

STATE OF IOWA
BEFORE THE BOARD OF COSMETOLOGY ARTS & SCIENCES

IN THE MATTER OF:)
) NO. 07-038
Nails Envy) DIA NO. 09DPHCE017
License No. 011289)
) FINDINGS OF FACT,
Aaron Le) CONCLUSIONS OF LAW,
License No. 01676) DECISION AND ORDER
)

RESPONDENTS

On August 31, 2009, the Iowa Board of Cosmetology Arts & Sciences (Board) issued a Notice of Hearing and Statement of Charges against Respondent Nails Envy, a licensed salon in the state of Iowa, and its owner, Aaron Le, a licensed nail technician in the state of Iowa. Respondents were charged with the following five counts:

Count I: Violating a regulation, rule, or law of this state, pursuant to 645 IAC 65.2(13), by failing to properly clean and disinfect whirlpool foot spas and by failing to document the cleanings, in violation of 645 IAC 63.25(2)-(5).

Count II: Violating a regulation, rule, or law of this state, pursuant to 645 IAC 65.2(13), by failing to change disinfectant solution and failing to store instruments as required in 645 IAC 63.12(1).

Count III: Violating a regulation, rule, or law of this state, pursuant to 645 IAC 65.2(13), by failing to post a copy of the most recent sanitation rules at eye level in the salon pursuant to 645 IAC 63.2.

Count IV: Violating a regulation, rule, or law of this state, pursuant to 645 IAC 65.2(13), by failing to have required hazardous waste containers available for use while services are being performed, in violation of 645 IAC 63.17(3).

Count V: Violating a regulation, rule, or law of this state, pursuant to 645 IAC 65.2(13), by having on the premises a prohibited product containing liquid methyl methacrylate monomer, in violation of 645 IAC 63.18(2).¹

¹ This is a typographical error. The rule governing methyl methacrylate is found at 645 IAC 63.18(1).

Count VI: Violating Iowa Code section 157.13(1) and 645 IAC 65.2(28) and 65.2(36) by employing individuals to practice cosmetology arts and sciences without a license.

Count VII: Violating 645 IAC 65.2(21) by failing to comply with the terms of the settlement agreement entered into with the Board on February 26, 2008.

The hearing was held on October 5, 2009 at 9:30 a.m. in the Lucas State Office Building, fifth floor conference room, Des Moines, Iowa. Respondents were served with the Notice of Hearing and Statement of Charges by restricted certified mail but failed to appear for the hearing. (State Exhibit 7) The state was represented by Assistant Attorney General Jordan Esbrook. The following Board members were present for the hearing: Jack Morlan, Chairperson; Becky J. Brockmann; Kimberly Setzer; Richard Mosley; Dana Atkins; Jerry Talbott; and Karen Thomsen. Administrative Law Judge Margaret LaMarche assisted the Board in conducting the hearing. The hearing was open to the public, pursuant to Iowa Code section 272C.6(1)(2009), and was recorded by a certified court reporter.

After hearing all the evidence and examining the exhibits, the Board convened in closed session, pursuant to Iowa Code section 21.5(1)(f)(2009), to deliberate its decision. The administrative law judge was instructed to prepare the Board's written decision, in accordance with its deliberations.

THE RECORD

The record includes the testimony of the witness and State Exhibits 1-9 (See Exhibit Index for description; Exhibit 9 is a University of Iowa Hygienic Laboratory Report for Sample Number 2009012645).

FINDINGS OF FACT

1. On May 9, 2006, the Board issued Iowa salon license number 011289 to Nails Envy, located at 894 Middle Road in Bettendorf, Iowa. Salon license No. 011289 is current and will next expire on December 31, 2010. Respondent Aaron Le is the owner of Nails Envy, and he was issued nail technology license no. 01676 on January 3, 2006. Mr. Le's license will next expire on March 31, 2010. (State Exhibit 3)

2. On February 26, 2008, Respondents entered into a combined Notice of Hearing, Settlement Agreement, and Final Order with the Board. The Settlement Agreement and Final Order required Respondents to complete four (4) hours of board-approved continuing education in the content areas of Iowa nail technology law, rules and sanitation within 90 days of execution of the agreement. This Order was entered after an inspection of the salon on June 5, 2007 revealed:

- two unlicensed individuals were engaged in activities requiring a license;
- sanitation rules and the salon license were not properly posted in an area visible to the public;
- hazardous waste container bags were not available;
- two razor-edged devices (heel shavers) on the premises; and
- unsatisfactory evidence of required whirlpool cleaning and no whirlpool cleaning record.

As of the date of hearing, Respondent had only completed two of the four hours of continuing education required by the February 26, 2008 Settlement Agreement and Final Order. (Testimony of Kimberly Groves; State Exhibits 1, 4)

3. On May 1, 2009, Department of Inspections and Appeals (DIA) Investigators Kimberly Groves and Tamara Adams made an unannounced investigative visit to Respondent salon. The salon had six manicure stations and four pedicure chairs. Respondent Aaron Le and two employees were working at the salon at the time of the investigator's visit. Mr. Le's current nail technician license was posted. The salon's license was not posted, and no licenses were posted for the other two employees. The investigators observed one of the employees, Ly Johnson, working on a customer when they entered the salon. Mr. Johnson admitted that he does not have an Iowa license and is only licensed in Illinois. The second employee, Thanh Nhat Le, retreated to the restroom when asked for his license. Aaron Le admitted to the investigators that Thanh Nhat Le does not have an Iowa license. (Testimony of Kimberly Groves; State Exhibits 3, 4)

4. At the time of the May 1, 2009 inspection, Investigators Groves and Adams documented the following violations of Board statutes and rules:

- No sanitation rules were posted in the reception area. The investigators gave new sanitation rules to the owner;
- The last inspection report was not posted;
- There was no whirlpool spa cleaning schedule;
- Debris was caught in the screens of three whirlpool spas. The investigators were unable to examine the jets for debris because Mr. Le did not have a screwdriver to remove the jets' cover.
- Disinfection solution (Barbicide) at some of the counters was cloudy and contained debris. Two containers of Barbicide were the consistency of jelly. Mr. Le reported changing the Barbicide every month;
- Nail brushes were in a cloudy container of Barbicide that did not fully cover the brushes;
- There were used nail buffers and emery boards present in the salon;
- Supplies, such as nippers and clippers, were located in unclean drawers with nail clippings, pens, paper, and money;
- Used sandpaper sleeves and bits were observed on the machines and in the drawers;
- Instruments were placed on top of each other in the sanitizer.

Aaron Le reported that he was cleaning the spas with the product "Scrubbing Bubbles" between customers and admitted that he was not performing nightly cleanings. He used Barbicide for bi-weekly cleanings and ran the jets for 15-30 minutes at that time. He did not use any soap or detergent when cleaning the spas. (Testimony of Kimberly Groves; State Exhibits 3, 4)

5. Investigator Groves took two samples of nail liquid for testing. One sample was taken from a container in the back room and one sample was taken from a container at nail station #2. Both samples tested positive for Methyl Methacrylate monomer, which is a substance banned by the Food and Drug Administration (FDA) for use in cosmetic products.² (Testimony of Kimberly Groves; State Exhibits 5, 6, 9)

² 645 IAC 63.18(1).

CONCLUSIONS OF LAW

645 IAC 65.2(13) provides authority for the Board to impose disciplinary sanctions for violation of a regulation, rule, or law of this state, another state, or the United States, which relates to the practice of the profession.

Count I: *Failing to Document the Cleaning and Disinfecting of a Whirlpool Foot Spa*

645 IAC 63.25 provides the procedures for proper cleaning and disinfecting whirlpool foot spas after each use, at the end of each day, and biweekly. In addition, the rule requires salons to maintain a record of cleaning and disinfecting. 645 IAC 63.25 provides, in relevant part:

645-63.25(157) Cleaning and disinfecting whirlpool foot spas and hydrotherapy baths.

63.25(1) As used in this rule, "whirlpool foot spa," "foot spa," "whirlpool," or "spa" is defined as any basin using circulating or still water.

63.25(2) After use for each patron, each whirlpool foot spa shall be cleaned and disinfected in the following manner:

a. All water shall be drained and all debris shall be removed from the spa basin.

b. The spa basin must be cleaned with soap or detergent and water.

c. The spa basin must be disinfected with an EPA-registered disinfectant with demonstrated bactericidal, fungicidal, and virucidal activity which must be used according to the manufacturer's instructions.

d. The spa basin and hydrotherapy bath must be wiped dry with a clean towel.

63.25(3) At the end of each day, the whirlpool foot spa must be cleaned and disinfected in the following manner:

a. The screen shall be removed, all debris trapped behind the screen shall be removed, and the screen and inlet shall be washed with soap or detergent and water.

b. Before the screen is replaced, it shall be completely immersed in an EPA-registered disinfectant with demonstrated bactericidal, fungicidal, and virucidal activity which must be used according to the manufacturer's instructions.

...

63.25(4) Every other week (biweekly), after being cleaned and disinfected as provided in subrule 63.25(3), each whirlpool foot spa and hydrotherapy bath shall be cleaned and disinfected in the following manner;

a. The spa basin...shall be filled completely with water and one teaspoon of 5.25 percent bleach or recommended whirlpool disinfectant for each one gallon of water, or a solution of sodium hypochlorite (bleach) of approximately 50 ppm used according to the manufacturer's instructions.

b. The spa...shall be flushed with the bleach or recommended whirlpool disinfectant and water solution...for five to ten minutes and allowed to sit for six to ten hours.

c. The spa...shall be drained and flushed with water before use for a patron.

63.25(5) For each foot spa and hydrotherapy bath, a record shall be made of the date and time of each cleaning and disinfecting as required by subrules 63.25(3) and 63.25(4), and shall indicate whether the cleaning was a daily or biweekly cleaning. This record shall be made at or near the time of cleaning and disinfecting. Records of cleaning and disinfecting must be made available upon request by a patron, inspector or investigator. The record must be signed by a licensee and include the licensee's license number beside each recorded cleaning event.

The preponderance of the evidence established that Respondent Nails Envy and Respondent Aaron Le violated 645 IAC 65.2(13) by failing to properly clean and disinfect the whirlpool foot spas and by failing to maintain and make available a record of the whirlpool foot spa cleanings, as required by 645 IAC 63.25(2)-(5). Respondents did not disinfect the whirlpool spas between customers, did not properly clean the whirlpool screens or jets, and did not use proper procedures for bi-weekly cleaning. Respondents did not have any cleaning record available at the time of the inspection.

Count II: Failure To Change Disinfection Solution and Properly Store Instruments

645 IAC 63.12(1) provides that before use upon a client, all non-electrical instruments shall be disinfected with an EPA-registered, hospital grade disinfectant with demonstrated bactericidal, fungicidal and virucidal activity and used according to the manufacturer's instructions. All disinfected instruments shall be stored in a clean,

covered place. All instruments that have been used on a client or soiled in any manner shall be placed in a proper receptacle. Disinfectant solutions shall be changed at least once per week or whenever visibly cloudy or dirty.

The preponderance of the evidence established that Respondents violated 645 IAC 63.12(1) by failing to replace disinfection solutions that had become visibly cloudy, that contained debris, and that had the consistency of jelly. Respondents further violated this rule by failing to change the disinfectant solution at least once a week and by storing nippers and clippers in unclean drawers with nail clippings, pens, paper and money.

645 IAC 63.14 provides that all instruments and supplies that come into direct contact with a patron and cannot be disinfected, including emery boards, must be disposed of in a waste receptacle immediately after use. 645 IAC 63.17(4) provides that emery boards, cosmetic sponges, cosmetic applicators, toe separators and orangewood sticks must be discarded after use or given to the client. 645 IAC 63.18(3)"a" provides, in relevant part, that a nail buffer that can be sanitized may be used more than once, but it must be sanitized before use on the next client. If a nail buffer cannot be sanitized, the nail buffer shall not be used for more than one client. Respondents violated 645 IAC 65.2(13) by failing to properly dispose of used nail buffers and emery boards, in conformance with these Board rules.

Count III: Failure to Post the Most Current Sanitation Rules

645 IAC 63.2 provides that a copy of the most current sanitation rules shall be posted in the reception area at eye level in the salon for the information and guidance of the general public. The preponderance of the evidence established that Respondents Nails Envy and Aaron Le violated 645 IAC 65.2(13) by failing to post the current sanitation rules in the reception area, in violation of 645 IAC 63.2.

Count IV: Failure To Have Required Hazardous Waste Containers

645 IAC 63.17(3) provides that hazardous waste containers and bags shall be available for use at all times when services are being performed. The absence of containers shall be prima facie evidence of noncompliance. The preponderance of the evidence established that Respondents Nails Envy and Aaron Le violated 645 IAC 65.2(13) by failing to have hazardous waste containers in the salon, in violation of 645 IAC 63.17(3).

Count V: Having A Product Containing Liquid Methyl Methacrylate Monomer On The Premises

645 IAC 63.18(1) provides, in relevant part:

645-63.18(157) Prohibited hazardous substances and use of products and equipment.

63.18(1) No salon or school shall have on the premises cosmetic products containing substances which have been banned or otherwise deemed hazardous or deleterious by the FDA for use in cosmetic products. Prohibited products include, but are not limited to, any product containing liquid methyl methacrylate monomer and methylene chloride. No product shall be used in a manner that is not approved by the FDA. The presence of the product in a salon or school is prima facie evidence of that product's use in the salon or school.

The preponderance of the evidence established that Respondents violated 645 IAC 65.2(13) by having nail products containing liquid methyl methacrylate (MMA) at a nail station and in the backroom of the salon on May 1, 2009, in violation of subrule 63.18(1).

Count VI: Employing Individuals Without A Current License To Practice Nail Technology

Iowa Code section 157.13(1)(2009) provides that it is unlawful to employ an individual to practice cosmetology arts and sciences unless that individual is licensed or has obtained a temporary permit under this chapter. 645 IAC 63.4(1)"a" provides that it is a salon owner's responsibility to ensure that individuals employed for cosmetology arts and sciences services hold a current and active license issued by the Board. 645 IAC 65.2(28) provides that the Board may impose any of the disciplinary sanctions provided in rule 645-65.3 when the Board determines that a licensed salon has permitted an unlicensed employee or person under the salon's control to perform activities requiring a license. 645 IAC 65.2(36) provides that it is prima facie evidence that an unlicensed person is providing services for which a license is required if the person is providing cosmetology services and leaves the salon at the time of inspection.

The preponderance of the evidence established that Respondents Nails Envy and Aaron Le violated Iowa Code section 157.13(1) and 645 IAC 65.2(28) by employing two unlicensed individuals to provide nail technology services to customers.

Count VII: Failure to Comply With the Terms of a Settlement Order

645 IAC 65.2(21) provides that the Board may discipline licensees for failure to comply with the terms of a board order, settlement agreement or consent order. The preponderance of the evidence established that Respondents Nails Envy and Aaron Le failed to comply with the terms of the Settlement Agreement approved on February 26, 2008. Respondents were required to complete four hours of continuing education in the content areas of Iowa nail technology law, rules and sanitation but completed only two hours of continuing education. Respondent Aaron Le has offered no explanation for his failure to fully comply with the continuing education requirement.

Sanction

Respondents' repeated violations affected all aspects of the salon's operation and they directly affect the public health, safety, and welfare. The nature and seriousness of these repeat violations, coupled with Respondents' failure to appear for hearing, justify revocation of both licenses.

DECISION AND ORDER

IT IS THEREFORE ORDERED that license number 011289, issued to Respondent Nails Envy, is hereby REVOKED, effective immediately upon service of this Order.

IT IS FURTHER ORDERED that license number 01676, issued to Respondent Aaron Le, is hereby REVOKED, effective immediately upon service of this Order.

IT IS FURTHER ORDERED, pursuant to Iowa Code section 272C.6, that the Respondents shall pay \$75.00 for fees associated with the disciplinary hearing and \$43.77 for the court reporter fees. The total fees of \$118.77 shall be paid within thirty (30) days of receipt of this decision.

IT IS FURTHER ORDERED that prior to reinstatement of either license, Respondents must establish that the reasons for the revocations no longer exist and that it is in the public interest for the licenses to be reinstated. 645 IAC 11.31.

This findings of fact, conclusions of law, decision and order is approved by the board on November 2, 2009.

Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final agency action, unless, within 15 days after the date of notification or mailing of this decision, a motion to vacate is filed and served on all parties or an appeal of the decision on the merits is timely initiated. A motion to vacate shall state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact attached to the motion. 645 IAC 11.21(3). The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate. 645 IAC 11.21(4).

Pursuant to Iowa Code section 17A.19(2009) and 645 IAC 11.29, any appeal to the district court from a decision in a contested case shall be taken within 30 days from the issuance of the decision by the board. The appealing party shall pay the full costs for the transcript of the hearing. 645 IAC 11.23.