

STATE OF NEW YORK  
DEPARTMENT OF STATE

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In the Matter of the Application of

**THEODORE KLEIN III**

**DECISION**

For Certification as a Residential  
Real Estate Appraiser

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on November 8, 1995 at the office of the Department of State located at 270 Broadway, New York, New York.

The applicant, of 72 Nautilus Avenue, Northport, New York 11768-1830, having been advised of his right to be represented by an attorney, appeared pro se.

The Division of Licensing Services (hereinafter "DLS") was represented by Supervising License Investigator Michael Coyne.

**ISSUE**

The issue before the tribunal is whether the applicant has sufficient experience to qualify for certification as a residential real estate appraiser.

**FINDINGS OF FACT**

1) By application dated May 8, 1995 the applicant applied for certification as a residential real estate appraiser (State's Ex. 2). The application and supporting documentation (State's Ex. 3) established, as conceded by DLS, that the applicant is entitled to credit for sufficient "appraisal points" pursuant to the scheme established by 19 NYCRR 1102.2. However, although the applicant has been credited with experience obtained over a period in excess of two years, he was advised by Michael J. Kernan, the application examiner, that DLS proposed to deny the application because, in spite of the applicant's being entitled to 240 experience credit points, as required by the regulation, Mr. Kernan had concluded that the applicant was not entitled to credit for two years of full time experience.

The applicant requested an administrative review and, after subsequently being advised that DLS continued to propose to deny the application, requested an administrative hearing. Accordingly,

notice of hearing was served on him by certified mail on October 31, 1995 (State's Ex. 3).

### OPINION

I- As the person who requested the hearing, the burden is on the applicant to prove, by substantial evidence, that he has acquired the required experience. State Administrative Procedure Act (SAPA), §306[1]. Substantial evidence is that which a reasonable mind could accept as supporting a conclusion or ultimate fact. Gray v Adduci, 73 N.Y.2d 741, 536 N.Y.S.2d 40 (1988). "The question...is whether a conclusion or ultimate fact may be extracted reasonably--probatively and logically." City of Utica Board of Water Supply v New York State Health Department, 96 A.D.2d 710, 465 N.Y.S.2d 365, 366 (1983)(citations omitted).

II- Executive Law §160-k provides that an applicant for certification as a real estate appraiser must "possess the equivalent of two years of appraisal experience in real property appraisal...." Pursuant to Executive Law §160-d the State Board of Real Estate Appraisal adopted rules and regulations in aid and furtherance of that requirement. 19 NYCRR 1102.1 states in relevant part: "Qualifying experience. Applicants for both residential certification and general certification must possess at least two years of full time experience." 19 NYCRR 1102.2 goes on to state:

"(a) Applicants will receive credit for experience according to the point system set forth in section 1102.3 of this Part....

(c) Applicants for general certification must have 240 experience points, which shall include at least 180 experience points from appraisals of properties that qualify under the 'General' category in the 'Appraisal Experience Point Schedule' set forth in section 1102.3 of this part."

The issue in this case is essentially the same as that which the tribunal addressed in Matter of the Application of Deborah Natalizio, 34 DOS 95 (which predates the receipt of, and the action by DLS on, the application herein). In addressing that issue, the tribunal pointed out that in its rules, and as explained on its application form, the State Board of Real Estate Appraisal had established a point system which is designed to assure consistency and fairness in evaluating appraisal experience. The tribunal noted that the Board had advised applicants that they need not list all appraisals performed so long as they show enough activity over a two year period to qualify for the required number of experience points. The tribunal went on to note that the position of DLS, put

forward in that hearing by Mr. Kernan, that an applicant must independently establish both entitlement to sufficient points and that he or she has worked as an appraiser full time for two years

"is inconsistent with the regulations and their stated purpose: 'To assure consistency and fairness in evaluating appraisal experience,' i.e., to establish an objective method of determining if an applicant has sufficient experience. Matter of the Application of Babakhanian, 22 DOS 95. If followed it would restore to the persons reviewing the applications the power to subjectively evaluate the amount of time which should be allowed for each appraisal, in contravention of the objective standards established by the point system. The point system would then become not a method of determining whether the required two years experience had been obtained, but an additional requirement for licensure or certification imposed by regulation without a grant of authority from the Legislature to impose such a requirement, and would be, therefore, invalid. Campagna v Shaffer, 73 NYS2d 237, 538 NYS2d 933 (1989)." 34 DOS 95 at p. 4.

The argument put forward by DLS in this proceedings, that the type of appraisals which the applicant did could have been completed while working only a few days a week, is not convincing. The regulation states that 240 experience points can be evidence of two years full time experience, and establishes the number of points to be granted for each type of appraisal. For DLS now to take the entirely contradictory position that an appraiser working full time would do more appraisals in two years than are required to earn 240 experience points is to attempt to negate entirely the stated purpose of the regulation. If DLS is correct, then the regulation should be amended. Until then, applicants are entitled to rely on the explanation on the application form that submission of evidence of appraisals which were conducted over a period of two years, and which are valued at 240 points, is sufficient to meet the experience requirement.

#### CONCLUSIONS OF LAW

The applicant has established that he has sufficient experience to qualify for certification as a general real estate appraiser. Executive Law §160-k; 19 NYCRR 1102.1 and 1102.2.

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT**, pursuant to Executive Law §160-3[3], the application of Theodore Klein III for certification as a general real estate appraiser is granted, and the Division of Licensing Services is directed to issue the certification forthwith.

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:

ALEXANDER F. TREADWELL  
Secretary of State  
By:

Michael E. Stafford, Esq.  
Chief Counsel