



**STATE OF WEST VIRGINIA
REAL ESTATE COMMISSION**

300 CAPITOL STREET, SUITE 400
CHARLESTON, WV 25301
(304) 558-3555
FAX (304) 558-6442
rec.wv.gov

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**JERRY A. FORREN
EXECUTIVE DIRECTOR**

July 25, 2018

Thomas H. Peyton
Peyton Law Firm
2801 First Avenue
P.O. Box 216
Nitro, WV 25143

RE: Complaint L-17-019 – Final Decision and Order

Dear Mr. Peyton,

Enclosed for you records is a fully executed copy of the Final Decision and Order. Please contact the Commission if you have any questions.

Sincerely,


Jerry A. Forren
Executive Director

BEFORE THE WEST VIRGINIA REAL ESTATE COMMISSION

WEST VIRGINIA REAL ESTATE COMMISSION,

Complainant,

v.

Complaint No. L-17-019

**LYNN E. KENNEDY
Licensed Real Estate Salesperson
License No. WV-0004781**

Respondent.

Real Estate Commission's Final Decision and Order

On July 18, 2018, the Real Estate Commission met and considered its designated Hearing Examiner's recommended Restitution Award issued on July 5, 2018. After having considered the Hearing Examiner's recommended Restitution Award and underlying record adduced in this matter, the Real Estate Commission voted to adopt and accept the Hearing Examiner's recommended Restitution Award, which is attached hereto and is incorporated in this Final Decision and Order in all respects.

It is hereby **ORDERED** that the July 5, 2018, Restitution Award is adopted and accepted. Respondent Kennedy is hereby **ORDERED** to make restitution to Real Estate Central in the amount of \$9,825.00 by certified check or money order made payable to Real Estate Central and delivered to the Real Estate Commission within six (6) months of receipt of this Final Decision and Order. Failure to comply with this Final Decision and Order is grounds for discipline and may result in the suspension of Respondent Kennedy's license until such time as payment is made.

Pursuant to West Virginia Code § 29A-5-4, you have the right to appeal this Final Decision and Order by filing a petition for appeal in either the Circuit Court of Kanawha County or the circuit court in the county in which you reside or do business. Such appeal must be filed within thirty (30) days after the day upon which you receive this Final Decision and Order.

ENTERED this 25th day of July, 2018.



CHERYL DAWSON, CHAIR
WEST VIRGINIA REAL ESTATE COMMISSION

BEFORE THE WEST VIRGINIA REAL ESTATE COMMISSION

WEST VIRGINIA REAL ESTATE COMMISSION,

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RESTITUTION AWARD

Introduction

This proceeding relates to a complaint which was brought by two brokers against Respondent Kennedy, Salesperson License No. WV-0004791 (“Respondent”) and Michael James Bell, Broker License No. WV-0028792 (“Bell”), which alleged various violations of W. Va. Code § 30-40-1 *et seq.* in connection with the transfer of managed properties from the original complainants to Bell at the inducement of Respondent. The licensure violations were resolved as to both Respondent and Bell prior to this hearing, which proceeded solely as to the remaining issue of restitution to be paid by Respondent to the original complainants. The separate consent decrees signed by each Respondent and entered on April 11, 2018, are deemed a part of the record of this hearing.

Issue Presented

What is an appropriate and reasonable amount of restitution to be paid to the original complainants by Respondent Kennedy?

Findings of Fact

1. This matter initially arose from communications sent by Respondent Kennedy to various owners who had contracts for property management services with the two original complainants, Josh McGrath, the broker for Real Estate Central, and Angie McCown, the broker for West Virginia Rentals. Their related businesses are hereafter jointly referred to as Real Estate Central, since most of those contracts were signed when the property management was still provided through Real Estate Central. Commission Exhibit 1; Trans. 29.
2. Respondent worked for Real Estate Central as a real estate manager on a commission only basis with no written contract. She was not considered to be an employee and received a 1099 to reflect her compensation for tax purposes. Trans. 92. There were no agreements between Respondent and Real Estate Central other than a verbal agreement as to the terms of compensation. Trans. 93. It is undisputed that Respondent had a right to advise the public she was leaving Real Estate Central, if appropriate procedures were utilized. Trans. 94.
3. The evidence indicates that Respondent grew Real Estate Central's property management business significantly during her tenure there and that most of the clients in existence at the time of her departure were secured by her efforts. Trans. 193.
4. Respondent's communications that are at issue commenced on May 1, 2017, and resulted in the transfer of thirteen (13) owners and their forty-seven (47) properties to from Real Estate

Central to Valley Girls, Respondent's new business, most of them over the next sixty (60) days. Commission Exhibit 2; Trans. 30, 32-33. In this correspondence, Respondent invited these owners to transfer to her new brokerage firm if they chose to do so. Trans. 198. There is no evidence in the record that Respondent offered these owners any financial incentive to make the change. Trans 199.

5. Of the 47 properties at issue, 29 were owned by Anthony Signorelli or one of his companies. Trans. 169. Mr. Signorelli testified at the hearing that he understood he was free to choose his brokerage firm and felt Respondent had in the past, and would in the future, provide him with the best service. Trans. 172-173. Mr. Signorelli also testified that he knew and understood the terms of his contracts, and nevertheless decided to transfer to Respondent's new firm. Trans. 172-173.

6. Real Estate Central received the same communication Respondent sent to owners, also on May 1, due to the fact that it was also an owner under Respondent's management. Trans. 99.

7. Almost immediately after learning of Respondent's letters to owners, Real Estate Central sent follow up emails to the property owners which clarified/advised them they had a choice to stay with Real Estate Central. Trans. 95.

8. In a May 2 meeting Real Estate Central terminated Respondent and, admitted during the hearing that Respondent was free thereafter to solicit any customers she wished. Trans. 95.

9. It is undisputed that all of the owners were competent adults and were entitled to make their own decisions whether to stay with Real Estate Central or change to another company. Trans. 102, 147.

10. Respondent relied on the advice of Bell to assist her with the transition to a new firm. He counseled her on how to do so, including reviewing and approving letters to property owners.

Trans. 195. Ultimately it was determined that Bell's advice was incorrect. *See*, Bell Consent Decree.

11. Real Estate Central testified that it was necessary for it to formally advise Respondent to cease communicating with the various owners and to provide it with her Real Estate Central email password, which was accomplished only after the retention of counsel who sent a cease-and-desist letter to Bell. Attachment 14 to Commission Exh. 1; Trans. 33-35, 116-117, 149-150.

12. Real Estate Central also stated that upon receiving the cease-and-desist letter, Bell insisted that communications between Real Estate Central and Valley Girls regarding the transferred properties be through the original complainants' counsel. Trans. at 42.

13. Testimony revealed that during the May 2 meeting, Respondent advised Real Estate Central of outstanding maintenance issues, and thereafter on May 22, provided Real Estate Central with an email listing the transfers. Trans. 202-203; Resp. Exh. 2.

14. Real Estate Central further stated that, although it had paid Respondent for real estate management work she was supposed to have been doing in April of 2017, additional wages were paid to existing employees to re-create and determine what had and had not been completed regarding the many properties that Respondent was asserting had transferred to Valley Girls, as well as the properties whose owners were not induced to transfer their properties to Valley Girls. Commission Exhibit 6; Trans. 55-56, 59-60.

15. Real Estate Central asserted that it was also required to hire additional staff to reduce the confusion and complications caused by Respondent's inducement to the owners to break their property management contracts with Real Estate Central. Trans. 48-49, 64, 113-15.

16. Real Estate Central admitted that it decided to turn over all security deposits and rents, retaining none of the owners' moneys, because they did not want to cause any more harm to these

owners or cause more confusion than had already occurred. Trans. 149. Furthermore, Real Estate Central stated that it was taught during its initial that one should not sue one's clients, especially in instances such as this, where the owners were solicited by Respondent to transfer to another company. Trans. 126.

17. The costs alleged to have resulted from the licensing violation fall into three (3) categories: amounts set forth in the contracts themselves relating to termination (\$11,616.00); moneys paid to Respondent for April and for additional help related to her departure (\$14,659.00); and money paid to the Real Estate Central's counsel (\$8,215.00).

Conclusions of Law

1. The West Virginia Real Estate Commission is a state entity created by W. Va. Code § 30-40-1 *et seq.*, which vests the Commission with the authority and responsibility to regulate real estate brokers, associate brokers and salespersons in the State of West Virginia.

2. The *West Virginia Real Estate License Act*, W. Va. Code § 30-40-1 *et seq.*, charges the West Virginia Real Estate Commission with determining whether the actions of a real estate salesperson or broker warrant the imposition of disciplinary action, sanctions or other measures, and the violations set forth in the Consent Decree signed by Respondent renders Respondent's license subject to discipline by the Commission. W. Va. Code § 30-40-19(a).

3. 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 fines 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.” W. Va. Code § 30-40-7(1)(emphasis supplied).

4. Neither the Act nor the rules of the Commission provide a definition for the term “restitution.”

5. The Respondent is the subject of a complaint filed with the West Virginia Real Estate Commission on May 15, 2017, by Real Estate Central. The Respondent is a licensed real estate salesperson under the West Virginia Real Estate License Act, W.Va. Code Chapter 30, Article 40. Therefore, her salesperson licensure is regulated by the Commission pursuant to the Act.

6. The Respondent and the Commission resolved the complaint via an agreed upon consent decree entered by the Commission on April 11, 2018, with the exception of the issue of potential restitution due the complainants.

7. By way of consent decrees with Respondent and Bell, the Commission has exercised its authority regarding the sanctions for the warranted disciplinary action but for the amount of reasonable restitution to be paid by Respondent to the original complainants.

8. Since no stricter standard of proof is set forth in Article 40 or the procedural rules of the Commission (West Virginia Code § 30-40-21 and West Virginia Code R. § 174-4-1 *et seq.*), the reasonableness of the amount of restitution must be proved by a preponderance of the evidence.

9. The Commission may assess the reasonable administrative costs incurred after the date of the settlements, which shall be placed in the account of the Commission. West Virginia Code § 30-1-8(a).

10. The Respondent's violations of the Act must be a proximate cause of damages before they can be recovered. In *Tolley v. ACF Industries, Inc.*, 212 W.Va. 548, 558, 575 S.E.2d 158,

168 (2002), the Court explained “the law is clear that a mere possibility of causation is not sufficient to allow a reasonable jury to find causation.” See also *Spencer v. McClure*, 217 W.Va. 442, 618 S.E.2d 451 (2005). The Court has “consistently held that the amount of damages cannot be proven by mere speculation or conjecture.” *Little v. Little*, 184 W.Va. 360, ___, 400 S.E.2d 604, 607 (1990). See also *Sisler v. Hawkins*, 158 W.Va. 1034, ___, 217 S.E.2d 60, 65 (1975) (Reversing award of damages based on a general statement that a person was inconvenienced, finding that this was the “grossest kind of speculation and conjecture.”)

11. The determination of the reasonableness of a legal fee request depends on a balancing of a number of factors. *Bishop Coal Co.*, 380 S.E.2d at 248. This principle is particularly true when there is an objection to the fee request as there is in this proceeding. The factors are set forth in Syllabus Point 4, *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986). Without some evidence from the attorney who performed the legal work in question, there is no reliable manner for a court to assess these factors. While the hourly rate of \$250 per hour may not be unreasonable for the type of work performed, the amount of time spent on particular tasks and how they relate to Respondent’s violations of the Act cannot be ascertained on the record presented here.

Analysis

Although Real Estate Central seeks to recover wages paid to existing employees to help clear up confusion and related issues, there is no evidence in the record that clarifies what duties were performed or the amount of time expended in doing so that would be separate and apart from those employees existing duties. None of these employees were called to testify. Although it appears reasonable that some expenses would be incurred in this regard, the aforementioned lack of clarity combined with the fact that Real Estate Central immediately communicated with

the owners to clear up any confusion and that Respondent provided information concerning maintenance issues on May 2 and a list of transfers on May 22, it does not seem reasonable that restitution should include all of the claimed wages of \$ 14,659. Without evidence to ascertain the precise amounts actually expended on the claimed activities, a reasonable estimation must be made. I find that a reasonable and appropriate amount of restitution attributable to expended wages to resolve the asserted issues is \$5,000.00.

In addition, the evidence suggests that Respondent did conduct work for Real Estate Central in April and no evidence was presented that attempted to separate the value of that work from the alleged efforts to transfer customers, and as a result, no award can be made in this regard.

As to attorneys' fees, Real Estate Central claims \$8,215. It seems reasonable that the initial amount of \$1,025.00 expended for consultation and preparation of the cease and desist letter is reasonable related to the actions of respondent, and accordingly I find this amount to be a reasonable component of restitution in this matter. Of the remaining attorneys' fees, \$3,800 appears to be reasonably related to the subject issues and I find them to be a proper element of restitution. However, the remainder of these fees appear to be related to matters within the discretion of Real Estate Central and/or outside the scope of this proceeding and will not be allowed.

Real Estate Central claims certain fees related to the termination of the contract with clients who transferred to Respondent. However, Real Estate Central admits those fees were the contractual obligation of the transferring clients and that Real Estate Central was entitled to collect the same from them., regardless of Respondent's conduct at issue here. Real Estate

Central voluntarily chose not to collect those fees as a business decision. Consequently, these costs are not a proper element of restitution based on these facts, and it does not appear Real Estate Central now makes this claim.

Restitution Award

Staff expenses	\$5,000
Salary reimbursement	\$ 0
Attorneys' fees	\$4,825
Contract fees	\$ 0
TOTAL	<u>\$ 9,825</u>

RESPECTFULLY SUBMITTED:

July 5, 2018



HEARING EXAMINER