

## WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES



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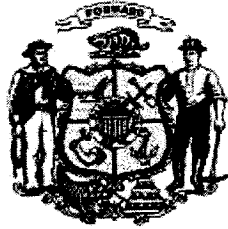
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**Before the  
State of Wisconsin  
Cosmetology Examining Board**

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In the Matter of Disciplinary Proceedings Against  
Steve D. Duong, Respondent

FINAL DECISION AND ORDER

Order No. 0004778

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**Division of Legal Services and Compliance Case No. 15 BAC 019**

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 24<sup>th</sup> day of June, 2016.

A handwritten signature in black ink, appearing to read 'Michael Berndt'.

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**

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In the Matter of Disciplinary Proceedings Against  
Steve D. Duong, Respondent

DHA Case No. SPS-16-0006  
DLSC Case No. 15 BAC 019

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**PROPOSED DECISION AND ORDER**

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

Steve D. Duong  
5524 W. Michaels Drive, Apt. 5  
Grand Chute, WI 54913-8642

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 Pamela M. Stach  
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 on January 13, 2016, when the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division), filed and served a formal Notice of Hearing on a Citation for Administrative Forfeiture which was issued to Respondent Steve D. Duong (Respondent), pursuant to Wis. Stat. § 454.15(3), on October 28, 2015. The citation alleged that Respondent violated Wis. Admin. Code § Cos 2.04(1) by practicing cosmetology or manicuring with an expired license and imposed a \$500 forfeiture for the violation.

A telephone prehearing conference was held with the parties and undersigned administrative law judge (ALJ) on January 28, 2016, at which a hearing date and related

deadlines were established. A hearing was held in this matter on March 14, 2016, and a transcript of the hearing was received by the ALJ on March 25, 2016.

### FINDINGS OF FACT

1. On July 6, 2015, Department Investigator Brian Henry (Henry) performed an inspection at Elite Nails in Appleton, Wisconsin based on a complaint to the Department regarding sanitation issues and licensing concerns. (Hrg. Tr., pp. 8-10)

2. On the date of the inspection, Respondent was performing pedicure services for compensation at Elite Nails. (Hrg. Tr., pp. 11-12)

3. Respondent's license to practice cosmetology was expired from April 6, 2015 through July 20, 2015. (Div. Ex. 2; Hrg. Tr., p. 15)

4. After Henry discovered that Respondent's license was expired, he contacted Respondent to inform him of that fact. When Respondent was informed that he had failed to renew his license on time, he immediately took care of it. (Hrg. Tr., pp. 15-16, 27, 38)

5. On July 22, 2015, Henry issued a citation to Aileen Nguyen (Nguyen), who is one of the two owners of Elite Nails. The citation issued to Nguyen was in the amount of \$500, and states as grounds for the citation: "Assist in unlicensed practice by owner. I observed Elite Nails employee Steve Duong [Respondent] provide manicurist services without a license," in violation of Wis. Admin. Code § Cos 2.04(1). (Div. Ex. 4; Hrg. Tr., pp. 16-17, 29-30)

6. When Nguyen received the citation, she gave it to Respondent to pay and told Respondent that he had received two citations. Respondent believed that perhaps the other citation could have been for some other conduct, perhaps related to cleanliness issues. (Hrg. Tr., pp. 23-24, 32)

7. Within a week of Respondent's conversation with Nguyen, Respondent contacted Henry and asked him how many citations he was issued. Henry told him that he was only issued one citation. Respondent informed Henry he would be sending a check. (Hrg. Tr., pp. 24, 31-32, 47)

8. Respondent believed that the citation referred to by Henry was the July 22, 2015 citation given to Respondent by Nguyen. (Hrg. Tr., p. 30)

9. By personal check dated August 11, 2015, Respondent paid the July 22, 2015 citation in the amount of \$500 issued to Nguyen. He signed the July 22, 2015 citation on August 11, 2015, the same date he wrote his check. (Div. Ex. 4; Resp. Ex. A; Hrg. Tr., pp. 16-17, 35)

10. Approximately three months later, on October 28, 2015, Henry issued another citation, this time to Respondent, also in the amount of \$500. As grounds for the citation, the citation states: "Participate in unlicensed practice by practitioner. Steve Duong was providing

manicure services with an expired license,” in violation of Wis. Admin. Code § Cos 2.04(1). (Div. Ex. 3; Hrg. Tr., pp. 18, 24)

11. When Respondent received the October 28, 2015 citation, he again called Henry, stating that he had already paid the citation. Henry informed him that the check he sent was for the owner. Henry told Respondent that sometimes people write checks for other people. Henry asked Respondent if he would like to contest the citation and Respondent stated that he did. Henry told Respondent that Respondent’s citation was issued later due to some paperwork confusion at the Department. (Hrg. Tr., pp. 25-27, 33)

12. Respondent testified that although the August 21, 2015 citation states that it is issued to Aileen Nguyen for assisting in unlicensed practice by owner, Respondent focused on the next sentence, which states, “Observed Elite Nails employee Steve Duong perform manicuring services without a license.” He acknowledged that he should have read the citation more carefully but just assumed it was his citation because it referred to him. (Hrg. Tr., pp. 28, 34-35)

13. Nguyen did not tell Respondent that although it was Nguyen’s citation, Respondent was nonetheless responsible for paying it. If Respondent had been told by Nguyen that he was supposed to pay her citation, he would have argued with her about it. If the two citations had been issued simultaneously, Respondent would have paid his and then discussed the other one with Nguyen and they would have determined how to handle it. (Hrg. Tr., pp. 34-35)

14. When asked how he arrived at the \$500 amount for Respondent’s citation, Henry testified that the Department utilizes a forfeiture grid, which sets amounts ranging from zero to \$1,000. The grid does not provide for exact amounts for most violations; rather, the amount imposed is discretionary and based on the totality of the circumstances, with the exception of some violations which require mandatory \$1,000 forfeitures. One factor in determining the amount of the forfeiture is whether it is a first or repeated offense. Henry did not testify regarding which specific factors he took into account in arriving at the \$500 amount for Respondent’s citation. There is no indication in the record that Respondent had any prior disciplinary action with regard to his profession. (Hrg. Tr., pp. 46-47)

### DISCUSSION

Respondent and his employer Nguyen were both issued citations under Wis. Admin. Code § Cos 2.04(1) which provides: “Licensees may not assist or participate in the unauthorized or unlicensed practice of cosmetology, aesthetics, electrology or manicuring.” Wisconsin Stat. § 454.04(1)(d) also governs this conduct, providing, in relevant part that “[n]o person may engage in manicuring unless the person . . . holds a current manicurist license, cosmetologist license, or cosmetology manager license issued by the examining board that is not an inactive license . . . .” The definition of cosmetology includes manicuring. *See* Wis. Admin. Code § Cos 1.01(3e) and Wis. Stat. § 454.01(7e), (7m)(c) and (7m)(e). “Manicuring” is defined as “for compensation, cleansing, cutting, shaping, beautifying or massaging limited to the hands, feet or nails of the human body.” Wis. Stat. § 454.01(13).

Respondent does not dispute that he engaged in the unlicensed practice of cosmetology or manicuring. Rather, he argues that the forfeiture amount of \$500 is excessive under the circumstances, particularly considering that he also mistakenly paid his employer's \$500 citation, believing it was his citation.

Wisconsin Stat. § 454.15(2)(i) states that the Cosmetology Examining Board (Board) may revoke, limit, or suspend a license under the subchapter of Wis. Stat. ch. 454 governing the Board or may reprimand the holder of a license if it finds that the licensee has violated that subchapter or any rule promulgated under that subchapter. Because Respondent violated a provision of the subchapter of Wis. Stat. ch. 454 governing the Board (Wis. Stat. § 454.04(1)(d)), and violated a rule promulgated under that subchapter (Wis. Admin. Code § Cos. 2.04(1)), the Division could have sought one of the forms of discipline delineated in Wis. Stat. § 454.15(2). Instead, the Division seeks a forfeiture in the amount of \$500 under Wis. Stat. § 454.15(3), which provides:

(3) The examining board may, in addition to or in lieu of a reprimand or revocation, limitation, suspension or denial of a license or permit, assess against a person who has done any of the things under sub. (2) (a) to (i) a forfeiture of not more than \$1,000 for each separate offense. Each day of continued violation constitutes a separate offense.

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).

With respect to these disciplinary objectives articulated in *Aldrich*, I note that practicing with an expired license is a serious offense. Licensure ensures that members of the profession are subject to rules which impose accountability and minimal levels of competence. *See Stringez v. Dep't of Regulation & Licensing Dentistry Examining Bd.*, 103 Wis. 2d 281, 287, 307 N.W. 2d 664 (1984). However, the record establishes a violation for only one day, July 6, 2015, and that Respondent's license was expired for a relatively short amount of time, from April 6, 2015 through July 20, 2015. When Respondent was informed that his license was expired, he immediately did what he needed to do in order to get his license back into active status.

I also note that Respondent took immediate responsibility for his actions by paying the \$500 citation which he believed was issued to him but which was in fact issued to his employer. He paid this amount after being led by his employer to believe that the citation was his and that another citation was forthcoming, and after contacting Department Investigator Henry and being told that only one citation was being issued to him. Although Henry was factually correct that Respondent himself was only issued one citation, Respondent mistakenly believed that his employer's citation was the citation to which Henry referred. Respondent's misunderstanding was caused not only by statements made by his employer and Respondent's own failure to read the citation more thoroughly, but also by the delay in issuing the two citations, which was evidently the result of some paperwork problems at the Department. Respondent credibly testified that had the two citations been issued at, or closer to, the same time, the situation would have been clear to him and he would have paid his own citation and discussed his employer's

citation with her. I also note that during his telephone call with Henry prior to issuance of the second citation, Respondent informed Henry that he would be sending in a check and that at the time the second citation was issued, the Department had been in possession of Respondent's check for over two months.

Under the circumstances of this case, and given that Respondent has already mistakenly paid \$500 for his conduct, I conclude that the \$500 citation issued to Respondent was excessive and that a citation in the amount of \$250 more appropriately advances the disciplinary objectives of *Aldrich*.

#### CONCLUSIONS OF LAW

1. Respondent violated Wis. Stat. § 454.04(1)(d) and Wis. Admin. Code § Cos 2.04(1) by participating in the unlicensed practice of cosmetology or manicuring.

2. As discipline for this conduct, a forfeiture in the amount of \$250 best serves the purposes of discipline articulated in *Aldrich*.

#### ORDER

For the reasons set forth above, IT IS ORDERED that Respondent shall, within 30 days of the Board's final decision and order in this matter, pay a forfeiture to the Department of Safety and Professional Services in the amount of \$250.

Dated at Madison, Wisconsin on April 21, 2016.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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By: 

Jennifer E. Nashold

Administrative Law Judge