

FINAL ORDER

APR 04 2011

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL
ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION *

v.

JOSEPH L. DRIVER
Respondent

* CASE NO. 2008-RE-129
* OAH NO. DLR-REC-21-10-17332

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated December 21, 2010, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 8th day of February, 2011

ORDERED,

A. That the Findings of Fact in the recommended decision be, and hereby are, AFFIRMED;

B. That the Conclusions of Law in the recommended decision be, and hereby are, AFFIRMED;

C. That the Recommended Order be, and hereby is, AMENDED as follows:

ORDERED that the Respondent Joseph L. Driver violated Md. Bus. Occ. and Prof. Art. §17-322(b)(25);

ORDERED that the Respondent Joseph L. Driver did not violate Md. Bus. Occ. and Prof. Art. § 17-322(33) and COMAR 09.11.02.02H;

ORDERED that the Respondent Joseph L. Driver be and hereby is

REPRIMANDED:

ORDERED that the Respondent Joseph L. Driver be assessed a civil penalty in the amount of \$1,500.00, which shall be paid within thirty (30) days of the date of this Proposed Order;

ORDERED that all real estate licenses held by the Respondent Joseph L. Driver shall be suspended if the civil penalty is not paid in full within the 30-day time period.

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

D. Pursuant to §10-220 of the State Government Article, the Commission finds that the Recommended Decision of the Administrative Law Judge had to be modified because the judge omitted the provision that the civil penalty be paid within a specified time period and that all real estate licenses held by the Respondent would be suspended if he does not pay the full amount of the civil penalty within that time period.

E. Pursuant to Code of Maryland Regulations (COMAR) 09.01.03.08 those parties adversely affected by this Proposed Order shall have 20 days from the postmark date of the Order to file exceptions and to request to present arguments on the proposed decision before this Commission. The exceptions should be sent to the Executive Director, Maryland Real Estate Commission, 3rd Floor, 500 North Calvert Street, Baltimore, MD 21202.

SIGNATURE ON FILE

Maryland Real Estate Commission

FINAL ORDER

THE MARYLAND REAL ESTATE
COMMISSION

v.

JOSEPH L. DRIVER, SALES AGENT,

RESPONDENT

* BEFORE THOMAS G. WELSHKO,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: DLR-REC-21-10-17332
* MREC NO.: 2008-RE-129

APR 04 2011

MARYLAND REAL
ESTATE COMMISSION

* * * * *

RECOMMENDED DECISION

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

STATEMENT OF THE CASE

On August 15, 2007, Jenae Bell (Complainant) filed a complaint with the Maryland Real Estate Commission (MREC) and, on that same date, a claim against the MREC Guaranty Fund (Fund) for reimbursement of \$8,325.00 in actual losses stemming from the alleged misconduct of the Respondent. The Complainant alleged these losses resulted from the Respondent's part ownership of Clipper City Holdings, LLC (Seller), an entity that participated in a real estate sales transaction involving the Complainant as the buyer.

Based on its investigation of the Complainant's complaint, the MREC issued a Statement of Charges and Order for Hearing (Charges) against the Respondent on April 27, 2010. The MREC amended the Charges on September 7, 2010. The parties resolved the Fund claim before the MREC issued its original Charges.

I held a hearing to adjudicate the regulatory charges on October 5, 2010 at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. § 17-324(a) (2010). Assistant Attorney General Peter Martin represented the MREC. Paul Harper, Attorney-at-Law, represented the Respondent.¹

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); Code of Maryland Regulations (COMAR) 09.01.03 and 28.02.01.

ISSUES

1. Did the Respondent engage in conduct that demonstrated bad faith, incompetency or untrustworthiness or that constituted dishonest, fraudulent or improper dealings?

2. Did the Respondent fail to ensure all agreements pursuant to a real estate contract were put in writing, expressed the exact agreement of the parties, and placed in the hands of all parties involved within a reasonable time after the parties executed the agreements?

3. If the Respondent committed violations of the Maryland Real Estate Law, what is the appropriate sanction for his misconduct?

¹ I heard this case simultaneously with that of *Maryland Real Estate Commission v. Robert F. Hirsch, Jr.*, DLR-REC-21-10-17328. All exhibits entered by both Respondents are simply referred to as Respondent's Exhibits.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted nine exhibits on behalf of the MREC and seven exhibits on behalf of the Respondent. I have attached a complete Exhibit List as an Appendix to this decision.

Testimony

William Allen, the Complainant's father; Lynn Lidard, Buyer's Agent; and Robert Oliver, Investigator for the MREC, testified for the MREC. William Allen testified as an adverse witness for the Respondent, and Robert Hirsch, Jr., Co-Respondent, testified on the Respondent's behalf. The Respondent also testified on his own behalf.

FINDINGS OF FACT

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

1. In 2007 and at all times relevant, the Respondent held a valid real estate sales agent's license. The MREC most recently renewed the Respondent's license on December 3, 2009, and it has a scheduled expiration date of December 3, 2011. (REC² Ex. 4.)
2. In 2006 and 2007, the Respondent, his broker, Robert Hirsch, Jr., and Kevin Blumberg, a non-MREC licensee, were co-owners of Clipper City Holdings, LLC (Clipper City). The Respondent, Mr. Hirsch and Mr. Blumberg used Clipper City to buy and rehabilitate properties for sale. (Test. Hirsch and Resp.; REC Ex. 8, narrative at p. 6.)
3. In 2006, Clipper City purchased a property on Ashland Avenue in Baltimore City (the Property) for \$27,500.00. The principals in Clipper City planned to rehabilitate the Property for sale. (Test. Resp.)

² I marked MREC's exhibits with the designation "REC."

4. In September 2006, Clipper City hired Coverall Construction, operated by Paul Goetzinger, to perform rehabilitation work on the Property. Coverall Construction did not hold a contractor's license issued by the Maryland Home Improvement Commission. (Test. Oliver; REC Ex. 8, narrative at p. 5; REC Ex. 9.)

5. Coverall Construction performed all of the rehabilitation work on the property, including electrical, plumbing and roof repair. (Test. Oliver and Allen; REC Ex. 8, narrative at p. 5.)

6. The Property has a flat roof. Coverall Construction did not repair that roof properly, so it leaked. (Test. Allen.)

7. On December 9, 2006, the Baltimore City Environmental Control Board issued Citations 04446977 and 0446985 to Clipper City for the presence of rodent holes and overgrown weeds in the backyard of the Property. (REC Ex. 8, Tab 3.)

8. On January 29, 2007,³ the Complainant, Jenae Bell, entered into contract to purchase the Property from Clipper City. The Respondent's real estate brokerage, Century 21/Horizon Realty, served as listing broker in that transaction. Lynn Lidard, a sales agent with Re/Max Elite Realty in Bel Air, Maryland served as buyer's agent. (Test. Allen, Hirsch and Resp.; REC Ex. 8, narrative at p. 6 and Tab 1.)

9. The contract of sale for the Property identified the seller of the Property as "Clipper Holdings." It noted that real estate agents were owners of "Clipper Holdings," but it did not identify who those owners were. (REC Ex. 8, narrative at p. 5 and Tab 1.)

10. The purchase price of the Property was \$105,000.00. (REC Ex. 8, Tab 1.)

³ The Complainant signed the contract of sale on January 27, 2007. Mr. Hirsch, for Clipper City, ratified the contract on January 29, 2007.

11. William Allen, the Complainant's father, assisted the Complainant in the purchase of the Property. He had his name added to the Contract of Sale on February 28, 2007. (Test. Allen.)

12. On February 16, 2007, Jerry White, a home inspector, performed an inspection of the Property. (REC Ex. 8, Tab 7.)

13. The following items needed repair as of February 16, 2007:

- The porch roof was in need of resurfacing because it was sagging;
- new replacement windows were needed throughout the house except in the rear of the basement;
- new steel doors were needed in the basement;
- general grading in the rear of the house was needed because of a large tree and its root system;
- the gutter and downspout were in poor condition;⁴
- there was water intrusion on the front wall;
- the vinyl floor sheeting needed cleaning; and
- cracks in the foundation wall needed attention.

14. The parties set March 28, 2007 as the settlement date. Just before settlement took place, the Complainant, the Complainant's father and Ms. Lidard performed a pre-settlement walk-through of the Property. (Test. Allen and Lidard.)

15. The Complainant raised concerns about the condition of the property based on what she observed during the walk through. She noticed, among other things, that

⁴ The home inspector described the gutter and downspouts as being "very risky." I interpret that statement to mean they were in poor condition and ready to fall off.

neither the front door nor the front window was sealed, and there was a stain on the second floor ceiling. (Test. Lidard.)

16. Based on the problems that the Complainant observed during the pre-settlement walk-through, Ms. Lidard drafted an Addendum that stated that the seller would make ten specific repairs as a condition of sale. (Test. Lidard; REC Ex. 8, Tab 10.)

17. Respondent Hirsch attended the settlement as the representative of Clipper City. Mr. Hirsh did not agree that the ten listed repairs were necessary. After some discussion, the parties had an understanding that Clipper City would provide \$700.00 to the Complainant in lieu of making the repairs. (Test. Oliver; REC Ex. 8, Tab 10.)

18. Respondent Hirsch amended the addendum with a handwritten statement to reflect Clipper City would make a \$700.00 payment in lieu of making the repairs. The Complainant never signed off or initialed the handwritten statement. (Test. Oliver; REC Ex. 8, Tab 10.)

19. At settlement, Respondent Hirsch explained that he did not have the roofing certificate or the home warranty with him to give to the Complainant. He promised to provide both items to the Complainant soon after settlement. (Test. Oliver; REC Ex. 8, narrative at 5 – 6, Tab 9.)

20. As of March 28, 2007, Clipper City had not purchased the home warranty. Clipper City actually did not purchase it until June 2007. The warranty's two-year coverage was effective from June 13, 2007 through June 13, 2009. (Test. Allen and Lidard; Resp. Ex. 1.)

21. The Complainant began living in the house about a week after settlement. Problems became readily apparent. The roof began leaking, the plumbing malfunctioned

and, when the weather got warmer, the Complainant realized the air conditioning was not working. Leaks in the plumbing resulted in damage to the living room ceiling. (Test. Allen.)

22. The Complainant also became aware that holes in the ground near a backyard tree were rat burrows. She began noticing rat infestation in her home. (Test. Allen; REC Ex. 8, narrative at 6.)

23. The Complainant received the roof certificate by facsimile on April 7, 2007. When the Complainant noticed the leaking roof, she called Paul Goetzinger of Coverall Construction to make repairs because she believed the certificate was a warranty. Mr. Goetzinger refused to acknowledge any warranty and stated that he would only repair the roof if the Complainant paid him. (Test. Allen and Lidard; REC Ex. 8, narrative at 6.)

24. The Complainant remained in the property for only a total of six months. During that time, she was often absent because of the various problems with the property that she was experiencing. (Test. Allen.)

25. The Complainant filed a claim under the home warranty that Clipper City purchased from American Home Shield. American Home Shield denied the Complainant's claim because the problems she cited were "pre-existing." (Test. Allen.)

26. On May 7, 2007, the Baltimore City Environmental Control Board issued Citation 04688727 with a fine of \$60.00 to Clipper City for failure initiate pest control associated with the December 2006 violations. The date of the violation was April 4, 2007. The imposition of this fine resulted in a possible lien on the Property. The Baltimore City Environmental Control Board was unaware of the change in ownership of the property. (Test. Oliver; REC Ex. 8 at Tab 13.)

27. On June 8, 2007, the Baltimore City Environmental Control Board issued Citation 204591A-1 for the presence of rat infestation on the Property. Rectification could be achieved by closing all rat burrows. The Baltimore City Environmental Control Board was still unaware of the change in ownership of the Property. (Test. Oliver; REC Ex. 8 at Tab 13.)

28. On August 15, 2007, the Complainant filed a complaint against the Respondent with the MREC. (REC Ex. 8 at Tab 1.)

DISCUSSION

Upon the foregoing Findings of Fact, I find by a preponderance of the evidence that the MREC has proven, by a preponderance of the evidence, the charges it issued against the Respondent. I have set out the reasons for my conclusions in detail below.

I. Regulatory Charges

The MREC charged the Respondent with violations of the statutory and regulatory sections governing licensed real estate brokers and agents. The sections of the Maryland Business Occupations and Professions Article, Annotated Code of Maryland⁵ that the Respondent allegedly violated are set out below:

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

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

.....

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

⁵ Unless otherwise noted, all references will be to the Business Occupations and Professions Article.

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

Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(25) and (33) (2010).

COMAR 09.11.02.02H (Code of Ethics) states:

.02 Relations to the Client.

H. 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.

The MREC, as the moving party, has the burden of proof by a preponderance of the evidence to demonstrate that the Respondent violated the statutory and regulatory sections at issue. Section 10-217 of the Maryland State Government Article; *Commissioner of Labor and Industry v. Bethlehem Steel Corp.*, 344 Md. 17, 34 (1996) citing *Bernstein v. Real Estate Comm'n*, 221 Md. 221, 231 (1959).

The MREC alleges that the Respondent—and his co-Respondent Robert F. Hirsch, Jr.—handled the transaction involving the Property ineptly, which resulted in considerable harm to the Complainant. Based on their ineptness, the Complainant essentially could not live in the home that she had purchased.

The MREC further emphasizes that this was not a typical real estate sales transaction where a real estate agent or broker represents a third-party seller. Here, the Respondent was the seller, by virtue of his stake as a shareholder of Clipper City, a limited liability company organized as a vehicle to rehabilitate and sell formerly derelict properties. Even though the Respondent was acting primarily for his own interest and not for a third party seller, the MREC asserts that any potential violations involving licensees and the

sale of real estate still comes within the purview of the MREC as the Maryland Court of Special Appeals decided in *Nelson v. Real Estate Commission*, 34 Md. App. 334, 338 – 39 (1977).

The MREC contends the Respondent violated section 17-322(b)(25) by demonstrating incompetency and a lack of trustworthiness and engaging in improper dealings with respect to the sale of real estate. The MREC argues that Clipper City, and by extension, the Respondent, "overlooked many things." From the outset, Clipper City did not ensure that the home improvement contractor it hired to renovate the Property held a valid Maryland Home Improvement Commission-issued home improvement license. That contractor, Paul Goetzinger, t/a Coverall Construction, performed work that appeared satisfactory on the surface, but ultimately turned out to be shoddy. Moreover, Mr. Goetzinger demonstrated untrustworthiness by refusing to honor a two-year warranty that he gave Clipper City for roofing repairs. When the Complainant subsequently attempted to exercise that warranty after the roof started leaking, Mr. Goetzinger's reply was that he would only perform repairs if paid and rather cavalierly told her "to call Mr. Hirsch" if she wanted to complain. Coverall's other renovations to the property were no better than the roof repair. Plumbing problems abounded to the extent that the living room ceiling suffered water damage. There were also electrical problems, the most significant of which was the failure of the Property's air conditioning.

There was also rodent infestation. In December 2006, while Clipper City was still renovating the Property, the Baltimore City Department of Environmental Quality issued Clipper City a citation for the presence of rodent holes (rat burrows) and overgrown weeds in the backyard. Clipper City apparently engaged an exterminator, but did not follow-up to

ensure the rats did not return. Once the Complainant bought the property, the rats did return and, as a result, created a health hazard.

The Complainant signed a contract to buy the Property on January 29, 2007. She had a home inspection performed on February 16, 2007. That inspection discovered a number of deficiencies that went beyond mere punch list items. Porch roof sagging and gutter and downspout problems were among the deficiencies that the inspector found. The Complainant and her father, William Allen, discovered additional problems during a pre-settlement walkthrough. The discovery of these problems culminated in Lynn Lidard, the buyer's agent, composing a typewritten addendum requiring ten items to be rectified by Clipper City as a condition of sale.

When settlement took place on March 28, 2007, Respondent Hirsch represented Clipper City at the settlement and balked at agreeing to the addendum. He instead proposed giving the Complainant \$700.00, which she could use to repair the ten items herself. The Complainant agreed. Respondent Hirsch added a handwritten statement that amended the addendum. The MREC avers that, later on, it became a point of contention whether the \$700.00 payment covered roof repairs. The Complainant insisted that it did not, but Clipper City maintained that it did. The MREC faulted the Respondent, as a principal in Clipper City, for not ensuring that the amendment expressed the exact agreement of the parties, a violation section 17-322(b)(33), which incorporates the real estate brokers' and agents' Code of Ethics sections by reference. As noted above, COMAR 09.11.11.02H is the section at issue here.

Based on the Respondent's misconduct, the MREC asks that the Respondent be reprimanded and that a \$3,000.00 total fine be imposed. The MREC also asks that the

Respondent be required to take continuing real estate sales education courses to refresh his memory about how home sale transactions should be conducted.

The Respondent contends that section 5-107 of the Courts and Judicial Proceedings Article bars monetary penalties against persons involved in misconduct if the misconduct took place more than one year before charges are made. Since the MREC did not charge the Respondent for his alleged misconduct in 2007 until 2010, the MREC cannot fine him based on the limitations period contained in section 5-107.

Assuming that section 5-107 does not bar a monetary penalty here, the Respondent argues that the MREC presented insufficient evidence of his misconduct. He notes that the actual buyer, the Complainant, was not present at the hearing and did not testify. Therefore, it is unclear exactly what was said and who said it. According to the Respondent, the absence of the Complainant "speaks volumes about the sufficiency of the MREC's case."

Furthermore, the Respondent testified that he did not participate in drafting the contract addendum amendment. He did not even attend the March 28, 2007 settlement. He did send the roofing certificate to Ms. Lidard by facsimile on April 7, 2007. Therefore, it cannot be said that he failed to fulfill this contractual obligation.

The Respondent notes that both he and Respondent Hirsch undertook repairs of the property before sale. He contends that he cannot be held responsible for care and upkeep issues that arose after sale. He asks that I dismiss all charges.

I conclude that the MREC has proven its case. I agree that *Nelson* is applicable to the Respondent's conduct for the reasons cited by the MREC. Although there is no evidence that the Respondent and Mr. Hirsch actually intended to harm the Complainant,

their negligent acts harmed her just the same. The Respondent, on behalf of Clipper City, did not ensure the rodent problem had been rectified, validate the licensing status of the home improvement contractor or follow through to obtain a home warranty that actually provided some benefit to the Complainant. It is true that the Respondent ultimately provided the roofing certificate, but he provided it late and, it turned out that the certificate had no value since Mr. Goetzinger would not honor it as a warranty. I further agree with the MREC that the way that the Respondent and co-Respondent Robert Hirsch went about selling this property was haphazard and inept.

The Respondent's arguments lack merit. Section 5-107 of the Courts and Judicial Proceedings Article does not bar monetary fines here, because this case is administrative not judicial. The Administrative Procedure Act and the OAH's Rules of Procedure govern this case, not the Courts and Judicial Proceedings Article.

To make up for the lack of direct testimony from the Complainant, the MREC offered the testimony of Mr. Allen, Ms. Lidard and Mr. Oliver concerning the Complainant's actions. Admittedly, much of this evidence is hearsay (testimony from a source other than the declarant that is offered for its truth without the declarant being present at the proceeding). Unlike in court trials, hearsay is generally admissible in administrative hearings. Md. Code Ann., State Gov't § 10-208; *Travers v. Baltimore Police Dept.*, 115 Md.App. 395 (1997); *Kade v. Charles H. Hickey School*, 80 Md.App. 721 (1989). Nevertheless, the Court in *Travers* cautioned administrative law judges or other administrative adjudicators to ensure that any hearsay they considered was reliable and probative. 115 Md.App. at 413. In determining the reliability and probative value of hearsay evidence, the Court advised triers of fact to consider (a) whether the hearsay

statements were made under oath, (b) whether they were made in close proximity to the event in question and (c) whether the hearsay statements were corroborated by other evidence. *Id.* The *Travers* Court also noted that absence of a witness could not be a denial of due process where either party could have compelled the witness to testify. *Id.* at 418 – 19.

Against this background, I have evaluated the hearsay evidence offered by the MREC and have found it reliable, competent and probative. Mr Allen, the Complainant's father, assisted the Complainant throughout time she was engaged in buying the Property from Clipper City. It seems Mr. Allen was just as involved or even more involved in the buying process than the Complainant. (On February 28, 2007, his name was added to the Contract of Sale, even though he ultimately was not a co-buyer with the Complainant.) Ms. Lidard described her role in the transaction, while Mr. Oliver provided his investigative report, which contained the statements of all relevant parties to the sale and purchase of the Property. Thus, there was corroboration. It is true that any statements made by the Complainant were not made under oath, but they were made in close proximity to the transaction in question. Finally, the Respondent could have summoned the Complainant to testify if he wanted to probe her credibility directly.

Citing care and upkeep issues that occurred after the sale is a poor attempt by the Respondent to shift the blame to the Complainant. Given the state of disrepair the Property was in at the time of purchase, there was little in the way of upkeep that the Complainant could have done. A leaking roof, poorly installed electric service and substandard plumbing were the Respondent's responsibility to have addressed before

the sale, so the Complainant would not have had to face monumental upkeep issues after occupying the Property.

I will note that co-Respondent Hirsch was a more active player in this transaction than the Respondent. Even so, the Respondent, as a licensed real estate agent and part owner of Clipper City, had an oversight role to fulfill. Thus, with regard to section 17-322(b)(25), he cannot plead ignorance to avoid overall liability here. Nonetheless, it is true that the Respondent was not involved in negotiating the \$700.00 payment in lieu of having the repairs made. Therefore, I cannot find that the Respondent violated section 17-322(b)(33) or COMAR 09.11.02.02H.⁶

II. Penalties

Section 17-322(c) of the Business Occupations Article provides that a licensee may be reprimanded or have his/her Real Estate Agent's, Associate Broker's or Broker's license suspended or revoked for violations of the Maryland Real Estate law. Section 17-322(c)(1) provides that instead of or in addition to reprimanding a licensee or suspending or revoking a Real Estate license, the MREC may impose a civil penalty not to exceed \$5,000.00. Section 17-322(c)(2) lists the factors that must be considered in imposing a civil penalty:

⁶ The Respondent offered a May 2007 Multiple Listing Services (MLS) listing for the Property (Respondent's Exhibit No. 6) to show that the Complainant did not have clean hands. That listing revealed that in May 2007, the Complainant was attempting to sell the Property for \$125,000.00. This was only two months after she bought it. According to the Respondent, the Complainant was not intending to live in the Property, but was trying to flip it for a quick \$20,000.00 profit. Moreover, the listing indicates that the Complainant had leased it to tenants for \$999.00 a month, and it does not disclose any of the problems that were the focal point of the hearing. Mr. Allen, in response, explained that the Complainant wanted to live in the Property, but the plumbing and rodent problems, in particular, prevented her from doing so. The Complainant only attempted to sell it (and rented it) to get out of a bad situation. I accept Mr. Allen's explanation, but it actually is not relevant to this case. The Complainant's motives are not at issue. The Respondent is the licensee and, therefore, he must abide by standards pertinent to real estate brokers and agents that the Complainant, as a non-licensee, may not have a legal obligation to follow.

(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 violations that the Respondent committed are serious. The evidence presented by the MREC demonstrates that he was inept in his dealings with this Property. The harm caused by the Respondent's violations was the Complainant's inability to occupy her home. I know of no previous violations by the Respondent.

The MREC has asked that the Respondent be reprimanded and that he pay a civil penalty totaling \$3,000.00. (While I see a need, I cannot impose a continuing education requirement because neither the statute nor the regulation authorizes this kind of sanction.) I agree with the reprimand, but not with the total penalty amount. The Respondent was only an interested bystander in drafting the contract addendum amendment. His co-Respondent actually negotiated the change in terms. Since the Respondent's participation was nil in drafting the addendum, I will not recommend a penalty for his violation of 17-322(b)(33) (which includes COMAR 09.11.02.02H). I will recommend a civil penalty of \$1,500.00 for his violation of section 17-322(b)(25). This will be his total penalty.

CONCLUSIONS OF LAW

Upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that:

1. The Respondent violated section 17-322(b)(25) of the Business Occupations Article by engaging in conduct that demonstrated incompetency.

2. The Respondent did not violate section 17-322(b)(33) of the Business Occupations Article or COMAR 09.11.02.02H by failing to abide by the Code of Ethics governing Real Estate agents and brokers because he did not participate in drafting the contract addendum amendment.

3. The Respondent is subject to sanction based on his violations of the Real Estate law pursuant to Business Occupations Article section 17-322(c)(2).

RECOMMENDED ORDER

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

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

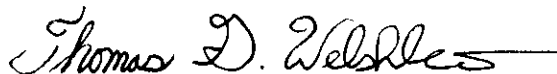
ORDER that the Respondent did not violate section 17-322(b)(33) and COMAR 09.11.02.02H, and be it further,

ORDERED, that the Respondent be **REPRIMANDED**; and be it further,

ORDERED, that the Respondent pay a civil statutory penalty to the Maryland Real Estate Commission in the amount of \$1,500.00; and be it further,

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

December 21, 2010
Date Decision Issued


Thomas G. Welshko
Thomas G. Welshko
Administrative Law Judge

#118598

THE MARYLAND REAL ESTATE
COMMISSION
v.
JOSEPH L. DRIVER, SALES AGENT,
RESPONDENT

* BEFORE THOMAS G. WELSHKO,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: DLR-REC-21-10-17332
* MREC NO.: 2008-RE-129

* * * * *

FILE EXHIBIT LIST

MREC's Exhibits:

1. July 7, 2010 Notice of Hearing, with Statement of Charges and Order for Hearing (Respondent Hirsch)
2. September 7, 2010 letter from Assistant Attorney General Peter Martin to Respondent Hirsch with Amended Charges
3. October 4, 2010 Licensing Record for Respondent Hirsch
4. July 7, 2010 Notice of Hearing, with Statement of Charges and Order for Hearing (Respondent Driver)
5. August 23, 2010 Corrected Copy of Notice for Respondent Driver
6. September 7, 2010 letter from Assistant Attorney General Peter Martin to Respondent Driver with Amended Charges
7. October 4, 2010 Licensing Record for Respondent Driver
8. January 29, 2010 Report of Robert Oliver, containing the following:
9-page narrative followed by supporting attachments:
 - (1) August 15, 2007 Complaint and Guaranty Fund Claim
 - (2) September 14, 2007 Response to the Complaint from the Respondents' attorney

- (3) November 29, 2006 Baltimore City Environmental Control Board Citations 04446985 and 044467977
 - (4) February 5, 2007 MRIS listing
 - (5) January 27, 2007 Residential Contract of Sale
 - (6) January 29, 2007 Disclosure of License Status Addendum
 - (7) Home Inspection Checklist
 - (8) February 16, 2007 Addendum Number 3
 - (9) March 2, 2007 roof Certification
 - (10) March 28, 2007 Addendum Number 3
 - (11) March 28, 2007 HUD-1 Settlement Statement
 - (12) May 7, 2007 Baltimore City Treasury Bureau Environmental Fine Notification
 - (13) June 8, 2007 Baltimore Housing Violation Notice and Order
 - (14) January 21, 2010 MDAT Business Entity Information Printout
9. October 1, 2010 Home Improvement Commission Records

Respondent's Exhibits:

1. February 26, 2010 American Home Shield letter
2. March 28, 2007 Deed
3. January 29, 2007 Addendum
4. April 7, 2007 Roofing Certification
5. April 27, 2010 Original Charges for Respondent Driver
6. May 2007 Listing
7. February 28, 2007 addition of William Allen to the Contract of Sale