

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

-against-

EMMANUEL BAILLE

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on December 14, 1998 and February 18, 1999 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent was present on December 14, 1998 without his attorney, James Tinajaro, Esq., 214-47 Jamaica Avenue, Queens Village, New York 11428. He stated that he had called Mr. Tinajaro and that Mr. Tinajaro had told him that he was on his way. However, when Mr. Tinajaro had not arrived by 11:02 A.M. for the hearing which had been calendared for 10:30 A.M. the matter was opened in his absence. Mr Tinajaro arrived sometime after the 11:38 A.M. closing of the day's proceedings. Neither the respondent nor Mr. Tinajaro was present on February 18, 1999.

The complainant was represented by Associate Litigation Counsel Scott NeJame, Esq.

COMPLAINT

The complaint alleges that the respondent, a notary public, notarized a power of attorney although the signatory did not appear before him, failed to specify the day on which he notarized the document, and improperly charged \$4.00 for the notarization.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint, was served on the respondent by certified mail delivered on December 3, 1998 (State's Ex. 1), and notices of continuation to February 18, 1999 were sent to him, at the address at which the

notice of hearing was served, and to Mr. Tinajaro, at the address provided to the tribunal by the respondent, by regular first-class mail posted on December 14, 1998 and were not returned by the Postal Service (State's Ex. 9).

2) The respondent is, and at all times hereinafter mentioned was, a duly commissioned notary public (State's Ex. 4).

3) In or about February, 1998 Mamie Childs, an elderly woman who suffers from severe Alzheimer's disease accompanied by dementia (State's Ex. 6), executed a durable power of attorney naming her son, Jessie E. Childs, her attorney in fact. Mr. Childs, unaccompanied by his mother, then took the document to the respondent, who notarized it, indicating that Ms. Childs had appeared before him and had acknowledged her signature. No where on the document is there any indication of the day of its execution or notarization (State's Ex. 4).

Mr. Childs does not recall how much the respondent charged for officiating, and did not receive a receipt.

4) Mr. Childs submitted the power of attorney to European American Bank, which then permitted him to withdraw the \$1,454.79 balance of an account belonging to Ms. Childs and her daughter, Anna Dumpson (State's Ex. 3). Ms. Dumpson was not aware of the withdrawal until notified of it by the bank. Mr. Childs has since paid back \$600.00 to Ms. Dumpson.

OPINION AND CONCLUSIONS OF LAW

I- Proceeding ex parte on the second day of the hearing was permissible, inasmuch as there is a presumption that the notices of continuation were delivered by the Postal Service and, therefore, evidence that notice of the place, time and purpose of the hearing was properly served. *Patterson v Department of State*, 36 AD2d 616, 312 NYS2d 300 (1970); *Matter of the Application of Rose Ann Weis*, 118 DOS 93.

II- Regardless of his intent, a notary public acts unlawfully when he notarizes a document without the purported signatory being present. *Division of Licensing Services v Caputo*, 37 DOS 95. The notary's "failure accurately to state the fact is not consistent with the strict obligation imposed upon a notary public." *People v Reiter*, 273 NY 348, 350 (1937).

The respondent notarized a power of attorney without the signatory being present. That enabled the document to be used to make an unauthorized withdrawal from a bank account. The respondent's misconduct was contrary to the fundamental function of notaries public: the authentication of documents, *Division of*

Licensing Services v Erdheim, 80 DOS 94, and warrants imposition of the strongest possible penalty.

III- The respondent failed to indicate in his certificate of acknowledgement the date of the notarization. Pursuant to General Obligations Law §5-1401, the form of the certificate of acknowledgement used on a durable power of attorney must be that prescribed by the Real Property Law (RPL). RPL §309 sets forth the form to be used in acknowledgements by corporations, and RPL §307 relates to acknowledgements taken by commissioners of deeds. In both cases the certificate of acknowledgement is required to contain the date that the acknowledgement was taken. However, RPL §306, the provision which governs acknowledgements by individuals certified to by notaries public makes no reference to including the date. Accordingly, the charge that the respondent failed to specify the day on which he notarized the document must be, and is, dismissed.

IV- The complaint alleges that the respondent overcharged for the notarization. However, because Mr. Childs did not have a receipt and could not remember how much the respondent charged for officiating, that charge must be dismissed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Emmanuel Baille engaged in an act of misconduct as a notary public, and accordingly, pursuant to Executive Law §130, his commission as a notary public is revoked, effective immediately. He is directed to send his pocket card to Usha Barat, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier
Administrative Law Judge

Dated: February 22, 1999