

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-

DWAYNE T. KIRKLAND,

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on June 13, 2000 at the office of the Department of State located at 123 William Street, New York, New York.

The respondent did not appear.

The complainant was represented by Litigation Counsel Laurence Soronen, Esq.

COMPLAINT

The complaint alleges that the respondent, a licensed private investigator, failed to refund an unearned fee and failed to cooperate with a Department of State investigation.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served by certified and regular first class mail posted to the respondent at his last known business address on May 18, 2000 (State's Ex. 1 and 2). Neither the certified mail receipt nor either of the mailings was returned by the Postal Service.

2) The respondent is duly licensed as qualifying officer of D T KS Quality Protection Services, 134-37 166th Place, Suite 9C, Jamaica, New York 11434.

2) On February 6, 1999 the respondent entered into a contract with Juanita Longs Johnson pursuant to which he agreed to obtain for her a photograph of another person in return for a payment of

\$500.00 given to him at that time. In spite of several subsequent inquiries by Ms. Johnson the respondent neither provided her with the promised photograph nor refunded her money (State's Ex. 3, 4, and 5).

3) On August 13, 1999 License Investigator Ernest Delaney wrote to the respondent requesting that he be provided with a written statement by the respondent regarding the transaction along with copies of all related documents (State's Ex. 6). The respondent did not reply to that letter.

4) On October 12, November 4, and November 17, 1999 License Investigator Jack M. Bilello wrote to the respondent by both certified and regular first class mail, requesting that the respondent appear at the investigator's office to discuss Ms. Johnson's complaint at stated times. The certified mailings were all returned by the Postal Service marked "Unclaimed" (State's Ex. 6), and the respondent did not reply to the uncertified mailings.

5) On January 19, 2000 Investigator Bilello sent another letter to the respondent, requesting that he appear for a discussion of the Johnson complaint on January 25, 2000 at 2:00 PM. That letter was accepted by the respondent on January 21, 2000 (State's Ex. 6). However, on January 25, 2000 an employee of the respondent telephoned the investigator and asked that the meeting be rescheduled.

The meeting was rescheduled for January 27, 2000, but on that date the respondent's employee telephoned the investigator again, stating that she had mistakenly told the respondent that the meeting would be on February 3, 2000. She was told to have the respondent telephone to reschedule.

On January 28, 2000, the respondent not having telephoned, Investigator Bilello left a message on the respondent's answering machine rescheduling the meeting to January 31, 2000. However, on January 31, 2000 the respondent telefaxed to the investigator a message in which he stated "I can't make the meeting. I would just like to pay if that would be okay. I have a case that I need to do right away, and don't have the time to come down to your office. Even though I don't owe the money I will pay it" (State's Ex. 7).

On February 1, 2000 Investigator Bilello left another message for the respondent, calling for a meeting on February 7, 2000. The respondent did not respond to that message and has not made a refund, and there has been no further contact between him and Investigator Bilello.

OPINION AND CONCLUSIONS OF LAW

I- The holding of an ex parte quasi-judicial administrative hearing was permissible, inasmuch as there is evidence that notice of the place, time and purpose of the hearing was properly served. General Business Law (GBL) §79[2]; *Patterson v Department of State*, 36 AD2d 616, 312 NYS2d 300 (1970); *Matter of the Application of Rose Ann Weis*, 118 DOS 93.

II- The respondent was retained by Ms. Johnson to obtain a photograph for her, and accepted an advance payment of \$500.00 for those services. In spite of repeated attempts by Ms. Johnson to obtain that photograph, the respondent has failed to fulfill the terms of his contract but has retained the \$500.00. In so doing he has demonstrated untrustworthiness.

III- Where a licensee has received money to which he is not entitled, he may be required to return it, together with interest, as a condition of retention of his license. *cf. Donati v Shaffer*, 83 NY2d 828, 611 NYS2d 495 (1994); *Kostika v Cuomo*, 41 N.Y.2d 673, 394 N.Y.S.2d 862 (1977); *Zelik v Secretary of State*, 168 AD2d 215, 562 NYS2d 101 (1990); *Edelstein v Department of State*, 16 A.D.2d 764, 227 N.Y.S.2d 987 (1962).

IV- Pursuant to GBL §73[1] a licensed private investigator is required to cooperate with investigations conducted by the complainant, and failure to comply with a lawful request made during such an investigation is grounds for the imposition of disciplinary sanctions against the licensee. In ignoring and/or failing to respond to most of the complainant's investigators' letters and telephone calls, and in failing to meet with Investigator Bilello, the respondent violated that statute.

V- In setting the penalty to be imposed for the respondent's above two violations, I have taken into consideration the fact that by order dated February 9, 2000 (52 DOS 00) the respondent's license was suspended because of his failure to comply with a plea of *nolo contendere* entered by him on December 20, 1999, such suspension to be in effect until such time as he made several payments to former clients and assisted Investigator Bilello in locating property provided to the respondent by a former client.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Dwayne T. Kirkland has violated General Business Law §73[1] and has demonstrated untrustworthiness, and accordingly, pursuant to General Business Law §79, the respondent shall pay a fine of \$2000.00 (\$1,000.00 per violation) to the Department of State on or before June 30, 2000, and should he fail to pay the fine by that date his license as a Private Investigator shall be suspended until such time as such

payment has been made. Effective July 1, 2000 the respondent's license as a Private Investigator shall be further suspended until he shall have produced proof satisfactory to the Department of State that he has refunded the sum of \$500.00 plus interest from February 6, 1999 at the legal rate for judgements (currently 9% per year) to Juanita Longs Johnson. The respondent is directed to send a certified check or money for the fine payable to "Secretary of State" and proof of having made the refund, or his license certificate and 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: June 15, 2000