

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.:C180046

-against-

**FRANK GARCIA, JR.,**

Respondent.

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The above noted matter came on for a video hearing before the undersigned, John Kenny, on October 10, 2018 at the office of the Department of State (“Department”) located at 99 Washington Avenue, Albany, New York and 123 William Street, New York, New York.

The applicant failed to appear. The Division of Licensing Services (“DLS”) was represented by hearing presenter Nadine Azarian.

**COMPLAINT**

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

**FINDINGS OF FACT**

1) The respondent was registered as a real estate salesperson, UID #10401290559, whose license expired on May 3, 2018. The respondent’s association with Upton Realty Group, Inc. was terminated on June 25, 2017 (State’s Ex. 1; State’s Ex. 3).

2) Notice of Hearing together with a copy of the Complaint was served by certified and regular mail to the home address of the respondent on September 14, 2018 (State’s Ex. 1).

3) On June 17, 2016, the respondent submitted an online application seeking licensure as a real estate salesperson. The respondent’s examination and education history, based on

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information provided by the respondent at time of submission, was automatically converted by the Department's licensing system into a "Certification Preparation Report". The Certification Preparation Report indicates, in part, that the respondent claimed his qualifying education was completed on or about May 11, 2016. Based upon the respondent's original submission, the DLS issued the requested license on June 18, 2016 (State's Ex.2).

4) By an email dated November 20, 2017, the respondent was informed that he needed to provide proof of the required 75 hours of qualifying education by submitting documentation of his course completion certificate(s) within 14 days of the date of the email message (State's Ex. 2).

5) By letter dated December 18, 2017, which was sent by email only, the DLS advised the respondent that he failed to comply with the November 20, 2017 request for documentation. The DLS proposed to recommend the revocation of his real estate salesperson license for non-compliance with the audit. In the letter, the respondent was advised of the right to have a hearing or he could waive his right to a hearing and either provide proof of completion of the 75 hours of approved courses. In the alternative, the respondent could surrender his license by completing an attached Surrender Form (State's Ex. 2). The respondent failed to reply or comply with the request from the DLS.

### OPINION

I- To obtain personal jurisdiction and bind the respondent to the agency decision the complainant must properly serve the respondent with notice of the hearing and a copy of the complaint and afford him the opportunity to be heard (see Siegel, New York Practice §58 (4<sup>th</sup> 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 or not the opposing party actually receives 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 certified and regular mail addressed to the respondent at his last known address as appearing in the records of the DLS. The certified and regular mail were not returned to the DLS by the Post Office. 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 AD2d 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 to conduct this proceeding even though the respondents' license has expired; his misconduct occurred while he was licensed. *Albert Mendel & Sons, Inc. v. NYS Department of Agriculture and Markets*, 90 AD2d 567, 455 NYS2d 867 (3<sup>rd</sup> Dept. 1982); *Maine Sugar of Montezuma, Inc. v. Wickham*, 37 AD2d 381, 325 NYS2d 858 (3<sup>rd</sup> Dept. 1971).

III- 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 (2<sup>nd</sup> 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.

IV- 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).

V- A license as a real estate salesperson or broker may be revoked or suspended if the licensee made a material misstatement on said application for the license. RPL §441-c. A material misstatement in an application is an incorrect statement, or an omission of fact which, in whole or in part, is an essential factor in determining the fitness of the applicant for licensure. *Division of Licensing Services v. Gise*, 48 DOS 88; *see Gise v. Shafer*, 153 AD2d 688, 544 NYS2d 677 (1989). In other words, a material misstatement is any statement made in an application that, if 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. *Division of Licensing Services v. Bzdel*, 290 DOS 97 (1997). In order to make a material misstatement in violation of the Real Property Law, the licensee must have made the statement 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).

Here, the DLS has failed to prove that the respondent made any material misrepresentations on his application for licensure. There is no evidence that he did not, in fact, complete his 75 hours of qualifying education. Given that there is no proof presented that the respondent made a false statement on his application, there cannot be any determination made about whether he made a statement with the intent to deceive the DLS. Accordingly, this charge is dismissed.

VI- Pursuant to RPL §442-e (5), a real estate salesperson is obligated to cooperate with the complainant’s investigation. By failing to respond to the complainant’s emails, the respondent violated that statute.

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Frank Garcia, Jr. has violated Real Property Law §§441 (1-A) (d) and 442-e (5), and accordingly, pursuant to Real Property Law §441-c, his license as a real estate salesperson, UID #10401290559, is deemed revoked, effective as of the date that the license expired, May 3, 2018. He is directed to send, as appropriate, his license certificate, pocket card, salesperson's identification and proof of completion of the qualifying education to Norma Rosario, Department of State, Division of Licensing Services, One Commerce Plaza, 99 Washington Avenue, 5<sup>th</sup> Floor, Albany, New York, 12231-0001.

/s/

John E. Kenny  
Administrative Law Judge

Dated: January 15, 2019