

BEFORE THE MARYLAND REAL ESTATE COMMISSION

**MARYLAND REAL ESTATE
COMMISSION**

*

* **CASE NO. 2019-RE-459**

v.

*

* **OAH NO. LABOR-REC-24-20-01674**

**HOWARD SCOTT LOKEY,
Respondent**

*

and

*

**IN RE THE CLAIM OF ROBERT
WALTER KENNY AGAINST
THE MARYLAND REAL ESTATE
COMMISSION GUARANTY FUND**

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* * * * *

PROPOSED ORDER

The Findings of Fact, Proposed Conclusions of Law and Recommended Order of the Administrative Law Judge dated June 3, 2020, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 16th day of July, 2020, hereby

ORDERED:

A. That the Findings of Fact in the proposed decision be, and hereby are, **AFFIRMED.**

B. That the Conclusions of Law in the proposed decision be, and hereby are, **APPROVED.**

C. That the Recommended Order in the proposed decision be, and hereby is, **ADOPTED.**

D. That the records, files, and documents of the Maryland Real Estate Commission reflect this decision.

E. Pursuant to Code of Maryland Regulations (COMAR) 09.01.03.09 those parties

adversely affected by this Proposed Order shall have twenty (20) days from the postmark date of the Order to file written exceptions to this Proposed Order. The exceptions should be sent to the Executive Director, Maryland Real Estate Commission, 3rd Floor, 500 North Calvert Street, Baltimore, MD 21202. If no written exceptions are filed within the twenty (20) day period, then this Proposed Order becomes final.

F. Once the Proposed Order becomes final, the parties have an additional thirty (30) days in which to file an appeal to the Circuit Court for the Maryland County in which the Appellant resides or has his/her principal place of business, or in the Circuit Court for Baltimore City

7/16/20
Date

MARYLAND REAL ESTATE COMMISSION
SIGNATURE ON FILE
By: [Signature]

MARYLAND REAL ESTATE
COMMISSION

v.

HOWARD SCOTT LOKEY,
RESPONDENT,

and

IN RE THE CLAIM OF ROBERT
WALTER KENNY AGAINST THE
MARYLAND REAL ESTATE
GUARANTY FUND

* BEFORE WILLIAM F. BURNHAM,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
*
* OAH No.: LABOR-REC-24-20-01674
* REC No.: 2019-RE-459

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On December 13, 2018, Robert Walter Kenny (Claimant) filed a complaint against licensed real estate broker Howard Scott Lokey (Respondent). That same day, the Claimant also filed a claim for compensation from the Maryland Real Estate Guaranty Fund (Fund) for losses the Claimant allegedly sustained as a result of the Respondent's misconduct. The complaint and claim both arose out of interaction between the Claimant and the Respondent as it related to 500 Military Road, Frederick, Maryland, (Frederick Property), the address of a home purchased by the Claimant.

The Maryland Real Estate Commission (REC or Commission) investigated the complaint and determined that charges against the Respondent were warranted and that the Claimant was entitled to a hearing on his claim. Accordingly, the Commission issued a Statement of Charges and Order for Hearing (Statement of Charges), dated December 17, 2019, against the Respondent. The Statement of Charges set forth information about the claim and alleged that the Respondent violated sections 17-322(b)(25), (32), (33), and 17-532 of the Business Occupations and Professions Article (Business Occupations Article)¹ of the Maryland Annotated Code, and that he also violated sections 09.11.01.16 and 09.11.02.02A of the Code of Maryland Regulations (COMAR). The Statement of Charges advised the Respondent that if the charged violations are substantiated, the Commission could sanction him by reprimand, or by suspension or revocation of his real estate broker's license and could, in addition to or instead of those actions, impose a monetary penalty of \$5,000.00 per violation. On December 27, 2019, the Commission forwarded the Statement of Charges to the Office of Administrative Hearings (OAH) to conduct a hearing.

On March 12, 2020, I conducted the hearing at the OAH in Hunt Valley, Maryland. Business Occupations Article §§ 17-324(a) and 17-408(a). Hope Sachs, Assistant Attorney General, Maryland Department of Labor (Labor), represented the REC on the charged violations. The Respondent failed to appear after proper notice.² The Claimant represented himself. Robert McCray, Assistant Attorney General, Labor, represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedures for Administrative Hearings before the Office of the Secretary of Labor, and the Rules of Procedure

¹ All references to the Business Occupations and Professions Article are to the 2018 Replacement Volume and 2019 Supplement.

² The notice was mailed to the Respondent's address of record, Premium Realty Associates, 419 Lee Place, Frederick, Maryland 21702, and was not returned. COMAR 28.02.01.05C. After waiting over fifteen minutes, I proceeded the Respondent's absence. COMAR 28.02.01.23A.

of the OAH govern this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 and Supp. 2019); COMAR 09.01.02; COMAR 09.01.03; COMAR 28.02.01.

ISSUES

1. Did the Respondent engage in conduct that demonstrated bad faith, incompetency, or untrustworthiness, or that constituted dishonest, fraudulent, or improper dealings in violation of Business Occupations Article § 17-322(b)(25), including failure to reply to the Commission in writing?³

2. Did the Respondent violate COMAR 09.11.02.02A, the REC's Code of Ethics (Code), by failing to protect and promote the interests of his client or by failing to act with absolute fidelity to the client's interest, which would violate the Code and also Business Occupations Article § 17-322(b)(33)?

3. If the Respondent violated any of these provisions or any other provision of Title 17, what sanction, if any, is appropriate?⁴

4. Has the Claimant established a compensable claim against the Fund under section 17-404 of the Business Occupations Article?

5. If the Claimant has established a compensable claim, what is the appropriate award?

SUMMARY OF THE EVIDENCE

Exhibits

The REC offered the following exhibits, which I admitted into evidence:

- REC #1 Notice of Hearing generated by the OAH, January 30, 2020
- REC #2 Statement of Charges, December 17, 2019
- REC #3 REC licensing records for the Respondent and related companies, printed March 10, 2020

³ The Commission cited COMAR 09.11.01.16.

⁴ The Statement of Charges also charged a violation of Business Occupations Article § 17-322(b)(32), which provides that a licensee's real estate license is subject to sanction if he "violates any other provision of this title."

REC #4 REC, Report of Investigation, closed August 1, 2019 with the following attachments:

- #1 Complaint filed with the REC on December 13, 2018 (pp. 1/1 to 1/5)⁵
 - Copy of Checks to Premium Realty Associates (Premium Realty), August 31, 2018 (p. 1/5)
 - Email from Claimant to Brenda Iman, December 13, 2018 (p. 1/6)
 - Settlement documents, June 19, 2018 (pp. 1/7 to 1/10)
 - Email from First United Bank & Trust to the Respondent, June 8, 2018 (p. 1/11)
 - Residential contract of sale, signed June 4, 2018, (pp. 1/12 to 1/31)
 - Copy of check, June 4, 2018 (p. 1/32)
 - REC licensing information for the Claimant, last updated September 16, 2018 (p. 1/33)
 - REC licensing information for the Respondent, last updated March 13, 2018 (p. 1/34)
 - REC real estate agent representation information, undated (pp. 1/35 to 1/36)
 - Third party approval addendum, May 31, 2018 (p. 1/37)
 - Residential contract of sale, (pp. 1/38 to 1/52)
- #2 Letter from DLLR⁶ to the Respondent, January 30, 2019 (unnumbered)
 - Letter from DLLR to the Respondent, March 1, 2019 (p. 2/1)
 - Email from Patrick Richardson to Lucinda Rezek, July 8, 2019 (p. 2/2)

The Claimant did not offer any exhibits for inclusion in the record.

The Respondent did not offer any exhibits for inclusion in the record.

The Fund did not offer any exhibits for inclusion in the record.

Testimony

The REC presented testimony from the Claimant and Brenda Iman, Administrative Officer II, Paralegal Investigator, on the regulatory charges. The Claimant also testified on his own behalf in support of his claim. Neither the Respondent nor the Fund presented any testimony.

⁵ The exhibit and attachments were pre-numbered by the Commission.

⁶ On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation (DLLR) became the Department of Labor.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. Since 1985, the Respondent was licensed as a Real Estate Broker by the REC under license number 77479 with no prior REC complaints.
2. The Respondent was the owner and the broker of record for Premium Realty Associates (Premium Realty).
3. The Claimant was an associate broker for Premium Realty.
4. The Claimant engaged the Respondent to purchase a property. Premium Realty was the selling broker and the Claimant was the sales associate for two properties on which the Claimant made offers.
 5. The first property was located at 17334 Sabillasville Road, Sabillasville, Maryland (Sabillasville Property). The Sabillasville Property was listed for \$25,000.00.
 6. On May 30, 2018, the Claimant gave the Respondent \$20,000.00 to hold in escrow. The money was to be used to make an offer and purchase the Sabillasville Property. The Claimant did not purchase the Sabillasville Property.
 7. The Claimant asked the Respondent to maintain the \$20,000.00 in escrow in order to make an offer on the second property located at 500 Military Road, Frederick, Maryland (Frederick Property).
 8. On June 4, 2018, the Claimant gave the Respondent an additional \$140,000.00 to hold in escrow. The money was to be combined with the \$20,000.00 the Respondent had in escrow to make an offer and purchase the Frederick Property.
 9. On June 5, 2018, the seller accepted the Claimant's offer of \$145,000.00 for the Frederick Property. Closing was scheduled for June 19, 2018.

10. On June 19, 2018, the Claimant closed on the Frederick Property. The total due from the Claimant was \$152,778.82.

11. The Respondent paid \$152,778.82 from the \$160,000.00 escrow money given to him by the Claimant.

12. The Respondent did not return \$7,221.18, the balance of the escrow money, to the Claimant.

13. On June 22, 2018, the Claimant attempted to contact the Respondent about the return of his escrow money and payment of the commission he was due as the sales associate for the transaction.

14. On July 30, 2018, the Respondent contacted the Claimant and told him the escrow money was moved to another bank account because the Respondent was in litigation with his sons. The Respondent promised to pay the balance of the escrow and the Claimant's commission to the Claimant, but he did not.

15. On November 25, 2018, the Claimant went to the Respondent's office. The Respondent told the Claimant he would begin payment the next day. The Respondent never paid the Claimant any money and did not contact him again.

16. The Claimant filed a complaint with the REC on December 13, 2018.

17. The REC sent the Respondent letters on January 30, 2019 and March 1, 2019 requesting a response to the complaint. The Respondent never replied to either letter.

18. The REC scheduled an audit of Rental Services for July 2, 2019 and sent an auditor to examine the Respondent's financial records. The Respondent was not at his business address and the property at the address on file with the Commission appeared vacant.

DISCUSSION

The Regulatory Charges

The REC charged the Respondent with violating sections 17-322(b)(25), (b)(32), (b)(33) and 17-532 of the Business Occupations Article, COMAR 09.11.01.16 and COMAR

09.11.02.02A. Section 17-322 of the Business Occupations Article provides, in pertinent part:

(b) *Grounds.* – Subject to the hearing provisions of § 17-324 of this subtitle, the Commission may . . . reprimand any licensee, or suspend or revoke a license if the applicant or licensee:

...

(25) engages in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings;

...

(32) violates any other provision of this title;

(33) violates any regulation adopted under this title or any provision of the code of ethics.

Determination of penalty

(c) (1) Instead of or in addition to reprimanding a licensee or suspending or revoking a license under this section, the Commission may impose a penalty not exceeding \$5,000 for each violation.

(2) To determine the amount of the penalty imposed, the Commission shall consider:

- (i) the seriousness of the violation;
- (ii) the harm caused by the violation;
- (iii) the good faith of the licensee; and
- (iv) any history of previous violations by the licensee.

COMAR 09.11.02.02A provides:

In accepting employment as an agent, the licensee shall protect and promote the interests of the client. This obligation of absolute fidelity to the client's interest is primary, but it does not relieve the licensee from the statutory obligations towards the other parties to the transaction.

The REC bears the burden of establishing, by a preponderance of the evidence, that the Respondent committed the violations alleged in the Statement of Charges. COMAR

09.01.02.16. To prove something by a "preponderance of the evidence" means "to prove that

something is more likely so than not so[,]" when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

As an initial matter, although COMAR 09.11.01.16 is titled "Use of Trade Names," the Commission cited COMAR 09.11.01.16 in its Statement of Charges as providing the following:

Form of Licensee's Reply to Commission's Inquiries.

A Licensee shall reply in writing to the Commission within 20 days of receipt of written inquiries directed to the licensee by the Commission. Failure to reply in this way may be considered by the Commission to be a violation of Business Occupations and Professions Article, 17-322(b)(25),⁷ Annotated Code of Maryland, for which the revocation or suspension of the license can be imposed.

The Commission cited a version of COMAR 09.11.01.16 that was in effect from June 1990 until it was revised in 2017. The COMAR provision presently in effect that relates to a licensee's failure to respond to the Commission is COMAR 09.11.01.13. It provides:

Failure to Respond.

- A. If an applicant or licensee receives from the Commission a written communication requesting a response, the applicant or licensee shall respond in writing within 30 days of the date of the mailing.
- B. The Commission shall send a written communication by first-class mail to the last known address furnished to the Commission by the applicant or licensee.
- C. It is a responsibility of an applicant or licensee to notify the Commission in writing if there has been a change in applicant's or licensee's address.
- D. Failure to respond as required by this regulation may be considered by the Commission to be a violation of Business Occupations and Professions Article, §17-322(b), Annotated Code of Maryland.

Because the Commission alleges that the Respondent failed to respond to its notices related to the Claimant's complaint, I will presume the REC alleged the Respondent failed to comply with

⁷ The former COMAR 09.11.01.16 referencing failure to reply to the Commission cited Business Occupations Article § 16-322(a)(25). The Commission cited the section of the Business Occupations Article that a licensee now violates if he fails to respond to the Commission. See COMAR 09.11.01.13.

COMAR 09.11.01.13 because that section is related to the failure of a licensee to respond to a written communication of the REC that required a response.

The starting point for this discussion is that there were written contracts signed by the Claimant and the Respondent for the purchase of both properties. The documents were a form used by the Respondent and, to the extent that it had blanks to be filled in, the Respondent filled in those blanks prior to signing. The first contract, dated May 31, 2018, was an offer for the Sabillasville Property (Sabillasville Contract). The Complainant's offer for the Sabillasville Property was not accepted. The second contract was for the purchase of the Frederick Property (Frederick Contract). The Frederick Contract was signed on June 10, 2018, an offer was accepted, and closing occurred on June 19, 2018.

The Claimant testified that he never received the balance of escrow funds or his commission from the Respondent following the June 19, 2018 closing on the Frederick Property. He wrote in his complaint that the Respondent did not respond to his inquiry about his funds for over a month. According to the Claimant, in July 2018, the Respondent admitted to moving the escrow funds to another bank account "to make it easier" to address litigation with his sons. The Claimant testified that the Respondent knew that moving the funds was wrong and the Respondent promised to pay the Claimant, but never did. The Claimant testified that he experienced serious medical challenges and was not able to pursue the Respondent until the fall of 2018.

The Claimant testified that the Frederick Property is close in proximity to the Respondent's real estate office, so he decided to walk to the Respondent's office in November 2018. According to the Claimant, the Respondent met him face-to-face because the Claimant came to his office in person and the Respondent had no choice but to speak with him. At that time, the Respondent acknowledged that he needed to pay the Claimant and promised to begin

doing so the following day. The Claimant said the Respondent never paid any money nor spoke with him again.

Ms. Iman testified that the REC mailed a notice of the complaint to the Respondent on January 30, 2019 and the Respondent had twenty days in which to respond in writing to the REC regarding the complaint. According to Ms. Iman, the Respondent never provided any answer to the REC's January 2019 notice and so the REC sent a second letter marked final notice on March 1, 2019.

According to Ms. Iman, the March 1, 2019 letter informed the Respondent that he was obligated to respond in writing to the REC regarding the Claimant's complaint but had failed to do so. The REC provided an extra ten days from the date of the final notice for the Respondent to provide a written response and informed the Respondent he was subject to suspension or revocation of his license and up to a \$5,000.00 fine. Ms. Iman testified that the REC never received any response from the Respondent, he was not present at his business address on July 2, 2019 for the audit, and the property seemed vacant and under repair. It appeared to the REC that the Respondent closed his brokerage without telling the REC and without returning any of the Claimant's escrow money.

The REC argued that facts support its allegations that the Respondent violated Section 17-322(b)(25) of the Business Occupations and Professions Article because the Respondent acted untrustworthy, in bad faith, and fraudulently when he improperly withheld the escrow money due the Claimant under the Frederick Contract. Next, the REC argued that the Respondent violated Section 17-532(b)(1)(vi) of the Business Occupations Article because he kept the escrow money and did not remit the balance due the Claimant after the sale and closing on the Frederick Property, therefore exercising no reasonable care or diligence. In addition, according to the REC's argument, the Respondent violated COMAR 09.11.01.16 because he

never responded in any respect to either notice or the scheduled audit. Finally, the REC argued the Respondent was in violation of COMAR 09.11.02.02A, and thereby also violated section 17-322(b)(33) of the Business Occupations Article, because the actions described did not protect the interest of the Claimant, to whom the Respondent owed an absolute fidelity. Therefore, the REC argued, the Respondent did not in any way promote or protect the Claimant's interests.

The REC proposed that the Respondent be penalized by revocation of his license and a \$5,000.00 fine for each of the violations the REC enumerated in its argument. The REC stated that in fashioning its recommendation, it considered the factors under Section 17-322(c) and determined the Respondent's violations were as serious as could be, caused extensive financial harm to the Claimant, and the Respondent exercised "zero" good faith. The REC acknowledged that the Respondent has no other history of complaints since his licensure in 1985. The REC recommended the revocation of the Respondent's license and a total fine of \$20,000.00.

The Respondent signed the Frederick Contract and promised to provide real estate brokerage services to the Claimant. The Respondent was paid escrow money under the Sabillasville Contract and the Frederick Contract. He failed to disburse to the Claimant what was left in escrow after the purchase of the Frederick Property.

For the foregoing reasons, I find that the REC has proven by a preponderance of the evidence that the Respondent acted in a manner that demonstrated bad faith, incompetency and untrustworthiness. For the same reasons I find that the Respondent's conduct was dishonest, fraudulent and he engaged in improper dealings. Business Occupations Article § 17-322(b)(25). Although the REC made no argument specific to Business Occupations Article Sections 17-322(b)(32) & (33), I find, based on the allegations in the Statement of Charges and the evidence in the record, that the Respondent violated each of these statutory provisions for the same reasons.

The REC also charged the Respondent with violating COMAR 09.11.02.02A, which requires that the Respondent protect and promote the interests of the client. The Respondent owed the Claimant an obligation of absolute fidelity and failed in every respect set forth above to promote any interest of the Claimant. The Respondent completed the Frederick Contract and knew that he kept the remaining escrow money that he should have disbursed to the Claimant. The Respondent chose to steal the remaining escrow money. He failed to adequately protect and promote the interests of the Claimant in this situation.

Finally, the REC cited the outdated COMAR section for its proposition that the Respondent was required to address the Claimant's complaint within twenty days of the REC's January 30, 2019 notice letter. The Respondent never responded at all to the REC's letters. The Respondent knew that the REC threatened to reprimand him, suspend or revoke his license if he did not reply. He failed to reply. If he closed his business or moved, he did not tell the REC because the REC continued to try and reach him at his business address that is still registered with the REC. *See* REC #3; *and see* COMAR 09.11.01.08 ("When a licensed broker changes business location, the licensed broker shall notify the Commission in writing within 10 days"). In addition, although twenty days was an incorrect timeframe for the Respondent to reply, the REC gave the Respondent thirty days to reply when the times in the first and second notices are combined, so the Respondent actually had thirty days to respond, failed to do so, and therefore, suffered no prejudice as a result of the twenty-day notice.⁸

Given the foregoing, a revocation is appropriate, and I recommend that sanction. With regard to a monetary penalty, the Respondent has no history of prior violations. The Respondent failed to adhere to the terms of his written Contract with the Claimant, failed to protect and promote the Claimant's interests, and failed to respond in any way to the Commission. The

⁸ No argument was presented that the incorrect response time had any effect on the Respondent's failure to reply to the Commission.

Commission notified the Respondent that he was subject to “a monetary fine of up to \$5,000.00 per violation.”⁹ The maximum possible monetary penalty for four violations is \$20,000.00. The REC suggested a total of \$20,000.00 for the violations of section 17-322(b)(25) and section 17-532(b)(1)(vi) of the Business Occupations Article, and COMAR 09.11.01.16 and 09.11.02.02A.

Section 17-322(c) of the Business Occupations Article provides the penalty for the alleged violations in this case. The maximum penalty is \$5,000.00 for each violation under this section. Business Occupations Article § 17-322(c). The REC’s requested \$5,000.00 penalty for the Respondent’s engagement in conduct exhibiting bad faith, incompetency, untrustworthiness and dishonest, fraudulent and improper dealings with the Claimant is proper under the facts of this case. Business Occupations Article § 17-322(b)(25). The REC’s request for \$5,000.00 for failure to respond to its written communications is a request under COMAR 09.01.01.13 and that section provides that a violation is akin to violation of the section 17-322(b)(25) of the Business Occupations Article and is, therefore, proper. The Respondent additionally violated section 17-532 of the Business Occupations Article and COMAR 09.11.02.02A. Because penalties under section 17-322(c) apply to any violation of another provision of Title 17 of the Business Occupations Article, I find the \$5,000.00 penalty requested by the REC appropriate for the Respondent’s section 17-532 violation. *See* Business Occupations Article § 17-322(b)(32). Finally, a violation of COMAR 09.11.02.02A is a violation of the Code and therefore a basis for a penalty under the Business Occupations Article. *See* Business Occupations Article § 17-322(b)(33). Therefore, I find a monetary penalty of \$5,000.00 appropriate under section 17-322(c) of the Business Occupations Article.

⁹ The REC notified the Respondent in its March 1, 2019 notice letter that the Respondent was subject to “a fine up to \$5,000.00 and/or a suspension of your license.” REC #4 Att. 2 (p. 2/1). The Statement of Charges informed the Respondent the hearing could result in “a reprimand, or the suspension or revocation” of his license and in addition, “a monetary fine of up to \$5,000.00 per violation.” REC #2.

The Guaranty Fund Claim

Section 17-404 of the Business Occupations Article governs claims brought against the Fund. A claimant may recover compensation from the Fund for an actual loss based on an act or omission by a licensed real estate broker that occurs in the provision of real estate brokerage services involving a transaction that relates to real estate located in this State. Business Occupations Article § 17-404(a).

Business Occupations Article section 17-404 provides in pertinent part that:

A claim shall:

(i) be based on an act or omission that occurs in the provision of real estate brokerage services by:

1. a licensed real estate broker;

(ii) involve a transaction that relates to real estate that is located in the State; and

(iii) be based on an act or omission:

1. in which money or property is obtained from a person by theft, embezzlement, false pretenses, or forgery; or

2. that constitutes fraud or misrepresentation.

Therefore, a claim must be based on an act or omission in which money or property is obtained from a person by theft, embezzlement, false pretenses, or forgery; or an act or omission that constitutes fraud or misrepresentation. Business Occupations Article § 17-404(a)(2)(iii); COMAR 09.11.03.04A and B.

With respect to claims against the Fund, COMAR 09.11.01.15 states as relevant to this case:

The amount of compensation recoverable by a claimant from the [Fund] ... shall be restricted to the actual monetary loss incurred by the claimant, but may not include monetary losses other than the monetary loss from the originating transaction.

Under Section 17-407(e) of the Business Occupations Article, the Claimant bears the burden of proof to establish his claim for recovery from the Fund. The burden of proof is by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR

09.01.02.16C. The Claimant proved by a preponderance of the evidence that he suffered an actual loss caused by the act or omission of the Respondent. The Fund recommended compensation.

There is no dispute the Frederick Property is located in the State and there is no dispute the Respondent was a licensed real estate broker at the time of the events at issue. The Claimant purchased the Frederick Property with funds he gave to the Respondent to hold in escrow for that purpose and has no business or familial relationship with the Respondent that would disqualify him from recovery. *See Business Occupations Article § 17-404(c)*. There is an allegation of theft, false pretenses, fraud and misrepresentation and, as described *infra*, there is evidence to support such findings. I conclude there was proof by a preponderance of the evidence of theft, false pretenses, fraud, and misrepresentation by the Respondent.

The Sabillasville Contract, Frederick Contract, and the settlement documents show that the Respondent was given \$160,000.00 to hold in escrow and paid \$152,778.82 of the escrow money at settlement for the Frederick Property. The Respondent owed the Claimant \$7,221.18, which was the balance of the money held in escrow for the purchase of the Frederick Property.¹⁰

The Respondent never returned the balance of the Claimant's escrow money. The total amount the Claimant lost due to the Respondent's actions is \$7,221.18. The Fund is set up to provide compensation for these types of losses. The Fund is not set up to address the Claimant's claim of loss of commission for the sale of the Frederick Property and I do not address that loss here. In this case, the Claimant has proved by a preponderance of the evidence that he is entitled to compensation from the Fund in the amount of the escrow held by the Respondent that he never reimbursed to the Claimant.

¹⁰ The Claimant indicated that he lost \$7,191.18 as a result of the Respondent's keeping the difference between the money held in escrow and the gross amount due at settlement. Because no one explained why there was a \$30.00 difference in what the Claimant and the Fund presented as the loss, I calculate the loss as \$160,000.00 minus \$152,778.82.

PROPOSED CONCLUSIONS OF LAW

Based on the Findings of Fact and Discussion, I propose the Commission conclude as a matter of law that:

1. The Respondent engaged in conduct that demonstrated bad faith, incompetency or untrustworthiness and that constituted dishonest, fraudulent and improper dealings in violation of section 17-322(b)(25) of the Business Occupations Article.

2. The Respondent violated COMAR 09.11.02.02A, the REC's Code of Ethics and section 17-322(b)(33) of the Business Occupations Article, by failing to protect and promote the interests of his client or by failing to act with absolute fidelity to the client's interest.

3. The Respondent violated COMAR 09.11.01.13 and section 17-322(b)(25) of the Business Occupations Article by failing to respond in any manner to the REC's notice letters regarding the Claimant's complaint.

4. A revocation of the Respondent's Real Estate Commission license is an appropriate sanction, as well as a monetary penalty of \$20,000.00, which represents \$5,000.00 for each of the violations of sections 17-322(b)(25), (32) and (33) and 17-532 of the Business Occupations Article. *See Business Occupations Article § 17-322(c); and see COMAR 09.11.01.13; COMAR 09.11.02.02A.*

5. The Claimant established a compensable claim against the Fund under section 17-404 of the Business Occupations Article in the amount of \$7,221.18 representing the total amount of escrow money minus the gross amount due at settlement of the Frederick Property.

RECOMMENDED ORDER

I therefore **RECOMMEND** that the Maryland Real Estate Commission **ORDER** as follows:

1. That the Respondent's real estate broker license be revoked;
2. That the Respondent pay a civil penalty in the amount of \$20,000.00;
3. The Maryland Real Estate Commission Guaranty Fund pay the Claimant's claim of \$7,221.18; and
4. That the records and publications of the Maryland Real Estate Commission reflect this decision.

June 3, 2020
Date Decision Issued

SIGNATURE ON FILE

William F. Burnham
Administrative Law Judge

WFB/kdp
Document #185968