

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Complaint of

**DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,**

Complainant,

DECISION

-against-

HUY NGUYEN,

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on May 4, 1999 at the New York State Office Building located at 44 Hawley Street, Binghamton, New York.

The respondent did not appear.

The complainant was represented by Legal Assistant Thomas Napierski.

COMPLAINT

The complaint alleges that the respondent: Allowed unlicensed persons to work as Appearance Enhancement operators in his shop without them being licensed to do so; did not have a bond or liability insurance on the premises; did not clean, disinfect, or sterilize implements to be used in the practice of Appearance Enhancement in his shop; failed to have invoices of sterilants and disinfectants used in his shop; allowed the use of neck dusters and/or their presence in his shop; and failed to have on file the material safety data sheets for chemicals being used in his shop.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served by mailing copies thereof addressed to the respondent at his last known business address by both certified and regular first class mail on March 5, 1999. The certified mail was delivered on March 12, 1999 (State's Ex. 1 and 2).

2) The respondent is, and at all times hereinafter mentioned was, duly licensed to operate Appearance Enhancement businesses d/b/a "Nail Pro" at 100 Pike Street, Port Jervis, New York 12771 and at 365 Route

211 East, Middletown, New York 10940 (State's Ex. 3 and 4). Since January 13, 1999 another Appearance Enhancement business named "No. 1 Nails" has also been licensed, to a different person, at the Port Jervis address.

3) On September 29, 1998 License Investigator Carolyn L. Williams conducted an inspection of the respondent's Port Jervis shop and noted, among other things, the following (State's Ex. 7):

a) Charles Phuoc Tran, who was observed performing manicuring services for compensation, could not produce an Appearance Enhancement license. (Subsequent examination by the complainant of its records disclosed that Mr. Tran was properly licensed);

b) Another male and a female, each of whom "was observed servicing female customer," refused to present any identification. (No evidence was presented to establish whether those persons were licensed);

c) There was no bond or liability insurance on the premises;

d) Unsterilized tools were in use;

e) No invoices for disinfectants had been retained;

f) There were four neck dusters on the premises; and

g) There were no material safety data sheets available.

OPINION AND CONCLUSIONS OF LAW

I- The holding of an ex parte quasi-judicial administrative hearing was permissible, inasmuch as there is evidence that notice of the place, time and purpose of the hearing was properly served. General Business Law §441[2]; *Patterson v Department of State*, 36 AD2d 616, 312 NYS2d 300 (1970); *Matter of the Application of Rose Ann Weis*, 118 DOS 93.

II- As the party which initiated the hearing, the burden is on the complainant to prove, by substantial evidence, the truth of charges in the complaint. State Administrative Procedure Act (SAPA), §306(1). Substantial evidence is that which a reasonable mind could accept as supporting a conclusion or ultimate fact. *Gray v Adduci*, 73 N.Y.2d 741, 536 N.Y.S.2d 40 (1988). "The question...is whether a conclusion or ultimate fact may be extracted reasonably--probatively and logically." *City of Utica Board of Water Supply v New York State Health Department*, 96 A.D.2d 710, 465 N.Y.S.2d 365, 366 (1983)(citations omitted).

III- The complaint alleges that the respondent permitted persons to work in his shop without the proper licenses. The evidence establishes that one of the persons whom the investigator thought was unlicensed was in fact licensed, and fails to establish what the other

two persons observed "servicing" female customers were doing or that they were not licensed. Therefore, the charge that the respondent had unlicensed operators in his shop must be, and is, dismissed.

IV- 19 NYCRR 160.9, enacted pursuant to GBL §404, provides that the owner of an appearance enhancement business must maintain either a surety bond or accidental and professional liability insurance or general liability insurance in prescribed amounts, and that evidence of such bond or insurance must be maintained on the premises. The respondent violated that regulation.

V- Pursuant to 19 NYCRR 160.17 tools used in an appearance enhancement business for manicuring must be sterilized. As established by the investigator's observations, the respondent violated that regulation.

VI- Pursuant to 19 NYCRR 160.14[c] the owner of an appearance enhancement business is required to retain for two years, and to have available for inspection, the invoices for all sterilants and disinfectants used in the shop. The respondent did not have such invoices available when the inspection was conducted and, therefore, violated the regulation.

VII- Pursuant to 19 NYCRR 160.18[a][9] the use of neck dusters in an appearance enhancement business is prohibited. As established by the presence of four such items in his shop, which presence is presumptive evidence of their use, 19 NYCRR 160.18[b], the respondent violated that regulation.

VIII- Pursuant to 19 NYCRR 160.25 the owner of an appearance enhancement business must have on file the material safety data sheets for all chemicals, including nail care chemicals, used in the shop. The respondent violated that regulation.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Huy Nguyen has violated 19 NYCRR 160.9, 160.14[c], 160.17, 160.18[a][9], and 160.25, and accordingly, pursuant to General Business Law §410, he shall pay a fine of \$1,000.00 to the Department of State on or before May 28, 1999, and should he fail to pay the fine then his licenses to operate appearance enhancement businesses shall be suspended for a period commencing on June 1, 1999 and terminating two months after the receipt by the Department of State of his license certificates. The respondent is directed to send the fine, in the form of a certified check or money

order, or his license certificates to Usha Barat, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier
Administrative Law Judge

Dated: May 6, 1999