

STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Complaints of

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

Complainant,

DECISION

-against-

**LEE ANN KENNY d/b/a TECHNI-CUTS,
ROBIN CONINE, and TAMMY POIRIER,**

Respondents.

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Pursuant to the designation duly made by the Hon. Gail S. Shaffer, Secretary of State, the above noted matters came on for hearing before the undersigned, Roger Schneier, on April 28, 1993 at the New York State Office Building, 333 E. Washington Street, Syracuse, New York. Because the matters were directly related to each other they were dealt with in a consolidated hearing.

Lee Ann Kenny, of 2715 James Street, Syracuse, New York 13206 was represented by Thomas E. O'Bryan, Esq., 360 S. Warren Street, 5th Floor, Syracuse, New York 13202.

Robin Conine, of 140 Ross Park, Syracuse, New York 13208, and Tammy Poirier, of 117 Heins Avenue, North Syracuse, New York 13212, having been advised of their right to be represented by attorneys, appeared pro se.

COMPLAINTS

The complaints in the consolidated matters allege that Conine and Poirier operated as renters in Kenny's beauty parlor without renter's licenses, that Kenny permitted them to do so, and that Kenny permitted Kimberly Hallock to wash the hair of a patron after Hallock's license had expired.

FINDINGS OF FACT

1) Notices of hearing together with copies of the complaint were served on the respondents by certified mail (Comp. Ex. 1).

2) All of the respondents are duly licensed to engage in the practice of hairdressing and cosmetology. In addition, Kenny is

licensed to operate a beauty parlor d/b/a Techni-Cuts at 2715 James Street, Syracuse, New York, Conine and Poirier are, pursuant to licenses issued after the time in issue in the complaints, licensed to operate rental spaces in Kenny's beauty parlor, and Conine is licensed to operate a rental area at Marie's Hair Fashions, 2535 James Street, Syracuse, New York.

3) On May 5, 1992 License Investigator Dale R. Bolton conducted an inspection of Techni-Cuts. He observed Kimberly Hallock, a partner in the ownership of the shop whose license as a hairdresser and cosmetologist had expired on July 31, 1990, shampooing the hair of a patron. Also, based on information which he gathered during the inspection, Bolton came to the conclusion that Conine and Poirier were operating as independent contractor space renters in the shop without being licensed to do so.

4) Both Conine and Poirier worked, with some variation, regular hours which were set by Kenny. They charged their customers standard rates as established by Kenny, and all payments by customers were made to the shop. All necessary expendable supplies were provided by the shop.

Conine received payment from Kenny of 50 per cent of the money received from her customers, with a weekly minimum payment of \$200.00. Poirier was paid an hourly wage.

OPINION AND CONCLUSIONS OF LAW

I- General Business Law (GBL) §412 provides that any person who employs, permits or authorizes any unlicensed person to engage in the practice of hairdressing and cosmetology shall be guilty of a misdemeanor. GBL §401(5) defines "practice of hairdressing and cosmetology" as including, among other things, the cleansing of the hair of any person. Therefore, by permitting Hallock to shampoo the hair of a customer of Techni-Cuts after Hallock's license as a hairdresser and cosmetologist had expired, Kenny violated GBL §412.

Hallock asserts that her failure to renew her license should be excused because it resulted from the failure of the complainant to send her the required renewal forms after assuring her that because "they were short-handed and backed up with licenses" she shouldn't worry, and that she would be contacted. She goes on to claim that although she gave the complainant her new address, the renewal forms were sent to her old address and not received by her (Comp. Ex. 1). That defense might have served to mitigate the seriousness of the violation had the expiration of the license been relatively recent in relation to the inspection, but the expiration was nearly two years before the inspection. Both Hallock and Kenny should have taken additional steps to assure renewal of the license, and they should not have simply sat back and ignored the situation.

II- 19 NYCRR 160.25(b) states:

"A shop owner's license shall be required by any licensed barber or cosmetologist operating as an independent contractor in a designated area within any licensed beauty shop, which shall be referred to as a renter's license."

The issue here is whether Conine and Poirier were independent contractors.

There is no absolute rule for determining whether a person is an independent contractor or an employee, but there are certain indicia of the status of employee which are present in this case. 3 NYJur2d Agency, §324. The most important of these is the right of Kenny to control the manner in which Conine and Poirier did their work, 3 NY Jur2d Agency, §325, in that they were required to work regular hours and to charge standard fees. Another indicia present is Kenny's obligation to provide supplies and materials. 3 NY Jur2d Agency, §329. When taken with those elements, the facts that Poirier was paid on an hourly basis and that Conine received a guaranteed minimum salary lead to the conclusion that Conine and Poirier were Kenny's employees, and not independent contractors, 3 NY Jur2d Agency, §330, and that the charges regarding the lack of renter's licenses should, therefore, be dismissed. I have reached this conclusion in spite of Kenny's position that Conine and Poirier were independent contractors whom she assumed had gotten the proper licenses in response to her directions to do so. Even assuming that Kenny thought that Conine and Poirier were independent contractors, her belief does not comport with the law.¹

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Lee Ann Kenny has violated General Business Law §412, and accordingly, pursuant to General Business Law §409(8), she shall pay a fine \$250.00 to the Department of State on or before June 30, 1993, and should she fail to pay the fine then her licenses to engage in the practice of hairdressing and cosmetology and to operate a beauty parlor shall be suspended for a period of one month, commencing on July 1, 1993 and terminating on July 31, 1993, and

IT IS FURTHER DETERMINED THAT all other charges herein against Lee Ann Kenny, and the charges herein against Robin Conine and Tammy Poirier are dismissed.

¹ It appears that Kenny has taken this position as part of her defense in an investigation being undertaken with regards to possible tax violations.

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