

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-

ALEX CHEUNG,
Notary Public (Expired),
Licensed Nail Specialist,
Licensed Esthetician,
Licensed Appearance Enhancement Business Owner,
PERMANENT MAKEUP INTERNATIONAL INC.,
Appearance Enhancement Business

Respondents.

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The above noted matter was heard by the undersigned, Ziedah F. Giovanni, on March 24, 2014 at the office of the Department of State located at 123 William Street, New York, New York.

The respondents were represented by Bruce Feffer, Esq., Dai & Associates, Times Square Plaza, 1500 Broadway, 22nd floor, New York, NY 10036.

The Division of Licensing Services (DLS) was represented by Senior Attorney David Mossberg, Esq.

COMPLAINT

The complaint alleges that the respondents improperly enrolled an appearance enhancement student when not authorized to do so, and issued fraudulent cosmetology certificates.

FINDINGS OF FACT

1) Respondent Alex Cheung is licensed as a nail specialist for the term September 28, 2012 to September 28, 2016, and licensed as an esthetician for the term September 28, 2012 to

September 28, 2016. He was most recently commissioned as a notary public for the term August 6, 2010 to August 6, 2014 (State's Ex. 2).

2) Respondent Cheung is also currently licensed as an appearance enhancement business owner under the business name Permanent Makeup International Inc. ("Permanent Makeup") for the term May 7, 2012 to May 7, 2016 (State's Ex. 2). He is the president and sole owner of this company. Between 2007 and 2008, Permanent Makeup was located at 126 Lafayette Street, Manhattan. It is currently located at 101 Lafayette Street, Manhattan (Transcript at 40, 41) (State's Ex. 2).

3) Respondent Cheung testified that he is also the secretary, and one of two controlling officers, of Tinny Beauty, a beauty school. He testified that this school has always been based in Flushing, Queens (Transcript at 42, 81). Tinny Beauty is authorized by the Department of Education to provide training courses to Department of State license holders (Transcript at 20).

4) At all relevant times, respondents Cheung and Permanent Makeup International were not authorized to enroll or instruct students in appearance enhancement course curricula.

5) On or about October 29, 2013, a notice of hearing together with a copy of the complaint was served by certified and regular mail on the respondents (State's Ex. 1). The hearing was adjourned from December 5, 2013 at the respondents' request.

6) DLS Chief Investigator Jack Bilello (Inv. Bilello) received a complaint involving the respondents from the New York State Department of Education. The complaint had initially been filed by Ms. Hui Ping Wu (Ms. Wu) with the New York Attorney General's Bureau of Consumer Frauds and Protection on September 8, 2011 (Transcript at 7) (State's Ex. 3).

7) At the hearing, there was no indication of whether or not Ms. Wu filed a formal "Preliminary Statement of Complaint" against any of the respondents with the Department of State.

8) Ms. Wu, who was not present at the hearing, stated in her complaint to the Attorney General, "In 2007, I had enrolled in a series of courses offered by Permanent Makeup International, Inc. (PMI) with the purpose of getting the New York Cosmetology License..." She stated that she attended 600 hours of courses and paid \$5,520.00 in tuition to Permanent Makeup. The complaint did not specify where these lessons physically occurred. Ms. Wu stated in the complaint that she was "issued" a cosmetology license by Permanent Makeup, but did not specify how she received this certificate. According to the complaint, after checking with the Department of State, Ms. Wu learned that both her 2008 license and 2010 renewal license were fraudulent. With regard to how she received the 2010 license she stated, "I received a renewed Cosmetology License from PMI in an envelope with a sender's address that is totally different from what I have learned from one of my friends in a similar situation" [sic] (State's Ex. 3).

9) In her complaint to the Attorney General, Ms. Wu further stated, "The representatives of PMI assured me again and again and promised me that after the course I was qualified to

apply for and they will get the New York Cosmetology License for me” [sic] (State’s Ex. 3). There were no details about who Ms. Wu may have spoken to.

10) Ms. Wu’s license certificates and a series of invoices were submitted with her complaint to the Attorney General (State’s Ex. 5). Inv. Bilello confirmed at the hearing that the licenses were, indeed, fraudulent (Transcript at 16).

11) Inv. Bilello met with Ms. Wu, her husband, and a New York State Education Department investigator in 2011 to discuss the complaint filed by Ms. Wu (Transcript at 11). In his testimony, Inv. Bilello, referring to Ms. Wu as “the complainant,” stated, “With respect to the license certificate with the expiration date of September 19, 2010, it was explained to me by Ms. Wu that after she finished her course, her husband visited the respondent’s place of business in Manhattan at which time Mr. Cheung had provided her with that specific license certificate. With respect to the license certificate with the expiration date of September 19, 2012, the complainant explained to me that this was after she had not received the renewal of her first license, her husband went to the office of the respondent in Manhattan and complained about not receiving the renewed license and shortly thereafter the second license was received by the complainant from the respondents” [sic] (Transcript at 15, 16). Mr. Wu was not present at the hearing and provided no written statement detailing any interactions with Mr. Cheung or other employees of Permanent Makeup.

12) Respondent Cheung testified that he did not know how Ms. Wu received the fraudulent licenses and that neither he nor anyone at his company sent them to Ms. Wu (Transcript at 71).

13) The respondent testified that his first recollection of Ms. Wu was when she and her husband came to the office of Permanent Makeup, at 101 Lafayette Street, in late 2010 to complain that Ms. Wu’s license could not be confirmed by the Department of State and that she had been overcharged by Permanent Makeup for her courses (Transcript at 44, 83). Mr. Cheung testified that he interacted only with Mr. Wu and told him he could not verify the license and that only Department of State could. He testified he also explained that if Ms. Wu had been overcharged for classes he would refund her money (Transcript at 45). Respondent Cheung testified that a payment of \$5000 would have been too much because the course was only \$3500.

14) The invoices submitted with Ms. Wu’s complaint span multiple dates from May 6, 2007 to July 21, 2007, and indicate she paid \$3700 for cosmetology courses and course materials (State’s Ex. 4). The invoices, which have been translated from Chinese into English, are printed on stationary stamped at the top with the words: “Permanent Makeup Int’l, Inc. 126 Lafayette Street 2/FI. New York, NY 10013.” The description section on the first of the invoices states, in relevant part, “Cosmetology License Education Courses, Registration Fee, School Archives, 600 Hours Cosmetology Courses.” The bill also indicates that the “charging salesperson” is Mei Ying (State’s Ex. 4). Subsequent invoices repeat the word “courses.” One invoice includes the statement, “This student requests to waiver the cosmetology license exam but take cosmetology courses” [sic].

15) Respondent Cheung testified that Permanent Makeup did not administer training and that he had not authorized anyone to administer training. He testified that the invoices had been

pre-printed and were widely accessible to all of the employees. The name indicated on the invoices, Mei Ying, was a former manager of Permanent Makeup (Transcript at 54). Respondent Cheung testified that he attempted to locate Mei Ying regarding Ms. Wu's complaint, but he heard she had returned to her home country of Malaysia in 2010, and he had been unable to reach her (Transcript at 55). The respondent acknowledged it was possible that Mei Ying could have accepted payments without his knowledge or authorization (Transcript at 57). He also stated that Mei Ying never worked for Tinny Beauty (Transcript at 82).

16) Respondent Cheung testified that Permanent Makeup sells skin care services, skin care products and salon equipment. He insisted that Permanent Makeup is not a school, has never been a school, and has never been involved in procuring appearance enhancement licenses (Transcript at 40). He testified that Tinny Beauty school is a licensed school based in Flushing, Queens that has never shared a facility with Permanent Makeup in Manhattan (Transcript at 42, 43). Respondent Cheung testified that if a customer of Permanent Makeup expressed an interest in appearance enhancement courses he or she would be directed to Tinny Beauty (Transcript at 43).

17) On March 22, 2012, Respondent Cheung met with Supervising Investigator Edward G. Kramer of the State Education Department (Inv. Kramer) to discuss Ms. Wu's complaint. After the meeting, in an April 4, 2012 letter to Respondent Cheung, Inv. Kramer stated, "Although you denied any training took place in Manhattan, it is clear that Ms. Wu enrolled in Permanent Makeup International, a business in which you were an officer. Since Permanent Makeup International was not a licensed school, she should never have been enrolled. Therefore, as we discussed, a full refund is required..." (App's Ex. A). Inv. Kramer's letter to Respondent Cheung pertains only to the improper enrollment of Ms. Wu in courses and does not address Ms. Wu's allegations about the fraudulent certificates.

18) Respondent Cheung testified that he did not tell Mr. Kramer that he had, in fact, enrolled Ms. Wu. He testified that he told Mr. Kramer, "If we trained Ms. Wu it would have been in Flushing." He explained that Permanent Makeup did not have any training facilities in Manhattan and, therefore, she would not have been trained there (Transcript at 83).

19) By check dated April 9, 2013, Respondent Cheung refunded \$5,520 to Ms. Wu (State's Ex. 7). He testified that he provided the refund because Inv. Kramer had "directed" him to do so and he was concerned Tinny Beauty might lose its license if he did not comply (Transcript at 46, 50, 79). It is not clear why Respondent Cheung was required to pay the refunded amount when the invoices only substantiated \$3,700 in course fees.

20) Respondent Cheung indicated that he did not know why Ms. Wu would have obtained a cosmetology license with a 1000-hour course prerequisite if she had only completed a 600-hour esthetics course.

21) Respondent Cheung testified that only after he met with Inv. Kramer and refunded the money was he able to more thoroughly analyze his records. He said he had "checked the records" and found no evidence that Ms. Wu attended or paid tuition for Tinny Beauty (Transcript at 80, 84). He testified that he never personally collected any money from her.

Respondent Cheung further testified that the majority of Permanent Makeup's costumers paid in cash.

OPINION AND CONCLUSIONS OF LAW

I - As the person who commenced the proceeding, 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 "means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact... More than seeming or imaginary, it is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt (citations omitted)." *300 Gramatan Avenue Associates v. State Div. of Human Rights*, 45 NY2d 176, 408 NYS2d 54, 56-57 (1978); *Tutuianu v. New York State*, 22 AD3d 503, 802 NYS2d 465 (2nd Dept. 2005). "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 AD2d 719, 465 NYS2d 365, 366 (1983), quoting *300 Gramatan Avenue Associates, supra*, 408 NYS2d at 57.

II - The expiration of the respondent's notary public commission does not deprive the Tribunal of jurisdiction of conduct that occurred while that commission was in effect. *Albert Mendel & Sons, Inc. v N.Y. State Department of Agriculture and Markets*, 90 AD2d 567, 455 NYS2d 867 (1982); *Main Sugar of Montezuma, Inc. v Wickham*, 37 AD2d 381, 325 NYS2d 858 (1971).

III- Being an artificial entity created by law, Permanent Makeup can only act through its officers, agents, and employees, and is, therefore, bound by the knowledge acquired by, and is responsible for, the acts committed by its officer and license qualifier, Mr. Cheung, within the actual or apparent scope of his authority. *Roberts Real Estate, Inc. v Department of State*, 80 NY2d 116, 589 NYS2d 392 (1992); *A-1 Realty Corporation v State Division of Human Rights*, 35 A.D.2d 843, 318 N.Y.S.2d 120 (1970); *Division of Licensing Services v First Atlantic Realty Inc.*, 64 DOS 88; RPL §442-c.

IV – The respondents are charged with issuing fraudulent cosmetology licenses. Ms. Wu enrolled in classes with Permanent Makeup and, at later a later time, came to possess two fraudulent license certificates. It is not clear, however, how Ms. Wu received these certificates or who created them.

While her written complaint to the Attorney General indicates that the certificates came to Ms. Wu from Permanent Makeup, there is no documentary evidence to substantiate this claim. No envelopes have been provided, nor did Ms. Wu indicate in her complaint what return address may have been on the mail. She only indicated the address for the renewal certificate had been "different" from return address accompanying her friend's license. Ms. Wu's complaint does not mention how she acquired the first certificate. She also does not state in her Attorney General complaint (as she later alleged to Inv. Bilello) that she received the certificates, both times, only after her husband visited Permanent Makeup and complained.

There was also weak testimonial support for the allegation that Permanent Makeup is responsible for the fraudulent certificates. It was not clear from Inv. Bilello's testimony whether Mr. Wu received the first certificate in person or not. His testimony seems to indicate that Ms. Wu told him that Mr. Cheung himself provided the initial certificate during an in-person visit (Trans. at 15). However, his testimony and Ms. Wu's complaint are ambiguous, at best, on the issue of her receipt of this certificate. Notably, Mr. Cheung is not even mentioned in Ms. Wu's description of her interactions with Permanent Makeup. If Ms. Wu is now alleging that Mr. Cheung himself handed her (or her husband) the fraudulent first certificate, then the omission of that allegation from her complaint would be a significant one that would warrant questioning and further explanation. If it is alleged someone other than Mr. Cheung at Permanent Makeup personally provided the certificate, then that too would warrant probing, under oath, particularly since no documentary evidence has been provided on the issue of exactly how the certificates came to be in Ms. Wu's possession. Since she was not present, Ms. Wu could not be questioned about how, when or in what manner the certificates were received. Mr. Wu was also not present at the hearing to testify about his conversations at Permanent Makeup, what, if any, representations were made to him about Ms. Wu's certificates, and who, if anyone, personally handed him the first certificate.

Although Respondent Cheung admits meeting Mr. Wu, he indicated he believed it was at the end of 2010 and that Mr. Wu told him Ms. Wu's cosmetology license could not be verified by the Department of State. Mr. Cheung denied sending the certificates or being aware of the circumstances under which they were sent. He testified credibly that he told Mr. Wu that only the Department of State could verify licenses, and that he would refund his wife's money if she had overpaid. It is not clear to this tribunal whether the second certificate was received by Ms. Wu prior to or subsequent to Mr. Wu's talk with Mr. Cheung.

Ms. Wu's written complaint indicates she was assured by Permanent Makeup personnel that she would qualify for her cosmetology license and that they would obtain the license for her. Although Ms. Wu does not indicate with any specificity who she may have spoken to, the invoices substantially support her claim that that she was led to believe her courses would qualify her for a cosmetology license. The issue of *how* the licenses were obtained was not adequately addressed by documentary or testimonial evidence. While hearsay testimony is permitted in administrative hearings, here, there are two levels of hearsay (Mr. Bilello testifying to what Ms. Wu said her husband experienced) and the tribunal is unable to assess the credibility of Ms. Wu or her husband with regard to the certificates and their interactions with personnel at Permanent Makeup. Although there has certainly been egregious misconduct by the person or persons who created and sent these fraudulent certificates, it has simply not been proven, by substantial evidence, that the respondents are the responsible parties. Accordingly, this charge is dismissed.

V – The respondents have been charged with the unauthorized enrollment of a student. Although it has not been established that Ms. Wu actually attended the courses she was enrolled in, the Permanent Makeup invoices indicate payments for specific cosmetology coursework and hours, and show the specific dates that these services were paid for by Ms. Wu. The invoices also indicate Ms. Wu made her payments to Mei Ying, who, according to Mr. Cheung, managed Permanent Makeup. 19 NYCRR §160.11[b] prescribes that an owner of an appearance

enhancement business is responsible for any statutory or regulatory violations that occur in the shop. Accordingly, Respondent Cheung is responsible for the unauthorized enrollment of Ms. Ying. This unauthorized enrollment is a demonstration of untrustworthiness, and shall, pursuant to General Business Law §410[1], be met with discipline. Additionally, since these acts took place while he was commissioned as a notary public, Mr. Cheung's conduct constitutes misconduct in violation of Executive Law §130.

In assessing the penalty, I have considered that the complainant has not proven the Respondents were aware of the improper enrollment of Ms. Wu by Ms. Ying, nor has it been established that the respondents benefitted financially or otherwise from Ms. Wu's enrollment. Furthermore, Mr. Cheung has paid restitution to Ms. Wu above the amount the invoices support. Under these circumstances, revocation, the most severe punishment, is not warranted. However, for this demonstration of untrustworthiness, the maximum financial penalty allowable under General Business Law Article 27 shall be assessed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT respondents Alex Cheung and Permanent Makeup International, Inc. demonstrated untrustworthiness by improperly enrolling a cosmetology student without being authorized to do so. Further, Mr. Cheung's misconduct violates Executive Law §130. Accordingly, pursuant to General Business Law §410[1], the respondents are ordered to pay a fine of \$500.00 on or before October 9, 2014. Should they fail to pay the fine by that date, Mr. Cheung's appearance enhancement business license, UID #21PE1303080, nail specialist license, UID #26CH1009519, and esthetician license, UID #28CH1009434, shall all be suspended for a period commencing October 10, 2014 and terminating one month after the receipt, by certified mail, by the Department of State of the license certificates. Furthermore, should Respondent Cheung ever re-apply for a commission as a notary public, no commission shall be granted until he has paid the \$500 fine. The respondents are directed to send a check or money order for the fine payable to "Secretary of State", or their license certificates, by certified mail, to Norma Rosario, Department of State, Division of Licensing Services, One Commerce Plaza, 99 Washington Avenue, 5th Floor, Albany, New York 12231-0001.

/s/
Ziedah F. Giovanni
Administrative Law Judge

Dated: September 30, 2014