

BEFORE THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE CLAIM
OF ERIC HARRIS, CLAIMANT

*

CASE NO. 2018-RE-623

*

v.

*

OAH NO. DLR-REC-22-18-36447

THE MARYLAND REAL
ESTATE COMMISSION
GUARANTY FUND FOR THE
ALLEGED MISCONDUCT OF
DUANE FARLEY, RESPONDENT

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PROPOSED ORDER

The Findings of Fact, Proposed Conclusions of Law and Recommended Order of the Administrative Law Judge dated April 5, 2019, having been received, read and considered, it is, by the Maryland Real Estate Commission (the Commission”), this 22 day of May, 2019, hereby **ORDERED**:

A. That the Findings of Fact¹ in the proposed decision be, and hereby are, **ADOPTED**.

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

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

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

E. Pursuant to Code of Maryland Regulations (COMAR) 09.01.03.09 those parties adversely affected by this Proposed Order shall have twenty (20) days from the postmark date of

¹ On pages 3-4 of the proposed decision the Administrative Law Judge identifies exhibits admitted into evidence. For clarification purposes the Commission notes that the “Cover letter with Claimant’s Complaint” identified as GF Ex. 3, is dated July 19, 2018, not July 10, 2018.

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

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

5/22/2019
Date

MARYLAND REAL ESTATE COMMISSION

By: SIGNATURE ON FILE

IN THE MATTER OF THE
CLAIM OF ERIC HARRIS,
CLAIMANT

v.

MARYLAND STATE
REAL ESTATE COMMISSION,
REAL ESTATE GUARANTY FUND,
FOR THE ALLEGED MISCONDUCT
OF DUANE FARLEY,
RESPONDENT

* BEFORE NICOLAS ORECHWA,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-REC-22-18-36447
* REC No.: 18-RE-623GF

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PROPOSED DECISION

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

STATEMENT OF THE CASE

On June 19, 2018, Eric Harris (Claimant) filed a complaint against Duane Farley, Real Estate Broker (Respondent). The Claimant also filed a claim with the Maryland Real Estate Commission Guaranty Fund (MREC or Fund), in which he alleged he sustained monetary losses as a result of the Respondent's acts or omissions. Specifically, the Claimant alleged the Respondent, acting in her capacity as the property manager for property owned by the Claimant, failed to reimburse the Claimant for various monies to which the Claimant was rightfully entitled. On November 9, 2018, the MREC ordered the Claimant should have a hearing to

establish his eligibility for an award from the Fund. On November 21, 2018, the MREC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On February 19, 2019, at 9:30 a.m., I conducted a hearing at the OAH headquarters in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2018). The Claimant appeared without counsel. Andrew Brouwer, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. After waiting fifteen minutes, neither the Respondent nor anyone on her behalf appeared at the hearing or requested a postponement.

On January 16, 2019, the OAH mailed notice of the hearing to the Respondent by certified and regular mail to The Estate of Duane Farley,¹ c/o Thomas Kokolis and Jacob Deaven, Parker, Simon & Kokolis, LLC, 110 North Washington Street, Suite 500, Rockville, Maryland, 20540, the Respondent's last known address of record on file with the MREC. Md. Code Ann., Bus. Reg. § 17-408(c) (2015).² The notice advised the Respondent of the time, place, and date of the hearing. The United States Postal Service (USPS) did not return the notice as unclaimed or undeliverable. On January 23, 2019, the OAH received the signed return receipt for the notice. I received no forwarding order or other correspondence from the Respondent to identify alternative addresses. Therefore, I determined that the Respondent received proper notification, but failed to appear for the hearing. As a result, I found it appropriate to proceed in the Respondent's absence. Md. Code Ann., Bus. Occ. & Prof. § 17-408(c) (2018). Code of Maryland Regulations (COMAR) 28.02.01.23A.

¹ As set forth in further detail below, the Respondent is deceased and all correspondence and interaction with regard to the Claim concerns the Respondent's estate. However, for the sake of simplicity, I will simply refer to the Estate as the Respondent for the balance of this decision.

² "The Commission may not proceed with the hearing unless the records of the Commission show that all notices required under this subtitle were sent to each licensee and each unlicensed employee alleged to be responsible for the act or omission giving rise to the claim." Md. Code Ann., Bus. Occ. 17-408(c).

The contested case provisions of the Administrative Procedure Act, the Department's and the MREC's procedural regulations, and the OAH Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); COMAR 09.01.03 and 09.11.03; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual monetary loss as a result of the Respondent's conduct which constituted theft, embezzlement, forgery, false pretenses, fraud, or misrepresentation; and, if so,
2. What is the amount of the actual loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits for the Claimant:

- CL Ex. 1: Property Management Agreement, January 26, 2014
- CL Ex. 2: Residential Dwelling Lease (Lease), June 13, 2017
- CL Ex. 3: Letter from the Respondent to her clients, February 27, 2018
- CL Ex. 4: E-mail from the Claimant to the Respondent, March 7, 2018
- CL Ex. 5: E-mails between the Claimant and John Tselepis (Tselepis), various dates
- CL Ex. 6: Check #1479, March 5, 2018
- CL Ex. 7: E-mail from Tselepis, March 21, 2018 with attached letter dated March 12, 2018
- CL Ex. 8: Summary Exhibit from the Claimant
- CL Ex. 9: E-mail from Claimant to Samuel Freeman (Freeman), February 21, 2018
- CL Ex. 10: E-mails between the Claimant and Tselepis, various dates
- CL Ex. 11: E-mail from the Claimant to Tselepis, May 24, 2018
- CL Ex. 12: E-mail from the Claimant to Tselepis, June 5, 2018

I admitted the following exhibits for the Fund:

- GF Ex. 1: Hearing Order, November 9, 2018
- GF Ex. 2: Notice of Hearing, January 16, 2019
- GF Ex. 3: Cover letter with Claimant's Complaint, July 10, 2018
- GF Ex. 4: Respondent's Licensing History
- GF Ex. 5: Affidavit of Jillian Lord, January 15, 2019
- GF Ex. 6: Printout from the Maryland Register of Wills

The Respondent did not offer any exhibits.

Testimony

The Claimant testified and did not present other witnesses. The Respondent and the Fund did not present witnesses.

FINDINGS OF FACT

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

1. At all times relevant, the Respondent was a real estate broker licensed by the MREC under License #0148951. In particular, the Respondent managed properties on behalf of owners who rented their properties to third parties.
2. At all times relevant, the Claimant owned a residence located at 3117 Raking Leaf Drive, Abingdon, MD, 21009 (Raking Leaf).
3. On January 26, 2014, the Claimant³ and the Respondent entered into a Property Management Agreement with regard to Raking Leaf. The Respondent managed Raking Leaf per the terms of the Property Management Agreement, which remained in full force and effect until April 1, 2018.

³ The Claimant and his wife Kristi Harris entered into the Property Management Agreement with the Respondent. However, since only the Claimant's name is listed on the claim and only the Claimant presented his case at the hearing, for the sake of simplicity, I refer to only the Claimant and the Respondent as the parties to the Property Management Agreement.

4. On or about April 1, 2018, the Respondent closed her business and terminated the Property Management Agreement as of that date. The Respondent died on June 24, 2018.

5. On June 13, 2017, two tenants, Madeline and William Collins (Madeline and William) signed a lease (lease or Collins lease) to rent Raking Leaf. The time period of the lease spanned from June 15, 2017, until June 30, 2018. The lease obligated Madeline and William to pay \$1,795.00 per month in rent.

6. Per the terms of the lease, Madeline and William paid their monthly rent directly to the Respondent. The Property Management Agreement obligated the Respondent to pay the Claimant rents collected after deduction of a seven percent management fee. Madeline and William paid the Respondent rent in full for March 2018. The Respondent did not reimburse the Claimant his share of the March 2018 rent she received.

7. The lease obligated Madeline and William to make a security deposit of \$3,590.00. The Property Management Agreement obligated the Respondent to hold the Security Deposit in an escrow account to be returned to Madeline and William upon expiration of the lease. Madeline and William paid the Respondent \$3,590.00 as a security deposit which the Respondent deposited in her escrow account. After she closed her business, the Respondent did not return the security deposit to Madeline and William or to the Claimant.

DISCUSSION

The Respondent's Failure to Appear

Per the MREC's hearing order, the Respondent died on June 24, 2018. (GF Ex. 1.) The OAH scheduled the hearing in this case for Tuesday, February 19, 2019, at the OAH offices in Hunt Valley, Maryland. The OAH originally mailed a Notice of the hearing to the parties on November 29, 2018. The OAH sent the Respondent's copy of the Notice by first-class and certified mail (return receipt requested) to 327 South Union Avenue, Havre De Grace, Maryland,

21078, the Respondent's address of record with the MREC when she was alive. The OAH addressed the Notice to the attention of the Respondent's estate. The OAH sent the Notice by certified mail and the USPS returned it to the OAH as "moved left no address, unable to forward, return to sender." The USPS also returned the Notice sent by regular first class mail as "moved, unable to forward."

On or about January 15, 2019, Assistant Attorney General Andrew Brouwer searched the Maryland Register of Wills for an estate opened on behalf of the Respondent. The search yielded an estate opened on behalf of the Respondent on or about October 15, 2018. The search also revealed the estate's personal representative to be Thomas J. Kokolis, Esquire, 110 North Washington Street, Suite 500, Rockville, Maryland, 20850. Mr. Kokolis's attorney is listed as Jacob Deaven, Esquire, also located at 110 North Washington Street, Suite 500, Rockville, Maryland, 20850.⁴ On January 15, 2019, Mr. Brouwer sent a letter to the OAH notifying the clerk of the address of the Estate's personal representative and instructing the clerk to send Notice to that address.⁵ On January 16, 2019, the OAH sent notice by first-class and certified mail (return receipt requested) to "The Estate of Duane Farley, C/O Thomas Kokkolis (sic) and Jacob Deaven, Parker, Simon & Kokkolis (sic), LLC, 110 N. Washington Street, Suite 500, Rockville, MD 20850." On January 25, 2019, the OAH received the green return receipt from the USPS which the recipients signed on January 22, 2019. The USPS did not return the notice the OAH sent to that address by first class mail.

As someone signed for the Notice sent by certified mail on behalf of the personal representative of the Respondent's Estate, I find that the Respondent received proper notice of the hearing. At no time did the Respondent or anyone on the Respondent's behalf request a postponement of the hearing.

⁴ All information concerning Mr. Brouwer's search of the Estate and the results of that search is contained in GF Ex. 6.

⁵ Mr. Brouwer provided an alternate address for the Respondent of P.O. Box 426, 42 Neptune Drive, Joppa, Maryland, 21085. The OAH sent notice to that address which the USPS returned as "unclaimed, unable to forward."

Section 17-324 of the Business Occupations and Professions Article provides that before the Commission can take any final action against an individual, the individual must be personally served with a hearing notice or the hearing notice must be sent by certified mail at least ten days prior to the hearing to the individual's last known business address. Md. Code Ann., Bus. Occ. & Prof. § 17-324(d)(1) (2018). If the individual, after receiving proper notice of the hearing, fails or refuses to appear, the Commission may hear and determine the matter despite the individual's absence. Md. Code Ann., Bus. Occ. & Prof. §§ 17-324(f), 17-408(c) (2018). The address used to notify the Respondent of the hearing is the address of the Respondent's personal representative as determined by Mr. Brouwer on behalf of the MREC. I therefore find it is the Respondent's address of record with the MREC. Accordingly, I conclude that the Respondent received proper notice of the hearing, but nevertheless failed to appear. As a result, I determined that it was appropriate to proceed with the hearing despite the Respondent's failure to appear.

Legal Framework

Section 17-404(a) of the Business Occupations and Professions Article provides the criteria for a person to recover compensation from the Guaranty Fund:

- (a) (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;
 4. an unlicensed employee of a licensed real estate broker;
 - (ii) involve a transaction that relates to real estate that is located in the State; and

(iii) be based on an act or omission;

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

The amount recovered for any claim against the Guaranty Fund “shall be restricted to the actual monetary loss incurred by the claimant, but may not include monetary losses other than the monetary loss from the originating transaction.” COMAR 09.11.01.14. The Claimant bears the burden of proving his entitlement to recover compensation from the Guaranty Fund by a preponderance of the evidence. Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (2018). To prove something by a “preponderance of the evidence” means “to prove that something is more likely so than not so” when all of the evidence is considered. *Coleman v. Anne Arundel Co. Police Dep’t*, 369 Md. 108, 125 n.16 (2002). Under this standard, if the supporting and opposing evidence is evenly balanced on an issue, the finding on that issue must be against the party who bears the burden of proof. *Id.* For the reasons articulated below, I find the Claimant has satisfied his burden.

The Merits of the Case

Arguments of the Parties

Neither the Respondent nor the Fund presented any evidence to be considered. In support of his claim, the Claimant testified that he and the Respondent entered into a Property Management Agreement whereby the Respondent would manage Raking Leaf as a rental property. Madeline and William signed a lease, paid a security deposit of \$3,590.00, commenced living in Raking Leaf in June of 2017, and paid rent of \$1,795.00 per month thereafter. Per the terms of the Property Management Agreement, the Respondent deducted a seven percent management fee from the monthly rent received and remitted the balance to the Claimant.

In the winter of 2018, the Respondent notified the Claimant she would close her business on April 1, 2018. Madeline and William paid their March 2018 rent to the Respondent. However, the Respondent did not pay the Claimant his share of the March 2018 rent payment. Additionally, the Respondent did not return the \$3,590.00 security deposit to either Madeline and William or the Claimant. The Claimant attempted to contact the Respondent or Tselepis, an accountant the Respondent hired. Tselepis provided a few unhelpful responses to the Claimant's inquiries.

Analysis

There is no dispute the Respondent is a licensed real estate broker, Raking Leaf is located in the State of Maryland, and the agreements into which the Claimant and the Respondent entered concern Raking Leaf. The issues to be decided are whether the Respondent committed "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." Md. Code Ann., Bus. Occ. & Prof. 17-404(a), I shall address each of the Claimant's allegations separately below:

Unpaid rents

Paragraph 3.4 of the Property Management Agreement entitled "Collection of Rents" reads as follows:

[The Respondent] will endeavor to collect all rents and other charges which may become due to [the Claimant] at any time from any tenant. All monies so collected shall be deposited in the Operating Account of [the Respondent]. [The Respondent] shall remit to [the Claimant] or deposit in [the Claimant's] designated account all sums in excess of those required to operate the Property (i.e., monthly management fees, repair escrow funds, costs of necessary repairs, etc.) on or before the twenty third (23rd) day of each month, provided rents received from the Tenant are available by this [sic] date.

The Claimant presented evidence the Respondent received and deposited a rent check from Madeline and William for March of 2018.⁶ (CL Ex. 6). However, the Respondent did not pay the Claimant anything for the March 2018 rent and closed her business as of April 1, 2018. Paragraph 8.2 of the Property Management Agreement entitled “Termination for Cause by Agent” reads in full as follows:

This Agreement will terminate immediately without further action from [the Respondent] in the event [the Claimant] breaches any of its obligations to [the Respondent] under the terms of this Agreement (herein defined to be “Default”), and fails to cure such Default within thirty (30) days after receipt of written notice from [the Respondent] specifying the nature of such Default.

Notice of Termination by [the Respondent] shall be sent to [the Claimant], mailed postage prepaid, by both “regular first class mail” and separately by “certified, return receipt requested” mail.

(CL Ex. 1)

I find, by virtue of her February 27, 2018 letter, the Respondent closed her business as of April 1, 2018. (CL Ex. 3). Paragraph 8.3 of the Property Management Agreement entitled “Final Accounting” reads: “Upon termination of this agreement **for any reason**, [the Respondent] shall deliver to [the Claimant] all records, contracts, leases, unpaid bills, outstanding sums of monies (**i.e., repair escrow, security deposit, etc.**), and any other papers or documents which are in [the Respondent’s] possession and which relate to the Property.” (CL Ex. 1) (Emphasis added). Accordingly, I find the Respondent’s termination of the Property Management Agreement obligated her to return undistributed rents to the Claimant.

⁶ Per the lease, the monthly rent is \$1,795.00 per month. Madeline and William issued a check for \$1,895.00 for the March 2018 rent. The Claimant testified they included the additional hundred dollars to either address a repair or a shortage in the rent they paid for a previous month. The Claimant clarified that he is only seeking reimbursement for the \$1,795.00 regular rent amount for March 2018.

The Claimant claimed the Respondent failed to remit the March 2018 net rent proceeds. Further he claimed the Property Management Agreement entitled the Respondent to retain a seven percent management fee or \$125.65. Thus, the Claimant only claimed \$1,669.35. I find the Claimant's position reasonable and his testimony credible. While the Claimant did not provide any documentary evidence the Respondent did not remit the March 2018 net rent proceeds, the evidence persuades me of his truthfulness. First, the Claimant presented several e-mails where he tried to contact either the Respondent, Freeman or Tselepis. The e-mails serve as a stark historical record of the Claimant's unrequited requests to obtain any information from the Respondent in the winter/spring of 2018. Tselepis does respond to the Claimant, but states his communication with the Respondent (or anyone on her behalf) is spotty. In one e-mail, Tselepis contends that despite being hired by the Respondent to "pick up the pieces" he lacks the authority to perform useful ministerial acts, such as the negotiation of checks. (CL Ex. 10).

Furthermore, the e-mails reveal the Claimant is not seeking redress from the Fund of all his grievances against the Respondent. For example, in a March 7, 2018 e-mail to the Respondent, the Claimant raises issues concerning incomplete repairs and homeowners association complaints with regard to Raking Leaf. (CL Ex. 4). However, the Claimant only chooses to raise the issues of the unpaid net rental proceeds and the unreturned security deposit with the Fund. Finally, the Claimant does not make a claim for the Respondent's management fee for March 2018. I find the reasonableness of the Claimant's claims before the Fund bolster his credibility. Thus, I find the Claimant sustained an actual loss of \$1,669.35.

I find the Respondent committed an act or omission by failing to return the \$1,669.35 to the Claimant. I further find the Respondent committed that act or omission through misrepresentation. Misrepresentation is defined as "[t]he act or an instance of making a false or misleading assertion about something [usually] with the intent to deceive. The word denotes not

just written or spoken words but also any other conduct that amounts to a false assertion.” Black’s Law Dictionary (10th ed. 2014). I find the Respondent’s act of failing to return the \$1,669.35 in net rental proceeds despite agreeing to do so pursuant to the Property Management Agreement constitutes a misrepresentation. Accordingly, I find the \$1,669.35 in unpaid net rental proceeds to be compensable by the Fund.

\$3,590.00 Security Deposit

Paragraph 3 of Madeline and William’s lease obligates them to provide a \$3,590.00 security deposit upon the signing of the lease. (CL Ex. 2). Paragraph 3.5 of the Property Management Agreement entitled “Security Deposits” reads: “Monies collected from the Tenant for the required Security Deposit will be held by [the Respondent] in a Security Deposit escrow account so as to comply with the Landlord/Tenant Security Deposit Law of the State of Maryland.” As noted above, paragraph 8.3 of the Property Management Agreement obligates the Respondent to return the security deposit upon termination of the Property Management Agreement. The Respondent terminated the Property Management Agreement as of April 1, 2018. However, she did not return the security deposit to the Claimant. For the reasons stated above I find the Claimant’s testimony credible that the Respondent did not return the security deposit to him. The Claimant testified that Madeline and William still reside at Raking Leaf and will remain there until the summer of 2019 under the terms of the original lease. When they leave, he will either have to pay them the security deposit out of his own pocket or pay for repairs to Raking Leaf out of his own pocket. I thus find the Claimant incurred an actual loss in the amount of \$3,590.00.

I find the Respondent committed an act or omission by failing to return the security deposit to the Claimant per the terms of the Property Management Agreement. I further find the Respondent committed that act or omission through misrepresentation as defined above. I find the Respondent's act of failing to return the security deposit despite agreeing to do so pursuant to paragraphs 3.5 and 8.3 of the Property Management Agreement constitutes a misrepresentation. Thus, I find the Claimant is entitled to reimbursement from the fund of \$3,590.00 representing the principal amount of the security deposit.

In light of the above, I find the Claimant is entitled to the following reimbursement from the Fund: \$1,669.35 (net rental proceeds owed) + \$3,590.00 (security deposit) = \$5,259.35.

PROPOSED CONCLUSIONS OF LAW

Based on the Findings of Facts and Discussion, I conclude that the Claimant has established by a preponderance of the evidence that he sustained an actual loss compensable by the Guaranty Fund resulting from the Respondent's act or omission in providing real estate brokerage services that constitutes misrepresentation. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2) (2018).

I further conclude as a matter of law that the amount of the award the Claimant is entitled to receive from the Fund is \$5,259.35. Md. Code Ann., Bus. Occ. § 17-404(b) (2018); COMAR 09.11.01.14.

RECOMMENDED ORDER

I **PROPOSE** that the Claim filed by the Claimant against the Maryland Real Estate Commission Guaranty Fund be **GRANTED** in the amount of \$5,259.35;

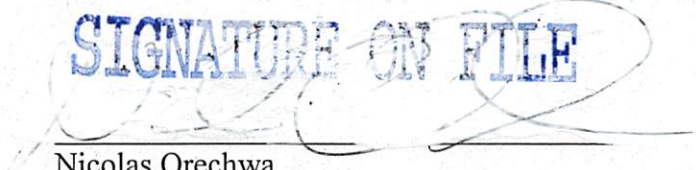
I further **PROPOSE** that the Maryland Real Estate Commission Guaranty Fund pay to the Claimant his actual monetary loss in the amount of \$5,259.35 for the Respondent's wrongful acts and omissions;

I further **PROPOSE** that the Respondent shall be ineligible for any Maryland Real Estate Commission license until the Respondent reimburses the Fund for all monies disbursed under this Order plus annual interest of at least ten percent, as set by the Commission pursuant to Section 17-411(a) of the Business Occupations and Professions Article of the Maryland Annotated Code; and

I further **PROPOSE** that the Commission's records and publications reflect this proposed decision.

April 5, 2019
Date Decision Issued

SIGNATURE ON FILE


Nicolas Orechwa
Administrative Law Judge

NO/sw
#178927