

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION *

v. *

JOHN S. UPCHURCH
Respondent

* CASE NO. 2010-RE-0074

* OAH NO. DLR-REC-21-11-41190

And

*

WILLIAM UPCHURCH, JR.
Respondent

CASE NO. 2011-RE-0342

*

OAH NO. DLR-REC-21-11-41195

*

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law, and Recommended Order of the Administrative Law Judge dated June 18, 2012, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 14th day of August, 2012

ORDERED,

A. That the Findings of Fact in the recommended decision be, and hereby are, **ADOPTED**;

B. That the Conclusions of Law in the recommended decision be, and hereby are, **ADOPTED**;

C. That the Recommended Order be, and hereby is, **AMENDED** as follows:

ORDERED that the Respondent John Upchurch violated Md. Bus. Occ. and Prof. Art. §17-322(b)(25), (30), and (33); §17-530; and COMAR 09.11.02.01H;

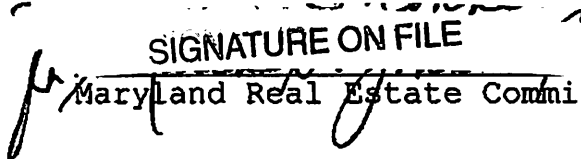
ORDERED that the Respondent William Upchurch did not violate Md. Bus. Occ. and Prof. Art. §17-601;

ORDERED that the Respondent John Upchurch pay to the Real Estate Commission a civil penalty in the amount of \$10,500.00 within thirty days of the date of this Proposed Order, and that, if the Respondent fails to pay the penalty in full within that time, all real estate licenses held by him will be suspended until the penalty is paid;

ORDERED that the records and publications of the Maryland Real Estate Commission reflect this decision.

D. Pursuant to '10-220 of the State Government Article, the Recommended Order of the Administrative Law Judge had to be modified to provide that the penalty imposed on this Respondent is in the amount of \$10,500. In her discussion, the judge stated, "I find that a \$3,500 penalty for each of the three statutory violations, for a total of \$10,500, is appropriate." However, in her recommended order she provided for a civil penalty of \$700.00. The Commission agrees with the judge's initial decision with regard to the amount of the penalty. The Commission has also provided that the full amount of the civil penalty must be paid within thirty days of the date of this Order.

E. Pursuant to Code of Maryland Regulations (COMAR) 09.01.03.08 those parties adversely affected by this Proposed Order shall have 20 days from the postmark date of the Order to file exceptions and to request to present arguments on the proposed decision before this Commission. The exceptions should be sent to the Executive Director, Maryland Real Estate Commission, 3rd Floor, 500 North Calvert Street, Baltimore, MD 21202.


SIGNATURE ON FILE
Maryland Real Estate Commission

**MARYLAND REAL ESTATE
COMMISSION**

V.

**JOHN S. UPCHURCH, AND
WILLIAM UPCHURCH, JR.,
RESPONDENTS**

*** BEFORE SONDRAL SPENCER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* OAH # DLR-REC-21-11-41195
* MREC # 11-RE-342
* (WILLIAM UPCHURCH, JR.)
* OAH # DLR-REC-21-11-41190
* MREC # 10-RE-074
* (JOHN S. UPCHURCH)**

* * * * *

RECOMMENDED DECISION

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

STATEMENT OF THE CASE

On October 14, 2010, the Maryland Real Estate Commission (MREC) filed separate charges and orders for hearing against John S. Upchurch (the Respondent, John Upchurch) and William Upchurch, Jr., (the Respondent, William Upchurch), charging each of them with violations of Maryland real estate law. The MREC transmitted the cases to the Office of Administrative Hearings (OAH) on October 24, 2011. The OAH consolidated the cases for hearing judicial economy.

On March 20, 2012, I conducted the hearing at the Office of Administrative Hearings (OAH), 2730 University Boulevard, Wheaton, Maryland, 20730. Code Ann., Bus. Occ. & Prof. § 17-324 (2010)).¹ Jessica Kaufman, Assistant Attorney General, represented the REC. The Respondents represented themselves.

The Administrative Procedure Act, the procedures for Administrative Hearings of the Office of the Secretary of the DLLR, the procedures for Hearings of the Commission, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§10-201 through 10-226 (2009 & Supp. 2010); Code of Maryland Regulations (COMAR) 09.01.02, 09.01.03, 09.11.03; and COMAR 28.02.01.

ISSUES

Did the Respondent, John Upchurch, or the Respondent, William Upchurch, violate Maryland real estate law and, if so, is either Respondent subject to a civil penalty?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the REC:

REC Ex. 1. Notice of Hearing, November 1, 2011, for Respondent John Upchurch

REC Ex. 2. Transmittal to OAH, dated October 19, 2011, with attached Statement of Charges and Order for Hearing for Respondent, John Upchurch, dated October 14, 2011

REC Ex. 3. Licensing Information for Respondent, John Upchurch, dated February 21, 2012

REC Ex. 4. Notice of Hearing, November 1, 2011, for Respondent, William Upchurch.

¹ Unless otherwise noted, all statutory references are to the Business Occupations Article.

- REC Ex. 5. Transmittal to OAH, dated October 14, 2011, with attached Statement of Charges and Order for Hearing for Respondent, William Upchurch, dated October 19, 2011
- REC Ex. 6. Licensing Information for Respondent ,William Upchurch, dated February 21, 2012
- REC Ex. 7. Complaint and Guaranty Fund Claim filed March 17, 2011 against Respondent ,William Upchurch
- REC Ex. 8. REC Investigation Report re: Respondent, William Upchurch, by Jack L. Mull, Jr., dated February 4, 2011

The Respondents did not offer any exhibits.

Testimony

The MREC presented the following witnesses: Gerard Occhiuzzo, Fairfax Realty Branch Manager; Ana Soto, Fairfax Realty Assistant Manager; and Thomas Mark, real estate broker, REI Realty. The Respondent ,William Upchurch, Jr., testified on his own behalf and did not present other witnesses. The Respondent, John Upchurch, did not testify or present any witnesses on his own behalf.

FINDINGS OF FACT

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

1. At all relevant times, the Respondent, William Upchurch, did not hold any licenses issued by the MREC. He previously held a real estate salesperson's license, which expired in 2002.

2. At all relevant times, the Respondent, John Upchurch, held a real estate salesperson's license issued by the MREC and he worked for Fairfax Realty (Fairfax). The Respondent, John Upchurch, has no history of disciplinary actions by the MREC.
3. The Respondents are brothers.
4. At all relevant times, Gerard Occhiuzzo held an Associate Real Estate Broker license issued by the MREC and he was the Branch Manager at Fairfax.
5. At all relevant times, the Respondent, William Upchurch, was the resident agent in Maryland for Thai Life, L.L.C. (Thai Life).
6. At all relevant times, Thomas Mark (Mr. Mark), REI Realty, was the listing agent for property located at 714 Radnor Avenue (the Property), which was a bank-owned property.
7. On November 29, 2008, an agent representing the Property's buyer, Thai Life, signed a contract offer for the property. The Respondents prepared the contract together. The contract stated that settlement would take place on or before January 15, 2009, an initial deposit in the form of a check for \$500.00 would be provided and an additional deposit of \$500.00 would then be paid within seven days from the date of the contract acceptance. The Respondent, John Upchurch, failed to give the parties a disclosure form, titled Understanding Whom Real Estate Agents Represent, identifying his role in the real estate transaction. The Respondent, John Upchurch, as the buyer's agent, was responsible for but did not forward all funds received from the buyer to Settlement One Title and Escrow Company (the Title Company).
8. On December 1, 2008, Mr. Mark received the contract offer as an email attachment from email from wuspartan@msn.com, which is the Respondent, William Upchurch's, email

account. Thai Life was the buyer and the Respondent, John Upchurch, was the buyer's agent. Mr. Mark responded to the email via email to wuspartan@msn.com but addressing it "John," the Respondent, John Upchurch; Mr. Mark reminded the Respondent, John Upchurch, that the settlement date was approaching. William Upchurch replied that the buyer was on vacation, but he was still looking to close by January 15, 2009.

9. On January 13, 2008, Mr. Mark sent an email to the Respondent, William Upchurch, advising him that the title agent/substitute trustee had not received any communication from the buyer's settlement company and requested that the Respondent, William Upchurch, contact him.
10. Mr. Mark initially thought that the Respondent, John Upchurch, and the Respondent, William Upchurch, were the same person. Neither Respondent set the record straight with Mr. Mark, nor did the Respondent, William Upchurch, ever refer Mr. Mark to his brother.
11. The Respondent, John Upchurch, did not advise the seller that the settlement could not proceed because the buyer had not obtained financing.
12. No one appeared at settlement on January 15, 2009 on the buyer's behalf.
13. Mr. Mark never told either Respondent that the seller was holding off on the buyer's offer because the seller was waiting to consider multiple offers.

DISCUSSION

The Respondent John Upchurch

The MREC alleges that the Respondent John Upchurch is subject to disciplinary action for violating Maryland real estate law. For the reasons that follow, I find that the MREC has met its burden of proof on all but one claim.

The MREC alleges that the Respondent is subject to disciplinary action for failing to make the disclosure or provide the consent form required by Section 17-530. (Section 17-322(b)(30). Section 17-530(b)(1) states that a “licensee who participates in a residential real estate transaction as a seller’s agent, buyer’s agent, or as a cooperating agent, shall disclose in writing that the licensee represents the seller or the lessor or the buyer or the lessee.” The most compelling evidence of this violation is that the Respondent, John Upchurch, (and the Respondent, William Upchurch, for that matter) could not produce the disclosure form. The Respondent, John Upchurch, admitted to the MREC investigator that he was not sure if he provided the disclosure and the Respondent, William Upchurch, testified that he was not sure if his brother prepared one. Thus, I conclude that the Respondent, John Upchurch, violated Maryland real estate law.

The MREC also alleges that the Respondent is subject to disciplinary action for having violated Section 17-322(b)(25), which prohibits a licensee from engaging “in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings.” More specifically, the MREC alleges that the Respondent, John Upchurch, is subject to this law for failing to forward earnest money it received from the buyer to the Title Company. The Respondent, William Upchurch, testified that he is certain that the Respondent, John Upchurch, paid the buyer’s \$500.00 deposit to the Title company. The

Respondent, John Upchurch, told the MREC investigator that he thought the Respondent, William Upchurch, did so but he was not sure. Because the Respondents disagreed with each other, and neither presented any evidence to corroborate their claims that the other had taken care of it, I do not find either of them credible. I do find credible the MREC's investigator, because he contacted the Title Company and spoke with Leah Maillard, who reviewed company files and confirmed that the company had not received a ratified contract or the buyer's \$500.00 deposit. Thus, the Respondent, John Upchurch, violated Maryland real estate law.

The MREC also alleges that the Respondent is subject to Section 17-322(b)(25) for assisting the Respondent, William Upchurch, in performing real estate brokerage services by helping to draft the Contract, communicating with the seller and the like. The Respondent, John Upchurch, admitted to the MREC investigator that he and his brother prepared the contract together, claiming though that he thought his brother held a valid salesperson's license. I do not believe that the Respondent, John Upchurch, believed that his brother held a license; indeed, neither Respondent made any statement to the investigator or at the hearing establishing that the Respondent, William Upchurch, had misled his brother about his licensure status.

A person shall hold an MREC license to provide brokerage services. Section 17-601. Providing "real estate brokerage services" means engaging in any of the following activities:

- (1) for consideration, providing any of the following services for another person:
 - (i) selling, buying, exchanging, or leasing any real estate; or
 - (ii) collecting rent for the use of any real estate;
- (2) for consideration, assisting another person to locate or obtain for purchase or lease any residential real estate;
- (3) engaging regularly in a business of dealing in real estate or leases or options on real estate;

(4) engaging in a business the primary purpose of which is promoting the sale of real estate through a listing in a publication issued primarily for the promotion of real estate sales;

(5) engaging in a business that subdivides land that is located in any state and sells the divided lots; or

(6) for consideration, serving as a consultant regarding any activity set forth in items (1) through (5) of this subsection.

I do not find that any definition of real estate brokerage services applies in this case. The Respondent, William Upchurch, was not acting on behalf of a real estate broker and the record does not establish that he received consideration for his services. Further, the record does not establish that the Respondent, William Upchurch, assisted his brother in any transaction other than the one at issue and thus he did not regularly engage in real estate business. I do not find that he was acting as a real estate salesperson and thus I do not find that the Respondent, John Upchurch, aided his brother in real estate brokerage activities.

Having said that, I find that the Respondent, John Upchurch, exhibited dishonesty and lack of trustworthiness when he knowingly misled Mr. Mark into believing that Mr. Mark was dealing with him when in fact he was dealing with the Respondent, William Upchurch. The Respondent, William Upchurch, communicated with Mr. Mark via email from his own email account. The emails are undoubtedly from the Respondent, William Upchurch's, email account. The Respondent, William Upchurch, testified that his brother used his computer for convenience but the Respondent, William Upchurch, was the person who actually emailed Mr. Mark. I did not find the Respondent, William Upchurch's, testimony on this point credible. It is one thing to borrow a person's computer but quite another to use that person's email address, especially in an age when email accounts are readily accessible from any computer. Thus, I find that the

Respondent, John Upchurch, communicated with Mr. Mark via email on his brother's behalf. The Respondent, John Upchurch's, failure to always advise Mr. Mark with whom he was actually communicating is dishonest and untrustworthy conduct.

The Respondent, John Upchurch, was also dishonest and untrustworthy when he did not proceed to closing as agreed by the buyer and seller. The Respondent, William Upchurch, testified that he thought the seller had not ratified the contract and instead was considering multiple offers. The Respondent, John Upchurch, told the MREC investigator that the buyer failed to get financing and because he did not hear back from Mr. Mark, he assumed the seller went with another buyer. The inconsistent statements from Respondents cause me to find neither credible. Moreover, Mr. Mark testified that he never told either Respondent that the seller was looking at multiple offers and as far as Mr. Mark was concerned settlement would proceed as scheduled. Mr. Mark's belief is corroborated by the Respondent, William Upchurch's, email to Mr. Mark on January 5, 2009 in which the Respondent stated that the buyer was still looking forward to closing by January 15, 2009. (REC Ex. 8, attachment 13.) Nevertheless, the buyer did not proceed to settlement and the Respondent, John Upchurch, did not tell the seller that there was a problem.

The MREC further alleges that the Respondent, John Upchurch, is subject to disciplinary action under Section 17-322(b)(33) by violating the applicable code of ethics. The code of ethics provides in pertinent part as follows:

For the protection of all parties with whom the licensee deals, the licensee shall see to it that financial obligations and commitments regarding real estate transactions are in writing, expressing the exact agreement of the parties, and that copies of these agreements are placed in the hands of all parties involved within a reasonable time after the agreements are executed.

The Respondent, John Upchurch's, failure to execute the necessary disclosure form, as discussed above, violates the code of ethics and in turn Section 17-322(a)(33).

Having found that the Respondent, John Upchurch, violated real estate law, the discussion turns to the penalty. The MREC has proposed a \$10,000.00 civil penalty. The MREC may impose a penalty not exceeding \$5,000.00 for each violation. Section 17-322(c)(1). In assessing a penalty, the MREC shall take into consideration the seriousness of the violation, the harm caused by the violation, the good faith of the licensee, and any history of previous violations by the licensee. Section 17-322(c)(1). The Respondent, John Upchurch, has no prior violations. These violations are serious. Although the seller eventually sold the property to another buyer, the seller suffered a loss in that Thai Life did not proceed to closing as scheduled, the Respondent, John Upchurch, did not forward earnest money to the Title Company, did not execute the required disclosure document and mislead Mr. Marks. The Respondent, John Upchurch, did not exhibit good faith. In fact, he gave the MREC investigator false statements. Accordingly, I find that a \$3,500.00 penalty for each of the three statutory violations, for a total of \$10,500.00, is appropriate.

The Respondent William Upchurch

The MREC alleges that the Respondent, William Upchurch, perform real estate brokerage services during without a license. Section 17-601 provides that a person cannot provide real estate brokerage services without a license. For the reasons described above, I find that the MREC has not proven its charge. In short, the MREC has not proven that the Respondent, William Upchurch, engaged in real estate broker activities.

CONCLUSIONS OF LAW

I conclude as a matter of law that the Respondent, John Upchurch, is subject to disciplinary action for:

- engaging in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings (Section 17-322(b)(25));
- failing to make the disclosure or provide the consent form required by Section 17-530 (Section 17-322(b)(30)) and
- violating any regulation adopted under this title or any provision of the code of ethics (Section 17-322(b)(33)).²

I further conclude as a matter of law that the Respondent, John Upchurch, is thus subject to a civil penalty (Section 17-322(c)(1)).

I conclude as a matter of law the the Respondent, William Upchurch, is not subject to disciplinary action under Section 17-322.

RECOMMENDED ORDER

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

The Respondent, John Upchurch, violated Maryland real estate law and is accordingly assessed a civil penalty of \$700.00; and

The Respondent, William Upchurch, did not violate Maryland real estate law and thus no penalty should be assessed.

² The MREC withdrew its charges as to Section 17-322(b)(6) and (b)(33).

I further **RECOMMEND** that the records and publications of the Maryland Real Estate Commission reflect its final decision.

June 18, 2012
Date Decision Mailed

#135308
SLS/ak

SIGNATURE ON FILE
Sondra L. Spencer
Administrative Law Judge

MARYLAND REAL ESTATE

COMMISSION

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WILLIAM UPCHURCH, JR.,

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*** OAH # DLR-REC-21-11-41195**

MREC # 11-RE-342

*** (WILLIAM UPCHURCH, JR.)**

OAH # DLR-REC-21-11-41190

MREC # 10-RE-074

(JOHN S. UPCHURCH)

* * * * *

FILE EXHIBIT LIST

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