

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.:C170112

-against-

CANDICE McMILLAN,

Respondent.

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The above noted matter came on for hearing before the undersigned, John Kenny, on May 30, 2018 at the office of the Department of State (“Department”) located at 99 Washington Avenue, Albany, New York.

The respondent was represented by Lino A. Solis, Esq.

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

COMPLAINT

The complaint alleges that 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) The respondent is registered as a real estate salesperson, UID #10401297024, with a license expiration date of December 5, 2018. The respondent is associated with Lino A. Solis, a licensed real estate brokerage (State’s Ex. 1).

2) The Notice of Hearing together with a copy of the Complaint was served by certified and regular mail to the business address of the respondent on February 1, 2018 (State’s Ex. 1). At the hearing, the respondent acknowledged receipt of the notice and complaint.

3) On December 5, 2016, the respondent submitted an online application seeking licensure as a real estate salesperson. The respondent's examination and education history, based on 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 her qualifying education was completed on or about December 23, 2011. Based upon the respondent's original submission, the DLS issued the requested license on December 6, 2016 (State's Ex.2).

4) By an email dated June 21, 2017, the respondent was informed that she needed to provide proof of the required 75 hours of qualifying education by submitting documentation of her course completion certificate(s) within 14 days of the date of the email message (State's Ex. 2).

5) On or about June 27, 2017, the respondent replied to the DLS request by asking for a time extension, which was granted (State's Ex. 2).

6) By letter dated August 15, 2017, which was sent by email only, the DLS advised the respondent that she failed to comply with the June 21, 2017 request for documentation. The DLS proposed to recommend the revocation of her 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 she could waive her right to a hearing and either provide proof of completion of the 75 hours of approved courses or that she could surrender her license by completing an attached Surrender Form (State's Ex. 2).

7) On or about August 28, 2017, after communicating with the DLS since June 2017 in an attempt to provide the requisite proof that she had completed the 75 hour qualifying education course, the respondent decided to move forward with a hearing rather than agree to a surrender of her license to the DLS (Respondent's Ex. A; Transcript at 11).

8) The respondent testified that she took the qualifying education course in December 2011 through Express Real Estate. Shortly after taking the course in January 2012, she went to work as a salesperson for Rapid Realty. The respondent further testified that she stopped working as a salesperson shortly after taking the qualifying education course with Express Real Estate and working for Rapid Realty. The respondent decided to reapply for her license as a salesperson in 2016. The respondent testified that she attempted to obtain her qualifying education records from Express Real Estate but the school was no longer in existence. The respondent further testified that she attempted to access her qualifying education records from two individuals who were formerly associated with school with no success (Transcript at 8-10, 25).

9) On cross examination, the respondent testified that she completed the 75 hour qualifying education course through Express Real Estate. The respondent testified that she took the exam at the end of the course and that she passed the state exam but not the school exam. The respondent acknowledged that she did not receive a certificate for the 75 hour qualifying education course since she did not pass the school exam (Transcript at 22-23).

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 complaint alleges that the respondent violated Real Property Law (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 respondent testified that she did not pass the school exam after having completed the qualifying education course of study. As a result of not passing the school exam, she was not issued a certificate indicating she had completed the 75 hour qualifying education course. The respondent has failed to provide the requisite proof and, therefore has violated RPL §441(1-A) (d).

III- Pursuant to RPL §442-e (5), a real estate salesperson is obligated to cooperate with the complainant’s investigation. The respondent testified and offered emails showing that she was attempting to comply with the DLS request for proof of completing the 75 hour qualifying education course during the time period from June 2017 until the end of August 2017. The evidence shows that the respondent was cooperating with the DLS requests for providing the requisite proof of having completed the qualifying education course. Accordingly, this charge is dismissed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Candice McMillan, UID §10401297374, has violated Real Property Law §§441 (1-A) (d), and accordingly, pursuant to Real Property Law §441-c, her license is suspended until she has produced proof satisfactory to the DLS that she has completed the required 75 hours of qualifying education. She is directed to send her proof of completion of the qualifying education course to Norma Rosario, Department of State, Division of Licensing Services, One Commerce Plaza, 99 Washington Avenue, 5th Floor, Albany, New York, 12231-0001. As an alternative to payment by check or money order, the fine may be paid by credit card using the form available at <http://www.dos.ny.gov/forms/licensing/1450-f-1-a.pdf>.

/s/

John E. Kenny
Administrative Law Judge

Dated: July 2, 2018