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SC Court of Appeals

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Angel Nails,)
Appellant,)
vs.)
South Carolina Department of Labor,)
Licensing, & Regulation, State Board of)
Cosmetology,)
Respondent.)

Docket No. 14-ALJ-11-0339-AP

FINAL ORDER AND DECISION

The Honorable Carolyn C. Matthews
June 1, 2015

Hearing Date: April 7, 2015
For the Appellant: Prentiss Counts Shealy, Esquire
For the Respondent: Suzanne Hawkins, Esquire

STATEMENT OF THE CASE

This matter is before the Administrative Law Court ("ALC") for a final order and decision following a contested case hearing pursuant to S.C. Code Ann. § 1-23-600(A) (Supp. 2014). The South Carolina Department of Labor, Licensing, and Regulation's Board of Cosmetology ("Department" or "Board") placed the license of Angel Nails ("Appellant salon") on probation for three (3) years and issued a fine of nine thousand three hundred and no/100ths Dollars (\$9,300.00) based on violations of applicable law including S.C. Code Ann. §§ 40-13-110(A)(1), 40-13-110(A)(8), and 40-13-20(2), and (8) (1976, as amended); and S.C. Code Ann. Reg. §§ 35-20(D)(2), 35-20(H)(1), 35-20(M)(1) and (2), and 35-20(c). Van Tran ("Appellant"), owner of Angel Nails, filed a Notice of Appeal with this Court on or about July 10, 2014. After notice to the parties, the court held a hearing on April 7, 2015. Present at the call of the case were the attorneys, as listed above. Evidence was introduced and testimony presented. After carefully reviewing all of the evidence, this Court finds that the Department's sanctions imposing on Appellant a public reprimand and three (3) years' probation are upheld. However, the \$9,300.00 fine is reduced to \$6,300.00 based on the following analysis.

FINDINGS OF FACT

Having observed the arguments of counsel presented at the hearing, and taking into consideration the burden of persuasion by the parties, the court makes the following Findings of Fact by the existence of substantial evidence:

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1. On or about October 28, 1997, Appellant salon was issued a license by Respondent. Appellant also applied for a license as a Nail Technician.
2. On four (4) separate incidents in 2012, Appellant salon was inspected by a designated inspector for the Board of Cosmetology, and multiple infractions were found, as follows:
 - a. On or about May 3, 2012, an inspector found used buffers and nail files that were not properly discarded and a wax room that appeared to have been used recently (though no employees were licensed to perform waxing services). An inspection report was created and left with Appellant.
 - b. On or about June 28, 2012, a re-inspection was conducted. The inspector found a wax canister that was plugged in, but hidden in a cabinet, as well as a sleeper sofa in the back of the premises and used buffers that had not been discarded properly. An inspection report was created and left with Appellant.
 - c. On or about August 24, 2012, another re-inspection was conducted, and the inspector found dirty filters in the pedicure chairs and towels left out in the open. The sleeper sofa was still on the premises. An inspection report was created and left with Appellant.
 - d. On or about November 9, 2014, another re-inspection was conducted. The inspector found used graters, buffers, and nail files, and the sleeper sofa was still on the premises. An inspection report was created and left with Appellant.
3. As a result of these inspections and their resulting reports, a formal complaint was issued by the Respondent on March 19, 2014, along with a notice of hearing for April 28, 2014. Before the hearing date, the parties entered into a Memorandum of Agreement ("MOA") that was drafted by the Respondent and signed by the Appellant on March 24, 2014. This was referred to at the subsequent hearing. Appellant undertook both the execution of the MOA and appearance at the hearing without the assistance of an attorney or other representation.
4. The hearing went forward on April 28, 2014, with Appellant again representing herself and Ms. Melanie C. Thompson, chair of the South Carolina Board of Cosmetology, serving as hearing officer. Appellant gave basic testimony regarding the operation of the shop and her understanding of the violations. She stated that she was away from the shop due to health problems and the birth of her child, and that her sister-in-law watched the

shop. (A different sister-in-law has subsequently purchased the business, and is now having trouble obtaining a license due to these violations.) Appellant further testified that some of the violations, such as the couch in the back room, had been in place since before she purchased the salon.

5. It appears from the transcript that the members of the board who were present agreed on the sanctions that were ultimately imposed: a public reprimand; license placed on probation for three (3) years; and fines in total of nine thousand three hundred and no/100ths Dollars (\$9,300.00) to be paid within one hundred twenty (120) days. However, the final order issued on June 11, 2014 states that "the hearing officer deferred ruling and requested that the matter be brought before the full Board. The full Board, with Melanie C. Thompson recused, considered the MOA at its meeting on May 13, 2014, with a quorum present" and that a *de novo* hearing was held in accordance with the applicable sections of the Administrative Procedures Act.
6. The imposed sanctions were justified by reference to the following code sections and regulations that were included in the MOA and agreed to by the Appellant:
 - a. S.C. Code Ann. § 40-13-110(A)(1) (1976, as amended), in that Respondent violated or failed to comply with any provision of this chapter, a regulation promulgated under this chapter, or an order of the board;
 - b. S.C. Code Ann. Reg. § 35-20(D)(1) (1976, as amended), in that Respondent failed to keep furnishings and fixtures clean and in good repair;
 - c. S.C. Code Ann. Reg. § 35-20(H)(1) (1976, as amended), in that Respondent failed to dispose of instruments that come into direct contact with a patron and that cannot be disinfected in a waste receptacle immediately after use;
 - d. S.C. Code Ann. Reg. § 35-20(M)(1) & (2) (1976, as amended), in that Respondent failed to discard used towels into a closed receptacle after use and failed to store towels in a closed cabinet before use;
 - e. S.C. Code Ann. § 40-13-20(2) & (8) (1976, as amended), in that Respondent allowed Nail Technicians to practice outside of the scope of their license by performing waxing services which require a cosmetology license;
 - f. S.C. Code Ann. Reg. § 35-20(c) (1976, as amended), in that Respondent used its premises for sleeping and living quarters;

g. S.C. Code Ann. § 40-13-110(A)(8) (1976, as amended) and S.C. Code Ann. § 40-13-20(2) (1976, as amended), in that Respondent used devices not intended for cosmetic use and outside the scope of cosmetology..

7. Appellant filed the instant appeal on July 10, 2014, by and through her counsel of record Suzanne Hawkins, Esq. A hearing was held on April 7, 2015.

8. Appellant contended at the hearing that the sole issue was with the fine issued by the Board, and alleged two (2) arguments. Argument 1 was that S.C. Code Ann. § 40-1-120(a) (1976, as amended) is the only method for fining, and that its plain reading allows for a maximum fine of Five Hundred and no/100ths Dollars (\$500.00).¹ Argument 2 was that if stacking of multiple fines is permitted under the reading of that code section, the method that the Board used in the instant case was random and arbitrary.

9. For the reasons set forth below, I find that all punitive measures must stand, but the fine shall be decreased.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the court concludes the following as a matter of law:

1. Jurisdiction over this case is vested with the South Carolina Administrative Law Court pursuant to S.C. Code Ann. § 1-23-600(D) (Supp. 2007). As such, the Administrative Law Judge sits in an appellate capacity under the APA rather than as an independent finder of fact. The abilities of an Administrative Law Judge in such a role are dictated by S.C. Code Ann. § 1-23-380(5) (Supp. 2007):

(5) The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been

¹ "SECTION 40-1-120. Sanctions. (A) Upon a determination by a board that one or more of the grounds for discipline exists, in addition to the actions the board is authorized to take pursuant to its respective licensing act, the board may: (1) issue a public reprimand; (2) impose a fine not to exceed five hundred dollars unless otherwise specified by statute or regulation of the board; (3) place a licensee on probation or restrict or suspend the individual's license for a definite or indefinite time and prescribe conditions to be met during probation, restriction, or suspension including, but not limited to, satisfactory completion of additional education, of a supervisory period, or of continuing education programs; (4) permanently revoke the license." S.C. Code Ann. § 40-1-120(a) (1976, as amended)

prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

2. "Substantial evidence" has been defined both as "evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action"² and requiring "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."³ The fact that the record, when considered as a whole, presents "[t]he possibility of drawing two inconsistent conclusions from the evidence will not mean the agency's conclusion was unsupported by substantial evidence." Waters v. South Carolina Land Resources Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996); *see also* Grant v. South Carolina Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995).

3. If substantial evidence exists for a certain agency decision, that decision may not be disturbed unless there is an abuse of discretion evidenced by a showing that the action of the agency was arbitrary or unlawful. S.C. Code Ann. § 1-23-600(A) (Supp. 2014). "A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." Deese v. South Carolina State Bd. Of Dentistry, 286 S.C. 182, 184-5, 332, S.E.2d 539, 541 (Ct.App. 1985).

4. Pursuant to the Cosmetology Board Practice Act as contained in S.C. Code Ann. § 40-13-110(A) (2014), "the board may revoke suspend, or restrict a license" upon a showing of a violation of a statutory or regulatory requirement. Additionally, "upon a determination...that one

² Lark v. Bi-Lo, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981).

³ Midlands Utility, Inc. v. S.C. Dep't of Health and Environmental Control, 298 S.C. 66, 69, 378 S.E.2d 256, 258 (1989).

or more of the grounds for discipline exists,” the board may issue a public reprimand, impose a fine not to exceed five hundred dollars unless otherwise specified by a statute or regulation of the board, place a licensee on probation or restrict the individual’s license for a definite or indefinite time and prescribe conditions to be met during probation, restriction, or suspension including, but not limited to, satisfactory completion of additional education, of a supervisory period, or of continuing education programs.

5. Appellant contends that the Board’s stacking of the fines “not to exceed five hundred dollars” as authorized by S.C. Code Ann. § 40-13-110(A) (2014) for a finding of “one or more grounds for discipline” is without adequate legal or factual basis and was an abuse of discretion. In the alternative, Appellant contends that if the Board is permitted to stack fines under the statute, many of the fines in the instant case were without factual or legal basis.

6. Though there is no specific case law regarding the issuance of sanctions by the South Carolina Board of Cosmetology, similar cases arising from other occupations overseen by Labor, Licensing, and Regulation have been taken to the South Carolina Supreme Court. A prime example of this is the matter of Hibah O. Osman, M.D., v. South Carolina Department of Labor, Licensing, and Regulation, South Carolina State Board of Medical Examiners, 382 S.C. 244, 676S.E.2d 672 (2009). In this case, the Supreme Court reversed a ruling by this Court that a portion of the Board’s order requiring Dr. Osman to reestablish her competency in surgical obstetrics before resuming medical practice in South Carolina was outside the bounds of its authority. This opinion defined the Supreme Court’s view that S.C. Code Ann. § 40-1-120(a) (1976, as amended), the governing statutory section from which all regulatory boards within South Carolina draw the power to issue sanctions, will be construed very broadly. As such, I conclude that the issuance of different types of sanctions as well as the stacking of fines is permissible in this matter.

7. Generally, courts defer to the relevant administrative agency’s decisions with respect to its own regulations unless there is a compelling reason to differ. Dunton v. South Carolina Bd. of Exam’rs in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987). Though I must defer to the Board’s ruling regarding the number and types of violations in four (4) of the seven (7) statutory categories, I cannot uphold the sanctions that merely cite to organizational or definitional sections to justify the imposition of fines. For this reason, the following fines will be deleted:

- a. S.C. Code Ann. § 40-13-110(A)(1) (1976, as amended), in that Respondent violated or failed to comply with any provision of this chapter, a regulation promulgated under this chapter, or an order of the Board.
 - i. Appellant was fined five hundred and no/100ths Dollars (\$500.00) for each of two (2) violations of this section; however, this section does not specifically allow for the imposition of a fine, but rather provides general authority to the Board to revoke, suspend, or restrict a license.
 - ii. These fines are therefore disallowed;
 - b. S.C. Code Ann. § 40-13-20(2) & (8) (1976, as amended), in that Respondent allowed Nail Technicians to practice outside of the scope of their license by performing waxing services, which require a cosmetology license.
 - i. Appellant was fined five hundred and no/100ths Dollars (\$500.00) for each of two (2) violations of these two (2) subsections; however, neither allows for the imposition of a fine, but rather define an aspect of the practice of cosmetology.
 - ii. These fines are deleted;
 - c. S.C. Code Ann. § 40-13-110(A)(8) (1976, as amended) and S.C. Code Ann. § 40-13-20(2) (1976, as amended), in that Respondent used devices not intended for cosmetic use and outside the scope of cosmetology.
 - i. Appellant was fined five hundred and no/100ths Dollars (\$500.00) for each of two (2) violations of these sections; however, these sections do not allow for the imposition of a fine; rather, they allow the Board to revoke, suspend, or restrict a license if it has found an incident where a substance or device not labeled for cosmetic use was used in the practice of cosmetology;
 - ii. Because these sections authorize the Board only to revoke, suspend, or restrict a license, and does not allow imposition of a fine, the monetary penalties are deleted.
8. The fines imposed thus total six thousand three hundred and no/100ths Dollars (\$6,300.00), in addition to the public reprimand and three (3) year probationary period. A public

reprimand plus probation is a powerful sanction and, when combined with the reduced fine, is still a very serious punishment for the Appellant.


ORDER

Based upon the Findings of Fact and Conclusions of Law stated above, it is

ORDERED that the Department's decision to place Appellant's cosmetology license on probation for three (3) years is upheld; the Department's decision to issue a public reprimand is upheld; and the Department's imposed fine is reduced to a total of six thousand three hundred and no/100ths (\$6,300.000) for the reasons described above.

IT IS SO ORDERED.

June 1, 2015
Columbia, South Carolina

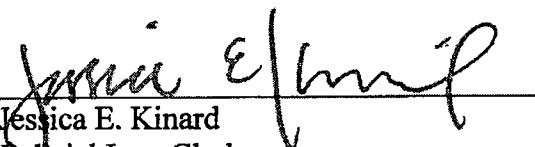

CAROLYN C. MATTHEWS
Administrative Law Judge

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CERTIFICATE OF SERVICE

I, Jessica E. Kinard, hereby certify that I have, on this date, served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid; in the Interagency Mail Service; or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

June 1, 2015
Columbia, South Carolina



Jessica E. Kinard
Judicial Law Clerk

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