

00000STATE OF IOWA
BEFORE THE BOARD OF COSMETOLOGY ARTS & SCIENCES

IN THE MATTER OF:)	
)	NO. 10-018
Top Nails)	DIA NO. 11IBC028
License No. 010604)	
)	FINDINGS OF FACT,
Phuong Van Nguyen, owner)	CONCLUSIONS OF LAW,
License No. 01553)	DECISION AND ORDER
)	
RESPONDENTS		

On January 5, 2011, the Iowa Board of Cosmetology Arts & Sciences (Board) issued a Notice of Hearing and Statement of Charges against Respondent Top Nails, a licensed salon in the state of Iowa, and its owner, Phuong Van Nguyen, a licensed nail technician in the state of Iowa. Respondents were charged with the following six counts:

Count I: Engaging in unsanitary practices in violation of Iowa Code sections 147.55, 157.6, and 157.9(2011) and 645 IAC 63.11, 63.13, 63.14, 63.15, 63.25.

Count II: Failing to post professional licenses in the reception area at eye level, in violation of Iowa Code sections 147.55 and 157.9(2011) and 645 IAC 65.2(13), 61.5(3), and 61.5(4).

Count III: Failing to provide for biohazard disposal, in violation of Iowa Code sections 147.55, 157.9(2011) and 645 IAC 65.2(13) and 63.11.

Count IV: Failing to post a copy of the most recent sanitation rules and inspection report at eye level in the reception area, in violation of Iowa Code sections 147.55, 157.9(2011) and 645 IAC 65.2(13) and 63.2.

Count V: Employing an unlicensed individual to provide nail technician services, in violation of Iowa Code sections 147.55, 157.9(2011) and 645 IAC 65.2(13) and 65.2(28).

Count VI: Permitting licensed individuals to perform activities outside the scope of their licenses, in violation of Iowa Code sections 147.55, 157.13(1)(2011) and 645 IAC 60.3(6), 63.4(3), 65.2(13), and 65.2(29).

The hearing was held on January 10, 2012 in the Lucas State Office Building, fifth floor conference room, Des Moines, Iowa. The state was represented by Assistant Attorney General David Van Compernelle. Respondents were represented by Twin Van Nguyen, who identified himself as the son of Phuong Van Nguyen and manager of Top Nails. The following Board members were present for the hearing: Kimberly Setzer, Chairperson; Richard Mosley; Dana Atkins; Richard Sheriff; Mary Clausen; and Nicole Schultz. Administrative Law Judge Margaret LaMarche assisted the Board in conducting the hearing. The hearing was closed to the public at Respondents' request, pursuant to Iowa Code section 272C.6(1)(2011), 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)(2011), 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 DIA Investigator Kimberly Groves and State Exhibits 1 and 2.

FINDINGS OF FACT

1. On December 16, 2004, the Board issued Iowa salon license number 010604 to Top Nails, which is located at 1875 Venture Drive in Ottumwa, Iowa. Salon license no. 010604 will expire on December 31, 2012. Respondent Phuong Van Nguyen is the owner of Top Nails. Phuong Van Nguyen holds nail technology license no. 01553, which expires on March 31, 2013. (Exhibits 1, 2)
2. On October 1, 2010, Department of Inspections and Appeals (DIA) Investigators Tamara Adams and Kimberly Groves made an unannounced visit to Top Nails. Five employees were present at the salon when the investigators arrived. Four female employees were providing pedicures to customers and a fifth female employee was

working at the front desk. The front desk employee left the business after the investigators identified themselves. The salon owner, Phuong Van Nguyen, was not present in the salon when the investigators arrived. Salon manager Twin Van Nguyen was not present in the salon. However, Phuong Van Nguyen and Twin Van Nguyen both had current nail technician licenses that were posted on the back wall of the salon, along with the professional licenses of other employees. Board rules require licenses to be posted at eye level in the reception area so that they can be easily viewed by customers.

The following four female employees provided photo identification to the investigators: Lan K. Tran, Phuong Thi Ly, Uyen Thi Phuong Pham, and May Thi Nguyen. Three of the four had current Iowa nail technician licenses, which were posted on the back wall of the salon rather than in the reception area. The fourth employee, Uyen Thi Phuong Pham, had a Virginia driver's license and did not have an Iowa nail technician license. She told the investigators that she had only been working in the salon for twenty days. (Testimony of Kimberly Groves; Exhibit 2)

3. Top Nails advertised waxing services on the salon's front window. Kimberly Groves found warmed wax in a back room. There were waxing strips in a basket. Used wooden sticks with wax on them had not been discarded. None of the salon's employees were properly licensed to provide waxing services for the face. When Ms. Groves asked who provided waxing services, the employees initially responded that it was the employee who left the salon when the investigators arrived. Later it was reported that Phuong Thi Ly provided eyebrow waxing services to customers. (Testimony of Kimberly Groves; Exhibit 2)

4. At the time of the October 1, 2010 inspection, Kimberly Groves documented the following sanitation violations of Board statutes and rules:

- Closed drawers contained nail instruments along with nail clippings, dust, money, and paper;
- Nail tools were piled on each other in the UV sanitizer;
- Disinfectant was not located at each work station;
- Used nail buffers and emery boards had not been discarded and were found throughout the salon;
- Used sanding bands and other electric bits were on machines and at stations;
- Bandages served as the only first aid kit;

- The salon did not have biohazard bags;
- Large “blush-like” brushes that could not be sanitized were located at manicure stations;
- The sanitation rules were outdated (2007) and were on the reception desk. The inspection report was placed behind the rules.

(Testimony of Kimberly Groves; Exhibit 2)

5. In January 2009, Kimberly Groves conducted an investigation of Da Vi Nails (Case No. 08-042), which is located across the street from Top Nails. At the time of that investigation, Twin Van Nguyen was the owner of Da Vi Nails. As a result of that investigation, Da Vi Nails and Twin Van Nguyen were charged and eventually disciplined for sanitation violations similar to the violations in this case. On November 16, 2009, Twin Van Nguyen was ordered to pay a \$1000 civil penalty within thirty days and complete 4 hours of continuing education. Twin Van Nguyen did not pay the civil penalty or complete the continuing education until some time after March 18, 2011, when he was contacted by Board staff. (Testimony of Kimberly Groves)

6. Kimberly Groves also conducted a prior investigation of Top Nails (Case No. CO-06-010) in March 2008. At that time Phuong Van Nguyen owned Top Nails and his son, Twin Van Nguyen, managed Top Nails. The investigation revealed sanitation and license violations similar to those charged in the current Statement of Charges. Case No. CO-06-010 was settled without hearing. Phuong Van Nguyen agreed to pay a \$1000 civil penalty, to complete 4 hours of continuing education, and to abide by the statutes and rules governing licensed salons in Iowa. (Testimony of Kimberly Groves; Exhibit 2)

CONCLUSIONS OF LAW

The Board is authorized to impose disciplinary sanctions on licensees for violations of Iowa Code chapters 147, 157, or the rules promulgated by the Board. Iowa Code sections 147.55(9); 157.9; and 645 IAC 65.2(13).

Count I: *Unsanitary Practices*

The legislature has authorized the Board to prescribe sanitary rules for salons and schools of cosmetology arts and sciences, which shall include sanitary conditions necessary for the practice of cosmetology arts and sciences and for the prevention of

infectious and contagious diseases. The Board is also authorized to make necessary inspections for enforcement purposes. Iowa Code section 157.6(2011). The Board has promulgated rules on Sanitation for Salons and Schools of Cosmetology Arts and Sciences at 645 IAC chapter 63.

645 IAC 63.11 addresses universal precautions, which are to be consistently practiced by all licensees and students. The rule requires all instruments and implements to be disinfected in accordance with subrule 63.12. 645 IAC 63.11(6). Instruments and supplies that have been used on a client or soiled in any manner shall be placed in a proper receptacle. 645 IAC 63.11(7).

645 IAC 63.13 provides the proper procedures for disinfecting instruments and equipment. The rule requires all tools and implements to be disinfected by complete immersion in an EPA-registered disinfectant mixed and used according to the manufacturer's directions. 645 IAC 63.13(1). Disinfected implements shall be stored in a disinfected, dry, covered container and shall be isolated from contaminants. 645 IAC 63.13(2). Disinfectant solutions shall be changed at least once per week or whenever visibly dirty. 645 IAC 63.13(3). Instruments and supplies that cannot be disinfected, for example cotton pads, sponges, applicators, emery boards, nail buffers, arbor or sanding bands, sleeves, toe separators and neck strips, shall be disposed of in a waste receptacle immediately after use. 645 IAC 63.14. Salons and schools shall have and maintain a complete first-aid kit in a readily accessible location on the premises. At a minimum, the first-aid kit must include adhesive dressings, gauze and antiseptic, tape, triple antibiotics, eyewash, and gloves. 645 IAC 63.6.

The preponderance of the evidence established that there were numerous violations of the Board's sanitation rules at Top Nails at the time of the October 1, 2010 investigation. Nail instruments were piled on top of each other in the sanitizer, in violation of 645 IAC 63.13(1). Clean nail tools were found in drawers containing money, paper, nail clippings, and dust, in violation of 645 IAC 63.13(2). Used disposable buffers and emery boards were present throughout the salon and had not been properly discarded, in violation of 645 IAC 63.14. The salon had large brushes at each manicure station that could not be disinfected, in violation of 645 IAC 63.14. The salon did not have a complete first-aid kit, in violation of 645 IAC 63.6. Twin Van Nguyen elected not to testify, and Respondents presented no evidence to refute the credible testimony and detailed written report provided by DIA Investigator Kimberly Groves.

Count II: Failure to Post Professional Licenses In The Reception Area At Eye Level

645 IAC 61.5(3) provides that a copy of the license (and current renewal card) for each licensee employed by the salon shall be posted and visible in the salon reception area at eye level. The preponderance of the evidence established that the professional licenses for Top Nails' employees were not posted in the salon reception area on October 1, 2010, in violation of 645 IAC 65.2(13) and 61.5(3). The licenses were posted on the salon's back wall where they could not be easily viewed by customers.

Count III: Failure to Provide Biohazard Disposal

645 IAC 63.11(3) requires all licensees and students to consistently practice universal precautions by placing disposable material that will release blood or other potentially infectious materials in a liquid or semiliquid state if compressed in a red hazardous waste bag and to dispose of it in accordance with the regulations for removal of hazardous waste. The preponderance of the evidence established that Respondents Top Nails and Phuong Van Nguyen did not have or use red biohazard bags or containers, in violation of 645 IAC 63.11(3).

Count IV: Failure to Post Rules and Report

645 IAC 63.2 provides that a copy of the most current sanitation rules and the most recent inspection report 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 Top Nails and Phuong Van Nguyen violated 645 IAC 63.2 by failing to post the current sanitation rules and current inspection report at eye level in the reception area, in violation of 645 IAC 63.2. The salon had an outdated copy of the sanitation rules on the reception desk. The last inspection report was also on the desk, behind the outdated rules.

Count V: Employing Unlicensed Person

Iowa Code section 157.13(1)(2011) 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. 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. The preponderance of the evidence established that Respondents Top Nails and Phuong Van Nguyen violated Iowa Code section 157.13(1)(2011) and 645 IAC 65.2(28) by permitting Uyen Thi Phuong Pham to provide nail technician services when she did not have an Iowa nail technician license.

Count VI: Practice Beyond Scope of License

Iowa Code section 157.1(5) defines the practice of cosmetology. The practice of cosmetology includes removing superfluous hair from the face or body of a person with the use of depilatories, wax, sugars or tweezing but does not include shaving. Iowa Code section 157.1(5)(c)(2011). The practice of nail technology includes the removal of superfluous hair from the hands, arms, feet, or legs of a person by the use of wax or a tweezer, but does not include the removal of superfluous hair from the face. Iowa Code section 157.1(24)(c)(2011). 645 IAC 60.3(6) provides that facial waxing shall only be done by a cosmetologist or esthetician. Licensees are responsible for ensuring that they do not exceed their scope of practice. 645 IAC 63.4(3).

645 IAC 65.2(29) authorizes the Board to discipline licensees for permitting an unlicensed employee or a person under the licensee's or licensed salon's control to practice outside the scope of the person's license. The preponderance of the evidence established that Respondents Top Nails and Phuong Van Nguyen violated Iowa Code section 157.13(1) and 645 IAC 60.3(6) and 65.2(29) when they permitted Phuong Thi Ly to perform eyebrow waxing. Phuong Thi Ly is a licensed nail technician and is not a licensed cosmetologist. Eyebrow waxing is outside the permissible scope of practice for a nail technician.

Sanction

Respondents' violations directly affect the public health, safety, and welfare. Moreover, these are repeated violations that have continued despite prior disciplinary action against these same Respondents. The Board's prior disciplinary action was ineffective in bringing these Respondents into compliance. The Board was not persuaded that Respondents are willing and/or able to operate this salon in conformance with state statutes and regulations.

DECISION AND ORDER

IT IS THEREFORE ORDERED that license number 010604, issued to Respondent Top Nails, is hereby REVOKED, effective immediately upon service of this Decision and Order.

IT IS FURTHER ORDERED that license number 01553, issued to Respondent Phuong Van Nguyen, is hereby REVOKED, effective immediately upon service of this Decision and 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 \$55.00 for the court reporter fees. The total fees of \$130.00 shall be paid within thirty (30) days of receipt of this decision.

Dated this 20th day of February, 2012.



Kimberly Setzer, Chairperson
Iowa Board of Cosmetology Arts & Sciences

Pursuant to Iowa Code section 17A.19(2011) 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.

cc: David Van Compernelle, Assistant Attorney General