

FILED

DEC 15 2020

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE
By R. dew

* * *

In the Matter of the Accusation of:)	DRE No. H-12441 SF
GARY YING WU SHING,)	OAH No. 2020070397
Respondent.)	

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:

1. Page 2, Factual Findings 1, is corrected to read as follows:
"May 04, 2020".

The Decision suspends or revokes one or more real estate licenses, but the right to a restricted salesperson license is granted to Respondent.

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.

The right to reinstatement of a revoked real estate license or to the reduction of 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 05 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:

GARY YING WU SHING,

Respondent.

Case No. H-12441 SF

OAH No. 2020070397

PROPOSED DECISION

Administrative Law Judge Michael C. Starkey, State of California, Office of Administrative Hearings, heard this matter on October 1, 2020, via videoconference and telephone.

Counsel Megan Lee Olsen represented complainant Robin Tanner, Supervising Special Investigator, State of California, Department of Real Estate.

Respondent Gary Ying Wu Shing represented himself.

A protective order sealing Exhibit 3 and redacting Exhibit 4 was issued during the hearing to protect the sensitive financial information of individuals who are not parties to this proceeding.

The record closed and the matter was submitted on October 1, 2020.

FACTUAL FINDINGS

1. On March 18, 2020, complainant Robin S. Tanner, acting in her official capacity as a Supervising Special Investigator, State of California, Department of Real Estate (Department), issued the accusation. Complainant alleges that respondent Gary Ying Wu Shing acted in the capacity of a real estate broker by operating a property management business and mishandled trust funds; and that those alleged acts constitute cause to discipline his salesperson license. Respondent timely filed a notice of defense and this proceeding followed.

2. On May 8, 2006, the Department issued a real estate salesperson license to respondent. That license was in effect at all relevant times and will expire on May 7, 2022, unless renewed. There have been no prior disciplinary actions against respondent.

Issues

3. The issues in this case are: (a) whether complainant established cause to discipline respondent's license; (b) if so, to what extent did respondent prove mitigation or rehabilitation, and what is the appropriate level of discipline; (c) what is the amount of costs reasonably incurred by complainant in the investigation and prosecution of this matter; and (d) to what extent, if any, is respondent liable for such costs?

Standard of Proof

4. The standard of proof applicable to prove cause for discipline of a license depends on whether the license is determined to be a professional license (clear and convincing proof to a reasonable certainty) or a non-professional license

(preponderance of the evidence). That determination depends on the amount of education, training, or work entailed in obtaining the license at issue. (See *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1892-95.). Here, the applicable standard of proof is not clear and neither party presented evidence or argument on the issue. However, this issue is not dispositive because the facts of this matter are largely undisputed and Findings 6 through 12 were proven by clear and convincing proof to a reasonable certainty.

5. If a respondent contends mitigation or rehabilitation, it is his or her burden to prove that contention by a preponderance of the evidence. (*Whetstone v. Board of Dental Examiners of Cal.* (1927) 87 Cal.App. 156, 164; Evid. Code, § 115.)

Respondent's Unlicensed Property Management Activities

6. The Department has never licensed respondent as a real estate broker.

7. From January 2018 through early February 2019, respondent solicited prospective tenants for, negotiated rental agreements for, and collected rents from, 11 real properties owned by 9 other individuals or entities. Respondent listed himself as the agent on multiple lease agreements and included his salesperson license number. On at least four lease agreements, he also listed himself as the broker, but left blank the field on the form for the broker's license number. On other lease agreements, he left blank the field for the broker and broker's license number or left blank the fields for broker and salesperson. On two lease agreements, he listed "Golden World Realty" as the broker and left blank the field on the form for the broker's license number.

8. Respondent received compensation from the property owners in connection with these management activities.

9. Kuolin Enterprises Inc. (Kuolin) is respondent's employer and the responsible broker affiliated with respondent's salesperson license. However, Kuolin did not supervise, or otherwise participate in, respondent's property management activities.

2019 Audit

10. From January 29 through February 11, 2019, Department auditor Jayendra P. Barbhaiya conducted an audit of the accounting and other records related to respondent's property management activities for the period June 1, 2018, through January 31, 2019 (Audit Period). Respondent cooperated with the audit. Barbhaiya issued a report dated February 25, 2019, and testified at hearing.

11. During the Audit Period, respondent, while acting in the capacity of a real estate broker, received trust funds from or on behalf of owners, lessees, and others in connection with property management activities and deposited those funds into five personal bank accounts (Five Bank Accounts) that respondent maintained in his own name, jointly with his wife, or in the name of MAGALAND ENTERPRISE, LLC.

12. In the course of those activities respondent:

a. failed to properly designate each of the Five Bank Accounts as trust fund accounts and in the name of a broker as trustee, as required by Business and Professions Code section 10145, subdivision (a), and section 2832 of Title 10, California Code of Regulations, as none of the Five Bank Accounts

were designated as trust accounts and each was a personal account of respondent;¹

b. caused funds of others which were received and held by respondent to be commingled with respondent's own personal funds in the Five Bank Accounts, in violation of section 10176, subdivision (e);

c. caused funds of others which were received and held by respondent to be commingled with broker funds which had not been disbursed within 25 days of earning them in three of the Five Bank Accounts in accordance with section 2835 of Title 10, California Code of Regulations, in violation of section 10176, subdivision (e);

d. failed to maintain an accurate columnar record in chronological sequence of all trust funds received and disbursed (Control Record), containing all required information, for each of the Five Bank Accounts, in violation of section 2831 of Title 10, California Code of Regulations;

e. failed to maintain accurate separate records for each beneficiary of trust funds accepted or received and disbursed for each of the Five Bank Accounts, in violation of section 10145, subdivision (g), and section 2831.1 of Title 10, California Code of Regulations; and

f. failed to reconcile at least once a month, the balance of all separate beneficiary or transaction records with the records of all trust funds

¹ All statutory references are to the Business and Professions Code unless stated otherwise.

received and disbursed for the Five Bank Accounts, as required by section 2831.2 of Title 10, California Code of Regulations.

Respondent's Evidence

13. Respondent testified at hearing. Respondent is still an employee of Kuolin.

14. Respondent admits that he violated the Real Estate Law, but contends that he did so unknowingly. He ceased all property management activity promptly after the audit. Respondent reports that he did not solicit the property management business of the owners, rather they were friends who asked him to help take care of their properties. That contention was corroborated by letters from two of the owners. Respondent did not enter into written contracts with the owners for those services. Respondent contends that the owners voluntarily compensated him for his time, mileage and gasoline costs. Respondent reports that this compensation was as little as \$80 per month for some of the properties.

15. Respondent contends that he did not know a broker's license was required to perform property management services, he thought it was permissible to do so under his salesperson license. He also contends that he did not know he was required to: maintain funds received in that capacity in a trust fund; disburse funds within 25 days; maintain a separate Control Record for each account; maintain accurate separate records for each beneficiary for each account; or to complete monthly reconciliations. Respondent has never taken a course in handling trust funds.

16. After the audit, respondent stopped performing property management services and has no intention of performing such services in the future.

17. Respondent is willing to pay complainant's costs because he did violate the law, but believes that revocation of his license would be unfair because his violations were unintentional and he corrected them immediately.

Costs

18. Complainant requests \$8,554.07 in investigation and enforcement costs, consisting of \$5,287.02 in audit costs, \$1,420.30 in other investigation costs, and \$1,846.75 in prosecution costs reflecting time spent on this matter by counsel for the Department. That request is supported by sworn statements that comply with the requirements of California Code of Regulations, title 1, section 1042. In the absence of any argument or evidence to the contrary, complainant is found to have reasonably incurred \$8,554.07 in the investigation and enforcement of this matter.

LEGAL CONCLUSIONS

First Cause for Discipline (Unlicensed Activity and Compensation)

1. The Department may discipline the license of: a real estate licensee who acts in the capacity of a real estate broker without first obtaining a real estate broker license (§ 10130); a real estate salesperson who receives compensation for activity requiring a real estate license from anyone other than the salesperson's supervising broker (§ 10137); or a real estate licensee who willfully disregards or violates the Real Estate Law or demonstrates negligence or incompetence in performing licensed activity (§ 10177, subds. (d) & (g).) Cause exists to discipline respondent's salesperson license under sections 10130, 10137, and 10177, subdivisions (d) and (g), in light of the matters set forth in Findings 6 through 9.

Second Cause for Discipline (Trust Account Violations)

2. The Department may also discipline the license of a real estate licensee who: commingles with his own money the money of others which is received and held by him, or violates the regulations governing the handling of trust funds. (§ 10176, subd. (e).) Cause exists to discipline respondent's salesperson license under sections 10176, subdivision (e), and 10177, subdivisions (d) and (g), in light of the matters set forth in Findings 11 and 12.

Determination of Discipline

3. Cause for discipline having been established, the remaining issue is what level of discipline is required to protect the public. Rehabilitation factors include the time elapsed, correction of the responsible business practice, and subsequent misconduct. (Cal. Code Regs., tit. 10, § 2912.)

Respondent engaged in unlicensed activity and should have known such activity required a broker's license. Further, respondent grossly failed to handle trust funds in accordance with the Real Estate Law. However, respondent has been licensed since 2006 and has no prior record of discipline. No harm to any client or member of the public was shown. Respondent cooperated with the Department's audit, admits his misconduct, and ceased his misconduct promptly after the audit. As such, respondent appears to be a good candidate for a restricted license. The public will be adequately protected by revocation of respondent's license; issuance of a restricted license for a period of two years; a 60-day actual suspension of the restricted license; and a requirement that respondent complete a trust fund handling course.

Costs

4. Pursuant to Business and Professions Code section 125.3, complainant may request an administrative law judge to order a licensee found to have violated the licensing act to pay an amount that does not exceed the reasonable costs of investigation and enforcement. Complainant proved reasonable costs of enforcement in the amount of \$8,554.07. (Factual Finding 18.)

5. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth guidelines for determining whether costs should be assessed in the particular circumstances of each case. The Department must consider whether to do so will unfairly penalize the licensee who has committed misconduct, but who has used the hearing process to obtain a dismissal or a reduction in the severity of the discipline imposed, as well as whether the licensee will be financially able to pay the full costs of investigation and prosecution when it has conducted a disproportionately large investigation to prove that a licensee engaged in relatively innocuous misconduct. (*Id.* at pp. 44–45.) No cause for a reduction of the cost award was established.

ORDER

All licenses and licensing rights of respondent Gary Ying Wu Shing under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to section 10156.5 of the Business and Professions Code if respondent makes application therefor and pays to the Department of Real Estate the appropriate fee for the restricted license within 90 days from the effective date of this Decision. The restricted license issued to respondent

shall be subject to all of the provisions of section 10156.7 of the Business and Professions Code and to the following limitations, conditions and restrictions imposed under authority of section 10156.6 of that Code:

1. The restricted license issued to respondent may be suspended prior to hearing by order of the Real Estate Commissioner in the event of respondent's conviction or plea of nolo contendere to a crime which is substantially related to respondent's fitness or capacity as a real estate licensee.
2. The restricted license issued to respondent may be suspended prior to hearing by order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that respondent has violated provisions of the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to the restricted license.
3. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor for the removal of any of the conditions, limitations or restrictions of a restricted license until two years have elapsed from the effective date of this Decision.
4. Respondent shall submit with any application for license under an employing broker, or any application for transfer to a new employing broker, a statement signed by the prospective employing real estate broker on a form approved by the Department of Real Estate which shall certify:
 - (a) That the employing broker has read the Decision of the Commissioner which granted the right to a restricted license; and

(b) That the employing broker will exercise close supervision over the performance by the restricted licensee relating to activities for which a real estate license is required.

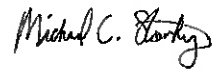
5. Respondent shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education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

6. Respondent shall, within 60 days from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that respondent has completed a course on the proper handling of real estate trust funds. This course will not be used to satisfy continuing education requirements.

7. Suspension: Any restricted real estate license issued to respondent pursuant to this Decision shall be suspended for 60 days from the date of issuance of said restricted license.

8. Respondent shall pay the Department of Real Estate \$8,554.07 for the reasonable costs of investigation and enforcement of this matter.

DATE: 10/30/2020

A handwritten signature in black ink, appearing to read "Michael C. Starkey".

MICHAEL C. STARKEY

Administrative Law Judge

Office of Administrative Hearings