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.: 2019-1474

-against-

NANCY ANDERSON,

Respondent.
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The above-noted matter came on for a WebEx hearing before the undersigned, Aiesha L. Hudson, on February 2, 2021 and March 1, 2021.

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

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

COMPLAINT

The complaint alleges that the respondent has demonstrated untrustworthiness and/or incompetency, in violation of Real Property Law (RPL) §441-c, by engaging in an unlawful discriminatory practice as proscribed by any federal, state, or local law. The complaint specifically charges that, during an investigation of alleged housing discrimination by real estate brokers and salespersons on Long Island, New York, it was uncovered that the respondent engaged in unlawful discrimination by refusing to show homes to a "minority" tester unless he first obtained a prequalification letter, although the respondent provided assistance and house tours to a "white" tester without a prequalification letter. The complaint further charges that the respondent engaged in racial steering by providing the "white" tester with home tours in Port Jefferson, which is a predominantly white area, but denied the "minority" tester home tours in that area for the arbitrary reason of not having provided a prequalification letter.[1]

[1] The complaint also references the respondent's alleged discriminatory conduct having violated the Fair Housing Act (42 U.S.C. § 3604(a), (f)(3)(B)) and the New York State Human Rights Law (Executive Law § 296) (*See* Complaint ¶¶ 17, 20). As noted by the tribunal in *Division of Licensing Services v. Adelheid O'Brien*, 149 DOS 21 (October 22, 2021) (ALJ Paulose), while it is unclear whether this tribunal has

FINDINGS OF FACT

1) The Notice of Hearing and Complaint was served by certified and regular mail on December 11, 2020 to the respondent at her last known business address as per the records of the State's Ex. 1). The respondent acknowledged receiving the Notice of Hearing and Complaint prior to the hearing (Transcript ("Tr.") at 8).

2) The respondent is a licensed real estate salesperson, UID #10401258741, who is currently associated with Homesmart Premier Living Realty, and whose license is due to expire on February 10, 2022. She was formerly associated with Laffey Fine Homes from April 25, 2016 to August 25, 2016 and Laffey Real Estate from August 25, 2016 to July 16, 2020 (State's Ex. 2).

The Newsday Investigation

3) On or about November 17, 2019, Newsday published an article and posted videos on its website in connection with the report *Long Island Divided*, a news article whose purpose was to expose the disparate treatment of minorities by real estate licensees on Long Island (hereinafter, "Article"). One of the licensees mentioned in the Article was respondent Nancy Anderson who at the time was associated with Laffey Fine Homes. The Article, in large part, was a report of "tests" conducted on behalf of Newsday by actors or other individuals, who posed as prospective residential real estate buyers. For each test, there was a "minority" and "white" tester, both of whom were equipped with hidden video cameras, and met with a real estate licensee at two different times. The Article alleges that Ms. Anderson refused to provide house tours to the "minority" tester before he obtained a preapproval letter from a lender, but she did not require the "white" tester to provide a preapproval letter before she took him on house tours. The reference to Ms. Anderson in the Article was brief and neither the true nor assumed names of the testers with whom Ms. Anderson met were identified (State's Ex. 3, p. 22).[2]

4) On its website, Newsday posted the video recordings of the respondent's meeting with the "minority" tester on May 16, 2016 and her meeting with the "white" tester on August 24, 2016 under the heading "Test 92" (State's Ex. 4 – Anderson Newsday Test #92 Videos 1-2).[3]

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authority to enforce the alleged violations of the Fair Housing Act or NYS Human Rights Law in this forum, those issues are moot since the statute of limitations has run for any claims to be brought under either statute for the allegations in the complaint given those events occurred in 2016 (*See* New York State Division of Human Rights Fair Housing Guide https://dhr.ny.gov/sites/default/files/pdf/nysdhr-fair-housing-guide.pdf (last accessed December 10, 2021). Accordingly, to the extent that the complaint alleges any violations of these statutes, those claims are dismissed. Regardless, the respondent may be disciplined for any discriminatory conduct deemed a demonstration of untrustworthiness and/or incompetence under RPL § 441-c since there is no statute of limitations applicable to that statute.

[2] The full Newsday article is available at https://projects.newsday.com/long-island/real-estate-agents-investigation/ (last accessed December 10, 2021).

[3] More information regarding Test 92 and all of the test videos are available at: https://projects.newsday.com/long-island/real-estate-investigation-results/?card=78 (last accessed December 10, 2021).

5) In the recording of the May 16, 2016 meeting with Ms. Anderson, the "minority" tester identified himself as Paul Williams and indicated he and his wife were looking to purchase a home in Port Jefferson, Long Island NY (also known as Port Jefferson Village) because his wife worked in the area at St. Charles Hospital (Newsday Test #92 Video 1 at timestamp (1:02)). The "minority" tester (hereinafter, "Mr. Williams") told Ms. Anderson that he and his wife were first-time home buyers, and his uncle was a loan officer who had "crunched the numbers" and determined that they could afford a house in the prince range up to $500,000 (3:15). He also stated they were ready to move within six months (27:48). When asked whether they had obtained a prequalification or preapproval letter,[4] Mr. Williams indicated he did not have either and stated vaguely that they planned "go through it with [his uncle]") (3:42). Ms. Anderson explained that a pre-qualification by a lender is not a guarantee that the home buyer will be given the money, but preapproval is an indication home buyer is "good to go." Accordingly, preapproval is what a home buyer wants to have when approaching a seller about buying a home (3:50). During a 69-minute meeting, the respondent described the home-buying process at length, including the purpose of the agency disclosure form (20:58, 1:02:09). She asked Mr. Williams numerous questions about his preferences for the style and specifications of the home he was searching for and whether he was interested in looking at homes in communities surrounding Port Jefferson Village, such as Mt. Sinai, Setauket, and Port Jefferson Station, which are also close to the hospital where his wife works (54:30). The respondent stated that she intended to search the listings for properties that might interest him so that they could go on house tours as soon as that weekend (1:04:49). Importantly, the recording shows that, before ending the meeting, the respondent left the room to speak with someone to "see if she can give [him] any kind of packet before [he] goes" (1:04:50). It was when she returned that she told him that she needed a copy of a preapproval letter, while also stating that she would send him listings for houses in which she thought he might be interested (1:06:40). Before he left the office, Ms. Anderson offered to take Mr. Williams out to see any of the houses he liked on Friday (1:09:09), but she also reiterated that he must send her the preapproval letter (1:09:14).

6) In the recording of the respondent's August 24, 2016 meeting, the "white" tester identifies himself as Mike Fusco (Newsday Test #92 Video 2 at timestamp (33:53)). He stated that he and his wife were interested in purchasing a home within a half hour of Port Jefferson "give or take" (1:28; 17:05) and also had a price range of up to $500,000 (19:25). During the 34-minute meeting, Ms. Anderson explained the same home-buying process using documents contained in Laffey Real Estate's buyer's package, which was provided to the "white" tester (hereinafter "Mr. Fusco") (2:54 to 12:30). When the respondent asked Mr. Fusco whether he was "prequalified," he indicated he was not, but he likely would be financing through a friend that worked at a bank (3:05). She offered Mr. Fusco a referral to the office's "title guy" if Mr. Fusco needed assistance with obtaining prequalification (3:15). As she did with Mr. Williams, the respondent asked numerous questions about the type of home in which Mr. Fusco was interested and showed him sample listings for reference (19:42 to 23:31). She also described the benefit of living outside Port Jefferson (23:31 to 25:36). She offered to take him to look for properties, asking only that he "start the process of getting prequalified" so that she could keep the letter in her records (30:06). The

[4] A prequalification or preapproval letter is a document from a lender stating that the lender is tentatively willing to lend to a buyer, up to a certain loan amount. https://www.consumerfinance.gov/owning-a-home/process/explore/get-prequalification-or-preapproval-letter/ (last accessed December 10, 2021).

respondent also offered to stop by the Port Jefferson Chamber of Commerce to pick up information for Mr. Fusco about the local clubs, churches, and organizations in the area (29:08).

The Department of State's Investigation

7) Investigator Francia Justinvil ("Inv. Justinvil") testified that she was assigned to investigate Newsday's claims against the respondent, and the investigation consisted of an interview of the respondent and the review of the respondent's license history, the Article, and the videos posted on the Newsday website related to her (Tr. at 15-16).

8) When the respondent was questioned by Inv. Justinvil about the videos of her meetings with the testers that were captured on video and posted on Newsday's website, she admitted that she had seen them and did not deny it was her in the videos (Tr. at 34). The respondent told Inv. Justinvil that she requested that the "minority" tester, Mr. Williams, provide a preapproval letter before she would take him out to see homes because she was in training at the Laffey Real Estate ("Laffey") office in Northport when she met Mr. Williams and her branch manager, Nicole Campisi, advised her that she requires a preapproval letter prior to showing clients houses (Tr. at 40-41). She told the investigator that she did not tell the same of Mr. Fusco because when she met with him months later, the meeting took place at the respondent's home office in Huntington, where she was more comfortable and had more freedom to decide what forms to require prior to seeing houses with clients (Tr. at 41). When asked to explain the difference in her treatment of Mr. Williams and Mr. Fusco, she told the investigator that Laffey's policy allowed real estate salespersons to use their discretion as to what forms they require before taking clients to see homes as long as they are consistent with all clients. She told the investigator that typically she does not require "prequalification" letters in the beginning before she takes clients to see houses (Tr. at 42).

9) At the investigator's request (Tr. at 43), the respondent provided a written statement in which she summarized what she recalled of her meeting on May 16, 2016 with Mr. Williams at Laffey's Northport Office. She claimed that Mr. Williams had a previous email exchange with the manager Ms. Campisi, but Ms. Campisi forwarded the lead to the respondent. In the letter, the respondent recalled discussing basic information about home buying and the type of home Mr. Williams was interested in purchasing and that Mr. Williams said he had "family in the mortgage business." She therefore thought "he had a prior discussion with them about financing and knew the importance of a pre-approval letter to making a strong offer (State's Ex. 5). She recalled asking Mr. Williams for a preapproval[5] letter after the meeting and later sending him a follow up email regarding making appointments to see homes. However, she did not admit (or deny) that she

[5] Despite the legal distinction, the parties have used the term "prequalification" and "preapproval" interchangeably in these proceedings. The distinction is not relevant or probative in this case, however, since the case turns on the fact the respondent admittedly requested Mr. Williams provide such a letter (whether it be a preapproval or prequalification letter) before she showed Mr. Williams any houses, but she did not require the same of Mr. Fusco. The tribunal will refer to the letter requested from Mr. Williams as a preapproval letter going forward, as is clearly stated in the video, and referred to by respondent in her written statement and hearing testimony (State's Ex. 4 – Anderson Newsday Test #92 Videos 1 at timestamp (1:09:14); Tr. at 64; State's Ex. 5).

conditioned taking Mr. Williams to see homes on providing her with a copy of a preapproval letter. She also recalled her meeting in August 2016 with Mr. Fusco at the Laffey's Huntington Office, during which she covered the same topics as the meeting with Mr. Williams, including "the issue of pre-approval letter" (State's Ex. 5). She states the only difference between her interactions with Mr. Williams and Mr. Fusco was that the latter was more committed to purchasing a home, and despite the evidence to the contrary, she was willing to show either person houses in which they were interested (State's Ex. 5).

10) Both Mr. Williams and Mr. Fusco told the respondent that they were interested in purchasing a home in Port Jefferson (also known as Port Jefferson Village), New York. The tribunal takes official notice that U.S. Census Tract data which estimates that population of Port Jefferson Village, New Yok in 2016 was approximately 86.2% white and 3.4% Black (or African American) (ALJ Ex. 1).[6]

Respondent's Testimony

11) The respondent testified that she joined Laffey on April 26, 2016 and in the first week of May began a 6-week training academy. During her training, she worked at Laffey's Northport office, although she would be regularly based out of Laffey's Huntington office (Tr. at 60-61). She testified that Mr. Williams was the first potential home buyer she had met with in her real estate career (Tr. at 89).[7]

12) The respondent's hearing testimony was consistent with her interview with Investigator Justinvil and her written statement. She reiterated that her meeting with Mr. Williams was a referral from her supervisor, Nicole Campisi, and after she discussed the information in Laffey's home buyer's packet with Mr. Williams, she deferred to Ms. Campisi on how to close the meeting. She testified that when she stepped away from the meeting with Mr. Williams, as is shown on the video, she spoke to Ms. Campisi, who told her that it was her practice not to take clients to see homes without first obtaining a preapproval letter (Tr. at 62-64). The respondent testified that the practice made sense to her at the time and because she was in training and she did not know any differently (Tr. at 88). The respondent contended that, since Mr. Williams mentioned that someone in his family had "crunched the numbers," she thought he would be able to obtain a preapproval letter. She claimed that "if he showed up without the preapproval, I would not have refused to take him out. I wouldn't do that. My goal is to help him" (Tr. at 64-65). However, she admitted that the last thing she said to Mr. Williams before he left the office was that he had to have the preapproval letter before she went out with him to view houses (Tr. at 65). She stated that, refusing to take him to see homes without the preapproval letter "did not sit right with [her]" (Tr. at 65),

[6] The U.S. Census Data is available online at: https://data.census.gov/cedsci/table?q=port%20jefferson%20station&g=1600000US3659355&tid=ACSDP5Y2016.DP05&hidePreview=true (last accessed December 10, 2021).

[7] Although the respondent had been licensed prior to working for Laffey's Real Estate, the respondent testified that her work at her previous employer, Coach Realtors, involved rental transactions (Tr. at 83-84).

and it "bothered" her that she "hurt somebody in some way" (Tr. at 66). When asked, she did not elaborate further.[8] She stated she regretted asking her supervisor for advice (Tr. at 89).

13) The respondent testified that following their initial meeting she sent Mr. Williams an email about making an appointment to see homes in Port Jefferson but she still insisted that he needed a preapproval letter (Tr. at 73-74) which made her a "little uncomfortable" (Tr. at 74).[9] She stated Mr. Williams was not responsive regarding when he would be available, so their contact ceased (Tr. at 74). In contrast, when she met with Mr. Fusco, they talked about the fact at some point he would need to obtain a preapproval letter, but she did not require him to obtain it before making appointments to see the listings she pulled for him, and she took him out to see houses (Tr. at 75, 78). Notably, the respondent testified that Ms. Campisi was the manager of Laffey's Huntington office at the time of the respondent's meeting with Mr. Fusco in August 2016, although she was not in the office at the time of her meeting with Mr. Fusco (Tr. at 125).[10]

14) The respondent testified that from the training she completed between the May and August meetings, she learned that, as an independent contractor, she needed to set up a protocol for herself regarding how she would handle her clients, including when to ask for preapproval letters (Tr. at 67). She explained that she did not ask Mr. Fusco to obtain a preapproval letter when she me him in August 2016 because by then she had finished her training and knew what to do and how she wanted to operate her business. After her training, she realized requiring a preapproval letter before providing house tours was no longer something she wanted to do because it was more important to take the person out to look at houses before getting the preapproval letter (Tr. at 70-71, 130-31). Currently, she does not require potential clients to have a preapproval letter before showing them homes because requiring it limits the buyers and herself and does not create a good relationship (Tr. at 70).

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 N.Y.2d 176, 180-81 (1978); *Tutuianu v. New York State*, 22 A.D.3d 503 (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*

[8] When asked to elaborate on her statement on the record that she felt uncomfortable about requesting the preapproval letter, she could not recall making the statement (Tr. at 96).

[9] The follow-up email was mentioned in the Newsday article, as well as in the respondent's written statement (State's Ex. 3, 5), but it was not offered as evidence in this proceeding.

[10] That fact is corroborated by the video of the respondent's August 24, 2016 meeting with Mr. Fusco during which she told him that "Nicole" was manager of Laffey's Huntington Office (State's Ex. 4 – Anderson Newsday Test #92, Video 2, timestamp (34:20)).

Department, 96 A.D.2d 719, 719 (4th Dept. 1983) (quoting *300 Gramatan Avenue Associates*, 45 N.Y.2d at 181).

II- The complaint charges that the respondent engaged in unlawful discrimination by refusing to show homes to Mr. Williams (identified by Newsday as the "minority" tester) unless he obtained a "prequalification letter" from a lender, while providing house tours to Mr. Fusco (the person identified by Newsday as the "white" tester) without requiring the same. Because it was clearly indicated on the video and admitted to in the respondent's written statement and hearing testimony that the respondent requested that Mr. Williams provide a "preapproval" (not "prequalification") letter, the DLS seeks to amend the complaint to conform to the pleadings to the evidence in the record. "Pleadings may be amended to conform to the proof at any time, provided that no prejudice is shown." *Miles v. City of New York*, 251 A.D.2d 667, 667 (2d Dep't 1998), *lv. denied* 92 N.Y.2d 818 (1998); *Cerio v. New York City Transit Authority*, 228 A.D.2d 676 (2d Dept. 1996); *Dougherty v. Dougherty*, 256 A.D.2d 714 (3d Dept. 1998); *see Ford v. Martino*, 281 A.D.2d 587, 588 (2d Dep't 2001) (pleadings may be amended either before or after judgment, "absent prejudice or surprise resulting directly from the delay"). Given that it is respondent's own words that establish the document she requested was a preapproval letter, she clearly will suffer no surprise or otherwise be prejudiced by the amendment. As such, the complainant's motion to amend is granted.

III- The complainant is seeking disciplinary action against the respondent because it alleges the respondent has demonstrated untrustworthiness and/or incompetence by engaging in unlawful discriminatory conduct[11] with respect to her dealings with Mr. Williams and Mr. Fusco. 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." Real Property Law ("RPL") § 441(1)(b). RPL § 441-c permits the Department to revoke or suspend the license of a real estate broker or salesperson or issue a fine or reprimand if the licensee has demonstrated untrustworthiness or incompetency to act as a real estate broker or salesperson." RPL § 441-c(1)(a). "This statute is grounded upon the strong public interest in protecting the public at large from unreliable and untrustworthy real estate brokers." *Schimkus v Shaffer*, 143 A.D.2d 418, 420-421 (2d Dept 1988).

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[11] The DLS' complaint contends that the respondent engaged in conduct proscribed by federal state, and local law, specifically 42 U.S.C. § 3604, New York State Human Rights Law, Executive ("Exec.") Law § 296, and 19 NYCRR §175.17(b). Pursuant to both 42 U.S.C. § 3604(a) and Exec Law § 296 it is unlawful to discriminate in the sale or lease of a dwelling to any person because of race, color, religion, sex, familial status, or national origin." Exec Law § 296 (5)(a) also prohibits discrimination in housing accommodations because of sexual orientation, gender identity or expression, military status, age, disability, and lawful source of income.

19 NYCRR § 175.17(b) provides that "No 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."

Here, the allegation is that the respondent engaged in housing discrimination motived by the fact that Mr. Williams is a member of a protected class. However, as explained *infra*, there is insufficient evidence in the record to establish by substantial evidence that the respondent engaged in the alleged discriminatory conduct because of Mr. Williams' race.

Because the Secretary of State has an obligation to protect the public against wrongdoing or incompetency, the Secretary possesses "wide discretion in determining what should be deemed untrustworthy conduct." *Gold v. Lomenzo*, 29 N.Y.2d 468, 477 (1972); *Chiaino v. Lomenzo*, 26 A.D.2d 469, 472 (1st Dep't 1966). In exercising this discretion, however, the Secretary is subject to the requirement that "there should be such factual presentation concerning acts or conduct by the licensee or his agent as would warrant a conclusion of unreliability, and which establishes that any confidence or reasonable expectation of fair dealing to the general public would be misplaced." *Gold*, 29 N.Y.2d at 477.

However, for an act to be found either untrustworthy or incompetent, there must be substantial evidence as that standard is defined under the law. *Geisler v. Department of State*, 73 A.D.2d 392, 397 (4th Dept 1980); *Chiaino v. Lomenzo*, 26 A.D.2d 469, 473 (1st Dept. 1966). "Substantial evidence does not rise from bare surmise, conjecture, speculation or rumor." *Geisler*, 73 A.D.2d at 397. "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*, 26 A.D.2d at 473.

Based on those principles of law, there is insufficient evidence in the record that the respondent engaged in discriminatory conduct to support a finding of untrustworthiness and/or incompetence.

As an initial matter, it is notable that the DLS' case relies heavily on the videos recorded by the testers of their meetings with respondent as proof that she engaged in unlawful discriminatory conduct. To the extent the videos contain hearsay statements, those statements are admissible as they are probative and reliable evidence of the respondent's conduct corroborated by the respondent's sworn hearing testimony and written statement in evidence. *See Ayala v. Ward*, 170 A.D.2d 235 (1st Dep't 1991), leave to appeal denied, 78 N.Y.2d 851 (1991) (hearsay is admissible in administrative hearings under SAPA if it is deemed sufficiently reliable and probative as to the matters at issue in the case); *see also Conley v. Division of Licensing Services*, 720 DOS 05 (2005) (hearsay evidence given significant weight in ALJ's determination because it was corroborated by testimony at the hearing).[12]

The crux of the DLS' complaint is that the respondent demonstrated untrustworthiness or incompetence by treating Mr. Williams and Mr. Fusco unequally. "Disparate treatment" occurs when a person "treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical." *Intl. Bhd. of Teamsters v. United*

[12] This case differs from two recent cases involving alleged discriminatory conduct described in the above-mentioned Newsday article, *Division of Licensing Services v. Le-Ann Vicquery*, 125 DOS 21 (August 31, 2021) (ALJ Kenny) and *Division of Licensing Services v. Adelheid O'Brien*, 149 DOS 21 (October 22, 2021) (ALJ Paulose), in which the tribunals concluded that the statements in Newsday article that the DLS relied upon as evidence supporting their discrimination claims were not sufficiently reliable to constitute substantial evidence that the respondents engaged in discriminatory conduct. In the instant case, the respondent was mentioned only briefly in the Newsday article and, although it is in the record, the Article was given little if any weight in the undersigned's decision.

States, 431 U.S. 324, 335 n.15 (1977).[13] Undoubtedly, the respondent treated the respondent less favorably by requiring him to provide a preapproval letter, proof of financial capability, while not requiring the same of Mr. Fusco. The DLS argues that the respondent added this barrier to being shown homes because Mr. Williams is Black and therefore a member of a protected class (Complaint ¶ 14). While it is not disputed that Mr. Williams is a member of a protected class, there is no proof of a discriminatory motive other than the disparity in treatment. The tribunal finds that evidence is insufficient to establish that the respondent engaged in unlawful discriminatory conduct in this case.

While the Secretary of State has found real estate brokers and salespersons guilty of untrustworthiness in violation of RPL § 411-c due to their failure to accord equal treatment to clients on the basis of race, the unlawful discriminatory conduct must be proven by substantial evidence. *See Schimkus v Shaffer*, 143 A.D.2d 418, 421 (2d Dep't 1988) (real estate broker who steered Black clients away from predominately white neighborhoods by making false representations and failed to show Black clients available homes in predominantly white neighborhoods was found untrustworthy); *Birch v. Lomenzo*, 31 A.D.2d 835, 836 (2d Dep't 1969) (real estate salesperson found untrustworthy because she did not "accord equal treatment" to Black client). However, substantial evidence of discrimination based on race is not evident in the instant case.

The facts of *Department of State v. Schimkus*, 29 DOS 87 (1987), conf'd by *Schimkus v. Schaffer*, 143 A.D.2d 418 (2d Dept 1989), which also involved an investigation of racial discrimination in real estate practices on Long Island, are illustrative. In that case, when a Black test couple approached Herbert Schimkus, a real estate broker, about houses for sale in Franklin Square that had been advertised by his office, he falsely told them there were no listings in Franklin Square in their price range despite the fact there were numerous listing available at the time. He also did not show the Black test couple a house in West Hempstead, a predominately white area, falsely representing that it was a "handyman's special" needing structural work and in a bad school district, although he did show the Black test couple a house that he also described as undesirable but was located in Lakeview, a predominately black area. When a couple identified as "white" visited Schimkus' real estate office on the same day, they were shown the house in West Hempstead and informed that the house needed only cosmetic work. *Schimkus*, 143 A.D.2d at 419-20.

In finding Schimkus guilty of untrustworthiness, the tribunal found evidence of an intent to discriminate was present: the false representation to the Black test couple that there were no

[13] Because discriminatory intent is rarely susceptible to direct proof, the U.S. Supreme Court has held that courts facing questions of discriminatory intent for claims brought under the Equal Protection Clause must make "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (internal quotation marks and citations omitted). Here, other than the disparate treatment itself, the DLS has put forth no direct or circumstantial evidence that the respondent's conduct was discrimination based on Mr. William's race. However, "mere disparate treatment, without a showing that the disparity was based on a protected characteristic, does not amount to discrimination." *Abe v. NY Univ.*, 169 A.D.3d 445, 447 (1st Dep't 2019).

other Franklin Square listings in their price range available *and* the taking of the Black test couple to the undesirable house in Lakeview, a predominately black area, while failing to take them to West Hempstead, a predominately white area, to view another house the broker also claimed was undesirable. *Id.* at 420. The tribunal concluded that "If the undesirability of the house was the reason for not showing [the house in West Hempstead], Schimkus would have shown neither house." *Id.* (quoting *Schimkus*, 29 DOS 87 at p. 4). Although Schimkus provided reasons why the Black test couple had been treated differently, the tribunal did not find them credible. *Schimkus*, 29 DOS 87 at p. 4. The tribunal recognized:

> It cannot be expected that a case of discrimination will be proved easily and with entirely objective evidence. It is necessary to look at the totality of the situation and the reasonableness (or lack thereof) of any explanations. "One intent on violating the Law Against Discrimination cannot be expected to declare or announce his purpose. Far more likely is it that he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive--for we deal with an area in which 'subtleties of conduct ••• play no small part'." *Holland v Edwards*, 307 NY 38 (1954) (citation omitted).

Schimkus, 29 DOS 87 at p. 5; *Division of Licensing Services v. Rubino*, 36 DOS 95 (1995). The tribunal concluded that the discriminatory motive for the broker's unequal treatment could be inferred from the fact that the broker refused to show the Black couple the West Hempstead house, and gave them false reasons for not doing so, but the "white" couple was shown the house and told the truth. The inference was further supported by false representation that there were no Franklin Square listings available. *Schimkus*, 29 DOS 87 at p. 5. The tribunal's decision was upheld on appeal, in a decision in which the Appellate Division affirmed that the determination that the respondent demonstrated untrustworthiness by "fail[ing] to accord the black test couple treatment equal to that of the white test couple . . . was supported by substantial evidence." *Schimkus v. Schaffer*, 143 A.D.2d 418, 421 (2d Dept 1989).

By comparison, in this case, while it is evident that the two testers were not treated equally, there is no evidence that the difference was because of Mr. William's race. First, while both testers clearly stated they were interested in looking for houses in the Port Jefferson area, there was no reference to the race or ethnicity of the inhabitants of the area or composition of school districts, nor has the DLS pointed to other indicators with which an inference could be drawn that the disparate treatment was due to race. Second, a comparison of the two meetings shows no direct or circumstantial evidence of discriminatory motive. The record shows the two office visits occurred three months apart at the start of and then after the respondent completed her training. The Newsday videos shows that the respondent spent over an hour with Mr. Williams promoting Port Jefferson, asking him questions about the type of home he was interest in purchasing, and explaining the home buying process. It was evident that the respondent was ready to take Mr. Williams out to see homes in Port Jefferson until she left the office to speak with her supervisor. It was not until the respondent returned that she conditioned showing homes to Mr. Williams on him providing a preapproval letter. It has been said 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 human experience." *Division of Licensing Services 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).[14] Here, the respondent testified credibly that she relied on the guidance of her supervisor who advised her to require a preapproval letter before showing listings, given that the respondent was in training at the time of the meeting and reasonably "didn't know differently." While her claim that she was told to ask for the preapproval letter by her is hearsay, the video corroborates that she planned to show Mr. Williams homes at his convenience prior to leaving the room and did not make seeing homes contingent on Mr. Williams first obtaining a preapproval letter until after she stepped away. The tribunal credits the respondent's testimony that the change was because she sought advice from her supervisor. The respondent followed up with Mr. Williams by email, again requesting the preapproval letter, based on that same advice.

The respondent's meeting with Mr. Fusco in August 2016 occurred approximately two months after she completed her 6-week training. The Newsday video shows that the respondent discussed and gathered the same information regarding the home buying process and his preferences during her meeting with Mr. Fusco, including prequalification and preapproval. The respondent testified credibly that the meeting was shorter because, after completing her training, she was more comfortable and knew how she wanted to operate her business. That the respondent was more proficient and efficient in her discussion with Mr. Fusco (in comparison with Mr. Williams) was evident by the fact that she discussed the same topics and obtained the same information from Mr. Fusco in half the time. The tribunal credits her testimony that post-training she had established a business strategy in which she chose not to reduce her potential client base by requiring a preapproval letter before showing homes and, therefore, was willing to show Mr. Fusco homes before he obtained a prequalification or preapproval letter. [15]

While the respondent's denial of Mr. Williams' access to home showings without a preapproval letter can be analogized to the broker's refusal to show listings in Franklin Square or West Hempstead to the Black test couple in *Schimkus*, the respondent's case differs significantly to the extent that there is no evidence here that the respondent made any misrepresentations to Mr.

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[14] S*ee* http://archive.citylaw.org/wp-content/uploads/sites/17/oath/98_Cases/98-678.pdf (last accessed December 10, 2021).

[15] The DLS has not raised that, at their August 2016 meeting, the respondent offered to pick up information for Mr. Fusco about the Port Jefferson area from the local Chamber of Commerce, but she did not make that same offer to Mr. Williams in May. The respondent's reason for the offer was vague and there is no evidence in the record that she followed through. Notably, she was not questioned about her offer at the hearing, and the DLS has not argued that the offer was made for any nefarious purpose or indicative of discriminatory intent. The only other difference in the meetings of note was that Mr. Fusco was given a Laffey's home buyers' packet to keep, but although the respondent mentioned it at the end of her meeting with Mr. Williams, he was not provided with one. This issue also was not mentioned at the hearing or noted in the complaint. Accordingly, the tribunal finds no basis to conclude that these disparities are evidence of discrimination based on race.

Williams or that her proffered explanation for requiring the preapproval letter is untrue or not credible.

As evidence of discriminatory intent, the DLS points to the respondent's testimony that asking Mr. Williams for the preapproval letter before showing him listings "did not sit right with her" and made her "uncomfortable." However, her statements can be interpreted multiple ways. While her statements could indicate she felt guilt about imposing the restriction because she had a discriminatory motive, it was also likely that the respondent felt bad because, after spending a significant amount of time with Mr. Williams and offering to show him homes with no prerequisites, she was suddenly requiring him, without a reason, to obtain a preapproval letter as a condition to seeing the homes. Understandably, the respondent may have been unhappy having to do deny him what she had already offered as if she no longer trusted his representations regarding his finances.[16] Regardless, the respondent's meaning is far from clear and not probative evidence of her intent to discriminate based on race.

Cases in which a real estate broker or salesperson has been found guilty of untrustworthiness based on discriminatory conduct have involved more significant evidence of discriminatory conduct from which intent could be inferred. *See, e.g., Kranzler Realty Inc. v. Department of State,* 76 A.D.2d 901 (2d Dep't 1980) (court finds sufficient evidence of discrimination to support charge of untrustworthiness where real estate agent made clear reference to racial matters by noting a listing was in an integrated neighborhood; suddenly found houses in areas other than predominantly Black occupied areas were unavailable after she was introduced to her client's "black husband"; and subsequently attempted to sell client a house in the predominately Black neighborhood); *Butterly & Green, Inc. v. Lomenzo*, 36 N.Y.2d 250, 258 (1975) (upholding Secretary's determination that real estate brokers and salesperson were untrustworthy in that they engaged in racially discriminatory practices by discouraging white home buyers from purchasing property in Black communities, in violation of § 441-c); *Diona v. Lomenzo,* 26 A.D.2d 473 (1st Dep't 1966) (real estate broker found guilty of untrustworthiness where he was found to have engaged in pattern of denying housing accommodations based on race; license revocation upheld); *Russo v. Shaffer*, 131 A.D.2d 853, 854 (2d Dep't 1987) (Secretary of State found brokers soliciting property listings in certain neighborhoods were engaging in discriminatory "blockbusting" practices and were untrustworthy; license suspensions upheld); *Kamper v. Department of State*, 26 A.D.2d 697 (2d Dep't 1966), *aff'd on opinion below*, 22 N.Y.2d 690 (1968) (substantial evidence existed that real estate salesmen committed unlawful discriminatory acts by refusing to rent or sell housing accommodations based on race, warranting a finding they demonstrated untrustworthiness and suspension of their licenses). In comparison to the aforementioned cases, the proof of unlawful discriminatory conduct in this case is "insufficient and insubstantial" *Chiaino*, 26 A.D.2d at 473.

The critical question in this case is whether the respondent had a discriminatory motive for requiring Mr. Williams to produce a preapproval letter before showing him homes. The only evidence to support a discriminatory motive is the comparison to how the respondent treated Mr.

[16] That the respondent regrets requesting taking her supervisor's advice is logical regardless of the intent behind it. Any rational person would regret taking the action which has caused disciplinary action to be taken against them and the possible loss or their license/livelihood.

Fusco under similar circumstances. It has been stated that "[p]roof of discriminatory motive . . . can in some situations be inferred from the mere fact of differences in treatment." *Intl. Bhd. of Teamsters v. United States,* 431 U.S. at 335 fn.15; *contra Abe v. NY Univ.,* 169 A.D.3d 445, 447 (1st Dep't 2019) ("mere disparate treatment, without a showing that the disparity was based on a protected characteristic, does not amount to discrimination"). Arguably, however, that inference cannot be made here where there is no other evidence supporting, or even hinting to, a discriminatory motive. *See Arlington Heights,* 429 U.S. at 266 (advising an inquiry into the circumstantial and direct evidence of intent to determine discriminatory motive). Moreover, the mere fact that Mr. Fusco and Mr. Williams provided similar profiles as first-time home buyers seeking a home in Port Jefferson in the $500,000 price range cannot be the sole basis for the determination that the disparate treatment was based on race when the circumstances under which each tester met with the respondent were different. The meetings occurred three months apart which resulted in a difference in the level of training and supervision the respondent had at the time of each meeting, which were significant factors in this case. Further, the respondent provided a credible explanation for why she closed the meeting in May with Mr. Williams and August with Mr. Fusco differently. There is no evidence that she has been untruthful. Since the tribunal has found her explanation credible and there is no other evidence of discriminatory intent, the tribunal finds insufficient proof of untrustworthiness and/or incompetency because the respondent engaged in unlawful discriminatory conduct.

IV- The DLS also claims that the respondent should be found untrustworthy and/or incompetent because she engaged in unlawful racial steering by providing Mr. Fusco (the "white" tester) with home tours in and around Port Jefferson, which is a predominately white area, while using an arbitrary reason to deny Mr. Williams (the "minority" tester) home tours in the same area. A charge of racial steering requires a finding that the respondent "rejected the testers or directed them to a particular property because of their race." *Division of Licensing Services v. Rubino,* 36 DOS 95 (1995) (citing *Department of State v. Herbert Schimkus,* 29 DOS 87, conf'd. 143 A.D. 2d 418 (1988)). However, on the record before this tribunal, the DLS has failed to show the disparity in treatment in this case was racially motivated. *See Rubino,* 36 DOS 95 at p.4.

As noted above, the Newsday videos showed that the respondent made no reference at either meeting to the demographics or school districts in Port Jefferson or the surrounding areas. The respondent discussed the benefits of living in Port Jefferson Village, along with the surrounding communities at both meetings. Given that a buyer's financial ability to pay is highly relevant to the home-buying process, requiring Mr. Williams to provide a preapproval letter was not arbitrary although inequitable if not asked of all clients. However, as explained above, that inequity alone is not proof in discriminatory intent. The tribunal finds that under these circumnutates there is insufficient evidence of racial steering to support a finding of untrustworthiness or incompetence by substantial evidence.

CONCLUSION OF LAW

The Tribunal finds the complainant has not proven by substantial evidence that the respondent demonstrated untrustworthiness and/or incompetency by engaging in unlawful discriminatory conduct.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the complaint against Nancy Anderson is dismissed.

/S/
Administrative Law Judge

Dated: December 10, 2021