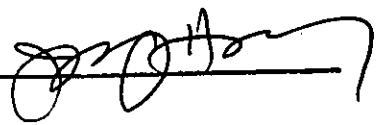


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FILED
NOV 23 2004
DEPARTMENT OF REAL ESTATE

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

By 

* * *

In the Matter of the Accusation of)
PETER ALLEN SMITH, JR.,)
Respondent.)

NO. H-30702 LA
L-2004030366

DECISION

The Proposed Decision dated September 23, 2004, 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 December 13, 2004.

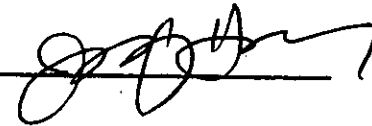
IT IS SO ORDERED , 2004.

JEFF DAVI
Real Estate Commissioner



BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED
OCT 27 2004
DEPARTMENT OF REAL ESTATE

By 

In the Matter of the Accusation Against:) Agency No. H-30702 LA
)
PETER ALLEN SMITH, Jr.,) OAH No. L-2004030366
)
Respondent.)
_____)

PROPOSED DECISION

This matter came on regularly for hearing before Carolyn D. Magnuson, Administrative Law Judge of the Office of Administrative Hearings, in Los Angeles, California, on August 24, 2004.

Darlene Averetta, Staff Counsel, represented the Complainant.

Paul D. Bojic, Attorney at Law, represented Peter Smith, who was present at the hearing.

Testimonial and documentary evidence was received, and the matter submitted at the close of the hearing.

FACTUAL FINDINGS

1. Maria Suarez (Complainant) made the Accusation in her official capacity as a Deputy Real Estate Commissioner of the Department of Real Estate (Department) of the State of California.

2. Paul Allen Smith, Jr. (Respondent) holds real estate broker license number 01063501 issued to him by the Department. In November 2003 the Department authorized Respondent to use the fictitious business name of Smith Mortgage. Until then, there were no authorized fictitious business names associated with the license. The license was in full force and effect at all relevant times.

3. In November 2003, an auditor for the Department audited Respondent's real estate business books and records for the period January 1, 2003 through October 31, 2003 to determine whether Respondent was complying with the real estate law and regulations.

4. Respondent has been a licensed broker since 1994. His main occupation is brokering mortgage loans to financial institutions; and when so engaged, he does business

under the name of Smith Mortgage. In September 2003, Respondent hired Sandra Brody to be an escrow officer and, thereafter, began providing escrow services. This business was conducted under the name Smith Mortgage Escrow.

5. At the time Respondent hired Ms. Brody, he was aware that she was being investigated by the Department of Corporations with regard to shortages in her escrow company. Ms. Brody told Respondent that the problem was with the software she had been using.

6. Respondent opened a bank account for the escrow business at Tamalpais Bank under the name The Smith Group Inc. The account was not designated as a trust account. Both Respondent and Ms. Brody were signatories on the account even though Ms. Brody was not licensed by the Department and no fidelity bond had been obtained for her. Ms. Brody signed all the checks on the escrow account. Respondent did not do a monthly reconciliation of the account.

7. Respondent's personal bank account was also at Tamalpais Bank. Whenever Respondent's personal account balance was low, the bank automatically transferred funds from the escrow account into Respondent's personal account. In September and October 2003, transfers totaling \$69,706.26 were made from the escrow account to Respondent's account and transfers of \$44,000 were made from Respondent's account to the escrow account, resulting in a net shortage in the escrow account of \$25,780.26. The balance in Respondent's personal bank account was, at times, less than the amount of escrow funds that had been transferred to the account. When that occurred, Respondent converted the trust funds to his own use. Respondent acknowledged that he did not have the written consent of the principals in the escrows to make these transfers and reduce the balance in the escrow account below the amount of the existing obligations.

8. Respondent denies authorizing the transfers between the two accounts and claims that Ms. Brody must have done so. However, Ms. Brody was not a signatory on Respondent's personal account, so it would have been difficult for her to have arranged the automatic transfers. Moreover, it is hard to think of a reason why Ms. Brody would arrange to cover Respondent's personal financial needs with escrow funds. It also seems odd that so much money could have gone in and out of Respondent's personal account without his noticing the transactions.

9. The escrow instructions Respondent used did not include his licensed name and the name of the issuing department and did not disclose Respondent's financial interest in the escrow. In three escrows, Respondent failed to provide the mandated written disclosures. In one escrow, Respondent failed to disclose the rebate he received from the lender. On two occasions, trust funds were not deposited into the escrow account by the following day.

10. The auditor met with Respondent and informed him of the various violations he had confirmed through the audit. Respondent was very cooperative and acted promptly to correct the problems. He immediately contacted the Department to obtain authorization do

business as Smith Mortgage, and he removed Ms. Brody as an authorized signatory on the escrow account. Shortly thereafter, Respondent closed the escrow business. He made good the shortage in the escrow account.

11. Respondent has worked in the real estate field for sixteen years and has no other record of discipline. Subsequent to the audit, Respondent provided the auditor with evidence that Ms. Brody had forged checks on the escrow account.

LEGAL CONCLUSIONS

12. Business and Professions Code section 10145 sets out in detail the manner in which a real estate licensee is to handle trust funds.¹ California Code of Regulations, title 10, section 2832.1 requires a licensee to obtain written permission to reduce the balance of a trust fund below the aggregate liability and section 2951 applies this obligation to escrow accounts. Because Respondent made unauthorized withdrawals from the escrow account which reduced its balance below the amount owed to the principals, grounds to discipline his license exist.

13. California Code of Regulations, title 10, section 2832.2 requires a licensee to do a monthly reconciliation of trust account receipts and disbursements and section 2951 applies this obligation to escrow accounts. Because Respondent did not do a reconciliation of the escrow account for September 2003, he violated this provision and thereby established grounds to discipline his license.

14. California Code of Regulations, title 10, section 2832 requires a licensee to use a trust account as the repository for trust funds and section 2950, subdivision (f), requires a licensee to deposit trust funds in such an account by close of business of the following business day. Respondent failed to designate the escrow account as a trust account and failed to timely deposit two escrow checks thereby establishing cause to discipline his license.

15. California Code of Regulations, title 10, section 2834 requires a fidelity bond for an unlicensed employee who is authorized to sign checks on a trust account and section 2951 applies this requirement to an escrow trust account. Respondent allowed Ms. Brody to sign escrow account checks even though she was not licensed by the Department and had no fidelity bond thereby establishing grounds to discipline his license.

16. Business and Professions Code section 10176, subdivision (e) and California Code of Regulations, title 10, section 2835 prohibit a licensee from co-mingling trust funds with his personal funds and section 2951 applies this requirement to an escrow trust account. By allowing automatic fund transfers between the escrow account and his personal account, Respondent violated these provisions thereby establishing grounds to discipline his license.

¹ Business and Professions Code section 10145 is incorporated into each finding that a cause for discipline exists even though it has not been specifically cited in each case,

17. Business and Professions Code section 10159.5 and California Code of Regulations, title 10, section 2731 require a licensee to obtain authorization from the Department to use a fictitious business name when engaging in licensed activities. During the audit period, Respondent had no authorization to use the names Smith Mortgage, Smith Mortgage Escrow or The Smith Group Inc. and by doing so violated these provisions thereby establishing grounds to discipline his license.

18. California Code of Regulations, title 10, section 2950, subdivision (h), requires a licensee to notify parties to an escrow in writing of his ownership interest in the company handling their escrow transaction. Respondent failed to make this disclosure in every escrow thereby violating this provision and establishing grounds to discipline his license.

19. Business and Professions Code section 10240, subdivision (a), requires a licensee who is brokering a loan to provide a disclosure statement to the borrower and to retain a copy of that disclosure in the loan file. In at least three cases, Respondent either failed to provide the disclosure or failed to retain a copy of it in violation of this provision thereby establishing grounds to discipline his license.

20. Imposition of discipline against Respondent's license for the violations identified above is authorized by provisions of Business and Professions Code sections 10176 and 10177. The purpose of such discipline is to protect the public from licensees who are potentially harmful in their character or business practices.

21. Although Respondent has many trouble free years in the real estate business, the violations found in this case are so egregious that they pose a serious threat to the public.

22. Respondent attempted to place the responsibility for the violations on Ms. Brody. No doubt, to some extent the blame is hers. However, it is Respondent, who knew that Ms. Brody was being investigated for shortages in her escrow business, who nonetheless hired her and allowed Ms. Brody to run the escrow business virtually unsupervised. Moreover, the most culpable conduct – that of commingling and converting escrow funds was not done by Ms. Brody, or at least, was not done without Respondent's knowledge and approval.

23. In the criminal arena conversion is known by the term "theft." No doubt Respondent did not intend to permanently keep the funds transferred to his account. Indeed, he had returned \$44,000 to the escrow account at the time of the audit. Still, he took money held in trust by him, not belonging to him, and used it for his own benefit. In addition, at the hearing, Respondent was less than honest when he testified that he was completely unaware of the link between the two accounts.

24. It is difficult to think of an attribute more essential in a real estate licensee than honesty. Respondent's conduct with regard to the escrow business, and in particular the escrow account, casts great doubt on his honesty and integrity. Respondent failed to offer any adequate explanation for his conduct or persuasive evidence that such conduct would not recur. In the absence of such proof, the risk to the public as established by the Respondent's behavior

in violating various laws and regulations and by his lack of candor at the hearing is too great to allow him to retain his license.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

All licenses and licensing rights of Respondent, Peter Allen Smith, Jr.,
under the Real Estate Law are revoked

Dated: September 23, 2004

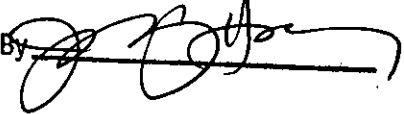


CAROLYN D. MAGNUSON
Administrative Law Judge
Office of Administrative Hearings

SACTO

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SBN 175887
2 Department of Real Estate
320 West 4th Street, Suite 350
3 Los Angeles, California 90013-1105
4 Telephone: (213) 576-6982
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FILED
FEB 3 2004
DEPARTMENT OF REAL ESTATE

By: 

6
7
8 BEFORE THE DEPARTMENT OF REAL ESTATE
9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Accusation of) NO. H-30702 LA
12 PETER ALLEN SMITH, JR.,) A C C U S A T I O N
13 doing business as, Smith)
Mortgage,)
14 Respondent.)
15

16 The Complainant, Maria Suarez, a Deputy Real Estate
17 Commissioner of the State of California, for cause of Accusation
18 against PETER ALLEN SMITH, JR., doing business as Smith Mortgage
19 ("Respondent") is informed and alleges as follows:

20 I

21 The Complainant, Maria Suarez, a Deputy Real Estate
22 Commissioner of the State of California, makes this Accusation in
23 her official capacity.

24 II

25 Respondent is presently licensed and/or has license
26 rights under the Real Estate Law, Part 1 of Division 4 of the
27 Business and Professions Code ("Code") as a real estate broker.

1 III

2 At all times mentioned herein, Respondent was licensed
3 by the Department of Real Estate of the State of California
4 ("Department") as a real estate broker, acting for compensation
5 and in expectation of compensation, and performing acts for which
6 a real estate license is required.

7
8 AUDIT VIOLATIONS

9 IV

10 At all times material herein, Respondent engaged in the
11 business of, acted in the capacity of, advertised or assumed to
12 act as a real estate broker in the State of California, within
13 the meaning of Section 10131(d) of the Code, including the
14 solicitation of borrowers and lenders for or negotiating loans or
15 collecting payments or performing services for borrowers or
16 lenders or note holders in connection with loans secured directly
17 or collaterally by liens on real property or on a business
18 opportunity.

19 In connection with the above-described activities,
20 Respondent engaged in the business of, acted in the capacity of,
21 advertised, or assumed to act as escrow holder, servicer and/or
22 agent, and thereby acted or assumed to act under the exemption
23 from provisions of the Escrow Law as provided by Section
24 17006(a)(4) of the California Financial Code.

25 V

26 Also in connection with the activities described in
27 Paragraph IV, above, Respondent accepted or received funds in
trust ("trust funds") from or on behalf of property borrowers and

1 lenders and thereafter made deposits and or disbursements of such
2 funds. From time to time herein mentioned, said trust funds were
3 deposited and/or maintained by Respondent, in bank account no.
4 0110204601, known as "The Smith Group, Inc." ("Escrow Account"),
5 at Tamalpais Bank, 851 Irwin Street, Suite 102, San Rafael,
6 California 94901.
7

8 VI

9 On or about December 4, 2003, Department auditor, Ron
10 Revilla, completed an examination of the books and records of
11 Respondent pertaining to the real estate and trust fund handling
12 activities described in Paragraphs IV and V, above, covering a
13 period from approximately January 1, 2003 to October 31, 2003
14 which examination revealed violations of the Code and of Title
15 10, Chapter 6, California Code of Regulations ("Regulations") as
16 set forth below and as more specifically set forth in Audit
17 Reports No.s LA 030186 and LA 030194 and the exhibits attached to
18 said report.

19 VII

20 In the course of activities described in Paragraphs IV
21 and V, above, and during the examination period described in
22 Paragraph VI, Respondent acted in violation of the Code and the
23 Regulations in that:

24 (a) As of October 31, 2003, the Escrow Account had a
25 shortage in the amount of approximately \$25,780.26. Respondent
26 caused, permitted and/or allowed, the withdrawal or disbursement
27 of trust funds from this account, without the prior written

1 consent of every principal who then was an owner of funds in the
2 account, thereby reducing the balance of funds in the said
3 account to an amount less than the existing aggregate trust fund
4 liability of the broker to all owners of said trust funds, in
5 violation of Code Section 10145 and Regulations 2832.1 and 2951;

6
7 (b) Respondent failed to perform a monthly reconciliation
8 of the columnar records for the Escrow Account in violation of
9 Section 10145 of the Code and Regulations 2831.2 and 2951;

10 (c) Respondent failed to designate the Escrow Account as a
11 Trust Account in the name of Respondent as trustee, in violation
12 of Section 10145 of the Code and Regulation 2832; in addition, on
13 at least two occasions, trust funds received by Respondent were
14 not deposited into the escrow account by the following business
15 day in violation of Regulation 2950(f);

16 (d) Respondent permitted an unlicensed individual, not
17 covered by a fidelity bond, to act as signatory on the escrow
18 account in violation of Code Section 10145 and Regulations 2834
19 and 2951;

20 (e) Respondent allowed funds from the Escrow Account to be
21 transferred to his personal bank account to avoid overdrafts,
22 thus commingling funds in violation of Sections 10145 and
23 10176(e) of the Code and Regulations 2835 and 2951;

24 (f) Respondent violated Section 10159.5 of the Code and
25 Regulation 2731 when he utilized the business names of "Smith
26 Mortgage" and "Smith Mortgage Escrow" without first obtaining a
27 license from the Department bearing said fictitious business
names;

1 (g) Respondent violated Regulation 2950(h) when he failed
2 to advise parties in writing of his ownership interest in the
3 escrow company handling their escrow transactions;
4

5 (h) Respondent violated Code Section 10240(a) when he
6 failed to maintain Mortgage Loan Disclosure Statements in three
7 loan files examined by the Department's auditor.

8 VIII


9 The conduct, acts and omissions of Respondent as
10 described in Paragraph VII, above, are in violation of
11 Regulations 2731, 2831.2, 2832, 2832.1, 2835, 2950(f), 2950(h),
12 and 2951 and Sections 10145, 10159.5 and 10240(a) of the Code and
13 constitutes cause under Sections 10176(e), 10177(d) and 10177(g)
14 of the Code for the suspension or revocation of all real estate
15 licenses and license rights of Respondent under the Real Estate
16 Law.

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WHEREFORE, Complainant prays that a hearing be conducted on the allegations of this Accusation and, that upon proof thereof, a decision be rendered imposing disciplinary action against all licenses and license rights of Respondent PETER ALLEN SMITH, JR., under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code) and for such other and further relief as may be proper under other applicable provision of law.

Dated at Los Angeles, California
this 3rd day of February, 2004.



MARIA SUAREZ
Deputy Real Estate Commissioner

cc: Peter Allen Smith, Jr.
Maria Suarez
SACTO
LA Audits (Revilla)
AK