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BUREAU OF REAL ESTATE

By Brooke Nichols

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BEFORE THE BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of)	CalBRE No. H-12089 SF
)	
JONATHAN DARYL FLEMING,)	OAH No. 2017060988
)	
Respondent.)	
)	

ORDER DENYING RECONSIDERATION

On, February 22, 2018 a Decision was rendered in the above-entitled matter. The Decision was to become effective on March 20, 2018, and was stayed by separate Order to April 20, 2018.

On March 30, 2018, Respondent petitioned for reconsideration of the Decision of February 22, 2018.

I have given due consideration to the petition of Respondent. I find no good cause to reconsider the Decision of February 22, 2018, and reconsideration is hereby denied.

IT IS SO ORDERED April 17, 2018

WAYNE S. BELL
REAL ESTATE COMMISSIONER

David J. Sand

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MAR 12 2018

BUREAU OF REAL ESTATE

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BEFORE THE BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of)	CalBRE NO. H-12089 SF
JONATHAN DARYL FLEMING,)	OAH NO. 2017060988
Respondent.)	

ORDER STAYING EFFECTIVE DATE

On February 22, 2018, a Decision was rendered in the above-entitled matter to become effective March 20, 2018.

IT IS HEREBY ORDERED that the effective date of March 20, 2018, is stayed for a period of 30 days to allow Respondent JONATHAN DARYL FLEMING to file a petition for reconsideration.

The Decision of February 22, 2018, shall become effective at 12 o' clock noon on April 20, 2018.

DATED: 3/12/18 .

WAYNE S. BELL
REAL ESTATE COMMISSIONER

By: *Daniel J. Sandri*
DANIEL J. SANDRI
Chief Deputy Commissioner

FILED

BEFORE THE BUREAU OF REAL ESTATE

FEB 27 2018

STATE OF CALIFORNIA

BUREAU OF REAL ESTATE

By B. Nicholas

In the Matter of the Accusation of)	CalBRE No. H-12089 SF
JONATHAN DARYL FLEMING,)	OAH No. 2017060988
Respondent.)	

DECISION

The Proposed Decision dated January 16, 2018, 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 Decision suspends or revokes one or more real estate licenses, but the right to a restricted salesperson license is granted to Respondent.

Pursuant to Government Code Section 11521, the Bureau of Real Estate may order reconsideration of this Decision on petition of any party. The party seeking reconsideration shall set forth new facts, circumstances, and evidence, or errors in law or analysis, that show(s) grounds and good cause for the Commissioner to reconsider the Decision. If new evidence is presented, the party shall specifically identify the new evidence and explain why it was not previously presented. The Bureau's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the effective date of this Decision, whichever occurs first.

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The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 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 MAR 20 2018.

IT IS SO ORDERED 2/22/18

WAYNE S. BELL
REAL ESTATE COMMISSIONER



By: DANIEL J. SANDRI
Chief Deputy Commissioner

BEFORE THE
BUREAU OF REAL ESTATE
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JONATHAN DARYL FLEMING,

Respondent.

Case No. H-12089 SF

OAH No. 2017060988

PROPOSED DECISION

Administrative Law Judge Juliet E. Cox, State of California, Office of Administrative Hearings, heard this matter on August 15 and November 30, 2017, in Oakland, California.

Counsel for the Bureau of Real Estate Megan Lee Olsen represented complainant Robin S. Tanner, in her official capacity as Supervising Special Investigator for the State of California.

Respondent Jonathan Daryl Fleming was present, representing himself.

The record was held open to permit respondent to provide additional documentary evidence. Respondent timely provided four documents, which were marked for identification as Exhibits E, F, G, and H. Complainant timely provided a declaration analyzing Exhibits E and F that was marked for identification as Exhibit 8, and objected to admission of Exhibits G and H on the ground that the hearing judge had not invited post-hearing submission of information beyond that included in Exhibits E and F. Exhibits E, F, and 8 were admitted into evidence; Exhibits G and H were not admitted.

The matter was submitted for decision on December 21, 2017.

FACTUAL FINDINGS

1. The Bureau of Real Estate licensed respondent Jonathan Daryl Fleming as a real estate salesperson effective December 7, 2002. Effective April 3, 2012, the Bureau licensed respondent as a real estate broker (License No. B/01361748). The Bureau authorized respondent effective April 18, 2013, to do business as a real estate broker under the names "Jonathan Fleming & Associates," "Jonathan Fleming Real Estate," and

“Openworld Properties.” As of August 14, 2017, respondent’s license was active and was scheduled to expire on April 2, 2020.

2. Effective October 18, 2016, the Bureau licensed Jonathan Fleming & Associates, Inc., as a corporate real estate broker (License No. C/02016149); as of August 14, 2017, this corporation’s license was active and was scheduled to expire on October 17, 2020. The Bureau has recognized respondent Fleming as the natural person this corporate licensee has designated to act for it, and has authorized the corporation to do business as “Jonathan Fleming & Associates” and as “Openworld Properties.”

3. On May 17, 2017, Robin S. Tanner, acting in her official capacity as a Supervising Special Investigator for the Bureau, filed an accusation seeking discipline against respondent’s individual license for mismanaging client trust funds. The accusation does not seek discipline against Jonathan Fleming & Associates, Inc. Respondent timely requested a hearing.

Client Trust Fund Management

4. Beginning in August 2016, Bureau auditor Na Lin conducted an audit of respondent’s business books and records for the period between September 1, 2015, and August 31, 2016. The chief purpose of Lin’s audit was to examine whether respondent had handled and accounted for client trust funds in accordance with applicable laws and regulations.

5. One of respondent’s business activities is residential property management. At the time of Lin’s audit, respondent managed housing units at between 25 and 30 sites, for between 15 and 20 clients.

6. For the period covered by her audit, Lin examined records for two bank accounts that respondent used for client trust funds. He used one to receive tenant rents and to pay for client expenses, such as maintenance costs and management fees. He used the other to hold tenants’ security deposits for clients, although he held few such deposits.

7. Respondent did not hold either of these client trust accounts in his own name. Rather, although respondent was the sole signer on both accounts, he held them in the name of “Openworld Communications LLC.”

8. Lin attempted to reconcile respondent’s records for each bank account against individual transaction records for each client for the period ending June 30, 2016. She was not able to do so. Lin could not confirm either that respondent had a complete and accurate record of every transaction receiving funds into or disbursing funds from the client trust accounts, or that he had complete and accurate records assigning each of those transactions to an individual client trust fund beneficiary.

9. Lin attempted to reconcile respondent's records for each bank account against bank statements for that account, for the period ending June 30, 2016. She was not able to do so.

Additional Evidence

10. After Jonathan Fleming & Associates, Inc., received its license as a corporate real estate broker, and received Bureau approval to do business as Openworld Properties, respondent opened two new client trust accounts in December 2016. He began using them in April 2017. Respondent is the sole signer on both accounts, which the corporation holds in its own name as trustee for clients of Openworld Properties.

11. Respondent hired Tamara Richardson as his new bookkeeper in mid-2016. Richardson has worked as a bookkeeper for a variety of businesses since 1988, and has served property management businesses since 2009.

12. When Richardson began working for respondent, respondent's business financial records were in disorder. Consistent with Lin's observations during the audit, Richardson found that respondent's prior bookkeeper had not reconciled respondent's books against bank records in a regular, timely, or accurate manner. In addition, Richardson found that her predecessor had not kept careful records of each client's revenue and expense transactions, from which to determine each client's share of the total client trust fund.

13. In her first several months working for respondent, Richardson corrected these errors. By reviewing individual transaction records, she was able to bring respondent's books into balance against his bank records, and to determine each client's share of the total client trust fund.

14. Richardson now performs monthly reconciliations of all respondent's business accounts against bank records. She also confirms that the business records show each owner's transactions and month-end balance (if any) accurately, and prepares monthly owners' statements.

15. Respondent provided copies of month-end bank statements for both client trust accounts for December 2016 through July 2017. He also provided reports that Richardson had prepared, reflecting transactions in both client trust accounts between December 1, 2016, and July 31, 2017. Finally, he provided reconciliation reports, again prepared by Richardson, showing her reconciliation of respondent's accounting records against the month-end bank statements for both accounts for December 2016 through July 2017.

16. The reports and documents respondent provided for the period ending July 31, 2017, confirm that Richardson has made great improvements in respondent's business financial records. They also show that Richardson was able throughout this period to reconcile respondent's records for the client trust account containing security deposits

against the bank's records, and that she was able to produce a report identifying each client's share of the security deposit trust fund account.

17. With respect to the client trust account containing tenant rents, the documents respondent provided for the period between December 1, 2016, and July 31, 2017, do not demonstrate that Richardson was able to reconcile respondent's accounting records for each month against the bank's records for that month. Specifically, for July 2017, Richardson's reconciliation report states that the month-end balance in respondent's records for this account is \$47,817.44; the report reconciles this balance against the month-end balance on the bank statement. Reports from respondent's records detailing transactions in this account do not show that its balance on July 31, 2017, was \$47,817.44, however; one such report shows a balance on July 31, 2017, of \$39,471.89, while another shows a balance of \$53,617.44. The evidence did not explain these discrepancies.

18. Likewise, the documents respondent provided for the period between December 1, 2016, and July 31, 2017, do not demonstrate that Richardson was able to determine each client's share of the funds in the tenant rent trust fund account. One report detailing transactions in this account on a site-by-site basis suggests that at least three clients owe money to the client trust fund, having received disbursements (or having had expenses paid on their behalf) in excess of their shares of the fund; a second report detailing what should be the same transactions shows that only one client owes money to the fund, and in an amount different from the amount stated for that client in the first report. The evidence did not explain these discrepancies.

19. The evidence did not establish that any of respondent's clients ever have complained to the Bureau about respondent's services, or that respondent ever has been unable to account to his clients' satisfaction for their revenues and expenses.

20. Respondent was a credible and forthright witness, and he cooperated fully in the Bureau's audit of his business. His testimony, and his conduct during the hearing, however, demonstrated that he defers to and relies on his business's bookkeepers (Richardson and her predecessor) rather than supervising them. In addition, respondent demonstrated little understanding of the potential client harm that may result from inaccurate client trust fund bookkeeping.

Costs

21. The Bureau incurred \$10,126.39 in expense for the audit conducted in this matter. The Bureau's claim for these costs is supported by a declaration that complies with California Code of Regulations, title 1, section 1042. The audit cost is reasonable.

22. The Bureau incurred \$749 in expense for investigation conducted in this matter. The Bureau's claim for these costs is supported by a declaration that complies with California Code of Regulations, title 1, section 1042. The investigation cost is reasonable.

23. The Bureau incurred \$712 in attorneys' fees for this matter. The Bureau's claim for these costs is supported by a declaration that complies with California Code of Regulations, title 1, section 1042. The attorneys' fees are reasonable.

LEGAL CONCLUSIONS

1. The Bureau may suspend or revoke a real estate broker's license only if clear and convincing evidence proves the facts supporting discipline. The factual findings above reflect this standard.

2. A real estate broker must maintain all client trust funds in a designated client trust account. (Bus. & Prof. Code, § 10145, subd. (a)(1).) The client trust funds must be in a bank account distinct from the broker's own funds; the account must be titled in the broker's name or in any fictitious business name the Bureau has approved for the broker, with an indication that the broker holds the funds in the account as trustee for the broker's clients. (Cal. Code Regs., tit. 10, § 2832, subd. (a).) Under subdivisions (d) and (g) of Business and Professions Code section 10177, the matters stated in Findings 1, 6, and 7 constitute cause for discipline against respondent's real estate broker's license.

3. A real estate broker must maintain an accurate record of receipts to and disbursements from any client trust fund bank account. (Cal. Code Regs., tit. 10, § 2831.) Under subdivisions (d) and (g) of Business and Professions Code section 10177, the matters stated in Findings 8, 9, 12, 17, and 18 constitute cause for discipline against respondent's real estate broker's license.

4. A real estate broker also must maintain accurate separate transaction records for each client trust fund beneficiary. ((Bus. & Prof. Code, § 10145, subd. (g); Cal. Code Regs., tit. 10, § 2831.1.) Under subdivisions (d) and (g) of Business and Professions Code section 10177, the matters stated in Findings 8, 12, and 18 constitute cause for discipline against respondent's real estate broker's license.

5. A real estate broker must reconcile its client trust account at least monthly, confirming both that the overall balance is accurate and that the individual beneficiary records correspond with the overall balance. (Cal. Code Regs., tit. 10, § 2831.2.) Under subdivisions (d) and (g) of Business and Professions Code section 10177, the matters stated in Findings 8, 9, 12, 17, and 18 constitute cause for discipline against respondent's real estate broker's license.

Disciplinary Considerations

6. The matters stated in Findings 2 and 10 establish that respondent has corrected the violation described in Legal Conclusion 2.

7. Overall, and in particular as stated in Finding 20, no evidence in this matter even suggested that respondent's errors in trust fund management resulted from dishonesty. Further, and in particular as stated in Finding 19, no evidence established that respondent's errors have caused actual harm to any client. Finally, the only errors the Bureau alleged or proved in this matter related to client trust fund management; the Bureau neither alleged nor proved any other professional misconduct relating to respondent's activities as a licensed real estate salesperson or broker. For these reasons, the public interest does not require the Bureau to prohibit respondent from acting under supervision as a real estate licensee.

8. As stated in Findings 11 through 18, however, respondent has been unable to correct fully the bookkeeping problems Lin identified in her 2016 audit. Moreover, and as stated in Finding 20, his failure to correct those problems stems largely from his personal focus on other aspects of his business. Because of the possibility that recordkeeping errors will harm a real estate broker's clients, a broker may not simply delegate client trust fund management to a bookkeeping employee without supervising that employee's work to ensure that it satisfies statutory and regulatory requirements. Respondent's inability to discharge this responsibility warrants revocation of his real estate broker's license, and issuance to respondent instead of a restricted real estate salesperson's license.

Costs

9. If the Bureau, after a hearing, imposes discipline on a real estate broker for errors and omissions revealed by an audit, the broker shall reimburse the Bureau for the reasonable audit costs. (Bus. & Prof. Code, § 10148, subd. (b).) In this matter, as stated in Finding 21, the Bureau's reasonable audit costs total \$10,126.39.

10. A licensee found to have committed a violation of the licensing act may be required to pay the Bureau the reasonable costs of the investigation and enforcement of the case. (Bus. & Prof. Code, § 10106.) The Bureau's request for reimbursement for \$1,461 in costs in this case is justified, and as set forth in Findings 22 and 23 is reasonable.

11. In *Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth the standards by which a licensing board or bureau must exercise its discretion to reduce or eliminate cost awards to ensure that the board or bureau does not deter licensees with potentially meritorious claims from exercising their administrative hearing rights. The court held that a licensing board requesting reimbursement for costs relating to a hearing must consider the licensee's "subjective good faith belief" in the merits of his position and whether the licensee has raised a "colorable challenge" to the proposed discipline. (*Id.*, at p. 45.) The board also must consider whether the licensee will be "financially able to make later payments." (*Ibid.*) Lastly, the board may not assess full costs of investigation and enforcement when it has conducted a "disproportionately large investigation." (*Ibid.*)

12. These matters have been considered. An order requiring respondent to reimburse the Bureau for its full investigation and enforcement costs (\$11,587.39) is warranted.

ORDER

1. All licenses and licensing rights of respondent Jonathan Daryl Fleming under the Real Estate Law are revoked; provided, however, that a restricted real estate salesperson license shall be issued to respondent Fleming pursuant to Section 10156.5 of the Business and Professions Code if respondent makes application therefor and pays to the Bureau 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 nor for the removal of any of the conditions, limitations or restrictions of a restricted license until four years have elapsed from the effective date of this Decision.

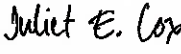
D. Respondent shall submit with any application for license under an employing broker, or any application for transfer to a new employing broker, a statement signed by the prospective employing real estate broker on a form approved by the Bureau of Real Estate which shall certify:

(1) that the employing broker has read the Decision of the Commissioner which granted the right to a restricted license; and

(2) that the employing broker will exercise close supervision over the performance by the restricted licensee relating to activities for which a real estate license is required.

- E. Respondent shall, prior to and as a condition of the issuance of the restricted license, submit proof satisfactory to the Commissioner of having taken and successfully completed the continuing education course on trust fund accounting and handling specified in subdivision (a) of section 10170.5 of the Business and Professions Code. Proof of satisfaction of this requirement includes evidence that respondent has successfully completed the trust fund account and handling continuing education course within 120 days prior to the effective date of the Decision in this matter.
- F. Respondent shall, within six months from the effective date of this Decision, take and pass the Professional Responsibility Examination administered by the Bureau including the payment of the appropriate examination fee. If respondent fails to satisfy this condition, the Commissioner may order suspension of respondent's license until respondent passes the examination.
- G. 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 the respondent presents such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.
2. Respondent shall reimburse the Bureau \$11,587.39 toward its reasonable audit, investigation, and prosecution costs within 30 days following the Bureau's final decision in this matter.

DATED: January 16, 2018

DocuSigned by:

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JULIET E. COX
Administrative Law Judge
Office of Administrative Hearings