



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 SEP 23 2020.

IT IS SO ORDERED 8.21.20

DOUGLAS R. McCAULEY  
REAL ESTATE COMMISSIONER

Douglas R. McCauley

**FILED**

AUG 12 2020

DEPARTMENT OF REAL ESTATE

By                      *dew*

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

**In the Matter of the Accusation against:**

**THOMAS GLEN ROGERS, Respondent**

**Case No. H-6899 SAC**

**OAH No. 2020020957**

**PROPOSED DECISION**

Danette C. Brown, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter telephonically on July 2, 2020, in Sacramento, California.

Megan Lee Olsen, Counsel, represented Tricia D. Parkhurst (complainant), Supervising Special Investigator, Department of Real Estate (DRE), State of California.

Thomas Glen Rogers (respondent) represented himself.

Evidence was received, the record closed, and the matter submitted for decision on July 2, 2020.

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. On October 28, 2003, DRE issued real estate broker license number B01199592 to respondent. The license expires October 27, 2023, unless renewed or revoked.

2. On January 7, 2019, complainant filed the Accusation in her official capacity. Complainant seeks to discipline respondent's real estate broker license on the grounds that, while acting as a real estate broker and using the fictitious business name Feather River Properties, respondent unlawfully received funds in trust for property management activities. A DRE audit revealed trust violations of the Real Estate Law (Business and Professions Code<sup>1</sup> section 10000 et seq.).

3. On February 12, 2020, respondent filed a Notice of Defense. The matter was set for an evidentiary hearing before an administrative law judge of the OAH, pursuant to Government Code section 11500.

### **Respondent's Testimony**

4. Respondent admitted to the audit violations set forth in the Accusation. DRE's audit report for the period January 1, 2018, through June 30, 2019 was admitted into evidence.

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<sup>1</sup> All code sections refer to the Business and Professions Code, unless otherwise indicated.

5. The audit violations were the following:
- (a) As of April 30, 2019, the Thomas Rogers dba Feather River Properties Trust Account (trust account) had a \$900 shortage (§ 10145);
  - (b) Respondent failed to obtain written permission from the owners of trust funds in the trust account, to allow the balance to drop below the accountability amounts (Cal. Code Regs., tit. 10, § 2832.1);
  - (c) As of April 30, 2019, the trust account contained unidentified and/or unaccounted for funds of \$611.16, and no separate record was maintained (§ 10145, subd. (g), and Cal. Code Regs., tit. 10, § 2831.1);
  - (d) Respondent failed to record receipt of security deposits in the separate record (Cal. Code Regs., tit. 10, § 2831.1);
  - (e) Respondent failed to reconcile at least once a month, the balance of all separate beneficiary or transaction records for the trust account (Cal. Code Regs., tit. 10, § 2831.2);
  - (f) Respondent conducted real estate activity using the fictitious business name "Feather River Properties" prior to registering the fictitious business name with DRE (§ 10159.5 and Cal. Code Regs., tit. 10, § 2731);

(g) Respondent allowed an unlicensed person to be a signatory on the trust account without a fidelity bond (§ 10145 and Cal. Code Regs., tit. 10, § 2834).

6. Respondent resides in Greenville, California. DRE issued a salesperson license to respondent in 1995, and he has been a real estate broker since 2003. He conducts real estate business under the DRE-registered fictitious business name "Feather River Property Management Services." He previously used the fictitious business name "Feather River Properties" after filing the name with the county, but before it was registered with DRE. Respondent primarily conducts residential property management. He manages 17 properties with 14 owners.

7. Respondent addressed each violation. First, the \$900 shortage in the trust account occurred because of a "misunderstanding on the homeowner's part." Respondent insists that there was no money missing, and no correction to be made, but later in his testimony, stated that he "corrected the shortage."

8. Second, respondent believes that the unaccounted funds of \$611.16 occurred because he changed his software program in 2018. The program did not produce a separate record for the funds. He does not know to whom the money belongs. He is in the process of rectifying the issue.

9. Third, respondent also attributed his failure to record receipt of security deposits in a separate record to his software program. He had a record of what the tenant paid him, but it did not "post to the owner as well." He contacted his software company, who informed him that "it's your problem." Respondent "wrote a scathing letter" to customer service and obtained assistance. He created a new way to post

security deposits, where they are posted under the owner's name as well as the tenant's.

10. Fourth, respondent explained that he failed to reconcile the balance of all separate beneficiary or transaction records for "a month or two" during the audit period. He corrected last month's account on the date of hearing.

11. Fifth, respondent put his wife, an unlicensed person, as a signatory on the trust account, because he was having health issues at the time. He placed her on the account in case she needed to sign on his behalf. He has since corrected this by removing her as a signatory.

12. Since the audit, respondent has completed a trust account course, and submitted proof to DRE when he renewed his real estate broker license in approximately September 2019. He realizes that the audit was beneficial because it compelled him to correct his noncompliance issues.

## **Discussion**

13. Respondent was sincere and forthcoming at hearing. He admitted that he is responsible for the audit violations, and is taking corrective action. It has been judicially recognized that rehabilitation requires an acknowledgment of wrongdoing. (*Seide v. Committee of Bar Examiners of the State Bar of California* (1989) 49 Cal.3d 933, 940 [fully acknowledging the wrongfulness of his actions is an essential step towards rehabilitation].)

14. Respondent has completed a trust handling course in the past year for his license renewal. He acknowledged that the audit was beneficial in identifying violations so that he could correct them, and learning from his mistakes.

15. The audit violations were recent. DRE needs assurances that respondent will make the requisite corrections pursuant to the audit, and that he no longer presents a danger to the trust beneficiaries. (*Handeland v. Department of Real Estate* (1976) 58 Cal.App.3d 513, 518 [disciplinary procedures are to protect the public not only from conniving real estate salesmen but also from the uninformed, negligent, or unknowledgeable salesman].) Based upon the foregoing considerations, it would not be contrary to the public interest to allow respondent to continued to hold a real estate broker license on a restricted basis.

### **Costs**

16. Complainant has requested reimbursement for costs incurred by the DRE in connection with enforcement, investigation, and audit of this matter, in the total amount of \$6,584.68. (\$1,858 for investigation, \$1,112.50 for enforcement, and \$3,614.18 for the audit.) The costs were certified in a manner provided by section 10106. The cost of the audit has been charged against respondent in accordance with section 10148, subdivision (b). The time spent appears to be reasonable, and the activities claimed were necessary to the development and presentation of the case. Complainant's request for costs is addressed further in the Legal Conclusions below.

## **LEGAL CONCLUSIONS**

### **Burden of Proof**

1. Complainant has the burden of proving the grounds for discipline alleged in the Accusation by clear and convincing evidence to a reasonable certainty. (*Realty Projects, Inc. v. Smith* (1973) 32 Cal.App.3d 204, 212.) Clear and convincing evidence is evidence that leaves no substantial doubt and is sufficiently strong to

command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478, 487.)

2. Section 10131, subdivision (b), defines a real estate broker, in part, as one who leases or rents, or offers to lease or rent, or collects rents from real property.

### **Trust Fund Account and Maintenance of Separate Record**

3. Section 10145 provides, in part, that a real estate broker who accepts funds belonging to others, must place those funds into a trust fund account maintained by the broker. All funds deposited by the broker in a trust fund account shall be maintained there until disbursed by the broker per instructions from the person entitled to the funds. (§ 10145, subd. (a)(1).) The broker shall maintain a separate record of the receipt and disposition of all funds described in subdivisions (a) and (b), including any interest earned on the funds. (§ 10145, subd. (g).)

4. A monthly separate record must be kept as follows:

A broker shall keep a separate record for each beneficiary or transaction, accounting for all funds which have been deposited to the broker's trust bank account and interest, if any, earned on the funds on deposit. This record shall include information sufficient to identify the transaction and the parties to the transaction. Each record shall set forth in chronological sequence the following information in columnar form:

(1) Date of deposit.

(2) Amount of deposit.

- (3) Date of each related disbursement.
  - (4) Check number of each related disbursement.
  - (5) Amount of each related disbursement.
  - (6) If applicable, dates and amounts of interest earned and credited to the account.
  - (7) Balance after posting transactions on any date.
- (b) Maintenance of trust ledgers of separate beneficiaries or transactions, or similar records, or automated data processing systems, including computer systems and electronic storage and manipulation of information and documents, in accordance with generally accepted accounting principles will constitute compliance with subdivision (a), provided that such ledgers, records, or systems contain the elements required by subdivision (a) and that such elements are maintained in a format that will readily enable tracing and reconciliation in accordance with Section 2831.2.

(Cal. Code Regs., tit. 10, § 2831.1, subd. (a).)

### **Control Record**

- 5. A monthly control record must be kept as follows:

The balance of all separate beneficiary or transaction records maintained pursuant to the provisions of Section

2831.1 must be reconciled with the record of all trust funds received and disbursed required by Section 2831, at least once a month, except in those months when the bank account did not have any activities. A record of the reconciliation must be maintained, and it must identify the bank account name and number, the date of the reconciliation, the account number or name of the principals or beneficiaries or transactions, and the trust fund liabilities of the broker to each of the principals, beneficiaries or transactions.

(Cal. Code Regs., tit. 10, § 2831.2.)

### **Consent of Owners of Trust Account Funds**

6. The written consent of every principal who is an owner of the funds in the account shall be obtained by a real estate broker prior to each disbursement if such a disbursement will reduce the balance of funds in the account to an amount less than the existing aggregate trust fund liability of the broker to all owners of the funds.

(Cal. Code Regs., tit. 10, § 2832.1.)

7. Withdrawals may be made from a trust fund account of an individual broker only upon the signature of the broker or one or more of the following persons if specifically authorized in writing by the broker:

[ ] . . . [ ]

(3) an unlicensed employee of the broker with fidelity bond coverage at least equal to the maximum amount of the trust funds to which the employee has access at any time.

(Cal. Code Regs., tit. 10, § 2834, subd. (a).)

### **Fictitious Business Name**

8. Section 10159.5, subdivision (a)(1), provides that a person desiring to have the license issued under a fictitious business name shall file with his application a certified copy of his fictitious business name statement filed with the county clerk.

9. A licensee is prohibited from using a fictitious name "in the conduct of any activity for which a license is required under the Real Estate Law unless the licensee is the holder of a license bearing the fictitious name." (Cal. Code Regs., tit. 10, § 2731, subd. (a).)

### **Investigation and Enforcement Costs**

10. Section 10106 provides, in pertinent part:

(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before the department, the commissioner may request the administrative law judge to direct a licensee found to have committed a violation of this part to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

[¶] . . . [¶]

(c) A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the commissioner or the commissioner's designated representative, shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

### **Audit Costs**

11. Section 10148, subdivision (b), provides that "the commissioner shall charge a real estate broker for the cost of any audit," if the commissioner has found that the broker has violated section 10145.

### **Causes for Discipline**

12. Cause exists to discipline respondent's real estate broker license pursuant to section 10145, due to the \$900 shortage in the trust account, by reason of Factual Findings 4 and 5.

13. Cause exists to discipline respondent's real estate broker license pursuant to California Code of Regulations, title 10, § 2832.1, in that respondent failed to obtain written permission from owners of funds in the trust account to allow the balance to drop below the accountability amounts, by reason of Factual Findings 4 and 5.

14. Cause exists to discipline respondent's real estate broker license pursuant to section 10145, subdivision (g), and California Code of Regulations, title 10, § 2831.1,

in that the trust account had unaccounted funds of \$611.16 with no separate record, by reason of Factual Findings 4 and 5.

15. Cause exists to discipline respondent's real estate broker license pursuant to California Code of Regulations, title 10, § 2831.1, in that respondent failed to record receipt of security deposits in the separate record, by reason of Factual Findings 4 and 5.

16. Cause exists to discipline respondent's real estate broker license pursuant to California Code of Regulations, title 10, § 2831.2, in that respondent failed to reconcile at least once a month, the balance of all separate beneficiary or transaction records for the trust account, by reason of Factual Findings 4 and 5.

17. Cause exists to discipline respondent's real estate broker license pursuant to section 10159.5, and California Code of Regulations, title 10, § 2731, in that respondent conducted real estate activity using an unregistered fictitious business name, by reason of Factual Findings 4 and 5.

18. Cause exists to discipline respondent's real estate broker license pursuant to California Code of Regulations, title 10, § 2832.1, in that respondent allowed an unlicensed person to be a signatory on the trust account, without a fidelity bond, by reason of Factual Findings 4 and 5.

### **Costs**

19. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 10106. These factors include whether the licensee has been

successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate in light of the alleged misconduct.

20. As set forth in Factual Finding 16, complainant requested that respondent be ordered to pay the costs of investigation and enforcement incurred up to the date of hearing, and the audit, in the total amount of \$6,584.68. When all the relevant factors set forth in *Zuckerman* are considered, assessment of costs in the amount of \$6,584.68, in bringing and enforcing the Accusation is reasonable and appropriate.

## ORDER

All licenses and licensing rights of respondent Thomas Glen Rogers under the Real Estate Law are REVOKED; provided however, a restricted real estate broker license shall be issued to respondent pursuant to section 10156.5 if respondent makes application therefor and pays to the DRE 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 and to the following limitations, conditions and restrictions imposed under authority of section 10156.6 of that Code:

1. (Applicable if criminal conviction has occurred.) The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of respondent's conviction or plea of nolo contendere to a

crime which is substantially related to respondent's fitness or capacity as a real estate licensee.

2. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that respondent has violated provisions of the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to the restricted license.

3. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor for the removal of any of the conditions, limitations or restrictions of a restricted license until two years have elapsed from the effective date of this Decision.

4. Respondent shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until respondent presents such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

5. Respondent shall, within six months from the effective date of this Decision, take and pass the Professional Responsibility Examination administered by the DRE including the payment of the appropriate examination fee. If respondent fails

to satisfy this condition, the Commissioner may order suspension of respondent's license until respondent passes the examination.

6. Respondent shall report in writing to the DRE as the Real Estate Commissioner shall direct by his Decision herein or by separate written order issued while the restricted license is in effect such information concerning respondent's activities for which a real estate license is required as the Commissioner shall deem to be appropriate to protect the public interest.

Such reports may include, but shall not be limited to, periodic independent accountings of trust funds in the custody and control of respondent and periodic summaries of salient information concerning each real estate transaction in which respondent engaged during the period covered by the report.

7. Trust Fund Violations: Pursuant to section 10148, respondent shall pay the Commissioner's reasonable costs for: (a) the audit which led to this disciplinary action and, (b) a subsequent audit to determine if respondent has corrected the trust fund violation(s) in Factual Finding 5. In calculating the amount of the Commissioner's reasonable costs, the Commissioner may use the estimated average hourly salary for all persons performing audits of real estate brokers, and shall include an allocation for travel time to and from the auditor's place of work. Respondent shall pay such costs within 60 days of receiving an invoice from the Commissioner detailing the activities performed during the audit and the amount of time spent performing those activities. The Commissioner may suspend the restricted license issued to respondent pending a hearing held in accordance with Government Code section 11500, et seq., if payment is not timely made as provided for herein, or as provided for in a subsequent agreement between respondent and the Commissioner. The suspension shall remain in effect until payment is made in full or until respondent enters into an agreement satisfactory to

the Commissioner to provide for payment, or until a decision providing otherwise is adopted following a hearing held pursuant to this condition.

8. Trust Fund Violation Course Requirement. Respondent shall, prior to and as a condition of the issuance of the restricted license, submit proof satisfactory to the Commissioner of having taken and successfully completed the continuing education course on trust fund accounting and handling specified in section 10170.5. Proof of satisfaction of this requirement includes evidence that respondent has successfully completed the trust fund account and handling continuing education course within 120 days prior to the effective date of the Decision in this matter.

9. Respondent shall pay to the DRE \$1,858 in investigation costs, \$1,112.50 in enforcement costs, and \$3,614.18 in audit costs, for a total of \$6,584.68, in a manner as directed by the DRE.

DATE: July 14, 2020

DocuSigned by:  
*Danette C. Brown*  
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DANETTE C. BROWN  
Administrative Law Judge  
Office of Administrative Hearings

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Department of Real Estate

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