

STATE OF NEW YORK  
DEPARTMENT OF STATE

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In the Matter of the Application of

**DANIEL CUERVO**

**DECISION**

For a License as a Real Estate Broker

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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 January 27 and February 24, 1994 at the office of the Department of State located at 270 Broadway, New York, New York.

The applicant, of 2 Bay Club Drive, Bayside, New York 11360, was not present at the hearing on January 27, 1994. The hearing had been opened in the applicant's absence when he failed to arrive more than one-half hour after the time for which it was noticed. Shortly after the matter had been closed and the hearing reporter had left the applicant appeared and explained that he had been unavoidably delayed by traffic. For that reason the matter was noticed to be reopened on February 8, 1993. On February 4, 1994 a request for an adjournment because the applicant had to be out of state for a family emergency was received from an attorney representing him, and the matter was adjourned to February 24, 1994. The applicant appeared on February 24, 1994 without a lawyer, and having been advised of his right to be represented by a lawyer chose to represent himself.

The Division of Licensing Services was represented by Supervising License Investigator Bernard Friend.

**ISSUES**

The issues presented are whether the applicant has sufficient experience to qualify for a license as a real estate broker, and whether the fact that he engaged in salesperson activity without proper licensure reflects adversely on his trustworthiness and/or competency.

**FINDINGS OF FACT**

1) By application dated October 10, 1991 the applicant applied for a license as a real estate broker (Dept. Ex. 2). He supported that application with a claim of experience obtained as a real estate salesperson with two real estate brokers: Orbi Realty, from

October 1986 to January 1988, and Coleman Neary Realty Ltd., from June 1990 to March 1991 (Dept. Ex. 2, 3, 4, 5 and 6).

2) The applicant was first licensed as a real estate salesperson on March 3, 1986, in association with broker Thomas A. Volpe. That association was terminated on July 17, 1986. No change of association notice was subsequently filed with the Division of Licensing Services, and the applicant's license was not renewed after its March 3, 1988 renewal (Dept. Ex. 7). Accordingly, at the times of the transactions for which the applicant claims credit for experience as a real estate salesperson he either was not licensed in association with a licensed real estate broker (October 1986 to January 1988), or was not licensed at all (June 1990 to March 1991).

3) By letter dated August 21, 1992 the applicant was advised by the Division of Licensing Services that it proposed to deny his application for lack of qualifying experience and because he had demonstrated untrustworthiness and/or incompetency, inasmuch as he had engaged in salesperson activity without proper licensure. By letter dated September 24, 1992 the applicant requested an administrative review of that proposed denial, and by letter dated November 7, 1993 he requested a formal hearing. In response, a notice of hearing was served on the applicant by certified mail (Dept. Ex. 1).

#### OPINION AND CONCLUSIONS OF LAW

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 and is sufficiently trustworthy and competent to be licensed as a real estate broker. State Administrative Procedure Act (SAPA), §306[1]; Real Property Law (RPL) §441[1][d]. 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). In this instance, the experience required is participation in the general real estate brokerage business as a licensed real estate salesperson under the supervision of a licensed real estate broker for a period of at least one year. RPL §441[1][d].

For credit to be granted for experience, that experience must have been gained lawfully. To hold otherwise would be to reward conduct in violation of the statute and would undermine the foundation of the licensing law. Matter of the Application of Alfredo-DiVitto, 78 DOS 91.

A real estate salesperson may lawfully engage in real estate brokerage transactions only when associated with a licensed real estate broker (RPL §§440[3]). When a salesperson who is already licensed enters into an association with a new broker, that new association must be regularized by the filing by the broker of a change of association report (RPL §442-b), and the salesperson is not considered to be "regularly associated" with the broker (RPL §442) until that filing is effectuated. Division of Licensing Services v Lo Vuolo, 44 DOS 88.

While the applicant claims that the required forms were filed when he entered into association with new brokers, he was unable to produce any corroborating evidence. The records of the Division of Licensing Services show that such forms were not filed, and absent any evidence showing that errors may have been made with regards to the filing at least two documents involving the applicant (change of association form to Orbi Realty and renewal of license in association with Coleman Neary Realty Ltd.), those records are more credible than is the applicant's unsupported testimony.

All of the experience with which the applicant seeks to support his application was obtained when he was either not regularly associated with a licensed real estate broker or not licensed at all. Accordingly, since credit toward the issuance of a license as a real estate broker cannot be granted for that experience, the applicant has failed to prove that he has sufficient experience to qualify for a license as a real estate broker, and his application should be denied.

RPL §442-b places the burden of filing the change of association form on the employing broker. Since the statute makes no reference to a filing by the salesperson, the failure of the broker to file when required does not provide a basis for a finding of untrustworthiness or incompetency on the part of the salesperson. However, the obligation to obtain a license is clearly that of the salesperson (RPL §§440-a and 441). Therefore, the applicant is liable for having worked as a real estate salesperson for Coleman Neary Realty Ltd. when not so licensed. Since there is no evidence that he intentionally violated the law he should not, under these particular circumstances, be found to have demonstrated untrustworthiness. His conduct is, however, a clear demonstration of incompetency.

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Daniel Cuervo has failed to establish that he has sufficient experience to qualify for a license as a real estate broker, and has demonstrated incompetency as a real estate salesperson, and accordingly, pursuant to Real Property Law §441-e and State Administrative Procedure Act §306, his application for a license as a real estate broker is denied.

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