

**STATE OF NEW HAMPSHIRE
OFFICE OF PROFESSIONAL
LICENSURE AND CERTIFICATION**

BOARD OF BARBERING, COSMETOLOGY AND ESTHETICS

**In Re: Polished Nails and Spa
Shop License #5079**

**Owner: Tracy Nguyen
License # 18948**

Docket No.: 23-BAR-034

NOTICE OF DECISION DATED 4/25/2024

Enclosed please find a copy of the Board's Order dated 4/25/2024 relative to:

DISCIPLINARY HEARING FINAL DECISION AND ORDER

PETITIONS FOR REHEARING:

Pursuant to N.H. Code Admin. Rs. Plc 206.31(b), 206.33 ("Rules") and RSA 310:14, II, petitions for rehearing shall be filed within 30 calendar days after service of a final adjudicative order. Pursuant to Rule 206.31(c) and (d), the Petition shall: 1) clearly identify the respondent, by name and license number, and the docket number of the matter for which the petition is being filed, for rehearing in a disciplinary or non-disciplinary remedial proceeding; 2) clearly state whether the petitioner is seeking to have the decision reversed or modified and, if modified, the specific modification(s) sought; 3) clearly identify the specific findings of fact or conclusions of law, or both, that the petitioner asserts are erroneous; 4) contain such argument in support of the petition as the petitioner desires to present, including an explanation of how substantial justice would be done by granting the relief requested; and 5) be served by the petitioner on all other participants in accordance with Plc 206.11. Pursuant to Rule 206.31(e), the petitioner or petitioner's representative shall sign the petition. Pursuant to Rule 206.31(f), such signature shall constitute attestation that: 1) the signer has read the petition for rehearing; 2) the signer is authorized to file the petition for rehearing; 3) to the best of the signer's knowledge, information, and belief, there are good grounds to support the petition for rehearing; and 4) the petition for rehearing has not been filed solely or primarily for purposes of delay or harassment in any pending or contemplated administrative, civil, or criminal proceeding. Pursuant to Rule 206.31(g), no answer to a petition for rehearing shall be required, but any answer or objection filed shall be delivered to the presiding officer's office within 5 working days following receipt of service of the petition for rehearing. Pursuant to RSA 541:5, upon the filing of such petition for rehearing, the Board or Presiding Officer shall within ten days either grant or deny the same, or suspend the order or decision complained of pending further consideration, and any order of suspension may be upon such terms and conditions as the Board or Presiding Officer may prescribe. The Presiding Officer and/or Board shall rule upon a Motion for Rehearing in accordance with Rule 206.32. Pursuant to Rule 206.32(e), a decision on reconsideration shall be issued after fully considering the petition and any

responses thereto, which reconsideration shall include a hearing on the factual issues identified in the motion if the board determines a hearing to be necessary to a full consideration of the facts.

RIGHT TO APPEAL:

Pursuant to RSA 310:14, III, appeals from a decision on a petition for rehearing shall be by appeal to the New Hampshire Supreme Court pursuant to RSA 541. Pursuant to RSA 541:6, within 30 days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the New Hampshire Supreme Court. Pursuant to RSA 310:14, III, no sanction shall be stayed by the Board during an appeal. *See also* Rule 206.33.

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FINAL DECISION AND ORDER – 02/20/24

I. PARTICIPANTS:

Board Members and Support Staff and Counsel:

Sarah J. Partridge, Board Member
Donna Woodsom, Board Member
Sara Joe, Board Member

Teresa Boyer, OPLC Board Administrator
Carson Hansford, OPLC Board Administrator
Elizabeth Eaton, OPLC Board Counsel

Presiding Officer:

Attorney Nikolas Frye, OPLC Hearings Examiner

Parties:

Marissa Schuetz, Esq., Hearing Counsel
Polished Nails and Spa/Tracy Nguyen, Licensee and shop owner

II. CASE SUMMARY/PROCEDURAL HISTORY:

On or about 07/24/23, the Office of Professional Licensure and Certification, Division of Enforcement (“OPLC Enforcement”), acting on behalf of the New Hampshire Board of Barbering, Cosmetology, and Esthetics (“Board”), received a complaint alleging potential sanitation issues at

Polished Nails and Spa (“Licensee”) had caused fungus under a customer’s nails. On 08/09/23 OPLC Enforcement conducted an inspection of the Licensee, which resulted in 2,705 points for alleged health, sanitation, and licensing violations. On 09/18/23 the Board voted to initiate a disciplinary adjudicative proceeding in this matter. This Final Order and Decision follows.

III. SUMMARY OF THE PROPOSED EVIDENCE AND EVIDENTIARY RULINGS:

The Board received the following evidence pursuant to RSA 541-A:33 and Rules 206.22 and 206.18(d):

A. Exhibits were submitted by Hearing Counsel, numbered as follows:

Exhibit 1	8/17/23 Memorandum of Inspection	HC001
Exhibit 2	7/24/23 Complaint with pictures	HC005
Exhibit 3	8/9/23 Inspection Report with pictures	HC008
Exhibit 4	Second 8/9/23 Inspection Report	HC033

B. Exhibits were submitted by the Licensee, labeled as follows:

A. Licensee’s Written Response to 08/08/23 Inspection Report

C. Sworn testimony was received from:

1. Sandra Hodgdon, OPLC Chief Board Inspector (called by Hearing Counsel)
2. Tracy Nguyen, Licensee and shop owner (called by Licensee)

Exhibits were fully admitted by the Presiding after a prehearing conference.

IV. CONDUCT OF THE HEARING AND EVIDENCE PRESENTED:

The hearing was held pursuant to RSA 310:10 with the burden of proof, by a preponderance of the evidence, placed upon Hearing Counsel. *See* Rule 206.07(e). The issues before the Board were:

- (1) Whether or not the Licensee violated RSA 313-A:22, II(c), RSA 313-A:22, II(d), and/or RSA 313-A:22, II(i) (see Rules 302.05, 302.07, 501.01, 501.02) by allegedly operating a shop with one or more of the related sanitation, health, and/or safety violations, as set out in the inspection report and/or memorandum dated 8/9/2023.

- (2) Whether or not the Licensee violated RSA 313-A:22, II(c) and/or RSA 313-A:22, II(i) (see Rules 302.07, 404.01, 501.01, 501.02, RSA 313-A:17, and/or RSA 313-A:9) by allegedly operating a shop with one or more of the related licensing violations, as set out in the inspection report and/or memorandum, dated 8/9/2023.
- (3) If the Board makes a finding of misconduct pursuant to issues 1 and/or 2 above, whether and to what extent the Licensee should be subject to discipline pursuant to RSA 313-A:22, III, Bar 402, Bar 404, and/or RSA 310:12.
- (4) If the Board makes a finding of misconduct pursuant to issue 1 and/or 2 above, whether and to what extent the Board should adjust the administrative fine amount on account of any aggravating or mitigating factors pursuant to Bar 404.11 (see RSA 313-A:22, II(g)).

NOH at II(c).

The Board then heard evidence related to these inquiries as summarized below.

HEARING COUNSEL'S CASE-IN-CHIEF:

Sandra Hodgdon, OPLC Chief Board Inspector:

Sandra Hodgdon testified that after receiving a consumer complaint in late July of 2023, she conducted an inspection of Polished Nail's location in August of 2023 and assessed 2,705 violation points. According to her testimony, the complaint alleged the complainant had nails applied at the Licensee's shop and when she had them removed there was something green underneath some of the nails. Ms. Hodgdon next testified to the various sanitation, hygiene, and safety issues she noted during her inspection. Additionally, she mentioned that she found three licenses not displayed, an expired license, and three licenses without a photograph attached. Ms. Hodgdon's testimony also revealed that she found a bag of unused rasps, one rasp that she described as used, and one bottle of Methyl Methacrylate powder. Ms. Hodgdon explained that while leaving she issued a second inspection report because she saw the front desk receptionist taking nail polish off a client, and she was not licensed.

On cross examination, Ms. Hodgdon agreed that there was no handle on the one used rasp she found on site.

LICENSEE’S CASE-IN-CHIEF:

Tracy Nguyen, shop owner and Licensee

The Licensee reviewed Exhibit A with the Board, which provides her responses to the various allegations in Ms. Hodgdon’s two inspection reports. The Licensee denied that the front desk personnel was sitting down and doing anyone’s nails. The Licensee also clarified that the rasps and sandals Ms. Hodgdon found in the back of the shop were not used on customers. She said that the sandals were dirty because they were in the back and never used. She also explained that the logs for the business that Ms. Hodgdon could not find were on the table and everyone worker also has one in the drawer near their station.

On cross examination, the Licensee testified she has been a cosmetologist for 18 years.

V. DISCUSSION, FINDINGS OF FACTS, AND CONCLUSIONS OF LAW:

After reviewing all the evidence and considering the presentation and demeanor of all the witnesses, the Board makes the following findings of facts:

- a. The Licensee holds an active Manicurist and Esthetician license and a now expired shop license for Polished Nails and Spa.
- b. On July 24, 2023, the OPLC received a complaint alleging health and sanitation issues resulting in the complainant stating her daughter contracted a nail fungus after a manicure. Chief Inspector Sandra Hodgdon conducted an investigation which included an inspection on August 9, 2023.
- c. The inspection found numerous sanitation violations as well as a few licensing violations. One of the licensing violations cited the unlicensed receptionist performing services on a customer.
- d. The unlicensed receptionist was observed removing nail polish from a customer.
- e. The inspector also noted a box of unused rasp files in addition to 2 rasp files that had been used.

Based upon the findings of fact made by the Board, the Presiding Officer makes the following conclusions of law:

1. Hearing Counsel established, by a preponderance of the evidence, that the Licensee engaged in professional misconduct as defined at RSA 313-A:22, II(c), RSA 313-A:22, II(d), and RSA 313-A:22, II(i) (*see* Rules 302.05, 302.07, 501.01, and 501.02) by operating a shop with the sanitation, health, and safety violations set out in the inspection report dated 8/9/2023.
2. Hearing Counsel established, by a preponderance of the evidence, that the Licensee engaged in professional misconduct as defined at RSA 313-A:22, II(c) and RSA 313-A:22, II(i) (*see* Rules 302.07, 404.01, 501.01, 501.02, RSA 313-A:17, and RSA 313-A:9) by operating a shop with the licensing violations set out in the inspection report dated 8/9/2023.
3. Hearing Counsel did not establish, by a preponderance of the evidence, that the Licensee should be subject to discipline pursuant to RSA 313-A:22, III, Bar 402, Bar 404, and/or RSA 310:12. The findings of fact and evidence presented do not establish willful or repeated violations of the provisions of RSA 313-A.

Upon a finding of misconduct made pursuant to RSA 319-C:12, II, the Board imposes the following disciplinary action against the Licensee:

- A. Pursuant to RSA 310:12, I(a), the Licensee is **REPRIMANDED**.
- B. Pursuant to RSA 310:12, I(d)(1), the Licensee's shop and personal licenses (#5079 and #18948) are placed on **PROBATION** for a period of two years, starting from the below signed date of this order. Any violation of the Board's rules relating to sanitation and hygiene over 100 points within the probationary period shall constitute misconduct pursuant to RSA 313-A:22, and a separate and sufficient basis for further disciplinary action by the Board against the Licensee shop and shop owner.
- C. Pursuant to RSA 310:12, I(d)(2), the Board directs the Licensee shop owner, Tracy Nguyen, to participate in and successfully complete 10 hours of program(s) of **CONTINUING EDUCATION** in the areas of in sanitation and disinfection control (including at least 3 hours addressing first aid) within 90 days of the below signed date of this order. To document successful completion of the course(s), the Licensee shall provide the Board with written documentary proof issued/authored by the program offering the course(s). Whether any program(s) meets the requirements of this section shall be determined by the Board. Therefore, the Licensee is strongly encouraged to seek the Board's pre-approval of program(s) before taking them. The Board has authorized the Board's Chair to pre-approve courses on its behalf, so that the Licensee does not have to wait until a meeting to learn whether coursework he or she wishes to take is acceptable. The Licensee can submit information about proposed programs to the Hearings Clerk (hearingsclerk@oplcnh.gov) and Board Administrator (Teresa.A.Boyer@oplcnh.gov), who shall present same to the Board Chair for determination.
- D. Pursuant to RSA 310:12, I(d)(1), the Licensee is subject to a **PROBATIONARY REINSPECTION**, following completion of the continuing education coursework or expiration of the period for taking the continuing education coursework.

- E. Pursuant to RSA 310:12, I(e), the Board assesses against the Licensee an **ADMINISTRATIVE FINE** in the amount of \$2,450.00 payable to the State of New Hampshire through the Office of Professional Licensure and Certification within 45 days of the signed date of this order.
- F. Pursuant to RSA 332-G:11, the Board assesses the Licensee the reasonable **COSTS OF INVESTIGATION** in the amount of \$250.00 payable to the State of New Hampshire through the Office of Professional Licensure and Certification within 45 days of the signed date of this order.

VI. CONCLUSION AND DECISION:

Pursuant to RSA 310:10 and RSA 310:12, the Presiding Officer hereby makes the findings of professional misconduct noted herein and the Board administers the discipline outlined above.

DATED: 4/25/2024

_____/s/ Nikolas K. Frye, Presiding Officer_____
Nikolas K. Frye, Administrative Law Judge
New Hampshire Office of
Professional Licensure & Certification
7 Eagle Square
Concord, NH 03301