

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-

JIM JACKSON,

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on April 25, 2000 at the New York State Office Building located at 65 Court Street, Buffalo, New York.

The respondent was not present, but was represented by Jack Martin, manager of the respondent's barber shop.

The complainant was represented by Assistant Litigation Counsel Scott NeJame, Esq.

COMPLAINT

The complaint alleges that the respondent allowed an unlicensed person to act as a barber in his shop and failed to maintain that shop in a clean and sanitary manner.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail delivered at his last known business address on March 9, 2000 (State's Ex. 1).

2) At all times hereinafter mentioned the respondent was duly licensed to operate a Barber Shop d/b/a Jim Jackson's Barber Shop located at 319 Glenwood Avenue, Buffalo, New York 14208 (State's Ex. 2). That license expired on January 31, 2000 and, I take official notice, has not been renewed.

3) On October 7, 1999 Senior License Investigator Ronald Schwartz conducted an inspection of the respondent's shop and

observed Thomas J. Dobbins, Jr. cutting the hair of a customer for compensation (State's Ex. 4). Mr. Dobbins was unlicensed at the time, but subsequently obtained a registration as a Barber Apprentice pursuant to an application submitted on the day of, but subsequent to, the inspection (State's Ex. 3). Mr. Martin asserts that prior applications had been made, but that they were denied because they contained an improper name for the respondent's shop.

4) During his inspection Mr. Schwartz also observed two counters which had hair on them, three uncovered trash containers, dirty disinfectant in a wet sterilizer, and two dirty implement drawers (State's Ex. 4).

5) Upon completing his inspection Mr. Schwartz served Mr. Martin with a properly dated notice of violation (State's Ex. 4).

OPINION AND CONCLUSIONS OF LAW

I- Inasmuch as the events charged in the complaint occurred prior to the expiration of the respondent's license, that expiration does not divest this tribunal of jurisdiction to hear and determine the matter. *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).

II- So long as the issue has been fully litigated by the parties, and is closely enough related to the stated charges that there is no surprise or prejudice to the respondent, the pleadings may be amended to conform to the proof and encompass a charge which was not stated in the complaint. This may be done even without a formal motion being made by the complainant. *Helman v Dixon*, 71 Misc.2d 1057, 338 NYS2d 139 (Civil Ct. NY County, 1972). In ruling on the motion, the tribunal must determine that had the charge in question been stated in the complaint no additional evidence would have been forthcoming. *Tollin v Elleby*, 77 Misc.2d 708, 354 NYS2d 856 (Civil Ct. NY County, 1974). What is essential is that the "matters were raised in the proof, were actually litigated by the parties and were within the broad framework of the original pleadings." *Cooper v Morin*, 91 Misc.2d 302, 398 NYS2d 36, 46 (Supreme Ct. Monroe County, 1977), mod. on other grnds. 64 AD2d 130, 409 NYS2d 30 (1978), aff'd. 49 NY2d 69, 424 NYS2d 168 (1979).

The complaint alleged that the inspection of the respondent's shop had been conducted on October 17, 1999. In fact, however, the inspection was conducted on October 7, 1999. Inasmuch as the correct date appeared on the notice of violation which was served on Mr. Martin at the time of the inspection and he was, therefore, obviously aware of the correct date and did not object to the complainant's motion to conform the pleadings to the proof, that motion is granted.

III- Pursuant to General Business Law (GBL) §444, it is unlawful for the operator of a barber shop to permit an unlicensed or unregistered person to engage in the practice of barbering in that shop. The cutting of hair falls within the definition of "practice of barbering." GBL §431[4][a]. Accordingly, by allowing Thomas J. Dobbins, Jr. to cut hair in his shop prior to his registration as a Barber Apprentice the respondent violated GBL §444. The seriousness of the violation is in no way mitigated by the fact Mr. Dobbins may have unsuccessfully applied for registration as a barber apprentice prior to the inspection since no such registration had been issued and the respondent had no reasonable grounds to believe that the making of the application was of itself sufficient to allow Mr. Dobbins to cut hair.

IV- Pursuant to GBL §436 Barber Shops must be operated in compliance with the State Sanitary Code. §10.20 of that code provides that the licensed owner of a barber shop shall keep that shop in a clean and sanitary condition at all times. By allowing the existence of dirty counters, uncovered trash containers, dirty disinfectant in a wet sterilizer, and two dirty implement drawers in the shop the respondent violated the State Sanitary Code.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Jim Jackson has violated General Business Law §444 and State Sanitary Code §10.20, and accordingly, pursuant to General Business Law §441, he shall pay a fine of \$350.00 to the Department of State, and no license to operate a Barber Shop shall be issued to him until such fine is paid. Should such a license have been issued, it shall be suspended effective June 1, 2000 until such time as the fine has been paid. The respondent is directed to send the fine in the form of a bank check or money order payable to "Secretary of State" to Usha Barat, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier
Administrative Law Judge

Dated: May 3, 2000