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FILED

JUL 31 2013

BEFORE THE BUREAU OF REAL ESTATE

BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

By: Jana B. [unclear]

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|------------------------------------|---|--------------------|
| In the Matter of the Accusation of |) | BRE No. H-38461 LA |
| |) | OAH No. 2012110464 |
| WILSON OBED QUISPE, |) | |
| |) | |
| |) | |
| Respondent(s). |) | |
| _____ |) | |

DECISION

The Proposed Decision dated June 28, 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 AUG 20 2013.

IT IS SO ORDERED 7/22/2013.

REAL ESTATE COMMISSIONER



WAYNE S. BELL

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

WILSON QUISPE,

Respondent.

DRE No. H-38461 LA

OAH No. 2012110464

PROPOSED DECISION

This matter was heard on May 16, 2013, in Los Angeles, California, by David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California. Wilson Quispe (Respondent) represented himself. Maria Suarez (Complainant), Deputy Real Estate Commissioner, was represented by James A. Demus, Counsel for the Department of Real Estate (Department).

Oral and documentary evidence was received, and the matter was submitted for decision on May 16, 2013.

FACTUAL FINDINGS

1. Complainant brought the Accusation in her official capacity.
2. Respondent has been licensed as a real estate salesperson since October 7, 1998. His license will expire on August 4, 2016, unless renewed. The license is restricted, as of August 5, 2008, as the result of a settlement of a prior accusation wherein it was found that Respondent had been convicted on his plea of guilty of violating Penal Code section 475, subdivision (c), possession of a completed money order or check with the intent to defraud. Although Respondent was eligible to apply for an unrestricted license after three years (that is, as of August 5, 2011), he did not do so and the license is still restricted.
3. On October 13, 2009, Respondent signed an offer to purchase residential real estate on behalf of his clients, Robert Ayala and Maria Mora relating to a single family home in Moreno Valley. Respondent signed indicating that he was employed by Prudential California Realty (Prudential), a licensed real estate broker. In fact, Respondent was not employed by Prudential California Realty at that time. The property owner's broker made several contacts with Respondent to conclude the sale, but the buyers' deposit to Respondent was never forwarded to the escrow and the escrow was cancelled. Eventually, the owner sold the property to other buyers.

4. Prior to September 2009 Respondent had worked for Remax (the formal name of the brokerage was Moreno Valley Realty Inc.). He decided to look for another employing broker and had several interviews with Prudential (the formal name of the broker is Silver Oak Real Estate of Riverside County). Respondent signed a contract to work for Prudential on September 24, 2009, and paid \$393 to Prudential to be added to its errors and omissions policy. This check was not cashed. The next day he paid \$80 for Prudential business cards. This was cashed and he later received the business cards. He moved into the Prudential offices. He processed the transaction representing the buyers of the Moreno Valley property while he was at the Prudential office. The purchase agreement lists Prudential as the broker but includes the address of Respondent's prior employer, Remax, due to Respondent's failure to update the software he used to prepare the document to include his new business address.

5. On October 20, 2009, the office manager at Prudential informed Respondent that Prudential would not accept his employment contract because his license was restricted. Respondent was surprised because he had informed the manager about his restricted license during his interview. Respondent immediately contacted another broker he had interviewed with and began working for Coldwell Banker the next day. Although he tried to have the transaction for purchase of the Moreno Valley property transferred to Coldwell Banker, by this time the seller was more interested in accepting an offer from a different buyer.

6. Respondent's license was not transferred to indicate he was under the employ of Prudential. Respondent took no action to do so because he assumed that Prudential would.

7. Respondent was sincere in his testimony that he thought he was working for Prudential as of September 24 when he signed the contract and soon thereafter moved into its offices. He certainly believed he was employed by Prudential when the purchase offer was signed. Respondent had no intent to defraud anyone by virtue of this scenario. He is not aware of any complaints by any of his customers at Coldwell Banker and is held in high esteem by his colleagues and employing broker.

8. The Department's cost of investigation and enforcement is \$1,726.60, based on 19.4 hours of work by counsel at the rate of \$89 per hour.

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LEGAL CONCLUSIONS AND DISCUSSION

Based upon the foregoing factual findings, the Administrative Law Judge makes the following legal conclusions:

1. The Accusation alleges that Respondent has violated various statutes. Under Business and Professions Code¹ section 10176, a real estate licensee may have his license disciplined for "Making any substantial misrepresentation" (subdivision (a)), or any other conduct "which constitutes fraud or dishonest dealing." (Subdivision (i).)

2. Under section 10132, a real estate salesperson must be employed by a broker when he does acts requiring a license. Offering to buy real estate is an act requiring a license. (Section 10131, subdivision (a).) To act in the capacity of a broker or salesperson without a license is a violation of section 10130. Complainant alleges that, because Respondent was not employed by a broker (Prudential) when he submitted the purchase offer, he was operating without a license, in violation of sections 10177, subdivisions (d) and/or (g).

3. Under section 10177, a real estate license may be disciplined if a licensee "Willfully disregarded or violated the Real Estate Law . . ." (subdivision (d)) or "Demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license." (Subdivision (g).)

4. Various sources define or interpret fraud, dishonesty and misrepresentation. As stated in *Small v. Smith* (1971) 16 Cal.App.3d 450, 456: "The term 'dishonesty' has been defined in the scope of real estate disciplinary proceedings as follows: 'Dishonesty' necessarily includes the element of bad faith. As defined in the dictionaries and in judicial decisions, it means fraud, deception, betrayal, faithlessness. (Citations.) As put by the court in *Alsup v. State*, 91 Tex.Cr.R. 224 (238 S.W. 667), 'Dishonesty' denotes an absence of integrity; a disposition to cheat, deceive, or defraud; deceive and betray.' (*Hogg v. Real Estate Commissioner*, *Supra* (1942) 54 Cal.App.2d 712, 717, 129 P.2d 709, 711- 712.) As so defined dishonesty in itself demonstrates unfitness to be a broker or at least to require discipline as authorized by the statute."

5. The definitions of "dishonest" and "dishonesty" (Webster's Seventh New Collegiate Dict. (1969) p. 239), include references to willfulness, intent and fraud such that it may be reasonably concluded that there can be no dishonesty where there is no intent to deceive.

6. However, Respondent's intent is irrelevant to the determination of whether he engaged in misrepresentations in the purchase offer. In a case involving false medical records it was found that the danger is in falsely certifying facts which are not true, as

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

opposed to any intent to do evil. This is "regardless of the intent of the doctor signing the certificate." (*Brown v. State Department of Health* (1978) 86 Cal.App.3d 548, 556.)

7. Intent to deceive with respect to the truth of a representation is not an essential element of a cause of action for deceit. Only an intent to induce action is required. (*Gagne v. Bertran* (1954) 43 Cal.2d 481; *Ashburn v. Miller* (1958) 161 Cal.App.2d 71; *Sixta v. Ochsner* (1960) 187 Cal.App.2d 485.) In submitting the offer to buy the property, including the wrong information concerning his employing broker, Respondent intended to induce action by the buyer, i.e., acceptance of the offer and sale of the property.

8. Fraud, dishonest dealing, and willful disregard of the law all imply an element of intent that is lacking under the facts and circumstances of this case. Respondent accepted an offer of employment and signed an employment contract. He reasonably believed he was employed by Prudential when he submitted the offer to buy the property, and was only informed a few days later that his contract had not been accepted. There is insufficient evidence to establish that Respondent intended to violate the law or deal dishonestly or fraudulently. However, no intent to deceive is necessary to find that Respondent made a misrepresentation, even though he was not aware of the fact that, technically, his employment contract had not yet been accepted.

9. There is cause to suspend or revoke Respondent's real estate salesperson license pursuant to section 10176, subdivision (a), because Respondent made a substantial misrepresentation in the offer to purchase, as set forth in Factual Findings 2 - 7.

10. There is no cause to suspend or revoke Respondent's real estate salesperson license pursuant to section 10176, subdivision (i), dishonest dealing, or section 10177, subdivision (d), for willful disregard of the Real Estate Law, or section 10177, subdivision (g), for negligence or incompetence, as Respondent did not intend to do so and his actions were reasonable, as set forth in Factual Findings 2 - 7.

11. Under section 10106, the Commissioner of the Department may request an order for the licensee to pay the reasonable cost of investigation and enforcement of the case. This cost is \$1,726.60, as set forth in Factual Finding 8.

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12. Under all of the facts and circumstances, and to adequately protect the public safety and welfare, it is appropriate for Respondent's restricted license to be extended for two years, and for Respondent to pay the cost of investigation and enforcement of the case.

ORDER

1. The restricted real estate salesperson license of Respondent, Wilson Quispe, under Business and Professions Code section 10156.5, is extended for two years from the effective date of this Decision.

2. Respondent shall pay the cost of investigation and enforcement of the case in the amount of \$1,726.60 on a schedule acceptable to the Commissioner.

DATED: June 28, 2013.


DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings