

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-

MARIANNE FIORILLO,

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on November 26, 1997 at the office of the Department of State located at 41 State Street, Albany, New York.

The respondent, of Country Charm, 102 5th Street, Scotia, New York 12302, did not appear.

The complainant was represented by District Manager Michael Coyne.

COMPLAINT

The complaint alleges that the respondent provided appearance enhancement services without the required Appearance Enhancement Renter's License, in violation of General Business Law (GBL) Article 27, §401.

FINDINGS OF FACT

1) On October 8, 1997 the complainant sent the following items to the respondent's business address by certified mail (which was delivered on October 17, 1997): Notice of hearing; notice of appearance form; letter referring to an attached notice of violation and offering the respondent the opportunity to resolve the matter through the payment of a fine of \$250 or to appear at a conference to discuss the matter; notice of violation referring to "the annexed notice, the complaint in these proceedings." There was, however, no complaint annexed to the notice of violation, and there was nothing in the mailing to advise the respondent of the nature of the charges (State's Ex. 1).

2) On October 27, 1997 the complainant sent by certified mail addressed to the respondent at the same address a copy of the

complaint, which was delivered on October 30, 1997 (State's Ex. 2). There was nothing else in that mailing. In particular, there was no letter or other notice advising the respondent that the complaint related to the earlier notice of hearing.

OPINION AND CONCLUSIONS OF LAW

Pursuant to GBL §411[2], before revoking or suspending a license issued under GBL Article 27, or imposing a fine or reprimand on the holder of such a license, the holder of the license must be notified of the charges in writing at least ten days prior to the date set for the hearing. Pursuant to State Administrative Procedure Act (SAPA) §301, respondents must be given

"reasonable notice of such hearing, which notice shall include (a) a statement of the time, place, and nature of the hearing; (b) a statement of the legal authority and jurisdiction under which the hearing is to be held; (c) a reference to the particular sections of the statutes and rules involved, where possible; (d) a short and plain statement of matters asserted."

In this case, the respondent was served with a notice of hearing which did not contain a statement of the charges. That notice was clearly defective under the statute. The respondent was then was served with a bare statement of charges, unaccompanied by any indication that the statement of charges related to the notice of hearing.

The service of process in this matter was inadequate and unacceptable. Neither the GBL nor SAPA contemplates the service of a piecemeal notice of hearing. When the complainant realized that the original mailing was inadequate it should have re-served a complete notice of hearing and complaint. At the very least, the second mailing, which contained the charges, should have been accompanied by an explanatory letter relating those charges to the previously served notice of hearing. The respondent should not be required to guess, in the first instance, what the charges are, and, in the second instance, why she has received a naked complaint.

Accordingly, the service of the notice of hearing and of the complaint not having been in compliance with the governing statutes, the complaint must be dismissed, without prejudice to the complaint being re-instituted with proper service.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the charges herein are dismissed without prejudice.

Roger Schneier
Administrative Law Judge

Dated: December 4, 1997