

# WILSON, KISTEN

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

---

IN THE MATTER OF: ) CASE NO. 06-164  
 ) DIA NO. 06DPHCE001  
~~KISTEN M. SMUCK~~ )  
n/k/a KISTEN M. WILSON ) FINDINGS OF FACT,  
 ) CONCLUSIONS OF LAW,  
License No. 843-62993 ) DECISION AND ORDER

---

On August 2, 2006, the Iowa Board of Cosmetology Arts & Sciences (Board) filed a Notice of Hearing and Statement of Charges against Kisten M. Smuck, License No. 843-62993 (Respondent) alleging that she failed to comply with a Consent Order, failed to respond to Board communications, and failed to notify the Board of a change of address, in violation of Iowa Code sections 157.9, 272C.3, 272C.10(8) and 645 IAC 65.2(20), (21), and (24). The Notice of Hearing and Statement of Charges were personally served on Respondent on September 15, 2006.

The hearing was held on November 1, 2006 at 9:30 a.m. in the Lucas State Office Building, sixth floor conference room, Des Moines, Iowa. Respondent did not appear and was not represented by counsel. Assistant Attorney General John Baty represented the state. The following Board members presided at the hearing: Jack Morlan, Chairperson; Mary Beth Myers; Jerry Talbott; David Weatherwax; Lois Leytem; and Becky Brockmann. 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 by a certified court reporter.

After hearing all 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 Marilyn Ubaldo and state exhibits 1-11.

FINDINGS OF FACT

1. On January 29, 1999, Respondent was convicted of a felony in Polk County District Court. She was sentenced to a term not to exceed ten years, sentence was suspended, and she was placed on probation for two years. Respondent's probation was revoked on September 10, 2002. On June 9, 2003, the Court reconsidered and again suspended Respondent's sentence and placed her on probation. (State Exhibit 2a, 2b)

2. On April 1, 2004, Respondent applied for Iowa licensure by examination. Respondent successfully completed the theory and law examinations. On January 10, 2005, Respondent and the Board entered into a Consent Agreement and Order allowing Respondent to be licensed as a nail technician, subject to a two-year period of probation. Conditions of probation included, in part, that Respondent must:

- fully comply with all relevant statutes and administrative rules in the course of her practice as a licensed nail technician;
- work under the supervision of an individual who holds a current license in good standing issued by the Board;
- file quarterly reports, beginning within 15 days of issuance of the Consent Order, notifying the Board of her employment status as a nail technician; and
- notify the Board within 15 days of the termination, either voluntarily or involuntarily, of her employment as a nail technician.

(Testimony of Marilyn Ubaldo; State Exhibit 2a)

3. At the time of the Consent Order, Respondent's address on file with the Board was 1212 Walnut St., West Des Moines, Iowa 50265. Respondent has never notified the Board that her address has changed. (Testimony of Marilyn Ubaldo; State Exhibits 9c, 2a)

4. On or about February 8, 2005, Respondent filed an initial (late) quarterly report stating that she had been employed by Montego Bay Day Spa & Tanning salon at 2824 E. University, Des Moines, Iowa since February 2004. Respondent reported that she is the only nail technician on

duty and that she works Mondays, 8am to 8pm, and by appointment only on Tuesdays through Saturdays. Respondent reported that her supervisor was licensed cosmetologist Emma Campbell. Respondent's supervisor, Emma Campbell, also filed a written report clarifying that Respondent was employed as a receptionist/training consultant prior to receiving her nail technician license. (Testimony of Marilyn Ubaldo; State Exhibit 3)

5. Respondent did not file any further quarterly reports with the Board. On June 29, 2005, Respondent was sent a letter at her address of record, reminding her that she had not yet filed her quarterly report that was due April 25, 2005. Respondent was also reminded that additional quarterly reports were due on July 25, 2005; October 25, 2005; January 25, 2006; April 25, 2006; July 25, 2006; and October 25, 2006. Respondent was warned that failure to comply could result in additional disciplinary action against her license. This letter was not returned to the Board and is presumed delivered. Respondent did not reply. (Testimony of Marilyn Ubaldo; State Exhibit 4)

6. On November 21, 2005, the Board sent a second letter to Respondent at her address of record. The letter states that the Board had not received the quarterly reports that were due by April 25, July 25, or October 25, 2005. Respondent was told to submit those reports within 15 days of the date of the letter. Respondent was reminded of her responsibility to submit timely reports by January 25, April 25, July 25, and October 25, 2006. This letter was sent by restricted certified mail and by first-class mail. The certified mailing was returned to the Board marked "Unclaimed." The first-class mailing was not returned to the Board and is presumed delivered. Respondent did not reply to the Board's correspondence. (Testimony of Marilyn Ubaldo; State Exhibit 5)

7. On March 23, 2006, the Board sent Respondent a letter stating that no reports had been received. Once again, the Board directed Respondent to submit her four overdue quarterly reports to the Board within 15 days. The letter was not returned to the Board and is presumed delivered. Respondent did not reply to the Board's correspondence. (Testimony of Marilyn Ubaldo; State Exhibit 6)

8. On April 7, 2006, the Board sent its investigator to Respondent's address of record: 1212 Walnut Street, West

Des Moines, Iowa. The investigator discovered that Respondent's grandmother resided at this address and that Respondent had moved and was living at 809 Vine Street, West Des Moines, Iowa. The investigator found Respondent at her residence and provided her with copies of the Board's November 21, 2005 letter.

Respondent told the Board's investigator that she left her employment at Montego Bay Salon in December 2005, following her divorce, and that she has not been employed in the cosmetology field since that time. Respondent has been working two part-time jobs unrelated to cosmetology. (State Exhibit 7a)

9. On May 4, 2006, the Board sent Respondent another letter advising her that quarterly reports are required regardless of whether she is currently employed in the cosmetology field. Respondent was directed to submit her five overdue quarterly reports within 7 days of the letter. Respondent was advised that the Board would review her file at their May 17, 2006 meeting and that failure to comply could result in further disciplinary action. (State Exhibit 7b) When Respondent did not reply, another letter was sent by certified mail on May 24, 2006. Respondent did not reply and did not file any additional quarterly reports. (Testimony of Marilyn Ubaldo; State Exhibit 8)

#### CONCLUSIONS OF LAW

##### I. Failure to Appear

645 IAC 11.6(1)"a" provides that the statement of charges and notice of hearing may be served on a licensee by personal service. Respondent was properly served with the Notice of Hearing, Statement of Charges, and Statement of Matters Asserted (Confidential) by personal service on September 15, 2006. (State Exhibit 1c)

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 Respondent's absence.

II. The Violations

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 (2005). 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 (2005).

Licensing boards are authorized to revoke or suspend a license upon failure of a licensee to comply with a decision of the Board imposing licensee discipline. Iowa Code section 272C.3(2)(a) (2005).

645 IAC 65.2, 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(20)** Failure to respond within 30 days of receipt of communication from the board which was sent by registered or certified mail.

...

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

...

**65.2(24)** Failure to report a change of name or address within 30 days of the occurrence.

The preponderance of the evidence established that Respondent violated Iowa Code sections 157.9, 272C.3(2)(a) and 272C.10(2005) and 645 IAC 65.2(20), (21), and (24) when she repeatedly failed to file quarterly reports as required by the Consent Order issued January 10, 2005, failed to reply to certified letters from the Board, and failed to report a change of address to the Board.

The Consent Agreement and Order clearly required Respondent to file quarterly reports concerning her employment status regardless of whether she was employed in cosmetology. Respondent failed to file seven quarterly reports, failed

to respond to repeated communications from the Board, including certified letters, and failed to notify the Board of her current address. Respondent did not file an Answer to the Statement of Charges and did not appear for the hearing. The Board has been more than patient with Respondent but is unable to work with a licensee who ignores Board orders and who fails to respond to its communications. Under the circumstances, the Board's only choice is to revoke Respondent's license.

DECISION AND ORDER

IT IS THEREFORE ORDERED that License No. 843-62993, issued to Kisten M. Smuck (now Kisten M. Wilson), is hereby REVOKED. Respondent shall immediately return her license to the Board office.

IT IS FURTHER ORDERED that Respondent shall pay a civil penalty of five hundred dollars (\$500).

IT IS FURTHER ORDERED, pursuant to Iowa Code section 272C.6, that the Respondent shall pay a \$75.00 disciplinary hearing fee and the \$45.00 fee for the court reporter. The \$120.00 shall be paid within thirty (30) days of receipt of this decision. If a transcript is ordered, the cost will be charged to the party requesting it. Iowa Code section 272C.6(6); 645 IAC 11.23.

Pursuant to 645 IAC 11.31, Respondent may not apply for reinstatement until one year has elapsed from the date of this Decision and Order. However, the Board will not consider any application for reinstatement of license unless the civil penalty and hearing fees have been paid in full.

**This findings of fact, conclusions of law, decision and order is approved by the board on February 5, 2007.**

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(2005) 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.

cc: John Baty, Assistant Attorney General