

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-

MARILYN L. PAHL,

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on February 3, 2000 at the office of the Department of State located at 41 State Street, Albany, New York.

The respondent did not appear.

The complainant was represented by Litigation Counsel Laurence Soronen, Esq.

COMPLAINT

The complaint alleges that the respondent, a licensed real estate salesperson, forged the signature of her principal on an escrow refund check, and thereafter issued her principal her personal check for the escrow funds, which check was returned due to insufficient funds.

FINDINGS OF FACT

1) Notice of hearing together with copy of the complaint was served by mailing copies by certified mail addressed to the respondent at both her last known business address and at her last known residence address. The mail to the business address was returned marked "Refused" and "Return to Sender No Longer w/Company," but the mail to the residence was delivered on December 11, 1999 (State's Ex. 1).

2) The respondent is, and at all times hereinafter mentioned was, duly licensed as a real estate salesperson in association with Realty USA Clifton Park, 480 Balltown Road, Schenectady, New York 12304, although she is no longer employed by that real estate broker (State's Ex. 1). She resides at 1713 Albany Street, Schenectady, New York 12304 (State's Ex. 4).

3) On or about March 8, 1999 the respondent was given by her employing broker a check in the amount of \$1,000.00 payable to Paul Beaudoin. The check was a refund of a deposit paid by Mr. Beaudoin and held in escrow by the broker for a transaction which failed to close. The respondent was directed to give the check to Mr. Beaudoin, whom she

had been assisting in locating real property to purchase. Instead, she forged Mr. Beaudoin's signature on the check, endorsed it herself, and cashed it (State's Ex. 1).

4) After Mr. Beaudoin confronted the respondent about the missing escrow refund she issued him her personal check for \$1,000.00. That check was dishonored due to there being insufficient funds in the respondent's account (State's Ex. 1).

5) The broker subsequently made good on the check to Mr. Beaudoin, and on April 5, 1999 the respondent acknowledged her debt to the broker for the \$1,000.00 plus a \$25.00 bank charge. As of the date of the hearing only part of that repayment had been accomplished by way of an offset against a commission due from the broker to the respondent.

6) On June 18, 1999 License Investigator Carolyn Williams sent the respondent a letter requesting that the respondent meet with her on a stated date (State's Ex. 3 and 4). Although the letter was delivered (State's Ex. 3), the respondent did not respond to it.

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 §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- In assisting Mr. Beaudoin in his efforts to locate real property to purchase, the respondent became his agent and he became her principal. The relationship of agent and principal is fiduciary in nature, "...founded on trust or confidence reposed by one person in the integrity and fidelity of another." *Mobil Oil Corp. v Rubinfeld*, 72 Misc.2d 392, 339 NYS2d 623, 632 (Civil Ct. Queens County, 1972). Included in the fundamental duties of such a fiduciary are good faith and undivided loyalty, and full and fair disclosure. Such duties are imposed upon real estate licensees by license law, rules and regulations, contract law, the principals of the law of agency, and tort law. *L.A. Grant Realty, Inc. v Cuomo*, 58 AD2d 251, 396 NYS2d 524 (1977). The object of these rigorous standards of performance is to secure fidelity from the agent to the principal and to insure the transaction of the business of the agency to the best advantage of the principal. *Department of State v Short Term Housing*, 31 DOS 90, conf'd. *sub nom Short Term Housing v Department of State*, 176 AD 2d 619, 575 NYS2d 61 (1991); *Department of State v Goldstein*, 7 DOS 87, conf'd. *Sub nom Goldstein v Department of State*, 144 AD2d 463, 533 NYS2d 1002 (1988).

In breach of her fiduciary duties, the respondent forged Mr. Beaudoin's signature to the refund check, converted the funds to her own use, and issued a bad personal check to him. In so doing she demonstrated gross untrustworthiness.

III- Fraudulent practices "...as used in relation to the regulation of commercial activity, is often broadly construed, but has generally been interpreted to include those acts which may be characterized as dishonest and misleading. Since the purpose of such

restrictions on commercial activity is to afford the consuming public expanded protection from deceptive and misleading fraud, the application is ordinarily not limited to instances of intentional fraud in the traditional sense. Therefore, proof of an intent to defraud is not essential." *Allstate Ins. Co. v Foschio*, 93 A.D.2d 328, 464 N.Y.S.2d 44, 46-47 (1983) (citations omitted). A single fraudulent practice may be the basis for the imposition of disciplinary sanctions. *Division of Licensing Services v Linfoot*, 60 DOS 88, conf'd. *sub nom Harvey v Shaffer*, 156 A.D.2d 1013, 549 N.Y.S.2d 296 (1989). The respondent's forging Mr. Beaudoin's signature on, and cashing of, the escrow refund check, and her issuance of a bad check in its place, were fraudulent business practices.

IV- 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."

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 failed to cooperate with the complainant's investigation when she failed to respond to its investigator's letter requesting that she meet with that investigator. *Division of Licensing Services v Naftal*, 189 DOS 99. That non-cooperation was a violation of RPL 442-e[5], *Division of Licensing Services v Lawson*, 42 DOS 93, and was a further demonstration of untrustworthiness.

V- Where a broker or salesperson has received money to which he is not entitled, he may be required to return it, together with interest, as a condition of retention or reissuance of his or her license. *Donati v Shaffer*, 83 NY2d 828, 611 NYS2d 495 (1994); *Kostika v Cuomo*, 41 N.Y.2d 673, 394 N.Y.S.2d 862 (1977); *Zelik v Secretary of State*, 168 AD2d 215, 562 NYS2d 101 (1990); *Edelstein v Department of State*, 16 A.D.2d 764, 227 N.Y.S.2d 987 (1962).

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Marilyn L. Pahl has engaged in fraudulent business practices and has demonstrated untrustworthiness, and accordingly, pursuant to Real Property Law §411-c, her license as a real estate salesperson is revoked effective February 15, 2000. Should she ever re-apply for a license as a real estate salesperson or as a real estate broker, no action shall be taken

on that application until she has produced proof satisfactory to the Department of State that she has fully satisfied her debt to Realty USA, together with interest at the legal rate for judgement (currently 9% per year) from April 5, 1999. She is directed to send her 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: February 4, 2000