

STATE OF NEW YORK  
DEPARTMENT OF STATE  
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Application of

**DANIEL KING**

**DECISION**

For a License as a Real Estate Appraiser  
Assistant

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on July 14 and September 29, 1998 at the office of the Department of State located at 270 Broadway, New York, New York.

The applicant was not present on July 14th, and, in light of his failure to appear, a decision holding that he was deemed to have withdrawn his request for a hearing was issued on July 15, 1998 (201 DOS 98). He subsequently contacted the tribunal, stated that he had been unaware of the adjourned date of the hearing, and requested that the matter be re-opened. He appeared on September 29th and, having been advised of his right to be represented by an attorney, chose to represent himself.

The Division of Licensing Services (hereinafter "DLS") was represented by License Investigator III Richard Drew.

**ISSUE**

The issue before the tribunal is whether the applicant should be denied a license as a real estate appraiser assistant because of prior criminal convictions.

**FINDINGS OF FACT**

By application dated on November 23, 1997 the applicant applied for a license as a "real estate appraiser assistant" (State's Ex. 6). I take official notice that such licenses, although not provided for in the governing statute and regulations, are issued by DLS to persons who have fulfilled the education requirements, but not the experience requirements, for an appraiser's license.

2) The applicant has the following record of criminal convictions:

12/14/83-Attempted Robbery in the 2nd degree (State's Ex. 2 and 3);

12/22/92-Conspiracy to Commit Murder (New Jersey)(State's Ex. 4 and 7).

3) The applicant was approximately 29 years old at the time of the commission of the most recent crime, which occurred when he conspired with an undercover investigator in an attempt to have another person murdered as a favor to a friend.

4) Since his last conviction the applicant has worked in the construction industry. For some period before that conviction, but after the first conviction, he was licensed as a real estate salesperson.

5) By letter dated February 3, 1998 the applicant was advised by DLS that it proposed to deny his application because of the convictions, and that he could request an administrative review, which he did on February 23, 1998. By letter dated March 12, 1998 he was advised by DLS that after review it continued to propose to deny his application, and that he could request a hearing, which he did by a letter postmarked April 4, 1998. Accordingly, the matter having been referred to the tribunal on May 15, 1998, notice of hearing was served on the applicant by certified mail delivered to him on May 29, 1998 (State's Ex. 1). The matter was subsequently adjourned at the applicant's request and, as noted above, was subsequently re-opened at his request after his default.

#### **OPINION AND CONCLUSIONS OF LAW**

The application which is before this tribunal was purportedly submitted pursuant to Executive Law Article 6-E. That statute provides for the issuance of licenses and certifications as real estate appraisers to persons who have fulfilled certain stated requirements. Included in those requirements is that the applicant shall have obtained a certain level of experience in conducting real estate appraisals (Executive Law §160-k).

DLS, without the support of any statute or duly enacted regulation, and, therefore, without any readily available criteria, has created something which it calls a "real estate appraiser assistant license." Thus, this tribunal is confronted with the question of whether it can or should direct DLS to grant or deny a license which has no apparent legal existence.

Before this tribunal can determine whether DLS acted reasonably in proposing to deny the application, it must first find that DLS had the authority to act on that application. *Mancini v McLaughlin*, 54 NY2d 860, 444 NYS2d 901 (1981). "It is axiomatic that an administrative agency may not by its rules expand the grant

of authority from the Legislature, but must function within its mandate." *Freitas v Geddes Sav. & Loan*, 63 NY2d 254, 264 (1984). "Administrative agencies can only promulgate rules to further the implementation of the law *as it exists*; they have no authority to create a rule out of harmony with the statute." *Matter of Jones v Berman*, 37 NY2d 42, 53 (1975) (emphasis added). Certainly, what an agency may not do through rules it may not do through what amounts to an informal administrative procedure.

Executive Law Article 12-E contains no reference whatsoever to a "real estate appraiser assistant license." Nor, assuming arguendo that it has such authority under the statute, has the Department of State enacted any rules providing for such a license. Accordingly, this tribunal lacks the jurisdiction to rule on the application.

#### DETERMINATION

**WHEREFORE, IT IS HEREBY DETERMINED** that this proceeding is dismissed.

Roger Schneier  
Administrative Law Judge

Dated: October 2, 1998