

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION *

v. *

TAMMY PHELPS
RESPONDENT

* CASE NO. 2008-RE-395

* OAH NO. DLR-REC-21-09-46313

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated September 28, 2010 having been received, read and considered, it is, by the Maryland Real Estate Commission, this 16th day of November, 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 Tammy Phelps violated Md. Bus. Occ. and Prof. Art. §§ 17-322(b)(25) and (30) and 17-530;

ORDERED that all real estate licenses held by the Respondent Tammy Phelps are SUSPENDED for ninety days;

ORDERED that the Respondent Tammy Phelps 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 all real estate licenses held by the Respondent Tammy Phelps shall be SUSPENDED if the civil penalty imposed on her in this Order is not paid in full within thirty (30) days and that this suspension is in addition to the ninety-day suspension and will continue until the penalty is paid;

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. After reviewing the facts as found by the Judge and the conclusions of law made based on those facts, the Commission believes that the appropriate penalty is a ninety-day suspension and a civil fine in the amount of \$5,000. The Respondent was an investor in the real estate for sale as well acting as the listing agent for the property. She and her fiancé and the owner of the property had verbally agreed that the owner would purchase materials for renovations, her fiancé would purchase materials and perform renovations, and she would provide real estate services to sell the property. They agreed to an even split of the profit from the sale of the property, with the Respondent agreeing to contribute any commission due to her from the sale to the profit to be shared. An offer was made on the property, which the seller accepted on January 31, 2006. The Respondent prepared the offer, and did not include a security deposit to be paid to the seller.

She was subsequently notified that the sister of one of the buyers, who was a licensee, had prepared a substitute contract that included a security deposit and a contingency for the buyers selling their current home. The Respondent was concerned that the involvement of another licensee would reduce the amount of commission she would receive and so instructed the seller to declare the previously-signed contract null and void. A release of the contract was not obtained, and the buyers were apparently not notified. They subsequently learned that a second contract had been signed with a new buyer.

The original buyers insisted that their contract was still valid, and they filed a lawsuit seeking specific performance of it. The case was settled with the original buyers agreeing to pay the higher amount offered by the second buyer, and stipulating that there would be no buyer's agent to share in the commissions.

The Respondent received the full commission, but did not share it with the seller as had been agreed on. This resulted in a second lawsuit, which was settled based on the Respondent's agreement to pay the seller \$7,000.

The Commission has concluded that the Respondent's conduct in this case warrants a more serious penalty based on these facts, as well as on the existence of prior disciplinary action (a reprimand) against her. The Respondent demonstrated a disturbing lack of competency in her activities in this transaction. She had both parties sign a contract that did not include a security deposit, a clear breach of her obligation to protect the interests of her

client, the seller. Her explanation that this was to be agreed on later does not justify the omission or the lack of any written documentation to indicate that this remained an open issue. She advised the seller that the contract could be terminated by his written declaration that it was null and void; she did not try to obtain a release from the buyers, and did not advise them of what was occurring. The record indicates that the sole reason for her effort to terminate the contract was concern over the amount of her commission. (She told the investigator that there was no agreement that the commission would be shared with the seller, making it clear that her own financial interests, not the best interests of the parties, drove her actions in the transaction.)

The Commission finds that this licensee demonstrated both a lack of competence in her handling of the transaction and a lack of good faith in her treatment of the parties. The parties had to institute two lawsuits to try to straighten out the problems that she created - one to show that her efforts to terminate the first contract had been ineffective, and the second to resolve a financial arrangement that she had not reduced to writing. What could have been a relatively routine transaction was unnecessarily complicated by her incompetence and self-dealing.

In his evaluation of the appropriate sanction, the Administrative Law Judge did not weigh the fourth factor, "any history of previous violations by the licensee." Further, he noted harm to the Complainant/seller, but did not factor in the harm to the buyers who were forced to resort to the courts to

vindicate their position, as well as pay a higher amount to obtain the property. For these reasons, and based on the evidence of a serious violation of § 17-322(b)(25), and the lack of good faith of the Respondent, the Commission believes that a greater penalty is warranted. Accordingly, it is imposing a license suspension of ninety-days and a civil penalty of \$5,000.

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.

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for *[Handwritten name]*, Commissioner

(COMMISSIONER'S SIGNATURE APPEARS ON ORIGINAL ORDER)

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on
[Handwritten signature]

MARYLAND REAL ESTATE

* BEFORE ROBERT F. BARRY,

COMMISSION

* AN ADMINISTRATIVE LAW JUDGE

v.

* OF THE MARYLAND OFFICE

TAMMY PHELPS,

* OF ADMINISTRATIVE HEARINGS

RESPONDENT

* OAH Case No.: DLR-REC-21-09-46313

* MREC Case No.: 2008-RE-395

* * * * *

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 December 20, 2007, Richard Heath (Complainant) filed a complaint with the Maryland Real Estate Commission (REC) concerning Tammy Phelps (Respondent), a licensed real estate salesperson. On December 3, 2009, the REC filed regulatory charges against the Respondent.

On June 30, 2010, I conducted a hearing at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2010). Jessica Kaufman, Assistant Attorney General, represented the REC. Attorney M. Arnold Politzer represented the Respondent, who did not appear.

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); Code of Maryland Regulations (COMAR) 09.01.03 and 28.02.01.

ISSUES

1. Did the REC properly charge the Respondent with violations of § 17-530 of the Business Occupations & Professions Article (failing to obtain consent to dual agency representation); COMAR 09.11.02.01H (failing to protect, promote, and observe absolute fidelity to the interest of the Claimant); and COMAR 09.11.02.02A (failing to protect and promote the interests of the client)?
2. Did the Respondent violate § 17-322(b)(25) of the Business Occupations & Professions Article by engaging in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent or improper dealings?
3. Did the Respondent violate § 17-322(b)(30) of the Business Occupations & Professions Article by failing to make the disclosure or provide the consent form required by § 17-530 of the Business Occupations & Professions Article?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the REC:

- REC Ex.1 - Notice of Hearing, dated April 28, 2010, for June 30, 2010
- REC Ex.2 - Transmittal from REC to the OAH, with Statement of Charges and Order for Hearing, dated December 3, 2009
- REC Ex. 3 - Respondent's licensing history with the REC
- REC Ex. 4 - Request for Investigation
- REC Ex. 5 - REC Report of Investigation, with nineteen attachments:
 1. REC Complaint, December 20, 2007, with letter from the Complainant; Regional Sales Contract marked Null & Void; Release Agreement; Settlement Agreement; FAX form; Letter, February 15, 2006, from Attorney Michael L. Rifkin to the Complainant
 2. Letter, January 25, 2008, from Greg Smith, Broker, to the REC

3. Letter, postmarked February 29, 2008, from Ken Crowley, Associate Broker/Owner, RE/MAX Realty Group, to the REC, with Account of the Respondent
4. Regional Sales Contract, marked Null & Void
5. Montgomery County Jurisdictional Addendum to Sales Contract
6. Buyer Agency Agreement, Broker Representation of Buyer
7. Note from the Complainant, with Regional Sales Contract marked Null & Void
8. Multiple Listing of Property at 19900 Hunter Road
9. Residential Contract of Sale; Sale, Financing, Settlement or Lease of Other Real Estate Addendum; Minimum Appraisal Amount; Service Providers Addendum; REC Understanding Whom Real Estate Agents Represent; Addendum #5, and other attachments; Photocopy of canceled check for \$1,000.00
10. Regional Sales Contract; Photocopy of canceled check for \$10,000.00
11. Letter, February 13, 2006, from Wanda Burt to RE/MAX Realty Group
12. Letter, February 15, 2006, from Attorney Michael L. Rifkin to the Complainant
13. Release Agreement
14. Information concerning Circuit Court for Montgomery County, Case Number 269773V
15. Letter, March 9, 2006, from Attorney Matthew J. Downs to Attorney Michael L. Rifkin; Letter, March 10, 2006, from Attorney Michael L. Rifkin to the Hannans
16. Court Settlement Agreement, March 24, 2006
17. Real Estate Settlement Statement, April 21, 2006
18. Information concerning District Court of Maryland for Montgomery County, Case Number 060200050742007
19. Court Settlement Agreement, January 16, 2008

There were no exhibits offered on behalf of the Respondent.

Testimony

The REC presented testimony from the Complainant and Robert Oliver, a REC investigator. There were no witnesses presented for the Respondent.

FINDINGS OF FACT

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

1. The Respondent has been a licensed real estate salesperson under registration number 05-528245 since at least March 21, 2001. At the time of her actions in this case, she was affiliated with RE/MAX Realty Group, a real estate broker, in Gaithersburg, Maryland. (REC Ex. 3).
2. In or about March 2005, with the Respondent acting as his buyer's agent, the Complainant purchased a property located at 19900 West Hunter Road, Beallsville, Maryland 20839. The Complainant intended to renovate the property and then sell it as soon as possible.
3. The Complainant, the Respondent, and the Respondent's fiancé, Jimmy Keglovich, had a verbal agreement whereby the Complainant would purchase materials for the renovations, Mr. Keglovich would purchase materials and perform renovations, and the Respondent would provide real estate services to sell the property.
4. The three partners agreed to an even split of the profit from the sale of the property. The Respondent agreed to contribute any commission due to her from the sale to the profit to be shared.
5. On January 30, 2006, the Respondent held an open house to show the property.
6. On that same date, the Respondent received an offer of \$450,000.00 on the property from John Hannan and his wife Jean Hungerford Hannan. The Respondent had the Hannans sign a sales contract. (REC Ex. 5, #1).

7. Under the terms of the sales contract, settlement would occur on February 23, 2006. The sales contract contained a provision for an earnest money deposit, but there was no amount listed. (REC Ex. 5, #1).

8. The first paragraph of sales contract indicated that the Respondent was acting as the seller's agent. (REC Ex. 5, #1).

9. The Respondent also had the Hannans sign a "Montgomery County Jurisdictional Addendum," which contained the following paragraph: "**Buyer Agent**. The Seller and Buyer acknowledge that the signature of the Buyer's agent below indicates that the Broker has accepted the offer of compensation to Buyer brokers made through the multiple listing service." The Respondent signed as the Buyer Agent and listed her broker as the Broker. (REC Ex. 5, #5).

10. The Respondent also had the Hannans sign a "Buyer Agency Agreement," which granted the Respondent's broker the right to represent the Hannans in the acquisition of real property. (REC Ex. 5, #6).

11. The Complainant signed the sales contract on January 31, 2006. (REC Ex. 5, #1).

12. Wanda Burt, Mrs. Hannan's sister, is a licensed real estate sales person, affiliated with a real estate broker.

13. Sometime between January 31, 2006 and February 7, 2006, Ms. Burt spoke with the Respondent's broker about the sales contract. Ms. Burt said that the Hannans were mentally challenged and that she was concerned about their interests, especially their ability to sell their existing residence, potentially requiring them to obtain a bridge loan pending the sale of their existing residence.

14. Ms. Burt prepared a new sales contract that listed Ms. Burt as the buyer agent and the Respondent as the seller's agent. This contract listed a settlement date of April 28, 2006, an

earnest money deposit of \$1,000.00, and contingencies for the sale of the Hannans' existing home and for a minimum appraisal amount equal to the sales price. (REC Ex. 5, #9).

14. The Respondent, concerned that her commission would be halved if Ms. Burt acted as a buyer's agent for the Hannans, spoke to the Complainant about Ms. Burt.

15. The Complainant shared the Respondent's concern about Ms. Burt sharing in the sales commission, which would reduce the profit to be shared among the Complainant, the Respondent, and Mr. Keglovich.

16. On February 7, 2006, the Complainant, at the behest of the Respondent, declared the original sales contract null and void. The Complainant signed a statement indicating that he canceled the contract because the "purchasers failed to apply for loan application within said time frame of contract and did not provide earnest money deposit." (REC Ex. 5, #7).

17. Neither the Respondent nor the Complainant received a release from the sales contract from the Hannans.

18. The Complainant never signed the sales contract prepared by Ms. Burt.

19. On February 9, 2006, the Respondent and the Complainant received a sales contract for the property from Melody Butler for \$457,000.00. (REC Ex. 5, #7).

20. On February 13, 2006, the Complainant accepted Ms. Butler's offer. The Respondent's broker received a check for \$10,000.00 as an earnest money deposit from Ms. Butler. (REC Ex. 5, #10).

21. On February 13, 2006, Ms. Burt wrote to the Respondent's broker, indicating that she considered the January 31, 2006 sales contract, as corrected by her in the February 7, 2006 sales contract, to be valid. (REC Ex. 5, #11).

22. On February 15, 2006, Michael L. Rifkin, an attorney for the Hannans, wrote to the Complainant, with a copy to the Respondent, asserting, as had Ms. Burt, that the Hannans had a valid sales contract with the Complainant. (REC Ex. 5, #12).

23. On March 6, 2006, the Hannans filed a *lis pendens* civil action in the Circuit Court for Montgomery County against the Complainant, seeking specific performance of the sales contract for the property. (REC Ex. 5, #14).

24. On March 8, 2006, Ms. Butler withdrew her sales contract and signed a Release Agreement with the Complainant, the Respondent, and the Respondent's broker. (REC Ex. 5, #13). Ms. Butler's earnest money deposit was returned to her.

25. On March 24, 2006, the Complainant and the Hannans reached a settlement agreement whereby the Hannans would purchase the property for \$457,000.00. The agreement also provided that there would be no buyer's agent to share in commissions and that the Hannans would dismiss their civil action against the Complainant. (REC Ex. 5, #16).

26. The sales contract went to settlement on April 21, 2006. (REC Ex. 5, #17).

27. The Respondent received a commission of \$27,420.00, (REC Ex. 5, #17), out of which she reimbursed Mr. Keglovich for his labor and for materials that he had purchased for the renovations. The Respondent did not share any of her commission with the Complainant.

28. The Complainant filed a civil action in the District Court of Maryland for Montgomery County against the Respondent for his share of the profit. (REC Ex. 5, #18).

29. On January 16, 2008, the Complainant and the Respondent reached a settlement agreement whereby the Respondent would pay the Complainant \$7,000.00 in installments. (REC Ex. 5, #19).

30. The REC previously reprimanded the Respondent for a violation of Maryland real estate law. (REC Ex. 3).

DISCUSSION

REC'S Statement of Charges

The REC purportedly charged the Respondent with violating subsections 17-322(b)(25), 17-322(b)(30), and 17-530 of the Business Occupations and Professions Article, as well as COMAR 09.11.02.01.H¹ and COMAR 09.11.02.02A.² Section 17-322 of the Business Occupations and Professions Article authorizes the REC to reprimand a licensee, or suspend or revoke a licensee's license for violation of any of the listed subsections. In addition to or in lieu of a reprimand, suspension, or revocation, the REC may impose a \$5,000.00 penalty for each violation of § 17-322. Section 17-530 of the Business Occupations and Professions Article and the two COMAR provisions do not provide for any disciplinary action; instead each of these provisions is referenced in and properly charged through § 17-322. For example, the REC properly charged the Respondent with violating § 17-530 of the Business Occupations and Professions Article by charging a violation of § 17-322(b)(30) (REC can sanction a licensee who fails to make the disclosure or provide the consent form required by § 17-530 of this title). The REC, however, did not properly charge the Respondent with violating the two COMAR provisions because the REC did not charge the Respondent with violating § 17-322(b)(33) (REC can sanction a licensee who violates any regulation adopted under this title or any provision of the code of ethics).

The Respondent did not raise any issue concerning the Statement of Charges; however, I find this to be a jurisdictional issue properly raised *sua sponte*. I find that the REC properly

¹ COMAR 09.11.02.01H. 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.

² COMAR 09.11.02.02A. 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.

charged only the violations of § 17-322(b)(25) and § 17-322(b)(30) of the Business Occupations and Professions Article. I will dismiss the other three charges. (Although I find that the violations of the code of ethics were not properly charged, I will consider the code of ethics in analyzing the properly charged violations.)

Section 17-322(b)(25)

A licensed real estate salesperson, such as the Respondent, may be disciplined if she “engages 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) (2010). In its Statement of Charges, the REC wrote:

It is alleged that the Respondent coaxed the Complainant into signing an incomplete contract stating that she would be negotiating the incomplete items with the buyers. It is alleged that the Respondent never had the Complainant read or sign the appropriate disclosure concerning dual agency. It is further alleged that the Respondent was acting as representative of both buyer and the seller at this point in the transaction.

It is alleged that soon thereafter, the Respondent told the Complainant that the buyers were hesitating regarding the transaction, and that the buyers wanted their (sic) sister (a licensed real estate salesperson), to represent them in the transaction. It is alleged that based on this, and the Respondent potentially losing part of her commission, the Respondent advised the Complainant to cancel the contract (which he did), by writing “Null and Void” on the first page of the contract.

The Respondent’s actions in this real estate transaction demonstrate, at a minimum, bad faith and incompetence.

As a licensed real estate salesperson, the Respondent was required to reduce the terms of her agreement with her fiancé and the Complainant concerning the property to writing. COMAR 09.11.02.01H. The Respondent gave a written statement to the REC in which she denied that she and her fiancé and the Complainant had the verbal agreement concerning the property described above. She claimed that she was only acting as the seller’s agent and had not agreed to contribute her commission to the shared profits. The Complainant’s testimony concerning the existence of

the verbal agreement was straightforward and convincing, and I conclude beyond any doubt that there was such a verbal agreement.

The REC alleged that the Respondent coaxed the Complainant into signing an incomplete contract stating that she would be negotiating the incomplete items with the buyers. The incomplete terms included the amount of earnest money deposit and a date of ratification. This is an additional violation of COMAR 09.11.02.01H for failure to reduce the terms of any agreement to writing.

The REC also alleged that the Respondent told the Complainant that the buyers were hesitating regarding the transaction, and that the buyers wanted Ms. Burt, Ms. Hannan's sister and a licensed real estate salesperson, to represent them in the transaction. The REC further alleged that the Respondent, concerned about having to share part of her commission, advised the Complainant to cancel the contract by declaring it null and void. I find this to be the strongest, as well as the most serious, charge against the Respondent because it eventually led to the Complainant having two contracts for sale of the property, and to being sued by the Hannans for specific performance of the original sales contract.

The Respondent made two crucial mistakes: (1) believing that Ms. Burt was interested in receiving a buyer's agent's commission for the sale of the property when Ms. Burt was actually interested in protecting her sister's interest, and (2) failing to advise the Complainant to obtain a Release from Agreement to properly rescind the original sales contract with the Hannans. The Respondent's mistaken belief that Ms. Burt was interested in receiving a buyer's agent's commission caused her essentially to panic and to advise the Complainant to void the sales contract so that the Respondent and the Complainant could avoid cutting into their shared proceeds from the sale. The Complainant subsequently accepted another sales contract while the first sales contract was still effective. When the Hannans then sued the Complainant to enforce

the first sales contract, which the Hannans considered to be a valid, ratified contract, the Complainant had to retain an attorney and eventually settle the legal action. The Respondent's conduct concerning the original sales contract, especially her failure to advise the Complainant to get a Release from Agreement, displayed incompetence. Moreover, the Respondent exhibited bad faith by mixing her own financial interest in the sale of the property with the best interest of her client, the Complainant.

Section 17-322(b)(30)

A licensed real estate salesperson, such as the Respondent, may be disciplined if she "fails to make the disclosure or provide the consent form required by § 17-530 of this title." Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(30) (2010) " The REC alleged that the Respondent failed to disclose in writing to the Complainant that she represented the Complainant as a seller's agent.³ Md. Code Ann., Bus. Occ. & Prof. § 17-530(b)(1) and (c) (2010). This written disclosure is typically accomplished by using a standard REC form: "Understanding Whom Real Estate Agents Represent." The Complainant testified convincingly that he did not receive any such disclosure document from the Respondent. The Respondent technically violated this portion of § 17-322(b)(30) of the Business Occupations and Professions Article.

The REC also alleged that the Respondent failed to provide the Complainant with a consent form, "Consent for Dual Agency." The consent form is used to obtain a client's consent to have the a real estate broker act as a dual agent⁴ in a real estate transaction by assigning one intra-company licensed real estate salesperson to represent the Complainant and one intra-company licensed real estate salesperson to represent the buyer. Md. Code Ann., Bus. Occ. &

³ "Seller's agent" means a licensed real estate broker, licensed associate real estate broker, or licensed real estate salesperson who: (i) is affiliated with or acts as the listing broker for real estate Md. Code Ann., Bus. Occ. & Prof. § 17-530(a)(6) (2010).

⁴ "Dual agent" means a licensed real estate broker, licensed associate real estate broker, or licensed real estate salesperson who acts as an agent for both the seller and the buyer . . . in the same real estate transaction Md. Code Ann., Bus. Occ. & Prof. § 17-530(a)(5) (2010).

Prof. § 17-530(d)(1)(ii) (2010). This is the only type of dual agency permitted under Maryland real estate law - a real estate salesperson on their own cannot act as a dual agent even with the consent of the parties.⁵

The Respondent's broker clearly did not authorize dual agency in this case. In a statement to the REC investigator, Mr. Crowley, the broker, said that the Respondent told him that she represented the seller and that, in any event, he would not have allowed her to represent the buyer. The REC, however, argued that the Respondent herself intended to, and, in fact, did represent both the Complainant and the Hannans in the transaction, at least between January 30, 2006 and February 7, 2006, when Ms. Burt submitted a new contract and the Complainant canceled the original contract. The REC referred to the Montgomery County Addendum and to a Buyer Agency Agreement that the Respondent had the Hannans sign on January 30, 2006. The Montgomery County Addendum contained the following provision: "The Seller and Buyer acknowledge that the signature of the Buyer's agent⁶ below indicates that the Broker has accepted the offer of compensation to Buyer brokers made through the multiple listing service."

⁵ (c) *Dual agents – Generally prohibited.* - Except as otherwise provided in subsection (d) of this section, a licensed real estate broker, licensed real estate associate broker, or licensed real estate salesperson may not act as a dual agent in this State.

(d) *Dual agents – Exception.* –

(1) (i) If a licensed real estate broker or a designee of the real estate broker obtains the written informed consent of all parties to a real estate transaction, the real estate broker may act as a dual agent.

(ii) When acting as a dual agent in a real estate transaction, a real estate broker or a designee of the real estate broker shall assign a licensed associate real estate broker or licensed real estate salesperson affiliated with the real estate broker to act as the intra-company agent on behalf of the seller or lessor and another licensed associate real estate broker or licensed real estate salesperson affiliated with the real estate broker to act as the intra-company agent on behalf of the buyer or lessee.

(2) The written consent shall identify each property for which the real estate broker will serve as a dual agent.

Md. Code Ann., Bus. Occ. & Prof. § 17-530(c) and (d) (2010).

⁶ "Buyer's agent" means a licensed real estate broker, licensed associate real estate broker, or licensed real estate salesperson who represents a prospective buyer or lessee in the acquisition of real estate for sale or for lease. Md. Code Ann., Bus. & Prof. § 17-530(a)(2) (2010).

The Respondent provided the REC a written statement, in which she indicated that she was acting as the buyer's agent for the Hannans not for the West Hunter Road property, but only for other properties they might be interested in. The REC asserted that the Respondent's claim was not credible because the Hannans had already signed a contract to purchase the property. I agree with the logic of this argument to some extent; however I cannot see why the Respondent, who was already the seller's agent and entitled to the full commission, would attempt to or intend to have her broker establish a dual agency relationship with the Complainant and the Hannans for the West Hunter Road property. There is simply no benefit in such a relationship for the Respondent. As implausible as the Respondent's claim is, it is more plausible than the Respondent attempting to create a dual agency situation that could only serve to cut into her own commission. I note that eventually the Respondent received the full commission as the seller's agent and no other agent was entitled to a commission because Ms. Burt assisted the Hannans but did not seek a commission.

Based on this rather confusing record, I am not satisfied that the Respondent acted as a dual agent for the transaction. The REC bears the burden of proof on this issue and, although it is far from clear, it appears that in this real estate transaction the Respondent represented only the Complainant, not the Hannans. She was not required to obtain consent for dual agency from the Complainant.

Sanction

The Respondent violated § 17-322 (b)(25) and a portion of § 17-322(b)(30) of the Business Occupations and Professions Article, which subjects her to being reprimanded or to having her license suspended or revoked. Md. Code Ann., Bus. & Prof. § 17-322(b) (2010). Further, § 17-322(c) of the Business Occupations and Professions Article provides for the imposition of monetary penalties 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.

The REC recommended a ninety-day suspension and a monetary penalty in the amount of \$10,000.00 (\$2,500.00 for each of four violations, counting the charged COMAR violations as one).

Based on all the evidence, I find that a monetary penalty is warranted. The Respondent's violation of § 17-322(b)(25) of the Business Occupations and Professions Article was serious because it caused harm to the Complainant, who ended up with two contracts for the property and was sued by the Hannans. The Respondent, by failing to appear for this hearing, showed little good faith in addressing her conduct. The REC previously issued the Respondent a reprimand. Because I find only one violation of § 17-322(b)(25), and a partial violation of § 17-322(b)(30), not the four violations alleged by the REC, I find it appropriate to recommend a lesser suspension than ninety days, but, in recognition of the seriousness of the violations that I found, a significant monetary penalty. Based on the entire record, I recommend a thirty-day suspension and a \$5,000.00 civil penalty.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude:

1. The REC did not properly charge the Respondent with violating a regulation or a provision of the code of ethics. Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(33) (2010); COMAR 09.11.02.01H; COMAR 09.11.02.02A.

2. The Respondent engaged in conduct that demonstrates bad faith or incompetency. Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(25) (2010).

3. The Respondent violated § 17-322(b)(30) by failing to disclose to the Complainant that she was acting as a seller's agent. Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(30) (2010).

4. The Respondent did not violate § 17-322(b)(30) by failing to disclose a dual agency or to provide the consent form required by § 17-530 concerning dual agency. Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(30) (2010).

5. The Respondent is subject to sanctions for her conduct, and a thirty-day suspension and a \$5,000.00 civil penalty are appropriate sanctions. Md. Code Ann., Bus. Occ. & Prof. § 17-322(c) (2010).

RECOMMENDED ORDER

I THEREFORE RECOMMEND that the Maryland REC:

ORDER, that the charges under Section 17-530 of the Business Occupations and Professions Article, COMAR 09.11.02.01H, and COMAR 09.11.02.02A be dismissed as not being properly charged;

ORDER that the Respondent violated Section 17-322(b) (25) of the Business Occupations and Professions Article;

ORDER that the Respondent violated § 17-322(b)(30) of the Business Occupations and Professions Article by failing to disclose to the Complainant that she was acting as a seller's agent.

ORDER that the Respondent did not violate § 17-322(b)(30) of the Business Occupations and Professions Article by failing to disclose to the Complainant that she was acting as a dual agent.

ORDER, that the Respondent's real estate salesperson's license be suspended for thirty days; and further

ORDER, that the Respondent pay a civil penalty of \$5,000.00; and further

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

ADMINISTRATIVE LAW JUDGE'S SIGNATURE
APPEARS ON ORIGINAL ORDER

September 28, 2010
Date Decision Mailed

Robert F. Barry
Administrative Law Judge

Doc #115017