

**THE REAL ESTATE COUNCIL OF ALBERTA**

**IN THE MATTER OF** Section 83.1 of the *REAL ESTATE ACT*, R.S.A. 2000, c.R-5 (the "**Act**")

**AND IN THE MATTER OF** a Hearing regarding the conduct of JASON CHRISTOPHER FERGUSON, a Mortgage Associate, at all material times registered with Verico IMortgage Solutions

**Hearing Panel Members:** Phil McDowell, Chair  
Sanjeet (Sunny) Parmar  
Graham Lock

**Appearances:** SK, for the Executive Director of the Real Estate Council of Alberta  
  
Jason Ferguson, on his own behalf

**Hearing Date:** June 21, 2018 at the offices of the Real Estate Council of Alberta ("**RECA**") in Calgary, Alberta

**DECISION – SANCTION AND COSTS**

**INTRODUCTION:** The Hearing Panel has considered written submissions on sanction and costs from the parties. Specifically, the Hearing Panel has considered the submissions of the case presenter for the executive director ("case presenter") dated June 29, 2018 and the submissions of Mr. Ferguson dated July 13, 2018 and the case presenter's reply on July 16, 2018.

**DECISION:** The Hearing Panel hereby confirms the Administrative Penalty of \$1,000.00 that the executive director assessed against Mr. Ferguson. In addition, Mr. Ferguson is ordered to pay costs in the amount of \$4,348.12.

**REASONS FOR DECISION:** The Hearing Panel issued a written decision dated June 22, 2018. In that decision the Hearing Panel found that Mr. Ferguson contravened section 40(1)(g) of the *Real Estate Act Rules* (the "**Rules**") and asked the parties to provide written submissions with respect to both sanction and costs.

Section 83.1(5) of the *Real Estate Act* (the "Act") provides:

(5) The Hearing Panel on an appeal may

- (a) quash, vary or confirm the administrative penalty, and
- (b) make an award as to costs of the investigation that resulted in the administrative penalty and of the appeal in an amount determined in accordance with the bylaws.

With respect to determining the appropriate sanction, the Hearing Panel has carefully considered the factors identified in the important decision of *Jaswal v. Newfoundland (Medical Board)* [1996], ("*Jaswal*").

In the review of the matter using the *Jaswal* factors, the panel agrees with the case presenter that:

1. Mr. Ferguson was relatively new to the industry and his training is relatively current.
2. That Mr. Ferguson had no previous disciplinary history.
3. This was the only incident that breached Rule 40(1)(g).
4. The breach was serious in nature and gravity as it allowed Mr. Ferguson to continue his practice without the executive director having reviewed the information pertaining to the incident.

Mr. Ferguson believes the penalty to be unjust. In light of the seriousness of the breach, the Panel disagrees. Respecting deterrence, Mr. Ferguson understands his error, but no exception can be made in this instance given the potential harm to public confidence in the Alberta real estate industry, if it should go unsanctioned.

After consideration of all factors, the panel concludes that \$1,000.00 is the appropriate administrative penalty for Mr. Ferguson's contravention.

All industry members should be familiar with the *Act* and Bylaws, the *Act* s.83.1(5)(b) permits the Hearing Panel to award costs against the losing party in an appeal of an administrative penalty. The *Act* Bylaw s.28 sets out criteria which may be considered in any cost order. The RECA Hearing and Appeal Practice and Procedure Guidelines (Page 19) sets out Council's general policy: "The industry member whose conduct is deserving of sanction ought to be responsible for the full costs of the hearing process. Council believes that industry at large ought not to bear the hearing costs for industry misconduct." This hearing panel supports costs orders and the statement in the RECA Hearing and Appeal Practice and Procedure Guidelines. We will make a cost order in this case.

We have reviewed all of the materials submitted by the case presenter in support of his request for us to order \$4,348.12 in costs against Mr. Ferguson. We have reviewed Mr. Ferguson's response. He does not believe such a cost order would be appropriate because the circumstances were the result of his accidental oversight during a very stressful personal period of time and are unreasonable given his financial difficulty at this time.

Instead of appealing the administrative penalty, Mr. Ferguson had options. He could have reviewed the evidence with the case presenter or other RECA staff. He could have thereby acknowledged his mistake, paid the administrative penalty and the matter would have been at an end. We believe this was the only reasonable course of action for Mr. Ferguson. This is because the evidence clearly showed Mr. Ferguson had not complied with the reporting requirements of RECA following his being charged with a criminal offence. In the face of this evidence, Mr. Ferguson decided to appeal the administrative penalty knowing if his appeal was unsuccessful, he could be exposed to a Cost Order. An appeal is his legal right. However, a decision to appeal should not be taken lightly and there needs to be recognition of the potential for adverse consequences if unsuccessful. This panel believes that it is not fair for the industry at large to pay for the costs of proceedings resulting from the actions of its members.

The Act Bylaw s.28(3) sets out a Schedule of Costs to be used in certain circumstances. Instead of using the Schedule of Costs, hearing panels can apply certain factors found in Bylaw s.28(4) should they decide to deviate from the Schedule of Costs. The case presenter points out that in this instance, the recommended costs have been very modest in relation to the actual costs that were incurred, and which could be assessed. The panel agrees that the case presenter has taken into consideration Mr. Ferguson's situation and as a result has either reduced costs or removed certain costs that could otherwise be recovered as costs. For example, the lowest rates for legal counsel has been assessed, investigation costs have been waived, and administrative work has not been factored into the actual costs.

We carefully considered each Bylaw s.28(4) factor as well as the factors noted in *Jaswal*. Each factor and our reasoning for its application to this case follows:

1. The degree of cooperation by the industry member:

While Mr. Ferguson cooperated during the process, he proceeded with the appeal when the appeal clearly little chance of success. Mr. Ferguson simply believes that the penalty was excessive.

2. The result of the matter and degree of success:  
Mr. Ferguson's appeal was not successful. The administrative penalty was confirmed. There was clear evidence that Mr. Ferguson had not complied with RECA's reporting requirement in a timely manner in spite of his having been advised to do so.
3. The importance of the issues:  
It is important for a Hearing Panel to protect consumers affected by the real estate industry. If industry members were allowed to not comply with RECA's requirements, RECA's reputation as overseer of a self-regulated industry would be at risk.
4. The complexity of the issues:  
This was not a complicated hearing. There was essentially one issue which required that the breach of RECA's requirements had to be established. Mr. Ferguson did not challenge that he had not met the requirement to report his criminal charges to the executive director.
5. The necessity of incurring the expenses:  
Given that the administrative penalty of \$1,000, was relatively modest and that an appeal would incur significant incremental costs, and the fact that Mr. Ferguson could not offer any evidence to show that the reporting requirement had been met, the panel concluded that there was little reason for incurring the extra costs of an appeal.
6. The reasonable anticipation of the case outcome:  
Given that the evidence clearly confirmed that Mr. Ferguson had not met the reporting requirement of RECA, the Panel concludes that Mr. Ferguson could reasonably have concluded that he would not be successful at the Appeal.
7. The reasonable anticipation for the need to incur the expenses:  
In this case, the same analysis in paragraph 5 above applies under this factor.
8. The financial circumstances of the industry member and any financial impacts experienced to date by the industry member:  
The panel agrees with the case presenter that costs as recommended and agreed by the Panel are modest in light of the actual costs incurred.
9. Any other matter related to an order reasonable and proper costs as determined appropriate by the Panel.  
No other evidence was provided.

**CONCLUSION:** The Hearing Panel orders Mr. Ferguson to pay the Administrative Penalty of \$1,000.00 and to further pay costs of this Appeal in the amount of \$4,348.12.

Dated at the City of Calgary in the Province of Alberta, this 30<sup>th</sup> day of July, 2018.

Hearing Panel of the  
Real Estate Council of Alberta

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Phil McDowell, Chair

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**Hearing Date:** June 21, 2018 at the offices of the Real Estate Council of Alberta ("**RECA**") in Calgary, Alberta

**DECISION**

**UPON Hearing** the testimony of witnesses and considering the evidence submitted at the hearing of this matter; **AND UPON** reviewing and considering the materials submitted and the arguments made by the parties;

**THE HEARING PANEL HEREBY FINDS AS FOLLOWS:**

A. Introduction

An Administrative Penalty was issued by the Executive Director of the Real Estate Council of Alberta against Mr. Ferguson in the amount of \$1,000.00 after having determined that there is sufficient evidence that Mr. Ferguson contravened section 40(1)(g) of the *Real Estate Act Rules* (the "**Rules**").

Mr. Ferguson has appealed the Administrative Penalty. Accordingly, a hearing was held before this Panel on June 21, 2018 to determine whether Mr. Ferguson did contravene section 40(1)(g) of the Rules.

Mr. Ferguson confirmed at the outset that he was aware of his entitlement to legal representation but that he wished to proceed without legal representation.

B. Issue(s)

The main issue to be determined is whether Mr. Ferguson contravened section 40(1)(g) of the Rules that states the following:

40 (1) An industry member must immediately notify, in writing, the executive director when:

(g) proceedings pursuant to the Criminal Code are commenced against the industry member;

The Panel must determine whether, on a balance of probabilities, Mr. Ferguson contravened section 40(1)(g) of the Rules.

C. The Facts

The case presenter and his witnesses clearly established that proceedings pursuant to the Criminal Code were commenced against Mr. Ferguson on May 3, 2017. It was further shown that Mr. Ferguson did not notify the Executive Director in writing until June 29, 2017, 57 days following the charges being placed.

SF testified that, as Broker Owner of Mr. Ferguson's employer at the time, she had informed Mr. Ferguson on June 14, 2017 of the requirement to notify the Executive Director and that it must be done immediately. Yet Mr. Ferguson did not notify the Executive Director until June 29, 2017.

Mr. Ferguson was apologetic that he hadn't complied and emphasized that he was not aware of the obligation to notify the Executive Director. He further cited being new to the industry, stress related to the incident that led to the charges and following legal proceedings, as well as the fact that the charges were withdrawn as extenuating circumstances.

D. : Conclusions of Breach

The Panel determines that Mr. Ferguson failed to notify the Executive Director in a manner consistent with the requirement of the Rules of the *Real Estate Act*. The Panel notes that a lack of knowledge of the industry rules is not sufficient to avoid a finding of a contravention of the Rules. The industry member has the onus to learn and follow the Rules.

The Panel has therefore found that Mr. Ferguson did contravene section 40(1)(g) of the Rules.

E. Request for Submissions on Sanction and Costs

The Executive Director is now directed to supply his written submissions respecting sanction and costs within 14 days of receipt of this decision.

The Industry Member is directed to supply to the Hearing Administrator any written submissions he may wish to make within 14 days of receipt of the Executive Director's submissions.

Thereafter, the Executive Director will be allowed 7 days for rebuttal to any submissions by the industry member.

Once the timelines have passed, the submissions will be provided to the Hearing Panel for their consideration and decision on sanction and costs.

Dated at the City of Calgary in the Province of Alberta, this 22<sup>nd</sup> day of June, 2018.

Hearing Panel of the  
Real Estate Council of Alberta

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Phil McDowell, Hearing Panel Chair