

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-

**PETER B. KNOBEL,
GILBERT CHARLES BEYLAN, INC.,
ANDREW P. GRAHAM, SHARON BERGH, and
STEVEN SCHLEIDER,**

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 November 5, 1993 at the office of the Department of State located at 270 Broadway, New York, New York.

Peter B. Knobel, Gilbert Charles Beylan, Inc., and Steven Schleider, having settled the complaints against them prior to the hearing, did not appear. (Schleider was present at the hearing and testified as a witness for the complainant).

Andrew P. Graham, of 215 West 88th Street, New York, New York 10024, and Sharon Bergh, of 408 Columbus Avenue, New York, New York 10024, having been advised of their right to be represented by attorneys, appeared pro se.

The complainant was represented by Scott NeJame, Esq.

COMPLAINT

The complaint, as amended without objection and as relates to the remaining respondents, alleges that Bergh entered into a scheme to violate Real Property Law (RPL) §§442 and 442-a and 19 NYCRR §175.13 by arranging to be paid a commission by a person other than the licensed real estate broker with whom she was licensed as a real estate salesperson, and violated RPL §442-a by receiving such a payment, and that Graham violated RPL §441-b[2] by being an officer of Gilbert Charles Beylan, Inc. (GCB), a corporation which was licensed as a real estate broker, at the same time that he was a

licensed real estate salesperson associated with that corporate broker.

FINDINGS OF FACT

1) Notices of hearing together with a copy of the complaint was served on the respondents by certified mail (Comp. Ex. 1).

2) Graham is, and at all times hereinafter mentioned was, duly licensed as a real estate salesperson in association with real estate broker Daria M. Prochurska, located at 215 West 88th Street, New York, New York (Comp. Ex. 2). At the same time he was Executive Vice President of GCB, located at 645 Fifth Avenue, New York, New York.

Bergh is duly licensed as a real estate salesperson in association with Halstead Property Company, 408 Columbus Avenue New York, New York. From January 30, 1989 until July 27, 1990 she was licensed as a real estate salesperson in association with J.I Sopher & Co., Inc. (Sopher) (Comp. Ex. 2).

3) In April or May 1990 Bergh, acting on behalf of a potential purchaser, contacted Schleider, a real estate broker licensed in his own name who was working for GCB, to express interest in an apartment for which GCB was the sales agent. They arranged for the customer to view the apartment, and on or about June 1, 1990 an agreement for the purchase and sale of the apartment was entered into.

At the end of July Schleider ended his association with GCB but, by agreement, continued to represent GCB with regards to the sale of the apartment. At about the same time Bergh, who had ended her association with Sopher, asked Schleider if there was any way that her share of the commission on the sale could be paid directly to her. She did that because she had not been able to collect from Sopher a commission which was due her on another transaction which had closed after her association with Sopher had ended¹, she had heard that salespersons formerly associated with Sopher in its rental department had experienced similar problems, and she feared that if her share of the commission was first paid to Sopher she would not be able to collect it.

The sale of the apartment closed on September 13, 1990, at which time the seller paid a commission of \$16,578.60 in the form of a check issued to GCB (Comp. Ex. 4), which Schleider had delivered to it. Bergh and Schleider both spoke with Graham, who was responsible for disbursing the commission to the proper parties, and having become convinced that Bergh was genuinely distressed about her relationship with Sopher, Schleider convinced Graham to allow the

¹ She eventually had to sue Sopher for that commission and was not paid until sometime after she obtained a default judgement (Resp. Ex. A).

direct payment to Bergh. Without the advance knowledge of Sopher, the payment was effectuated as follows: Graham agreed to issue a check to Schleider for the shares of the commission which were due to Schleider, Bergh and Sopher, with the check to be issued to a corporation owned by Schleider, and with Schleider to in turn make the proper disbursements to Bergh and Sopher; Schleider signed an agreement to indemnify GCB and hold it harmless in the event any claims were made on the commission (Comp. Ex. 8); Bergh signed an agreement to indemnify Schleider's corporation and hold it harmless in the event any claims were against it for the commission (Comp. Ex. 9); on September 18, 1990 Graham issued a GCB check to Schleider's corporation in the amount of \$14, 195.43 (Comp. Ex. 5), which included the total of \$8,289.30 which was due to Bergh and Sopher; and on September 24, 1990 Schleider issued a check in the amount of \$4,144.65 to Bergh.

Schleider was out of town the next day. On September 26, 1990 he received telephone messages from Greg Young, Sopher's vice president, and from its attorney. He telephoned Young to tell him that he had Sopher's share of the commission for him, but Young insisted that Sopher receive both the \$4,144.65 which Schleider was holding for it and the sum which had been paid to Bergh, since according to him Bergh was entitled to less than she had received.

On September 27, 1990 Bergh, who had received a telefax demanding the full commission from Young the day before (Resp. Ex. A), gave Schleider a cashier's check for \$4,144.65 payable to Sopher (Comp. Ex. 6), and Schleider delivered that check and another certified check in the same amount to Sopher the same day (Comp. Ex. 7).

Eventually, Sopher paid Bergh a share of the commission, with a 20% deduction made because she had left its employ prior to the closing.

OPINION

I- As the party which initiated the hearing, the burden is on the complainant to prove, by substantial evidence, the truth of allegations 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).

II- RPL §442 provides that a real estate broker may not pay any part of a commission received by him or her to any person for help in the sale of real property unless the payee is a real estate salesperson licensed in association with the broker or a licensed

real estate broker. RPL §442-a provides that a real estate salesperson may not receive or demand compensation for the sale of real property from any person other than the broker with whom the salesperson is associated. 19 NYCRR 175.13 provides that a real estate broker may not give anything of value to a salesperson associated with another broker without the knowledge of such broker. The evidence clearly establishes that Bergh entered into a scheme to violate those prohibitions. The complainant has failed however to show where, under the governing statutes and regulations, absent a charge of untrustworthiness or incompetency (no such charge was made against Bergh) the entering into such a scheme is grounds for the imposition of disciplinary sanctions.

The evidence also establishes that, as charged in the complaint, by accepting the check from Schleider, Bergh actually violated RPL §442-a. Although that was unlawful, and cannot be excused, it was perhaps understandable. According to her testimony, which I find entirely credible, she did not trust Sopher to pay her the money to which she was entitled. Sopher had already failed to pay her for one transaction, for which payment she eventually had to bring suit, and she believed that Sopher had a practice of not paying some of its salespersons after they terminated their associations with it. She needed the money from the commission, feared that she would be victimized again, and incorrectly believed that the statute allowed her to be paid by any broker. Also mitigating is the fact that she paid over the money to Sopher as soon as a demand was made on her, and that there is no evidence of any harm to the public having been caused by her conduct.² Cf. Stowell v Cuomo, 69 AD2d 9, 417 NYS2d 1008 (1979), aff'd. 52 NY2d 208, 437 NYS2d 270.

III- RPL §441-b[2] provides that a license as a real estate salesperson may not be issued to an officer of a corporation which is licensed as a real estate broker, and has been interpreted as applying to the issuance of a license as a salesperson for the very corporation of which the salesperson is an officer. Brenner & Lewis v Fawcett Publications, 197 Misc. 207, 90 NYS2d 853 (Supreme Ct. N.Y. County, 1949), aff'd. 276 AD 994, 95 NYS2d 598, app. denied 276 AD 1081, 97 NYS2d 186. In view of the statutory requirement that a real estate broker supervise the brokerage activities of the salespersons associated with it (RPL §441[1][d]), the obvious purpose of that statute is to avoid the anomaly of a salesperson corporate officer being in a position to supervise his or her own brokerage activities.

The complainant has proved that Graham was licensed as a salesperson, and that he was an officer of GCB. However, it has not proved that he was licensed as a salesperson for GCB. It would be contrary to the clear intent of the statute, and would serve no apparent purpose of protection of the public, to hold that it was a

² No representative of Sopher testified at the hearing, although a subpoena for such testimony was issued and served.

violation of the statute for him, while an officer of a corporate real estate broker, to be licensed as a salesperson with another broker at a different address, particularly where there is no evidence that he took part in negotiations or engaged in anything other than administrative functions.

CONCLUSIONS OF LAW

1- By asking for and accepting payment of a commission by Schleider, Bergh violated RPL §442-a.

2- The complainant has failed to establish that Graham violated RPL §441-b[2].

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Sharon Bergh violated Real Property Law §442-a, and accordingly, pursuant to Real Property Law §441-c, she is reprimanded therefor, and

IT IS FURTHER DETERMINED THAT the charge the Andrew P. Graham violated Real Property Law §441-b[2] 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:

GAIL S. SHAFFER
Secretary of State
By:

James N. Baldwin
Executive Deputy Secretary of State