

FINAL ORDER

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MAY 07 2012

**MARYLAND REAL ESTATE
COMMISSION**

**MARYLAND REAL
ESTATE COMMISSION**

v.

**JESSIE BANKS
Respondent**

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* **CASE NO. 2008-RE-785**
* **OAH NO. DLR-REC-24-11-08610**

And

**CLAIM OF JEWEL BALTIMORE
AGAINST THE MARYLAND
REAL ESTATE GUARANTY FUND**

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OPINION AND FINAL ORDER

This matter came before the Maryland Real Estate Commission (“Commission”) on argument on Exceptions filed by the Respondent, Jessie Banks, to the Proposed Order of October 18, 2011. On August 25, 2011, Administrative Law Judge Kimberly A. Farrell (“ALJ”) filed a Proposed Decision and Recommended Order in which she recommended that the Respondent pay a civil penalty of \$5,000.00 and that the claim of Jewel Baltimore against the Maryland Real Estate Guaranty Fund be allowed in the amount of \$2,500.00.

On October 18, 2011, the Commission issued a Proposed Order that affirmed the Findings of Fact and Conclusions of Law in the Proposed Decision of the ALJ. In its Proposed Order, the Commission amended the Recommended Order as follows:

“ORDERED that the Respondent Jessie Banks violated Md. Bus. Occ. and Prof. Art. § 17-322(b)(25) and (32); and § 17-532(c)(1)(iv);

ORDERED that the Respondent Jessie Banks be assessed a civil penalty in the amount of \$5,000.00 which shall be paid within thirty (30) days of the date of this Proposed Order;

ORDERED that the claim of Jewel Baltimore against the Maryland Real Estate Guaranty Fund be GRANTED in the amount of \$2,500;

ORDERED that the Respondent Jessie Banks shall be ineligible for a real estate license until the civil penalty is paid, and the Guaranty Fund is repaid in full, together with any interest that is due;

ORDERED that a licensing hearing before a panel of Commissioners of the Maryland Real Estate Commission be held should the Respondent Jessie Banks apply for a license or for reinstatement of a license that has expired;

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

A hearing on the Exceptions filed by the Respondent was held by a panel of Commissioners, consisting of Commissioners Robin L. Pirtle, Anne S. Cooke, and Georgiana S. Tyler, on January 18, 2012. Peter Martin, Assistant Attorney General, represented the Commission. Both the Respondent, Jessie Banks, and the Claimant, Jewel Baltimore, waived the right to counsel at the hearing. A transcript of the hearing before the ALJ was provided for the Commission’s review. The proceedings were electronically recorded.

PRELIMINARY MATTERS

On behalf of the Commission, Mr. Martin introduced, as preliminary exhibits, those exhibits which were admitted at the hearing before the ALJ. Ms. Banks initially

objected to the introduction of the Office of Administrative Hearings' Notice of Hearing ("Exhibit REC 1") and an Affidavit from a Commission employee detailing the information she had obtained from the Motor Vehicle Administration's computer system regarding the Respondent's address ("Exhibit REC 4"). Mr. Martin argued that Department regulations provide that the record at an Exceptions' hearing is to include all of the documentary evidence admitted into evidence before the ALJ. Ms. Banks then agreed to the introduction of the exhibits in question.

Ms. Banks contended that she did not receive notice of the hearing before the ALJ and that she should, therefore, be permitted to present additional evidence to rebut the regulatory charges and the Guaranty Fund claim filed against her in this case. Mr. Martin stated that, as reflected by the documents entered into the record at the hearing before the ALJ, notice of the hearing before the ALJ was sent to Ms. Banks at both her business address of record with the Commission and an address listed as Ms. Banks' most recent address with the Maryland Motor Vehicle Administration. Mr. Martin argued, citing *Golden Sands Club v. Waller*, 313 Md. 484, 500 (1998) and *Griffin v. Bierman*, 403 Md. 186, 208 (2008) that in determining whether the requirements of procedural due process have been met in the context of notice, actual receipt of the notice is not the test. Rather, the test is whether the method used for notice was reasonable and, in the case of the mailing of a notice, whether the notice was mailed, not whether it was received. Mr. Martin pointed out that Ms. Banks was interviewed concerning this matter prior to the expiration of her real estate broker's license, as evidenced in the Commission's Report of Investigation, and was aware of the pending complaint. (See Exhibit REC 6, page 3.)

The Commission finds that notice of the hearing before the ALJ was sent to Ms. Banks' last known business address in accordance with the requirements of § 17-324(d), Business Occupations and Professions Article ("Md. Bus. Occ. & Prof. Art."), *Annotated Code of Maryland*. The Commission notes that a real estate broker is required to notify the Commission when there is a change in address (See Md. Bus. Occ. & Prof. Art. §17-520.) No evidence was produced by Ms. Banks that she had notified the Commission that her business address had changed. The Commission further finds that, in addition to sending notice of the hearing before the ALJ to Ms. Banks at her last known business address as required by law, the Commission also sent notice to Ms. Banks of the hearing at the home address she had listed with the Maryland Motor Vehicle Administration. The Commission concludes that although Ms. Banks may not have received actual notice of the hearing before the ALJ, the Commission took reasonable steps to notify her of the hearing before the ALJ by mailing notice of the hearing before the ALJ to both her last known business address on record with the Commission and to a home address she had listed with the Maryland Motor Vehicle Administration. The Commission concludes that the requirements of procedural due process in regard to notification of Ms. Banks of the scheduled hearing before the ALJ were met and the ALJ properly conducted the hearing in her absence.

Ms. Banks also sought to introduce evidence and provide the testimony of witnesses at the Exceptions' hearing. Mr. Martin objected to Ms. Banks' request based on regulations governing the introduction of additional evidence at an Exceptions' hearing. The Commission reviewed Ms. Banks's proffered documents and testimony set forth in her January 3, 2012 letter to the Executive Director of the Commission

(Commission Exhibit #4) and determined that the additional evidence did not meet the requirements of Code of Maryland Regulations (“COMAR”) 09.01.03.09 K. which provides:

“Additional evidence may not be introduced unless the party seeking to introduce it demonstrates to the satisfaction of the administrative unit that the new evidence:

- (1) Is relevant and material;
- (2) Was not discovered before the ALJ hearing; and
- (3) Could not have been discovered before the ALJ hearing with the exercise of due diligence.”

Specifically, the Commission concludes that the evidence which Ms. Banks sought to introduce was available and discoverable with the exercise of due diligence prior to the ALJ’s hearing. Therefore, the Commission denied Ms. Banks’ request to introduce additional, new evidence at the Exceptions’ hearing.

SUMMARY OF THE EVIDENCE

On behalf of the Commission four exhibits, as well as the transcript of the hearing before the ALJ and the exhibits which were entered into the record at the hearing before the ALJ, were entered into the Exceptions’ hearing record.

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

At all times relevant to this matter, the Respondent was a licensed real estate

broker. Her license expired on October 7, 2010. FF 1.¹ In late 2007, the Claimant, Jewel Baltimore, was interested in purchasing a home and engaged her aunt, Deborah Price-Scott, a licensed real estate salesperson, to assist her as the buyer's agent. FF 2. Despite having been licensed for more than a year, Ms. Price-Scott had never actually served as an agent for the purchase or sale of a home. FF 3. Ms. Price-Scott's mother was terminally ill at the time and because her time was absorbed by the demands of attending to her mother's needs, arrangements were made for the Respondent, Jessie L. Banks, to assist Ms. Baltimore in purchasing a home. FF 4, 5.

The Claimant made an offer on a residential property located at 9308 Fordsville Court in Clinton, Maryland (the "Property") on January 21, 2008. The offer included an addendum form seeking a \$10,000.00 decorator's allowance. Negotiations occurred between the buyer, through the Respondent, and the sellers. Among other adjustments, the \$10,000.00 decorator's allowance figure was marked out and \$5,000.00 was substituted. The sellers signed the contract and the addendum, as amended, on January 29, 2008. FF 6. The Respondent prepared all of the documents relating to the transaction and conducted all of the negotiations on behalf of the Claimant. FF 7.

At some point, there came to be a problem with the decorator allowance. The Claimant was shown a settlement sheet in advance that showed the allowance, but the allowance was not on a subsequent settlement sheet. The Claimant was in regular contact with the Respondent regarding the decorator allowance and other matters and made it clear she would not go to settlement without the decorator allowance. The Respondent

¹ "FF" refers to the ALJ's Findings of Fact.

repeatedly assured her that she would get the decorator allowance and that the sellers would come to the settlement table with a check for her for \$5,000.00. FF 8. The Respondent knew that this was not true and that there was no plan for the sellers to pay the Claimant \$5,000.00 at settlement. FF 9.

At settlement on February 28, 2008, the Claimant became aware that the sellers had not agreed to pay her \$5,000.00 in cash as a decorator allowance. The Claimant was angry and upset, particularly with the Respondent, because the Respondent had made material misrepresentations to the Claimant regarding the \$5,000.00 decorator allowance. FF 10. Settlement went on for approximately five hours with the Claimant firmly maintaining that she was not going to go through with settlement unless she received the \$5,000.00 decorator allowance. FF 11. The Respondent and Ms. Price-Scott agreed each would pay the Claimant \$2,500.00 and the Respondent signed a promissory note on February 28, 2008 promising to pay the Claimant \$2,500.00 by March 31, 2008. Ms. Price-Scott paid \$2,500.00 as agreed. FF 12. Approximately one week later, the Respondent and Ms. Scott-Price had a conversation regarding the decorator allowance and the Respondent told Ms. Scott-Price that she would never pay the \$2,500.00 to the Claimant. FF 13. The Respondent did not pay the Claimant \$2,500.00 by March 31, 2008. FF 14. The Claimant contacted the Respondent and inquired about the \$2,500.00. The Respondent told the Claimant that she had consulted an attorney and could not pay the money based on the advice of counsel. FF 15. Sometime between April 14, 2008 and April 21, 2008, the Claimant sent the Respondent a letter demanding payment and, on April 21, 2008, the Respondent replied by e-mail, promising to mail a check by April 30, 2008. FF 16. The Respondent did not meet that deadline and never paid any money to

the Claimant. FF 17. In the course of investigating the complaint and claim the Claimant filed with the Commission, Commission Investigator Robert Oliver interviewed the Respondent on June 9, 2010. During that interview, the Respondent admitted that she signed the promissory note and advised that she signed the promissory note only to get the deal through settlement and never intended to make any payment to the Claimant. FF 19.

In July, 2010, the Respondent entered into a Consent Order with the Commission admitting to certain violations of the Md. Bus. Occ. & Prof. Art. and accepting a two-week suspension as a sanction in a matter unrelated to this case. FF 20.

It is clear that in order to foster settlement on the Property, when it appeared that settlement would not occur as a result of the dispute over the decorator allowance, and in order to preserve her commission, the Respondent promised to pay the Claimant \$2,500.00 and signed a promissory note documenting that promise. Based on evidence and testimony at the ALJ's hearing, it is also clear that the Respondent never intended to pay the Claimant \$2,500.00 and never did. The Respondent's promise to pay the Claimant \$2,500.00, memorialized in the promissory note, was a deliberate lie to induce the Claimant to go through with settlement on the Property. The Respondent's conduct was a violation of Md. Bus. Occ. & Prof. Art., §17-322 (b) (25) which prohibits a licensee from engaging in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings. The Respondent's conduct was also a violation of Md. Bus. Occ. & Prof. Art.,

§17-532 (c) (1) (iv) which requires a licensee to treat all parties to a real estate transaction honestly and fairly and answer all questions truthfully. By violating Md. Bus. Occ. & Prof. Art. §17-532 (c) (1) (iv), the Respondent has also violated Md. Bus. Occ. & Prof. Art. §17-322 (b) (32).

Instead of or in addition to reprimanding, suspending or revoking a real estate license for violations of the above cited statutes, Md. Bus. Occ. & Prof. Art., §17-322 (c) permits the assessment of up to a \$5,000.00 penalty per violation. To determine the amount of penalty to be imposed, the Commission is required to consider the following criteria:

- 1) the seriousness of the violation;
- 2) the harm caused by the violation;
- 3) the good faith of the licensee; and
- 4) any history of previous violations by the licensee.

The violations committed by the Respondent are serious. The Respondent had a duty to deal with her client honestly and fairly. Instead, in order to induce her client to settle on a property which she otherwise would not have purchased, she lied to her client, promising her that she would pay her \$2,500.00 when she had no intention of doing so. The Respondent benefited from her dishonest conduct in that she received a commission which she would not have received if the settlement had not occurred.

The Respondent's conduct harmed her client, who has not received the promised \$2,500.00 to which she is entitled. Further, her client was inconvenienced by the necessity of filing a claim with the Commission, participating in the Commission's investigation of the claim and being required to present her case at a hearing before the

ALJ. The Respondent's conduct also caused harm to the reputation of the real estate profession and violated the trust which the public accords to real estate licensees who represent them in real estate transactions.

The Respondent's lack of good faith in dealing with her client is clear. In addition, the Respondent has a history of a previous violation. In July, 2010, she entered into a Consent Order with the Commission admitting that she had violated certain provisions of the Md. Bus. Occ. & Prof. Art. Among the violations she admitted in the Consent Order, was a violation of Md. Bus. Occ. & Prof. Art., §17-322 (b) (25), which prohibits a licensee from engaging in conduct that demonstrates bad faith, untrustworthiness, incompetency, or that constitutes dishonest, fraudulent, or improper dealings, one of the same grounds for disciplinary action that she violated in this case.

The Commission concludes, based on an evaluation of the criteria noted above, that the appropriate sanction in this case would be the revocation of all real estate licenses held by the Respondent and the imposition of a civil penalty of \$5,000.00. However, the Respondent's license had expired prior to the time of the hearing before the ALJ and revocation was not possible. Therefore, the Commission concludes it appropriate to require the Respondent to appear before a panel of Commissioners for a licensing hearing if she applies for a license or for reinstatement of any expired licenses she may have been issued by the Commission.

The Claimant filed a claim for reimbursement from the Maryland Real Estate Commission Guaranty Fund ("Fund"). Claims for reimbursement from the Fund are governed by Md. Bus. Occ. & Prof. Art., § 17-404, which provides, in pertinent part:

§17-404.

(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;

. . . .

(ii) involve a transaction that relates to real estate that is located in the State; and

(iii) be based on an act or omission:

. . . .

2. that constitutes fraud or misrepresentation.

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

04. Claims Against the Guaranty Fund.

A. A guaranty fund claim shall be based on the alleged misconduct of a licensee.

B. For the purpose of a guaranty fund claim, misconduct:

(1) Is an action arising out of a real estate transaction involving real estate located in this State which causes actual loss by reason of theft or embezzlement of money or property, or money or property unlawfully obtained from a person by false pretenses, artifice, trickery, or forgery, or by reason of fraud, misrepresentation, or deceit;

(2) Is performed by an unlicensed employee of a real estate broker or by a duly licensed real estate broker, associate broker, or salesperson; and

(3) Involves conduct for which a license is required by Business Occupations and Professions Article, Title 17, Annotated Code of Maryland.

COMAR 09.11.01.18 provides further:

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

The Commission concludes that the Claimant sustained an actual monetary loss in the amount of \$2,500.00 based on the misrepresentation of the Respondent, a licensed real estate broker, that she would pay the Claimant \$2,500.00. This misrepresentation was made during the course of a transaction which involved real estate located in the State of Maryland. Therefore, the Commission concludes that the Claimant is entitled to an award of \$2,500.00 from the Fund.

CONCLUSIONS OF LAW

Based upon the ALJ's Findings of Fact, which have been adopted by the Commission and the foregoing Discussion, the Commission concludes, as a matter of law, that:

1. The Respondent engaged in conduct that demonstrates bad faith, incompetency, or untrustworthiness, or that constitutes dishonest, fraudulent, or improper dealings in violation of Md. Bus. Occ. & Prof. Art., § 17-322 (b) (25).
2. The Respondent violated Md. Bus. Occ. & Prof. Art., § 17-532-(c) (1) (iv) by failing to treat all parties to a transaction honestly and fairly and failing to answer all questions truthfully.

3. The Respondent violated Md. Bus. Occ. & Prof. Art., § 17-322 (b) (32) by engaging in conduct which violated another provision of Md. Bus. Occ. & Prof. Art., Title 17.

4. The Respondent is subject to sanctions for her conduct, and the requirement of a licensing hearing before a panel of Commissioners in the event the Respondent applies to the Commission for a license or for reinstatement of a license which has expired as well as a civil penalty in the amount of Five Thousand Dollars (\$5,000.00) are appropriate sanctions. Md. Occ. & Prof. Art., § 17-322 (c).

5. The Claimant has established an actual monetary loss recoverable from the Fund in the amount of Two Thousand Five Hundred Dollars (\$2,500.00). Md. Bus. Occ & Prof. Art., § 17-404.

ORDER

The Exceptions of the Respondent, Jessie L. Banks, having been considered, it is this 5th day of April, 2012 by the Maryland Real Estate Commission, **ORDERED:**

1. That the Respondent, Jessie L. Banks, violated Md. Bus. Occ. & Prof. Art., § 17-322 (b) (25) and (32); and § 17-532 (c) (1) (iv);

2. That the Respondent, Jessie L. Banks, be assessed a civil penalty in the amount of **Five Thousand Dollars (\$5,000.00)**, which shall be paid within thirty (30) days of the date of this Order;

3. That the claim of Jewel Baltimore against the Maryland Real Estate Guaranty Fund be **GRANTED** in the amount of **Two Thousand Five Hundred Dollars (\$2,500.00)**;

4. That the Respondent, Jessie L. Banks, shall be ineligible for a real estate license until the civil penalty is paid, and the Guaranty Fund is repaid in full, together with any interest that is due;

5. That a licensing hearing before a panel of Commissioners of the Maryland Real Estate Commission be held should the Respondent, Jessie L. Banks, apply for a license or for reinstatement of a license that has expired; and

6. That the records and publications of the Maryland Real Estate Commission 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 principal 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. *

JESSIE BANKS *
Respondent *

* CASE NO. 2008-RE-785

And *

* OAH NO. DLR-REC-24-11-08610

CLAIM OF JEWEL BALTIMORE *
AGAINST THE MARYLAND *
REAL ESTATE GUARANTY FUND *

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law, and Recommended Order of the Administrative Law Judge dated August 25, 2011, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 18th day of October, 2011

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 Jessie Banks violated Md. Bus. Occ. and Prof. Art. § 17-322(b)(25) and (32); and § 17-532(c)(1)(iv);

ORDERED that the Respondent Jessie Banks be assessed a civil penalty in the amount of \$5,000.00, which shall be paid within thirty (30) days of the date of this Proposed Order;

ORDERED that the claim of Jewel Baltimore against the Maryland Real Estate Guaranty Fund be GRANTED in the amount of \$2,500;

ORDERED that the Respondent Jessie Banks shall be ineligible for a real estate license until the civil penalty is paid, and the Guaranty Fund is repaid in full, together with any interest that is due;

ORDERED that a licensing hearing before a panel of Commissioners of the Maryland Real Estate Commission be held should the Respondent Jessie Banks apply for a license or for reinstatement of a license that has expired;

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 because the Judge failed to include a time period within which the civil penalty had to be paid or that the Respondent would be ineligible for a real estate license until the civil penalty is paid, and the Guaranty Fund is reimbursed in full, together with any interest as provided for by law. The Commission has also required that there be a licensing hearing should the Respondent apply for a new license or reinstatement of the license that has expired. The Commissioners

believe that the appropriate penalty in the case, in addition to a civil penalty, would have been revocation of all real estate licenses held by the Respondent. However, the Respondent's license had expired prior to the time of the hearing, so revocation was not possible. At the licensing hearing, the Commissioners will be able to determine whether, given the Respondent's conduct in this case as well as in a prior case, she has the professional competence and good character and reputation required to hold a Maryland 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.

SIGNATURE ON FILE

Maryland Real Estate Commission

MARYLAND REAL ESTATE	* BEFORE KIMBERLY A. FARRELL,
COMMISSION	* AN ADMINISTRATIVE LAW JUDGE
v.	* OF THE MARYLAND OFFICE
JESSIE BANKS,	* OF ADMINISTRATIVE HEARINGS
RESPONDENT	* OAH Case No.: DLR-REC-24-11-08610
and	* MREC Case No.: 2008-RE-785
CLAIM OF JEWEL BALTIMORE,	*
CLAIMANT	*
AGAINST THE MARYLAND REAL	*
ESTATE COMMISSION GUARANTY	*
FUND	*

* * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On May 7, 2008, Jewel Baltimore¹ (Claimant) filed a complaint with the Maryland Real Estate Commission (REC) and a claim against the REC Guaranty Fund (Fund) for losses allegedly suffered as a result of the actions of Jessie Banks (Respondent), a licensed real estate broker. On February 16, 2011, the REC filed regulatory charges against the Respondent based

¹ The Claimant's last name has changed. She is now known as Jewel Taylor.

on her dealings with the Claimant and authorized the Claimant to proceed with her claim against the Fund.

On June 8, 2011, I conducted a hearing at the Largo Government Center, 9201 Basil Court, Largo, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2010).² Jessica Kaufman, Assistant Attorney General, represented the REC and Hope Sachs, Assistant Attorney General, represented the Fund. The Claimant represented herself and the Respondent failed to appear at the hearing despite notices sent to several addresses. This issue was addressed on the record, and I proceeded in the Respondent's absence.

The Administrative Procedure Act, the REC's Hearing Regulations and the OAH Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't. §§ 10-201 through 10-226 (2009 & Supp. 2010); Code of Maryland Regulations (COMAR) 09.01.03 and 28.02.01.

ISSUES

1. Did the Respondent violate section 17-322(b)(25) of the Business Occupations Article by engaging in conduct that demonstrated bad faith, incompetency or untrustworthiness or that constitutes dishonest, fraudulent or improper dealings?
2. Did the Respondent violate section 17-322(b)(32) of the Business Occupations Article by engaging in conduct that violated any other provisions of the title?
3. Did the Respondent violate section 17-532(c)(iv) of the Business Occupations Article by failing to treat all parties to a transaction honestly and fairly and failing to answer all questions truthfully?
4. Did the Claimant suffer an actual monetary loss as a result of the conduct of the Respondent and, if so, what is the amount of the loss?

² Throughout this decision, Maryland Code Annotated, Business Occupations & Professions (2010) is referred to as "Business Occupations" and all references to this Article will be to the 2010 Volume.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the REC:

REC #1	Notices of Hearing and returned mail
REC #2	Hearing Transmittal (undated), Statement of Charges and Order for Hearing, February 16, 2011
REC #3	REC licensing records for the Respondent
REC #4	Affidavit of Charlotte Streat, April 13, 2011
REC #5	Consent Order and Settlement Agreement, REC case no. 08-RE-891
REC #6	REC Report of Investigation, June 16, 2010, with attachments
REC #7	REC licensing records for Deborah Price-Scott

No additional exhibits were offered by the Claimant, the Respondent, or the Fund.

Testimony

The REC presented the testimony of the Claimant (who also testified on behalf of her claim against the Fund), Deborah Price-Scott, and Robert Oliver, an investigator with REC.

The Fund did not present any additional witnesses.

FINDINGS OF FACT

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

1. At all times relevant to this matter, the Respondent was a licensed real estate broker. Her license expired on October 7, 2010. The Statement of Charges and Order for Hearing for this case issued February 16, 2011.
2. In late 2007, the Claimant was interested in purchasing a home and engaged her aunt, Deborah Price-Scott, to assist her as the buyer's agent. Ms. Price-Scott was a licensed real estate salesperson at the time.
3. Ms. Price-Scott had never actually served as an agent for the purchase or the sale of a home, despite having been licensed for more than a year.

4. Ms. Price-Scott's mother was terminally ill at the time and Ms. Price-Scott's time was absorbed by the demands of attending to her mother's needs.
5. Consequently, arrangements were made for the Respondent to assist the Claimant in purchasing a home.
6. Eventually the Claimant decided to make an offer on residential real estate located at 9308 Fordsville Court in Clinton, Maryland. She submitted an offer on January 21, 2008. The offer included an addendum form seeking a \$10,000 decorator allowance. There were negotiations back and forth between the buyer (through the Respondent) and the sellers. Among other adjustments, the \$10,000 figure was marked out and \$5,000 was substituted. The sellers signed the contract and the addendum as amended on January 29, 2008.
7. The Respondent prepared all the documents relating to the transaction and conducted all of the negotiations on behalf of the Claimant.
8. At some point there came to be a problem with the decorator allowance. The Claimant was shown a settlement sheet in advance that showed the allowance, but on a subsequent settlement sheet, the allowance had disappeared. The Claimant was in regular contact with the Respondent about this and other matters. The Claimant made it clear that she would not go to settlement without the decorator allowance. The Respondent assured her repeatedly that she would get the decorator allowance and that the sellers would come to the settlement table with a check for her for \$5,000.
9. The Respondent knew that this was not true and that there was no plan for the sellers to pay the Claimant \$5,000 at settlement.
10. At settlement on February 28, 2008, the Claimant became aware that the sellers had not agreed to pay her \$5,000 in cash as a decorator's allowance. The Claimant was angry and upset,

particularly with the Respondent, because the Respondent had made material misrepresentations to the Claimant regarding the \$5,000 decorator allowance.

11. Settlement dragged on for approximately five hours, with the Claimant firmly maintaining that she was not going to go through with settlement unless she got the \$5,000 decorator allowance.

12. The Respondent and Ms. Price-Scott agreed that each would pay the Claimant \$2,500. The Respondent signed a promissory note on February 28, 2008, promising to pay the Claimant \$2,500 by March 31, 2008. Ms. Price-Scott paid her half as agreed.

13. About one week later the Respondent and Ms. Price-Scott had a conversation about the decorator allowance. The Respondent told Ms. Scott-Price that she would never pay the \$2,500 to the Claimant.

14. The Respondent did not pay by March 31, 2008.

15. The Claimant contacted the Respondent to inquire about the money. The Respondent said that she had consulted an attorney and that she could not pay the money based on advice of counsel.

16. The Claimant sent the Respondent a letter sometime between April 14, 2008 and April 21, 2008 demanding payment. The Respondent replied by email on April 21, 2008, promising to mail a check by April 30, 2008.

17. The Respondent did not meet that deadline. She never paid any money to the Claimant.

18. The Claimant filed a complaint and a claim.

19. In the course of the investigation Robert Oliver, the REC's assigned investigator, interviewed the Respondent. In that interview, which took place on June 9, 2010, the Respondent admitted that she signed the promissory note. She further advised that she signed it

only to get the deal through settlement and she never intended to make any payment to the Claimant.

20. In July 2010, the Respondent entered into a Consent Order with the REC admitting to certain violations of the Business Occupations Article and accepting a two-week suspension as a sanction in a matter unrelated to this case.

DISCUSSION

Regulatory charges

With regard to the regulatory charges brought by the REC, the burden of proof is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2009). It rests with the REC as the moving party. *Commissioner of Labor and Industry v. Bethlehem Steel Corp.*, 344 Md. 17, 34 (1996).

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

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

...

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

...

(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[.]

Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(25) and (32).

§ 17-532. Duties to client.

(c) *In General.* (1) A licensee shall:

(iv) treat all parties to the transaction honestly and fairly and answer all questions truthfully[.]

Md. Code Ann., Bus. Occ. & Prof. § 17-532(c)(iv).

The facts of this case are not complicated. When all necessary parties were at the settlement table, it looked as if the settlement was going to fall through. To keep that from happening and to preserve her commission, the Respondent promised to pay the Claimant \$2,500. She stated that she would pay and she signed a promissory note documenting the promise. She never intended to pay and she never did. The promise was a deliberate lie told to induce the Claimant to sign the contract and go through with settlement. It manifestly violates all of the charged sections, as they have to do with bad faith, untrustworthiness, dishonest dealings, failing to treat parties to a real estate transaction honestly, fairly and failing to respond truthfully to any questions.

As a result of her conduct, the Respondent is subject to sanction under section 17-322(c) of the Business Occupations Article:

(c) *Penalty.* –

(1) Instead of or in addition to reprimanding a licensee or suspending or revoking a license under this section, the Commission may impose a penalty not exceeding \$5,000 for each violation.

(2) To determine the amount of the penalty imposed, the Commission shall consider:

- (i) the seriousness of the violation;
- (ii) the harm caused by the violation;
- (iii) the good faith of the licensee; and
- (iv) any history of previous violations by the licensee.

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

The REC seeks a recommendation that the Respondent's license be revoked. The REC acknowledged that the Respondent's license is currently expired, but suggested that a revocation could nevertheless be noted against the old Maryland license. The REC argued that if no revocation is entered it, in effect, allows the Respondent to avoid certain types of discipline by allowing the license to simply expire. The REC pointed to Business Occupations Article § 17-314(g) addressing reinstatement of licenses. That statute provides that the REC shall reinstate an expired license if the licensee: "(1) applies to the [REC] within 4 years after the license expires; (2) meets the requirement of good character and reputation; (3) complies with the applicable continuing education requirement for the period during which the individual was not licensed; and (4) pays to the [REC] a reinstatement fee set by the Commission." The REC posited that the Respondent could be reinstated if there was not a record of her license having been revoked.

Business Occupations Article § 17-322(b) permits the REC to "suspend or revoke a license if the applicant or licensee" commits one of the enumerated infractions. The Respondent is not an applicant. Neither is she currently a "licensee" as that term is defined in Business Occupations Article § 17-101(k), which, "unless the context requires otherwise," defines a licensee as "a licensed real estate broker, a licensed associate real estate broker, or a licensed real estate sales person."³ Because the Respondent is neither an applicant nor a licensee, I find no statutory authority for revoking the Respondent's expired license. The REC would prefer that her record reflect a revocation. I find the

³ The context requires otherwise in Business Occupations Article § 17-314(g), addressing reinstatement of licenses, where a person with an expired license is still referred to as a licensee. There is nothing in Business Occupations Article § 17-322(b) suggesting that the context requires a reading other than the primary definition of licensee in Business Occupations Article § 17-322(b).

conduct worthy of revocation, and the REC's argument logical, but I also find the language of the statute to be unambiguous and to fail to afford revocation as an option. This Respondent's license had expired before the Statement of Charges even issued.

The REC recommended the imposition of a civil penalty of \$5,000.00 in addition to revocation of the Respondent's real estate license. The evidence supports the recommended civil penalty. The violations that the Respondent committed were serious. There is no getting around the fact that she simply lied to her client to trick her client into settling on a property that she otherwise would not have purchased. The Respondent's motivation was personal gain.

The Respondent's actions harmed the Claimant, who has been out the \$2,500 she is entitled to for more than three years now. She was put to the inconvenience of filing a complaint and a claim, participating in the REC's investigation, and presenting a case at hearing. The lack of good faith in the Respondent's actions is clear. Finally, the Respondent has another violation in her history. In July 2010, she entered into a Consent Order with the REC admitting that she had violated certain provisions of the Business Occupations Article, including, among others, Business Occupations Article § 17-322(25) - one of the same provisions she violated in this case – engaging in conduct that demonstrates bad faith, untrustworthiness, incompetency, or that constitutes dishonest, fraudulent, or improper dealings. Therefore I recommend that the REC impose a \$5,000 civil penalty.

Guaranty Fund Claim

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

§ 17-404. Claims against the Guaranty Fund.

- (a)(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;

...

(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.

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

.04 Claims Against the Guaranty Fund.

A. A guaranty fund claim shall be based on the alleged misconduct of a licensee.

B. For the purpose of a guaranty fund claim, misconduct:

(1) Is an action arising out of a real estate transaction involving real estate located in this State which causes actual loss by reason of theft or embezzlement of money or property, or money or property unlawfully obtained from a person by false pretense, artifice, trickery, or forgery, or by reason of fraud, misrepresentation, or deceit;

(2) Is performed by an unlicensed employee of a real estate broker or by a duly licensed real estate broker, associate broker, or salesperson; and

(3) Involves conduct for which a license is required by Business Occupations and Professions Article, Title 17, Annotated Code of Maryland.

COMAR 09.11.01.18 provides further:

The amount of compensation recoverable by a claimant from the Real Estate Guaranty Fund, pursuant to Business Occupations and Professions Article, Title 17, Subtitle 4, Real Estate Guaranty Fund, Annotated Code of Maryland, shall be restricted to the actual monetary loss incurred by the claimant, but may not include monetary losses other than the monetary loss from the originating transaction. Actual monetary losses may not include commissions owed to a

licensee of this Commission acting in his capacity as either a principal or agent in a real estate transaction, or any attorney's fees the claimant may incur in pursuing or perfecting the claim against the guaranty fund.

The Claimant bears the burden of proof in this proceeding against the Fund. Md. Code Ann., Bus. Occ. & Prof. § 17-407(e). The Claimant met her burden in this case. There is no need to rehash the pertinent facts. The Fund observed that this was a "classic" case of misrepresentation and recommended that an award of \$2,500 be made to the Claimant. I shall follow that recommendation.

CONCLUSIONS OF LAW

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

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

B. The Respondent violated section 17-322(b)(32) of the Business Occupations Article by engaging in conduct that violated another provision of the title.

C. The Respondent violated section 17-532(c)(iv) of the Business Occupations Article by failing to treat all parties to a transaction honestly and fairly and failing to answer all questions truthfully.

D. The Respondent is subject to sanction for her conduct, and a \$5,000 civil penalty is appropriate. Md. Code Ann., Bus. Occ. & Prof. § 17-322(c).

E. The Claimant has established an actual loss recoverable from the Fund, in the amount of \$2,500. Md. Code Ann., Bus. Occ. & Prof. § 17-404.

RECOMMENDED ORDER

I THEREFORE RECOMMEND that the Maryland Real Estate Commission:

ORDER that the Respondent pay a civil penalty of \$5,000; and further

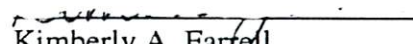
ORDER that the Claimant's claim against the Fund be allowed in the amount of \$2,500;

and

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

SIGNATURE ON FILE

August 25, 2011
Date Decision Issued



Kimberly A. Farrell
Administrative Law Judge

KAF/kkc
Doc #125560

MARYLAND REAL ESTATE	* BEFORE KIMBERLY A. FARRELL,
COMMISSION	* AN ADMINISTRATIVE LAW JUDGE
v.	* OF THE MARYLAND OFFICE
JESSIE BANKS,	* OF ADMINISTRATIVE HEARINGS
RESPONDENT	* OAH Case No.: DLR-REC-24-11-08610
and	* MREC Case No.: 2008-RE-785
CLAIM OF JEWEL BALTIMORE,	*
CLAIMANT	*
AGAINST THE MARYLAND REAL	*
ESTATE COMMISSION GUARANTY	*
FUND	*
* * * * *	* * * * *

FILE EXHIBIT LIST

I admitted the following exhibits offered by the REC:

- | | |
|--------|--|
| REC #1 | Notices of Hearing and returned mail |
| REC #2 | Hearing Transmittal (undated), Statement of Charges and Order for Hearing, February 16, 2011 |
| REC #3 | REC licensing records for the Respondent |
| REC #4 | Affidavit of Charlotte Streat, April 13, 2011 |
| REC #5 | Consent Order and Settlement Agreement, REC case no. 08-RE-891 |
| REC #6 | REC Report of Investigation, June 16, 2010, with attachments |
| REC #7 | REC licensing records for Deborah Price-Scott |

No additional exhibits were offered by the Claimant, the Respondent, or the Fund