

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-

BEVERLY FORRESTER,

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 16, 1994 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent, of 3735 Olinville Avenue, Bronx, New York 10467, did not appear.

The complainant was represented by Compliance Officer William Schmitz.

COMPLAINT

The complaint alleges that the respondent operated a beauty parlor without a license, and engaged in the practice of hairdressing and cosmetology without having a current license.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail on April 30, 1994 (Comp. Ex. 1).

2) The respondent is, and at all times hereinafter mentioned was, duly licensed to engage in the practice of hairdressing and cosmetology (Comp. Ex. 2).

3) On January 8, 1993 License Inspector Juanita Davis conducted an inspection of a beauty parlor known as "European Hair Flair" located at 3719 White Plains Road, Bronx, New York, for which no license had

been issued. She observed the respondent, who is the owner of the shop, curling the hair of a customer. The respondent had an expired, but not her current, hairdresser's license on the premises.

OPINION AND CONCLUSIONS OF LAW

As the party which instigated the hearing, the burden is on the complainant to prove, by substantial evidence, the truth of the charges set forth in the complaint. State Administrative Procedure Act (SAPA), §306(1). Substantial evidence is that which a reasonable mind could accept as supporting a conclusion or ultimate fact. Gray v Adduci, 73 N.Y.2d 741, 536 N.Y.S.2d 40 (1988). "The question...is whether a conclusion or ultimate fact may be extracted reasonably--probatively and logically." City of Utica Board of Water Supply v New York State Health Department, 96 A.D.2d 710, 465 N.Y.S.2d 365, 366 (1983)(citations omitted).

There are two charges in the instant complaint. The first is that the respondent operated a beauty parlor without a license. A "beauty parlor" is any place or premises wherein hairdressing and cosmetology is practiced. General Business Law (GBL) §401[4]. "The practice of hairdressing and cosmetology" includes, among other things, the curling of the hair of any person. GBL §401[5]. Therefore, since the respondent was curling the hair of a customer in her shop, she was operating a beauty parlor.

GBL §402[2] provides that no person may operate a beauty parlor without being licensed to do so. Since the respondent was not so licensed, she violated that statute.

The second charge is that the respondent engaged in the practice of hairdressing and cosmetology without having a current license. The evidence, however, establishes that she was licensed, but had an expired license on the premises. So long as an issue has been fully litigated by the parties, and is closely enough related to the stated charges that there is no surprise or prejudice to the respondent, the pleadings may be amended to conform to the proof and encompass a charge which was not stated in the complaint, Helman v Dixon, 71 Misc.2d 1057, 338 NYS2d 139 (Civil Ct. NY County, 1972). However, since the respondent was not present at the hearing the issue was not fully litigated. Therefore, an amendment to the pleadings to encompass a charge that the respondent failed to have her current license posted would not be proper, and the charge that the respondent engaged in the practice of hairdressing and cosmetology without a current license must be dismissed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Beverly Forrester violated General Business Law §402[2], and accordingly, pursuant to General Business Law §409[8], she shall pay a fine of \$200 to the Department of State on or before July 29, 1994, and should she fail to pay the fine

then her license to engage in the practice of hairdressing and cosmetology shall be suspended for a period of one month, commencing on August 1, 1994 and terminating on August 31, 1994, both dates inclusive.

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