

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-

**LYNNAE J. KIRBY d/b/a
STYLISH CREATIONS,**

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 March 16, 1993 at the office of the Department of State located at 162 Washington Avenue, Albany, New York.

The respondent, of 28 Church Street, Canajoharie, New York 13317, having been advised of her right to be represented by an attorney, appeared pro se.

The complainant was represented by Compliance Officer William Schmitz.

COMPLAINT

The complaint in the matter alleges that the respondent operated an unlicensed beauty parlor.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail (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. Since June 23, 1992 she has also been licensed to operate a beauty parlor under the trade name "Stylish Creations" at 28 Church Street, Canajoharie, New York (Comp. Ex. 2).

3) On June 4, 1992 license inspector Carolyn L. Williams conducted an inspection of the premises at 28 Church Street, Canajoharie, New York and observed that the respondent was operating a beauty parlor

without a license. At the time a customer was in the shop having her hair cut and waved (Resp. Ex. B). She issued a notice of violation to the respondent, gave her a license application form, and advised her that it would be illegal for her to operate the beauty parlor until she obtained a license to do so. That same day the respondent completed and mailed the application, which was received by the complainant on June 5, 1992 (Comp. Ex. 3). As noted in (2), infra, the license was issued on June 23, 1992.

In January, 1991 the respondent had taken over the operation of the beauty parlor from its former owner. She consulted with the town clerk and was told that she needed to file a certificate of doing business under an assumed name and to obtain what she testified was a certificate of occupancy, but which was apparently a certificate of authority to collect sales tax (Comp. Ex. 1), and she did as directed. She was not aware of the need for a shop license.

OPINION AND CONCLUSIONS OF LAW

General Business Law (GBL) §402(2) provides that "no person shall conduct a beauty parlor without having first received a license...to conduct said beauty parlor...." A "beauty parlor" is any place in which hairdressing and cosmetology is practiced. GBL §401(4). "Hairdressing and cosmetology" includes the cutting and waving of the hair of any person. GBL §401(5).

There is no doubt, and in fact there is no dispute, that the respondent was operating a beauty parlor without a license at the time of the inspection. That the respondent was unaware of the statutory requirement for a license is irrelevant to the question of guilt, as the statute contains no requirement that the complainant establish that a violation was willful. It is, however, mitigating with regards to the question of penalty.

The respondent's argument that no fine should be imposed because she has already lost a great deal of money after having been forced to close her shop pending receipt of her license is misplaced. The respondent's financial loss in that situation was no different from what she would have experienced had she delayed taking over the shop pending receipt of a license. The fact that she had to close her shop was not the result of a penalty, but, rather, of the statutory provision forbidding the operation of an unlicensed beauty parlor and providing that a violation is a misdemeanor punishable by imprisonment for up to six months, by a fine of \$500.00, or by both. GBL §412. Any penalty imposed by this tribunal would be for the respondent's violation of the law at the time of the inspection, and prior to her entering in compliance. In setting the terms of the penalty imposed, however, I have taken into consideration the fact of the financial difficulties created by the shop closing, and have allowed the respondent a much longer period than is usual to pay the fine.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Lynnae J. Kirby has violated General Business Law §402(2), and accordingly, pursuant to General Business Law §409, she shall pay a fine of \$200.00 to the Department of State on or before October 31, 1993, and upon failure to pay the fine her licenses to operate a beauty parlor and to engage in the practice of hairdressing and cosmetology shall be suspended for a period of one month, commencing on November 1, 1993 and terminating on November 30, 1993.

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