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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.: C180091

-against-

**LISA MARIE OTTERBEIN**

Respondent.

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The above-captioned matter was scheduled for a hearing before Judge Aiesha L. Hudson on December 13, 2018 at 10:00 a.m. at 123 William St., 2<sup>nd</sup> Floor, New York, N.Y. 10038 and the Respondent failed to appear at the Hearing. The Complainant was represented by Hearing presenter Nadine Azarian. This matter was subsequently assigned to the undersigned, Judge Diane T. Noshay, for Decision.

**COMPLAINT**

The complaint alleges that the Respondent real estate salesperson has failed to provide proof that she successfully completed the mandatory 75 hours of qualifying education prior to applying for her license, that she failed to cooperate with the Department’s investigation, and/or that she made a material misstatement on her License application, and that she has demonstrated untrustworthiness and/or incompetency.

**FINDINGS OF FACT**

1) The Department submitted a Notice of Hearing with Attachments showing that the Respondent was properly served with the Notice of Hearing and Complaint (State’s Exhibit 1), and the Affirmation of Marcella Rose, Senior License Examination Specialist for the Department, sworn to April 13, 2018 (State’s Exhibit 2). Ms. Rose affirmed the following facts: On June 14, 2016, the Respondent submitted an on-line application for a license as a real estate salesperson. Ms. Rose stated that agency documentation indicates that the Respondent claimed in her on-line application for the license that she had completed 75 hours of approved pre-licensure education on or about April 20, 2015 (State’s Exhibits 2,3). Based on the representations in her submission, the

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Department issued to Respondent a real estate salesperson's license, UID# 10401290410 on June 15, 2016, under the sponsorship of LEVEL GROUP INC., for a term ending June 14, 2018. (State's Exhibits 2, 3).

2) Ms. Rose conducted an audit of the Respondent to verify that the Respondent had completed the educational requirements (State's Exhibit 2).

3) On February 16, 2018, the Department informed the Respondent via email (addressed to the email address supplied by the Respondent at the time of her application) that an audit had been commenced and requested proof of the 75 hours of qualifying education. The Department directed her to provide a copy of the "course completion certificate(s)" within 14 days of the email (State's Exhibit. 2).

4) On March 14, 2018, the Department sent a follow-up final notice and request for the same information via email to the same email address supplied by the Respondent and informed her that the Department was seeking the revocation of her license. Its correspondence also informed the Respondent of her right to an administrative hearing and notified her that she must respond within 10 days or face fines, suspension and/or revocation of her license (State's Exhibit 2).

5) According to Ms. Rose, the Respondent failed to respond to the Department. She did not co-operate with the Department's audit (State's Exhibit 2).

6) The Respondent's license is marked in Department records as being presently current and having an expiration date of June 14, 2020 (State's Exhibit 3). However, as stated above, the Respondent failed to respond to the Department's Notices concerning the mandatory 75 hours of qualifying education (State's Exhibit 2).

7) On November 10, 2018, the Department served upon the Respondent a Notice of Hearing together with the Complaint by certified and regular mail to Respondent's last known residence address in the records of the Department of State. According to the Verified Statement of Service, sworn to by Norma I. Rosario, neither the certified nor the regular mail was returned by the U.S. Postal Service as of December 6, 2018, the date of Commissioner Rosario's Verified Statement (State's Exhibit 1).

### **OPINION AND CONCLUSIONS OF LAW**

I- The DLS properly served the Respondent with a Notice of Hearing and Complaint in this matter, via certified and regular mail to the Respondent's last known address on file with the Department. Neither the regular nor the certified mail was returned. *See* 19 New York Codes, Rules, and Regulations ("NYCRR") § 400.4(b). To obtain personal jurisdiction over and bind the applicant to the agency decision, the complainant must properly serve the applicant with notice of the hearing and a copy of the complaint and afford him or her an opportunity to be heard. *Matter of Skolnick*, 108 AD3d 720, 723 (2d Dep't 2013) ("An elementary and fundamental requirement of due process in any proceeding which is accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them

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an opportunity to present their objections”) (citing *Mullane v. Central Hanover Bank & Trust Co.*, [339 US 306, 314 \[1950\]](#)). Service properly made in a manner reasonably calculated to provide notice of the time, date, place, and nature of the proceedings is sufficient whether or not the opposing party actually receives notice. See *Persad v. Division of Licensing Services*, 63 DOS APP 09 (2009); *Pinger v. Division of Licensing Services*, 23 DOS APP 07 (2007).

Inasmuch as there is evidence that notice of the place, time, and purpose of the hearing was properly served upon the applicant at her last known address on file with the Department, the hearing was permissibly conducted in the Respondent’s absence. See generally *Jacoby v. New York State Bd. for Professional Medical Misconduct*, 295 AD2d 655 (3d Dep’t 2002); *Verdell v. DeBuono*, 262 AD2d 812 (3d Dep’t 1999); *Patterson v. Dep’t of State*, 35 AD2d 616 (3d Dep’t 1970); *Roy Staley v. Division of Licensing Services*, 14 DOS APP 01 (2001); *Matter of Application of Rose Ann Weis*, 118 DOS 93 (1993).

II - As the person who initiated the hearing, the burden is on the Department to prove by “substantial evidence” that the Respondent failed to submit to the Department proof that she completed the educational requirements for the real estate salesperson’s license and violated the other applicable provisions of law as alleged. State Administrative Procedure Act (“SAPA”), § 306(1); see *Matter of Kelly v. DiNapoli*, 30 NY3d 674, 684 (2018) (defining substantial evidence). Substantial evidence is that which “a reasonable mind” could “accept as adequate to support a conclusion or ultimate fact.” *300 Gramatan Ave. Associates v. State Div. of Human Rights*, 45 NY2d 176, 180 (1978), cited in *Gray v. Adduci*, 73 NY2d 741, 742-743 (1988); *Tutuianu v. New York State*, 22 AD3d 503, 504 (2d Dep’t 2005). “The question. . . is whether ‘a conclusion or ultimate fact may be extracted reasonably -- probatively and logically.’” *City of Utica Bd. of Water Supply v. New York State Health Dep’t*, 96 AD2d 719 (4th Dep’t 1983), quoting *300 Gramatan Ave. Associates*, *supra*, 45 NY2d at 181; *Division of Licensing Services v. Cirrincione*, 246 DOS 98 (1998).

III - I find that the Department proved that the Respondent failed to provide proof that she successfully completed the required 75 hours of qualifying education prior to applying for her license, that she failed to cooperate with the Department’s investigation, and that she has demonstrated untrustworthiness by ignoring the Department’s audit. See generally *Charles F. Cefalu, et al. v. Division of Licensing Services*, 16 DOS APP 13 at 5 (2013) (“It is well-settled that the Secretary of State is vested with wide discretion in determining whether specific conduct in particular circumstances rises to the level of untrustworthy conduct, and that bad acts other than the specific violation of Real Property Law or the regulations promulgated pursuant thereto may be found to constitute a demonstration of untrustworthiness in violation of Real Property Law § 441-c” (citing *Chiaino v. Lomenzo*, 26 AD2d 469, 472 [1966]) (untrustworthiness is shown by conduct of licensee that “would warrant a conclusion of unreliability”). I find that the Respondent’s failure to respond to the DLS communications and to co-operate with its investigation is plainly unreliable and untrustworthy conduct. *Division of Licensing Services v. Jason Garcia*, 327 DOS 11 at 3 (2011) (non-cooperation with Department’s inquiries seeking proof of mandatory education violated Real Property Law §§ 441 and 442-e[5,] and demonstrated untrustworthiness, in violation of Real Property Law § 441-c).

IV – The Respondent’s License is presently current (State’s Exhibit 3). Notwithstanding that, under Real Property Law section 441(1-A) (d), the Respondent, as an applicant for a real

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estate salesperson's license, was required to provide to the Department proof of having completed 75 hours of qualifying education when she initially applied for her License and she failed to do so.

V - Pursuant to Real Property Law section 442-e (5),<sup>1</sup> the Respondent was required to cooperate with the Department's investigation. By failing to respond to the Department's emails during the audit, the Respondent violated that statute and showed herself to be untrustworthy, in violation of Real Property Law section 441-c. The Department, by its letter of November 8, 2018, advised the Respondent of her right to an administrative hearing and placed her on notice that the Department was proposing revocation of her license, yet she did not respond (State's Ex. 3). Nor did she respond to the subsequent Notice of Hearing and Complaint, which gave her additional notice of her rights and of the risk of revocation of her license. Revocation is appropriate here. *See generally Gise v. Shaffer*, 153 AD2d 688 (2d Dep't 1989) (real estate salesperson's license revoked based on untrustworthiness); *Division of Licensing Services v. Lior Sofer*, 372 DOS 11 (2011) (real estate salesperson's license revoked for failure to provide proof of completion of 75-hour qualifying course and to respond to the Department's requests aimed at verifying compliance with educational requirements for licensure); *Jason Garcia*, supra, 327 DOS 11 at 3 (same for renewed real estate salesperson's license for failure to respond with proof of continuing education) (failure to respond to Department's inquiries "demonstrates . . . lack of regard for maintaining . . . license;" this dereliction and the substantial period of licensure without meeting the statutory requirements warrant revocation); *Division of Licensing Services v. Melody R. Dekel*, 809 DOS 10 (2010) (same); *Division of Licensing Services v. Desiree C. Jacobs*, 808 DOS 10 (2010) (same).

### **DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Lisa Marie Otterbein violated Real Property Law §§ 441(1-A) (d) and 442-e(5), and accordingly, pursuant to Real Property Law § 441-c, her license as a real estate salesperson, UID #1040129410, is revoked immediately. The Respondent is directed to send, as appropriate, her license certificate, pocket card, and salesperson's identification, to Norma Rosario, Department of State, Division of Licensing Services, One Commerce Plaza, 99 Washington Avenue, 5th Floor, Albany, New York 12231-0001.

Dated: February 14, 2019

/S/

Diane T. Noshay  
Administrative Law Judge

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<sup>1</sup> That section provides:

The Secretary of State shall have the power to enforce the provisions of this article and upon complaint of any person, or on his own initiative, to investigate any violation thereof or to investigate the business, business practices and business methods of any person, firm or corporation applying for or holding a license as a real estate broker or salesman, if in the opinion of the Secretary of State such investigation is warranted. Each such applicant or licensee shall be obliged, on request of the Secretary of State, to supply such information as may be required concerning his or its business, business practices or business methods, or proposed business practices or methods. Real Property Law § 442-e(5).

