

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-

PHUNG TO,

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on April 17, 1997 at the office of the Department of State located at 41 State Street, Albany, New York.

The respondent, of Nail Top, 340 Central Avenue, Albany, New York 12206, did not appear.

The complainant was represented by Assistant Litigation Counsel Scott L. NeJame, Esq.

COMPLAINT

The complaint in the matter alleges that the respondent allowed an unlicensed person to perform nail services in her shop in violation of General Business Law (GBL) §401, used emery boards and cubes on multiple patrons in violation of 19 NYCRR 160.18, and did not have material safety data sheets available in violation of 19 NYCRR 160.25.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail delivered on March 26, 1997 (State's Ex. 1).

2) The respondent is, and at all times hereinafter mentioned was, duly licensed to operate an appearance enhancement business d/b/a Nail Top at 340 Central Avenue, Albany, New York. Since November 18, 1996 she has also been licensed to engage in the practice of nail specialty (State's Ex. 2).

3) On October 11, 1996 License Inspector Jeffrey Staats conducted an inspection of the respondent's shop. Among other things, he

observed Huong Annie Phan, who was not licensed pursuant to GBL Article 27, filing a customer's nails, and emery boards and cubes being used on multiple patrons. The services performed by Ms. Phan were being provided for consideration.¹ He also ascertained that material safety data sheets were not available in the shop. Inspector Staats returned to the shop for a compliance visit on November 20, 1996, and observed that, while some other violations had been corrected, none of the foregoing violations, of which the respondent had been advised on his first visit, had been (State's Ex. 3).

4) I take official notice that prior to service of the notice of hearing the respondent was offered the opportunity to settle the matter by paying a fine of \$450.00 and did not avail herself of that opportunity.

OPINION AND CONCLUSIONS OF LAW

I- Pursuant to GBL §401[1], no person may engage in the practice of nail specialty without being licensed to do so pursuant to the terms of GBL Article 27. The practice of nail specialty includes the providing of services for a fee or any consideration to cut, shape or enhance the appearance of the nails of the hands or feet. GBL §400[4]. As the owner of appearance enhancement businesses, the respondent is liable for any unlicensed activity which occurs in her shop, 19 NYCRR 160.11, and she is, therefore responsible for the resulting violations of GBL §401[1].

II- Pursuant to 19 NYCRR 160.18[6] the use in an appearance enhancement business of an emery board for more than one person is prohibited. The evidence establishes a clear and continuing violation of that regulation, which is designed to protect the public health.

III- 19 NYCRR 160.25[e] provides that the owner of an appearance enhancement business must maintain, in a metal file accessible to all employees, all material safety data sheets. While the regulation does not define what those sheets are, it is clear from the placement of the filing requirement in a regulation governing the use and storage of chemicals (including those used for nail care), that the sheets relate to the safe use of such chemicals. By failing to have such sheets available the respondent violated the regulation.

IV- In setting the penalty to be imposed for the respondent's violations, I have considered the fact that prior to the scheduling of the hearing she was offered the opportunity to resolve the matter through the payment of a fine of \$450.00 (State's Ex. 1). Where such an offer of settlement has been refused and the respondent has subsequently been found guilty, it is proper to impose a fine higher than that which was asked for in the settlement offer. *Vito v Jorling*,

¹ I have concluded that services were being provided for consideration based on a price list obtain by Inspector Staats.

197 AD2d 822, 603 NYS2d 64 (1993) (finding that it was proper to impose a fine of \$22,825.00 after an offer to settle for a \$500.00 penalty was rejected).

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Phung To has violated General Business Law §401 and 19 NYCRR 160.18 and 160.25, and accordingly, pursuant to General Business Law §410, she shall pay a fine of \$750.00 to the Department of State on or before June 30, 1997, and should she fail to pay the fine, her licenses to operate an appearance enhancement business and to engage in the practice of nail specialty shall be suspended for a period commencing on July 1, 1997 and terminating two months from the receipt by the Division of Licensing Services of her license certificates. She is directed to send either payment of the fine or her license certificates to Thomas F. McGrath, Revenue Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier
Administrative Law Judge

Dated: May 8, 1997