

**NEW JERSEY REAL ESTATE COMMISSION**

NEW JERSEY REAL ESTATE COMMISSION,	)	DOCKET NO.: MOR-15-009
	)	
Complainant,	)	
v.	)	<b>FINAL ORDER OF</b>
	)	<b>DETERMINATION</b>
JAMES FRESELLA, New Jersey real estate	)	
salesperson, (SP9591488)	)	
	)	
Respondent.	)	

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This matter was heard at a plenary hearing by the New Jersey Real Estate Commission ("Commission") in the Department of Banking and Insurance, State of New Jersey at the Real Estate Commission Hearing Room, 20 West State Street, Trenton, New Jersey on May 19, 2015.

**BEFORE:** Commissioners Linda Stefanik, Eugenia K. Bonilla, Denise Illes, Jeffrey A. Lattimer, Harold J. Poltrock, Esq., Cindy Marsh-Tichy, and Michael Timoni.

**APPEARANCES:** Marianne Gallina, Regulatory Officer, appeared on behalf of the complainant, the New Jersey Real Estate Commission ("REC"). Respondent James Fresella ("Fresella") failed to file an answer or otherwise appear despite receiving proper notice and the matter was heard ex parte.

**STATEMENT OF THE CASE**

The REC initiated this matter on its own motion through service of an Order to Show Cause ("OTSC") dated February 24, 2015, pursuant to N.J.S.A. 45:15-17, N.J.S.A. 45:15-18 and N.J.A.C. 11:5-1.1 et seq. The OTSC alleges that Fresella's failure to cooperate with a

Real Estate Commission (“REC”) investigation and to comply with a duly issued subpoena constitutes unworthiness in violation of N.J.S.A. 45:15-17(e).

By letter dated February 24, 2015, the REC served the OTSC on Respondent Fresella via regular and Certified Mail, return receipt requested. Service was made on Respondent at his address on file with the REC. Despite proper service of the OTSC, the REC did not receive an answer or response from Respondent Fresella. Thereafter, the Respondent was notified of the hearing date by letter dated April 15, 2015, which was also served by regular and Certified Mail. (See Exhibit S-1). The REC received confirmation from the United States Postal Service that the Certified Mail was delivered and the regular mail was not returned to the REC. In addition, during the course of the REC’s investigation, Respondent was in communication with the REC investigator about the allegations in the OTSC.

The matter was deemed uncontested and a proof hearing was scheduled on May 19, 2015. In accordance with N.J.A.C. 11:5-11.6 and N.J.A.C. 1:1-14.4, the REC is permitted to present proofs on an ex parte basis because Fresella failed to answer the charges of the OTSC and failed to appear at the May 19, 2015 hearing, despite receiving notice of the hearing date. At the hearing, the following exhibits were admitted into evidence:

- S-1 Hearing scheduling letter from the REC to James Fresella dated April 15, 2015 with Certified Mail receipt card attached.
- S-2 License renewal application screening questions for James Fresella dated May 25, 2013.
- S-3 Letter dated August 1, 2014 from REC Investigator Lynne Guenot to James Fresella with Certified Mail receipt card attached.
- S-4 Faxed letter dated November 21, 2014 from JoAnne Mitchell, Century 21 Broker, to REC Investigator Clark Masi.
- S-5 Subpoena dated December 3, 2014 to James Fresella to Appear and Produce Records returnable December 19, 2014 with Certified Mail receipt card and certification of service attached.

S-6 Faxed letter dated December 19, 2014 from JoAnne Mitchell to REC Investigator Lynne Guenot.

**TESTIMONY OF THE WITNESS**

Investigator Lynne Guenot testified on behalf of the REC. Investigator Guenot testified that she is an investigator with the Real Estate Commission and was assigned the Fresella case to investigate Respondent's response to Question #1 on the license renewal application questionnaire regarding criminal charges and convictions.

Investigator Guenot identified Exhibit S-2 as the license renewal screening questions for Respondent James Fresella dated May 25, 2013. Investigator Guenot stated that Fresella answered "yes" to Question #1 which asks if an applicant had been arrested, indicted, charged with a crime or convicted of a crime since the applicant's license was issued or renewed. Investigator Guenot testified that she contacted Respondent by phone and at first he appeared to be cooperative and said that he would send the requested information surrounding the criminal charges. When she did not receive the requested information, she contacted him again by phone and was informed by Fresella that he did not have the time or energy to provide the information and that she could get it from the Attorney General's office.

Investigator Guenot further identified Exhibit S-3 as her August 1, 2014 letter, with signed mailing receipt attached. She explained that this was the letter she sent to Fresella requesting documentation about his affirmative answer to Question #1. She testified that she sent this letter to Fresella advising him that he had failed to submit the required supporting documentation for his response to Question #1 on his license renewal questionnaire. In this letter, she requested a written explanation from him as to why he failed to comply with the notification requirements. Investigator Guenot testified that she did not receive a response from Fresella.

Investigator Guenot further testified that Exhibit S-4 was a letter to REC Investigator Clark Masi from Jo Anne Mitchell (“Mitchell”), broker associate at Century 21 Preferred Realty, 1333 Route 23 South, Butler, N.J. 07405, dated November 21, 2014. In this letter, Mitchell wrote about a conversation she had with Fresella. Mitchell wrote that she stated to Fresella that it was his responsibility to contact the REC regarding their investigation. However, she further stated that Fresella said to her that he had “gone through this with them for over a year and if he wants documentation, he can go across the hall and get it from the Attorney General himself”.

Investigator Guenot further identified Exhibit S-5 as the subpoena returnable December 19, 2014 sent to Fresella at his broker’s office, Century 21 Preferred Realty. The Certification of Service was signed by his employing broker, Jeff Montemarano, on December 8, 2014. Investigator Guenot testified that she received confirmation from the broker that Fresella was told that there was a subpoena for him at the office. Investigator Guenot identified Exhibit S-6 as a letter the REC received from Mitchell that stated that Fresella was left a voicemail message and an email advising him of the subpoena and instructing him to pick it up.

### **FINDINGS OF FACT**

Based on the pleadings, the testimony of the witness, and the documentary evidence duly admitted into the record, the Commission makes the following findings of fact:

1. James Fresella was a licensed New Jersey real estate salesperson employed with Preferred Realty, Inc., a licensed New Jersey real estate broker, located at 1333 Route 23 South, Butler, N.J. 07405.
2. On or about May 25, 2013, Respondent answered “yes” to Question #1 on his license renewal application, which asked “Since your last New Jersey real estate license was

issued or renewed have you been arrested (other than for motor vehicle violations), indicted, charged with a violation of a crime, misdemeanor or disorderly persons offense or convicted of a crime, misdemeanor or disorderly persons offense in this state, any other state or by the federal government.

3. On or about August 1, 2014, a letter was sent from the REC by Certified Mail to Respondent at his business address requesting supporting documentation in regard to his affirmative answer to Question #1 on the license renewal application.
4. On or about August 8, 2014, a REC investigator spoke by telephone with Fresella and requested that he provide an explanation of his answer as well as copies of the court documents pertinent to the criminal charges. Respondent stated that he had spoken to a REC Investigator two years ago and that the matter had "been taken care of." Respondent was informed that there was no information on file at the REC regarding the criminal charges and Respondent was asked to provide documentation regarding same.
5. When Respondent failed to provide documents as requested, a REC investigator contacted Respondent by telephone on or about November 20, 2014. At that time Respondent stated that he did not have "the time or the energy" to provide the documents and that the investigator should "go across the hall to the Attorney General's office and get the documents."
6. On or about December 4, 2014, a Subpoena to Appear and Produce Records was served on Respondent, returnable December 19, 2014. Service was made by personally delivering the subpoena to Respondent's place of business, Preferred Realty, Inc., 1333 Route 23 South, Butler, N.J. 07405, and the subpoena was left with his employing broker. Respondent failed to appear or otherwise comply with the subpoena.

## CONCLUSIONS OF LAW

In light of the above findings of fact, the Commission makes the following conclusions of law with regard to the charges contained in the OTSC and summarized above:

1. Respondent Fresella's conduct constitutes unworthiness in violation of N.J.S.A. 45:15-17e because he failed to cooperate with a Real Estate Commission investigation and to comply with a duly issued subpoena.

## DETERMINATION

In arriving at the determination in this matter, the Commission took into consideration the testimony and credibility of the witness and the undisputed documentary evidence admitted during the course of the hearing. The Commission also considered the serious nature of the allegations.

Pursuant to N.J.S.A. 45:15-17e, the Commission may place on probation, suspend or revoke the license of any licensee or issue a penalty for, "Any conduct which demonstrates unworthiness, incompetency, bad faith, or dishonesty". Moreover, the failure of any person to cooperate with the Commission in the performance of its duties or to comply with a subpoena issued by the Commission compelling the production of materials in the course of an investigation may be construed as conduct demonstrating unworthiness.

The Real Estate Brokers and Salesperson Act charges the Commission with the "high responsibility of maintaining ethical standards among real estate brokers and sales[persons]" in order to protect New Jersey real estate consumers. Goodley v. New Jersey Real Estate Comm'n., 29 N.J. Super., 178, 181-182 (App. Div. 1954). Thus, the Commission has the power to suspend or revoke the licenses of brokers and salespersons, and to impose fines, for any acts that violate any of the offenses enumerated in N.J.S.A. 45:15-17 or the real estate

regulations. Maple Hill Farms, Inc. v. Div. of New Jersey Real Estate Comm'n., 67 N.J. Super. 223, 232 (App. Div. 1961); Div. of New Jersey Real Estate Comm'n. v. Ponsi, 39 N.J. Super. 526, 527 (App. Div. 1956). It is essential that the REC receive timely notice of the filing of formal criminal charges against its licensees. These timely notifications enable the REC to take appropriate licensing action when necessary to protect the public.

In this case, Investigator Guenot made numerous attempts to obtain information from Respondent Fresella regarding his affirmative response to Question #1 on his license renewal application regarding criminal charges or convictions. Investigator Guenot's testimony established that despite her attempts to contact Respondent directly by phone, letter and subpoena, Respondent repeatedly failed to cooperate with the REC's investigation. Therefore, license revocation is the appropriate sanction in this matter.

In Kimmelman v. Henkels & McCoy, Inc. 108 N.J. 123 (1987), the Supreme Court established the following seven factors to evaluate the imposition of fines in administrative proceedings and these factors are applicable to this matter which seeks the imposition of penalties under the Real Estate License Act, N.J.S.A. 45:15-1, et seq.: (1) The good or bad faith of the respondent; (2) The respondent's ability to pay; (3) Amount of profits obtained from illegal activity; (4) Injury to the public; (5) Duration of the illegal activity or conspiracy; (6) Existence of criminal or treble actions; and (7) Past violations. Kimmelman, supra 108 N.J. at 137-139. Analysis of these factors in this matter requires imposition of a significant fine.

First, Respondent Fresella demonstrated bad faith by failing to provide documentation and an explanation of why he answered "Yes" to Question #1. He also demonstrated bad faith by failing to comply with the REC's subpoena and for his overall failure to cooperate with the investigation. Second, no evidence was presented regarding Respondent's

ability to pay a fine. Third, although there was no evidence presented as to whether or not Respondent profited from his actions, it is unclear whether Respondent profited from his illegal activity. Fourth, the public is significantly harmed when real estate licensees in fiduciary positions fail to provide information surrounding their criminal charges and then fail to cooperate with an investigation because the public's confidence in that individual as a real estate agent and the real estate industry as a whole is eroded. Fifth, Respondent's failure to cooperate with the REC's investigation continued from August 1, 2014 through the commencement of this action because Respondent Fresella never provided the requested criminal information. Sixth, Respondent admitted in his response to the license renewal questionnaire that he was arrested, charged, indicted or convicted of a crime, misdemeanor or disorderly persons offense. However, Respondent concealed the details of this activity by failing to cooperate with the REC investigation. Finally, the Commission is not aware of prior violations of the Commission's rules by the Respondent.


Accordingly and pursuant to N.J.S.A. 45:15-17, the Commission imposes the following sanctions:

- A. Respondent James Fresella's real estate salesperson's license shall be revoked from the date of this Order.
- B. Respondent James Fresella shall pay a fine in the amount of \$3,500.00 within 30 days from receipt of this Order.

SO ORDERED this 2<sup>nd</sup> day of March, 2017.



By: Linda Stefanik, President  
Eugenia K. Bonilla, Commissioner  
Harold J. Poltrock, Esq., Commissioner  
Jeffrey A. Lattimer, Commissioner  
Denise Illes, Commissioner  
Cindy Marsh-Tichy, Commissioner  
Michael Timoni, Commissioner



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Robert L. Kinniebrew  
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