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Before the
State Of Wisconsin
Cosmetology Examining Board

In the Matter of the Disciplinary Proceedings
Against Kim Bui and TLC Nails & Spa LLC,
Respondents.

FINAL DECISION AND ORDER

Order No. **ORDER 0007907**

Division of Legal Services and Compliance Case No. 18 BAC 003

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

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Cosmetology Examining Board.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated at Madison, Wisconsin on the 28th day of March, 2022

Al. Rohmeyer

Member

DSPS Chief Legal Counsel,

Delegatee

Cosmetology Examining Board



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

In the Matter of Disciplinary Proceedings
Against Kim Bui and TLC Nails & Spa LLC,
Respondents.

DHA Case No. SPS-21-0073
DLSC Case No. 18 BAC 003

PROPOSED DECISION AND ORDER

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

Kim Bui
5308 Heatherfield Court
Sheboygan, WI 53083

TLC Nails & Spa, LLC
4140 Harbor Town Lane, Suite 900
Manitowoc, WI 54220

Wisconsin Cosmetology Examining Board
P.O. Box 8366
Madison, WI 53707-8366

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

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

PROCEDURAL HISTORY

The Notice of Hearing and the Complaint in this matter were served on the Respondents Kim Bui and TLC Nails & Spa, LLC by the Department of Safety and Professional Services, Division of Legal Services and Compliance (Division), on September 23, 2021, by both Certified and regular mail, consistent with Wis. Admin. Code § SPS 2.08. An Answer to a Complaint must be filed within 20 days from the date of service of the Complaint. Wis. Admin. Code § SPS 2.09(4). No Answer has been filed, even though the Respondents' Answer deadline has been extended two times.

Following the expiration of the second deadline to file an Answer, the Division moved for default judgement based on the Respondents' failure to timely file an Answer pursuant to Wis. Admin. Code § SPS 2.14. In light of the Respondents' failure to file an answer to the Complaint, Administrative Law Judge (ALJ) Andrea Brauer found the Respondents to be in default.

On December 16, 2021, the ALJ issued a Notice of Default and Order against Respondents and ordered that the Division file a recommended proposed decision and order by January 19, 2022. The Division timely filed its submission.

FINDINGS OF FACT

Facts Related to the Alleged Violations

Findings of Fact 1-13 are taken from the Division's Complaint filed against Respondents in this matter.

1. Respondent Kim Bui (Birth Year 1976) is licensed by the State of Wisconsin as a Manicurist, having license number 6772-85, first issued on June 20, 2007, and expired since April 1, 2017. Ms. Bui is also licensed by the State of Wisconsin as an Aesthetician, having license number 1938-86, first issued on March 10, 2008, and expired since April 1, 2017.

2. Ms. Bui's most recent address on file with the Wisconsin Department of Safety and Professional Services (Department) is 5308 Heatherfield Court, Sheboygan, Wisconsin 53083.

3. Respondent TLC Nails & Spa, LLC is licensed by the State of Wisconsin as a Manicuring Establishment, having license number 3590-71, first issued on January 6, 2010, and expired since April 1, 2017.

4. TLC Nails & Spa, LLC's most recent address on file with the Department is 4140 Harbor Town Lane, Suite 900, Manitowoc, Wisconsin 54220.

5. Ms. Bui is identified in Department records as the responsible licensee of TLC Nails & Spa, LLC.

6. On January 8, 2018, the Department received a complaint against TLC Nails & Spa LLC alleging that the facilities, especially the chairs, were maintained in a poor condition.

7. On May 3, 2018, an inspection of TLC Nails & Spa LLC was conducted by a Department investigator. During the inspection, the investigator noted the following:

- a. Ms. Bui was participating in unlicensed practice of manicuring.
- b. Ms. Bui admitted that TLC Nails & Spa LLC provided manicuring and aesthetics services to the public and that she performed manicuring and aesthetics services for payment.

- c. TLC Nails & Spa LLC had several sanitary violations, including:
- i. Pedicure basins had debris in the bottom and basin jet assemblies had standing water, debris, and/or buildup in them;
 - ii. Pedicure chair had large rips in the upholstery;
 - iii. Wooden spatulas, paper waxing strips, tweezers, eyebrow brushes and combs, cotton strips, eyebrow scissors, and clean towels were stored outside of closed covered containers;
 - iv. Single-use equipment, such as nail files and buffer blocks appeared to have been re-used and not discarded after each use;
 - v. Reusable equipment, such as cuticle nipper, cuticle remover, nail clippers and cuticle pusher, were partially submerged in Barbicide, in an uncovered container; and
 - vi. Lysol, a container of bleach, and a container of laundry detergent were stored at floor level outside of a closed locked cabinet.

8. On May 8, 2018, a Department investigator notified Ms. Bui of the observed violations and that her licenses and Respondent TLC Nails & Spa LLC's licenses were expired. Ms. Bui was also notified that she could not provide manicuring or aesthetics services unless she renewed her licenses and that services could not be provided by TLC Nails & Spa LLC unless its licenses were also renewed.

9. On October 15, 2018, the Department issued a Cease and Desist Notice to Ms. Bui to immediately cease and desist from performing any manicuring services. The Department issued a Cease and Desist Notice to TLC Nails & Spa LLC to immediately cease and desist from providing any manicuring and aesthetics services at the establishment.

10. The Respondents failed to return proof of compliance to the Department.

11. Pursuant to Wis. Stat. § 440.08(3), Ms. Bui retains the right to renew her Manicurist license until March 31, 2022.

12. Pursuant to Wis. Stat. § 440.08(3), Ms. Bui retains the right to renew her Aesthetician license until March 31, 2022.

13. Pursuant to Wis. Stat. § 440.08(3), TLC Nails & Spa LLC retains the right to renew its Manicuring Establishment license until March 31, 2022.

Facts Related to Default

14. The Notice of Hearing and the Complaint in this matter were served on the Respondents by the Division, on September 23, 2021, by both Certified and regular mail, consistent with Wis.

Admin. Code § SPS 2.08. An Answer to a Complaint must be filed within 20 days from the date of service of the Complaint. Wis. Admin. Code § SPS 2.09(4). No Answer has been filed.

15. At the prehearing conference held on October 28, 2021, the Respondents requested additional time to file an Answer. The ALJ extended the time for the Respondents to file an Answer to Friday, November 12, 2021, and scheduled an adjourned prehearing conference. The Respondents did not file an Answer by the extended deadline.

16. An adjourned prehearing conference was held as scheduled on November 17, 2021, with the Respondents and the Division's attorney. At that time, the Division moved for default judgment based on the Respondents' failure to timely file an Answer. The ALJ granted the Division's motion in part and found the Respondents in default pursuant to Wis. Admin. Code § SPS 2.14. However, because the Respondents demonstrated good cause, they were permitted to file an Answer no later than 5:00 p.m. on December 1, 2021.

17. The Respondents did not file an Answer by the second extended deadline, and the Division again moved for default judgment pursuant to Wis. Admin. Code § SPS 2.14.

18. In light of Respondents' failure to file an Answer to the Complaint, the ALJ again found the Respondents to be in default.

19. On December 16, 2021, the ALJ issued a Notice of Default and Order against the Respondents and ordered that the Division file a recommended proposed decision and order by January 19, 2022.

20. The Division timely filed its recommended proposed decision and order.

DISCUSSION

Jurisdictional Authority

The Wisconsin Cosmetology Examining Board (Board) has jurisdiction over this matter pursuant to Wis. Stat. § 454.15. The undersigned ALJ has authority to preside over this disciplinary proceeding pursuant to Wis. Admin. Code § SPS 2.10(2) and Wis. Stat. § 227.46(1).

Default

The Division properly served the Notice of Hearing and Complaint on the Respondents by mailing a copy to the address on file with the Department. Service by mail is complete upon mailing. Wis. Admin. Code § SPS 2.08(1). Under Wis. Admin. Code § SPS 2.14, if a respondent "fails to answer as required by s. SPS 2.09 or fails to appear at the hearing at the time fixed therefor, the respondent is in default and the disciplinary authority may make findings and enter an order on the basis of the complaint and other evidence." *See also* Wis. Admin. Code § HA 1.07(3)(c).

Here, the Respondents violated Wis. Admin. Code § SPS 2.09(4) by failing to file an Answer to the Complaint within 20 days from the date of service as ordered in the notice of prehearing conference. The Respondents also failed to file an Answer to the Complaint despite being provided two extended deadlines. Therefore, the Respondents are in default, and findings and an order may be entered on the basis of the Complaint.

Burden of Proof

The burden of proof in disciplinary proceedings before the Board is a preponderance of the evidence. Wis. Stat. § 440.20(3). However, given the finding of default and the Respondents' failure to answer the allegations in the Complaint, the facts in this proceeding are undisputed and are found on the basis of the Complaint.

Violations

The Board has authority to discipline the Respondents pursuant to Wis. Stat. § 454.15. Following an investigation, if the Board determines that a that a credential holder has "engaged in conduct in the practice of barbering, cosmetology, aesthetics, electrology, or manicuring that evidences a lack of knowledge or ability to apply professional principles or skills" or "violated this subchapter or any rule promulgated under this subchapter," it may "revoke, limit, suspend, or refuse to issue or renew, ... or reprimand the holder of a license or permit issued under this subchapter." Wis. Stat. § 454.15(2)(c) and (i). The Board may also impose a forfeiture of not more than \$1,000 for each separate offense in addition to or in lieu of other discipline. Wis. Stat. § 454.15(3).

Wisconsin Admin. Code § Cos 2.04(1) requires a person be licensed by the Board before providing manicuring or aesthetic services. By her own admission, Ms. Bui provided these services to customers for payment even though her license was expired. (Complaint ¶ 7.b.) Ms. Bui provided these services in her establishment TLC Nails & Spa, LLC, even though the establishment's license was expired in violation of Wis. Admin. Code § Cos 3.01(1).

During an inspection, Department investigators found numerous violations. Pedicure basins had debris in the bottom and basin jet assemblies had standing water, debris, and/or buildup in them in violation of Wis. Admin. Code § Cos 4.01(5). A pedicure chair had large rips in the upholstery in violation of Wis. Admin. Code § Cos 3.01(1). Wooden spatulas, paper waxing strips, tweezers, eyebrow brushes and combs, cotton strips, eyebrow scissors, and clean towels were stored outside of closed covered containers in violation of Wis. Admin. Code §§ Cos 4.01(1) and 4.02(4). Single-use equipment, such as nail files and buffer blocks appeared to have been re-used and not discarded after each use in violation of Wis. Admin. Code §§ Cos 4.01(3r) and 4.10(4). Reusable equipment, such as cuticle nipper, cuticle remover, nail clippers and cuticle pusher, were partially submerged in Barbicide in an uncovered container in violation of Wis. Admin. Code §§ Cos 4.02(1) and 4.02(5). Lysol, a container of bleach, and a container of laundry detergent were stored at floor level outside of a closed locked cabinet in violation of Wis. Admin. Code § Cos 3.01(6). (Complaint ¶ 7.c.).

On May 8, 2018, Respondents were notified of the observed violations and that their licenses were expired. Pursuant to Wis. Admin. Code § Cos 3.05(2), Respondents must notify the Board of their correction or of their proposed plan to correct the violation. It is an additional violation under Wis. Admin. Code § Cos 3.05(3) to fail to respond to the notice of violation entirely. Respondents failed to respond to the notice sent by the Department. (Complaint ¶¶ 8 and 10).

By engaging in conduct in the practice of barbering, cosmetology, aesthetics, electrology, or manicuring that evidences a lack of knowledge or ability to apply professional principles or skills, as well as violating rules promulgated by the Board, Respondents are subject to discipline pursuant to Wis. Stat. § 454.15(2)(b) and (i). Additionally, Respondents are subject to forfeitures pursuant to Wis. Stat. § 454.15(3).

Discipline

The Division recommends that the Respondents' credentials, and any appurtenant rights to renew, be revoked. In addition, the Division recommends that the Respondents also each be assessed a \$500 forfeiture. I find the Division's recommended discipline appropriate because of the severity of the Respondents' misconduct. They committed numerous sanitation violations and practiced manicuring and aesthetics although their licenses had been expired for nearly five years. In addition, they failed to correct their violations when requested by the Division and failed to adequately participate in these disciplinary proceedings.

The proposed discipline is consistent with the three purposes of discipline in a professional misconduct case: (1) to promote the rehabilitation of the credential holder; (2) to protect the public from other instances of misconduct; and (3) to deter other credential holders from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206, 209, 237 N.W.2d 689 (1976). "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). By granting a license, the state assures the public that the 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 credential holder's competence to practice the profession, revocation is appropriate. *Gilbert v. State Medical Examining Bd.*, 119 Wis. 2d 168, 189-90, 349 N.W.2d 68 (1984).

In this case, the Board has already unsuccessfully attempted to rehabilitate the Respondents by sending them notification of the observed violations and requesting a response. The Respondents did not respond or describe their plans for correcting the violations as is required by Wis. Admin. Code § Cos 3.05(2). It is difficult to determine whether other rehabilitative measures could be effective since the Respondents have not provided an Answer to the Division's Complaint and have made no arguments on their own behalf.

Revocation is therefore necessary to protect the public from other potential instances of misconduct by the Respondents and to deter other credential holders from engaging in similar conduct. The Division has proven that the Respondents engaged in serious misconduct, including unlicensed practice and numerous uncorrected sanitation violations. Revocation is an appropriate response to Respondents' disregard for the licensing authority governing their profession, and it

will put other credential holders on notice that failing to cooperate with the Board is a not an option. Credential holders must be required to cooperate with the Board's investigations, so that the Board can ascertain whether a violation was committed and determine the appropriate outcome. Because the Respondents have completely disregarded the Board's authority as well as the laws in place to protect the public, revocation of their credentials is an appropriate response. Revocation is also consistent with prior Board decisions. See *In the Matter of Disciplinary Proceedings Against Bichyen T. Tran and Steel Magnolias Body Salon & Spa*, Board Order No. L09091410BAC (September 14, 2009) (Board revoked Respondents' credentials after finding several sanitary violations).¹

Finally, it is appropriate to also assess a \$500 forfeiture against each of the Respondents. The Board is authorized to assess a forfeiture of up to \$1,000 for each offense in addition to or in lieu of license revocation. Wis. Stat. § 454.15(3). The requested \$500 forfeiture per licensee is therefore less than the maximum amount the Board could assess and is reasonable considering the number of violations proven and the Respondents' lack of participation in these proceedings.

In light of the facts of this case, the factors set forth in *Aldrich*, and prior Board decisions, it is appropriate to revoke Respondents' credentials and any appurtenant right to renew their credentials to practice as a manicurist and aesthetician, or to operate as a manicuring establishment in Wisconsin. In addition, it is appropriate to also assess a \$500 forfeiture against each of the Respondents.

Costs

The Board is vested with discretion concerning whether to assess all or part of the costs of this proceeding against Respondents. See Wis. Stat. § 440.22(2). In exercising such discretion, the Board must look at aggravating and mitigating facts of the case. *Noesen v. State Department of Regulation & Licensing, Pharmacy Examining Board*, 2008 WI App 52, ¶¶ 30-32, 311 Wis. 2d 237, 751 N.W.2d 385. In previous orders, Boards have considered the following factors when determining if all or part of the costs should be assessed against the Respondent: (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, funded by other licensees; and (7) any other relevant circumstances. See *In the Matter of Disciplinary Proceedings Against Elizabeth Buenzli-Fritz*, LS0802183CHI (Aug. 14, 2008). It is within the Board's discretion as to which of these factors to consider, whether other factors should be considered, and how much weight to give any factors considered.

It is appropriate for the Respondents to pay the full costs of the investigation and prosecution of these proceedings. They are in default and the factual allegations identified in this decision are thus deemed admitted. They also failed to follow essential laws governing their professions and failed to cooperate with the Board. In addition, the Respondents failed to file an Answer to the Complaint or otherwise provide any argument regarding the allegations brought

¹ *In the Matter of Disciplinary Proceedings Against Bichyen T. Tran and Steel Magnolias Body Salon & Spa*, Board Order No. L09091410BAC (September 14, 2009).

against their credentials. Finally, the Department is a program revenue agency whose operating costs are funded by the revenue received from credential holders. It would be unfair to impose the costs of pursuing discipline in this matter on those licensees who have not engaged in misconduct.

Therefore, it is appropriate for Respondents to pay the full costs of the investigation and this proceeding, as determined pursuant to Wis. Admin. Code § SPS 2.18.

ORDER

For the reasons set forth above, IT IS ORDERED that the manicurist license of Respondent Kim Bui (license number 6772-85), and any appurtenant right to renew or reinstate said license, is REVOKED.

IT IS FURTHER ORDERED that the aesthetician license of Respondent Kim Bui (license number 1938-86), and any appurtenant right to renew or reinstate said license, is REVOKED.

IT IS FURTHER ORDERED that the manicuring establishment license of Respondent TLC Nails & Spa, LLC (license number 3590-71), and any appurtenant right to renew or reinstate said license, is REVOKED.

IT IS FURTHER ORDERED that Ms. Bui pay a FORFEITURE in the amount of \$500.00.

IT IS FURTHER ORDERED that TLC Nails & Spa, LLC pay a FORFEITURE in the amount of \$500.00.

IT IS FURTHER ORDERED that Ms. Bui pay one-half of all recoverable costs in this matter in an amount to be established, pursuant to Wis. Admin. Code § SPS 2.18.

IT IS FURTHER ORDERED that TLC Nails & Spa, LLC pay one-half of 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 the Department Monitor at:

Department Monitor
Division of Legal Services and Compliance
Department of Safety and Professional Services
P.O. Box 7190, Madison, WI 53707-7190
Telephone (608) 266-2112; Fax (608) 266-2264
DSPSMonitoring@wisconsin.gov

Respondents may also submit this information online at: <https://dspsmonitoring.wi.gov/>

IT IS FURTHER ORDERED that the terms of the Order are effective the date the Final Decision and Order in this matter is signed by the Board.

Dated at Milwaukee, Wisconsin, on February 18, 2022.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: Andrea Brauer
Andrea Brauer
Administrative Law Judge