

THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE
COMMISSION

V.

ELAINE GORDY
RESPONDENT

* BEFORE HARRIET C. HELFAND,
* ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* OAH No: DLR-REC-21-12-26881
* REC CASE NO: 2012-RE-030

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated January 3, 2013, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 28th day of February, 2013,

ORDERED,

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

and,

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

MARYLAND STATE REAL ESTATE COMMISSION

SIGNATURE ON FILE

2/28/13
Date

By: _____
Marla S. Johnson, Commissioner

**MARYLAND REAL ESTATE
COMMISSION**

v.

**ELAINE GORDY,
License # 4210760,
RESPONDENT**

*** BEFORE HARRIET C. HELFAND,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* OAH No.: DLR-REC-21-12-26881
* REC CASE No.: 12-RE-30**

*** * * * ***

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 April 20, 2012, the Maryland Real Estate Commission (REC) issued a Statement of Charges against Elaine Gordy (Respondent), a licensed real estate broker, alleging that she violated sections 17-322(b)(3), (25), (32) and (33) and 17-532(c)(1)(i) of the Business Occupations and Professions Article of the Maryland Annotated Code, as well as Code of Maryland Regulations (COMAR) 09.11.02.02A. On May 3, 2012, the REC forwarded the Statement of Charges to the Office of Administrative Hearings (OAH) for a hearing and issuance of a recommended order.

On October 26, 2012, I conducted the hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. § 17-408 (2010). Assistant Attorney General Kris King represented the REC. The Respondent represented herself.¹

The Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012), COMAR 09.11.03, and OAH's Rules of Procedure, COMAR 28.02.01, govern procedure in this case.

ISSUES

- (1) Did the Respondent willfully make a misrepresentation or knowingly make a false promise, act in bad faith or in an incompetent or untrustworthy manner in the provision of real estate services?
- (2) If so, what is the appropriate sanction?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following REC exhibits offered into evidence:

- | | |
|--------|--|
| REC #1 | Notice of Hearing, dated August 10, 2012 |
| REC #2 | Statement of Charges and Order for Hearing, dated April 30, 2012 |
| REC #3 | Respondent's Licensing History |
| REC #4 | Consent Order, dated May 2, 2012 |

¹ On the afternoon of October 25, 2012, OAH received a fax from James P. Nolan, Esq., requesting a postponement of the hearing per the request of the Respondent, having been contacted by the Respondent on October 24, 2012 at 4:05 p.m. with a request to represent her in this matter. The OAH postponement office denied the request on the basis that the Respondent, who was notified of the hearing on August 10, 2012, had adequate time to obtain counsel. On October 26, 2012, the Respondent appeared at the hearing alone and renewed the request for postponement in order to be represented by counsel at a later date. The REC opposed the postponement request. For the same reason stated by the OAH postponement office, I denied the Respondent's request.

REC #5 Report of Investigation, with attachments, dated December 13, 2011

REC #6 Photographs

I admitted the following Respondent's exhibits offered into evidence:

Resp. #1 Email, dated August 28, 2011

Resp. #2 Lockbox Access Log-Serial Number 00470207

Resp. #3 Letter from Mark S. Holloway, CRB, GRI, Vice President, Eastern Shore Area Manager, to Katherine Connelly, Executive Director, REC, dated August 25, 2011

Resp. #4 Letter from Sheila Dodson, Executive Director, Coastal Association of Realtors, to the Respondent, dated October 24, 2012

Testimony

The REC presented the following witnesses: William F. Reynolds, Investigator, REC and Susan Rivera.² The Respondent testified on her own behalf.

FINDINGS OF FACT

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

1. The Respondent is a licensed real estate agent with Long & Foster Real Estate, Inc. (Long & Foster). The Respondent has been licensed since June 1984. Her current license, # 3933980, expires January 3, 2012.
2. On or about July 18, 2010, the Respondent entered into a Residential Exclusive Listing Agreement (Agreement) with Susan Rivera (Owner) to place on the Multiple List Service (MLS) and sell 6648 Oak Ridge Drive, Hebron, MD (the Property).³ At the

² Ms. Rivera, who testified by telephone, was the complainant in this case.

³ "Listing" means entering the Property into the regional multiple listing entity (MLS) database.

time, the Owner was living in Florida and her daughter was living in the Property. All of the documents were signed by the Owner electronically.

3. Around this time, the Respondent met with the Owner's daughter and walked through the Property. She found a number of items to repair and gave a list to the Owner's daughter and spoke with the Owner about the inspection.⁴ The Owner stated she would see that the items were repaired.
4. The Owner had previously listed the Property with two other real estate sales companies, ERA (twice) and Martin and Moore Realty. Neither company had been able to sell the Property.
5. After executing the Agreement, the Respondent placed a sign and a lockbox on the Property.
6. Between July 18, 2010 and September 15, 2010, the Respondent showed the Property to potential buyers two times. Neither was interested in purchasing the Property.
7. The Owner never made the recommended repairs to the Property. The Owner's daughter moved out of the Property in October 2010. After the Property was vacant, the Respondent brought Long & Foster's rental property manager to see the Property to determine whether it could be rented. The manager indicated that the repairs would have to be made prior to rental. The Respondent informed the Owner about the manager's comments.
8. The Respondent never made repairs to the Property.
9. In early November 2010, the Owner checked the internet for a listing of the Property, but did not find one. She called Holley Campbell, an agent with ReMax Premiere

⁴ Some of the deficiencies in the property were stained carpeting, unsightly siding and exterior trim, debris and broken furniture in a poorly maintained yard, and rooms stuffed with boxes and other stored items.

Properties (ReMax), and asked Ms. Campbell to check whether the Property had been listed with Long & Foster. Ms. Campbell told the Owner that she could not find the listing.

10. The Owner then called the Respondent. The Respondent checked and did not see the Property listed, but took steps on November 6, 2010 to list the Property.
11. On November 8, 2010, the Owner contacted the Respondent and told her to take the Property off of the market. The Respondent withdrew the listing at that time.

DISCUSSION

Section 17-322(b)(3), (25), (32) and (33) of the Business Occupations Article provides as follows:

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

Grounds.

...

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

...

(3) directly or through another person willfully makes a misrepresentation or knowingly makes a false promise;

...

(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.

Md. Code Ann., Bus. Occ. § 17-322(b)(3), (25), (32) and (33) (2010).

Section 17-532 of the Business Occupations Article states, in pertinent part:

§ 17-532. Duties to client.

...

(c) In general.—(1) A licensee shall:

(i) act in accordance with the terms of the brokerage agreement.

Md. Code Ann., Bus. Occ. § 17-532(c)(1)(i) (2010).

COMAR 09.11.02.02A states: “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.”

In this matter, the charges against the Respondent arose from the failure to place the Property on the MLS following the execution of the Agreement. The REC alleges that, by this omission, the Respondent violated provisions of the Business Occupations Article by engaging in misrepresentation, bad faith and/or incompetency, or untrustworthiness, and therefore is subject to sanction. After considering the evidence presented at the hearing, I find that although the Respondent failed to ensure that the Property was included in the MLS at the time of the Agreement, this omission was not intended and did not result from any misrepresentation or bad faith on the part of the Respondent.

The Respondent credibly testified that at the time of the Agreement, the practice in her office was that an agent would submit a listing agreement and another individual in the office, who was responsible for administrative duties, would place a property on the MLS.⁵ Having

⁵ The Respondent noted that now agents place properties on the MLS themselves.

turned in the Agreement, the Respondent assumed that it had been properly listed. While I believed the Respondent, I also find that this practice did not absolve her from the responsibility of ensuring that Property had been listed properly.

It is obvious that the Respondent believed that the Property was on the MLS from the inception of the Agreement. She placed signage on the Property, showed it to prospective buyers, and recommended improvements to enhance the prospects of a sale. When the Respondent discovered in November 2010 that the Property was not included in the MLS, she promptly made sure it was properly listed.

I found the Owner's testimony neither credible nor persuasive. Although she claimed that the Property lost value by not being listed, no evidence was offered to support this contention. When asked for details on her interactions with the Respondent regarding the Property, the Owner frequently was unable to remember enough to answer the question. At the time the Respondent entered into the Agreement with the Owner, the Property had already been listed by at least two other real estate brokers, with no sale. Photographs offered by the Respondent demonstrated the Property's state of disrepair. In spite of these obstacles, the Respondent was able to show the property to prospective buyers between July and November, albeit without results.

Although the Respondent speculated that the listing could have been "lost in the system," or have been inadvertently deleted, I find it more likely than not that the Property was never included in the MLS prior to November 2010. While this might not have been a function ordinarily performed by the Respondent in her office structure at the time, it nonetheless remained her responsibility to see that the Property was properly listed. To do so

was part of her duty as a party to the Agreement, and by not fulfilling that obligation, she violated section 17-532(c)(1)(i).

I do not find, however, that the Respondent engaged in any acts of misrepresentation, untrustworthiness or bad faith. Although her failure to ensure the Property's inclusion in the MLS from July to November 2010 was not a testament to her competence, the evidence suggests that this was an act of sloppiness rather than overall incompetent performance. However, since sections 17-322(b) (32) and (33) make any violations actionable, the Respondent's violation of section 17-532(c)(1)(i) and an omission which could have left the Owner's interest unprotected, in violation of COMAR 09.11.02.02A, renders her subject to sanction.

Section 17-322(c) of the Business Occupations Article addresses penalties for violations in 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. § 17-322(c)(1) and (2) (2010).

The REC argued at the hearing that the Respondent's violations deserved a \$6,000.00 penalty as well as a ten-day suspension of her license. The REC arrived at the penalty by assessing \$1,500.00 for each proposed violation. The REC based its recommendation on its

belief that the Respondent's account contained unsupportable inconsistencies and that her explanation lacked credibility. The REC further asserted that a prior incident involving the Respondent necessitated the imposition of a significant penalty.

Contrary to the REC's contentions, I found the Respondent's actions based on error rather than malicious intent and that her failure to follow through on the listing in July indicated carelessness, not misrepresentation. No quantifiable harm was proven by the Respondent's violations. Moreover, the prior incident noted by the REC was irrelevant to the matter at hand

and had no bearing on the alleged violations in this case.⁶ However, because the Respondent did violate the statute, she is not completely absolved from sanction. It is vital that someone in a position of trust, such as the Respondent, be reliable and dependable when executing agreements with potential clients. In this matter, the Respondent, even if unintentionally, breached that trust by her inattention. Consequently, I recommend that the Respondent be reprimanded by the REC and that a \$1,500.00 penalty (\$500.00 each for violations of sections 17-322(b)(32) and (33) and COMAR 09.11.02.02A) be imposed.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Respondent did not act in accordance with the terms of a brokerage agreement and failed to protect and promote the interests of her client, and that these violations constituted grounds for a sanction and penalty. Md. Code Ann., Bus. Occ. §§ 17-322(b)(32) and (33) (2010); 17-532(c)(1)(i) (2010) and COMAR 09.11.02.02A.

⁶ The history of the Respondent's prior violation presented by the REC consisted of a Consent Order, dated May 2, 2012, in which the Respondent was ordered to pay an administrative fee of \$100.00 and a fine of \$1,500.00 for failing to complete the required number of continuing education hours for the renewal of her license.

I further conclude that the appropriate sanction is a reprimand and a \$1,500.00 penalty. Md. Code Ann., Bus. Occ. § 17-322(c)(1) and (2) (2010).

RECOMMENDED ORDER

I **RECOMMEND** that the Maryland Real Estate Commission **REPRIMAND** the Respondent and impose a penalty of \$1,500.00.

January 3, 2013
Date Decision Issued

HCH/tc
Doc. # 138327

SIGNATURE ON FILE

Harriet C. Helfand
Administrative Law Judge