

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Application of

MIGUEL FELICIANO

DECISION

For a License as a Real Estate Broker

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on October 21, 1996 at the office of the Department of State located at 270 Broadway, New York, New York.

The applicant, of 81 Weldon Street, Brooklyn, New York 11208, 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 William Schmitz.

ISSUE

The issue before the tribunal is whether the applicant should be denied renewal of his license as a real estate broker because the revocation of his license as an insurance broker reflects directly on the conduct and functions of a real estate broker.

FINDINGS OF FACT

1) By application dated February 12, 1996 the applicant applied for renewal of his license as a real estate broker. He answered "yes" to question number 9: "Since your last renewal, have you been convicted of a crime or offense (not a minor traffic violation) or has any license, commission or registration ever been denied, suspended or revoked in this state or elsewhere?" Attached to the application was a statement by the applicant disclosing the revocation of his license as an insurance broker (State's Ex. 2).

2) On July 14, 1995 the applicant's license as an insurance broker was revoked by the Superintendent of Insurance. The revocation was based on a Hearing Officer's Report and Recommendations in which it was found that: In 1992-93 the applicant issued some dozen checks totalling more than \$3,300.00 purportedly transmitting insurance premiums for clients, which checks were dishonored because of insufficient funds; during the

same period the applicant commingled funds from his premium account, and mismanaged fiduciary funds by running negative balances in the premium account; in 1993 the applicant falsely certified to the Department of Motor Vehicles that one L. Marrero had insurance coverage during a specified period; the applicant was decertified by the N.Y. Automobile Insurance Plan for a number of violations of Plan rules and standards; and that the applicant's attempt to blame the violations on an assistant, L. Rivera, was evasive and "betrays an abdication of responsibility for management of the office to an unlicensed person" (State's Ex. 3).

3) By letter dated May 28, 1996 the applicant was advised by DLS that it proposed to deny his application because the revocation of his license as an insurance broker relates directly to the conduct and functions of a real estate broker, but that he could request an administrative review. By letter dated June 25, 1996 the applicant requested such a review. By letter dated July 12, 1996 the applicant was advised by DLS that it continued to propose to deny his application, but that he could request an administrative hearing. By letter dated August 6, 1996 the applicant requested a hearing and, the matter having been referred to this tribunal on September 9, 1996, notice of hearing was served on the applicant by certified mail on September 14, 1996 (State's Ex. 1).

OPINION

I- As the person who requested the hearing, the burden is on the applicant to prove, by substantial evidence, that he is entitled to the renewal of his license as a real estate broker. 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- An applicant for a license as a real estate broker must establish that he or she is trustworthy and competent. Real Property Law (RPL) §441[1][d]. In the exercise of its discretion, the Department of State may impose such a requirement on an applicant for license renewal. RPL §441[1-A][2].

It has been previously held that acts of the type for which the applicant's insurance license was revoked are a demonstration of untrustworthiness, and that there is a direct relationship between those acts and a license as a real estate broker, a person who may have occasion to handle, hold in escrow, and pay over to third parties substantial sums of money received from and/or for

clients. *Department of State v Eich*, 39 DOS 86, conf'd. *sub nom Eich v Shaffer*, 136 AD2d 701, 523 NYS2d 902 (1988).

The type of violations involving trust funds of which the applicant was found guilty reflect directly on his trustworthiness and competency to be licensed as a real estate broker. A real estate broker has the fiduciary duty of handling his clients' funds with the utmost scrupulousness, and must take extreme care to assure that the rights of the lawful owners of those funds will not be jeopardized. *Department of State v Mittleberg*, 61 DOS 86, conf'd *sub nom Mittleberg v Shaffer*, 141 A.D.2d 645, 529 N.Y.S.2d 545 (1988); *Division of Licensing Services v Pellittieri*, 77 DOS 92; *Division of Licensing Services v Tripoli*, 96 DO 91. That duty is implemented through 19 NYCRR 175.1, which forbids the commingling of brokers' and clients' funds and requires that client funds be maintained in a special bank account. The purpose of that rule "is to assure that the rights of the lawful owners of escrow funds are not jeopardized by an agent's mismanagement of funds entrusted to the agent's care." *Division of Licensing Services v Pozzanghera*, 141 DOS 93, 7.

The applicant contends that the finding of commingling was incorrect. That finding is, however, *res judicata*, and may not be collaterally attacked in this forum. 2 NY Jur2d, Administrative Law §§150-152.

With regards to the dishonored checks, the applicant contends that he is responsible only because he trusted another person to run his insurance office while he managed the real estate office. However, that issue was also dealt with by the Insurance Department's Hearing Officer, who found the argument to be evasive and evidence of an abdication by the applicant of his supervisory responsibilities. The applicant has, in fact, demonstrated a pattern of such evasion by attempting to explain away an August, 1984 stipulation (State's Ex. 4), in which he admitted to the earlier issuance of a series of bad checks, by blaming a messenger whom he claims did not make certain bank deposits for which he had been given the money. Even if the applicant's explanations were to be believed, they demonstrate, through his failure to confirm through the prompt and thorough examination of the appropriate documents, a remarkably casual and negligent reliance on others to fulfill his responsibilities in the handling of trust funds

The applicant further asserts, unconvincingly, that the violations should be excused because he subsequently made good on the money. He also argues that he has never had complaints made against him as a real estate broker, and that he should not be penalized beyond the revocation of his insurance license since it was never his intent to hurt anyone and he never received any personal benefit from the violations. He fails to recognize that the non-renewal of his real estate broker's license would not be

caused by an intent to penalize him but, rather, by the need to protect the public from someone who has shown himself to be untrustworthy and incompetent.

The applicant's conduct establishes a clear pattern of, at the very least, an inexcusably casual disregard for his responsibilities in the handling of trust funds. That he might, at the current time, handle smaller amounts of money in his real estate business than he did in his insurance business is irrelevant. A real estate broker's fiduciary duties do not vary according to the amount of trust funds in his possession, and, in any case, should his license be renewed there would be nothing to stop him from larger sums of money in the future. His attempts to shift the blame for his violations to other persons indicates an inability to accept responsibility for the lawful and proper functioning of his businesses.

The tribunal is not unmindful of the applicant's community activities. However, the fact that may have demonstrated that he is public spirited does not alter the fact that he has shown himself not to be trustworthy and competent in the handling of other people's money.

CONCLUSIONS OF LAW

By reason of the findings of the Superintendent of Insurance that he mishandled trust funds, which misconduct was compounded by his efforts to avoid accepting responsibility for his violations, the applicant has demonstrated that he is not sufficiently trustworthy and competent to be licensed as a real estate broker, and, therefore, has failed to meet his burden of establishing by substantial evidence that his license should be renewed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the application of Miguel Feliciano for renewal of his license as a real estate broker is denied.

Roger Schneier
Administrative Law Judge

Dated: November 8, 1996