

STATE OF IOWA  
BEFORE THE BOARD OF COSMETOLOGY ARTS & SCIENCES

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IN THE MATTER OF:	)	
	)	NO. 10-081
Foxy Nails	)	DIA NO. 11IBC030
License No. 101945	)	
	)	<b>FINDINGS OF FACT,</b>
Thao Ngoc Dao, owner,	)	<b>CONCLUSIONS OF LAW,</b>
License No. 00926	)	<b>DECISION AND ORDER</b>
	)	

**RESPONDENTS**

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On October 4, 2011, the Iowa Board of Cosmetology Arts & Sciences (Board) issued a Notice of Hearing and Statement of Charges against Respondent Foxy Nails, a licensed salon in the state of Iowa, and its owner, Thao Ngoc Dao, 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(2009) and 645 IAC 65.2(13), 63.11, 63.13, 63.14, 63.15, 63.25.

Count II: Failing to provide for biohazard disposal, in violation of Iowa Code sections 147.55, 157.9(2009) and 645 IAC 65.2(13) and 63.11(3).

Count III: Failing to post a copy of the most recent sanitation rules at eye level in the reception area, in violation of Iowa Code sections 147.55, 157.9(2009) and 645 IAC 65.2(13) and 63.2.

Count IV: Employing an unlicensed individual to practice cosmetology arts and sciences, in violation of Iowa Code sections 147.55, 157.9, and 157.13(1) (2009) and 645 IAC 65.2(13) and 65.2(28).

Count V: Engaging in conduct that subverts an investigation, in violation of Iowa Code sections 147.55, 157.9(2009) and 65.2(18).

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

Count VII: Permitting a licensed individual to perform activities outside the scope of her license, in violation of Iowa Code sections 147.55, 157.9, 157.13(1)(2009) and 645 IAC 65.2(5), 65.2(13), and 65.2(29).

Count VIII: Having a razor edged device on its premises in violation of 645 IAC 63.18(2).

The hearing was held on December 5, 2011 at 2:00 p.m. 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 self-represented by Thao Ngoc Dao. The following Board members were present for the hearing: Kimberly Setzer, Chairperson; Richard Mosley; Dana Atkins; Richard Sheriff; Jerry Talbott; and Mary Clausen. Administrative Law Judge John M. Priester 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 DIA Investigator Jerry Viers and Thao Ngoc Dao and the Investigative Report dated September 22, 2010.

### FINDINGS OF FACT

1. On July 2, 2007, the Board issued Iowa salon license number 101945 to Foxy Nails, located at 3701 E. 14<sup>th</sup> Street in Des Moines, Iowa. Salon license no. 101945 expired on December 31, 2010. Respondent Thao Ngoc Dao is the owner of Foxy Nails, and he was issued nail technology license no. 00926. License no. 00926 will expire on March 31, 2012. (Investigative Report, pages 5-6)

2. On August 31, 2010 a complaint was filed against Foxy Nails by a patron who had a pedicure performed on her. The attendant used a razor to cut the loose skin from her heel. After the pedicure the customer noticed that her skin was raw and rough and there was a quarter inch slit on the bottom of her foot.

The customer then went on vacation to Lake Tahoe where she swam in the lake and went in a public hot tub. She later developed a fever, chills, headache and her foot began to swell. Her foot was infected and she had to spend three days in the hospital. (Investigative Report, pages 2-3)

3. The Investigator interviewed the person who accompanied the complainant to her pedicure. That person did not notice any type of razor device used on either her feet or the complaining customer's feet. (Investigative Report, page 4)

4. On August 31, 2010, Department of Inspections and Appeals (DIA) Investigators Jerry Viers and Kimberly Groves made an unannounced visit to Foxy Nails. Owner Thao Ngoc Dao was present at the salon at the time of the inspection. The following employees' licenses were posted: Thao Ngoc Dao, nail technology license number 00926 expiring on March 31, 2012; Thuy Thi Nguyen nail technology license number 01771 expiring on March 31, 2012 (she was present); Thao Thi Pham nail technology license number 01191 expiring on March 31, 2012; and Oanh Thi Thu Nguyen nail technology license number 066144 expiring on March 31, 2012 (she was present). A license was posted for the salon number 101945. Also present was a person identified as Tammy Pham. (Testimony of Investigator Viers, Investigative Report, pages 5-6)

5. Investigator Groves observed Trang Thi Thuy Nguyen performing a pedicure when the investigators entered, however she got up for the pedi chair and Thuy Than Thi Nguyen took over performing the pedicure. Thuy Than Thi Nguyen indicated that Trang Thi Thuy Nguyen was not yet licensed and was only filling the basin with water.

Thuy Than Thi Nguyen indicated that she is part owner of the salon. When Thao Ngoc Dao became defensive and would not answer questions Thuy Than Thi Nguyen would answer the investigators' questions. (Testimony of Investigator Viers; Investigative Report, pages 6)

6. The investigators made the following discoveries:

\*Two paraffin containers were noted. The container on the floor was unclear with debris on the bottoms. When they walked into the establishment a female was seen with a big wad of wax she threw it into the garbage.

\*Investigator Groves observed a hand shaver and blade. The employee tried to hide it when the investigators observed it. Ms. Nguyen stated that a customer brought it into the business. A sign was observed that stated, "To all customers, do not use razor blades razor edged devices to remove skin."

\*A biohazard container was noted in the establishment, but there was no bio hazard bag. A first aid kit was noted but it only contained bandages.

\*Ms. Nguyen was able to show a spa cleaning log, but it only had one entry per day with no license number of the person performing the cleaning.

\*There were a total of five pedicure basins and Ms. Nguyen stated that they used bleach to clean them. A bottle of spa fungicide was noted. Barbicide disinfectant was being used however there was not enough to cover the supplies and the liquid was cloudy.

\*An inspection report was noted in the back room, behind a plant. This was an area not accessible to the public. Sanitation rules were not posted at the front. Rules in possession of the establishment were outdated (March 5, 2003). Ms. Nguyen indicated that she knew where to find the rules on the website.

\*An inspection of the pedicure station revealed used sandpaper bands and unclean metal bits. Used nail buffers and files and other supplies were located in the drawers with pens, paper, calculator, phone and money.

\*Investigator Groves was accused of going through an employee's purse when Investigator Groves moved the purse to look in drawers. Mr. Dao indicated that the investigators were being rude to them and were trying to enter "private" areas of the salon.

\*Investigator Groves gathered two samples of nail products: one from the garbage adjacent to a manicure station and another from a bottle of manicure station. These samples were transported to the laboratory in Ankeny for analysis. Sample #1 retrieved from the container located in the garbage contained 600,000 mg/L of MMA with a Quantitation Limit of 20,000 mg/L. Sample #2 retrieved from the container at the manicure work station contained 620,000 mg/L of MMA with a Quantitation Limit of 20,000 mg/L.

(Testimony of Investigator Viers; Investigative Report, pages 6-8)

## 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 §157.6 (2009). 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 Foxy Nails at the time of the September 2, 2010 investigation. The barbicide did not completely cover the instruments, and there was visible debris in the bottom of disinfectant jars at the manicure stations, in violation of 645 IAC 63.13(1), (3). Clean nail tools were found in drawers containing money, paper, and pens and used buffers were found with clean supplies in a drawer, in violation of 645 IAC 63.13(2). Used disposable buffers and files were present throughout the salon and had not been properly discarded, in violation of 645 IAC 63.14. The salon did not have a complete first-aid kit, in violation of 645 IAC 63.6.

Count II: No 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 Foxy Nails and Thao Ngoc Dao did not have or use red biohazard bags or containers, in violation of 645 IAC 63.11(3).

Count III: Failure to Post 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 Foxy Nails and Thao Ngoc Dao violated 645 IAC 63.2 by failing to post the current sanitation rules at eye level in the reception area, in violation of 645 IAC 63.2.

Count IV: Employing Unlicensed Person

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. 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 failed to establish that Respondents Foxy Nails and Thao Ngoc Dao violated Iowa Code section 157.13(1)(2009) and 645 IAC 65.2(28). The evidence established that an unlicensed person was sitting at a pedicure station but the evidence did not establish that she was performing a pedicure.

Count V: Subverting An Inspection

645 IAC 65.2(18) authorizes the Board to impose disciplinary sanctions on a licensee for engaging in any conduct that subverts or attempts to subvert a board investigation. The preponderance of the evidence established that Respondents Foxy Nails and Thao Ngoc Dao violated 645 IAC 65.2(18) when the investigators tried to inspect the salon's premises Thao Ngoc Dao told the investigators that they could not go into certain rooms because they were "private." This subverted the investigation.

Count VI: 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 September 2, 2010, in violation of subrule 63.18(1).

Count VII: Practice Beyond Scope of License

Iowa Code section 157.1(24) defines the practice of nail technology . The practice of nail technology includes removing superfluous hair from hands, arms, feet, or legs of a person by the use of wax or a tweezer but does not include shaving. Iowa Code section 157.1(24)(c)(2009). 645 IAC 65.2(5) authorizes the Board to discipline licensees for practicing outside the scope of the profession. 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 failed to establish that Respondents Foxy Nails and Thao Ngoc Dao violated Iowa Code section 157.1(24) and 645 IAC 65.2(5) and 65.2(29). The investigators observed a razor edged instrument in the premises but did not observe anyone using the instrument. Therefore the State has not carried its burden to show a violation.

Count VIII: 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 Viers and Groves observed a heel shaver at a pedicure station in the salon. It was a violation for the heel shaver to be present on the premises and their presence is prima facie evidence of its use.

Sanction

The violations affect the public health, safety, and welfare and more than justify the maximum civil penalties of \$1,000 for both licensed Respondents. 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 Foxy Nails 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 Thao Ngoc Dao 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 Thao Ngoc Dao shall submit a separate payment of \$144.00 to reactivate salon license no. 101945 which expired December 31, 2010.

IT IS FURTHER ORDERED that license number 101945, issued to Respondent Foxy Nails and license no. 00926 issued to Respondent Thao Ngoc Dao, 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;
- steps taken by the salon to correct the licensing issues identified in this decision.

B. Respondent salon will have a follow up inspection approximately six months 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 Thao Ngoc Dao, owner of Respondent Foxy Nails, shall complete four (4) hours of continuing education on Iowa 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 \$61.87 for the court reporter fees. The total fees of \$2,136.87 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"(2009), and impose further sanctions, up to and including license revocation.

Dated this 10<sup>th</sup> day of January, 2012.



Kimberly Setzer, Chairperson

Iowa Board of Cosmetology Arts & Sciences

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.

cc: David Van Compernelle, Assistant Attorney General