

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION	*	
v.	*	
MONICA RICE-JACKSON	*	CASE NO. 2007-RE-741
Respondent	*	OAH NO. DLR-REC-24-
And	*	09-10565
CLAIM OF WILLIAM E. RAUSHER, JR.	*	
AGAINST THE MARYLAND REAL ESTATE	*	
GUARANTY FUND	*	

* * * * *

OPINION AND FINAL ORDER

On April 5, 2010, Administrative Law Judge Marc Nachman (“ALJ”) filed a Proposed Decision in which he recommended that the Respondent’s real estate license be suspended for six months and that the Respondent pay a civil penalty of \$5,000.00. It was also recommended that the Claimant be awarded the sum of \$1,000.00 from the Maryland Real Estate Guaranty Fund (“Fund”) for actual losses sustained as a result of the misconduct of the Respondent.

On May 18, 2010, the Maryland Real Estate Commission (“Commission”) issued a Proposed Order that amended the ALJ’s Findings of Fact to substitute “Seller” for “Buyer” in Findings of Fact 19 and 21; adopted the ALJ’s Conclusions of Law; and amended the ALJ’s Recommended Order to include the following: The Respondent, Monica Rice-Jackson violated Sections 17-322(b)(22), (25), (31) and (33), Business Occupations and Professions Article (“Md. Bus. Occ. & Prof. Art.”), Annotated Code of Maryland and Code of Maryland Regulations (“COMAR”) 09.11.02.01C; that all real

estate licenses held by the Respondent be suspended for six months; that the Respondent be assessed a civil penalty of \$5,000.00 which shall be paid within thirty (30) days of the date of the Proposed Order; that the claim of William E. Rauscher, Jr. against the Fund be granted in the amount of \$1,000.00; and that all real estate licenses held by the Respondent be suspended until the civil penalty is paid and the Fund claim is repaid in full, including interest that is due, and that the suspension is in addition to, and not in lieu of the six month disciplinary suspension. The Respondent filed Exceptions to the Proposed Order.

A hearing was held by a panel of Commissioners consisting of Marla S. Johnson, Nancy R. Simperts and Colette P. Youngblood on August 18, 2010. Peter Martin, Assistant Attorney General, represented the Commission. Edward C. Covahey, Jr., Esquire, represented the Respondent. The proceedings were electronically recorded.

SUMMARY OF THE EVIDENCE

On behalf of the Commission, four exhibits were entered into evidence. Counsel for the Commission and the Respondent jointly entered two additional exhibits. The exhibits admitted in the hearing before the ALJ were offered to the Commissioners. A transcript of the ALJ's hearing was not provided.

PRELIMINARY MATTERS

The Respondent sought to submit additional evidence, in the form of testimony regarding the handling of a \$1,000.00 deposit check, at the hearing on Exceptions. The Respondent contended that there was a good reason for her failure to introduce this evidence before the ALJ in that she did not attend the hearing because of the fact that her postponement request for the hearing was denied. In her Exceptions, the Respondent

contended that she did not receive a written response to her request for postponement, and several days prior to the scheduled hearing, contacted the Office of Administrative Hearings. She contended that she was advised that her request was denied because it was not on Internal Revenue Service stationery. According to the Respondent, on the date of the hearing, she was involved in a four month training program with the Internal Revenue Service, which was a requirement of the job that she had obtained in August, 2009, and she was not allowed by her employer to take time off which would cause her to miss training sessions.

In response, Mr. Martin stated that attached to Ms. Rice-Jackson's request for postponement was a letter indicating her employment with the Internal Revenue Service and that she was to receive training from her employer. However, the letter did not address the issue of taking time off from her employment. Mr. Martin stated that in his response to Ms. Rice-Jackson's request for a postponement he cited the fact that she knew of the hearing date in early September, 2009 but waited to file the request for a postponement until December 28, 2009. Mr. Martin stated that he also opposed the requested postponement because Ms. Rice-Jackson did not provide documentation from her employer confirming her statement that she could not take time off from work. Mr. Martin stated that he did indicate in his statement of opposition to the requested postponement, (a copy of which was sent to Ms. Rice), that if Ms. Rice-Jackson submitted documentation from her employer stating that she was not permitted to take time off from work, he would reconsider his opposition to her postponement request. Mr. Martin further stated that, under Office of Administrative Hearings regulations, Ms. Rice-Jackson was required to establish good cause for requesting a postponement.

In his recommended decision, the ALJ noted that Ms. Rice-Jackson had filed a postponement request that was denied for lack of supporting documentation and that she had failed to appear at the hearing despite notice. He directed that the hearing proceed in her absence.

Mr. Martin stated that although Ms. Rice-Jackson did not appear for the hearing before the ALJ, her letter stating what her testimony would have been if she had attended the hearing was entered into evidence at the hearing. Mr. Martin noted a conflict between information provided in that letter and her proffered testimony set forth in her counsel's letter of July 21, 2010 in regard to the handling of the deposit check.

Having considered the arguments of counsel as well as exhibits entered at the Exceptions hearing and at the hearing before the ALJ, the Commission concluded that the denial of Ms. Rice-Jackson's request for a postponement of the hearing before the ALJ was proper. Code of Maryland Regulations ("COMAR") 28.02.01.25A provides that a request for the postponement of a hearing before the Office of Administrative Hearings shall be considered only if the party requesting the postponement establishes good cause for the postponement. COMAR 28.02.01.25C provides that documentation of the reasons for the postponement may be required from the party making the request. Ms. Rice-Jackson contended in her request for a postponement that she was unable to take time off from work to attend the hearing before the ALJ because she was in training and on probation. She did not substantiate her allegation that her employer would not permit her to miss time from work when making her initial request for a postponement nor after being notified that Commission counsel would reconsider his objection to a postponement if she provided such documentation.

The Respondent sought to introduce new evidence, in the form of testimony, at the Exceptions hearing. A proffer of the new evidence was contained in her counsel's letter to the Commission dated July 21, 2010. Counsel for the Commission objected to the introduction of new evidence and stated that the time for Ms. Rice-Jackson to produce evidence was at the hearing before the ALJ, not at the Exceptions hearing. He argued that in order for additional evidence to be presented at the Exceptions hearing, there must be a finding that the evidence to be introduced is relevant and material; that it was not discovered before the ALJ hearing; and that it could not have been discovered before the ALJ hearing with the exercise of due diligence. COMAR 09.01.03.09K. The Commission found that the proffered testimony related to the handling of the \$1,000.00 deposit check. Not only was this evidence available to the Respondent prior to the ALJ's hearing, the Respondent specifically discussed her handling of the \$1,000.00 check in her letter of January 6, 2010 which was entered into evidence at the hearing before the ALJ. Thus, the Commission found that the proffered information was not new evidence, that was not discoverable before the ALJ's hearing. Rather, the proffered testimony was merely an attempt to further expound upon written testimony admitted into evidence at the ALJ's hearing. The Commission concluded that the proffered testimony did not comply with the criteria for admission of new evidence set forth in COMAR 09.01.03.09K and should not be admitted.

FINDINGS OF FACT

The Commission adopts the Findings of Fact recommended by the ALJ with the following amendment: Substitute "Seller" for "Buyer" in Findings of Fact 19 and 21.

CONCLUSIONS OF LAW

The Commission adopts the Conclusions of Law recommended by the ALJ.

DISCUSSION

At all times relevant to this matter, the Respondent was a salesperson licensed by the Commission with her most recent license issued on January 14, 2009 and due to expire on January 17, 2011. FF1.¹ The Respondent was affiliated with RE/MAX Home Center (“RE/MAX”) located in Baltimore, Maryland. FF2. The Claimant was the personal representative of his father’s estate, which owned real property located on James Street in Baltimore City (the “Property”). FF3. On or about February 1, 2007, the Respondent, as Buyer’s agent, submitted a contract of sale (“Contract”) on the Property to Cynthia Taylor, the Claimant’s listing agent, with a purchase price of \$116,000.00. FF4,5,6. The Contract provided for a settlement date of February 20, 2007 but did not provide for a Buyer’s deposit. FF5. On February 3, 2007, Ms. Taylor sent a fax to the Respondent requesting that the Contract include additional terms, including that the buyer pay a deposit of \$1,000.00. FF7. The Respondent resubmitted the Contract to Ms. Taylor which included a provisions for an escrow deposit of \$1,000.00 to be paid when the Contract was signed. FF8. The Respondent faxed a copy of a \$1,000.00 check, made payable to the Respondent’s broker, to Ms. Taylor. FF9. The check was written on the account of Lamont Moore, not the Buyer, Erika Fitch. FF9. The Property address was written on the memo line of the check. FF9. The Respondent did not deposit the

¹ “FF” refers to the ALJ’s Findings of Fact.

\$1,000.00 check into the escrow account of her broker, Bayo Oshinnaiye, nor into any other escrow account. FF10. The Respondent did not tell Ms. Taylor that the \$1,000.00 check had not been deposited into any escrow account. FF12. The Respondent's broker was not made aware of the Contract nor that a deposit was supposed to be made under the Contract. FF11. On February 20, 2007, the Claimant signed an addendum to the Contract, which had been submitted by the Respondent, extending the settlement date to February 28, 2007. FF13. Despite the extension of the settlement date, the Buyer was unable to obtain financing and the settlement did not occur on February 28, 2007, as scheduled. FF14,15. A second addendum to the Contract was submitted by the Respondent to Ms. Taylor on March 11, 2007 which provided that if settlement did not occur on March 26, 2007 or sooner, the contract would be null and void and the Buyer would lose her \$1,000.00 deposit. FF16. The Claimant signed this addendum but refused to sign a third addendum which would have required the Seller to give the buyer 5% back at settlement. FF17, 18, 19. On March 23, 2007, the Respondent submitted another addendum to the Seller, which would have required the Seller to give back \$5,700 at settlement, and which he also refused to sign. FF20, 21. When the settlement did not occur on March 26, 2007, Ms. Taylor and the Claimant declared the Contract in default and requested the forfeiture of the \$1,000.00 escrow deposit. FF22,24. The Respondent's broker first learned about the Contract when Ms. Taylor demanded the forfeiture of the deposit after the last scheduled settlement date passed. F24,25.

The Respondent violated Md. Bus. Occ. and Prof. Art. §17-322(b)(22), (25), (31), and (33); §17-502(a); and Code of Maryland Regulations ("COMAR") 09.11.02.01C.

The Respondent's failure to account for or properly remit the deposit check, which came into her possession and was to be applied as a deposit on the Contract, to her broker violated Md. Bus. Occ. and Prof. Art. Sections 17-322(b)(22) and (31) and Section 17-502(a).

The Respondent acted fraudulently by misrepresenting the existence of a deposit check which she would be required to turn over to her broker for deposit in an escrow account. Although the Respondent did not remit a deposit check to her broker for deposit in an escrow account, she feigned the existence of such a deposit by faxing a copy of a check, which was purportedly to be used as a deposit on the Contract, to the Seller's agent and fraudulently induced the Seller to enter into the Contract. She also acted fraudulently and in bad faith by presenting, on two occasions, Contract addenda which called for the forfeiture of the non-existent deposit in the event settlement did not occur. The Respondent prepared and submitted these Contract addenda knowing that no deposit on the Contract had been made to her broker's escrow account. The Respondent's actions demonstrated bad faith, incompetency, or untrustworthiness and constituted dishonest, fraudulent dealings in violation of Md. Bus. Occ. & Prof. Art. section 17-322(b)(25). Further, her fraudulent misrepresentation of the existence of an escrow deposit on the Contract constituted unethical behavior in violation of COMAR 09.11.02.01C, which requires a licensee to protect the public against fraud, misrepresentation, or unethical practices, as well as Md. Bus. Occ. & Prof. Art. Section 17-322(b)(33).

To determine the penalty which should be imposed, the Commission is required to consider four factors, pursuant to Md. Bus. Occ. & Prof. Art. Section 17-322(c):

- (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.

Counsel for the Respondent argued that since this was the Respondent's first offense, the penalty set forth in the Proposed Order was unduly severe. Counsel for the Commission responded that the penalty was not so extreme or egregious as to be improperly arbitrary and capricious. The Commission notes that the Respondent has no established history of violations. However, her actions in this case were serious and caused significant harm to the Seller. Violations involving trust money, by their nature, are always serious. The Seller was harmed by the Respondent's behavior because the property was kept off the market during the Contract term and the Respondent was denied a contractually agreed upon remedy for the Buyer's breach. Further, the Respondent's dishonest and fraudulent behavior negatively impacts the dignity of the real estate profession and indicates a lack of good faith in her dealings with the public. After evaluating the aforesaid factors, the Commission concludes that a three month suspension of her real estate license and a \$3,000.00 civil penalty is warranted. The reduction in the penalty set forth in the Proposed Order is deemed appropriate in light of the fact that the Respondent has no prior history of violations.

The ALJ found that the Claimant sustained actual losses in the amount of \$1,000.00 based on the misconduct of the Respondent while providing real estate brokerage services. Based on his finding, the ALJ recommended that the Claimant be awarded the sum of \$1,000.00 from the Maryland Real Estate Guaranty Fund. Neither the

Respondent nor the Claimant filed Exceptions to the Commission's Proposed Order that the Claimant is entitled to an award of One Thousand Dollars (\$1,000.00) from the Maryland Real Estate Guaranty Fund.

ORDER

It is this 28th day of September, 2010 **ORDERED**

that:

1. The Respondent, Monica Rice-Jackson, violated Md. Bus. Occ. & Prof. Art. §17-322(b)(22), (25), (31), and (33); §17-502(a); and COMAR 09.11.02.01C.;

2. All real estate licenses held by the Respondent, Monica Rice-Jackson, are suspended for three (3) months;

3. The Respondent, Monica Rice-Jackson, is assessed a civil penalty in the amount of Three Thousand Dollars (\$3,000.00), which shall be paid within thirty (30) days of the date of this Order;

4. The claim of William E. Rauscher, Jr. against the Maryland Real Estate Guaranty Fund is granted in the amount of One Thousand Dollars (\$1,000.00);

5. All real estate licenses held by the Respondent, Monica Rice-Jackson, are suspended until the civil penalty is paid and the Maryland Real Estate Guaranty Fund is repaid in full, including any interest that is due, and that this suspension is in addition to, and not in lieu of, the three month disciplinary suspension; and

6. The records and publications of the Maryland Real Estate Commission reflect this decision.

MARYLAND REAL ESTATE COMMISSION

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By: *[Handwritten Signature]* (COMMISSIONER'S SIGNATURE
APPEARS ON ORIGINAL ORDER) *[Handwritten Signature]*

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 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.

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION *

v. *

MONICA RICE-JACKSON *
Respondent *

CASE NO. 2007-RE-741

And *

OAH NO. DLR-REC-24-09-10565

CLAIM OF WILLIAM E. RAUSCHER, JR.*
AGAINST THE MARYLAND
REAL ESTATE GUARANTY FUND *

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law, and Recommended Order of the Administrative Law Judge dated April 5, 2010, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 18th day of May, 2010

ORDERED,

A. That the Findings of Fact in the recommended decision be, and hereby are, **AMENDED** as follows:

Findings of Fact 19 and 21 are amended to substitute "Seller" for "Buyer" in each instance.

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:

The Real Estate Commission **ORDERS** that:

The Respondent Monica Rice-Jackson violated Md. Bus. Occ. and Prof. Art. § 17-322(b) (22), (25), (31), and (33); § 17-502(a); and COMAR 09.11.02.01C;

All real estate licenses held by the Respondent Monica Rice-Jackson are suspended for six months;

The Respondent Monica Rice-Jackson is assessed a civil penalty in the amount of \$5,000.00, which shall be paid within thirty (30) days of the date of this Proposed Order;

The claim of William E. Rauscher, Jr. against the Maryland Real Estate Guaranty Fund is granted in the amount of \$1,000.00;

All real estate licenses held by the Respondent Monica Rice-Jackson are suspended until the civil penalty is paid and the Guaranty Fund is repaid in full, including any interest that is due, and that this suspension is in addition to, and not in lieu of, the six-month disciplinary suspension.

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

D. Pursuant to §10-220 of the State Government Article, the Commission finds that the Findings of Facts had to be corrected to read that it was the Seller, not the Buyer, who declined to sign the addenda. It is clear from the other facts in the case that it was the Seller not the Buyer who declined. Findings of Fact 18 and 20 show that the addenda in question were submitted by the Respondent to the Seller's agent, Ms. Taylor, so that she could

provide them to the Seller. They had presumably already been signed by the Buyer, who was the one who wanted to extend the contract beyond its current expiration date. The Administrative Law Judge erroneously attributed the refusal to sign to the Buyer, and the Findings are being changed for that reason.

The Administrative Law Judge made similar errors with regard to the correct parties in his Discussion section. On page 10, he repeated the error regarding which party refused to sign the addenda. He also stated that the "Buyer" and his agent declared the contract in default. This was obviously meant to be the "Seller", in accord with Finding of Fact 22. A similar error appears at the top of page 11. At the bottom of page 12, the Judge states that the Respondent "fraudulently and dishonestly induced the Buyer into the contract." Again, this was erroneous as it was the Seller who was induced to sign the contract based on the belief that there was a good faith deposit paid by the Buyer. A similar mistake appears on page 14, where the Judge states that the Respondent defrauded the "Buyer", not the Seller.

The Recommended Order of the Administrative Law Judge had to be modified to list the sections of law that the Respondent had violated and to provide a time period within which the civil penalty must be paid.

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.

J. Ma (COMMISSIONER'S SIGNATURE APPEARS ON ORIGINAL ORDER) *Chai*

(Signature)

MARYLAND REAL ESTATE	* BEFORE MARC NACHMAN,
COMMISSION	* AN ADMINISTRATIVE LAW JUDGE
v.	* OF THE MARYLAND OFFICE
MONICA RICE-JACKSON, ¹	* OF ADMINISTRATIVE HEARINGS
RESPONDENT	* OAH Case No.: DLR-REC-24-09-10565
and	* MREC Case No.: 2007-RE-0741
CLAIM OF WILLIAM E.	*
RAUSCHER, JR.,	*
CLAIMANT	*
AGAINST THE MARYLAND REAL	*
ESTATE COMMISSION GUARANTY	*
FUND	*

* * * * *

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 13, 2007, William E. Rauscher, Jr., (Claimant) filed a complaint with the Maryland Real Estate Commission (REC) and a claim against the REC Guaranty Fund (Fund) for losses allegedly suffered as a result of the actions of Monica Rice (Respondent), a licensed

¹ The charges were filed against the Respondent under the name "Monica Rice," the name under which she is licensed by the REC; however, she refers to herself as "Monica Rice-Jackson."

real estate salesperson. On March 6, 2009, the REC filed regulatory charges against the Respondent for her dealings with the Claimant and authorized the Claimant's claim against the Fund.

On January 8, 2010, I conducted a hearing at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2004).² Peter Martin, Assistant Attorney General (AAG), represented the REC; Kris King, AAG, represented the Fund. The Claimant represented himself. The Respondent was not present nor was there any person or persons claiming to be her agent or representative.

The Respondent filed a postponement request that was denied for lack of supporting documentation; she failed to appear at the hearing despite notice.

Because the OAH sent notice to the Respondent at her last known address of record and she made a postponement request acknowledging the hearing date, I directed that the case proceed in the Respondent's absence under section 17-324(f) of the Business Occupations Article, section 10-209 of the State Government Article, Annotated Code of Maryland (2009), and Code of Maryland Regulations (COMAR) 09.01.02.07D and 09.01.02.09.

The Administrative Procedure Act, the REC's Hearing Regulations and the OAH Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't. §§ 10-201 through 10-226 (2009); COMAR 09.01.03 and 28.02.01.

ISSUES

1. Did the Respondent violate section 17-322(b)(22) of the Business Occupations Article by failing to account for or to remit promptly money that came into her possession that belonged to another person?

² Throughout this decision, Maryland Code Annotated, Business Occupations & Professions (2004 & Supp. 2009) is referred to as "Business Occupations"

2. Did the Respondent violate section 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?
3. Did the Respondent violate sections 17-322(b)(31) or 17-502 of the Business Occupations Article by violating any provision of Subtitle 5 of the Business Occupations Article relating to trust fund money?
4. Did the Respondent violate section 17-322(b)(32) of the Business Occupations Article by violating any other provision of the Business Occupations Article?
5. Did the Respondent violate section 17-322(b)(33) of the Business Occupations Article by violating any regulation adopted under the Business Occupations Article or any provision of the code of ethics?
6. Did the Respondent violate COMAR 09.11.02.01C by failing to protect the public against fraud, misrepresentation or unethical practices in the real estate field?
7. Did the Claimant suffer an actual monetary loss 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 the following exhibits on behalf of the REC:

- REC Ex. # 1 Notice of Hearing dated September 3, 2009; Statement of Charges and Order for Hearing dated March 6, 2009
- REC Ex. # 2 Correspondence from AAG Peter Martin to Respondent, dated December 17, 2009 (with certified mail receipt attached)
- REC Ex. # 3 Respondent's licensing history
- REC Ex. # 4 REC Investigator Jack Mull's investigation report, with the following attachments:³
- 1) Complaint and Guaranty Fund Claim
 - 2a) Broker's Response
 - 2b) Respondent's Response
 - 3) Request for Investigation
 - 4) Statement of Charges and Order For Hearing
 - 5) Report of Investigation 2007-RE-0661
 - 6) Residential Contract of Sale

³ Mr. Mull wrote the document descriptions, which are adopted herein.

- 7) Photocopy of check #201
- 8) Addendum; signed by seller 2-20-07
- 9) Addendum; signed by seller 3-12-07
- 10) Addendum; signed by buyer 3-21-07
- 11) Page one contract, addendum; dated 3-23-07
- 12) Release of Obligation and Release of Deposit Agreement Created Under Contract of Sale

I admitted the following exhibit on behalf of the Respondent:

Resp. Ex. # 1 Letter addressed "To Whom It May Concern," dated January 6, 2010⁴

No exhibits were submitted on behalf of the Claimant or the Fund.

Testimony

The REC presented the testimony of the following witnesses: the Claimant; Real Estate Agent Cynthia Taylor; Real Estate Broker Bayo Oshinnaiye; and REC Investigator Jack Mull.

The Claimant also testified on his own behalf and did not present the testimony of any other witnesses.

No witnesses testified on behalf of the Respondent or the Fund.

FINDINGS OF FACT

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

1. At all times relevant to this matter, the Respondent was a duly licensed real estate salesperson. The Respondent's most recent license was issued to her on January 14, 2009, and will expire on January 17, 2011.
2. At all times relevant to this matter, the Respondent was affiliated with RE/MAXTM-Home Center (RE/MAX), a real estate franchise located in Baltimore, Maryland.
3. The Claimant was the personal representative of his father's estate, which owned real property on James Street in Baltimore City (Property).

⁴ Resp Ex. # 1 was introduced as a preliminary matter. The Respondent sent this letter to the OAH to advise that she would not be attending the hearing and to explain her position with regard to the charges against her. At the REC's request, the letter was marked and admitted into evidence without objection by the other parties present.

4. On or around February 1, 2007, the Respondent submitted a contract of sale (Contract) on the Property to Cynthia Taylor, the Claimant's listing agent.
5. By the terms of the Contract, the purchase price was \$116,600.00, and settlement was scheduled for February 20, 2007. The Contract did not include a Buyer's deposit.
6. Erika Fitch was the prospective buyer (Buyer). The Respondent acted as the Buyer's agent for the transaction.
7. On February 3, 2007, Ms. Taylor sent a fax to the Respondent requesting that the Contract include additional terms, including that the Buyer pay a deposit of \$1,000.00.
8. The Respondent resubmitted the Contract to Ms. Taylor. The resubmitted Contract included terms suggested by the Respondent, including an escrow deposit of \$1,000.00, which was to be paid when the Contract was signed.
9. The Respondent faxed to Ms Taylor a copy of check for \$1,000.00 made payable to the Respondent's broker. The check was written on the account of Lamont Moore, who was not the Buyer, but the Property address was written on the memo line of the check.
10. The Respondent did not deposit the Buyer's \$1,000.00 check into her broker's escrow account or into any other escrow account.
11. The Respondent's broker, Bayo Oshinnaiye, was not made aware of the Contract or the deposit that was supposed to be made under the Contract.
12. The Respondent did not tell Ms. Taylor that she did not deposit the Buyer's escrow check into any escrow account.

13. Prior to the scheduled settlement date, the Respondent faxed to Ms. Taylor an addendum to the Contract seeking to extend the settlement date from February 20, 2007 to February 28, 2007, ostensibly due to delays caused by the lender and the appraiser. On February 20, 2007, the Claimant signed the addendum.
14. Despite this contract addendum, the Buyer was unable to obtain financing and the Respondent advised Ms. Taylor that settlement would not occur before the scheduled deadline.
15. The settlement did not occur on February 28, 2007, as scheduled.
16. On March 11, 2007, the Respondent submitted to Ms., Taylor a second addendum to the Contract, which stated the following:

[The Buyer] is requesting an extension on contract for [the Property] until March 26, 2007. [The Buyer] understands if settlement does not occur on this date or sooner, contract will be null and void and she will lose her \$1000 deposit.
17. On March 12, 2007, the Claimant signed the second addendum.
18. On March 21, 2007, the Respondent submitted to Ms. Taylor a third addendum, stating the following: "Seller agrees to give buyer back 5% at settlement."
19. The Buyer declined to sign the third addendum.
20. On March 23, 2007, the Respondent then sent Ms. Taylor an additional addendum, stating the following:

The Seller will give back \$5700 [sic] which is the 5% increase minus the additional title fees.
21. The Buyer also declined to sign this addendum.
22. After the scheduled settlement date passed, Ms. Taylor and the Claimant declared the Contract in default and requested the forfeiture of the \$1,000.00 escrow deposit.

23. In response to Ms. Taylor’s forfeiture request, the Respondent suggested that only \$500.00 of the deposit be forfeited, with the Buyer to retain the other \$500.00.
24. Through Ms. Taylor, the Buyer requested that the entire escrow deposit be forfeited.
25. The Respondent never advised Mr. Oshinnaiye, her broker, about the deposit that was supposed to be made under the Contract. Mr. Oshinnaiye did not know about the Contract until contacted by Ms. Taylor after the last scheduled settlement date passed.
26. Mr. Oshinnaiye was first made aware of the Contract and the deposit that was supposed to be made under the Contract when Ms. Taylor demanded its forfeiture.

DISCUSSION

In its Statement of Charges, the REC determined that the regulatory charges and the monetary claim filed against the Fund by the Claimant arose from the same facts and circumstances and should be consolidated for hearing at the same time.

I. Regulatory charges.

A. Applicable law

The Commission charged the Respondent with violating the following sections of the Maryland Real Estate Law:

§ 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:

...
 (22) fails to account for or to remit promptly any money that comes into the possession of the licensee but belongs to another person;
 ...

(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;
- (32) violates any other provision of this title;
- (33) violates any regulation adopted under this title or any provision of the code of ethics. . . [.]

§17-502 - Handling of trust money.

- (a) *Submission to brokers by associate brokers and salespersons.* – An associate real estate broker or a real estate salesperson who obtains trust money while providing real estate brokerage services promptly shall submit the trust money to the real estate broker on whose behalf the associate real estate broker or the real estate salesperson provided the real estate brokerage services.

Md. Code Ann., Bus. Occ. & Prof. §§ 17-322(b)(22), (25), (31), (32) and (33); 17-502 (Supp. 2009).

Additionally, the Respondent was charged with violating the real estate code of ethics:

01. Relations to the Public

C. The licensee shall protect the public against fraud, misrepresentation, or unethical practices in the real estate field. The licensee shall endeavor to eliminate in the community any practices which could be damaging to the public or to the dignity and integrity of the real estate profession. The licensee shall assist the commission charged with regulating the practices of brokers, associate brokers, and salespersons in this State.

COMAR 09.11.02.01C.

With regard to the regulatory charges brought by the Commission, the burden of proof in this case is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2004). It rests with the Commission as the moving party. *Commissioner of Labor and Industry v. Bethlehem Steel Corp.*, 344 Md. 17, 34 (1996).

B. Course of events

The evidence in this case showed that the Claimant's father owned the Property. The Claimant was appointed personal representative of his father's estate when he died; the Property

was an asset of the estate. Among the duties of the Claimant as personal representative, the Claimant was charged with selling his father's house.

The Claimant contacted Cynthia Taylor, a licensed realtor with Fairfax Realty in Elkridge, Maryland, who listed the property for sale. The Respondent, as a buyer's agent, faxed Ms. Taylor a Residential Contract of Sale (Contract) offering to purchase the property for \$116,600.00; the contract did not include a deposit or provisions of how any such deposit was to be held (*i.e.*, interest or non-interest bearing account, etc.). Ms. Taylor responded to the Respondent by return fax, advising her that the Claimant would consider the contract if it included a deposit of \$1,000.00, limited the condition of the property to "as is condition no repairs," "Buyer to state inclusions contract,"⁵ and that the Seller would not be responsible for the "termite clause." The Contract set the settlement date at February 20, 2007, less than three weeks after the Contract was submitted (REC Ex. # 4, Att. 6).

On or before February 6, 2007, the Respondent agreed to the additions to the Contract, specifically indicating that the Buyer would pay a \$1,000.00 deposit under the Contract. The Respondent also faxed to Ms. Taylor a copy of a check written by Lamont Moore, who was not the Buyer, to "Remax Home Center" in the amount of \$1,000.00, with the Property address written in the memo line of the check (REC Ex. # 4, Att. 7). Because the Respondent faxed a copy of this check to Ms. Taylor, she understood that it represented the deposit requested in her fax to the Respondent of February 3, 2007.

Settlement did not occur on the scheduled date and, on February 15, 2007, the Respondent asked Ms. Taylor for an extension of the settlement date to February 28, 2008, "due

⁵ None of the witnesses addressed what was meant by this requirement, which is nevertheless immaterial to the decision reached in this matter.

to know [sic] fault of hers but her lender and appraiser [sic].” (REC. Ex. # 4, Att. 8). The Buyer signed the addendum on February 20, 2007.

The Respondent reaffirmed the existence of this deposit when she asked to extend the settlement date for the second time on March 11, 2007. The Respondent prepared and submitted a Contract addendum stating the following:

[The Buyer] is requesting an extension on contract for [the Property] until March 26, 2007. [The Buyer] understands if settlement does not occur on this date or sooner, contract will be null and void and she will lose her \$1000 deposit.

Ms. Taylor submitted the addendum to the Claimant for his signature, which he provided on the following day, March 12, 2007. REC Ex. # 4, Att. 9.

The Contract initially had a financing contingency, under which the Buyer would be absolved from her contractual obligations if she were unable to obtain financing. In exchange for extending the settlement date, the Buyer agreed that she would forfeit her \$1,000.00 deposit if settlement did not occur. The Respondent prepared this addendum knowing that there was no escrow deposit under the Contract.

On March 21 and 23, 2007, the Respondent submitted two more addenda seeking to change the terms of the contract. (REC Ex. # 4, Atts. 10 and 11). The first addendum sought a five percent reduction in the purchase price; the second addendum sought a reduction of \$5,700.00. The Buyer declined to sign either addendum.

When the settlement date of March 26, 2007 passed, the Buyer and his agent declared the Contract was in default and the deposit was to be forfeited under the terms of the Contract as amended. Ms. Taylor prepared a release for the deposit, which would also release the Property from the contract and allow the Claimant to accept another contract to sell the Property. The Respondent spoke with Ms. Taylor, asking if she would accept \$500.00 instead of the \$1,000.00

deposit stated in the contract; the Buyer and Ms. Taylor declined this offer. Ms. Taylor then prepared a "Release of Obligation and Release of Deposit Agreement Created Under Contract of Sale" and sent it to the Respondent's broker, Bayo Oshinnaiye. (REC Ex. # 4, Att. 12).

In fact, the Respondent never submitted the deposit check to her broker. Mr. Oshinnaiye testified that his office procedures required that contract deposits must be turned over to the office manager within 72 hours of receipt, along with a copy of the contract, which is a stricter requirement than that in the applicable regulations. Mr. Oshinnaiye testified that he had no inkling that there was a contract between the Claimant and the Respondent's client. No deposit was made into his office's escrow account, which is both required by law and by the procedures established in his office.

Under the terms of the Contract, if settlement did not take place, the Buyer forfeited the deposit. The Respondent did not collect a deposit; if the deposit did exist, it was not deposited into the proper escrow account. Therefore, the deposit could not be turned over the Claimant or Ms. Taylor.

On June 13, 2007, the Claimant filed a complaint against the Respondent, which resulted in the filing of a Statement of Charges and Order for Hearing on March 9, 2009, which is the subject of this case.⁶ The issues before me are whether Respondent violated statutes and regulations regulating realtors and whether the Claimant suffered a monetary loss as a result of these violations.

⁶ Mr. Oshinnaiye filed a complaint against the Respondent, which resulted in the filing of a Statement of Charges and Order for Hearing on October 31, 2008, which is not the subject of this case (REC Ex. #4, Att. 4).

C. Application of applicable law to the findings of facts

I find that the REC has demonstrated, by a preponderance of the evidence, that the Respondent violated the provisions of sections 17-322(b)(22), (25), (31), (32), (33), 17-502(a) of the Business Occupations and Professions Article, and COMAR 09.01.02.01C.

Credible evidence established that the Respondent failed to take a deposit from the Buyer, or in the alternative, took a deposit check from the Buyer and failed to remit the check to her broker in accordance with the applicable regulations and his more stringent requirements.

The Respondent is estopped from claiming that she did not have this check, since she faxed a copy of it to Ms. Taylor on February 6, 2007, and again referenced the deposit in the first addendum to the Contract. By improperly handling this check, the Respondent failed to account for or to remit promptly the deposit check paid as a result of the Contract that came into her possession, in violation of sections 17-322(b)(22) and (31), and §17-502 of the Business Occupations Article which prohibit the improper handling of trust fund money.

By failing to deposit the check, but using the check as a bargaining chip to extend the settlement date, the Respondent also acted fraudulently in misrepresenting the existence of the deposit in violation of section 17-322(b)(33) of the Business Occupations Article and COMAR 09.11.02.01C.

Even though the Respondent failed to deposit the deposit check into the proper escrow account, she feigned the existence of the deposit on at least three occasions. First, Ms. Taylor stated that she would not accept the Contract unless the Buyer paid a deposit. By faxing a copy of the check to Ms. Taylor, the Respondent fraudulently and dishonestly induced the Buyer into the contract. The Respondent then promised a

forfeiture of the non-existent deposit to extend the settlement date, a promise that could only be described as being made in bad faith. The Respondent then attempted to further shield her untrustworthy actions by promising to turn over only half of the non-existent deposit, which would have surely come out of her pocket and would have covered her initial fraud. The Respondent's actions demonstrated bad faith, incompetency, or untrustworthiness and were dishonest, fraudulent, or evidenced improper dealings, in violation of section 17-322(b)(25) of the Business Occupations Article..

Moreover, the Respondent's handling of the deposit constituted unethical behavior under COMAR 09.11.02.01C, which is a violation of section 17-322(b)(33) of the Business Occupations Article. By failing to deposit the Buyer's check into a proper escrow account, or by claiming the existence of the escrow deposit when none existed, the Respondent did not protect the public against fraud, misrepresentation or unethical behavior in the real estate field.

As a result of her actions and omissions, the Respondent is subject to sanction under section 17-322(c) of the Business Occupations Article.

D. Sanctions

Section 17-322(c) of the Business Occupations Article provides for the imposition of monetary penalties and states, in pertinent part, as follows:

(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. ...

Md. Code Ann., Bus. Occ. & Prof. § 17-322(c) (Supp. 2009).

Although the Respondent has no established history of violations, her actions in this case were serious and caused significant harm in the delay of the contract, keeping the Property off of the market, and denying the Claimant a remedy for the Buyer's eventual contract breach. The Respondent's dishonest and fraudulent conduct is indicative of a total absence of good faith in her dealings with the public. Trust money violations by their nature are always serious. Not only was there harm to the Claimant, the Respondent's actions caused harm to the public and to the dignity of the real estate profession. She defrauded the Buyer, his agent and the Respondent's broker, none of whom knew the truth about the deposit check.

Consequently, I find that the REC's recommended sanctions of a six-month suspension and a \$5,000.00 civil penalty are appropriate.

II. Claim against the Fund

Claims for reimbursement from the Fund are governed by section 17-404 of the Business Occupations Article, which states, in pertinent part:

§ 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: . . .
 - 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: . . .
 - 2. that constitutes fraud or misrepresentation.

Md. Code Ann., Bus. Occ. & Prof. § 17-404 (Supp. 2009).

With respect to claims against the Fund, COMAR 09.11.03.04 further provides as follows:

.04 Claims Against the Guaranty Fund

- A. A guaranty fund claim shall be based on the alleged misconduct of a licensee.
- B. For the purpose 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.

COMAR 09.11.01.18 provides further:

The amount of compensation recoverable by a claimant from the Real Estate Guaranty Fund, pursuant to Business Occupations and Professions Article, Title 17, Subtitle 4, Real Estate Guaranty Fund, Annotated Code of Maryland, 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. Actual monetary losses may not include commissions owed to a licensee of this Commission acting in his capacity as either a principal or agent in a real estate transaction, or any attorney's fees the claimant may incur in pursuing or perfecting the claim against the guaranty fund.

The Claimant bears the burden of proof in this proceeding against the Fund. Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (Supp. 2009). In this case, the Claimant seeks \$1,000.00, which is the deposit identified in the first Contract Addendum and which the Respondent promised as a forfeiture in order to extend the settlement date. Whether the Respondent failed to

deposit the check into her broker's escrow account or whether she fabricated the existence of the deposit check is immaterial. As a direct result of the Respondent's misrepresentations about or improper handling of the deposit, the Claimant was deprived of the opportunity to claim the deposit when the transactions fell through.

The Claimant was the personal representative of his father's estate and he shared the estate equally with his sister.⁷ He also had a listing agreement with Ms. Taylor, who might also have been entitled to retain some of the forfeited deposit under a listing agreement. However, the listing agreement was not submitted into evidence to show whether Ms. Taylor's firm was entitled to any portion of the deposit. Therefore, the Claimant, as personal representative of his father's estate, is entitled to reimbursement from the Fund in the amount of \$1,000.00, out of which he may be responsible to pay his realtor under the listing contract and to pay his sister her share of the proceeds of the estate.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Real Estate Commission demonstrated by a preponderance of the evidence that:

A. The Respondent failed to account for or to remit promptly money that came into her possession that belonged to another person. Md. Code Ann., Bus. Occ. & Prof. §17-322(b)(22) (Supp. 2009)

B. The Respondent engaged in conduct that demonstrates bad faith, incompetency, or untrustworthiness, or that constitutes dishonest, fraudulent, or improper dealings. Md. Code Ann., Bus. Occ. & Prof. §17-322(b)(25) (Supp. 2009)

⁷ None of the parties objected to the Claimant's filing the claim and complaint in his own name as opposed to filing a claim as personal representative of his father's estate. If the Fund decides to make an award to the Claimant, he would be responsible for distributing the money in accordance with his fiduciary obligation as personal representative, a duty which is beyond the scope of this proposed decision.

C. The Respondent failed to submit trust money obtained while providing real estate brokerage services to the real estate broker on whose behalf she provided services. Md. Code Ann., Bus. Occ. & Prof. §§ 17-322(b)(31); 17-502(a) (Supp. 2009)

D. The Respondent failed to protect the public against fraud, misrepresentation, or unethical practices. Md. Code Ann., Bus. Occ. & Prof. §17-322(b)(33) (Supp. 2009); COMAR 09.11.02.01C.

E. The Respondent violated regulations adopted under the Business Occupations Article and a provision of the code of ethics. Md. Code Ann., Bus. Occ. & Prof. §17-322(b)(33)(Supp. 2009).

F. I further conclude that the Respondent is subject to sanctions for her conduct, and that a six-month suspension of her license and a \$5,000.00 civil penalty are appropriate sanctions. Md. Code Ann., Bus. Occ. & Prof. §17-322(c) (Supp. 2009).

G. I further conclude that Claimant has established an “actual loss” valued at \$1,000.00, based on the conduct of the Respondent, a licensed real estate salesperson. Accordingly, the Claimant is entitled to prevail in his claim against the Fund in the amount of \$1,000.00. Md. Code. Ann., Bus. Occ. & Prof. § 17-404(a) (2004); COMAR 09.11.03.04; COMAR 09.11.01.18.

RECOMMENDED ORDER

I THEREFORE RECOMMEND that the Maryland Real Estate Commission:

ORDER, that the Respondent’s real estate license be suspended for six months; and further

ORDER, that the Respondent pay a civil penalty of \$5,000.00; and further

ORDER, that the Claimant be awarded the sum of \$1,000.00 from the Fund based on the claim filed on March 9, 2009 for actual losses sustained as a result of the misconduct of the Respondent; and that it further

ORDER that the Respondent be ineligible for any real estate broker's or salesperson's license until such time as the Respondent reimburses the Fund for all monies disbursed under this Order plus annual interest of ten percent (10%), pursuant to sections 17-411(a) and 17-412 of the Business Occupations and Professions Article of the Annotated Code of Maryland; and that it further

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

ADMINISTRATIVE LAW JUDGE'S SIGNATURE
APPEARS ON ORIGINAL ORDER

April 5, 2010
Date Decision Mailed

Marc Nachman
Administrative Law Judge

MJW/h
Doc #112816