

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.:C180101

-against-

**TONI SALISBURY,**

Respondent.  
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The above noted matter came on for a video hearing before the undersigned, John Kenny, on September 20, 2018 at the office of the Department of State (“Department”) located at 99 Washington Avenue, Albany, New York and 123 William Street, New York, New York.

The respondent having been advised of her right to be represented by counsel, chose to represent herself.

The Division of Licensing Services (“DLS”) was represented by hearing presenter Nadine Azarian.

**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, made a material misstatement on her license application and that she failed to cooperate with the complainant’s investigation.

**FINDINGS OF FACT**

1) The respondent was registered as a real estate salesperson, UID #10401294374, whose license expired on September 24, 2018. The respondent was associated with Redfin Real Estate (State’s Ex. 1; State’s Ex. 2).

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2) 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 June 26, 2018 (State's Ex. 1). The respondent acknowledged receipt of the mailing.

3) On September 24, 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 July 4, 2016. Based upon the respondent's original submission, the DLS issued the requested license on September 25, 2016 (State's Ex.2).

4) By an email dated February 16, 2018, 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) By letter dated March 14, 2018, which was sent by email only, the DLS advised the respondent that she failed to comply with the February 16, 2018 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).

6) The respondent testified that she believed she had completed the qualifying education course on July 24, 2016 by taking an online course through the New York Real Estate Institute (NYREI). Upon completing the course, she testified that she took the State exam and passed. However, she acknowledged through her testimony, that she failed to take the proctored final exam due to an honest oversight on her part and that it was not her intent to provide the DLS with inaccurate information. As a result of not taking the proctored exam, she testified that she does not have the course completion certificate for the required 75 hours of qualifying education (Transcript at 15-22).

7) The respondent testified that she was going to take the proctored final exam sometime after the conclusion of the hearing. The tribunal provided her with the date of October 20, 2018 to submit the requisite proof of having completed the 75 hours of qualifying education (Transcript at 24-17). The respondent has failed to submit proof of having completed the course.

8) The DLS acknowledged at the hearing that the respondent did reply to its inquiries on February 16, 2018, March 5, 2018 and March 20, 2018 in regard to providing proof of completing the qualifying education requirement (Transcript at 22).

## 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 (4<sup>th</sup> 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 was made by certified and regular mail addressed to the respondent at her last known address as appearing in the records of the DLS. The certified and regular mail were 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- The Department of State retains jurisdiction to conduct this proceeding even though the respondents' license has expired; her misconduct occurred while she was licensed. *Albert Mendel & Sons, Inc. v. NYS Department of Agriculture and Markets*, 90 AD2d 567, 455 NYS2d 867 (3<sup>rd</sup> Dept. 1982); *Maine Sugar of Montezuma, Inc. v. Wickham*, 37 AD2d 381, 325 NYS2d 858 (3<sup>rd</sup> Dept. 1971).

III- 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 (2<sup>nd</sup> 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.

IV- 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 has not provided such proof and, therefore has violated RPL §441(1-A) (d).

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V- 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 her application for licensure. While the respondent provided the DLS with insufficient proof of compliance with her qualifying education requirement, there is no proof that she did so with the intent to deceive the DLS. Accordingly, this charge is dismissed.

VI- Pursuant to RPL §442-e (5), a real estate salesperson is obligated to cooperate with the complainant's investigation. In this case, the respondent did reply to the inquiries made by the DLS. Accordingly, this charge is dismissed.

### **DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Toni Salisbury has violated Real Property Law §§441 (1-A) (d), and accordingly, pursuant to Real Property Law §441-c, her license as a real estate salesperson, UID #10401294374, is deemed revoked, effective as of the date that the license expired, September 24, 2018. She is directed to send, as appropriate, her 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, 5<sup>th</sup> Floor, Albany, New York, 12231-0001

/s/

John E. Kenny  
Administrative Law Judge

Dated: November 20, 2018