

FILED
JUN 22 2006

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE

By *[Signature]*

* * *

In the Matter of the Accusation of)	
)	NO. H-9446 SF
JOHN PETER OVERGAARD, JR.,)	
)	OAH NO. N-2005120197
Respondent.)	
_____)	

DECISION

The Proposed Decision dated June 7, 2006, 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 JUL 13 2006.

IT IS SO ORDERED

6-21-06

JEFF DAVI
Real Estate Commissioner

[Signature]

**BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA**

In the Matter of the Accusation of:

JOHN PETER OVERGAARD, JR.,

Respondent.

Case No. H-9446 SF

OAH No. N2005120197

PROPOSED DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on May 10, 2006.

David B. Seals, Counsel, represented complainant E. J. Haberer II, Deputy Real Estate Commissioner, State of California.

Respondent John Peter Overgaard, Jr., represented himself.

The matter was submitted on May 10, 2006.

FACTUAL FINDINGS

1. Respondent is licensed and/or has license rights under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code) as a real estate broker.
2. In December 2003, Department of Real Estate auditor Tayebbeh Farokh conducted two audits of respondent's real estate activities for the period July 1, 2002, to November 30, 2003. One audit concerned respondent's resale activities, the other concerned his property management activities.
3. The auditor found that, during the audit period, respondent managed six properties: two four-plexes, a six-plex, a single-family home, 21 apartment units, and an office building. Respondent collected approximately \$50,000 per month in rent from tenants, and paid the expenses related to the properties. Respondent informed the auditor that he was a part-owner, with an individual named Thomas Miller, of all six properties. Respondent claimed a 5 percent management fee on some of the properties during some of the months of the audit period. Respondent told the auditor that there was no written management agreement between himself and Miller, but they had an oral agreement that respondent would charge a management fee when the properties turned a profit.

During the audit period, respondent maintained one bank account at the Union Bank in Danville, California ("Bank Account #1"). Bank Account #1 was maintained under the account name "Realty Masters DBA: Bayside Club Apartments." Respondent was the sole signator on the account. Respondent deposited the rents from the six properties he managed in Bank Account #1, and paid the properties' expenses from that account. Respondent informed the auditor that Bank Account #1 also contained general business and personal funds, including commissions, and that disbursements from the account included mortgage payments and personal business expenses.

4. Following her examination of respondent's accounts and records, Farokh prepared an audit report dated January 30, 2004. The report is accompanied by Farokh's working papers and the records submitted to her by respondent. In her audit, Farokh found the following violations:

- a. Respondent did not maintain a control record of all trust funds received and disbursed, and did not maintain a record of all trust funds received but not placed in a trust account for sales transactions.
- b. Separate records maintained for each beneficiary or property were not in chronological order and did not have dates or a running balance.
- c. Bank Account #1 contained trust funds, but was not designated as a trust account.
- d. Respondent did not perform a monthly reconciliation comparing the balance of all trust funds received and disbursed to the balance of all separate records.

There was no finding of an overage or shortage in the trust account, because the records were insufficient to determine trust fund accountability. There was no finding of commingling, apparently because respondent did not maintain a control record, and adequate separate beneficiary ledgers, to distinguish trust funds from funds collected for general business purposes.

5. Respondent testified that it was his impression that, as an owner of each of the six properties under management, he did not have to maintain a trust account. Respondent acknowledged, however, that the rents he collected were "not all mine – part of the money was Mr. Miller's"; indeed, according to respondent, Miller is the only person who appears on the title to the six properties. Respondent emphasizes that "the money is all there," and that by referring to other records – such as profit and loss statements, closing statements, check registers, deposit slips, rent rolls, receipts, and cancelled checks – there is a paper trail of all trust funds received and disbursed. He acknowledges, however, that "[i]t's discombobulated."

Respondent testified that he understands that trust records must be in the form required by the department's regulations, and that he will comply with those regulations in

the future. At this time, however, respondent states that he is "no longer in property management at all." Five of the properties have been sold. Sale of the single-family home is in escrow, and there are no tenants on the property.

Respondent testified that he never intended to violate the law. He has been a broker for 28 years, and he feels that he has always been fair and straightforward. Respondent keeps up-to-date on legal requirements, and he holds his agents to a high standard; he does not allow them to do "anything in a gray area." Respondent emphasizes that all his actions were in good faith.

6. The rent payments respondent received from the properties identified in Factual Finding 3 were trust funds. Even if respondent was a part-owner of each of those properties, as he insists, a portion of the rents collected belonged to Miller, not to respondent. Respondent was required to handle those funds in accordance with the department's laws and regulations pertaining to trust funds.

LEGAL CONCLUSIONS

1. Business and Professions Code section 10177, subdivision (d), provides that the commissioner may suspend or revoke the license of a licensee who has "[w]illfully disregarded or violated the Real Estate Law . . . or the rules and regulations of the commissioner"

2. Respondent violated title 10, California Code of Regulations, section 2831, by failing to maintain both a control record of all trust funds received and disbursed, and a record of all trust funds received and not placed in a trust account.

3. Respondent violated title 10, California Code of Regulations, section 2831.1, by failing to maintain an accurate separate record for each beneficiary or property, in chronological sequence, identifying the date of each deposit and disbursement, and the balance after posting transactions on any date.

4. Respondent violated title 10, California Code of Regulations, section 2831.2, by failing to reconcile, at least once a month, all separate beneficiary or transaction records with a record of all trust funds received and disbursed.

5. Respondent violated Business and Professions Code section 10145, and title 10, California Code of Regulations, section 2832, in that he failed to deposit trust funds into an account in the name of respondent as trustee.

6. Cause for disciplinary action against respondent exists under Business and Professions Code section 10177, subdivision (d), by reason of the violations identified in Legal Conclusions 2 through 5.

7. While respondent did not intentionally violate the laws and regulations set forth in Legal Conclusions 2 through 5, he nevertheless did so willfully in that his actions were purposeful, not accidental or involuntary. (See Pen. Code § 7; *Murrill v. State Board of Accountancy* (1950) 97 Cal.App.2d 709, 713.)

8. Respondent's testimony that he did not establish a trust account because he was the owner of the properties he managed, even though he was at best a co-owner, is a matter of some concern; that concern is heightened by respondent's acknowledgment that only Miller's name, not respondent's, appears on the title to those properties. There are no claims by Miller, however, of any losses. It appears that respondent has chosen to avoid any issues in the future on the property management side by giving up his property management business altogether. Respondent appears to understand, however, that in his resale activities as well as in his property management activities, his records pertaining to the trust funds he receives must strictly conform to department regulations. Respondent has been a broker for over 25 years and there is no evidence of any prior discipline against his license. Considering all the evidence presented, it is determined that the public interest would be protected by permitting respondent to engage in licensed activities under the heightened supervision of a restricted license.


ORDER

All licenses and licensing rights of respondent John Peter Overgaard, Jr., under the Real Estate Law are revoked; provided, however, a restricted real estate broker license shall be issued to respondent pursuant to section 10156.5 of the Business and Professions Code if respondent makes application therefor and pays to the Department of Real Estate the appropriate fee for the restricted license within 90 days from the effective date of this Decision. The restricted license issued to respondent shall be subject to all of the provisions of section 10156.7 of the Business and Professions Code and to the following limitations, conditions and restrictions imposed under authority of section 10156.6 of that Code:

- a. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of respondent's conviction or plea of nolo contendere to a crime which is substantially related to respondent's fitness or capacity as a real estate licensee.
- b. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that respondent has violated provisions of the California Real Estate Law, the subdivided lands law, regulations of the Real Estate Commissioner or conditions attaching to the restricted license.
- c. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license or for the removal of any of the conditions, limitations or restrictions of a restricted license until two years have elapsed from the effective date of this Decision.

- d. Respondent shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until respondent presents such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.
- e. Pursuant to section 10148 of the Business and Professions Code, respondent shall pay the Commissioner's reasonable cost for: a) the audit which led to this disciplinary action and, b) a subsequent audit to determine if respondent has corrected the trust fund violations found in paragraphs 2 through 5 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 time to and from the auditor's place of work. Respondent shall pay such cost 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 suspend the restricted license issued to respondent pending a hearing held in accordance with Government Code section 11500 et seq. if payment is not timely made as provided for herein, or as provided for in a subsequent agreement between respondent and the Commissioner. The suspension shall remain in effect until payment is made in full or until respondent enters into an agreement satisfactory to the Commissioner to provide for payment, or until a decision providing otherwise is adopted following a hearing held pursuant to this condition.

DATED: June 7, 2006


DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings

1 DAVID B. SEALS, Counsel (SBN 69378)
2 Department of Real Estate
3 P. O. Box 187007
4 Sacramento, CA 95818-7007

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DEPARTMENT OF REAL ESTATE

[Signature]

8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Accusation of)
12)
13 JOHN PETER OVERGAARD, JR.,)
14)
Respondent.)

NO. H-9446 SF

ACCUSATION

15 The Complainant, E. J. Haberer II, a Deputy Real
16 Estate Commissioner of the State of California for cause of
17 Accusation against JOHN PETER OVERGAARD, JR. (hereinafter
18 Respondent) is informed and alleges as follows:

19 I

20 The Complainant, E. J. Haberer II, a Deputy Real
21 Estate Commissioner of the State of California, makes this
22 Accusation in his official capacity.

23 II

24 Respondent is licensed and/or have license rights
25 under the Real Estate Law, Part 1 of Division 4 of the
26 California Business and Professions Code (hereinafter "Code") as
27 real estate broker.

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III

At all times herein mentioned, Respondent engaged in the business of, acted in the capacity of, advertised or assumed to act as a real estate broker in the State of California, within the meaning of Section 10131(a) of the Code for or in expectation of compensation, by selling or offering to sell, buying or offering to buy, soliciting prospective sellers or purchasers of, soliciting or obtaining listings of, or negotiating the purchase, sale or exchange of real property or a business opportunity and within the meaning of Section 10131(b) of the Code, for or in expectation of a compensation by soliciting prospective tenants for, negotiating rental agreements for and collecting rents from real properties owned by another or others.

IV

Beginning on or about December 16, 2003, the Department conducted an audit of Respondent's real estate activities for the time period July 1, 2002 to November 30, 2003 as set forth in Audit Nos. OK030045 and OK030058. During the course of the activities described in Paragraph III above, Respondent received and disbursed funds held in trust on behalf of another or others.

V

Respondent maintained one account into which trust funds were placed. The account was located at Union Bank of California, 17 San Ramon Valley Blvd., Danville, CA, Account No.

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1 14209368 in the name of Realty Masters DBA Bayside Club
2 Apartments.

3 VI

4 During the period covered by the audits Respondent
5 failed to maintain both (1) a control record of all trust funds
6 received and disbursed from the account and (2) a record of all
7 trust funds received and not placed in a trust account in
8 violation of Section 2831, Title 10, California Code of
9 Regulations (hereinafter the "Regulations").

10 VII

11 During the period covered by the audits Respondent
12 failed to maintain an accurate separate record for each
13 beneficiary or property in that the records were not in
14 chronological order and did not have dates or a running balance
15 in violation of Section 2831.1 of the Regulations.

16 VIII

17 During the period covered by the audits Respondent
18 failed to maintain a reconciliation of the separate records to
19 the record of all trust funds received and disbursed on a
20 monthly basis in violation of Section 2831.2 of the Regulations.

21 IX

22 During the period covered by the audit Respondent
23 failed to maintain the account as a trust account in violation
24 of Section 2832 of the Regulations and Section 10145 of the
25 Code.

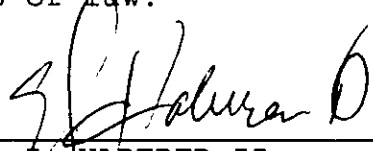
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2 The facts alleged above are grounds for suspension or
3 revocation of Respondent's licenses and license rights under
4 Section 10177(d) of the Code in conjunction with Section 10145
5 of the Code and Sections 2831, 2831.1, 2831.2, and 2832 of the
6 Regulations.

7 WHEREFORE, Complainant prays that a hearing be
8 conducted on the allegations of this Accusation and that upon
9 proof thereof, a decision be rendered imposing disciplinary
10 action against all licenses and license rights of Respondent
11 under the Real Estate Law (Part 1 of Division 4 of the Business
12 and Professions Code), and for such other and further relief as
13 may be proper under other provisions of law.

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15 
16 E. J. HABERER II
Deputy Real Estate Commissioner

17 Dated at Oakland, California,
18 this 31st day of October, 2005.
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