

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS
-----X

In the Matter of the Complaint of

**DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,**

Complainant,

DECISION

Complaint No.: C170180

-against-

KENNETH BARKETT II,

Respondent.

-----X

The above noted matter came on for hearing before the undersigned, Aiesha L. Hudson, on July 17, 2018 at the office of the Department of State located at 123 William Street, New York, New York.

The respondent failed to appear.

The complainant was represented by Hearing Presenter Penny Zhu, Esq.

COMPLAINT

The complaint alleges that the respondent real estate salesperson failed to provide proof that he successfully completed the required 75 hours of qualifying education prior to applying for his license, that he failed to cooperate with the complainant's investigation, that he made a material misstatement on his application for a license, and that he has thereby demonstrated untrustworthiness and/or incompetency.

FINDINGS OF FACT

1) On March 28, 2016, the respondent submitted an on-line application for a license as a real estate salesperson. In his on-line application for the license, the respondent certified that he had successfully completed 75 hours of approved pre-licensure education on or about November 16, 2015. Based on the representations in his submission, the respondent was issued a real estate salesperson license, UID# 10401287464, on April 5, 2016, under the sponsorship of KVMY Soho LLC, for a term ending April 4, 2018 (State's Ex. 2, 3).

2) The respondent's association with KVMY Soho LLC was terminated on July 29, 2016 (State's Ex. 2, 3).

3) On September 18, 2017, the complainant sent the respondent an email requesting that he provide proof of completion of 75 hours of qualifying education. The respondent did not reply to either that email or a follow up email sent on November 10, 2017, both of which were sent to the email address that the respondent provided when he applied for his license (State's Ex. 2).

4) Notice of Hearing together with a copy of the Complaint was sent by certified and regular mail to respondent's residential address in the records of the Department of State on April 3, 2018 (date of Affidavit of Service). The certified and regular mail were returned by the U.S. Postal Service as undeliverable with no forwarding address (State's Ex. 1).

OPINION AND CONCLUSIONS OF LAW

I- To obtain personal jurisdiction and bind the respondent to the agency decision, the DLS must properly serve him with notice of the hearing and afford him the opportunity to be heard. *See Siegel*, New York Practice § 58 (4th ed. 2005). Service properly made in a manner reasonably calculated to provide notice of the time, date, place, manner and nature of the proceedings is sufficient whether the opposing party actually receives the notice. *See Persad v. Division of Licensing Services*, 63 DOS APP 09 (2009); *Pinger v. Division of Licensing Services*, 23 DOS APP 07 (2007).

Service of the Notice of Hearing and Complaint in this matter was made by both certified and regular mail addressed to the respondent at his home address in the records of the Department of State. Both the regular and certified mailings were received back from the Post Office without a forwarding address. Accordingly, to the extent that there is evidence that notice was properly served in this instance, the hearing was permissibly conducted in the respondent's absence. *Patterson v. Department of State*, 35 A.D.2d 616 (3d Dept. 1970); *Staley v. Division of Licensing Services*, 14 DOS APP 01 (2001); *Department of State v. Battista*, 05 DOS APP 11 (2011); *Matter of the Application of Rose Ann Weis*, 118 DOS 93 (1993).

II- The Department of State retains jurisdiction in this matter even though the respondent's registration expired of its own terms. *Albert Mendel & Sons, Inc. v. N.Y. State Department of Agriculture and Markets*, 90 A.D.2d 567, 455 N.Y.S.2d 867 (1982); *Main Sugar of Montezuma, Inc. v. Wickham*, 37 A.D.2d 381, 325 N.Y.S.2d 858 (1971). The Department of State retains jurisdiction over a disciplinary matter and may impose disciplinary sanctions where (1) the alleged unlawful conduct occurred while the respondent was licensed and (2) the respondent was eligible to automatically renew the prior license at the time of the commencement of the action. *See Division of Licensing Services v. Yasrebi*, 12 DOS 99 (1999); *Division of Licensing Services v. Uqdah*, 287 DOS 98 (1998). Both criteria are met in the case at bar.

III-The complaint alleges that the respondent violated Real Property Law (RPL) § 441(1)(c) by not supplying proof that he had completed 75 hours of qualifying education. That

statute actually applies to real estate broker license applications by real estate salespersons, and provides a method to credit the salesperson's qualifying education to the fulfillment of the required real estate broker qualifying education requirement. It is RPL § 441(1-A)(d) which sets forth the requirement that an applicant for a license as a real estate salesperson provide proof of having completed 75 hours of qualifying education. Here, the respondent has not provided such proof and, therefore has violated RPL § 441(1-A)(d).

IV- Pursuant to RPL § 442-e(5) the respondent was required to cooperate with the complainant's investigation. By failing to respond to the complainant's emails, the respondent violated that statute.

V- RPL § 441-c(1) allows the Department of State to revoke or suspend the license of a real estate salesperson who makes a “material misstatement” in the application for the license. A material misstatement in an application presented to the Division of Licensing Services is a false or incorrect statement that, in part or in whole, is an essential factor in determining the fitness of the applicant for licensure. *Division of Licensing Services v. Balram*, 290 DOS 97 (1997); *Division of Licensing Services v. Deyonge*, 361 DOS 97 (1997) (citing *Division of Licensing Services v. Gise*, 48 DOS 88 (1988), *confirmed by Gise v. Shaffer*, 153 A.D.2d 688, 544 N.Y.S.2d 677 (2d Dep’t 1989)). In other words, a material misstatement is any statement made in an application that, if the true facts were known, would either (1) automatically disqualify the licensee from renewing his or her license under the requirements outlined in the Real Property Law, Article 12-A, or (2) enable the Division of Licensing Services to, in its discretion, deny the renewal of a license. *Balram*, 290 DOS 97. In determining whether the false statement is a violation of the Real Property Law, the issue is whether the licensee made the misstatement with the intent to deceive the licensing agency. *Id.*; *see also Division of Licensing Services v. Bell*, 68 DOS 05 (2005); *Mack v. Division of Licensing Services*, 341 DOS 03 (2003); *Division of Licensing Services v. Schultz*, 168 DOS 12 (2012).

Complainant’s material misstatement charge fails because the complainant failed to prove that the respondent made any false statement or misrepresentation on his application for licensure. There is no evidence that he did not, in fact, complete the qualifying education requirement. That the respondent failed to provide proof that he completed the qualifying education requirement prior to submitting his application does not establish that he failed to comply with the requirement. In fact, since the respondent did not respond to the complainant’s emails, the complainant does not know, and could not reasonably know, whether the respondent completed the qualifying education requirement. *See Division of Licensing Services v. Garcia*, 327 DOS 11 (2011) (material misstatement charge dismissed where there was no evidence real estate salesperson made false statement about continuing education compliance since he failed to respond to Department’s letter or appear at hearing). Given that there is no proof presented that the respondent made a false statement on his license application, there cannot be any determination made about whether he made a statement with the intent to deceive the Department of State. Accordingly, this charge is dismissed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Kenneth Barkett II has violated Real Property Law §§ 441(1-A)(d) and 442-e(5), and has demonstrated untrustworthiness in violation of Real Property Law § 441-c. Accordingly, pursuant to Real Property Law § 441-c, his license as a real estate salesperson, UID #10401287464, is deemed revoked, effective as of the date the license expired, April 4, 2018. He is directed to send, as appropriate, his license certificate, pocket card, and salesperson's identification, to Norma Rosario, Department of State, Division of Licensing Services, One Commerce Plaza, 99 Washington Avenue, 5th Floor, Albany, New York 12231-0001.

/S/

Aiesha L. Hudson
Administrative Law Judge

Dated: January 4, 2019