

THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE

*

BEFORE BRIAN ZLOTNICK,

COMMISSION

*

ADMINISTRATIVE LAW JUDGE

V.

*

OF THE MARYLAND OFFICE OF

MERLE HOFFMAN,

*

ADMINISTRATIVE HEARINGS

RESPONDENT

*

OAH No: LABOR-REC-21-23-33010

*

REC CASE NO: 2022-RE-663

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated October 9, 2024, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 20th day of November, 2024,

ORDERED,

A. That the Findings of Fact in the Recommended Decision be, and hereby are, AFFIRMED;

B. That the Conclusions of Law in the Recommended Decision be, and hereby are, APPROVED;

C. That the Recommended Order in the Recommended Decision be, and hereby is, ADOPTED;

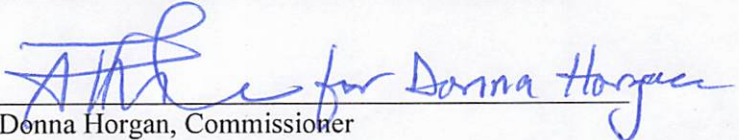
and,

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

MARYLAND STATE REAL ESTATE COMMISSION

11/25/24
Date

By:


Donna Horgan, Commissioner

MARYLAND REAL ESTATE
COMMISSION

v.

MERLE HOFFMAN,
RESPONDENT

* BEFORE BRIAN ZLOTNICK,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: LABOR-REC-21-23-33010
* MREC No.: 2022-RE-663

* * * * *

PROPOSED DECISION

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ISSUE
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On April 14, 2022, the Real Estate Commission (REC) filed a Complaint against Merle Hoffman (Respondent or Hoffman), a licensed real estate broker, for alleged violations of the Maryland Real Estate Brokers Act (Act). Md. Code Ann., Bus. Occ. & Prof. §§ 17-101 to 702 (2018 & Supp. 2024).¹ On November 27, 2023, after an investigation, the REC issued a Statement of Charges (Charges) against the Respondent. Bus. Occ. & Prof. § 17-322(b)(33) (Supp. 2023) and Code of Maryland Regulations (COMAR) 09.11.08.01.

¹ Unless otherwise noted, all references to the Business Occupations and Profession Article are to the 2018 Volume of the Maryland Annotated Code.

The REC transmitted the case to the Office of Administrative Hearings (OAH) on November 30, 2023, to conduct a hearing. Bus. Occ. & Prof. § 17-409. On February 28, 2024, the REC administratively consolidated the *REC v. Sharon Curtiss* case (Curtiss)², OAH case # LABOR-REC-21-24-00264, scheduled for a hearing on March 26, 2024, with the *REC v. Merle Hoffman* case³, OAH case # LABOR-REC-21-23-33010, scheduled for a hearing on March 27, 2024. On March 1, 2024, in response to the REC's February 28th consolidation decision, I issued an Order consolidating the Curtiss and Hoffman cases to a consolidated hearing scheduled for March 27, 2024.

On March 21, 2024, Hope Sachs, Assistant Attorney General, REC Fund, filed a Motion for Consolidation and Postponement (Motion) to postpone the April 9th hearing in the matter of *REC v. Kim Kiejzik & Claim of Steven Wichtendahl against the REC Fund*, OAH case # LABOR-REC-24-24-00256) case (Kiejzik-Wichtendahl); and to be consolidated with the Curtiss and Hoffman cases. In response to the Motion, I converted the March 27th hearing and the April 9th hearing in these matters to a joint telephone prehearing conference (Conference) on March 27, 2024, to discuss the Motion and the Curtiss, Hoffman and Kiejzik-Wichtendahl cases. At the Conference I granted the Motion to Consolidate and Postpone on the record and determined that separate decisions will be issued for the Curtiss, Hoffman and Kiejzik-Wichtendahl cases.

On April 8, 2024, I issued a Prehearing Conference Report and Scheduling Order which scheduled the consolidated Curtiss, Hoffman, and Kiejzik-Wichtendahl cases for a remote hearing on June 11, 2024.

² Sharon Curtiss will be referred to as either Curtiss or Respondent Curtiss for the remainder of this decision.

³ Merle Hoffman will be referred to as either Hoffman or Respondent Hoffman for the remainder of this decision.

On June 11, and July 16, 2024⁴, I held the consolidated Curtiss, Hoffman and Kiejzik-Wichtendahl hearing by video. Bus. Occ. & Prof. §§ 17-324(a), 17-408(a) (2018); COMAR 28.02.01.20B(1). Catherine Villareale, Assistant Attorney General, Maryland Department of Labor (Department), represented the REC on the charged violations of law. Ernie Dominquez, Assistant Attorney General, Department, represented the REC Fund. Respondents Curtiss, Hoffman and Kiejzik were each self-represented. Steven Wichtendahl (Claimant) was self-represented.

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. 2024); COMAR 09.01.03; COMAR 09.11.03; COMAR 28.02.01.

ISSUE

Did Respondent Hoffman violate the Act as set forth in the Charges?

SUMMARY OF THE EVIDENCE⁵

Exhibits

I admitted the following exhibits offered by the REC:

- REC Ex. 1 OAH Notice of Hearing for *REC v. Hoffman*, April 2, 2024
- REC Ex. 2 Statement of Charges and Order for Hearing for *REC v. Hoffman*, November 27, 2023
- REC Ex. 3 Hoffman's license record, May 21, 2024
- REC Ex. 4 Report of Investigation, 6/15/21
- REC Ex. 5 Statement of Charges and Order for Hearing for *REC v. Curtiss*, November 27, 2023
- REC Ex. 6 Curtiss' license record, May 21, 2024

⁴ An additional hearing day was necessary as the cases had not concluded at the end of the June 11th hearing. At the conclusion of the June 11th hearing, the parties agreed to schedule day two on July 16, 2024.

⁵ This hearing was consolidated with REC v. Merle Hoffman (OAH case # LABOR-REC-21-23-33010) and REC v. Kim Kiejzik (OAH case # LABOR-REC-24-24-00256), so the exhibits apply to all three cases. A copy of all exhibits has been retained with the record of this matter.

- REC Ex. 7 OAH Notice of Hearing, for *REC v. Kiejzik & Claim of Wichtendahl*, April 2, 2024
- REC Ex. 8 Statement of Charges and Order for Hearing for *REC v. Kiejzik & Claim of Wichtendahl*, April 2, 2024
- REC Ex. 9 Kiejzik's license record, March 18, 2024
- REC Ex. 10 REC Investigation Report for Hoffman, with attachments, June 29, 2023
- REC Ex. 11 REC Investigation Report for Kiejzik & Claim of Wichtendahl, December 3, 2021

I admitted the following exhibits, except when noted otherwise, offered by the Respondent:⁶

- Resp. Ex. 1 Consent for Dual Agency form, signed by the seller, November 26, 2018 – NOT OFFERED INTO EVIDENCE
- Resp. Ex. 2 Notification of Dual Agency Within a Team form, signed by the Seller, November 20, 2018 – NOT OFFERED INTO EVIDENCE
- Resp. Ex. 3 Consent for Dual Agency form, signed by the Claimant, signed by the Claimant, December 6, 2018 – NOT OFFERED INTO EVIDENCE
- Resp. Ex. 4 Exclusive Buyer/Tenant Representation Agreement, signed by the Claimant and Seller, December 6, 2018 – NOT OFFERED INTO EVIDENCE
- Resp. Ex. 5 Listing Contact Information for Claimant and Seller, October 2018 – NOT OFFERED INTO EVIDENCE
- Resp. Ex. 6 Respondent's Agent Production & Inventory Report, January 1, 2000 to December 31, 2018
- Resp. Ex. 7 Certificate of Course Completion – DL/MREC Brokerage Relationships & Disclosures, December 19, 2022

Testimony

The REC presented the testimony of the following individuals:

- Lindsey Anderson, Licensing and Regulation Investigator, REC
- Steven Wichtendahl, Claimant

The Respondent testified and did not present other witnesses.

The Fund did not offer any witnesses.

⁶ The Respondent's exhibits were premarked.

PROPOSED FINDINGS OF FACT

After considering the evidence presented, I find the following facts by a preponderance of the evidence:

1. At all times relevant, the Respondent was a licensed real estate salesperson in Maryland for Berkshire Hathaway Home Services-Penfed Realty (BHHS-PenFed) Ocean Pines office.
2. In 2018 Kiejzik was licensed by the REC as a real estate salesperson associated with BHHS-Penfed Ocean Pines office.
3. Steven Wichtendahl (Claimant) first met Kiejzik in November 2018 to obtain home listings. On December 4, 2018, Kiejzik sent the Claimant a listing for a home located at 4 Oxford Court, Berlin, Maryland (4 Oxford Court).
4. The Estate of Eneken Frischkorn and Katherine Hearn (Seller) listed 4 Oxford Court for sale through BHHS-PenFed as their broker and the Respondent as the Seller's sales associate.
5. On December 6, 2018, the Claimant signed an Exclusive Buyer Representation Agreement (Buyer Agreement) which listed Kiejzik as the Buyer Agent and BHHS-PenFed as the Broker. An addendum to the Buyer Agreement indicated that a Consent for Dual Agency and a Notification of Dual Agency within a Team forms were attached and made part of the Buyer Agreement.
6. On November 26, 2018, the Seller signed a Consent for Dual Agency Form for 4 Oxford Court. The Claimant signed an Affirmation for Prior Consent for Dual Agency Form for 4 Oxford Court on December 6, 2018.

7. On December 6, 2018, the Claimant signed a Residential Contract of Sale (Contract) for 4 Oxford Court. The Seller signed the Contract on December 7, 2018. The Contract listed BHHS-PenFed as the listing brokerage company and the Respondent as the Sales Associate for BHHS-PenFed. The Contract listed Kiejzik as the Buyer Agent. The Contract did not list Respondent Hoffman as the Listing Broker, Seller Agent or as an Intra-Company Agent with Broker as Dual Agent. The Contract did not list Respondent Kiejzik as an Intra-Company Agent with Broker as Dual Agent. Respondent Hoffman failed to have the Seller sign a Consent for Dual Agency form at the time of the Contract's execution.

8. On December 19, 2022, the Respondent completed a three-hour course on Brokerage Relationships & Disclosures.

9. The Respondent has no prior violations of the Act.

DISCUSSION

APPLICABLE LAW

The Act is a comprehensive statutory scheme that regulates real estate professionals in this State. The REC is charged with administering and enforcing the provisions of the Act. Bus. Occ. & Prof. § 17-209. Describing the role and function of the Act, the Appellate Court of Maryland explained that:

The Maryland legislature has seen fit to regulate the field of real estate sales through these statutes and regulations. As a regulated profession, much like physicians, attorneys, or certified public accountants, real estate brokers have a responsibility to the public to conduct themselves in a reputable manner. These statutes set minimum guidelines for professional conduct, their purpose being to safeguard the public.

Lewis v. Long & Foster Real Estate, Inc., 85 Md. App. 754, 760 (1991).

The REC contended in its Charges that the Respondent violated the following provisions:

(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:

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

Bus. Occ. & Prof. § 17-322(b)(33) (Supp. 2024).

In its Statement of Charges and Order for Hearing, the Commission cited COMAR 09.11.08.01 as providing the following:

Agency Relationship Disclosure Form/Dual Agency Consent Form.

In accordance with the provisions of Business Occupations and Professions Article, § 17-530, Annotated Code of Maryland, model Agency Disclosure and Dual Agency Consent forms provided by the Maryland Real Estate Commission shall be used in all applicable real estate property transactions.

BURDEN OF PROOF

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. Md. Code Ann., 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 violated the Act as charged. As discussed below, I find that the REC has met this burden.

ANALYSIS

A. Charges under Section 17-322 (b)(33) and COMAR 09.11.08.01

The Respondent argued that he believed he properly disclosed to his client, the Seller, that he was a dual agent in that he had the seller sign a dual agency consent form. He also asserted that he verbally informed the Seller prior to the execution of the Contract that BHHS-PenFed was affiliated with the Buyer's agent who also worked at the BHHS-PenFed Ocean Pines office. However, the Respondent admitted during the hearing that he failed to have the Seller sign the Affirmation of Prior Consent to Dual Agency section of the Contract and that the Contract failed to identify himself and Kiejzik as dual agents in this transaction as it only listed Kiejzik as the Buyer's Agent. Therefore, I find that the Respondent violated COMAR 09.11.08.01 by failing to properly utilize an Agency Disclosure and Dual Agency Consent forms in the 4 Oxford Court real estate transaction.

The Respondent did not dispute the charges against him, admitting during the hearing that this was an isolated oversight on his part and that he takes his role as a real estate sales associate very seriously and has since completed a course on brokerage relationships and disclosures to solidify his understanding of agency in real estate transactions.

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

B. 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. 2024).

The REC recommended that the Respondent be reprimanded and fined \$1,000.00 for his failure to ensure that proper dual agency forms and the designation of dual agency in the executed Contract were performed. The REC argued that the Respondent's conduct was serious in that he failed to uphold his obligation as a real estate sales associate to inform the Claimant and the Seller of the proper agency designation of himself and Kiejzik in the Contract.

I agree with the REC regarding its decision to issue a Reprimand, however, I disagree with the amount of the fine it proposed. The Respondent and Kiejzik were clearly acting as Dual Agents in this transaction and were sales associates at BHHS-PenFed at the time of this transaction. The Contract, as the Respondent admitted, lacked notification and affirmation of the Respondent's and Kiejzik's agency status. Clearly, this was a serious oversight as a Dual Agent's interests will differ from those of a Buyer Agent or a Seller Agent. However, I considered the Respondent's candid admission of his error and his credible presentation of evidence detailing the course he completed to further enhance his understanding of agency in real estate transactions to ensure that this oversight remains an isolated incident.

I further considered the Respondent's good faith efforts to inform the Seller of his connection as a dual agent with Kiejzik through his conversations with the Seller and in having the Seller sign a Consent for Dual Agency form. However, the executed Contract remained devoid of Dual Agency notification and affirmation. Considering the steps the Respondent has taken to address his oversight, and that the Respondent has no history of any prior violations of the Act, and his good faith attempts to alert the Seller of his Dual Agent status, I find that that a reprimand and a fine of \$500.00 is more appropriate than the \$1,000.00 fine proposed by the REC.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Respondent violated Business Occupations and Professions Article Section 17-322(b)(33) (Supp. 2024) and COMAR 09.11.08.01. Consequently, I conclude that the Respondent is subject to the disciplinary sanctions of a reprimand and a \$500.00 fine. Md. Code Ann., Bus. Occ. & Prof. § 17-322(c) (Supp. 2024).

RECOMMENDED ORDER

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

The Charges against the Respondent be upheld;

The Respondent be reprimanded and fined \$500.00; and

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

October 9, 2024
Date Decision Issued

Brian Zlotnick

Brian Zlotnick
Administrative Law Judge

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