

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-

BUDDIE L. DE RUCHER,

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 141 Whitesboro Street, Yorkville, New York 13495, did not appear.

The complainant was represented by Compliance Officer William Schmitz.

COMPLAINT

The complaint alleges that the respondent operated as a space renter in a beauty parlor without being so licensed.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail on January 5, 1994. A subsequent notice of adjournment was served on him by regular first-class mail (Comp. Ex. 1).

2) At all times hereinafter mentioned the respondent was licensed to engage in the practice of hairdressing and cosmetology pursuant to a license which expired on March 31, 1993 (Comp. Ex. 2), but was not licensed as a beauty parlor space renter (Comp. Ex. 3).

3) On February 11, 1993 License Investigator Donna Clark conducted an inspection of a beauty parlor known as Gregory and Company located at Center Court, New Hartford, New York. She observed the respondent

cutting and styling the hair of a customer. The respondent, who had his own separate area in which he worked, was paid on commission, and was not a salaried employee of the shop.

OPINION AND CONCLUSIONS OF LAW

I- As of the date of the hearing the respondent's license to engage in the practice of hairdressing and cosmetology had expired. However, the jurisdiction of the Department of State to conduct a disciplinary hearing continued even after that expiration, inasmuch as pursuant to General Business Law (GBL) §§407[4] and [5] he remains eligible to automatically renew that license until March 31, 1998. Brooklyn Audit Co., Inc v Department of Taxation and Finance, 275 NY 285 (1937); Maine Sugar of Montezuma, Inc. v Wickham, 37 AD2d 381, 325 NYS2d 858 (1971); Division of Licensing Services v Carroll, 47 DOS 94.

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 the respondent was an independent contractor.

There is no absolute rule for determining whether a person is an independent contractor or an employee. 3 NYJur2d Agency, §324. The only evidence presented in this case on the issue is the fact that the respondent was paid on a commission basis, which tends to indicate that the respondent was an independent contractor. In the absence of any evidence that would indicate that in spite of his payment by commission the respondent was an employee of the shop, it is proper to conclude that he was, in fact, an independent contractor. 3 NYJur2d Agency, §330.

By cutting and styling the hair of a customer, the respondent was operating as a hairdresser and cosmetologist. GBL §401[5]. Therefore, inasmuch as he was operating as an independent contractor in a designated area he was in violation of 19 NYCRR 160.25[b].

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Buddie L. DeRucher violated 19 NYCRR 160.25[b], and accordingly, pursuant to General Business Law §409[8], he shall pay a fine of \$250 to the Department of State on or before June 30, 1994. Should he fail to pay the fine, if he is currently licensed as a hairdresser and cosmetologist that license shall be suspended for a period of one month, commencing on July 1, 1994 and terminating on July 31, 1994, both dates inclusive.

If he is not currently licensed as a hairdresser and cosmetologist, then no such license, and no such license shall be issued to him unless and until he has paid the fine.

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