

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-

EUGENE CARDAMONE,

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on September 8, 1999 at the New York State Office Building located at 65 Court Street, Buffalo, New York.

The respondent did not appear.

The complainant was represented by License Investigator III Marcia Reinagel.

COMPLAINT

The complaint alleges that the respondent did not clean, disinfect, or sterilize implements used in the practice of Appearance Enhancement in his Appearance Enhancement shop, allowed the use of a common neck duster in his Appearance Enhancement shop, and allowed two Appearance Enhancement practitioners to work in his shop with having their photographs affixed to their licenses.

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 July 28, 1999 (State's Ex. 1).

2) The respondent is, and at all times hereinafter mentioned was, duly licensed to operate an Appearance Enhancement business d/b/a Shear Ego International at 2590 Ridge Road West, Rochester, New York 14626 (State's Ex. 2).

3) On March 23, 1999 Senior License Investigator Ron Schwartz conducted an inspection of the respondent's Appearance Enhancement business. He observed, among other things, that tools in the wet

sterilizer were not fully immersed, that there was a neck duster on the premises, and that the Appearance Enhancement licenses of Marcia Merkel and Alisha M. Pampalone did not have photographs affixed to them (State's Ex. 8). The evidence does not establish, however, whether the neck duster was disposable or if it could be immersed in approved disinfectant.

4) By letter dated April 4, 1999 the respondent was given the opportunity to either settle the matter by paying a fine of \$200.00 or to discuss the matter in a pre-hearing conference on May 5, 1999 (State's Ex. 4). The respondent responded with a letter dated April 28, 1999 in which he contested the sterilization and neck duster charges and stated that all licenses now have pictures affixed to them. He did not, however, agree to pay the fine, and did not attend the pre-hearing conference (State's Ex. 5 and 7).

OPINION AND CONCLUSIONS OF LAW

I- The holding of an ex parte quasi-judicial administrative hearing was permissible, inasmuch as there is evidence that notice of the place, time and purpose of the hearing was properly served. General Business Law §441[2]; *Patterson v Department of State*, 36 AD2d 616, 312 NYS2d 300 (1970); *Matter of the Application of Rose Ann Weis*, 118 DOS 93.

II- Pursuant to 19 NYCRR 160.17 tools used in an appearance enhancement business must be sterilized. Where liquid disinfectants are used the tools must be immersed for no less than ten hours. As established by the investigator's observation that tools in the respondent's shop were not fully immersed, the respondent violated that regulation.

III- Pursuant to 19 NYCRR 160.18 the use of non-disposable neck dusters which cannot be immersed in an approved disinfectant in an Appearance Enhancement shop is prohibited, and the presence of such an implement in the work place creates a presumption of its use. The evidence establishes that there was a neck duster in the respondent's shop, but not whether it was a non-disposable item which could not be immersed in disinfectant. Accordingly, the charge that the respondent violated the regulation should be, and is, dismissed.

IV- Pursuant to 19 NYCRR 160.28[a] Appearance Enhancement operators are required to affix their photographs to their licenses. As evidenced by the lack of photographs on two such licenses in the respondent's shop that regulation was violated.

V- Pursuant to 19 NYCRR 160.11 the respondent is liable for all violations of the applicable regulations occurring in his shop.

VI- In setting the penalty to be imposed for the respondent's violations, I have considered the fact that prior to the hearing he was offered the opportunity to resolve the matter through the payment of a

fine of \$200.00. Where such an offer of settlement has been refused or not acted upon and the respondent has subsequently been found guilty, it is proper to impose a fine higher than that which was asked for in the settlement offer. *Vito v Jorling*, 197 AD2d 822, 603 NYS2d 64 (1993) (finding that it was proper to impose a fine of \$22,825.00 after an offer to settle for a \$500.00 penalty was rejected). Where, as herein, one of multiple charges has been dismissed, any increase in the fine should be limited.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Eugene Cardamone has violated 19 NYCRR 160.17 and 160.28[a], and accordingly, pursuant to General Business Law §410, he shall pay a fine of \$300.00 to the Department of State on or before October 29, 1999. Should he fail to pay the fine his license to operate an appearance enhancement business shall be suspended for a period commencing on November 1, 1999 and terminating two months after the receipt by the Department of State of his license certificate. The respondent is directed to send a certified check or money order for the fine, payable to "NYS Department of State," or his license certificate, 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: September 21, 1999