

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-

**RAE McIVER,**

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 Rae's Beauty & Barber Shop, 282 Flatbush Avenue, Brooklyn, New York 11217, did not appear.

The complainant was represented by compliance officer William Schmitz.

**COMPLAINT**

The complaint alleges that the respondent failed to affix a photograph of herself to her shop license, permitted two persons to cut the hair of customers without barber or cosmetology licenses, and had a third person cutting hair in her shop without a photograph affixed to his license.

**FINDINGS OF FACT**

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail on September 13, 1994 (State's Ex. 1). That notice called for a hearing on October 26, 1994. I take official notice that the respondent did not appear on that date, that the matter was adjourned to November 14, 1994, that a notice of adjournment was mailed to her by first class mail, and that the adjournment notice was not returned undelivered by the postal service.

2) The respondent is, and at all times hereinafter mentioned was, duly licensed to engage in the practice of cosmetology and to operate an appearance enhancement business. (State's Ex. 2).<sup>1</sup>

3) On March 14, 1994 Senior License Investigator Elizabeth Vincent and License Investigator Cherie Fernandez conducted an inspection of the respondent's beauty parlor. They observed Wayne Wallace and Reg Richardson, neither of whom was licensed as either a hairdresser/cosmetologist or barber, cutting the hair of customers (State's Ex. 3). They also observed Jerome Johnson cutting the hair of a customer. Mr. Johnson had a license, but there was no photograph affixed to it.<sup>2</sup>

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

I- Pursuant to 19 NYCRR 161.2, as in effect at the time, every person licensed pursuant to General Business Law (GBL) Article 27 had to affix his or her photograph to the license "in the appropriate space indicated thereon." There was no photograph on the respondent's shop license. However, I take official notice that the shop license certificates as generated by the complainant's computer system do not indicate a space at which a photograph is to be affixed. Without such an indication, the respondent's failure to affix her photograph to the shop license was not a violation of the regulation. Therefore, the charge that the respondent failed to affix her photograph to her shop license must be dismissed.

II- Pursuant to GBL §412, as in effect at the time, it was unlawful for any person to employ, permit or authorize an unlicensed person to engage in the practice of hairdressing and cosmetology. The practice of hairdressing and cosmetology, as defined by GBL §401[5], included the cutting of the hair of the head of any person. Therefore, by reason of there being two unlicensed persons cutting hair in her shop the respondent violated GBL §412 twice.

III- The evidence does not establish what type of license Jerome Johnson held. If he was licensed as a hairdresser/cosmetologist, then his failure to have a photograph on his license was a violation of 19 NYCRR 161.2. If, however, he was licensed as a barber, the violation was of 19 NYCRR 165.3. The respondent can only be penalized for the violation of a regulation if the regulation was enacted under GBL Article 27. Since 19 NYCRR 165.3 was enacted pursuant to GBL Article 28, the complainant has failed to meet its burden of proving all of the

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<sup>1</sup> Prior to July 5, 1994 the license to practice cosmetology was known as a license to practice hairdressing and cosmetology, and the license to operate an appearance enhancement business was known as a license to operate a beauty parlor.

<sup>2</sup> There is no evidence in the record as to what type of license Mr. Johnson held.

elements of the charged violation by substantial evidence. Accordingly, the charge of a violation arising out of there not being a photograph on Mr. Johnson's license must be dismissed. State Administrative Procedure Act §306[1].

IV- In setting the penalty to be imposed on the respondent I have taken notice that she was previously fined \$500.00, with the option of accepting a three month suspension of her licenses in lieu of payment, after a finding that she operated a beauty parlor without a license and employed and permitted an unlicensed person to engage in the practice of hairdressing and cosmetology. Division of Licensing Services v Rae McIver, 42 DOS 92. It would appear that even after that she fails to appreciate the seriousness of her violations, which resulted in presumptively unqualified persons cutting hair and thereby endangering the welfare of the public (GBL §400), and that a much heavier penalty is required. She is admonished that any future violations can be expected to result in the suspension or revocation of her licenses without the option of paying of a fine.

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Rae McIver has violated General Business Law §412 twice, and accordingly, pursuant to General Business Law §410, she shall pay a fine of \$1000.00 to the Department of State on or before January 31, 1995. Should she fail to pay the fine her licenses to engage in the practice of cosmetology and to operate an appearance enhancement business shall be suspended for a period of six months, commencing on February 1, 1995 and terminating on July 31, 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