

FILED

APR 24 2014

BEFORE THE BUREAU OF REAL ESTATE

BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

By



In the Matter of the Accusation of

CalBRE No. H-38757 LA

ALAN KEITH ONTIVEROS,

OAH No. 2013050816

Respondent.

DECISION

The Proposed Decision dated March 18, 2014, 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.

The Decision suspends or revokes the real estate license and/or license rights; however, the right to a restricted real estate license is granted to Respondent.

The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Section 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

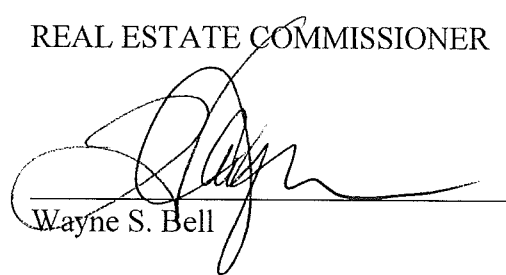
This Decision shall become effective at 12 o'clock noon on

MAY 15 2014

IT IS SO ORDERED

4/22/2014

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 Against:

ALAN KEITH ONTIVEROS

Respondent.

Case No. H-38757 LA

OAH No. 2013050816

PROPOSED DECISION

Glynda B. Gomez, Administrative Law Judge (ALJ) with the Office of Administrative Hearings, heard this matter on February 12, 2014, in Los Angeles, California. Cheryl Keily, Real Estate Counsel, represented Complainant. Respondent Alan Keith Ontiveros (Respondent) was present and represented by Mary Work, Attorney at Law. Oral and documentary evidence was received, and argument was heard. The record remained open until March 17, 2014 for submission of closing briefs. Complainant did not submit a closing brief. Respondent's closing brief was marked as Exhibit L, the record was closed, and the matter submitted for decision on March 17, 2014.

FACTUAL FINDINGS

1. Howard Alston, Deputy Real Estate Commissioner (Complainant), filed the Accusation in his official capacity on March 7, 2013. The Accusation concerns allegations that Respondent submitted fraudulent certification of continuing education hours to the Department of Real Estate (now Bureau of Real Estate (BRE)) in his Real Estate Salesperson Renewal Application (Application).

2. (BRE) issued a real estate salesperson license to Respondent on March 28, 1986 with Coldwell Banker Residential Brokerage as the Broker of Record. The real estate salesperson license was renewed on March 28, 2010 with the same employing broker. The real estate salesperson license will expire on March 27, 2014, unless renewed. Respondent has no record of license discipline.

3. On March 8, 2010¹, Respondent submitted his Application. As part of the Application, Respondent, under penalty of perjury, executed verification that he completed 45 hours of continuing education. In fact, Respondent had only completed 15 hours of the required 45 hours of continuing education. Respondent listed the following courses as completed, when in fact; he had never taken or completed the courses:

(a) CI 101: Financial Analysis for Commercial Real Estate for 21 hours. Respondent represented that he completed the course on August 6, 2008 and received certificate number 2808-1070;

(b) Agency Relationships, Duties & Disclosures for 3 hours. Respondent represented that he completed the course on February 6, 2008 and received certificate number 2472-1175;

(c) Ethics, Professional Conduct, and the Real Estate Professional for 3 hours. Respondent represented that he completed the course on February 6, 2008 and received certificate number 2473-1165;

(d) Trust Fund Handling for 3 hours. Respondent represented that he completed the course on March 13, 2008 and received certificate number 2473-1159.

4. In March of 2011, as part of a routine audit of continuing education providers, BRE sent lists of licensees and certificate numbers to continuing education providers CCIM institute (CCIM) and Revei/Prep Real Estate School (REVEI) for verification. Both providers responded that they were "unable to locate" certificates for Respondent's completion of the courses listed on his Application. CCIM responded on March 17, 2011. Although REVEI's response was provided around the same time as that of CCIM, the exact date was not established by the evidence.

5. At some point in time after March of 2011, but before March of 2012, BRE personnel requested that Respondent provide a copy of the certificates for the courses set forth in factual finding 3 above. The evidence did not establish whether the request was made verbally or in writing. Respondent was not able to provide the certificates because he had not completed the courses, so he did not comply with the request. Respondent believes that he called someone from the BRE in January or February of 2012 to discuss the fact that he had falsified the documents, but he did not remember the details of the discussion or the date and had no notes of the conversation. Respondent's recollection was uncorroborated and therefore, not persuasive in this regard.

¹ Portions of the Application were dated March 3, 2010 and one section was dated March 8, 2010. The Application was submitted electronically and was not complete until all portions were submitted.

6. On March 12, 2012, BRE analyst Shane McLatchey sent a Corrective Action Letter to Respondent which stated, in relevant part:

This is a Corrective Action Letter and is based on violation of the Real Estate Law. The purpose of the Corrective Action Letter is to put you on notice of the violation(s) listed below and to require prompt compliance with the Real Estate Law.

The following violation is specifically cited. Reference is to Regulation 3013 of the Real Estate Commissioner (as contained in Title 10, California Code of Regulations).

Commissioner's Regulation 3013

You have been requested to furnish a continuing education course completion certificate for the course entitled "1031 Tax Deferred Exchanges" offered by Exchange Resources Inc., Despite the Department's multiple attempts to request the certificate from you, You have failed to furnish said certificate.

Please provide a copy of the continuing education course completion certificate that been requested on or before **April 2, 2012.**

7. On May 15, 2012, BRE analyst Shane McLatchey received confirmation by email from Madeline A. Williams, the Director of Continuing Education of CCIM, the provider of the Course entitled "CI 101: Financial Analysis for Commercial Real Estate" that certificate number 2808-1070 was not issued to Respondent and that Respondent had not registered for or taken the course.

8. Also on May 15, 2012, BRE analyst Shane McLatchey received confirmation by email from Shane Hunter of REVEL, the provider of the "Agency Relationships, Duties & Disclosures," "Ethics, Professional Conduct, and the Real Estate Professional," and "Trust Fund Handling" courses, that Respondent had never completed any course with REVEL.

9. After receiving the email communications set forth in factual findings 7 and 8 above, Shane McLatchey wrote another letter to Respondent requesting the certificates. In relevant part the letter provided:

Department of Real Estate (DRE) records indicate that on a recent renewal of your Salesperson license, you certified that you competed a course titled, "CI 101:

FINANCIAL ANALYSIS FOR COMMERCIAL REAL ESTATE” with course provider CCIM Institute, and three courses titled “Ethics, Professional Conduct, and the Real Estate Professional”, “Agency Relationships, Duties & Disclosures”, and “Trust Fund Handling” with provider Real Estate Video Educational Institute.

The purpose of this letter to request that you submit a copy of the course completion certificate.

Please note that licensees who successfully complete an approved continuing education offering shall be provided with a course completion certificate, the course sponsor shall maintain this record for a period of five years, sufficient to allow for the preparation of a duplicate certificate upon request by a participant.

A copy of the certificate, along with a copy of this letter, should be either faxed or mailed to the above address, *Attention Education Section*, within 15 days from the date of this letter.

10. On May 29, 2012, Respondent called Shane McLatchey in response to the May 15, 2012 letter. Mr. McLatchey testified that this was his first and only telephone conversation with Respondent. During the conversation, Respondent admitted that he had not taken the courses and that he would not be able to obtain certificates. Respondent asked Mr. McLatchey what he should do. Mr. McLatchey told Respondent to provide a written statement and that he would be notified of how BRE would handle it. Mr. McLatchey turned the investigation over to BRE investigator Paul Mim Mack for further investigation.

11. Respondent cooperated fully with the investigation from May 29, 2012 onward. He explained to the BRE investigator that at the time that he filed his Application, he was under a lot of stress and trying to cope with a family crisis. Specifically, Respondent’s father was sick with Leukemia and died in October of 2010. Respondent’s mother, also in bad health, was very emotionally and financially dependent on Respondent and he was overwhelmed. About the same time, a title representative with whom Respondent was acquainted came into his office and saw him working on his continuing education courses. Respondent mentioned his predicament and his lack of time to complete the necessary courses. The title representative offered to provide Respondent with some course titles and certificate numbers as a favor. Respondent accepted the information and then listed the certificate numbers and course names on his Application.

12. Respondent expressed remorse and shame for his conduct. Respondent admitted that there was no excuse for his conduct and that he exercised bad judgment. He has been a real estate salesperson for 28 years without incident.

13. Joseph Camelat (Camelat), the retired branch manager for Coldwell Banker, was a licensed real estate salesperson for 35 years until his retirement in October of 2013. He managed Respondent's real estate activities as a branch manager for 25 years until October of 2013. Camelat was surprised when he learned that Respondent submitted false information to the BRE. According to Camelat, Respondent has always been an ethical and responsible salesperson and there have never been any complaints about him. He described Respondent as a top producer and a great family man. At the request of Sandra Deering, the broker of record, Camelat discussed the conduct with Respondent and counseled him about it. Camelat opined that Respondent had learned a lesson from this experience. Respondent has been an asset to Coldwell Banker and the company would like to maintain him as a real estate salesperson. Camelat opined that Respondent's conduct was an aberration from Respondent's normal course and practice and that it was unlikely Respondent would ever engage in similar conduct again.

14. Respondent's wife, Robin Ontiveros, testified that she was shocked when Respondent advised her of his conduct and the BRE investigation. Mrs. Ontiveros testified that her husband is a very ethical and honest person and that his conduct was completely out of character. He has expressed remorse and regret to her about his conduct. She testified that his mental and physical health have been effected by the guilt and stress he feels from his conduct and its ramifications.

15. Respondent is the father of two teenage girls and is active in coaching their sports and assisting them with school and scouting projects. He is the main financial support for his family and also provides for his widowed mother.

16. Respondent provided letters of reference from his broker of record, his office administrator, and several clients.

(a) Sandra Deering, the broker of record, writes of Respondent:

Based upon my research and conversations I can attest that Alan Ontiveros has been a valued agent for Coldwell Banker Residential Brokerage currently since 2005 and before that between 4/1986 and 3/2002.

[W]e have never received any complaints or had any other issues with his work. In addition, I confirmed with his longtime manager, Joe Calamet (who recently retired) that he was a valued agent, who is well respected in the office and in the brokerage community and he never caused any problems or

concerns.

(b) In her letter, Julie Mort, the office administrator, described Respondent as "a man of integrity, compassion and commitment." She described Respondent's conduct as "completely out of character for him" and "a temporary lapse in judgment." She also described the negative impact of Respondent's conduct on his marriage, his health and his ability to sleep.

17. Respondent submitted several letters from clients attesting to his honesty and hard work on their behalf in various real estate transactions.

18. Respondent has completed all of his required continuing education.

19. Complainant produced a declaration of Bureau District Manager Robin Trujillo which claimed 12.40 hours of time by Board employees Shane McLatchey and Paul Mim Mack at \$62 per hour and 1.00 hours of management time at \$100 per hour for a total of \$868 in investigative costs and such costs are deemed reasonable. Additionally, Complainant's attorney Cheryl Keily, provided a declaration regarding enforcement costs and attorney time. According to Keily's declaration, she expended 3.5 hours conducting an initial review of the file and preparing the accusation, 5 hours on telephone calls, correspondence and analysis and 3 hours preparing for hearing. Keily's time was charged at an hourly rate of \$89 for a total of \$1,023 and such costs are deemed reasonable. Accordingly, Complainant incurred \$1,891 in reasonable costs of investigation and prosecution of this matter.

Respondent's Statute of Limitations Defense

20. Respondent contends that Complainant is barred from proceeding by the three year statute of limitations for disciplinary actions set forth in Code section 10110. For the reasons set forth below, the argument fails. In pertinent part the provision states:

[An Accusation] shall be filed not later than three years from the occurrence of the alleged grounds for disciplinary action unless the acts or omissions which the licensee is charged involves fraud, misrepresentation or a false promise in which case the accusation shall be filed within one year after the date of discovery by the aggrieved party of the fraud, misrepresentation or false promise or within three years after the occurrence thereof, whichever is later, except that in no one case shall an accusation be filed later than 10 years from the occurrence of the alleged grounds for discipline.

21. Here, the Accusation was filed on March 7, 2013. Although Respondent's Application was submitted on March 8, 2010, the first hint that

Respondent's continuing education certification might not be correct was March 17, 2011 when a routine audit of continuing education providers returned information that the providers were "unable to locate" any records of Respondent's completion of 4 of the courses he listed on his Application. Complainant attempted to ascertain whether or not the "unable to locate" a record of attendance was a result of the providers' poor recordkeeping or whether Respondent had not completed the courses. Respondent did not provide the certificates that were requested and the providers were asked to review their records looking specifically for Respondent's attendance records. It was not until May 15, 2012, that Complaint knew that Respondent had submitted false information in his application.

22. As set forth in Code section 10110, in the case of fraud or misrepresentation, Complainant has the later of either three years from the occurrence or one year from discovery to file an accusation. Here, Complainant discovered the fraud and misrepresentation in May 15, 2012. Moreover, Respondent's Application which was in part dated March 3, 2010 and in part dated March 8, 2010, was submitted electronically to BRE on March 8, 2010. The initial filing of the Accusation, on March 7, 2013, was within the 3 year statute of limitation set forth in Code section 10110. Additionally, the time for filing of the Accusation would have been extended for one year after the discovery of Respondent's fraud and misrepresentation² to May 15, 2013. Accordingly, the Accusation is not time barred.

DISCUSSION AND LEGAL CONCLUSIONS

1. Business and Professions Code (Code) section 10176, subdivision (a) provides in pertinent part that making a substantial misrepresentation is cause for discipline of a real estate license. Respondent's real estate salesperson license is subject to discipline pursuant to Code section 10176, subdivision (a), based upon findings of fact 1-11 because he procured a real estate salesperson license renewal by making a material misstatement concerning the completion of 30 hours of continuing education courses.

2. Code section 10176, subdivision (i), provides in pertinent part that dishonest dealings or fraud are cause for discipline of a real estate license. Respondent's real estate salesperson's license is subject to discipline pursuant to Code section 10176, subdivision (i), based upon findings of fact 1-11 because he procured a real estate salesperson license renewal by committing fraud and a dishonest act when he misrepresented to the BRE that he had completed 45 hours of continuing education, when in fact, he had not.

² May 15, 2012

3. Code section 10177, subdivision (a), provides in pertinent part that making a material misstatement in a real estate license renewal application or procuring such license by misrepresentation, fraud or deceit is cause for discipline of a real estate license. Respondent's real estate salesperson's license is subject to discipline pursuant to Code section 10177, subdivision (a), based upon findings of fact 1-11 because he procured a real estate salesperson license renewal by fraud, misrepresentation and deceit when he made a material misstatement concerning the completion of 30 hours of continuing education courses.

4. Code section 10177, subdivision (d), provides in pertinent part that willful disregard or violation of the real estate law by a real estate salesperson is cause for discipline. Respondent is subject to discipline pursuant to Code section 10177, subdivision (d), based upon findings of fact 1-11 because he procured a real estate salesperson license renewal without completing the required continuing education in willful disregard of the real estate law.

5. Code section 10177, subdivision (g), provides in pertinent part that demonstrated negligence or incompetence in performing an act for which a real estate salesperson license is required is cause for discipline. Respondent is not subject to discipline pursuant to Code section 10177, subdivision (g), because there was no evidence of negligence committed by Respondent. His conduct was intentional and not negligent.

6. Code section 10177, subdivision (j), provides in pertinent part that fraud or dishonest dealings by a real estate licensee constitutes grounds for discipline. Respondent's real estate salesperson's license is subject to discipline based upon findings of fact 1-11, based upon his fraud and dishonesty in his Application and misrepresentations about completing the required continuing education hours.

7. The purpose of a disciplinary matter is to protect the public and not to punish the licensee. (*Handeland v. Department of Real Estate* (1976) 58 Cal.App.3d 513, 518; *Camacho v. Youde* (1979) 95 Cal.App.3d 161; *Small v. Smith* (1971) 16 Cal.App.3d 450, 457.) Here, Respondent made a bad decision at a time when he was tired and overwhelmed by his family responsibilities. His conduct did not result in harm to the public. This was a significant lapse in judgment by someone who by all accounts has been an exemplary real estate salesperson for 28 years, and a responsible, father, husband and son. Nevertheless, there is no excuse for Respondent's conduct, and he appropriately, does not seek to excuse himself for his wrongdoing, and merely seeks to explain his frame of mind at the time and express his regret and remorse for his conduct. The seriousness of Respondent's conduct requires that discipline be imposed and Respondent's activities be monitored. Revocation of Respondent's real estate license and issuance of a restricted license with a requirement that Respondent takes and passes an ethics course is sufficient to protect the public by providing closer scrutiny of Respondent's dealings and further instruction on his professional and ethical responsibilities. Outright revocation or

suspension of the license is not necessary for public protection and would only serve a punitive purpose. (Factual Findings 1-18)

8. Code section 10106 provides that the Administrative Law Judge may order that a respondent in a disciplinary action pay the reasonable costs of investigation and prosecution. Here, the reasonable costs of investigation and prosecution are \$ 1,891. (Factual Finding 19)

ORDER

1. All licenses and licensing rights of respondent Alan Keith Ontiveros 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 Bureau 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:

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.

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.

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.

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 Bureau 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

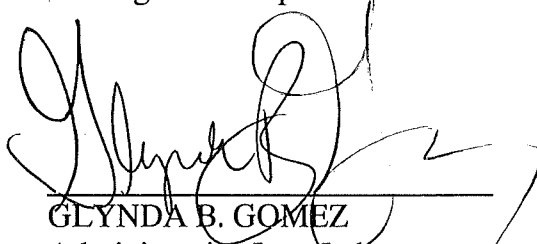
estate license is required.

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.

2. Respondent shall, within six months from the effective date of this Decision, take and pass the Professional Responsibility Examination administered by the Bureau including the payment of the appropriate examination fee. If respondent fails to satisfy this condition, the Commissioner may order suspension of respondent's license until respondent passes the examination.

3. As a precondition of issuance of a restricted license, Respondent shall reimburse the BRE for reasonable costs of investigation and prosecution of this matter in the amount of \$1,891.

DATED: March 18, 2014



GLYNDA B. GOMEZ
Administrative Law Judge
Office of Administrative Hearings