

**Nasti v New York State Dept. of State, Div. of  
Licensing Servs.**

2023 NY Slip Op 31168(U)

April 13, 2023

Supreme Court, New York County

Docket Number: Index No. 160742/2022

Judge: Erika M. Edwards

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ERIKA M. EDWARDS**

**PART 10M**

*Justice*

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**INDEX NO. 160742/2022**

ANTHONY NASTI,

**MOTION DATE 12/15/2022**

Petitioner,

**MOTION SEQ. NO. 001**

- v -

NEW YORK STATE DEPARTMENT OF STATE, DIVISION  
OF LICENSING SERVICES,

**DECISION + ORDER ON  
MOTION**

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, the court denies Petitioner Anthony Nasti's ("Petitioner") motion by order to show cause and Verified Petition seeking an order for injunctive relief and declaratory judgment modifying the penalty imposed in the decision of Administrative Law Judge Roger Schneier, dated December 1, 2021, which revoked Petitioner's real estate broker's license and real estate associate broker's license.

Petitioner brought this Article 78 Verified Petition for Injunctive and Declaratory Relief against Respondent New York State Department of State, Division of Licensing Services ("Respondent") alleging in substance that the penalty revoking his real estate broker's license, which also revoked his real estate associate broker's license by operation of law, was "manifestly unfair to one's sense of justice and disproportionate to the misconduct in light of all the circumstances and is therefore shocking to the conscience thus constituting an abuse of discretion by the ALJ as a matter of law" (Verified Petition @ ¶2).

Petitioner alleges in substance that he held his real estate broker's license for more than thirty-six (36) years and had an unblemished record. He alleges that he was an owner of a brokerage firm and as a licensed real estate broker who was responsible for supervising dozens of real estate agents. A discrimination complaint was filed by the New York State Division of Human Rights against one of the agents for whom Petitioner supervised, David Elliot, and Petitioner's brokerage firm regarding discriminatory email correspondence in February 2018 between the complainant and Mr. Elliot. It was alleged that Mr. Elliot discriminated against an applicant for rental property in Manhattan on the basis of the applicant's national origin. Both the firm and Mr. Elliot settled the action without admitting liability in September 2019.

Respondent initiated a licensing complaint against Petitioner, Mr. Elliot and Petitioner's firm. Petitioner appeared in the proceeding *pro se* and opposed the allegations against him. Petitioner argued in substance that he learned of the email communication after the fact and that Mr. Elliot advised him in substance that the building manager told Mr. Elliot that the building would not accept an application from a Malaysian diplomat because the consulate would not waive diplomatic immunity. Although Mr. Elliot alleged in substance that he told the managing agent that such statement was discriminatory and that he could not convince the managing agent to change his position, ALJ Schneier did not find Mr. Elliot's statement to be credible. Petitioner further alleges that Respondent claimed that a representative from the managing agent's office denied making the statement.

Upon completion of the hearing, ALJ Schneier rendered a decision, dated December 1, 2021, and determined that Petitioner violated Real Property Law (RPL) §441(1)(b) and 19 NYCRR 175.21, that he demonstrated untrustworthiness and incompetency by failing to properly

supervise David Elliot, pursuant to RPL §441-c, and ALJ Schneier revoked Petitioner's real estate broker's license effective December 15, 2021.

Petitioner appealed the decision to Special Deputy Secretary of State Daniel E. Shapiro and requested a stay of the revocation pending the appeal. The stay was granted. However, on August 31, 2022, the Special Deputy Secretary of State affirmed the decision and Petitioner's license was revoked. Petitioner's licenses have remained revoked.

Petitioner now moves by order to show cause to modify the penalty imposed in the decision because it is so disproportionate to the determined misconduct in light of all the circumstances to be shocking to one's sense of fairness. Petitioner moved for a temporary restraining order (TRO) to reinstate his real estate broker's license, *nunc pro tunc*, pending the hearing of his Article 78 Petition and for a preliminary injunction pending the determination of the Article 78 Petition. The court declined to sign the portion of Petitioner's order to show cause which would have granted the TRO and in an Interim Decision and Order, dated January 17, 2023, the court denied Petitioner's request for the TRO and preliminary injunction.

Petitioner argues that the penalty was based on facts unsupported by substantial evidence and was an abuse of discretion as a matter of law. Petitioner relies on RPL §442-c and argues that the penalty was unauthorized and unfair. Petitioner argues in substance that since he was not directly involved in the underlying real estate transaction and he was not found liable for any direct involvement with the discriminatory emails, the revocation of his license was a drastic, grossly unfair, and disproportionate penalty. Petitioner further argues that such a penalty has never been imposed on a real estate broker for failing to supervise an agent who worked under his license. Additionally, Petitioner argues that alternative disciplinary measures could have been

imposed which would have permitted him to continue to work as a real estate licensee, yet still protect the public.

Petitioner further argues that at the time of the hearing, he was working in an associate broker capacity with another brokerage firm, as he was winding down his own firm's operations. Since his licenses were revoked, he has been unable to obtain gainful employment and he is prohibited from owning and operating his own real estate brokerage firm or being associated with another real estate broker's firm. Therefore, the revocation is an extremely harsh penalty as compared to his conduct.

Respondent answered and opposed the relief requested in the order to show cause. Respondent argues in substance that the revocation penalty imposed on Petitioner was not an abuse of discretion as Respondent has wide discretion and the authority to fashion an appropriate penalty, including revocation of a real estate broker's license if the broker demonstrated untrustworthiness or incompetency. Respondents further argue that Petitioner was found to have engaged in such conduct and therefore, the revocation penalty was not an abuse of discretion.

Respondent also argues in substance that Petitioner was responsible for supervising Mr. Elliot because Mr. Elliot was a licensed real estate salesperson duly associated with the Petitioner, who was his supervising licensed real estate broker. Respondent argues that Mr. Elliot engaged in blatant unlawful housing discrimination based on national origin and Petitioner failed to competently supervise, guide, or instruct Mr. Elliot to rectify the problem after it occurred and failed to prevent Mr. Elliot from engaging in similar conduct in the future. Mr. Elliot's emails stated in substance that although the building accepts diplomats, it won't accept diplomats from Malaysia and that the landlords feel that Malaysia isn't stable, which could lead to issues. Therefore, Respondent argues that even once Petitioner learned of the unlawful discrimination,

he failed to take any action to rectify the harm. Therefore, Respondent argues that revocation was the appropriate penalty, that it is not so disproportionate to the offense as to be shocking to one's sense of fairness, it is not an abuse of discretion and that the penalty should be upheld.

Respondent further argues that RPL §442-c does not apply to Petitioner because Petitioner was held directly liable for his own conduct for failing to properly supervise Mr. Elliot and he was not held liable vicariously for Mr. Elliot's conduct. Respondent argues that Petitioner was disciplined for his own conduct by failing to take any action to rectify Mr. Elliot's conduct once he learned of Mr. Elliot's behavior and failing to educate Mr. Elliot to make sure that it doesn't happen again. Respondent argues that by failing to act, Petitioner permitted Mr. Elliot's blatant discriminatory conduct to go unpunished.

Additionally, Respondent argues that Petitioner downplayed the severity of his misconduct and exaggerated the severity of the penalty. Respondent argues that the revocation is not permanent because Petitioner can reapply for his licenses after one year from the date of such revocation, pursuant to RPL §441-c(4).

In an Article 78 proceeding, the scope of judicial review is limited to whether a governmental agency's determination was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law (*see* CPLR § 7803[3]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230 [1974]; and *Scherbyn v BOCES*, 77 N.Y.2d 753, 757-758 [1991]). In reviewing an administrative agency's determination, courts must ascertain whether there is a rational basis for the agency's action or whether it is arbitrary and capricious in that it was without sound basis in reason or regard to the facts (*Matter of Stahl York Ave. Co., LLC v City of New York*, 162 AD3d 103, 109 [1<sup>st</sup> Dept 2018]; *Matter of Pell*, 34 NY2d at 231). Where the agency's determination involves factual evaluation within an area of the

agency's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference (*Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1<sup>st</sup> Dept 2010]). When a court reviews an agency's determination it may not substitute its judgment for that of the agency and the court must confine itself to deciding whether the agency's determination was rationally based (*Matter of Medical Malpractice Ins. Assn. v Superintendent of Ins. of State of N.Y.*, 72 NY2d 753, 763 [1<sup>st</sup> Dept 1988]).

Furthermore, an agency is to be afforded wide deference in the interpretation of its regulations and, to a lesser extent, in its construction of the governing statutory law, however an agency cannot engraft additional requirements or assume additional powers not contained in the enabling legislation (*see Vink v New York State Div. of Hous. and Community Renewal*, 285 AD2d 203, 210 [1<sup>st</sup> Dept 2001]).

Here, the court denies the relief requested in Petitioner's Verified Petition and motion by order to show cause and dismisses the Verified Petition. The court finds that Respondent was well within its authority to impose a disciplinary sanction of revocation of Petitioner's licenses based on Petitioner's conduct and that it was not an abuse of discretion for it to do so. The court determines that Petitioner failed to demonstrate that ALJ Schneier's penalty was an abuse of discretion or that his conduct by failing to properly supervise Mr. Elliot did not demonstrate untrustworthiness and incompetency. Based on the findings, although severe, the court does not find that the penalty was so grossly unfair or disproportionate to Petitioner's conduct that it shocks the conscience or shocks one's sense of justice.

As noted by ALJ Schneier, under the law Petitioner, as the licensed real estate broker, is obligated to supervise the real estate brokerage activities of Mr. Elliot because Mr. Elliot is a salesperson associated with Petitioner. Such supervision required Petitioner to provide "regular,

frequent and consistent personal guidance, instruction, oversight and superintendence” over Mr. Elliot’s work related to general real estate brokerage business (19 NYCRR 175.21[a]). ALJ Schneier found that Petitioner “offered no evidence that would reasonably lead to the conclusion that he was unaware of Mr. Elliot’s discriminatory conduct” (Decision by ALJ Roger Schneier, dated December 1, 2021). ALJ Schneier found that Petitioner violated state and federal laws, violated RPL §441(1)(b) and 19 NYCRR 175.21 and that he demonstrated untrustworthiness and incompetency (*id.*). ALJ Schneier stated in substance that he considered the seriousness of Petitioner’s violations and that he failed to interfere with Mr. Elliot’s blatant discriminatory conduct (*id.*).

Petitioner repeatedly stated that he was not challenging ALJ Schneier’s determination that he failed to supervise Mr. Elliot and that he agrees that Respondent has the discretion to fashion an appropriate penalty, yet Petitioner argued that his conduct did not warrant a finding of untrustworthiness or incompetence so revocation was grossly unfair and an abuse of discretion. By challenging ALJ Schneier’s determination that he demonstrated untrustworthiness and incompetence, Petitioner appears to challenge this determination and not just the penalty.

In the Verified Petition, Petitioner alleges in substance that he was not aware of any further discriminatory communications and that based on the information known to him at the time, he determined that no corrective action was necessary. However, in his Reply, Petitioner argues that once he learned of the discriminatory conduct and potential complaint, he attempted to investigate the allegations of impropriety against Mr. Elliot by contacting the complainant and the managing agent, although he was unable to do so. He also removed the listing from the office so that it could not be rented by any other agent. Although Respondent stated in substance that the removal only meant that the office did not have exclusive rights to rent the property and that

any agent could still attempt to rent it, the court takes no position on this issue. However, the court agrees with ALJ Schneier that even though Mr. Elliot claimed that he was only telling the complainant what the managing agent had told him, Mr. Elliot is still responsible for engaging in discriminatory conduct because he acted in concert to violate the statutes (*id.*). Therefore, the court agrees that Petitioner had an obligation to act in a manner that would discourage such unlawful conduct, further train Mr. Elliot on unlawful discrimination and take necessary action to prevent such conduct from happening again. Instead of treating the situation as an important teaching opportunity, Petitioner chose to do nothing.

The court recognizes, and Petitioner does not dispute, that blatant housing discrimination based on a person's nationality and the rejection of a potential tenant solely because the person is Malaysian are serious offenses. Therefore, the court understands Respondent's desire to impose a severe penalty on Petitioner as the supervisor responsible for Mr. Elliot's conduct based on Petitioner's inaction after learning of the discrimination. Mr. Elliot's failure to properly supervise Mr. Elliot, failure to instruct or train him about the severity of his unlawful discriminatory conduct, failure to impose any penalty on Mr. Elliot and failure to take any action to prevent him from repeating the same or similar conduct in the future, made Petitioner complicit with such conduct. Therefore, the court does not find the revocation of Petitioner's real estate broker's and associate broker's licenses to be an abuse of discretion.

Therefore, the court denies Petitioner's motion by order to show cause and denies and dismisses his Verified Petition, without costs and disbursements to any party.

As such, it is hereby

ORDERED and ADJUDGED that the court denies Petitioner Anthony Nasti's motion by order to show cause, denies the Verified Petition and dismisses the Verified Petition, without costs and disbursements to any party.

This constitutes the decision and order of the court.

4/13/2023

DATE

*Erika M. Edwards*  
ERIKA M. EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE