

Before the
N. H. Board of Barbering, Cosmetology and Esthetics
Concord, New Hampshire

In the matter of:

Hai Phuoc Tran
Manicuring License #17601
(Professional Misconduct Disciplinary Proceeding)

Docket No. 2009-02

DECISION AND ORDER

By the Board Leanne Lummis, Chair, Gary Trottier, Kathleen Humes, Kay Hoyt,
David Caron, Louise Lavertu, & Holly Manning. Board Members.

Appearances: Hai Phuoc Tran, Licensee
James Moyer, Esq., Respondent's Counsel
Catherine Bernhard, Esq., Senior Assistant Attorney General, Hearing Counsel
Sean Ford, Detective, Concord Police Department, Witness

BACKGROUND

On December 15th 2009 the New Hampshire Board of Barbering, Cosmetology, and Esthetics ("the Board") issued a Notice of Hearing commencing a public disciplinary proceeding to determine whether Hai Phuoc Tran ("the Respondent") had violated RSA 313-A:8, 313-A:18, 313-A:22, RSA 541-A and Barbering, Cosmetology and Esthetics Administrative Rules ("Bar") 102.01, 201 and 217.

As set forth in the Notice of Hearing the purpose of the hearing was to determine whether Respondent committed professional misconduct by virtue of a conviction of the misdemeanor crime of sexual assault. The hearing was scheduled for February 1, 2010.

On February 1, 2010, the Board held an adjudicatory/disciplinary hearing. Through Detective Ford, Hearing Counsel introduced three exhibits:

- Exhibit 3, the transcription of a one-party intercept between the Respondent and the victim, coordinated by Detective Ford, who was trained in one-party intercepts and who testified at the Respondent's criminal trial.
- Exhibit 1, which contained an Information that alleged that the Respondent did commit the crime of sexual assault contrary to RSA 632:4,I(a).
- Exhibit 2, which contained a Return from the Superior Court, which stated that the Respondent was found guilty of the crime after a jury trial. Included in the Respondent's sentence was to serve in the House of Corrections for 12 months, and he was ordered to obtain a psycho-sexual evaluation.

The Respondent introduced one exhibit: the psychosexual evaluation required by his sentence.

At the hearing, the Respondent did not contest that he was convicted of the misdemeanor crime of sexual assault in contrary to RSA 632-A:4, I. The Respondent proved that the Grand Jury

had met and passed multiple counts by information but that he was “only” convicted of the one. The Respondent’s main claim of defense was that the misdemeanor crime of sexual assault was not an “offense involving moral turpitude” according to RSA 313-A:22.

The Respondent provided the Board with a copy of the psychosexual evaluation to prove that he is not a threat to customers or the public. In response to questions by the Board and Hearing Counsel, the Respondent could not articulate how he would avoid boundary violations in the future or what meaningful actions he would take in order to avoid the situation that led up to the events underlying the conviction.

The Board left the record open for the Respondent to submit a plan that would assure the Board that he would not repeat the behavior/actions that led to the convictions. Hearing Counsel responded to this submission.

DISCUSSION

The Respondent was the owner of Queen Nails, located in Concord, New Hampshire. The Respondent holds a manicurist license and worked as a manicurist in his nail salon. Most of the Respondent’s clients are women.

The victim, J.J., was a client of the Respondent, whom the Respondent knew through his practice as her manicurist. On the day in question, J.J. and the Respondent were at Queen Nails, it was after hours and the Respondent locked the door to the salon. According to the Information for which the Respondent was convicted (08-S-147):

1. [The Respondent] engaged in sexual contact with [J.J.];
 - a. By intentionally putting [J.J.]’s hand on his penis;
 - b. This contact can reasonably be construed as being for the purpose of sexual arousal or gratification;
2. [J.J.] indicated by speech and/or conduct that she did not freely consent to the performance of the sexual act.
3. [The Respondent] committed this offense purposely.

The Board’s Administrative Rule Bar 102.01 states: “The board shall administer the provisions of RSA 313-A, which include but are not limited to safeguarding life, health, and property, to promoting public welfare and maintaining a high standard of integrity regarding the practice of barbering, cosmetology, esthetics, and manicuring in this state.” Bar 102.01

The Board’s practice act states that the Board may undertake disciplinary proceedings. It further states that “[m]isconduct sufficient to support disciplinary proceedings under this section shall include: **Conviction of a felony or any offense involving moral turpitude.**” RSA 313-A:22, II(b) (emphasis added).

FINDINGS OF FACT

- 1) The Board granted the Respondent a license to practice in the State of New Hampshire as a manicurist.

- 2) The Respondent is the holder of Manicuring License #17601.
- 3) In 2008, the Respondent practiced as a manicurist at Queen Nails, which he was the owner of, located at 239 Loudon Road in Concord, N.H.
- 4) On or about October 14th, 2009, the Respondent notified the Board of his conviction of a misdemeanor for sexual assault when applying for renewal of his manicurist license.
- 5) The Respondent was convicted of misdemeanor sexual assault on July 20th, 2009 in the Merrimack County Superior Court (Docket number 08-S-1467).
- 6) The Respondent perpetrated the sexual assault on the premises of Queen Nails, his manicuring salon on August 12th, 2008.
- 7) A conviction of sexual assault on a client in a salon is an offense involving moral turpitude pursuant to RSA 313-A, 22, II.
- 8) The victim of the crime was a client known to the Respondent through his practice as a manicurist.
- 9) The Respondent was sentenced after this conviction on July 20, 2009. The sentence included a provision that respondent is to have no contact with the victim and that the Respondent undergo a psychosexual evaluation.
- 10) The psychosexual evaluations contains the following analysis:
 - (page 4) Thought Dysfunction: [The Respondent] reports significant persecutory ideation such as believing that others seek to harm him. He is likely to be suspicious of and alienated from others, to experience interpersonal difficulties as a result of suspiciousness, and to lack insight.
 - (page 6) Profile Severity: On the basis of the test data, it may be assumed that [the Respondent] is experiencing a severe mental disorder.
 - (page 6) Possible Diagnoses: [The Respondent] appears to fit the following Axis II classifications best: Paranoid Personality Disorder, and Depressive Personality Disorder, with Schizoid Personality Traits, and Negativistic (Passive-Aggressive) Personality Features.
- 11) The Respondent's testimony and his submitted plan fail to explain how he will conduct his conversation and behavior in a professional manner so as not to repeat the type of boundary violations that occurred with [J.J.] and led to the conviction for sexual assault.

RULINGS OF LAW

- 1) The Board may to undertake disciplinary action against a licensee. RSA 313-A:22, I.

- 2) Misconduct sufficient to support disciplinary proceedings includes any unprofessional conduct or dishonorable conduct unworthy of, and affecting the practice of the profession. RSA 313-A:22, II(c).
- 3) The Respondent's conviction of sexual assault on a client in his salon is a violation of RSA 313-A:22, II (c).
- 4) Misconduct sufficient to support disciplinary proceedings includes a conviction of any offense involving moral turpitude. RSA 313-A:22, II (b).
- 5) The Respondent's conviction of sexual assault on a client in his salon is a violation of RSA 313-A:22, II (b).

CONCLUSION

The Board has authority to undertake disciplinary action against a licensee, after a hearing and a finding that the licensee has committed misconduct as described above or has engaged in acts that pose a threat to public health or safety. RSA 313-A:22; Bar 402.01.

The Board has determined that the Respondent engaged in professional misconduct by virtue of the criminal conviction of the misdemeanor crime of sexual assault.

The Board read the Psychosexual Evaluation of the Respondent as ordered by the Court. The Board also notes that the Respondent's sentence states that he "is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer." The Board concluded that the Respondent would need to have ongoing counseling with a licensed psychologist, clinical social worker, or clinical mental health counselor licensed by the New Hampshire Board of Mental Health Practice or a licensed psychologist licensed by the New Hampshire Board of Medicine. Such counseling must address the issues of sexual boundaries as well as the broader issue of professional boundaries so that the Respondent clearly understands the behavior requirements of a licensed professional manicurist.

The Board determined a Fit-for-Duty report is required stating the Respondent no longer has sexual and other professional boundary issues. The Board will require a release letter from the same clinician stating that the Respondent is no longer a threat to public safety.

The Board has concluded that at such time that the Respondent petitions the Board for reinstatement of his license, any license granted by the Board shall be restricted to employee status only – in other words, no shop ownership will be granted and that if any future license is to be granted, it will have the condition that the Respondent will always be supervised by another licensee.

DISCIPLINARY ACTION

THEREFORE, IT IS ORDERED, that Respondent's manicurist license shall be suspended for a period of no less than 2 years.

IT IS FURTHER ORDERED, that the Respondent will not be reinstated until such time as the Respondent can satisfy the Board that he no longer constitutes a threat to any customers, himself, or others.

IT IS FURTHER ORDERED, that Respondent obtain ongoing counseling with a licensed psychologist, clinical social worker, or clinical mental health counselor licensed by the New Hampshire Board of Mental Health Practice or a licensed psychologist licensed by the New Hampshire Board of Medicine ("Counselor"). Such counseling must address the issues of sexual boundaries and all professional boundaries as well as the Respondent's suicidal tendencies. The Respondent is required to submit a "fit-for-duty report" by such a licensee who has counseled the Respondent for a period of at least one year, minimally four visits, prior to petitioning the Board for reinstatement of licensure.

IT IS FURTHER ORDERED, that if the Respondent is reinstated, he shall submit evaluations from a treating Counselor on a quarterly basis for a period of five years or until such time the Board orders such reports are no longer necessary. Said evaluations shall include the assurance that the Respondent poses no ongoing threat to his customers, himself or others.

IT IS FURTHER ORDERED, that if the Respondent is reinstated, his license would contain the following conditions/restrictions including but not limited to:

1. The Respondent shall not own any shop as defined by RSA 313-A:19;
2. The Respondent shall not be a manager of any shop as defined by RSA 313-A:19;
3. The Respondent shall have direct supervision at all times from another Board licensed manicurist or cosmetologist; and
4. The Respondent obtain ongoing therapy to address the specific concerns raised in the psychosexual evaluation.

IT IS FURTHER ORDERED, that the burden of proof for establishing compliance with the Board's Order shall be on the Respondent. The Respondent shall bear all costs of any counseling, treatment, or reporting required by this Order, but he shall be permitted to share such costs with third parties

IT IS FURTHER ORDERED, that the Respondent's failure to comply with any terms or conditions imposed by this Order shall constitute unprofessional misconduct pursuant to RSA 313-A:22, II (c), and a separate and sufficient basis for further disciplinary action against the licensee.

IT IS FURTHER ORDERED, that this Order shall become a permanent part of the Respondent's file, which is maintained by the Board as a public document.

IT IS FURTHER ORDERED, that within thirty (30) days of the effective date of this Order, the Respondent shall furnish a copy of this Order to any current employer for whom the Respondent performs services as a manicurist and/or esthetician, and to any agency or authority which licenses or certifies manicurists and/or estheticians, with which the Respondent is presently affiliated, in this State or any other jurisdiction.

IT IS FURTHER ORDERED, that for a continuing period of two (2) years from the effective date of this Order, the Respondent shall furnish a copy of this Order to any employer to which the

Respondent may apply for work as a manicurist and/or esthetician, and to any agency or authority which licenses or certifies manicurists and/or estheticians, in this State or any other jurisdiction.

IT IS FURTHER ORDERED, that this Order shall take effect as an Order of the Board on the date an authorized representative of the Board signs it.

BY ORDER OF THE BOARD

Date 5/17/10



Leanne Lummis
Board Chairperson