

**MARYLAND REAL ESTATE COMMISSION**

MARYLAND REAL ESTATE  
COMMISSION

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V.

\* OAH No. DLR-REC-24-07-47722

GERTHA LEE YOUNG  
RESPONDENT

\* REC Case No. 2006-RE-391

CLAIM OF FAYE HILL & KISHA  
RUSSELL-BROWN  
AGAINST THE MARYLAND  
REAL ESTATE COMMISSION  
GUARANTY FUND

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**OPINION AND FINAL ORDER**

Claimant, Kisha Russell-Brown, filed Exceptions, which were received by the Maryland Real Estate Commission on January 12, 2009, to the Proposed Order of December 17, 2008. On November 7, 2008, Administrative Law Judge Kimberly A. Farrell (“ALJ”) filed a Proposed Decision and Recommended Order in which she recommended that the Respondent be found to have violated §§17-322(b)(25) and (31) and 17-505 of the Business Occupations and Professions Article, (“Md. Bus. Occ. & Prof. Art.”) *Annotated Code of Maryland* ; that the Respondent pay a civil statutory penalty to the Maryland Real Estate Commission (“Commission”) in the amount of \$5,000.00; and that the claim of the Claimants against the Maryland Real Estate Commission Guaranty Fund (“Fund”) be denied.

On December 17, 2008, the Commission issued a Proposed Order that affirmed the ALJ’s Findings of Fact; approved the ALJ’s Conclusions of Law; and adopted the ALJ’s Recommended Order. The Respondent did not file Exceptions.

A hearing was held by a panel of the Commission consisting of Commissioners Anne S. Cooke, Robin L. Pirtle and Georgiana S. Tyler on June 30, 2009. Ms. Russell-Brown did not appear at the scheduled time of the hearing. Jessica Berman Kaufman, Assistant Attorney General, represented the Commission. The proceedings were electronically recorded.

### **SUMMARY OF THE EVIDENCE**

On behalf of the Commission, three exhibits were entered into the record.

### **PRELIMINARY MATTERS**

Upon receipt of Ms. Russell-Brown's Exceptions, the Commission scheduled a hearing on the Exceptions. Ms. Russell-Brown was advised by letter, dated January 27, 2009 that the Commission had scheduled a hearing on the Exceptions which was to take place at 500 N. Calvert Street, Third Floor Conference Room, Baltimore, Maryland 21202 on Tuesday, June 30, 2009, at 11:00 a.m. The notification of the June 30, 2009 hearing date, time and place was sent to Ms. Russell-Brown by both certified mail, return receipt requested, and regular mail. The notice which was sent by certified mail was returned "unclaimed"; however, the regular mailing to the address provided by Ms. Russell-Brown in her Exceptions letter was not returned.

Ms. Russell-Brown did not appear for the hearing. The Commission waited twenty minutes beyond the scheduled start of the hearing to begin the proceedings. Ms. Russell-Brown was notified in the January 27, 2009 letter that "If the excepting party fails to appear within fifteen minutes of the scheduled time for this hearing, its exceptions will be dismissed absent extenuating circumstances." No extenuating circumstances

were presented to the Commission. Ms. Kaufman argued that the Exceptions should be dismissed since Ms. Russell-Brown failed to appear for the hearing.

Code of Maryland Regulations (“COMAR”) 09.11.03.01F provides that the Commission may dismiss an appeal without holding a hearing if the person who filed the Exceptions to the proposed order fails to appear at the scheduled time after receiving proper notice. The records reflect that notice of the hearing was sent to the Claimant at her last known address as reflected in the records of the Commission and the regular mailing was not returned to the Commission as undeliverable. Accordingly, in light of the Claimant’s failure to appear at the scheduled hearing, her Exceptions are dismissed.

#### **FINDINGS OF FACT**

The Commission adopts the Findings of Fact recommended by the ALJ.

#### **CONCLUSIONS OF LAW**

The Commission adopts the ALJ’s Conclusions of Law.

#### **DISCUSSION**

At all times relevant to this matter, the Respondent Gertha Lee Young was a licensed real estate broker. FF1<sup>1</sup>. Derrick L. Plummer was a licensed real estate salesperson affiliated with the Respondent at the time of the transaction at issue. FF2. The Claimants owned 13905 Amberfield Terrace, (the “Property”) Upper Marlboro, Maryland and they engaged Wayne Reid, a licensed real estate agent, to act as their agent in selling the Property. FF3. On August 23, 2005, the Claimants and the buyer entered into a contract for the sale of the Property with settlement to take place on September 23,

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<sup>1</sup> “FF” refers to the ALJ’s Findings of Fact.

2005. FF4. Derrick Plummer was the buyer's agent. FF5. A \$5,000.00 deposit was provided by the buyer and held in escrow by the Respondent's agency. FF6. Section 22 of the contract of sale provided that "in the event this Contract shall be terminated or settlement does not occur, Buyer and Seller agree that the Deposit(s) shall be disbursed by Broker only in accordance with a release of Deposit(s) agreement executed by Buyer and Seller." FF7. A packet of documents which were necessary to accomplish the sale was provided to Plummer by the Claimants from their Homeowners Association. The Claimants paid \$100.00 to obtain these documents. FF8. The settlement date was extended to September 30, 2005 due to the buyer's difficulty in obtaining financing. Plummer sent a general addendum extending the settlement date, which was signed by the buyer, to the Claimants who added language setting forth their expectation that if settlement did not occur on September 30, 2005, the buyer would forfeit 100% of the deposit. The buyer never agreed to the added language. FF9. On September 30, 2005, Plummer sent an addendum on behalf of the buyer which would have extended the settlement date until October 10, 2005 and which provided that if settlement did not occur on October 10, 2005, the buyer would forfeit 50% of the deposit. The Claimants did not agree to the extension. FF10. Instead, on September 30, 2005, the Claimants faxed a notice to Plummer advising that they would not extend the settlement date and if settlement did not occur on that day, they would deem the buyer to be in default. FF11. On October 5, 2005, the Claimants faxed an addendum to Plummer stating that they considered the contract to be null and void and directing that the \$5,000.00 deposit be released to them. The buyer did not agree to that disbursement. FF12. On October 10, 2005, Plummer faxed an Agreement of Release to Claimants which confirmed the

contract as null and void and provided that the \$5,000.00 be released to the buyer. The Claimants did not agree to the proposed Agreement of Release. FF13. The Claimants' agent was unsuccessful in his attempt to have Plummer return the Homeowners Association packet and the Claimants were forced to pay \$100.00 to obtain a duplicate packet before they could sell the Property. FF14. The Claimants sold the property on October 21, 2005 to another buyer for \$291,000.00, \$1,000.00 more than offered by Plummer's original buyer. FF15. Plummer asked the Respondent to release the deposit money to the buyer. He showed the Respondent a portion of the October 5, 2005 fax indicating that the Claimants considered the contract null and void. Plummer told the Respondent that the Claimants had sold the property for more money than the original buyer had offered. He did not have a release signed by the Claimants agreeing to the disbursement of the deposit. FF16. The Respondent released the \$5,000.00 deposit to the buyer on October 23, 2005 without notifying the Claimants of her intention to do so. FF17, 18.

The Commission finds that the Respondent violated Sections 17-322(b)(25), 17-322(b)(31) and 17-505, Business Occupations and Professions Article ("Md. Bus. Occ. & Prof. Art."), *Annotated Code of Maryland*.

The facts are clear that the Respondent had the deposit money from the transaction in an appropriate account and knew that a written authorization from the parties was required before the money could be disbursed. Such a written authorization was not provided to her. Nonetheless, she released the deposit money to her company's client without having a proper written release because Plummer asked her to do so. As Plummer's supervisor, she is accountable for his actions as well as her own. The

Respondent knew what was required of her in regard to disbursement of the deposit money but knowingly released the deposit money without the conditions for such release being fulfilled. This knowing disregard of her duties as a supervisor of Plummer and as a broker demonstrate incompetence and bad faith on her part in violation of Section 17-322(b)(25) Md. Bus. Occ. & Prof. Art.

The ALJ noted that the Respondent admitted in written correspondence with the Commission, dated July 10, 2006 that she had failed to adhere to the dictates of Section 17-505, Md. Bus. Occ. & Prof. Art. (citing Real Estate Commission Exhibit 3, page 48). Section 17-505(a)(2), Md. Bus. Occ. & Prof. Art. states that trust money must be kept in a suitable account until “the real estate broker receives proper written instructions from the owner and beneficial owner directing withdrawal or other disposition of the trust money”. It is clear from the evidence presented at the hearing that the Respondent violated Section 17-505(a)(2) when she returned the deposit money to the buyer without written authorization of the parties. The same evidence also constitutes a violation of Section 17-322(b)(25) which prohibits violating any provision of Subtitle 5 relating to trust money.

In determining the penalty to be imposed there are four factors which must be considered (Section 17-322(c) Md. Bus. Occ. & Prof. Art.):

1. the seriousness of the violation;
2. the harm caused by the violation;
3. the good faith of the licensee; and
4. any history of previous violations by the licensee.

In this case, the Respondent chose to ignore the law relating to the handling of trust money. Section 17-505 (a)(2), Md. Bus. Occ. & Prof. Art., which requires a real estate broker to receive proper written instruction from the owner and beneficial owner directing withdrawal or other disposition of the trust money, was enacted to prevent the type of problem which exists in this case. The public needs to be assured that monies which have been entrusted to a real estate broker as deposits will be properly disbursed. The Commission finds the violation of Section 17-505 and the accompanying violation of Section 17-322(b)(31) to be serious.

The actions of the Respondent have also harmed the general reputation of real estate professionals. The Claimants were harmed by not being treated fairly and have been inconvenienced by the need to pursue this action. The Respondent demonstrated bad faith in that she knew that the deposit money should not be released without the proper written authorization but she released it anyway. There was no evidence of any history of violations by the Respondent.

The Commission is authorized to impose a maximum civil penalty of \$5,000.00 for each violation. Section 17-322(c)(1), Md. Bus. Occ. & Prof. Art.

Claims against the Fund are governed by Section 17-404, Md. Bus. Occ. & Prof. Art. In regard to the claim against the Fund, the claim was based on an act or omission that occurred in the provision of real estate brokerage services by a licensed real estate broker. The claim also involved a transaction related to property located in the State of Maryland. Thus, Sections 17-404(a)(2)(i) and (ii), Md. Bus. Occ. & Prof. Art. were met. Section 17-404(a)(2)(iii) requires that the Claimant's actual monetary loss be based on an act or omission in which money is obtained by theft, embezzlement, false pretenses or

forgery; or in the alternative the act or omission must constitute fraud or misrepresentation. COMAR 09.11.03.04B(1) includes the concepts of “artifice, trickery or deceit” as additional ways of describing the statutory requirement of Section 17-404(a)(2)(iii). Based on the facts of this case, this requirement has not been met. Although the Respondent’s conduct was contrary to the statute governing the disbursement of funds held in escrow and was contrary to the contract terms, neither the Respondent, her business nor Plummer profited from her actions. It should also be noted that the Claimants did not prove an actual monetary loss in the amount of \$5,000.00. They did not actually lose any money they had put in escrow or money they had expended, rather they seek reimbursement for money they hoped to obtain based on the buyer’s default. Although the Claimants suffered an actual loss in regard to the \$100.00 they were required to expend to purchase a second packet of Homeowners Association documents, they did not suffer this loss due to theft, embezzlement or other fraudulent behavior which warrants an award under the Statute.

**ORDER**

It is this 28<sup>th</sup> day of July, 2009 by the Maryland Real Estate Commission **ORDERED:**

1. That the Respondent violated Sections 17-322(b)(25), 17-322(b)(31) and 17-505, Md. Bus. Occ. & Prof. Art.;
2. That the Respondent be assessed a civil penalty in the amount of \$5,000.00, which shall be paid within thirty (30) days of the date of this Order;

3. That all real estate licenses held by the Respondent, Gertha Lee Young, be and are hereby **SUSPENDED** and that she be ineligible for a real estate license until the civil penalty has been paid;

4. That the claim of Faye Hill and Kisha Russell-Brown against the Maryland Real Estate Guaranty Fund be **DENIED**; and

5. That the records and publications of the Maryland Real Estate Commission reflect this decision.

**MARYLAND REAL ESTATE COMMISSION**

BY: *Anne S. Cooke*  
*Commissioner* 

**NOTE:** A judicial review of this Final Order may be sought in the Circuit Court of Maryland in which the Appellant resides or has his/her principal place of business, or in the Circuit Court for Baltimore city. A petition for judicial review must be filed with the court within 30 days after the mailing of this Order.

THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE  
COMMISSION

V.

GERTHA LEE YOUNG  
RESPONDENT

AND

CLAIM OF FAYE HILL & KISHA  
RUSSELL- BROWN  
AGAINST THE MARYLAND  
REAL ESTATE COMMISSION  
GUARANTY FUND

\* BEFORE NEILE S. FRIEDMAN,  
\* ADMINISTRATIVE LAW JUDGE,  
\* OF THE MARYLAND OFFICE OF  
\* ADMINISTRATIVE HEARINGS  
\* OAH No: DLR-REC-24-07-47722  
\*  
\* REC CASE NO: 2006-RE-391  
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**PROPOSED ORDER**

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated November 7, 2008, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 17th day of December , 2008,

ORDERED,

- A. That the Findings of Fact in the Recommended Decision be, and hereby are, AFFIRMED;
- B. That the Conclusions of Law in the Recommended Decision be, and hereby are, APPROVED;
- C. That the Recommended Order in the Recommended Decision be, and hereby is, ADOPTED;

and,

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

MARYLAND STATE REAL ESTATE COMMISSION

December 17, 2008  
Date

By: Katherine J. Connelly, Exec. Dir.  
Anne S. Cooke, Commissioner

MARYLAND REAL ESTATE

\* BEFORE KIMBERLY A. FARRELL,

COMMISSION

\* AN ADMINISTRATIVE LAW JUDGE

v.

\* OF THE MARYLAND OFFICE OF

GERTHA LEE YOUNG, RESPONDENT

\* ADMINISTRATIVE HEARINGS

and the

\* OAH NO.: DLR-REC-24-07-47722

CLAIM OF FAYE HILL & KISHA

\* COMPLAINT NO.: 06-RE-391

RUSSELL-BROWN<sup>1</sup> AGAINST THE

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MARYLAND REAL ESTATE

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COMMISSION GUARANTY FUND

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**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On June 2, 2006, Faye Hill and Kisha Russell-Brown (Claimants) filed a complaint and Guaranty Fund (Fund) claim with the Maryland Real Estate Commission (REC), seeking reimbursement from the Fund for losses allegedly incurred as a result of the conduct of Gertha Lee Young (Respondent), a licensed real estate broker. On September 24, 2007, the Commission filed related regulatory charges against the Respondent. The Fund claim and the regulatory charges were consolidated by the REC and transmitted to the Office of Administrative Hearings

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<sup>1</sup> Some of the documents in evidence refer to Ms. Russell-Brown by her maiden name which was Kisha Hill.

I held a hearing on August 18, 2008, at OAH's offices located at 11101 Gilroy Road, Hunt Valley, Maryland. Assistant Attorney General Peter Martin appeared on behalf of the REC. Assistant Attorney General Hope Sachs represented the Fund. Claimant Kisha Russell-Brown represented the interests of both Claimants. The Respondent represented herself.

I conducted the hearing pursuant to section 17-324 of the Business Occupations and Professions Article, Annotated Code of Maryland (2004).<sup>2</sup> Procedure in this case is governed by the Administrative Procedure Act, OAH's Rules of Procedure, and the REC's hearing regulations. Md. Code Ann., State Gov't. §§ 10-201 through 10-226 (2004 & Supp. 2008); Code of Maryland Regulations (COMAR) 28.02.01; COMAR 09.11.03 and 09.01.03.

### **ISSUES**

1. Did the Respondent violate § 17-322(b)(25) of the Business Occupations Article by engaging in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent or improper dealings?
2. Did the Respondent violate § 17-322(b)(31) of the Business Occupations Article by violating a provision of Subtitle 5 of Title 17, relating to trust money?
3. Did the Respondent violate § 17-505(a)(2) of the Business Occupations Article by failing to maintain trust money in an authorized account until she received proper written instructions directing withdrawal or other disposition of the funds?
4. If the Respondent violated any of the cited provisions, what, if any, penalty should be imposed?
5. Did the Claimants suffer an actual monetary loss compensable by the Fund as a result of the conduct of the Respondent and, if so, what is the amount of the loss?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted four exhibits on behalf of the REC:

REC #1	Notice dated April 18, 2008, for hearing scheduled August 18, 2008, with attached Statement of Charges and Order for Hearing
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<sup>2</sup> The short form "Business Occupations Article" will be used in this Proposed Decision.

REC #2 REC Licensing history for the Respondent, dated August 4, 2008  
REC #3 Investigative Services Report of Investigation  
REC #4 REC records for affiliation of Derrick L. Plummer

No exhibits were offered by the other three parties.

### Testimony

Claimant Kisha Russell-Brown was called as a witness by the REC in presenting its evidence on the regulatory charges; the Claimant also testified in her own right on the claim against the Fund. In addition, the REC called Wayne Reid, a licensed real estate agent, and Robert Oliver, an investigator for the REC. The Respondent testified on her own behalf. No other witnesses were called.

### **FINDINGS OF FACT**

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

1. The Respondent was a licensed real estate broker assigned REC broker number 66908 at all times relevant to this matter.
2. At the time of the transaction at issue, Derrick L. Plummer (Plummer) was a licensed real estate salesperson (REC Salesperson's number 603956) affiliated with the Respondent.
3. The Claimants owned 13905 Amberfield Terrace, Upper Marlboro, Maryland. They engaged Wayne Reid, a licensed real estate agent, to act as their agent in selling the property.
4. On August 23, 2005, the Claimants and the buyer entered into a contract of sale for the property. The contract called for settlement to take place September 23, 2005.
5. The buyer's agent was Plummer.

6. The buyer provided a deposit of \$5,000.00 which was held in escrow by the Respondent's agency.
7. The contract stated, in numbered section 22, that "in the event this Contract shall be terminated or settlement does not occur, Buyer and Seller agree that the Deposit(s) shall be disbursed by Broker only in accordance with a release of Deposit(s) agreement executed by Buyer and Seller." REC #3, pg. 15 (as hand-numbered in the bottom right corner).
8. The Claimants provided a packet of documents to Plummer from their Home Owners Association (HOA). These documents were necessary to accomplish a sale. It cost the Claimants \$100.00 to obtain the packet from the HOA.
9. Due to the buyer having difficulty obtaining financing, the Claimants and the buyer agreed to extend the settlement date to September 30, 2005. Plummer sent a general addendum extending the settlement date, which was signed by the buyer. The Claimants signed the addendum, but they added language conveying their expectation that if settlement did not occur on September 30, 2005, the buyer would forfeit 100% of the deposit. The buyer never agreed to the added language.
10. On September 30, 2005, Plummer sent an addendum on behalf of the buyer seeking to extend the settlement date to October 10, 2005. The addendum further stated that in the event that settlement did not occur on or before October 10, 2005, the buyer would forfeit 50% of the deposit. The Claimants did not agree to this extension.
11. That same day, September 30, 2005, the Claimants faxed notice to Plummer that they would not extend the closing date and that if settlement did not occur on that day, they would deem the buyer to be in default.

12. On October 5, 2005, the Claimants faxed an addendum to Plummer, stating that they considered the contract to be null and void and they directed that the \$5000.00 deposit be released to them. The buyer did not agree to the disbursement.
13. On October 10, 2005, Plummer faxed an Agreement of Release to the Claimants. It confirmed the contract as null and void and directed that the \$5000.00 deposit be release to the buyer. The Claimants did not agree to the proposed Agreement of Release.
14. The Claimants' agent attempted to contact Plummer to get him to return the HOA packet because it could be used in other transactions and would have saved the Claimants the time and expense of obtaining a duplicate. The HOA packet was never returned and the Claimants were forced to pay \$100.00 to obtain a duplicate packet before they could sell the property.
15. On October 21, 2005, the Claimants sold the property to another buyer for \$291,000.00 which was \$1,000.00 more than offered by Plummer's original buyer.
16. Plummer approached the Respondent and asked her to release the deposit money to the buyer. Plummer showed the Respondent a portion of the October 5, 2005 fax indicating that the Claimants considered the contract null and void. Plummer did not have any release signed by the Claimants agreeing to disbursement of the deposit money. Plummer also told the Respondent that the Claimants had sold the property for more than the original buyer had offered.
17. On October 23, 2005, the Respondent released the full deposit amount of \$5,000.00 to the buyer.
18. The Claimants were never notified of the Respondent's intention to release the escrow funds to the buyer.

## DISCUSSION

### *General Discussion*

The REC has charged the Respondent with violating two statutes. The first is Business Occupations Article § 17-322(b), subsections (25) and (31) (Supp. 2008). Those read as follows:

§ 17-322. Denials, reprimands, suspensions, revocations, and penalties – Grounds.

(b) *Grounds.* - Subject to the hearing provisions of § 17-324 of this subtitle, the Commission may deny a license to any applicant, 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;

...

(31) violates any provision of Subtitle 5 of this title that relates to trust money[.]

The second statute cited by the REC is Business Occupations Article § 17-505 which outlines the requirements for the maintenance and disposition of trust money. It states that trust money must be kept in a suitable account until “the real estate broker receives proper written instructions from the owner and beneficial owner directing withdrawal or other disposition of the trust money.” Business Occupations Article § 17-505(a)(2) (Supp. 2008).

There was little, if any, dispute about the facts. The Respondent had the trust money from the transaction in an appropriate account. She knew that written authorization was required from the interested parties before the money could properly be released. Despite this, she released the money without written authorization because Plummer asked her to do so. The Respondent acknowledged that she was Plummer’s supervisor and accountable for his actions as well as her own. Plummer was aware of the tug-of-war going on over the escrowed money. The stream of faxes going back and forth made it clear both sides wanted those funds.

When this occurred, the Respondent was already aware of a complaint lodged against Plummer. She should have been particularly vigilant in supervising his activities. Instead, she asked for but never received documents from this transaction to review. When interviewed by the REC investigator, Plummer stated that he thought the deposit should have been split 50-50 because the Claimants ended up getting more money from the second buyer. He never reconciled his statement that a 50-50 split was equitable with his actions in securing release of the entire escrowed amount for the buyer.

The Respondent admitted in writing that she had failed to adhere to the dictates of Business Occupations Article § 17-505 in written correspondence with the REC dated July 10, 2006. REC #3, pg. 48 (as hand numbered in the bottom right corner). She also admitted as much in her interview with REC Investigator Oliver. She knew a written release was required, she never saw one, and she nevertheless released all the earnest money to the party who defaulted on the contract. Further, she did so without ever notifying the Claimants of her intention to release the escrowed funds. There is ample evidence supporting the regulatory charge of violating Business Occupations Article § 17-505. The same evidence also constitutes a violation of Business Occupations Article § 17-322(b)(25) which prohibits breaching any provision of Subtitle 5 relating to money.

A preponderance of the evidence also bears out the additional regulatory charge, namely that the Respondent engaged in conduct that demonstrates bad faith, incompetency, or improper dealings. The Respondent knew what was required of her – that there be a written release signed by both parties authorizing disbursement of the funds – and she knowingly released the funds to her company's client without the benefit of any written release. The REC argued that in knowing what was required and in acting in a contrary fashion, the Respondent demonstrated bad faith. Whether

the Respondent's conduct is specifically labeled as bad faith or incompetence or just as improper dealings, it is clear that her action violated Business Occupations Article § 17-322(b)(31).

*Appropriate Regulatory Sanction*

Available regulatory sanctions are outlined in Business Occupations Article § 17-322(b) and (c). They include denying a license to any applicant, reprimanding any licensee, or suspending or revoking a license if the licensee commits any one of a number of listed infractions. Dues to her violations of § 17-322(b)(25) and (31) and § 17—505(a)(2), the Respondent is subject to these sanctions. In addition, the statute provides the following:

(c) *Penalty.* -- (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.

(3) The Commission shall pay any penalty collected under this subsection into the General Fund of the State.

(4) The Commission may not impose a fine based solely on a violation of subsection (b)(35) of this section.

Business Occupations Article § 17-322(c).

The REC Commission did not seek to reprimand the Respondent or suspend or revoke her license. The REC Commission did recommend a \$5,000.00 fine for the Respondent's violations. In this case, the Respondent simply ignored the law. She knew what the law required and she did not follow it. There was no urgent circumstances, no confusion, just a short circuiting of the proper process with predictable results – further proceedings involving those unhappy with the disbursement. The law the Respondent ignored is designed to prevent exactly the problems that now exist in this case. The violation is serious.

The harm caused by the violation is difficult to gauge. The Claimants could be out as much as \$5,000.00, although there is no evidence tending to show that they ultimately would have ended up with the entire earnest money deposit. The Claimants were not treated fairly, and whatever the outcome would have been had the money not been turned over to the buyer, they have been irritated and inconvenienced by the need to file a claim and pursue this action. The general reputation of real estate professionals has been diminished by the Respondent's actions. There has also been a cost to the system in investigating the Respondent's actions and pursuing action against her.

The REC Commission argued that the Respondent demonstrated bad faith by knowing better than to release the money without proper written authorization and doing it anyway. The Respondent did not rebut the argument. There was no evidence of any history of violations by the Respondent.

The REC could have requested as much as \$10,000.00 in civil penalties, as it is authorized to seek a maximum penalty of \$5,000.00 for each violation.<sup>3</sup> Instead, the REC recommended \$5,000.00, a figure which echoes the amount in controversy in this case. I find that a \$5,000.00 penalty is reasonable in this case, and I will propose that that amount be assessed against the Respondent.

#### *Guaranty Fund Claim*

The Claimants bears the burden of proof in their claim against the Fund. Business Occupations Article § 17-407(e) (2004). Claims for reimbursement from the Fund are governed by Business Occupations Article § 17-404 (2004), which states in pertinent part as follows:

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<sup>3</sup> Although technically three violations are at issue in this case, as a practical matter the violations of Business Occupations Article § 17-322(b)(31) and Business Occupations Article § 17-505 are one in the same.

§ 17-404. Claims against the Guaranty Fund.

(a) *In General.* -- (1) Subject to the provisions of this subtitle, a person may recover compensation from the Guaranty Fund for an actual loss.

(2) 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;
2. a licensed associate real estate broker;
3. a licensed real estate salesperson...

(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.

COMAR 09.11.03.04 further provides with respect to claims against the Fund as follows.

A. A Guaranty Fund claim shall be based on the alleged misconduct of a licensee.

B. For the purposes of a guaranty fund claim, misconduct:

(1) Is an action arising out of a real estate transaction involving real estate located in this State which causes actual loss by reason of theft or embezzlement of money or property, or money or property unlawfully obtained from a person by false pretense, artifice, trickery, or forgery, or by reason of fraud, misrepresentation, or deceit;

(2) Is performed by an unlicensed employee of a real estate broker or by a duly licensed real estate broker, associate broker, or salesperson; and

(3) Involves conduct for which a license is required by Business Occupations and Professions Article, Title 17, Annotated Code of Maryland.

The Fund took the position that the Claimants are not entitled to recovery on the facts of this case. The Fund acknowledged that the claim was based on an act or omission that occurred in the provision of real estate brokerage services by a licensed real estate broker. The Fund also agreed with the Claimants that the claim involved a transaction related to property located in the state of Maryland. Thus, both the Claimants and the Fund agreed that Business Occupations

Article § 17-404(a)(2)(i) and (ii) were met.

The Fund argued, though, that Business Occupations Article § 17-404(a)(2)(iii), a prerequisite for recovery, is not met by the facts of this case. That subsection requires, in the context of this case, that the Claimants' actual monetary loss be based on an act or omission in which money is obtained by theft, embezzlement, false pretenses, or forgery; or in the alternative the act or omission must constitute fraud or misrepresentation. The Respondent's conduct was contrary to the requirements of the contract of sale and also contrary to the statute governing disbursement of funds held in escrow, but neither she nor her business nor Plummer profited. The Respondent's conduct is not fairly described by the terms in Business Occupations Article § 17-404(a)(2)(iii) – theft, embezzlement, false pretenses, forgery, fraud or misrepresentation. The governing COMAR provision includes the concepts of “artifice, trickery or deceit” as additional ways to define the statutory elements. COMAR 09.11.03.04B(1). None of these alternative labels accurately describes the Respondent's conduct either.

The Respondent took action which was not correct and not in accordance with the law's requirements, but I agree with the Fund that the act or omission of the Respondent does not fall within the ambit of the statute governing recovery against the Fund. Also, although it was not raised by the parties, I have concerns about whether the Claimants proved an actual loss in the amount of \$5,000.00. It is moot in view of my interpretation of the statute as not covering the claim presented in this case, but the Claimants were seeking reimbursement for monies they hoped to obtain based on the buyer's default. They did not lose money they had put into escrow or money they had actually expended.

With respect to the HOA packet, it is clear that the Claimants suffered an actual loss. They were forced to spend \$100.00 to replace the documents that Plummer carelessly and inconsiderately failed to return. The Respondent, as Plummer's supervisor, is accountable for that loss, but in terms of recovery from the Fund, I find that the claim does not meet the statutory requirements for the same reasons discussed above. Although it was a mistake to fail to return the HOA papers, it was not theft, embezzlement, or any other form of activity which qualifies for reimbursement under the statute. I sympathize with the Claimants who are in the unenviable position of having everybody, including the Respondent herself, agree that the Respondent's conduct was wrongful, but for whom I cannot recommend a monetary award against the Fund.

#### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Respondent violated Business Occupations Article §§ 17-322(b)(25), and (31) (Supp. 2008) and Business Occupations Article § 17-505 (Supp. 2008) when she released funds from an escrow account without written authorization from all interested parties and failed to return the Claimants' HOA packet to them in a timely fashion.

I conclude as a matter of law that the Respondent is subject to a monetary penalty for violations of the Business Occupations Article as cited above, and that \$5,000.00 is an appropriate penalty. Business Occupations Article § 17-322(c) (Supp. 2008).

Finally, I conclude that the Claimants are not entitled to recover an award from the Fund. The acts or omissions of the Respondent which lead to the claimed losses do not qualify under Business Occupations Article § 17-404(a)(2)(iii) (2004) as conduct for which recovery is authorized. *See also* COMAR 09.11.03.04B(1).

**RECOMMENDED ORDER**

I **RECOMMEND** that the REC:

**ORDER**, that the Respondent violated §§ 17-322(b)(25) and (31) of Business Occupations Article and Business Occupations Article § 17-505, and be it further,

**ORDERED**, that the Respondent pay a civil statutory penalty to the REC in the amount of \$5,000; and be it further,

**ORDERED**, that the Claimants claim for an award against the Fund be denied, and be it further,

**ORDERED**, that the records and publications of the REC reflect this decision.

November 7, 2008  
Date Decision Mailed

  
\_\_\_\_\_  
Kimberly A. Farrell  
Administrative Law Judge

KAF  
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