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

IN THE MATTER OF:	)	
	)	NO. 06-189
Elegant Nails	)	DIA NO. 08DPHCE001
License No. 010858	)	
	)	FINDINGS OF FACT,
Dung Quang Le, Owner	)	CONCLUSIONS OF LAW,
	)	DECISION AND ORDER
	)	
RESPONDENT	)	

On November 7, 2007, the Iowa Board of Cosmetology Arts & Sciences (Board) issued a Notice of Hearing and Statement of Charges against Respondent Elegant Nails, a cosmetology salon in the state of Iowa, and owner Dung Quang Le. Respondent Elegant Nails was charged with four counts:

Count I: Practicing cosmetology arts and sciences without a valid license, in violation of Iowa Code section 157.2(1) and 645 IAC 65.2(28).

Count II: Violating a regulation, rule, or law of this state, pursuant to 645 IAC 65.2(13), by possessing nail buffers without proper disposal, in violation of 645 IAC 63.14 and 63.18(3).

Count III: Violating a regulation, rule, or law of this state, pursuant to 645 IAC 65.2(13), by failing to have required hazardous waste containers and bags in violation of 645 IAC 63.17(3).

Count IV: Violating a regulation, rule, or law of this state, pursuant to 645 IAC 65.2(13), by failing to properly clean a whirlpool foot spa, in violation of 645 IAC 63.25(2)-(5).

The hearing was scheduled for February 26, 2008 at 10:00 a.m. in the Lucas State Office Building, fifth floor conference room, Des Moines, Iowa. Respondent failed to appear for the hearing. The state was represented by Assistant Attorney General Julie Bussanmas. The following Board members were present for the hearing: Jack Morlan, Chairperson; Mary Beth Myers; Lois Leytem; Jerry Talbott; Kimberly Setzer; and Becky J. Brockmann.

Administrative Law Judge Margaret LaMarche assisted the Board with the conduct of the hearing. The hearing was open to the public, pursuant to Iowa Code section 272C.6(1)(2007) 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)(2007), to deliberate its decision. administrative law judge was instructed to prepare the Board's decision, in accordance with its deliberations.

#### THE RECORD

The record includes the testimony of the witness and the following exhibits:

State Exhibit 1: Notice of Hearing and Statement of

Charges

State Exhibit 2: Complaint, Inspection 6/9/06 State Exhibit 3: Investigative Report, 6/21/07 State Exhibit 4: License Verifications

Proof of Service State Exhibit 5:

### FINDINGS OF FACT

- The Board issued cosmetology salon license number 010858 to Elegant Nails, located at 111 N. Main Street in Maguoketa, Iowa. License No. 010858 is current and will expire on December 31, Dung Quang Le, the owner of Elegant Nails, is not licensed as a cosmetologist in the state of Iowa. (Testimony of Lisa Noble; State Exhibit 4-2)
- 2. On June 9, 2006, a routine inspection was conducted at Elegant Nails, and the inspector documented several violations in his report. At the time of the inspection, four persons were working in the salon, but two of them left when the inspector Two cosmetology licenses were posted, but one license was from Florida and the other was for a person who was not working. The employees were observed reusing files. All of the pedicure spas were in use but the employees did not know how to clean them. (Testimony of Lisa Noble; State Exhibits 2-9, 2-10)
- On April 11, 2007, the Board issued Elegant Nails a Salon Inspection Report requiring immediate corrective action. Dung

Quang Le responded to the report and stated in writing that he would not practice at Elegant Nails until he received proper licensure. Mr. Le apologized for using his Florida license and further stated that "from now on we will throw away anything that is disposable." (Testimony of Lisa Noble; State Exhibits 2-2 to 2-6)

4. On June 19, 2007, Department of Inspections and Appeals (DIA) Investigator Lisa Noble made an unannounced visit to Elegant Nails at the Board's request. While Ms. Noble was standing outside, a woman who appeared to have been a customer left the salon. Upon entering the salon, Ms. Noble saw the owner, Dung Quang Le, performing cosmetology services on a woman's nails. No other customers or employees were present in the salon. The cosmetology licenses of Kin Anh Thi Nguyen and Hein Pham were posted on the wall of the salon, but Mr. Le told Ms. Noble that only Hein Pham still worked for him.

Mr. Le admitted that he had performed cosmetology services for the customer that had just left the salon and told Ms. Noble that he only did nails when Hein Pham had a day off. When Ms. Noble asked him why he had not obtained his license as promised in his written statement to the Board, Mr. Le replied that he had been "too busy doing nails."

When asked to demonstrate how he cleans his whirlpool spachairs, Mr. Le claimed that he no longer did pedicures and that the whirlpool spachairs had not been used in a long time. However, it was obvious that the whirlpools had been used recently because they had some water left in them. Mr. Le did not have a whirlpool cleaning schedule.

Lisa Noble found several used buffers in the salon. There were no Sharp's containers and no red biohazard bags in the salon. There were no MSDS sheets, and the instrument sterilizer was broken. (Testimony of Lisa Noble; State Exhibit 3)

5. The Notice of Hearing and Statement of Charges issued on November 7, 2007 was served on Elegant Nails and Dung Quang Le by restricted certified mail on January 10, 2008. Neither Elegant Nails nor Dung Quang Le filed a response to the Notice of Hearing and Statement of Charges, and no one appeared on behalf of Respondent at the hearing. (State Exhibits 1, 5)

### CONCLUSIONS OF LAW

## 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, return receipt requested. Respondent Elegant Nails was properly served with the statement of charges and notice of hearing but failed to appear for 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 was authorized to proceed with the hearing in Respondent's absence.

## Count I: Practicing Cosmetology Without A Valid License

Iowa Code section 157.2(1)(2007) 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. 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 Respondent Elegant Nails violated Iowa Code section 157.2(1) and 645 IAC 65.2(28) when its owner, Dung Quang Le, performed cosmetology services without obtaining a cosmetology license.

## Count II: Violating a Regulation, Law Or Rule By Possessing Used Nail Buffers Without Proper Disposal

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. 645 IAC 63.14 provides that all instruments and supplies that come into direct contact with a patron and cannot be disinfected, for example, cotton pads, sponges, emery boards, and neck strips, shall be disposed of in a waste receptacle immediately after use. 645

IAC 63.18(3) provides, in relevant part, that if a nail buffer cannot be sanitized, the nail buffer shall not be used for more than one client. The presence of chamois buffers in the workplace shall be prima facie evidence of their use.

The preponderance of the evidence established that Respondent Elegant Nails violated 645 IAC 65.2(13) by possessing and using nail buffers without proper disposal, in violation of 645 IAC 63.14 and 63.18(3).

# Count III: Violating a Regulation, Law Or Rule By Failing To Have Required Hazardous Waste Containers and Bags

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 Respondent Elegant Nails violated 645 IAC 65.2(13) by failing to have hazardous waste containers and bags in the salon, in violation of 645 IAC 63.17(3).

## Count IV: Violating a Regulation, Law Or Rule By Failing To Properly Clean a Whirlpool Foot Spa

645 IAC 63.25 provides the procedures for proper cleaning and disinfecting of 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 EPAregistered disinfectant with demonstrated

bactericidal, fungicidal, and virucidal activity which must be used according to the manufacturer's instructions.

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

. . .

63.2(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 subrules63.25(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 Elegant Nails violated 645 IAC 65.2(13), by failing to properly clean the whirlpool foot spas, in violation of 645 IAC 63.25(2)-(5). Mr. Le's claim to the investigator that the foot spas were no longer in use was not credible because the spas had water in them at the time of the investigation.

### Sanction

The violations at the Respondent salon affect the public health, safety, and welfare and justify the maximum civil penalty of \$1,000. In addition, if the salon is to continue to operate, it must be subject to ongoing oversight by the Board through a one year period of probation.

#### DECISION AND ORDER

IT IS THEREFORE ORDERED that Respondent Elegant 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 Dung Quang Le, owner of Elegant Nails, shall immediately cease providing any cosmetology services unless and until he obtains an Iowa cosmetology license.

- IT IS FURTHER ORDERED that license number 010858, issued to Respondent Elegant Nails, shall immediately be placed on PROBATION for a period of one (1) year, subject to the following terms and conditions:
  - A. Respondent must have a designated supervisor/manager on duty at all times who is licensed to practice nail technology or cosmetology in the state of Iowa.
  - B. Respondent must file quarterly written reports with the Board during the period of probation. The written reports shall include:
    - the name(s) and work schedule(s) of the designated supervisor(s)/manager(s);
    - the name, license number, and license expiration date for each employee; and
    - a copy of the whirlpool cleaning record.
  - C. Respondent will be subject to random inspections at the discretion of the Board.
  - D. Owner Dung Quang Le is prohibited from obtaining a license for any other cosmetology salon in the state of Iowa until Elegant Nails has satisfactorily completed its one year probationary period.
- IT IS FURTHER ORDERED that Respondent Dung Quang Le, owner of Respondent salon, shall complete four (4) hours of continuing education on law and sanitation within six (6) months of the issuance of this decision. Respondent owner must obtain Board approval before enrolling in any course taken for the purpose of satisfying this obligation.
- IT IS FURTHER ORDERED that Respondent shall promptly notify its employees of this Decision and Order of the Board and within thirty (30) days shall provide the Board with a written statement signed by each employee verifying that they have read the Board's Decision and Order.
- 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 \$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.

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"(2007), and impose further sanctions, up to and including license revocation.

This findings of fact, conclusions of law, decision and order is approved by the board March 17, 2008.

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(2007) 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.