

FILED
JUN - 6 2011

DEPARTMENT OF REAL ESTATE
By R. MAS

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of)
) NO. H-5417 SAC
GLADYS FAE SCOTT,)
) OAH NO. 2010080221
)
Respondent.)
_____)

DECISION

The Proposed Decision dated April 21, 2011, 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 JUN 27 2011

IT IS SO ORDERED June 3, 2011

BARBARA J. BIGBY
Acting Real Estate Commissioner

William E. Moran

By WILLIAM E. MORAN, Assistant Commissioner
Enforcement

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED
JUN - 3 2011

DEPARTMENT OF REAL ESTATE
By *R. Mat*

In the Matter of the Accusation Against:

GLADYS FAE SCOTT

Case No. H-5417 SAC

OAH No. 2010080221

Respondent.

PROPOSED DECISION

Administrative Law Judge Dan L. Colson, State of California, Office of Administrative Hearings, heard this matter in Sacramento, California on April 13, 2011.

Richard K. Uno, Counsel, represented the Department of Real Estate (Department), State of California.

Gladys Fae Scott (respondent) was present and represented herself.

Oral and documentary evidence was received. The record was closed on the hearing date and the matter was submitted for decision.

FACTUAL FINDINGS

1. Complainant Tricia D. Sommers, acting in her official capacity only as a Deputy Real Estate Commissioner of the Department, made the charges and allegations contained in the Accusation and caused it to be filed on June 26, 2010. The Department has jurisdiction to suspend or revoke any real estate license issued by the State of California upon satisfactory proof that cause exists for the action.¹

2. Respondent filed a Notice of Defense to the Accusation. The matter was set for this evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings.

¹ Business and Professions Code section 10175.

3. Respondent is currently licensed, and at all times relevant to this decision was so licensed, by the Department as an individual real estate broker. At all times relevant to this decision, respondent was actively engaged as a real estate broker. There is no history of any other disciplinary action by the Department against respondent.

4. Respondent's business includes brokering loans secured by real property, in expectation of compensation. In that activity, she referred buyers to Rate Is Low, a mortgage company operated by Ray Newsby and located in Lafayette, California.

5. In late June, or early July, 2007, respondent was invited to a seminar by Mr. Newsby to discuss his new business line. She attended the seminar, where Mr. Newsby explained that he was expanding his business to include real estate loan modification services, which would be operated under the name CTS Investments and Consulting. He also explained that a fee of between \$400 and \$600 would be paid for each referral accepted by CTS. Respondent testified that she was excited about the service and felt that it was needed because many people were in danger of losing their homes since the real estate market was "falling apart" at that time.

6. Respondent testified that in July 2007, she referred her daughter to CTS to modify the loan on her home in Yuba City, California, and a modification was obtained.

7. In early August 2007, respondent was contacted by telephone by Gordon McMahan. He had heard from someone who knew of her that she might be able to help him get a loan modification. He had been trying to get a modification by contacting the lender, but was having no success and was getting very frustrated. After hearing his explanation, respondent told Mr. McMahan that she thought CTS could help him. She had confidence in CTS partly due to the successful "test run" involving the loan modification CTS arranged for her daughter. Respondent put Mr. McMahan in touch with Kamela Felder, the President of CTS.

8. Respondent subsequently met with Mr. Newsby and Ms. Felder in Lafayette, California, where Rate Is Low was located. Since both respondent and Mr. McMahan lived in Vallejo, California, at that time, respondent was asked if she would deliver documents to Mr. McMahan and pick up his check for CTS' fee. On August 13, 2007, respondent met with Mr. McMahan at his home. At that meeting he gave her his personal check, number 1191, in the amount of \$2,495. The check was made out to CTS Investments. Respondent left three documents with Mr. McMahan: (1) a form stating that he had three days (until midnight on August 16, 2007) to cancel the agreement; (2) a form repeating the three-day cancellation period and stating that CTS could not ask him to sign any lien, deed of trust, or deed; and (3) a business card for Kamela Felder (on that card respondent also wrote her own name (Fae) and telephone number).

9. Respondent subsequently provided Mr. McMahan's check to CTS. That check was endorsed by Kamela Felder and was transacted by the bank on August 20, 2007. Respondent received a referral fee from CTS in the amount of \$500.

10. At no time relevant to this decision was CTS licensed as a real estate broker or salesperson in the State of California, nor did it receive approval of its advance fee documents or agreement (contract) from the Department.

11. Respondent testified that her daughter and Mr. McMahan were the only two referrals she made to CTS that were accepted by CTS. She did subsequently refer two other people to CTS, but they could not afford the fees charged by CTS and did not engage the services of CTS. She made those referrals in August or September 2007. Other than these four people, whom she put in contact with CTS in the summer of 2007, respondent had no connection to, or business dealings with, CTS.

12. Prior to meeting with respondent, Mr. McMahan checked with the Department and learned that she was a licensed real estate broker. Mr. McMahan felt that her licensure provided some assurance that the loan modification service was legitimate. Mr. McMahan relied upon respondent's representations concerning CTS and felt that she "sold him" on the service. After the August 13, 2007 meeting with respondent, Mr. McMahan dealt directly with CTS. Mr. McMahan testified that he considered cancelling the arrangement when, on August 16, 2007, he realized that he had not been provided with a contract. He contacted CTS and a contract was faxed to him on that same day. Mr. McMahan signed the contract on August 23, 2007, and faxed it to CTS. Kamela Felder, President, CTS, subsequently signed the document and faxed an executed copy back to Mr. McMahan on August 24, 2007.

13. Mr. McMahan was dismayed to subsequently learn that CTS was unlicensed. He maintains that this is something respondent should have checked before referring him to CTS. Mr. McMahan did not obtain a loan modification through the services of CTS. There was no testimony or other direct evidence as to the efforts put forth, or not put forth, by CTS in attempting to obtain a loan modification for Mr. McMahan. However, in an earlier written statement, Mr. McMahan described their service as "little more than a packaging service." Although he was obviously dissatisfied with CTS' service, Mr. McMahan has not requested that his money be refunded by either CTS or respondent, nor has he received any offer of a refund from either party.

14. Respondent concedes that, but for her involvement, Mr. McMahan would not have contracted with CTS, and she feels partially responsible for the situation because she relied upon Mr. Newsby rather than checking out CTS' licensure on her own. However, because she knew and trusted Mr. Newsby, she assumed that CTS was operating as a part of Rate Is Low based upon his presentation at the seminar. As to the collection of the advance fee, respondent explained that she was unaware of the need to obtain preapproval of the documents from the Department because she has never been in the loan modification business. Basically, respondent saw no harm in accepting Mr. McMahan's check on behalf of CTS, and she relied upon CTS to have met the legal requirements imposed upon loan modification providers. Respondent noted that she is a retired social worker (Masters in Social Work) and worked hard to obtain her broker's license. Respondent noted that she has worked out of her home ever since she obtained her broker's license in 2003. Respondent concedes that it was her responsibility to refer clients only to licensed entities, and to meet all

concedes that it was her responsibility to refer clients only to licensed entities, and to meet all of the rules applicable to her profession, but feels strongly that revocation of her license for honest mistakes in these circumstances is too harsh.

15. Complainant argued that, back at that time in question (2007), the Department was very concerned with the manner in which advance fees were being collected and had imposed specific requirements to closely regulate this area. While complainant did not argue that respondent acted intentionally to defraud anyone, it still urged revocation because of the serious nature of advance fee violations. Complainant noted that if revocation is not sustained, then a suspension of at least 60 days should be imposed.

LEGAL CONCLUSIONS

1. Business and Professions Code Section 10177, subdivision (d), provides:

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 . . . :

[¶] ... [¶]

(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.

[¶] ... [¶]

(g) Demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license.

2. Business and Professions Code Section 10130 provides:

It is unlawful for any person to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this state without first obtaining a real estate license from the department. . . .

3. Business and Professions Code Section 10085 provides that the commissioner may require that any or all materials used in obtaining advance fee agreements be submitted to him or her at least 10 calendar days before they are used. That section further provides:

[¶] ... [¶]

The commissioner may determine the form of the advance fee agreements, and all material used in soliciting prospective owners and sellers shall be used in the form and manner which he or she determines is necessary to carry out the purposes and intent of this part. Any violation of any of the provisions of this part or of the rules, regulations, orders or requirements of the commissioner thereunder shall constitute grounds for disciplinary action against a licensee, or for proceedings under Section 10081 of this code, or both. These sanctions are in addition to the criminal proceedings hereinbefore provided.

4. Title 10, California Code of Regulations, Section 2970, provides:

(a) A person who proposes to collect an advance fee as defined in Section 10026 in the Code shall submit to the Commissioner not less than ten calendar days before publication or other use, all materials to be used in advertising, promoting, soliciting and negotiating an agreement calling for the payment of an advance fee including the form of advance fee agreement proposed for use.

5. As set forth in the Factual Findings, an advance fee was collected from Mr. McMahan when neither the advance fee agreement nor the other documents used in securing the agreement had been preapproved by the Commissioner. While, other than making referrals, respondent was not involved in the loan modification operation at CTS, she did personally pick up the advance fee payment from Mr. McMahan on behalf of CTS. Respondent is a licensed real estate broker and is bound by the legal requirements governing the collection of advance fees. Although her improper actions were not willful, by accepting Mr. McMahan's check, respondent "collected" an advance fee and thereby violated Business and Professions Code Section 10085 and California Code of Regulations Section 2970. Respondent also violated Business and Professions Code section 10177, subdivision (g), in that she was negligent and demonstrated incompetence by failing to make herself aware of the statutory and regulatory requirements concerning the collection of advance fees.

Further, respondent used her position as a licensed real estate broker to obtain clients for an unlicensed real estate loan modification business. In order to act as a real estate broker in dealing with loan modifications, CTS had to be licensed as a broker by the Department. It was not so licensed during any period relevant to this decision. While respondent was credible in her testimony that she was unaware of the lack of licensure, and even though her

that responsibility and thereby violated Business and Professions Code Section 10177, subdivision (g).

6. Pursuant to Section 482(b) of the Business and Professions Code, the Department has developed criteria for the purpose of evaluating the rehabilitation of a licensee against whom an administrative disciplinary proceeding for revocation or suspension of the license has been initiated *on account of a crime committed by the licensee.*² The criteria are set out in Title 10, California Code of Regulations, Section 2912, as follows:

(a) The passage of not less than two years from the most recent criminal conviction that is "substantially related" to the qualifications, functions or duties of a licensee of the department. (A longer period will be required if there is a history of criminal convictions or acts substantially related to the qualifications, functions or duties of a licensee of the department.)

(b) Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the licensee.

[¶] ... [¶]

(h) Correction of business practices responsible in some degree for the crime or crimes of which the licensee was convicted.

(i) New and different social and business relationships from those which existed at the time of the commission of the acts that led to the criminal conviction or convictions in question.

(j) Stability of family life and fulfillment of parental and familial responsibilities subsequent to the criminal conviction.

[¶] ... [¶]

(m) Change in attitude from that which existed at the time of the commission of the criminal acts in question as evidenced by any or all of the following:

² Although these criteria were adopted for the specific purpose of evaluating whether a licensee convicted of a crime is rehabilitated, many of the criteria are equally relevant to assessing the facts in mitigation and rehabilitation regarding other forms of violations of law and regulations resulting in disciplinary action. Thus, to the extent applicable, the criteria are "borrowed" here to act as guidance for making the assessment required in this action that does not involve any criminal action or activity.

- (1) Testimony of applicant.
- (2) Evidence from family members, friends or other persons familiar with the licensee's previous conduct and with subsequent attitudes and behavioral patterns.
- (3) Evidence from probation or parole officers or law enforcement officials competent to testify as to applicant's social adjustments.
- (4) Evidence from psychiatrists, clinical psychologists, sociologists or other persons competent to testify with regard to neuropsychiatric or emotional disturbances.
- (5) Absence of subsequent felony or misdemeanor convictions that are reflective of an inability to conform to societal rules when considered in light of the conduct in question.

7. As set forth in the Factual Findings, respondent did not dispute the facts as set forth in the Accusation. Instead, she explained the circumstances under which the problems at issue arose. Respondent is truly remorseful that she failed to check CTS' license status for herself, and she accepted the responsibility for involving Mr. McMahan with an unlicensed loan modification company. Of course, her stated acceptance of responsibility would have carried more weight had she offered to reimburse Mr. McMahan, at least to the extent of the \$500 fee she was paid. Even so, the circumstances offer substantial mitigation. Her reliance upon Mr. Newsby and his presentation, which caused her to believe that CTS was operating as a part of Rate Is Low which she knew as an on-going mortgage business, is at least somewhat understandable. Simply put, she trusted Mr. Newsby based upon their past dealings. Her genuine remorse, and the problems that have arisen from her lack of "attention to detail" in this instance, will surely cause her to carefully research both the credentials of any business with which she becomes involved and the legal requirements governing any activity she undertakes relating to her real estate broker's license in the future.

8. It must also be considered that while respondent is responsible under the cited statutes and regulations for collecting the advance fee, under the facts presented here respondent truly believed that she was simply acting as a courier for the convenience of CTS and Mr. McMahan, since she and Mr. McMahan lived in the same city. It is also relevant that the check was not made out to respondent, but to CTS, a business in which respondent had no ownership or other interest beyond the referral of potential clients for a referral fee. There is no doubt she was promoting CTS' services in an effort to help people and to receive referral fees, but the advance fee was paid to CTS, not respondent. In any such situation there are varying degrees of culpability, and in this case respondent was certainly negligent but she did not knowingly or willfully violate the rules governing the collection of advance fees.

9. Finally, it must be considered that there is no information in the record of any allegation of misconduct by respondent at any time either before or after the incident in question, nor is there any evidence of any criminal behavior or other improper activity that would lead one to believe that the public would be endangered if she continues to hold a real estate broker's license. More than three years has passed since the August 2007 incident concerning Mr. McMahan, and since respondent last dealt with CTS in September 2007. The fact that the record contains no complaints concerning her activities as a broker since that time militates against complete revocation.

10. Although, as discussed above, there are items in mitigation, the fact that the laws and regulations were violated cannot be ignored. The seriousness of informing oneself of the rules governing a licensed profession, and in complying with those rules, must be impressed upon respondent. Acting without sufficient research and investigation, and then simply apologizing if things go awry, is not sufficient. On balance, it is concluded that, subject to the suspension and education requirements set out below, the public interest will not be harmed by permitting respondent to continue as a licensed real estate broker.

11. It is noted that, Business and Professions Code Section 10175.2 bestows upon the Real Estate Commissioner the discretion to determine whether the public interest and public welfare will be adequately served by permitting the payment of a monetary penalty to the Department in lieu of an actual license suspension. The Commissioner may, on the petition of the licensee, stay the execution of all or some part of the suspension on the condition that the licensee pay a monetary penalty and the further condition that the licensee incur no other cause for disciplinary action within a period of time specified by the Commissioner. Business and Professions Code Section 10175.2, subdivision (d), provides that the monetary penalty may be no greater than \$250 per day, nor total more than \$10,000 for the period of the suspension. It is also noted that subdivision (c) of section 10175.2 provides that if a licensee fails to pay the monetary penalty in accordance with the terms and conditions of the decision of the commissioner, the commissioner may, without a hearing, order the immediate execution of all or any part of the stayed suspension, in which event the licensee shall not be entitled to any repayment nor credit, prorated or otherwise, for money paid to the department under the terms of the decision.

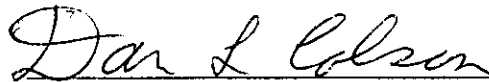
ORDER

Respondent's real estate broker's license is hereby suspended for 60 days, starting with the effective date of this decision.

Further, respondent shall be required to take and pass the Professional Responsibility Examination administered by the Department, including payment of the appropriate examination fee, within six months from the effective date of this decision. If respondent fails to satisfy this condition, the Commissioner may order suspension of respondent's license until respondent passes the examination.

fails to satisfy this condition, the Commissioner may order suspension of respondent's license until respondent passes the examination.

DATED: April 21, 2011

A handwritten signature in cursive script that reads "Dan L. Colson".

DAN L. COLSON

Administrative Law Judge

Office of Administrative Hearings

1 Richard K. Uno, Counsel (SBN 98275)
2 Department of Real Estate
3 P. O. Box 187007
4 Sacramento, CA 95818-7007

5 Telephone: (916) 227-0789
6 (916) 227-2380 (Direct)

FILED

JUN 26 2010

DEPARTMENT OF REAL ESTATE

By K. Mar

8 BEFORE THE DEPARTMENT OF REAL ESTATE
9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Accusation of)
12) NO. H-5417 SAC
13 GLADYS FAE SCOTT,)
14 Respondent.) ACCUSATION
15)

16 The Complainant, TRICIA D. SOMMERS, a Deputy Real Estate Commissioner
17 of the State of California for cause of Accusation against GLADYS FAE SCOTT (SCOTT), is
18 informed and alleges as follows:

19 1

20 The Complainant makes this Accusation in her official capacity.

21 2

22 SCOTT is presently licensed and/or has license rights under the Real Estate
23 Law, Part I of Division 4 of the California Business and Professions Code (the Code), as a real
24 estate broker.

25 3

26 At all times mentioned herein, Respondent engaged in the business of and acted
27 in the capacity of, or assumed to act as, a real estate broker in the State of California within the

1 meaning of Section 10131(d) (Licensed Acts Involving Loans) of the Code, for or in expectation
2 of compensation, by soliciting borrowers and lenders and negotiating loans or collecting
3 payments or performing services for borrowers or lenders in connection with loans secured
4 directly or collaterally by liens on real property.

5 4

6 Within the three year period prior to the filing of the Accusation and at all times
7 herein mentioned, SCOTT solicited clients for CTS Investments and Consulting (CTS) to
8 perform the services mentioned in Paragraph 3, above.

9 5

10 At no time, within the three year period prior to the filing of the Accusation, did
11 the Department issue a real estate license to CTS either as a real estate broker or as a real estate
12 salesperson.

13 6

14 At no time, within the three year period prior to the filing of the Accusation, did
15 SCOTT have an advance fee agreement approved by the Department.

16 7

17 SCOTT received a referral fee of \$500.00 or \$600.00 for each person referred to
18 CTS for a loan modification, including but not limited to Gordon McMahan (McMahan).

19 8

20 On or about August 13, 2007, McMahan gave SCOTT a check in the amount of
21 \$2,495.00, payable to CTS, as an advance fee for a loan modification.

22 9

23 At no time since August 13, 2007 did CTS obtain a loan modification for
24 McMahan.

25 ///

26 ///

27 ///

The facts alleged above, constitute a violation of Section 10085.5 (Unlawful Payment of Advance Fees) of the Code and are grounds for the suspension or revocation of the licenses and license rights of SCOTT under Sections 10177(d) (Willful Violation of Real Estate Law) and 10177(g) (Demonstration of Negligence or Incompetence in Performing Act Required to Hold License) of the Code.

WHEREFORE, Complainant prays that a hearing be conducted on the allegations of this Accusation and that upon proof thereof, a decision be rendered imposing disciplinary action against all licenses and license rights of Respondents under the Code, and for such other and further relief as may be proper under other provisions of law.


TRICIA D. SOMMERS
Deputy Real Estate Commissioner

Dated at Sacramento, California,
this 25th day of June, 2010