

STATE OF NEW YORK  
DEPARTMENT OF STATE

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In the Matter of the Complaint of

**DEPARTMENT OF STATE  
DIVISION OF LICENSING SERVICES,**

Complainant,

**DECISION**

-against-

**MARGARET GOLDSMITH BERRIE,**

Respondent.

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Pursuant to the designation duly made by the Hon. Gail S. Shaffer, Secretary of State, the above noted matter came on for hearing before the undersigned, Roger Schneier, on November 9, 1994 at the office of the Department of State located at 162 Washington Avenue, Albany, New York.

The respondent, of Marge's Crafty Haircutters, 17 Columbia Street, Mohawk, New York 13407, having been advised of her right to be represented by an attorney, appeared pro se.

The complainant was represented by Compliance Officer William Schmitz.

**COMPLAINT**

The complaint alleges that the respondent operated a beauty parlor without a shop license and with no photograph on her shop license, and engaged in the practice of cosmetology without a license and with no photograph on her license.

**FINDINGS OF FACT**

1) Notice of hearing together with a copy of the complaint, consisting of a copy of a notice of violation previously served on the respondent, was served on the respondent by certified mail on September 16, 1994 (Comp. Ex. 1).

2) The respondent is duly licensed to engage in the practice of cosmetology and to operate an appearance enhancement business d/b/a Marge's Crafty Haircutters at 17 Columbia Street, Mohawk, New York

13407 pursuant to licenses issued on March 14, 1994.<sup>1</sup> Her prior license as a hairdresser/cosmetologist expired on December 31, 1990, and her prior shop license expired on March 18, 1993 (Comp. Ex. 2).

3) On March 9, 1994 License Investigator Donna Clark conducted an inspection of the respondent's beauty parlor. At the time the respondent was rolling the hair of a one customer, and another customer was sitting under a hairdryer. Ms. Clark observed that the respondent's expired licenses was posted, and that there were no photographs on those licenses.

#### **OPINION AND CONCLUSIONS OF LAW**

I- 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).

In this case the complaint as written appears contradictory and confusing, inasmuch as it alleges both non-licensure and no pictures on licenses. Logically, it would seem that if there is no license there is no place to affix a photograph. The matter was, however, clarified through the testimony, which made it apparent that the charges were that the respondent operated with expired licenses on which there were no photographs affixed. The respondent raised no objection, was clearly not surprised or confused by the charges, and the issues were fully litigated. Accordingly, the complaint is amended to conform to the proof.

II- Pursuant to General Business Law (GBL) §403, as in effect at the time of the inspection, it was unlawful to engage in the practice of hairdressing and cosmetology and/or to conduct a beauty parlor without being licensed to do so. The "practice of hairdressing and cosmetology" was defined in GBL §401[5] as including, among other

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<sup>1</sup> The licenses issued to the respondent on that date were to engage in the practice of hairdressing and cosmetology and to operate a beauty parlor. Pursuant to a major revision of General Business Law Article 27 effective on July 5, 1995 the titles of those licenses have been changed to those indicated.

things, the waving, arranging and curling of hair, acts in which the respondent was involved. A "beauty parlor" was defined in GBL §401[4] as a place in which hairdressing and cosmetology were practiced. Therefore, the respondent violated GBL §403.

Pursuant 19 NYCRR 161.2, as in effect at the time, every licensee had to affix his or her photograph to the license "in the appropriate space indicated thereon." By failing to attach her photograph to her license as a hairdresser/cosmetologist, the respondent violated that regulation. The fact that the license was expired indicates that the violation was long standing in nature. With regards to the shop license, however, I take official notice that the shop license certificates as generated by the complainant's computer system do not indicate a space at which a photograph is to be affixed. Without such an indication, the respondent's failure to affix her photograph to the shop license was not a violation of the regulation.

The respondent claims that the violations were inadvertent. She testified that in 1992 she wrote to the complainant to renew the licenses, and that the check for the shop license was cashed. She says that she heard nothing further, didn't check to see if the licenses had been renewed, and in the press of holding down two jobs didn't realize that they hadn't been. While that may explain what happened with the shop license, which expired on March 18, 1993 and for which a renewal application could conceivably have been submitted in late 1992, it can in no way excuse the violation involving the hairdresser/cosmetologist license, which had expired on December 31, 1990. It may be that she sent in a check to renew that license, but it was already extremely overdue. Further, it in no way explains the lack of a photograph on that expired license. In any case, a processing error by the complainant is only a mitigating factor, as it is the respondent's obligation to be certain that her licenses are current, and that the current licenses are posted.

In setting the penalty to be imposed I have considered the respondent's testimony that she operates a small business and that this is the first time in twenty years that she has been charged with a violation.

#### **DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Margaret Goldsmith Berrie has violated General Business Law §403 and 19 NYCRR 161.2, and accordingly, pursuant to General Business Law §410, she shall pay a fine of \$200.00 to the Department of State on or before January 31, 1995. Should fail to pay the fine her licenses as a cosmetologist and to operate an appearance enhancement business shall both be suspended for a period on one month, commencing on February 1, 1995 and terminating on February 28, 1995, both dates inclusive.

These are my findings of fact together with my opinion and conclusions of law. I recommend the approval of this determination.

Roger Schneier  
Administrative Law Judge

Concur and So Ordered on:

GAIL S. SHAFFER  
Secretary of State  
By:

Phillip M. Sparkes  
Special Deputy Secretary of State