

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

Complaint No.: 2019-1463

-against-

AMINTA ABARCA,

Respondent.

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The above noted matter came on for a virtual hearing before the undersigned, John Kenny, on April 14, 2021.

The respondent, having been advised of her right to be represented by counsel, chose to represent herself.

The Division of Licensing Services (“DLS”) was represented by Matthew Wolf, Esq.

COMPLAINT

The complaint alleges that by engaging in unlawful discriminatory practices proscribed by federal, state or local law, the respondent has engaged in conduct demonstrating untrustworthiness and/or incompetency in violation of Real Property Law (RPL) §441-c and 19 NYCRR §175.17 (b). The DLS specifically alleges that the respondent engaged in the practice of racial steering by offering her opinion on the quality of schools, by providing unsolicited information about demographics, by suggesting to the testers to research the demographic make-up of the communities they were considering, by providing the white tester with more listings in predominately white communities, and by providing listings in predominately black communities to the minority tester. The DLS also alleges that the respondent engaged in disparate treatment of the minority and white testers by refusing to provide the minority tester with any home tours unless he signed a buyer’s agreement with the respondent and not requiring that the white tester sign a buyer’s agreement. The DLS further alleges that the respondent failed to complete her continuing education courses during the two years immediately preceding her license renewal application that she submitted in 2016 in violation of RPL §441 (3)(1) and RPL § 441-c.

FINDINGS OF FACT

1) The Notice of Hearing and Complaint were served by certified and regular mail on November 5, 2020 to the respondent at her last known business address as per the records of the DLS (State's Ex. 1; State's Ex. 2). The respondent acknowledged receiving the Notice of Hearing and Complaint prior to the hearing (Transcript at 8).

2) The respondent was licensed as a real estate salesperson, UID #10401263529, in association with Keller Williams Realty of Greater Nassau, and her license expired on June 11, 2020 (State's Ex. 2).

Newsday Article

3) On or about November 17, 2019, Newsday published an article and posted video on its website in connection with the report Long Island Divided. The purpose of the Newsday article was to expose the disparate treatment of minorities by real estate licensees on Long Island. A licensee featured in the article was respondent Aminta Abarca who was associated with the real estate firm of Keller Williams Realty of Greater Nassau.

4) The article was based, in large part, on tests conducted by actors or other individuals, who posed as prospective residential real estate buyers. The tests were conducted on behalf of Newsday to uncover discriminatory conduct. For each test, there was a minority and white tester, both of whom were equipped with hidden video cameras, and, who met with a real estate licensee at two different times.

5) The Newsday article identified the test involving the respondent as Test 93. The article alleges that during the time period from November 2016 through January 2017, the respondent engaged in steering by providing the minority tester, Kelvin Tune, with listings in predominately black communities and by providing the white tester, Richard Helling, with more listings in predominately white communities. The article also alleges that the respondent engaged in the disparate treatment of the minority tester by requiring Mr. Tune to sign a buyer's agreement before showing him any homes and not requiring Mr. Helling to sign a buyer's agreement when showing him homes (see Newsday article at <https://projects.newsday.com/long-island/real-estate-agents-investigation/>). Newsday Test Video #93, dated January 12, 2017, is the video of Mr. Tune's meeting with the respondent at her office on January 12th (State's Ex. 4).

6) According to the Newsday article referencing Test 93, the following statistical information applies to the minority and white testers:

A. Listings Given to Minority Tester – 13, Census Tracts: 43% White on Average

B. Listings Given to White Tester – 19, Census Tracts: 61% White on Average (State's Ex.

4).

TEST 93

7) During an in office meeting at Keller Williams on November 21, 2016, Mr. Helling stated that he was from Seattle, that he was currently living in New York City, that he had a budget of \$550,000, and that he wanted no more than a forty-five minute commute into the city (Newsday video timestamp 2:29, 4:45, 7:09. 8:00).

8) During an in office meeting at Keller Williams on January 12, 2017, Mr. Tune stated that he was moving out of New York City, that he had a budget of \$550,000 and that he wanted to find a house within forty-five minutes from Midtown Manhattan (Newsday video timestamp 5:53, 9:37, 15:03).

9) During the in office meeting on January 12th, Mr. Tune asked the respondent about homes in Hempstead, New York (Transcript at 67). She informed Mr. Tune that “the school districts [in Hempstead, NY], I don’t think they rank as high, I think they’re at the bottom.” (Transcript at 68, Newsday video timestamp 50:38). The respondent also told Mr. Tune that “Wikipedia will show you how many Haitians, how many whites, blacks, um, Native Americans, Asian and other races, Latinos” [live in Hempstead, NY] (Transcript at 71; Newsday video timestamp 1:04:00). The respondent advised Mr. Helling during their meeting on November 21st that he could find information about school demographics and ratings on the www.greatschools.com website (Newsday video timestamp 20:009, 39:08). The respondent’s statements to Mr. Helling about school demographic and ratings were non-specific in comparison to the specific statements she made to Mr. Tune about school demographics and ratings.

10) During the same meeting with Mr. Tune, she advised him about the benefits of signing an exclusive buyer’s agreement (hereinafter referred to as a buyer’s agreement) with her (Newsday video timestamp 53:13). She informed Mr. Tune that “When I work with clients, I work with them with a commitment” (Transcript at 82; Newsday video timestamp 57:47). The respondent also said that “I do like to work with a [sic] exclusive buyer representation agreement” (Transcript at 83; Newsday timestamp 58:03). In addition, she told Mr. Tune that if you “work with me, I do work, you know, with a contract” (Transcript at 84; Newsday video timestamp 1:14). In a second meeting with the respondent on January 19, 2017, Mr. Tune asked the respondent about showing him homes and she told him that “So, the way I work is when I take someone out, I sign them up to be a client. Ok. So that is the only way that I am going to be working with people is, if they’re my client, then I will take them out.” (Newsday video timestamp 1:19:27). She also informed Mr. Tune by stating, “in other words, if I take you to see any property, you would have to be my client” (Transcript at 88; Newsday video timestamp 1:20:12). The respondent never discussed the need to sign a buyer’s agreement with Mr. Helling before showing him any homes during their office meeting.

Department’s Investigation

11) Although the respondent told Mr. Tune during the meeting that she would not work with him unless he signed a buyer’s agreement, later that same day, she left Mr. Helling a voicemail offering to take him out for home tours without signing a buyer’s agreement. Subsequent to leaving the voice mail message for Mr. Helling, the respondent sent a text message to Mr. Tune informing him that he should tell his wife that she will not take out clients unless they sign a buyer’s agreement with her to be their exclusive salesperson (Transcript at 90-92).

12) Investigator Jack Bilello testified that the respondent recommended predominately black communities to the minority tester by specifically identifying Baldwin and Elmont, New York as communities in which to purchase a home (Transcript at 72, 73). The Tribunal takes judicial notice of the 2016 American Community Survey 5-Year Estimates of the United States Census Bureau for race and ethnicity percentages of Baldwin, New York which shows that the Black or African American population is 34.3% and that the Black or African American population for Elmont, New York is 46.4%. While the minority population of Baldwin, New York is not predominately black, as compared to the white population of 46.1%, it does account for a significant portion of that population whereas the minority population of Elmont, New York is predominately black at 46.4% compared to a white population of 20.3%. Investigator Bilello stated the respondent did not make the same recommendation to Mr. Helling about either community (Transcript at 73-77; State's Ex. 6).

13) Investigator Bilello testified, based upon his investigative experience and a review of the Newsday videos, that the respondent engaged in the act of steering by specifically informing Mr. Tune about the Hempstead School District rankings and ratings and by discussing the specific demographic make-up of people living in the Hempstead community (Transcript at 45-47).

14) In an email dated January 13, 2019, the DLS made a request to the respondent to provide those continuing education certificates that were completed during the two years immediately preceding her license renewal application submitted in 2016 (State's Ex. 7). As part of its investigation, Investigator Bilello interviewed Richard Amato, the broker of record for Keller Williams Realty of Greater Nassau, on January 17, 2020. At the interview, Mr. Amato provided copies of the respondent's continuing education certificates. After reviewing the certificates, Investigator Bilello found that some of the certificates were for different renewal periods and that other certificates were incomplete (Transcript at 150-155; Respondent's Ex. A).

Respondent's Testimony

15) The respondent testified that she did not steer Mr. Tune to either Baldwin or Elmont, New York. She stated he expressed an interest in Hempstead and that she identified the surrounding towns of Baldwin and Elmont as neighboring communities that appeared on the map on her computer (Transcript at 131). The respondent stated that she did not discuss the towns of Hempstead, Baldwin, or Elmont with Mr. Helling because he did not ask about those communities (Transcript at 133, 134).

16) The respondent testified that Mr. Tune called her and stated that he wanted her to show him some homes. She told Mr. Tune to come into the office to discuss the homes he was interested in seeing. At the office, Mr. Tune provided the respondent with three listings that he was interested in looking at. The respondent set up appointments to see the three homes. During the office visit, the respondent told Mr. Tune that she was not going to work with anybody without a contract and she gave him a contract to review. She told Mr. Tune to sign the contract and to have his wife sign it as well. After their initial office visit, Mr. Tune had a second visit with the respondent where he asked the following question, "you're going to show me those houses, right?" The respondent informed Mr. Tune, "I set them up, but I need you to sign the contract." Mr. Tune had not signed the contract which resulted in the respondent cancelling the appointments she had set up to see the

three houses. The respondent testified that had Mr. Tune signed the contract, she would have taken him to see the three houses (Transcript at 143, 144)

17) The respondent testified that she did not ask Mr. Helling to sign a buyer's agreement because she felt that he was wasting her time. This was based upon an incident in which Mr. Helling contacted another salesperson in her office about homes for sale while she was working with him. The respondent described Mr. Helling's actions as "agent hopping" and "playing with your time" which she classified as acts that wasted her time (Transcript at 135, 136). The respondent vaguely testified that she asked Mr. Tune to sign a buyer's agreement because she had become suspicious of him based upon the search criteria information he provided to her at their office visit which was exactly the same information Mr. Helling had provided to her during their office visit. The respondent testified that if Mr. Tune had signed the buyer's agreement she would have provided him with home tours. She also stated that Newsday "should have brought two more, or six more testers, and tested me over and over to see if I was not going to show black people homes... and only white people homes. That's how you really test someone." (Transcript at 139-141). The respondent's self-serving testimony regarding her suspicions of Mr. Tune appear to be a hindsight justification for her actions rather than actually being suspicious of Mr. Tune as being a tester or part of an investigation. When asked if she was still working with Mr. Helling when she requested that Mr. Tune sign an exclusive buyer's agreement before she would show him any homes, she stated, "At that point, not really." (Transcript at 135-144).

OPINION

I- As the party that initiated the hearing, the burden is on the complainant to prove, by substantial evidence, the truth of the charges set forth in the complaint. State Administrative Procedure Act §306(1). Substantial evidence "means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact... More than seeming or imaginary, it is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt (citations omitted)." 300 *Gramatan Avenue Associates v. State Div. of Human Rights*, 45 NY2d 176, 408 NYS2d 54, 56-57 (1978); *Tutuianu v. new York State*, 22 AD3d 503, 802 NYS2d 465 (2nd Dept. 2005). "The question... is whether a 'conclusion or ultimate fact may be extracted reasonably—probatively and logically" *City of Utica Board of Water Supply v. New York State Health Department*, 96 AD2d 719, 465 NYS2d 365, 366 (1983), quoting *300 Gramatan Avenue Associates, supra*, 408 NYS2d at 57.

II- The Department of State retains jurisdiction to conduct this proceeding even though the respondent's license has expired. The respondent was a licensed real estate salesperson on November 21, 2016 and January 12, 2017 when she met with the testers. *Albert Mendel & Sons, Inc. v. NYS Department of Agriculture and Markets*, 90 AD2d 567, 455 NYS2d 867 (3rd Dept. 1982); *Maine Sugar of Montezuma, Inc. v. Wickham*, 37 AD2d 381, 325 NYS2d 858 (3rd Dept. 1971).

III- To qualify for a real estate agent's license, the respondent must be both trustworthy and competent in order "to safeguard the interests of the public." See Real Property Law § 441 (b) (emphasis supplied). Section 441-c of the Real Property Law ("Powers of the department") provides in pertinent part: "The Department of State may revoke the license of a real estate broker

or salesperson or suspend the same, for such period as the department may deem proper, or in lieu thereof may impose a fine not exceeding one thousand dollars payable to the Department of State, or a reprimand...if such licensee... *has demonstrated untrustworthiness or incompetency to act as a real estate broker or salesperson...*” Real Property Law §441-c (1)(a) (emphasis supplied).

IV- 19 NYCRR §175.17 (b) provides that “No real estate broker or salesperson shall engage in an unlawful discriminatory practice, as proscribed by any Federal, State or local law applicable to the activities of real estate licensees in New York State. A finding by any Federal, State or local agency or court of competent jurisdiction that a real estate broker or salesperson has engaged in unlawful discriminatory practice in the performance of licensed real estate activities shall be presumptive evidence of untrustworthiness and will subject such licensee to discipline, including a proceeding for revocation. Nothing herein shall limit or restrict the department from otherwise exercising its authority pursuant to section 441-c of the Real Property Law.”

V- The basis of the evidence submitted by the DLS is primarily the Newsday article and the videos. The article contains hearsay statements claiming the respondent steered Mr. Tune to the communities of Baldwin and Elmont, New York. It is well established that hearsay evidence is permitted in an administrative proceeding and, under certain circumstances, may constitute an agency’s entire case. *Posner v. Division of Licensing Services*, 37 DOS APP 09 (2009); *Today’s Lounge of Oneonta, Inc. v. New York State Liq. Auth.*, 103 A.D.3d 1082, 1083 (3d Dep’t 2013). Both unsworn and oral statements may be sufficient. *Diehsner v. Schenectady City School Distr.*, 152 A.D.2d 796, 797 (3d Dep’t 1989). However, an administrative determination may be based entirely on hearsay evidence only if it is “sufficiently relevant and probative” or “sufficiently reliable” and is not otherwise “seriously controverted.” *Doctor v. NYS Office of Alcoholism and Substance Abuse Services*, 112 A.D.3d 1020, 1022 (3d Dep’t 2017); *see also Division of Licensing Services v. Sottile*, 19 DOS 91 (1991) (to be admissible in an administrative hearing, the hearsay evidence must be “reliable, relevant, and probative”); *Sowa v. Looney*, 23 N.Y.2d 329, 333 (1968) (“All relevant, material, and reliable evidence which will contribute to an informed result should be admissible in a disciplinary proceeding”). In determining whether the evidence presented constitutes substantial evidence, “[t]he question is whether the hearsay introduced is the kind of evidence on which responsible persons are accustomed to rely on.” *Diehsner*, 152 A.D.2d at 797 (internal questions omitted). While hearsay is permissible in an administrative hearing, the hearsay evidence must be relevant, probative, and reliable. The Newsday article provides a timeline of actions the respondent engaged in on January 19, 2017 in regard to the discussion she had with Mr. Tune about signing a buyer’s agreement. Upon discussing the buyer’s agreement with Mr. Tune, she subsequently left a voicemail for Mr. Helling about additional homes tours without having him sign a buyer’s agreement. After leaving the voicemail for Mr. Helling, the respondent texted Mr. Tune about the need for him and his wife to sign the buyer’s agreement that was provided to him during their initial office visit. The evidence is not only relevant, but it is probative as it relates to the issue of disparate treatment and is reliable as it is corroborated by sworn testimony and documentary evidence presented at the hearing.

The video evidence shows that the respondent provided specific demographic and school information about Hempstead, New York to Mr. Tune. The respondent referenced the quality of the schools in Hempstead and also described the racial and national origins of certain classes of people living within that community. In contrast, the respondent directed Mr. Helling to search

specific websites to find out about demographic and school information, however, she did not provide him with specific school or demographic information about a particular community or communities. In addition, the respondent directed Mr. Tune to look at the communities of Baldwin and Elmont, New York in lieu of Hempstead, New York. The fact that Mr. Helling did not ask about Hempstead or the surrounding communities does not negate the act of steering that Mr. Tune experienced. The evidence shows that the respondent has engaged in the unlawful act of steering as it pertains to Mr. Tune.

Disparate treatment, or adverse treatment, is when a person “treats some people less favorably than others because of their membership in a protected class.”¹ It has been held that an administrative tribunal assessing credibility may consider “such factors as witness demeanor, consistency of a witness’ testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness’ testimony comports with common sense and experience.” See *DLS v. Omonuwa Omogun, a/k/a George Omogun*, 590 DOS 19, citing *Dep’t of Sanitation v. Menzies*, OATH Index No. 678/98 at 3 (Feb. 5, 1998), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD98-101-A (Sept. 9, 1998).

The respondent’s testimony that Mr. Helling engaged in acts which she considered wasting her time is not credible. The respondent’s continued contact with Mr. Helling by offering to take him on home tours without signing a buyer’s agreement and subsequently advising Mr. Tune multiple times that he needed to sign a buyer’s agreement before providing him with home tours constitutes an act of discrimination. The respondent’s statement that she was not really involved with Mr. Helling after requesting Mr. Tune to sign a buyer’s agreement is also less than truthful based upon her continued contact with Mr. Helling. In addition, the evidence shows that the respondent engaged in the act of steering as it relates to Mr. Tune by providing him with specific demographic and school information about Hempstead, New York. Furthermore, the respondent failed to provide Mr. Helling with the same specific demographic and school information. The evidence of racial steering and disparate treatment combined supports the conclusion of disparate treatment as a result of membership in a protective class. By treating Mr. Tune less favorably than Mr. Helling because he is a member of a protected class by requiring Mr. Tune to sign a buyer’s agreement before showing him any homes, and not requiring Mr. Helling to sign a buyer’s agreement before showing him any homes, it is reasonable to conclude there is sufficient proof the respondent has engaged in the act of disparate treatment.

VI - The complaint alleges that the respondent failed to complete her required continuing education courses in violation of RPL §441(3)(1). The evidence establishes that the DLS requested the respondent to submit proof of having completed her continuing education for the two years preceding her license renewal application submitted in 2016. Pursuant to RPL §441(3), as amended effective July 21, 1993, no renewal of a license as a real estate broker or salesperson for a period commencing on or after November 1, 1995 may be granted to any applicant who has not, within the two year period immediately preceding such renewal period, attended and successfully completed 22.5 hours of approved continuing education courses. The certificates of completion submitted by the respondent indicate that she has completed 9.0 hours of continuing education for the licensing period from June 12, 2014 to June 11, 2016 which is 13.5 hours short of the required hours for that time period. The respondent did submit a certificate of completion for 22.5 hours of

¹ *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977).

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continuing education, however, the course was completed on September 7, 2017 and cannot be used as credit for the June 12, 2014 to June 11, 2015 licensing period (Respondent's Ex. A). Therefore, the respondent has failed to comply with the continuing education requirement.

CONCLUSION OF LAW

The Tribunal holds there is substantial evidence to support the conclusion of discriminatory behavior on the part of the respondent. Based upon the foregoing evidence, the tribunal finds that the respondent has violated 19 NYCRR §175.17(b) by engaging in unlawful discriminatory conduct and has demonstrated untrustworthiness and/or incompetency pursuant to RPL §441-c. The respondent has also violated RPL §441(3) by failing to successfully complete 22 ½ hours of approved continuing education courses for the two year period immediately preceding her 2016 renewal period.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Aminta Abarca has violated 19 NYCRR §175.17(b), RPL §441(3)(a), and has demonstrated untrustworthiness and/or incompetency and, accordingly, pursuant to RPL §441-c, her license as a real estate salesperson, UID #10401263529 is deemed revoked, effective as of the date of her expired license, June 11, 2020. She is directed to send, as appropriate, her license certificate, pocket card, salesperson's identification and proof of completion of her continuing education to Norma Rosario, Department of State, Division of Licensing Services, One Commerce Plaza, 99 Washington Avenue, 5th Floor, Albany, New York, 12231-0001

/S/
John E. Kenny
Administrative Law Judge

Dated: November 22, 2021