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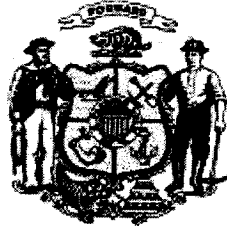
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**Before the
State of Wisconsin
Cosmetology Examining Board**

In the Matter of Disciplinary Proceedings Against
Terrance S. Byrd and Fashion Impressions,
Respondents

FINAL DECISION AND ORDER

Order No. 0004776

Division of Legal Services and Compliance Case No. 13 BAC 152


On June 23, 2016, the State of Wisconsin, Cosmetology Examining Board, delegated authority to Department of Safety and Professional Services Chief Legal Counsel Michael Berndt to review and decide this matter. Chief Legal Counsel Berndt, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes 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 to petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated at Madison, Wisconsin on the 24th day of June, 2016.


Michael Berndt, Chief Legal Counsel
Department of Safety and Professional
Services for the Cosmetology Examining
Board



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

In the Matter of Disciplinary Proceedings Against
Terrance S. Byrd and Fashion Impressions,
Respondents

DHA Case No. SPS-16-0012
DLSC Case No. 13 BAC 152

0004776

PROPOSED DECISION AND ORDER

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

Terrance S. Byrd
Fashion Impressions
1412 W. Lincoln Ave.
Milwaukee, WI 53215

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 Renee M. Parton
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 (Department), Division of Legal Services and Compliance (Division), filed and served a formal Notice of Hearing and Complaint against Respondents Terrance S. Byrd and Fashion Impressions (Respondents). The Complaint alleged that Respondents' licenses were subject to disciplinary action pursuant to Wis. Stat. § 454.15 because Respondents violated Wis. Admin. Code § Cos 2.04(1) by assisting or participating in the unauthorized or unlicensed practice of cosmetology.

The Division served Respondents on January 26, 2016, by sending a copy of the Notice of Hearing and Complaint to their address on file with the Department by both certified and regular mail, consistent with Wis. Admin. Code § SPS 2.08. Respondents failed to file an Answer to the Complaint, as required by Wis. Admin. Code § SPS 2.09(4).

At the telephone prehearing conference held before the Division of Hearings and Appeals on February 26, 2016, the undersigned Administrative Law Judge (ALJ) granted Respondents an extension of time to file an Answer to the Complaint to no later than March 11, 2016. The ALJ issued a Notice of Telephone Status Conference and Order on February 26, 2016, setting a new prehearing conference for March 17, 2016, and extending the time for Respondents to file an Answer. Respondents again failed to file an Answer to the Complaint, and failed to appear at the telephone status conference held on March 17, 2016.

The Division moved for default pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c). In light of Respondents' failure to file an Answer to the Complaint and failure to appear for the conference, the ALJ found Respondents to be in default and issued a Notice of Default and Order on March 17, 2016. Consistent with the notice, the Division filed a recommended proposed decision and order on April 4, 2016.

FINDINGS OF FACT

Facts Related to the Alleged Violations

Findings of Fact 1–11 are taken from the Division's Complaint against Respondents filed in this matter.

1. Respondent Terrance S. Byrd is licensed in the State of Wisconsin to practice as a Cosmetology Manager, having license number 28804-81, first issued on August 30, 2001, and current through March 31, 2017.

2. The most recent address on file with the Wisconsin Department of Safety and Professional Services (Department) for Respondent Byrd is 1412 W. Lincoln Avenue, Milwaukee, Wisconsin 53215.

3. Respondent Fashion Impressions is licensed in the State of Wisconsin as a Cosmetology Establishment, having license number 30895-80, first issued on January 28, 2003, and current through March 31, 2017.

4. The most recent address on file with the Department for Respondent Fashion Impressions is 1412 W. Lincoln Avenue, Milwaukee, Wisconsin 53215.

5. Respondent Byrd is identified in Department records as the owner and responsible manager of Respondent Fashion Impressions.

6. On September 12, 1994, the Wisconsin Barbering and Cosmetology Examining Board (Board) ordered Respondent Byrd to pay a forfeiture of \$100 for allowing an unlicensed person

to practice barbering and cosmetology in the cosmetology establishment he owned (Order # DE00000000930).

7. On October 5, 1998, the Board ordered Respondent Byrd to pay a forfeiture of \$750 for allowing an unlicensed person to practice barbering and cosmetology in the cosmetology establishment he owned and for operating the establishment for two separate periods of time between 1996 and 1998 without a licensed manager in charge (Order # LS9807071BAC).

8. On December 6, 2004, the Board ordered Respondent Byrd to pay a forfeiture of \$200 for five cited sanitation violations and for not having a price list posted in a conspicuous place (Order # LS0412062BAC).

9. On or about October 7, 2013, the Department received a complaint alleging that Respondent Byrd was allowing an unlicensed person to work at Respondent Fashion Impressions.

10. On June 25, 2014, a Division of Legal Services and Compliance Investigator made an unannounced visit to Respondent Fashion Impressions and observed a male, who stated that he was an apprentice at Respondent Fashion Impressions, cutting a customer's hair.

11. The aforementioned individual has never held an apprentice permit or any other credential issued by the Board.

Facts Related to Default

12. The Complaint and Notice of Hearing in this matter were served on Respondents on January 26, 2016, by both certified and regular mail consistent with Wis. Admin. Code § SPS 2.08. The Notice of Hearing advised Respondents: "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."

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

14. Following expiration of the 20-day time period to file an Answer, the ALJ scheduled a telephone prehearing conference for February 26, 2016. Notice of this prehearing conference was sent to both parties, with instructions that Respondents provide the ALJ with a telephone number at which they could be reached no later than February 22, 2016. The Notice instructed Respondents: "The Respondents' failure to appear at a scheduled conference or hearing may result in default judgment being entered against the Respondents."

15. Respondents failed to provide a telephone number at which they could be reached for the prehearing conference.

16. At the prehearing conference held on February 26, 2016, the Division provided two telephone numbers for Respondents. The ALJ contacted Respondents, and following a discussion between the parties and ALJ, the deadline for Respondents to file an Answer to the Division's Complaint was extended to March 11, 2016 and an additional status conference was scheduled for March 17, 2016. A Notice extending the deadline for Respondents' Answer and scheduling the March 17, 2016 conference was sent to both parties.

17. Respondents again failed to file an Answer.

18. At the prehearing conference held on March 17, 2016, Respondents could not be reached. One of Respondents' telephone numbers was no longer in service and the other could not receive voicemail.

19. The Division moved for default pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c).

20. On March 17, 2016, the ALJ issued a Notice of Default and Order, requiring the Division to file and serve no later than April 4, 2016, a recommended proposed decision and order.

21. The Division timely filed its recommended proposed decision and order on April 4, 2016.

22. Respondents did not file a response to the Notice of Default or to the Division's recommended proposed decision and order.

DISCUSSION AND CONCLUSIONS OF LAW

Default

As stated in the March 17, 2016 Notice of Default and Order, Respondents are in default for failing to file an Answer to the Complaint and failing to appear at the telephone conference held on March 17, 2016. As a result, an order may be entered against them on the basis of the Complaint and other evidence. *See* 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 alleges that Respondents are subject to discipline pursuant to Wis. Stat. § 454.15(2)(i), which states, in relevant part:

(2) Subject to the rules promulgated under s. 440.03(1) and this subchapter, the examining board may revoke, limit, suspend, or refuse to issue or renew, in accordance with the severity of the violation, a license or permit issued under this subchapter or reprimand the holder of a license

or permit issued under this subchapter if it finds that the holder or applicant has done any of the following:

...
(i) Violated this subchapter or any rule promulgated under this subchapter.

Wisconsin Admin. Code § Cos 2.04(1) states that, “[l]icensees¹ may not assist or participate in the unauthorized or unlicensed practice of cosmetology.”

The undisputed facts establish that on June 25, 2014, an Investigator with the Division made an unannounced visit to Respondent Fashion Impressions and observed a male, who stated he was an apprentice, cutting a customer’s hair. There was no apprentice permit or any other credential issued to the individual observed cutting hair. At all times relevant to this incident, Respondent Terrance S. Byrd was the owner and the responsible manager of Respondent Fashion Impressions. According to Wis. Admin. Code § Cos 2.06, the owner of any licensed establishment shall be responsible for compliance with ch. 454, Stats., and chs. Cos 2, 3 and 4. By allowing an unlicensed person to practice cosmetology at Fashion Impressions, the Respondents assisted in unlicensed practice.

Based on the facts of this case and that Respondents have made no argument to the contrary, I conclude that Respondents violated Wis. Admin. Code § Cos 2.04(1). As a result of the above violations, Respondents are subject to discipline pursuant to Wis. Stat. § 454.15(2)(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 both Respondent Terrance S. Byrd’s cosmetology manager license and Respondent Fashion Impressions’ cosmetology establishment license be revoked. The recommended discipline is consistent with the purposes articulated in *Aldrich* and with case law. “Protection of the public is the purpose of requiring a license.” *State ex rel. Green v. Clark*, 235 Wis. 628, 631, 294 N.W. 25 (1940). When a license is granted to an individual, Wisconsin is assuring the public that the licensed individual is competent in his or her profession. *Stringez v. Dep’t of Regulation & Licensing Dentistry Examining Bd.*, 103 Wis. 2d 281, 287, 307 N.W.2d 664 (1981). It follows that if the State cannot assure the public of the licensee’s competence to practice the profession, then revocation is appropriate. *Gilbert v. State Medical Examining Bd.*, 119 Wis. 2d 168, 189–90, 349 N.W.2d 68 (1984).

Rules regulating cosmetology exist to protect health, safety and public welfare by creating safety and sanitation standards for all licensees to follow. Contrary to this, Respondents continue to operate outside these standards by assisting in unlicensed practice. Respondents

¹ “Licensee” means “a person who holds a license, permit, certificate or registration issued by the board or who has the right to renew a license, permit, certificate or registration issued by the board.” Wis. Admin. Code § Cos 1.01(10).

thereby are endangering the public by assisting unlicensed individuals to provide cosmetology services to the public without these individuals completing instruction, training hours and passing the necessary exams. The purpose of a license is to assure the public that the individual is competent to perform such services in a manner that is consistent with basic and accepted practice standards and in accordance with all State statutes and Board rules. The Board has promulgated rules in order to take necessary and adequate precautions to protect patrons from harm when receiving cosmetology services. Unlicensed practice contravenes this purpose. Respondents' actions are therefore putting the public at great risk.

The undisputed facts of this case show this is the third time the Board has sought discipline against Respondent Byrd for assisting in unlicensed practice. Thus, Respondents have demonstrated an unwillingness to follow the requirements of operating a cosmetology establishment, and as such, are not fit to be a cosmetologist or operate a cosmetology establishment. When individuals demonstrate an inability to handle the amount of responsibility commensurate with holding professional licenses, they should not continue to be entrusted with that license. Therefore, revocation of Respondents' licenses is an appropriate response to their continued disrespect for the law, the public welfare, and the licensing authority governing this profession.

Promoting rehabilitation is one of the purposes of discipline; however, rehabilitation is not likely in this case, as Respondents continue to allow unlicensed practice despite previous attempts to rehabilitate. Moreover, revocation in this case would send a strong message to licensees that persistently violating the laws governing their profession is not an option. To allow licensees to disregard the law in this way would contravene the purpose of the licensing statutes.

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. Factors which may be considered in assessing costs include: (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, D.C.*, LS0802183CHI (Aug. 14, 2008). It is not mandatory that any or all of these factors be considered and it is within the Board's discretion what weight, if any, to give any factors considered.

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.

Particularly relevant are the following facts. First, the Division proved the count it alleged. This is not a case where the Division wasted resources or incurred additional costs by alleging multiple counts and then failing to prove those counts. Second, Respondents' conduct that led to the discipline at hand resulted from their assisting in unlicensed practice. Such conduct is serious. Third, as a result of Respondents' serious conduct, the Division sought a revocation of Respondents' licenses to practice cosmetology and provide cosmetology services in Wisconsin. The level of discipline sought is significant and recognizes the general absence of mitigating factors in this case. Fourth, Respondents failed to file an Answer to the Complaint and failed to appear at the March 17, 2016 status conference, demonstrating a lack of cooperation. Fifth, the Department is a program revenue agency whose operating costs are funded by the revenue received from credential holders. As such, fairness weighs heavily in favor of requiring Respondents to pay the costs of this proceeding which resulted in significant discipline, rather than spreading the costs among all cosmetology licensees in Wisconsin. Finally, Respondents made no argument concerning whether costs should be assessed against them. When Respondents fail to argue a position, the Division is not obliged to make the argument for them.

In view of the foregoing, I conclude that should Respondents ever apply for a credential with the Board in the future, Respondents shall pay the full costs of this proceeding in an amount to be determined under Wis. Admin. Code § SPS 2.18.

ORDER

Accordingly, it is hereby ORDERED that Respondent Terrance S. Byrd's cosmetology manager license (no. 28804-81) and Respondent Fashion Impressions' cosmetology establishment license (no. 30895-80) are REVOKED, effective on the date the final decision is signed by the Board.

IT IS FURTHER ORDERED that should Respondents ever apply for a credential with the Department in the future, Respondents shall pay all recoverable costs in this matter in an amount to be established, pursuant to Wis. Admin. Code § SPS 2.18, prior to the Department's consideration of any such application.

Dated at Madison, Wisconsin on April 28, 2016.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: 

Jennifer E. Nashold
Administrative Law Judge