

**STATE OF NEW HAMPSHIRE
BOARD OF BARBERING, COSMETOLOGY AND ESTHETICS
2 INDUSTRIAL PARK DRIVE
CONCORD, NEW HAMPSHIRE 03301**

In the Matter of:
Nam Ngoc Tran
Personal Manicuring License Number: 17321
Shop License Number: 2083
(Adjudicatory Proceedings)

Docket No. 2011-03

DECISION AND ORDER

By the Board: Leanne Lummis, Chair
Gary Trottier Vice Chair and Presiding Officer
Holly Manning, Board Member
Kathleen Humes, Board Member

Appearances: Laurel O'Connor, Hearing Counsel
Kathryn Wantuck, Executive Director for the Board
George Cacavas, Board Inspector
Margaret Gomes, Board Inspector
Nam Ngoc Tran, Respondent
Hank Tran, Co-Owner of Key Nails

BACKGROUND

On April 18, 2011 the New Hampshire Board of Barbering, Cosmetology, and Esthetics ("Board") issued a Notice of Hearing commencing a public disciplinary proceeding to determine whether Nam Ngoc Tran ("Respondent") had violated RSA 313-A:22 II (c), RSA 313-A:22 II (g), and Barbering, Cosmetology, and Esthetics Administrative Rules ("Bar") 302.07 (g) (1), 501.02 (e), 501.02 (h).

As set forth in the Notice of Hearing, the purpose of the hearing was to determine whether the Respondent violated RSA 313-A:22 II (c) and Bar 501.02 (e) by failing to maintain his shop, Key Nails, in a sanitary and hygienic manner; RSA 313-A:22 II (g) by willful or repeated violations of RSA 313-A; Bar 302.07 (g) (1) by using Methyl Methacrylate monomer ("MMA"); Bar 501.02 (h) for having an employee working who did not have a current New Hampshire license on display; and Bar 501.02 (e) by dumping liquid monomer in the trash when the Board's inspector entered the salon.

The Notice of Hearing noticed the hearing for 9:30 am on May 9, 2011. The Respondent appeared for the hearing as scheduled with his salon co-owner Hank Tran ("Mr. Tran"). Mr. Tran spoke at the hearing in part testifying, in part helping and/or speaking for the Respondent and acting as a counsel.

The Board accepted the following exhibits at the hearing:

Hearing Counsel's 10 (ten) exhibits:

- Exhibit 1, Shop Inspection Form dated May 16, 2005.
- Exhibit 2, Letter dated August 22, 2005 from the NH Board of Barbering, Cosmetology, and Esthetics informing Respondent of an \$800 fine imposed as a result of the inspection in May 2005.
- Exhibit 3, Shop Inspection Form dated March 30, 2006.
- Exhibit 4, Shop Inspection Form dated December 12, 2006.
- Exhibit 5, Shop Inspection Form dated July 17, 2007.
- Exhibit 6, Shop Inspection Form dated August 14, 2007.
- Exhibit 7, Shop Inspection Form dated March 18, 2008.
- Exhibit 8, Shop Inspection Form dated September 10, 2008.
- Exhibit 9, Shop Inspection Form dated January 6, 2010.
- Exhibit 10, Shop Inspection Form dated January 14, 2011.

Respondent's Exhibit:

- Exhibit A, Letter from Bonnie Mooney

HEARING TESTIMONY

I. Hearing Counsel's Case

The Board has the authority to grant manicuring licenses. See RSA 313-A:12. On July 13, 2004, the Board granted the Respondent a license to practice manicuring in the State of New Hampshire. The Respondent holds manicuring license number 17321. The manicuring license is the Respondent's personal license.

The Board also 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. On 07/24/04, the Board granted the Respondent a shop license for Key Nails ("shop", "salon", or "Key Nails"). The Respondent co-holds shop license number 2083.

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 (converting violation points to administrative fines). For each inspection, the inspector must file a written report of his/her findings. See RSA 313-A:21, I.

On January 14, 2011, a Board inspector inspected the Respondent’s salon. The inspector found violations and imposed an administrative fine. See Exhibit 10. In accordance with the Board’s regular procedures (see Exhibit 2), the Respondent was notified of the fine by letter from the Board. The letter states, in pertinent part, the amount of the administrative fine and the Respondent’s rights to an adjudicatory hearing. The Respondent requested a hearing; hence, the Notice of Hearing was issued in this matter.

Inspector George Cacavas testified at the hearing. Inspector Cacavas has over four years experience as an inspector for the Board. Through Inspector Cacavas, Hearing Counsel introduced Exhibit 9. Inspector Cacavas testified that on January 6, 2010, he conducted a routine inspection of Key Nails in Belmont, NH. On January 6, 2010, Inspector Cacavas found five (5) buffing sponges that were used and not discarded, four (4) nail clippers/trimmers were not cleaned and sanitized properly. The inspector also found seven (7) drill tips that were used and not discarded as required. Additionally, the inspector found an employee with an expired license displayed and he found that the previous inspection report was not displayed as required. The inspector imposed a \$131 fine. See Exhibit 9.

Inspector Cacavas testified he personally saw pieces of skin and nail clippings in the trimmers/clippers. Mr. Tran interjected that Key Nails has over eight (8) nail tables and sometimes the employees/manicurists make mistakes.

Inspector Margaret Gomes testified at the hearing. Inspector Gomes has over thirteen years of experience as an inspector for the Board. Hearing Counsel introduced Exhibit 1. On May 16, 2005, the inspector conducted an inspection of Key Nails and took a sample from a glass jar marked brush cleaner at a station. Inspector Gomes testified to the distinct smell and color of Methyl Methacrylate (“MMA”). No fines were imposed on the day of the inspection.¹ See Exhibit 1.

Inspector Gomes testified that she conducted a routine inspection of Key Nails on March 30, 2006. See Exhibit 3. The inspector found an employee with an expired license and imposed a \$25 fine.

Inspector Gomes testified that she conducted a routine inspection of Key Nails on December 12, 2006. See Exhibit 4. The inspector found five pedicure chairs that were not cleaned properly. The inspector also could not find any bleach used for cleaning. The inspector imposed a \$125 fine.

¹ However, see Wantuck’s testimony narrated below, regarding the imposition of a fine.

Inspector Gomes testified that she conducted a routine inspection of Key Nails on July 17, 2007. See Exhibit 5. The inspector found seven (7) pedicure chairs that were not properly cleaned or disinfected. The inspector imposed a \$700 fine.

Inspector Gomes testified that she conducted a follow up inspection of Key Nails on August 14, 2007. See Exhibit 6. The inspector found the pedicure chairs to be clean and sanitized. The inspected also noted there was a large bottle of bleach about 1/3 full. No fine was imposed.

Inspector Gomes testified that she conducted a routine inspection of Key Nails on March 18, 2008. See Exhibit 7. The inspector found used files and metal implements that were not cleaned or sanitized. The inspector also informed the salon to obtain Material Safety Data Sheets on their products. The inspector imposed a \$100 fine.

Inspector Gomes testified that she conducted a routine inspection of Key Nails on September 10, 2008. See Exhibit 8. The inspector found the foot spas were clean and the salon was in compliance. No fine was issued.

Inspector Gomes testified that she conducted a routine inspection of Key Nails on January 14, 2011. See Exhibit 10. Inspector Gomes testified that she was not sure if she identified herself as an inspector when she walked in. Mr. Tran countered that the employees, including the Respondent did not know she was a State Board inspector. Inspector Gomes further testified that she saw the two licensees dump the liquid from the dappen dishes on the tables into the trash, preventing her from taking a sample of the liquid. Mr. Tran interjected that this was the normal routine of the licensees performing the manicure. Inspector Gomes further testified she could smell the distinct smell of MMA and could also visually identify the MMA. Inspector Gomes testified that she did not have to test any liquid from the other unoccupied tables, once MMA is established; a fine is issued to every employee working on a client and one to the shop. The inspector found three licensees working, two licensees dumped the liquid monomer on their stations into the trash when she walked in. The inspector imposed a \$1600 fine, \$400 for each licensee working and \$400 to the shop. See Exhibit 10. As stated above, the Respondent is now contesting this fine.

Kathryn Wantuck ("Ms. Wantuck"), Executive Director for the Board, testified she has been employed in that position for the Board for a year. Ms. Wantuck identified Exhibit 1 as a standard inspection form used by Board inspectors. Ms. Wantuck testified that based on Exhibit 1, there were no points assessed or fines calculated at the time of the inspection on May 16, 2005. See Exhibit 1. Ms. Wantuck identified Exhibit 2 as a standard letter used by the Board's office to notify licensees of assessed fines and their options. Ms. Wantuck testified that Nam Ngoc Tran was issued an \$800 fine in August 2005 after monomer samples taken from Key Nails on May 16, 2005 were tested by the State Lab. The test results confirmed the monomer contained 50% MMA. The fine was paid on September 14, 2005. See Exhibit 2.

Ms. Wantuck testified that nail salons probably use several types of liquid, but she was not present at Key Nails at the time of the inspection. Mr. Tran proceeded to list several types of liquids used in a salon.

II. Respondent's Case

Mr. Tran acted as a counsel for the Respondent. The Respondent testified that he was working on a client on January 14, 2011 when Inspector Gomes arrived for the inspection. The Respondent testified that he put the nail drill filings in a cup and that is what he threw away. The Respondent also stated that the other licensees were performing manicures and no liquid is used for that service. Mr. Tran stated that the inspector would not listen to them or to the clients that were receiving the services.

In response to Mr. Tran's questions, the Respondent testified that he did not throw any liquid away. The Respondent further testified that he uses a paper towel to clean his brush while doing a full set of nails and when he was finished he put that paper towel in the trash. The Respondent further testified that he took the liquid monomer out from his table to show the inspector that he did not throw it away. The Respondent stated that the clients also told the inspector that he did not throw any liquid away.

The Respondent testified that he has worked at Key Nails since about 2005. The Respondent testified that he was working on January 14, 2011 and he started work at about 9am. The Respondent further stated he had worked on at least one other customer prior to the inspection and that there were already paper towels in the trash.

III. The Board's Questions

In response to the Board's questions, the Respondent testified that he has been the co-owner of Key Nails for about 5 years and in that time period has been inspected by Inspector Gomes previous to the January 14, 2011 inspection. When asked by the Board, the Respondent further testified that his signatures were on the previous inspection reports and he did in fact recognize Ms. Gomes to be the Board inspector. The Respondent further testified that he was aware in 2005 the product the salon was using contained MMA, the salon owners learned their lesson and they paid the fine. The product they now use is called Misa.

Hearing Counsel showed the Respondent each exhibit to have him identify the signature on each inspection form. The Respondent testified his signature was signed on Exhibits 1, 3, 4, 7, 8, and 9. The Respondent could not verify the signatures on Exhibits 5 and 6. There was no signature on Exhibit 10.

Mr. Tran testified at the hearing. Mr. Tran stated that in the past, they made mistakes and no one is perfect. Mr. Tran submitted a letter from one of the clients that was there during the inspection on January 14, 2011. Mr. Tran submitted a letter written by one of the clients, Bonnie Mooney, who was present at the time of the January 14, 2011 inspection. The Board reviewed the letter.

Mr. Tran sought to introduce to the Board a taped interview which he performed with a client. Hearing Counsel objected to the showing of the video since the witness was unavailable to be cross-examined. The Board sustained the objection.

Mr. Tran further questioned Inspector Gomes capability of recognizing MMA. Mr. Tran stated they have learned their lesson and only use product that does not contain MMA. He further testified that he doesn't even know what MMA is. He stated all the nail liquids smell similar. He further testified that they used MMA in the past to clean the brushes better. In response to Hearing Counsel's questions, Mr. Tran testified that he started working at Key Nails around 2004. Mr. Tran testified that he was not present at Key Nails at the time of the January 14, 2011 inspection. Mr. Tran stated he does the entire product ordering for the salon and he routinely orders a gallon size container of monomer. They employees then fill their smaller containers on their stations from the gallon container.

FINDINGS OF FACT

The Board took into consideration all exhibits. The exhibits presented showed multiple fines to the shop. Hearing Counsel proposed 10 findings of fact. All findings of fact are granted. However, to the extent there is an error in fact number 1. Fact number 1 indicates the Respondent holds cosmetology license, when in fact he holds a manicuring license.

RULINGS OF LAW

The Board makes the following rulings of law:

1. On or about May 16, 2005, the Respondent violated RSA 313-A:22, II (c) and/or Bar 302.07 (g) (1) by using Methly Methacrylate monomer.
2. On or about December 12, 2006, the Respondent violated RSA 313-A:22 II (c) and or Bar 501.02 (e) by failing to maintain Key Nails in a sanitary and hygienic manner.
3. On or about July 17, 2007, the Respondent violated RSA 313-A:22 II (c) and/or Bar 501.02 (e) by failing to maintain Key Nails in a sanitary and hygienic manner.
4. On or about March 18, 2008, the Respondent violated RSA 313-A:22, II (c) and/or Bar 501.02 (e) by failing to maintain Key Nails in a sanitary and hygienic manner.
5. On or about January 6, 2010, the Respondent violated RSA 313-A:22, II (c) and/or Bar 501.02 (e) by failing to maintain Key Nails in a sanitary and hygienic manner.
6. On or about January 6, 2010, the Respondent violated RSA 313-A:22, II (c) and/or Bar 501.02 (h) by having an employee working who did not have a current New Hampshire license on display.
7. On or about January 14, 2011, the Respondent violated RSA 313-A:22, II (c) and/or Bar 501.02 (e) by dumping liquid monomer in the rubbish when the inspector entered the salon.

8. Between May 2005 and January 2011, the Respondent violated RSA 313-A:22 II (g) by willful or repeated violations of the provisions of RSA 313-A

DISCUSSION AND CONCLUSION

The Board has the 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 and safety. RSA 313-A:22; Bar 402.01.

The Board has determined that the Respondent has engaged in professional misconduct by failing to maintain the salon premises of Key Nails in a sanitary and hygienic manner. The Board has also determined that the Respondent engaged in professional misconduct by dumping liquid into the trash to prohibit the inspector from collecting a sample. The Board relied on the exhibits presented as evidence and testimony given from two inspectors with combined experience of seventeen years to conclude that the Respondent violated RSA 313-A and Bar 500.

The Board rejects Mr. Tran's assertions that the inspector could not recognize MMA. The Board recognizes Inspector Gomes' thirteen years of experience dealing with and handling MMA. Moreover, the Board recognizes that MMA has a distinct smell and appearance that is easily identifiable by a trained individual such as Inspector Gomes. The Board also took into consideration the previous violation for Key Nails using MMA. The Board also found the inspection reports that were introduced to be valid, unbiased, and accurate. The Board does not find Mr. Tran's attestations that the licensees were dumping liquid into the trash at the time the inspector arrived as part of normal routine as credible. Although the Board realizes there are several types of liquid used during the course of a manicure or an application of a full set of acrylic nails, the Board finds it unrealistic that the licensees dumped water, acetone, or any or non-monomer liquid into the trash at the exact time the inspector was observing them.

The Board further finds the Respondent's testimony that he did not recognize the inspector as not credible. The exhibits entered clearly identified that the Respondent was present at six (6) previous inspections, signing his signature at the bottom of the inspection report when asked by Inspector Gomes.

The Board reviewed the letter written by Bonnie Mooney ("Ms. Mooney"). The letter stated that Ms. Mooney was having her nails done when the inspector came in and that the nail technician only threw away paper towels. The Board was not able to cross-examine Ms. Mooney for she was not present at the hearing. Although the Board finds the letter credible, the Board concludes that Ms. Mooney is not trained to observe the licensees in a manner similar to that of a Board inspector.

The Board concludes the Respondent violated RSA 313-A and/or Bar 500 including (1) failure to maintain his salon premises in a sanitary and hygienic manner and/or, (2) failure to ensure that all employees working in his salon had current New Hampshire licenses on display and/or, (3) using an illegal liquid monomer in his salon and/or, (4) repeatedly violating the provisions of RSA 313-A and/or Bar 500.

DISCIPLINARY ACTION

THEREFORE IT IS ORDERED the Respondent is REPRIMANDED.

IT IS FURTHER ORDERED that the Respondent's administrative fine of one thousand six hundred dollars (\$1,600) is affirmed. Exhibit 10.

IT IS FURTHER ORDERED that the Respondent is assessed an increase to the above administrative fine in the amount of one thousand dollars (\$1,000), pursuant to Bar 404.11(a), specifically factors (1), (2) and (4).

IT IS FURTHER ORDERED that the entirety of the administrative fine, two thousand six hundred dollars (\$2,600) is due within ninety (90) days of the effective date of this order as further defined below. The payment shall be made in the form of a Money Order or Cashier's Check payable to 'Treasurer, State of New Hampshire,' and delivered to the Board's office at 2 Industrial Park Drive, Concord, NH 03301.

IT IS FURTHER ORDERED that failure to pay these fines shall cause 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.

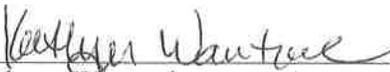
IT IS FURTHER ORDERED that the Respondent's failure to comply with any term of the conditions imposed by this Order shall constitute a basis for further disciplinary action against the licensee.

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 this Order shall take effect as an Order of the Board on the date as authorized representative of the Board signs it.

BY ORDER OF THE BOARD

Date: 6-13-11


Kathryn Wantuck, Executive Director
Authorized Representative of the Board