

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-

PAUL ENSER,

Respondent.

-----X

The above noted matter came on for hearing before the undersigned, Roger Schneier, on March 26 and April 29, 1997 at the New York State Office Building located at 65 Court Street, Buffalo, New York. The parties' post-hearing briefs were submitted to the tribunal on July 31 and October 7, 1997.

The respondent, of Appraisal Associates of WNY Great Lakes Division, 67 Foxmeadow Lane, Orchard Park, New York 14127, was represented by John R. Kresse, Esq., Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, 42 Delaware Avenue, Suite 300, Buffalo, New York 14202-3901.

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

COMPLAINT

The complaint alleges that from approximately 1987 to 1989 the respondent, a certified residential real estate appraiser worked as an independent appraiser for Charles S. Vacanti of Charles S. Vacanti Real Estate Appraisals (hereinafter "Vacanti Appraisals"), and that without Mr. Vancanti's knowledge, consent or authorization the respondent: Filed a change of address for Vacanti Appraisals with the Postal Service, and notified Mr. Vacanti's customers of such change to the respondent's home address; removed computers, office equipment and various records from the office of Vacanti Appraisals and took them to his home; and applied for and obtained a bank line of credit using the name of Vacanti Appraisals.

The complaint further alleges: That a fraudulent business certificate containing the purported signature of the respondent's

wife as the successor in interest to Vacanti Appraisals was filed without the permission of Mr. Vacanti; that on March 28, 1990 the respondent forged Mr. Vacanti's signature on an appraisal and cover letter; that the respondent executed and forwarded to a client an appraisal which listed a nonexistent property as a comparable; that in response to a complaint that he had forged Mr. Vacanti's signature on a HUD form and that he had forged a business certificate, on August 22, 1990 the respondent pled guilty to Forgery in the 3rd degree; that due to the respondent's failure to pay a number of bills Mr. Vacanti obtained a small claims judgement against the respondent, which judgement remains unpaid; that on the applicant's application for certification as an appraiser he failed to disclose the Forgery conviction; and that by reason of the foregoing the respondent has violated Executive Law §§160-u[a], [d],[e],[f],[g], and [h].

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail delivered on September 23, 1996 (State's Ex. 1).

2) The respondent is, and at all times since August 30, 1993 has been, duly certified as a residential real estate appraiser (State's Ex. 2).

3) Sometime in 1987 Charles S. Vacanti entered into an oral agreement with the respondent pursuant to which the respondent undertook to conduct appraisals for Vacanti Appraisals on a fee per appraisal basis.

Mr. Vacanti was subsequently diagnosed as having leukemia and then, as a result of the disease, suffered a broken back, which resulted in his seeking a buyer for the business. He spoke with the respondent, and the respondent expressed interest in the possibility of buying Vacanti Appraisals.

Mr. Vacanti and the respondent had a number of discussions. Various ideas as to how to structure the sale were discussed, but no final agreement was reached and no contract of sale was signed, although Mr. Vacanti had told the respondent that he should have his lawyer draw up a contract (which the respondent never did). However, in the summer of 1988 it was agreed that in anticipation of a final agreement the respondent would take over the operation of the business, which, pursuant to Mr. Vacanti's insistence, was to continue operating at its then current location.

It was agreed that the respondent would retain any payments received by Vacanti Appraisals, would pay all the expenses of operating the business, and would pay Mr. Vacanti \$1,000 per month

to be credited against the purchase of the business by him once a formal agreement was concluded.

The respondent began to operate the business, but soon found that the cash flow was insufficient for him to continue making the monthly payments of \$1,000. Accordingly, Mr. Vacanti, who was under treatment for his illness, agreed to a reduction in those payments.

Sometime in early 1990 Mr. Vancanti was in the local branch of Key Bank. One of the bank employees made mention of a loan application which she said he had pending. Mr. Vacanti questioned this, as he had made no such application, and in the course of the ensuing discussion he was shown a certificate of conducting business under an assumed name (hereinafter "d/b/a"), which had been submitted in connection with loan application.

The d/b/a stated that Barbara Enser, the respondent's wife, who had made the loan application purportedly on behalf of Vacanti Appraisals, was the successor in interest to Mr. Vacanti in the operation of Vacanti Appraisals. It bore the purported notarization of Commissioner of Deeds Stanley J. Nowak (State's Ex. 5). That notarization had, however, been forged by the respondent (State's Ex. 14 and 15).

Sometime thereafter Mr. Vacanti discovered that the respondent had moved Vacanti Appraisals to his own home without Mr. Vacanti's permission. In doing that the respondent had taken a typewriter, a computer and computer program and file disks, a computer printer, and a copier, and had notified Vacanti Appraisals' clients and the Postal Service of the change of address (State's Ex. 6 and 7).

Mr. Vacanti confronted the respondent about the unauthorized move. Eventually, with the assistance of attorneys, it was agreed in writing that their business relationship would be dissolved and, among other things: The respondent would return the above noted equipment; the respondent and Mr. Vacanti would each keep the appraisals completed by them (Mr. Vacanti had been performing appraisals for the respondent on a fee per appraisal basis); monies in two accounts at Key Bank would be turned over to the respondent and his wife, who would assume responsibility for the outstanding loan; out of \$1,625.00 due Vacanti Appraisals from Empire of America Mr. Vacanti would receive \$1,200.00, \$391.98 would be applied to a telephone bill, and \$38.14 would be applied to a photocopy bill; all payments received for appraisals completed prior to March 31, 1990 would be remitted to the respondent; and the respondent would be liable for bills and expenses incurred through and including March 31, 1990 with the exception of the above noted bills (State's Ex. 6)

The respondent failed to pay all of the bills for which he was responsible and, after due demand was made by Mr. Vacanti's attorney, Mr. Vacanti sued the respondent in Justice Court of the Town of Orchard Park. On December 18, 1990 Mr. Vacanti was granted a judgement for \$427.25 plus court costs of \$4.25, or a total of \$431.50 (State's Ex. 10). That judgement has not been satisfied, and the respondent has stated that he will not satisfy it.¹

4) On June 19, 1990 the respondent submitted to Avco Financial Services an appraisal of 590 E. Amherst, Buffalo, New York. The appraisal listed three purportedly comparable properties, one of which, 261 Berkshire, Buffalo, New York, did not exist (State's Ex. 8). The respondent included that phantom property on the appraisal solely on information he claims he received from a real estate broker, and took no steps to confirm the truth or accuracy of the data which he inserted in the appraisal form.

5) On August 22, 1990, County Court, County of Erie, the respondent pled guilty to a charge of Forgery in the 3rd degree, Penal Law §170.05, a misdemeanor, in satisfaction of a Superior Court Information charging him with two counts Forgery in the 2nd degree. The charges arose out of the forged d/b/a and an allegedly forged HUD form. The plea related to the d/b/a only (State's Ex. 13-17).

6) By application dated June 15, 1993 the applicant applied for certification as a real estate appraiser. In that application, in response to the question "(h)ave you ever been convicted of any criminal offense (other than a minor traffic offense)?", he disclosed that he had previously been convicted of Grand Larceny in the 4th degree on April 20, 1989. He did not, however, disclose the Forgery conviction (State's Ex. 11).

7) On March 28, 1990 an appraisal bearing the purported signature of Mr. Vacanti was submitted by Vacanti Appraisals to Empire of America Realty Credit Corp. (State's Ex. 3). Mr. Vacanti did not, in fact, sign that appraisal, but it is not clear from the evidence who did.

OPINION

¹ In response to questions by his attorney about the judgement, the respondent testified: "Well, with respect to the bills that occurred prior to March 31st, 1990, and totalling four hundred twenty-seven dollars -- I'm sorry, four hundred thirty-one dollars and fifty-one cents, I never intended to pay him" (transcript, p. 311, lines 5-10), and "Mr. Vacanti will never ever receive this four hundred and twenty-seven dollars and fifty cents from me" (transcript, p. 311, lines 22-24).

Pursuant to Executive Law §160-u, the rights of the holder under a state certificate as a certified real estate appraiser may be revoked or suspended for, among other things: Procuring a certificate by making a false statement or by submitting false information (§160-u[a]); conviction of a criminal offense which is substantially related to the qualifications, functions and duties of a person developing real estate appraisals and communicating real estate appraisals to others (§160-u[d]); an act or omission involving dishonesty, fraud or misrepresentation with the intent to substantially benefit the certificate holder (§160-u[e]); violation of any of the standards for the development or communication of real estate appraisals as provided in Executive Law Article 6-E (§160-u[f]); failure without good cause to exercise reasonable diligence in developing an appraisal, preparing an appraisal report, or communicating an appraisal (§160-u[g]; and negligence or incompetence in developing an appraisal, preparing an appraisal report, or communicating an appraisal (§160-u[h]. Through his conduct the respondent engaged in conduct proscribed by each of those sections other than §160-u[f]:

§160-u[a]. The respondent failed to disclose the forgery conviction on his application. His explanation, that the crime was not substantially related to the certification, is unconvincing. The application does not ask about related convictions, it asks "(h)ave you ever been convicted of any criminal offense (other than a minor traffic offense)?" (emphasis supplied). Further, the respondent strains the tribunal's credulity when he contends that he reasonably concluded that the conviction for larceny which was disclosed is more closely related to certification as a real estate appraiser than a conviction for forgery arising out of the operation of an appraisal business. That is particularly so as, when he was sentenced on the forgery conviction, the judge told the respondent "to impress upon you, particularly in the field that you are in, that one does not lightly place other people's names on legal documents, knowing that people will rely upon them to their -- to their detriment, therefore, a sanction must attend" (State's Ex. 17, p.9, lines 15-21);

§160-u[d]. The respondent was convicted of forgery, a crime of fundamental dishonesty. The document which was forged was used to obtain a line of credit from a bank for the operation of an appraisal business. As a real estate appraiser the respondent is hired to prepare reports upon which lenders rely when they advance substantial mortgage loans. Thus, there is a clear relationship between the conviction and the functions and duties of a real estate appraiser.

§160-u[e]. Without having the right to do so, the respondent relocated Vacanti Appraisals, a business which he did own and was, in essence, renting from Mr. Vacanti, and which, considering his failure to have a written agreement prepared, he could not have

reasonably believed he owned. He wrongfully notified clients of Vacanti Appraisals of the move, had the Postal Service redirect the mail, and appropriated property not belonging to him. In so doing he engaged in acts of extreme dishonesty. In addition, the respondent has refused to satisfy a lawfully obtained judgement. Inasmuch as that judgement is based on the respondent's failure to live up to his promise to pay certain bills arising out of the operation of Vacanti Appraisals (a promise which the respondent testified he never intended to keep), his refusal to satisfy the judgement is a further act involving dishonesty. Cf. *Department of State v Feldman*, 113 DOS 80, aff'd. *sub nom Feldman v Department of State*, 81 AD2d 558, 440 NYS2d 541 (1981).

§160-u[f]. Pursuant to this provision, certification as an appraiser may be revoked or suspended for violation of any of the standards for the development or communication of real estate appraisals as provided for in Executive Law Article 6-E. Executive Law §160-d[3] provides that the Board of Real Estate Appraisal shall establish those standards. While the statute establishes minimum criteria for such standards, they were not promulgated until November 4, 1991 (19 NYCRR 1106.2), which postdates the appraisal which the complainant contends did not comply with the standards. Obviously, the respondent cannot be penalized for violating standards which did not exist at the time of the alleged violation.

§160-u[g] and [h]. The respondent prepared an appraisal report in which he listed a non-existent comparable property. In doing that he claims to have relied on information received from a real estate broker. However, he failed to take any steps to confirm the reliability of the information purportedly received from the broker. He did not visit the property, and did not check any government or other records. That was both a failure without good cause to exercise reasonable diligence and an act of negligence.²

² Most of the improper acts (other than the false statement on his application and the refusal to satisfy the judgement) of which the respondent is guilty were engaged in prior to the effective date of Executive Law Article 6-E (January 1, 1991). That does not mean, however, that his certification may not be revoked because of those acts. Pursuant to Executive Law §160-p, an application for certification may be denied on the grounds that the applicant engaged in conduct proscribed by Executive Law §160-u. It would be illogical to conclude that if the Department of State was unaware of conduct which would have served as a basis to deny an application it may not, upon learning of such conduct, premise the revocation of the certification thereon. To say that the respondent's certification may not be revoked because his dishonest
(continued...)

It is obvious from the record that the respondent finds it difficult, if not impossible, to conduct his professional life in a honest and law abiding manner. Within a year of his conviction for grand larceny he forged the notarization on a certificate of doing business. He took over the operation of Vacanti Appraisals with the explicit condition that it remain at its original location, and then relocated it, and Mr. Vancanti's equipment, to his own home, in the process notifying the Postal Service and the firm's customers of the move. He agreed to pay certain bills, but did not intend to abide by that agreement, and he now refuses to satisfy a judgement obtained when he didn't pay the bills. When that is considered along with the fact that in 1987, facing numerous charges of misconduct, including escrow violations and other acts of dishonesty, the respondent surrendered his license as a real estate broker with prejudice, the inescapable conclusion is that the misconduct of which he has been found liable mandates the revocation of his certification as an appraiser.

CONCLUSIONS OF LAW

1) The respondent engaged in conduct proscribed by Executive Law §§160-u[a], 160-u[d], 160-u[e], 160-u[g], and 160-u[h].

2) The respondent did not violate Executive Law §160-u[f].

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Paul Enser has engaged in conduct proscribed by Executive Law §§160-u[a], 160-u[d], 160-u[e], 160-u[g], and 160-u[h], and accordingly, pursuant to Executive Law §160-u[1], his certification as a residential real estate appraiser is revoked, effective immediately. He is directed to immediately send his certificate and pocket card to Diane Ramundo, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier
Administrative Law Judge

Dated: October 22, 1997

²(...continued)
acts occurred prior to the effective date of the statute would be to undermine one of the obvious intents of the statute: to protect the consumers of the services of real estate appraisers from dishonesty and incompetence.