

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION *

v. *

BARBARA AXLINE, *
Respondent

* CASE NO. 2014-RE-442

And

* OAH NO. DLR-REC-24-15-28756

THE CLAIM OF DEREK AND ELLA *
NEWKIRK AGAINST THE MARYLAND *
REAL ESTATE GUARANTY FUND *

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law, and Recommended Order of the Administrative Law Judge dated January 27, 2016, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 3rd day of March, 2016

ORDERED,

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

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

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

ORDERED that the Respondent, Barbara Axline, shall be assessed a civil penalty in the amount of **Five Thousand Dollars (\$5,000)**, which shall be paid to the Real Estate Commission within thirty

(30) days of the date of this Order;

ORDERED that the Claimants, Derek and Ella Newkirk, be reimbursed from the Maryland Real Estate Guaranty Fund in the amount of **Five Thousand Two Hundred Dollars (\$5,200)**;

ORDERED that all real estate licenses held by the Respondent, Barbara Axline, be, and hereby are, **SUSPENDED** for thirty (30) days;

ORDERED that all real estate licenses held by the Respondent, Barbara Axline, shall be **SUSPENDED** until the civil penalty is paid in full, and the Maryland Real Estate Guaranty Fund is reimbursed, including any interest that is payable under the law, and that this suspension is in addition to the thirty-day disciplinary suspension; and

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 Recommended Order of the Administrative Law Judge had to be modified to (1) specify the length of the disciplinary suspension and (2) provide that the Respondent pay a civil penalty within a thirty-day time period. The Recommended Order had to further modified to state that Respondent's real estate licenses shall be suspended until the civil penalty is paid and the Guaranty Fund is reimbursed.

A disciplinary suspension of thirty days is appropriate in

this case, where the Respondent was found to have unilaterally imposed a maintenance fee which was not part of the agreement with the Claimants, and failed to account for an \$800.00 security deposit. The fact that the Respondent usurped funds from the Claimants over an eleven-year period demonstrates that a disciplinary suspension of specified length is required, in addition to the suspension related to payment of the civil penalty and reimbursement of the Guaranty Fund.

E. Pursuant to 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

MARYLAND REAL ESTATE
COMMISSION

v.

BARBARA AXLINE,
RESPONDENT

and

THE CLAIM OF DEREK AND ELLA
NEWKIRK,

CLAIMANTS,

AGAINST THE MARYLAND REAL
ESTATE GUARANTY FUND

* BEFORE M. TERESA GARLAND,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* OAH No.: DLR-REC-24-15-28756
* REC CASE No.: 2014-RE-442

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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 April 8, 2014, Derek A. Newkirk and Ella T. Newkirk (the Claimants) filed a Complaint against a licensed real estate broker, Barbara Axline (the Respondent), as well as a claim for reimbursement (the Claim) from the Maryland Real Estate Guaranty Fund (the Fund) for losses they allegedly incurred as a result of the Respondent’s misconduct. After investigation, the Maryland Real Estate Commission (the REC or the Commission) issued its August 21, 2015 Statement of Charges and Order for Hearing (Statement of Charges) against the

Respondent for her alleged violations of subsections 17-322(b)(22), (25), (32), and (33) of the Maryland Annotated Code's Business Occupations and Professions Article (the Business Occupations Article),¹ as well as Code of Maryland Regulations (COMAR) 09.11.02.01C and H. On August 25, 2015, the Commission forwarded the Claim and the Statement of Charges to the Office of Administrative Hearings (OAH) to conduct a hearing and to issue a recommended decision and order.

On November 23, 2015, I conducted a hearing at the OAH's Administrative Law Building in Hunt Valley, Maryland, pursuant to section 17-408 of the Business Occupations Article. Claimant Ella Newkirk participated by telephone and represented the Claimants. The Respondent represented herself. Peter Martin, Assistant Attorney General, represented the REC. Hope Sachs, Assistant Attorney General, represented the Fund.

The contested case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't. §§ 10-201 through 10-226 (2014), the Commission's procedural regulations, COMAR 09.11.03, and OAH's Rules of Procedure, COMAR 28.02.01, govern procedure in this case.

ISSUES

1. Did the Respondent violate the following provisions of the Business Occupations Article: 17-322(b)(22) (fail to account for or to remit promptly money that came into her possession but belonged to another person); 17-322(b)(25) (engage in conduct that demonstrates bad faith, incompetency, untrustworthiness or that constitutes dishonest, fraudulent or improper dealings); 17-322(b)(32) (violate other provisions of this subtitle); and 17-322(b)(33) (violate any regulation adopted under this title or any provision of the code of ethics)?

2. Did the Respondent violate COMAR 09.11.02.01C and H (Code of Ethics regarding relations to the public)?

¹ All references to the Annotated Code of Maryland, Business Occupations and Professions Article are to the version published in the 2010 Volume and the 2015 Supplement.

3. If the Respondent committed the alleged violations or engaged in the alleged conduct, what sanction is appropriate under section 17-322(b) and/or (c) of the Business Occupations Article?

4. Did the Claimants sustain an “actual loss” compensable by the Fund as the result of an act or omission of the Respondent within the meaning of section 17-404(a) of the Business Occupations Article, and if so, what should be the amount of the award?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the REC’s documents as the following numbered exhibits:²

REC Ex. 1 – Notice of Hearing, dated September 24, 2015

REC Ex. 2 – Letter from Katherine F. Connelly, Executive Director, dated November 2, 2015, with attached records of the Respondent’s licensing history

REC Ex. 3 – Report of Investigation, dated March 16, 2015, with the following pre-numbered attachments:

- Attachment 1 (pages 1-3), The Claim, dated April 8, 2014
- Attachment 2 (pages 4-5), Letter from the Respondent to the REC, dated April 17, 2014
- Attachment 3 (page 6), Request for Investigation, undated
- Attachment 4 (pages 7-9), Deed, dated August 14, 1987
- Attachment 5 (pages 10-17), Register Report, dated June 1, 2002 through December 31, 2012
- Attachment 6 (pages 18-30), Residential Lease, dated November 12, 2012
- Attachment 7 (pages 31-42), Letter from the Respondent to the Claimants, dated June 25, 2013, with 2002 through 2012 accounting
- Attachment 8 (page 43), Email correspondence between the Respondent and the Claimants, dated June 29, 2013
- Attachment 9 (page 44), Email correspondence between the Respondent and the Claimants, dated July 5, 2013
- Attachment 10 (page 45), Email correspondence between the Respondent and the Claimants, dated July 15, 2013
- Attachment 11 (page 46), Letter from the Respondent to the Claimants, dated November 30, 2008
- Attachment 12 (pages 47-53), Account Quick Report, dated March 9, 2015

² The Fund relied on the REC’s documents in determining that the Claimant’s were entitled to an award and the amount of that award. The Fund did not submit any documents.

- Attachment 13 (page 54), A & Associates invoice, dated February 4, 2006
- Attachment 14 (page 55), Copy of checkbook ledger, dated October 25, 2011 through November 12, 2011

The Claimants did not submit any documents into the record.³

The Respondent did not submit any documents into the record.

Testimony

The REC presented the testimony of the following witnesses:

- Ella Newkirk, Claimant
- Jack Mull, Jr., Investigator, REC.

Ella Newkirk testified on behalf of the Claimants.

The Respondent testified on her own behalf.

FINDINGS OF FACT

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

1. At all relevant times, the Respondent was a licensed real estate broker, license number 2359. (REC Ex. 2.)
2. On or about June 1, 2002, the Claimants entered into a property management contract (the Contract) with the Respondent for the management of 8619 Mapleville Road (the Property) located in Boonsboro, Maryland.⁴
3. Pursuant to the Contract, the Respondent was responsible to arrange for tenants to rent the Property, prepare lease agreements, collect rent and security deposits from tenants, and monitor and care for the Property, including maintenance and repair.
4. The Contract provided for the Respondent to retain a “finder’s fee” equal to fifty percent of the monthly rent when she procured a new tenant, and a management fee of eight percent of the total monthly rent collected from tenants.

³ On November 16, 2015, the Claimants submitted a list of deficiencies and damages to their property with attached photographs and provided a copy to Mr. Martin and the Respondent. As damages or disrepair of the property was not an issue properly before me, I did not consider the document, but have retained it with the file, unmarked.

⁴ Neither the Claimants nor the Respondent were able to provide a copy of the Contract. The terms of the Contract, as set forth in Findings of Fact numbers 3 and 4, are not in dispute.

5. The Respondent provided the Claimants year-end reports which reflected an accounting of the previous year.

6. On or about June 13, 2013, the Respondent sent the Claimants an eleven-year accounting report regarding the Property.

7. The eleven-year accounting report reflected that in each of the eleven years, the Respondent charged a \$400.00 maintenance fee which had not previously been reflected in any of the year-end reports.

8. The \$400.00 maintenance fee was not a provision in the 2002 Contract, the Respondent did not notify the Claimants of the fee prior to its imposition, and the Claimants did not agree to the additional maintenance fee.

9. On November 12, 2012, the Respondent entered into a lease agreement with a new tenant, Don Miller. The Respondent collected an \$800.00 security deposit from Mr. Miller which she did not note on the accounting report as being either deposited into the Claimants' account or dispersed to the Claimants.

10. The Claimants' total loss as a result of the Respondent's actions is \$5,200.00.

DISCUSSION

The Charges

The Commission charged the Respondent with violating subsections 17-322(b)(22), (25), (32), and (33) of the Business Occupations Article, as well as COMAR 09.11.02.01C and H.

Section 17-322(b) of the Business Occupations Article provides:

(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:

* * *

(22) fails to account for or to remit promptly any money that comes into the possession of the licensee but belongs to another person;

* * *

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

(32) violates any other provision of this title; [or]

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

COMAR 09.11.02.01 provides:

.01 Relations to the Public.

* * *

C. The licensee shall protect the public against fraud, misrepresentation, or unethical practices in the real estate field. The licensee shall endeavor to eliminate in the community any practices which could be damaging to the public or to the dignity and integrity of the real estate profession. The licensee shall assist the commission charged with regulating the practices of brokers, associate brokers, and salespersons in this State.

* * *

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.

* * *

With regard to the regulatory charges brought by the REC, “the [REC] shall bear the burden of proving, by a preponderance of the evidence, that the respondent committed the violations set forth in the charging document.” COMAR 09.01.02.16A.

The \$400.00 Yearly Maintenance Fee

In this case, the evidence presented by the REC is in accord with the Findings of Fact, above. While neither the Respondent nor the Claimants could locate the Contract, there was no dispute that the Contract did not provide for an additional, yearly maintenance fee of \$400.00. The REC’s investigator, Jack L. Mull, Jr., interviewed the Respondent on March 11, 2015. During that interview, Respondent claimed that she notified the Claimants of this additional fee, in writing, in 2008. The notification did not specify that the fee applied retroactively to 2002.

The Respondent showed the letter to Mr. Mull who opined that the letter was not recently fabricated and could reasonably have been drafted in 2008. However, the letter was purportedly sent to the Claimants by first class mail with no request for confirmation of receipt. The Claimants did not receive the letter. Further, there is no evidence before me that the Respondent contacted the Claimants to verify that they had received the letter and that they were in agreement with imposition of the \$400.00 maintenance fee. Irrespective of whether the Respondent sent the letter which notified the Claimants of a change in the terms of the Contract, one party to a contract cannot change the terms of that contract without the assent of the other parties. The Claimants had no knowledge of the additional maintenance fee and clearly did not assent to it.⁵

The \$800.00 Security Deposit

In November 2012, the Respondent rented the Property to Mr. Miller and obtained a security deposit from him in the amount of \$800.00. The security deposit was not placed in escrow. The Respondent maintains that the security deposit was used to pay for oil and Mr. Miller's delinquent electric bill when he vacated the property. However, the Respondent's own ledger shows that the delinquent electric bill and the cost of refilling the oil tank were charged to the Claimants. (REC Ex. 3, p. 42.) Moreover, Claimant Ella Newkirk testified that when she questioned the Respondent regarding the whereabouts of the \$800.00 security deposit, the Respondent told the Claimant that Mr. Miller could not afford to pay a security deposit. The rental agreement clearly demonstrates that a security deposit was collected from Mr. Miller. (REC Ex. 3, pp.18-30.)

⁵ Even had the Claimants received the letter and acquiesced to the \$400.00 maintenance fee, the letter does not reflect that the fee was retroactive to the date of the Contract.

During the hearing, I found the Respondent to be evasive and her testimony lacked credibility. Her assertion that she used the \$800.00 security deposit to pay the tenant's oil and electric bill is belied by her own records, which reflect that the Claimants were charged for those expenses. However, she continued to maintain that she had proven that she had paid the oil and electric bills. The Respondent told Mr. Mull that she charged the Claimants the \$400.00 maintenance fee retroactively from the date of her letter in 2008 but testified on cross-examination that she did not retroactively charge the yearly \$400.00 maintenance fee until the end of her relationship with the Claimants. I found the Respondent to be less than forthcoming as well as arrogant.

Sanction

Under section 17-322(b) of the Business Occupations Article, the REC “may deny a license to any applicant, reprimand any licensee, or suspend or revoke a license if the applicant or licensee” violates any enumerated subsection of section 17-322(b). In addition, the Respondent is subject to monetary sanctions under section 17-322(c) of the Business Occupations Article, which provides 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.

In this case I find that the Respondent clearly violated COMAR 09.11.02.01C and H as well as sections 17-322(b)(22), (25), and (33) of the Business Occupations Article.⁶ She usurped funds from the Claimants over an eleven-year period and appropriated Mr. Miller's \$800.00 security deposit, which belonged to the Claimants.

Pursuant to section 17-322(b) of the Business Occupations Article, the Respondent failed to account for or to remit promptly money that came into her possession that belonged to the Claimants when she did not account for the \$800.00 security deposit remitted by Mr. Miller at the beginning of his tenancy. Md. Code Ann., Bus. Occ. §17-322(b)(22). This action, coupled with the surreptitious imposition of a retroactive, yearly \$400.00 maintenance fee, of which the Claimants had no knowledge and to which the Claimants did not assent, establishes that the Respondent engaged in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings. Md. Code Ann., Bus. Occ. §17-322(b)(25).

Further, the Respondent violated two provisions under the Code of Ethics as established in COMAR 09.11.02.01C and H. She was unethical in her practice when she imposed the \$400.00 yearly maintenance charge without the Claimants' knowledge or agreement and when she failed to credit the Claimants' account with Mr. Miller's \$800.00 security deposit. These actions damaged the integrity of the real estate profession. Md. Code Ann., Bus. Occ. §17-322(b)(33).

I disagree with the recommendation of the REC to impose a reprimand in this matter. The Respondent's actions occurred over a period of years and were not limited to a momentary lapse in judgment. The imposition of the maintenance fee was a yearly event/course of conduct beginning in 2008 retroactively imposed to 2002. So, the Respondent committed at least six

⁶ I have intentionally omitted section 17-322(b)(32) of the Business Occupations Article from my findings as the REC did not present evidence that the Respondent violated "any other provision of this title."

separate acts when she imposed the yearly maintenance fee.⁷ The seventh act was the failure to account for Mr. Miller's \$800.00 security deposit and then lying about it. She told Mr. Mull that she used it to pay an oil and electric bill, and she told Claimant Ella Newkirk that Mr. Miller did not pay a security deposit. I find that the Respondent's transgressions demand a penalty more consequential than a reprimand. Accordingly, I recommend a suspension of the Respondent's broker's license.

Turning to the monetary penalty, there is no evidence before me that the Respondent has any history of prior violations; however, I find the Respondent's violations are serious as they occurred over almost the entire relationship with the Claimants. The violations caused harm in that the Claimants suffered a loss of \$5,200.00 and a loss of faith in the real estate profession. Moreover, I find that the Respondent did not act in good faith, for all of the reasons I have discussed previously in this decision. I agree with the REC's recommendation and recommend a monetary penalty of \$5,000.00.

The Guaranty Fund Claim

Section 17-404(a) of the Business Occupations Article governs claims brought against the Fund and sets forth, in pertinent part, the following criteria that must be established by a claimant to obtain an award:

§ 17-404. Claims against Guaranty Fund.

(a) In general.-

(1) Subject to the provisions of this subtitle, a person may recover compensation from the Guaranty Fund for an actual loss.

(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;

⁷ Beginning with the first act in 2008 and then yearly until 2013.

(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.

(b) The amount recovered for any claim against the Guaranty Fund may not exceed \$50,000 for each claim.

With respect to claims against the Fund, COMAR 09.11.03.04 provides as follows:

.04 Claims Against the Guaranty Fund.

A. A guaranty fund claim shall be based on the alleged misconduct of a licensee.

B. For the purpose of a guaranty fund claim, misconduct:

(1) Is an action arising out of a real estate transaction involving real estate located in this State which causes actual loss by reason of theft or embezzlement of money or property, or money or property unlawfully obtained from a person by false pretense, artifice, trickery, or forgery, or by reason of fraud, misrepresentation, or deceit;

(2) Is performed by an unlicensed employee of a licensed real estate broker or by a duly licensed real estate broker, associate broker, or salesperson; and

(3) Involves conduct for which a license is required by Business Occupations and Professions Article, Title 17, Annotated Code of Maryland.

Additionally, COMAR 09.11.01.18 provides further:

The amount of compensation recoverable by a claimant from the Real Estate Guaranty Fund, pursuant to Business Occupations and Professions Article, Title 17, Subtitle 4, Real Estate Guaranty Fund, Annotated Code of Maryland, 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. Actual monetary losses may not include commissions owed to a licensee of this Commission acting in his capacity as either a principal or agent in a real estate transaction, or any attorney's fees the claimant may incur in pursuing or perfecting the claim against the guaranty fund.

Under section 17-407(e) of the Business Occupations Article, the Claimants bear the burden of proof in this proceeding against the Fund.

The first two requirements of section 17-404 have been met in that the Respondent was a licensed real estate broker and the transaction involved real estate located in Maryland.

The third requirement has also been met. The clear and unequivocal evidence demonstrates that the Respondent imposed a yearly \$400.00 maintenance fee which was not part

of the Contract and to which the Claimants did not consent. Further, the Respondent clearly did not account for Mr. Miller's \$800.00 security deposit. Accordingly, I conclude that the Claimants suffered an actual monetary loss as a result of the Respondent's conduct, namely, the loss of the \$5,200.00 that the Respondent usurped by imposing an unauthorized \$400.00 per year maintenance fee over a period of eleven years and failing to account for Mr. Miller's \$800.00 security deposit, which was rightfully the Claimants.

Therefore, I recommend the Claimants be awarded the amount of \$5,200.00 from the Fund to compensate them for actual losses sustained as a result of the acts and omissions of the Respondent.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Respondent violated sections 17-322(b)(22), (25), and (33) of the Business Occupations Article.⁸ Additionally, the Respondent violated the Code of Ethics as set forth in COMAR 09.11.02.01C and H. Therefore, the Respondent is subject to sanctions under section 17-322(b) and (c) of the Business Occupations Article.

I further conclude as a matter of law that an appropriate sanction in this case is a suspension of the Respondent's broker license. Md. Code Ann., Bus. Occ. & Prof. § 17-322(b) & (c) (2010).

I further conclude as a matter of law that the Claimants are entitled to an award from the Guaranty Fund. Md. Code Ann., Bus. Occ. & Prof. § 17-404 (Supp. 2015); and COMAR 09.11.03.04.

⁸ See footnote 5, above.

RECOMMENDED ORDER

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

- (1) That the Respondent's real estate broker license be suspended;
- (2) That the Respondent pay a civil penalty in the amount of \$5,000.00;
- (3) The Maryland Real Estate Guaranty Fund shall pay to Derek and Ella Newkirk their actual monetary loss, in the amount of \$5,200.00, for the Respondent's wrongful acts and omissions; and

(4) That the records and publications of the Maryland Real Estate Commission reflect this decision.

January 27, 2016
Date decision issued

MTG/sw
#159589

SIGNATURE ON FILE
SIGNATURE ON FILE

M. Teresa Garland
Administrative Law Judge