

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation)	
Against:)	No. H-1186 FRESNO
DAVID RALPH TYRRELL)	OAH No. N-08097
Respondent.)	

PROPOSED DECISION

On January 28, 1994, in Sacramento, California, Stephen J. Smith, Presiding Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

David B. Seals, Counsel, Department of Real Estate, State of California, represented the complainant.

David Ralph Tyrrell appeared in person without an attorney and represented himself.

Evidence was received, the record was closed and the matter was submitted.

FINDINGS OF FACT

I

On July 20, 1993, Jerry E. Fiscus, acting in his official capacity as a Deputy Real Estate Commissioner, Department of Real Estate (hereafter "the Department"), State of California, made the charges and allegations contained in the Accusation, and caused it to be filed on July 27, 1993. In so doing, he acted pursuant to the authority of Business and Professions Code section 10175, which furnishes the Department jurisdiction to suspend, revoke or otherwise impose disciplinary action upon any holder of a real estate license issued by the Department on behalf of the State of California, provided cause for such action is established by clear and convincing competent evidence.

Another contributing factor to the shortage was unauthorized disbursements to the "HE116A" account, which amounted to \$4,111.29. These disbursements were unauthorized expenditures of trust funds belonging to other principals used to renovate a rental home belonging to yet another principal. Mr. Tyrrell renovated the home to provide a home for his girlfriend. Following the completion of the renovations, he persuaded the owner-principal to allow Mr. Tyrrell's girlfriend to rent the home at a reduced rent because so much had been invested in the renovation, to the owner-principal's benefit. It was not disclosed to the owner-principal where the funds had come from for the renovation, nor was it disclosed to other owner-principals Mr. Tyrrell represented that their trust funds had been used to renovate this other home in which they had no ownership interest.

Further shortages in the trust funds were caused by negative individual account balances. The total amount of negative account balances was \$6,213.57. These were caused by expenditures for the maintenance and operation of certain properties under management in excess of income received against them. These negative balances were possible because other properties caused a generation of income in excess of expenditures, and that excess was used to pay expenses on properties for which insufficient income was generated. This is not a problem if the same owner-principal owns all of the properties, and the auditor did not consider the account short for each owner-principal for which several properties had negative and positive cash flows. The figure set forth above is for those properties that did not have common ownership, and for which Mr. Tyrrell "borrowed" positive cash flow from one owner-principal to pay expenses on another owner-principal's property, without the knowledge or consent of the owner-principal to whom the positive cash balance should have been credited.

Another contributor to the trust fund shortage was unauthorized distributions of \$1,677.76 to an "inventory control" account. This account was Mr. Tyrrell's idea for an inexpensive manner in which he could resolve minor maintenance problems. For replacement items of small cost frequently used, such as light bulbs or furnace filters, he would use trust funds to bulk purchase an inventory of such items. When the item was needed for a particular property, he would use the inventory item, and charge the "going rate" to the particular property account that received the item. Mr. Tyrrell testified that the "going rate" was not always the actual cost of the item, and his firm would pocket the difference between the "going rate" charged and the actual cost.

The cause of the remainder of the trust fund shortage, \$10,922.17, could not be ascertained from the records kept by Mr. Tyrrell for Tyrrell Management Company.

VII

The investigative audit selected a second date, March 16, 1993, for a second evaluation of the trust fund's balance and accountability. On March 16, 1993, the trust fund balance of Tyrrell Management Company was \$32,020.53. The trust fund's accountability on that date was \$34,614.36. Therefore, the trust fund had a shortage of \$2,593.83. The shortage was caused predominately by negative account balances, causing a shortage of \$2,593.78. The cause of the remainder of the shortage, \$259.95, was unidentified.

VIII

It is clear that the negative account balances discovered by the investigative audit, as well as the unauthorized disbursements from the trust account, were the result of the failure of Mr. Tyrrell to reconcile the individual beneficiary records for each of his owner-principals with the records of trust funds received and paid out each month. This failure enabled Mr. Tyrrell to "borrow" excess cash flow from the owner-principals whose properties generated it, and to disburse funds in favor of accounts or properties that did not generate cash sufficient to cover the costs incurred. Further, the practice enabled Mr. Tyrrell to disburse management fees to himself for properties that did not generate enough income to pay for the fees, without requiring Mr. Tyrrell to go to the owner-principal for additional funds to pay his management fee.

IX

As set forth above, Mr. Tyrrell did not dispute that the facts determined by the Department's auditor were true, and that significant unauthorized disbursements of trust funds were made by himself for a variety of purposes, all without the knowledge or consent of the owner-principal beneficiaries to whom those funds belonged. Mr. Tyrrell testified that he went through a very low period in his life, in which he went through a period of substance abuse and an unsuccessful romance with the person he set up in the renovated managed home described above. The Department's audit appears to have been the catalyst to induce Mr. Tyrrell to change not only his business practices but his personal life as well. For the last year, Mr. Tyrrell has quit the substance abuse, gotten involved in church, begun an exercise program, and abandoned the patterns of his life up to that point. He is still involved in a rather unpleasant custody battle for his children.

As a result of the Department's auditor's presence for an extended period of time at his business, Mr. Tyrrell has learned a great deal regarding how to properly account for his trust funds. To the Department's great credit, its auditor,

Mr. Boiteaux, invested as much or more time educating and assisting Mr. Tyrrell to come into compliance with the real estate law, and helping him set up systems to assure continuing compliance, than he did auditing the company. The spirit of mutual cooperation between Mr. Tyrrell and the Department's auditor was readily evident at the hearing as well.

Mr. Boiteaux encouraged Mr. Tyrrell to implement a computerized system for accounting, which he did. This system reconciles individual beneficiary accounts monthly, as required, and Mr. Tyrrell has been using this system since shortly after the audit. Mr. Tyrrell still has small, occasional negative balances in some of the accounts, but as a result of the hearing, now realizes that none of the accounts may ever have a negative balance. These negative balances, he testified, occurred as a result of Mr. Tyrrell's concern to pay workmen in a timely manner for work performed on properties, in advance of seeking reimbursement from the owner for the amount necessary to pay the workers and not create a shortage. Mr. Tyrrell now realizes that he cannot make such payments, if the payment will put the account into a negative position, even if only for a short period. In addition, Mr. Tyrrell learned that he cannot take an immediate debit for his management fee when income is received, if such a debit would place the account into a negative position, even for a short period.

After the audit was completed, Mr. Boiteaux discussed the results with Mr. Tyrrell. On March 13, 1993, Mr. Tyrrell deposited the sum of \$21,032.81 to the trust account. This deposit was composed of Mr. Tyrrell's personal funds and funds he had borrowed from family. It was believed that this deposit would balance the trust account, however, it came up just a little short. Mr. Tyrrell has apparently balanced the account, following the discovery on March 16, 1993, that the account was still in a slightly negative position.

Further, Mr. Tyrrell terminated the inventory control account and the practice of bulk purchasing, reimbursed the owners (within the payment described above) for the unauthorized improvements to another owner's property, terminated the practice of taking advances on his management fees when the trust fund received income, and has a system now in place where each beneficiary's account is clearly identified and accountability of the individual accounts can easily be ascertained. In short, Mr. Tyrrell has made major efforts to bring his business practices into compliance with the real estate law and the expectations of the Department, and has maintained a very cooperative and compliance-oriented attitude throughout. Not only has he readily acknowledged the previous failures of his accounting system, and the causes of those errors frankly and forthrightly, but he has substantially and significantly corrected the problems that caused the errors.

X

Based upon all of the above facts and circumstances, particularly noting Mr. Tyrrell's attitude toward the Department, its audit and these proceedings, it would not be contrary to the public interest and welfare to permit Mr. Tyrrell to continue to practice as a licensed real estate broker and continue in his property management business. However, the license should be restricted, so that a period of monitoring and education may take place to insure that the changes in business practices Mr. Tyrrell has made are permanent. Mr. Tyrrell's prompt, cooperative and comprehensive responses to the Department's audit and the changes made in his business practices are impressive and significant factors in mitigation, and ultimately saved his license and business. But these factors must be viewed in the larger context of Mr. Tyrrell's lengthy experience in the property management business, which points to the fact that he was well aware that the unauthorized disbursements he made from the trust fund to improve a home for his girlfriend, make management fee payments to his firm when the trust balance was negative and the like were inappropriate and illegal. Mr. Tyrrell's management of his trust fund leading to its shortages was not the result of ignorance of the impropriety of making unauthorized disbursements or allowing the trust fund to continue with a grossly negative balance.

Nevertheless, the mitigation here is compelling and comprehensive. Noteworthy in evaluating mitigation in this case is Mr. Tyrrell's prompt and rather substantial restitution to the trust fund when it was made apparent to him that the trust fund balance was grossly negative. It does not appear that any owner-principal client of Mr. Tyrrell's firm sustained any loss as a result of the unauthorized disbursements and negative balances of the trust fund set forth above. The manner and promptness in which restitution to the trust fund was made, Mr. Tyrrell's responsiveness to the Department's findings upon the audit, and the number and extent of changes in his business practices implemented by Mr. Tyrrell with the Department's guidance are indicative that Mr. Tyrrell's present clients and those members of the public that might do business with him or his firm in the future are not at significant risk of future trust fund violations or misappropriation of trust funds.

DETERMINATION OF ISSUES

I

Mr. Tyrrell and Tyrrell Management Company violated Business and Professions Code section 10145 and Title 10,

7

California Code of Regulations section 2832.1. As set forth in the Findings, Mr. Tyrrell made disbursements from his trust account that reduced the balance of funds in the account to an amount less than the aggregate trust fund liability of Mr. Tyrrell to the owners of all the funds held in trust. These disbursements were made without the prior written consent of every principal who is an owner of funds in the account. Violation of Business and Professions Code section 10145, as further defined by Title 10, California Code of Regulations section 2832.1, constitutes cause to revoke, suspend or otherwise impose disciplinary action upon the real estate broker's license of Mr. Tyrrell, pursuant to Business and Professions Code section 10177(d).

II

Mr. Tyrrell and Tyrrell Management Company violated Title 10, California Code of Regulations section 2831.2. As set forth in the Findings, Mr. Tyrrell failed to reconcile each separate beneficiary record with the record of all trust funds received and disbursed at least monthly. Since Mr. Tyrrell did not keep separate beneficiary records for each owner-principal he managed, until after the Department's audit, separate accounting for each beneficiary was not possible. A violation of Title 10, California Code of Regulations section 2831.2 constitutes cause to revoke, suspend or otherwise impose disciplinary action upon the real estate broker's license of Mr. Tyrrell, pursuant to Business and Professions Code section 10177(d).

III

Mr. Tyrrell and Tyrrell Management Company violated Business and Professions Code section 10176(i). As set forth in Findings III, VI, IX and X, Mr. Tyrrell engaged in dishonest dealing with trust funds under his management and control. The unauthorized distribution of trust funds belonging to one owner-principal, in order to renovate and make habitable for his girlfriend the property of another owner-principal, the unauthorized distribution of trust funds to pay his own fees when the trust account is in a grossly negative condition, and the use of the inventory control account to add profit to unauthorized purchases of commonly purchased items all are examples of dishonest dealing with client trust funds.

IV

As set forth in Findings IX and X, substantial mitigation and rehabilitation evidence was presented at the hearing that was both comprehensive and persuasive. It is apparent that Mr. Tyrrell has distanced himself from the business practices that resulted in the violations determined above, and has made changes in his personal life as well. His prompt

compliance with the Department's audit and complete restitution has insured that no clients suffered any more than short term harm. The character and quality of this evidence is such that outright revocation of the license is not called for in this case. Rather, the public interest will be adequately protected if the license is restricted and made subject to terms and conditions that will enable the Department to easily continue to monitor Mr. Tyrrell's business and ensure that the changes that he has made are permanent. In lieu of any actual suspension, the condition requiring Mr. Tyrrell to pay for a follow-up audit of his trust account is imposed, in order that continuing compliance may be ascertained at no additional cost to the Department. If Mr. Tyrrell is out of trust when audited, suspension is provided for by that condition.

ORDER

The real estate broker's license and licensing rights appertaining thereto of David Ralph Tyrrell under the Real Estate Law are revoked; provided, however, a restricted real estate broker license shall be issued to Mr. Tyrrell pursuant to section 10156.5 of the Business and Professions Code, if Mr. Tyrrell 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 Mr. Tyrrell 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 Mr. Tyrrell may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of Mr. Tyrrell's conviction or plea of nolo contendere to a crime which is substantially related to Mr. Tyrrell's fitness or capacity as a real estate licensee.
2. The restricted license issued to Mr. Tyrrell may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that Mr. Tyrrell has violated provisions of the California Real Estate Law, the Subdivided Lands Act, Regulations of the Real Estate Commissioner or conditions attaching to the restricted license.
3. Mr. Tyrrell 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. Mr. Tyrrell shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that he 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. At least three of these course hours must be in the subject matter of trust fund accounting and maintenance. Mr. Tyrrell shall seek prior Department approval for the course work in trust fund accounting and maintenance, and the Department may, in its discretion, extend the time limit for the satisfaction of this particular course requirement for any delay in obtaining the Department's approval for the course, provided Mr. Tyrrell has been diligent in seeking the approval. If Mr. Tyrrell fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until Mr. Tyrrell presents such evidence. The Commissioner shall afford Mr. Tyrrell the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.
5. Mr. Tyrrell shall, within six months from the effective date of this Decision, take and pass the Professional Responsibility Examination administered by the Department including the payment of the appropriate examination fee. If Mr. Tyrrell fails to satisfy this condition, the Commissioner may order suspension of Mr. Tyrrell's license until he passes the examination.
6. Mr. Tyrrell shall report in writing to the Department of Real Estate no less frequently than quarterly, and no more frequently than monthly, as the Real Estate Commissioner shall direct by separate written order issued while the restricted license is in effect, such information concerning Mr. Tyrrell'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 Mr. Tyrrell and periodic summaries of salient information concerning each real estate transaction in which Mr. Tyrrell engaged during the period covered by the report.

7. Pursuant to section 10148 of the Business and Professions Code, Mr. Tyrrell shall pay the Commissioner's reasonable cost for an audit to determine if Mr. Tyrrell has corrected the trust fund violation(s) found in Paragraphs I, II and III, inclusive, of the Determination of Issues. 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. Mr. Tyrrell shall pay such cost within 45 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 Mr. Tyrrell 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 Mr. Tyrrell and the Commissioner, and may also suspend the license if any of the violations determined in Determinations I, II or III are found. The suspension shall remain in effect until payment is made in full or until Mr. Tyrrell enters into an agreement satisfactory to the Commissioner to provide for payment, and the violations are corrected to the Department's auditor's satisfaction, or until a decision providing otherwise is adopted following a hearing held pursuant to this condition.

Dated: March 10 1994

Stephen J. Smith

STEPHEN J. SMITH
Presiding Administrative Law Judge
Office of Administrative Hearings

FILED
AUG 31 1993

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

By Laurie A. Zain

In the Matter of the Accusation of

DAVID RALPH TYRRELL,

Case No. H-1186 FRESNO

OAH No. N-08097

Respondent

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 The

Office of Administrative Hearings, 501 J Street, Suite 220,

Second Floor Hearing Rooms, Sacramento, California 95814

on Friday -- January 28, 1994, at the hour of 9:30 AM,
or as soon thereafter as the matter can be heard, upon the Accusation served upon you.

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 subpoenas 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. The interpreter must be approved by the Administrative Law Judge conducting the hearing as someone who is proficient in both English and the language in which the witness will testify. You are required to pay the costs of the interpreter unless the Administrative Law Judge directs otherwise.

Dated: August 30, 1993

DEPARTMENT OF REAL ESTATE

By David B. Seals

DAVID B. SEALS

Counsel

1 DAVID B. SEALS, Counsel
2 Department of Real Estate
3 P. O. Box 187000
4 Sacramento, CA 95818-7000

5 Telephone: (916) 227-0789

FILED
JUL 27 1993
DEPARTMENT OF REAL ESTATE

By *Kathleen Contreras*

8 BEFORE THE
9 DEPARTMENT OF REAL ESTATE
10 STATE OF CALIFORNIA

11 * * *

12 In the Matter of the Accusation of)
13 DAVID RALPH TYRRELL,) NO. H-1186 FRESNO
14 Respondent.) ACCUSATION

15 The Complainant, Jerry E. Fiscus, a Deputy Real Estate
16 Commissioner of the State of California, for cause of Accusation
17 against DAVID RALPH TYRRELL (Respondent), is informed and
18 alleges as follows:

19 I

20 Respondent is presently licensed and/or has license
21 rights under the Real Estate Law, Part 1 of Division 4 of the
22 Business and Professions Code (the Code).

23 II

24 The Complainant, Jerry E. Fiscus, a Deputy Real Estate
25 Commissioner of the State of California, makes this Accusation
26 against Respondent in his official capacity as such and not
27 otherwise.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

III

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

IV

That at all times herein mentioned, Respondent engaged in the business of, acted in the capacity of, advertised, or assumed to act as a real estate broker in the State of California within the meaning of Section 10131 of the Code for or in expectation of compensation.

V

That at all times mentioned herein, Respondent accepted or received funds in trust (hereafter trust funds) from and on behalf of his principals placing them in a trust fund account and at times thereafter made disbursements of such funds.

VI

That during the period from March 2, 1993 to May 11, 1993, an investigative audit was made by the Department of the records and bank records of Respondent **DAVID RALPH TYRRELL** for the period from December 1, 1990 to March 16, 1993 as said records related to his activities as a real estate broker.

VII

That it was ascertained by said audit that the Respondent **DAVID RALPH TYRRELL** maintained a trust account into which trust funds were placed, at Bank of the Sierra, 90 N. Main Street, Porterville, CA 93257, Account No. 0122289970 in the name of Tyrrell, David R., Broker, as Trustee Tyrrell Management Co.,

1 and that the adjusted balance of the account as of February 26,
2 1993 was a negative Eighteen Thousand Three Hundred Sixty-five and
3 07/100 Dollars (-\$18,365.07).

4 VIII

5 That it was further ascertained by said audit that the
6 Respondent **DAVID RALPH TYRRELL'S** trust fund accountability in
7 the account as of February 26, 1993 was Seven Thousand Six Hundred
8 and 39/100 Dollars (\$7,600.39) and that therefore **DAVID RALPH**
9 **TYRRELL**, as of February 26, 1993, had a trust fund shortage of
10 Twenty-five Thousand Nine Hundred Sixty-five and 46/100 Dollars
11 (\$25,965.46)..

12 The shortage was caused by unauthorized disbursements in
13 the "Z-TMC" account which included advances on Respondent's
14 management fees (\$3,040.67), unauthorized disbursements in the
15 "HE116A" account which included using \$4,111.29 of trust funds to
16 fix-up a property without the consent or knowledge of the owner,
17 negative account balances (\$6,213.57), unauthorized disbursements
18 in the "Inventory control" account which included using funds
19 (without the consent of owners) to purchase items used to repair
20 or maintain properties (\$1,677.76), and (\$10,922.17) was
21 unidentified.

22 IX

23 That it was ascertained by said audit that the adjusted
24 balance of the account as of March 16, 1993 was Thirty-two
25 Thousand Twenty and 53/100 Dollars (\$32,020.53). The trust fund
26 accountability in the account as of March 16, 1993 was Thirty-four
27 Thousand Six Hundred Fourteen and 36/100 Dollars (\$34,614.36) and

1 that therefore DAVID RALPH TYRRELL, as of March 16, 1993, had a
2 trust fund shortage of Two Thousand Five Hundred Ninety-three and
3 83/100 Dollars (\$2,593.83).

4 The shortage was caused by negative account balances
5 (\$2,853.78), and (\$259.95) was unidentified.

6 X

7 It was also ascertained by the audit that Respondent
8 DAVID RALPH TYRRELL did not reconcile the individual beneficiary
9 records with the record of trust funds received and paid out on a
10 monthly basis.

11 XI

12 That by reason of the facts as alleged in Paragraphs V
13 through IX above, Respondent violated Section 10145 of the Code
14 and Section 2832.1, Title 10, California Code of Regulations
15 (Regulations), and said acts and/or omissions constitute grounds
16 for disciplinary action under the provisions of Section 10177(d)
17 of the Code.

18 XII

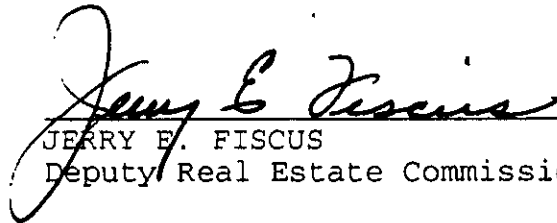
19 By reason of the facts as alleged in Paragraph X above,
20 Respondent violated Section 2831.2 of the Regulations, and said
21 acts and/or omissions constitute grounds for disciplinary action
22 under the provisions of Section 10177(d) of the Code.

23 XIII

24 By reason of the facts as alleged in Paragraphs VIII and
25 IX above, Respondent violated Section 10176(i) of the Code, and
26 said acts and/or omissions constitute grounds for disciplinary
27 action thereunder.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

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 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 provisions of law.


JERRY E. FISCUS
Deputy Real Estate Commissioner

Dated at Sacramento, California,
this 20th day of July, 1993.