#### BOARD OF BARBERING AND COSMETOLOGY

Professional and Vocational Licensing Division Department of Commerce and Consumer Affairs State of Hawaii

#### MINUTES OF MEETING

Date: Wednesday, December 12, 2012

Time: 9:03 a.m.

Place: **PVL Examination Room** 

King Kalakaua Building

335 Merchant Street, 3<sup>rd</sup> Floor Honolulu, Hawaii 96813

Present: Lance M. Marugame, Barber Member, Chairperson

Lee Ann Apao, Cosmetology Member, Vice-Chairperson

Alexander Choi, Public Member Angela Howard, Public Member Chad Nelson, Public Member

Christobal Quintana, Barber Member

Rodney J. Tam, Deputy Attorney General ("DAG")

Laureen M. Kai, Executive Officer

Lori Nishimura, Secretary

Jacque Flores, Paul Maria Salon Guests:

John Hassler, Regulated Industries Complaints Office ("RICO")

attorney

Patrick Kelly, RICO attorney

Barbara Kokubun, BK's Barber Shop

Faye Lee Tram Ngo

Agenda: The agenda for this meeting was filed with the Office of the

Lieutenant Governor, as required by Hawaii Revised Statutes

("HRS") section 92-7(b).

Call to Order: There being a guorum present, the meeting was called to order at

9:03 a.m. by Chairperson Marugame.

Additions/ Revisions to

Executive Officer Kai requested to make the following additions and revisions to the agenda:

Agenda:

Add:

5. **APPLICATIONS** 

\* \* \*

Reinstatement of Suspended License D.

Revise (to read as):

APPLICATIONS 5.

\* \* \*

- C. Restoration of Licenses
  - GILLESPIE, Philip L. (BEO 3249) 1)
  - 2) MARTIN, Mililani Catherine (BEO 6260)
  - 3) TRUONG, Hoa T. (BEO 11903)
- Reinstatement of Suspended License D.
  - LE, Truc Thanh (BEO 13916)

After discussion, it was moved by Ms. Howard, seconded by Mr. Quintana, and unanimously carried to approve the above additions and revisions to the agenda.

Minutes of the October 10, 2012 Board Meeting:

It was moved by Mr. Quintana, seconded by Ms. Howard, and unanimously carried to approve the minutes of the October 10, 2012 Board Meeting as circulated.

At 9:06 a.m., the Board recessed the meeting for adjudicatory matters.

<u>Adjudicatory</u> Matters:

Chapter 91, HRS, A. In the Matter of the Beauty Operator's License of Faye C.K. Lee; BAR 2011-28-L

> Respondent, Faye C.K. Lee, and Patrick Kelly, attorney for the Petitioner, Regulated Industries Complaints Office ("RICO), were present to present oral argument. At Ms. Lee's request, her sister remained in the conference room during the proceedings.

DAG Tam provided a brief summary of the case:

- Hearings Officer's Findings of Fact, Conclusions of Law and Recommended Order Granting Petitioner's Motion for Summary Judgment was received and provided to the Board for review:
  - o Findings of Fact:
    - ✓ Respondent is currently licensed as an esthetician (BEO 18704), and her license expires on

- December 31, 2013;
- ✓ Respondent also holds a real estate broker's license and is involved with Golden House Management, Inc. and Golden House Realty & Management, Inc. and Golden House Realty Hawaii, Inc.;
- ✓ On August 13, 2003, Respondent was convicted of driving under the influence ("DUI");
- ✓ On August 29, 2003, judgment against Golden House Realty and Management, Inc. (Civil No. ISC03-1-602); judgment was satisfied on August 21, 2004. This judgment was not reported to the Real Estate Commission;
- ✓ On June 22, 2004, Respondent submitted an application for a mortgage solicitor's license and answered "no" to the questions: "In the past 2 years have you been convicted of a crime in which the conviction has not been annulled or expunged?" and "Have you ever had or are there any pending law suits, judgments, tax liens, or any other liens against you?';
- ✓ On June 22, 2004, Respondent submitted an application for a mortgage broker's license for Golden House Mortgage, Inc. Respondent did not disclose that she held a real estate license. Respondent answered "no" to the questions: "Are there now or have there ever been any law suits, unpaid judgments, outstanding tax liens, or any other type of involuntary liens against any owner, corporation, officer of the corporation, major stockholder, partner, manager, or member of the entity?, and "In the past 20 years, has any owner, corporation, officer of the corporation, major stockholder, partner, manager or member of the entity ever been convicted of a crime in which the conviction has not been annulled or expunged?";
- ✓ On November 4, 2004, Respondent submitted a renewal application for her real estate license and did not disclose her conviction or judgments;
- ✓ On November 17, 2005, judgment against Golden House Realty and Management, Inc. (Civil No. ISC05-1-1310); judgment was satisfied on March 31, 2006 (per Respondent). This judgment was not reported to the Real Estate Commission;
- ✓ On September 12, 2006, Respondent was again convicted of DUI;

- ✓ On March 12, 2007, Respondent submitted an application for a real estate license for Golden House Realty Hawaii, Inc. and answered "no" to the questions: "In the past twenty years, have you been convicted of a crime in which the conviction has not been annulled or expunged?" and "Are there any pending lawsuits, unpaid judgments, outstanding tax obligations, or any other type of involuntary liens against you?";
- ✓ On August 2, 2007, judgment against Golden House Realty and Management, Inc. (Civil No. ISC07-1-1018); judgment was not fully satisfied as of meeting date. This judgment was not reported to the Real Estate Commission;
- ✓ On March 30, 2009, judgment against Golden House Realty and Management, Inc. (Civil No. ISC08-1-2062); a Garnishee Order was placed, and there is no evidence of satisfaction of judgment. This judgment was not reported to the Real Estate Commission;
- ✓ On October 2, 2010, Respondent submitted an application for a beauty operator's license and answered "no" to the question: "In the past twenty years, have you been convicted of a crime in which the conviction has not been annulled or expunged?";
- ✓ On October 11, 2010, judgment against Golden House Management, Inc. (Civil No. ISC10-1-268); judgment was satisfied on May 2012. This judgment was not reported to the Real Estate Commission;
- ✓ On December 30, 2010, judgment against Golden House Management, Inc. (Civil No. ISC10-1-2079); judgment was not paid by Respondents; however, their bank account was garnished. This judgment was not reported to the Real Estate Commission.
- Conclusions of Law:
  - ✓ Petitioner charged Respondent with violating HRS sections 439-19(a)(1), (2), (5), (7), and (9); HRS sections 436B-19(11), (12); HRS section 436B-16; and HAR section 16-78-15;
  - ✓ Petitioner proved by a preponderance of evidence that Respondent violated all provisions charged except HRS section 436B-16 (should be dismissed as the judgments cited were not in Respondent's practice of cosmetology) and HAR section 16-78-15

(should not be a basis for discipline as this section is definitional or instructional in nature).

## o Recommended Order:

- ✓ The Hearings Officer recommends that the Board find and conclude that there are no genuine issues of material fact and that Petitioner is entitled, as a matter of law, to an order concluding that Respondent violated above sections of the HRS, and dismissing the charges that Respondent violated HRS section 436B-16 and HAR section 16-78-15;
- ✓ As such, the Hearings Officer recommends granting Petitioner's Motion;
- ✓ For the violations found, the Hearings Officer adopts Petitioner's recommendation that: (1) Respondent's license be suspended for five (5) days after which Respondent can submit an application for reinstatement which properly discloses the information previously disclosed; (2) Respondent is required to pay a fine in the amount of \$500 within sixty (60) days of the Board's Final Order, and payment of the fine is a condition of licensure.

At 9:10 a.m., Vice-Chairperson Apao arrived to the meeting.

Ms. Lee stated that she did not know that she needed to "continually report" her DUI conviction and that her wrongdoing was that she did not report it within thirty (30) days. She expressed her desire to make "young people happy – taking care of their acne".

Mr. Kelly commented that the penalty by RICO is appropriate based on all the facts. Ms. Lee commented that she does not mind paying the monetary fee but wants a reduction in the term of the suspension and does not want any notation of this case on her licensing record.

DAG Tam commented that the Respondent's criminal conviction, Board's decision in this case, and the proceedings at today's meeting cannot be suppressed and would be included in the Respondent's licensing file and record.

At 9:27 a.m., guests were excused from the meeting.

After discussion, it was moved by Mr. Nelson, seconded by

Mr. Quintana, and unanimously carried to approve the Settlement Agreement Prior to Filing of Petition for Disciplinary Action and adopt the recommended order as the Board's Final Order in this matter.

At 9:34 a.m., the Board came out of adjudicatory matters, and the Respondent was informed of the Board's decision.

The Board immediately recessed the meeting.

## Executive Session:

At 9:36 a.m., it was moved by Vice-Chairperson Apao, seconded by Ms. Howard, and unanimously carried for the Board to enter into Executive Session to consider and evaluate personal information relating to individuals applying for licensure in accordance with HRS section 92-5(a)(1), and to consult with the Board's attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities, and liabilities in accordance with HRS section 92-5(a)(4).

#### **EXECUTIVE SESSION**

At 9:55 a.m., it was moved by Mr. Quintana, seconded by Ms. Howard, and unanimously carried for the Board to move out of Executive Session.

At 9:56 a.m., Mr. Choi arrived to the meeting.

#### **Applications**:

#### A. Ratification of Issued Licenses

It was moved by Vice-Chairperson Apao, seconded by Ms. Howard, and unanimously carried to ratify the list of issued licenses attached (see, attached list).

## B. Apprentice Registration

(1) KIM, Aukai R. (Barber Apprentice)

After discussion, it was moved by Ms. Howard, seconded by Mr. Nelson, and unanimously carried to approve the barber apprentice registration application for Aukai R. Kim.

## (2) PERRY, Denniz (Beauty Apprentice)

After discussion, it was moved by Ms. Howard, seconded by Mr. Nelson, and unanimously carried to approve the beauty apprentice registration application for Denniz Perry.

## C. Restoration of Licenses

(1) GILLESPIE, Philip L. (BEO 3249)

After discussion, it was moved by Vice-Chairperson Apao, seconded by Ms. Howard, and unanimously carried to approve the restoration of the beauty operator's license of Philip L. Gillespie.

(2) MARTIN, Mililani Catherine (BEO 6260)

After discussion, it was moved by Vice-Chairperson Apao, seconded by Ms. Howard, and unanimously carried to approve the restoration of the beauty operator's license Mililani Catherine Martin.

(3) TRUONG, Hoa T. (BEO 11903)

After discussion, it was moved by Vice-Chairperson Apao, seconded by Ms. Howard, and unanimously carried to approve the restoration of the beauty operator's license of Hoa T. Truong.

## D. Reinstatement of Suspended License

(1) LE, Truc Thanh (BEO 13916)

After discussion, it was moved by Ms. Howard, seconded by Mr. Nelson, and unanimously carried to approve the reinstatement of suspended license of the beauty operator's license of Truc Thanh Le.

Request from
Tram's LLC
(BSC 34) for
Board's Approval
of Changes to
Facility:

Ms. Tram Ngo, owner of beauty school, Tram's LLC, was introduced to the Board. Ms. Ngo submitted a request to switch her current beauty school's layout of the students' practical room to the side of the salon and the salon to the practical room, in order to provide more space for the students. It was noted that the Board, previously approved her to use the salon side for

students on certain days. Ms. Ngo provided pictures of her school and salon to Board members.

After discussion, and confirmation by Ms. Ngo that she intends to make this a permanent change in the use of the facility's space, where the beauty school would be located separately from the salon with separate entrances, signage, and reception areas, it was moved by Ms. Howard, seconded by Mr. Choi, and unanimously carried to approve the facility changes to beauty school, Tram's LLC.

Licensure
Requirements for
Beauty Operators
Working in
Licensed Beauty
Shops as
Independent
Contractors or
"Chair Renters":

RICO attorney, John Hassler, was introduced to the Board. Mr. Hassler was in attendance to participate in discussion with the Board concerning the licensure requirements for beauty operators who work in licensed beauty shops as independent contractors or chair/booth renters. Ms. Kai noted that the Board has consistently interpreted the definition of "beauty shop" as any establishment or place of business wherein the practice of cosmetology is engaged or carried on and is the primary purpose of that establishment or business, to mean that independent contractors (or "chair renters" or "booth renters") are individually holding themselves out as entities or businesses engaged in the practice of cosmetology. Therefore, they are required to hold both an individual license and a shop license.

Ms. Kai stated that the Board's position is being questioned by salon owner Sue Bierman, of Studio B Salon Incorporated, who has stylists who work as independent contractors in her salon, and whose salon was visited by a RICO investigator regarding licensure of the salon and the stylists. A copy of Ms. Bierman's letter of concern was made available to the Board. Ms. Bierman is appealing to the Board to rescind its determination requiring an independent contractor beauty operator to simultaneously hold both an individual and beauty shop license. She believes that this requirement is superfluous because there are already sufficient rules in place regulating beauty operators and beauty salons. She also contends that the requirement is unknown by members of the industry and that compliance is largely unenforceable.

Board members discussed the Board's existing interpretation of the laws and rules, which is to require both licenses to be held by an independent contractor who rents a booth or chair from a salon owner. The Board reiterated its position that the independent contractor does not fit within the commonly-held definition of an "employee", which may be the definition held by the Department of Labor or other regulatory agency. The Board believes that, although sharing the same general overall physical space, each independent contractor typically decides his/her own working schedule, charges for services, and as well as determining his/her own clientele. Also, each independent contractor is typically responsible for compliance with general excise tax requirements and insurance liability requirements.

Mr. Hassler commented that the statute may not be "entirely clear" on the issue of independent contractors; noting that the interpretation would be clearer if the term "employee" was defined in the statute, and RICO may be better able to enforce the Board's laws and rules. Based on the tax forms utilized by beauty operators who are chair/booth renters, a clearer determination could be made on which beauty operators would be required to meet the license requirement.

DAG Tam commented that this situation is no different from that of the massage establishments and massage therapists that are regulated by the Board of Massage Therapy, where both licenses are required in this type of working situation. Ms. Howard commented that she would like to see the statute written in layman's language, thereby eliminating confusion and misinterpretation. Discussion ensued on how the Board's administrative rules would need to be amended to accomplish this, and the Investigative Committee on HAR chapter 16-78 that is working on amendments to the chapter should address this in its review of proposed amendments.

#### Examinations:

# A. Results of Cosmetology Examinations Administered in October 2012

Executive Officer Kai provided the following results of the cosmetology examinations administered October 2012:

	EXAMS ADM	PASSED	FAILED	% PASS	% FAIL
COSMETOLOGY	97	42	55	43%	57%
HAIRDRESSER	33	17	16	51%	49%
NAIL TECHNICIAN	78	26	52	33%	67%
ESTHETICIAN	79	39	40	49%	51%

INSTRUCTOR	2	1	1	50%	50%
TOTALS	289	125	164	43%	57%

## B. <u>Updates to Licensing Examinations by Prometric</u>

Executive Officer Kai reported that the Board's testing administrator, Prometric, will be updating all of the licensing exams to be comprised of examination items (questions) with references to the 2012 editions of the required textbooks, to begin with the May 2013 examination.

## <u>Legislation</u> and Rules:

## A. <u>Hawaii Administrative Rules ("HAR")</u>

- Proposed Amendments to HAR Chapter 16-73 (Barbering)
   No report.
- (2) Proposed Amendments to HAR Chapter 16-78 (Cosmetology)
  No report.

Discussion continued on beauty operators who are independent contractors or chair/booth renters. The consensus of the Board was that basically "holding yourself out as an independent business" would mean that a beauty shop license is needed.

Ms. Flores commented that the "industry is in the dark" about beauty shop licenses for independent contractors or chair/booth renters. Further discussion ensued on what could be done to inform the licensees that operate in these types of working situations. It was noted that New Jersey does not allow chair renters.

#### Open Forum:

Vice-Chairperson Apao reminded members that at the Board's October 10, 2012 meeting, she had volunteered along with Mr. Choi, to conduct further research on the beautification and cosmetic treatments involving myopulse and acuscope machines. Ms. Apao reported that most states allow their licensed beauty professionals to use myopulse machines, as they are calibrated to be used on facial muscles, as well as muscles in the neck and upper body. She stated that she believes that operators who provide these services in other states must be certified, but was unsure if the certification was issued by the board of cosmetology

or the equipment manufacturer. She further reported that acuscope machines are primarily used in the medical field as they deal with nerve endings and underlying brain cells, which may alleviate a patient's pain for greater relaxation.

Board members agreed that this issue deserves further research and discussion, and requested that it be placed on the agenda for consideration at the Board's next meeting.

Next Board

Wednesday, February 13, 2013

Meeting:

9:00 a.m.

Queen Liliuokalani Conference Room

King Kalakaua Building

335 Merchant Street, 1st Floor

Honolulu, Hawaii 96813

<u>Announcements</u>: None.

Adjournment: There being no further business to discuss at this time, the

meeting was adjourned at 11:00 a.m.

Taken and recorded by:

/s/ Lori Nishimura

Lori Nishimura, Secretary

Reviewed and approved by:

/s/ Laureen M. Kai

Laureen M. Kai, Executive Officer

LMK: In 01/10/13

[X] Minutes approved as is.

Minutes approved with changes. See Minutes of \_\_\_\_\_\_

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BAS	1527	LOVELY HAIR COMPANY INC								
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BAS	1529	DJ'S BARBER & HAIR STYLING LLC								
BAS	1530	BIG ISLAND BARBERSHOP INC								

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