

BEFORE THE MARYLAND REAL ESTATE COMMISSION

**MARYLAND REAL ESTATE
COMMISSION**

*

v.

*

CASE NO. 2019-RE-392

**MATTHEW PIVEC,
Respondent**

*

OAH NO. DOL-REC-21-21-22839

*

and

*

**IN THE MATTER OF THE CLAIM
OF JAMEY HUESTON AGAINST
THE MARYLAND REAL ESTATE
COMMISSION GUARANTY FUND**

*

*

* * * * *

PROPOSED ORDER

The Findings of Fact, Proposed Conclusions of Law and Proposed Order of the Administrative Law Judge dated April 25, 2022, having been received, read and considered, it is, by the Maryland Real Estate Commission, this __ day of June, 2022, 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, **ADOPTED in part and AMENDED in part as follows**:

ORDERED that Respondent, **MATTHEW PIVEC**, be **REPRIMANDED**;

ORDERED that once this Proposed Order becomes a Final Order and all rights to appeal are exhausted, the Claimant, **JAMEY HUESTON**, be reimbursed

from the Maryland Real Estate Guaranty Fund in the amount of **One Thousand Nine Hundred Fifty Five Dollars And Fifty Four Cents (\$1,955.54)**;

ORDERED that the Respondent, **MATTHEW PIVEC**, pay a civil penalty in the amount of **Five Thousand Dollars (\$5,000.00)** 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, **MATTHEW PIVEC**, 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 the civil penalty is paid in full and the Maryland Real Estate Guaranty Fund (the "Fund") is reimbursed, including any interest that is payable under the law and application for reinstatement is made; and*

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 it omitted from the Proposed Order that all licenses held by the Respondent be suspended until the Fund, including any interest thereon, is repaid in full.

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, 500 North Calvert Street, Baltimore, MD 21202. If no written exceptions are filed within the twenty (20) day period, then

this Proposed Order becomes final.

G. Once the 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

6/22/2022
Date

By: _____

MARYLAND REAL ESTATE
COMMISSION

v.

MATTHEW PIVEC,
RESPONDENT

And

THE CLAIM OF JAMEY HUESTON,
CLAIMANT,

AGAINST THE MARYLAND
REAL ESTATE COMMISSION

GUARANTY FUND

* BEFORE RACHAEL BARNETT,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: LABOR-REC-24-21-22839

*

*

*

*

*

*

* * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On or about December 28, 2018, Jamey Hueston (Claimant) filed a complaint against Matthew Pivec (Respondent) with the Maryland Real Estate Commission (REC or Commission) for alleged violations of the Maryland Real Estate Broker's Act, Maryland Code Annotated, Business Occupations and Professions Article, section 17-101 *et. seq.* (2018 & Supp. 2021) and the provisions at Code of Maryland Regulations (COMAR) 09.11.02, enacted under the Maryland Real Estate Broker's Act. The charges against the Respondent arise out of a property

management agreement and lease for 1217 Havenwood Road (“the Property”), owned by the Claimant and located in Baltimore, Maryland. The Claimant also filed a claim for reimbursement from the REC Guaranty Fund (Fund) for losses incurred as a result of the alleged conduct of the Respondent (Claim). On September 28, 2021, the REC issued a Statement of Charges and Order for Hearing, setting forth regulatory charges (Charges) against the Respondent and ordering a consolidated hearing on the Charges and the Claimant’s claim against the Fund. Md. Code Ann., Bus. Occ. & Prof. § 17-409(a) (2018).

On November 29, 2021 and January 25, 2022, I conducted a remote hearing via the Webex videoconferencing platform. Md. Code Ann., Bus. Occ. & Profs. §§ 17-324(a), 17-408(a) (2018); COMAR 28.02.21.20B. John Hart, Assistant Attorney General, Department of Labor, represented the REC. The Claimant represented herself. Jonathan Herbst, Esquire, represented the Respondent. Shara Hendler and Andrew Brouwer, Assistant Attorneys General, Department of Labor, represented the Fund.

The contested case provisions of the Administrative Procedure Act, the Maryland Real Estate Broker’s Act, the procedures for Administrative Hearings before the Office of the Secretary of the Department of Labor, and the Rules of Procedure of the Office of Administrative Hearings govern this case. Md. Code Ann., State Gov’t §§ 10-201 through 10-226 (2021); Md. Code Ann., Bus. Occ. & Prof. §§ 17-101 through 17-702 (2018 & Supp. 2021); COMAR 09.01.02, 09.01.03 and 28.02.01.

ISSUES

1. Did the Respondent engage in conduct that demonstrated bad faith, incompetency, or untrustworthiness or that constituted dishonest, fraudulent, or improper dealings, in violation of section 17-322(b)(25) of the Business Occupations and Professions Article¹;

¹ Title 17 of the Business Occupations and Professions Article constitutes the Maryland Real Estate Brokers Act, hereinafter “the Act.”

2. Did the Respondent fail to protect and promote the interests of a client, in violation of COMAR 09.11.02 (“the Code of Ethics”); and
3. Did the Respondent violate any regulation adopted under the Act or any provision of the Code of Ethics, in violation of section 17-322(b) (33) of the Act;
4. If so, what is the appropriate sanction?
5. Did the Claimant sustain an actual monetary loss as a result of the Respondent’s acts or omissions in his capacity as a licensed real estate broker; and,
6. If so, what is the appropriate award to the Claimant from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

The REC submitted the following exhibits, which were admitted into evidence:

- | | |
|-----------|--|
| REC Ex. 1 | Notice of Remote Hearing, October 7, 2021 |
| REC Ex. 2 | Statement of Charges and Order for Hearing, September 28, 2021 |
| REC Ex. 3 | Maryland Department of Labor licensing records, June 17, 2021 |
| REC Ex. 4 | Report of Investigation, November 25, 2020, with numbered attachments: <ol style="list-style-type: none"> 1 REC – Online Complaint Form, December 28, 2018 2 Attachment to complaint, undated 3 Department of Labor Registration information for the Respondent, May 5, 2021 4 Department of the Treasury notification, April 10, 2014 5 Commercial General Liability Declarations, February 10, 2017 - February 10, 2018 6 Letter from the Respondent to the REC, February 20, 2019 7 Department of Labor Registration information for Elizabeth Glass, January 14, 2020 8 Letter from Elizabeth Glass to the REC, February 20, 2019 9 Rental ledger for the Property, September 1, 2016 – August 31, 2019 10 Property management agreement, June 25, 2016 11 Photographs of damage to the Property, undated 12 Lease agreement, August 17, 2016 13 Email correspondence between the Claimant and the Respondent, August – September 2017 14 Email from the Claimant to the Respondent, September 14, 2016 15 Email from the Claimant to the Respondent, September 9, 2017 |

- 16 Rental Property Insurance Policy Packet,
September 29, 2017 – September 29, 2018
- 17 Email from the Claimant to the Respondent, October 21, 2017
- 18 Email from the Claimant to the Respondent, November 13, 2017
- 19 Email from the Claimant to the Respondent, November 26, 2017
- 20 Email from the Claimant to the Respondent, December 13, 2017
- 21 Email from the Claimant to the Respondent, December 21, 2017
- 22 Email from the Claimant to the Respondent, January 4, 2018
- 23 Carroll Home Services transaction report, 2010 - 2018
- 24 Carroll Home Services statement, January 21, 2018
- 25 Email from the Claimant to the Respondent, February 19, 2018

REC Ex. 5 Email from the Claimant to Tovie Campbell, Maryland Department of Labor licensing records, November 24, 2020

REC Ex. 6 Color photographs of the damage to the Claimant's home,
November 19, 2021

The Claimant submitted the following exhibits, which were admitted into evidence:

- Cl. Ex. 1 Carroll Home Services Multi-Point Service Form, January 4, 2018
- Cl. Ex. 2 Carroll Home Services receipt for fuel delivery, January 5, 2018
- Cl. Ex. 3 Carroll Home Services Invoice, January 8, 2019
- Cl. Ex. 4 Baltimore, Maryland Weather History,
December 31, 2017 – January 6, 2018
- Cl. Ex. 5 Carroll Home Services Work Order and Services Details, January 4, 2018
- Cl. Ex. 6 BGE bill, January 18, 2018, and chart of water usage costs, January 4, 2018
– April 5, 2018
- Cl. Ex. 7 BGE bill, March 2018
- Cl. Ex. 8 Water bill chart, January 2018 - April 2018
- Cl. Ex. 9 CapitalOne statement, January 8, 2018 - February 7, 2018
- Cl. Ex. 10 USAA² Visa credit card statement, April 6, 2018
- Cl. Ex. 11 Email from the Claimant to Ms. Campbell, October 31, 2020
- Cl. Ex. 12 Email from the Claimant to Ms. Campbell, November 24, 2020

² USAA is an abbreviation for the United Services Automobile Association.

The Respondent submitted the following exhibits, which were admitted into evidence:

- Resp. Ex. A Email exchange between the Claimant and the Respondent,
September 14 - 17, 2016
- Resp. Ex. B Email from the Respondent to the Claimant, January 25, 2019
- Resp. Ex. C BGE bill, November 14, 2017
- Resp. Ex. D Email exchange between the Claimant and the Respondent,
August 21 - 23, 2016
- Resp. Ex. E Email exchange between the Claimant and the Respondent,
October 5 - 10, 2017
- Resp. Ex. F Email exchange between the Claimant and the Respondent,
March 11, 2017
- Resp. Ex. H Email exchange between the Claimant and the Respondent,
November 15, 2017
- Resp. Ex. I Email exchange between the Claimant and the Respondent,
October 14, 2017
- Resp. Ex. J Email exchange between the Claimant and the Respondent,
November 15, 2017
- Resp. Ex. K Email exchange between the Claimant and the Respondent,
December 2-7, 2017
- Resp. Ex. L Email exchange between the Claimant and the Respondent,
November 26, 2017
- Resp. Ex. M Email exchange between the Claimant and the Respondent,
December 5, 2017
- Resp. Ex. N Email exchange between the Claimant and the Respondent,
December 2-7, 2017
- Resp. Ex. O Email exchange between the Claimant and the Respondent,
December 21, 2017
- Resp. Ex. P Email exchange between the Claimant and the Respondent,
January 4, 2018
- Resp. Ex. R Email exchange between the Claimant and the Respondent,
January 13, 2018

- Resp. Ex. S Email exchange between the Claimant and the Respondent,
January 16, 2018
- Resp. Ex. T Email exchange between the Claimant and the Respondent,
December 21, 2017
- Resp. Ex. U Email exchange between the Claimant and the Respondent,
January 13, 2018

The following exhibits were jointly admitted by the parties:

- Jt. Ex. 1 Email exchange between the Claimant and the Respondent, October 3, 2017
- Jt. Ex. 2 Email exchange between the Claimant and the Respondent, January 2 - 3, 2018

The Fund did not submit any exhibits for admission into evidence.

Testimony

The REC presented the testimony of Tovie Campbell, REC Investigator II.

The Claimant testified on her own behalf.

The Respondent testified on his own behalf.

The Fund did not present any witnesses.

FINDINGS OF FACT

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

1. At all relevant times, the Claimant and her spouse owned a single-family home located at 1217 Havenwood Road, Baltimore, Maryland (the Property). The Property is heated with heating oil supplied by Carroll Fuel.
2. The Respondent is a real estate salesperson, licensed³ by the REC since June 2003.

³ The Respondent's licensing history reflects several license numbers. See REC Ex. 3.

3. At all times relevant, the Respondent was working for a real estate company and used an email signature for all communications relevant in this matter which represented that he was the realtor/team leader for the Pivec Group of Keller Williams Gateway.

4. On June 25, 2016, the Claimant entered into a Property Management Agreement (the Agreement) with the Respondent, who signed the agreement in his individual capacity and listed himself as the Manager of P&E Property Management, LLC. Under the Agreement, the Respondent had many responsibilities.

5. P&E Property Management, LLC⁴ (P&E) was owned by the Respondent and his business partner, Wayne Edwards.⁵

6. The Claimant entered into the Agreement because she and her spouse were going to be living overseas and wished to rent the Property and have it maintained in their absence.

7. The Agreement required the Respondent to offer and rent the Property, and to maintain the Property in a “decent, safe and sanitary condition and in a rentable state of repair” at the Claimant’s expense. (REC Ex. 4, attachment 10).

8. The Agreement required the Respondent to “make arrangements for water, electricity, fuel, oil, sewage, and trash disposal...” and to collect “all rents, charges, and other amounts receivable on the Owner’s account in connection with the management and operation of the Property.” The Agreement also authorized the Respondent to act as the Special Power of Attorney for the Claimant and specifically “to collect rents and other funds due Owner in Manager’s name on Owner’s behalf.” (REC Ex. 4, attachment 10).

9. The Respondent had the Property listed for rent through Keller Williams Gateway.

⁴ The business has since closed.

⁵ Mr. Edwards is a licensed contractor, not a real estate agent.

10. In addition to the Respondent's management of the Property, the Claimant's neighbor periodically checked on the Property and alerted the Claimant to any concerns.

11. On August 17, 2016, tenants entered into a lease agreement with the Claimant and P&E for a lease term of September 1, 2016 through August 31, 2017 at a monthly rate of \$1,750.00 per month. The Respondent agreed P&E would manage the majority of the lease terms for the Claimant.

12. An addendum to the lease agreement required the Claimant to fill the fuel oil tank at the outset of the lease at her expense and for the tenants to reimburse the Claimant for the fuel oil immediately upon taking occupancy. The Respondent did not collect this payment from the tenants.

13. In or around September 2016, prior to the entry of the tenants into the Property, the Claimant paid for the heating oil tank to be filled with heating oil. The cost of the full tank of oil at the time was \$728.48.

14. On September 16, 2016, the Claimant wrote the Respondent an email in which she provided her account number for the heating oil contract with Carroll Fuel and explained he is authorized to access her account. (REC Ex. 4, attachment 14).

15. From late 2016 through 2017, the Claimant wrote the Respondent several emails in which she expressed concerns about his care of the Property, including not arranging for leaf removal and not repairing a broken window. The Claimant also expressed concerns about communication, including not being able to reach the Respondent by phone and the Respondent not returning her calls.

16. The Agreement required the Respondent to ensure there was sufficient heating fuel for the Property; however, he did not do so (despite having access to the relevant account and physical access to the home to check the gauge).

17. While the tenants resided in the Property, they were responsible for refilling the heating oil tank pursuant to their lease agreement.

18. On or about August 31, 2017, at the conclusion of their lease, the tenants vacated the Property, and the Respondent did not find new tenants, leaving the Property vacant.

19. On September 29, 2017, while the Claimant was in town, she and the Respondent performed a walk-through of the Property and discussed management issues, including communication issues. The Respondent pledged to do more for the Claimant than he had in the past year.

20. The Respondent did not check the heating oil after the tenants vacated the Property, and at some point in the winter of 2017-2018, the heating fuel was exhausted in the Property.

21. In late December 2017 through early January 2018, Baltimore experienced below freezing temperatures.

22. As a result, on or about January 4, 2018, water pipes in the Property burst, which cause vast amounts of water to leak throughout the home. The damage that resulted included collapsed ceilings, blistering paint, electrical shorts, warped flooring and damaged walls.

23. On January 4, 2018, the Claimant's neighbor alerted the Claimant that her home was flooded. The Claimant promptly contacted the Respondent.

24. As a result of the damage to her Property, the Claimant flew home from Europe to manage the remediation of the damages. She returned a second time several weeks later to continue to oversee the remediation of the damages.

25. The Claimant also filed an insurance claim, which covered most of the damages.

26. As a result of the Respondent's conduct, the Claimant incurred the following costs that were not covered by her insurance:

- \$1,000.00 insurance deductible
- \$728.48 in oil reimbursement
- \$227.06 in water expenses

27. On February 19, 2018, the Claimant terminated the Agreement.

DISCUSSION

BURDEN OF PROOF

With regard to the Charges, the REC bears the burden of proof, by a preponderance of the evidence, to demonstrate that the Respondent violated the applicable provisions of the Act and the controlling regulations. COMAR 09.01.02.16A. With regard to the Claim against the Fund, the Claimant bears the burden of proof, by a preponderance of the evidence, to demonstrate she suffered an actual loss because of the Respondent's acts or omissions. Md. Code Ann., Bus. Occ. & Profs. § 17-407(e) (2018); COMAR 09.01.02.16C. To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so" when all of the evidence is considered. *Coleman v. Anne Arundel Co. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

For the reasons that follow, I find that the REC has met its burden. I further find that the Claimant has met her burden.

THE DISCIPLINARY CHARGES UNDER THE ACT

The REC charged the Respondent under section 17-322 of the Act, as follows:

Grounds for discipline

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

...

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

...

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

Md. Code Ann., Bus. Occ. & Profs. § 17-322(b)(25), (33) (2018).

The REC further charged the Respondent with violating COMAR 09.11.02.02A by failing to maintain his obligation of absolute fidelity to his client by not protecting and promoting her interests.

The Merits of the Case Regarding the Charges

As the realtor and property manager for the Property from June 2016 through February 2018, the Respondent was responsible for leasing and managing the Property, including but not limited to procuring suitable tenants, collecting rent, monitoring and paying for heating oil, and ensuring that appropriate repairs were made to the Property.

The Act defines “provide real estate brokerage services” to mean engaging in any of a list of activities, including “selling, buying, exchanging or leasing any real estate.” Md. Code Ann., Bus. Occ. & Profs. § 17-101(l)(1)(i) (2018). Since the Respondent leased the Property, he was working as a real estate agent and thereby is governed by the regulations under the Act. Additionally, the Respondent used an email signature for all of his electronic communications with the Claimant that represented he was working as a real estate agent. The Respondent argued that his property management work was separate from his work as a real estate agent but his responsibilities included leasing the Property, so his conduct directly falls under the statute.

The REC alleged that the Respondent violated the Act by acting in an incompetent manner when he failed to fulfill his responsibilities under the Agreement, namely to monitor the heating oil, pay for more as needed, and to recoup the cost of the heating oil from the tenants and return that sum to the Claimant. Bus. Occ. & Profs. § 17-322(b)(25), (33). For these reasons, the REC argued it has grounds to discipline the Respondent. Furthermore, the REC argued that the Respondent failed to protect the Claimant's interests by making sure the house was in habitable repair, pursuant to COMAR 09.11.02.02.

The Respondent admitted that he was responsible for and failed to check the fuel level on the heating oil tank and that as a result of the lack of heating oil, pipes in the Property froze and burst. The Respondent testified that his "property management team" checked the home to see that there was heat on (though he did not say how often) but he did not believe the team checked the heating oil gauge. The Respondent also acknowledged that he had direct access to the heating oil account, which would allow him to make payments for fuel; however, he did not do so. The Respondent argued that the Claimant stayed involved in the maintenance of her home from overseas, which he believed relieved him of some responsibilities under the Agreement. This argument was not persuasive. The Claimant maintained significant involvement to ensure that the Property was maintained, and the Respondent performed his responsibilities under the Agreement. The Claimant sometimes had information from her neighbor to suggest was not the case.

The Respondent further testified that the Claimant's neighbor would frequently check on the Property, then contact the Claimant who would then contact the Respondent about issues such as leaves, trash removal, and a broken window. From his testimony, it was clear the Respondent was irritated by the neighbor's involvement; however, if the Respondent had been adequately overseeing the maintenance of the home, the leaves and trash would have been

removed in a timely manner and there would not have been a broken window that was not promptly repaired.

The Respondent testified that he did respond to the Claimant's concerns and offered into evidence several emails in which he responded back to her in a timely manner. While there may have been occasions when his responsiveness was less than prompt, I will not base my decision on a finding that his communication was inadequate. His lack of action in maintaining the Claimant's home, not his lack of communication with the Claimant, placed him in violation of the Act and the corresponding regulation.

In conclusion, the Respondent's failure to monitor the heating oil and pay for additional fuel on an as-needed basis, as well as his failure to recoup the Claimant's payment for fuel oil from the tenants at the outset of the lease demonstrated incompetency as a real estate agent, in violation of section 17-322(b)(25) of the Business Occupations and Professions Article. The task of checking the heating oil is simple and straightforward; the Respondent needed to go to the Property and look at the gauge. The task of obtaining reimbursement from the tenants was similarly easy – he needed to contact them to obtain the funds and then turn the funds over to the Claimant.

The Respondent's failure to monitor and replenish the heating oil and to obtain a reimbursement for heating oil from the tenants also amounts to a failure to protect and promote the Claimant's interest, in violation of COMAR 09.11.02.02A, which also placed him in violation of section 17-322(b)(33) of the Business Occupations and Professions Article. His failure to protect and promote the Claimant's interest resulted in significant physical damage to the Property and financial hardship to the Claimant.

Disciplinary Sanctions

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

Determination of penalty

(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.

Md. Code Ann., Bus. Occ. & Prof. § 17-322(c) (2018).

The REC recommended that as a result of the Respondent's violations of the Act and its applicable COMAR provisions, the appropriate sanctions are a reprimand and the imposition of a total civil penalty of at least \$5,000.00 for the two violations found – incompetence for failure to obtain reimbursement of the oil and incompetence for failure to monitor the oil tank level.

The Respondent does not have a history of previous violations. However, one of the Respondent's violations is significant because he was supposed to ensure the maintenance of the home, but due to his incompetence the home suffered major damage. While the home was left standing, repairs were needed throughout the home to address the collapsed ceilings, blistering paint, electrical shorts, warped flooring and damaged walls. The other violation was incompetence for failure to collect a reimbursement of the oil tank fill, which had a less significant impact on the Claimant. The Respondent's violations with regard to this case are not insignificant, but they also are not in the most severe category of violations that could be committed by a real estate broker. While the Respondent clearly neglected the Property, there is no evidence that he committed fraud, engaged in racist conduct, or was convicted of a felony. *See* Bus. Occ. & Prof. § 17-322. I will not fine the Respondent separately for failure to recoup the reimbursement for the oil tank because the financial hardship that this caused the Claimant

was much less significant than the hardship of having her home nearly destroyed from water damage.

As previously discussed, the Claimant was harmed by the Respondent's conduct because her home was significantly damaged, and as a result paid uncovered costs associated with the loss including her insurance deductible, paid a large water bill, and did not receive a reimbursement for the oil tank.

Based on the forgoing, I find that the REC's requested reprimand and a single \$5,000.00 civil penalty are the appropriate sanctions. Md. Code Ann., Bus. Occ. & Prof. § 17-322(c) (2018).

THE GUARANTY FUND CLAIM

The Claimant filed a claim for reimbursement from the Fund for losses incurred as a result of the Respondent's conduct. On the December 28, 2018 Complaint Form, the Claimant complained that the Respondent failed to maintain the utilities, causing the pipes to burst, which she stated resulted in \$40,000.00 in damages to the home. She also complained that the Respondent failed to collect the oil tank reimbursement from the tenants. The claim form limits a claimant to 1,000 characters; however, the Claimant provided an attachment that included a breakdown of her financial damages, as well as additional attachments in support of the damages she alleged. She further elaborated on the damages during her testimony and through the exhibits she offered into evidence.

Under the Act, an individual may recover an award from the Fund for an actual loss as follows:

(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;

2. a licensed associate real estate broker;
3. a licensed real estate salesperson; or
4. an unlicensed employee of 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.

Md. Code Ann., Bus. Occ. & Profs. § 17-404(a)(2) (2018).

The amount of compensation recoverable by a claimant from the Guaranty Fund “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.” COMAR 09.11.01.15.

The maximum recovery from the Fund is \$50,000.00. Md. Code Ann., Bus. Occ. & Prof. § 17-404(b) (2018).

First, the analysis under section 17-404 requires that a claim shall be based on an act or omission. The Respondent’s actions, failing to collect a reimbursement and failing to monitor and pay for heating oil, were omissions. Thus, there was an omission by the Respondent in the provision of a real estate service.

Second, the analysis requires that as a result of the omission, money or property must be obtained from a person by theft, embezzlement, false pretenses or forgery; *or* constitute fraud or misrepresentation. Maryland recognizes two forms of misrepresentation: fraudulent misrepresentation and negligent misrepresentation. There is no evidence of fraud in this case. Negligent misrepresentation occurs when the defendant: (1) owes a duty of care to the plaintiff; (2) intends that his statement will be acted upon by the plaintiff; (3) has knowledge that the plaintiff will probably rely on the statement, which if erroneous will cause loss or injury; (4) plaintiff justifiably takes action in reliance on the statement, and (5) suffers damage proximately

caused by the defendant's negligence. *White v. Kennedy Krieger Institute, Inc.*, 221 Md. App. 601, 641 (2015). See also *Lloyd v. General Motors Corp.* 397 Md. 108, 135-36 (2007).

First, under the Agreement and as the realtor leasing the Property, the Respondent owed duties of care to the Claimant. Second, the Respondent intended the Claimant to rely upon his promises to lease and maintain the Property while she was overseas, because performing these job functions was what the Claimant was paying him for. Third, the Respondent knew that the Claimant was living abroad and relying upon him to lease the home and oversee its maintenance. Fourth, the Claimant justifiably relied upon the Respondent's promises to lease and maintain the Property because they had a written agreement and the Respondent represented himself as a realtor. Fifth, the evidence indicates the Claimant did not receive the reimbursement she was due from her tenants and her home suffered damage as a direct result of the Respondent's negligence when he did not maintain the Property.

The Claimant argued she is entitled to reimbursement for oil tank expenditures. The Claimant testified that she provided the tenants with a full tank of heating oil at the rate of \$2.65 per gallon for a 275-gallon tank for a total value of \$728.75. REC Exhibit 4, attachment 23 reflects this was the price per gallon of heating oil charged by Carroll Fuel when the Claimant filled the tank (it already had some oil in it) the rest of the way up for the new tenants. She further testified and the Respondent did not disagree that he failed to obtain that reimbursement for the cost of a tank of oil from the tenants. The Claimant also sought a reimbursement or additional heating oil that she had to pay for after the flood and testified it was part of her claim but it is unclear what the basis is for this portion of the claim, and the Fund did not recommend an award for this additional cost. I will recommend an award of \$728.75 to the Claimant for the heating oil reimbursement the Respondent misrepresented he would obtain for the Claimant.

The Claimant also argued that she is entitled to \$1,000.00, which was the amount of her insurance deductible she had to pay under her insurance policy with USAA in order to obtain a settlement check to pay for the damages to be repaired. (REC Ex. 4, attachment 16). The Claimant incurred this cost as a direct result of the Respondent's misrepresentation that he was monitoring the heating oil, something the Claimant was relying upon him to do under the Agreement. Therefore, I will recommend an award of \$1,000.00 to the Claimant.

The Claimant also argued she is entitled to \$248.04 for excess BGE costs. She offered into evidence bills that reflect her heating costs that include the time span when the pipes burst and the home had to be cleaned up. (Cl. Exs. 6 and 7). She argued that the Respondent should have to pay the cost of heating the home in the weeks after the pipes burst. Had they not burst, the Claimant would still have had to pay her BGE bill to heat the home. It is unclear how much more money she paid to BGE as a result of pipes bursting, and I have no basis for making this calculation, and therefore will not recommend an award for the BGE bills.

The Claimant also argued she is entitled to \$227.06 for her water bills from January 4, 2018 through April 5, 2018, the time period when the pipes burst and the Property was being cleaned up. Since the home was vacant at the time the pipes burst, it is logical to conclude that the Claimant's water bill would have been \$0 or very close to that amount since no one was present to use water. She offered into evidence a chart of her billed amounts from the date the pipes burst through April 5, 2018, when the clean-up concluded. (Cl. Ex. 6). Had the Respondent not misrepresented that he was overseeing the basic utilities of the Property, the Claimant would not have had to pay for leaking water or water being used to clean up the Property. Therefore, I will recommend an award of \$227.06 for the water bills.

The Claimant also argued she is entitled to travel expenses in the amount of \$1,251.82. The Claimant offered into evidence credit card statements which showed that was the cost of her

airfare for her two round-trip flights between Germany and Baltimore, Maryland. (Cl. Exs. 9 and 10). The Claimant explained that due to her military status, she is able to reserve reduced cost airfare. The Claimant testified she made these two trips to oversee the remediation of damages. The Claimant's expenditures on airfare were not the direct result of the Respondent's omission. Rather, she decided it would be prudent to fly home to manage the Property damage. Since the expenditures were not the direct result of the Respondent's misrepresentation, these costs are not recoverable.

The Claimant argued she should recoup the property management fee of \$150 per month for January and February, which the Respondent still charged her while, she argued, he did nothing to earn this money. However, her payment of \$300.00 to the Respondent was something she was contractually obligated to make under the Agreement and therefore, was not damages that originated from the Respondent's misrepresentation. For this reason, I will not recommend an award of \$300.00 to the Claimant.

The Claimant also argued that she is entitled to recoup \$7,000.00 in rent which is the amount of potential rental income she lost when the Property was damaged. The monthly rental cost for the home was \$1,750.00 for the previous tenants. They moved out in September 2017 and the Property had not been re-rented by the time the flood occurred in January 2018. While the Claimant lost the opportunity to earn rental income of \$1750.00 per month due to the damages in the home, she has not proven that the Property would have been rented out during the four months after the flood, particularly in January when there were no tenants under a contract. The Claimant did not prove that any loss of rental income originated from the Respondent's misrepresentation. For this reason, I will not recommend an award of lost potential rental income to the Claimant.

Thus, I find the Claimant met the requirements of section 17-404(a)(2)(iii) of the Business Occupations and Professions Article with regards to the cost of fuel for the oil tank, insurance deductible, and water costs. Accordingly, I will recommend the Claimant may recover \$1,955.54 from the Fund.

PROPOSED CONCLUSIONS OF LAW

Based on the Findings of Fact and Discussion, I conclude as a matter of law the Respondent engaged in conduct that demonstrated incompetency, in violation of section 17-322(b)(25) of the Act. The Respondent also violated the Code of Ethics, set forth in COMAR 09.11.02.02 by failing to protect and promote the interests of the Claimant. Based on these violations, I also find the Respondent violated section 17-322(b)(33) of the Act.

I further conclude that the appropriate disciplinary sanctions are a reprimand and the imposition of a \$5,000.00 civil penalty. Md. Code Ann., Bus. Occ. & Prof. §§ 17-322(c) (2018).

I further conclude that the Claimant demonstrated by a preponderance of the evidence that she sustained an actual loss in the amount of \$1,955.54 compensable by the Fund due to an act or omission of the Respondent in the provision of real estate brokerage services which constitutes misrepresentation. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2) (2018); COMAR 09.11.01.15.

PROPOSED ORDER

I **PROPOSE** that the Maryland Real Estate Commission **ORDER** that:

1. The Charges under section 17-322(b)(25), (33) be **UPHELD**;
2. The Charges under COMAR 09.11.02 be **UPHELD**;
3. The Respondent be **REPRIMANDED**;
4. The Respondent pay a civil penalty of \$5,000.00.

5. The Maryland Real Estate Commission Guaranty Fund grant the Claimant's claim in the amount of \$1,955.54; and

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

April 25, 2022
Date Decision Issued

SIGNATURE ON FILE

Rachael Barnett
Administrative Law Judge

RAB/at
#197628