

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.: C180038

-against-

CLEMESIA JOSEPH,

Respondent.

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The above-captioned matter was reassigned from Judge Aiesha L. Hudson to the undersigned, Joan R. Salzman, and came on for hearing before me on August 1, 2018, at the office of the Department of State (the “Department”), Office of Administrative Hearings, located at 123 William Street, New York, New York.

The respondent failed to appear.

The complainant was represented by Matthew Wolf, Esq., Senior Attorney for the Department.

COMPLAINT

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

FINDINGS OF FACT

1) The Department submitted the Affirmation of Marcella Rose, Senior License Examination Specialist for the Department, sworn to January 18, 2018 (State’s Ex. 3). Ms. Rose affirmed the following facts. On July 13, 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 her on-line application for the license that she had completed 75 hours of approved pre-licensure education on or about June 20, 2016 (State's Ex. 3). Based on the representations in her submission, the Department issued to respondent a real estate salesperson's license, UID# 10401291953, on July 24, 2016, under the sponsorship of Manhattan Residential Group until February 18, 2017, when that employment was terminated. Thereafter, from February 19, 2017, the respondent was under the sponsorship of Real Broker LLC, which terminated respondent's employment on August 3, 2017 (Certification of Whitney A. Clark, Special Deputy Secretary of State, sworn to Feb. 28, 2018, State's Ex. 2; State's Ex. 3).

2) According to Department records, the respondent was associated with two successive brokerage firms from July 24, 2016 until the termination of her last employment on August 3, 2017 (State's Ex. 2).

3) Ms. Rose conducted an audit of the respondent to verify that she had completed the educational requirements (State's Ex. 3).

4) On November 22, 2017, the Department informed the respondent via email (addressed to the email address supplied by the respondent at the time of her application) that an audit had been commenced and requested proof of the 75 hours of qualifying education. The Department directed her to provide a copy of the "course completion certificate(s)" within 14 days of the email (State's Ex. 3).

5) On December 18, 2017, 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 her that the Department was seeking the revocation of her license. Its correspondence also informed the respondent of her right to an administrative hearing and notified her that she must respond within 10 days or face fines, suspension and/or revocation of her license (State's Ex. 3).

6) According to Ms. Rose, the respondent has failed to respond to the Department. She did not co-operate with the Department's audit (State's Ex. 3).

7) The respondent's license is marked in Department records cancelled and expired as of July 23, 2018 (State's Ex. 3).

8) On April 5, 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 John Heffernan, neither the certified nor the regular mail was returned by the U.S. Postal Service as of July 18, 2018, the date of Mr. Heffernan's Verified Statement (State's Ex. 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 or her 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 her 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 she 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 she successfully completed the required 75 hours of qualifying education prior to applying for her license, that she failed to cooperate with the Department's investigation, and that she 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).

Ms. Rose explained in her Affirmation that based on information provided by the respondent, her online application was "automatically converted by the Department's licensing system into a 'Certification Preparation Report'" (State's Ex. 3). Thus, I am unable to discern exactly what the respondent stated in her application to generate the relevant entry on that agency report on Department letterhead, or to what extent agency personnel made the entry: "Sales 75HR CL-CB New York Real Estate Institute; Date Completed: 06/20/2016; Status: Approved" (State's Ex. 3). Without having been presented with the application itself or with the specific statement or representation the respondent made to the Department or with proof beyond her failure to respond to the Department, I am unable to determine whether the respondent intentionally made a material misstatement on her application, or whether she actually completed the training and failed to show it. Accordingly, I do not and need not reach the merits of the allegations of material misstatement or incompetence. *See Jason Garcia*, supra, 327 DOS 11 at 2 (2011) (due to respondent's failure to respond to Department's letter request for proof of education, "the complainant did not and reasonably could not know whether or not the respondent fulfilled her continuing education requirement and whether or not he made a false affirmation on his renewal application").

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. She has 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 herself to be untrustworthy, in violation of Real Property Law section 441-c. The Department, by its letter of December 18, 2017, advised the respondent of her right to an administrative hearing and placed her on notice that the

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).

Department was proposing revocation of her license, yet she did not respond (State's Ex. 3). Nor did she respond to the subsequent Notice of Hearing and Complaint, which gave her additional notice of her rights and of the risk of revocation of her 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 Clemesia Joseph 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 #10401291953, is deemed revoked, effective as of the date the license expired, July 23, 2018. She is directed to send, as appropriate, her license certificate, pocket card, and salesperson's identification, to Norma Rosario, Department of State, Division of Licensing Services, One Commerce Plaza, 99 Washington Avenue, 5th Floor, Albany, New York 12231-0001.

/S/
Joan R. Salzman
Administrative Law Judge

Dated: October 17, 2018