

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Alleged Violations of
Article 12-A of the Real Property Law and
Regulations promulgated thereunder,

-by-

DECISION

Complaint No.: 2017-0067

Lawrence Wai,
real estate salesperson,

Respondent.

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The above noted matter was calendared for October 24, 2017, at the offices of the Department of State (“Department”) located at 123 William Street, New York, New York. The case has been reassigned from Judge Ziedah Diata to Judge John Kenny.

The respondent failed to appear. The Division of Licensing Services (“DLS”) was represented by Penny Zhu, Esq.

COMPLAINT

The complaint alleges that the respondent made a material misstatement on his application for a license as a salesperson.

FINDINGS OF FACT

1) The Notice of Hearing and Complaint were served by certified and regular mail on March 3, 2017 to the respondent at his last known business address as per the records of the DLS. The certified mail was signed for as received. The matter was originally scheduled for May 3, 2017, the respondent requested an adjournment, and the matter was adjourned to July 27, 2017. An Adjournment Notice dated July 27, 2017, which was mailed to the respondent at his home address, scheduled the matter for a hearing on October 24, 2017 (State’s Ex. 1).

2) The respondent obtained his real estate salesperson license on July 9, 2013. The license expired on July 8, 2017 (State’s Ex. 1).

3) On or about April 19, 2004, the respondent was convicted of Assault in the Second Degree, Penal Law §120.05, a class D felony, in New York County Criminal Court. On or about January 18, 2013, the respondent applied for a real estate salesperson license. The respondent disclosed his felony conviction on the application (State’s Ex. 1).

4) On or about February 1, 2013, the DLS proposed to deny the respondent's real estate salesperson application based upon his felony conviction (State's Ex. 3).

5) On or about July 8, 2013, the respondent reapplied for a real estate salesperson license and failed to disclose his prior felony conviction (State's Ex. 1). On or about July 9, 2013, the DLS issued a real estate salesperson license to the respondent (State's Ex. 4).

6) On or about November 7, 2016, the respondent submitted an application for a real estate broker license. The respondent failed to disclose his felony conviction on the November 2016 broker application (State's Ex. 5).

7) The respondent submitted a letter dated November 29, 2016 describing the circumstances of his crime along with a copy of a Certificate of Disposition for his conviction from the New York County Criminal Court. The respondent also provided an amended copy of page 3 from his real estate broker application wherein he answers "Yes" to the question, "Have you ever been convicted of a crime that is a misdemeanor or felony?" (State's Ex. 6).¹

8) On or about December 8, 2016, the November 2016 broker application was denied, due to the respondent's prior felony conviction (State's Ex. 1).

OPINION

I – To obtain personal jurisdiction and bind the respondent to the agency decision, the DLS must properly serve the respondent with notice of the hearing and afford him or her an opportunity to be heard. 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).

In this case, the respondent was served by certified and regular mail at the address in the records of the DLS. The certified mail was returned to the DLS by the Post Office as Return to Sender-Unable to Forward. The Post Office did not provide a forwarding address. The regular mail was not returned to the DLS by the Post Office. Although the complainant is required to take reasonable and practical steps to ensure the respondent is afforded notice, the complainant is not required to search beyond its records and those provided by the US Postal Service for the respondent's current address. *Department of State v. Battista*, 05 DOS APP 11. Accordingly, notice of the opportunity to have an in-person hearing was properly served, and the issuance of this decision based upon written evidence submitted by the complainant is permissible. *Patterson v. Department of State*, 36 AD2d 616, 312 NYS2d 300 (3rd Dept. 1970); *Verdell v. DeBuono*, 262 AD2d 812, 691 NYS2d 679, 680 (3rd Dept. 1999) (*quoting Silverstein v. Minkin*, 49 NY2d 260, 263, 425 NYS2d 88, *quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865); *Matter of the Application of Rose Ann Weiss*, 118 DOS 93 (1993).

¹ Respondent's letter dated November 29, 2016 was numbered out of order as State's Ex. 7 at the hearing. For purposes of this Decision, State's Ex. 7 is amended to reflect the chronological number as State's Ex. 6.

II- 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*, 45NY2d 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 *Gramatan Avenue Associate*, *supra*, 408 NYS2d at 57.

A license as a real estate salesperson or broker may be revoked if the licensee made a material misstatement on his application or her application for the license. Real Property Law (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). On his January 2013 salesperson application, the respondent disclosed his prior felony conviction and the DLS denied his application pursuant to RPL §440-a. After the denial by the DLS, the respondent reapplied for a salesperson license by submitting a July 2013 salesperson application wherein he failed to disclose his 2004 felony conviction. Based upon his material misstatement, the DLS granted the respondent a real estate salesperson license without having the benefit of full disclosure from the respondent regarding his conviction.

III- The DLS retains jurisdiction over a disciplinary hearing 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 and when the hearing was held (*see Division of Licensing Services v. Akbar Yasrebi*, 12 DOS 99 (1999); *Division of Licensing Services v. Thabit Uqdah*, 287 DOS 98 (1998); *see also Albert Mendel & Son, Inc. v. New York Dept. of Agriculture and Markets*, 90 AD2d 567, 567, 455 N.Y.S. 2d 867, 869 (1982); *Maine Sugar of Montezuma, Inc. v. Wickham*, 37 AD2d 381, 383, 325 N.Y.S. 2d 858, 860 (1971)). Real Property Law §441 (2) provides that the renewal period for a real estate salesperson’s license is “two years from the date of expiration of a previously issued license.” The expiration without renewal of a real estate salesperson’s or broker’s license does not deprive the Department of State of jurisdiction arising out of an event occurring prior to the expiration of such license, nor does it deprive the Department of State of the ability to revoke the expired license (*see Maine Sugar of Montezuma*, 37 AD2d at 383; *DLS v. Carol Branch*, 2267 DOS 07 (2007); *see also Matter of Brooklyn Audit Co. v. Department of Taxation & Fin.* 275 N.Y. 284, 286 (1937); *Albert Mendel & Son, Inc.*, 90 AD 2d at 567). In this case, the DLS became aware of the respondent’s material misstatement at the time when he was licensed as a salesperson. Pursuant to Real Property Law §441(2), the respondent is entitled to renew his license by submission of an application prior to July 9, 2019.

IV – Real estate salespersons and brokers are special fiduciary agents upon whom the law imposes the fiduciary duties of good faith and undivided loyalty of full and fair disclosure, of reasonable care, of confidentiality and to account. *L.A. Grant Realty Inc. v. Cuomo*, 58 AD2d 252,

396 NYS2d 524 (4th Dept. 1977). The respondent failed to provide full and fair disclosure of his felony conviction on his January 2013 salesperson application. By failing to disclose the prior felony conviction on his application, the respondent made a material misstatement and prevented the DLS from determining whether he was sufficiently trustworthy to be licensed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT, Lawrence Mai, has violated Real Property Law §441-c, by making a material misstatement on his application for a license as a real estate salesperson, the respondent has demonstrated untrustworthiness, and accordingly, pursuant to Real Property Law §441-c, his license as a real estate salesperson is deemed revoked effective immediately. He is directed to immediately send his real estate salesperson license, 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: June 5, 2018