

FILED

AUG 22 2008

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE

By H. Contreras

* * *

In the Matter of the Accusation of)	
ARMELL*HERTLE REAL ESTATE, INC.,)	NO. H-2181 FR
A CORPORATION, and,)	
JOHN WILLIAM HERTLE,)	OAH NO. N-2007120492
Respondents.)	

DECISION

The Proposed Decision dated July 24, 2008, of the Administrative Law Judge of the Office of Administrative Hearings is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

This Decision shall become effective at 12 o'clock noon
on September 11, 2008.

IT IS SO ORDERED 8/20, 2008.

JEFF DAVI
Real Estate Commissioner

Barbara J. Bigby

BY: Barbara J. Bigby
Chief Deputy Commissioner

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

ARMELL*HERTLE REAL ESTATE, INC.,
A Corporation, and

JOHN WILLIAM HERTLE,

Respondents.

Case No. H-2181 FR

OAH No. 2007120492

PROPOSED DECISION

Judith A. Kopec, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 17, 2008, in Fresno, California.

Mary F. Clarke, Counsel, Department of Real Estate (department) represented the complainant. Diana Brewster, Auditor III for department, was also present.

Steven C. Lynes, Attorney, represented Armell*Hertle Real Estate, Inc. (AHREI) and John William Hertle. Mr. Hertle was also present.

Evidence was received, the record closed, and the matter was submitted for decision on July 17, 2008.

FACTUAL FINDINGS

1. On September 20, 2007, complainant John W. Sweeney, Deputy Real Estate Commissioner of the State of California, made the Accusation in his official capacity.
2. AHREI is licensed by department as a corporate real estate broker. Mr. Hertle is the designated broker officer of AHREI and is also individually licensed by department as a real estate broker.
3. AHREI provides property management and residential sales services. AHREI receives and disburses funds on behalf of the owners of the properties it manages. AHREI maintained and deposited the trust funds into an account with Union Bank of California in the name, "Armell*Hertle Real Estate Inc. Client Trust Account" (Trust Account). Approximately \$1,176,000 in trust funds are collected and deposited into Trust Account each year.

4. Ms. Brewster performed an audit of AHREI to determine whether it handled and accounted for trust funds as required by law. The audit, which covered the period from December 1, 2003, through December 1, 2006, was conducted from October 24, 2006, to February 2, 2007. Ms. Brewster examined a variety of records on a sample basis, which is an accepted accounting technique. Ms. Brewster conferred with Mr. Hertle and Joyce Cantrell, AHREI's bookkeeper at the time of the audit.

5. Ms. Brewster prepared bank reconciliations for September 30, October 31, and November 30, 2006, using the records given to her. She compared the accountability to the adjusted bank statements for the three dates.¹ Ms. Brewster identified a shortage on each of the following dates: on September 30, the shortage was \$1,457.67; on October 31, the shortage was \$1,733.06; and on November 30, the shortage was \$1,770.47. The shortages resulted from negative account balances, which occurred when funds in the Trust Account belonging to property owners with positive balances were used to pay for obligations of other owners whose accounts did not have sufficient funds. AHREI did not obtain the prior written consent of each owner of funds in the Trust Account prior to these disbursements. As a result of each disbursement, the balance of funds in the account was reduced to an amount less than AHREI's existing aggregate liability to all owners of funds in the Trust Account. The accounts were no longer negative as of January 24, 2007.

6. AHREI had funds that were unidentified and unaccounted for on September 30, 2006, in the amount of \$15,039.90; on October 31, 2006, in the amount of \$8,931.22; and on November 30, 2006, in the amount of \$8,639.22. AHREI did not maintain a separate record for these unidentified and unaccounted for funds.

7. AHREI failed to reconcile the balance of its separate beneficiary or transaction records with the record of all funds received and disbursed from the Trust Account.

8. From April 18 through September 22, 2006, AHREI failed to record correct check numbers for 10 checks disbursing funds from the Trust Account. In all but three of these, the error occurred in the last digit of the check number. For example, a check number was recorded as 5533 when the correct number was 5531. AHREI issued approximately 300 checks during this time period against the Trust Account.

9. Beginning in December 2005, Mr. Hertle transferred AHREI's financial records from one software program, Quick Books Pro, to another, Rent Manager. The transition was to be completed in January 2006. Mr. Hertle decided to make this change after talking with his bookkeeper at the time and because he wanted to use a software program that was specifically geared toward property management financial records. In February 2006, the bookkeeper told him the records concerning security deposits had not yet been transferred. In May or June 2006, Mr. Hertle noticed that the monthly reports appeared to be the same as those from prior months and realized that there were problems with the transition to the new accounting software. He hired a consultant to address these problems.

¹ Accountability is the broker's liability to the property owners as of a specific date.

AHREI's bookkeeper quit and Mr. Hertle hired Ms. Cantrell. The consultant worked with Mr. Hertle and Ms. Cantrell to complete the transition to the new software, reconcile the accounts, and address problems that were identified.

10. AHREI was still working to resolve these problems when Ms. Brewster began her audit. Mr. Hertle and AHREI's employees cooperated fully and completely with the audit. The problems with the transition to the new software were resolved and the accounts were reconciled in January 2007. AHREI subsequently transitioned to a different software program in the spring of 2007 which provides additional accounting controls. For example, the new software program will not allow a check to be issued if the account has insufficient funds.

11. AHREI had been audited once before. Mr. Hertle implemented the suggestions of the auditor. The prior audit did not result in disciplinary action. Mr. Hertle does not have an accounting background. He depends upon the staff he hires to perform their jobs. The bookkeepers he hired had background in the property management business. Mr. Hertle took a class during the past year when he renewed his license that addressed the legal requirements regarding trust funds.

12. Mr. Hertle displayed a surprisingly lackadaisical attitude toward his responsibility to be informed of the legal requirements governing trust accounts. When asked during cross examination if he had a better understanding of how trust funds needed to be handled, he responded, "Yes, I guess." Mr. Hertle did not seem very interested in gaining greater mastery of the legal requirements. While he reviews trust account records two to three times per month, his review is for business purposes, such as to see which tenants are late with their rent, rather than to ensure compliance with real estate licensing requirements. This suggests that Mr. Hertle does not fully understand or accept the importance of fully complying with the trust fund requirements.

LEGAL CONCLUSIONS

1. Complainant has the burden of proving by clear and convincing evidence to a reasonable certainty that respondents' licenses should be suspended or revoked. (See *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 855-6.)

2. Complainant may suspend or revoke a license for willfully disregarding or violating applicable statutes and regulations. The term "willfully," as used in this subdivision, means "done deliberately: not accidental [sic] or without purpose." (*Apollo Estates v. Department of Real Estate* (1985) 174 Cal.App.3d 625, 639; See also *Manning v. Fox* (1984) 151 Cal.App.3d 531, 542 ["Section 10177, subdivision (d), is designed 'to protect the public not only from conniving real estate salesmen but also from the uninformed, negligent, or unknowledgeable salesman.'"]) Thus, a violation of Business and Professions Code section 10177, subdivision (d) can be shown by deliberate or negligent misconduct.

AHREI's License

3. A real estate broker's license is required to perform property management services. (Bus. & Prof. Code, § 10131, subd. (b).) A broker is required to deposit funds which belong to others in connection with a real estate transaction that are not immediately placed into a neutral escrow depository or given to the broker's principal, in a trust fund account. (Bus. & Prof. Code, § 10145, subd. (a)(1).) The broker shall maintain a separate record of the receipt and disposition of all funds deposited in this trust fund account. (*Id.* at subd. (g).)

4. A broker is required to keep detailed and specific records concerning all trust funds received. (Cal. Code Regs., tit. 10, § 2831, subd. (a).) For funds previously deposited into the trust account, the records must include the check number and date of related disbursement. (*Id.* at subd. (a)(5).) For each bank account containing trust funds, a broker must keep a record of all trust funds received and disbursed that meets these requirements. (*Id.* at subd. (b).)

5. A broker is required to keep separate detailed and specific records for each beneficiary or transaction, accounting for all funds that have been deposited in the broker's trust account. (Cal. Code Regs., tit. 10, § 2831.1, subd. (a).) The check number of each related disbursement must be included. (*Id.* at subd. (a)(4).)

6. As determined in Factual Finding 8, during the audit period, AHREI failed to record correct check numbers for disbursements from the Trust Account. This constitutes a violation of California Code of Regulations, title 10, section 2831, subdivision (a), and section 2831.1, subdivision (a). Since the errors reasonably could have resulted from inadvertence, the evidence does not show that the violation resulted from either willful or negligent conduct. AHREI maintained a separate record for each of these disbursements from the Trust Account, so it did not violate Business and Professions Code section 10145 as complainant alleged. Therefore, cause does not exist under Business and Profession Code section 10177, subdivision (d), to suspend or revoke AHREI's license for these violations.

7. As determined in Factual Finding 6, during the audit period, AHREI had unidentified and unaccounted for funds in the Trust Account and did not maintain a separate record for these funds. This violated Business and Professions Code section 10145, subdivision (g), and California Code of Regulations, title 10, section 2831.1, and provides cause under Business and Professions Code section 10177, subdivision (d), to suspend or revoke AHREI's license.

8. A broker must reconcile, at least once a month, the balance of all separate beneficiary or transaction records with the record of all trust funds received and disbursed. (Cal. Code Regs., tit. 10, § 2831.2.)

9. As determined in Factual Finding 7, during the audit period, AHREI failed to reconcile its records in violation of California Code of Regulations, title 10, section 2831.2. This does not constitute a violation of Business and Professions Code section 10145. The failure to reconcile the records provides cause under Business and Professions Code section 10177, subdivision (d), to suspend or revoke AHREI's license.

10. A broker shall obtain the written consent of every principal who is an owner of the funds in a trust account prior to each disbursement if the disbursement will reduce the balance of funds in the account to an amount less than the existing aggregate trust fund liability of the broker to all owners of the funds. (Cal. Code Regs., tit. 10, § 2832.1.)

11. As determined in Factual Finding 5, during the audit period, AHREI did not obtain the prior consent of each owner of funds in the Trust Account prior to disbursing funds that resulted in reducing the balance of funds to less than AHREI's aggregate liability to all owners of funds in the Trust Account. This does not constitute a violation of Business and Professions Code section 10145. This violated California Code of Regulations, title 10, section 2832.1, and provides cause under Business and Professions Code section 10177, subdivision (d), to suspend or revoke AHREI's license.

Mr. Hertle's License

12. The broker officer designated by a corporate broker licensee is responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the law. (Bus. & Prof. Code, § 10159.2, subd. (a).)

13. Complainant may suspend or revoke a license for demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license. (Bus. & Prof. Code, § 10177, subd. (g).)

14. Complainant may suspend or revoke a broker's license for failing to exercise reasonable supervision over the activities of his or her salespersons, or, as the officer designated by a corporate broker licensee, failing to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required. (Bus. & Prof. Code, § 10177, subd. (h).)

15. Mr. Hertle was at all times responsible for the supervision and control of the activities conducted on behalf of AHREI by its employees and was responsible to secure full compliance with all legal requirements. Mr. Hertle was responsible for the violations described in Legal Conclusions 6, 7, 9, and 11, thereby providing cause under Business and Professions Code section 10177, subdivisions (d), (g), and (h), individually and jointly, to suspend or revoke Mr. Hertle's license.

16. There is evidence to mitigate these serious violations. Mr. Hertle was at all times cooperative during the audit. While aware of problems with AHREI's financial records, he did not attempt to evade or unreasonably delay the audit. Some of the deficiencies, such as the incorrect check numbers, may have been caused or exacerbated by problems with the software program. When Mr. Hertle became aware that there were significant problems with the records, he hired a consultant to both assist with the transition to a new software program and to reconcile the records. Weighing all of the evidence, it is determined that the public interest and welfare will be adequately protected by AHREI and Mr. Hertle maintaining their licenses, subject to stayed suspensions.

ORDER

1. All licenses and licensing rights of respondent AHREI are suspended for one year from the effective date of this decision; provided, however, that the suspension shall be stayed upon the following terms and conditions:

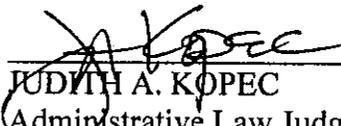
- a. Respondent AHREI shall obey all laws, rules and regulations governing the rights, duties and responsibilities of a real estate licensee in the State of California.
- b. That no final subsequent determination be made, after hearing or upon stipulation, that cause for disciplinary action occurred within one year of the effective date of this decision. Should such a determination be made, the Commissioner may, in his discretion, vacate and set aside the stay order and reimpose all or a portion of the stayed suspension. Should no order vacating the stay be made pursuant to this condition or condition "c" below, the stay imposed herein shall become permanent.
- c. Pursuant to Business and Professions Code, section 10148, respondent AHREI shall pay the Commissioner's reasonable cost for: (1) the audit which led to this disciplinary action and (2) a subsequent audit to determine if respondent AHREI has corrected the trust fund violations found in paragraphs 6, 7, 9, and 11 of the Legal Conclusions. In calculating the amount of the Commissioner's reasonable cost, the Commissioner may use the estimated average hourly salary for all persons performing audits of real estate brokers, and shall include an allocation for travel costs, including mileage, time to and from the auditor's place of work, and per diem. Respondent AHREI shall pay such costs within 60 days of receiving an invoice from the Commissioner detailing the activities performed during the audit and the amount of time spent performing those activities. The Commissioner may, in his discretion, vacate and set aside the stay order, if payment is not timely made as provided for herein, or as provided for in a subsequent agreement between respondent AHREI

and the Commissioner. The vacation and the set aside of the stay shall remain in effect until payment is made in full, or until respondent AHREI enters into an agreement satisfactory to the Commissioner to provide for payment. Should no order vacating the stay be issued, either in accordance with this condition or condition "b" above, the stay imposed herein shall become permanent.

2. All licenses and licensing rights of respondent Hertle are suspended for one year from the effective date of this decision; provided, however, that the suspension shall be stayed upon the following terms and conditions:

- a. Respondent Hertle shall obey all laws, rules and regulations governing the rights, duties and responsibilities of a real estate licensee in the State of California.
- b. That no final subsequent determination be made, after hearing or upon stipulation, that cause for disciplinary action occurred within one year of the effective date of this decision. Should such a determination be made, the Commissioner may, in his discretion, vacate and set aside the stay order and reimpose all or a portion of the stayed suspension. Should no such determination be made, the stay imposed herein shall become permanent.

Dated: July 24, 2008



JUDITH A. KOPEC
Administrative Law Judge
Office of Administrative Hearings

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FILED
OCT 23 2007

DEPARTMENT OF REAL ESTATE

By K. Contreras

8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Accusation of)
12)
13 ARMELL*HERTLE REAL ESTATE, INC.,)
14 A Corporation, and,)
15 JOHN WILLIAM HERTLE,)
16 Respondents.)

NO. H-2181 FR

ACCUSATION

16 The Complainant, JOHN W. SWEENEY, a Deputy Real Estate
17 Commissioner of the State of California, for cause of Accusation
18 against ARMELL*HERTLE REAL ESTATE, INC., a corporation (herein
19 "AHREI") and JOHN WILLIAM HERTLE (herein "HERTLE"), is informed
20 and alleges as follows:

21 I

22 The Complainant, JOHN W. SWEENEY, a Deputy Real Estate
23 Commissioner of the State of California, makes this Accusation in
24 his official capacity.

25 II

26 At all times herein mentioned, Respondents AHREI and
27 HERTLE (herein "Respondents") were and now are licensed and/or

1 have license rights under the Real Estate Law (Part 1 of Division
2 4 of the Business and Professions Code) (herein "the Code").

3 III

4 At all times herein mentioned, AHREI was and now is
5 licensed by the Department of Real Estate of the State of
6 California (herein "the Department") as a corporate real estate
7 broker by and through HERTLE as designated officer-broker of
8 AHREI to qualify said corporation and to act for said corporation
9 as a real estate broker.

10 IV

11 At all times herein mentioned, HERTLE was and now is
12 licensed by the Department as a real estate broker, individually
13 and as designated officer-broker of AHREI. As said designated
14 officer-broker, HERTLE was at all times mentioned herein
15 responsible pursuant to Section 10159.2 of the Code for the
16 supervision of the activities of the officers, agents, real
17 estate licensees, and employees of AHREI for which a license is
18 required.

19 V

20 Whenever reference is made in an allegation in this
21 Accusation to an act or omission of AHREI, such allegation
22 shall be deemed to mean that the officers, directors, employees,
23 agents and/or real estate licensees employed by or associated
24 with AHREI committed such act or omission while engaged in the
25 furtherance of the business or operations of such corporate
26 Respondent and while acting within the course and scope of their
27 authority and employment.

1 VI

2 At all times herein mentioned, Respondent AHREI
3 engaged in the business of, acted in the capacity of, advertised,
4 or assumed to act as a real estate broker within the State of
5 California within the meaning of Sections:

6 (a) 10131(a) of the Code, including the operation and
7 conduct of a real estate brokerage that included the
8 sale or offer of sale, purchase or offer of purchase,
9 solicitation of prospective sellers and purchasers of,
10 solicitation or obtaining listings of, or negotiations
11 of the purchase, sale or exchange of real property or a
12 business opportunity; and

13 (b) 10131(b) of the Code, including the operation and
14 conduct of a property management business with the
15 public wherein, on behalf of others, for compensation
16 or in expectation of compensation, Respondent leased or
17 rented and offered to lease or rent, and placed for
18 rent, and solicited listings of places for rent, and
19 solicited for prospective tenants of real property or
20 improvements thereon, and collected rents from real
21 property or improvements thereon.

22 VII

23 In so acting as a real estate broker, as described in
24 Paragraph VI, above, Respondent AHREI accepted or received funds
25 in trust (herein "trust funds") from or on behalf of buyers,
26 sellers owners, tenants, and others in connection with the
27 leasing, renting, and collection of rents on real property or

1 improvements thereon, as alleged herein, and thereafter from
2 time to time made, or caused to be made, disbursements of said
3 funds.

4 VIII

5 The aforesaid trust funds accepted or received by
6 Respondent AHREI were deposited or caused to be deposited by
7 Respondent AHREI into one or more bank accounts (herein "trust
8 fund accounts") maintained by Respondent AHREI for the handling
9 of trust funds, including but not necessarily limited to the
10 following account maintained by Respondents at the Los Angeles,
11 California branch of Union Bank of California, Armell*Hertle
12 Real Estate Inc. Client Trust Account, account number 7030001316
13 (herein "the Trust Account").

14 IX

15 During the three year period next preceding the filing
16 of this Accusation, in connection with the collection and
17 disbursement of said trust funds, Respondent AHREI:

- 18 (a) failed to keep a columnar record in chronological
19 sequence of all trust funds received and disbursed
20 from the Trust Account containing all the
21 information required by Section 2831 of Chapter 6,
22 Title 10, California Code of Regulations (herein
23 "the Regulations");
- 24 (b) failed to keep a separate record for each
25 beneficiary or transaction for the Trust Account
26 containing all the information required by Section
27 2831.1 of the Regulations;

1 (c) failed to reconcile at least once a month, the
2 balance of all separate beneficiary or transaction
3 records with the Trust Account, as required by
4 Section 2831.2 of the Regulations; and

5 (d) caused, suffered or permitted the balance of funds
6 in the Trust Account to be reduced to amounts, as
7 tabulated below, less than the liability of
8 Respondent to all owners of such funds without
9 first obtaining the written consent of each and
10 every owner of such funds in violation of Section
11 2832.1 of the Code:

	<u>DATE</u>	<u>AMOUNT</u>
12		
13	09/30/2006	\$1,457.67
14	10/31/2006	\$1,733.06
15	11/30/2006	\$1,770.47

16 X

17 At all times mentioned herein, Respondent HERTLE failed
18 to exercise reasonable supervision over the acts of Respondent
19 AHREI and its agents and employees in such a manner as to allow
20 the acts and omissions on the part of AHREI, described above, to
21 occur.

22 XI

23 The facts alleged above are grounds for the suspension
24 or revocation of the licenses and license rights of Respondent
25 under the following provisions of the Code and/or the Regulations:

26 (a) as to Paragraph IX(a) and Respondent AHREI under
27 Section 10145 of the Code and Section 2831 of the

1 Regulations in conjunction with Section 10177(d) of
2 the Code;

3 (b) as to Paragraph IX(b) and Respondent AHREI under
4 Section 10145 of the Code and Section 2831.1 of the
5 Regulations in conjunction with Section 10177(d) of
6 the Code;

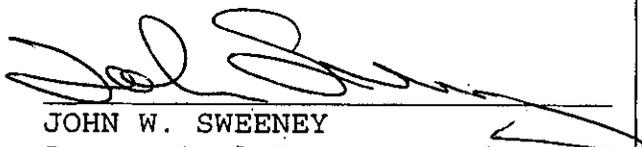
7 (c) as to Paragraph IX(c) and Respondent AHREI under
8 Section 10145 of the Code and Section 2831.2 of the
9 Regulations in conjunction with Section 10177(d) of
10 the Code;

11 (d) as to Paragraph IX(d) and Respondent AHREI under
12 Section 10145 of the Code and Section 2832.1 of the
13 Regulations in conjunction with Section 10177(d) of
14 the Code; and

15 (e) as to Paragraph X and Respondent HERTLE under Section
16 10159.2 of the Code in conjunction with Sections
17 10177(g), 10177(h), and 10177(d) of the Code.

18 WHEREFORE, Complainant prays that a hearing be conducted
19 on the allegations of this Accusation and that upon proof thereof
20 a decision be rendered imposing disciplinary action against all
21 licenses and license rights of Respondents under the Real Estate
22 Law (Part 1 of Division 4 of the Business and Professions Code)
23 and for such other and further relief as may be proper under
24 other applicable provisions of law.

25
26
27 Dated at Fresno, California
this 20~~th~~ day of September, 2007.


JOHN W. SWEENEY
Deputy Real Estate Commissioner