

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED

OCT 31 2018

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In the Matter of the Accusation of:

CYNTHIA GREELY,

Respondent.

) DRE No. H-12249 SF

) OAH No. 2018060823

DEPARTMENT OF REAL ESTATE

By K. Kropp

DECISION

The Proposed Decision dated October 10, 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 broker license is granted to Respondent.

Pursuant to Government Code Section 11521, the Department 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 Department'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.

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 NOV 20 2018

IT IS SO ORDERED October 26, 2018

DANIEL SANDRI
ACTING REAL ESTATE COMMISSIONER



BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of:

CYNTHIA GREELY,

Respondent.

Case No. H-12249 SF

OAH No. 2018060823

PROPOSED DECISION

Administrative Law Judge Holly M. Baldwin, State of California, Office of Administrative Hearings, heard this matter on September 25, 2018, in Oakland, California.

Truly Sughrue, Real Estate Counsel, represented complainant Robin S. Tanner, Supervising Special Investigator, Department of Real Estate, State of California.

Respondent Cynthia Greely was present at the hearing, representing herself.

The record was left open until October 2, 2018, for respondent to submit evidence that she opened a new trust account, and for complainant to submit any response. On September 27, 2018, respondent submitted a bank notice, which was marked as Exhibit C. Complainant's response, marked as Exhibit 9 for the record, did not state an objection to admission of Exhibit C, and made an argument as to what it showed. On October 1, 2018, respondent submitted a bank account statement, which was marked as Exhibit D. Complainant's response, marked as Exhibit 10 for the record, stated that complainant had no objection. Exhibits C and D were received into evidence. The record closed and the matter was submitted for decision on October 2, 2018.

FACTUAL FINDINGS

1. Respondent Cynthia Greely was issued a real estate salesperson's license on July 18, 1978. On November 18, 2006, respondent was issued a real estate broker's license and her salesperson license was terminated. Respondent's broker's license was active at all times relevant to this matter, and is scheduled to expire on February 5, 2019.

2. On May 25, 2018, complainant Robin S. Tanner filed the accusation in her official capacity as Supervising Special Investigator, Department of Real Estate

(Department), State of California.¹ The accusation alleges that respondent is subject to discipline based on violations discovered during an audit of respondent's business records. Respondent filed a notice of defense, and this hearing followed.

3. Respondent is engaged in the business of acting as a real estate broker, as defined by Business and Professions Code section 10131, subdivision (b), including conducting a property management business. As part of this property management business, respondent accepts funds from or on behalf of tenants and owners (trust funds) in connection with renting real property, and makes disbursements of those trust funds.

4. Susie Hsueh, who was employed as an auditor by the Department, conducted an audit of respondent's records.² Hsueh examined respondent's property management records for the period of July 1, 2016 through August 31, 2017. The audit was performed in September and October 2017, and resulted in an audit report dated November 28, 2017. The audit report made six noncompliance findings. The audit did not include any finding that respondent's clients were harmed by the violations.

5. Respondent used a trust account with an account number ending in -7580 to handle the trust funds for her property management business, including rent receipts and security deposits. The trust account was not in the name of respondent; it was in the name of Clifton Greely, Greely Realty Broker Trust Account. Respondent was a signatory on the trust account.

6. Respondent did not maintain a written control record for the trust account that showed all trust funds received and disbursed.

7. Respondent maintained separate records for each property she managed for which funds were deposited into the trust account, but she did not maintain a separate record for her broker-owned funds that were deposited into the trust account.

8. Respondent did not perform a monthly reconciliation of the separate records for each beneficiary with the control record for the trust account. Such a reconciliation could not be performed, because respondent did not maintain a control record and did not maintain a separate record of her own broker funds.

9. Respondent did not withdraw her broker fees for property management services from the trust account within 25 days of their deposit. For the period between January 1, 2017 and July 31, 2017, a total of \$16,573 in management fees was deposited into

¹ At the time the accusation was filed, the agency was the Bureau of Real Estate. The Bureau became the Department of Real Estate on July 1, 2018.

² The audit concerned respondent's property management business activity. Respondent also engages in real estate sales activity, but that activity is not at issue in this proceeding.

the trust account, and a total of \$10,042.29 in management fees was disbursed. The auditor found that the difference, \$6,530.71, is the minimum amount of broker-owned funds that were commingled with trust funds in the trust account as of August 31, 2017.

10. Hsiuli Michelle Lin is licensed as a real estate salesperson working under respondent's individual broker license. At the time of the audit, respondent did not have a written broker-salesperson relationship agreement with Lin.

Respondent's Evidence

11. Respondent does not dispute the findings of the audit. She is working to correct the business practices responsible for the audit's noncompliance findings, and she is committed to correcting the remaining areas of noncompliance.

12. Respondent had been working as a licensed real estate salesperson under the broker license of her husband, Clifton Greely. She started doing property management work under his supervision in approximately 2001. Respondent's husband died in April 2003.³

13. The trust account was originally set up many years ago by respondent's husband. Because respondent is a signatory on the account, she did not think she needed to change the trust account to be in her name after her husband's death.

14. In June 2018, respondent opened a new trust account with an account number ending in -8817, in the name of DBA Greely Realty, Cynthia M. Greely Sole Proprietor, Trust Account. The Department agrees that respondent is now in compliance with the requirement that the trust account be in her name.

15. Respondent took classes as required when she renewed her broker license in 2015, which included instruction on trust fund handling. She thought she understood the rules, but now knows she was not in compliance.

16. Respondent has been reading educational material, a guide for real estate brokers and salespersons about California real estate trust funds, in an effort to better understand her obligations.

17. Respondent thought that she was keeping good records for her property management business, but her records did not comply with the regulatory requirements.

18. In April or May 2018, respondent hired an accountant to help her come into compliance with her recordkeeping requirements. The accountant told respondent what level of detail he requires in order to create a control record and a separate record for her broker

³ Respondent was employed as a real estate salesperson under the broker license of Brian Andrew Wieber from February 2004 to November 2006.

fees, and respondent is working on gathering that information. Once the control record is set up, the accountant will be performing a monthly reconciliation of the trust account funds.

19. Respondent has also discussed with the accountant what level of detail she should be recording for deposits, and is changing her practices to comply.

20. Respondent charges different property management fees for each landlord. She is in the process of correcting her records to keep better track of what the fees are for each landlord or property address.

21. Respondent knows that she is supposed to withdraw her property management broker fees from the trust account on a timely basis. For tenants that pay by check, she waits until the checks clear and she has disbursed rent payments to landlords. Respondent intends to withdraw her fees but sometimes she has forgotten to do so. When the auditor told respondent to withdraw a certain amount of broker funds from the trust account, she did so. Respondent is now withdrawing her fees from the trust account on a monthly basis.

22. Lin has worked as a salesperson under respondent's broker license since October 15, 2016. After the auditor informed respondent of the noncompliance finding, respondent signed a written agreement with Lin. The first page of the agreement is dated January 1, 2017, but the signature pages are dated April 18, 2018.

23. There is no history of discipline on respondent's former salesperson license or her current broker license.

Costs

24. The Department incurred \$3,190.31 in audit costs. These costs are supported by a certification that describes the tasks performed, time spent on each task, and method of calculating the cost, in compliance with California Code of Regulations, title 1, section 1042. In the absence of any evidence to the contrary, these costs are found to be reasonable.

25. The Department incurred \$1,344.50 in investigation costs and \$1,958 in enforcement costs to prosecute this accusation, for a total of \$3,302.50. These costs are supported by certifications that describe the tasks performed, time spent on each task, and method of calculating the cost, in compliance with California Code of Regulations, title 1, section 1042. In the absence of any evidence to the contrary, these costs are found to be reasonable.

LEGAL CONCLUSIONS

1. The burden of proof is on the Department to show cause for discipline, by clear and convincing evidence. (*Small v. Smith* (1971) 16 Cal.App.3d 450, 457; Evid. Code,

§ 500.) The burden is on respondent to show rehabilitation, by a preponderance of the evidence. (Evid. Code, §§ 115, 500.)

Causes for Discipline

2. Business and Professions Code section 10177, subdivision (d), authorizes the Commissioner 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 for administration and enforcement of the Real Estate Law. 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 or she is required to hold a license.
3. Business and Professions Code section 10145 describes the obligations of a real estate broker who accepts trust funds belonging to others.
4. In order to be in compliance with Business and Professions Code section 10145, a broker's trust fund account must be in the name of the broker as trustee. (Cal. Code Regs., tit. 10, § 2832, subd. (a).) As set forth in Finding 5, respondent's trust account was not in her own name. Accordingly, cause exists to impose discipline 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, subdivision (a).
5. A broker must maintain a written control record for a trust account, meaning a record of all trust funds deposited into and disbursed from the trust account, that contains specific information required by the regulation. (Cal. Code Regs., tit. 10, § 2831, subd. (a).) As set forth in Finding 6, respondent failed to keep a written control record for her trust account. Accordingly, cause exists to impose discipline pursuant to Business and Professions Code section 10177, subdivisions (d) and (g), in conjunction with California Code of Regulations, title 10, section 2831.
6. A broker must maintain separate records for each beneficiary or transaction. (Cal. Code Regs., tit. 10, § 2831.1.) As set forth in Finding 7, respondent failed to maintain a separate record for the broker-owned funds in her trust account. Accordingly, cause exists to impose discipline pursuant to Business and Professions Code section 10177, subdivisions (d) and (g), in conjunction with California Code of Regulations, title 10, section 2831.1.
7. A broker must reconcile the balance of all separate beneficiary or transaction records with the written control record of all trust funds received and disbursed, on at least a monthly basis. (Cal. Code Regs., tit. 10, § 2831.2.) As set forth in Finding 8, respondent did not perform this reconciliation. Accordingly, cause exists to impose discipline pursuant to Business and Professions Code section 10177, subdivisions (d) and (g), in conjunction with California Code of Regulations, title 10, section 2831.2.

8. Business and Professions Code section 10176, subdivision (e), authorizes the Commissioner to suspend or revoke the license of a real estate licensee who has commingled her own money or property with that of others received and held by her. The regulations permit the broker to deposit reasonably sufficient funds, not to exceed \$200, into a trust account in order to cover service charges or fees. (Cal. Code Regs., tit. 10, § 2835, subd. (a).) The broker must disburse funds belonging to the broker not later than 25 days after their deposit into the trust account. (Cal. Code Regs., tit. 10, § 2835, subd. (b).) As set forth in Finding 9, respondent commingled funds by failing to withdraw broker-owned funds from the trust account on a timely basis. Accordingly, cause exists to impose discipline pursuant to Business and Professions Code section 10176, subdivision (e), in conjunction with California Code of Regulations, title 10, section 2835.

9. A broker must have a written agreement with her real estate salesperson. (Cal. Code Regs., tit. 10, § 2726.) As set forth in Finding 10, respondent did not have a written agreement with Lin, who is licensed as a real estate salesperson under respondent's broker license. Accordingly, cause exists to impose discipline pursuant to Business and Professions Code section 10177, subdivisions (d) and (g), in conjunction with California Code of Regulations, title 10, section 2726.

Level of Discipline

10. The purpose of administrative proceedings regarding professional licenses is not to punish the applicant or licensee, but to protect the public. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 785-786; *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 768.) Having found cause for discipline in this matter, the issue is what level of discipline is required to protect the public.

11. There is no evidence that clients were harmed or suffered monetary loss as a result of respondent's violations. Respondent has taken steps to correct her business practices, and is committed to correcting the remaining areas of noncompliance. She opened a new trust account, and withdrew her commingled broker funds at the auditor's direction. She hired an accountant, and is in the process of working with him to gather the information needed to maintain compliant control and separate records, and to perform reconciliations. Respondent should have known what the applicable regulations required, but she is taking appropriate steps to ensure she is implementing them in her practice. And, respondent has a long history as a real estate salesperson and broker, with no prior record of discipline.

Complainant's counsel argued that restricting respondent's license would be an appropriate disciplinary measure under the circumstances of this case. That recommendation is reasonable. Upon consideration of the record as a whole, it is determined that allowing respondent to keep her broker's license on a restricted basis, with terms and conditions that include a future audit, is not inconsistent with protection of the public.

Costs

12. Pursuant to Business and Professions Code section 10148, subdivision (b), the Commissioner is entitled to charge a real estate broker for the cost of an audit, if the Commissioner has found, in a final decision following a disciplinary hearing, that the broker has violated the trust fund handling requirements of Business and Professions Code section 10145 or a regulation interpreting section 10145. As set forth in Legal Conclusions 4 through 8, respondent violated section 10145 and its interpreting regulations. As set forth in Finding 24, complainant has established that the Department incurred \$3,190.31 in reasonable audit costs.

13. Business and Professions Code section 10106 authorizes the Department to recover its reasonable costs of investigation and enforcement in disciplinary proceedings. As set forth in Finding 25, it was established that complainant has reasonably incurred \$3,302.50 in actual costs in connection with investigation and enforcement of this matter.

14. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the California Supreme Court set forth standards for determining whether costs should be assessed in the particular circumstances of each case, to ensure that licensees with potentially meritorious claims are not deterred from exercising their right to an administrative hearing. Those standards include whether the licensee has been successful at hearing in getting the charges dismissed or reduced, the licensee's good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate to the alleged misconduct. None of these considerations support a reduction in the Department's cost recovery in this case.

ORDER

All licenses and licensing rights of respondent Cynthia Greely 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:

1. 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.

2. 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.
3. 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 two years have elapsed from the effective date of this Decision.
4. 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.
5. Respondent shall report in writing to the Department of Real Estate as the Real Estate Commissioner shall direct by his decision herein or by separate written order issued while the restricted license is in effect such information concerning respondent's activities for which a real estate license is required as the Commissioner shall deem to be appropriate to protect the public interest.

Such reports may include, but shall not be limited to, periodic independent accountings of trust funds in the custody and control of respondent and periodic summaries of salient information concerning each real estate transaction in which respondent engaged during the period covered by the report.
6. Pursuant to Business and Professions Code section 10148, respondent shall pay the Commissioner's reasonable costs for the audit that led to this disciplinary action, in the amount of \$3,190.31.
7. Pursuant to Business and Professions Code section 10148, respondent shall pay the Commissioner's reasonable cost for a subsequent audit to determine if respondent has corrected the trust fund violations found in Legal Conclusions 4 through 8. 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 section 11500 et seq., of the Government Code, if payment is not timely made as provided for herein, or as provided for in a subsequent agreement between the 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.

8. 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.
9. Pursuant to Business and Professions Code section 10106 respondent shall pay the Commissioner's reasonable costs for investigation and enforcement of this matter, in the amount of \$3,302.50.

DATED: October 10, 2018

DocuSigned by:

Holly M. Baldwin

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HOLLY M. BALDWIN

Administrative Law Judge

Office of Administrative Hearings