

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation against:

JOSEPOLH DAVID GITTI,

Respondent.

No. H-1653 FRESNO

OAH No. N2004070143

PROPOSED DECISION

On November 17, 2004 and December 17, 2004, in Fresno, California, Denny R. Davis, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Deidre L. Johnson, Counsel, represented the complainant.

Russell G. Vanrozeboom, attorney, represented respondent.

Evidence was received, the record was closed and the matter was submitted on December 17, 2004.

FACTUAL FINDINGS

1. John Sweeney, Deputy Real Estate Commissioner, State of California, filed this accusation against Joseph David Gitti, in his official capacity, and not otherwise.
2. At all times herein mentioned respondent was a licensed real estate salesperson. His license was issued by the Department of Real Estate (hereinafter referred to as Department) in the year 2001.
3. On March 4, 2002, respondent's clients, Mr. and Mrs. H (buyers) signed an offer to purchase a home located at 2003 North Vagedes, Fresno, California. The sellers of the home were Mr. and Mrs. B. The offer included a \$500.00 deposit submitted by the buyers. On the same day, the sellers submitted a counter offer requesting that the buyers deposit \$1,000.00, and the sellers'

further countered with a request that the buyers accept the responsibility for certain repairs that were needed.

4. Pursuant to seller's counter offer of March 5, 2002, the buyers submitted an additional \$500.00, for a total deposit of \$1000.00. However, the buyers' counter offered requesting that the sellers be responsible for the needed repairs. On March 6, 2002, escrow was opened with Financial Title Company. The buyers submitted to the sellers a list of repairs. On March 20, 2002, the sellers agreed to make all repairs. This resulted in the formation of a contract between the buyers and the sellers.

5. Two days after the contract was formed, the buyers conducted another inspection of the home. Conditions found in the basement caused the buyers to decide that they did not want to purchase the home. They informed respondent about their decision. At that time no mention was made between the respondent and the buyers whether or not the \$ 1,000.00 deposit would be refunded. Conversations between the buyers and respondent included respondent's advice that from the time the sellers agreed to make all repairs, an enforceable contract existed. A consequence of being an enforceable contract is that the buyers were not entitled to a refund of the \$1000.00 deposit.

6. On March 22, 2002, the sellers' agent informed the sellers that the buyers did not wish to go forward with the purchase. On March 28, 2002, the buyers signed escrow instructions canceling the escrow. On that same date they signed a sharing agreement with their agent, respondent, to split the \$1000.00, if their deposit could be recovered. At that time the sellers had not yet authorized the return of the deposit.

7. On April 3, 2002, the escrow company received sellers' instructions to cancel the escrow and to refund the buyers' deposit. The sellers chose to refund the deposit because they sold the home to another buyer and for more money. On April 3, 2002, the buyers' \$1000.00 deposit was returned to the buyers.

8. Respondent entered into the agreement with his clients to split the deposit money. After making the agreement he consulted with his supervising broker, Mr. Mead. He asked his broker if he should put the agreement in writing. His broker responded by saying: "yes, if it will make you feel better." The broker did not advise him that such practice was a violation of company policy and he did not advise him that it was in violation of the Business and Professions Code. The agreement was put in writing and it was signed by the buyers and respondent. On April 3, 2002, the buyers' gave respondent a check in the amount of \$500.00.

9. The President of respondent's brokerage firm is Mr. J. Leonard. He asserted that respondent's conduct of accepting money directly from clients was in violation of both company policy and the Business and Professions Code. He testified that Mr. Mead and respondent believed the \$500.00 was some sort of gift. This belief was based on Mr. Mead's belief that because the money had been taken out of escrow it was no longer part of a buy-sell transaction. And as such the buyers were free to gift part of the refunded money to respondent. Mr. Mead

admitted that he failed to properly inform respondent and he now understands that the practice of giving the money was in violation of company policy and it was in violation of the Business and Professions Code. Mr. J. Leonard placed respondent on company probation for 90 days. He believes respondent made a serious mistake but he believes it was a mistake made in good faith. Both Mr. Leonard and Mr. Mead believe that respondent is honest and that he deserves their trust. They intend to continue to employ respondent as a real estate salesperson if he is permitted to retain his license.

10. The accusation filed against respondent was framed thusly: "Respondent caused the buyers to agree to pay respondent \$500.00 in order to obtain the return of the buyers' \$1,000.00 deposit." If the words "respondent caused the buyers to agree..." means that respondent induced the buyers to enter into an agreement to split the deposit, then the accusation has not been supported by the evidence. The buyers felt that they were not entitled to a refund because they understood that an enforceable contract existed. Their belief controlled their understanding of their rights and reasonable expectations of getting a refund. Mrs. H, buyer, stated it was her belief that \$500.00 was better than nothing. As a result she and her husband said they would split the refund with respondent for his effort in obtaining the refund. She asserts that the idea to split the deposit money came from respondent. Respondent asserts that the buyers proposed the split of the deposit money based on their belief that they were not entitled to a refund. The credibility of Mrs. H is not in question. She could have reasonably believed that respondent offered to try to obtain a refund in exchange for half of the \$ 1,000.00 deposit. But the facts do not support the contention that respondent fraudulently withheld information and engaged in deceit and misrepresentation. The accusation that respondent knew that the sellers were going to return the deposit and that he withheld that information from the buyers is not established by the evidence. The evidence does not show that respondent engaged in dishonest dealings. Respondent did violate the Business and Professions Code in that he was negligent and incompetent in his dealings with his clients. Respondent subjected his license to discipline. His conduct was substantially related to the functions and duties of a real estate salesperson.

LEGAL CONCLUSIONS

1. Business and Professions Code section 10176, subdivision (g), provides:

The commissioner may, upon his own motion, and shall, upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this state, and he may temporarily suspend or permanently revoke a real estate license at any time where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:

...

(g) The claiming or taking by a licensee of any secret or undisclosed amount of compensation, commission or profit or the failure of a licensee to reveal to the employer of such licensee the full amount of such licensee's compensation, commission or profit under any agreement authorizing or employing such licensee to do any acts for which a license is required under this chapter for compensation or commission prior to or coincident with the signing of an agreement evidencing the meeting of the minds of the contracting parties, regardless of the form of such agreement, whether evidenced by documents in an escrow or by any other or different procedure.

2. Respondent entered an agreement with his clients to split refunded deposit money. Reducing the agreement to writing did not alter or eliminate respondent's violation of Business and Professions Code section 10176, subdivision (g). The claiming or taking by a licensee of any amount of compensation, commission or profit under any agreement, regardless of the form of such agreement violates this subdivision. Respondent's conduct of accepting money directly from his clients was a violation of Business and Professions Code section 10176.

3. Business and Professions Code section 10176.5 provides:

(a) The commissioner may, upon his or her own motion, and shall upon receiving a verified complaint in writing from any person, investigate an alleged violation of Article 1.5 (commencing with Section 1102) of Chapter 2 of Title 4 of Part 4 of Division 2 of the Civil Code by any real estate licensee within this state. The commissioner may suspend or revoke a licensee's license if the licensee acting under the license has willfully or repeatedly violated any of the provisions of Article 1.5 (commencing with Section 1102) of Chapter 2 of Title 4 of Part 4 of Division 2 of the Civil Code.

(b) Notwithstanding any other provision of Article 1.5 (commencing with Section 1102) of Chapter 2 of Title 4 of Part 4 of Division 2 of the Civil Code, and in lieu of any other civil remedy, subdivision (a) of this section is the only remedy available for violations of Section 1102.6b of the Civil Code by any real estate licensee within this state.

4. Pursuant to the buyer's complaint, an investigation into the business practices of respondent was conducted by the Department. Respondent has subjected his license to discipline for accepting money from his clients pursuant to an agreement to split refunded deposit.

5. Business and Professions Code section 10177, subdivision (g) provides:

The commissioner may suspend or revoke the license of a real estate licensee, or may deny the issuance of a license to an applicant, who has done any of the following, or may suspend or revoke the license of a corporation, or deny the issuance of a license to a corporation, if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has done any of the following:

...

(g) Demonstrated negligence or incompetence in performing any act for which he or she is required to hold a license.

...

5. The evidence does not show that respondent induced the buyers to split the money. The evidence does not establish that respondent was dishonest in his dealings with his clients. This does not mean that he did not violate the rules governing the conduct of a real estate salesperson. Respondent's conduct was negligent and it was incompetent. Respondent did violate Business and Professions Code 10177. Because he was negligent and incompetent in his dealings with his clients respondent subjected his license to discipline. He failed to exercise adequate care in following the rules prescribed for the conduct of real estate salespersons.

ORDER

All licenses and licensing rights of respondent, Joseph David Gitti, under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license shall be issued to Respondent pursuant to Section 10156.5 of the Business and Professions Code if respondent makes application therefore 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 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 Department of Real Estate which shall certify:


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

(b) 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.

5. 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.

Dated: _____

JANUARY 25, 2005


DENNY R. DAVIS
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED
NOV 19 2004

DEPARTMENT OF REAL ESTATE

By Patricia Contreras

In the Matter of the Accusation of

JOSEPH DAVID GITTI,

} Case No. H-1653 FRESNO

} OAH No. N-2004070143

Respondent

**SECOND CONTINUED
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 STATE BUILDING
2550 MARIPOSA MALL, ROOM 1038
FRESNO, CALIFORNIA 93721**

on **DECEMBER 17, 2004**, at the hour of **9:00 AM**, 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 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 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: November 19, 2004

By Deidre L. Johnson
DEIDRE L. JOHNSON, Counsel

FILED
AUG 18 2004

**BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA**

DEPARTMENT OF REAL ESTATE

By Kathleen Centenas

In the Matter of the Accusation of

JOSEPH DAVID GITTI,

} Case No. H-1653 FR

} OAH No. 2004070143

Respondents

**FIRST CONTINUED
NOTICE OF HEARING ON ACCUSATION**

To the above named respondents:

You are hereby notified that a hearing will be held before the Department of Real Estate at

THE STATE BUILDING

2550 MARIPOSA MALL, ROOM 1027

FRESNO, CALIFORNIA 93721

on **NOVEMBER 17, 2004**, at the hour of **9:00 AM**, 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 subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Department of Real Estate.

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DEPARTMENT OF REAL ESTATE

Dated: AUGUST 18, 2004

By

Deidre L. Johnson
DEIDRE L. JOHNSON, Counsel

1 DAVID A. PETERS, Counsel (SBN 99528)
2 Department of Real Estate
3 P. O. Box 187000
4 Sacramento, CA 95818-7000

5 Telephone: (916) 227-0789
6 -or- (916) 227-0781 (Direct)
7

FILED
JAN 20 2004
DEPARTMENT OF REAL ESTATE
Laurie A. Zini

8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Accusation of)
12 JOSEPH DAVID GITTI,) No. H-1653 FRESNO
13 Respondent.) ACCUSATION
14)

15 The Complainant, John Sweeney, a Deputy Real Estate
16 Commissioner of the State of California, for Statement of Issues
17 against JOSEPH DAVID GITTI (hereinafter "Respondent") alleges as
18 follows:

19 I

20 The Complainant, John Sweeney, a Deputy Real Estate
21 Commissioner of the State of California, makes this Accusation
22 against Respondent in his official capacity.

23 II

24 Respondent is presently licensed and/or has license
25 rights under the Real Estate Law, Part 1 of Division 4 of the
26 California Business and Professions Code (hereinafter "the
27 Code"), as a real estate salesperson.

1 III

2 At all times herein mentioned, Respondent was
3 performing acts requiring a real estate license for or in
4 expectation of a compensation.

5 IV

6 On or about March 4, 2002, Raymond Hernandez Jr. and
7 Margie Hernandez (hereinafter "the Buyers") submitted an offer,
8 by and through Respondent, to purchase certain real property
9 commonly known as 2003 N. Vagedes, Fresno, California
10 (hereinafter "the Subject Property") owned by Arnold G. Badilla
11 and Ruth Badilla (hereinafter "the Sellers"). Said offer in the
12 form of a Residential Purchase Agreement and Joint Escrow
13 Instructions (and Receipt for Deposit) provided that a \$500.00
14 deposit was being held uncashed by Respondent until acceptance
15 and would be deposited with the escrow holder within three (3)
16 business days after acceptance.

17 V

18 On or about March 4, 2002, the Sellers submitted a
19 counter offer requesting an increase in the deposit described in
20 Paragraph IV above, from \$500.00 to \$1,000.00. The Sellers also
21 requested that the Buyers be responsible for certain repairs to
22 the Subject Property among other things.

23 VI

24 On or about March 5, 2002, the Buyers submitted a
25 counter offer to the Sellers counter offer described in
26 Paragraph V above. Said counter offer included the deposit
27

1 increase to \$1,000.00 and that the repairs to the Subject
2 Property were to be approved by the Sellers among other things.

3 VII

4 On or about March 5, 2002, the Sellers accepted the
5 Buyers counter offer described in Paragraph VI above.

6 VIII

7 On or after March 14, 2002, the \$1,000.00 deposit from
8 the Buyers in connection with the sale of the Subject Property
9 was deposited with Financial Title Company, Fresno, California.

10 IX

11 On or about March 20, 2002, the Sellers' agent
12 notified the Sellers that the Buyers were no longer interested
13 in purchasing the Subject Property.

14 X

15 Beginning on or about March 22, 2002 through on or
16 about April 1, 2002, Financial Title Company received
17 authorizations from the Buyers and the Sellers to return the
18 \$1,000.00 deposit to the Buyers and to cancel the escrow on the
19 sale of the Subject Property.

20 XI

21 Beginning on or about March 27, 2002 and continuing
22 thereafter, the Respondent, in order to induce the Buyers into
23 paying Respondent \$500.00 failed to disclose to the Buyers the
24 material fact well known to Respondent but unknown to the Buyers
25 that the Sellers were willing to return the full \$1,000.00
26 deposit to the Buyers.

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XII

On or about March 27, 2002, without disclosing the fact that the Sellers were willing to return the full \$1,000.00 deposit to the Buyers as described in Paragraph XI above, Respondent caused the Buyers to agree to pay Respondent \$500.00 in order to obtain the return of the Buyers \$1,000.00 deposit.

XIII

On or about April 3, 2002, the Buyers paid Respondent \$500.00 in the form of a check in the amount of \$500.00 made payable to Respondent in the belief that said payment to Respondent was necessary for return of the Buyers \$1,000.00 deposit from the Sellers. Respondent received said compensation without the knowledge or authorization of Respondent's real estate broker John Scott Leonard.

XIV

On or about April 3, 2002, Financial Title Company issued a check to the Buyers, for return of the deposit, in the amount of \$1,000.00.

XV

The acts and/or omissions of Respondent set forth in Paragraphs XI and XII above, constitute fraud or dishonest dealing, and are cause under Sections 10176(i) and/or Section 10177(j) of the Code and are cause for suspension or revocation of all licenses and license rights of Respondent under the Real Estate Law.

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