

BEFORE THE WEST VIRGINIA REAL ESTATE COMMISSION

WEST VIRGINIA REAL ESTATE COMMISSION,

Complainant,

v.

Complaint No. L-17-019

LYNN E. KENNEDY
Licensed Salesperson
License No. WV-0004781

MICHAEL JAMES BELL
Licensed Broker
License No. WV-0028792

Respondents.

CONSENT DECREE
IN PARTIAL SETTLEMENT WITH RESPONDENT KENNEDY

Now comes the Respondent, Lynn E. Kennedy (hereinafter at times "Respondent Kennedy") and the West Virginia Real Estate Commission (hereinafter "Commission"), by Cheryl L. Dawson, its Chairman, for the purpose of resolving a complaint filed against Respondent Kennedy and Michael James Bell (hereinafter at times "Respondent Bell" and collectively "Respondents") by the Commission. As reflected in this Consent Decree, the Commission has reached an agreement with Respondent Kennedy in which Respondent Kennedy agrees and stipulates to the Findings of Fact and Conclusions of Law set forth in this Consent Decree concerning the proper disposition of this matter. The Complaint as to Respondent Bell remains pending. The Commission, having approved this agreement with Respondent Kennedy, does hereby Find and Order as follows:

FINDINGS OF FACT

1. The Commission, as the state entity created to regulate the conduct of real estate brokers, associate brokers and salespersons, has jurisdiction over this Complaint.
2. Respondent Bell is a real estate broker holding broker license number WV-0028792 and at the time of the matters which gave rise to this complaint and currently was and is the broker of record for West Teays Properties, LLC, West Teays Properties Referrals, LLC and Valley Girls Property Professionals, LLC (hereinafter at times "Valley Girls"), all in Scott Depot, West Virginia. Respondent Bell is also an attorney.
3. Respondent Kennedy is a real estate salesperson licensed by the Commission, holding license number WV-0004781, working under the supervision of Respondent Bell.
4. Respondents formed Valley Girls Property Professionals, LLC on or about April 12, 2017, and both are part owners of Valley Girls.
5. Respondent Bell became broker of record for Valley Girls Property on May 10, 2017, and Respondent Kennedy first became licensed under Respondent Bell on May 3, 2017.
6. Complaint L-17-019 was filed by Angie McCown ("Broker McCown" or "Complainant McCown") and Josh McGrath ("Broker McGrath" or "Complainant McGrath") (collectively, they are at times collectively referred to herein as Respondent Kennedy's "former brokers" or "Original Complainants").
7. Broker McGrath is the broker of record for Real Estate Central, LLC; at some point prior to the time relevant to this complaint, Broker McGrath formed West Virginia Rentals & Property Management, LLC ("WV Rentals"), with Broker McCown as its broker of record; these Original Complainants then transferred Real Estate Central's property management business to WV Rentals.

8. Respondent Kennedy was a salesperson working for the Original Complainants until the circumstances which gave rise to this Complaint which are set forth in part below.
9. The references to "Owners" herein refer to all or some of the owners of property who were under contract with Real Estate Central or WV Rentals to provide property management services as of May 1, 2017.
10. Complaint L-17-019 was received by the Commission on May 15, 2017, and served upon Respondents.
11. Respondent Bell, on behalf of both Respondents, filed a timely response, and the Commission, at its meeting on June 20, 2017, found probable cause to proceed against both Respondents upon a finding that the allegations, if true, constituted violations of various provisions of West Virginia Code §§ 30-40- 1 *et seq.*
12. The following procedural developments are noted:
 - a. On October 27, 2017, in accordance with the Administrative Law Judge's ("ALJ") Scheduling Order entered on August 15, 2017, which set the hearing for November 28-29, 2017, the Commission served its Initial Exchange of Relevant Documents and its Initial Disclosure of Potential Fact Witnesses, together with the Commission's Notice of Hearing and Statement of Charges;
 - b. Respondents did not comply with the ALJ's scheduling order, but on November 3rd requested leave for a late filing of the disclosures; the Commission agreed to a belated filing on or before November 10th, and Respondent Bell, who up to that time had been acting as attorney for both Respondents, made their disclosures;

- c. Respondent Bell did not materially involve Respondent Kennedy in the defense of the Complaint prior to his receipt and review of the Notice of Hearing and Statement of Charges on October 27, 2017;
- d. Sometime around the middle of November, the Commission was notified that Respondents had each obtained separate counsel, Respondent Kennedy, by counsel, moved for a continuance, and the parties agreed to continue the hearing to January 12, 2018, for which a Revised Notice of Hearing and Statement of Charges was served;
- e. On January 4th, Respondent Bell, by counsel, again requested a continuance, and the parties agreed to hold a status conference before the ALJ in lieu of the hearing, resulting in another scheduling order with a new hearing date of March 6 and 7, 2018;
- f. The Commission agreed to the continuance because Respondents had requested an informal conference before the Commission, which request had been granted by the Chair and which informal conference was held before the Commission on January 24, 2017;
- g. Settlement negotiations continued, and a proposed joint settlement was tendered to Respondents on February 8, 2018;
- h. Having never heard from Respondent Bell, counsel for Respondent Kennedy and the Commission proceeded to negotiate the partial resolution set forth herein, leaving the matter pending as to Respondent Bell and the issue of restitution;

- i. Counsel for the Commission did not hear from Respondent Bell until after the February 27, 2018, disclosure set forth in the Amended Scheduling Order agreed to at the January 12, 2018 status conference.

13. The following is a brief recitation of facts which Respondent Kennedy and the Commission contend are undisputed:

- a. On May 1, 2017, Respondent Kennedy emailed Broker McCown and Broker McGrath, attaching a letter on WV Rentals' letterhead informing her former brokers of her 30-day notice of resignation, saying she would do all she could to make the transaction [sic] as smooth as possible.
- b. At about the same time, Respondent Kennedy sent similar 30-day notices of resignation, also on WV Rentals' letterhead, to all the Owners of property under management contract with WV Rentals and stated her availability during that time "to transition the properties accordingly."
- c. Original Complainant McCown texted Respondent Kennedy to cease all contact with WV Rentals' Owners.
- d. Shortly thereafter, on May 1st, Respondent Kennedy sent another email to selected Owners, attaching a letter on Valley Girls letterhead which identified her as the "Owner and Property Manager" of Valley Girls and invited these Owners to "come with [her] on [her] new adventure."
- e. This email also attached a notice to terminate the property management contract with WV Rentals, an agreement to obtain property management services from Valley Girls, and various other forms to effectuate this transfer.

- f. Neither of the emails sent to Owners explained that the Owners could continue with WV Rentals, which caused much confusion both to the Owners and to WV Rentals and resulted in Broker McCown emailing the Owners on the afternoon of May 1st to apologize for the confusion and to assure them that other licensed professionals were available to manage their property.
- g. On April 25th, 2017, Respondent Kennedy emailed Respondent Bell, attaching the letters to Owners set forth above and stating: “The first will go to all owners, the second the ones I want to retain ...”
- h. Via a text message, Respondent Bell stated that he reviewed the letters and that they looked “great” although he questioned why the checks should not be made to their new company.
- i. Respondent Kennedy relied on the approval of Respondent Bell, who was both her supervising broker and an attorney.
- j. Also on May 1, 2017, Respondent Kennedy’s former brokers requested a meeting with Respondent Kennedy, which meeting took place on May 2, 2017, at which time Respondent Kennedy was dismissed from WV Rentals, her license was canceled by her former brokers and mailed to the Commission, and she again was instructed to have no further contact with any of the owners under contract with Real Estate Central or WV Rentals.
- k. Despite such instruction, Respondent Kennedy again emailed selected Owners advising them she could no longer be reached at the phone number provided by her former brokers and again expressing her desire to provide property management services for these Owners.

- l. Various communications occurring between the Original Complainants and Respondent Kennedy and with some of the Owners alerted the Original Complainants to the fact that Respondent Bell was Respondent Kennedy's new supervising broker.
- m. On May 3, 2017, the Original Complainants, by counsel, sent a cease and desist letter to Respondent Bell, who responded by letter dated May 4, 2017, stating that Respondent Kennedy was an "at will employee" who was "not under the terms of a no compete agreement."
- n. Several of the Owners transferred to Valley Girls, and in one instance Valley Girls leased a property which was still under contract with and managed by WV Rentals.
- o. The confusion continued over the course of at least the next two months, with WV Rentals not receiving notice of which Owners were transferred to Valley Girls and other issues arising as a result of the unforeseen and sudden occurrences described above.

14. The Original Complainants also alleged several other circumstances and occurrences that occurred in connection with Respondent Kennedy's resignation and the ensuing transfers, but the Commission has agreed to focus on the gravamen of the allegations without making findings regarding the forms used, issues regarding Respondent Kennedy's missing text messages, and her use of an email address provided by her former brokers.

15. The Commission finds that:

- a. Respondent Kennedy, with the knowledge and support of broker Respondent Bell, contacted Owners under contract with her former brokers in an attempt to

persuade them to move their business to Valley Girls, in violation of various provisions of the West Virginia Real Estate License Act set forth below;

- b. Even though Respondent Kennedy contends that she relied on the advice of her supervising broker, who was also a lawyer, Respondent Kennedy as a licensee should have independently known that her actions violated the West Virginia Real Estate License Act;
 - c. Respondent Kennedy's actions constitute an inducement under the West Virginia Real Estate License Act which caused, at least in part, many of the Owners to break their contract with WV Rentals for the purpose of substituting a new contract with Valley Girls and further constitute serious violations of the West Virginia Real Estate License Act;
 - d. These violations caused financial loss and foreseeable additional expenses to the Original Complainants, thereby giving rise to the availability of restitution being paid to them by Respondent Kennedy; and
 - e. These findings relate to Respondent Kennedy only and do not limit or prohibit any future findings by the Commission regarding Respondent Bell's actions in connection with Respondent Kennedy's transfer to Valley Girls.
16. Procedurally, the Commission finds that Respondent Bell's delay in addressing the complaint and involving Respondent Kennedy in the defense of same, his failure to comply with the ALJ's scheduling orders, his delay in obtaining counsel and recommending that Respondent Kennedy do likewise, his informal request for a continuance of the first hearing and his January 4th motion for another continuance which falsely stated that the parties were close to achieving a complete agreed resolution, his failure to respond to the settlement offer tendered on

February 8th, and other examples of non-performance and delay caused a considerable increase in the expense of and attempts to resolve this matter.

17. Respondent Kennedy admits her actions violated sections of the West Virginia Real Estate License Act, as more specifically set forth in this Consent Decree.

18. Respondent Kennedy agrees to settle the Complaint informally through the entry of this Consent Decree.

19. The Commission has incurred expenses in connection with these complaints in an amount in excess of Seven Thousand Five-Hundred Dollars (\$7,500.00), which expenses relate to the Commission's legal expenses incurred in connection with preparation for hearing, as well as time expended by Commission staff in the review and investigation of Complaint L-17-019 and amounts billed by the ALJ.

CONCLUSIONS OF LAW

1. West Virginia Code § 30-40-1 *et seq.*, vests the Commission with the authority and responsibility to regulate real estate brokers, associate brokers and salespersons in the State of West Virginia.

2. West Virginia Code § 30-40-7 gives the Commission all the powers set forth in West Virginia Code § 30-1-1 *et seq.* and additional powers, including the discretionary power to "impose one or more sanctions as considered appropriate in the circumstances for the discipline of a licensee. Available sanctions include, but are not limited to, denial of a license or renewal thereof, administrative fine not to exceed one thousand dollars per day per violation, probation, revocation, suspension, restitution, required additional education, censure, denial of future

license, downgrade of license, reprimand or order the return of compensation collected from an injured consumer.”

3. West Virginia Code § 30-40-19(a)(15) provides that the Commission has the authority to revoke, suspend or otherwise discipline a licensee if the licensee “(i)nduces any person to a contract to break the contract for the purpose of substituting a new contract with a third party.”

4. Respondent Kennedy, in contacting the Owners in an attempt to encourage them break their property management contract with WV Rentals and follow her to Valley Girls, violated West Virginia Code § 30-40-19(a)(15).

5. W. Va. Code § 30-40-19(a)(37) provides that the Commission may revoke, suspend or impose any other sanction against a licensee if the licensee: “(e)ngages in any act or conduct which constitutes or demonstrates bad faith, incompetency or untrustworthiness, or dishonest, fraudulent or improper dealing.”

6. Respondent Kennedy’s actions constituted or demonstrated bad faith, incompetency or untrustworthiness, or dishonest, fraudulent or improper dealing, in violation of W. Va. Code § 30-40-19(a)(37).

7. West Virginia Code § 30-40-19(a)(39) provides that the Commission has the authority to revoke, suspend or otherwise discipline a licensee if the licensee “(n)egotiates a real estate transaction directly with any person that is represented exclusively by another broker, unless the conduct is specifically authorized by the other broker.”

8. Each and every attempted solicitation of WV Rentals’ Owners or acquisition of tenants for properties still under contract with WV Rentals by Respondent Kennedy constitutes a violation of West Virginia Code § 30-40-19(a)(39).

9. The Commission may assess administrative costs, which shall be placed in the account of the Commission. Any fine shall be deposited in the state treasury's general revenue account. West Virginia Code § 30-1-8(a).

CONSENT

Respondent Kennedy, by signing below, agrees to the following:

1. Respondent Kennedy eventually obtained and is represented by counsel, and she executes this Consent Decree voluntarily, freely, without compulsion or duress and mindful that it has legal consequences. No person or entity has made any promise or given any inducement whatsoever to encourage Respondent Kennedy to make this settlement other than as set forth herein. Respondent acknowledges that she may pursue this matter through appropriate administrative and/or court proceedings and is aware of her legal rights regarding this matter, but intelligently and voluntarily waives such rights.

2. Respondent Kennedy consents to the findings above and the entry of the following Order.

3. Respondent Kennedy acknowledges that her consent to this settlement shall be offered as evidence in any hearing which may be held regarding this Complaint, and she agrees to cooperate in any proceeding which may be had against Respondent Bell, including providing sworn testimony at the hearing to matters set forth in this Consent Decree.

ORDER

On the basis of the foregoing, the Commission hereby **ORDERS** as follows:

1. Respondent Kennedy's salesperson's license is hereby **REVOKED** for a period of two (2) years for the violations set forth herein. Such revocation is stayed immediately for a period of up to fifteen (15) months provided Respondent Kennedy complies with the provisions of this Consent Decree, to-wit:

- a. Respondent Kennedy agrees to again take and successfully complete the pre-licensing course required for a salesperson license, provide to the Commission a course completion certificate, and then again take and pass the salesperson licensing examination;
- b. Upon Respondent Kennedy's passing the salesperson licensing examination, the revocation shall not take effect and shall be rescinded so long as Respondent Kennedy has otherwise complied with this consent decree; and
- c. Upon Respondent Kennedy's failure to pass the test within fifteen months, unless the Commission has agreed in writing to Respondent Kennedy's request for additional time, the Commission, without further action and at any time after the expiration of the 15-month period, may notify Respondent Kennedy by certified mail that the stay has been lifted and that her license is revoked for two years from the date of her receipt of such notice.

2. During the period of stay, Respondent Kennedy shall comply with the West Virginia Real Estate License Act and related Legislative Rules. In the event Respondent Kennedy is named in a Complaint for which the Commission finds probable cause to proceed, the Commission may consider the finding of probable cause a good-faith basis for the summary suspension of Respondent Kennedy's license pursuant to the provisions of West Virginia Code §30-1-8(e)(1).

3. So long as Respondent Kennedy is otherwise in compliance with this Consent Order and any related Addenda or Order entered by the Commission or ALJ, Respondent Kennedy may request in writing to be allowed additional time to pass the examination.
4. Respondent Kennedy shall pay **RESTITUTION** to the Original Complainants in such amount as may be agreed to by the Commission and Respondent Kennedy, or as may be recommended by the ALJ and adopted or modified by the Commission after a hearing is held on the issue of restitution. The Commission also agrees to accept a restitution figure which has been negotiated between Respondent Kennedy and the Original Complainants on the condition that Respondent agrees to the payment of any additional administrative costs incurred by the Commission at the time the Addendum to this Consent Order is signed incorporating the negotiated amount of restitution.
5. Respondent shall pay approximately one-third of the administrative costs associated with this matter incurred to date, which one-third amount is Two Thousand Five Hundred Dollars (\$2,500.00). The pro-rata portion of administrative costs agreed to herein does not bind the Commission on the percentage or pro-rata share of administrative costs to be assessed against Respondent Kennedy at the time of any adjudication or settlement of the amount of restitution.
6. The total payment of Two Thousand Five Hundred Dollars (\$2,500.00) in administrative costs shall be paid by check or money order payable to the State of West Virginia and sent directly to the Commission's office within thirty (30) days of the date of entry of the Consent Decree.
7. Any non-compliance by Respondent Kennedy with the requirements of this Consent Decree or any addendum hereto, or a Commission Order related to this Complaint, without the prior written consent of the Commission, shall constitute a violation of an Order of

the Commission and may, upon Commission action, result in the lifting of the stay of revocation of Respondent Kennedy's license or the non-renewal of same until such time as she achieves full compliance. In the event the stay of the revocation of Respondent Kennedy's license is lifted, the Commission shall immediately notify Respondent via certified mail of the alleged violation of the Consent Decree and the lifting of the stay of revocation of Respondent's license. In the event Respondent contests the allegations of violation of the Consent Decree resulting in the lifting of the stay, Respondent may request a hearing to seek review of the Commission's action. Any such hearing shall be scheduled and conducted in accordance with the provisions of W. Va. Code §§ 30-1-8 and 30-40-1 *et seq.* and any procedural rules promulgated by the Commission. At its discretion, the Commission also may schedule a hearing on its own initiative for the purpose of allowing the Commission to consider further discipline against Respondent based upon Respondent's violation of this Order of the Commission.

8. If during any time the stay of revocation is in effect, a new complaint is filed against Respondent Kennedy and probable cause is found based on the allegations set forth in the new complaint, the finding of probable cause may be deemed a finding that Respondent Kennedy's continuation in the licensed activity constitutes an immediate danger to the public, and the Commission may summarily suspend Respondent Kennedy's license in accordance with the provisions of W. Va. Code § 30-1-8(e)(1) until such time as a hearing is held on the new complaint or it is otherwise resolved. Upon a finding of probable cause resulting in the summary suspension of Respondent's license, the Commission shall notify the Respondent via certified mail of the Commission's action.

9. The events giving rise to this Consent Decree may be considered in the determination of the kind and extent of sanctions against Respondent Kennedy for any subsequent violations of the West Virginia Real Estate Licensing Act and related rules.

10. The Commission shall retain jurisdiction of this matter until such time as a Final Commission Order is entered which states that the matter has been fully resolved and is closed.

AGREED TO BY:


LYNN E. KENNEDY

3/22/18
DATE

ENTERED into the records of the Real Estate Commission this 11th day of April, 2018.

WEST VIRGINIA REAL ESTATE COMMISSION,


By: 
CHERYL L. DAWSON,
Its Chairperson

Prepared by:

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Dated: _____

3/22/18

Counsel for Lynn E. Kennedy