FILED
FEB 18 2005
DEPARTMENT OF REAL ESTATE
By

DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

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In the Matter of the Accusation of RAFAEL HERNANDEZ, dba Realty Casa & Estates, Fairway Lending Group, and County Realty & Finance, Respondent.	No. H-30947 LA L-2004080314

DECISION

The Proposed Decision dated January 18, 2005, 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 March 10, 2005.

IT IS SO ORDERED 2-17, 2005.

JEFF DAVI
Real Estate Commissioner

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against: RAFAEL HERNANDEZ, dba Realty Casa & Estates, Fairway Lending Group, and County Realty & Finance, Respondent.	Case No. H-30947LA OAH No.: L2004080314

PROPOSED DECISION

On December 20, 2004, in Los Angeles, California, Deborah Myers-Young, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Complainant, Janice Waddell, a Deputy Real Estate Commissioner, Department of Real Estate, was represented by James Peel, Staff Counsel.

Respondent, Rafael Hernandez, (Respondent), appeared and was represented by Timothy Nilan, Attorney at Law.

Oral and documentary evidence was received. The matter was submitted and the record was closed.

FACTUAL FINDINGS

The Administrative Law Judge makes the following Factual Findings:

1. The Statement of Issues was made by Janice Waddell, Complainant, who is a Deputy Real Estate Commissioner of the State of California, acting in her official capacity.

2. Respondent is presently licensed and/or has license rights under the Real Estate Law (Bus. & Prof. Code, Part 1, Div. 4) as a real estate broker. At all relevant times, Respondent acted as a real estate broker for others within the meaning of Business and Professions Code section 10131, subdivisions (a) and (b).

3. On February 26, 2003, the Department of Real Estate (hereinafter Department) completed an examination of Respondent's books and records for the period beginning January 1, 2001 through December 31, 2002, at two of his locations,

which revealed violations of the Business and Professions Code and the California Code of Regulations, title 10, chapter 6, as described below.

4. Respondent was originally licensed as a real estate salesperson on March 29, 1985, and as a broker on August 9, 1989. Respondent has filed 35 "dba's" with the Department since that time. Respondent engaged in selling real estate properties and negotiating loans for qualified borrowers. At the time of the audit, he operated 13 offices. The dollar value of the property sold in the last twelve months was $2,400,000.00. The dollar value of the loans he negotiated was $35,000,000.00.

5. Respondent accepted and received funds from and/or on behalf of clients. He did not maintain a trust account, as he arranged for the funds to be deposited directly into the client's corresponding escrow accounts. He did maintain a record of trust account funds deposited into escrow accounts. On one occasion, the record of a $2000.00 check did not contain the date it was released into escrow. Respondent credibly testified that this was an oversight. He has since reviewed all of the files in his multiple offices to ensure that it does not happen again.

6. On three occasions, earnest money deposits were held beyond the next three business days. Respondent credibly testified that this was performed at the request of his clients who needed time to transfer funds into that account. The funds were always made payable to the escrow company directly. The funds were never deposited into his trust account since he did not maintain one. He has since changed his business practices to include obtaining a written authorization from his buyers to allow him to hold the funds for the additional time. He further testified that these three checks were in the sum of $500.00, $500.00, and $1000.00, and that he thought that checks written for $1000.00 and less were not earnest money deposits under California Code of Regulations, title 10, section 2832, subdivision (e), and therefore were not bound by the three-day requirement.

7. Respondent filed fictitious business name statement with the County Recorder for his Fontana office, "Remax Casa and Estates" and in turn, filed it with the Department on May 29, 2001. He filed a main office and mailing address change with the Department on December 31, 2001, designating the Fontana office as his main office. He changed his main office to his Santa Ana office and filed the main office and mailing address change on February 22, 2002. This had the effect of canceling the Fontana office. Respondent credibly testified that he believed that his Fontana office would still be listed as a licensed branch office when he made this change, and didn't realize he needed to register the Fontana office as a branch office when he changed his main office to the Tustin office. He now understands that he is required to file an additional form. He cancelled that "dba" and filed a new "dba" for that office on January 18, 2002, naming it "Realty Casa & Estates".

8. Respondent similarly filed a fictitious business name statement with the County Recorder for his Tustin office, "Country Realty and Finance", and in turn,

filed it with the Department on March 8, 2001. He appeared credible when he explained he misunderstood that he needed to register that office as a branch office as he believed that the filing of the "dba" with the Department was sufficient. He now understands that he is required to file an additional form.

9. Respondent filed a fictitious business name statement with the County Recorder for "Mega Properties & Investments", and in turn, filed it with the Department on July 10, 2001. Mega Properties was located in the same office as Realty Casa & Estates. Respondent appeared credible when he explained he misunderstood that he needed to register that office as a branch office as he believed that the filing of the "dba" with the Department was sufficient. He now understands that he is required to file an additional form.

10. Respondent filed a fictitious business name statement with the County Recorder for "Fairway Lending Group", and in turn, filed it with the Department on April 29, 1999. He appeared credible when he explained he misunderstood that he needed to register that office as a branch office as he believed that the filing of the "dba" with the Department was sufficient. He now understands that he is required to file an additional form.

11. Respondent filed a fictitious business name statement with the County Recorder for "Infinity Real Estate and Home Loans", and in turn, filed it with the Department on December 17, 1998. He appeared credible when he explained he misunderstood that he needed to register that office as a branch office as he believed that the filing of the "dba" was sufficient. He now understands that he is required to file an additional form.

12. Complainant's auditor and expert witness admitted that he did not see the License Change Transaction of Respondent which listed these "dba's" when he prepared his audit report. He would have found these offices (Findings 7-11) "active" if he had seen the License Change, although Respondent still needed to have connected these "dba's" to a branch license. It did not appear to the auditor that the Respondent was attempting to hide his locations, or any other information, from the Department.

13. Respondent admitted that he failed to notify the Department that eight real estate salespersons in his employ were terminated. He now keeps a closer scrutiny of those records. This appears to have been an oversight that has been corrected.

14. Respondent did not retain the license certification of one real estate salesperson in his employ. This appears to have been an oversight that has been corrected.

15. Respondent did not retain on file a copy of the department approved Mortgage Loan Disclosure Statement for three borrowers. This appears to have been an oversight that has been corrected.

16. The Mortgage Loan Disclosure Statement that Respondent provided to borrowers did not always contain Respondent's broker license number, although it did contain the salesperson's license. Respondent credibly testified that this was due to a programming error in his software system "Genesis", which was a standard program used in the industry. That program did not contain a field that would enter the broker's license number when printed out. Respondent has since changed his software program to "Point", another industry standard program, which properly prints out his broker's license number on the Mortgage Loan Disclosure Statement.

17. The Complainant did not establish that Respondent failed to comply with a supena duces tecum served upon him. Respondent credibly testified that he met with Deputy Real Estate Commissioner Kishiyama and discussed in detail how a real estate salesperson "Guzman" had stolen his information and perpetrated a fraud upon buyers. Respondent and another Department of Real Estate employee then went to the alleged branch office used, and found it vacant. Respondent was convincing when he explained that he had never employed that salesperson, had never been contacted by the buyers, and was never in possession of the records maintained by that salesperson.

18. The Department's auditor acknowledged that Respondent's violations were technical in nature, and he was not aware of any complaints against Respondent in the 20 years that he was licensed by the Department. He admitted that Respondent was cooperative, and did not appear to be hiding anything from him. The auditor believed that Respondent was not trying to do anything illegal, was not trying to harm anyone, and was not trying to gain financially from these technical violations. He believed that Respondent was on top of the day-to-day operations of his many offices. He believed that the Respondent was proactive about correcting these violations. This assessment was corroborated by the Respondent's testimony and demeanor.

19. Respondent's attitude was cooperative and appreciative. Respondent took the information that he learned from the audit and personally reviewed all the files in his many offices to correct any deficiencies. He now travels 200 miles each day to visit each of these offices and ensure his technical compliance with the law. There was no evidence that anyone was harmed by Respondent's technical violations. There was no evidence that Respondent gained financially from these technical violations.

LEGAL CONCLUSIONS

Pursuant to the foregoing Factual Findings, the Administrative Law Judge makes the following legal conclusions:

1. Cause does not exist to suspend or revoke all licenses and licensing rights of Respondent Rafael Hernandez under Business and Professions Code section 10177, subdivision (d), for willful disregard or violation of the real estate laws. It was not established by clear and convincing evidence that Respondent willfully disregarded and violated Business and Professions Code sections 10163, 10161.8, 10160, 10240, 10236.4, and 10148, or California Code of Regulations, title 10, sections 2831, 2832, 2731, 2752, 2753, and 2840. This is set forth in Findings 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19.[1]

2. Cause does exist to suspend or revoke all licenses and licensing rights of Respondent Rafael Hernandez under Business and Professions Code section 10177, subdivision (g), for demonstrating negligence in performing acts for which he is required to hold a license. It was established by clear and convincing evidence that Respondent was negligent and violated Business and Professions Code sections 10163, 10161.8, 10160, 10240, and 10236.4, and California Code of Regulations, title 10, sections 2831, 2752, 2753, and 2840. This is set forth in Findings 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19. Complainant did not establish that Respondent violated Business and Professions Code section 10148 or California Code of Regulations, title 10, sections 2731 and 2832.

3. Cause does not exist to suspend or revoke all licenses and licensing rights of Respondent Rafael Hernandez under Business and Professions Code section 10177, subdivision (j), for engaging in any conduct which constitutes fraud or dishonest dealing. It was not established by clear and convincing evidence that Respondent committed fraud or a dishonest dealing and violated Business and Professions Code sections 10163, 10161.8, 10160, 10240, 10236.4, and 10148, or California Code of Regulations, title 10, sections 2831, 2832, 2731, 2752, 2753, and 2840. This is set forth in Findings 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19.

Respondent's violations set forth above are technical in nature, and appear to have been the result of Respondent's internal administration errors caused by maintaining so many offices. Respondent has made strong rehabilitative efforts which have resolved these errors. Respondent was cooperative during the audit, and

[1] Clear and convincing evidence has been defined as evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered. It is a higher standard of proof than proof by a preponderance of the evidence. See, BAJI 2.62. "Clear and convincing evidence" requires a finding of high probability. It must be sufficiently strong to command the unhesitating assent of every reasonable mind. In re David C. (1984) 152 Cal.App.3d 1189, 1208.

quickly corrected any violations which were called to his attention. He now travels 200 miles each day to visit each of his offices so that he remains on top of the day-to-day operations. He has reviewed every file in those offices to ensure his compliance with the law. Respondent has had no complaints made against him in the twenty years he has been a real estate broker and salesperson. There was no evidence that anyone was harmed by these violations. There was no evidence that Respondent gained financially from these violations, or ever intended to do so. When the number of defects in Respondent's compliance with the real estate law is compared with the volume of Respondent's business, the shortcomings are minimal in nature.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

All licenses and licensing rights of Respondent Rafael Hernandez under the Real Estate Law are suspended for a period of five (5) days from the effective date of this Decision; provided, however, that five (5) days of said suspension shall be stayed for one (1) year upon the following terms and conditions:

1. Respondent shall obey all laws, rules and regulations governing the rights, duties and responsibilities of a real estate licensee in the State of California; and

2. That no final subsequent determination be made, after hearing or upon stipulation, that cause for disciplinary action occurred within one (1) year of the effective date of this Decision. Should such a determination be made, the Commissioner may, in his discretion, vacate and set aside the stay order and reimpose all or a portion of the stayed suspension. Should no such determination be made, the stay imposed herein shall become permanent.

Dated: January 18, 2005

Deborah Myers-Young

DEBORAH MYERS-YOUNG
Administrative Law Judge
Office of Administrative Hearings

FILED
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DEPARTMENT OF REAL ESTATE

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of

RAFAEL HERNANDEZ

Respondent

Case No. H-30947 LA

OAH No. L-2004080314

NOTICE OF HEARING ON ACCUSATION

To the above named respondent:

You are hereby notified that a hearing will be held before the Department of Real Estate at **Office of Administrative Hearings, 320 West Fourth Street, Suite 630, Los Angeles, California,** on **December 20, 2004**, at the hour of **1:30 p.m.**, or as soon thereafter as the matter can be heard, upon the Accusation served upon you. If you object to the place of hearing, you must notify the presiding administrative law judge of the Office of Administrative Hearings within ten (10) days after this notice is served on you. Failure to notify the presiding administrative law judge within ten days will deprive you of a change in the place of the hearing.

You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. If you are not present in person nor represented by counsel at the hearing, the Department may take disciplinary action against you based upon any express admission or other evidence including affidavits, without any notice to you.

You may present any relevant evidence and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Department of Real Estate.

The hearing shall be conducted in the English language. If you want to offer the testimony of any witness who does not proficiently speak the English language, you must provide your own interpreter and pay his or her costs. The interpreter must be certified in accordance with Sections 11435.30 and 11435.55 of the Government Code.

DEPARTMENT OF REAL ESTATE

Dated: September 24, 2004

By James R. Peel
JAMES R. PEEL, Counsel

cc: Rafael Hernandez
Timothy E. Nilan, Esq.
Sacto./OAH

JAMES R. PEEL, Counsel (SBN 47055)
Department of Real Estate
320 West Fourth Street, Suite 350
Los Angeles, CA 90013-1105

Telephone: (213) 576-6982
-or- (213) 576-6913 (Direct)

FILED
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DEPARTMENT OF REAL ESTATE
By

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of RAFAEL HERNANDEZ, dba Realty Casa & Estates, Fairway Lending Group, and County Realty & Finance, Respondent.	No. H-30947 LA A C C U S A T I O N

The Complainant, Janice A. Waddell, a Deputy Real Estate Commissioner of the State of California, for cause of Accusation against RAFAEL HERNANDEZ, dba Realty Casa & Estates, Fairway Lending Group, and County Realty & Finance, alleges as follows:

I

The Complainant, Janice A. Waddell, acting in her official capacity as a Deputy Real Estate Commissioner of the State of California, makes this Accusation against RAFAEL HERNANDEZ, dba Realty Casa & Estates, Fairway Lending Group, and County Realty & Finance.

II

RAFAEL HERNANDEZ, dba Realty Casa & Estates, Fairway Lending Group, and County Realty & Finance (hereinafter referred to as "Respondent"), is presently licensed and/or has license rights under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code) (hereinafter Code).

III

At all times herein mentioned, Respondent was licensed by the Department of Real Estate of the State of California (hereinafter Department) as a real estate broker.

IV

At all times herein mentioned, Respondent, on behalf of others in expectation of compensation, engaged in the business, acted in the capacity of, advertised or assumed to act as a real estate broker in the State of California within the meaning of Sections 10131(a) and (b) of the Code.

V

On or about February 26, 2003, the Department completed an examination of Respondent's books and records, pertaining to the activities described in Paragraph IV above, covering a period from January 1, 2001, through December 31, 2002, which examination revealed violations of the Code and of Title 10, Chapter 6, California Code of Regulations (hereinafter Regulations) as set forth below.

VI

The examination described in Paragraph V, above, determined that, in connection with the activities described in

Paragraph IV above, Respondent accepted or received funds, including funds in trust (hereinafter "trust funds") from or on behalf of principals and thereafter made deposit or disbursement of such funds.

VII

In the course of activities described in Paragraphs IV and VI and during the examination period described in Paragraph V, Respondent acted in violation of the Code and the Regulations as follows, and as more specifically set forth in Audit Report Nos. LA 020208 and LA 020286 and related exhibits:

1. Violated Regulation 2831. The control record did not always include the date trust funds were forwarded.

2. Violated Regulation 2832. Earnest money deposits were sometimes held beyond the next three business days after the offer was accepted without written authorization.

3. Violated Section 10163. Respondent maintained an unlicensed branch office at 8285 Sierra Avenue, Suite 106, Fontana, and 205 West First Street, #202, Tustin.

4. Violated Regulation 2731. Respondent performed activities requiring a real estate license under the unlicensed fictitious business names, Casa & Estate Realty and Mega Properties; Fairway Lending Group, Inc.; Fairway Lending, Inc.; Fairway Lending; and Infinity Real Estate.

5. Violated Section 10161.8/Regulation 2752. Respondent failed to notify the Department of the termination of salespersons in his employ.

6. Violated Section 10160/Regulation 2753. Respondent failed to retain the license certificates of all salespersons in his employ.

7. Violated Section 10240/Regulation 2840. Respondent did not retain on file a true and correct copy of a Department approved Mortgage Loan Disclosure Statement for borrowers Martinez, Castillo and Vidal.

8. Violated Section 10236.4(b). The Mortgage Loan Disclosure Statement Respondent provided borrowers did not always disclose his license number.

9. Violated Section 10148. Respondent was served with a Subpoena Duces Tecum to produce certain books and records for inspection and examination by the employees of the Department but Respondent has refused to produce such records as required by the Subpeona.

VIII

The conduct of Respondent, as alleged above, subjects his real estate licenses and license rights to suspension or revocation pursuant to Sections 10177(d), 10177(j) and/or 10177(g) of the Code.

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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 Respondent RAFAEL HERNANDEZ, dba Realty Casa & Estates, Fairway Lending Group, and County Realty & Finance, under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code) and for such other and further relief as may be proper under other applicable provisions of law.

Dated at Los Angeles, California

this 9th day of April, 2004.

JANICE A. WADDELL
Deputy Real Estate Commissioner

cc: Rafael Hernandez
Janice A. Waddell
Audit Section
Eric Goff
Sacto.
AK