

THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE * BEFORE LOUIS N. HURWITZ,
COMMISSION * ADMINISTRATIVE LAW JUDGE
V. * OF THE MARYLAND OFFICE OF
SAEED MALIK * ADMINISTRATIVE HEARINGS
RESPONDENT * OAH No: DLR-REC-21-13-35172
* REC CASE NO: 2011-RE-409
* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated April 4, 2014, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 21st day of May, 2014,

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

5/21/2014
Date

By: **SIGNATURE ON FILE**
Marla S. Johnson, Commissioner

MARYLAND REAL ESTATE

* BEFORE LOUIS N. HURWITZ,

COMMISSION

* AN ADMINISTRATIVE LAW JUDGE

v.

* OF THE MARYLAND OFFICE OF

SAEED MALIK,¹

* ADMINISTRATIVE HEARINGS

RESPONDENT

* OAH No.: DLR-REC-21-13-35172

* REC No.: 2011-RE-409

* * * * *

RECOMMENDED DECISION

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RECOMMENDED ORDER

STATEMENT OF THE CASE

On April 5, 2012, the Maryland Real Estate Commission (REC or Commission) issued a Statement of Charges and Order for Hearing against the Respondent, who was alleged to have violated Maryland Annotated Code, Business Occupations and Professions (BOP) Article, sections 17-322(b) (21), (22), (25), (31), (32), and (33), 17-502, 17-532(c)(1)(v)² and Code of Maryland Regulations (COMAR) 09.11.02.01C.

On October 1, 2012, Administrative Law Judge (ALJ) William Somerville conducted a hearing at the Hunt Valley, Maryland headquarters of the Office of Administrative Hearings (OAH). On January 2, 2013, Judge Somerville issued a Recommended Decision in favor of the Commission, which the Commission affirmed on or about February 21, 2013. After the Commission issued its Final Order in this matter, the Respondent filed a Notice of Appeal in the

¹ The Respondent also uses "Sam" as a first name

² All references to BOP are to the 2010 volume and the 2013 Supplement.

Circuit Court for Howard County. In the process of producing a record of the October 1, 2012 hearing, an OAH representative determined that the recording of the proceeding was blank and so notified counsel for the Respondent. As a result of the discovery, the OAH could not provide the Circuit Court with a complete administrative record of the proceeding.

On an unknown date, the parties filed a Joint Motion to Remand the Respondent's case to the Commission based on the unavailability of a transcript and the resulting lack of a complete administrative record. On June 26, 2013, the Circuit Court granted that Motion. On August 1, 2013, the Commission ordered that the case be remanded to the OAH for a *de novo* hearing before an ALJ and that the ALJ issue a proposed, or recommended, decision to the Commission.

On January 7, 2014, I convened a hearing at the OAH's Hunt Valley, Maryland location. Jessica B. Kaufman, Assistant Attorney General, represented the REC. The Respondent appeared and was represented by Louis Glick, Esquire.

Procedure is governed by the Administrative Procedure Act, Md. Code Ann., State Gov't. §§ 10-201 through 10-226 (2009 & Supp. 2013); the REC's Hearing Regulations, COMAR 09.11.03; and OAH Rules of Procedure, COMAR 28.02.01.

ISSUES

The issues are as follows:

1. Did the Respondent accept a real estate commission from other than a real estate broker with whom he was affiliated in violation of BOP section 17-322(b)(21)?
2. Did the Respondent fail to account for or to remit promptly any money that came into the possession of the licensee but belonged to another person in violation of BOP section 17-322(b)(22)?
3. Did the Respondent engage in conduct that demonstrates bad faith, incompetency, or

untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings in violation of BOP section 17-322(b)(25)?

4. Did the Respondent violate any provision of Subtitle 5 of title 17 that relates to trust money. BOP section 17-322(b)(31)?
5. Did the Respondent violate any other provision of this title. BOP section 17-322(b)(32)?
6. Did the Respondent violate BOP section 17-502 by failing to promptly submit trust money to the real estate broker on whose behalf he provided real estate brokerage services?
7. Did the Respondent violate BOP section 17-532 by failing in a timely manner to account for all trust money received?
8. Did the Respondent fail to comport with COMAR 09.11.02.01, the REC's Code of Ethics, which requires a licensee to "protect the public against fraud, misrepresentation, or unethical practices in the real estate field;" to "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;" and to "assist the commission charged with regulating the practices of brokers, associate brokers, and salespersons in this State"?
9. Did the Respondent violate any regulation adopted under title 17 of the BOP article or any provision of the code of ethics in violation of BOP section 17-322(b)(33)?
10. Is the Respondent subject to any sanction, and if so, what sanctions and/or penalties should be imposed?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted into evidence the following exhibits on behalf of the REC:

REC #1 Notices of Hearing, dated October 1, 2013 and October 18, 2013

REC #2 Transmittal, undated; Remand Order, dated August 1, 2013; Order, Circuit

Court for Howard County, dated June 26, 2013; REC Statement of Charges and Order for Hearing, undated

REC #3 REC records regarding licensure for Respondent, dated November 7, 2013

REC #4 Certification from Katherine F. Connelly, Executive Director, REC, dated September 25, 2012; REC Report of Investigation, closed February 23, 2012; with attached REC Complaint and Guaranty Fund Claim, dated April 25, 2011; Two letters from Albert H. Bae to the REC, dated April 25, 2011; and the following numbered attachments:

Att. #1 REC Complaint and Guaranty Fund Claim, dated April 25, 2011; Two letters from Albert H. Bae to the REC, dated April 25, 2011; Letter from Mr. Bae to the REC, dated May 31, 2011, Letter from Mr. Bae to the REC, dated May 18, 2011; Letter from Mr. Bae to the REC, dated April 25, 2011, with attached real estate licenses of the Respondent and Eun J. Yoon; Letter to Mr. Sung from Mr. Bae, dated December 22, 2001; and Letter from Louis Glick, Esquire, to Gary Maslan, Esquire;

Att. #2 Letter from Mr. Glick to the REC, dated May 25, 2011

Att. #3 Letter from Mr. Maslan to the REC, dated June 7, 2011

Att. #4 Deed, dated November 10, 2010, and Maryland Department of Assessments and Taxation (MDAT) Real Property Data Search, undated

Att. #5 Statement re: 1422 Annapolis Road, Odenton, Maryland 21113

Att. #6 Independent Contractor Agreement, dated March 17, 2009

Att. #7 Note from Mr. Bae to "Sam," undated

Att. #8 Contract of Sale, dated June 20, 2009

Att. #9 Check issued by the Bae Co. to the Respondent in the amount of \$10,000.00, dated January 8, 2010

Att. #10 Maryland Courts web site case history for *Bae Co. vs. Malik*; Stipulation of Dismissal Without Prejudice, undated; Unsigned Order, Case No. 03-C-11-007776CN; Counter-Complaint, Answer to Complaint, Notice of Service of Discovery, Request for Production of Documents, and Complaint

Att. #11 Letter from Charley Sung, Esquire, to Mr. Bae, dated November 17, 2011, and Independent Contractor Agreement

The Respondent did not offer any exhibits for inclusion into evidence.

Testimony

The REC presented the Respondent as an adverse witness. The REC also presented the testimony of Albert H. Bae, Real Estate Broker and President of A. H. Bae Co. (Bae Co.). The Respondent testified on his own behalf. No other witnesses were called.

FINDINGS OF FACT

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

1. The Respondent has been a real estate salesperson licensed by the REC under salesperson's number 4436020 since February 8, 2000. He had various transfers and renewals of his license, which was in effect at all times relevant to this matter. The Respondent's license was most recently renewed on August 6, 2013 and is due to expire on February 16, 2016.
2. From April 2009 until sometime in 2011, the Respondent was affiliated with the Bae Co. located at 5707 Calverton Street, Suite 2F, Catonsville, Maryland 21228.
3. While affiliated with the Bae Co. brokerage, the Respondent and the Bae Co. entered into an Independent Contractor Agreement to split real estate commissions on an 80/20 percentage basis, in favor of the Respondent, in sales where the Respondent "made a deal by himself or co-op (sic) with other real estate companies." (REC Ex. #5, Att. 11). In a case where there was dual agency, the contract provided for a 50/50 split of real estate sales commissions.
4. The Independent Contractor Agreement called for, among other things, commissions collected by the real estate agent to be deposited in the broker's account and for the broker to pay the agent any commissions due.
5. Sometime in 2009, the Respondent was involved in the sale of a commercial entity, a liquor store, with the Bae Co. as the real estate broker and the Respondent as the listing agent. A dispute ensued regarding the real estate commission that was owed to the Respondent as a result

of the transaction, with the Respondent asserting that the Bae Co. owed him a \$15,000.00 commission that remained unpaid.

6. In 2010, while affiliated with the Bae Co., the Respondent was the listing agent for the property located at 1422 Annapolis Road, Odenton, Maryland (the Annapolis Road property).

7. At some point when the property was listed with the Bae Co., the Respondent received an offer to purchase the property along with a \$35,000.00 check as a deposit from the prospective buyer. The seller accepted the buyer's offer, however the Respondent neither informed the Bae Co. about the contract or the deposit nor did he submit the deposit to the Bae Co. to be placed in escrow. The Respondent deposited the \$35,000.00 check in his own escrow account.

8. On November 10, 2010, unbeknownst to the Bae Co., the Annapolis Road property transaction went to settlement. The Respondent neither informed the Bae Co. of the settlement nor did he provide the Bae Co. with the settlement sheet or a check for \$32,000.00 in commission on the sale of the Annapolis Road property, to be split by him and the Bae Co. on an 80/20 basis, in favor of the Respondent.

9. The Respondent retained \$32,000.00 from the \$35,000.00 earnest money deposit he deposited in his own escrow account to satisfy what he claimed to be a debt in that amount owed to him by the Bae Co. The balance of the deposit (\$3,000.00) was applied towards the settlement.

10. The real estate commission the Respondent earned from the Annapolis Road property transaction pursuant to the Independent Contractor Agreement is less than the \$32,000.00 he retained from the earnest money deposit he failed to submit to the Bae Co.

11. The Respondent resorted to self-help in collecting what he claimed the Bae Co. owed him while being fully aware that he was violating the Independent Contractor Agreement he entered into with the Bae Co. as well as Maryland real estate law.

12. The Bae Co. only learned of the November 10, 2010 settlement when, five to six months later, the real estate appraiser associated with the sale of the Annapolis Road property informed Mr. Bae of the transaction.
13. On August 5, 2011, the Bae Co. filed suit against the Respondent in the Circuit Court for Baltimore County for monies allegedly owed the Bae Co. in conjunction with the Annapolis Road property settlement and other settlements where the Bae Co. was involved as the real estate broker of record.
14. At some point after the Bae Co. filed its suit against the Respondent, the Respondent filed a counter complaint against the Bae Co., in which he alleged that he was owed a commission arising out of the above-referenced settlement of the liquor store property.
15. On April 26, 2011, Albert Bae filed a complaint with the REC. He made no claim against the REC Guaranty Fund.
16. On January 17, 2012, both parties to the Circuit Court for Baltimore County action, the Bae Co. and the Respondent, stipulated to the dismissal without prejudice of all claims in the pending Circuit Court case.
17. The Respondent, as of the date of this hearing, has not submitted to the Bae Co. any of the \$35,000.00 earnest money deposit he received in association with the purchase of the Annapolis Road property .
18. The Respondent did not provide the REC investigator with his bank statements, as requested.

DISCUSSION

The pertinent facts in this case are not in dispute. The Respondent began an affiliation with Bae Co. as a real estate salesperson in April 2009, entering into an Independent Contractor Agreement with Bae Co., a real estate broker. He left the Bae Co. and affiliated with another broker in April 2011.

The Respondent was involved in the transaction for the sale of real property located at 1422 Annapolis Road in Odenton, Maryland as both the listing and selling agent. As part of their offer to purchase the property, the buyers presented an earnest money deposit to the Respondent in the form of a \$35,000.00 check. The Respondent did not submit the check to the Bae Co., as required by law. BOP § 17-502. The Bae Co.'s policy requires an agent to submit the earnest money deposit check to it, as the broker, along with the ratified contract of sale within three days after the contract is ratified.

In 2009 and 2010, the Respondent was involved in a dispute with the Bae Co. over commissions he was allegedly owed from other real estate transactions in which he was involved. The Respondent acknowledged that he resorted to "self-help" when he retained the earnest money deposit and placed it in his escrow account and then, in November 2010, when the Annapolis Road property went to settlement, he retained \$32,000.00 from the earlier deposit. Based on the Independent Contract Agreement the Respondent entered into with the Bae Co., he was entitled to receive 80% of the total \$32,000.00 commission earned on the Annapolis Road property transaction. Instead, the Respondent retained \$32,000.00 from the \$35,000.00 he improperly withheld from the Bae Co. earlier.

The Respondent offered an explanation at the hearing, justifying the "self-help" measures he undertook because Mr. Bae had improperly withheld real estate commissions due him. Consequently, the Respondent acknowledged that he took it upon himself to circumvent the process by which a real estate agent receives an earnest money deposit, remits it to the broker with whom he is affiliated, and then receives commissions earned when they are paid to him by his broker after settlement.

Mr. Bae testified credibly that did not learn of the Annapolis Road property going to settlement in November 2010 until five or six months later, when an appraiser involved in the

process informed him of the settlement and faxed him a copy of the deed associated with the transaction. The Respondent neither submitted the contract of sale nor the deposit check to the Bae Co., nor did he provide copies of documents related to the settlement of the Annapolis Road property to the Bae Co.

Although the Respondent questioned Mr. Bae's veracity at the hearing about how he learned of the settlement of the Annapolis Road property, the Respondent does not dispute that he circumvented the well-established requirements that earnest money deposits and real estate commissions earned be submitted first to a real estate agent's broker before any distribution of commissions is made to the real estate agent. Additionally, how Mr. Bae eventually discovered the Respondent's actions in this case is not relevant to the determinations of whether the Respondent has violated certain provisions of real estate law and what, if any, disciplinary sanction and/or civil penalty should be imposed.

Although the ongoing dispute involving real estate commissions made its way to the Circuit Court for Baltimore County in 2011 as a result of the Bae Co. filing suit against the Respondent and the Respondent filing a counter complaint, the merits of the matter were never resolved by the Court. Pursuant to the agreement of the parties, the Court dismissed the proceeding without prejudice.

After Mr. Bae filed a complaint with the REC, an REC investigator interviewed the Respondent as part of his investigation. The Respondent indicated that he would provide the investigator with a copy of his bank statements, but he never did.

Violations of real estate law

The Respondent did not dispute the REC's charges that he committed the following violations, which I find to have occurred.

By deducting a \$32,000.00 commission from an earnest money deposit check the Respondent improperly retained, he accepted a real estate commission from other than a real estate broker with whom he was affiliated in violation of BOP section 17-322(b)(21). The Respondent accepted the \$35,000.00 deposit and failed to account for or to remit promptly any money that came into the possession of the licensee but belonged to another person in violation of BOP section 17-322(b)(22).

The Respondent engaged in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings in violation of BOP section 17-322(b)(25). It is clearly bad faith to circumvent the legal requirement of submitting an earnest money deposit check to one's broker and subtract a commission from that amount upon settlement as a "self-help" remedy in a dispute with one's broker over unrelated commissions.

The Respondent violated BOP section 17-502 by failing to promptly submit trust money to the real estate broker on whose behalf he provided real estate brokerage services. He also violated BOP section 17-532 by failing in a timely manner to account for all trust money received. Due to the violation of these provisions of Subtitle 5 of title 17 that relate to trust money, the Respondent also violated BOP sections 17-322(b)(31) and 17-322(b)(32), respectively.

The Respondent failed to comport with the REC's Code of Ethics which requires a licensee to "protect the public against fraud, misrepresentation, or unethical practices in the real estate field;" to "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;" and to "assist the commission charged with regulating the practices of brokers, associate brokers, and salespersons in this State" COMAR 09.11.02.01. The Respondent committed this ethical violation by

circumventing legal requirements involving the handling of earnest money deposits and the payment of real estate commissions from a broker in order to resolve his dispute with the Bae Co. regarding commissions owed in unrelated matters. In light of the fact that the Respondent violated other provisions of this title, as noted above, he is therefore in violation of BOP section 17-322(b)(32). Accordingly, the Respondent, by breaching the above-referenced ethical requirements, violated a regulation adopted under title 17 of the BOP article and provisions of the code of ethics in violation of BOP section 17-322(b)(33).

Sanctions and/or penalties

The above violations subject the Respondent to sanctions and/or penalties. For a violation of any subsection of BOP section 17-322, the REC may reprimand a licensee or suspend or revoke a license. BOP § 17-322(b). Further, pursuant to BOP section 17-322(c), the Commission also has the following option:

(c) Penalty. --

(1) Instead of or in addition to reprimanding a licensee or suspending or revoking a license under this section, the Commission may impose a penalty not exceeding \$ 5,000 for each violation.

(2) To determine the amount of the penalty imposed, the Commission shall consider:

- (i) the seriousness of the violation;
- (ii) the harm caused by the violation;
- (iii) the good faith of the licensee; and
- (iv) any history of previous violations by the licensee.

The REC recommended a revocation of the Respondent's real estate license. The Respondent argued that he is astounded by REC's recommendation of a revocation because he admitted what he did was wrong, he refunded the balance due to the Bae Co., and because he has had no prior disciplinary action in the thirteen years he has been licensed as a real estate agent. The Respondent continued to assert his right to receive commissions in unrelated matters as

some kind of appropriate explanation for his actions. I find the Respondent's attack on Mr. Bae's credibility to lack any foundation and relevance to this matter.

I, too, am astounded, but it is by the Respondent's behavior in this case. My take on his testimony is not so much that he admitted wrongdoing, but that he matter-of-factly recited what he had done. That recitation hardly qualifies as an admission to wrongdoing when he continued to offer his dispute with the Bae Co. over alleged commissions owed as justification for his actions. I fail to see the contrition the Respondent referred to in his closing argument. I find a revocation appropriate to protect the public and other real estate professionals from the Respondent. Such a sanction should make clear the seriousness of the Respondent's actions.

The REC also recommends a total civil penalty in the amount of \$6,000.00 (representing \$1,000.00 for each of the six substantive violations) for all of the violations noted above. The Commission may impose a penalty of \$5,000.00 for each violation of BOP section 17-322(b). As the Respondent violated six substantive subsections of that statute, the Commission could have suggested a much higher penalty. In evaluating the amount of penalty that should be imposed, I consider the listed statutory factors. The first is the seriousness of the violation. I find the Respondent's resorting to self-help measures, contrary to established real estate law, in a financial dispute with his broker over real estate commissions, to be a very serious matter. The Respondent has retained funds he should have provided to the broker. In addition, the Respondent's failure to disclose his retention of funds to be paid the broker and documents related to the sale and settlement to be serious matters of financial impropriety.

The next factor to consider is the harm caused by the violation. The harm here was not only to the broker, the Bae Co., but also to the dignity and integrity of the real estate profession. The evidence does not show, contrary to what the Respondent argued, that the Bae Co. has been

made whole in receiving all of the funds due it in conjunction with the Annapolis Road property transaction.

The third consideration is the good faith exhibited by the Respondent. I find good faith to be lacking in the retention of funds the Respondent was not entitled to retain, in the failure to disclose to the Bae Co. his actions and information about the sale and settlement of the property in question, and his failure to provide his bank statements to the REC investigator, as requested. I also find a lack of good faith in that the Respondent knew of the legal requirements governing earnest money deposits and his obligation to provide documentation and information to his broker, but he failed to conform to those requirements. The REC has not shown any history of prior disciplinary proceedings or violations. After weighing all these factors, I find that a penalty of \$6,000.00 is appropriate.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that Respondent accepted a real estate commission from other than a real estate broker with whom he is affiliated in violation of BOP section 17-322(b)(21).

I conclude as a matter of law that Respondent failed to account for or to remit promptly any money that came into his possession, but belonged to another person, in violation of BOP section 17-322(b)(22).

I conclude as a matter of law that Respondent engaged in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings in violation of BOP section 17-322(b)(25).

I conclude as a matter of law that Respondent violated BOP section 17-502 by failing to promptly submit trust money to the real estate broker on whose behalf he provided real estate brokerage services.

I conclude as a matter of law that Respondent violated BOP section 17-532 by failing in a timely manner to account for all trust money received.

I conclude as a matter of law that by violating sections BOP 17-502 and 17-532, the Respondent violated a provision of Subtitle 5 of title 17 that relates to trust money. BOP § 17-322(b)(31).

I conclude as a matter of law that by violating BOP sections 17-502 and 17-532, that the Respondent thereby violated BOP section 17-322(b)(32).

I conclude as a matter of law that Respondent failed to comport with the REC's Code of Ethics which requires a licensee to "protect the public against fraud, misrepresentation, or unethical practices in the real estate field;" to "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;" and to "assist the commission charged with regulating the practices of brokers, associate brokers, and salespersons in this State" COMAR 09.11.02.01.

I conclude as a matter of law that Respondent's failure to comport with COMAR 09.11.02.01 constitutes a violation of BOP section 17-322(b)(33).

I conclude as a matter of law that these violations justify a revocation of Respondent's license to act as a real estate salesperson. BOP section 17-322(b).

I further conclude as a matter of law that these statutory violations justify imposing a monetary penalty of \$6,000.00. BOP section 17-322(c).

RECOMMENDED ORDER

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

The REC's Charges against Respondent under section 17-322(b)(21), (22), (25), (31), (32) and (33), sections 17-502 and 17-532 of the Business Occupations and Professions Article, and COMAR 09.11.02.01 are **AFFIRMED**; the Commission **ORDER** that Respondent's

license as a real estate salesperson be **REVOKED**; the Commission **ORDER** that Respondent pay a civil penalty in the amount of \$6,000.00; and, the Commission **ORDER** that its records and publications reflect its final decision.

April 4, 2014
Date Decision Issued

SIGNATURE ON FILE

Louis N. Hurwitz
Administrative Law Judge

LNH/bp
#147332

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