

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JOSE R. SANCHEZ,

Respondent.

Case No. H-4401 SD

OAH No. 2012100201

PROPOSED DECISION

This matter was heard before Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearing, State of California, on March 25, 2013, in San Diego, California.

John W. Barron, Counsel, represented Veronica Kilpatrick (complainant), a Deputy Real Estate Commissioner with the Department of Real Estate (department).

Jose R. Sanchez (respondent) appeared and represented himself.

Evidence was received, the record was closed, and the matter was submitted on March 25, 2013.

FACTUAL FINDINGS

Jurisdiction

1. At all times relevant herein, respondent was licensed by the department as a real estate broker, License No. B/00639027. Respondent has been licensed since 1986. Respondent's license expiration date is November 6, 2014.

2. On August 21, 2012 complainant filed the Accusation in her official capacity.

3. Respondent timely filed a Notice of Defense to the Accusation, pursuant to Government Code section 11506.

Rental Property at 2190 Berryland Court

4. Thuy Raines owned a home at 2190 Berryland Court in Lemon Grove (home). Respondent approached her to discuss renting the home to Mohammed and Reshma Shamshi

(the Shamshis or Shamshi family). Respondent had previously helped the Shamshi family rent an apartment.

5. Ms. Shamshi applied, through Respondent, to rent the home. She gave Respondent a blank check for \$1625 for a deposit to lease the house. Respondent asked Ms. Shamshi to leave the payee of the check blank. Ms. Shamshi wrote a check dated July 19, 2011 in the amount of \$1625 with the payee's name blank. Respondent wrote his name on the check and cashed the check on July 20, 2011. Respondent testified that he was entitled to this sum as a fee for supplying Ms. Raines with a renter for the house. He spent the money on personal debts within four days thereafter.

6. Mohammed and Reshma Shamshi signed a lease agreement for the home on July 19, 2011. The security deposit was identified as \$1625. Respondent never gave this sum to Ms. Raines. Respondent did not deposit this amount into a trust account.

7. Shortly afterwards, Ms. Raines and the Shamshis disagreed over the terms of the rental agreement and the Shamshis did not move into the home. They called to cancel the lease on July 26, 2011. They asked Ms. Raines for the \$1625 security deposit which Respondent had cashed.

8. Respondent acknowledges that he owes the Shamshis \$1625 and has recently made two \$35 payments to them.

9. Respondent is 67 years old and has no disciplinary history with the Department. He earns \$1000 a month from Social Security and does not work actively as a broker.

LEGAL CONCLUSIONS

Applicable Case Law, Statutes and Regulations

1. The burden of proof in this matter is on complainant to show by clear and convincing evidence to a reasonable certainty that respondent's license should be suspended or revoked. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 855-56.)

2. Business and Professions Code section 10145 requires a broker to hold real estate transaction funds belonging to others in trust.¹

¹ Business and Professions Code section 10145 provides, in pertinent part, as follows:

3. Business and Professions Code section 10148, subdivision (a), requires a broker to retain copies of all real estate transaction documents for three years from the date of the closing of the transaction or from the date of the listing if the transaction is not consummated.²

4. Business and Professions Code section 10176, subdivision (a), prohibits a licensee in the course of his duties as a licensee from making any substantial misrepresentation.

5. Business and Professions Code Section 10176, subdivision (i), prohibits a licensee from engaging in conduct which constitutes fraud or dishonest dealing.

6. Business and Professions Code section 10177, subdivision (d), authorizes the suspension or revocation of the license of a real estate licensee for "willfully" disregarding or violating the Real Estate Laws or the Commissioner's Regulations.³ The term "willfully," as

(a) (1) A real estate broker who accepts funds belonging to others in connection with a transaction subject to this part shall deposit all those funds that are not immediately placed into a neutral escrow depository or into the hands of the broker's principal, into a trust fund account maintained by the broker in a bank or recognized depository in this state. All funds deposited by the broker in a trust fund account shall be maintained there until disbursed by the broker in accordance with instructions from the person entitled to the funds.

[¶]...[¶]

(g) The broker shall maintain a separate record of the receipt and disposition of all funds described in subdivisions (a) and (b), including any interest earned on the funds.

² Business and Professions Code section 10148, subdivision (a), provides as follows:

A licensed real estate broker shall retain for three years copies of all listings, deposit receipts, canceled checks, trust records, and other documents executed by him or her in connection with any transactions for which a real estate broker license is required. The retention period shall run from the date of the closing of the transaction or from the date of the listing if the transaction is not consummated. After notice, the books, accounts, and records shall be made available for examination, inspection, and copying by the commissioner of his or her designated representative during regular business hours; and shall, upon the appearance of sufficient cause, be subject to audit without further notice, except that the audit shall not be harassing in nature.

³ Business and Professions Code section 10177, provides, in pertinent part, as follows:

used in this subdivision, means “done deliberately: not accidental or without purpose.” (*Apollo Estates, Inc. 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.’”].)

7. Business and Professions Code section 10177, subdivision (g), authorizes the suspension or revocation of the license of a real estate licensee for demonstrating “negligence or incompetence in performing an act for which he or she is required to hold a license.”

8. Rehabilitation is a state of mind and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved reformation and regeneration. (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) Fully acknowledging the wrongfulness of past actions is an essential step towards rehabilitation. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940.) The evidentiary significance of misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. (*Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1070.)

CAUSES FOR DISCIPLINE

9. Business and Professions Code Section 10145, subdivision (a)(1), requires a broker who accepts funds for a transaction to deposit funds into a trust account until instructed by the person entitled to the funds. California Code of Regulations, title 10, section 2832, subdivision (a), requires that trust funds be deposited in a trust account in the name of the broker or in a fictitious name if the broker is the holder of a license bearing such

The commissioner may suspend or revoke the license of a real estate licensee, or may deny the issuance of a license to an applicant, who has done any of the following, or may suspend or revoke the license of a corporation, or deny the issuance of a license to a corporation, if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has done any of the following:

[¶]...[¶]

(d) Willfully disregarded or violated the Real Estate Law (Part 1 (commencing with Section 10000)) or Chapter 1 (commencing with Section 11000) of Part 2 or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 (commencing with Section 11000) of Part 2.

fictitious name, as trustee.⁴ Respondent failed to deposit the \$1625 security deposit into an account designated as trust accounts as required by section 10145, subdivision (a)(1), and regulation 2832. Therefore, cause is established by clear and convincing evidence to suspend or revoke respondent's license pursuant to Business and Professions Code sections 10145, subdivision (a)(1) and 10177, subdivision (d), and California Code of Regulations, title 10, section 2832.

10. Business and Professions Code Section 10145, subdivision (g), requires a broker to maintain separate records for receipt and disposition of trust funds. There is no evidence that Respondent maintained separate records for receipt and disposition of this trust fund amount. Respondent asked Ms. Shamshi to leave the check payee blank in the amount of \$1625. He then wrote his name as the payee and cashed the check the next day. Accordingly, cause is established by clear and convincing evidence to suspend or revoke respondent's license pursuant to Business and Professions Code sections 10145, subdivision (g), and 10177, subdivision (d).

11. Business and Professions Code section 10176, subdivision (a), prohibits a licensee in the course of his duties as a licensee from making any substantial misrepresentation. Respondent misrepresented to the Shamshis that he was holding the \$1625 deposit on the behalf of her family when in fact he converted the money into a fee for arranging a renter for the property. Respondent solicited from Ms. Shamshi a check in the amount of \$1625 and asked Ms. Shamshi to leave the payee name blank. He then cashed the check and spent the money on debts shortly thereafter. Accordingly, cause is established by clear and convincing evidence to suspend or revoke respondent's license pursuant to Business and Professions Code sections 10176, subdivision (a), and 10177, subdivision (d).

12. Business and Professions Code section 10176, subdivision (i), prohibits a licensee from engaging in conduct constituting fraudulent or dishonest dealing. Respondent misappropriated \$1625 by cashing the sum for his personal use and spending the money in four days on personal debts. He did this before the Shamshis had moved into the property and without instructions from either the Shamshis or Ms. Raines regarding disposition of this money. Accordingly, cause is established by clear and convincing evidence to suspend or

⁴ California Code of Regulations, title 10, section 2832, subdivision (a), provides, in pertinent part, as follows:

Compliance with Section 10145 of the Code requires that the broker place funds accepted on behalf of another into the hands of the owner of the funds, into a neutral escrow depository or into a trust fund account in the name of the broker, or in a fictitious name if the broker is the holder of a license bearing such fictitious name, as trustee at a bank or other financial institution not later than three business days following receipt of the funds by the broker or by the broker's salesperson.

revoke respondent's license pursuant to Business and Professions Code sections 10176, subdivision (i), and 10177, subdivision (d).

13. Business and Professions Code section 10177, subdivision (g), authorizes suspension or revocation of a license where the licensee has demonstrated "negligence or incompetence in performing an act for which he or she is required to hold a license." Cause is not established to suspend or revoke respondent's real estate broker's license on this basis. There was no expert testimony regarding the standard of care or departures from any applicable standards of care to warrant a finding of negligence or incompetence against Respondent.

DISCUSSION

1. Complainant established cause to suspend or revoke respondent's real estate broker's license by clear and convincing evidence. The established trust fund violation is serious and involved a fundamental breach of his duties as a broker, namely, to hold funds for other persons in a designated bank account. Respondent took a fee that was not earned or authorized at the expense of a family attempting to rent a home. Although Complainant asked that Respondent be allowed to obtain a restricted license, Respondent is not a good candidate for such a license. Rehabilitation is a state of mind and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved reformation and regeneration. (*Pacheco* at 1058.) Fully acknowledging the wrongfulness of past actions is an essential step towards rehabilitation. (*Seide* at 940.) Respondent only recently, and well after the present accusation was filed, made two payments towards restitution. Belated restitution, under threat of disciplinary proceedings, is not helpful. (*Rhodes v. State Bar* (1989) 49 Cal.3d 50, 59;

Fitzpatrick v. State Bar (1977) 20 Cal.3d 73.) Respondent's belated reimbursement of funds owed to the Shamshis was a result of the pending charges against him and is not persuasive evidence of rehabilitation.

In addition, Respondent insisted at the hearing that he was entitled to the deposit money as his earned commission. Thus, it cannot be determined that Respondent fully acknowledged, or appreciated, his wrongdoing. Accordingly, it would be contrary to public protection to allow Respondent to obtain a restricted license. The only appropriate remedy to protect the public is outright revocation of his license.

2. Complainant requested investigation costs totaling \$1323.50, pursuant to Business and Professions Code Section 10106. In connection with this application, Complainant submitted declarations of costs signed by Complainant and by Mr. Barron. Based upon these declarations, and consistent with the factors articulated in *Zukerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, reasonable costs of investigation and enforcement of this matter are found to be \$500. This represents deductions due to the

dismissal of one of the charges against Respondent and considering Respondent's limited income of \$1000 a month. Respondent is advised that this amount must be paid prior to the reinstatement of any licensing rights, pursuant to section 10106, subdivision (g)(1).

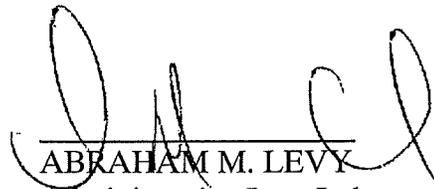
3. With respect to restitution to Mr. and Ms. Shamshi, a restitution order may only issue when a restricted license is granted, pursuant to California Code of Regulations, title 10, section 2930. Here, revocation is deemed appropriate. Pursuant to California Code of Regulations, title 10, section 2912, subdivision (b), payment of this restitution is one of the factors Respondent will need to show to demonstrate that he is rehabilitated should he seek reinstatement of his license.

ORDER

All licenses and licensing rights of Respondent Jose R. Sanchez under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code) are REVOKED.

Respondent shall pay to the Department \$500 for costs associated with its investigation and enforcement of this matter.

DATED: April 8, 2013



ABRAHAM M. LEVY
Administrative Law Judge
Office of Administrative Hearings

RECEIVED
Dept of Real Estate

APR 09 2013

SACRAMENTO LEGAL