

FILED

MAY - 3 2013

BEFORE THE DEPARTMENT OF REAL ESTATE DEPARTMENT OF REAL ESTATE
BY: 62

STATE OF CALIFORNIA

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In the Matter of the Accusation of)	DRE No. H-37969 LA
)	
JENIFFER BERTHA HERNANDEZ)	OAH No. 2012060233
)	
)	
Respondent.)	
_____)	

DECISION

The Proposed Decision dated April 5, 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.

Pursuant to Section 11517(c)(2) of the Government Code, the following correction is made to the Proposed Decision:

Caption, Page 1, "JENNIFER BERTHA HERNANDEZ" is corrected to read "JENIFFER BERTHA HERNANDEZ".

This Decision shall become effective at 12 o'clock noon on
May 23, 2013.

IT IS SO ORDERED

4/29/2013

REAL ESTATE COMMISSIONER


Wayne S. Bell

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JENNIFER BERTHA HERNANDEZ,

Respondent.

Case No. H-37969

OAH No. 2012060233

PROPOSED DECISION

This matter was heard on January 28, 2013, by Erlinda G. Shrenger, Administrative Law Judge with the Office of Administrative Hearings, in Los Angeles.

Lisette Garcia, Counsel, represented Complainant.

Jennifer Bertha Hernandez (Respondent) represented herself.

Oral and documentary evidence was received, and argument was heard. The matter was submitted for decision on January 28, 2013.

FACTUAL FINDINGS

Parties and Jurisdiction

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

2. Respondent is licensed by the Department as a real estate broker. Her real estate broker license, number B/01255811, was originally issued on July 19, 2005. The license will expire on July 18, 2013, unless renewed.

3. Respondent is authorized by her real estate broker license to conduct business as Sol Investments. The main office is located in Alta Loma. Respondent is the employing broker for three real estate salespersons.

4. Jose Manuel Hernandez (Mr. Hernandez) is Respondent's father. Mr. Hernandez is licensed by the Department as a real estate salesperson.¹ Mr. Hernandez testified he has worked as a real estate agent since 1988, and has worked in Respondent's office since 2006.

Audit of Respondent's Records

5. Starting in March 2011, the Department conducted an audit of the books and records for Respondent's real estate activities.² The audit period was June 1, 2008, through March 31, 2011. The audit was completed on July 1, 2011. The purpose of the audit was to determine whether Respondent handled and accounted for trust funds and other real estate activities in accordance with the Real Estate Law and the Department's regulations. The Department's auditor reviewed a sample of Respondent's client files, and interviewed Respondent and Mr. Hernandez.

6. The audit disclosed that Respondent did not maintain a trust account for any of the residential resale activities during the audit period. At hearing, both Respondent and Mr. Hernandez testified Respondent does not have a trust account. Respondent testified that, for any deposits received, Mr. Hernandez would hold the checks himself.

7. Respondent maintained a "Record of All Trust Funds Received" (Log), which was a log with handwritten entries for trust funds received by Sol Investments. (Exh. 4, pp. 1-3.) The Log indicated, among other things, the date the trust funds were received, the name of the person who provided the funds, the amount of funds, and the date the trust funds were forwarded to escrow or other principal. Mr. Hernandez wrote all of the entries on the 2008, 2009, and 2010 Logs for Sol Investments' transactions.

8. (A) The 2008 Log indicates Respondent received a \$3,000 check from V.C. on June 17, 2008, for a transaction involving real property in Rancho Cucamonga. The 2008 Log indicates the check was forwarded to the escrow company on *January 22, 2008*.

(B) Respondent's records for this transaction include a Residential Purchase Agreement and Joint Escrow Instructions dated June 17, 2008, by which Respondent's clients, V.C. and E.M., offered to purchase the property for \$465,000. (Exh. 7) This purchase agreement indicates that the buyers, V.C. and E.M., had given Respondent a personal check of \$2,000 as an initial deposit. Respondent's records indicate that V.C. and

¹ Official notice is taken of the Department's records, accessible on its website, showing that Mr. Hernandez was issued a real estate salesperson license, number 00991974, which is set to expire on May 24, 2016. (Gov. Code, § 11515; Evid. Code, § 452, subd. (h).)

² The audit report includes findings regarding a transaction for Carmen R. and real property in Victorville. This transaction, however, is not included in the Accusation as a basis for discipline against Respondent's license.

E.M. accepted the seller's counter offer number one on June 21, 2008. One of the terms of the counter offer was that the amount of the buyer's initial deposit would be increased to \$3,000.

(C) The information on the 2008 Log for this transaction is not accurate. The 2008 Log indicates V.C.'s check was forwarded to escrow on *January 22, 2008*, which is obviously erroneous in light of the entry indicating the check was received on *June 17, 2008*. Mr. Hernandez admitted he made a mistake by writing January 22 as the date the check was forwarded to escrow. He initially testified that the correct date was July 22, 2008. However, after reviewing Respondent's records, Mr. Hernandez testified the check was forwarded on June 22, 2008. The records indicated that V.C. and E.M. accepted the seller's counter offer on June 21, 2008.

(D) The 2008 Log for this transaction is not consistent with the terms of the purchase agreement. The 2008 Log indicates Respondent received a \$3,000 check from V.C. on June 17, 2008. A copy of the front of the check was presented. (Exh. 4, p. 4.) The purchase agreement dated June 17, 2008, states that an initial deposit of \$2,000 was given to Respondent. There is no entry on the 2008 Log corresponding to receipt of an initial deposit of \$2,000 for this transaction. The amount of the initial deposit was not increased to \$3,000 until June 21, 2008, when V.C. and E.M. accepted the seller's counter offer. Based on the documents, V.C. had no obligation to pay a \$3,000 deposit before June 21, 2008. There is no evidence to explain why she did so on June 17, 2008, as reflected in Respondent's records.

(E) It was established that Respondent failed to maintain an accurate and complete record of trust funds received and disbursed in connection with the V.C. and E.M. transaction, in violation of Business and Professions Code section 10145 and California Code of Regulations, title 10, section 2831.

9. (A) The 2010 Log indicates Respondent received a \$1,000 check from C.F. on March 13, 2010, for a transaction involving real property in Riverside. The 2010 Log indicates the check was forwarded to the escrow company on May 1, 2010.

(B) Respondent's records for this transaction include a Residential Purchase Agreement and Joint Escrow Instructions dated March 13, 2010, by which Respondent's client, C.F., offered to purchase the real property for \$240,000. (Exh. 8.) This written offer indicates that the buyer, C.F., had given Respondent a personal check of \$1,000 as an initial deposit which would be held uncashed until acceptance of the offer and then deposited with escrow within three business days after acceptance. This \$1,000 deposit is recorded in the 2010 Log. The seller accepted C.F.'s written offer to purchase the property on March 13, 2010. The 2010 Log indicates that Respondent did not forward C.F.'s check for \$1,000 to the escrow company until May 1, 2010. A receipt from the escrow company established that the check was received on May 24, 2010. Mr. Hernandez admitted that C.F. did not give him written authorization to hold his check beyond three days after the seller's acceptance of C.F.'s offer to purchase.

(C) It was established that Respondent failed to forward C.F.'s earnest money deposit within three business days following the acceptance of C.F.'s offer, without authorization from C.F., in violation of Business and Professions Code section 10145 and California Code of Regulations, title 10, section 2832.

10. (A) The 2010 Log indicates Respondent received a \$1,000 check from D.H. on March 22, 2010, for a transaction involving real property in Compton. A copy of the front of the check was presented. The 2010 Log indicates the check was forwarded to the escrow company on April 1, 2010. However, a receipt from the escrow company indicates it received the check on March 24, 2010. The receipt includes a notation that it was printed on March 24, 2010, at 2:35 p.m. Based on that receipt, the 2010 Log is not accurate as to the date that D.H.'s check was forwarded to the escrow company. Therefore, it was established that Respondent failed to maintain an accurate and complete record of trust funds received and disbursed, in violation of Business and Professions Code section 10145 and California Code of Regulations, title 10, section 2831.

(B) Respondent's records for this transaction include a Residential Income Property Purchase Agreement and Joint Escrow Instructions dated September 8, 2009, by which Respondent's clients, D.H. and F.R., offered to purchase the real property for \$199,000. (Exh. 4, p. 7.) This purchase agreement included a representation that, as of September 8, 2009, the buyers, D.H. and F.R., had given Respondent an initial deposit of \$1,000 by personal check which would be held uncashed until acceptance of the offer and then deposited with escrow within three business days after acceptance. The representation that Respondent held such deposit as of September 8, 2009, was false. Respondent did not receive the \$1,000 check from D.H. until March 22, 2010. Thus, it was established that Respondent misrepresented to the seller that the initial deposit was received from the buyers at the time the purchase agreement was drawn when, in fact, there was no such check received, in violation of Business and Professions Code section 10176, subdivision (a).

(C) It cannot be determined from the evidence presented whether Respondent forwarded D.H.'s check to the escrow company within three days of the acceptance of D.H. and F.R.'s offer. The purchase agreement dated September 8, 2009, indicates the offer was accepted by the seller on September 10, 2009. (Exh. 4, p. 17.) D.H.'s check for the initial deposit was not received by Respondent until March 22, 2010. Since the trust funds at issue were received by Respondent six months *after* the acceptance of the offer on September 10, 2009, it cannot be established, from this record, that Respondent failed to forward trust funds within three days of acceptance of the offer, in violation of Business and Professions Code section 10145 and California Code of Regulations, title 10, section 2832.

(D) Respondent's documentation for this transaction is confusing. Mr. Hernandez testified that, prior to D.H. and F.R., he represented another buyer for this property, but the transaction for that first buyer fell through. Subsequently, D.H. and F.R. became the buyers for the property. D.H. gave Mr. Hernandez the deposit check on March 22, 2010. Mr. Hernandez testified the listing agent for the property told him to use the date of the first buyer's offer (i.e., September 8, 2009) as the date of the purchase agreement for

D.H. and F.R.'s offer. Mr. Hernandez testified that is what he did. But he gave no reason justifying why documentation for D.H. and F.R.'s offer should be dated according to the first buyer's unsuccessful offer.

Mitigation / Rehabilitation

11. Respondent received her Ph.D. in biological sciences from U.C. Irvine in 2011. She is currently employed at the Salk Institute in La Jolla on a fellowship to do research, Monday through Friday, 7 a.m. to 4 p.m. The distance between La Jolla and Alta Loma is approximately 115 miles.³ Respondent, as the licensing broker, supervises the Alta Loma office by visiting once a month, for one to two hours. Mr. Hernandez is in charge of the office when she is not there.

12. Both Mr. Hernandez and Respondent testified at the hearing. Mr. Hernandez provided the bulk of the testimony at the hearing. Respondent testified because Complainant's counsel called her as a witness pursuant to Government Code section 11513, subdivision (b).⁴ It was clear from Respondent's testimony she had no direct knowledge of the transactions described in Findings 8, 9, and 10, above. Nor did her testimony indicate any familiarity with the documentation and records of those transactions. Her testimony showed no familiarity with real estate laws and regulations. She deferred to her father's testimony when asked about the transactions. Mr. Hernandez was directly involved in the transactions. His name appears on the documents. It was clear from Mr. Hernandez's testimony that he was more knowledgeable and familiar with the subject transactions, the documentation, and the real estate activities of Sol Investments.

13. At the hearing, Respondent did not contest the findings of the Department's audit. Her only explanation was that there was "no malicious intent" and that her father "just entered the dates wrong." Respondent wants to retain her real estate broker license as a "back-up" (her words).

Cost Recovery

14. The Department incurred enforcement costs of \$1,112.50 and investigative costs of \$3,651, for a total amount of \$4,763.50. These costs are deemed reasonable, based on the declarations of Lissete Garcia and Eric Goff.

³ Official notice is taken that the driving distance between Alta Loma and La Jolla, one way, is approximately 115 miles. (Gov. Code, § 11515; Evid. Code, § 452, subd. (h).)

⁴ Government Code section 11513, subdivision (b), provides, in part: "If respondent does not testify in his or her own behalf, he or she may be called and examined as if under cross-examination."

LEGAL CONCLUSIONS

1. Cause exists to suspend or revoke Respondent's broker license, pursuant to Business and Professions Code section 10177, subdivision (d), in that Respondent willfully disregarded and violated the Real Estate Law and applicable regulations as follows:

- a. Failed to maintain accurate and complete records of trust funds, in violation of Business and Professions Code section 10145 and California Code of Regulations, title 10, section 2831. (Factual Findings 6, 7, 8, and 10(A).)
- b. Failed to forward trust funds to escrow within three business days of acceptance of the offer, in violation of Business and Professions Code section 10145 and California Code of Regulations, title 10, section 2832. (Factual Finding 9.)
- c. Misrepresented to the seller that the buyer's initial deposit was received at the time the purchase agreement was drawn, in violation of Business and Professions Code section 10176, subdivision (a). (Factual Finding 10(B).)

2. Cause exists to suspend or revoke Respondent's broker license, pursuant to Business and Professions Code section 10177, subdivision (h), and California Code of Regulations, title 10, section 2725, in that Respondent, as a broker licensee, failed to exercise reasonable supervision over the activities of her salespersons, based on Factual Findings 2-4 and 11.

3. "Reasonable supervision" that a real estate broker is required to exercise over the activities of his or her salespersons includes, as appropriate, the establishment of policies, rules, procedures, and systems to review, oversee, inspect and manage, among other things, transactions requiring a real estate license, documents which may have a material effect on the rights and obligations of a party to the transactions, and the handling of trust funds. (Cal. Code Regs., tit. 10, § 2725, subds. (a), (b), and (d).) Respondent is the employing broker for three salespersons. Her supervision of those salespersons consists of visiting the office once a month for one to two hours, and leaving Mr. Hernandez, a licensed salesperson, in charge of the office the rest of the time. This does not constitute reasonable supervision of salespersons. No evidence was presented that Respondent has policies, rules, and procedures to review, oversee, and manage the activities of the salespersons employed under her broker license. Mr. Hernandez, not Respondent, is reviewing, overseeing, and managing the activities of the other salespersons.

4. Cause does not exist to suspend or revoke Respondent's broker license, pursuant to Business and Professions Code section 10177, subdivision (g), for negligence. This ground for discipline was not established by the evidence.

5. Administrative proceedings to revoke, suspend or impose discipline on a professional license are noncriminal and nonpenal; they are not intended to punish the licensee, but rather to protect the public. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 785-786.) In particular, the statutes relating to real estate licenses are designed to protect the public from any potential risk of harm. (*Lopez v. McMahon* (1988) 205 Cal.App.3d 1510, 1516; *Arneson v. Fox* (1980) 28 Cal.3d 440.)

6. The evidence in this case showed that Respondent, in essence, allowed Mr. Hernandez to function as a real estate broker under *her* broker license. She left it to Mr. Hernandez, who is licensed only as a salesperson, to carry out the fiduciary and supervisory duties required by her broker license. Respondent, as a licensed broker, should know this is not allowed by the laws and regulations that govern her license. Her lack of knowledge of the transactions and documents that were the subject of the Department's audit, and her reliance on Mr. Hernandez's knowledge for the same, demonstrate that she does not fully understand the duties and responsibilities of her real estate broker license. Her lack of understanding is troubling. Currently, Respondent is focused on her career in biological sciences and real estate is merely a "back up." She offered no evidence that she is changing her business practices to ensure future compliance with her fiduciary and supervisory duties as a broker. Respondent's violations are not excused or mitigated by the fact that no consumers or clients suffered financial injury as a result of her violations. Consumers face a potential risk of harm when they deal with salespersons who are not properly supervised by a licensed broker as required by law. Under the circumstances, the revocation of Respondent's broker's license is necessary and appropriate to ensure public protection.

7. Pursuant to Business and Professions Code section 10106, cause exists to require Respondent to pay the Department \$4,763.50 for the reasonable cost of enforcement and investigation in this matter. (Factual Finding 14.) However, since Respondent will no longer be able to work as a real estate broker due to the revocation of her license, and she is presently employed on a research fellowship, she will not be required to pay the costs at this time, but will be required to pay the full amount of costs (\$4,763.50) as a condition precedent to the reinstatement of her broker license or issuance of any new license by the Department.

ORDER

1. All licenses and licensing rights of Respondent Jennifer Bertha Hernandez under the Real Estate Law are revoked.

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2. Respondent shall pay \$4,763.50 to the Department only as a condition precedent to the reinstatement of her broker license number B/01255811 or issuance of any new license by the Department.

DATED: April 5, 2013



ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearings