

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-

ANTHONY ANNUNZIATA,

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on July 8, 1998 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent did not appear.

The complainant was represented by Legal Assistant Thomas Napierski.

COMPLAINT

The complaint alleges that the respondent procured the renewal of his license as a real estate salesperson by falsely indicating on his application that he had completed the required continuing education, and that he wrongfully failed to cooperate with the audit/investigation of his compliance with the continuing education requirement.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail delivered at his last know business address on June 18, 1998 (State's Ex. 1).

2) By an application signed by him subject to the penalties of perjury in September, 1996 the applicant applied for renewal of his license as a real estate salesperson. He answered "yes" to question number 2: "Have you taken the required continuing education for this period or are you exempt?" (State's Ex. 4). In response, the license was renewed effective January 29, 1997, with an expiration date of January 29, 1999 (State's Ex. 3).

3) By letter dated December 31, 1997 the complainant advised the respondent that it was conducting an audit of the continuing education requirement, and requested that he answer certain questions regarding that requirement (State's Ex. 5). The respondent failed to respond to that letter, and when advised to appear at the complainant's office on March 24, 1998 to discuss the matter, failed to do so (State's Ex. 6 and 7).

OPINION

I- As required by Real Property Law (RPL) §441-e, notice of hearing was served on the respondent by sending it by certified mail to his last known business address. Accordingly, inasmuch as there is evidence that notice of the place, time and purpose of the hearing was properly served, the holding of an ex parte quasi-judicial administrative hearing was permissible. *Patterson v Department of State*, 36 AD2d 616, 312 NYS2d 300 (1970); *Matter of the Application of Rose Ann Weis*, 118 DOS 93.

II- As the party which initiated the hearing, the burden is on the complainant to prove, by substantial evidence, the truth of the charges in the complaint. 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).

III- Pursuant to RPL §441[3][a], as amended effective July 21, 1993, no renewal of a license as a real estate salesperson for a period commencing on or after November 1, 1995¹ may be granted to any applicant who has not, within the two year period immediately preceding such renewal period, attended and successfully completed an approved continuing education course. The complainant alleges that the respondent has not completed the required course, and that his claim that he had was false. It has, however, in light of the lack of a requirement that proof of such completion be submitted by licensee with the license application², and in the absence of any

¹ Although the exact language of the statute is "for any period commencing November first, nineteen hundred ninety-five....", the obvious intent is for it to apply to periods commencing on or after that date. To hold otherwise would be to make the statute almost meaningless.

² The statute provides that the Department of State may, in connection with the renewal procedure, require that a renewal applicant submit proof of completion of a continuing education
(continued...)

appearance at the hearing by the respondent, presented no proof of the respondent's failure to complete the required course.

IV- Real Property Law (RPL) §442-e[5] states:

"The secretary of state shall have the power to enforce the provisions of this article and upon complaint of any person, or on his own initiative, to investigate any violation thereof or to investigate the business, business practices and business methods of any person, firm or corporation applying for or holding a license as a real estate broker or salesman, if in the opinion of the secretary of state such investigation is warranted. Each such applicant or licensee shall be obliged, on request of the secretary of state, to supply such information as may be required concerning his or its business, business practices or business methods, or proposed business practices or methods."

In addition, as noted above, pursuant to RPL §441[3][a] a licensee may be required to provide proof of compliance with the continuing education requirement.

Pursuant to RPL §442-j the Secretary of State has the authority to delegate to employees of the Department of State the above powers to compel a licensee to supply information.

The respondent completely failed to comply with the complainant's requests that he cooperate with its audit of his application and provide proof that he had completed the continuing education course. That non-cooperation was a violation of RPL 442-e[5]. *Division of Licensing Services v Lawson* 42 DOS 93.

V- In determining what penalty to impose for the above violation, the tribunal has considered the fact that the respondent may have been wrongfully licensed for a substantial period of time. The penalty should take that into consideration, and should be tailored to eliminate, as much as possible, any advantage which the respondent may have obtained through misrepresenting his compliance with the continuing education requirement.

²(...continued)
course. The complainant has, however, chosen to rely on audits conducted after the issuance of the licenses.

CONCLUSIONS OF LAW

1) The complainant has failed to establish by substantial evidence that the respondent has not complied with the continuing education requirement of RPL §441, and that charge should be, and is, dismissed.

2) The respondent has violated RPL §442-e[5] by failing to cooperate with the complainant's audit of his application.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Anthony Annunziata has violated Real Property Law §442-e[5], and accordingly, pursuant to Real Property Law §441-c, his license as a real estate salesperson is suspended effective immediately and until such time as he shall submit proof satisfactory to the Department of State that he has satisfactorily completed an approved continuing education course in compliance with Real Property Law §441[3][a]. If upon submission of such proof it shall appear that at the time of the issuance of the license he had not yet completed the course, his license shall be further suspended for a period equal to the amount of time prior to the receipt by the Division of Licensing Services of his license certificate and pocket card that he was improperly licensed, plus two months. He is directed to immediately send his license 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: July 8, 1998