

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

BOARD OF BARBERING, COSMETOLOGY AND ESTHETICS

**In Re: Redpersimmon
License No.: 2250**

Docket No.: 23-BAR-013

NOTICE OF DECISION DATED 12/14/2023

Enclosed please find a copy of the Board's Order dated 12/14/2023 relative to:

HEARING FINAL DECISION AND ORDER

MOTIONS/PETITIONS FOR RECONSIDERATION OR REHEARING:

Pursuant to N.H. Code Admin. R. Plc 206.29(a) ("Rules") and RSA 310:14, II, motions/petitions for reconsideration or rehearing shall be filed within 30 calendar days after service of a final adjudicative order. Pursuant to Rule 206.29(b), the Motion/Petition shall: 1) clearly identify points of law or fact that the movant asserts the Board and/or Presiding Officer has overlooked or misapprehended; 2) contain such argument in support of the motion as the movant desires to present; and 3) be served by the movant on all other participants in accordance with Rule 206.11. Pursuant to Rule 206.29, no answer to a motion/petition for reconsideration or 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 motion/petition for reconsideration. Pursuant to RSA 541:5, upon the filing of such motion/petition for rehearing or reconsideration, 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.

RIGHT TO APPEAL:

Pursuant to RSA 310:14, III, appeals from a decision on a rehearing and/or motion for reconsideration 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.

**STATE OF NEW HAMPSHIRE
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BOARD OF BARBERING, COSMETOLOGY AND ESTHETICS

**In Re: Redpersimmon
Shop Lic. #2250**

**Huong Khong, Owner
unlicensed**

Docket No.: 23-BAR-013

FINAL DECISION AND ORDER – 11/20/23

I. PARTICIPANTS:

Board Members and Support Staff and Counsel:

Jeanne Chappell, Board Chair and Member
Sarah J. Partridge, Board Member
Donna Woodsom, Board Member
Sara Joe, Board Member

Talia Wilson, OPLC Board Administrator
Teresa Boyer, OPLC Board Administrator
Elizabeth Eaton, OPLC Board Counsel

Presiding Officer:

Attorney Nikolas Frye, OPLC Hearings Examiner
Thomas Pappas, Jr., Hearings Clerk

Parties:

Marissa Schuetz, Esq., OPLC Hearing Counsel
Redpersimmon/Huong Khong, Licensee (failed to appear)

II. CASE SUMMARY/PROCEDURAL HISTORY:

On 3/13/23 the New Hampshire Board of Barbering, Cosmetology, and Esthetics (“Board”) voted to initiate an adjudicative hearing process in the matter of Redpersimmon (“Licensee”). The purpose of

this hearing was: 1) to address the shop’s three outstanding fines levied on 8/23/22, 9/17/19, and 6/11/19; and 2) to address the Licensee’s 8 consecutive inspection failures. A final hearing in this matter was held on 11/20/23. This final decision and order follows.

III. SUMMARY OF THE PROPOSED EVIDENCE AND EVIDENTIARY RULINGS:

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

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

Exhibit 1	MLO Accounting	HC 001 – HC 002
Exhibit 2	Shop Inspection Report 01/11/2022	
	• Photos – Tables/Furniture/Implements	ENF 004-010; 012
	• Photo – Spa Agitator	ENF 011
	• Photos – Waxing Area/Floor/Walls	ENF 015 – 026
Exhibit 3	Bar 404.05 Notice Letter and Settlement Agreement Packet (Unsigned)	HC 027 – HC 033
Exhibit 4	Shop Inspection Report 09/17/2019	HC 034
Exhibit 5	Shop Inspection Report 06/11/2019	HC 035

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

None.

C. Sworn testimony was received from:

1. Sandra Hodgdon, Chief Inspector, OPLC, Division of Enforcement (via offer of proof)

The Presiding Officer fully admitted Exhibits 1-5 after reviewing them, hearing an offer of proof with respect to each, and determining they were material and relevant to the proceeding.

IV. CONDUCT OF THE HEARING AND EVIDENCE PRESENTED:

The Licensee failed to appear for the final hearing in this matter. On 06/27/23 at 9:00 AM EST, the Presiding Officer held a prehearing conference at which the Licensee failed to appear. The record shows that OPLC had sent a 05/11/23 notice of hearing to the Licensee’s mailing address on file with the Board via certified mail, return receipt requested and first class mail. This notice was also sent to the

Licensee's email address on file with the Board. The record also contains a signed return receipt for the certified mailing. The notice states the dates, times, and locations of the final hearing and prehearing conference, and otherwise complies with RSA 541-A and Plc Rules 206.06(b) and 206.17.

On 07/10/23 at 11:46 PM EST, the Licensee, through a representative identifying himself as the "assigned manager of Red Persimmon Nail" (Nick Nguyen), contacted OPLC via email requesting a continuation of the final adjudicatory hearing scheduled for 07/11/23 at 9:30 AM EST because Huong Khong's "health condition wasn't great". The Presiding Officer granted this continuance and notified the parties of a rescheduled prehearing conference to occur on 09/29/23 at 9:00 AM EST. On 09/28/23 at 11:13 PM EST, an individual identifying themselves as the "daughter of Huong Khong" emailed OPLC requesting a continuation of the prehearing conference scheduled for 09/29/23 at 9:00 AM EST because her mother "was not in a good state of health". The individual provided OPLC with a report from an urgent care facility to corroborate the claim, which the Presiding Officer **SEALS** pursuant to RSA 91-A:5, IV. The Presiding Officer granted the continuance and sent a rescheduled notice of hearing to the email addresses that had requested continuances on behalf of the Licensee on 10/02/23. The record shows that the email did not come back as undeliverable from either email account. The record, however, is unclear as to whether the new notice of hearing was sent via mail to the Licensee's mailing address on file with the Board. The record shows that the "Rescheduled Notice of Adjudicative Hearing- 11/20/23 @ 9:30 AM" states the hearing is on 11/20/23 at 9:30 AM, is located at OPLC, 7 Eagle Square, Concord, NH 03301, and contains the information required by RSA 541-A:31 and Plc Rule 206.06(b). The record contains no correspondence from the Licensee in which she or any of her representatives claim an inability to make the hearing or request a continuance.

After considering the record, the sole issue of concern for the Presiding Officer the Licensee received insufficient notice under RSA 310:10, II because the most recent notice was not mailed to

Licensee's address of record. RSA 310:10, II explains that "[b]oards shall conduct disciplinary and non-disciplinary remedial proceedings in accordance with procedural rules adopted by the executive director."

The executive director has adopted the Plc 200s for disciplinary proceedings. *See* OPLC Executive Director's Standing Order 2023-1. These rules instruct that:

Notices, orders, decisions, or other documents issued by the regulatory authority or presiding officer in connection with an adjudicative proceeding shall be served by the issuer upon all participants in the matter by:

- (1) Depositing a copy of the document, first class postage prepaid, in the United States mail, addressed to the address of record in the proceeding for the participant being served;
- (2) Delivering a copy of the document in hand to the participant being served; or
- (3) Sending a copy of the document to the participant being served as an attachment to an email addressed to the email address of record, provided that the participant who provided the email address has indicated that service would be accepted in this manner.

Plc Rule 206.11(b).

Although it is uncertain whether the Presiding Officer's Office mailed the "Rescheduled Notice of Adjudicative Hearing- 11/20/23 @ 9:30 AM" to the Licensee's address, the Presiding Officer finds and concludes that OPLC still sent "... a copy of the document to the participant being served as an attachment to an email addressed to the email address of record". Plc Rule 206.11(b)(3). Moreover, the Presiding Officer finds and concludes that the Licensee— through her agents previously requesting continuances on her behalf via email— "indicated that service would be accepted in this manner [by email]." Plc Rule 206.11. Where the Presiding Officer's Office did not receive any delivery failure notifications when sending these emails to the Licensee, the Presiding Officer also finds and concludes that the Licensee received sufficient notice pursuant to Plc Rule 206.02(e) and thus RSA 310:10, II. The Presiding Officer additionally finds and concludes that OPLC had provided "notice reasonably calculated, under all the circumstances, to apprise ... [the Licensee] ... of the pendency of the action and afford ... [her] ... an opportunity to present ... [her] ... objections." *See, i.e., Jones v. Flowers*, 547 U.S. 220, 225-26 (2006);

See also City of Claremont v. Truell, 126 N.H. 30, 35 (1985). Hence, the Presiding Officer finds and concludes that notice was sufficient under both the Federal and State Constitutions.

The hearing was then 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 the Licensee committed professional misconduct as defined at RSA 313-A:22, II(c), RSA 313-A:22, II(d), and/or RSA 313-A:22, II(i) (*see* N.H. Code Admin. Rs. Bar 404.09, 302.05, and/or 302.07) by allegedly operating a shop with one or more of the related health and safety violations, as set out in the inspection report, dated 1/10/22 and in previous inspection reports.
- (2) Whether the Licensee committed professional misconduct as defined at RSA 313-A:22, II(c) and/or RSA 313-A:22, II(i) by allegedly not fully and timely paying the fine assessed pursuant to the Board's 8/23/22 action *In re Red Persimmon Nails Case #2022-BAR-RED PERSIMMON-0042*.
- (3) Whether the Licensee committed professional misconduct as defined at RSA 313-A:22, II(i) and/or RSA 313-A:22, II(c) by allegedly not fully and timely paying the fine assessed pursuant to the Board's 9/17/19 action.
- (4) Whether the Licensee committed professional misconduct as defined at RSA 313-A:22, II(i) and/or RSA 313-A:22, II(c) by allegedly not fully and timely paying the fine assessed pursuant to the Board's 6/11/19 action.
- (5) If the Board makes a finding of misconduct pursuant to issue 1, 2, and/or 3 above, whether the Licensee committed professional misconduct as defined at RSA 313-A:22, II(g).
- (6) If the Board makes a finding of misconduct, what if any discipline the Board should impose upon the Licensee's license pursuant to RSA 313-A:22, III, RSA 310:12, and N.H. Code Admin. Rs. Bar 402.

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 Inspector (via offer of proof):

Ms. Hodgdon, through an offer of proof given by Hearing Counsel and questioning by the Presiding Officer, testified to the authenticity and meaning of Exhibits 1-5, and that Hearing Counsel's proposed findings of fact were true and accurate to the best of her knowledge and belief.

LICENSEE'S CASE-IN-CHIEF:

None.

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

Based upon the evidence presented, and considering the presentation and demeanor of the witness, the Board makes the following findings of facts, which are Hearing Counsel's Proposed Findings of Fact 1-10:

1. At all times relevant, Huong Khong was the owner of shop license #2250, named Red Persimmon ("Shop") located at 1500 S. Willow St., Unit M 105, Manchester NH 03103 having shop license #1516. *See* Exhibit 1.
2. At all times relevant, Nick Nguyen was the manager of Shop. *See* Exhibit 2, 4, and 5.
3. On 06/11/2019, Inspector Hodgdon conducted a follow-up inspection which resulted in one thousand and sixty-six (1,066) violation points for the following:
 - a. Seven hundred (700) points for seven (7) foot spa agitators that were not properly disinfected. *See* Exhibit 5.
 - b. Two hundred and ninety-four (294) points for failing to clean/disinfect and properly store forty-nine (49) re-useable implements. *See* Exhibit 5.
 - c. Seventy-two (72) points for failing to dispose of and properly store twelve (12) disposable implements. *See* Exhibit 5.
 - d. Received a warning concerning having wax points turned on, yet did not have a licensed esthetician on site. *See* Exhibit 5.
4. The Respondents have never paid a fine nor received a final disposition as a result of the 06/11/2019 inspection. *See* Exhibit 1.
5. On 09/17/2019, Inspector Sandra Hodgdon conducted an inspection in response to a complaint which resulted in five hundred and fifteen (515) violation points for the following:

- a. Two hundred (200) points for eight (8) foot spas lacked a record of cleaning and disinfection. *See Exhibit 4.*
 - b. One hundred and fifty-six points for failing to clean/disinfect and properly store twenty-six (26) re-useable implements. *See Exhibit 4.*
 - c. Eighty-four (84) points for failing to dispose of and properly store fourteen (14) disposable implements. *See Exhibit 4.*
 - d. Fifty (50) points for one (1) license lacking a photograph as required. *See Exhibit 4.*
 - e. Twenty-five (25) points for one (1) license not displayed as required. *See Exhibit 4.*
6. The Respondents have never paid a fine nor received a final disposition as a result of the 09/17/2019 inspection. *See Exhibit 1.*
7. On 01/10/2022, Chief Inspector Sandra Hodgdon and Inspector Talia Wilson conducted a routine inspection of the Licensee's shop which result in one thousand eight hundred and seventy (1,870) violation points for the following:
- a. Five hundred points for five (5) foot spa agitators that were not properly disinfected. *See Exhibit 1.*
 - b. Two hundred (200) points for eight (8) foot spas lacked a record of cleaning and disinfection. *See Exhibit 1.*
 - c. Four hundred and twenty-five (425) points for failing to disinfect nine (9) tables and eight (8) pedicure areas. *See Exhibit 1.*
 - d. One hundred and ninety-two (192) points for failing to clean/disinfect and properly store thirty-two (32) re-useable implements. *See Exhibit 1.*
 - e. One hundred and fifty (150) points for failing to dispose of and properly store twenty-five (25) disposable implements. *See Exhibit 1.*
 - f. Three (3) points for a licensee failing to wash hands immediately before attending to a patron. *See Exhibit 1.*
 - g. Four hundred points assess for providing waxing services when not licensed to do so outside of the scope of practice. *See Exhibit 1.*
 - h. Zero points assessed for failing to have an eyewash station. *See Exhibit 1.*
 - i. Zero points assess for displaying multiple expired licenses. *See Exhibit 1.*

8. On 08/23/2022, the Board Administrator sent a notice pursuant to Bar 404.05 concerning the inspection on 01/10/2022.
9. The Respondent did not pay the proposed fine immediately, did not request a prehearing conference pursuant to Bar 404.06, and did not request in writing a hearing pursuant to Bar 404.07.
10. Licensees have the following disciplinary history before the Board:
 - a. On 12/19/2017, Respondents paid and administrative fine of one thousand five hundred and fifty-five (\$1,555.00) dollars. *See Exhibit 1.*
 - b. On 09/25/2018, Respondents paid an administrative fine of six hundred and fifty-nine (\$659.00) dollars. *See Exhibit 1.*
 - c. On 03/07/2019, Respondents paid an administrative fine of one thousand four hundred and twelve (\$1,412.00) dollars. *See Exhibit 1.*
 - d. On 04/19/2019, Respondents paid an administrative fine of three hundred twenty-four (\$324.00) dollars. *See Exhibit 1.*

Based upon the findings of fact made by the Board, the Presiding Officer makes and adopts the following conclusions of law and renders the following legal opinions:

1. The Licensee committed 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* N.H. Code Admin. Rs. Bar 404.09, 302.05, and 302.07) by operating a shop with the health and safety violations set forth in the inspection report, dated 1/10/22.
2. The Licensee committed 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* N.H. Code Admin. Rs. Bar 404.09, 302.05, and 302.07) by operating a shop with the health, safety, and licensing violations set forth in the inspection report, dated 09/17/19.
3. The Licensee committed 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* N.H. Code Admin. Rs. Bar 404.09, 302.05, and 302.07) by operating a shop with the health and safety violations set forth in the inspection report, dated 06/11/19.
4. Based upon the preceding conclusions of law, evidence presented and findings of fact, the Licensee committed professional misconduct as defined at RSA 3130A:22, III(g) by willfully and repeatedly violating provisions of RSA 313-A.
5. Pursuant to Plc Rule 206.24, Hearing Counsel has proven all elements of the misconduct found above by clear and convincing evidence.

6. Hearing Counsel's proposed conclusions of law contained in paragraphs 12, 13, and 14 are not adopted.

Upon a finding of misconduct made pursuant to RSA 313-A:22, II, by clear and convincing evidence, the Board imposes the following disciplinary action against the Licensee pursuant to RSA 310:12, I:

1. Pursuant to RSA 313-A:22, III(b) and RSA 310:12, I(c), the Licensee's shop license #2250 is **REVOKED**.
2. Pursuant to RSA 332-G:11, the Board affirmatively assess Huong Khong, as owner of shop License #2250, the reasonable cost of investigation and prosecution of this disciplinary proceeding in the amount of \$500.00.
3. Pursuant to RSA 313-A:22, III and RSA 310:12, I(e), the Board affirmatively assess Huong Khong, as owner of shop License #2250, \$3,451.00, which represents the cumulative total fine assessment from the 01/10/22 inspection report (\$1,870.00); the 09/17/19 inspection report (\$515.00); and the 06/11/19 inspection report (\$1,066.00).
4. The administrative fines and/or cost of investigation shall be paid within 90 days of the below signed date of this final order. No separate invoice will follow.
5. Pursuant to Bar Rule 301.09(i)(4), the Board shall deny an application if there is pending discipline, including unpaid fines, against the shop license.

VI. CONCLUSION AND DECISION:

Pursuant to RSA 310:10, RSA 310:12, and RSA 313-A:22, II, the Presiding Officer and Board hereby makes the herein findings of professional misconduct, **REVOKES** the Licensee's New Hampshire Shop License #2250, and imposes the other discipline stated herein.

DATED: 12/14/2023

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