

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-

TRUDY T. FRENCH d/b/a THE HAIR AFFAIR,

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 May 3, 1994 at the New York State Office Building located at 333 East Washington Street, Syracuse, New York.

The respondent, of 406 Genesee Street, Chittenango, New York 13037, 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:permitted a person to engage in the practice of hairdressing in the respondent's shop with an expired license; did not have a current hairdresser's license for herself posted in her shop; had uncovered waste containers in her shop; failed to conspicuously post rules and regulations in her shop; and stored rods and rollers uncovered and without fumigant.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail on January 9, 1994 (Comp. Ex. 1).

2) The respondent is, and at all times hereinafter mentioned was, duly licensed to operate a beauty parlor d/b/a The Hair Affair located at 406 Genesee Street, Chittenango, New York (Comp. Ex. 2). She is

currently also licensed to engage in the practice of hairdressing and cosmetology, pursuant to an application received by the complainant on August 3, 1993 (Comp. Ex. 3).

3) On May 27, 1993 License Investigator Donna Clark conducted an inspection of the respondent's beauty parlor and observed:

a) Virginia Nykaza, whose license to engage in the practice of hairdressing and cosmetology had expired but was posted in the shop, cutting and administering a permanent wave to the hair of two customers;

b) Although the appointment book showed that the respondent had appointments to perform hairdressing services for customers on that day, she had no license to engage in the practice of hairdressing posted in the shop. (In her testimony the respondent admitted to having engaged in the practice of hairdressing and cosmetology in her shop on the day of the inspection although she was not then licensed to do so, her license having expired and not been renewed);

c) Uncovered waste containers;

d) No posted copy of the sections of the State Sanitary Code applicable to beauty parlors; and

e) Rods and rollers stored uncovered and without fumigant.

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, while the complaint alleges that the respondent permitted Virginia Nykaza to work with an expired license posted, and failed to have her own operator's license posted in the shop, the issues of Nykaza's and the respondent's unlicensed status, which are closely related to the charges of posting an expired license and not

having any license posted, were fully litigated without objection. Accordingly, the complaint is amended to conform to the proof presented on those issues.

II- General Business Law (GBL) §412 provides that it is a misdemeanor for any person to directly or indirectly employ, permit or authorize any unlicensed person to engage in the practice of hairdressing or cosmetology. The "practice of hairdressing" includes, among other things, the cutting and curling of hair. GBL §401[5]. Therefore, by permitting Nykaza to cut and administer permanent waves to the hair of customers in her beauty parlor the respondent violated that statute. Division of Licensing Services v Ndiaye, 154 DOS 93.

III- GBL §402[1] provides that no person may engage in the practice of hairdressing and cosmetology without being licensed to do so. By continuing to practice hairdressing and cosmetology after the expiration of her license the respondent violated that statute. Division of Licensing Services v Saunders, 134 DOS 92.

IV- §10.17 of the State Sanitary Code provides that the waste containers in beauty parlors must be covered. By having uncovered waste containers in her shop the respondent violated that regulation.

V- §10.2 of the State Sanitary Code provides that the licensed owner of a beauty parlor must conspicuously post that code in his or her beauty parlor. By failing to do so the respondent violated that regulation.

VI- §10.24 of the State Sanitary Code provides that all implements used on customers in beauty parlors shall undergo thorough cleansing after serving each customer, and 19 NYCRR 160.16 provides that all instruments must be thoroughly disinfected after serving each customer. By storing rods and rollers without fumigant the respondent violated those regulations.

VII- In setting the penalty to be imposed on the respondent, I have considered her testimony that while she always renewed her shop license she failed to renew her hairdresser's license because she forgot to do so when she did not receive a renewal application. I have also considered, however, the her failure to receive that application occurred after she had moved and not notified the complainant of her new home address.¹ Also of relevance is the respondent's past record of sanitary and licensing violations on two prior occasions.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Trudy T. French has violated General Business Law §§402[1] and 412, §§10.2 and 10.17 of the

¹ Operator's licenses bear the home addresses of the licensees, unlike shop licenses, which the business address.

State Sanitary Code, and 19 NYCRR 160.16, and accordingly, pursuant to General Business Law §409[8], she shall pay a fine of \$1000.00 to the Department of State on or before June 30, 1994, and should she fail to pay the fine then her licenses to operate a beauty parlor and to engage in the practice of hairdressing and cosmetology shall be suspended for a period of two months, commencing on July 1, 1994 and terminating on August 31, 1994, 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:

James N. Baldwin
Executive Deputy Secretary of State