

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS
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In the Matter of the Complaint of

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

Complainant,

DECISION

Complaint No.:2016-1867

-against-

ANDREW GENOVESE,

Respondent.

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The above noted matter came on for a video hearing before the undersigned, John Kenny, on December 12, 2018 at the office of the Department of State (“Department”) located at 99 Washington Avenue, Albany, New York.

The respondent was represented by Jeffrey McMorris, Esq., 9 Broad Street, P.O. Box 3271, Glens Falls, New York 12801.

The Division of Licensing Services (“DLS”) was represented by Jasmine Norman, Esq.

COMPLAINT

The complaint alleges the respondent created and submitted a false report thereby breaching his fiduciary duty in violation of Real Property Law (RPL) §443. The complaint further alleges that through this misconduct the respondent demonstrated untrustworthiness and/or incompetency in violation of RPL §441-c.

FINDINGS OF FACT

1) On October 11, 2018, the Notice of Hearing and Complaint were served by certified and regular mail on the respondent at his address listed in the records of the DLS. On the same date, the DLS also mailed a second Notice of Hearing and Complaint by certified and regular mail to the respondent’s attorney (State Ex. 1). The respondent acknowledged receipt of the notice and complaint through his attorney.

2) The respondent was licensed as a real estate salesperson, who was associated with Hunt Real Estate (Hunt) and whose license expired on June 9, 2018 (State's Ex. 2).

3) Dave Evans, regional manager for Hunt, testified that the respondent was employed as a real estate salesperson for Hunt during the period of 2015 through 2016. Mr. Evans stated that he supervised the respondent during his employment with Hunt. Mr. Evans testified that on or about April 2016, Hunt was informed by USAA bank (USAA) that a water test report had been falsified for a property in which the respondent was representing the buyer on behalf of Hunt (Transcript at 11-14).

4) The respondent testified that he represented Mr. DiDominico, as the buyer, for a property located at 43 Brook Lane, Salem, New York. The respondent stated that Mr. DiDominico did not want a home inspection performed at the property because he did not want to pay for it. He stated that Mr. DiDominico used a home inspection from a prior sale that had fallen through. The respondent testified that the prior home inspection report did not include a water test because the property was supplied by municipal water. The respondent testified that USAA was requiring that a water test be conducted in order to close because there was an existing water well on the property (Transcript at 112-114).

5) The respondent testified that he did not falsify the water test report for the 43 Brook Lane property. He stated that at the time in question he had two pending closings in Salem, New York, with one closing being the 43 Brook Lane property, and the other for a property located at 675 Turnpike Road, Eagle Bridge, New York. The respondent testified that a water test performed at the 675 Turnpike Road property was for Tim Smith, the buyer/client, for that property. On or about April 12, 2016, the respondent received the water test report for the 675 Turnpike Road property from home inspector Michael Feeder by email. On or about April 19, 2016, after receiving the report from Mr. Feeder, the respondent forwarded the report to Mr. DiDominico because he thought a water test had been performed at the 43 Brook Lane property. The respondent testified that after forwarding the water report to Mr. DiDominico, he emailed Mr. DiDominico, to inform him that he had forwarded the wrong water report and that the report was for another closing. The respondent testified that the email he received from home inspector Feeder stated that the water test report was for the Eagle Bridge property in Salem, New York. The respondent further stated that the Village of Eagle Bridge is located within the Town of Salem. The respondent acknowledged during the hearing that the subject line for the email he received from home inspector Feeder indicated "water test results" with the attachment line stating that the water report was for 675 Turnpike Road, Eagle Bridge (Transcript at 109-112, 116, 124, 125; State's Ex. 7). The tribunal takes judicial notice that the hamlet of Eagle Bridge, New York is located in Renssalaer County and that the Village and Town of Salem, New York are located in Washington County.

6) On April 6, 2016, home inspector Feeder performed a home inspection for a property located at 675 Turnpike Road, Eagle Bridge, New York. Mr. Feeder stated he performed the water test as part of the home inspection for his clients Tim Smith and Kylie May on April 8, 2016. After taking the water sample, he forwarded it to the lab for testing. On April 11, 2016, he received the results back from the lab. He stated that he emailed the lab results to Tim Smith, Kylie May, Robert Hafter, Esq., attorney for the buyers, and the respondent on April 12, 2016.

Mr. Feeder testified that the lab typed the results of the water test report from the water sample submitted for testing. He stated that the paperwork submitted to the lab required him to fill out the address of the property, the date and time the water sample was taken, the client's name and the name of the home inspector. He testified that the paperwork he prepared and submitted to the lab was for his client, Tim Smith, at 675 Turnpike Road, Eagle Bridge, New York (Transcript at 77-84; State's Ex. 7).

7) Mr. Feeder testified that he received a call from Anthony Wallace at USAA on or about May 9, 2016. Mr. Feeder stated that Mr. Wallace was looking for a payment receipt for a water test performed on behalf of Dave DiDominico. Mr. Feeder told Mr. Wallace that he did not perform a water test for Mr. DiDominico. Mr. Wallace informed Mr. Feeder that a water test report existed for 43 Brook Lane in Salem, New York with his name on the report. On May 10, 2016, after some inquiry between Mr. Feeder, ETR Laboratories and Mr. Wallace, Mr. Feeder testified he received a copy of the lab report from Mr. Wallace for 43 Brook Lane. Mr. Feeder testified that after reviewing the lab report he noted that the ETR Laboratories logo was positioned improperly and faded, the report number was not in the correct format in regard to the month, day and year and that the typeface for the heading of the report was not the same. Mr. Feeder stated that the report he received from ETR Laboratories for the 675 Turnpike Road property had 4116462 as the report number. He stated the 4116 number references the date the report was completed by the lab, in this case, April 11, 2016, with a sequence number of 462. Mr. Feeder testified that the report he received from Mr. Wallace for the 43 Brook Lane property had 41126462 as the report number. He stated that report had a completion date of April 11, 2026 with the same sequence number (Transcript at 85-94; State's Ex. 8).

8) Mr. Feeder testified that the lab results for the report he received from Mr. Wallace for the 43 Brook Lane property were identical to the lab results for the 675 Turnpike Road property. Mr. Feeder testified that he has never seen two identical water test results for two different properties in his twenty plus years of experience as a home inspector. Mr. Feeder testified that he concluded, after reviewing both reports, that the 43 Brook Lane report was fraudulent. He further testified that he bases his opinion on the results, layout and appearance of the report. Mr. Feeder stated that he subsequently performed a water test for Mr. DiDominico at the 43 Brook Lane property and was paid \$250.00 by Mr. DiDominico. After performing the water test, Mr. Feeder stated that he contacted the New York State Police and provided a statement regarding the altered report for the 43 Brook Lane property (Transcript at 94-97; State's Ex. 9).

9) On or about May 10, 2016, Mr. Evans emailed the respondent to inquire about the source of the altered report as USAA wanted to know the source of the report. In a reply email on or about the same date, the respondent informed Mr. Evans that he did not know the source of the report. On or about May 10, 2016, Mr. Evans emailed Dave DiDominico who informed him that he received the water report directly from the respondent and forwarded the lab report to USAA (Transcript at 24-26, 31, 36-38; State's Ex. 3; State's Ex. 4).

10) On or about February 2, 2018, Investigator Weakly interviewed home inspector Mike Feeder. Investigator Weakly stated that Mr. Feeder informed him that he never conducted a water test at the 43 Brook Lane property in Salem, New York in April 2016. Investigator Weakly testified that Mr. Feeder provided him with a written statement wherein Mr. Feeder stated that

the 43 Brook Lane water test report provided to him by Mr. Wallace had been clumsily cut and pasted from the 675 Turnpike Road water test report. The respondent was charged with Criminal Possession of a Forged Instrument in the Third Degree and Falsifying Business Records in the Second Degree. The respondent entered into a six month Adjournment in Contemplation of Dismissal (ACOD) on October 11, 2017. The court approved the ACOD on or about January 2018. Investigator Weakly testified that the charges were dismissed as of July 2018 (Transcript at 58, 59, 63, 63, 68, 69; State's Ex. 5; State's Ex. 6).

OPINION

I- As the party that initiated 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 §306(1). Substantial evidence “means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact... More than seeming or imaginary, it is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt (citations omitted).” 300 Gramatan Avenue Associates v. State Div. of Human Rights, 45 NY2d 176, 408 NYS2d 54, 56-57 (1978); Tutuianu v. New York State, 22 AD3d 503, 802 NYS2d 465 (2nd Dept. 2005). “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 AD2d 719, 465 NYS2d 365, 366 (1983), quoting 300 Gramatan Avenue Associates, supra, 408 NYS2d at 57.

II- 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. Akbar Yasrebi*, 12 DOS 99; *Division of Licensing Services v. Thabit Uadah*, 287 DOS 98. The respondent is not currently licensed and was not licensed at the time of the commencement of the proceeding. However, he was licensed at the time of his alleged misconduct, and can, until June 9, 2020, renew that license by submitting an application and paying the required fees. RPL §441(2). The Department of State retains jurisdiction over this matter since the respondent was licensed at the time of the alleged misconduct and was eligible to automatically renew his license at the time of the commencement of the action.

III- The complainant has charged that by creating and submitting a false report the respondent breached his fiduciary duty in violation of RPL §443 and demonstrated untrustworthiness and/or incompetency pursuant to RPL §441-c. The evidence establishes that the respondent was the source of the altered report. It is apparent that a water test had been performed at the 675 Turnpike Road, Eagle Bridge, New York property by home inspector Feeder for his clients, Tim Smith and Kylie May. The complainant has established a clear chain of custody. Mr. Feeder submitted the water sample to ETR Laboratories, who prepared the results of the lab report, and returned the report to Mr. Feeder. Mr. Feeder then forwarded the report to his client's, their attorney and the respondent. Mr. DiDominico received the 43 Brook Lane report from the respondent. After receiving the report from the respondent, Mr. DiDominico forwarded the report to USAA. USAA in turn forwarded the report they received

124-DOS 19

from Mr. DiDominico to Hunt and Mr. Feeder. Mr. Feeder credibly testified that the report was fraudulent based upon his examination of the report when comparing it to the 675 Turnpike Road, Eagle Bridge, New York report. During his twenty plus years of experience as a home inspector, Mr. Feeder has never seen two water tests for two different properties having the exact same water test results. In addition, Mr. Feeder found that the report had an incorrect report number, that the lab logo of the report was not positioned properly and that the typeface on the heading was not the same as the 675 Turnpike Road report. Mr. Feeder noted in a letter to Investigator Weakly that the report had been clumsily cut and pasted. The respondent's testimony regarding his confusion and mistake in forwarding the incorrect report to Mr. DiDominico is not credible. The respondent testified that the report he received from Mr. Feeder was for a Salem water test. However, the email dated April 12, 2016 from Mr. Feeder to the buyers and the respondent for the 675 Turnpike Road property indicates that it is in regard to a water test result for the property located in Eagle Bridge, New York and not in Salem, New York. The tribunal has taken into consideration the six month ACOD that the respondent entered into wherein the criminal charges have been dismissed.

Based upon the totality of the evidence, the complainant has proven, by substantial evidence, that the respondent created and submitted a false report in violation of RPL §443 and demonstrated untrustworthiness in violation of RPL §441-c.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Anthony Genovese, UID #10401216801, violated RPL §443 and demonstrated untrustworthiness pursuant to RPL §441-c. Accordingly, pursuant to RPL §441-c, his license as a real estate salesperson is revoked, effective immediately. The respondent is directed to send his license certificate, by certified mail, to Norma Rosario, Department of State, Division of Licensing Services, One Commerce Plaza, 99 Washington Avenue, 5th Floor, Albany, New York 12231-0001.

/S/

John E. Kenny
Administrative Law Judge

Dated: March 11, 2019