

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Carolyn C. Matthews, Administrative Law Judge

Case No. 2015-001435

Angel Nails,

Appellant,

v.

South Carolina Department of Labor Licensing & Regulation,
State Board of Cosmetology,

Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This matter is an appeal from the June 1, 2015 final order and decision of Judge Carolyn Matthews. It arose from a South Carolina Board of Cosmetology disciplinary matter, in which the Board imposed a public reprimand, a three-year probationary period, and a fine in the amount of \$9,300 in an order dated June 11, 2014. Appellant appealed the Board order to the Administrative Law Court (hereinafter "ALC") on July 10, 2014. In her June 1, 2015 order, Judge Carolyn Matthews reduced the fine from \$9300 to \$6300. Appellant timely appealed the ALC order to this Court on June 30, 2015.

FACTS

Appellant, Angel Nails, has been licensed as a salon since 1997 and is owned by Van Tran. Appellant entered into a memorandum of agreement with the Department, admitting to certain violations; namely, the existence of used buffers, graters, and nail files that were not properly discarded, a wax room that appeared to have been used recently though no employees are licensed to perform waxing services, improperly stored towels, dirty filters in the pedicure chairs, and sleeping quarters in the back of the premises. (R. p. 14-25). A Board-designated hearing officer considered the parties' agreement at a hearing on April 28, 2014, but deferred ruling and referred the matter to the full Board. (R. p. 10, lines 9-15). A hearing was held on May 13, 2014 before the full Board.

Ms. Tran appeared pro se at both hearings and presented mitigating testimony regarding the circumstances that led to the charges against her. Appellant explained to the Board that she bought the salon in June 2011, and the sofa and wax room were in place at the time. She was not informed of any issue or violation with either at the Board's initial inspection of the business after she purchased it. (R. p. 11, lines 25-37).

Further, Ms. Tran testified that she was not physically present or acting in a managerial capacity at the salon for any of the inspections. Her child was born in April 2012, before the first inspection in May 2012. She has not returned to the salon since the birth of her child. She attempted to sell the business to her sister-in-law in January 2013, but a transfer of the license was not possible until the charges were resolved. (R. p. 12, lines 1-2).

In its order of June 11, 2014, the Board accepted the parties' agreement and imposed a public reprimand, a three-year probationary period, and a fine in the amount of \$9,300. (R. p. 13, lines 5-8). The Board order indicated that the fine was calculated as follows:

1. \$500 each for 2 violations of S.C. Code §40-13-110(A)(1), which states, "In addition to the grounds for disciplinary action provided for in Section 40-1-110, the board may revoke, suspend or restrict a license upon a satisfactory showing to the board that the holder of the license has failure to comply with any provision of this chapter, a regulation promulgated under this chapter, or an order of the board."
2. \$500 each for 6 violations of S.C. Code of Regulations §35-20(D)(1), which states, "Cleanliness and repair. Each salon and school must keep the floors, walls, woodwork, ceilings, furniture, furnishings, and fixtures clean and in good repair."
3. \$100 each for 12 violations of S.C. Code of Regulations §35-20(H)(1), which states, "Licensees and students must dispose of all supplies or instruments which come in direct contact with a patron and cannot be disinfected in a waste receptacle immediately after their use."
4. \$200 each for 3 violations of S.C. Code of Regulations §35-20(M)(1)&(2), which state, (1) Used towels to be discarded. After a towel has been used once, it must be deposited in a closed receptacle, and shall not be used again until properly laundered and sanitized. (2) Methods of laundering. Used towels must be laundered either by regular commercial laundering or by a noncommercial laundering process which includes immersion in water at 140 degrees F for not less than 15 minutes during the washing or rinsing operation."
5. \$500 each for 2 violations of S.C. Code §40-13-20(2)&(8), which provide definitions of the practice of cosmetology and nail technician, respectively.
6. \$500 each for 3 violations of S.C. Code of Regulations §35-20(C), which states, "Residential salons must maintain a separate entrance for clients, which entrance shall not open from the living, dining, or sleeping quarters, and all doors previously opening into such quarters must be permanently sealed. (2) No portion of the salon may be used as a portion of a private residence."

7. \$500 each for 2 violations of S.C. Code §40-13-110(A)(8), which states, "In addition to the grounds for disciplinary action provided for in Section 40-1-110, the board may revoke, suspend, or restrict a license upon a satisfactory showing to the board that the holder of the license has used a substance or device which is not labeled for cosmetic use," and S.C. Code §40-13-20(2), which, as previously stated, provides a definition of the practice of cosmetology. (R. p. 13, lines 5-14).

ARGUMENT

I. THE BOARD IS NOT AUTHORIZED TO FINE A LICENSEE IN EXCESS OF FIVE HUNDRED DOLLARS

The Board's authority to sanction is set forth in the Cosmetology Board Practice Act, S.C. Code §40-13-110(A), which provides that "the board may revoke, suspend, or restrict a license" upon a showing of a violation of a statutory or regulatory requirement. In addition, S.C. Code § 40-1-110(A), the "Engine" bill, which applies to all of the occupational and professional boards administered by SCDLLR, provides that a board, "upon a determination..that one or more of the grounds for discipline exists," 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 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.

The Board's stacking of the fine "not to exceed five hundred dollars" as authorized by S.C. Code 40-1-110(A) for a finding of "one or more grounds for discipline," without adequate legal or factual basis, was an abuse of discretion.

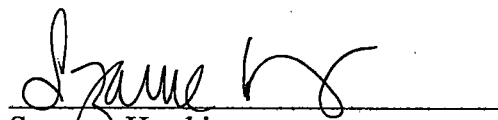
The Board's practice act has no provision for the imposition of a fine; therefore, the only authority this Board has to fine is found in S.C. Code 40-1-110(A), which provides for the imposition of a fine "not to exceed five hundred dollars" for a finding of "one or more

grounds for discipline.” The statute clearly provides that a finding of multiple grounds for discipline limits the Board to a fine “not to exceed five hundred dollars.” Therefore, the Board’s imposition of a fine in excess of five hundred dollars is unduly harsh in that it was not within the Board’s authority to impose. S.C. Board of Examiners in Optometry v. Cohen, 256 S.C. 13, 180 S.E.2d 650 (1971). The Board’s fine should therefore be overturned.

CONCLUSION

Based on the foregoing, the fine imposed should be reduced to \$500, or, in the alternative, remanded to the Board for reconsideration pursuant to the Board’s proper authority to sanction the Appellant.

Respectfully submitted,



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December 15, 2015
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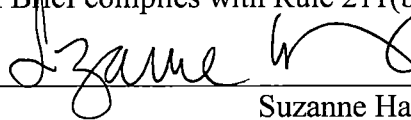
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South Carolina Department of Labor Licensing & Regulation,
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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.



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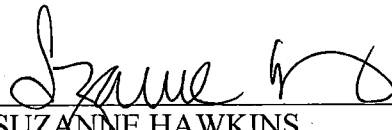
South Carolina Department of Labor Licensing & Regulation,
State Board of Cosmetology,

Respondent.

CERTIFICATE OF SERVICE BY MAILING

I certify that on December 15, 2015, I served the Respondent with copies of the Appellant's Final Brief and Final Reply Brief, by United States Mail, with proper postage attached, addressed as follows: Prentiss Counts Shealey, Esquire, Assistant Disciplinary Counsel, SCDLLR, Post Office Box 11329, Columbia, SC 29211-1329.

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December 15, 2015

The Honorable Jenny Abbott Kitchings
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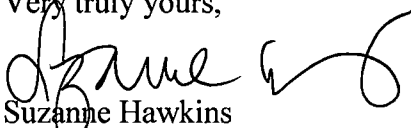
RE: Angel Nails, Appellant v. South Carolina Department of Labor, Licensing and Regulation, State Board of Cosmetology, Respondent, Case No.2015-001435

Dear Ms. Kitchings:

Enclosed for filing are the Appellant's Final Brief and Final Reply Brief in the above-referenced case, and proof of service of both.

Thank you for your attention to this matter.

Very truly yours,


Suzanne Hawkins

Encl

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