

STATE OF IOWA
BEFORE THE BOARD OF COSMETOLOGY ARTS & SCIENCES

IN THE MATTER OF:)
) NO. 09-074
Nails Expo) DIA NO. 10DPHCE004
License No. 008850)
) FINDINGS OF FACT,
Theresa Yen Dang Nguyen,) CONCLUSIONS OF LAW,
License No. 01122) DECISION AND ORDER
)

RESPONDENTS

On January 11, 2010, the Iowa Board of Cosmetology Arts & Sciences (Board) issued a Notice of Hearing and Statement of Charges against Respondent Nails Expo, a licensed salon in the state of Iowa, and its owner, Theresa Yen Dang Nguyen, a licensed nail technician in the state of Iowa. Both Respondents were charged with the following five counts:

Count I: Failing to document the cleaning and disinfecting of whirlpool foot spas, in violation of 645 IAC 65.2(13) and 63.25(5).

Count II: Failing to post a copy of the salon license and professional licenses at eye level in the reception area of the salon, in violation of 645 IAC 65.2(13), 61.5 and 63.4(1) and with failing to post the most recent sanitation rules at eye level in the reception area in violation of 645 IAC 63.2.

Count III: Having razor edged tools on the premises, in violation of 645 IAC 65.2(13) and 63.18(2).

Count IV: Failing to discard single use items, in violation of 645 IAC 65.2(13), 63.17(4) and 63.18(3) and with failing to properly store instruments as required in 645 IAC 63.12(1).

Count V: Having a product containing liquid methyl methacrylate (MMA) on the premises, in violation of 645 IAC 65.2(13) and 63.18(1).

The hearing was held on April 6, 2011 at 10:10 a.m. in the Lucas State Office Building, fifth floor conference room, Des Moines, Iowa. The state was represented by Assistant Attorney General Kristen Ensign. Respondents Nail Expo and Theresa Yen Dang Nguyen were represented by attorney Don Nguyen. The following Board members were present for the hearing: Becky J. Brockmann, Chairperson; Kimberly Setzer; Richard Mosley; Dana Atkins; Richard Sheriff; Jerry Talbott; and Karen Thomsen. Administrative Law Judge Margaret LaMarche assisted the Board in conducting the hearing. The hearing was closed to the public at Respondent's 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 Tamara Adams and Theresa Yen Dang Nguyen; State Exhibits A-E (See Exhibit Index for description) and Respondent Exhibits 1-2.

FINDINGS OF FACT

1. On July 16, 2001, the Board issued Iowa salon license number 008850 to Nails Expo, located at 3839 Merle Hay Road, Suite 100, in Des Moines, Iowa. Salon license No. 008850 is current. Respondent Theresa Yen Dang Nguyen is the owner of Nails Expo. She was issued nail technology license no. 01122 on March 28, 2002. (State Exhibit C)
2. In 2005, Respondents and the Board entered into a Settlement Agreement that placed Respondents' licenses on probation for one year. Respondents were also fined for using products containing MMA and for allowing unlicensed individuals provide nail technology. (State Exhibit B; Testimony of Theresa Yen Dang Nguyen)
3. On November 13, 2009 at 2:50 p.m., Department of Inspections and Appeals (DIA) Investigators Tamara Adams and Kimberly Groves made an unannounced investigative visit to Nails Expo. The visit was in response to a complaint filed by

another licensee who alleged that nail technicians employed by Nails Expo were providing waxing services to customers. (State Exhibit A, pp. 1-2; Attachment A; Testimony of Tamara Adams)

Respondent Theresa Yen Dang Nguyen was providing nail technician services to a customer when the investigators arrived at the salon to conduct the inspection. The investigators found several licenses, including licenses for the salon, four nail technicians, and one cosmetologist, posted high on a wall in the front of the salon. The licenses were not at eye level. One of the investigators, who is approximately 5'10" tall, had to stand on a chair in order to read the licenses. The investigators told Ms. Nguyen that the licenses had to be posted at eye level, and she moved the licenses to a proper height following the inspection. (Testimony of Tamara Adams; Theresa Yen Nguyen; State Exhibit A; Respondent Exhibit 1)

There were sanitation rules posted on the wall of the reception area, but they were from 2006 and were not the current rules. Ms. Adams gave Ms. Nguyen a copy of the current sanitation rules, and she posted them in the reception area. (Testimony of Tamara Adams; State Exhibit A)

4. The investigators asked Ms. Nguyen if she was providing waxing services to customers at Nails Expo. Ms. Nguyen explained that all waxing services were provided by the licensed cosmetologist, Giao Q. Nguyen, who is her daughter. Ms. Nguyen further explained that Giao Q. Nguyen and another nail technologist had been working in the salon that morning. (Testimony of Tamara Adams; Theresa Yen Nguyen; State Exhibit A)

5. At the time of the November 13, 2009 inspection, Investigators Adams and Groves documented the following violations of Board statutes and rules at Nails Expo, in addition to the posting violations:

- The last entry in the whirlpool spa cleaning schedule was on October 31, 2009, and there were no entries for November 2009;
- Used disposable nail files were found in a storage bin with clean, unused buffers and files. The used files were touching the unused supply;
- There were used nail buffers and nail files at the manicure stations;
- Clean nail instruments were found in drawers containing pens and paper; and

- Used wax strips with hair attached had not been discarded and were lying on a table that was not in use at the time.

(Testimony of Tamara Adams; State Exhibit A)

6. The investigators also found 9 new heel shavers, still sealed in plastic, under the salon's front counter. Theresa Yen Dang Nguyen explained that the heel shavers were given to her by one of her suppliers as advertising. Ms. Nguyen testified that the shavers were only the shaver handles without any razors attached to them. Ms. Nguyen denies using the shavers on customers or selling them to her customers. Ms. Nguyen presented written statements from four customers who had never seen heel shavers used in the salon. Tamara Adams recalled that the heel shavers were sealed in plastic and had handles with a metal clasp for holding a razor. Ms. Adams could not specifically recall if there were any razors with the heel shavers. (Testimony of Theresa Yen Dang Nguyen; Tamara Adams; State Exhibit A; Respondent Exhibit 2)

7. Investigator Adams took two samples of nail liquid for testing. One sample was taken from a container located on the manicure station where Theresa Yen Dang Nguyen was providing services to her customer. The second sample was taken from a bottle on the manicure station that was next to the station where Ms. Nguyen was working. The bottle for the second sample had a label that said "No MMA." Ms. Adams sealed and labeled the samples and delivered them to the University of Iowa Hygienic Laboratory office in Ankeny, Iowa. The first sample tested positive for Methyl Methacrylate monomer (MMA), which is a substance banned by the Food and Drug Administration (FDA) for use in cosmetic products.¹ A positive result is greater than 20,000 mg/L of Methyl Methacrylate. The first sample tested at 580,000 mg/L of Methyl Methacrylate (Testimony of Tamara Adams; State Exhibit A)

8. Ms. Nguyen claimed that Nail Expo had not used the whirlpool spas since the last cleaning entry was made on October 31, 2009, which was 13 days earlier. Ms. Nguyen claimed that no customers had come in for a pedicure because the weather was too cold. The Board did not find this claim to be credible. Currently, Ms. Nguyen is writing "no" on the spa cleaning record if the whirlpool spa is not used that day. (Testimony of Theresa Yen Dang Nguyen)

¹ 645 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. In November 2009, 645 IAC 63.25 provided, 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:

...

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

...

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;:

...

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 Expo and Respondent Theresa Yen Dang Nguyen violated 645 IAC 65.2(13) by failing to properly document the cleaning and disinfection of the whirlpool foot spas, as required by 645 IAC 63.25(5). The last entry in the whirlpool foot spa cleaning record was 13 days prior to the investigator's visit. The Board believes it is very unlikely that a salon with four licensed nail technicians and two whirlpool spas did not provide any pedicures to customers for 13 days in early November.

Count II: Failure to Properly Post Professional License and the Most Current Sanitation Rules in Reception Area at Eye Level

645 IAC 61.5 requires salons to pose the salon license and current renewal card and the original license certificate, duplicate certificate, or reissued certificate for each licensee employed by the salon in the reception area at eye level. The preponderance of the evidence established that Respondents violated 645 IAC 65.2(13) and 61.5 by failing to post the salon license and licenses of employees at eye level in the salon. The licenses were posted high on the wall where customers were unable to read them.

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 Expo and Theresa Yen Dang Nguyen 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. The rules that were posted were not the current rules.

Count III: Possession of Razor-Edged Tools on the Premises

645 IAC 63.18(2) provides, in relevant part, that no salon shall have on the premises any razor-edged device or tool which is designed to remove skin, with the exception of cuticle nippers used for manicure or pedicure services. If such equipment is on site, it shall be prima facie evidence of its use.

The preponderance of the evidence established that Respondents violated 645 IAC 65.2(13) by possessing razor-edged devices, i.e. heel shavers, on the premises in violation of 645 IAC 63.18(2). Investigator Adams observed nine new heel shavers behind the front counter in the salon. It was a violation for the heel shavers to be present on the premises and their presence is prima facie evidence of their use.

Count IV: Failure To Discard Single Use Instruments and Failure To Properly Store Instruments

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 63.12(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 63.17(4) by failing to dispose of disposable nail files, buffers, and wax strips after use.

The preponderance of the evidence established that Respondents violated 645 IAC 63.12(1) by storing disposable nail files in a bin with clean, unused buffers and files and by storing clean nail files in a drawer with pens and paper.

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 a nail product containing liquid methyl methacrylate (MMA) at a nail station on November 13, 2009, in violation of subrule 63.18(1). Respondent previously violated this rule by having MMA on the premises in 2005.

Sanction

The violations affect the public health, safety, and welfare and more than justify the maximum civil penalties of \$1,000 for both Respondents. This is the second time that Respondents have been disciplined for having nail products containing MMA on the salon premises. Moreover, if the salon is to continue to operate, it must be subject to ongoing oversight by the Board through a two year period of probation.

DECISION AND ORDER

IT IS THEREFORE ORDERED that Respondent Nails Expo shall pay a total civil penalty of one thousand dollars (\$1,000) within thirty (30) days of issuance of this Decision and Order.

IT IS FURTHER ORDERED that Respondent Theresa Yen Dang Nguyen shall pay a total civil penalty of one thousand dollars (\$1,000) within thirty (30) days of issuance of this Decision and Order.

IT IS FURTHER ORDERED that license number 008850, issued to Respondent Nails Expo and license no. 01122 issued to Respondent Theresa Yen Dang Nguyen, shall immediately be placed on PROBATION for a period of two (2) years, subject to the following terms and conditions:

- A. Respondents must file quarterly written reports with the Board during the period of probation. The written reports shall include:
- the name, license number, and license expiration date for each employee; and
 - a copy of the whirlpool cleaning record.

B. Respondent salon will have a follow up inspection approximately six weeks after issuance of this Decision and Order. In addition, Respondent salon will be subject to random inspections at the discretion of the Board.

IT IS FURTHER ORDERED that Respondent Theresa Yen Dang Nguyen, owner of Respondent Nails Expo, shall complete four (4) hours of continuing education on law and sanitation within six (6) months of the issuance of this decision. Respondent must obtain Board approval before enrolling in any course taken for the purpose of satisfying this obligation. These four (4) hours of continuing education may not be used for license renewal.

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 and \$140.25 for the court reporter fees. The total fees of \$215.25 shall be paid within thirty (30) days of receipt of this decision.

FINALLY, IT IS ORDERED that if Respondent fails to comply with any of the terms of this Order, the Board may hold a hearing, pursuant to Iowa Code section 272C.3(2)"a"(2011), and impose further sanctions, up to and including license revocation.

Dated this 28th day of April, 2011.