

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE
COMMISSION

*

CASE NO. 2018-RE-487

*

v.

*

OAH NO. DOL-REC-21-23-16903

GARY MELVIN,
Respondent

*

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* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated November 30, 2023, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 29th day of January, 2024, hereby

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, **AMENDED as follows:**

ORDERED that the Respondent, Gary Melvin, be reprimanded by the Maryland Real Estate Commission;

ORDERED that the Respondent, Gary Melvin, pay a civil penalty in the amount of **Six Thousand Dollars (\$6,000.00)** within thirty (30 days) of the date this Proposed Order becomes a Final Order and all rights to appeal are exhausted;

ORDERED that all real estate licenses held by the Respondent, Gary Melvin, shall be suspended from the date this Proposed Order becomes a Final Order and all rights to appeal are exhausted and shall not be reinstated until the civil penalty is paid; and

ORDERED that the charge under subsection 17-322(b)(32) is **DISMISSED**.

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

E. Pursuant to Annotated Code of Maryland, State Government Article § 10-220, the Commission finds that the Recommended Decision of the Administrative Law Judge required modification because the Administrative Law Judge's Recommended Order made no reference to the charge under §17-322(b)(32). In the Discussion section of the Recommended Decision, the Administrative Law Judge noted in a footnote that, while the Respondent was also charged under that subsection, at the hearing the REC did not cite an additional section of the Article that Respondent may have violated (beyond those referenced in the Proposed Conclusions of Law); and therefore he did not consider §17-322(b)(32) as a separate charge for the purpose of his Recommended Decision. Accordingly, the Recommend Order is amended to indicate the charge under §17-322(b)(32) is dismissed.

F. 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, 1100 N. Eutaw Street, Baltimore, MD 21201. If no written exceptions are filed within the twenty (20) day period, then

this Proposed Order becomes final.

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

MARYLAND REAL ESTATE COMMISSION

SIGNATURE ON FILE

1/25/24
Date

By: _____

is required to be performed and
once this proposal is approved, the
this is the as agreed to the Council. The
of the proposal, and the Council shall

PLANNING DEPARTMENT

SIGNATURE ON FILE

1/2/20

MARYLAND REAL ESTATE
COMMISSION

v.

GARY MELVIN,
RESPONDENT

* BEFORE STEPHEN W. THIBODEAU,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
* OAH No.: LABOR-REC-21-23-16903
* MREC No.: 2018-RE-487

* * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On June 13, 2023, the Maryland Real Estate Commission (REC) issued a Statement of Charges against Gary Melvin (Respondent), a real estate salesperson licensed in Maryland. Following its investigation, the REC charged the Respondent with violating section 17-322(b)(4), (32), and (33) of the Business Occupations and Professions Article of the Maryland Code and Code of Maryland Regulations (COMAR) 09.11.02.02A when serving as the buyer's agent for a residence for sale by Piper Faith McKeithen (Complainant). The Statement of Charges advised the Respondent that if the charged violations were established following a hearing, the REC would seek a reprimand, suspension, or revocation of any real estate license the Respondent holds, along with a fine of up to \$5,000.00 per violation.

The Statement of Charges included an Order for Hearing to allow the Respondent an opportunity to answer the Statement of Charges. On June 21, 2023, the REC forwarded the case to the Office of Administrative Hearings (OAH) to schedule and conduct a hearing. Md. Code Ann., Bus. Occ. & Prof. § 17-324 (2018).

Accordingly, on August 8, 2023, the OAH issued a Notice of Hearing to the parties, advising them of a hearing scheduled for September 8, 2023, at the OAH. The Respondent's case was scheduled at the same date and time as case LABOR-REC-21-23-16903 (case 23-16896), in which the REC charged June Holmes, the Complainant's listing agent, with violations stemming from the same transaction. As a result, when I commenced the hearing on September 8, 2023, I consolidated this matter and case 23-16896 for hearing.¹

On September 8, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Occ. & Prof. §§ 17-324(a), 17-408(a) (2018). Hope Sachs, Assistant Attorney General, Maryland Department of Labor (Department), represented the REC. The Respondent represented himself.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, the REC's procedural regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021 & Supp. 2023); COMAR 09.01.03; COMAR 09.11.03; COMAR 28.02.01.

ISSUES

1. Did the Respondent violate Section 17-322(b)(4) of the Act by intentionally or negligently failing to disclose to the Complainant a material fact that the Respondent knew or should have known and that related to the Complainant's property?

¹ Though the hearing was consolidated, I have issued separate decisions for each respondent.

2. Did the Respondent violate Section 17-322(b)(33) of the Act by violating any regulation adopted under the Act or any provision of COMAR 09.11.02 (the Code of Ethics), including COMAR 09.11.02.02, governing relations to the client?

3. If so, what is the appropriate sanction?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the REC:²

MREC Ex. 1 - Notice of Hearing for case 23-16896, July 19, 2023

MREC Ex. 2 - Notice of Hearing for Respondent's case, August 8, 2023

MREC Ex. 3 - Statement of Charges and Order for Hearing against June Holmes, June 13, 2023

MREC Ex. 4 - Statement of Charges and Order for Hearing against the Respondent, June 13, 2023

MREC Ex. 5 - REC Licensing History for June Holmes, printed August 29, 2023

MREC Ex. 6 - REC Licensing History for the Respondent, printed August 29, 2023

MREC Ex. 7 - REC Report of Investigation, January 11, 2022, with the following attachments:

- REC Complaint filed by the Complainant, received June 25, 2018 (pgs. 1-5)
- Residential Brokerage Agreement between the Complainant, Joe Henry Jones, and United Real Estate Executives (United), October 31, 2017, with addenda and attachments (pgs. 6-37)
- Certified Funds Letter for Ann Carlista Cooper (Buyer), purported to be from Bank of America, March 5, 2018 (pg. 38)
- Contract of Sale for 8015 Pink Azalea Court, Baltimore, Maryland (Property), March 7, 2018, with addenda and attachments (pgs. 39-79)
- Email correspondence between the Complainant, June Holmes, and United, March 28, 2018 through April 12, 2018 (pgs. 80-94)
- Letter from the Respondent and Mr. Jones to Wayne Davis, Broker for United, Ms. Holmes, and the Respondent, April 12, 2018 (pgs. 95-96)
- Emails between the Respondent, the Complainant, Mr. Davis, and Ms. Holmes, April 12, 2018 through April 25, 2018, with attachments (pgs. 97-115)
- Text messages between the Complainant and Ms. Holmes, March 22, 2018 through April 10, 2018 (pgs. 116-135)
- Deed for the Property from Integrity Title and Escrow Company (Integrity), April 9, 2018 (pgs. 136-137)

² The REC exhibits were admitted in both the Respondent's case and in case 23-16896.

- Settlement Statement for the Property, with attachments, April 9, 2018 (pgs. 138-144)

MREC Ex. 8 - MREC Additional Information Request, with emails between Roderick Dotson and Integrity, March 3, 2022 to March 11, 2022

The Respondent did not offer any exhibits.

Testimony

The REC presented the testimony of Jillian Lord, Assistant Executive Director for the REC, and the Complainant.

The Respondent testified and presented the testimony of Wayne Davis, Broker for United.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was licensed by the REC as a real estate salesperson and worked for United.
2. On or about October 31, 2017, the Complainant and the Complainant's ex-husband entered into a listing agreement with United for the sale of the Property. June Holmes acted as the selling agent for the Complainant and Mr. Jones and listed the Property.
3. On March 7, 2018, the Respondent, acting as the Buyer's agent and also an employee of United, presented an offer from the Buyer to purchase the Property from the Complainant and the Complainant's ex-husband. The Buyer made an offer of \$425,000.00 to purchase the Property, which was accepted.
4. To demonstrate good faith, the Buyer presented a letter to the Respondent purported to be from Bank of America stating that the Buyer had enough funds in her Bank of America account to cover the cash purchase of the Property. In addition, the Buyer presented the

Respondent with a \$4,000.00 personal check as an earnest money deposit (EMD) for the purchase.

5. The Respondent sent the check to Integrity, the title company used for the purchase, to be held in escrow, and closing was scheduled for March 29, 2018.

6. A few weeks after the EMD check was sent to Integrity, the title company informed the Respondent that the check had bounced.

7. The Respondent spoke to the Buyer to get another check and instructed her to forward the check to Integrity.

8. The Respondent never confirmed whether Integrity received a second check from the Buyer.

9. The Respondent never confirmed whether the second check sent to Integrity was in certified funds.

10. The Respondent never informed the Complainant or Mr. Jones that the Buyer's first EMD check bounced.

11. The day before closing, on March 28, 2018, the Buyer asked to postpone closing because she was travelling to South Carolina because her sister passed away. The Complainant agreed to postpone closing at that time.

12. At that time, the Complainant was not aware that the first EMD check had bounced.

13. On or about April 6, 2018, the parties set a new closing date of April 9, 2018.

14. The parties proceeded to closing on April 9, 2018. The Buyer did not show, indicating that her bank accounts were frozen by the IRS and that she was filing for bankruptcy.

15. On the same day, the Complainant contacted Integrity and discovered that they never received a good faith deposit from the Buyer. Integrity told the Complainant that they had informed the Respondent that the second EMD check had also not cleared.

16. On or about April 10, 2018, the Complainant spoke with Wayne Davis, Broker for United. Mr. Davis confirmed that he contacted Bank of America after the failed closing and determined that the “good faith letter” the Buyer submitted as proof of funds for the purchase was fraudulent.

17. On April 11, 2018, the Complainant and Mr. Jones cancelled their listing agreement with United and unilaterally cancelled the contract of sale with the Buyer.

DISCUSSION

Regulatory Charges

The REC charged the Respondent with violating subsections 17-322(b)(4), (b)(32), and (b)(33) of the Business Occupations Article and subsection 09.11.02.02A of COMAR. Section 17-322 of the Business Occupations Article provides, in pertinent part:

(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:

...
(4) intentionally or negligently fails to disclose to any person with whom the applicant or licensee deals a material fact that the licensee knows or should know and that relates to the property with which the licensee or applicant deals;

...
(32) violates any other provision of this title;

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

...

Bus. Occ. & Prof. § 17-322(b) (Supp. 2023).

COMAR 09.11.02.02 provides, as pertinent here:

- A. 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.

When not otherwise provided by statute or regulation, the standard of proof in a contested case hearing before the OAH is a preponderance of the evidence, and the burden of proof rests on the party making an assertion or a claim. State Gov't § 10-217 (2021); COMAR 28.02.01.21K. To prove an assertion or a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

In this case, the REC bears the burden to prove by a preponderance of the evidence that the Respondent committed the violations alleged in the Charges.³ COMAR 28.02.01.21K(1), (2)(a).

1. Section 17-322(b)(4) charge (Intentional or Negligent Failure to Disclose a Material Fact)

At the hearing, the Respondent affirmed that he was aware that the Buyer's first EMD check bounced prior to closing on the Property, and that he did not inform the Complainant of that fact prior to closing. Indeed, instead of informing the sellers, the Respondent attempted to get a second check from the Buyer, but never followed up to determine whether that second check cleared with Integrity or was deposited with certified funds.

³ While the Charges note a charge under subsection 17-322(b)(32) of the Business Occupations Article, at the hearing the REC did not cite an additional section of the Business Occupations Article that the Respondent may have violated. Moreover, the REC made clear it was pursuing the other charges related to subsections 17-322(b)(4) and 17-322(b)(33) and the relevant COMAR provisions. As a result, I have not considered subsection 17-322(b)(32) as a separate charge for the purposes of this proposed decision.

The Respondent maintained at the hearing that everyone involved in the transaction, including the Respondent, the Complainant, Mr. Jones, United, and Ms. Holmes, were all “duped” by the Buyer. The facts show otherwise. Indeed, United and its employees, including the Respondent and Ms. Holmes, were made aware that the Buyer may not be operating in good faith several weeks before the scheduled closing when the first EMD check bounced. They concealed this fact from the Complainant and Mr. Jones. Rather than consult with the sellers as to what they wished to do, the Respondent and Ms. Holmes proceeded with the transaction as if nothing unusual had occurred, going so far as to request a second check from the Buyer, never confirming if that check had cleared, or asking that the second check be in certified funds.

At a minimum, therefore, the Respondent was negligent in failing to disclose a material fact to the Complainant that the Complainant should have been made aware of prior to closing: the bounced EMD check from the Buyer. There is no question that the fact that the Buyer bounced the deposit check is a material fact that should have been disclosed to the Complainant. Indeed, the Complainant testified that had she and Mr. Jones known that the first EMD check had bounced, they would have unilaterally called off the sale of the Property to the Buyer far sooner and explored other buyers for the Property. The Respondent’s conduct constituted a negligent failure to disclose to the sellers, in particular when, instead of informing the sellers of the Buyer’s potential lack of funds, he attempted a second time to retrieve funds from the Buyer, without ever confirming the funds were available. Indeed, a reasonable person in the Respondent’s shoes would, at a minimum, try to determine whether the Buyer had the funds for the sale. Beyond that, the Respondent should have informed the sellers of the potential issue regarding the Buyer’s lack of funds.

The only dispute in this case was presented in the testimony of Mr. Davis, who testified that he had a conversation with the Complainant *before* the closing date of April 9, 2018, during which he informed her of the bounced check and the Buyer's lack of funds, including the discovery of the fraudulent "good faith letter."⁴ None of the documentary evidence corroborates this claim, and the Complainant denies speaking with Mr. Davis until April 11, 2018, after the date of the scheduled closing.

Moreover, in a text message exchange between the Complainant and Ms. Holmes, the Complainant received Mr. Davis's phone number from Ms. Holmes on April 10, 2018. (REC Ex. 7, pg. 135). This strongly implies that the Complainant had no contact with Mr. Davis until after the failed closing on April 9, 2018, just as the Complainant testified. As a result, I do not find the claim by Mr. Davis that the Complainant had knowledge of the Buyer's lack of funds prior to the closing date to be credible.

For all the reasons stated, I find the REC met its burden to establish the Respondent violated subsection 17-322(b)(4) of the Business Occupations article.

2. COMAR Violation

The REC charged the Respondent with violating section 09.11.02.02A of COMAR. This charge is brought through subsection 17-322(b)(33) of the Business Occupations Article, which allows for charges for violations of applicable regulations and the REC Code of Ethics.

The REC charged the Respondent with violation of COMAR 09.11.02.02A, in particular the provision that he engaged in conduct that failed to promote and protect the interests of the Complainant. The Respondent acted as the Buyer's agent, not the Complainant's agent, so the Complainant was not technically the Respondent's client. However, the Complainant's listing

⁴ On September 14, 2023, approximately a week after the hearing, Mr. Davis sent me a letter recanting this testimony and indicating that his contention that he spoke with the Claimant before April 9, 2018, was incorrect. As the record closed on the date of the hearing, I have not considered this letter in my decision, but have retained it with the file.

agreement was with United, who was a licensed real estate broker and employed the Respondent. As a result, the Respondent had a duty to ensure that he promoted and protected the Complainant's interests, even though he was the Buyer's agent. Moreover, the Respondent had a statutory obligation to *all* parties of the transaction, regardless of relationship, as noted in COMAR 09.11.02.02A. Here, the Respondent failed to promote and protect the interests of the Complainant and Mr. Jones when he failed to disclose that the Buyer's EMD check bounced. The bounced check should have been disclosed to the Complainant and Mr. Jones because it strongly implied the Buyer did not have the funds to complete the sale of the Property. Such knowledge directly concerned the interest of the sellers, and the Respondent failed to protect those interests by seeking to go forward with a closing that the Respondent knew or should have known would fail. As a result, the REC established the Respondent violated COMAR 09.11.02.02A.

I conclude that the Respondent violated the statutes and regulations charged, and I will address sanctions as follows.

Disciplinary Sanctions

Section 17-322(c) of the Act provides as follows:

(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.

(3) The Commission shall pay any penalty collected under this subsection into the General Fund of the State.

(4) The Commission may not impose a fine based solely on a violation of subsection (b)(35) of this section.

Bus. Occ. & Prof. § 17-322(c) (Supp. 2023).

I will address the four statutory factors to determine the penalty. There is no doubt the violations were serious. The Respondent's withholding crucial information from the sellers regarding the Buyer's apparent lack of funds went to the heart of whether the sale of the Property would occur. In terms of the harm caused by the violations, the Respondent and Ms. Holmes noted that United offered the Complainant and Mr. Jones compensation because of the abandoned sale. Moreover, the Property was ultimately purchased by another buyer in June 2018, for slightly less than the Buyer offered. However, the harm here goes beyond the monetary transaction involved with the sale of the Property. It also involves the reputational damage in the public eye for the profession to be forthright with all parties involved in a transaction.

In terms of any good faith on the part of the Respondent, little is present in the record that directly implies any bad faith on the part of the Respondent. To the contrary, the Respondent presented more as someone who was negligent in his actions regarding the transaction as opposed to acting in bad faith. Finally, the Respondent does not appear to have any prior disciplinary record and has been licensed by the REC for over fourteen years.

Given all these factors, the REC recommended a monetary penalty less than the maximum for each charge against the Respondent, as well as a reprimand of the Respondent. As a result, a reprimand of the Respondent and a monetary penalty of \$6,000.00, which includes \$3,000.00 for the statutory violation, and an additional \$3,000.00 for the COMAR violation, are appropriate.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Respondent violated subsection 17-322(b)(4) and(b)(33) of the Business Occupations Article, and subsection 09.11.02.02A of COMAR. Consequently, I conclude that the Respondent is subject to the disciplinary sanctions of a reprimand and a fine of \$6,000.00. Md. Code Ann., Bus. Occ. & Prof. §§ 17-322(b), (c) (Supp. 2023).

RECOMMENDED ORDER

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

- (1) That the Respondent be reprimanded by the Maryland Real Estate Commission;
- (2) That the Respondent pay a civil penalty in the amount of \$6,000.00; and
- (3) That the records and publications of the Maryland Real Estate Commission reflect this decision.

SIGNATURE ON FILE

November 30, 2023
Date Decision Issued

Stephen W. Thibodeau
Administrative Law Judge

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