

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.: C170139

-against-

CHRISTINE DAY,

Respondent.

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The above noted matter came on for hearing before the undersigned, Aiesha L. Hudson, on February 22, 2018, at the office of the Department of State located at 99 Washington Avenue, Albany, New York.

The respondent failed to appear.

The complainant was represented by Hearing Presenter Aqil Qureshi.

COMPLAINT

The complaint alleges that the respondent real estate salesperson has failed to provide proof that she successfully completed the required 75 hours of qualifying education prior to applying for her license, and that she failed to cooperate with the complainant's investigation.

FINDINGS OF FACT

1) On May 23, 2016, the respondent submitted an on-line application for a license as a real estate salesperson. In her on-line application for the license, the respondent certified that she had successfully completed 75 hours of approved pre-licensure education on or about September 22, 2014. Based on the representations in her submission, the respondent was issued a real estate salesperson license, UID# 10401290156, on June 9, 2016, in association with Select Sotheby's International Realty, for a term ending June 8, 2018 (State's Ex. 2).

2) Per Department of State records, the respondent has been associated with the licensed real estate broker Select Referrals LLC since January 10, 2017 (State's Ex. 2).

3) On July 18, 2017, the complainant sent the respondent an email requesting that she 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 August 28, 2017, both of which were sent to the email address that the respondent provided when she applied for her 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 last known business address in the records of the Department of State on December 27, 2017 (date of posting). Neither the certified or regular mail was returned by the U.S. Postal Service. The certified mail return receipt was not returned (State's Ex. 1).

5) On January 19, 2018, after the Notice of Hearing and Complaint were served, the respondent sent an email to the complainant, responding to the complainant's inquiries regarding her NYS real estate license. She attached documents to the email that she contended were proof that she completed 75 hours of approved pre-licensure education, by completing a 75-hour online real estate course with Manfred Real Estate Learning Center ("Manfred"), and passed the New York State real estate examination on March 10, 2016 (State's Ex. 3). The documents included screenshot images of: the respondent's eAccessNY online real estate license application submission, including the portion showing her affirmation that she satisfactorily completed a 75 hour qualifying education course at "Manfred RE Learning" on 9/22/2014; a web page explicitly stating that, now that the respondent had completed the online portion of her New York real estate sales pre-licensing course at Manfred, the respondent "must take and pass a proctored, paper-based final exam before she could receive [her] official transcript for the course";¹ and a webpage showing each time the respondent took the New York State real estate exam, and that she passed on May 10, 2016.² The respondent also sent a screenshot of a webpage stating that the respondent was required to take an online survey to complete the online portion of the real estate course. The page states that once the respondent has completed the survey, the respondent can access her certificate or "get important information about **any additional steps that are necessary for [her] to take**" (emphasis added) (State's Ex. 3).

6) The complainant replied to the respondent's email that same day, January 19, 2018, indicating that the respondent's screenshots were insufficient to show that the respondent successfully completed 75 hours of approved pre-licensure education inasmuch as the evidence provided indicated that that the respondent had not taken the proctored exam required by the school to complete the 75-hour online pre-licensure course (State's Ex. 4). In reply emails, the respondent contended that there was a "miscommunication" and it was not clearly stated online that she needed to take a proctored exam at her school in order to complete the online course **in addition to** having to take the proctored New York State real estate exam to obtain her real estate license. According to the respondent, New York State is aware that the instructions for completion of the online class are unclear and several other Manfred students have been audited because of the vague

¹ Notably, the page also states that "[f]or more information **and to make exam arrangements**", the respondent should contact Manfred Real Estate Learning Center (emphasis added) (State's Ex. 3).

² The respondent took the NY real estate exam the first time on November 18, 2014 (State's Ex. 3).

instructions.³ The respondent indicated that she intended to attend the hearing to explain that the miscommunication was caused by the State. She did not want to pay to re-take the 75-hour online course in order to take the proctored exam (State's Ex. 4). However, the respondent did not appear at the February 22, 2018 hearing.

OPINION AND CONCLUSIONS OF LAW

I- To obtain personal jurisdiction and bind the respondent to the agency decision, the complainant must properly serve her with notice of the hearing and afford her 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's last known business address in the records of the Department of State. Neither the regular or certified mail was returned. Moreover, it is evident from the January 19, 2018 email correspondence between the complainant and the respondent that she was aware of the hearing, and that she would have an opportunity to plead her case, since she stated her intention to do so. 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- During the hearing, the complainant moved to amend the complaint to conform to the proof to include the charge that the respondent's real estate license should be revoked, pursuant to Real Property Law (RPL) § 441-c(1), because she made a material misstatement on her application. The complainant argued that, to the extent that respondent admitted, subsequent to service of the Notice Hearing and Complaint, that she did not take the proctored school exam required to complete the online real estate pre-licensing education course, the evidence shows that respondent made a material misstatement on her application by indicating that she completed 75 hours of qualifying pre-licensing education (Transcript at 11).

"Pleadings may be amended to conform to the proof at any time, provided that no prejudice is shown (citations omitted)." *Miles v. City of New York*, 251 A.D.2d 667, 676 N.Y.S.2d 485 (2d Dept. 1998), *lv. denied* 92 N.Y.2d 818, 684 N.Y.S.2d 489; *Cerio v. New York City Transit Authority*, 228 A.D.2d 676, 645 N.Y.S.2d 822 (2nd Dept. 1996); *Dougherty v. Dougherty*, 256 A.D.2d 714, 680 NYS2d 759 (3d Dept. 1998); *Ford v. Martino*, 281 A.D.2d 587, 722 N.Y.S.2d 574 (2d Dept. 2001) (pleadings may be amended either before or after judgment, absent prejudice or surprise). Ultimately, however, the decision of whether to conform the pleadings to the evidence is "a matter within the sound discretion of the [tribunal]." *Division of Licensing Services v. Iglicki*,

³ The respondent's email indicates that she was informed by the owner of Manfred that the online real estate pre-licensure course is "directly tied in with the state of New York" (State's Ex. 4).

2 DOS APP 12 (2012 (quoting *Loomis v. Civetta Corrino Const. Corp.*, 54 N.Y.2d 18, 23 (1981) (internal quotations omitted)).

In this case, the respondent would not be prejudiced by the amendment since the complainant's new charge that the respondent made a material misstatement on her real estate license application falls within the broad framework of the initial complaint regarding the respondent's completion of the requisite 75 hours of qualifying pre-licensure education. The new charge also involves the same set of facts as the initial complaint. The respondent also could not claim surprise since the material misstatement charge is based on the statements she made in email correspondence with the complainant, after she received the Complaint, which indicate that she did not complete Manfred's online real estate pre-licensing course. Had the respondent appeared at her hearing, she would have had the opportunity to explain the statements she made in her emails, and the alleged "miscommunication" to which she refers.

Notwithstanding the lack of prejudice, the complainant's proposed amendment fails because it is not supported by the evidence in the record. RPL § 441-c(1) allows the Department of State to revoke 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 Gise v. Shaffer*, 153 A.D.2d 688, 544 N.Y.S.2d 677 (2d Dept. 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).

In this case, in an email exchange with the complainant, the respondent admitted that she failed to take the proctored school test, and therefore failed to complete Manfred's on-line real estate education course prior to applying for her real estate license. Thus, the affirmation in her online real estate license application that she had completed the 75-hour qualifying education requirement was indeed false. Since the law requires that an applicant for a real estate sales person license to satisfactorily complete 75 hours of qualifying pre-licensure education, the false statement was undoubtedly material to her application. The record, however, does not support that the statement was made with an intent to deceive the complainant.

To the contrary, the respondent's email correspondence proffered at the hearing by the complainant indicates that the respondent believed that she had completed Manfred's online real estate course at the time she submitted her online application, and that the only proctored exam she was required to take for licensure was the New York State real estate exam which the respondent took and passed prior to filing her application. The respondent claimed she made a

mistake based on her comprehension of the online directions when she completed the online classes, and provided the screenshot images to support her argument. While the respondent did not appear at the hearing, the tribunal finds the respondent's emails and supporting documents are credible evidence which do not support that the applicant deliberately made the false statement regarding completion of the course with the intent to deceive the Division of Licensing Services. As such, the tribunal concludes that the charge that the respondent's real estate license should be revoked on the ground that the respondent made a material misstatement in violation of RPL § 441-c(1) is not supported by the record, and therefore, the complainant's motion to amend the complaint is dismissed.

III- The complaint alleges that the respondent violated RPL § 441(1)(c) by not supplying proof that she 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 record indicates that the respondent completed 75 hours of online coursework, but she admittedly did not take and pass the proctored school exam.⁴

According to her emails, she did not take the final examination because she misunderstood the online instructions after she completed the online course work and did not understand that she had to take more than one proctored exam to obtain her real estate license. She provided computer screenshots taken after she completed the online course work to show the directions she misinterpreted.⁵ I have considered the respondent's emails in mitigation of any penalty to be imposed. However, it is clear that until she takes the final examinations she has not successfully completed the required education and, therefore, that she is not entitled to retain an active license as a real estate salesperson. Under such circumstances, and to avoid the mandatory one year bar to reapplication which would arise from a revocation of the respondent's license (RPL § 441-c (4)), I find that the respondent's license should be suspended until she submits proof either that she has taken and passed the examination for the qualifying education course which she previously completed, or that she has taken and completed a new qualifying education course and has taken and passed the examination for that course.

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 July 18, 2017 and August 28, 2017 emails during the complainant's audit, the respondent violated that statute.⁶

⁴ A proctored final examination is required for online courses pursuant to 19 NYCRR § 176.23(g).

⁵ The respondent's emails also mentioned she planned to appear at the hearing to further explain the "miscommunication", but she did not appear to offer further evidence.

⁶ Although the respondent did contact the complainant, she did not do so until after she was served with the Notice of Hearing and Complaint on December 27, 2017. The respondent did not appear at the scheduled hearing, or provide an explanation in her emails, for her failure to respond to complainant's previous communications (in July and August 2017). The tribunal notes, however, that the email address the respondent used to email the complainant after she received the Notice of Hearing and Complaint was not the same email address the complainant used to contact the respondent during the audit.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Christine Day has violated Real Property Law §§ 441(1-A)(d) and 442-e(5), and accordingly, pursuant to Real Property Law § 441-c, her license as a real estate salesperson, UID #10401293348, is suspended effective immediately and until such time as she produces proof satisfactory to the Department of State that prior to the submission of her original application for that license she completed the required 75 hours of real estate salesperson qualifying education, and until she shall have paid a fine of \$250.00. She is directed to send, as appropriate, her license certificate, pocket card, and salesperson's identification, proof of completion of the qualifying education, and a certified check or money order for the fine payable to "Secretary of State" 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: May 31, 2018