123 DOS 93

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-

JOSEPH P. HARRINGTON and
HARRINGTON REALTY, INC.,

Respondents.

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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 October 21, 1993 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondents, of 4408 White Plains Road, Bronx, New York 10470, did not appear. On October 14, 1993 a person who identified himself as Joseph Harrington telephoned the office of this tribunal and spoke with one of the secretaries. He stated that he wished to request an adjournment, and was advised of the need to make the request in writing to the Administrative Law Judge. However, it was not until October 22, 1993, the day after the hearing, that a request for a adjournment postmarked October 18, 1993 was received.

The complainant was represented by Compliance Officer William Schmitz.

COMPLAINT

The complaint in the matter alleges that the respondents employed an unlicensed person and permitted her to engage in activities requiring a license; failed to file termination of association forms for five salespersons upon the termination of their association with the respondents; and failed to satisfy a judgement obtained against them in Civil Court.

FINDINGS OF FACT

1) Notices of hearing together with copies of the complaint were served on the respondents by certified mail on September 16, 1993 (Comp. Ex. 1).

2) Joe (sic) Harrington is, and at all times hereinafter mentioned was, duly licensed as a real estate broker representing Harrington Realty, Inc. (Harrington Realty) (Comp. Ex. 2).

3) On October 3, 1988 Barbara Jordan went to the respondents' office and gave to M. Paulette McConnangly, a/k/a Mary P. McConnaugney, a $100.00 deposit on the rental of an apartment.[1] McConnangly had been hired by Harrington to work in his office.[2] She had been licensed as a real estate salesperson in association with the respondents from September 26, 1983 until October 31, 1983, but failed to renew her license upon its expiration (Comp. Ex. 13).

Jordan never obtained possession of the apartment (Comp. Ex. 4), and sued Harrington Realty for the return of her deposit. On February 27, 1989 she was granted a judgement in the amount of $106.25, including disbursements and interest to the date of judgement, in the Small Claims Part of Civil Court, Bronx County (Comp. Ex. 5). The respondents failed to satisfy the judgement, but on October 20, 1992, after having received a Notice of Violation from the complainant, sent the complainant a check payable to Jordan in the amount of $100.00 (Comp. Ex. 11).

4) In 1989, while investigating the matter involving Jordan, License Investigator Ernita Ray-Gant questioned Harrington about six salespersons who were licensed in association with the respondents but who no longer worked for them (Catherine B. Airall, Nevilleton G. Daguilar, Kerieth A. Mair, Cheryl L. Manning, Beverly E. Hodges, and James S. Lockhart).[3] The respondents had not filed termination of

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[1] The fact that M. Paulette McConnangly and Mary P. McConnaugney are one and the same person is readily confirmed by a comparison of the signatures on the receipt given to Jordan (Comp. Ex. 5) and on the real estate salesperson's license application of McConnaugney (Comp. Ex. 9).

[2] In a letter dated November 21, 1989 Harrington stated that he had "only hired Paulette McConnangly as a part time receptionist. She answered phones and her duties were to take messages and answer phone <u>only</u>." (Comp. Ex. 6). Yet in a letter dated October 20, 1992 he stated "Paulette McConnangly worked here approx. (7) seven years ago as a licencee (sic) person and was brought up on charges of signing a tenants (sic) name on a lease, and the Dept. of State suspender (sic) her license for a year, it is on record, and I have not seen her sense (sic)." (Comp. Ex. 11). These totally contradictory statements indicate that Harrington's representations with regards to McConnangly are totally lacking in credibility and should be disregarded.

[3] The complaint alleges violations only with regards to Airall, Daguilar, Mair, and Manning. It makes no reference to Hodges and Lockhart. It does refer to a Shirley Williams, who was not one of the persons that Ray-Gant testified she spoke about with Harrington.

association forms for those salespersons, and when asked why, Harrington replied that he did not feel that it was his responsibility to pay the termination fees.[4]

OPINION

I- Service of the notice of hearing and complaint meets the procedural due process standards of providing the respondents with fair notice and an opportunity for a hearing embodied in the provisions of Real Property Law (RPL) §441-e[2], State Administrative Procedure Act (SAPA) §301, and 19 NYCRR 400.1.

In accordance with 19 NYCRR 400.9 the notices of hearing were accompanied by a booklet containing, among other things, the Hearing Rules of Procedure (19 NYCRR Part 400). Rule 400.11 provides that requests for adjournments must be made in writing, and must be received no later than three days prior to the scheduled date of the hearing. In spite of that the respondents did not mail their request until three days prior to the hearing, with the result that it was not received until the day after the hearing, and apparently took no steps to ascertain whether the request had been granted. Consequently, and particularly in light of the fact that the notice of hearing clearly states that adjournments must be in a writing signed by the Administrative Law Judge, the holding of an ex-parte, quasi-judicial administrative hearing without the presence of the respondents was not a denial of due process. Patterson v Department of State, 36 AD2d 616, 312 NYS2d 300 (1970); Matter of Sneed, 136 DOS 92.

II- Being an artificial entity created by law, Harrington Realty, Inc. can only act through it officers, agents, and employees, and it is, therefore, bound by the knowledge acquired by and is responsible for the acts committed by its representative broker, Harrington, within the actual or apparent scope of his authority. Roberts Real Estate, Inc. v Department of State, 80 NY2d 116, 589 NYS2d 392 (1992); A-1 Realty Corporation v State Division of Human Rights, 35 A.D.2d 843, 318 N.Y.S.2d 120 (1970); Division of Licensing Services v First Atlantic Realty Inc., 64 DOS 88; RPL § 442-c.

III- A real estate broker who or which has an unlicensed salesperson associated with him or it is guilty of a misdemeanor, RPL §442-c, and of demonstrating incompetency. Doherty v Cuomo, 64 AD2d 847, 407 NYS2d 337 (1978), app. dism. 45 NY2d 960, 411 NYS2d 566; Division of Licensing Services v Fishman, 153 DOS 92. Such an

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[4] In his letter of October 20, 1992 (Comp. Ex. 11), Harrington changed his story, and took the position that although inactive the salespersons had not ceased being associated with him. He also stated that he never employed or heard of Airall, a position which is refuted by the presence of his signature as sponsoring broker on Airall's 1987 application for a license as a real estate salesperson (Comp. Ex. 8). This again casts great doubt on Harrington's credibility.

association is also a violation of RPL §440-a. A real estate salesperson is a person associated with a real estate broker with the purpose of, among other things, renting or placing for rent any real property. RPL §440[3].

In accepting from Jordan, while acting on behalf of the respondents, a deposit for the rental of an apartment, an act which is clearly referable to an attempt to rent real property, McConnangly acted as an unlicensed real estate salesperson. Division of Licensing Services v Ardelean, 96 DOS 93.

IV- The failure to pay a judgement which has been lawfully obtained, without a showing that he is unable to do so, is a demonstration of untrustworthiness by a real estate broker. Department of State v Feldman, 113 DOS 80, conf'd. sub nom Feldman v Department of State, 81 AD2d 553, 440 NYS2d 541 (1981); Division of Licensing Services v Shulkin, 40 DOS 90; Division of Licensing Services v Janus, 33 DOS 89. As representative broker of Harrington Realty, Harrington was responsible to see to it that it complied with its obligation to satisfy the judgement.

The respondents' attempt to resolve the Jordan matter by issuing a check for $100.00 does not qualify as a good faith effort to satisfy the judgement. Not only was the original judgement larger than $100.00, but in the three and one half years between its being awarded and the issuance of the check it would have been increased by the accrual of further interest charges.

V- RPL §442-b provides that:

> "When the association of any real estate salesman shall be terminated for any reason whatsoever, his broker shall forthwith notify the Department of State thereof in such manner as the department shall proscribe."

The complainant has established that the respondent failed to file termination of association notices for four salespersons who had ceased working for them, and are, therefore, guilty of violating the statute. Division of Licensing Services v Kassorla, 23 DOS 93; Division of Licensing Services v James, 10 DOS 93. The fact that the respondents are unhappy with the need to pay the fee mandated by the statute does not excuse their failure to file.

VI- In determining what penalty should be imposed on the respondents, I have taken into consideration that fact that by a previous determination Harrington was found to have demonstrated incompetency by failing to exercise appropriate lawful supervision over McConnangly at the time that she was licensed in association with the respondents, and by failing to file a timely notice of employment of a salesperson, and was admonished that any repetition of such incompetency "shall be severely dealt with by the Department". Department of

State v Harrington, 141 DOS 84, 12/3/84, p.2. That determination casts Harrington's continuing cavalier attitude with regards to his salespersons in a particularly harsh light.

CONCLUSIONS OF LAW

1) By employing an unlicensed person in a position in which she was permitted to engage in an activity requiring a license as a real estate salesperson, the respondents violated RPL §§440-a and 442-c.

2) By failing to satisfy the judgement obtained by Barbara Jordan the respondents demonstrated untrustworthiness as real estate brokers.

3) By failing to file termination of association forms for four salespersons, the respondents violated RPL §442-b four times.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Joe Harrington and Harrington Realty, Inc. have violated Real Property Law §§440-a, 442-b (four times), and 442-c, and have demonstrated untrustworthiness, and accordingly, pursuant to Real Property Law §441-c, all licenses issued to them as real estate brokers are suspended for a period of two months, commencing on January 1, 1994 and terminating on February 28, 1994, and upon conclusion of the suspension their licenses shall be further suspended until such time as they shall produce proof satisfactory to the Department of State that they have fully satisfied, together with all interest, the judgement in Barbara Jordan v Harrington Realty, Civil Court of the City of New York, Bronx County, S.C. #326/89. Upon receipt of such proof the uncertified check for $100.00 payable to Jordan sent by the respondents to the complainant on October 20, 1992, which is a part of complaint's exhibit 11, shall be returned to the respondents.

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