

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-

MARTIN USCAMAYTA,

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on June 18, 1997 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent, of Barber Shop, 89-14 Roosevelt Avenue, Jackson Heights, New York 11370, did not appear.

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

COMPLAINT

The complaint in the matter alleges that the respondent provided appearance enhancement services in a barber shop, allowed two unlicensed persons to perform appearance enhancement services in his shop, and failed to have evidence of a surety bond or liability insurance on the premises of his shop in violation of 19 NYCRR 160.9.

FINDINGS OF FACT

1) Notice of hearing calendared for April 16, 1997 together with a copy of the complaint was sent to the respondent at his licensed business address by certified mail March 8, 1997, and was returned marked "UNCLAIMED" by the Postal Service. A second set of pleadings was then sent to the respondent by regular first class mail addressed to him at the same address. When, on April 16, 1997, the tribunal was notified that a message had been received indicating that the respondent was in Puerto Rico, thereby establishing that the respondent had received the notice of hearing, the matter was adjourned, and a notice of adjournment to June 18, 1997 was sent to the respondent at the same address also by regular first class mail (State's Ex. 1).

2) Since June 28, 1996 the respondent has been licensed to operate a barber shop under the business name of Barber Shop at 89-14 Roosevelt Avenue, Jackson Heights, New York 11370 (State's Ex. 3). Since at least January 1, 1996 he has not been licensed to operate an appearance enhancement business (State's Ex. 5).

3) On September 11, 1996 Senior License Investigator Richard McArthur conducted an inspection of the respondent's barber shop. In that shop he obtained an advertising flyer which listed prices for the following services: Hair cuts for men and women, dyeing, and permanents (State's Ex. 4). He observed Monica Caberra and Mary Cueva, neither of whom was licensed to do so, cutting the hair of men. He also determined that there was no evidence of a surety bond or liability insurance on the premises.

OPINION AND CONCLUSIONS OF LAW

I- Pursuant to GBL §401[2], no person may own, control or operate an appearance enhancement business without being licensed to do so. An "appearance enhancement business" is a place in which any or all of the services licensed pursuant to GBL Article 27 are provided. GBL §400[8]. Included in those services is the dyeing and curling of hair. GBL §400[7]. Inasmuch as the respondent was not so licensed, by operating a shop in which the advertised services offered for payment of a fee included dyeing and permanent he violated GBL §401[2].¹

II- Investigator McArthur observed two unlicensed persons cutting the hair of men in the respondent's shop. Based on that observation the respondent has been charged with allowing a violation of GBL §401[1], pursuant to which a license is required to engage in any of the practices of appearance enhancement. The cutting of hair is such a practice (GBL §400[5]), and, therefore, there being evidence that the service was being provided for a fee, the respondent is guilty of the alleged violation.²

III- 19 NYCRR 160.9, enacted pursuant to General Business Law §404, provides that the owner of an appearance enhancement business must maintain either a surety bond, or accidental and professional liability insurance, or general liability insurance in prescribed amounts, and that evidence of such bond or insurance must be maintained on the premises. The respondent violated that regulation.

IV- Were the respondent been licensed pursuant to GBL Article 27 his license could be revoked or suspended, or a fine could be imposed, because of the foregoing violations. However, the respondent is licensed pursuant to GBL Article 28.

GBL Article 28, §441 lists nine grounds for the imposition of disciplinary sanctions against the holder of a license to conduct a barber shop. None of those grounds include violation of any of the provisions of GBL Article 27. *Division of Licensing Services v Pomarico*, 90 DOS 97.

However, GBL §410[2][a] provides that this tribunal, acting on behalf of the Secretary of State, may issue an order directing any person to cease from operating an unlicensed appearance enhancement business and from employing unlicensed persons to provide services for which a license is required. Should the respondent not comply with such an order, the Secretary of State may request that the Attorney General seek court enforcement of the order, along with the imposition of a monetary penalty, pursuant to GBL §§410[2][b] and 412.³

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT, pursuant to General Business Law §410[2][a], Martin Uscamayta is ordered to cease and desist from the operation of an appearance enhancement business without a license to operate such business, and from the employment of unlicensed persons to provide services for which a license issued pursuant to General Business Law Article 27 is required.

Roger Schneier
Administrative Law Judge

Dated: July 10, 1997

1. The respondent is licensed to operate a barber shop. However, pursuant to GBL §431[4][c], while the dyeing and curling of hair may be performed in a barber shop such services may only be provided to males. The respondent advertised the availability of such services to men and women.

2. For reasons to which the tribunal is not privy, the respondent was not charged with allowing unlicensed persons to engage in the practice of barbering, a charge which would appear to have been more appropriate, inasmuch as the respondent is licensed to operate a barber shop. In view of the respondent's non-appearance and, therefore, of the issue not having been fully litigated, the tribunal may not amend the complaint to conform to the proof and encompass such a charge.

3. The mailing of the notice of hearing to the respondent by certified mail addressed to him at his last known business address provided him with the notice mandated by GBL §411[2] and justified the holding of an *ex parte* hearing resulting in the issuance of an order to cease and desist.