

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.: C180081

-against-

MYLES MCGINLEY

Respondent.

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The above-captioned matter was scheduled for a hearing before Judge Aiesha L. Hudson on December 13, 2018 at 10:00 a.m. at 123 William St., 2nd Floor, New York, N.Y. 10038. The Respondent failed to appear at the Hearing. The Complainant was represented by Hearing presenter Nadine Azarian. This matter was subsequently assigned to the undersigned, Judge Diane T. Noshay, for Decision.

COMPLAINT

The complaint alleges that the Respondent real estate salesperson has failed to provide proof that he successfully completed the mandatory 75 hours of qualifying education prior to applying for his license, that he failed to cooperate with the Department’s investigation, and/or that he made a material misstatement on his License application, and that he has demonstrated untrustworthiness and/or incompetency.

FINDINGS OF FACT

1) The Department submitted a Notice of Hearing with Attachments showing that the Respondent was properly served with the Notice of Hearing and Complaint (State’s Exhibit 1) and the Affirmation of Marcella Rose, Senior License Examination Specialist for the Department, sworn to April 6, 2018 (State’s Exhibit 4). Ms. Rose affirmed the following facts: On October 28, 2016, the Respondent submitted an on-line application for a license as a real estate salesperson. Ms. Rose stated that agency documentation indicates that the Respondent claimed in his on-line application for the license that he had completed 75 hours of approved pre-licensure education on or about October 5, 2016 (State’s Exhibit 4). Based on the representations in his submission, the

Department issued to Respondent a real estate salesperson's license, UID# 10401295719 on October 29, 2016, under the sponsorship of CANVAS REAL ESTATE, LLC, for a term ending October 28, 2018. (State's Exhibits 2, 4).

2) Ms. Rose conducted an audit of the Respondent to verify that the Respondent had completed the educational requirements (State's Exhibit 4).

3) On February 13, 2018, the Department informed the Respondent via email (addressed to the email address supplied by the Respondent at the time of his application) that an audit had been commenced and requested proof of the 75 hours of qualifying education. The Department directed him to provide a copy of the "course completion certificate(s)" within 14 days of the email (State's Exhibit. 4).

4) On March 13, 2018, the Department sent a follow-up final notice and request for the same information via email to the same email address supplied by the Respondent and informed him that the Department was seeking the revocation of his license. Its correspondence also informed the Respondent of his right to an administrative hearing and notified him that he must respond within 10 days or face fines, suspension and/or revocation of his license (State's Exhibit 4).

5) According to Ms. Rose, the Respondent failed to respond to the Department. He did not co-operate with the Department's audit (State's Exhibit 4).

6) The Respondent's license is marked in Department records as being expired effective October 28, 2018. (State's Exhibits 2,4).

7) On November 10, 2018, the Department served upon the Respondent a Notice of Hearing together with the Complaint by certified and regular mail to Respondent's last known residence address in the records of the Department of State. According to the Verified Statement of Service, sworn to by Norma I. Rosario, neither the certified nor the regular mail was returned by the U.S. Postal Service as of December 6, 2018, the date of Commissioner Rosario's Verified Statement (State's Exhibit 1).

OPINION AND CONCLUSIONS OF LAW

I - The Department of State retains jurisdiction to hear and determine this matter even though the Respondent's license has expired. *Sachs v. New York State Racing and Wagering Board*, 1 AD3d 768, 771 (3d Dep't 2003) (agency has clear authority to suspend or revoke licenses it issued based on licensee's conduct during the term of the license), *appeal denied*, 2 NY3d 706 (2004); *Albert Mendel & Son, Inc. v. New York State Department of Agriculture and Markets*, 90 AD2d 567, 567-568 (3d Dep't 1982), *leave to appeal denied*, 58 NY2d 610 (1983); *Main Sugar of Montezuma, Inc. v Wickham*, 37 AD2d 381, 383-384 (3d Dep't 1971); *Division of Licensing Services v. Katherine (Kathy) Re, et al.*, 506 DOS 16 at 3 (2016); *Division of Licensing Services v. Thomas E. Seymour*, 490 DOS 16 at 3 (2016).

II- The DLS properly served the Respondent with a Notice of Hearing and Complaint in this matter, via certified and regular mail to the Respondent's last known address on file with the Department. Neither the regular nor the certified mail was returned. *See* 19 New York Codes, Rules, and Regulations ("NYCRR") § 400.4(b). To obtain personal jurisdiction over and bind the applicant to the agency decision, the complainant must properly serve the applicant with notice of the hearing and a copy of the complaint and afford him an opportunity to be heard. *Matter of Skolnick*, 108 AD3d 720, 723 (2d Dep't 2013) ("An elementary and fundamental requirement of due process in any proceeding which is accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections") (citing [*Mullane v. Central Hanover Bank & Trust Co.*, 339 US 306, 314 \[1950\]](#)). Service properly made in a manner reasonably calculated to provide notice of the time, date, place, 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).

Inasmuch as there is evidence that notice of the place, time, and purpose of the hearing was properly served upon the applicant at his last known address on file with the Department, the hearing was permissibly conducted in the Respondent's absence. *See generally Jacoby v. New York State Bd. for Professional Medical Misconduct*, 295 AD2d 655 (3d Dep't 2002); *Verdell v. DeBuono*, 262 AD2d 812 (3d Dep't 1999); *Patterson v. Dep't of State*, 35 AD2d 616 (3d Dep't 1970); *Roy Staley v. Division of Licensing Services*, 14 DOS APP 01 (2001); *Matter of Application of Rose Ann Weis*, 118 DOS 93 (1993).

III - As the person who initiated the hearing, the burden is on the Department to prove by "substantial evidence" that the Respondent failed to submit to the Department proof that he completed the educational requirements for the real estate salesperson's license and violated the other applicable provisions of law as alleged. State Administrative Procedure Act ("SAPA"), § 306(1); *see Matter of Kelly v. DiNapoli*, 30 NY3d 674, 684 (2018) (defining substantial evidence). Substantial evidence is that which "a reasonable mind" could "accept as adequate to support a conclusion or ultimate fact." *300 Gramatan Ave. Associates v. State Div. of Human Rights*, 45 NY2d 176, 180 (1978), *cited in Gray v. Adduci*, 73 NY2d 741, 742-743 (1988); *Tutuianu v. New York State*, 22 AD3d 503, 504 (2d Dep't 2005). "The question. . . is whether 'a conclusion or ultimate fact may be extracted reasonably -- probatively and logically.'" *City of Utica Bd. of Water Supply v. New York State Health Dep't*, 96 AD2d 719 (4th Dep't 1983), *quoting 300 Gramatan Ave. Associates, supra*, 45 NY2d at 181; *Division of Licensing Services v. Cirrincione*, 246 DOS 98 (1998).

IV - I find that the Department proved that the Respondent failed to provide proof that he successfully completed the required 75 hours of qualifying education prior to applying for his license, that he failed to cooperate with the Department's investigation, and that he has demonstrated untrustworthiness by ignoring the Department's audit. *See generally Charles F. Cefalu, et al. v. Division of Licensing Services*, 16 DOS APP 13 at 5 (2013) ("It is well-settled that the Secretary of State is vested with wide discretion in determining whether specific conduct in particular circumstances rises to the level of untrustworthy conduct, and that bad acts other than the specific violation of Real Property Law or the regulations promulgated pursuant thereto may be found to constitute a demonstration of untrustworthiness in violation of Real Property Law § 441-c" (citing *Chiaino v. Lomenzo*, 26 AD2d 469, 472 [1966]) (untrustworthiness is shown by

conduct of licensee that “would warrant a conclusion of unreliability”). I find that the Respondent’s failure to respond to the DLS communications and to co-operate with its investigation is plainly unreliable and untrustworthy conduct. *Division of Licensing Services v. Jason Garcia*, 327 DOS 11 at 3 (2011) (non-cooperation with Department’s inquiries seeking proof of mandatory education violated Real Property Law §§ 441 and 442-e[5,] and demonstrated untrustworthiness, in violation of Real Property Law § 441-c).

V – Under Real Property Law section 441(1-A) (d), the Respondent, as an applicant for a real estate salesperson’s license, was required to provide to the Department proof of having completed 75 hours of qualifying education when he initially applied for his License and he failed to do so.

VI - Pursuant to Real Property Law section 442-e (5),¹ the Respondent was required to co-operate with the Department’s investigation. By failing to respond to the Department’s emails during the audit, the Respondent violated that statute and showed himself to be untrustworthy, in violation of Real Property Law section 441-c. The Department, by its letter of November 8, 2018, advised the Respondent of his right to an administrative hearing and placed his on notice that the Department was proposing revocation of his license, yet he did not respond (State’s Exhibit 3). Nor did he respond to the subsequent Notice of Hearing and Complaint, which gave his additional notice of his rights and of the risk of revocation of his license. Revocation is appropriate here. *See generally Gise v. Shaffer*, 153 AD2d 688 (2d Dep’t 1989) (real estate salesperson’s license revoked based on untrustworthiness); *Division of Licensing Services v. Lior Sofer*, 372 DOS 11 (2011) (real estate salesperson’s license revoked for failure to provide proof of completion of 75-hour qualifying course and to respond to the Department’s requests aimed at verifying compliance with educational requirements for licensure); *Jason Garcia*, supra, 327 DOS 11 at 3 (same for renewed real estate salesperson’s license for failure to respond with proof of continuing education) (failure to respond to Department’s inquiries “demonstrates . . . lack of regard for maintaining . . . license;” this dereliction and the substantial period of licensure without meeting the statutory requirements warrant revocation); *Division of Licensing Services v. Melody R. Dekel*, 809 DOS 10 (2010) (same); *Division of Licensing Services v. Desiree C. Jacobs*, 808 DOS 10 (2010) (same).

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Myles McGinley 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 #10401295719, is deemed revoked immediately. The Respondent is directed to send, as appropriate, his license certificate, pocket card, and salesperson’s identification, to Norma Rosario, Department of State, Division of

¹ That section provides:

The Secretary of State shall have the power to enforce the provisions of this article and upon complaint of any person, or on his own initiative, to investigate any violation thereof or to investigate the business, business practices and business methods of any person, firm or corporation applying for or holding a license as a real estate broker or salesman, if in the opinion of the Secretary of State such investigation is warranted. Each such applicant or licensee shall be obliged, on request of the Secretary of State, to supply such information as may be required concerning his or its business, business practices or business methods, or proposed business practices or methods. Real Property Law § 442-e(5).

Licensing Services, One Commerce Plaza, 99 Washington Avenue, 5th Floor, Albany, New York
12231-0001.

Dated: February 14, 2019

/s/

Diane T. Noshay
Administrative Law Judge