

FILED

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

JUL 11 2013
BUREAU OF REAL ESTATE

By 

In the Matter of the Accusation of)
) NO. H-11471 SF
TONY BAYARD DE VOLO,)
) OAH NO. 2012110559
Respondent.)
_____)

DECISION

The Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings dated May 30, 2013, is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

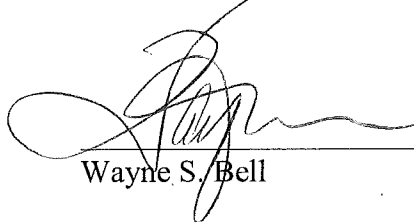
The Decision suspends or revokes the real estate license and/or license rights; however, the right to a restricted license is granted to Respondent.

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 Section 11522 and a copy of the Commissioner's Criteria of Rehabilitation are enclosed for the information of respondent.

This Decision shall become effective at 12 o'clock noon on JUL 31 2013.

IT IS SO ORDERED 7/9/2013

REAL ESTATE COMMISSIONER



Wayne S. Bell

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

TONY BAYARD DE VOLO,¹

Respondent.

Case No. H-11471 SF

OAH No. 2012110559

PROPOSED DECISION

Administrative Law Judge Mary-Margaret Anderson, Office of Administrative Hearings, State of California, heard this matter on May 2, 2013, in Oakland, California.

Richard K. Uno, Real Estate Counsel, represented Complainant Robin S. Tanner, a Deputy Real Estate Commissioner.

Frank M. Buda, Attorney at Law, represented Respondent Tony Bayard de Volo.

The record closed on May 2, 2013.

FACTUAL FINDINGS

1. Complainant Robin S. Tanner, filed the Accusation in her official capacity as a Deputy Real Estate Commissioner for the Department of Real Estate (Department), State of California.

2. The Department initially licensed Tony Bayard de Volo (Respondent) as a real estate broker on July 15, 2003. The license will expire July 14, 2015, unless renewed.

3. Respondent was admitted to the practice of law in California under the name Anthony Bayard de Volo on December 4, 2000. His State Bar Number is 210018. On July 16, 2012, the Supreme Court of California approved a stipulation resolving State Bar Case No. 10-O-09257. (That case number consolidated case numbers 10-O-10543, 10-O-10684, 10-O-10921, 11-O-16158 and 11-O-10461.) Respondent stipulated to multiple violations of the Rules of Professional Conduct as follows: Rule 3-110(A) (Failure to Perform With

¹ The Accusation mistakenly identifies Respondent as: TONY DE VOLO BAYARD.

Competence) and Rule 4-400(B) (Limiting Liability to Client). He also stipulated to a violation of Business and Professions Code 6090.5, subdivision (a)(2), seeking an agreement not to file or to withdraw a State Bar complaint.

The Supreme Court suspended Respondent from the practice of law for one year, stayed, and placed his license on probation for two years pursuant to certain terms. The probationary terms included an actual suspension for the first 90 days of probation and passing the Multistate Professional Responsibility Examination within one year. He was ordered to pay \$8,087.02 for discipline costs. Half the amount was added to his dues for 2013, and has been paid. The second half is due with his 2014 dues.

4. The State Bar discipline was imposed in connection with Respondent's loan modification business. He was the only attorney, and he employed non-attorneys and failed to properly supervise them. The five counts of failure to perform with competence were based upon Respondent's failure to perform legal services, delegation of non-attorneys to perform legal duties, and unauthorized withdrawal of client trust fund monies (by his employees). The two counts of limiting liability to clients were based upon Respondent having settled claims with clients without advising them that they could seek independent counsel.

5. Real estate licensees are required to supervise non-licensed individuals in a manner that does not violate the Real Estate Law. They must also comply with regulations governing the administration of trust accounts and many other rules designed for public protection. The discipline imposed upon Respondent's license to practice law thus constituted the discipline of a license issued by another state agency for acts, which if done by a real estate licensee, would be grounds for discipline of a real estate license. And the discipline occurred in the context of a hearing process that included due process protections.

6. Respondent began working in the real estate field in the area of loan originations. When the economic downturn began in 2007, Respondent's work decreased. He began to hear about people who were trying to prevent foreclosures and began a loan modification business. This work was not terribly different from loan originations and refinancing. Respondent had a network of people who knew he was also a lawyer, and who referred him business. Between 2007 and 2010, Respondent completed about 300 loan modifications. He was in the office every day, and as the office grew he hired more and more people. He supervised the office, but did not serve the clients individually. In hindsight, he had too many clients, and also did not understand his responsibility as an attorney to the clients. Respondent regrets his actions, and notes that he was in full agreement with the State Bar charges and settled the case early on.

7. Currently, Respondent operates a small private law practice. He served the suspension and made full restitution to the clients he owed money to. He has no employees, and handles all of the work himself, including spending time with each client. He goes over the fee agreement very carefully with his clients, and endeavors to give them a true assessment of their chances of success at obtaining a loan modification. His real estate

license is very important to his financial well-being, as he does not earn a great deal from his law practice.

8. Samuel C. Bellicini, Attorney at Law, represented Respondent in his State Bar matter and testified on his behalf. Bellicini practices in the area of professional responsibility. He advises attorneys on ethical issues and represents them in State Bar Court proceedings. Bellicini was very impressed with Respondent's lack of defensiveness as regards his professional misconduct. Respondent agreed to settle early and was cooperative with opposing counsel. Respondent instructed Bellicini to inform the Department about the State Bar matter. In Bellicini's opinion, Respondent is an honest person who "bit off more than he could chew" as regards his loan modification business.

9. Respondent presented five reference letters.

a. David R. Koehler is a certified public accountant with Koehler & Associates in San Jose. He has known Respondent over five years. In a letter dated May 1, 2013, he wrote that Respondent told him about the State Bar suspension last year. They discussed the matter at length. Koehler has been an accountant since 1994, and has experienced many different real estate professionals. He wrote that Respondent is "one of the good guys. He is competent, puts his client's interests first and does not abandon them if the challenge is tough." Koehler is confident that Respondent will not have problems with supervision of others again, and he would not hesitate to refer him to his clients.

b. Patrice Ventresca is a client of Respondent's, who has worked with him to secure a home loan modification and unsecured loan. In a letter dated May 1, 2013, she wrote that she is aware of his suspension, but holds the opinion that Respondent's actions "were neither indicative of dishonesty, mal intent nor fraud, but rather due to an honest mistake." She further opines that Respondent is "ethical, honest and loyal."

c. James and Anthony Marchese signed a letter dated April 16, 2007. (The date is in error-2013 is the correct year.) Respondent assisted their mother to prevent a family home from foreclosure. He worked with them for over one year, and eventually the loan modification was approved. The letter states: "To this day I call him for legal and real estate advice. I consider him to be trustworthy."

d. Reena Sharma has known Respondent "in a variety of capacities for some years." She is aware of the suspension. She wrote a letter of support dated April 19, 2013, that states Respondent is "always willing to offer his assistance and has an excellent rapport."

e. Anzhela Bayard de Volo is Respondent's wife. In a letter dated May 1, 2013, she writes that Respondent "is a very intelligent, honest and ethical person," with "the highest standards."

Cost recovery

10. The evidence provided by the Department demonstrated that it has incurred \$194.70 in costs of investigation of this case. This amount reflects work performed by three Department special investigators and is reasonable.

11. Also in evidence is a declaration signed on May 1, 2013, by Staff Counsel Richard K. Uno. He declares that he performed a total of 12 hours of work on the case, including hearing and travel time on May 2, 2013. The declaration is signed under penalty of perjury that the contents are true and correct. The information in the declaration is not true and correct because Uno declares that he worked on the case on a date and time that followed the date he signed it.

LEGAL CONCLUSIONS

1. Business and Professions Code section 10177, subdivision (f), provides that the suspension or revocation of a license issued by another state agency is cause for discipline of a real estate license where the discipline ordered by the other agency was for acts that, if committed by a real estate licensee, would be grounds for discipline of a real estate license, and if the licensee was provided certain due process rights in connection with the other agency's action. Cause for discipline exists pursuant to this section by reason of the matters set forth in Findings 3 through 5.

2. The purpose of the licensing scheme regarding real estate brokers is protection of the public. Real estate brokers, like attorneys, often act as fiduciaries and utilize trust accounts, and it is essential that they be honest, trustworthy, and conscientiously follow the rules governing the practice of real estate. The State Bar proceedings demonstrated that Respondent violated the rules governing the practice of law. The facts underlying the discipline give cause for concern about his ability and willingness to comply with the duties required of a real estate broker.

3. On the other hand, Respondent correctly describes the State Bar matter as largely confined to improperly delegating attorney work to non-attorneys. Although his lack of knowledge of the rules is troubling, Respondent was convincing that he now understands the rules and will attentively follow them henceforth.

4. Complainant's contention that the circumstances require revocation of Respondent's broker's license is not persuasive. The relevance of the State Bar's action logically extends to the penalty imposed by the Supreme Court. Respondent's license to practice law was not revoked – he is currently practicing law under a probationary license. All things considered, it is concluded that the issuance of a restricted broker license for a period of two years is sufficient to protect the public interest.

Costs

5. Pursuant to Business and Professions Code section 10106, a licensee found to have violated the Real Estate Law may be required to pay the reasonable costs of the investigation and enforcement of a case. Section 10106, subdivision (c), provides, in pertinent part:

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 the costs shall include the amount of investigative and enforcement costs up to the date of the hearing

Here, evidence of a portion of the costs was presented in a declaration, signed under penalty of perjury, by Department staff counsel. Seen in a light most favorable to the declarant, it could be inferred that the costs alleged to have been incurred on May 2 were not deliberately misrepresented, but instead were "good faith estimates" of costs expected to be incurred. In support of this conclusion is the fact that the date written next to the amount was the day before the declaration was signed. On the other hand, the declaration is a legal document, signed under penalty of perjury, by an attorney who should be held to the highest standard when signing official documents. And costs for time spent on the hearing date are not recoverable under the statute; the time for recoverable costs stops before the hearing convenes. All things considered, it is determined that the cost declaration from Mr. Uno shall be disregarded and no attorney's fees/costs will be awarded.

As set forth in Finding 10, the reasonable costs of investigation and enforcement in this matter are \$194.70.

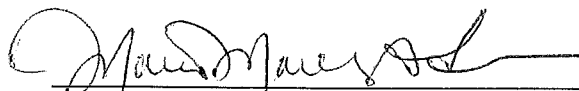
6. In *Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court held that licensing boards must exercise their discretion in fashioning cost awards to ensure that they do not deter licensees with potentially meritorious claims from exercising their right to an administrative hearing. The court set forth factors to be considered, which 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 to the alleged misconduct. None of these factors militate in Respondent's favor and the total amount is reasonable. Respondent shall be ordered to pay \$194.70.

ORDER

Respondent Tony Bayard de Volo's real estate broker license is revoked; provided, however, a restricted real estate broker license shall be issued to Respondent pursuant to section 10156.5 of the Business and Professions Code. 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 license shall not confer any property right in the privileges to be exercised, and the Real Estate Commissioner may by appropriate order suspend the right to exercise any privileges granted under this restricted license in the event of:
 - (a) The conviction of Respondent (including a plea of nolo contendere) of a crime which is substantially related to Respondent's fitness or capacity as a real estate licensee; or
 - (b) The receipt of evidence 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 this restricted license.
2. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license or 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.
3. Respondent shall pay \$194.70 to the Department of Real Estate for the costs of investigation and enforcement of this case. Such amount shall be paid in full before an unrestricted real estate license is issued or any restrictions are removed.

DATED: May 30, 2013



MARY-MARGARET ANDERSON
Administrative Law Judge
Office of Administrative Hearings