher, changed its terms, and rendered it irredeemable to the purchaser. She also practiced cosmetology in her home, which was unlicensed. In addition, Respondents were previously disciplined by the Board in 2011, for leasing cosmetology booths to individuals who did not hold manager and establishment licenses. Respondents were each reprimanded, fined \$250.00 and assessed the costs of investigating and prosecuting the matter. Despite this prior disciplinary action by the Board and her previous felony convictions

involving clients, Respondent Winter, owner of Studio One, continued to engage in shoddy and reprehensible behavior.

The discipline recommended by the Division will best serve to protect the public and deter others from engaging in such conduct. Although rehabilitation seems unlikely based on Respondents' conduct and history, any discipline less than that imposed here will certainly fail to rehabilitate.

Costs

The Division has the authority to assess costs pursuant to Wis. Stat. § 440.22. The Division requests that Respondents be ordered to pay the full costs of this 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).

Based on the factors delineated in the *Buenzli-Fritz* decision and the facts of this case, Respondents should be assessed the full amount of recoverable costs in this case.

Multiple violations, several of them quite serious, were alleged, some of which were quite serious, and all of which were proven by the Division. For these violations, the Division is seeking the highest penalty available, revocation of Respondents' licenses. Respondents' participation in these proceedings has been negligible. Respondents originally failed to submit an answer, and when granted an extension, simply re-submitted a letter which was provided early in this investigation. Respondents did not submit any exhibits or exhibit or witness list for hearing and ultimately did not show up for the hearing. Respondents did not request an extension of the hearing and did not inform the Division or ALJ that she would fail to appear. The Division's witnesses had been subpoenaed and were ready to testify, the Division attorney was ready to present his case, and the ALJ was prepared to hear the evidence and arguments. Further, as stated, Respondents had been disciplined previously in 2011 for leasing cosmetology booths to individuals who did not hold the required credentials. Finally, it would be unfair to impose the costs of these proceedings on members of the cosmetology profession who have not engaged in such misconduct.

In view of the foregoing, imposing full costs on Respondents is appropriate.

ORDER

Accordingly, IT IS HEREBY ORDERED:

1. The cosmetology license issued to Respondent Winter and the establishment license issued to Studio One are REVOKED.

2. Respondents may not reapply for re-licensure for a period of 5 years.

3. Respondents shall pay all recoverable costs in this matter in an amount to be established, pursuant to Wis. Admin. Code § SPS 2.18. After the amount is established, payment shall be made by certified check or money order payable to the Wisconsin Department of Safety and Professional Services and sent to:

Department Monitor
Department of Safety and Professional Services
Division of Legal Services and Compliance
P.O. Box 7190
Madison, WI 53707-7190

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

Dated at Madison, Wisconsin on September 19, 2014.

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

By: _____

Jennifer E. Nashold
Administrative Law Judge