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BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Accusation of: GREG J. BERNAVE, Respondent.))))	DRE No. H-05093 SD OAH No. 2020080721
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DECISION

The Proposed Decision dated October 30, 2020 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.

Pursuant to Section 11517(c)(2) of the Government Code, the following corrections are made to the Proposed Decision.

Cost of Investigation and Enforcement, Page 16, Line 11, reads as, "...the bureau..." corrected as, "...the Department..."

The Decision suspends or revokes one or more real estate licenses.

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.

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The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock noon on JAN 26 2021.

IT IS SO ORDERED 12.10.20

DOUGLAS R. McCAULEY
REAL ESTATE COMMISSIONER

Douglas R. McCauley

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

In the Matter of the Accusation Against:

GREG J. BERNAVE, Respondent

Agency Case No. H-05093 SD

OAH No. 2020080721

PROPOSED DECISION

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter telephonically on October 1, 2020, pursuant to the August 28, 2020, order converting this matter to a telephonic hearing in light of the COVID-19 pandemic.

Judith Vasan, Real Estate Counsel, represented Complainant, Veronica Kilpatrick, Supervising Special Investigator, Department of Real Estate, State of California (department).

Greg J. Bernave, respondent, represented himself.¹

¹ The accusation in this matter was brought against both Greg J. Bernave and Michael Anthony Brunnhoelzl, doing business as Downtown Real Estate Consultants and Michael Anthony Properties. At hearing, counsel for complainant represented that the department settled the matters alleged against Michael Anthony Brunnhoelzl,

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on October 1, 2020.

SUMMARY

Respondent holds a real estate salesperson's license. Complainant seeks to revoke respondent's real estate salesperson's license for failing to deliver trust funds to his broker or trust fund account as required for two different properties in violation of Business and Professions Code section 10145, subdivision (c). Complainant produced clear and convincing evidence that supports the imposition of discipline on respondent's license. Respondent provided insufficient evidence of rehabilitation, and public protection requires the revocation of respondent's real estate salesperson's license.

doing business as Downtown Real Estate Consultants and Michael Anthony Properties, and the department is no longer alleging paragraphs 3, 5, 6, 7, 8, 9, 10, 11, and 15 in the accusation. Accordingly, at hearing the department amended the accusation to delete those paragraphs, and the only remaining paragraphs at issue in the accusation are paragraphs 1, 2, 4, 12, 13, 14, and 16. The word "respondent" is used in this Proposed Decision to refer exclusively to Greg. J. Bernave.

FACTUAL FINDINGS

Jurisdictional Matters

1. On January 7, 1994, respondent was first issued a real estate salesperson's license. Respondent's real estate salesperson's license is scheduled to expire on January 6, 2023, unless renewed or revoked. Respondent is not currently employed by a real estate broker, but from October 10, 2014 to September 8, 2017, respondent was employed by a real estate broker named Michael Anthony Brunnhoelzl.

2. On September 4, 2019, complainant filed the accusation in this matter alleging cause for discipline against respondent's license based upon allegations that respondent failed to deliver trust funds to his broker or trust fund account as required for two different properties in violation of Business and Professions Code section 10145, subdivision (c). The first property is located at 1601 India Street, Unit 114 (hereinafter "Unit 114") and the second property is located at 1501 Front Street, Unit 533 (hereinafter "Unit 533"). Complainant also seeks costs of investigation and enforcement.

3. Respondent timely filed a Notice of Defense and this hearing followed.

Respondent's Work for Michael Anthony Brunnhoelzl

4. Mr. Brunnhoelzl is a licensed real estate broker in California and has been since 1991. He opened his own real estate brokerage and respondent was a real estate salesperson operating under Mr. Brunnhoelzl's real estate broker license from July 16, 2002, to September 8, 2017. Mr. Brunnhoelzl testified at the hearing and the following

factual findings are based on his testimony and supporting documents received into evidence.

5. Mr. Brunnhoelzl first met respondent in 1998 when they both worked as real estate salespersons for Re/Max. In 2002 Mr. Brunnhoelzl opened his own brokerage. Thereafter, respondent began working under Mr. Brunnhoelzl's real estate broker license as a real estate salesperson and property manager. Mr. Brunnhoelzl oversaw all real estate sale transactions and all property management activities conducted by respondent. In 2017 Mr. Brunnhoelzl's real estate business had two offices and respondent worked in the downtown office located on India Street. In August and September of 2017, during the time at issue in this accusation, respondent managed approximately 40 properties on behalf of Mr. Brunnhoelzl's brokerage. In his normal course of business as a property manager, respondent would collect rents and funds from tenants and deliver them to Mr. Brunnhoelzl, or alternatively some tenants paid Mr. Brunnhoelzl directly through electronic means.

6. Mr. Brunnhoelzl never had issues with respondent's work until about September 2017. Prior to September 2017 Mr. Brunnhoelzl also had no indication that respondent would be leaving Mr. Brunnhoelzl's brokerage for any reason. During the first two days of September 2017, respondent failed to show up at the office and failed to respond to texts, emails, and telephone calls from Mr. Brunnhoelzl. On September 3, 2017, Mr. Brunnhoelzl went to respondent's home and got no answer at the door. Mr. Brunnhoelzl was able to open the door to find respondent under the influence of either drugs or alcohol and "in bad shape." Mr. Brunnhoelzl attempted to get respondent to go to the emergency room for treatment, but respondent refused.

On September 4, 2017, Mr. Brunnhoelzl spoke to respondent's parents by telephone, who live in Arizona. Respondent's parents were worried about respondent

and asked Mr. Brunnhoelzl to go back to "check on" respondent. On September 4, 2017, Mr. Brunnhoelzl went back to respondent's home to check on him. While at respondent's home, respondent gave Mr. Brunnhoelzl the keys to the downtown office, which Mr. Brunnhoelzl did not previously have. Mr. Brunnhoelzl then went to the downtown office to use those keys to go inside and the keys did not work. The neighboring tenant in that building informed Mr. Brunnhoelzl that respondent had been evicted from the building and that was the reason the keys no longer worked.

Mr. Brunnhoelzl thereafter had to contact the clients of his brokerage and inform them that he would be taking over respondent's duties. During this time Mr. Brunnhoelzl discovered the two incidents of trust funds being collected by respondent and not provided to Mr. Brunnhoelzl. Those incidents involved the Unit 114 property and the Unit 533 property as described below. After Mr. Brunnhoelzl discovered the discrepancies and funds that were taken by respondent and not provided to the brokerage, Mr. Brunnhoelzl fired respondent and officially discontinued the affiliation of respondent with Mr. Brunnhoelzl's broker license on September 9, 2017.

THE UNIT 114 PROPERTY

7. During the next few days after September 4, 2017, Mr. Brunnhoelzl was contacting clients to inform them he would take over the duties of respondent. Mr. Brunnhoelzl received communication from J.B., a former tenant, in the Unit 114 property asking why his security deposit of \$3,200 had not been returned to him after he moved out of Unit 114. Mr. Brunnhoelzl informed J.B. that he had no funds in his account for that security deposit. In an email exchange dated September 7 and 8, 2017, between Mr. Brunnhoelzl and J.B., J.B. informed Mr. Brunnhoelzl that he had given respondent a check for \$3,200 on July 14, 2017, which was thereafter deposited in a bank account at U.S. Bank. Unit 114 is a property that had been managed by

respondent on behalf of Mr. Brunnhoelzl's brokerage. Mr. Brunnhoelzl's trust account for his brokerage is with Torrey Pines Bank, and neither he nor his brokerage have an account at U.S. Bank. J.B. provided a copy of the check made out to DREC (Downtown Real Estate Consultants), which is one name of Mr. Brunnhoelzl's brokerage, with deposit information showing that the check was deposited at U.S. Bank on July 14, 2017. Mr. Brunnhoelzl testified that these funds were never provided to Mr. Brunnhoelzl or deposited into the trust account for the brokerage by respondent. After Mr. Brunnhoelzl learned this information, he issued a check from his trust account for his brokerage to J.B. to cover the \$3,200 deposit amount.

8. Bank account documents for the trust account for Mr. Brunnhoelzl's brokerage show that a check was issued to J.B. for \$3,200 on September 9, 2017, for Unit 114. Mr. Brunnhoelzl was never reimbursed by respondent for this \$3,200 payment to J.B.

THE UNIT 533 PROPERTY

9. During the next few days after September 4, 2017, Mr. Brunnhoelzl also started calling tenants in an effort to account for rent payments that his brokerage did not have. Mr. Brunnhoelzl contacted a tenant that he believed had not yet paid the September rent. The tenant, who typically paid in cash, told Mr. Brunnhoelzl that he had already paid respondent the September rent payment in cash and received a receipt from respondent. Mr. Brunnhoelzl testified that this tenant provided him with a copy of a receipt for that cash payment in the amount of \$2,200, and the receipt was signed by respondent. Mr. Brunnhoelzl testified that this \$2,200 payment was never delivered to him or his brokerage. Typically, respondent would keep the cash payments from this tenant, and that amount would be taken out of respondent's fees for that month and paid to Mr. Brunnhoelzl's brokerage. In this case, respondent failed

to return to work so Mr. Brunnhoelzl never received the payment of \$2,200. Mr. Brunnhoelzl testified that his brokerage also managed another property, specifically respondent's apartment, where respondent would not pay Mr. Brunnhoelzl directly for the \$1,900 per month in rent, but Mr. Brunnhoelzl would take the \$1,900 per month from respondent's fees. As respondent failed to return to work, Mr. Brunnhoelzl also had to cover the \$1,900 payment for the September rent for respondent's apartment.

10. Mr. Brunnhoelzl testified that he forgot to provide the department with a copy of the receipt for the \$2,200 cash payment from the tenant to respondent as discussed above. No such receipt was offered or received into evidence in this matter.

Respondent's Testimony

11. Respondent is 46 years old, living with his parents in Arizona, and is not currently employed. Respondent testified at the hearing and the following factual findings are based on his testimony.

12. Respondent wrote a letter of explanation to the department dated September 2, 2020, which states as follows:

I am responding to the matter of [*sic*] accusation against me regarding trust fund handling. Specifically, I failed to immediately deliver two separate payments in a timely manner to my broker on or around September 1, 2017. Shortly thereafter in the same month, both payments and corresponding accounts were successfully reconciled and completely accounted for by my broker. I personally made a mistake and a careless oversight which resulted in the delay of delivering trust funds in a timely manner to my broker. I

further hope that the DRE will understand that this was completely unintentional and in no way whatsoever did I intend on delaying my broker's ability to process the trust funds in a timely manner. It is my intent to demonstrate with this letter the fact that I take full responsibility and personal accountability for my inactions and to seek a reasonable compromise or settlement to the accusation at hand with the DRE. Lastly, I hope the DRE also recognizes that in addition to being licensed since 1994, I had been working with my former broker, Michael Anthony Properties, for over 15 years and engaged in full time property management without any DRE infractions or complaints etc. This truly was a one time mistake on my part and I will do absolutely everything in my power to make sure that all future trust funds are handled expeditiously and with utmost care and diligence while in my hands.

13. Respondent testified that with regard to the Unit 114 property, the owner of the Unit 114 property did give him a check in July 2017. He further stated, "If there was something late, I take full responsibility, but I don't know." On cross-examination, respondent stated he had no idea if he received a check from J.B. in July 2017. He also admitted that he did have a bank account at U.S. Bank in 2017, "among other banks." In response to the question of whether that U.S. Bank account was under the name of Downtown Real Estate Consultants or his personal name, respondent stated "I think it was under both, but I am not sure."

14. In response to the question on cross-examination of, "At any point did you reimburse Mr. Brunnhoelzl for the money he used to cover the trust funds that did not make it into the trust account?" as alleged in the accusation, respondent stated, "Why would I, I don't know what that check is, I did not receive anything from Mr. Brunnhoelzl." With regard to his letter of explanation to the department, respondent was asked what he meant by, "both payments and corresponding accounts were successfully reconciled and completely accounted for by my broker." Respondent stated repeatedly, "I knew that when I left everything was taken care of." Respondent failed to explain what that meant. Additionally, respondent's testimony on cross-examination was rapid and disjointed.

15. Respondent admits he did not get paid by Mr. Brunnhoelzl for September 2017 because "he was not going to take commissions for September" even though he collected rent during the first few days of September. Respondent stated, "That was the deal because I was leaving . . . I was out of there, everything was his and we had no contracts."

16. With regard to the Unit 533 property, respondent stated that the owner of that property had given him notice he intended to take back the property to move into it, and as a result, respondent did not collect rent for September 2017 for that property. Respondent was confused as to why Mr. Brunnhoelzl did not produce a ledger for rents for September 2017 showing the rent collected on that property as he asserts or that the property was no longer being rented as respondent asserts. However, respondent then admitted that he is the person who creates those ledgers and he had left Mr. Brunnhoelzl's employment in early September 2017.

17. When questioned about his admission in his letter of explanation to the department of, "I failed to immediately deliver two separate payments in a timely

manner to my broker on or around September 1, 2017," respondent stated that he takes responsibility for "it" and "it could have happened, and if it did I take responsibility." Respondent then again repeated his statement that he thought "everything was taken care of" with no further explanation.

18. Respondent denied that he has a substance abuse problem. He had no recollection of Mr. Brunnhoelzl finding him on September 3, 2017, in his apartment or of Mr. Brunnhoelzl asking respondent to go to the emergency room. He had previously told Mr. Brunnhoelzl sometime prior to September 2017 that he intended to "take a leave of absence" and intended to move to Arizona. Respondent stated that he moved to Arizona for two reasons: (1) his parents living there are getting old and he wanted to take care of them, and (2) he has contacts in Arizona and was "offered a position there." Respondent refused to elaborate on the nature of that position but stated that it did not involve real estate. Respondent admitted that he is not currently employed and has been licensed as a real estate broker in Arizona since 2018.

19. Respondent asserted that the lease for the downtown office building where he worked for Mr. Brunnhoelzl's brokerage was only in his name and not the name of Mr. Brunnhoelzl. He produced an unsigned rental agreement to support his argument. He stated that Mr. Brunnhoelzl was not part of that lease despite the fact that respondent was operating Mr. Brunnhoelzl's business from that property. It was unclear how respondent's argument was relevant to the two issues in the accusation regarding whether he failed to provide trust fund money to his broker as required by law.

Respondent's Documentary Evidence

20. Respondent provided four documents in support of his arguments. He provided an unsigned copy of the real estate lease for the downtown office of Mr. Brunnhoelzl's brokerage that was between respondent and the property owner without Mr. Brunnhoelzl's name on the agreement as discussed above. Respondent also provided an email from himself to the department in response to a notice of intent to introduce the declaration of Mr. Brunnhoelzl at this hearing wherein respondent requested an opportunity to cross-examine Mr. Brunnhoelzl. Respondent also provided his letter of explanation to the department, the substance of which is reproduced above. Finally, respondent provided two-pages of email correspondence between himself and Mr. Brunnhoelzl dated November 11, 2019. The email correspondence shows that Mr. Brunnhoelzl tried to contact respondent through calling his parents and respondent emailed him asking him to contact him by email. Mr. Brunnhoelzl then wrote to respondent that he was disappointed respondent would not speak to him and elaborated that respondent neglected the clients resulting in the accusation against them both. Mr. Brunnhoelzl requested that respondent contact him and speak to Mr. Brunnhoelzl's attorney.

Costs

21. Complainant submitted a Declaration of Enforcement Costs pursuant to Business and Professions Code section 10106 seeking \$569.60 in legal fees. The declaration included the name of the attorney providing services, her hourly rate, and the number of hours she spent on this matter. The attorney in this matter was professional and given the nature and scope of this matter, these costs are reasonable. Complainant did not submit any evidence regarding investigation costs. The reasonable costs of enforcement of this matter is \$569.60.

LEGAL CONCLUSIONS

1. The object of an administrative proceeding aimed at revoking a real estate license is to protect the public. The object is to determine whether a licensee has exercised his privilege in derogation of the public interest and to keep the regulated business clean and wholesome. Disciplinary proceedings are not conducted for the purpose of punishing an individual but to protect the public. (*Small v. Smith* (1971) 16 Cal.App.3d 450, 457.)

Burden and Standard of Proof

2. In an administrative license disciplinary proceeding, the burden of proof is upon the party asserting the affirmative. The charges must be established to a reasonable certainty. Guilt cannot be based on surmise or conjecture, suspicion or theoretical conclusions, or upon uncorroborated hearsay. (*Smith, supra*, at p. 457.) The standard of proof in a disciplinary proceeding involving a professional license is clear and convincing evidence. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) The key element of clear and convincing evidence is that it must establish a high probability of the existence of the disputed fact, greater than proof by a preponderance of the evidence. (*People v. Mabini* (2001) 92 Cal.App.4th 654, 662.)

Applicable Statutes

3. Business and Professions Code section 10177, states in part:

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 . . .

[¶] . . . [¶]

(d) Willfully disregarded or violated the Real Estate Law (Part 1 (commencing with Section 10000)) or Chapter 1 (commencing with Section 11000) of Part 2 or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 (commencing with Section 11000) of Part 2. . . .

[¶] . . . [¶]

(g) Demonstrated negligence or incompetence in performing an act for which the officer, director, or person is required to hold a license. . . .

4. Business and Professions Code section 10145, subdivision (c), states:

A real estate salesperson who accepts trust funds from others on behalf of the broker under whom he or she is licensed shall immediately deliver the funds to the broker or, if so directed by the broker, shall deliver the funds into the custody of the broker's principal or a neutral escrow depository or shall deposit the funds into the broker's trust fund account. . . .

5. Business and Professions Code section 10106 provides that in any order issued in pursuant to a disciplinary proceeding before the department, the administrative law judge may make a proposed finding with regard to the reasonable costs of investigation and enforcement of the case, and may direct a licensee found to

have committed a violation to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

Evaluation

6. Complainant provided clear and convincing evidence to demonstrate that respondent failed to provide the funds for the \$3,200 security deposit for Unit 114 to Mr. Brunnhoelzl in a timely manner after he received them from the tenant of Unit 114 by check. Respondent deposited those funds into his account at U.S. Bank instead. In 2017 he had an account at U.S. Bank, where the check was shown to have been deposited. Mr. Brunnhoelzl's testimony that his brokerage did not have an account at U.S. Bank was credible.

Additionally, respondent asserted that the tenant of Unit 533 never paid him rent in cash for September 2017 because that tenant was moving back into the property. Respondent's testimony in that regard was in direct contradiction to that of Mr. Brunnhoelzl, who testified that the tenant told him he paid respondent in cash and produced a receipt for that payment. While complainant failed to provide a copy of that receipt in evidence, Mr. Brunnhoelzl's testimony in this regard was more credible than that of respondent. Mr. Brunnhoelzl's testimony at this hearing generally was sincere, forthright, and credible regarding the circumstances underlying the accusation in this matter.

By comparison, respondent's testimony was evasive, confusing, and failed to provide any substantive information regarding the circumstances of the events at issue. At times respondent's testimony was rapid and rambling. Respondent admitted in his letter to the department that he did not timely provide the funds in these two instances. However, at hearing he refused to admit his wrongdoing and stated that he

"could" have made a mistake. Respondent refused to admit at hearing that he took the funds in each of these matters for his own benefit without ever providing them to Mr. Brunnhoelzl.

Accounting records show respondent deposited the check from the tenant of Unit 114 to a U.S. Bank account in July 2017, but no such funds were deposited into Mr. Brunnhoelzl's trust account for his brokerage. Accounting records also show that Mr. Brunnhoelzl paid the tenants of Unit 114 and Unit 533 in early September 2017 after learning of respondent's misdeeds. Respondent provided no substantive evidence in mitigation or explanation. Upon consideration of all the evidence provided, public protection requires revocation of respondent's real estate license.

Cause for Discipline

7. Cause exists to impose discipline upon respondent's real estate salesperson's license under Business and Professions Code, sections 10177, subdivision (d), based upon respondent's failure to timely deliver the \$3,200 security deposit from the tenant of Unit 114 to Mr. Brunnhoelzl in July 2017, or ever, in violation of Business and Professions Code section 10145, subdivision (c).

8. Cause exists to impose discipline upon respondent's real estate salesperson's license under Business and Professions Code, sections 10177, subdivision (d), based upon respondent's failure to timely deliver the cash rent in the amount of \$2,200 for September 2017 rent for Unit 533 to Mr. Brunnhoelzl after respondent received those funds from the tenant, in violation of Business and Professions Code section 10145, subdivision (c).

9. Cause exists to impose discipline upon respondent's real estate salesperson's license under Business and Professions Code section 10177, subdivision

(g), for demonstrated incompetence or negligence in his duty to timely deliver the \$3,200 security deposit from the tenant of Unit 114 to Mr. Brunnhoelzl in July 2017, or ever.

10. Cause exists to impose discipline upon respondent's real estate salesperson's license under Business and Professions Code section 10177, subdivision (g), for demonstrated incompetence or negligence in his duty to failure to timely deliver the cash rent in the amount of \$2,200 for September 2017 rent for Unit 533 to Mr. Brunnhoelzl after respondent received those funds from the tenant.

Cost of Investigation and Enforcement

11. The accusation in this matter sought an order to reimburse the ~~bureau~~ ^{Department} for its reasonable costs of investigation and enforcement under Business and Professions Code 10106.

12. The Statement of Costs and declaration complainant introduced in support of her request for costs of enforcement constitutes prima facie evidence of the reasonableness of the costs incurred. (Bus. & Prof. Code, § 10106, subd. (c).) Complainant offered no evidence for the costs of investigation. Respondent did not introduce any evidence to rebut complainant's evidence of costs of enforcement.

13. In *Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court held that licensing boards must exercise their discretion to reduce or eliminate cost awards to ensure that they do not deter licensees with potentially meritorious claims from exercising their right to an administrative hearing. All the *Zuckerman* factors have been considered. Respondent presented no evidence to demonstrate he is unable to pay costs in this matter.

14. Complainant is awarded reasonable costs of enforcement in the amount \$569.60.

ORDER

1. All licenses and licensing rights issued to respondent, Greg J. Bernave, under the Real Estate Law are revoked.

2. Respondent shall pay the department its costs of investigation and enforcement in the amount of \$569.60 within 90 days of the effective date of this order, or as authorized by the department.

DATE: October 30, 2020

Debra Nye-Perkins
Debra Nye-Perkins (Oct 30, 2020 15:39 PDT)

DEBRA D. NYE-PERKINS

Administrative Law Judge

Office of Administrative Hearings