

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-

**TONY GUERRIERO,**

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 November 14, 1994 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent, of Premier Hair Studio, Inc., 65 East Main Street, Elmsford, New York 10523, having been advised of his right to be represented by an attorney, appeared pro se.

The complainant was represented by Compliance Officer William Schmitz.

**COMPLAINT**

The complaint alleges that respondent failed to affix his photograph to his license to operate a beauty parlor, had an out of date photograph on his license to engage in the practice of hairdressing and cosmetology, and employed two unlicensed persons to engage in the practice of hairdressing and cosmetology.

**FINDINGS OF FACT**

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail (State's Ex. 1).

2) At all times hereinafter mentioned the respondent was duly licensed to operate a beauty parlor on behalf of Premier Hair Studio Inc. at 65 East Main Street, Elmsford, New York, and to engage in the practice of hairdressing and cosmetology (State's Ex. 2). Pursuant to amendments to General Business Law Article 27 effective July 5, 1994,

those licenses are now denominated a license to operate an appearance enhancement business and a license to engage in the practice of cosmetology.

3) On December 2, 1993 License Inspector Carolyn L. Williams conducted an inspection of the respondent's shop. She observed that there was no photograph on his shop license, that the photograph on his hairdresser/cosmetologist license was ten years old, and that there were two unlicensed persons in the shop whom she believed were working as hairdresser/cosmetologists. In response she issued a notice of violation to the respondent (State's Ex. 3).

#### **OPINION AND CONCLUSIONS OF LAW**

I- 19 NYCRR 161.2[b], as in effect at the time of the inspection, required that the photograph of the manager of a beauty parlor owned by a corporation be affixed to the shop license. By failing to affix his photograph to the shop license the respondent violated that regulation. In mitigation, I take official notice that, unlike an operator's license, there is no indication on a shop license that a photograph need be attached.

II- 19 NYCRR 161.2[c] provides that no photograph may be affixed to a license if it was taken more than four years earlier. By having a ten year old photograph affixed to his license to engage in the practice of hairdressing and cosmetology the respondent violated that regulation.

III- As the party which initiated the hearing, the burden is on the complainant to prove, by substantial evidence, the truth of the charges contained 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).

Inasmuch as she had failed to indicate of the notice of violation what work, if any, she observed them performing, the only evidence as to what the two unlicensed persons were doing in the shop was the testimony of Inspector Williams and that of the respondent. She testified, as she had in a previous hearing the same day with regards to another unlicensed person, that they had combs in their hands. When questioned as to whether they may have something other than combs in their hands she admitted that it was possible, and that she didn't actually recall what they were doing. The respondent, however, testified that there were no customers in the shop at the time.

The evidence is conflicting and unconvincing. The inspector's testimony was uncertain. While it is logical to believe that she saw

the unlicensed persons doing something, because of the inspector's lack of contemporaneous notes the complainant was unable to establish what that something was. Accordingly, I am constrained to find that the complainant failed to establish by substantial evidence that the respondent employed two unlicensed persons to engage in the practice of hairdressing and cosmetology, and that charge should be dismissed.

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Tony Guerriero violated 19 NYCRR 161.2[b] and [c], and accordingly, pursuant to General Business Law §410, he shall pay a fine of \$200.00 to the Department of State on or before January 31, 1995. Should he fail to pay the fine his licenses to operate an appearance enhancement business and to engage in the practice of cosmetology shall be suspended for a period of one month, commencing on February 1, 1995 and terminating on February 28, 1995, 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:

Phillip M. Sparkes  
Special Deputy Secretary of State