

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.:C180026

-against-

OMAR FERNANDEZ,

Respondent.

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The above noted matter came on for hearing before the undersigned, John Kenny, on July 11, 2018, at the offices of the Department of State (“Department”) located at 99 Washington Avenue, Albany, New York.

The applicant failed to appear. The Division of Licensing Services (“DLS”) was represented by Matthew Wolf, Esq.

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, that his application for licensure contained a material misstatement and that he failed to cooperate with the complainant’s investigation.

FINDINGS OF FACT

1) The respondent was registered as a real estate salesperson whose license expired on April 14, 2018. The respondent has not renewed his license (State’s Ex. 2).

2) Notice of Hearing together with a copy of the Complaint were served by certified and regular mail to the registered address of the respondent on April 3, 2018. The certified mail was returned to the DLS as “Return to Sender-Not Deliverable as Addressed”. The Post Office did not provide a forwarding address. The regular mail was not returned to the DLS by the Post Office (State’s Ex. 1).

3) On March 31, 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 his qualifying education was completed on or about March 28, 2016. Based upon the respondent's original submission, the DLS issued the requested license on April 15, 2016 (State's Ex.3).

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. 3).

5) By letter dated December 13, 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 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. He was also advised he could waive his right to a hearing and either provide proof of completion of the 75 hours of approved courses, or surrender his license by completing an attached Surrender Form (State's Ex. 3). 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 (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 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 were made by both certified and regular mail to the respondent's last known registered address. The certified mail was returned to the DLS as "Return to Sender-Not Deliverable as Addressed" with no forwarding address for the respondent. The regular mail was 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- 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.

III- 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).

IV- 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.

V- 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)). RPL §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 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 respondent claimed that he had completed his qualifying education on March 28, 2016, which the DLS relied upon in issuing the license on April 15, 2016. The respondent's license expired on April 14, 2018. Pursuant to RPL §441(2), the respondent is entitled to renew his license by submission of an application prior to April 13, 2020. As the respondent is eligible to renew his license on or before April 13, 2020, the DLS retains jurisdiction and may impose disciplinary sanctions.

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 the statute.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT, Omar Fernandez has violated RPL §§441 (1-A) (d), 442-e (5), and accordingly, pursuant to RPL §441-c, his license as a real estate salesperson, UID #10401287986, is deemed suspended, effective immediately and until such time as he produces proof satisfactory to the Department of State that prior to the submission of his original application for that license he completed the required 75 hours of real estate salesperson qualifying education. 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, 5th Floor, Albany, New York, 12231-0001.

/S/
John E. Kenny
Administrative Law Judge

Dated: August 30, 2018