

BEFORE THE MARYLAND REAL ESTATE COMMISSION

**MARYLAND REAL ESTATE
COMMISSION**

*

CASE NO. 2019-RE-655

v.

*

OAH NO. LABOR-REC-24-20-01706

**HOWARD SCOTT LOKEY,
Respondent**

*

*

and

*

**IN THE MATTER OF THE CLAIM
OF JUSTINE BUSCHMAN AGAINST
THE MARYLAND REAL ESTATE
COMMISSION GUARANTY FUND**

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* * * * *

PROPOSED ORDER

The Findings of Fact, Proposed Conclusions of Law and Recommended Order of the Administrative Law Judge dated May 29, 2020, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 16th day of July, 2020, hereby **ORDERED:**

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

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

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

¹ On pages 3-4 of the proposed decision the Administrative Law Judge lists exhibits admitted at the hearing. The Complaint included as part of attachment #1 to Exhibit REC #4 is listed as dated January 9, 2019 but is actually dated April 26, 2019 and ends on page 1/5, not 1/6. The second part of the same attachment to Exhibit REC #4 starts on page 1/6 not 1/7. Finally the July 2018 check included in Exhibit CL #1 is listed as dated July 18, 2018, but is actually dated July 10, 2018. The Commission corrects these harmless typographical errors for clarification purposes only.

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

E. Pursuant to Code of Maryland Regulations (COMAR) 09.01.03.09 those parties adversely affected by this Proposed Order shall have twenty (20) days from the postmark date of the Order to file written exceptions to this Proposed Order. The exceptions should be sent to the Executive Director, Maryland Real Estate Commission, 3rd Floor, 500 North Calvert Street, Baltimore, MD 21202. If no written exceptions are filed within the twenty (20) day period, then this Proposed Order becomes final.

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

7/16/20
Date

MARYLAND REAL ESTATE COMMISSION
SIGNATURE ON FILE
By: J. J. [unclear]

MARYLAND REAL ESTATE
COMMISSION

v.

HOWARD SCOTT LOKEY,
RESPONDENT,

And

IN RE THE CLAIM OF JUSTINE
BUSCHMAN AGAINST THE
MARYLAND REAL ESTATE
GUARANTY FUND

* BEFORE WILLIAM F. BURNHAM,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
*
* OAH No.: LABOR-REC-24-20-01706
* REC No.: 2019-RE-655

* * * * *

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 or about April 26, 2019, Justine Buschman (Claimant) filed a complaint against licensed real estate broker Howard Scott Lokey (Respondent). That same day, the Claimant also filed a claim for compensation from the Maryland Real Estate Guaranty Fund (Fund) for losses the Claimant allegedly sustained as a result of the Respondent's misconduct. The complaint and claim both arose out of interaction between the Claimant and the Respondent as it related to 1718 Derrs Square East, Frederick, Maryland (Property), the address of a home owned by the Claimant at the times relevant to this case as detailed below.

The Maryland Real Estate Commission (REC or Commission) investigated the complaint and determined that charges against the Respondent were warranted and that the Claimant was entitled to a hearing on her claim. Accordingly, the Commission issued a Statement of Charges and Order for Hearing (Statement of Charges), dated December 20, 2019, against the Respondent. The Statement of Charges set forth information about the claim and alleged that the Respondent violated sections 17-322(b)(25), (32), (33), and 17-532 of the Business Occupations and Professions Article of the Maryland Annotated Code (Business Occupations Article)¹ and that he also violated sections 09.11.01.16 and 09.11.02.02A of the Code of Maryland Regulations (COMAR). The Statement of Charges advised the Respondent that if the charged violations are substantiated, the Commission could sanction him by reprimand, or by suspending or revoking his real estate broker's license and could, in addition to or instead of those actions, impose a monetary penalty of \$5,000.00 per violation. On December 27, 2019, the Commission forwarded the Statement of Charges to the Office of Administrative Hearings (OAH) to conduct a hearing.

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

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

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

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

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

ISSUES

1. Did the Respondent engage in conduct that demonstrated bad faith, incompetency, or untrustworthiness, or that constituted dishonest, fraudulent, or improper dealings in violation of Business Occupations Article § 17-322(b)(25), including failure to reply to the Commission in writing?³
2. Did the Respondent violate COMAR 09.11.02.02A, the REC's Code of Ethics (Code), by failing to protect and promote the interests of his client or by failing to act with absolute fidelity to the client's interest, which would violate the Code and also Business Occupations Article § 17-322(b)(33)?
3. If the Respondent violated any of these provisions or any other provision of Title 17, what sanction, if any, is appropriate?⁴
4. Has the Claimant established a compensable claim against the Fund under section 17-404 of the Business Occupations Article?
5. If the Claimant has established a compensable claim, what is the appropriate award?

SUMMARY OF THE EVIDENCE

Exhibits

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

- | | |
|--------|--|
| REC #1 | Notice of Hearing generated by the OAH, January 30, 2020 |
| REC #2 | Statement of Charges, December 20, 2019 |
| REC #3 | REC licensing records for the Respondent and related companies, printed March 10, 2020 |

³ The Commission cited COMAR 09.11.01.16.

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

REC #4 REC, Report of Investigation, closed August 2, 2019, with the following attachments:

- #1 Complaint filed with the REC on January 9, 2019 (pp. 1/1 to 1/6)⁵ Residential Lease (Lease), July 17, 2018 (pp. 1/7 to 1/21)
- #2 Letter from the DLLR⁶ to the Respondent, June 5, 2019 (unnumbered)
Letter from the DLLR to the Respondent, July 24, 2019 (p. 2/1)
Email from Patrick Richardson to Lucinda Rezek, July 8, 2019 (p. 2/2)

The Claimant offered the following exhibit, which I admitted into evidence:

CL #1 Copies of Checks, July 18, 2018, December 1, 2018, October 31, 2018 and USAA Bank statements:

June 28, 2018 to July 30, 2018
July 30, 2018 to August 30, 2018
August 30, 2018 to September 27, 2018
September 27, 2018 to October 30, 2018

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

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

Testimony

The REC presented testimony from the Claimant and Brenda Iman, Administrative Officer II, Paralegal Investigator, on the regulatory charges. The Claimant also testified on her own behalf in support of her claim and presented the testimony of Folake Adebusuyi, tenant.

Neither the Respondent nor the Fund presented any testimony.

FINDINGS OF FACT

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

1. Since 1985, the Respondent was licensed as a Real Estate Broker by the REC under license number 77479 with no prior REC complaints.
2. The Respondent was the owner and the broker of record for Premium Realty Associates, T/A Rental Services Group (Rental Services).

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

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

3. In or around 2015, the Claimant engaged the Respondent to manage rental of the Property.

4. The agreement was a written contract (Contract) in which the Respondent agreed to manage the Property for a management fee of eight percent of monthly rent.

5. Sometime prior to June 2018, the Respondent located a tenant who signed a lease for the Property. The monthly rent was \$1,750.00. The Respondent made monthly deposits to the Claimant's bank account until June 2018.

6. The Respondent located a new tenant in July 2018. The Lease was signed on July 17, 2018 and the tenant made a prorated rent payment of \$571.80 for the month of July 2018.

7. The tenant was responsible for, and paid the Respondent, monthly rent of \$1,750.00 under the Lease and paid the Respondent a \$1,750.00 security deposit.

8. The Respondent earned \$140.00 per month, eight percent of \$1,750.00, in management fees that were deducted from the rental payments before deposit in the Claimant's bank account. The Claimant was owed \$1,610.00 per month after management fees were paid to the Respondent.

9. The Respondent made no payment to the Claimant in July 2018.

10. The Respondent made no payment to the Claimant in August 2018.

11. The Respondent made no payment to the Claimant in September 2018.

12. The Respondent made no payment to the Claimant in October 2018.

13. The Respondent made no payment to the Claimant in November 2018.

14. The Respondent made no payment to the Claimant in December 2018

15. The Respondent did not return the \$1,750.00 security deposit.

16. The Claimant hired a new real estate manager to collect rent for the Property in January 2019.

17. The Claimant filed a complaint with the REC on or about April 26, 2019.

18. The REC sent the Respondent letters on June 5, 2019 and July 24, 2019, requesting a response to the complaint. The Respondent never replied to either letter.

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

DISCUSSION

The Regulatory Charges

The REC charged the Respondent with violating sections 17-322(b)(25), (b)(32), (b)(33) and 17-532 of the Business Occupations Article, COMAR 09.11.01.16 and COMAR 09.11.02.02A. Section 17-322 of the Business Occupations Article provides, in pertinent part:

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

...

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

...

(32) violates any other provision of this title;

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

Determination of penalty

- (c) (1) Instead of or in addition to reprimanding a licensee or suspending or revoking a license under this section, the Commission may impose a penalty not exceeding \$5,000 for each violation.
- (2) To determine the amount of the penalty imposed, the Commission shall consider:
- (i) the seriousness of the violation;
 - (ii) the harm caused by the violation;
 - (iii) the good faith of the licensee; and
 - (iv) any history of previous violations by the licensee.

COMAR 09.11.02.02A provides:

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

The REC bears the burden of establishing, by a preponderance of the evidence, that the Respondent committed the violations alleged in the Statement of Charges. COMAR 09.01.02.16A. To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so[,]" when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

The Commission cited a version of COMAR 09.11.01.16 that was in effect from June 1990 until it was revised in 2017. After the 2017 revision, COMAR 09.11.01.16 was titled "Use of Trade Names." The Commission cited COMAR 09.11.01.16 in its Statement of Charges as providing the following:

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

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

The COMAR presently in effect that addresses a licensee's failure to respond to the Commission is COMAR 09.11.01.13. It provides:

Failure to Respond.

A. If an applicant or licensee receives from the Commission a written communication requesting a response, the applicant or licensee shall respond in writing within 30 days of the date of the mailing.

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

B. The Commission shall send a written communication by first-class mail to the last known address furnished to the Commission by the applicant or licensee.

C. It is a responsibility of an applicant or licensee to notify the Commission in writing if there has been a change in applicant's or licensee's address.

D. Failure to respond as required by this regulation may be considered by the Commission to be a violation of Business Occupations and Professions Article, §17-322(b), Annotated Code of Maryland.

Because the Commission alleges that the Respondent failed to respond to its notices related to the Claimant's complaint, I will presume the REC alleged the Respondent failed to comply with COMAR 09.11.01.13 because that section addresses the failure of a licensee to respond to a written communication of the REC that requires a response.

This discussion begins with the agreement (Contract) between the Claimant and the Respondent. The undisputed evidence shows that the Claimant and the Respondent agreed to the Respondent's management of the Property. The Contract was made in or about 2015 and the Respondent drafted a rental agreement with a tenant. The Respondent agreed to manage the Property and collect a management fee of eight percent of the rent. All the money collected in rental payments was due to the Claimant on a monthly basis minus the management fee, and the security deposit was supposed to be deposited in an account devoted exclusively to security deposits. *See* REC #4 Att. 1 (pp. 1/6 & 1/7).

The Claimant testified that she moved to Maryland from Missouri for employment and was referred to the Respondent by another real estate agent. The Respondent helped her buy the Property and she lived in it until 2015, when she decided to purchase a single family home and rent the Property. She employed Rental Services and the Respondent to manage the Property.

According to the Claimant, she received monthly disbursements via direct deposit from the Respondent regularly from 2015 until 2018. She stated in her complaint that there was no tenant in the Property in July 2018. In August 2018, there was no direct deposit to her account.

Upon contacting the Respondent, she was told that he “had a lot going on” and that he would get the Claimant the money he owed her. In September 2018, when another direct deposit payment was missing, the Respondent told the Claimant he would deposit both months’ rent he owed to her account. The Respondent also told the Claimant that his account had been hacked and the Claimant said she believed the Respondent because he had given her no reason over the years to disbelieve him. The Respondent next informed the Claimant that his father was in the hospital and doing poorly as the reason for missed payments. No deposit to the Claimant’s account was made for October or November 2018.

The Claimant testified that she sent her husband to the Property to collect December’s rent in the first week of December 2018, but the tenant had already paid the Respondent. No deposit to the Claimant’s account was made for December 2018. By January 2019, the Claimant hired a new property manager and collected the January 2019 rent through the new real estate manager.

The Respondent communicated with the Claimant after she hired the new property manager and asked her to allow him to manage the Property for no fee in order to repay the money he owed. The Claimant testified she told the Respondent she had already hired a new property manager. The Claimant testified that she no longer trusted the Respondent. According to the Claimant, the Respondent never returned any of the rent or the security deposit he collected for the tenant, Folake Adebusuyi (Tenant).

The Tenant testified she signed the lease in July 2018 and paid a prorated rent payment for July so she could clean the Property before she moved in. In addition, she said she gave the Respondent a \$1,750.00 security deposit and a blank check in order to set up direct debit. The Tenant provided copies of checks for \$1,750.00 made payable to “Rental Services Group” as proof she paid the security deposit and rent for November and December 2018. CL #1. She

provided bank statements that showed debits to her bank account for Rental Services for \$517.80 in July 2018, \$1,750.00 in August 2018, \$1,750.00 in September 2018, and \$1,750.00 in October 2018 for rent payments. *Id.*

Ms. Iman testified the REC mailed the Respondent a notice of the complaint on June 5, 2019. Ms. Iman testified that the Respondent had twenty days in which to respond in writing to the REC regarding the complaint. According to Ms. Iman, the Respondent never provided any answer to the REC's June 2019 notice, so the REC sent a second letter marked final notice on July 24, 2019.

Ms. Iman referenced the letters that informed the Respondent he was obligated to respond in writing to the REC regarding the Claimant's complaint. The REC provided an extra ten days from the date of the second letter for the Respondent to provide a written response and informed the Respondent he was subject to suspension or revocation of his license and up to a \$5,000.00 fine. Ms. Iman testified that the REC never received any response from the Respondent and the Commission scheduled an audit of Rental Services for July 2, 2019. The Respondent was not present at his business address on July 2, 2019, and according to the auditor, Patrick Richardson, the property seemed vacant and under repair. *See* REC #4 Att. 2 (p. 2/2). It appeared to the Commission that the Respondent closed his brokerage without telling the Commission and without returning the Claimant's proceeds under the Contract.

The REC argued the facts supported its allegations that the Respondent violated section 17-322(b)(25) of the Business Occupations Article because the Respondent acted untrustworthy, in bad faith, and fraudulently when he improperly withheld the money due the Claimant under the Contract.

Next, the REC argued the Respondent violated section 17-532(b)(1)(vi) of the Business Occupations Article because he collected money for the rent but did not remit any of it to the

Claimant; therefore, he exercised no reasonable care or diligence. In addition, according to the REC's argument, the Respondent violated COMAR 09.11.01.16 because he never responded in any respect to either notice. Finally, the REC argued the Respondent was in violation of COMAR 09.11.02.02A, and thereby also violated section 17-322(b)(33) of the Business Occupations Article, because the actions described did not protect the interest of the Claimant, to whom the Respondent owed an absolute fidelity. Therefore, the REC argued, the Respondent did not in any way promote or protect the Claimant's interests.

The REC proposed that the Respondent be penalized by revocation of his license and a \$5,000.00 fine for each of the violations the REC enumerated in its arguments. The REC fashioned its recommendation by considering the factors under section 17-322(c) of the Business Occupations Article and determining the Respondent's violations could not get much more serious, caused extensive financial harm to the Claimant, and demonstrated bad faith. The REC acknowledged the Respondent had no other history of complaints since his licensure in 1985. The REC recommended the revocation of the Respondent's license and a \$20,000.00 fine.

The Respondent agreed to the Contract and promised to provide real estate brokerage services to the Claimant in exchange for eight percent of the rent he collected. The Respondent collected a security deposit and rent under the Lease. Before the months in question, the Respondent forwarded collected rents to the Claimant in 2015, 2016, 2017 and part of 2018. From July 2018, he failed to disburse any of the rent collected under the Lease to the Claimant. The Respondent kept all the rent he collected. In addition, he kept the security deposit after the Claimant hired a new property management company. I believe the Claimant's testimony that the tenant paid the \$1,750.00 security deposit because the Lease corroborates the Claimant's testimony, as does the Tenant's testimony. The Respondent kept the \$1,750.00 security deposit. Rental Services was paid before the tenant moved in the Property.

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

The REC also charged the Respondent with violating COMAR 09.11.02.02A, which requires the Respondent protect and promote the interests of the client. The Respondent owed the Claimant an obligation of absolute fidelity and failed in every respect set forth above to promote the interest of the Claimant. The Respondent agreed to the Contract and knew that he kept the money he should have disbursed to the Claimant. The Respondent chose to steal the rental payments and the security deposit and took money from the tenant that the Claimant had to repay. In doing so, he wholly failed to adequately protect and promote the interest of the Claimant.

Finally, the REC cited the outdated COMAR section for its proposition that the Respondent was required to address the Claimant's complaint within twenty days of the REC's June 5, 2019 notice letter. The Respondent never responded at all to the REC's letters. The Respondent knew the REC threatened to reprimand him or suspend or revoke his license if he did not reply; nevertheless, he failed to reply. If he closed his business or moved, he did not tell the REC because the REC continued to try and reach him at his business address that was still registered with the REC. *See* REC #3; *and see* COMAR 09.11.01.13C ("It is a responsibility of an applicant or licensee to notify the Commission in writing if there has been a change in

applicant's or licensee's address"); COMAR 09.11.01.08 ("When a licensed broker changes business location, the licensed broker shall notify the Commission in writing within 10 days"). In addition, although twenty days was an incorrect timeframe for the Respondent to reply, the REC gave the Respondent thirty days to reply when the times in the first and second notices are combined, so the Respondent actually had thirty days to respond, failed to do so, and therefore, suffered no prejudice as a result of the twenty-day notice.⁸

Given the foregoing, a revocation is appropriate, and I recommend that sanction. With regard to a monetary penalty, the Respondent has no history of prior violations. The Respondent failed to adhere to the terms of the Contract with the Claimant, failed to protect and promote the Claimant's interests, and failed to respond in any way the Commission. The Commission notified the Respondent that he was subject to "a monetary fine of up to \$5,000.00 per violation."⁹ The maximum possible monetary penalty for four violations is \$20,000.00. The REC suggested a total of \$20,000.00 for the violations of sections 17-322(b)(25) and 17-532(b)(1)(vi) of the Business Occupations Article, and COMAR 09.11.01.16 and 09.11.02.02A.

Section 17-322(c) of the Business Occupations Article provides the penalty for the alleged violations in this case. The maximum penalty is \$5,000.00 for each violation under this section. Business Occupations Article § 17-322(c). The REC's requested \$5,000.00 penalty for the Respondent's engagement in conduct exhibiting bad faith, incompetency, untrustworthiness and dishonest, fraudulent and improper dealings with the Claimant is proper under the facts of this case. Business Occupations Article § 17-322(b)(25). The REC's request for \$5,000.00 for failure

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

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

to respond to its written communications is a request under COMAR 09.01.01.13 and that section provides that a violation is akin to violation of the section 17-322(b)(25) of the Business Occupations Article and is therefore proper. The Respondent additionally violated section 17-532 of the Business Occupations Article and COMAR 09.11.02.02A. Because penalties under section 17-322(c) apply to any violation of another provision of Title 17 of the Business Occupations Article, I find the \$5,000.00 penalty requested by the REC appropriate for the Respondent's section 17-532 violation. *See Business Occupations Article § 17-322(b)(32).* Finally, a violation of COMAR 09.11.02.02A is a violation of the Code and therefore a basis for a penalty under the Business Occupations Article. *See Business Occupations Article § 17-322(b)(33).* Therefore, I find a monetary penalty of \$5,000.00 appropriate under section 17-322(c) of the Business Occupations Article.

The Guaranty Fund Claim

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

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

A claim shall:

- (i) be based on an act or omission that occurs in the provision of real estate brokerage services by:
 - 1. a licensed real estate broker;
 - ...
- (ii) involve a transaction that relates to real estate that is located in the State; and
- (iii) be based on an act or omission:
 - 1. in which money or property is obtained from a person by theft, embezzlement, false pretenses, or forgery; or
 - 2. that constitutes fraud or misrepresentation.

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

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

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

Under Section 17-407(e) of the Business Occupations Article, the Claimant bears the burden of proof to establish a claim for recovery from the Fund. The burden of proof is by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.01.02.16C. For the reasons set forth above, the Claimant proved by a preponderance of the evidence that she suffered an actual loss caused by the act or omission of the Respondent. The Fund recommended compensation.

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

The Lease contemplated that the Property be rented for \$1,750.00 per month and a \$1,750.00 security deposit be secured. It was expected that the Respondent would pay the Claimant the rent he collected each month, minus his eight percent management fee, and

maintain the security deposit in an account “devoted exclusively to security deposits” and bearing interest.

The Respondent signed the Lease and collected a prorated payment from the Tenant for July 2018. According to the Claimant’s complaint, she was last paid in June 2018 and thought there was no tenant in July 2018. There is no evidence that the Respondent paid the Claimant in July 2018 and evidence he did not pay her because the Claimant indicated in her complaint that there was no tenant in July 2018. Therefore, the Respondent failed to make any payment to the Claimant for any rent he collected from the Tenant. He collected \$517.80 in July 2018 and \$1,750.00 every month thereafter from August through December 2018 and made no payment to the Claimant. He also collected and failed to return the \$1,750.00 security deposit. The total amount the Claimant lost due to the Respondent’s actions is \$10,276.38.¹⁰ The Fund is set up to provide compensation for these types of losses. In this case, the Claimant has proved by a preponderance of the evidence that she is entitled compensation from the Fund in the amount of the security deposit and her monthly disbursements under the Contract.

PROPOSED CONCLUSIONS OF LAW

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

1. The Respondent engaged in conduct that demonstrated bad faith, incompetency or untrustworthiness and that constituted dishonest, fraudulent and improper dealings in violation of section 17-322(b)(25) of the Business Occupations Article.
2. The Respondent violated COMAR 09.11.02.02A, the REC’s Code of Ethics and section 17-322(b)(33) of the Business Occupations Article, by failing to protect and promote the interests of his client or by failing to act with absolute fidelity to the client’s interest.

¹⁰ Five months’ rent at \$1,750.00 + prorated July 2018 rent \$517.80 – 8% Management fee + security deposit \$1,750.00.

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

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

5. The Claimant established a compensable claim against the Fund under section 17-404 of the Business Occupations Article in the amount of \$10,276.38 representing five months' full rent, one month's prorated rent, and the security deposit, minus management fees.

RECOMMENDED ORDER

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

1. That the Respondent's real estate broker license be revoked;
2. That the Respondent pay a civil penalty in the amount of \$20,000.00;
3. The Maryland Real Estate Commission Guaranty Fund pay the Claimant's claim of \$10,276.38; and
4. That the records and publications of the Maryland Real Estate Commission reflect this decision.

May 29, 2020
Date Decision Issued

SIGNATURE ON FILE

William F. Burnham
Administrative Law Judge

WFB/kdp
Document #186062