

FILED

OCT 21 2013

BUREAU OF REAL ESTATE

By K. Contreras

BEFORE THE
BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of)
)
JOE L. VANNI,)
)
 Respondents.)
_____)

NO. H-11536 SF

OAH NO. 2013050999

DECISION

The Proposed Decision dated September 11, 2013, 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.

This Decision shall become effective at 12 o'clock noon on

NOV 20 2013

IT IS SO ORDERED

10/11/2013

REAL ESTATE COMMISSIONER



WAYNE S. BELL

BEFORE THE
BUREAU OF REAL ESTATE
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation of:

JOE L. VANNI,

Respondent.

Case No. H-11536 SF

OAH No. 2013050999

PROPOSED DECISION

Administrative Law Judge Kirk E. Miller, State of California, Office of Administrative Hearings, heard this matter on July 23, 2013, in Oakland, California.

Stephanie K. Sese, Counsel, Bureau of Real Estate¹, represented Complainant E. J. Haberer II, a Deputy Real Estate Commissioner of the State of California.

Joe L. Vanni, appeared on his own behalf.

The record was left open until August 23, 2013, for the submission of closing briefs. Complainant's brief was timely received and marked for identification as Exhibit 6; respondent's reply brief was also timely received and marked for identification as Exhibit E. The record was closed and the matter was submitted for decision on August 23, 2013.

FACTUAL FINDINGS

1. At all relevant times, respondent Joe L. Vanni was licensed under the Real Estate Law as a real estate broker and as a mortgage loan originator. (The Real Estate Law is found at Business and Professions Code section 10000 et seq.) Respondent was first licensed as a real estate salesperson in 1978, and has been licensed as a real estate broker since 1985. Respondent's mortgage loan originator license endorsement was approved on November 30, 2010. Respondent conducted his real estate brokerage business using the fictitious business names "HRF Mortgage, Inc." and "HRF Investments, Inc."

2. On March 19, 2013, Complainant, acting in his official capacity as a Deputy Real Estate Commissioner of the State of California, filed an accusation against respondent. The accusation is based on findings from an audit of respondent's mortgage lending records,

¹ On July 1, 2013, the Department of Real Estate became the Bureau of Real Estate.

and alleges that respondent failed to comply with various provisions of the Business and Professions Code dealing with mortgage lending.

The Audit

3. On August 13, 2012, the Bureau's auditor, Susie Hsueh held an entrance conference with respondent. Between August 13, 2012, and September 19, 2012, Hsueh examined respondent's accounting and other records for the period January 1, 2010, through July 31, 2012. The audit was conducted because the Bureau had received a complaint from one of respondent's former borrower's. The facts underlying the complaint were not part of the audit or the accusation.

4. During the audit period, respondent, for compensation or in expectation of compensation, engaged in the business of, acted in the capacity of, or assumed to act as a real estate broker in the State of California within the meaning of Business and Professions Code section 10131, and as a mortgage loan originator. In this capacity, respondent solicited borrowers and negotiated mortgage loans. During 2011, respondent negotiated five loans totaling \$770,500, and during the same period, serviced 35 loans with a total dollar volume of approximately \$6 million and collections of \$941,000.

5. In acting as a real estate broker and mortgage loan originator, respondent accepted or received funds in trust and from time to time made disbursements of trust funds. Trust funds accepted or received by respondent were deposited into a bank account maintained by respondent at Bay Commercial Bank, in an account entitled HRF Mortgage Inc., dba HRF Servicing.

6. Respondent was responsible for properly accounting for all funds received and disbursed; making required filings with the Bureau; and providing required disclosures to borrowers.

7. Based on the audit's findings, Complainant alleges the following violations of the Real Estate Law and the Bureau's regulations:

MAINTAINING SEPARATE RECORDS

8. The audit found that respondent kept separate records for each loan beneficiary, but the records did not contain all of the information required by California Code of Regulations,² title 10, section 2381.1. Specifically, the individual lender records did not contain (1) check numbers for disbursements and (2) monthly loan balances after payments from borrowers were posted.

² All references to the Bureau's regulations are to title 10 of the California Code of Regulations, unless otherwise indicated.

9. Respondent believed his records contained the required information. Respondent has since changed his practice to conform to the requirements of Section 2831.1.

10. The audit finding is sustained. Respondent's records did not include check numbers, and loan balances were not updated on a monthly basis.

DESIGNATION OF TRUST FUND ACCOUNT

11. The audit found that respondent's account at Bay Commercial Bank, in the name of HRF Mortgage Inc., dba HRF Servicing, was not formally designated as a trust account under the name of respondent as trustee.³ This account was used for the deposit of loan re-payments.

12. Respondent agreed that the HRF Mortgage Inc., dba HRF Servicing account was not expressly designated as a trust account, but his testimony established that it was used as a trust account. Respondent did not place funds into the account other than from borrowers and he did not commingle the funds in the account with other money; deposits into the account were used for the benefit of lenders. Even though the bank account was not properly designated as a trust account, the audit found the "control records are complete and accurate." As a result of the audit, respondent has formally established a trust account under his name as trustee.

13. The audit finding is sustained. The HRF Mortgage Inc., dba HRF Servicing account with Bay Commercial Bank was not designated as a trust account in the name of respondent as trustee.

MONTHLY RECONCILIATION OF TRANSACTION RECORDS WITH CONTROL RECORDS

14. The audit found that respondent did not, on a monthly basis, reconcile borrower and lender account balances, and did not maintain a separate record for broker funds, as required by section 2831.2.

15. Respondent provided records that confirmed that monthly borrower repayments are reconciled with interest and service charge payments to lenders, but they did not show monthly changes in account balances. Respondent testified that this reconciliation

³ Section 2832 of the Bureau's regulations states, in relevant part:

(a) Compliance with Section 10145 of the Code requires that the broker place funds accepted on behalf of another into the hands of the owner of the funds, into a neutral escrow depository or into a trust fund account in the name of the broker, or in a fictitious name if the broker is the holder of a license bearing such fictitious name, as trustee at a bank or other financial institution not later than three business days following receipt of the funds by the broker or by the broker's salesperson.

was done online on the 20th of each month, and that payments are made to borrowers on the 25th day of the month.

16. The audit finding is sustained to the extent that the records provided at the hearing did not show, on a monthly basis, changes in outstanding loan balances. Respondent's practice is now to provide lenders with a month-end reconciliation of the outstanding loan balance on each loan.

UNAUTHORIZED SIGNATORY ON THE TRUST ACCOUNT

17. The audit found that respondent's wife, Virginia A. Vanni, signed trust account checks payable to investors. Virginia Vanni is not licensed under the Real Estate Law nor is she bonded in an amount equal to the maximum amount of the trust funds to which she had access, as required by section 2834, subdivision (a).⁴

18. Virginia Vanni worked as respondent's bookkeeper and issued online checks to investors at respondent's direction. As a result of the audit, respondent has changed this practice and only respondent issues checks from the trust account.

19. The audit finding is sustained in that Virginia Vanni was not legally authorized to write checks to investors. There was no allegation or finding that Virginia Vanni misused trust account funds.

UNDISCLOSED COMPENSATION

20. The audit found that in administering the "Hasan loan," respondent incorrectly calculated the amount of monthly interest owed to the investor, Don H., resulting in an underpayment of \$1,541.79.

⁴ Section 2834, subdivision (a) provides:

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:

- (1) a salesperson licensed to the broker.
- (2) a person licensed as a broker who has entered into a written agreement pursuant to section 2726 with 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.

21. Respondent acknowledged the underpayment and fully and credibly explained how and why it occurred. A separate loan at the rate of 11.5 percent, which was owned by investor Don H., had been paid off. Don H. asked respondent to reinvest those proceeds into a new loan, which was made to Hasan. The new loan was at a higher interest rate, 12 percent, but the one-half or one percent increase was not credited to Don H. This was an isolated, unintentional clerical error that was corrected and the underpayment was refunded to the lender.⁵

22. Respondent made a clerical error with respect to the Hasan loan. There was no secret or undisclosed compensation. No violation of Business and Professions Code section 10176, subdivision (g) was substantiated.

LENDER PURCHASER DISCLOSURE STATEMENTS

23. The accusation alleges respondent: "failed to provide investors with a Lender/Purchaser Disclosure Statement following solicitation by respondent of funds from prospective lenders for purchases that directly benefited respondent, and failed to submit a complete copy of the disclosure statement, with the investor's signature, to the [Bureau] in violation of Section 10231.2, subdivision (a) of the Code."

24. Respondent testified that each of his investors received the required disclosure statement, and by way of example, one completed Lender/Purchaser Disclosure Statement was made part of the record. Respondent acknowledged, however, he did not also provide signed copies of the form to the Bureau.⁶

⁵ The audit work papers confirm respondent's explanation. The auditor's note states: "[Respondent] refunded \$1,541.79 to the lender after learning about his clerical error during the audit."

⁶ Section 10231.2, subdivision (a) provides in relevant part:

(a) A real estate broker who, through express or implied representations that the broker or any salesperson acting on the broker's behalf is engaging in acts for which a real estate license is required by subdivision (d) or (e) of Section 10131, proposes to solicit and accept funds, or to cause the solicitation and acceptance of funds, to be applied to a purchase or loan transaction in which the broker will directly or indirectly obtain the use or benefit of the funds other than for commissions, fees, and costs and expenses as provided by law for the broker's services as an agent, shall, prior to the making of any representation, solicitation, or presentation of the statement described in subdivision (b), submit the following to the Bureau of Real Estate:

25. The audit finding is substantiated to the extent that Lender/Purchaser Disclosure Statements with the investors' signatures were not provided to the Bureau.

THRESHOLD NOTIFICATION REQUIREMENTS

26. The audit found that during 2011, respondent met the threshold reporting requirements set forth in section 10232, subdivision (a)(1) (C)(2),⁷ because he collected loan payments in excess of \$250,000 by the end of March of that year. Respondent did not file the required reports with the Bureau.

27. Respondent did not contest the audit finding; however, as a result of the audit, respondent has retained a CPA to perform the required review of trust fund financial statements, and the required reports have been filed.

28. The audit finding is sustained.

MULTI-LENDER TRANSACTION NOTICE

29. The audit found that respondent did not file with the Bureau a Multi-Lender Transaction Notice. This notice is required by Business and Professions Code section 10238, when loan payments in excess of \$125,000 are due to a broker in any three-month period.

30. Respondent did not acknowledge that he is required to file a Multi-lender Transaction Notice with the Bureau, but nonetheless filed the document for the first quarter of 2013.

31. The audit finding is sustained.

TRUST FUND STATUS REPORTS

32. The audit found that respondent did not file with the Bureau the reports required by Business and Professions Code section 10232.2, subdivisions (a) and (c), or the report required by Business and Professions Code section 10232.25. These reports are to be

(1) A true copy of the statement described in subdivision (b) complete except for the signature of the prospective lender or purchaser.

⁷ Section 10232, subdivision (a)(1)(C)(2), together with Business and Professions Code sections 10232.2 and 10233, require an independent, certified public accountant to review a broker's trust fund financial statements, when the broker collects loan payments in excess of \$250,000 in any twelve month period. The report must be filed with the Bureau.

prepared by an independent public account, and their purpose is to confirm compliance by real estate brokers with various provisions of the Real Estate Law.

33. Respondent acknowledges that at the time of the audit, the reports had not been filed; however, an independent public accountant has prepared and timely filed the reports covering the third quarter of 2012, and for the first and second quarters of 2013.

34. The audit finding is sustained.

Other Evidence

35. Respondent has been a licensed real estate broker for over 25 years and his license has never been disciplined. Respondent cooperated fully throughout the audit.

36. Respondent acknowledged that he is responsible for the operations of his business, took responsibility for all compliance issues, and apologized for those instances where his operations were out of compliance. Respondent has corrected each violation identified in the audit report and changed his practices as needed.

37. Susie Hsueh, the Bureau's auditor, testified that "the public is not in jeopardy as a result of [respondent's] actions."

Costs

38. Complainant has requested the respondent be ordered to pay the bureau the costs of investigation and enforcement of the case. Business and Professions Code section 10106 provides that respondent may be ordered to pay the bureau "a sum not to exceed the reasonable costs of the investigation and enforcement of the case." The actual costs of investigation are \$620.00 and legal fees are \$4,272.00.

39. Business and Professions Code section 10148 provides that a respondent may be ordered to pay the Bureau for the cost of any audit, where the audit identifies a violation of Business and Professions Code section 10145. This provision governs the handling of trust accounts. The audit costs in this case are \$5,820.00.

40. The most serious charge contained in the accusation, retained secret profits or undisclosed compensation, was unsubstantiated. Respondent's explanation for the discrepancy was clear and compelling and the audit itself described the discrepancy as a "clerical error." On the other hand, most of the audit's technical findings were substantiated. The case of *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 sets forth the factors to be considered in determining the reasonableness of costs. Those 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 to

the alleged misconduct.” In light of this mix of unsubstantiated and substantiated charges, the legal fees should be reduced to \$2,000. The investigation and audit fees are reasonable.

41. Respondent used the audit findings constructively and has made the changes needed to bring his mortgage loan practices into compliance.

LEGAL CONCLUSIONS

1. Under Business and Professions Code section 10177, subdivision (d), the Real Estate Commissioner may suspend or revoke the license of a real estate licensee who has “violated the Real Estate Law . . . or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law”

Maintaining Separate Account Records

2. Respondent did not keep records containing the check numbers for loan payments or the date and check number for disbursements, as required by section 2831. (Findings 6, and 8 through 10.)

Designation of Trust Fund Account

3. Respondent failed to designate the Bay Commercial Bank Account as a trust account under the name of respondent as trustee, as required by Business and Professions Code section 10145 and section 2832 of the commissioner’s regulations. (Findings 5 and 6, and 11 through 13.)

Monthly Reconciliation of Transaction Records with Control Records

4. Respondent did not reconcile borrower and lender account balances on a monthly basis, as required by section 2831.2. (Findings 6, and 14 through 16.)

Unauthorized Signatory on the Trust Account

5. Respondent failed to secure fidelity bond coverage at least equal to the maximum amount of the trust account balance at Bay Commercial Bank, to which an unlicensed employee of respondents had access, in violation of section 2834. (Findings 6, and 17 through 19.)

Undisclosed Compensation

6. Under Business and Professions Code section 10176, subdivision (g), the Real Estate Commissioner may suspend or revoke the license of a real estate licensee who has taken “. . . any secret or undisclosed amount of compensation. . . .” The evidence did not establish that respondent took secret or undisclosed compensation. No cause exists to

suspend or revoke respondent's licenses for this alleged violation of Business and Professions Code section 10176, subdivision (g). (Findings 20 through 22.)

Lender-Purchaser Disclosure Statements

7. Respondent failed to provide the Bureau with unsigned copies of the Lender/Purchaser Disclosure Statements that were provided to lenders. (Findings 6 and 23 through 25.)

Threshold Notification Requirements

8. Respondent did not file with the Bureau the reports required under Business and Professions Code section 10232, subdivision (a), when respondent received collections from outstanding loans in excess of \$250,000. (Findings 6, and 26 through 28.)

Multi-Lender Transaction Notice

9. Respondent did not file a Multi-Lender Transaction Notice as required by Business and Professions Code section 10238, when collections from loans exceeded \$125,000 in any three-month period. (Findings 6 and 29 through 31.)

Trust Fund Status Reports

10. Respondent did not submit to the Bureau quarterly and annual trust fund status reports, for the periods ending March 31, 2011, June 30, 2011, September 30, 2011, March 31, 2012 and May 31, 2012, in accordance with the provision of sections 10232, subdivision (a) and (c), and section 10232.25. (Findings 6, and 32 through 34.)

11. Cause for discipline exists pursuant to Business and Professions Code section 10177, subdivision (d), by reason of the matters set for in Legal Conclusions 1 through 4 and 6 through 10.

Disciplinary Considerations

12. Cause for license discipline having been established, the issue is the level of discipline to impose. The purpose of license discipline is not to punish the licensee, but to protect the public.

The audit revealed several violations of the laws that govern the establishment of trust accounts, the accounting for receipts and disbursements of trust funds, and reporting to the Bureau regarding business activities governed by the Real Estate Law. Many of these requirements are technical ones, but they are nonetheless important; they are in place for the protection of the public, and uniform compliance by all licensees is necessary for the Bureau to regulate the business of real estate in California.

The audit served a useful purpose in pointing out to respondent shortcomings in his lending practice, that if continued might ultimately have resulted in confusion or worse by lenders and borrowers alike. That said, no intentional misconduct was found. Respondent cooperated with the auditor, and has corrected his practices to conform with the audit findings. Following the conclusion of the audit, an independent public accountant was hired to complete the required review and file those reports must be prepared by a CPA.

This is not only the first time respondent has been audited, but the first time in 27 years that he has been subject to discipline. Respondent no doubt better understands his record keeping and filing obligations as a result of the Bureau's audit. Respondent prides himself on operating in an ethical manner and providing a useful service. Importantly, the individual who conducted the audit confirmed that respondent does not presently present a risk to the public. Under these circumstances, the public interest will be adequately protected by a stayed suspension subject to the conditions (among others) that respondent pay the reasonable cost of the 2012 audit, and that he submit to, and pay the reasonable cost of, a subsequent audit, not to exceed \$5,870.

ORDER

All licenses and licensing rights of respondent Joe L. Vanni under the Real Estate Law are suspended for a period of 20 days from the effective date of this decision; provided, however, that the suspension shall be stayed for one year upon the following terms and conditions:

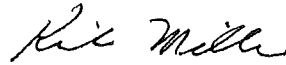
a. Respondent shall obey all laws, rules and regulations governing the rights, duties and responsibilities of a real estate licensee in the State of California.

b. The Commissioner may, if a final subsequent determination is made, after hearing or upon stipulation, that cause for disciplinary action occurred during the term of the suspension provided for herein, vacate and set aside the stay order including any further stay imposed pursuant to section 10175.2. Should no order vacating the stay be made pursuant to this condition or condition (c), below, the stay imposed herein shall become permanent.

c. Pursuant to Business and Professions Code section 10148, Respondent shall pay the Commissioner's reasonable cost for: (a) the audit which led to this disciplinary action and, (b) a subsequent audit in an amount not to exceed \$5,870, to determine if respondent has corrected the trust fund and reporting violations found in Legal Conclusions 2 through 4, and 6 through 10, above. 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 costs, including mileage, time to and from the auditor's place of work and per diem. Respondent shall pay such cost 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. Pursuant to Business and Professions Code section 10106, respondent shall pay the Bureau's legal fees in the amount of \$2,000. The Commissioner may, in his or her discretion, vacate and set aside the stay order, if payment is not timely made as provided for herein, or as provided for in a subsequent agreement between respondent and the Commissioner. The vacation and the set aside of the stay 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. Should no order vacating the stay be issued, either in accordance with this condition or condition (b), above, the stay imposed herein shall become permanent.

DATED: September 11, 2013



KIRK E. MILLER
Administrative Law Judge
Office of Administrative Hearings