

STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Complaint of

**DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,**

Complainant,

DECISION

-against-

J. PATRICK WAGNER,

Respondent.

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Pursuant to the designation duly made by the Hon. Gail S. Shaffer, Secretary of State, the above noted matter came on for hearing before the undersigned, Roger Schneier, on July 7, 1993 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent, of 166-16 14th Road, Beechhurst, New York 11357, was represented by Ronald M. Larocca, Esq., DiConza, Larocca & DiCunto, 478 Bay Ridge Parkway, Brooklyn, New York 11209.

The complainant was represented by Supervising License Investigator Michael Coyne.

COMPLAINT

The complaint in the matter alleges that the respondent, a certified real estate appraiser, does not meet the qualifications for such certification, and that, therefore, his certification should be revoked.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail (Comp. Ex. 1).

2) By application dated April 8, 1992, received by the complainant on April 21, 1992, the respondent applied for certification as a residential real estate appraiser (Comp. Ex. 2). He supported that application with a claim of twenty five years of real estate appraisal experience and of having completed sufficient appraisals and review appraisals to earn a total of 3571 appraisal points in accordance with the system established by 19 NYCRR 1102.3. In response to the inquiry as to his employment during the previous five years, he listed the following:

1978-79. Real estate appraiser. United States Department of Housing and Urban Development (HUD).

1980-83. Vice president, with duties involving real estate appraising and loan workouts. Flushing Savings Bank.

1983-86. Senior real estate officer, responsible for appraising, lending and supervising. Community National Bank and Trust of New York.

1986-87. Regional vice president, responsible for supervision of appraising and lending. Home Savings of America.

1987-92. Senior Loan Officer and Chief Appraiser, First City National Bank.

At the time that the respondent applied for the certification the complainant, acting in accordance with the directions of the State Board of Real Estate Appraisal, did not require that applicant's submit documentation of claimed experience along with their applications. It did, however, pursuant to 19 NYCRR 1102.2[d], reserve the right to demand the production of such documentation after certification. Such a demand was made on the respondent, who was unable to produce the required documentation.

By letter dated December 4, 1992 the respondent was advised by the complainant he had failed to substantiate his claimed experience, was directed to surrender his certification, and was advised that failure to surrender the certification would result in disciplinary action. By letter dated December 14, 1992 the respondent replied with a discussion of his claimed experience and explained why documentation was not available. The institution of these proceedings by the complainant ensued.

3) At the hearing the respondent produced the following documentation:

a) Eight appraisal memoranda prepared by the respondent during the period of 1988-92, regarding: a proposed twenty four unit condominium apartment building; a shopping center (an appraisal and a reappraisal one year later); a seventeen unit apartment building; a multi-unit office building; a factory; a two building complex containing thirty six apartments and an office suite; a combined industrial and office building; and a two building complex containing fifteen apartments (Resp. Ex. A).

b) Ten review appraisals prepared by the respondent during the period of 1990-92. The underlying appraisals are not attached (Resp. Ex. B).

c) Six appraisals prepared by the respondent in 1991 and 1992 on behalf of Real Estate Appraisal Corporation of America (REAC), of which he is chairman of the board and chief

executive officer, all regarding single family residences (Resp. Ex. C).

d) Stationary and promotional materials for REAC (Resp. Ex. D).

e) A letter from the current Chief Appraiser at HUD, stating that the respondent was employed by HUD as a "multifamily appraiser" during the period of 1976-77, and that records from that period are not available, having been destroyed in the regular course of business (Resp. Ex. E).

OPINION

I- The certification of real estate appraisers is governed by Executive Law Article 6-E.

Executive Law §160-k[3] states:

"Each applicant for certification or license shall furnish under oath a detailed listing of the real estate appraisal reports for each year for which experience is claimed by the applicant. Upon request, the applicant shall make available to the department (of state) for examination, a sample of appraisal reports which the applicant has prepared in the course of his or her appraisal practice."

Apparently, the complainant considers the appraisal experience report, on which an applicant claims appraisal points, and which is part of the application for certification, as meeting the requirement to furnish a detailed listing of appraisal reports. There is no claim, therefore, that the respondent has not complied with that requirement.

19 NYCRR 1102.2, promulgated in accordance with the direction to adopt rules and regulations (Executive Law §160-d[1]), states:

"Upon request by the Department of State, either prior to certification or after certification, an applicant must provide documentation or other proof, satisfactory to the Department of State, to substantiate any or all of the experience claimed by the applicant."

The Legislature has explicitly stated, in Executive Law §160-k[3], that the complainant can request from applicants a sample of appraisal reports. While the statute does not state how large that sample should be, it clearly does not contemplate a requirement that applicants produce all of the reports underlying their claimed experience.

"(A)n administrative officer has no power to declare through administrative fiat that which was never contemplated or delegated by the Legislature. An agency cannot by its regulations effect its

vision societal policy choices, and may adopt only rules and regulations which are in harmony with the statutory responsibilities it has been given to administer". Campagna v Shaffer, 73 NY2d 237, 538 NYS2d 933, 935 (1989, citations omitted).

Therefore, any interpretation of 19 NYCRR 1102.2 as authorizing the complainant to require applicants to produce copies of appraisal reports for all of the experience claimed by them would be an attempt to exercise power in excess of that granted by the Legislature. However, since the term "documentation" contained in the regulation need not be limited to copies of actual appraisal reports, and can be read more expansively to include such things as affidavits, detailed descriptions of transactions, and the testimony of persons who have seen such reports, the regulation is not invalid on its face.

II- Pursuant to 19 NYCRR 1102.1, applicants for certification as appraisers may receive credit only for experience gained within the five years prior to the submission of their applications. Therefore, only that experience obtained by the respondent in the five years preceding April 21, 1992, or from April 22, 1987 to April 21, 1992, may be considered in determining whether he has established his entitlement to such certification, and all evidence offered with regards to the respondent's alleged employment by HUD, or by any other employer prior to those dates, is irrelevant.

The eight appraisal memoranda produced by the respondent (Resp. Ex. A) establish that during the period of 1988-92 the respondent did conduct some appraisals. Using the system established by 19 NYCRR 1102.3, the respondent is entitled to 80 of the 240 experience points required by 19 NYCRR 11.02.2[b].

Normally, the respondent would be entitled to credit for the ten review appraisals which he produced (Resp. Ex. B). However, since he failed to attach the underlying appraisals, it is impossible to determine the validity of the reviews, and, therefore, to grant any experience points.

Finally, for the six single family residential appraisals (Resp. Ex. C), the respondent is entitled 6 experience points, bringing his total to 86. Obviously, no credit can be granted on the basis of the REAC stationary, etc., as those materials do not have any probative value with regards to the question of whether the respondent has performed appraisals.

In view of the foregoing, it is obvious that the respondent has engaged in some appraisal work during the last five years. However, although he did produce an affidavit and subsequent unsworn letter regarding his employment with Home Savings of America, which employment at least partially predates the five year period and for which he has given no specific termination date showing that the employment continued within that five year period, and for which, therefore, he cannot be granted credit, he failed to produce any such evidence from his employer during that five year period, a failure which I find significant.

Neither did he produce any kind of a list of appraisals conducted during the relevant period from which it could be determined if his experience point calculations are accurate.

CONCLUSIONS OF LAW

The respondent has failed to provide satisfactory documentation or other proof, as required by 19 NYCRR 1102.2[d], that he has acquired the required experience to qualify for certification as an appraiser pursuant to Executive Law §160-k and 19 NYCRR 1102.1 and 1102.3. It is concluded, therefore, that he has not met the prerequisite qualifications for certification as a real estate appraiser.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT J. Patrick Wagner has failed to meet the minimum qualifications for certification as an appraiser, and accordingly, pursuant to Executive Law §160-u[b], his certification as an appraiser is revoked, effective immediately.

These are my findings of fact together with my opinion and conclusions of law. I recommend the approval of this determination.

Roger Schneier
Administrative Law Judge

Concur and So Ordered on:

GAIL S. SHAFFER
Secretary of State
By:

James N. Baldwin
Executive Deputy Secretary of State