STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, BOARD OF COSMETOLOGY,	)	
Petitioner,	)	
vs.	)	Case No. 10-1506PL
TRANG DOAN,	)	
Respondent.	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case for the Division of Administrative Hearings (DOAH) on May 18, 2010. The ALJ conducted the hearing by video teleconference in Tallahassee and Orlando, Florida.

APPEARANCES

For Petitioner: Jason White, Esquire
Department of Business and Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

For Respondent: Trang Doan, pro se
8112 Anhinga Road
Fort Myers, Florida 33967

STATEMENT OF THE ISSUES

The issues are whether Respondent practiced beyond the scope of her nail specialist license by performing waxing treatments on a customer in violation of Subsections

455.227(1)(o) and 477.029(1)(i), Florida Statutes (2007),[1] and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

Petitioner filed an Administrative Complaint against Respondent on June 4, 2009. Respondent timely requested a formal hearing, and Petitioner referred the matter to DOAH to conduct the hearing.

At the hearing, Petitioner presented the testimony of one witness, submitted one exhibit for admission into evidence, and requested official recognition of two documents. Respondent testified and submitted no exhibits for admission into evidence.

The identity of the witnesses, exhibit, and documents for official recognition, and the rulings regarding each, are reported in the one-volume Transcript of the hearing filed with DOAH on June 3, 2010. Petitioner timely filed its Proposed Recommended Order (PRO) on June 10, 2010. Respondent did not file a PRO.

FINDINGS OF FACT

1. Several material facts are undisputed. Petitioner is the state agency responsible for licensing and regulating the practice of cosmetology in Florida. At all times material to this proceeding, Respondent was licensed in the state as a nail specialist pursuant to license number FV 9527661. Respondent's

license does not authorize her to perform hair removal wax treatments.

2. The disputed material facts are whether Respondent performed hair removal wax treatments on Ms. Priya Bhuta on February 21, 2008, and collected $24.00 for the service. For the reasons stated hereinafter, clear and convincing evidence does not show that Respondent committed the disputed material facts.

3. Ms. Bhuta did not testify at the final hearing. Petitioner did not submit her deposition testimony for admission into evidence.

4. Petitioner seeks to prove the disputed material facts with the statements of two investigators concerning alleged statements of Respondent. One investigator did not testify at the hearing (hereinafter, the investigator-in-absentia). The other investigator testified at the hearing (hereinafter, the investigator-witness).

5. The investigator-witness testified that the investigator-in-absentia told the investigator-witness in a private conversation between the two investigators that Respondent made the alleged statements to the investigator-in-absentia. For reasons discussed in the Conclusions of Law, the ALJ does not find the testimony of the investigator-witness pertaining to any alleged statements by Respondent to be

admissible. If the alleged statements were found to be admissible, the statements are not credible or persuasive and do not form an adequate basis for a finding of fact.

6. Respondent testified at the hearing, and the fact-finder finds Respondent's testimony to be credible and persuasive. Respondent did not perform wax treatments on Ms. Bhuta, and Respondent did not make the alleged statements attributed to her in the hearsay testimony of the investigator-witness.

7. The alleged offense occurred on February 21, 2008, according to paragraph number 4 in the Administrative Complaint. The investigator-in-absentia conducted the field interview of Respondent, in which the alleged statements occurred, on the morning of February 21, 2008, prior to the opening of business and prior the time of day when the alleged violation occurred.[2] It is not plausible to the trier of fact that Respondent made the alleged statements to the investigator-in-absentia pertaining to a violation in futuro. The trier of fact resolves the evidential conflict in favor of Respondent for reasons described more fully in the Conclusions of Law.

CONCLUSIONS OF LAW

8. DOAH has jurisdiction over the subject matter and the parties in this proceeding. §§ 120.569 and 120.57(1), Fla.

Stat. (2009). DOAH provided the parties with adequate notice of the final hearing.

9. The burden of proof is on Petitioner. Petitioner must show by clear and convincing evidence that Respondent committed the disputed material facts and the reasonableness of the proposed penalty. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996).

10. If Respondent were to have made the alleged out-of-court statements to the investigator-witness, the alleged statements may have been admissions by a party opponent. Admissions by a party opponent would have been admissible in evidence for the truth of the matter stated, even though a party opponent denies the admissions. § 90.803(18)(a); Lee v. Department of Health and Rehabilitative Services, 698 So. 2d 1194, 1200 (Fla. 1997); Christopher v. State, 583 So. 2d 642, 645 (Fla. 1991); Costa v. School Board of Broward County, 701 So. 2d 414, 415 (Fla. 4th DCA 1997). Seabord Coast Line Railroad Company v. Nieuwendaal, 253 So. 2d 451, 452 (Fla. 2d DCA 1971).

11. The disputed statements in this proceeding are statements allegedly made by the investigator-in-absentia to the investigator-witness. The investigator-witness did not testify that Respondent made any statement to the investigator-witness

or that the investigator-witness heard any statements from Respondent. The investigator-witness only heard statements from the investigator-in-absentia.

12. The investigator-in-absentia was not present at the hearing, did not testify that Respondent made the statements to him, and was not available for cross-examination by Respondent. Therefore, the statements allegedly made by the investigator-in-absentia to the investigator-witness are hearsay within the meaning of Subsections 90.801(1) and (2) and are inadmissible pursuant to Section 90.802. Compare Strickland v. Florida A&M University, 799 So. 2d 276, 279 (Fla. 1st DCA 2001)(party's testimony describing out-of-court statements by a non-party that the non-party attributes to the opposing party is inadmissible).

13. The excluded statements attributed to Respondent by the investigator-witness do not supplement other competent evidence within the meaning of Subsection 120.57(1)(a).[3] When the hearsay statements attributed to Respondent do not supplement other competent evidence, the trier of fact is constrained to disregard the hearsay. Tenbroeck v. Castor, 640 So. 2d 164, 167 n.3 (Fla. 1st DCA 1994).

14. The fact-finder did not consider the hearsay statements of the investigator-in-absentia or the hearsay testimony of the investigator-witness pertaining to the alleged statements of Respondent. Even if the fact-finder were to have

considered that evidence, the evidence does not rise to the standard of clear and convincing evidence.

15. The requirement for clear and convincing evidence imposes an intermediate level of proof on Petitioner. Petitioner must prove material factual allegations by more than a preponderance of the evidence, but the proof need not be beyond and to the exclusion of a reasonable doubt. The Florida Supreme Court has explained the clear and convincing standard in the following manner:

> This intermediate level of proof entails both a qualitative and quantitative standard. The evidence must be credible; the memories of witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy. . . . [T]he facts to which witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witness must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Inquiry Concerning a Judge No. 93-62, 645 So. 2d 398, 404 (Fla. 1994)(quoting in part from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). See also Owens-Corning Fiberglass Corp. v. Ballard, 749 So. 2d 483, 486 (Fla. 1999); Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995); E.F. v. State, 889 So. 2d 135, 139 (Fla. 3d DCA 2004); K-Mart Corporation v.

Collins, 707 So. 2d 753, 757 n.3 (Fla. 2d DCA 1998); McKesson Drug Co. v. Williams, 706 So. 2d 352, 353 (Fla. 1st DCA 1998); Kingsley v. Kingsley, 623 So. 2d 780, 786-787 (Fla. 5th DCA 1993); Lee County v. Sunbelt Equities, II, Limited Partnership, 619 So. 2d 996, 1006 n.13 (Fla. 2d DCA 1993). Compare Robinson v. Florida Board of Dentistry, Department of Professional Regulation, 447 So. 2d 930, 932 (Fla. 3rd DCA 1984)(the term "competent and substantial evidence" takes on vigorous implications in license discipline proceedings that are not present in other types of agency action).

16. The evidence relied on by Petitioner in this proceeding fails the qualitative and quantitative standards for clear and convincing evidence. The out-of-court statements attributed to Respondent do not take the form of specific and precise accounts of the words uttered. The evidence surmises what Respondent said by a witness who did not hear Respondent speak. The incriminating evidence lacks the precision and specificity required to be clear and convincing. Compare Inquiry Concerning a Judge, 645 So. 2d at 405 (testimony without specific recollection is not clear and convincing), with Inquiry Concerning a Judge, 645 So. 2d at 404 (unequivocal testimony of various meetings is clear and convincing).

17. If the evidence were to present any factual conflict in this proceeding, the fact-finder must resolve conflicts in

the evidence and decide the question one way or the other. Dunham v. Highlands County School Board, 652 So. 2d 894, 896 (Fla. 2d DCA 1995); Heifetz v. Department of Business Regulation, Division of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); Department of Professional Regulation v. Wagner, 405 So. 2d 471, 473 (Fla. 1st DCA 1981). The trier of fact resolved any evidential conflict in favor of Respondent. The fact-finder is the sole arbiter of credibility. Bejarano v. State, Department of Education, Division of Vocational Rehabilitation, 901 So. 2d 891, 892 (Fla. 4th DCA 2005); Hoover, M.D. v. Agency for Health Care Administration, 676 So. 2d 1380, 1384 (Fla. 3d DCA 1996); Goss v. District School Board of St. Johns County, 601 So. 2d 1232, 1234 (Fla. 5th DCA 1992).

18. The surmise of the investigator-witness and the inferences she gleaned from the statements made to her by the investigator-in-absentia ostensibly sufficed as Petitioner's definition of probable cause to initiate this proceeding. However, inference and surmise do not satisfy the clear and convincing standard in this de novo proceeding. Tenbroeck, 640 So. 2d at 167-168. In a world ensnarled by false assumptions and hasty judgments, an agency's proof at the final hearing must be as serious-minded as the penalty. Bowling v. Department of Insurance, 394 So. 2d 165, 172 (Fla. 1st DCA 1981). The trier

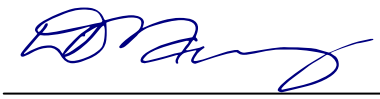
of fact weighed the proof against Respondent at the final hearing and found it less than clear and convincing.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Business and Professional Regulation, Board of Cosmetology, enter a final order finding Respondent not guilty of the violations charged in the Administrative Complaint.

DONE AND ENTERED this 17th day of June, 2010, in Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of June, 2010.

ENDNOTES

[1/] References to subsections, sections, and chapters are to Florida Statutes (2007), unless otherwise stated.

[2/] Another alleged violation by a different licensee occurred on January 8, 2008, but the Administrative Complaint does not

charge Respondent with that violation, and the alleged violation of January 8, 2008, is not at issue in this proceeding.

[3/] The hearsay statements of the investigator-in-absentia are also included in Petitioner's Exhibit 1, but are not considered as a basis for a finding of fact.

COPIES FURNISHED:

Jason White, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

Trang Doan
8112 Anhinga Road
Fort Myers, Florida 33967

Reginald Dixon, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Robyn Barineau, Executive Director
Division of Professions
Board of Cosmetology
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.