

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-

DANIEL H. FISHER,

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on November 4, 1999 at the New York State Office Building located at 65 Court Street, Buffalo, New York.

The respondent did not appear.

The complainant was represented by License Investigator III Marcia Reinagel.

COMPLAINT

The complaint alleges that on two occasions the respondent obtained licenses as a real estate broker through the use of applications which contained material misstatements, and that he thereby demonstrated untrustworthiness and/or incompetence.

FINDING OF FACTS

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail delivered at his last known business address on September 30, 1999 (State's Ex. 1). An additional copy of the notice and complaint sent to him by regular first class mail was returned by the Postal Service with a notation that the respondent had moved (State's Ex. 3), and additional copies of the notice and complaint were sent to the new address by both certified and regular first class mail on October 8, 1999 (State's Ex. 4). The certified mailing was delivered at the new address on October 12, 1999 (State's Ex. 5).

2) The respondent is duly licensed as a real estate broker representing GWF Chosen Spot Realty, Inc., 22 Lakeshore Drive, Canandaigua, New York 14424 for the license period of May 13, 1998 through May 13, 2000. Until April 29, 1999 he was also licensed as a real estate broker d/b/a Rare Earth Properties (State's Ex. 6).

3) On November 16, 1987 the respondent was convicted of driving a commercial vehicle while intoxicated, Penal Law §1192[3] and [5], an unclassified felony. In spite of that, on his original applications for both his corporate and d/b/a licenses, signed, respectively, on April 27, 1998 and April 23, 1997, he answered "no" to question number 4: "Have you ever been convicted of any criminal offense in this State or elsewhere...." (State's Ex. 1).

OPINION AND CONCLUSIONS OF LAW

I- The holding of an ex parte quasi-judicial administrative hearing was permissible, inasmuch as there is evidence that notice of the place, time and purpose of the hearing was properly served. Real Property Law (RPL) §441-e[2]; *Patterson v Department of State*, 36 AD2d 616, 312 NYS2d 300 (1970); *Matter of the Application of Rose Ann Weis*, 118 DOS 93.

II- Pursuant to Real Property Law (RPL) §441-c a license as a real estate broker which was issued in response to an application which contained a material misstatement may be revoked. A material misstatement in an application is an incorrect statement, or an omission of fact which, in whole or in part, is an essential factor in determining the fitness of the applicant for licensure. *Division of Licensing Services v Gise*, 48 DOS 88, conf'd. *sub nom Gise v Shafer*, 153 AD2d 688, 544 NYS2d 677 (1989). In the instant case, had the respondent disclosed his felony conviction, pursuant to RPL §440-a his license would not have been issued. Even without the automatic bar of a felony, the complainant would still have had discretion to consider the conviction. Therefore, the misstatement was material.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Daniel H. Fisher has submitted two applications for licenses as a real estate broker which contained material misstatements, and has, thereby, demonstrated untrustworthiness, and, accordingly, pursuant to Real Property Law §441-c, his license as a real estate broker is revoked, effective November 22, 1999. He is directed to send his

license certificate and pocket card to Usha Barat, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier
Administrative Law Judge

Dated: November 8, 1999