

**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,

-against-

ADELHEID O'BRIEN,

Respondent.

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**DECISION**

Complaint No. 2019-1467

For respondent: Carl M. Perri, Esq., Clausen Miller PC, 28 Liberty St., 39<sup>th</sup> Fl,  
New York, NY 10005, cperri@clausen.com.

For complainant: Matthew D. Wolf, Esq., Division of Licensing Services, State of  
New York, Department of State, 123 William St., New York, NY 10038,  
matthew.wolf@dos.ny.gov.

**THE COMPLAINT**

By Complaint dated December 23, 2020, the New York State Department of  
State, Division of Licensing Services, charged respondent Adelheid O'Brien, a New York  
State licensed real estate salesperson, of untrustworthiness and incompetency. See  
State's Ex. 1 (Complaint at 1); NYRPL § 441-c. According to the Complaint, on May 5,  
2016, during a meeting with a potential home buyer, whom the Division identifies as  
"white" and who was looking for homes in the Bay Shore area of Long Island, New

York, O'Brien suggested he look for homes directly in the Bay Shore school district and avoid homes in the nearby Brentwood school district. Meanwhile, on June 7, 2016, at a meeting with a different potential home buyer, whom the Division identifies as "black" and who was also looking for homes in the Bay Shore area with similar search criteria, O'Brien did not suggest he avoid homes in the nearby Brentwood school district.<sup>1</sup>

The Complaint further alleges that at the time of or subsequent to the meeting with the "white" buyer, O'Brien gave this buyer 14 listings of homes in areas with an average census tract of 84% white. Meanwhile, at the time of or subsequent to the meeting with the "black" buyer, O'Brien gave that buyer only 7 listings of homes in areas with an average census tract of 70% white.

Based on these two events, the Division alleges O'Brien engaged in discriminatory behavior and that she is therefore untrustworthy and incompetent pursuant to NYRPL § 441-c. See State's Ex. 1 (Complaint at 1).<sup>2</sup> The Division seeks revocation or suspension of O'Brien's license, imposition of a fine, and such other and further relief as is just and proper.<sup>3</sup> A hearing was held on September 10, 2021. The parties were represented by able counsel. Testimony and exhibits were received.

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<sup>1</sup> At the hearing in this matter, the Division moved to amend the date alleged in the Complaint from June 8, 2016, to June 7, 2016. The motion was granted without objection. Transcript at 9.

<sup>2</sup> On April 26, 2021, and May 13, 2021, the undersigned rendered two additional decisions in this matter, one addressing a motion by respondent to dismiss the complaint, the other addressing a motion by respondent for an adjournment of an earlier date of the hearing. The decision on the motion to dismiss was appealed. For purposes of any further appeal, the motions, supporting papers, and decisions are hereby made part of the record.

<sup>3</sup> There are some errant references to certain statutes in the Division's Complaint. One is a citation to the federal Fair Housing Act. See Complaint ¶ 16 (discrimination in housing), 18 (discrimination based on disability). The FHA is a comprehensive statute with specific provisions regarding statute of limitations, standing, exemptions, and other details. It is not specifically listed as one of the statutes enforceable under 441-c. Accordingly, the undersigned may not have jurisdiction to decide FHA matters. Cf. 19 NYCRR 175.17(b). In any event, even if jurisdiction was had, the applicable statute of limitations has

**FINDINGS OF FACT**

The following facts are derived from the credible testimony, the admitted exhibits, and the record as a whole. Where conflicting evidence existed, such evidence is noted below or was disregarded for reasons of competency, credibility, or admissibility:

1. O'Brien is a New York State licensed real estate salesperson. State's Ex. 2 (Licensing Information). She has been licensed since 2001. Transcript at 67.
2. On May 5, 2016, she met with a potential home buyer, whom she acknowledges as "white". Transcript at 82. On or about June 7, 2016, she met with another potential home buyer, whom she acknowledges as "black". Transcript at 82.<sup>4</sup>
3. She acknowledges that both potential buyers were looking for homes 30 minutes from the Bay Shore area of Long Island. Transcript at 83.
4. Importantly, she acknowledges that she asked the following of the "white" buyer: "School district, important?" and that she then verbally suggested to him that he avoid homes in the nearby Brentwood school district. Transcript at 92, 23. Meanwhile, she did not verbally suggest to the "black" home buyer that he avoid homes in the Brentwood school district. Transcript at 93, 22, 23. She did however mention school

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expired. Next, is a citation to NYSHRL § 296. See Complaint ¶ 18. While 441-c does provide jurisdiction to address violations of the State Human Rights Law – to a certain extent, see 441-c (effective 08/03/2020 only recently adding enforcement of Article 15 of the Executive Law) – the applicable statute of limitations has expired as to that statute as well. Accordingly, insofar as the Complaint alleges any violations of these statutes, those claims are dismissed. As stated in the accompanying decision dated April 26, 2021, there is no statute of limitations for the claims related to untrustworthiness and incompetence; those claims remain.

<sup>4</sup> The homebuyers were undercover testers participating in an investigative news series supported by Newsday and first published on November 17, 2019. State's Ex. 3.

districts in general in similar degree with the “black” home buyer as she did with the “white” homebuyer. See State’s Ex. 4 (videos).

5. While it is noted that she ultimately did not provide the “black” home buyer with any home listings in the Brentwood school district, Transcript at 91, 99, that fact is not pertinent as it is the alleged steering of the “white” home buyer away from a particular neighborhood that is at issue here, not the steering of the “black” home buyer. State’s Ex.1; Transcript at 51, 59.

6. The Brentwood school district, for the 2015-2016 school year, had an 82% enrollment rate of students identified as “Hispanic or Latino”, 11% “Black or African American”, 2% “Asian or Native Hawaiian or Other Pacific Islander” and 4% “White”. State’s Ex. 8. It is unclear whether O’Brien knew of the Brentwood school district’s ethnic enrollment at the time of the meeting with the “white” home buyer. Transcript at 74-75. She acknowledges however that she is familiar with the Brentwood school district area in general as well as the school district’s performance. Transcript at 92-93.

7. O’Brien provided the “white” home buyer with listings in areas other than in the Brentwood school district area, including homes in the Commack school district area. Transcript at 72, 74, 88. No evidence of the enrollment rates of any other school district, including that of Commack, was submitted into the record however.

8. O’Brien explains that the reason she verbally suggested to the “white” home buyer that he avoid homes in the Brentwood school district is because he was a first-time home buyer who would likely resell his home, or in other words because of “investment consideration(s).” State’s Ex. 7 (O’Brien Statement 01/27/2020 to DLS Investigator T. Massey). However, the record establishes that both buyers were first time

home buyers. This undermined her explanation somewhat, but not enough to find her explanation incredible. Transcript at 29, 75. Review of the video of her meetings proved her explanation more genuine than not. See State’s Ex. 4 (videos).

9. At the hearing in this matter, O’Brien acknowledged that it was “improper to discuss school districts with potential home buyers” and that the “white” buyer “might be inclined not to look for homes in the Brentwood School District after [her] comment to him.” Transcript at 98-99.

10. At the hearing, the listings alleged in the complaint were not submitted into the record by the Division. Transcript at 44, 47, 106 (“[The Division] acknowledge[s] we don’t have the listings.”). For respondent’s part, she testified that she had no memory of how many listings or much of the details of any listing she provided to either home buyer. Transcript at 75, 78. The only evidence of any quantifiable number of listings were from a newspaper article. State’s Ex. 3 (Newsday article dated 11/17/2019).

### **CONCLUSIONS OF LAW**

Based on the facts as found, it is concluded that the charges against respondent have not been established pursuant to the substantial evidence standard, except for the charge of incompetence, which is sustained and respondent is fined \$500 payable within 30 days of service and receipt of this decision.

It is well settled that the State may restrict a real estate salesperson’s right to practice should she be found untrustworthy or incompetent. NYRPL § 441-c. Untrustworthiness and incompetence are not the same. Juba v. State, 35 A.D.2d 633, 633

(3<sup>rd</sup> Dept. 1970) (“There is a great difference between charges . . . demonstrating untrustworthiness, and a charge of demonstrating incompetence.”); Roman v. Lobe, 243 N.Y. 51, 54-55 (N.Y. 1926) (discussing addition of incompetence to statute).

“Untrustworthiness” involves an act done with “bad faith”. Trivelas v. Paterson, 91 A.D.2d 1000, 1000 (2<sup>nd</sup> Dept. 1983) (“Untrustworthiness is akin to violation of a professional norm and contemplates such bad faith as would cast doubt on one’s character and fitness to act as a broker [or salesperson].”) Importantly, an “untrustworthy” act is more than a negligent act. Id.

“Incompetence” also is more than a negligent act; but in contrast to untrustworthiness, it is generally understood among the learned professions to involve an act done with a “lack of skill or knowledge necessary to practice the profession.”

Mehulic v. State Board for Professional Med. Conduct, 967 N.Y.S.2d 183, 185 (3<sup>rd</sup> Dept. 2013); Dhabuwala v. State Board of Professional Med. Conduct, 225 A.D.2d 209, 213 (3<sup>rd</sup> Dept. 1996). For an act to be found either untrustworthy or incompetent, there must be substantial evidence as that standard is defined under the law, or in other words, evidence that has “such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that . . . a conclusion or ultimate fact may be extracted reasonably, probatively and logically.” Geisler v. State, 73 A.D.2d 392, 397 (4<sup>th</sup> Dept. 1980). “Substantial evidence does not rise from bare surmise, conjecture, speculation or rumor.” Id. “A mere scintilla of evidence sufficient to justify a suspicion is not sufficient to support a finding upon which legal rights and obligations are based.” Chiaino v. Lomenzo, 26 A.D.2d 469, 473 (1<sup>st</sup> Dept. 1966).

Based on these principles of law, the charge concerning the listings is dismissed sua sponte. There is no evidence in the record revealing how many listings (or the details of those listings) respondent had given to the “white” home buyer compared to how many she gave to the “black” home buyer. While there was a newspaper article submitted into evidence purportedly showing the number of listings respondent had given to each home buyer, that article has been held by at least one Judge of this Office to be “not sufficiently reliable” for evidentiary purposes. See Matter of Vicquery, 125 DOS 21 (08/30/2021) (ALJ Kenny). The undersigned agrees. The newspaper is neither a government document nor such other document typical rules of evidence, even flexible ones, customarily find reliable. For sure, reliance on the newspaper article was sufficient at the pleading stage, it was not however at the hearing stage. See, e.g., Peckman v. Mutual Life Ins., 125 A.D.2d 244, 247 (1<sup>st</sup> Dept. 1986). This is especially true because of who bears the burden of proof in this proceeding and the applicable standard of proof. See, e.g., Simmons v. Van Alstyne, 65 A.D.2d 869, 872 (3<sup>rd</sup> Dept. 1978); Ayala v. Toia, 59 A.D.2d 739, 739 (2<sup>nd</sup> Dept. 1977) (“uncorroborated hearsay evidence does not constitute the substantial evidence upon which an administrative decision must be based.”).

Turning next to the charge based on the steering of the “white” home buyer away from Brentwood, it is addressed as follows: First, insofar as untrustworthiness is concerned, there is a lack of evidence of “such quality and quantity” that would allow the fact finder to conclude respondent had engaged in bad faith behavior affecting the public. The evidence consisted of only one singular and lonely comment to the “white” home buyer that he should avoid homes in the Brentwood school district area. That comment however came in the context of a much longer meeting and much longer conversation

where no other similar comment was made that would lead one to believe that respondent's aim was to deter a "white" home buyer from purchasing within a predominately minority owned area. See State's Ex. 4 (videos). Further illustrating this point is the lack of evidence in the record of the demographic make-up of the other areas respondent had suggested to the "white" home buyer, such as Commack. If such evidence had been submitted and had such evidence shown that these other areas were predominately non-minority owned, then perhaps the first step to a conclusion of inappropriate steering could have been made. But no such evidence was submitted. In the realm of discrimination complaints against real estate professionals, more is needed. See, e.g., Schimkus v. Shaffer, 143 A.D.2d 418, 419 (2<sup>nd</sup> Dept. 1988) (evidence that broker patently lied to potential home buyers); Kranzler Realty v. State, 76 A.D.2d 901, 902 (2<sup>nd</sup> Dept. 1980) (evidence that broker had a pattern and practice of steering home buyers to certain neighborhoods); Butterly & Green v. Lomenzo, 36 N.Y.2d 250, 254 (N.Y. 1975) (evidence that brokerage engaged in "predesigned procedure" of discrimination); Kamper v. State, 26 A.D.2d 697, 697 (2<sup>nd</sup> Dept. 1966) (evidence of "practice" of discrimination); Diona v. Lomenzo, 26 A.D.2d 473, 475 (1<sup>st</sup> Dept. 1966) (evidence of a "design or plan" of discrimination); cf. Birch v. Lomenzo, 31 A.D.2d 835, 836 (2<sup>nd</sup> Dept. 1969) (affirming, but questioning, Secretary's suspension of broker for discrimination based on one incident; revocation reduced to 10-day suspension).

Insofar as incompetence is concerned however, there is sufficient evidence that would allow the fact finder to conclude that respondent had a lack of skill required of a practitioner within the licensed real estate profession. As respondent readily admits she knew it was "improper to discuss school districts with potential home buyers" and that



the “white” home buyer “might [have been] inclined not to look for homes in the Brentwood School District after [her] comment to him.” Transcript at 98-99; 42 U.S.C.A. § 3604 (Anti-discrimination provision of Fair Housing Act). It is no longer debatable that school districts remain a proxy for neighborhood make-up, notwithstanding this country’s efforts to correct past injustices in the housing market. See generally, Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 111 n. 24 (1979) (“school segregation is linked closely to housing segregation”). There are exceptions of course, but concern is not with anomalies, but with general understandings and the required skills born from such understandings. One such skill required of New York real estate professionals is the ability to find and recommend a home to a potential home buyer without consideration of school district so as to avoid the infiltration of actual or implicit bias into the decision-making process. See, e.g., Real Estate Board of New York, Code of Ethics and Professional Practices, Part II, (1) – (11); National Association of Realtors, Realtors Code of Ethics, Article 10; see also Steering, Schools, and Equal Professional Service, NAR (June 9, 2014) (“[I]f an agent expresses his or her own positive or negative views about certain communities or schools, the purpose of which is to direct a buyer either towards or away from a community, then that agent may be stating a housing preference based on race or familial status or religion. These would be violations of the Fair Housing Act and of the REALTORS® Code of Ethics.”).<sup>5</sup> While it is a refined skill, it is a skill very much required of New York real estate professionals, who know or should know that they are not simply in a profession consisting of sales and profits, but are in “a position of trust and confidence” with their clients and the people of

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<sup>5</sup> Available at <https://www.nar.realtor/articles/steering-schools-and-equal-professional-service>

this State. Russo v. Shaffer, 131 A.D.2d 853, 854 (2<sup>nd</sup> Dept. 1987). Respondent, who has more than 20 years of experience in the field, should have developed this skill to a point of refinement by now. Respondent's discussion, and more seriously, her prompting of the discussion about school districts to a potential home buyer warrants a \$500 fine. It is SO ORDERED.<sup>6</sup>

**DETERMINATION**

WHEREFORE, IT IS HEREBY DETERMINED THAT the charge against respondent for incompetence pursuant to NYRPL § 441-c is sustained and respondent is ordered to pay a fine of Five Hundred Dollars (\$500) within 30 days of service and receipt of this decision. The fine shall be paid by certified check or money order payable to "Secretary of State" and delivered to State of New York, Department of State, Division of Licensing Services, One Commerce Plaza, 99 Washington Avenue, 5<sup>th</sup> Floor, Albany, NY 12231-0001.

Dated: October 22, 2021

/S/  
MATHEW PAULOSE JR.  
Administrative Law Judge

Copy:

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<sup>6</sup> A harsher punishment would have been instituted but for respondent's history, the isolated nature of the comments, and her candor at the hearing.