

STATE OF IOWA
BEFORE THE BOARD OF COSMETOLOGY ARTS & SCIENCES

IN THE MATTER OF:)	
)	NO. CO-00-044
CLASSIC NAILS & TANNING)	DIA NO. 02DPHCE004
License No. 002-008500)	
)	FINDINGS OF FACT,
RESPONDENT)	CONCLUSIONS OF LAW,
)	DECISION AND ORDER

On April 16, 2002, the Iowa Board of Cosmetology Arts & Sciences (Board) issued a Statement of Charges charging Classic Nails & Tanning (Respondent), a salon licensed in the state of Iowa, with two counts:

COUNT I: Engaging in practices that are harmful or detrimental to the public by permitting the use of a recognized dangerous substance (Methyl Methacrylate) on consumers receiving nail technology services, in violation of Iowa Code section 157.9 (2001) and 645 IAC 65.12(1)"c."

COUNT II: Permitting an unlicensed employee or person under the licensee's control to perform activities requiring a license, in violation of Iowa Code sections 157.2, 157.3, 157.13 (2001) and 645 IAC 65.1(9)"a".

A Notice of Hearing was issued on April 16, 2001. The state filed a Motion To Continue the hearing scheduled for November 13, 2002. After a letter was sent by the Respondent's attorney, the state's Motion for Continuance was granted, and the hearing was continued to December 4, 2002 at 9:00 a.m. The notice of hearing was served on the Respondent's attorney by certified mail on November 15, 2002. The certified notice sent to the licensee was returned as "unclaimed."

A hearing was held on December 4, 2002 at 9:50 a.m. in the Lucas State Office Building, fifth floor conference room, Des Moines, Iowa. The Respondent did not appear and was not represented by counsel. The state was represented by Melissa Biederman, Assistant Attorney General. The following Board members were present for the hearing: Curtis Stamp, Chairperson; Sheila O'Hern; Mary Beth Myers; Lois Leytem; Jack Morlan; and Michael Salvner. Margaret LaMarche, administrative law judge from the Iowa Department of Inspections and Appeals, assisted the Board

in conducting the hearing. The hearing was open to the public, pursuant to Iowa Code section 272C.6(1)(2001), and was recorded by a certified court reporter.

After hearing the testimony and examining the exhibits, the Board convened in closed session, pursuant to Iowa Code section 21.5(1)(f)(2001) to deliberate its decision. The administrative law judge was instructed to prepare the Board's decision, in accordance with its deliberations.

THE RECORD

The record includes the Notice of Hearing, Motion for Continuance, 11/12/02 letter to Board from Respondent's Attorney, Ruling Granting Continuance, the testimony of the witness, and the following exhibits:

State Exhibit 1:	Statement of Charges
State Exhibit 2:	Licensee Status Sheet
State Exhibit 3:	Inspection Report
State Exhibit 4:	Licenses
State Exhibit 5:	Select Statutes and Administrative Rules

FINDINGS OF FACT

1. On September 25, 2000, the Board issued cosmetology salon license number 002-008500 to Classic Nails & Tanning (Respondent) for a salon located at 550 South Gear Avenue, West Burlington, Iowa. Respondent's cosmetology license is current through December 31, 2002. According to the records maintained by the Board, the owner of the Respondent salon is Thao Da Nguyen. (Testimony of Darby Matteson; State Exhibits 1-2, 4)

2. On October 31, 2001, investigator Darby Matteson went to Classic Nails & Tanning at 550 South Gear Avenue in West Burlington, Iowa to perform an inspection. The purpose of the inspection was to verify the current licenses of all operators, to collect samples of nail products used by operators to seal and fill artificial nails, and to submit the samples to the University of Iowa Hygienic Lab for testing of Methyl Methacrylate (MMA). (Testimony of Darby Matteson; State Exhibits 1, 3)

3. Three licenses were posted on the wall by the reception counter: one salon license and two nail technology licenses. Only one person was providing nail technology services at the time of the investigator's visit. This person identified herself as Cindy Cao. Neither of the posted licenses was for Cindy Cao. Cindy Cao told the investigator that she attended school in Silver Springs, Maryland and is licensed in the state of Maryland but not in Iowa. Ms. Cao stated that she had been in Iowa for only three months and had not taken any steps to become licensed in Iowa. When the investigator arrived, Ms. Cao was performing nail technology services for one client, and another client was waiting for services. (Testimony of Darby Matteson; State Exhibit 3)

4. Ms. Cao told the investigator that the owner of the salon is Kim Phung and that the only other employee was its manager, Hao Van Nguyen. The licenses that were posted on the wall were for Kim Phung and Hao Van Nguyen. (Testimony of Darby Matteson; State Exhibit 3)

5. The investigator took a sample of the product being used by Ms. Cao to seal and fill artificial nails. The sample was taken from an 8-12 oz. plastic squirt bottle at Ms. Cao's work station. The investigator asked Ms. Cao to show her the container used to refill the squirt bottle. Ms. Cao took the investigator to a storage room and showed her a one gallon white plastic jug. A sample was also taken from the one gallon plastic jug. (Testimony of Darby Matteson; State Exhibit 3)

6. The morning after the inspection, the investigator received a telephone call from Kim Phung. She stated that she took over the salon three months earlier and that the previous owner moved to Marshalltown to open a Classic Nails there. She stated that the previous owner is her sister-in-law. Ms. Phung owns another nail salon in Des Moines and works at the nail salon in West Burlington about two weeks each month. Ms. Phung admitted that Cindy Cao worked at Classic Nails & Tanning in West Burlington, Iowa. (State Exhibit 3)

7. On November 1, 2001, the investigator delivered the samples taken from the Respondent salon to the State Hygienic Lab at the Wallace State Office Building. The samples were forwarded to the main lab in Iowa City. The laboratory results indicated that the samples tested positive for Methyl Methacrylate. The

Food and Drug Administration (FDA) has determined that Methyl Methacrylate is a "poisonous and deleterious" ingredient when used in liquid monomer. It is widely known within the nail technology industry that the use of nail sealer or filler products containing Methyl Methacrylate possess a potential health and safety hazard to consumers of nail technology services. (Testimony of Darby Matteson; State Exhibits 1, 3)

CONCLUSIONS OF LAW

I. Failure to Appear

645 IAC 11.6(1)"b" provides that the statement of charges and notice of hearing may be served by restricted certified mail. The licensee's attorney was properly served with the statement of charges and notice of hearing by certified mail, but no one appeared on behalf of the licensee at the time of the hearing.

If a party fails to appear or participate in a contested case hearing after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party. 645 IAC 11.21(1). The Board waited for forty-five minutes before proceeding with the hearing. The Board was authorized to proceed with the hearing in the absence of the Respondent.

II. Practice Harmful or Detrimental To The Public

The Iowa Board of Cosmetology Arts & Sciences Examiners was created by the legislature, pursuant to Iowa Code chapters 147 and 157, and was directed to adopt rules to implement the provisions of Iowa Code chapter 157. Iowa Code section 157.14 (2001). Any license issued by the department can be suspended, revoked, or renewal denied for violation of any provision of Iowa Code chapter 157 or the rules promulgated by the Board. Iowa Code section 157.9 (2001).

645 IAC 65.1(1)"c"¹ provides, in relevant part:

645-65.1(272C) Discipline. For all acts and offenses listed in this rule, the board may impose any of the

¹ This subrule was formerly numbered as 65.12(1)"c"

disciplinary methods outlined in Iowa Code section 272C.3(2)"a" to "f," including the imposition of a civil penalty which shall not exceed \$1,000. The board may discipline a licensee for any of the following reasons:

...

65.1(1) All grounds listed in Iowa Code section 147.55 which are:

...

c. ...or engaging in ...practice harmful or detrimental to the public. Proof of actual injury need not be established.

The preponderance of the evidence established that the Respondent salon violated Iowa Code section 157.9 and 645 IAC 65.1(1)"c" when it used Methyl Methacrylate, a substance known to be potentially harmful or detrimental, on consumers receiving nail technology services.

III. Allowing An Unlicensed Person To Practice Cosmetology

Iowa Code section 157.2(1)(2001) provides that it is unlawful for a person to practice cosmetology arts and sciences with or without compensation unless the person possesses a license issued under section 157.3. Iowa Code section 157.13 provides that it is unlawful for a person to employ an individual to practice cosmetology arts and sciences unless the individual is licensed or has obtained a temporary permit. "Cosmetology" means...manicuring the nails of any person...nail technology. Iowa Code section 157.1(3)(c) and (f). The "Cosmetology arts and sciences" include nail technology. Iowa Code section 157.1(4)(d)(2001).

645 IAC 65.1(9)(a) provides that the Board may impose any of the disciplinary methods outlined in Iowa Code section 272C.3(2)"a" to "f", including the imposition of a civil penalty which shall not exceed \$1,000, for permitting an unlicensed employee or person under the licensee's control to perform activities requiring a license.

The preponderance of the evidence established that Classic Nails & Tanning violated Iowa Code sections 157.2, 157.13 and 645 IAC 65.1(9)(a) when it permitted an unlicensed person to perform activities (i.e., nail technology) requiring a license.

III. Sanction

In determining the appropriate sanction, the Board considered the factors outlined at 645 IAC 13.2. The use of Methyl Methacrylate is a serious violation that directly affects public health and safety. Allowing an unlicensed person to practice cosmetology undermines the Board's effort to regulate the cosmetology profession and also has a direct impact on public health and safety. The Respondent did not respond to the Statement of Charges or appear for the hearing, so it is unknown whether the salon continues to use Methyl Methacrylate or to employ an unlicensed person to perform cosmetology. For these reasons, the Board has determined that it is necessary to impose both a civil penalty and a period of probation, with monitoring requirements.

DECISION AND ORDER

IT IS THEREFORE ORDERED, that the Respondent Classic Nails & Tanning, license no. 002-008500, shall pay civil penalties of \$500 for each count, or a total civil penalty of one thousand dollars (\$1000), within thirty (30) days of issuance of this Decision and Order.

IT IS FURTHER ORDERED, that upon receipt of this Decision and Order, the Respondent salon shall immediately remove and properly dispose of any and all products containing Methyl Methacrylate that remain on its premises.

IT IS FURTHER ORDERED, that salon license no. 002-008500 issued to Respondent Classic Nails & Tanning, shall be placed on probation for a period of (1) year from the date of issuance of this Decision and Order, subject to the following terms and conditions:

1. The Respondent shall prominently post its probationary license on the salon premises where it is visible to all customers.
2. The Respondent shall comply with all relevant statutes and administrative rules in the course of its operation as a nail technology salon. Within its salon, the Respondent

shall only permit nail technology services to be performed by persons who are properly licensed by the state of Iowa.

3. The Respondent shall file quarterly reports with the Board listing the salon's nail technicians. The quarterly reports shall be typewritten and shall attest to the following information for each and every person who performed nail technology services within the Respondent salon during the three month period immediately preceding the report:

- a. The name of the employee who performed nail technology services.
- b. The license number and expiration date for the employee's Iowa cosmetology and/or nail technology license.
- c. The employee's date of hire.
- d. If applicable, the employee's date of termination.

The failure of the Respondent salon to provide complete and truthful information in the quarterly employee reports shall constitute a violation of this order. The first report required by this Order shall be submitted to the Board within thirty (30) days of the service of this Order, and each report thereafter by the first day of every subsequent third month.

4. Upon request of the Board, the owner of the Respondent salon shall appear before the Board to report on the status of the Respondent's operations as a nail technology salon and to answer any questions or concerns the Board may have regarding the Respondent's compliance with this Order. The Board shall provide the Respondent with reasonable notice of the date, time, and place for any requested appearance.

5. The Board or its designee shall have the right to verify the Respondent salon's compliance with all provisions of this order through established investigative protocols including, but not limited to, examination of salon records, interviews with persons identified as salon employees or clients, and by conducting unannounced inspections of the Respondent salon.

6. If at any time during this probation the Respondent violates any provision of this Order, the Board may hold a hearing pursuant to Iowa Code section 272C.3(2)"a"(2001), because of failure of the Respondent to comply with the terms of this Order. Any such violation would result in consideration by the Board of more serious sanctions, including revocation.

7. Successful completion of the probationary period shall constitute a final disposition of this matter.

IT IS FURTHER ORDERED, pursuant to Iowa Code section 272C.6, that the Respondent shall pay \$75.00 for fees associated with the disciplinary hearing within thirty (30) days of receipt of this decision.

This Findings of Fact, Conclusions of Law, Decision and Order (Consolidated) was approved by the Board on January 7, 2003.

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 or 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(2001) 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.