

BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSE OF	.	
ASHLEY MARIE MIDBY	:	AMENDED ORDER
TO PRACTICE AS A	.	Case No.
COSMETOLOGIST/BARBER	:	DOPL-OSC-2008-166
IN THE STATE OF UTAH	:	
	:	

BY THE DIVISION:

The Division's Findings of Fact, Conclusions of Law, Recommended Order and Order, dated June 10, 2010, in the above-referenced case is hereby amended as follows:

IT IS HEREBY ORDERED that the suspension on Respondent's license to practice as a cosmetologist/barber is terminated effective the date of this Amended Order. Said license is placed on probation for three (3) years subject to the conditions identified in the June 10, 2010 Findings of Fact, Conclusions of Law, Recommended Order and Order in Case No DOPL-OSC-2008-166 and the August 25, 2008 Memorandum of Understanding in Case No. DOPL-2008-166

All other conditions identified in the June 10, 2010 Findings of Fact, Conclusions of Law, Recommended Order and Order and the August 26, 2008 Memorandum of Understanding and Order shall remain the same and in effect.

Dated this 13th day of June, 2011.

W. Ray Walker

W. Ray Walker
Acting Division Director



BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

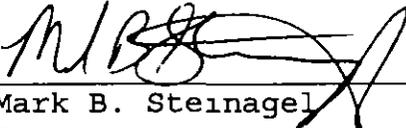
IN THE MATTER OF THE LICENSE OF	:	
ASHLEY MARIE MIDBY	:	ORDER
TO PRACTICE AS A	:	
COSMETOLOGIST/BARBER	:	Case No.
IN THE STATE OF UTAH	:	DOPL-OSC-2008-166
	:	

The attached Findings of Fact, Conclusions of Law and Recommended Order are hereby adopted by the Director of the Division of Occupational and Professional Licensing of the State of Utah. Respondent's expired license to practice as a cosmetologist/barber is thus suspended, effective the date of this Order

IT IS FURTHER ORDERED that the suspended license, both wall and wallet sizes, as well as any embossed certificate, thus be surrendered to the Division of Occupational and Professional Licensing.

Dated this 10 day of June, 2010.





Mark B. Steinagel
Director

Agency review of this Order may be obtained by filing a request for agency review with the Executive Director, Department of Commerce, within thirty (30) days after the date of this Order. The laws and rules governing agency review are found in Section 63G-4-301 of the Utah Code, and Section R151-46b-12 of the Utah Administrative Code.

BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSE OF	:	FINDINGS OF FACT
ASHLEY MARIE MIDBY	:	CONCLUSIONS OF LAW
TO PRACTICE AS A COSMETOLOGIST/BARBER	:	AND RECOMMENDED ORDER
IN THE STATE OF UTAH	:	Case No.
	:	DOPL-OSC-2008-166

APPEARANCES:

Laurie Noda for the Division of Occupational and
Professional Licensing

Ashley Marie Midby participated by telephone

Glenn Midby on behalf of Respondent

BY THE BOARD:

A January 25, 2010 hearing was conducted in the above-entitled proceeding before J. Steven Eklund, Administrative Law Judge for the Department of Commerce, and the Barber, Cosmetology/Barber, Esthetician, Electrology, and Nail Technology Licensing Board.

Members of the Board present were Marti Frasier, Lyle G. Ferguson, Fran Brown, Dianne Niebuhr, Holly A. Murphy and Carlotta Vesay. The remaining Board members (Sunny Smith and Carol Peterson) were absent. Mark B. Steinagel, Director of the Division of Occupational and Professional Licensing, was present

Thereafter, evidence was offered and received. The hearing

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concluded on January 25, 2010. The Board then took the matter under advisement and conducted initial deliberations in this case with the expectation that the Court would prepare a draft of the Board's Finding of Fact, Conclusions of Law and Recommended Order and submit that draft to the Board for its review and action.

The Board reviewed the draft and resumed its deliberations in this proceeding. The Board now enters its Findings of Fact and Conclusions of Law, and submits the following Recommended Order to the Division for its review and action:

FINDINGS OF FACT

1. Respondent was licensed to practice as a cosmetologist/barber in this state. Respondent became so licensed on August 25, 2008.

2. Respondent submitted her application for initial licensure on or about June 18, 2008. Pursuant to an August 25, 2008 Memorandum of Understanding and Order, Respondent was licensed on a probationary basis for three (3) years, subject to various terms and conditions.

3. The August 25, 2008 Memorandum of Understanding and Order was prompted by Respondent's entry of a guilty plea to one (1) charge of Illegal Possession/Use of a Controlled Substance. That plea was entered on February 13, 2008. Respondent's guilty plea was held in abeyance for 36 months.

4. The August 25, 2008 Memorandum of Understanding

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required Respondent to meet with the Board at the first Board meeting conducted after August 25, 2008. Respondent was to then meet with the Board on a quarterly basis or as otherwise determined by the Board and the Division for the duration of the August 25, 2008 Memorandum of Understanding and Order.

5. Respondent was also required to provide samples for drug analysis upon the request of the Division. Such analysis was to be conducted by Compass Vision, the company authorized by the Division to provide that service. The Division was to determine when and where Respondent was to submit for such drug testing.

6. Respondent was charged with Theft, a Class B misdemeanor, in Riverdale Justice Court proceedings on April 1, 2009. That charge was based on an offense which allegedly occurred on March 20, 2009 when Respondent falsified product return slips and removed cash from the till where she was employed. Respondent entered an April 7, 2009 guilty plea to the charge. Based on Respondent's guilty plea, she was fined a total of \$587.

7. Respondent met with the Division and the Board on September 8, 2008 and December 1, 2008. Respondent was excused from attending the Board meeting scheduled for March 2, 2009. She failed to appear for the scheduled Board meeting on June 1, 2009.

8. Respondent did not register for drug testing to be conducted by Compass Vision. However, Respondent was subject to drug testing through Davis County Mental Health during her criminal probation. The Board thus allowed Respondent to forego registering with Compass Vision since drug testing was otherwise taking place.

9 No documentation of any drug testing conducted relative to Respondent's criminal probation was ever submitted to the Division. This record does not reflect whether the Division contacted Respondent and requested the submission of any such test results or notified Respondent that no documentation was being submitted to the Division in that regard.

10. This proceeding was initiated based on the filing of a June 23, 2009 notice of agency action. The notice provided a September 14, 2009 Board hearing would be conducted. Respondent sustained multiple injuries from an automobile accident which occurred on July 29, 2009. She has pursued a lengthy course of rehabilitation due to her serious injuries from that accident.

11. Respondent's license expired on September 30, 2009 when that license was not timely renewed. Based on Respondent's injuries, the Division and Respondent agreed the September 14, 2009 Board hearing should be continued. During a November 2, 2009 prehearing teleconference with the Division and Mr. Midby, the parties informed the Court this case would proceed to a

Board hearing. Accordingly, that hearing was scheduled to be conducted on December 7, 2009.

12. Mr. Midby contacted the Court by telephone during the mid-morning of December 7, 2009. He thus informed the Court that driving conditions from Napa, Idaho to Salt Lake City, Utah were severely compromised due to a winter storm. Accordingly, Mr. Midby stated he and Respondent would not be able to appear for the scheduled hearing.

13. The Court was able to contact Ms. Noda shortly thereafter on December 7, 2009. The Court informed Ms. Noda of the recent contact by Mr. Midby. The Division readily agreed the scheduled hearing should be continued. Pursuant to a December 23, 2009 notice, that hearing was thus rescheduled to be conducted on January 21, 2010.

CONCLUSIONS OF LAW

The Division contends Respondent engaged in unprofessional conduct violative of §58-1-501(2)(a). Specifically, the Division asserts Respondent did not comply with the August 25, 2009 Memorandum of Understanding and Order when she failed to meet with the Board as scheduled for March 2, 2009 and June 1, 2009.

The Division also asserts Respondent violated that Order based on her guilty plea to the theft charge. The Division argues Respondent thus engaged in unprofessional conduct which bears a reasonable relationship to her ability to safely and

competently practice as a cosmetologist/barber.

The Division thus contends Applicant's expired license should be revoked and any residual rights which Respondent would have to obtain a renewal of that license should also be revoked. The Division asserts the nature and degree of the seriousness of Respondent's misconduct, as evidenced by the two criminal proceedings which occurred within a relatively short time, warrants that Respondent not be licensed in this state.

Respondent contends a revocation of her license would be both excessive and punitive, given the nature of this case. Respondent asserts she believed her probation officer would provide drug test results to the Board. Respondent also asserts she made a concerted effort to get those drug tests submitted to this Board, yet those tests were not so provided.

Respondent admits she did not meet with the Board on June 1, 2009. However, Respondent contends she has spent much effort to obtain her license, it expired due to her lack of finances and she is willing to do whatever this Board would conclude is necessary to retain her license. Respondent argues her license should not be revoked, but rather suspended for 12-18 months.

Respondent asserts she has been diagnosed with ADHD and she is receiving treatment in Ogden, Utah for that mental condition. However, Respondent acknowledges she will likely remain living with her parents in Idaho until her recovery from the injuries

she sustained in the automobile accident is basically complete. Respondent contends it is unknown when she might return to Utah, although Respondent presently intends to do so.

§58-1-401(2)(a) provides the Division may revoke, suspend, restrict, place on probation, issue a public or private reprimand to, or otherwise act upon the license of any licensee who:

(a) . . . engaged in unprofessional conduct conduct, as defined by statute or rule under this title . . .

§58-1-501(2) defines unprofessional conduct to include:

(a) violating . . . any statute, rule, or order regulating an occupation or profession under this title;

(c) engaging in conduct which results in the conviction of, or a plea of nolo contendere to, a crime of moral turpitude or any other crime that, when considered with the functions and duties of the occupation or profession for which the license was issued. . . bears a reasonable relationship to the licensee's . . . ability to safely or competently practice the occupation or profession.

The Board readily finds and concludes Respondent has engaged in unprofessional conduct violative of §58-1-501(2)(a) and (c). The Board thus concludes a proper factual and legal basis exists to enter a disciplinary action in this proceeding.

Respondent's initial criminal conviction prompted the requirement in the August 25, 2008 Memorandum of Understanding that she be subject to drug testing. Her second conviction

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occurred in the course of her practice as a cosmetologist/barber and is thus squarely related to her ability to safely practice that profession.

The Board duly notes Respondent's diagnosed mental condition will require some ongoing treatment to address that condition. It is also significant that Respondent obtain - at some point - a mental health evaluation to address the current status of her mental condition and if that condition would compromise her ability to safely and competently practice as a cosmetologist/barber in this state.

It is presently uncertain when Respondent may actually relocate to Utah with an intent to resume a practice as a cosmetologist/barber. This Board concludes Respondent's expired license should be suspended for the time set forth herein and that drug testing is largely impractical when Respondent continues to reside in Idaho.

The Board thus concludes the Recommended Order set forth below will adequately protect the public health, safety and welfare, and also provide necessary guidance to Respondent in any subsequent attempt to obtain the ability to resume a practice as a cosmetologist/barber in this state.

One further matter should be addressed. Respondent was to have duly reported for regular drug testing and she was to have also periodically met with the Board, as required by the August

25, 2008 Memorandum of Understanding and Order.

Respondent is cautioned that her timely and continuous compliance with the terms governing her license while suspended and any probationary terms and conditions which may govern her license following that suspension will be a primary concern. Should Respondent fail to comply with those requirements, further proceedings shall be conducted and a determination shall be made whether a greater disciplinary action than set forth herein is warranted.

RECOMMENDED ORDER

WHEREFORE, IT IS ORDERED Respondent's expired license shall be suspended until February 1, 2011, effective the date this Recommended Order may be adopted by the Division.

It is also ordered the following terms and conditions shall govern the suspension of Respondent's license:

1. Within thirty (30) days from the date this Recommended Order may become effective, Respondent shall submit an application to reinstate her expired license. Based on the entry of an Order adopting this Recommended Order, the application to reinstate Respondent's license shall be granted upon the timely filing of that application and payment of the renewal fee and applicable reinstatement fee.

- 2 Respondent shall provide written notice to the Division within ten (10) days after she relocates to Utah. Respondent shall meet with the Board at its next regularly scheduled meeting following her return to this state.

3. Concurrent with that Board meeting, Respondent shall provide a written statement

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from her primary care physician which sets forth her current mental condition, the course of treatment which Respondent has received for that condition and whether such treatment will continue to be provided. The evaluation shall further identify whether Respondent's mental condition would adversely affect her ability to practice safely as a cosmetologist/barber in this state.

It is further ordered that, upon review of the foregoing, the Board will determine whether Respondent's license should be placed on probation at the conclusion of the suspension set forth herein. If the Board determines Respondent's license should be placed on probation, the Board shall meet with Respondent to identify the various probationary terms and conditions which should govern her license.

Those terms and conditions shall, at a minimum, include that Respondent submit documentation of all drug test results performed through Compass Vision after Respondent's license has been placed on probation

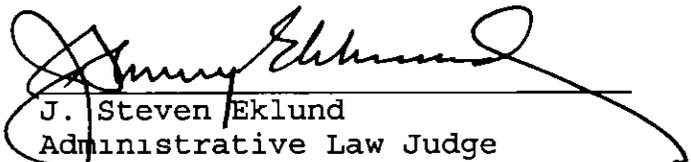
Respondent shall also be required to provide documentation to the Board of her completion of any outpatient and aftercare drug therapy programs during such time Respondent has resided in Idaho. The Board will thus determine whether a proper basis exists to require Respondent to obtain any such treatment and attend support groups while on probation in this state.

Respondent shall further be required provide written notice to the Board of any intent to resume a practice as a

cosmetologist/barber in this state, where such services will be performed and identify her prospective employer in that regard. The Board will then address the submission of employer reports to the Board, which shall identify the nature of Respondent's work performance and any deficiencies noted by her supervisor.

Should Respondent fail to comply with any of the terms and conditions required during such time her license is suspended, further proceedings shall be conducted and a determination whether greater disciplinary action than that set forth herein is warranted.

On behalf of the Barber, Cosmetology/Barber, Esthetician, Electrology and Nail Technology Licensing Board, I hereby certify the foregoing Findings of Fact, Conclusions of Law and Recommended Order were submitted to Mark B. Steinagel, Director of the Division of Occupational and Professional Licensing, on the 9th day of June 2010 for his review and action.


J. Steven Eklund
Administrative Law Judge
Department of Commerce