

STATE OF IOWA
BEFORE THE BOARD OF COSMETOLOGY ARTS & SCIENCES EXAMINERS

IN THE MATTER OF:)	
)	NO. 04-068
MICHELLE BROWN)	DIA NO. 04DPHCE012
License No. 843-56018)	
)	FINDINGS OF FACT,
RESPONDENT)	CONCLUSIONS OF LAW,
)	DECISION AND ORDER

On November 3, 2004, the Iowa Board of Cosmetology Arts & Sciences (Board) filed a Statement of Charges and issued a Notice of Hearing to Michelle Brown (Respondent). The Statement of Charges alleged that the Respondent failed to comply with the terms of a board order or the terms of a settlement agreement or consent order, in violation of 645 IAC 65.2(21). A Notice of Hearing was issued scheduling the hearing for February 2, 2005. The initial hearing date was continued.

The hearing was held on May 4, 2005 at 11:00 a.m. in the Lucas State Office Building, Des Moines, Iowa. The Respondent did not appear for the hearing and was not represented by counsel. John Baty, Assistant Attorney General, represented the state. The following Board members presided at the hearing: Jack Morlan, Chairperson; Mary Beth Myers; Jerry Talbott; Lois Leytem; Becky Brockmann, and Janet Olsen. Administrative Law Judge Margaret LaMarche assisted the Board in conducting the hearing. The hearing was open to the public, pursuant to Iowa Code section 272C.6(1)(2005), and was recorded.

After hearing the evidence and examining the exhibits, the Board convened in closed session, pursuant to Iowa Code section 21.5(1)(f)(2005) to deliberate its decision. The administrative law judge was instructed to prepare the Board's decision, in accordance with its deliberations.

THE RECORD

The record includes the testimony of the witness and state exhibits 1-16.

FINDINGS OF FACT

1. The Board initially issued cosmetology license number 843-56018 to the Respondent on August 30, 1993. (Testimony of Marilyn Ubaldo; State Exhibit 5)

2. The Respondent's license lapsed on March 31, 2003, and she filed an application for reinstatement on December 24, 2003. The Respondent reported that she had been convicted of a felony but did not attach the record of her conviction as required by the application. (State Exhibits 1, 2)

Upon further inquiry from the Board, the Respondent submitted her conviction record. On October 13, 2001, the Respondent was convicted of a controlled substance felony, in violation of Iowa Code section 124.401(1). The Respondent received a ten-year suspended sentence, was placed on a three-year period of probation, and was fined \$1,000. (Testimony of Marilyn Ubaldo; State Exhibits 3, 4)

3. On March 4, 2004, the Respondent and the Board entered into a Consent Agreement and Order, which placed the Respondent's cosmetology license on probation for a period of two (2) years, subject to a number of terms and conditions. The terms of probation included, in relevant part:

...

e. Not less than twice per year during Applicant's probationary period, Applicant shall participate in a chemical screening program approved by the Board. The timing of the screenings shall be determined by the Board. It is Applicant's responsibility to ensure that authorized personnel witness the collection of her UA samples. UA samples which are not witnessed shall be considered invalid...Applicant shall be responsible for all costs of participation in the program.

(Testimony of Marilyn Ubaldo; State Exhibit 5)

4. On June 14, 2004, the Respondent applied to participate in the Board's approved chemical screening program through FirstLab. The Respondent designated Concentra Medical Center in Des Moines as her collection site. Pursuant to the terms of the program, the Respondent was required to call every day between

5:00 a.m. and 1:00 p.m. EST to access the FirstLab Random Notification System. When notified that she had been selected for a drug test, the Respondent was required to call her designated collection facility and report for a drug test by the close of business that day. (Testimony of Marilyn Ubaldo; State Exhibit 6)

5. On July 30, 2004, the FirstLab Random Notification System selected the Respondent to report for a drug test, but the Respondent never called in to FirstLab. On November 8, 2004, the Respondent was again selected to report for a drug test, but never called in to FirstLab. Board staff contacted FirstLab and discovered that while the Respondent submitted her application, she never made the daily calls as required by the program. (Testimony of Marilyn Ubaldo; State Exhibits 7-9)

6. On February 2, 2005, the Respondent was again randomly selected by FirstLab to report for a drug test but failed to call in. Board staff verified that the Respondent had never called in to FirstLab since her initial enrollment and never notified FirstLab of any change of address. (Testimony of Marilyn Ubaldo; State Exhibits 10, 11)

7. The Statement of Charges and a Notice of Hearing were mailed to the Respondent by restricted certified mail, return receipt requested, at her residential address on file with the Board and were delivered on November 9, 2004. (Testimony of Marilyn Ubaldo; State Exhibits 12, 13) The Respondent did not file an Answer to the Statement of Charges, as required by 645 IAC 11.12.

The Board later continued the hearing to May 4, 2005. The continuance order was mailed to the Respondent by restricted certified mail and was also sent by ordinary, first-class mail, as permitted by 645 IAC 11.13(2). The certified mailing was returned to the Board, marked "unclaimed" after several notices were left for the Respondent. The continuance order that was sent by first-class mail was not returned and is presumed delivered. The Respondent failed to appear for the hearing. (Testimony of Marilyn Ubaldo; State Exhibits 15, 16)

CONCLUSIONS OF LAW

I. Failure to Appear

Delivery of the statement of charges and notice of hearing constitute commencement of the contested case proceeding. 645 IAC 11.6(1)"b" provides that the statement of charges and notice of hearing may be served on a licensee by restricted certified mail, return receipt requested. The statement of charges and original notice of hearing were sent to the Respondent by restricted certified mail at the residential address on file with the Board and was delivered by the post office on November 9, 2004. The hearing was later continued, and the continuance order was served on the Respondent by first-class mail, in conformance with 645 IAC 11.13(2). The Respondent failed to claim the continuance order that was sent by restricted certified mail.

If a party fails to appear or participate in a contested case hearing after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party. 645 IAC 11.21(1). The Board was authorized to proceed with the hearing in the absence of the Respondent.

II. Failure To Comply With Consent Agreement and Order

The Iowa Board of Cosmetology Arts & Sciences Examiners was created by the legislature, pursuant to Iowa Code chapters 147 and 157, and was directed to adopt rules to implement the provisions of Iowa Code chapter 157. Iowa Code section 157.14 (2003). Any license issued by the department can be suspended, revoked, or renewal denied for violation of any provision of Iowa Code chapter 157 or the rules promulgated by the Board. Iowa Code section 157.9 (2003).

645 IAC 65.2(21) provides, in relevant part:

645-65.2(157,272C) Grounds for discipline. The board may impose any of the disciplinary sanctions provided in rule 645-65.3(157,272C) when the board determines that any of the following acts or offenses have occurred:

...

65.2(21) Failure to comply with the terms of a board order or the terms of a settlement agreement or consent order.

The preponderance of the evidence established that the Respondent violated 645 IAC 65.2(21) when she failed to comply with the terms of the March 4, 2004 Consent Agreement and Order. The Respondent failed to participate in the chemical screening program approved by the Board.

III. Sanction

The Respondent has flagrantly violated the terms of the Consent Agreement that she negotiated with the Board by her failure to call in to the FirstLab Notification System and her failure to participate in any chemical screenings in the past year. The Board previously determined that the Respondent could only continue to safely practice cosmetology if she is monitored through random drug screening. The Respondent failed to respond to the Statement of Charges and offered no explanation for her ongoing failure to comply with the Consent Order. The protection of the public health, safety and welfare and the integrity of the licensing process require revocation of the Respondent's cosmetology license.

DECISION AND ORDER

IT IS THEREFORE ORDERED that Cosmetology License No. 843-56018 issued to Michelle Brown is hereby REVOKED, effective immediately upon service of this Order. The Respondent shall return her license to the Board office upon receipt of this decision and order. Any request for reinstatement is subject to the provisions of 645 IAC 11.31. In any proceeding for reinstatement, the burden will be on the Respondent to establish that the reason for the revocation no longer exists and that it is in the public interest for her license to be reinstated.

IT IS FURTHER ORDERED that the Respondent shall pay a civil penalty of \$500, within thirty (30) days of the issuance of this decision and order.

IT IS FURTHER ORDERED, pursuant to Iowa Code section 272C.6, that the Respondent shall pay \$75.00 for fees associated with

the disciplinary hearing within thirty (30) days of receipt of this decision.

Dated this 23rd day of May, 2005.

Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final agency action, unless, within 15 days after the date of notification or mailing of this decision, a motion to vacate is filed and served on all parties or an appeal of the decision on the merits is timely initiated. A motion to vacate shall state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit or a person with personal knowledge of each such fact attached to the motion. 645 IAC 11.21(3). The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate. 645 IAC 11.21(4).

Pursuant to Iowa Code section 17A.19(2003) and 645 IAC 11.29, any appeal to the district court from a decision in a contested case shall be taken within 30 days from the issuance of the final decision by the board. The appealing party shall pay the full costs for the transcript of the hearing. 645 IAC 11.23.

This Findings of Fact, Conclusions of Law, Decision and Order is approved by the board on May 23, 2005.