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STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Complaint of

**DEPARTMENT OF STATE**
**DIVISION OF LICENSING SERVICES,**

Complainant, **DECISION**

-against-

**RALPH W. FUSCO d/b/a FUSCO REAL ESTATE,**

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on November 9, 1994 at the office of the Department of State located at 162 Washington Avenue, Albany, New York.

The respondent, of 2311 Genesee Street, Utica, New York 13501, an attorney at law, having been advised of his right to be represented by an attorney, appeared pro se.

The complainant was represented by Compliance Officer William Schmitz.

## COMPLAINT

The complaint alleges that the respondent failed to post a proper sign in violation of Real Property Law (RPL) §441-a.

## FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint dated March 24, 1993 was served on the respondent by certified mail in February, 1994 (Comp. Ex. 1).

2) The respondent was duly licensed as a real estate broker d/b/a Fusco Real Estate, commencing on a date not appearing in the record, until the expiration of his license on August 8, 1992. He renewed his

license on November 25, 1992, and it remained in effect until it expired on August 18, 1994 (Comp. Ex. 2).

3) On November 19, 1992 License Investigator Donna Clark visited the respondent's office at 2311 Genesee Street, Utica, New York, at which he conducts his legal practice. She observed that there was no sign on the exterior of the building indicating that the respondent was a licensed real estate broker, and advised the respondent that he was required to post such a sign, with the additional requirement that the sign be readable from the sidewalk. The respondent replied that because he was in a designated historic district he was not permitted to comply. He stated that he had a neighbor who made a practice of complaining to the authorities whenever he perceived that there had been an infraction of the zoning rules, and that because of that he had not renewed his license.

Clark and the respondent discussed how the matter could be dealt with, and the respondent decided to renew his license. As an accommodation, Clark accepted a renewal application and a check for the renewal fee from the respondent and subsequently submitted them for processing.

Clark returned to the respondent's office on March 9, 1993, at which time she observed that there was still no sign posted. She spoke to the respondent again, and he said that he would submit a request to the city authorities for permission to post a sign.

Clark visited the respondent's office a third time on October 14, 1993, and observed that there was now a small sign posted in the window of the office door. While the sign contained the respondent's name and the fact that he was a licensed real estate broker, it was too small to be visible from the sidewalk. Clark spoke with the respondent's receptionist and told her that the sign was not acceptable.

Clark made a fourth visit to the respondent's office on October 22, 1993, at which time she observed that there was a large sign with the required information in the office window, and that the sign was readable from the street.

## OPINION

I- The respondent is not currently licensed as a real estate broker. The expiration of his license does not, however, divest this tribunal of jurisdiction to hear the matter. That is so since: the complaint alleges a continuing violation as of March 24, 1993, when the respondent was licensed; the hearing was commenced through the service

of the notice of hearing in February, 1994, when the respondent was licensed; and pursuant to RPL §441[1-A][2] until August 18, 1996 the respondent may automatically renew his license simply by submitting an application and a fee. Albert Mendel & Sons, Inc. v N.Y. State Department of Agriculture and Markets, 90 AD2d 567, 455 NYS2d 867 (1982); Main Sugar of Montezuma, Inc. v Wickham, 37 AD2d 381, 325 NYS2d 858.

II- RPL §441-a[3] provides that licensed real estate brokers

> "shall have and maintain a definite place of business within this state, and shall conspicuously post on the outside of the building in which said office is conducted a sign of sufficient size to be readable from the sidewalk indicating the name and the business of the applicant (sic) as a licensed real estate broker...."

On its face, therefore, it would appear that the respondent is guilty of the violation charged. However, as an attorney the respondent, on the facts of this case, did not have to comply with that provision of the statute.

In Huber v Shaffer, No. 21731/93, slip op. (Supreme Ct. Nassau County, Nov. 12, 1993), the Court held that an attorney who is licensed as a real estate broker need not, in light of the "Saving clause" set forth in RPL §442-f, comply with RPL §441-a[3] if the attorney/broker does not act and has not acted as a real estate broker.

In this case the respondent testified that although he was licensed as a broker he never had an active real estate brokerage business. While several salespersons were licensed in association with him at various times, the respondent's unrefuted testimony was that those associations never resulted in brokerage activities by his office, and were effectuated merely as accommodations of his wife, a friend, and the elderly father of the respondent's physician.[1]

**CONCLUSIONS OF LAW**

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[1] Whether such accommodations were improper, and whether there was a lack of proper supervision of the salespersons, is not before this tribunal and is not, therefore, addressed herein.

The complainant has failed to meet its burden of establishing by substantial evidence a necessary element of the violation charged: that the respondent, a licensed attorney at law, conducted a real estate brokerage business. State Administrative Procedure Act §306[1]. Accordingly, the charge that he violated RPL §441-a[3] must be dismissed.

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** the complaint against Ralph W. Fusco is dismissed.

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:

Phillip M. Sparkes
Special Deputy Secretary of State