

Circuit Court for Baltimore City
Case No.: 24-C-20-003617

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 56

September Term, 2021

IN THE MATTER OF THE PETITION OF
WILLIAM MCCONKEY

Wells, C.J.,
Tang,
Eyler, Deborah, S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah, S., J.

Filed: April 23, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

In this administrative appeal, William McConkey, the appellant, appeals from a decision of the Maryland Real Estate Commission (“the Commission”), the appellee, denying his application for a real estate salesperson license. That decision was affirmed on judicial review in the Circuit Court for Baltimore City.

Mr. McConkey presents two questions for our review,¹ which we have rephrased:

I. Did the Commission afford Mr. McConkey due process before a neutral tribunal?

II. Was the Commission’s decision denying the application legally correct and supported by substantial evidence in the record?

For the following reasons, we answer “Yes” to those questions and affirm the decision of the Commission.

FACTS AND PROCEEDINGS

Licensing History

In 1984, the Commission issued Mr. McConkey a real estate salesperson license and, two years later, a broker’s license. In 1993, the Commission reprimanded Mr. McConkey for failing to properly supervise an agent in his brokerage. In 1994, it fined him \$500 for failing to respond to a complaint filed with the Commission and failing to follow Commission regulations. In 1995, he was fined \$2,000 and his brokerage license was

¹ The questions as posed by Mr. McConkey are:

I. Did the Circuit Court allow too much deference to the Commission in its mishandling of petitioner’s right to due process before a neutral tribunal?

II. A decade after suspending a real estate salesperson for “one year,” may the Commission use the same misconduct to ban him for a lifetime?

“revoked for willful misrepresentation, failure to account for money, improper conduct[,] and violation of the [Commission’s] Code of Ethics.” Mr. McConkey appealed the revocation decision to the circuit court and this Court, both of which affirmed the revocation.

Also in 1995, Mr. McConkey, who had been admitted to the Maryland bar for five years, was disbarred by consent based on the same conduct.

At the end of 1998, Mr. McConkey reapplied for a broker’s license. Following a hearing in early 1999, his application was denied because the Commission found that Mr. McConkey was “unwilling to accept responsibility for his past actions” and that it was not in the public interest to allow him to hold a broker’s license.

In 2000, Mr. McConkey applied for and was granted a salesperson license.

2010 License Suspension & Guaranty Fund Awards

Between October 2007 and June 2008, three consumers – Teresa Milligan, Angela Powell, and Lauri Donovan – filed complaints against Mr. McConkey with the Commission alleging that he had engaged in a fraudulent foreclosure avoidance scheme. They simultaneously filed claims with the Commission’s Guaranty Fund² for actual losses suffered because of alleged misconduct by Mr. McConkey.

² The Guaranty Fund is maintained by the Commission to reimburse consumers for actual losses suffered during the provision of real estate brokerage services (up to a statutory maximum per claim) caused by an act or omission of a licensee in which “money or property is obtained from a person by theft, embezzlement, false pretenses, or forgery” or “that constitutes fraud or misrepresentation.” Md. Code, Bus. Occ. § 17-404(a)-(b). The Guaranty Fund is financed from fees charged to real estate professionals upon issuance of a license. Bus. Occ. § 17-403(a).

The Commission investigated the complaints and, in December 2009 and January 2010, respectively, filed regulatory charges against Mr. McConkey in relation to the three complaints. The regulatory charges and claims against the Guaranty Fund were consolidated and transmitted to the Office of Administrative Hearings for a contested case hearing before an administrative law judge on October 25, 2010. At the outset of that hearing, Mr. McConkey and the Commission placed on the record an agreement settling the regulatory charges against him and waiving his right to participate in the hearing relative to the claims against the Guaranty Fund.

The terms of the agreement were incorporated in three consent orders entered on November 12, 2010 (“the Consent Orders”). Mr. McConkey and the Commission stipulated and agreed to the following pertinent facts. At all times, Mr. McConkey was licensed as a real estate salesperson with a license set to expire on July 19, 2012. He had “a practice whereby he would contact real property owners who were on the verge of having their property foreclosed upon and offer to help them save the property from foreclosure.” Mses. Milligan, Powell, and Donovan each were on the verge of foreclosure when they met Mr. McConkey. Mr. McConkey contacted Ms. Donovan by letter on his brokerage letterhead offering to pay her mortgage and utilities while he searched for a buyer for her property. Ms. Powell contacted Mr. McConkey after seeing a television commercial in which he advertised himself as a licensed real estate agent who could save homeowners from foreclosure. Mr. McConkey contacted Ms. Milligan by knocking on her door and offering to help save her home from foreclosure. Mr. McConkey admitted that “by his acts and omissions related to [the properties owned by Mses. Milligan, Powell, and

Donovan], he knowingly and willfully violated the Protection of Homeowners in Foreclosure Act (PHIFA), Md. Code Ann., Real Property Art., Title 7, subtitle 3.” Mr. McConkey consented to entry of an order by the Commission finding that by knowingly and willfully violating PHIFA, he also violated Md. Code, Bus. Occ. § 17-322(b)(25) by “engaging in conduct that demonstrates incompetency and improper dealings.”

Paragraph 7 of the Consent Orders provided:

Based on his violation of [Bus. Occ.] § 17-322(b)(25), [Mr. McConkey] consents to the entry of an Order by the Commission suspending any and all real estate licenses issued to him by the Commission for a period of one (1) year commencing on the date the Commission executes this Consent Order. [Mr. McConkey] understands and agrees that *at the conclusion of the one (1) year suspension period his license will not be automatically reinstated.* To have his license reinstated, [Mr. McConkey] will be required to apply for the reinstatement of his license and to appear at an application hearing before the Commission or its[] designee. The burden of proof at the application hearing will be on [Mr. McConkey] to show why his license should be reinstated. ***There is no guarantee that the Commission or its[] designee will reinstate his license following the application hearing.***

(Emphasis added.)

Mr. McConkey agreed not to oppose the claims against the Guaranty Fund made by Mses. Donovan, Powell, and Milligan and expressly waived his right to participate in the hearing on those claims. He likewise waived his right to appeal from the Consent Orders or any future order awarding the complainants money from the Guaranty Fund.

On January 20, 2011, the ALJ issued a proposed decision finding that Mr. McConkey, in his dealings with the three complainants, engaged in “fraud, misrepresentation, and false pretenses, as well as violations of the [Commission’s] ethical standards[.]” The ALJ found that each complainant sustained actual damages exceeding

\$25,000,³ which then was the statutory maximum,⁴ and awarded each that amount. Mr. McConkey was obligated to reimburse the Guaranty Fund for the payment of those penalties, plus interest, and was “ineligible for a license” until he had done so. The Commission affirmed and adopted that proposed decision by order entered on February 4, 2011 (“the 2011 Decision”).

Reprimand by the House of Delegates

In 2002, Mr. McConkey was elected to the Maryland House of Delegates to represent District 33A in Anne Arundel County. He served in the General Assembly for four terms until he lost his 2018 reelection bid.

During the 2012 legislative session, the legislature engaged in a sunset review of the Commission and proposed legislation to make changes to the Guaranty Fund. As pertinent, the State Senate proposed, in SB 134, doubling the statutory cap to \$50,000 per claim. A related bill introduced in the Maryland House of Delegates, HB 1073, proposed increasing the statutory cap to \$35,000 per claim, reducing the interest payable on debt owed to the Guaranty Fund; requiring the Commission to allow a licensee to set up a payment plan for reimbursement of the Guaranty Fund; and authorizing reinstatement of a licensee’s license upon establishment of a payment plan. Mr. McConkey was not a sponsor of either bill.

³ The ALJ found that Ms. Donovan sustained a loss of \$29,300, that Ms. Powell sustained a loss of \$40,600, and that Ms. Milligan sustained a loss of \$78,000.

⁴ As we will discuss, in 2012, the legislature raised the statutory maximum to \$50,000 per claim. *See* Bus. Occ. § 17-404(b).

After SB 134 passed the Senate, however, Mr. McConkey sponsored three amendments to the bill in the House of Delegates that added the reduced interest rate, the payment plan, and the license reinstatement provisions of HB 1073 to SB 134. The House Economic Matters Committee voted favorably on the bill, as amended, and it was approved unanimously by the full House, including Mr. McConkey. That same day, *The Washington Post* published an article highlighting that Mr. McConkey was one of just a few licensees owing a large debt to the Guaranty Fund and noting that passage of SB 134, as amended, could result in a direct benefit to him. Thereafter, the Senate refused to concur in the House amendments and a conference committee was appointed. Ultimately, the amendments were removed from SB 134 and the bill passed both houses.

Days later, the Joint Committee on Legislative Ethics received a complaint from a state senator concerning Mr. McConkey’s involvement in sponsoring the amendments and lobbying for passage of SB 134, as amended. It investigated the complaint and, in January 2013, adopted a written report finding that Mr. McConkey would have realized a direct financial benefit from the passage of the bill, as amended, “in the form of thousands of dollars in reduced interest charges, no administrative charges, and possible reinstatement of his real estate salesperson license.” Given that Mr. McConkey was one of just seven persons owing a large debt to the Guaranty Fund, the Joint Committee concluded that Mr. McConkey had been obligated to recuse from participation in legislative action on the bill. The Joint Committee’s report was adopted by the House of Delegates by a resolution and Mr. McConkey was reprimanded for his conduct.

2018 Application to the Commission

On December 14, 2018, Mr. McConkey filed his application to renew his real estate salesperson license with the Commission. He alleged that he would affiliate with his former brokerage, “Sell DC Real Estate,” which now was operated by Susan McConkey, his wife.

By letter dated January 2, 2019, the Commission advised Mr. McConkey that because his prior license had expired on July 19, 2012, more than three years earlier, his application would be treated as an application for an original license. The Commission scheduled a hearing on his application for March 20, 2019.⁵ Mr. McConkey moved to postpone the hearing, scheduled for 30 minutes; to increase its length; and for the Commission to delegate the hearing of the case to an ALJ at the Office of Administrative Hearings.⁶ The Commission granted his request to postpone, resetting the case for a three-hour hearing before it on May 22, 2019, and implicitly denying the request to delegate the hearing.

Commission Hearing

Mr. McConkey was represented by counsel and an assistant attorney general represented the Commission at the hearing. At the outset, counsel for the Commission introduced 15 exhibits which were admitted without objection. The exhibits included the Consent Orders, Mr. McConkey’s licensing record, the 2011 Decision, and the House of

⁵ Despite scheduling this hearing, the Commission initially summarily denied Mr. McConkey’s application on January 15, 2019.

⁶ Under the Administrative Procedures Act, the decision to delegate a case to the Office of Administrative Hearings for hearing and a proposed or final administrative decision lies solely within the discretion of the agency. Md. Code, State Gov’t § 10-205(a).

Delegates resolution reprimanding Mr. McConkey, as well as records concerning the earlier disciplinary actions against Mr. McConkey.

McConkey testified and called five character witnesses. First, Brigitte Genovese, a licensed real estate salesperson who had known Mr. McConkey for four years through their sons' sports team, testified that he was a "very kind and considerate person" who "sets a good example." She described him as "consistent," "dependable," and "very honest[.]" On cross-examination, Ms. Genovese acknowledged that she was unaware of Mr. McConkey's disciplinary record with the Commission, his reprimand by the House of Delegates, or his disbarment.

Gary Dinsick testified that he had known Mr. McConkey for about three years through their church. Mr. Dinsick led a men's group at the church focused on personal improvement that Mr. McConkey attended on a weekly basis. The two men also had traveled to Jamaica together on church outreach projects to build housing in very impoverished areas of the country. In Mr. Dinsick's opinion, Mr. McConkey's "integrity [was] beyond reproach" and he was very reliable. On cross-examination, he testified that he was unaware of Mr. McConkey's disciplinary history and had no experience with him in a business setting.

William Frank had known Mr. McConkey for 17 years and had served in the General Assembly with him for 12 years. He characterized Mr. McConkey's ethical violation during his time in office as a "lapse in judgment[.]" In his view, Mr. McConkey was a "good" and "honest" person. On cross-examination, he testified that he was unaware

of Mr. McConkey’s disciplinary history with the Commission. He cited instances of Mr. McConkey’s generous spending on others as examples of his character.

Al Mendelsohn testified that he and Mr. McConkey were fraternity brothers in college and had known each other for nearly 40 years. In his view, Mr. McConkey “bec[a]me one of the most responsible people [he] kn[e]w” in the last decade. Mr. Mendelsohn would “not hesitate” to refer someone to Mr. McConkey. He had learned about Mr. McConkey’s disciplinary history the day prior to the hearing, explaining that Mr. McConkey told him that he had violated a new law, *i.e.*, PHIFA, about which he did not “understand some of the intricacies.” On cross-examination, Mr. Mendelsohn testified that he was unaware that Mr. McConkey had co-sponsored the bill that became PHIFA and was unaware that Mr. McConkey had been disciplined by the Commission in 1993, 1994, and 1995. He agreed that if he did not know Mr. McConkey, he “would be really reticent” to recommend him. He was aware that Mr. McConkey had been disbarred, noting that he had told Mr. McConkey at the time that he “really screwed up.”

Mrs. McConkey testified that she met her husband in 1998 and that they have three children together, ranging in age from a high school freshman to a kindergartner. She is licensed as a real estate broker associated with Sell DC Real Estate. Mrs. McConkey was selling real estate “less than part-time” because she was working full time for the Internal Revenue Service. Since Mr. McConkey’s license was suspended, he has performed the administrative work for the brokerage, and she has acted as the broker. He also has helped friends and investors to purchase properties “at the courthouse steps” to rehab and resell.

Mrs. McConkey acted as the broker in those transactions, but Mr. McConkey found the properties.

Mrs. McConkey testified that their family had struggled financially because of Mr. McConkey’s losing his license and because of his debt to the Guaranty Fund, especially since he lost his reelection bid. Counsel asked Mrs. McConkey if she could provide assurances that, if Mr. McConkey’s application were granted, he would not violate any rules or regulations again. She replied, “We can’t afford for it to happen again.” She added that Mr. McConkey would not be involved in any foreclosure properties were his license to be reinstated.

On cross-examination, Mrs. McConkey acknowledged that she has no experience supervising a real estate salesperson. She explained that it would be helpful to her if his license were reinstated because she would be able to spend more time going to her children’s sports events while he handled open houses and other real estate tasks on the weekends. She testified that Mr. McConkey had reimbursed the Guaranty Fund for the three claims, but still owed interest and fees to the State Central Collections Unit.

Mr. McConkey testified about his disciplinary history. He explained that the first time he was disciplined was for closing his brokerage office without providing proper notice to the Commission.⁷ With regard to his violations of PHIFA, Mr. McConkey testified that he had cosponsored the bill that provided a “safe haven” for distressed homeowners to protect them from “scam artists[.]” He admitted that he “ran afoul” of and

⁷ Actually, this was the second disciplinary action against him. The first action concerned his failure to properly supervise an agent.

“definitely violated” PHIFA in his transactions with Mses. Milligan, Powell, and Donovan, but explained that “it was a change in the law” and “[n]o attention had been paid really to the law to give [real estate professionals] guidance.” He added that “everything that [he] did” would have been legal before the passage of PHIFA. With respect to the ALJ’s decision on the claims against the Guaranty Fund, Mr. McConkey emphasized that he “wasn’t allowed to give [his] side of the story” or “participate” in the proceeding.

Mr. McConkey testified that he initially made monthly payments to the Guaranty Fund, but because he was being charged a 17% collection fee and 12% interest per annum, he fell further behind. Eventually, he sold a rental property and his wife borrowed money from her federal retirement account to pay the principal amount owing to the Guaranty Fund. He still owed money to the State collections unit but had entered into an agreement to pay that money back over time.

Mr. McConkey explained that he was reapplying for his license because he “love[s] the business” and with the end of his political tenure, he wanted to focus on real estate again. He promised that he was not interested in “buy[ing] up foreclosure properties” and just wanted “to list and sell, and make a calm, simple life, with no headaches, no controversy.” He emphasized that he would be watched closely by the media because of his history.

On cross-examination, Mr. McConkey acknowledged that he had waived his right to participate in the ALJ hearing concerning the claims against the Guaranty Fund by entering into the Consent Orders. However, he continued to maintain that the

Commission’s final order did not have the same force because the ALJ only heard “one side of everything[.]”

The First Commission Decision and Remand Following Judicial Review

On June 20, 2019, the Commission issued a decision denying Mr. McConkey’s application. It was guided by factors governing the determination of whether to reinstate a disbarred attorney:

- (1) The nature and circumstances of the licensee’s misconduct;
- (2) The licensee’s subsequent conduct and reformation;
- (3) The licensee’s present character; and
- (4) The licensee’s present qualifications and competence to [act as a real estate professional].

(Citing *In re Cooke*, 425 Md. 652, 661 (2012) (additional citations omitted).)⁸ The Commission concluded that the evidence bearing on each factor weighed in favor of denying the application. As pertinent, the Commission was “swayed” by testimony from Ms. Genovese and Mr. Dinsick that they thought Mr. McConkey “was still engaged in the practice of real estate[.]” It further found that though Mr. McConkey had taken the required courses and passed his exam, the evidence that he was continuing to practice real estate and/or holding himself out as practicing real estate reflected a “disregard for the authority of the Commission and lack of qualification and competence.”

⁸ The Supreme Court of Maryland has reasoned that attorney licensure decisions are useful analogs in the context of real estate licensure decisions because both professions involve duties of trust owed to clients and management of monies. *Pautsch v. Md. Real Est. Comm’n*, 423 Md. 229, 257-62 (2011).

Mr. McConkey petitioned for judicial review of that decision in the Circuit Court for Baltimore City. On January 21, 2020, the circuit court determined to vacate the decision and remand the matter to the Commission because it concluded that there was not substantial evidence in the record to support the Commission’s finding that Mr. McConkey continued to practice real estate without a license and/or held himself out as practicing real estate. On remand, it directed the Commission to “reconsider its decision without any consideration of the allegation that Mr. McConkey violated his suspensions by continuing to practice the real estate profession.” The circuit court expressed no opinion about whether the Commission should “reopen the record” on remand to take additional evidence.⁹

The Final Commission Decision

On remand, neither party requested to reopen the record, and, on July 27, 2020, the Commission issued a new decision denying Mr. McConkey’s application. Evaluating the same four factors, the Commission found under factor one that Mr. McConkey’s prior misconduct resulted in serious harm to his clients and that his “attempts to explain how he managed to violate a law he had a significant hand in creating were confusing and not persuasive.” In sum, “[t]he severity of the misconduct outweigh[ed] his justifications.”

Turning to the second factor – subsequent conduct and reformation – the Commission found that although there was testimony “regarding Mr. McConkey’s parenting, friendship, and church volunteering, no witness spoke to subsequent conduct or

⁹ Mr. McConkey filed a petition for writ of *certiorari* in the Supreme Court of Maryland, which the Commission moved to dismiss. *McConkey v. Md. Real Est. Comm’n*, Case No. COA-PET-0479-2019. On April 10, 2020, the Supreme Court dismissed the petition.

reformation that would tend to show any improvement in his reputation and character *as it relates to the practice of real estate.*” (Emphasis added.) Mrs. McConkey’s testimony about how she would supervise Mr. McConkey if he were granted a license “indicate[d] to the Commission that [he] does not take required supervision seriously.” Further, although Mrs. McConkey testified that her husband would “stay away from foreclosure” properties, she also testified that he was then engaged in buying properties at foreclosure with friends and investors and flipping them for resale.

The Commission likewise was troubled by Mr. McConkey’s “attempt[] to skirt his responsibility to reimburse the Guaranty Fund by using his power as a legislator in an attempt to restructure the repayment process.” It found that he “remain[ed] defiant” and downplayed his actions as a “simple little amendment.” Given that Mr. McConkey bore the burden of proving his good character and reputation, the Commission found his refusal to accept responsibility for this ethical violation “consequential.”

With respect to Mr. McConkey’s present character, the Commission emphasized that although his witnesses all spoke highly of his character, they were uniformly “unaware of the extent of Mr. McConkey’s past disciplinary issues with the Commission, [the Supreme Court] of Maryland, and [the] House of Delegates.” Absent this “necessary context[,]” the witnesses’ opinions about his present character were not entitled to significant weight.

On the final factor – qualifications and competence – the Commission found that Mr. McConkey had presented evidence that he had taken the required real estate course and passed his exam,¹⁰ demonstrating his current competence to practice real estate.

Weighing the factors, the Commission concluded that “the combination of his past disciplinary history, his witnesses’ lack of knowledge about that history, the striking attempt to legislate his way out of a sanction, the resulting punishment by the House of Delegates, and his continued justification of his behavior outweigh any qualification or competence.” Although the Commission did “believe in second chances[,]” Mr. McConkey failed to adduce evidence bearing on the critical issue of reformation and without that evidence, he failed to meet his burden to establish that he had the good character and reputation to be granted a real estate salesperson license.

Mr. McConkey filed a petition for judicial review in the circuit court, which affirmed the Commission’s decision. This timely appeal followed.¹¹

¹⁰ Under Bus. Occ. § 17-303(d)-(e), an applicant for a real estate salesperson license must complete a “basic course in real estate” approved by the Commission and pass an examination given by the Commission.

¹¹ Mr. McConkey filed three notices of appeal. On February 18, 2022, this Court remanded the case to the circuit court without affirmance or reversal for it to determine if any of those notices of appeal were timely consistent with the *Eighth Administrative Order Restricting Statewide Judiciary Operations Due to the COVID-19 Emergency* based upon the method of delivery. By order entered July 18, 2023, the circuit court determined that one notice of appeal was timely. By order entered August 29, 2023, this Court ordered that this appeal could proceed.

STANDARD OF REVIEW

In an appeal taken from a decision on judicial review of an administrative agency decision, “we look through the circuit court’s decision, although applying the same standards of review, and evaluate the decision of the agency.” *Piney Orchard Cmty. Ass’n v. Md. Dep’t of the Env’t*, 231 Md. App. 80, 91 (2016) (cleaned up). Our “role in reviewing an administrative agency adjudicatory decision is narrow; it is limited to determining if there is substantial evidence in the record as a whole to support the agency’s findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.” *Md. Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005) (internal quotation marks and citation omitted) (quoting *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 67-69 (1999)). The Supreme Court of Maryland has consistently defined substantial evidence as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Comm’r of Lab. & Indus. v. Whiting-Turner Contracting Co.*, 462 Md. 479, 490 (2019) (cleaned up). “A reviewing court should defer to the agency’s fact-finding and drawing of inferences if they are supported by the record.” *Noland*, 386 Md. at 571. Although an agency’s statutory interpretation is reviewed *de novo*, “an administrative agency’s interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts.” *Halici v. City of Gaithersburg*, 180 Md. App. 238, 261 (2008) (further quotation marks and citation omitted) (quoting *Miller v. Comptroller of Md.*, 398 Md. 272, 281 (2007)). Nevertheless, an agency’s interpretation is not controlling if “it is plainly erroneous or inconsistent with the regulation.” *Md. Transp. Auth. v. King*, 369 Md. 274, 288-89 (2002)

(quotation marks and citations omitted). “With respect to matters committed to agency discretion, a reviewing court applies the arbitrary and capricious standard of review, which is extremely deferential to the agency.” *Md. Dep’t of the Env’t v. Cnty. Comm’rs of Carroll Cnty.*, 465 Md. 169, 202 (2019) (quotation marks and citations omitted).

DISCUSSION

I.

Mr. McConkey contends the Commission demonstrated bias against him, depriving him of due process of law. First, he maintains that the Commission sanctioned him a second time for the same misconduct. Second, he argues that the Commission improperly relied upon the 2011 Decision because it resulted from a “one-sided, kangaroo . . . hearing” in which Mr. McConkey could not present a defense.¹² Mr. McConkey further contends the Commission could not consider his conduct as a legislator, including the conduct resulting in a reprimand by the House of Delegates, in assessing his character, because the Maryland Constitution prohibits a delegate from being held ““liable in any civil action, or criminal prosecution, whatever, for words spoken in debate.”” (Quoting MD. CONST. art. III, § 18.) He also takes issue with the Commission’s determination not to reopen the evidentiary

¹² After the 2011 Decision, Mr. McConkey, in his capacity as a member of the House of Delegates, sought an opinion from the Office of Counsel to the General Assembly of the Attorney General’s Office regarding whether the Commission’s practice of conditioning offers of settlement on the waiver of the right to contest Guaranty Fund claims amounted to duress. The Office of Counsel responded in April 2011 that it was “possible that in certain circumstances[] a court might find that putting a broker in a situation that requires him or her to make such a choice[] is unconstitutional.” This opinion was not introduced into evidence or raised in argument before the Commission, however, and is not before us on appeal.

record on remand following the first petition for judicial review or hold a hearing, which he characterizes as secretive.

We begin with the well-established proposition that “procedural due process . . . requires that administrative agencies performing adjudicatory or quasi-judicial functions observe the basic principles of fairness as to parties appearing before them.” *Regan v. State Bd. of Chiropractic Exam’rs*, 355 Md. 397, 408 (1999) (cleaned up). This bar is ordinarily satisfied if a party appearing before an administrative tribunal is afforded notice, the ability to present evidence and argument, the right to rebut adverse evidence, the right to appear with counsel, the right for the decision to be based upon evidence introduced on the record, and the right to have a complete record of the proceedings. *Boehm v. Anne Arundel Cnty.*, 54 Md. App. 497, 512-13 (1983) (citing Bernard Schwartz, *ADMINISTRATIVE LAW* § 67 at 192-93 (1976)). Mr. McConkey does not dispute that all these rights were afforded to him at his hearing before the Commission.¹³

Mr. McConkey waived two of his procedural challenges. He did not raise before the Commission his constitutional challenge to the consideration of his legislative reprimand. “Under settled Maryland law, appellate review of administrative decisions is limited to those issues and concerns raised before the administrative agency.” *Cap. Com. Props., Inc.*

¹³ Although Mr. McConkey claims he learned for the first time at the hearing that it would last three hours, he does not argue that the length of the hearing deprived him of due process. Considering that Mr. McConkey was on notice that the hearing would last three hours more than two months before the hearing took place, lodged no objection to time constraints imposed during the hearing, and the record reflects that he was not restricted in his presentation of his case, had he raised this issue directly we would conclude that the issue was waived.

v. Montgomery Cnty. Plan. Bd., 158 Md. App. 88, 96 (2004) (citing *Mayor & City Council of Rockville v. Woodmont Country Club*, 348 Md. 572, 582 n.3 (1998)). Consequently, that issue is not before us on appeal. In any event, because the Commission is an administrative agency determining Mr. McConkey’s entitlement to a professional license, the legislative privilege was inapplicable.

For the same reason, Mr. McConkey waived any contention that the Commission should have reopened the record following the circuit court’s remand upon vacation of the first Commission decision because he never requested that it do so.

Mr. McConkey’s contention that the Commission was sanctioning him a second time for the same misconduct is without merit. The Consent Orders clearly and unambiguously stated that although the Commission was imposing a one-year suspension, Mr. McConkey was not entitled to an “automatic[] reinstate[ment]” of his license. Rather, he was obligated to apply for a new license, to appear at a hearing, and to prove his entitlement to reinstatement. As we shall discuss in more detail, *infra*, Mr. McConkey’s prior misconduct and his acceptance of responsibility for it were relevant to the Commission’s determination of whether he met his burden of showing that he possessed the “good character and reputation” necessary to obtain a salesperson license. Bus. Occ. § 17-303(b).

Mr. McConkey’s contention that the Commission should not have considered the 2011 Decision because it was the result of a one-sided proceeding is equally unavailing. Again, Mr. McConkey expressly waived his right to participate in that proceeding in the

Consent Orders. He may not be heard to complain on appeal that the resulting proceeding was unfair to him or collaterally attack it on its merits in this proceeding.

II.

On the merits, Mr. McConkey reframes his argument concerning his prior misconduct, asserting that the Commission improperly focused on that misconduct instead of his “present moral character[.]” He emphasizes that he practiced real estate for many years without any complaints or infractions and served honorably in the legislature for 16 years. He reiterates his position that it was unfair for the Commission to make his suspension permanent.

Mr. McConkey bore the burden of establishing, as pertinent, that he was of “good character and reputation[.]” and competent to practice real estate. Bus. Occ. § 17-303. The issues before us are whether there was substantial evidence in the record supporting the Commission’s finding that he did not satisfy that burden and whether the ultimate decision to deny the application was arbitrary or capricious.

Our Supreme Court’s decision in *Matter of Knight*, 464 Md. 118 (2019), is instructive. There, the character committee and the State Board of Law Examiners each recommended denial of Ms. Knight’s application to the bar based on discrepancies in her application involving prior civil and criminal actions against her, delinquent accounts, and terminations of past employment. *Id.* at 119, 124. The Supreme Court concurred that Ms. Knight did not meet her burden of showing that she had “the moral character and fitness requisite for a member of the Bar.” *Id.* at 131. It emphasized that an applicant’s character must be assessed at the time of the application. *Id.* at 123. An applicant who has committed

serious prior misconduct may satisfy the character requirement by showing that he or she “convincingly rehabilitated’ himself or herself.” *Id.* Nevertheless, “[w]hen an applicant’s character is put in question by past misconduct or difficulties, it is significant whether the applicant admits or minimizes the past misconduct.” *Id.* at 131 (citing *Application of Allan S.*, 282 Md. 683, 690 (1978)).

Consistent with *Knight*, here the Commission considered Mr. McConkey’s past misconduct in two ways: 1) whether he had accepted responsibility or minimized his role and 2) whether he had convincingly shown that he had rehabilitated himself. The Commission found that Mr. McConkey continued to minimize his past misconduct, both in his testimony and in his statements to his character witnesses. Most of his witnesses were unaware of his prior disciplinary history and all were unaware of the extent of it. Those witnesses who knew about aspects of his prior misconduct believed that it reflected a lapse in judgment or a misunderstanding of the law. Mrs. McConkey also downplayed her husband’s violations of the law in her testimony. Mr. McConkey himself downplayed his misconduct, admitting violating PHIFA, but claiming that the lack of guidance on that law had prejudiced him; arguing that the Guaranty Fund awards were not entitled to great weight because he was not allowed to contest them; and disputing the seriousness of his ethics violation.

For similar reasons, Mr. McConkey’s character witnesses were ill equipped to testify to his rehabilitation. Their lack of knowledge of his misconduct and their inexperience with him in a professional or business setting made their opinions of his current character less significant. Mrs. McConkey likewise did not testify that her husband

had learned from his mistakes, but only that he would not reoffend because they could not afford for him to do so.

In further support of its decision, the Commission found that Mr. McConkey did not take the need for broker supervision seriously given his wife’s testimony that his reinstatement would free up her time to attend their children’s sports events. Mr. McConkey’s current practice of buying properties in foreclosure with friends and investors also cast doubt on his and his wife’s testimony that he would not return to his practice of purchasing homes in foreclosure.

All of the Commission’s findings were supported by substantial evidence in the record and supported its determination that Mr. McConkey did not meet his burden of establishing that he had the good character and reputation to practice real estate. The Commission’s ultimate discretionary decision to deny the application was not arbitrary or capricious. Perceiving no error, we affirm the decision of the circuit court affirming the final agency decision.

**JUDGMENT OF THE CIRCUIT COURT FOR
BALTIMORE CITY AFFIRMED. COSTS TO
BE PAID BY APPELLANT.**