

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION *

v.

*** CASE NO. 2008-RE-119**

KWAKU AGYAPONG

*** OAH NO. DLR-REC-21-09-**

RESPONDENT

*** 46308**

* * * * *

OPINION AND FINAL ORDER

This matter came before the Commission for argument on Exceptions filed by the Respondent, Kwaku Agyapong, to a Proposed Order of October 18, 2010. On July 27, 2010, Administrative Law Judge Latonya B. Dargan (“ALJ”) filed a Recommended Decision and Recommended Order in which she recommended that the Respondent be reprimanded and required to pay a civil penalty of \$2,000.00 for violating the provisions of Business Occupations and Professions Article, *Annotated Code of Maryland* (“Md. Bus. Occ. and Prof. Art.”) §17-322(b)(25) and Code of Maryland Regulations (“COMAR”) 09.11.02.02H..

On October 18, 2010, the Maryland Real Estate Commission (“Commission”) issued a Proposed Order that affirmed the ALJ’s Findings of Fact and affirmed the ALJ’s Conclusions of Law. The Proposed Order amended the ALJ’s Recommended Decision and Recommended Order as follows: The civil penalty of \$2,000.00 shall be paid within thirty (30) days of the date of the Proposed Order and all real estate licenses held by the Respondent, Kwaku Agyapong shall be suspended if the civil penalty imposed on him in the Proposed Order is not paid in full within thirty (30) days. The Proposed Order also

modified the Recommended Decision and Recommended Order to correct an error found on the bottom of page 2.

A hearing was held by a panel of the Commission, consisting of Commissioners J. Nicholas D'Ambrosia, Marla S. Johnson, and Colette P. Youngblood, on February 16, 2011. Peter Martin, Assistant Attorney General, represented the Commission. The Respondent, Kwaku Agyapong appeared and was represented by Kwaku D. Ofori, Esquire. The proceedings were electronically recorded.

SUMMARY OF THE EVIDENCE

On behalf of the Commission, three exhibits, as well as the exhibits admitted at the hearing before the ALJ, were entered into evidence. A transcript of the hearing before the ALJ was provided to the Commission.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

The Commission adopts the ALJ's Conclusions of Law.

DISCUSSION

On August 13, 2007, Janet Alving ("Complainant") filed a complaint with the Maryland Real Estate Commission against Kwaku Agyapong ("Respondent"). On November 18, 2009, the Commission issued a Statement of Charges and Order for Hearing against the Respondent and on May 25, 2010, a hearing was conducted by ALJ Latonya Dargan at the Office of Administrative Hearings. At all times relevant to this matter, the Respondent, who was originally licensed as a real estate salesperson on July 20, 2003, held a valid real estate salesperson license and was employed with Fairfax

Realty. FF1, 2¹. The Complainant was the owner and seller of residential property located at 3711 Jones Bridge Road, Chevy Chase, Maryland (“the Property”). FF3. The Respondent acted as the Buyer’s agent for the purchase of the Property. FF4. On June 2, 2007, the Respondent and the Buyer signed a contract for the purchase of the Property. FF10. On June 3, 2007, the Respondent presented the Complainant with the Buyer’s contract of sale to purchase the property for \$525,000.00. FF5. The contract of sale stipulated that a \$15,000.00 earnest money deposit was to be paid by the Buyer: An initial deposit of \$5,000.00 was to be paid at the time of the contract signing, with an additional \$10,000.00 deposit to be paid within fourteen days from the date of contract acceptance. FF6. The Respondent contacted the listing agent to discuss whether a contingency, which the Buyer sought, could be added to the contract. FF7. The contingency would have provided that the Buyer would only be required to pay the additional \$10,000.00 deposit if the Buyer was able to sell a property which he owned. FF7. In order to ensure that the Complainant would sign the contract, the listing agent declined to include the contingency language in the contract and informed the Respondent that the contingency would not be included in the contract. FF8. The Respondent admitted at the hearing before the ALJ that the contingency was never put into the contract of sale. T20². The Respondent did not tell the Buyer that the proposed contingency has been rejected. FF9. On June 5, 2007, the Complainant signed and accepted the contract of sale. FF11. The Respondent collected the initial \$5,000.00 earnest money deposit from the Buyer and forwarded it to

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

² “T” refers to the transcript of the hearing before the ALJ.

the Complainant after the Complainant accepted the contract of sale. FF12. At some point during the fourteen days after June 5, 2007, the Respondent verbally informed the listing agent's husband that the additional \$10,000.00 earnest money deposit would only be paid in the event the Buyer was able to sell a property which he owned. FF13.

The Commission charged the Respondent with violating Md. Bus. Occ. & Prof. Art. §17-322, which provides, in relevant part:

§17-322.

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

...

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

The Commission also charged the Respondent with violating the Real Estate Commission's Code of Ethics as set forth in COMAR 09.11.02.02H, which provides:

.02 Relations to the Client.

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

Counsel for the Respondent argued at the Exceptions hearing that the Respondent should not be found to have violated §17-322(25) Md. Bus. Prof. & Occ. Art. and COMAR 09.11.02.02H because there were valid reasons for not memorializing the contingency agreement. Specifically, he argued that the contingency agreement was not included in the contract by the Respondent due to:

1) a misrepresentation of facts by the listing agent's husband, who advised the Respondent not to put the contingency in writing;

2) a material, mutual mistake by both the listing agent and the Respondent in failing to comply with the Statute of Frauds' requirement that the contingency be made a part of the written contract;

3) a justifiable, detrimental reliance by the Respondent on the listing agent's husband to communicate the contingency to the Seller; and

4) the conduct of the parties, which constituted a waiver of the requirement that the contingency be put in writing, in that the listing agent's knowledge that the \$10,000.00 deposit was to be contingent was imputed to the Seller.

The Commission concludes that, although the arguments made by counsel for the Respondent at the Exceptions hearing might be made in a civil action based on a theory that the contract of sale was unenforceable, the instant matter solely involves a disciplinary action for alleged violations of Maryland law and regulations governing the conduct of real estate salespersons.

The Respondent admitted at the hearing before the ALJ that he knew "...that the money, everything must be put in writing, the earnest money must be put in writing." T 21. He also admitted that, despite this knowledge, he did not insist on the contingency being written into the contract. T 20.

It is the responsibility of a licensed real estate salesperson to know and comply with relevant laws regarding the content of real estate sales contracts. A real estate sales

person is required to "...see to it that financial obligations and commitments regarding real estate transactions are in writing...". (COMAR 09.11.02.02 H.) The Respondent had a duty to know that the contingency had to be a part of the written contract to be enforceable as well as a duty to ensure that the contingency, sought by the Buyer, was made part of the contract. His stated reliance on incorrect advice regarding the inclusion of the contingency in the contract of sale does not relieve him of his professional responsibilities to comply with the requirements of relevant law and regulations. In failing to include a written contingency in the contract, the Respondent failed to protect his client's interest to avoid being responsible for an additional \$10,000.00 earnest money deposit. His failure to include the contingency in the contract also adversely affected the Seller: The Seller was not made aware that the Buyer did not intend to pay the additional \$10,000.00 earnest money deposit unless he was able to sell another property he owned since that contingency was not included in the contract of sale.

The public has a justified expectation that licensed real estate salespersons will be knowledgeable regarding what must be included in a contract for the sale of real property. The Respondent failed to perform his professional responsibilities as a licensed real estate salesperson in a competent manner when he failed to memorialize the contract contingency desired by his client. His conduct thus violated §§17-322(b)(25) and (33) Md. Bus. Occ. & Prof. Art. and COMAR 09.11.02.01 H.

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

- (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.

The Respondent's actions in this case were serious violations of the statute and regulations governing the duties of a licensed real estate salesperson. As previously noted, his actions caused harm both to his client and to the Seller. The Commission concludes, however, that his failure to reduce the contingency to writing does not appear to have been the result of malice or an intent to deceive anyone. Rather, his violations appear to be the result of his disregard for relevant law and regulations relating to the content of real estate contracts. The Commission notes that the Respondent does not have a prior history of violations.

Based on an evaluation of the factors set forth in §17-322(c) Md. Bus. Occ. & Prof. Art., the Commission concludes that the Respondent's violations warrant a reprimand and the imposition of a civil penalty in the amount of Two Thousand Dollars (\$2,000.00).

ORDER

It is this 16th day of March, 2011 **ORDERED**
that:

1. The Respondent, Kwaku Agyapong, violated Md. Bus. Occ. & Prof. Art. §§ 17-322(b)(25) and (33) and COMAR 09.11.02.01 H;
2. The Respondent, Kwaku Agyapong, be and hereby is **REPRIMANDED**;
3. The Respondent, Kwaku Agyapong, be assessed a civil penalty in the amount of Two Thousand Dollars (\$2,000.00) which shall be paid within thirty (30) days of the date of this Order;

4. All real estate licenses held by the Respondent, Kwaku Agyapong, shall be **SUSPENDED** if the civil penalty imposed on him in this Order is not paid in full within thirty (30) days; and

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

MARYLAND REAL ESTATE COMMISSION

SIGNATURE ON FILE

By: _____

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. *

KWAKU AGYAPONG
RESPONDENT

* CASE NO. 2008-RE-119

* OAH NO. DLR-REC-21-09-46308

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated July 27, 2010 having been received, read and considered, it is, by the Maryland Real Estate Commission, this 18th day of October, 2010.

ORDERED,

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

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

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

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

ORDERED that the Respondent Kwaku Agyapong be and hereby is REPRIMANDED;

ORDERED that the Respondent Kwaku Agyapong be assessed a

civil penalty in the amount of \$2,000.00, which shall be paid within thirty (30) days of the date of this Proposed Order;

ORDERED that the all real estate licenses held by the Respondent Kwaku Agyapong shall be SUSPENDED if the civil penalty imposed on him in this Order is not paid in full within thirty (30) days;

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

D. Pursuant to §10-220 of the State Government Article, the Commission finds that the Recommended Decision of the Administrative Law Judge had to be modified. The Commission first corrects an error found on page 2 of the Recommended Decision. At the bottom of page 2, the Administrative Law Judge stated that the Commission "presented the testimony of the Respondent." It is clear from the context that Judge intended to say that the Commission presented the testimony of the Complainant. In fact, the next sentence states that "the Respondent testified on his own behalf and did not present any other witnesses", an action that would have been unnecessary had the Respondent already testified for the Commission. The Commission also revised the Order to provide that the civil penalty had to be paid within 30 days, and that failure to do so could result in suspension of the Respondent's real estate license.

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.

Kathleen J. Connelly, Exec. Dir.
Maryland Real Estate Commission
for Marla S. Johnson, Commissioner

**MARYLAND REAL ESTATE
COMMISSION**

v.

**KWAKU AGYAPONG,
RESPONDENT**

*** BEFORE LATONYA DARGAN,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* OAH CASE NO.: DLR-REC-21-09-46308
* REC COMPLAINT NO: 2008-RE-119**

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RECOMMENDED DECISION

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

STATEMENT OF THE CASE

On August 13, 2007, Janet Alving (Complainant) filed a complaint with the Maryland Real Estate Commission (Commission or REC), an administrative unit of the Department of Labor, Licensing and Regulation (DLLR), against Kwaku Agyapong (Respondent), a real estate salesperson associated with Fairfax Realty, Inc. On November 18, 2009, the Commission issued a Statement of Charges and Order for Hearing against the Respondent.

On May 25, 2010, I conducted a hearing at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-324 (2004) (Business Occupations Article). Hope Sacks, Assistant Attorney General, represented the Commission. The Respondent appeared and represented himself.

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

ISSUES

- 1) Did the Respondent violate the provisions of Business Occupations Article § 17-322(b)(25);
- 2) Did the Respondent violate the provisions of the REC Code of Ethics at COMAR 09.11.02.02H; and, if so,
- 3) What is the appropriate sanction?

SUMMARY OF EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Commission:

- | | |
|--------|---|
| REC #1 | Notice of Hearing, dated March 31, 2010 |
| REC #2 | Computerized printout of the Respondent's REC Licensing History, dated May 13, 2010 |
| REC #3 | Statement of Charges, dated November 18, 2009 |
| REC #4 | Residential Contract of Sale, dated June 3, 2007 |

The Respondent did not submit any exhibits.

Testimony

The Commission presented the testimony of the Respondent. The Respondent testified on his own behalf and did not present any other witnesses.

FINDINGS OF FACT

After considering the evidence, I find the following facts by a preponderance of the evidence:

1. On July 30, 2003, the Respondent was originally licensed as a real estate agent in Maryland. The Respondent held a valid real estate agent license at all times relevant to this matter.
2. At all times relevant to this matter, the Respondent was employed with Fairfax Realty Inc., as a real estate salesperson.
3. The Complainant owned the residential property located at 3711 Jones Bridge Road, Chevy Chase, Maryland (the Property). The Complainant was the seller of the Property.
4. The Respondent acted as the Buyer's agent for the purchase of the Property.
5. On June 3, 2007, the Respondent presented the Complainant with the Buyer's contract of sale to purchase the Property. The offered contract price was \$525,000.00.
6. The contract of sale stipulated that a \$15,000.00 earnest money deposit be paid by the Buyer. The initial deposit was to be \$5,000.00 and was due at the time of the contract signing. An additional \$10,000.00 deposit was to be paid within fourteen days from the date of contract acceptance.
7. The Respondent contacted the listing agent to discuss whether a contingency agreement, sought by the Buyer, could be added to the contract. The contingency was that the Buyer would only be required to pay the additional \$10,000.00 if the Buyer was able to sell another piece of property he owned.

8. In order to ensure that the Complainant would sign the contract, the listing agent declined to include the contingency agreement in the contract and informed the Respondent that the agreement would not be included in the contract.
9. The Respondent did not tell the Buyer that the proposed contingency agreement was rejected.
10. On June 2, 2007, the Respondent and the Buyer signed the contract of sale.
11. On June 5, 2007, the Complainant signed and accepted the contract of sale.
12. Once the Complainant accepted the contract, the Respondent collected and forwarded the initial \$5,000 earnest money deposit from the Buyer to the Complainant.
13. At some point during the fourteen days after June 5, 2007, the Respondent verbally informed the listing agent's husband that the additional \$10,000.00 deposit would only be paid in the event that the Buyer was able to sell another piece of property.
14. The Respondent has had no previous statutory or regulatory violations.

DISCUSSION

Statutory and Regulatory Provisions

The Commission charged the Respondent with violating Business Occupations Article § 17-322 (Supp. 2009). The relevant portions of the statute provides as follows:

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

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

...

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

The Commission also charged the Respondent with violating the REC Code of Ethics at COMAR 09.11.02.02H, which provides as follows:

.02 Relations to the Client.

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

The Merits of the Instant Case

The Commission's charges arise out of a residential contract of sale for the Complainant's home. There is no dispute that at the time of the transaction the Respondent was licensed by the Commission as a real estate agent and he was affiliated with Fairfax Realty. The Commission argued that the Respondent acted incompetently when he failed to include the contingency in writing and, by failing to do so, he did not protect the interest of all the parties. I find that the evidence overwhelmingly supports the Commission's charges.

The Respondent admitted at the hearing that the contingency agreement was never put into the contract of sale. He testified that based on a conversation with his professional mentor, he believed the contingency was not required to be included in the contract of sale. He further indicated that the listing agent told him not to put the contingency in writing.

None of the explanations provided by the Respondent undercut or contradict the Commission's theory of the case. It is the responsibility of a real estate agent to know the basics of contract construction as well as the relevant state laws regarding real estate contracts. The Respondent is not relieved of his professional duties to the public under the law because he relied on incorrect advice or guidance. By failing to place the contingency in writing, the Respondent did not protect the Buyer's interest in not being responsible for an additional \$10,000.00

payment even if he was unable to sell another property. The Complainant's interest in obtaining a total earnest money deposit of \$15,000.00 was also not protected; upon reviewing the contract on its face, the Complainant had no way of knowing that the additional \$10,000.00 payment was contingent upon other factors. The Respondent's actions were incompetent and his conduct violated Business Occupations Article § 17-322(b)(25) and COMAR 09.11.02.01(H).

The statute is designed to protect the public from professional wrongdoing, whether or not a real estate agent's actions were deliberate. An incompetent real estate agent can be as detrimental to society as a fraudulent one. At the hearing, the Respondent did not seem to understand why his actions were wrong. He believed that he should not be reprimanded because the listing agent's husband told him the contingency did not have to be in writing. The statute and regulation seek to protect the public's expectation of a certain level of competency on the part of paid professionals. It was the duty and obligation of the Respondent to know that in order for the contingency to be enforceable, the agreement had to be written into the contract of sale.

Business Occupations Article § 17-322(c) (Supp. 2009) governs the imposition of monetary penalties and provides, 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. ...

Although the Respondent has no prior history of violations, his actions in this case are serious violations that caused harm to his client and to the Complainant. On the other hand, the Respondent acted in good faith. Although his belief that the contingency agreement did not need

to be in writing was mistaken, his failure to reduce it to writing was not malicious. The Respondent is guilty of being ignorant of the law of contracts, but not of intentionally deceiving anyone. Thus, his conduct does not warrant a revocation of his real estate license. Instead, the Commission's recommendation of a monetary civil penalty and a reprimand is appropriate. Accordingly, I recommend a penalty of \$1,000.00 for the violation of Business Occupations Article § 17-322(b)(25) and a penalty of \$1,000.00 for the violation of COMAR 09.11.02.01H, for a total civil penalty of \$2,000.00. In addition to the civil penalty, I recommend a reprimand.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Respondent violated Business Occupations Article § 17-322(b)(25) and COMAR 09.11.02.02H.

I further conclude as a matter of law that the Maryland Real Estate Commission may reprimand the Respondent and may impose on him a monetary penalty of \$2,000.00. Md. Code Ann., Bus. Occ. & Prof. §§17-322(b)(25), 17-322(c) (Supp. 2009); COMAR 09.11.02.02H.

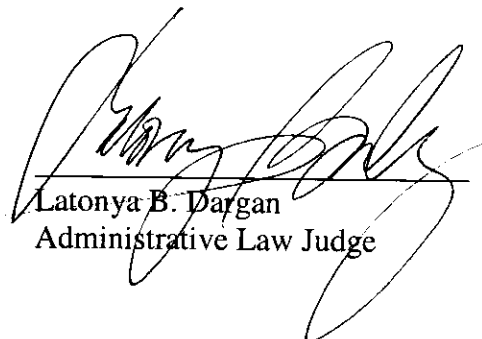
RECOMMENDED ORDER

IT IS THEREFORE **RECOMMENDED** that the Maryland Real Estate Commission:
ORDER that Respondent Kwaku Agyapong be reprimanded and required to pay a \$2,000.00 civil penalty for violating the provisions of the Business Occupations Article and the Real Estate Commission Code of Ethics; and,

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

July 27, 2010
Date Decision Mailed

#115327



Latonya B. Dargan
Administrative Law Judge

**MARYLAND REAL ESTATE
COMMISSION**

v.

**KWAKU AGYAPONG,
RESPONDENT**

*** BEFORE LATONYA B. DARGAN,
* AN ADMINISTRATIVE LAW JUDGE
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* OAH CASE NO.: DLR-REC-21-09-46308
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FILE EXHIBIT LIST

Agency Exhibits:

- REC #1: Notice of Hearing, dated March 31, 2010
- REC #2: Computerized printout of the Respondent's REC Licensing History, dated May 13, 2010
- REC #3: Statement of Charges, dated November 18, 2009
- REC #4: Residential Contract of Sale, dated June 3, 2007

Respondent Exhibits:

The Respondent did not submit any exhibits.