

FILED

DEC 09 2015

BUREAU OF REAL ESTATE

By Angela M. ...

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Accusation of)	CalBRE No. H-39677 LA
)	
LILY KAUT,)	OAH No. 2015031180
)	
Respondent.)	

DECISION

The Corrected Proposed Decision dated October 29, 2015, 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 one or more real estate licenses, but the right to a restricted salesperson 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 DEC 29 2015.

IT IS SO ORDERED 12/7/2015

WAYNE S. BELL
REAL ESTATE COMMISSIONER

[Signature]

BEFORE THE
BUREAU OF REAL ESTATE
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

LILY KAUT

Respondent.

Case No. H-39677 LA

OAH No. 2015031180

CORRECTED PROPOSED DECISION

Glynda B. Gomez, Administrative Law Judge (ALJ) with the Office of Administrative Hearings, heard this matter on September 8, 2015 in Los Angeles, California. Julie L. To, Real Estate Counsel, represented Complainant. Respondent Lily Kaut (Respondent) was self-represented. Oral and documentary evidence was received, and argument was heard. The record was left open until September 15, 2015 for Complainant to submit an updated license certification. However, Complainant failed to submit the document and the matter was deemed submitted on September 15, 2015. The proposed decision was transmitted on October 14, 2015.

On October 21, 2015, OAH received a written request from Complainant that the ALJ correct the Agency Case Number to add "LA" at the end. Good cause appearing, the ALJ granted the request and the proposed decision is hereby corrected as requested.

FACTUAL FINDINGS

1. Maria Suárez, Deputy Real Estate Commissioner (Complainant); filed the Accusation in her official capacity.
2. The Bureau of Real Estate (formerly Department of Real Estate) (BRE) originally issued real estate salesperson license number 01164893 to Respondent on August 2, 1993. Respondent was issued a real estate broker license bearing number 01164893 on February 22, 1999. The license will expire on November 16, 2016, unless renewed. Since January 11, 2005, Respondent has been actively registered with the BRE to do business under the fictitious business name of "Professional Realty Services."

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3. Respondent's license was previously disciplined in BRE Case Number H-30118 LA. The case was resolved by stipulation and order resulting in the 180 day suspension of Respondent's license effective March 24, 2004.

4. On December 13, 2013, the BRE received a complaint from Donald Durant wherein he alleged that Respondent was doing business as Professional Realty Escrow Division and had failed to return two original notes, a substitution of trustee, and full reconveyance to him, as agreed upon, in escrow 434-RA. The properties were located at 16040 Arrow Road, Fontana, California and 2954 Juniper Avenue, Fontana, California. When BRE investigators attempted to investigate the complaint, Respondent provided them only a copy of a document dated December 28, 2012 that was entitled, "Agreement about houses in Foreclosure," two unrecorded Grant Deeds for the subject properties and a facsimile cover sheet bearing letterhead of "Professional Escrow Division" and the email address professionalescrowdivision@yahoo.com. The cover sheet made no reference to "Professional Realty Services" which was Respondent's active registered fictitious business name.

5. Mr. Durant had been Respondent's live-in boyfriend and had lent her money to purchase some properties. At some point Mr. Durant became incapacitated and his sons took control of his affairs. As part of their management of his affairs, the sons demanded that Respondent refinance the properties and provide Mr. Durant with funds to pay off the outstanding notes or surrender the properties. Respondent was unable to refinance the properties and subsequently provided full reconveyances to Mr. Durant. She is no longer romantically involved with Mr. Durant. Respondent faxed the copies of the documents to BRE auditors on December 28, 2012, but never explained the relationship between the faxed documents and Escrow 434-RA as requested by BRE.

6. Respondent admitted that she conducted real estate activities requiring licensure as a real estate broker during the period of November 1, 2010 to September 30, 2013.

7. On September 16, 2014, Auditor Gina King contacted Respondent by telephone to arrange an appointment to review and audit Respondent's books and records pertaining to the activities of Professional Realty Services, Respondent's real estate brokerage. The audit and review was to cover the period of November 1, 2010 to September 30, 2013 (audit period). At that time, Respondent advised the auditor that she would not be available in the near future because she would be leaving for Peru on September 17, 2014 and would not return for 6 months. Respondent also advised the auditor that she was experiencing heart problems and on her doctor's advice would not be able to retrieve her records from storage. Auditor King requested that Respondent substantiate her claims with a written statement and a copy of her plane ticket so that the BRE could consider extending the time to complete the audit.

8. Respondent never provided Auditor Gina King with the requested substantiation and did not appear for the audit appointment. On September 24, 2013, the

BRE auditor sent Respondent a certified letter advising her of an audit appointment scheduled for October 3, 2013. Respondent Kaut responded to the letter by sending two identical letters dated October 3, 2013 and August 5, 2013 which stated:

This is a letter to inform you that I am surrendering my Real Estate Broker License # 01164893, effective today, I am retiring and no longer need my License.

9. Respondent did not appear for the October 21, 2013 audit appointment and did not provide the required documentation.

10. At hearing, Respondent provided a note from her physician, Altaf L. Ali, M.D. attesting to the diagnosis of Atrial Fibrillation made in 2012.

11. Respondent attempted to surrender her license in 2013 because she was too ill from her heart problems to practice her profession and did not believe that she would recover. The BRE provided her with a stipulation to surrender her license. Pursuant to the stipulation, Respondent's surrender would have been discipline of her license. Respondent did not want to agree to discipline of her license so she did not sign the stipulation. Respondent lost her home in foreclosure in 2012 and for financial reasons had to move to much smaller living quarters and eliminate her storage locker. In the course of her move and downsizing, Respondent shredded her real estate brokerage documents from 2012 and 2013 and is not able to reconstruct them for an audit. At hearing, Respondent asserted that she did not use "Professional Escrow Division" as a business name. Instead, she explained that it was used only internally or with escrow companies to help her assistant determine the appropriate file for documents. It was easier for all of the escrow related documents to go to a dedicated escrow email and to send them to escrow companies from her company's escrow division which she labeled as "Professional Escrow Division." Respondent wants to maintain her real estate broker license and continue selling real estate now that she has substantially recovered from her health problems.

12. Respondent has worked in the real estate field for 22 years and has always supported herself selling real estate. Her only source of income is \$1,200 per month in social security benefits.

13. Respondent expressed remorse and regret for her failure to maintain documents for the audit period and failure to submit to the audit.

Costs

14. Complainant produced a declaration of BRE Supervising Special Investigator II, Maria Suarez which described 23.35 hours of investigative time by BRE Special Investigator William Pak at \$62 per hour and 1.15 hours of time expended by Supervising Investigator Dionne Faulk at \$80 per hour for a total of \$1,539.70 in investigative costs. Complainant also submitted a declaration of its counsel Julie L. To setting forth 6.50 hours

expended at the rate of \$89 per hour for a total of \$578. Taken together, Complainant established that \$2,117.70 was expended in prosecution and investigation of this matter. The costs are deemed reasonable.

LEGAL CONCLUSIONS

1. Business and Professions Code (Code) section 10176 provides that:

The commissioner may, upon his or her own motion, and shall, upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this state, and he or she may temporarily suspend or permanently revoke a real estate license at any time where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:

- (a) Making any substantial misrepresentation.

....

- (I) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

2. Code section 10177, subdivision (d), provides in pertinent part the commissioner may suspend or revoke the license of a real estate licensee, delay the renewal of a license of a real estate licensee, or deny the issuance of a license to an applicant, who has willfully disregarded or violated the Real Estate Law or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law.

3. Code section 10177, subdivision (g), provides in pertinent part the commissioner may suspend or revoke the license of a real estate licensee, delay the renewal of a license of a real estate licensee, or deny the issuance of a license to an applicant, who has demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license.

4. Code section 10177, subdivision (j), provides in pertinent part the commissioner may suspend or revoke the license of a real estate licensee, delay the renewal of a license of a real estate licensee, or deny the issuance of a license to an applicant, who has engaged in any other conduct, whether of the same or a different character than specified in this section, that constitutes fraud or dishonest dealing.

5. Code section 10148 provides as follows:

(a) A licensed real estate broker shall retain for three years copies of all listings, deposit receipts, canceled checks, trust records, and other documents executed by him or her or obtained the listing if the transaction is not consummated. After notice, the books, accounts, and records shall be made available for examination, inspection, and copying by the commissioner or his or her designated representative during regular business hours; and shall, upon the appearance of sufficient cause, be subject to audit without further notice, except that the audit shall not be harassing in nature. This subdivision shall not be construed to require a licensed real estate broker to retain electronic messages of an ephemeral nature, as described in subdivision (d) of Section 1624 of the Civil Code.

(b) The commissioner shall charge a real estate broker for the cost of any audit, if the commissioner has found, in a final desist and refrain order issued under Section 10086 or in a final decision following a disciplinary hearing held in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code that the broker has violated Section 10145 or a regulation or rule of the commissioner interpreting Section 10145.

(c) If a broker fails to pay for the cost of an audit as described in subdivision (b) within 60 days of mailing a notice of billing, the commissioner may suspend or revoke the broker's license or deny renewal of the broker's license. The suspension or denial shall remain in effect until the cost is paid or until the broker's right to renew a license has expired.

(d) The commissioner may maintain an action for the recovery of the cost of an audit in any court of competent jurisdiction. In determining the cost incurred by the commissioner for an audit, the commissioner may use the estimated average hourly cost for all persons performing audits of real estate brokers.

(e) The bureau may suspend or revoke the license of any real estate broker, real estate salesperson, or corporation licensed as a real estate broker, if the real estate broker, real estate salesperson, or any director, officer, employee, or agent of the corporation licensed as a real estate broker knowingly destroys, alters, conceals, mutilates, or falsifies any of the books, papers, writings, documents, or tangible objects that are required to be maintained by this section or that have been sought in connection with an investigation, audit, or examination of a real estate licensee by the commissioner.

6. California Code of Regulation, title 10 (CCR), section 2731, provides that a licensee shall not use a fictitious name in the conduct of any activity for which a license is

required under the Real Estate Law unless the licensee is the holder of a license bearing the fictitious name.

First Cause for Discipline (Audit)

7. Cause exists, pursuant to Business and Professions Code (Code) section 10177, subdivisions (d) and (g), in conjunction with Code section 10148, to discipline Respondent's real estate broker's license based upon the attempted BRE audit. Respondent failed to participate in the audit, failed to cooperate with the audit and failed to provide the requested records. Additionally, Respondent destroyed records she was required to preserve that pertained to the audit period. However, cause does not exist pursuant to Code sections 10177, subdivision (j) and 10176, subdivisions (a) and (d) in conjunction with CCR 2731.

Second Cause for Discipline (Disregard of Real Estate Law)

8. Cause for discipline of Respondent's Real Estate Broker license exists pursuant to Code section 10177, subdivision (d) based upon her willful disregard and violation of the Real Estate Law by reason of her failure to cooperate with the Bureau's audit and her failure to retain brokerage records for three years by reason of factual findings 4-11.

Third Cause for Discipline (Negligence or Incompetence)

9. Cause for discipline of Respondent's Real Estate Broker license exists pursuant to Code section 10177, subdivision (g) by reason of Respondent's negligence and incompetence in the maintenance of brokerage records for the audit period by reason of factual findings 4-11.

Fourth Cause for Discipline (Breach of Fiduciary Duty)

10. Cause for discipline of Respondent's Real Estate Broker license does not exist pursuant to Code sections 10176, subdivision (i) and 10177, subdivision (j) by reason of factual findings 4-11.

11. As cause for discipline of Respondent's real estate license has been established, Respondent bears the burden of proving she is sufficiently rehabilitated to warrant continued licensure. (See, *Martin v. Alcoholic Beverage Control Appeals Bd.* (1950) 52 Cal.2d 259, 264-265.) Here, Respondent has shown that at the time of the scheduled audit and investigation, she was under substantial personal, financial and health related stress. As a result, Respondent made some poor choices with respect to the audit and later compounded those poor choices by destroying the documents pertinent to the audit period. The statutes relating to licensing of professions generally are designed to protect the public from dishonest, untruthful and disreputable licensees. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 451.) Such proceedings are not for the primary purpose of punishing an individual. (*Camacho v. Youde* (1979) 95 Cal.App.3d 161, 165.) Rather, in issuing and

disciplining licenses, a state agency is primarily concerned with protection of the public, maintaining the integrity and high standards of the profession, and preserving public confidence in licensure. (*Ibid*; see also *Fahmy v. Medical Bd. of California* (1995) 38 Cal.App.4th 810, 817.) Here, Respondent has demonstrated poor judgment with respect to maintaining brokerage records and failed in a fundamental duty of a real estate in her handling of real estate records for which she has expressed regret and remorse. As extenuating circumstances, Respondent was suffering from health, personal and financial problems at the time. There is no evidence of consumer harm or evidence establishing that allowing Respondent to continue to engage in real estate sales would present any danger to the public. Therefore, the public can be adequately protected by the revocation of Respondent's real estate broker's license and the issuance of a restricted real estate salesperson license to Respondent. As a real estate salesperson, Respondent will have the supervision of a real estate broker and will not be responsible for supervision of agents or maintenance of trust accounts. Additionally, with a restricted license, Respondent will be more closely monitored.

12. Complainant prevailed on three of the four cases for discipline alleged. Respondent has modest financial means and has suffered recent health and financial issues which make the payment of all costs of investigation and prosecution a hardship. Based upon Respondent's financial circumstances, and the severity of the order below, it is reasonable for Respondent to pay \$1,200 in costs.

ORDER

All licenses and licensing rights of Respondent Lily Kaut 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:

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 issuance of an unrestricted real estate license nor for the removal of any of the conditions, limitations or restrictions of a restricted license until four 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 broker, a statement signed by a prospective employing real estate broker on a form approved by the Bureau of Real Estate which shall certify:

(a) That employing broker has read the Decision of the Commissioner which granted the right to a restricted license; and

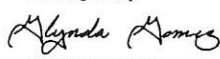
(b) That the employing broker will exercise close supervision over the performance by the restricted licensee relating to activities for which a real estate license is required.

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 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 notify the Commissioner in writing within 72 hours of any arrest by sending a certified letter to the Commissioner at the Bureau of Real Estate, Post Office Box 137000, Sacramento, CA 95813-7000. The letter shall set forth the date of Respondent's arrest, the crime for which Respondent was arrested and the name and address of the arresting law enforcement agency. Respondent's failure to timely file written notice shall constitute an independent violation of the terms of the restricted license and shall be grounds for suspension or revocation of that license.

7. Respondent shall pay the Bureau of Real Estate's reasonable costs of investigation and enforcement in the amount of \$1,200 within 180 days of the effective date of this order.

Dated: October 29, 2015

DocuSigned by:

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GLYNDA B. GOMEZ
Administrative Law Judge
Office of Administrative Hearings