

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

In the matter of:

Phung Truong
Manicuring License #13205
(Adjudicatory/Disciplinary Proceeding)

Docket No. 2010-01

DECISION AND ORDER

By the Board: Leanne Lummis, Chair.
Gary Trottier, Kathleen Humes, Aaron Losier, Holly Manning. Board Members.

Appearances: Laurel O'Connor, Hearing Counsel
Kathryn Wantuck, Executive Director for the Board
Margaret Gomes, Board Inspector

BACKGROUND

On October 7, 2010 the New Hampshire Board of Barbering, Cosmetology, and Esthetics ("the Board") issued a Notice of Hearing commencing a public disciplinary proceeding to determine whether Phung Truong ("the Respondent") had violated RSA 313-A:22 II (c), RSA 541-A and Barbering, Cosmetology and Esthetics Administrative Rules ("Bar") 501.02 (e).

As set forth in the Notice of Hearing the purpose of the hearing was to determine whether Respondent violated, among other violations, RSA 313-A:22 II (c) and Bar 501.02 (e) by failing to maintain his shops, A+ Princess Nails and OK Nails, in a sanitary and hygienic manner.

The Notice of Hearing noticed the hearing for November 8, 2010 at 9:30 a.m. Indeed, on November 8, 2010, the hearing was held *in absentia* given that Mr. Truong did not appear at the scheduled time of 9:30 a.m. After the hearing was concluded, the Board deliberated the merits of the hearing and voted on findings. Shortly before 10:30 a.m., Mr. Truong appeared at the Board's office. Mr. Truong appeared with Nini Thach. See adjudicatory/disciplinary proceeding of Nini

Thach, Manicuring and Esthetics License #14706, Docket No. 2010-02, Decision and Order dated February 7, 2011. Mr. Truong spoke at Ms. Thach's hearing, in part testifying, in part helping and/or speaking for Ms. Thach.¹

Kathryn Wantuck, the Board's Executive Director, testified at the hearing. Ms. Wantuck testified that the Board's Office mailed the Notice of Hearing to the Respondent by certified mail. She further testified that the United State's Postal Service card indicated that Christine Truong signed for this mail on October 9, 2010.

Eight exhibits were introduced at the hearing:

- Exhibit 1, Shop Inspection Form for A+ Princess Nails Spa dated May 8, 2009.
- Exhibit 2, Shop Inspection Form for A+ Princess Nails Spa dated June 2, 2010.
- Exhibit 3, Shop Inspection Form for OK Nails dated March 24, 2004.
- Exhibit 4, Shop Inspection Form for OK Nails dated June 10, 2005.
- Exhibit 5, Shop Inspection Form for OK Nails dated April 30, 2009.
- Exhibit 6, Shop Inspection Form for OK Nails dated February 6, 2010.
- Exhibit 7, Shop Inspection Form for OK Nails dated May 26, 2010.
- Exhibit 8, Shop Inspection Form for OK Nails dated September 10, 2010.

Background Narrative

The Board has the authority to grant manicuring licenses. See RSA 313-A:12. In 2001, the Board granted the Respondent a license to practice manicuring in the State of New Hampshire. The

¹ At the end of Ms. Thach's hearing, Mr. Truong noted that he had received the Notice of Hearing and questioned whether he should return that afternoon. The Board informed Mr. Truong that the Notice of Hearing had stated that his hearing was scheduled for 9:30 a.m. and that the hearing was held without his presence. Mr. Truong did not appear to be surprised to learn that his hearing was scheduled for 9:30 a.m. He did not object to it having occurred in his absence, he did not make any requests concerning his own hearing, and he did not question its outcome.

Respondent holds manicuring license #13205. The manicuring license is the Respondent's personal license.

The Board has the authority to grant shop licensure in accordance with RSA 313-A:19. Pursuant to this authority, the Board may grant shop licensure to an individual who is the owner of the shop if this individual has a personal license as a barber, cosmetologist, manicurist or esthetician. See RSA 313-A:19, II. The Board also has the authority to grant shop licensure to an individual/owner who does not have a personal license, if the shop has a manager who has had a personal license for at least one year. See RSA 313-A:19, III. Indeed, where the owner does have a personal license, s/he may still employ a manager with a qualifying personal license.

The Board employs inspectors. See RSA 313-A:21. At least twice a year, the inspectors are "to enter and make reasonable examination and inspection of any salon ... during business hours for the purpose of ascertaining whether or not the administrative rules of the board and the provisions of this chapter are being observed." See RSA 313-A:21, I and III. If the inspector finds violations, the inspector may impose administrative fines. See RSA 313-A:8, XVII; 313-A:22, III; Bar 404.09; Bar 404.10. For each inspection, the inspector must file a written report of his/her findings. See RSA 313-A:21, I.

Inspector Margaret Gomes testified at the hearing. Inspector Gomes has thirteen years of experience as an inspector for the Board. Through Inspector Gomes, Hearing Counsel introduced 8 Exhibits. All eight were inspection reports. These reports are the current reports used by Board Inspectors to conduct shop inspections. Inspector Gomes testified to the date of each inspection, the fines issued for each inspection, and the reason for such fines.

A+ Princess Nails Spa, Inc.

On May 8, 2009, a Board Inspector inspected A+ Princess Nails Spa, Inc. (“A+”). See Exhibit 1. The Respondent was the owner of A+ at this time.² The inspector found, among other violations, that several tables need to be cleaned and powder dust was everywhere. The inspector further found that implements and/or supplies were not being sanitized, maintained, or discarded properly. The inspector imposed a \$239 fine.

On June 2, 2010, a Board Inspector inspected A+. See Exhibit 2. The Respondent was the owner of A+ at this time. The inspector found, among other violations, several implements and/or supplies that were not cleaned, sanitized, or stored properly. Moreover, the inspector found that some implements were not discarded after use. The inspector imposed a \$168 fine.

OK Nails

On March 24, 2004, a Board Inspector inspected OK Nails. See Exhibit 3. The Respondent was the manager of OK Nails at this time.³ The inspector found, among other violations, that several implements and/or supplies were not sanitized or store properly. Additionally, the inspector found that four employees were using methyl methacrylate⁴ (“MMA”). See Bar 302.07 (g)(1) (“A licensee shall not apply methyl methacrylate (MMA) monomer on a person.”). The inspector also found an unlicensed individual was working in the shop. See RSA 313-A:9, II (b) (“It shall be a misdemeanor for any person to hire or employ any person to engage in a practice regulated by this

² Nini Thach was the manager. See Docket 2010-02, Decision and Order.

³ Nini Thach was the owner. See Docket 2010-02, Decision and Order.

⁴ In 1974, the Food and Drug Administration (“FDA”) identified MMA as a hazardous and injurious substance. According to FDA guidelines, MMA is not approved for, and may not be used in, the application of artificial nails. The FDA also prohibited its use as an adhesive in cosmetic nail products.

chapter, unless such person then holds a valid license or a temporary permit issued by the board to practice the respective profession.”)⁵; see also Bar 404.09(h). The inspector imposed a \$548 fine.

On June 13, 2005, a Board Inspector inspected OK Nails. See Exhibit 4. The Respondent was an employee of OK Nails at this time.⁶ The inspector found, among other violations, that the salon was filthy. The inspector warned that the paraffin wax pots were “disgustingly filthy.” She recorded that the pedicure tubs were neither being cleaned or disinfected before each use nor at the end of each day. Finally, the inspector found that credo blades were being used to remove calluses.⁷ See Bar 307.02 (g)(4) (“A licensee shall not use a blade to remove any corns, callouses (sic) or skin.”). The inspection sheet states that the salon “requires a follow up [inspection] ASAP – whole salon needs thorough cleaning and sanitizing.” The inspector imposed a \$3,875 fine.

On April 30, 2009, a Board Inspector inspected OK Nails. See Exhibit 5. The Respondent was an employee of OK Nails at this time.⁸ The inspector found, among other violations, that the salon was dirty overall and needed a thorough cleaning. She “noticed [that a] nail brush was used to clean pedi[cure] chairs, also noticed nail clippings and sludge from screens.” The inspector further found that implements and supplies were not being cleaned or sanitized properly. The inspector “found credo blade hidden in drawer and blades (about 4) in trash. See Bar 307.02 (g)(4) (“A licensee shall not use a blade to remove any corns, callouses (sic) or skin.”). The inspector imposed a \$2,132 fine.

On February 6, 2010, a Board Inspector inspected OK Nails. See Exhibit 6. The Respondent was the owner of OK Nails. The inspector found, among other violations, that an unlicensed individual was working in the shop. See RSA 313-A:9, II (b) (“It shall be a

⁵ See also RSA 313-A:9, I (“It shall be a class A misdemeanor for any natural person, and a felony for any other person, to engage in any practice regulated by this chapter without the appropriate license.”).

⁶ Nini Thach was the owner. See Docket 2010-02, Decision and Order.

⁷ See Exhibit 4 (“3 plastic handled credo blade holders. 7 metal heads for credo blades. 1 razor blade.”).

⁸ Nini Thach was the owner. See Docket 2010-02, Decision and Order.

misdemeanor for any person to hire or employ any person to engage in a practice regulated by this chapter, unless such person then holds a valid license or a temporary permit issued by the board to practice the respective profession.”)⁹; see also Bar 404.09(h). The inspector also observed that several staff had not washed their hands between customers. See Bar 302.07(a) (“Each licensee shall wash his/her hands immediately before attending to a patron.”). The inspector imposed a \$537 fine.

On May 26, 2010, a Board Inspector inspected OK Nails. See Exhibit 7. The Respondent was the owner of OK Nails. The inspector found, among other violations, that the salon was dirty and needed a thorough cleaning and sanitizing. The inspector also found that over one hundred implements and/or supplies were not being cleaned, sanitized or stored properly. The inspector imposed a \$1,463 fine.

On September 10, 2010, two Board Inspectors inspected OK Nails. See Exhibit 8. The Respondent was the owner of OK Nails. The inspectors found, among other violations, that the salon was extremely dirty and unsanitary. They found at least one unlicensed individual working on a client. They found used buffing sponges, used clippers and used drill tips put back in drawers. The inspectors further found that there had been no change since the May 2010 inspection. The inspectors imposed a \$1,238 fine.

Findings of Fact

The Board took into consideration all exhibits. The exhibits presented showed the multiple fines to each shop. The fines listed were issued for the sanitation violations of implements not being properly discarded, sanitized, or maintained, manicuring tables not cleaned, nail clippers and trimmers not sanitized and stored properly, pedicure tubs not cleaned

⁹ See also RSA 313-A:9, I (“It shall be a class A misdemeanor for any natural person, and a felony for any other person, to engage in any practice regulated by this chapter without the appropriate license.”).

and disinfected, and filthy paraffin wax pots. The shops were also fined for the floors, walls, woodwork, and furniture not cleaned as required. Different Board Inspectors listed on separate inspection reports that the salons owned or managed by the Respondent, were in need of a thorough cleaning and sanitizing.

In addition to making a specific finding that the above Background Narrative was true, the Board found that the fines listed also included expired licenses, unlicensed individuals found working, MMA violations, lack of certification for nail drills, lack of MSDS Sheets, shop license not displayed, inspection report not displayed, lack of record of disinfecting pedicure tubs, unauthorized use of credo blades, and licensees not washing their hands prior to each client.

Hearing Counsel proposed 26 findings of fact. All the findings of fact are granted. However, to the extent there is a contradiction between Hearing Counsel's proposed findings of fact and this order, the above Background Narrative and these Findings of Fact control.

Rulings of Law

The Board makes the following rulings of law:

- The Board may undertake disciplinary proceedings against its licensees. See RSA 313-A:22. If the Board sufficient misconduct pursuant to subsection II, it may impose disciplinary action pursuant to subsection III. See RSA 313-A:22.
- On May 8, 2009, the Respondent violated RSA 313-A:22, II (c) by failing to maintain A+ in a sanitary and hygienic manner.
- On May 8, 2009, the Respondent violated and Bar 501.02 (e) by failing to maintain A+ in a sanitary and hygienic manner.
- On June 2, 2010, the Respondent violated RSA 313-A:22, II (c) by failing to maintain A+ in a sanitary and hygienic manner.

- On June 2, 2010, the Respondent violated BAR 501.02 (e) by failing to maintain A+ in a sanitary and hygienic manner.
- On February 6, 2010, the Respondent violated RSA 313-A:22, II (c) by failing to maintain OK Nails in a sanitary and hygienic manner.
- On February 6, 2010, the Respondent violated BAR 501.02 (e) by failing to maintain OK Nails in a sanitary and hygienic manner.
- On February 6, 2010, the Respondent violated RSA 313-A:22, II (c) by having a person working who was not duly licensed.
- On February 6, 2010, the Respondent violated BAR 501.02 (h) by having a person working who was not duly licensed.
- On May 26, 2010, the Respondent violated RSA 313-A:22, II (c) by failing to maintain OK Nails in a sanitary and hygienic manner.
- On May 26, 2010, the Respondent violated BAR 501.02 (e) by failing to maintain OK Nails in a sanitary and hygienic manner.
- On September 10, 2010, the Respondent violated RSA 313-A:22, II (c) by failing to maintain OK Nails in a sanitary and hygienic manner.
- On September 10, 2010, the Respondent violated BAR 501.02 (e) by failing to maintain OK Nails in a sanitary and hygienic manner.
- On September 10, 2010, the Respondent violated RSA 313-A:22, II (c) by having a person working who was not duly licensed.
- On September 10, 2010, the Respondent violated BAR 501.02 (h) by having a person working who was not duly licensed.

- Between May 2009 and September 2010, the Respondent violated RSA 313-A:22, II (g) by willful or repeated violations of the provisions of RSA 313-A.
- Hearing Counsel proposed 2 Rulings of Law:
 - To the extent the first proposed ruling of law was not noticed in the October 7, 2010, Notice of Hearing it is denied. The Board finds that the Respondent committed professional misconduct in “negligent [and] willful acts performed in a manner inconsistent with the health or safety of persons relying on the expertise of the licensee.” RSA 313-A:22, II(d). As it was not contained in the notice of hearing, the Board does not find a violation of this statute. Likewise for Bar 501.01(b). The Board makes this finding as indicia of the severity of the Respondent’s actions, but not for the purposes of any sanctions.
 - The second proposed ruling of law is granted as discussed above.

DISCUSSION AND 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 failing to maintain his salon premises, A+ Princess Nails and OK Nails in a sanitary and hygienic manner. The Board relied on the exhibits presented as evidence and testimony given by a State Inspector with thirteen years of experience to conclude that the Respondent violated sections RSA 313-A and Bar 500 for failure to maintain his salon premises in a sanitary and hygienic manner. The fines imposed at each inspection demonstrate a repeated, willful violation of the Board’s Administrative Rule requirements for proper sanitation. The fines imposed were repeated and

increased over time. At some point, the Respondent began a payment plan with the Board's office and although he continues to make payments, he continues to violate the rules and incur even greater fines to add to his installment plan.

The Board concluded that these repeated violations are evidence that the Respondent does not wish to correct the sanitation issues he was instructed to correct at every inspection. The Board concludes that any continuing sanitation education would not benefit the Respondent for he willfully disregarded the Board's Administrative Rules. The numerous sanitation violations over several years and the Respondent's lack of attendance at the hearing conveyed a lack of respect for the rules of the Board. Therefore, the Board concludes revocation of licensure is necessary to ensure the safety and health of the public from these continued unsanitary practices.

DISCIPLINARY ACTION

THEREFORE, IT IS ORDERED, that Respondent's manicurist license shall be revoked.

IT IS FURTHER ORDERED, that the Respondent shall not manage any shop as defined by RSA 313-A:19. To the extent that any shop currently employs the Respondent as its manager, it must name a new manager within 30 days of the effective date of this order.

IT IS FURTHER ORDERED, that the Respondent shall pay all fines/monies owed to the Board within 90 days of the effective date of the order in a single payment by certified bank check or postal money order payable to the "Treasurer State of NH". Failure to pay these fines shall additional legal/collection proceedings including court proceedings necessary to enforce this obligation. The Board may petition a court of appropriate jurisdiction to assess the Respondent with all costs including reasonable legal fees and accrued interest at the prevailing government rate.

IT IS FURTHER ORDERED, that due to oversight by Hearing Counsel (who drafted the Notice of Hearing) and the Board (who voted to issue it) the subject of the disciplinary hearing was only

the Respondent's personal manicurist license. (a) Accordingly, the Respondent shall not own any shop as defined by RSA 313-A:19 - meaning that any future shop license application that is submitted to the Board, where the Respondent is the owner, shall automatically be denied as a result of this order; and (b) Accordingly, Hearing Counsel is directed to initiate adjudicatory proceedings against OK Nails (Shop license #2421) and A+ (Shop license #2839) within 60 days.

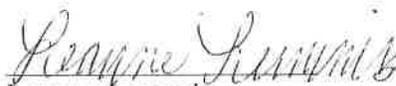
IT IS FURTHER ORDERED, that this Order shall become a permanent part of the Respondent's file, which is maintained by the Board as a public document.

IT IS FURTHER ORDERED, that 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

Jan 3, 2011


Leanne Lummis
Board Chairperson