

## **The DOS: The Renewal or Revocation of a Real Estate Licensee's License**

By John Dolgetta, Esq.

The renewal process for a real estate licensee is usually a simple one. A licensee receives an email alert and is prompted to renew his or her license online. The licensee signs in, answers a few relatively straightforward questions and submits the credit card information in order to pay the renewal fee. However, if any false or incomplete answers are provided it will likely result in the eventual revocation of the agent's license. Another scenario which could lead to a termination or revocation of a license is where the applicant has been convicted of a crime, is involved in a pending criminal proceeding or has had a separate license revoked by a different agency. While revocation in any form is certainly not welcome by anyone, it is especially devastating when a principal broker's license is revoked, as this will automatically cause the license of every salesperson and associate broker associated with that principal broker to be suspended as well. This would have a devastating effect on hundreds, and in some instances, thousands, of agents.

### **Renewal Application: Simple Questions, or Are They?**

There are three basic sets of questions asked during the renewal process.

One deals with whether or not the licensee has completed the 22.5 hours of continuing education ("CE") (including 3 hours on fair housing and 1 hour of agency or 2 hours of agency if it is a first renewal by a salesperson) or whether the individual qualifies for an exemption. Unfortunately, many licensees fail to complete the CE requirements and falsely affirm, when renewing online, that they have completed all required CE. This is a very common reason for revocation. Licensees need to be aware that the Department of State Division of Licensing Services ("DOS") randomly requests that proof of completion for the required CE be submitted. This has been a more frequent occurrence lately.

Another set of questions deal with whether the licensee owes child support or if there is a pending action relating to child support payments. Again, the questions must be answered truthfully. If it is found that a licensee has provided a false response or has failed to make child support payments, this too, will be a reason for revocation or non-renewal.

Finally, there is a set of questions that deal with whether the licensee has been convicted of a crime, whether there is a criminal proceeding pending or if the licensee has had another license revoked. A licensee is required to divulge anything that has occurred or is pending worldwide, not just in New York State. The questions read as follows:

- Since your last application, have you been convicted of a crime or offense (not minor traffic violation), in this state or elsewhere or has any license, permit, commission, registration or application for a license, permit, commission or registration held by or submitted by you or a company in

which you are or were a principal been revoked, suspended, or denied by any state, territory or governmental jurisdiction or foreign country for any reason?

OR

- Are there any criminal charges (misdemeanor or felony) pending against you in any court in this state or elsewhere?

It is important to note that even when the applicant tells the truth about a crime or other issue, that person still runs the risk of having his or her license revoked. If a licensee responds affirmatively to any of the questions described above, he or she is required to "...submit a written explanation describing the place, court jurisdiction, nature of the offense, sentence and/or other disposition. The licensee must also provide a copy of the accusatory instrument (e.g., indictment, criminal information or complaint) and a Certificate of Disposition..." to the DOS Application Audit Unit ("Audit Unit"). In addition, if the licensee has received a Certificate of Relief from Disabilities, Certificate of Good Conduct or Executive Pardon, then such documentation would also need to be submitted. The latter documents are helpful, although not dispositive, in the DOS decision-making process.

In the event the DOS decides not to renew a license, it will immediately revoke the existing license. Unfortunately, once the license is revoked, the licensee's only right is to appeal the DOS's decision through an administrative proceeding and appear before an Administrative Law Judge ("ALJ").

### **What is the Licensee's Burden For Reinstatement?**

Once the DOS has decided not to renew or to revoke an individual's license, the burden is on the licensee to prove, by substantial evidence [emphasis added], that he or she is entitled to be licensed as a real estate broker, associate broker or salesperson. *In the Matter of Lin* (100 DOS 16, February 26, 2016) (hereinafter "*Lin*"), the ALJ explains that "[s]ubstantial evidence is that which a reasonable mind could accept as supporting a conclusion or ultimate fact. (citation omitted)." An agent must, through testimony and other evidence presented at the hearing, prove to the ALJ that he or she is trustworthy and of good moral character to hold a real estate license.

Real Property Law §441 requires that an applicant must establish that he or she is trustworthy and competent to transact business as a real estate salesperson or broker in such a manner so as to protect the public. Therefore, when a criminal conviction (or a revocation by another agency) is involved, the conviction or revocation (and the circumstances surrounding same) can be evaluated and analyzed by the DOS and used by it to determine the outcome.

### **To Renew or Not to Renew: The DOS Analysis**

In *Lin*, the ALJ provides a useful guide in applying the provisions of the Correction Law, Article 23-A ("Correction Law"), when deciding whether or not to issue (or renew) a license. The ALJ points out that the Correction Law "...imposes an obligation on licensing agencies to deal equitably with ex-offenders while also protecting society's interest in assuring performance

by reliable and trustworthy persons. Thus, the statute sets out a broad general rule that...public agencies cannot deny...a license to an applicant solely based on status as an ex-offender.”

Section 753 of the Correction Law requires that the following eight factors be taken into account by a public agency (in this case the DOS) when assessing whether a licensee’s license should be revoked or renewed:

- It is public policy to encourage the licensure and employment of persons previously convicted of a criminal offense or offenses.
- The specific duties and responsibilities necessarily related to the license or employment sought need to be assessed.
- The bearing of criminal offenses on the person’s fitness or ability to perform one or more of the duties or responsibilities required.
- The amount of time that has elapsed since the occurrence of the offense(s).
- The age of the person when the offense(s) occurred.
- The seriousness of the offense(s).
- Any information provided by the individual regarding his or her rehabilitation and good conduct.
- The legitimate interest in protecting property, and the safety and welfare of specific individuals or the general public.

Citing the New York Court of Appeals in *Bonacorsa v. Van Lindt*, (71 N.Y.2d 605, 611-12 (N.Y. 1988)) (*see* <https://casetext.com/case/bonacorsa-v-van-lindt-3>), the ALJ explained that while a person’s license cannot be denied simply because there exists an offense, there are certain “...*exceptions* [emphasis added] either where there is a direct relationship between the criminal offense and the specific license or employment sought (Correction Law §752), or where the license or employment would involve an unreasonable risk to persons or property (Correction Law §752).” Therefore, it is important to note that the DOS, even where there is no incarceration involved, or where there is no significant fine or penalty required to be paid, or where it is a first offense only, does have the discretion not to renew a license if the crime or offense is directly related to the license being sought or if there is an unreasonable risk associated with issuing or renewing that individual’s license.

In *Lin*, there was a “direct relationship” between the applicant’s crime (i.e., grand larceny and embezzlement of client funds) and fiduciary duties, which the applicant was expected to adhere to as a real estate agent. The breach of the client’s trust is critical in this case. Yet, after going through all of the relevant factors and applying the balancing test, the ALJ found that the renewal should be approved. As stated in *Bonacorsa*, “[t]he weighing of the factors is not a mechanical function and cannot be done by some mathematical formula. Rather..., it must be done through the exercise of discretion to determine whether the direct relationship between the ‘convictions and the license has been attenuated sufficiently.’”

In *Lin*, the applicant was convicted of embezzling a large sum of money from a client. He was also a compulsive gambler, which gave rise to the crime. However, the ALJ explained that the applicant dealt with his addiction and had not gambled for several years. These were factors that weighed in the applicant’s favor. The ALJ also noted that he found the

applicant's testimony "...to be entirely credible, he expressed shame for what he had done to both his client and his own family, and the resolve to re-establish his good reputation in his community...[and] that he now fully understands the importance of the fiduciary relationship." Finally, the ALJ took into account that since the applicant was applying for an associate broker's license he would "...be subject to the direct and regular supervision of the real estate broker with whom he is associated...[and would] provide an extra level of protection for the public."

In other similar cases, the ALJ, after going through a similar analysis, denied the applicants' application. (See *In the Matter of Di Donato*, 99 DOS 16 (February 26, 2016); and *Department of State, Division of Licensing Service v. Bruce W. Jones*, 1010 DOS 09 (October 22, 2009)).

### **The Real Estate License - A Privilege, Not a Right!**

While there are no guaranties that the DOS will approve a renewal application, it is important to understand that holding a real estate license is a privilege and not a right. The DOS will assess each individual application independently and determine whether or not a particular licensee should be issued a license. For most real estate licensees, real estate is their life and livelihood. However, it only takes one mistake or wrong choice for that livelihood to be taken away abruptly. Not only does that choice affect the principal broker, it also directly affects all of those agents who are associated with that broker and broker's firm.

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