

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-

DENNIS B. LE,

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on June 3, 1998 at the New York State Office Building located at 65 Court Street, Buffalo, New York.

The respondent, of Lee Nails, 1222 Abbott Road, Lackawanna, New York 14218, having been advised of his right to be represented by an attorney, chose to represent himself.

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

COMPLAINT

The complaint in the matter alleges that: A customer of the respondent's appearance enhancement business contracted a nail fungus as the result of the respondent's use of dirty implements; the respondent acted as a nail specialist with an expired license; the respondent failed to post his and the licenses of other operators in his shop; the respondent permitted two unlicensed persons to engage in the practice of nail specialty in his shop; the respondent permitted or engaged in the use of prohibited items; the respondent permitted or engaged in the use of dangerous and/or unsanitary facilities; and the respondent did not have a photo on his temporary nail specialist and his business license.

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 25, 1998 (State's Ex. 1).

2) The respondent is currently licensed in engage in the practice of nail specialty pursuant to a license issued on October 20, 1997. He was previously so licensed under the name Lap V. Le pursuant to a temporary license which expired on March 14, 1996. He is also licensed, pursuant to a license issued on September 18, 1995, to operate an appearance enhancement business d/b/a Lee Nails at 1222 Abbott Road, Lackawanna, New York (State's Ex. 2 and 3).

3) On September 16, 1997 Lori Mendez filed a complaint in which she alleged that she had contracted a nail fungus after having received nail services from the respondent (State's Ex. 4 and 5). The respondent denies having provided such services to Ms. Mendez, who did not appear to testify at the hearing.

4) On October 10, 1997 License Investigator Ron Schwartz conducted an inspection of the respondent's shop (State's Ex. 6). He observed the respondent and Tue Van Le, the respondent's brother, filing the nails of customers for compensation although their temporary nail specialty licenses had expired (State's Ex. 2). He also observed Tan Le, who was never licensed pursuant to General Business Law (GBL) Article 27, filing the nails of a customer for compensation. He also observed that: Dirty implements were stored in a open container in a drawer; nail bits were stored in drawers with money; neck dusters were in use; and there were no photographs on the respondent's business and (expired) operator's licenses.

5) On January 31, 1997 an inspection of the respondent's shop had disclosed two unlicensed persons, including Tue Van Le, engaged in the unlicensed practice of nail specialty in the respondent's shop (State's Ex. 7). That resulted in the respondent being charged with two violations of GBL §401. The respondent chose not to contest those charges and paid a fine of \$500.00 (State's Ex. 8 and 9).

OPINION AND CONCLUSIONS OF LAW

I- As the party which initiated the hearing, the burden is on the complainant to prove, by substantial evidence, the truth of the 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).

II- The only evidence offered by the complainant to support the charge that Lori Mendez contracted a fungus infection in the respondent's shop was her unsworn statement and a computer print out from a pharmacy showing that an anti-fungal medicine had been prescribed. The respondent, however, testified under oath and subject to cross examination that Ms. Mendez had never been in his shop. Under

these circumstances the tribunal is unable to conclude that Ms. Mendez's complaint is true, and that aspect of the charges must be, and are, dismissed.

III- Pursuant to GBL §401[1] it is unlawful for any person to engage in the practice of nail specialty without being licensed to do so. By filing the nails (GBL §400[4]) of a customer in his shop after his temporary license had expired the respondent violated that statute.

IV- 19 NYCRR 160.10[c] requires that the license to operate an appearance enhancement business, and the licenses of the persons working in the shop, be conspicuously posted. At the time of the inspection there were no licenses posted. With regards to the business license that was a violation of the regulation. There was no failure to post violation with regards to the operators, as none of them had valid licenses at the time and, therefore, they had no licenses to post.

V- As noted above, 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, and the practice of nail specialty includes the filing of nails. As the owner of an appearance enhancement business, the respondent is liable for any unlicensed activity which occurs in his shop, 19 NYCRR 160.11, and he is, therefore responsible for the violations of GBL §401[1] which resulted from Tue Van Le and Tan Le working in his shop without valid licenses. This violation is made particularly serious by the facts that the respondent had previously paid a fine for having Tue Van Le, his brother, working in his shop without a license and that in spite of that he allowed he to continue to do so.

VI- The use of non-disposable neck dusters is forbidden pursuant to 19 NYCRR 160.18. The investigator observed that neck dusters were in use in the respondent's shop. However, there is no indication in his report as to whether those neck dusters were disposable. Accordingly, that charge must be, and is, dismissed.

VII- Pursuant to 19 NYCRR 160.17[c][2] nail specialty implements used must be thoroughly cleaned after use and must then be stored in a drawer, cabinet, or covered container. By storing dirty implements in an open container the respondent violated that regulation.

VIII- Pursuant to 19 NYCRR 160.28 [b], business licenses issued pursuant to GBL Article 27 must have the licensee's photograph affixed to them. By failing to affix his photograph to his business license the respondent violated that regulation.

IX- The respondent's multiple violations of statute and the regulations are a demonstration of incompetence.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Dennis B. Le has violated General Business Law §401[1] and 19 NYCRR 160.10[c], 160.17[c][2], and 160.28 [b], and has demonstrated incompetence, and accordingly, pursuant to General Business Law §410, his licenses to engage in the practice of nail specialty and to operate an appearance enhancement business are suspended for a period commencing on July 1, 1998 and terminating two months after the receipt by the complainant of his license certificates. He is directed to send his license certificates to Diane Ramundo, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier
Administrative Law Judge

Dated: June 5, 1998