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

In the matter of:

Nini Thach
Manicuring License #14706
(Adjudicatory/Disciplinary Proceeding)

Docket No. 2010-02

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
Maragret 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 Nini Thach ("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 her 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 10:30 a.m. Nini Thach appeared with Phung Truong. See adjudicatory/disciplinary proceeding of Phung Truong, Manicuring License #13205, Docket No. 2010-02, Decision and Order dated January 3, 2011. Mr. Truong spoke at Ms. Thach's hearing, in part testifying, in part helping and/or speaking for Ms. Thach. After the hearing concluded and the record was closed, the Board notified the Respondent

that they would deliberate on the matter. The Respondent opted not to remain for the public deliberations.

Hearing Counsel introduced six (6) exhibits at the hearing:

- Exhibit 1, Shop Inspection Form for OK Nails dated March 24, 2004.
- Exhibit 2, Shop Inspection Form for OK Nails dated June 10, 2005.
- Exhibit 3, Shop Inspection Form for OK Nails dated April 30, 2009.
- Exhibit 4, Shop Inspection Form for VIP Salon & Spa dated November 29, 2006.
- Exhibit 5, Shop Inspection Form for A+ Princess Nails Spa dated May 8, 2009.
- Exhibit 6, Shop Inspection Form for A+ Princess Nails Spa dated June 2, 2010.

HEARING TESTIMONY

I. Hearing Counsel's Case

The Board has the authority to grant manicuring licenses. See RSA 313-A:12. On August 15, 2002, the Board granted the Respondent a license to practice manicuring in the State of New Hampshire. The Respondent holds manicuring license #14706. The manicuring license is the Respondent's personal license.

The Board also has the authority to grant esthetics licenses. See RSA 313-A:13. On January 6, 2005, the Board granted the Respondent a license to practice esthetics in the State of New Hampshire. The Respondent holds manicuring license #14706.[1] The esthetics license is likewise 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

[1] A licensee's personal license number remains constant when licensed for the Board's various disciplines (e.g. Barbering, Cometology, or Esthetics).

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 six (6) Exhibits. All six 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.

OK Nails

On March 24, 2004, a Board Inspector inspected OK Nails. See Exhibit 1. The Respondent was the owner of OK Nails at this time.[2] 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 methacrylate[3] ("MMA"). See Bar 302.07 (g)(1) ("A

[2] Phung Truong was the manager. See Docket 2010-01, Decision and Order.

[3] 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.

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 chapter, unless such person then holds a valid license or a temporary permit issued by the board to practice the respective profession.")[4]; see also Bar 404.09(h). The inspector imposed a $548 fine.

On June 13, 2005, a Board Inspector inspected OK Nails. See Exhibit 2. The Respondent was the owner of OK Nails at this time.[5] 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.[6] 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 3. The Respondent was the owner of OK Nails at this time. 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.

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[4] 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.").
[5] Phung Truong was an employee. See Docket 2010-01, Decision and Order.
[6] See Exhibit 4 ("3 platic handled credo blade holders. 7 metal heads for credo blades. 1 razor blade.").

VIP Salon and Spa

On November 29, 2006, a Board Ispector inspected VIP Salon and Spa. The Respondent was the owner of OK Nails at this time. The inspector found, among other violations, that implements and supplies were not being cleaned or sanitized properly. The inspector also found that clean towels were not covered, in a closed area or in a container. The inspector imposed a $370 fine.

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 manager of A+ at this time.[7] 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 apparently the manager of A+ at this time.[8] 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.

II. Rebuttal to Hearing Counsel's Case

The Respondent explained to the Board that she had difficulty expressing herself in English. To this end, she asked if Phung Truong could help her. The Board allowed this. As stated above, Mr. Truong spoke at Ms. Thach's hearing, in part testifying, in part helping and/or speaking for Ms. Thach.

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[7] Phung Truong was the owner. See Docket 2010-01, Decision and Order.
[8] Phung Truong was the owner. See Docket 2010-01, Decision and Order.

Mr. Truong offered a narrative before asking Inspector Gomes any questions. In pertinent part he told the Board: He/they always follows what the Board tells him and he/they tries to make the salon better. He/they was never given a chance to explain why items were dirty and he/they was never told what he/they did wrong. He/they invested large amounts of money into the business. He/they works seven days a week, fifteen hours a day. He/they comes from a poor country and has several children each.

Mr. Truong made a demonstration for the Board with two nail files. He showed and explained that they take the sharp edge off of one file with the other file and keep those in a box in the tables. Inspector Gomes responded that his demonstration showed that he was contaminating the nail files in this fashion. Mr. Truong asked why he was never given a chance to explain his fines. Inspector Gomes replied that each inspector would have explained to him that his nail stations were dirty with nail dust and filings. Mr. Truong questioned Inspector Gomes why she did not like them (intimating that the inspection reports were negative due to the Respondent's national origin). Inspector Gomes responded that she neither liked nor disliked them. She further stated that she was just doing her job. The Board found Inspector Gomes credible.

III. Respondent's Case

The Respondent testified in her case. She stated that she wants to take care of her children and if the Board takes her license she will have no other job and will have to file bankruptcy. She asked the Board to issue another fine to her rather than impose other disciplinary action. She stated that she did not know what else to say.

The Respondent affirmed that she uses different names. She testified that she was also known as Chi K. Thach, Chi Kim Thi Thach, and Kim Chi Thach. She acknowledged that she

was familiar with the six exhibits and that she was either the owner or manager at the time of each of the inspection reports.

IV. The Board's Questions

The Respondent testified (either on her own or through Mr. Truong) that it did not matter what they did, the inspectors would always say the salon is dirty. She stated that the salon was always cleaned at the end of the day and that they could not clean between clients.

Although the Respondent did not introduce any exhibits, she did present several pictures to show the Board the salon's overall extravagant and expensive appearance.

When asked about the MMA violations, the Respondent stated she uses OPI or Creative. She stated that once the bottles on the tables are used with the brush and the powder, they are contaminated. The Respondent acknowledged her/their mistake in hiring individuals who are not licensed in this state. The Respondent blamed her/their employees for bringing in their own credo blades – stating that employees who originate from Massachusetts believe it is okay to use the blades. The Respondent claims to have fired the employees who brought in the blades.

The Respondent explained that the inspectors come at the wrong time. The Respondent explained that it is coincidence that he runs out of bleach when the inspectors come. The Respondent explained that she has stayed home with her baby and the employees at the salon do not clean how she wants them to clean.

The Respondent understood that she was responsible for following the Board's statutes and administrative rules. The Respondent was asked about the procedures for cleaning pedicure tubs. The Respondent stated that she used a lot of bleach to clean the tubs. When pressed for specifics, the Respondent offered that, at night, she pours 'maybe a cup full' and cleans the tub

with a brush and lets it run for 30 minutes. She stated that because they have pipeless tubs, she only runs the tub three to five minutes between clients.

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 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 Hearing Counsel's Case (Section I) 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 records of disinfecting pedicure tubs, unauthorized use of credo blades, and licensees not washing their hands prior to each client.

Hearing Counsel proposed 22 findings of fact. Number 1 granted as to the first sentence; it is denied as to the second sentence. All the other findings of fact (2-22) 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:

1. The Board may undertake disciplinary proceedings against its licensees. See RSA 313-A:22. If the Board finds sufficient misconduct pursuant to subsection II, it may impose disciplinary action pursuant to subsection III. See RSA 313-A:22.

2. On March 24, 2004:

a. The Respondent violated RSA 313-A:22, II (c) by failing to maintain OK Nails in a sanitary and hygienic manner.

b. The Respondent violated BAR 501.02 (e) by failing to maintain OK Nails in a sanitary and hygienic manner.

c. The Respondent violated RSA 313-A:22, II (c) by having technicians use MethylMethacrylate ("MMA").

d. The Respondent violated BAR 501.02 (j) by having technicians use MethylMethacrylate ("MMA").

e. The Respondent violated RSA 313-A:22, II (c) by having a technician working who did not have a New Hampshire license.

f. The Respondent violated BAR 501.02 (h) by having a technician working who did not have a New Hampshire license.

3. On June 10, 2005:[9]

a. The Respondent violated RSA 313-A:22, II (c) by failing to maintain OK Nails in a sanitary and hygienic manner.

b. The Respondent violated BAR 501.02 (e) by failing to maintain OK Nails in a sanitary and hygienic manner.

4. On April 30, 2009:[10]

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[9] The Notice of Hearing states: "on or about April 15, 2005." The Board finds it was June 10, 2005. See Exhibit 2.

a. The Respondent violated RSA 313-A:22, II (c) by failing to maintain OK Nails in a sanitary and hygienic manner.

b. The Respondent violated BAR 501.02 (e) by failing to maintain OK Nails in a sanitary and hygienic manner.

5. On November 29, 2006:

a. The Respondent violated RSA 313-A:22, II (c) by failing to maintain VIP Salon and Spa in a sanitary and hygienic manner.

b. The Respondent violated BAR 501.02 (e) by failing to maintain VIP Salon and Spa in a sanitary and hygienic manner.

6. On May 8, 2009:

a. The Respondent violated RSA 313-A:22, II (c) by failing to maintain A+ in a sanitary and hygienic manner.

b. The Respondent violated and Bar 501.02 (e) by failing to maintain A+ in a sanitary and hygienic manner.

7. On June 2, 2010:

c. The Respondent violated RSA 313-A:22, II (c) by failing to maintain A+ in a sanitary and hygienic manner.

d. The Respondent violated and Bar 501.02 (e) by failing to maintain A+ in a sanitary and hygienic manner.

8. Between March 2004 and June 2010, the Respondent violated RSA 313-A:22, II (g) by willful or repeated violations of the provisions of RSA 313-A..

9. Hearing Counsel proposed 2 Rulings of Law:

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[10] The Notice of Hearing states: "on or about April 25, 2009." The Board finds it was April 30, 2009. See Exhibit 3.

a. 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). The Board also finds that the Respondent engaged in professional misconduct by failing to maintain her salon premises in a sanitary and hygienic manner in violation of 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.

b. The second proposed ruling of law is granted as discussed above in ruling of law #8.

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 her salon premises, OK Nails, VIP Salon & Spa, and A+ Princess 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 her 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 she continues to make payments, she continues to violate the rules and incur even greater fines to add to her installment plan.

The Board rejects the Respondent's attestations that she was not given a chance to explain her violations to the inspectors that inspected her salons. The Board did not find the assertions that she/they were fined no matter what she/they did as credible. The Board recognized that salons are inspected prior to opening; that the owners and/or managers of these salons would have had to receive inspections reports that contained no violations in order to open. The Board did not have information before it whether there were other inspections and inspection reports, which might not contain violations, for these salons beyond those that were put into evidence. The Board found the inspection reports that were introduced into evidence to be valid, unbiased and accurate. The Board reviewed that three different Board Inspectors signed the introduced inspection reports. The Board concluded that the Board Inspectors routinely give direction to salon owners, managers and employees on how to correct violations at the time of each inspection. The Board concluded that there was no deviation of the standard practice here.

The Board reviewed the photographs presented to it by the Respondent. Although the photographs portrayed a clean looking salon, this was determined to be a snapshot in time and did not contradict the inspection reports. While the Board is sympathetic to the Respondent's plight, to her testimony that she invested lots of time and money into these shops, the Board's main concern is the health, safety and welfare of the clients. Based upon past actions, the Board finds that the Respondent's request for an additional monetary fine, stating that this time it would teach her a lesson, as opposed to the Board imposing a different disciplinary sanction, is not credible.

The Board rejects the Respondent's testimony that another substance turned into MMA as unsubstantiated and implausible. The Board rejects the Respondent's testimony that it was a single

mistake to hire employees who did not have New Hampshire licenses. The evidence controverts this testimony. See Exhibits 1 and 2. The Board finds individuals working on more than one occasion and the salon owner and manager have a responsibility to verify that employees are licensed in the State of New Hampshire before they work on clients. The Board rejects the Respondent's testimony that the credo blades found all belonged to employees and that she/they were unaware of the blades illegal use. The Board finds that where this violation was repeated, the testimony is not credible. See Exhibits 2 and 3. Moreover, the Board finds that the owner and manager of a salon are responsible for instructing their employees on proper procedure and use of implements or tools.

The Board rejects the Respondent's testimony that the inspectors coincidently come when she/they run out of bleach. The Board finds that the Respondent could have substantiated this assertion with order forms. More importantly, the Board finds that the lack of bleach or other appropriate disinfectant on premises is indicia of the Respondent's disregard for the Board's rules and the underlying reasoning to protect the public from the spread of disease. The Board rejects the Respondent's claim that she/they do not have time to clean in between each client. The Board notes that the industry practice is to schedule clients further apart to allow for nearly twenty minutes of cleaning time between clients. Moreover, the Respondent's testimony of running the pedicure tub with cleaner "for three to five minutes" violates the Board's rules that clearly specify performance needs minimally ten minutes. See Bar 302.05 (q).[11] The Respondent's testimony that she pours

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[11] Bar 302.05(q) states: After each patron, each whirlpool, foot spa, or spa shall be cleaned and disinfected as follows:

(1) All water shall be drained and all debris removed from the spa basin;

(2) The spa basin shall be disinfected by filling spa basin with water and by circulating:

a. Two tablespoons of automatic dishwashing powder and ¼ cup of 5.25% chlorine bleach to one gallon of water through the unit for 10 minutes; or

"maybe a cup" and cleans the tub with a brush also violates the Board's administrative rules. See Bar 302.05(q) and (r).[12]

The Board concluded that these repeated violations specified in the inspection reports are evidence that the Respondent does not wish to correct the sanitation issues she was instructed to correct at every inspection. The Board concludes that any continuing sanitation education would not benefit the Respondent for she has willfully disregarded the Board's statutes and administrative rules. The numerous sanitation violations over several years as an owner and manager of several different salons 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 personal manicurist and esthetic licenses shall be revoked.

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b. Surfactant or enzymatic soap with an EPA-registered disinfectant with bactericidal, fungicidal, and virucidal activity which is used according to manufacturer's instructions through the unit for 10 minutes.

(3) The spa basin shall be drained and rinsed with clean water; and

(4) The spa basin shall be wiped dry with a clean towel.

[12] In addition to Bar 302.05(q) (quoted above), Bar 302.05(r) states: Bar 302.05(q)(2) states: At the end of each day, each whirlpool, foot spa, or spa shall be cleaned and disinfected as follows:

(1) The screen shall be removed and all debris trapped behind the screen removed;

(2) The screen and the inlet shall be washed with surfactant or enzymatic soap or detergent and rinsed with clean water;

(3) Before replacing the screen, one of the following procedures shall be performed:

a. The screen shall be totally immersed in a chlorine bleach solution of ¼ cup of 5.25% chlorine bleach to one gallon of water through the unit for 10 minutes; or

b. The screen shall be totally immersed in an EPA-registered disinfectant with bactericidal, fungicidal, and virucidal activity, and used in accordance to the manufacturer's instructions through the unit for 10 minutes;

(4) The inlet and area behind the screen shall be cleaned with a brush and surfactant soap and water to remove all visible residue; and

(5) The spa system shall be flushed with low sudsing surfactant or enzymatic soap and warm water for at least 10 minutes and then rinsed and drained.

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 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 Feb 9 2011

Leanne Lummis

Leanne Lummis
Board Chairperson