BEFORE THE
DEPARTMENT OF BUSINESS OVERSIGHT
STATE OF CALIFORNIA

In the Matter of the Accusation Against: NOE F. GONZALEZ, Respondent.	Case No. 963-1834 OAH No. 2014100876

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated September 24, 2015, is hereby adopted by the Department of Business Oversight as its Decision in the above-entitled matter with technical and minor changes on the attached Errata Sheet pursuant to Government Code section 11517(c)(2)(C).

This Decision shall become effective on January 6, 2016.

IT IS SO ORDERED this 7th day of December, 2015.

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JAN LYNN OWEN
Commissioner of Business Oversight

State of California - Department of Business Oversight

ERRATA SHEET

(Changes to Proposed Decision – Noe F. Gonzalez)

1) On page 2 of the Proposed Decision, Paragraph 4b of the FACTUAL FINDINGS, line 1, delete "Escrow No. 67693-NG" and insert instead "Escrow No. 67963-NG".

2) On page 3 of the Proposed Decision, Paragraph 7 of the FACTUAL FINDINGS, line 3, delete "(67693-NG)" and insert instead "(67963-NG)".

3) On page 5 of the Proposed Decision, Paragraph 5 of the LEGAL CONCLUSIONS, line 3, delete "(68097-NG and 67693-NG)" and insert instead "(68097-NG and 67963-NG)".

4) On page 4 of the Proposed Decision, Paragraph 14 of the FACTUAL FINDINGS, line 5, delete "even if it that" and insert instead "even if that".

5) On page 5 of the Proposed Decision, Paragraph 1 of the LEGAL CONCLUSIONS, line 1, delete "censure, suspend, or bar" and insert instead "censure or suspend for a period not exceeding 12 months or bar".

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In the Matter of the Accusation Against: NOE F. GONZALEZ, Respondent.	Case No. 963-1834 OAH No. 2014100876

PROPOSED DECISION

Administrative Law Judge Thomas Heller, State of California, Office of Administrative Hearings, heard this matter in Los Angeles, California on August 25, 2015.

Judy L. Hartley, Senior Corporations Counsel, Department of Business Oversight (Department), represented complainant Jan Lynn Owen, Commissioner of Business Oversight (complainant or Commissioner).

Respondent Noe F. Gonzalez represented himself.

The matter was submitted on August 25, 2015.

FACTUAL FINDINGS

Parties and Jurisdiction

1. From a date not established until September 2007, respondent was an escrow officer at Escrow Today, Inc. (Escrow Today), an escrow agent located in City of Industry, California. Escrow Today is licensed by the Commissioner under the Escrow Law (Fin. Code, § 17000 et seq.).[1]

2. On October 14, 2014, complainant filed an Accusation against respondent, requesting that he be barred from any position of employment, management or control of any escrow agent, due to alleged violations of the Escrow Law in four escrow transactions while he worked at Escrow Today.

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[1] All further undesignated statutory references are to the Financial Code.

3. On a dated not established, respondent submitted a Notice of Defense, and requested a hearing to contest the Accusation.

The Four Escrows at Issue

4. In May 2008, the Department received information from the Better Business Bureau about consumer complaints involving respondent and Escrow Today. After briefly investigating the complaints in May 2008, the Department examined them in more detail starting in July 2011.[2] During the examination, Sultanna Wan, a Corporation Examiner for the Department, reviewed at least four of respondent's escrows from 2007. The Department obtained the files for these escrows from Genienne Gastelum, the owner and president of Escrow Today. The escrows involved small loans between private parties, as follows:

a. Escrow No. 68097-NG[3] was opened on August 22, 2007, and involved a $20,000 loan secured by a deed of trust that was recorded on August 29, 2007.

b. Escrow No. 67693-NG was opened on July 27, 2007, and involved an $18,000 loan secured by a deed of trust that was recorded on September 4, 2007.

c. Escrow No. 67913-NG was opened on July 24, 2007, and involved a proposed $30,000 loan. The lender cancelled the escrow in late July or early August 2007.

d. Escrow No. 67739-NG was opened on June 29, 2007, and involved a $30,000 loan secured by a deed of trust that was recorded on August 6, 2007.

5. Ms. Wan completed her examination August 2014. Based on that examination, complainant alleges that respondent improperly disbursed loan commissions or fees prior to closing in three of the four escrows (68097-NG, 67963-NG, and 67739-NG). Complainant also alleges that respondent improperly disbursed funds without authorizing instructions in two of the four escrows (68097-NG and 67913-NG).

6. At the hearing, the evidence established that respondent disbursed a "Processing Fee" of $1,500 to a person named Angel Zendejas in three of the four escrows (68097-NG, 67963-NG, and 67739-NG). According to respondent, Mr. Zendejas was a loan processor for the private lenders in those escrows. The evidence also established that

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[2] The Accusation incorrectly alleges that the Department began its examination in May 2012. The evidence did not explain the delay between the May 2008 and July 2011 investigations.

[3] The suffix "NG" stands for Noe Gonzalez.

respondent made these disbursements before the recording dates of the deeds of trust for the loans, which is typically the escrow closing date. Respondent did not dispute that he disbursed the fees prior to closing, but testified that he was unaware of the prohibition on paying loan commissions or fees before closing escrow.

7. The evidence also established that respondent made a pre-closing payment of $3,000 to Jose Valenzuela in one escrow (68097-NG), and pre-closing payments of $2,835 and $13,000 to Mr. Valenzuela in another (67693-NG). Mr. Valenzuela was not a lender or borrower in either of these escrows, although he was a borrower in another one (67739-NG). But complainant did not prove that these payments were for loan commissions or fees, as complainant alleges in the Accusation. Unlike the payments to Mr. Zendejas, the escrow documents in evidence do not describe the purpose of the payments to Mr. Valenzuela, and complainant did not otherwise establish that purpose. Respondent's testimony did not establish the purpose of the payments, Mr. Valenzuela did not testify, and the amounts paid to Mr. Valenzuela call into question whether they were for loan commissions or fees. For instance, the $13,000 payment to Mr. Valenzuela in 67963-NG concerned an $18,000 loan. The other payments to Mr. Valenzuela are also large percentages of the underlying loan amounts, suggesting that the payments may have been for something other than loan commissions or fees.

8. Complainant's allegations that respondent disbursed funds without authorizing instructions concern a $1,500 payment to Mr. Zendejas in one escrow (68097-NG), and a $2,400 payment to Angel Vidal, the borrower in another (67913-NG). Ms. Wan testified that she obtained the files for these escrows from Ms. Gastelum, and that there are no authorizing instructions for these disbursements in the documents Ms. Wan received. The $1,500 payment to Ms. Zendejas in 68097-NG was one of the "Processing Fee" payments that respondent made before the close of escrow. No escrow document in evidence authorizes (or prohibits) the $1,500 payment.

9. The $2,400 payment to Mr. Vidal in 67913-NG occurred on July 31, 2007, the day after the lender – Saul Rodriguez, a lender in three of the four escrows – sent a $30,000 cashier's check to Escrow Today. At some point between July 30 and August 2, 2007, Mr. Rodriguez cancelled the escrow, with instructions stating: "I want funds to be transfered [sic] to ESC #67739. The funds are for Jose Valenzuela. There will be a hold of $2,400 until August 7, 2007." (Ex. 3 p. DBO 00081.)[4] Complainant asserts that this statement proves that respondent disbursed $2,400 to Mr. Vidal in disregard of Mr. Rodriguez's instruction to hold that amount.

10. Ms. Wan's testimony is insufficient to prove the absence of authorizing instructions for the $1,500 and $2,400 payments. Ms. Wan has no personal knowledge about the completeness of the escrow files that she reviewed. Respondent contested the completeness of the files, and complainant presented no evidence from anyone at Escrow

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[4] The handwritten cancellation instructions are in Spanish, with an English translation underneath each handwritten line. The source of the English translation was not established.

Today, such as a custodian of records, that the absence of authorizing instructions in the documents Ms. Wan received is a trustworthy indication that no such instructions ever existed. Complainant called Ms. Gastelum from Escrow Today to testify, but asked her no questions about this subject.

11. As to the $2,400 payment in 67913-NG, the cancellation instructions of the lender (Mr. Rodriguez) are undated, and complainant did not establish that respondent received them before disbursing $2,400 to Mr. Vidal on July 31, 2007. Mr. Rodriguez did not testify, and complainant presented no other evidence establishing the precise date of the instructions. Disregard of the cancellation instructions requires evidence that respondent had them before he made the $2,400 disbursement. Complainant did not present such evidence.

12. Furthermore, the "hold of $2,400" in Mr. Rodriguez's cancellation instructions could simply mean that this amount would be held back from the other funds to be transferred out of the cancelled escrow – perhaps because it had already been disbursed to Mr. Vidal, and needed to be returned. The specific reference to delaying transfer of $2,400 suggests that Mr. Rodriguez knew of some issue about accessing that amount when cancelling the escrow. If this is the meaning of the "hold," it does not prove that respondent lacked authorization for the $2,400 payment to Mr. Vidal. Respondent testified that he had such authorization, but that it was now missing from the escrow file. More evidence about what Mr. Rodriguez meant was necessary, but complainant did not provide it.

Other Evidence

13. According to respondent, he closed thousands of files with Escrow Today, and has received no other complaint about his work. Respondent feels that he is being targeted for discipline unfairly, because his supervisors at Escrow Today allegedly approved his actions, and no action has been taken against the supervisors or the company. Respondent testified that he had all of the necessary authorizations to disburse funds from the escrows, but some approvals are now missing from the escrow files. He attributes the missing approvals to the considerable passage of time and lax document management at Escrow Today. As noted above, complainant did not prove the completeness of the escrow files at issue. (Factual Finding 10.)

14. For the last five years, respondent has worked as an escrow officer for a title company. The Commissioner does not regulate title companies, and complainant asserts that a disciplinary order against respondent will therefore not affect that employment. (See § 17006, subd. (a)(3).) Respondent, on the other hand, asserts that an adverse order will affect his employment, even if it that impact is not direct.

LEGAL CONCLUSIONS

1. Complainant filed the Accusation against respondent under the authority of Financial Code section 17423, subdivision (a)(1). That section allows the Commissioner to

"censure, suspend, or bar from any position of employment, management, or control any escrow agent, or any other person, if the commissioner finds . . . [¶] . . . [t]hat the censure, suspension, or bar is in the public interest and that the person has committed or caused a violation of this division or rule or order of the commissioner, which violation was either known or should have been known by the person committing or causing it or has caused material damage to the escrow agent or to the public." (§ 17423, subd. (a)(1).)

2. Complainant, as the party asserting a claim for relief, bears the burden of proof. (See Evid. Code, § 500.) The standard of proof is proof by a preponderance of the evidence, because no provision of law provides otherwise. (Evid. Code, § 115.) The clear and convincing evidence standard from cases such as *Ettinger v. Bd. of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856, applies only to disciplinary actions involving professional licenses, due to the fact that such licenses are obtained after extensive education, training, and passing a rigorous state-administered examination. In this case, respondent has no license with the Commissioner. Moreover, there was no evidence presented that respondent's position at Escrow Today involved professional employment or activity.

3. Complainant proved by a preponderance of the evidence that respondent disbursed $1,500 "Processing Fees" to Mr. Zendejas in three escrows before they closed (68097-NG, 67963-NG, and 67739-NG). (Factual Finding 6.) Those pre-closing payments violated the Escrow Law. It is a "violation for any person to enter into any arrangement, either of his own making or of a subsidiary nature, or through any other person having a dual capacity, or through any person having a direct or indirect interest in the escrow, or other device permitting any fee, commission, or compensation which is contingent upon the performance of any act, condition, or instruction set forth in an escrow to be drawn or paid, either in whole or in part, or in kind or its equivalent, prior to the actual closing and completion of the escrow." (§ 17420.) The written escrow instructions of all parties can allow some pre-closing disbursements, but not for "a fee, commission, or compensation." (§ 17421.)

4. Further, complainant proved by a preponderance of the evidence that respondent "should have . . . known" of the aforementioned violations. (§ 17423, subd. (a)(1).) By respondent's own account, he was an experienced escrow officer, and he should have known the bar against paying pre-closing fees and commissions. (Factual Finding 13.) Respondent may not have actually known of the prohibition, but actual knowledge is not required for discipline under section 17423. (§ 17423, subd. (a)(1).)

5. On the other hand, complainant did not prove by a preponderance of the evidence that the three pre-closing payments to Mr. Valenzuela in two of the escrows (68097-NG and 67693-NG) violated the Escrow Law. Complainant alleged that the payments to Mr. Valenzuela were for loan commissions or fees, but did not present sufficient evidence that they were. (Factual Finding 7.) The evidence in the record does not prove the purpose of the three payments. (*Ibid.*)

6. Furthermore, complainant did not prove by a preponderance of the evidence that respondent made payments without authorizing instructions in two of the escrows (68097-NG and 67913-NG). Disbursements without written authorizing instructions violate the Escrow Law (§ 17414, subd. (a)(1); Cal. Code Regs., tit. 10, §§ 1738, 1738.2), but complainant's evidence was insufficient to prove the absence of authorizing instructions. (Factual Findings 8-12).

7. Complainant requests the respondent be barred for life from any position of employment, management, or control of any escrow agent. Given the violations that complainant proved, this level of discipline would be excessive. Complainant proved three violations of the Escrow Law, in three escrows that closed about eight years ago. There was no evidence presented that the proven violations involved fraud, or were so severe that they warrant a lifetime ban. There was also no evidence presented that the Commissioner has taken other administrative action against respondent.

8. At the same time, the violations occurred while respondent was acting as an escrow officer for a licensed escrow agent. Thus, there is a direct and substantial nexus between respondent's violations and a restriction of his further ability to process escrows. Respondent's violations also involved an unawareness of a basic provision of the Escrow Law. The public relies heavily on escrow agents and officers to know the Escrow Law, and to apply it carefully. Some form of discipline is warranted for respondent's violations in order to protect the public from repetition of similar violations in the future. Considering the totality of the record, the proper level of discipline is a 30-day suspension under Financial Code section 17423.

ORDER

Respondent Noe F. Gonzalez is suspended for a period of 30 days from any position of employment, management or control of any escrow agent, pursuant to Financial Code section 17423.

DATED: September 24, 2015

/s/

THOMAS HELLER
Administrative Law Judge
Office of Administrative Hearings