

FILED

MAY 14 2013

DEPARTMENT OF REAL ESTATE

By K. Contreras

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of)	
)	No. H-11440 SF
ANTIOCH REALTY GROUP, INC.)	
and ALLEN RAY SCHNIBBEN,)	OAH No. 2012100433
)	(As to ALLEN RAY SCHNIBBEN Only)
Respondents.)	
_____)	

DECISION

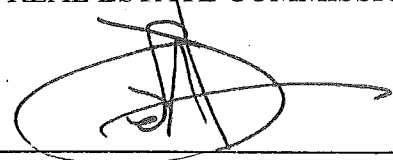
The Proposed Decision dated April 9, 2013, of the Administrative Law Judge of the Office of Administrative Hearings is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

The right to reinstatement of a revoked real estate license or to the reduction of a suspension is controlled by Section 11522 of the Government Code. A copy of Section 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock noon on JUN - 3 2013

IT IS SO ORDERED MAY 13, 2013

REAL ESTATE COMMISSIONER



By: Jeffrey Mason
Chief Deputy Commissioner

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of

ANTIOCH REALTY GROUP, INC.
and ALLEN RAY SCHNIBBEN,

Respondents.

Case No. H-11440 SF

OAH No. 2012100433

PROPOSED DECISION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on March 6, 2013, in Oakland, California.

John W. Barron, Counsel, represented complainant Robin S. Tanner, a Deputy Real Estate Commissioner of the State of California.

No appearance was made by, or on behalf of, respondent Allen Ray Schnibben.¹

The record was left open until March 15, 2013, to permit the department to submit declarations to support its requests for costs. The declarations were timely received, marked as Exhibit 12 and received in evidence. The matter was deemed submitted for decision on March 15, 2013.

FACTUAL FINDINGS

1. Upon proof of compliance with Government Code sections 11505 and 11509, the hearing proceeded as a default against Allen Ray Schnibben (respondent) pursuant to Government Code section 11520.

2. Robin S. Tanner made the accusation in her official capacity, as a Deputy Real Estate Commissioner of the State of California.

¹ Antioch Realty Group, Inc., did not file a notice of defense to the accusation and a default decision revoking its license was issued by the department effective March 12, 2013.

Introduction

3. The Department of Real Estate issued respondent a real estate broker license on June 2, 1981. Respondent's license is scheduled to expire on June 1, 2013. Between June 9, 2008, and March 14, 2010, respondent was the licensed broker/officer of Antioch Realty Group, Inc. (ARG).

4. ARG was licensed by the department to act as a real estate corporation. ARG performed real estate resale and property management activities. From January 1, 2008, to December 31, 2009, ARG closed 1,982 residential resale transactions in which they represented the seller. During the same period of time, ARG closed 1,929 transactions in which they represented the buyers.

5. In addition, ARG operated and conducted a loan brokerage business for compensation or in expectation of compensation. ARG solicited lenders and borrowers for loans secured directly or collaterally by liens on real property. ARG arranged, negotiated, processed and consummated such loans.

6. ARG was also engaged in the business of property management with the public. ARG leased, rented, solicited prospective tenants, and collected rents from tenants on behalf of clients. Between January 1, 2008, and December 31, 2009, ARG managed a total of 64 residential properties. ARG collected monthly rental income and charged a monthly management fee based upon the amount of the collected rents of the property managed.

The Department's Audit of ARG

7. Between January 25, 2010, and February 26, 2010, the department conducted an audit of ARG at its offices. The auditor examined the records for the period of January 1, 2008, through December 31, 2009 (the audit period).

8. The auditor determined that ARG accepted or received funds in trust in the course of the loan brokerage and property management activities, and deposited the funds into a trust account maintained by ARG at Fremont Bank. The signatories on the trust account were licensed real estate salespersons Jennifer Haus and Richard Geha, and Joe Dauskurdas, a non-licensee. Dauskurdas was an improper signatory because he was not licensed by the department and was not an employee of ARG. Geha was not a proper trust fund signatory because, although he was licensed by the department, he was not licensed under respondent or ARG's broker licenses. Haus was not a proper signatory because although she was licensed under ARG's broker license, she did not have proper written authority to make withdrawals. In addition, respondent should have been a signatory on the trust account, but was not.

9. The audit revealed that on December 31, 2009, there was a shortage in the ARG trust account in the amount of \$1,916.78. ARG did not provide evidence that the

owners of the trust funds had given their written consent allowing ARG to reduce the balance of the funds to an amount less than the existing aggregate trust fund liabilities.

10. The audit also revealed that ARG had failed to maintain a record of all trust funds deposited into and disbursed from the trust account. The audit also revealed that ARG had failed to maintain separate records for each beneficiary whose funds were held in the trust account, and failed to reconcile the total of separate beneficiary/property records with a control record on a monthly basis.

11. ARG used the fictitious business name of "Keller Williams Realty – TOP Management" in conducting the real estate loan brokerage and property management activity without first obtaining a license bearing that fictitious business name from the department.

12. On at least three transactions occurring during the audit period, ARG failed to collect the earnest money deposit from buyers even though the purchase contract indicated such deposits had been collected. The dates of the three transactions are March 19, 2008, November 19, 2008, and July 10, 2009.

13. Respondent, as the designated broker/officer of ARG, was responsible for the supervision and control of the activities conducted on behalf of ARG by its officers and employees. Respondent failed to exercise reasonable supervision and control over the property management activities of ARG. Respondent permitted the conduct described in Factual Findings 8 through 12 to occur, and failed to take reasonable steps to ensure compliance with the Real Estate Law² and regulations, including the handling of trust funds, supervision of employees and the implementation of policies and procedures.

Costs

14. Complainant has requested reimbursement of the department's costs of investigation and prosecution in the amount of \$911.80. The costs include \$93 in investigative costs and \$818.80 in enforcement costs. The costs of enforcement are supported by a declaration dated March 5, 2013, by the department counsel assigned to this case in which the general tasks performed, the time spent on each task and the method of calculating the costs are described. The investigative costs are submitted in a statement made by complainant that describes the costs and the method of calculation, with an attachment describing the tasks performed, and the time spent on each task. The department's costs statement is supported by a declaration of a supervising special investigator. The department's costs of investigation and enforcement are reasonable.

² The Real Estate Law commences at Business and Professions Code section 10000. The rules and regulations of the commissioner commence at California Code of Regulations, title 10, section 2705.

15. Complainant has also requested reimbursement of the department's audit costs in the amount of \$6,272.75. A description of the general tasks performed and the time spent on each task is described in a declaration by a supervising auditor and an attachment thereto. The audit costs are also reasonable.

Respondent's Evidence

16. Although respondent did not appear at hearing, he submitted a letter under penalty of perjury dated February 25, 2013, in which he attempts to explain his conduct. Respondent states initially that he does not dispute any of the allegations in the accusation.

17. Respondent reports that he joined Keller Williams Premier Properties (KWPP), doing business as ARG, on August 8, 2007. He became the designated broker in mid-2008, after being asked by Haus to fill in until she could find a permanent replacement. Respondent anticipated acting as the designated broker for a few months, but ended up acting as the broker until 2010. Respondent states that Haus explained to him that he "would not have any authority over the bank accounts or setting office policy as that was her job." Haus also advised respondent that he would not be permitted to be a signatory on any bank accounts and that his role was limited to assisting and guiding agents in handling sales.

18. Respondent states that he was unaware of ARG conducting a loan brokerage business. He does not recall seeing an ARG employee engage in loan business activities.

19. Respondent states that he was unaware of the property management business conducted by ARG until the audit was conducted. He had previously advised agents that they were not permitted to engage in property management. By the time respondent learned of the property management business and trust account, the part-owner who had been in charge of it had left the company. Respondent states that he tried to reconcile the trust account to the best of his ability. Respondent does not believe that anyone was cheated, but that disbursements were not properly recorded.

20. Regarding ARG's failure to collect earnest money deposits even though the contract deposits had been collected, respondent notes that the first such instance occurred on a contract dated March 19, 2008, before he became the designated broker. As to the other two transactions, respondent was unaware that this had occurred. Respondent reports having implemented a policy of not accepting or holding deposit checks. Agents were to instruct clients to send their deposit checks to the escrow company.

21. Respondent reports that he is 72 years old and retired. He relies on his real estate income to live on and to pay for his children's expenses, one of whom is in high school, and another who is in college. He requests a payment plan if costs are awarded.

LEGAL CONCLUSIONS

1. The burden of proof in this matter is on complainant to show by clear and convincing evidence that respondent's license should be suspended or revoked. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 855-856.)

Causes for Discipline

2. Pursuant to Business and Professions Code section 10159.2, the designated broker/officer of a corporate broker licensee is responsible for the supervision of the activities conducted on behalf of the corporation by its officers and employees. As the designated broker/officer of ARG, respondent is responsible for the activities of ARG employees.

3. Pursuant to Business and Professions Code section 10177, subdivision (d), the commissioner is authorized to suspend or revoke the license of a real estate licensee who has willfully disregarded or violated the Real Estate Law, or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law. The term "willfully," as 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.'"]).

4. Business and Professions Code section 10177, subdivision (g), authorizes the commissioner to suspend or revoke the license of a real estate licensee who has demonstrated negligence or incompetence in performing an act for which he is required to hold a license.

5. Business and Professions Code section 10145, in conjunction with California Code of Regulations, title 10, section 2832.1, provides that the written consent of every principal who is an owner of funds in a trust account shall be obtained by a real estate broker prior to each disbursement, if such a 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.

Without obtaining written consent prior to the disbursement of funds, ARG allowed the balance in the trust account to be reduced to less than the existing liabilities. (Factual Finding 9.) Cause therefore exists to discipline respondent's real estate broker license pursuant to Business and Professions Code sections 10145 and 10177, subdivisions (d) and (g), in conjunction with California Code of Regulations, title 10, section 2832.1.

6. Business and Professions Code section 10145, in conjunction with California Code of Regulations, title 10, section 2834, requires that only a broker, a salesperson licensed to the broker, or an unlicensed employee of the broker be permitted to make withdrawals from a trust account. Respondent allowed improper signatories on the trust

account as described in Factual Finding 8. Moreover, respondent was not a signatory on the trust account as required by Business and Professions Code section 10145:

Cause for discipline of respondent's license therefore exists pursuant to Business and Professions Code sections 10145 and 10177, subdivisions (d) and (g), in conjunction with California Code of Regulations, title 10, section 2834.

7. Business and Professions Code section 10145, in conjunction with California Code of Regulations, title 10, section 2831, require a broker to maintain a record of all trust funds deposited into and disbursed from a trust account.

Respondent and ARG failed to maintain a record of all trust funds deposited into and disbursed from the trust account. (Factual Finding 10.) Cause for discipline of respondent's license therefore exists pursuant to Business and Professions Code sections 10145 and 10177, subdivisions (d) and (g), in conjunction with California Code of Regulations, title 10, section 2831.

8. Business and Professions Code section 10145, in conjunction with California Code of Regulations, title 10, section 2831.1, require a broker to maintain a separate record for each beneficiary of funds held in a trust account.

Respondent and ARG failed to maintain a separate record for each beneficiary of funds held in a trust account. (Factual Finding 10.) Cause for discipline of respondent's license therefore exists pursuant to Business and Professions Code sections 10145 and 10177, subdivisions (d) and (g), in conjunction with California Code of Regulations, title 10, section 2831.1.

9. Business and Professions Code section 10145, in conjunction with California Code of Regulations, title 10, section 2831.2, provides that the commissioner may suspend or revoke a real estate license where the licensee fails to reconcile the total of separate beneficiary/property records with a control record on a monthly basis.

As set forth in Factual Finding 10, respondent and ARG failed to reconcile the total of separate beneficiary/property records with a control record on a monthly basis. Cause for discipline therefore exists pursuant to Business and Professions Code sections 10145 and 10177, subdivisions (d) and (g), in conjunction with California Code of Regulations, title 10, section 2831.2.

10. Business and Professions Code section 10159.5, in conjunction with California Code of Regulations, title 10, section 2731, provides that the commissioner may suspend or revoke a real estate license where the licensee uses a fictitious business name prior to obtaining a license bearing that fictitious business name from the department.

As set forth in Factual Finding 11, respondent allowed ARG to use a fictitious business name, Keller Williams Realty – TOP Management, without first obtaining a license

bearing that fictitious business name from the department. Cause for discipline therefore exists pursuant to Business and Professions Code sections 10159.5 and 10177, subdivisions (d) and (g), in conjunction with California Code of Regulations, title 10, section 2731.

11. Business and Professions Code section 10176, subdivision (a), provides that the commissioner may impose discipline on a licensee who has made a substantial misrepresentation in performing an act for which he is required to hold a license.

As set forth in Factual Finding 12, in at least three real estate transactions, ARG failed to collect the earnest money deposit from buyers even though the purchase contract indicated that such deposits had been collected. Cause for discipline therefore exists pursuant to Business and Professions Code sections 10176, subdivision (a), and 10177, subdivisions (d) and (g).

12. Business and Professions Code section 10159.2, in conjunction with California Code of Regulations, title 10, section 2725, provides that the commissioner may suspend or revoke a real estate license where the designated broker/officer fails to supervise and control the activities conducted by the officers and employees of a corporate licensee. Business and Professions Code section 10171, subdivision (h), provides that a broker licensee who fails to exercise reasonable supervision over the activities of salesperson, or the officer designated by a corporate broker license, failed to exercise reasonable supervision and control of the corporation for which a real estate license is required, constitutes cause for discipline.

Respondent failed to supervise and control the activities of ARG and its employees while acting as ARG's designated broker/officer. (Factual Findings 3 through 13, 16 through 19.) Cause for discipline therefore exists pursuant to Business and Professions Code sections 10159.2 and 10177, subdivision (h).

Costs

13. Complainant has requested reimbursement of the costs of the audit, and the costs of investigation and enforcement of this matter. Pursuant to Business and Professions Code section 10148, subdivision (b), the commissioner is entitled to charge a real estate broker for the cost of any audit, if the commissioner has found, in a final decision following a disciplinary hearing, that the broker has violated section 10145 or a regulation of the commissioner interpreting section 10145.

As set forth in Legal Conclusions 2, 5, 6, 7, 8 and 9, respondent violated section 10145 and the regulations interpreting section 10145. Complainant has established that the department has incurred audit costs in the amount of \$6,272.75, and that the amount of the costs is reasonable. (Factual Finding 15.)

14. Business and Professions Code section 10106 provides that in any order issued in resolution of a disciplinary proceeding, the commissioner may ask the administrative law judge to direct a licensee found to have committed a violation to pay a sum not to exceed the

reasonable costs of the investigation and enforcement of the case. Section 10106 provides that a certified copy of the actual costs, signed by the commissioner or the commissioner's designated representative shall be prima facie evidence of reasonable costs of investigation and enforcement.

Complainant has established that the department has incurred costs of investigation and prosecution in the amount of \$911.80. (Factual Finding 13.) The amount of the costs of investigation and enforcement is reasonable.

In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the Supreme Court enumerated several factors that a licensing agency must consider in assessing costs. It must not assess the full costs of investigation and enforcement when to do so would unfairly penalize a respondent who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty. The agency must also consider a respondent's subjective good faith belief in the merits of his or her position and whether the respondent has raised a colorable challenge to the discipline or is unable to pay. Respondent has not established a basis to reduce the costs of enforcement.

Level of Discipline

15. In determining the appropriate level of discipline, the issue is whether respondent is substantially rehabilitated following his misconduct. Respondent bears the burden of demonstrating rehabilitation.

Respondent failed to appear at hearing to explain his conduct, or to submit any evidence of rehabilitation. (Factual Findings 16 through 21.) Under these circumstances, the protection of the public compels the revocation of respondent's license. However, in light of respondent's claim of financial hardship, he will be permitted to pay the costs of the audit over a period of six months.

ORDER

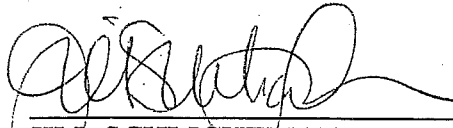
1. All licenses and licensing rights of respondent Allen Ray Schnibben under the Real Estate Law are revoked.

2. Respondent Allen Ray Schnibben shall pay the cost of the audit in the amount of \$6,272.75, within six months of the effective date of this Decision.

3. Respondent may not apply to the Department of Real Estate for reinstatement of his license until he has paid in full the costs of audit in the amount of \$6,272.75, and the

costs of investigation and enforcement of this matter, in the amount of \$911.80.

DATED: 4.9.13



JILL SCHLICHTMANN
Administrative Law Judge
Office of Administrative Hearings

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