

DEPARTMENT OF STATE
OFFICE OF THE SECRETARY OF STATE

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In the Matter of

DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,

Appellant,

DECISION AND ORDER
10 DOS APP 05

-against-

LA LA WANG,

Respondent
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In a Decision rendered on or about December 9, 2004¹ in the matter of La La Wang, Applicant for an Apartment Information Vendor, v. Division of Licensing Services, Objector, 1031 DOS 04, Supervising Administrative Law Judge Felix Neals (hereinafter "ALJ") ordered that the application of Ms. La La Wang, a.k.a. Lan Lan Wang, a.k.a. Elizabeth Wang (hereinafter "Respondent") for licensure as an apartment information vendor be granted. The Department of State Division of Licensing Services (hereinafter "Appellant") appeals the Decision to the Secretary of State.

BACKGROUND

In a prior proceeding, which involved Respondent's real estate broker's license, the Department of State determined that Respondent was operating an apartment information vendor business without a license, and that Respondent's operation of such unlicensed apartment information vendor business demonstrated a lack of good character and trustworthiness. Based

¹ The date indicated on the Decision ("November 9, 2004") appears to be a typographical error. The Decision was actually issued on or about December 9, 2004.

on those determinations, the Department of State suspended Respondent's real estate broker's license "until such time as she has presented proof satisfactory . . . that she . . . is no longer engaged in the business of apartment information vendor" (See Department of State Division of Licensing Services v. Wang, 23 DOS 00 (Jan. 2000)).

The instant proceeding involves Respondent's application for an apartment information vendor license under Article 12-C of the Real Property Law (the "RPL").

Respondent filed an application for licensure as an apartment information vendor, dated August 24, 2003, with the Department of State (State's Ex. 2). By letters dated March 16, 2004 and March 20, 2004, Appellant notified Respondent that her application was to be denied for the following reasons: (1) Respondent failed to prove that she had fully complied with the order made in 23 DOS 00, and (2) Respondent continued to engage in the business of an apartment information vendor without benefit of a license, thereby indicating a lack of good character and trustworthiness required for licensure. By letter dated April 13, 2004, Respondent requested an administrative hearing to review the Appellant's proposed denial of her application.

A hearing on this matter was held on October 26, 2004 and December 7, 2004. The Respondent appeared *pro se* on both dates. Respondent asserted that she modified her business web-based model subsequent to the Department's determinations in 23 DOS 00, and that her remodeled business is not an apartment information vendor business.

In his Decision, the ALJ stated that Respondent " . . . proved by substantial evidence that she possesses the good character and trustworthiness required for licensure as an apartment information vendor," and ordered that Respondent's application for a license as an apartment information vendor be granted.

In light of the procedural background discussed above, the ALJ determined that Respondent's remodeled business, prior to the filing of her instant application for an apartment information vendor license, was not an apartment information vendor business.²

ISSUE

The question presented in this appeal is whether there is substantial evidence in the record to support the finding, implicit in the decision of the ALJ, that Respondent was not conducting an apartment information vendor business prior to the filing of her application for a license to conduct such a business.

FINDINGS OF FACT

The following facts are relevant on this appeal:

1. Prior to the Decision in Department of State Division of Licensing Services v. Wang, 23 DOS 00 (Jan. 2000), Respondent, under the name "MLX.com," was operating the business described in Finding of Fact No. 4 in that Decision. Finding of Fact No. 4 in 23 DOS 00 is incorporated herein by reference.³

² During the hearing in this matter, the ALJ himself noted, several times, that the issue to be determined at the hearing was whether Respondent was or was not engaged in the business of apartment information vendor without a license. See, for example, the ALJ's statement at page 87 of the Transcript, lines 11 - 15: "The Tribunal stated at the last hearing and it will state again, the main issue of this hearing is whether Ms. Wang was or was not involved in apartment vendor activities without licensure."

³ Finding of Fact No. 4 in 23 DOS 00 reads, in pertinent part, as follows: "When consumers access the respondent's web site they are offered, without fee, the opportunity (to) obtain information about various aspects of the real estate business in New York City, about taxes, and about moving, to receive discounts from certain non-affiliated businesses, to participate in an on-line bulletin board, and to access a data base of apartments which are available for rent or sale. *The data base describes the apartments which are available for rent, but does not give their addresses or otherwise indicate how to contact the landlords. By paying a fee of \$150.00 the consumer receives on-line access to the addresses of and contact information for the rental apartments, as well as increased*

2. At some point after the Decision in 23 DOS 00 and prior to the filing of her application for an apartment information vendor license, Respondent modified her MLX.com business. Under Respondent's modified MLX.com business:

- customers could access Respondent's web site and obtain, without fee, certain general information concerning the location and availability of apartments and other housing;
- the information available without fee did not include the exact address of, or the contact information for, the apartments; and
- by paying a fee of \$149.00 a customer could "upgrade" to "insider" status, and receive on-line access to the addresses of and contact information for the rental apartments, as well as (See State's Ex. 5; R-123, 125, 126).⁴

OPINION

The issue of trustworthiness presented in this appeal hinges upon the question of whether the Respondent acted as an apartment information vendor without a license in operating the modified MLX.com web site

Threshold Issues

Before considering whether Respondent's modified MLX.com business is an apartment information vending business, several threshold issues must be addressed.

discounts from the non-affiliated businesses. . ." (emphasis added)

⁴ See R-125 (stating, "That [free] information would show . . . that [the apartment] is on East 74th Street . . . what the rent is . . . number of bedrooms"); R-123, 126 (illustrating that in order to attain contact information, an MLX guest is required to become an "insider," which requires payment of a fee of \$149)

First, RPL § 446-a defines "apartment information vendor" as "any person who engages in the business of claiming, demanding, charging, receiving, collecting, or contracting for the collection of, a fee from a customer for furnishing information concerning the location and availability of real property." The phrase "information concerning the location and availability of real property" covers a wide range and variety of information. A person who charges for any such information is in the apartment information vending business; this conclusion is not changed merely because the person also provides certain other information for free. This is particularly true where the "free" information is insufficient to enable a customer to determine (1) exactly where the apartment is located and (2) how to contact the landlord or the landlord's representative.

"[I]nformation concerning the location and availability of real property" within the meaning of RPL Article 12-C includes, but is not necessarily limited to, specific location information (e.g., that an apartment located at a *specific address* on East 74th Street is available for rent), as well as contact information that would enable a potential tenant to contact the landlord or the landlord's representative, for without this information, the property is effectively unavailable to the potential tenant.⁵ If a person provides only non-specific information (e.g., that the apartment "on East 74th Street" is available) for free, but requires the customer to pay a fee in order to obtain the information necessary to "close the deal" (e.g., that the available apartment is

⁵ Information "concerning" availability is not limited to the fact that an apartment *is* available for rent. An apartment is "available" only to potential tenants who can contact the landlord (or the landlord's representative). Accordingly, for the purposes of RPL Article 12-C, information "concerning" availability includes, *inter alia*, contact information. Respondent's assertion to the contrary (Transcript, page 122, lines 16-18) is rejected.

located at 41 East 74th Street and/or that the landlord's name is X and telephone number is xxx-xxxx), that person is engaging in the business of apartment information vending.

Second, a finding that a person is engaged in the business of apartment information vending will not be negated by the "packaging" of that information with other services and/or with merchandise. In this case, Respondent appears to argue that the \$149 fee paid by a customer who wishes to "upgrade" to "insider" status is attributable entirely to changing the customer's free "mini 'apartment wanted ad'" to a "featured" advertisement.⁶ This argument misses the fundamental point: a customer *must* pay the \$149 fee in order to obtain the additional, detailed location / availability information that is necessary to have a chance to obtain the apartment. The fact that the customer may obtain some service or merchandise in addition to the apartment location and availability information does not change the fact that the customer must pay the fee to get the information.⁷

Finally, a determination that a person is engaged in an apartment information vending business would not be negated by a finding that such person provides relevant information with

⁶ See Respondent's Memorandum in Opposition to Appeal, at page 4.

⁷ This point should not be carried to an illogical extreme. Respondent has argued that if her business is held to be an apartment information vending business then so too must a newspaper that carries apartment for rent advertisements. This argument was rejected in 23 DOS 00 (see page 4 of that Decision). Yet the Department of State did not unilaterally invent an exception for newspapers. Support for holding that a newspaper is not an apartment information vendor can also be found in Lefkowitz v. Harrell's Employment Guide, Inc., 89 Misc. 2d 807 (Sup. Ct. Albany County, 1977), where respondent Harrell argued that he was not an apartment referral agent under RPL Article 12-G because his "bulletin" was a newspaper. The Court described the bulletin as "32 pages of data pertaining to apartments, purportedly available for rental . . . (and an) additional eight page article entitled 'Tenants Rights' . . . and . . . a one-page article by 'J. Harrell' complaining of harassment by the Attorney-General" (89 M.2d at 807). The Court held that "(t)he fact that such information is furnished through the device of a published bulletin does not convert the referral business into a newspaper, as contended by respondent (Cf. General Construction Law, § 60.) The bulletin published by Guide basically is a compendium of information relating to rental apartments purportedly available to the general public." The Court enjoined the respondent from engaging in the business of apartment referral agent

respect to *some* apartments free of charge; if a person charges a fee for access to all or any part of the relevant location and availability information for *any* apartments, such person is conducting an apartment information vending business. Thus, the fact that Respondent's modified MLX.com business may have permitted free access to all relevant information for *certain* apartments described in "certain feature ads" (Transcript, page 124) will not negate a finding that the modified MLX.com business is an apartment information vending business.

Burden of Proof

As the party who requested the hearing in this matter, and as the applicant for an apartment information vendor license, Respondent has the burden of establishing that she is trustworthy.⁸ In the context of this case, this means that Respondent bears the burden of proving that her modified MLX.com business was not an apartment information vendor business.

It appears that the ALJ may have erroneously assumed that the burden of proof in this matter was on the Appellant. See, for example, the statements made by the ALJ at page 88 of the Transcript:

"... the State had not proved that Ms. Wang was even in business ... if the State had not proved that the applicant was in business ... But when the applicant went forward and proved that she was in business, she established a prima facie case for the State, and that's where we are today ..."

Accordingly, on this appeal the Secretary of State must review the record to determine if it supports a conclusion that *Respondent* has carried *her* burden of establishing that her modified MLX.com business was not an apartment information vending business.

⁸ See State Administrative Procedure Act § 306(1). See also RPL § 446-b(1), which provides "It is unlawful for any person to act or engage in the business as an apartment information vendor in this state without first having obtained a license from the secretary of state. No person shall be granted a license until *he has established* that he is trustworthy and bears a reputation for good and fair dealing" (emphasis added).

Respondent's Modified MLX.com Business

It has already been determined that the business described in 23 DOS 00 (hereinafter referred to as Respondent's "pre-2000 MLX.com business") was an unlicensed apartment information vendor business, and that Respondent's operation of such unlicensed business demonstrated that Respondent was untrustworthy.⁹ These determinations were confirmed by the Court.¹⁰

It appears that Respondent's modified MLX.com business is virtually identical, in matters relevant to this appeal, to her pre-2000 MLX.com business. In both the pre-2000 MLX.com business and the modified MLX.com business, customers were able to obtain some information concerning apartment location and availability on the "free" portion of the web site; however, under both the pre-2000 MLX.com business and the modified MLX.com business, customers were required to pay a fee in order to access other information concerning apartment location and availability.

However, in reviewing the Transcript of the hearings held in this matter, there is a measure of ambiguity regarding the extent of the information available in the "free" portion of Respondent's modified MLX.com business. See, for example, the following exchanges, at pages 123 - 125 of the Transcript:

Question (by Mr. Drew): "[b]ut isn't it true that in order to get the more specific information, the contact information, the customer is required to pay that \$149 fee?"

⁹ DLS v. Wang, 23 DOS 00.

¹⁰ See Wang v. Daniels, 305 A.D.2d 186, 757 N.Y.S.2d 857 (First Dept., 2003), motion for leave to appeal denied 100 N.Y.2d 511, 798 N.E.2d 349 (2003).

Answer (by Respondent): "You are required to become an insider, and as an insider, access to contact information is part of the service, but the location and availability was already given to you for free as a guest, so we're not charging, we're not charging for access to the listings. That was given away for free."

Question (by the ALJ): "Without paying the \$149, under the free services, is it possible for a subscriber to have access, get information or have contact with a landlord or seller?"

Answer (by Respondent): "From time to time we've gone through different models, so sometimes for certain featured ads, the answer is yes. You know, over the course of years, you keep sort of changing how – or you fuss with, you know, how you're doing things, so from time to time we have promoted certain landlord's and broker's or owner's listings and they're totally free to a consumer."

Question (by the ALJ): "I haven't paid any money. I now have access to certain information in the site. That information is limited to what?"

Answer (by Respondent): "That information would show you that it's on East 74th Street, it would show you what the rent is, the number of bedrooms, the description, it would give you an I.D. number, which is unique to that property listing."

As the burden of proof falls on the party requesting the hearing, here the Respondent, the lack of specific information on the record regarding what MLX.com furnishes for a fee weighs against the Respondent.¹¹ Accordingly, the Secretary of State finds that Respondent has failed to carry her burden of establishing that the modified MLX.com business is not an apartment information vending business.

Nevertheless, the Secretary of State will take into account the following mitigating factors: (1) prior to this appeal, Respondent appeared pro se, and (2) the Respondent may have become confused with regard to her burden of proof in this matter.

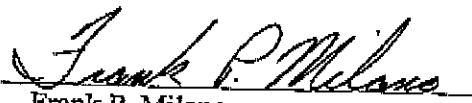
¹¹ Based on Respondent's evasive answers and frequent retreats from the near-specific to the general, as shown in the exchanges quoted above, it would not be unreasonable to conclude that Respondent deliberately attempted to obfuscate the true nature of her modified MLX.com business.

DETERMINATION

Accordingly, for the reasons previously set forth, this matter is remanded to the Office of Administrative Hearings to conduct further proceedings necessary to elicit evidence regarding which specific items, services, or information are furnished for a fee by the modified MLX.com business, and which items, services, or information are provided free of charge and to thereafter render a determination based thereon.

So ordered on:

May 16, 2005



Frank P. Milano
First Deputy Secretary of State