

BEFORE THE
DEPARTMENT OF BUSINESS OVERSIGHT
STATE OF CALIFORNIA

In the Matter of:

THE COMMISSIONER OF BUSINESS
OVERSIGHT,

Complainant,

v.

TOWER ESCROW, INC.,

Respondent.

Escrow License No.: 963-1915

OAH No.: 2019020797

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated October 31, 2019, is hereby adopted by the Department of Business Oversight as its Decision in the above-entitled matter.

This Decision shall become effective on February 29th, 2020.
IT IS SO ORDERED this 30th day of January, 2020.




MANUEL P. ALVAREZ
Commissioner of Business Oversight

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STATE OF CALIFORNIA**

In the Matter of:

THE COMMISSIONER OF BUSINESS OVERSIGHT, Complainant

v.

TOWER ESCROW, INC., Respondent

Escrow License No. 963-1915

OAH No. 2019020797

PROPOSED DECISION

Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on September 24 through 26, 2019, in Los Angeles.

Johnny Vuong, Senior Counsel, and Taylor Herrlinger, Counsel, represented the Commissioner of Business Oversight (the Commissioner).

Matthew S. Davis, Attorney at Law, represented Tower Escrow, Inc. (respondent).

The record was held open to October 11, 2019, for the parties to brief the standard of proof to be used in this case. The parties timely filed briefs, which were marked for identification as follows: the Commissioner's, exhibit 14; respondent's, exhibit 66. The record was closed and the matter submitted on October 11, 2019.

SUMMARY

The Commissioner seeks to suspend respondent's escrow agent license for a period of up to 12 months.

In 2017, respondent fell victim to two cyber-attacks, in which it sent funds from escrow to imposters posing as principals. The Commissioner therefore issued an order directing respondent to not similarly violate the Escrow Law. (Fin. Code, § 17000 et seq.) In June 2018, after issuance of the Commissioner's order, respondent again wired escrow funds to an imposter's bank account, instead of to the intended principal, due to a more sophisticated cyber-attack. The Commissioner contends that respondent thereby made an unauthorized disbursement from escrow, which resulted in a trust fund shortage, both violations of the Escrow Law, and violated the 2018 order directing respondent not to do so.

While the standard of proof in this case as a matter of law is a preponderance of the evidence, the evidence presented in this case was generally undisputed and of such quality that all of the factual findings were established by clear and convincing evidence to a reasonable certainty, the standard used for professional licenses.

As a result, the Commissioner established that, despite the experience of the prior two cyber-attacks in 2017 and the Commissioner's subsequent order, respondent failed to abide by its own policies put in place after the 2017 cyber-attacks and recklessly disbursed escrow funds to the imposter in June 2018. However, it was not established that respondent created a trust fund shortage in so doing. Moreover, due to the significant evidence of mitigation, only a one-day suspension is warranted.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Respondent is an escrow agent licensed by the Commissioner pursuant to the Escrow Law.

2. On November 26, 2018, the Commissioner issued a Notice of Intention to Issue Order Suspending Escrow Agent's License (Notice), and an Accusation in support of the Notice (Accusation). Both the Notice and Accusation request suspension of respondent's escrow agent license for a period of up to 12 months.

3. Respondent timely filed a Notice of Defense and Request for Hearing to challenge the Notice and Accusation.

Respondent's Background Information

4. Respondent has been licensed as an escrow agent since 2001. Its principal office is located in Los Angeles, and it has three other branch offices. Respondent is owned and operated by Sun Yong "Sunny" Park. Respondent currently has 35 employees.

5. Ms. Park has been employed in the escrow business since 1987, starting that year as a receptionist for an escrow company. After two years, Ms. Park became an escrow officer and worked in that capacity until she started respondent in 2001.

6. A. On February 8, 2018, the Commissioner issued an Order to Discontinue Violations Pursuant to Financial Code Section 17602 (2018 Order) against respondent, based on allegations that, in March 2017 and again in June 2017, respondent made unauthorized disbursements of trust funds in violation of Financial

Code section 17414 and California Code of Regulations, title 10, sections (regulation) 1738 and 1738.2.

B. The 2018 order alleged that in 2017 respondent fell victim to two separate cyber-attacks, in which employees recklessly followed the instructions of an imposter, who had assumed the identity of the actual principals of the escrow transactions in question. Specifically, it was alleged that the imposter emailed respondent's staff requesting that trust funds be wired to accounts that did not belong to the actual principals. It was further alleged that respondent failed to exercise due diligence and contact the actual principals in both instances to confirm the new wiring instructions, despite indications that the instructions did not come from the principals.

C. Respondent did not appeal the 2018 Order and it became final.

D. The 2018 Order directed respondent to immediately discontinue violations of Financial Code section 17414 and regulations 1738 and 1738.2 (unauthorized disbursement of escrow funds), and regulation 1738.1 (creating a debit balance in a trust account).

7. Cyber-attacks were not new to the escrow industry when respondent was attacked in 2017. For example, in April 2016, the Commissioner issued a bulletin warning escrow companies about the dangers of "cyber-hacking of escrow accounts every month for the past nine months." (Ex. 3, p. 302.) A scenario similar to the 2017 attacks against respondent was described as the "most common attack method." (*Ibid.*) Escrow licensees were advised to proactively train staff to recognize the red flags of cyber-attacks, not follow an e-mail that changes original funding instructions without confirmation, and to telephone clients to affirm their identities. (*Ibid.*)

8. A. As a result of the 2018 Order, and before the June 2018 events described below, respondent put in place remedial efforts to help safeguard against future cyber-attacks.

B. For example, respondent's employees were warned during weekly staff meetings to remain vigilant against cyber-attacks. Respondent's employee, Sarah Choe, testified that staff were told to be "extra careful", and to not rely on just one source of information, especially when wiring funds.

C. Ms. Park hired an information technology professional to help create counter-measures against cyber-attacks, including adding more fire-walls and encrypting email. Respondent's employees were asked to start new email threads when communicating on transactions, as opposed to replying to prior emails in which hidden imposters may be embedded. Staff were also asked to do their best to verify email addresses of parties communicating with them on escrows, especially when receiving an email for the first time from a person.

D. Ms. Park testified that she also created a three-page manual on wiring funds from escrow, since that was the cyber-attackers' favorite method of stealing money from escrow. The manual directed respondent's staff to call and verify wire and bank information with the principals before wiring escrow funds, and to note such contact in the escrow file.

Escrow Number L-036456-NY

9. On May 23, 2018, respondent opened Escrow Number L-036456-NY (the escrow) for a real property purchase transaction.

10. On May 24, 2018, a third-party deposit in the amount of \$16,950 was made for the buyer. The written third-party deposit instructions stated that, "In the event the escrow is not consummated, it is understood that all funds deposited in this escrow . . . shall be disbursed ONLY in accordance with mutually signed disbursement/cancellation instructions of the principals. . . ." (Emphasis in original.)

11. At the time the escrow was opened, Mr. Choe, respondent's escrow assistant working on the escrow with respondent's escrow officer, Martha Kim, sent an email to the buyer's real estate agent, advising that "[d]ue to increased cyber fraud, please forward the [attached wire] instructions to the buyers(s) and have them **CALL TO VERIFY** all information before arranging the wire." (Ex. 6, p. 65; emphasis in original.)

12. On May 30, 2018, the buyer's real estate agent advised respondent that his client discovered zoning issues that made the property no longer desirable to him and that the buyer wanted to cancel escrow.

13. On May 31, 2018, respondent received the parties' executed joint instructions to cancel the escrow and refund the buyer's deposit.

14. Because the escrow was cancelled so quickly, the joint escrow instructions prepared by respondent were never executed by the parties. However, the Residential Income Property Purchase Agreement and Joint Escrow Instructions (purchase agreement), signed by the parties when the real property purchase transaction was initiated, contained provision 19.G., which stated, in part:

If Buyer or Seller gives written notice of cancellation . . . the Parties agree to Sign mutual instructions to cancel the sale and escrow and release deposits, if any, to the party entitled

to the funds. . . . **[R]elease of funds will require mutual
Signed release instructions from the Parties. . . .**

(Ex. 7, p. 226, bold in original.)

15. On May 31, 2018, the buyer's real estate agent forwarded to respondent an email from the buyer requesting that the refund check be mailed to his home. Later that day, respondent issued a trust check in the amount of \$16,950 to the buyer and mailed the trust check to the buyer's mailing address.

16. A. On June 5, 2018, an imposter, assuming the identity of the buyer's real estate agent, emailed respondent requesting that the refund of the buyer's deposit be sent through wire transfer to an account at SunTrust Bank, in the name of the buyer. (Ex. 4, p. 40.) The imposter's email address was the same as the buyer's real estate agent's email address, except it ended in "@pacuinonla.com" instead of "@pacunion.com." The fake email address used by the imposter contained an email signature with the actual email address of the buyer's real estate agent. The imposter's email was addressed to Ms. Choe, with a copy also sent to Ms. Kim.

B. Ms. Choe and Ms. Kim did not notice that the imposter's email address was different from the actual email address of the buyer's real estate agent in the email signature. Ms. Choe testified that she would have not seen the imposter's email address on her computer screen, but rather just the name of the sender, i.e., the buyer's real estate agent's name. However, at the end of the email string begun by the imposter on June 5, 2018, was an email system message to Ms. Choe that, "You received this message because the sender is not on your allow list", referring to the email from the imposter posing as the buyer's real estate agent. (Ex. 4, p. 37.) The message also provided an option to "Remove this sender from my allow list." (*Ibid.*)

C. While Ms. Choe testified she did not remember seeing this message when receiving the imposter's first email, she also admitted it was possible that she "clicked on something" that allowed the imposter's subsequent emails to be received without such messages. In any event, it was not established that Ms. Choe spent any time scrutinizing this message or confirming the email address of the sender.

17. In response to the imposter's email of June 5, 2018, Ms. Kim advised that the buyer would need to return the \$16,950 trust check that had already been mailed to the buyer. The imposter informed Ms. Kim by email that the buyer would mail the check back to respondent's office.

18. On June 6, 2018, the imposter inquired with Ms. Kim by email (with a copy to Ms. Choe) whether respondent received the buyer's refund check.

19. Meanwhile, and unbeknownst to respondent's staff or the principals to the escrow, the same imposter also posed as Ms. Choe and contacted the buyer by email. The imposter convinced the buyer to return the refund check that had been mailed to him when he received it, so that his refund could be sent by a wire transfer. In the communication by email, the imposter used Ms. Choe's correct name, and an email address cleverly ending with "@towerrescrow.com" instead of the correct "@towerescrow.com." (See, e.g., ex. 61.)

20. The fact that the imposter was posing as Ms. Choe when communicating with the buyer, on the one hand, and posing as the buyer's real estate agent when communicating with Ms. Choe, on the other hand, allowed the imposter to coordinate and explain the requests being made, therefore making the ruse more sophisticated and harder to detect.

21. Ms. Choe testified that she had one telephone contact with the actual buyer, in which he told her he had received the refund check and had mailed it back to respondent's office; Ms. Choe intimated that the two also discussed sending him the funds by wire. However, Ms. Choe admitted in her testimony that she did not remember the date of this call. Nor did she document anywhere in the escrow file speaking with the buyer. Ms. Park testified a call involving disbursement of funds like this should have been described on a call log in the escrow file. Moreover, when Ms. Choe wrote a memorandum about this incident as part of respondent's disclosure about it to the Commissioner, she wrote nothing about having any telephonic contact with the buyer. Under these circumstances, Ms. Choe's testimony was uncorroborated and unconvincing, and therefore, it was not established that she ever had telephonic contact with the buyer.

22. On June 7, 2018, the imposter, posing as the buyer's real estate agent, emailed Ms. Kim regarding the status of wiring the refund. Ms. Kim replied directly to that email, advising the imposter that respondent needed physical possession of the refund check before a wire could be sent to the buyer. The imposter quickly replied, insisting that because the check had been mailed, "you can place a stop payment on a check without having it in hand." (Ex. 4, p. 28.) Ms. Kim replied to that email thread, advising the imposter that "we will request to stop the check and do our best to send the wire out today." (*Id.*, p. 27.) Ms. Kim did so that same day, advising the bank that the check had been lost in the mail, which technically was not true. (Ex. 57, p. 116.)

23. Ms. Choe testified that the escrow officer, Ms. Kim, decided to honor the request to stop payment on the refund check, even though respondent did not have possession of the check, because Ms. Kim felt the buyer's real estate agent was more

aggressively advocating for an impatient client, which is commonly experienced by escrow officers concerning the release of funds from escrow.

24. Later in the day of June 7, 2018, Ms. Choe advised the imposter that the refund in the amount of \$16,950 had been wired to the SunTrust account provided by the imposter. (Ex. 4, pp. 39-41.)

25. A. Later in the day of June 7, 2018, the imposter emailed Ms. Choe (copying Ms. Kim), advising that incorrect bank account information had been provided and requesting that respondent recall the wire and rewire the buyer's refund to an account at Wells Fargo Bank, in the name of a third party, Donna L. Pederson. (Ex. 4, p. 26.) Ms. Kim notified the bank and requested recall of the wire. (Ex. 4, p. 21.)

B. In response, Ms. Kim advised the imposter that the buyer must submit a written authorization, signed and dated by him, in order to send the wire to a third party other than himself. (Ex. 4, p. 24.)

C. The imposter replied that the account in question was jointly owned by the buyer with his brother, so there was no need for a written authorization. (Ex. 4, p. 24.) This should have raised a suspicion, since the third party identified in the second wire instruction was a woman, with a different last name than the buyer.

26. Later in the day of June 7, 2018, and apparently before a wire to the Wells Fargo account had been approved or sent, the buyer's actual real estate agent contacted Ms. Kim about the status of the refund. (Ex. 13.) After rapid email communications between Ms. Kim, Ms. Choe, the buyer, and the buyer's actual real estate agent, it was discovered that neither the buyer nor the buyer's actual real estate agent requested respondent to cancel the trust check sent to the buyer on May 31,

2018, or disburse the buyer's refund through wire. The buyer also informed Ms. Kim that the bank account provided by the imposter did not belong to the buyer.

27. Upon discovering that they had been the victim of a sophisticated cyber-attack, Ms. Kim contacted the involved bank(s) to dispute the wire. On June 12, 2018, respondent transferred the refund amount from its own general account into the escrow's trust account for the buyer's benefit. On June 14, 2018, Ms. Choe personally gave the buyer a check in the full refund amount, after confirming his identity by looking at his driver license. (Ex. 4, p. 51.) While the buyer was not happy about the situation, he never lodged a complaint with the Commissioner. Respondent's wire to SunTrust Bank was ultimately recalled and the funds returned to respondent's trust account on June 29, 2018.

28. None of respondent's staff knew they were communicating with an imposter during this cyber-attack until after the funds were wired to the imposter's SunTrust account. However, the evidence demonstrated that Ms. Choe and Ms. Kim should have known they were the subject of a cyber-attack, and they had numerous opportunities to discover the cyber-attack before wiring funds to the imposter's account. Respondent's staff deliberately disregarded known risks and new corporate policies put in place to safeguard against such risks, as the following shows.

a) Despite warning the buyer's real estate agent at the outset of escrow to have the buyer call her to confirm all wiring instructions, no evidence was presented indicating Ms. Choe tried to confirm wiring instructions with the buyer or that he ever submitted any wiring instructions to respondent, either verbally or in writing.

b) Respondent's employees did not attempt to contact the buyer or the buyer's real estate agent by telephone to confirm that the buyer had changed his instruction about how he wanted the refund disbursed, i.e., from having the refund sent by check through the mail to it being wired to a bank account. As discussed above, Ms. Choe's testimony about having a telephone discussion with the buyer was not convincing.

c) Despite receiving a second request for a wire transfer from the imposter, this time to a different bank and in the name of a third party, respondent's employees again failed to contact the actual buyer or the buyer's real estate agent by telephone to confirm the change in disbursement instructions. Respondent's employees should have been suspicious about this request because Ms. Kim specifically had advised the imposter that a wire could not be sent to a third party unless the buyer sent written authorization. When the imposter advised that the third party on the bank account in question was the buyer's brother, Ms. Kim should have noticed the name of the account holder on the second wire instruction was a woman with a different last name. Respondent's staff only learned about the cyber-attack as a result of being contacted by the buyer's actual real estate agent, not due to their own attempts to verify or confirm the situation.

d) Respondent's employees agreed to wire the refund to the purported buyer, even though they did not have possession of the refund check. Ms. Kim even advised the imposter of this requirement. Without any further investigation or attempts to verify the situation with the buyer or his real estate agent, Ms. Kim agreed to request a stop payment of the check. She reported to the issuing bank that the check had been lost in the mail, which was not true. Ms. Choe admitted that Ms. Kim was motivated to act with such haste because she feared the buyer was in a rush and she did not want to delay the process.

e) In acting as described above, respondent's employees disregarded the remedial instructions they had received from Ms. Park after the 2017 cyber-attacks and the Commissioner's 2018 Order. For example, respondent's staff relied on only one source of information when agreeing to wire funds from escrow. Respondent's employees also replied to email threads created by the imposter, instead of initiating new communications by a new email. Ms. Choe specifically failed to verify email addresses of those with whom she was in contact on the escrow, when she disregarded a prompt from her email system warning about the first email she received from the imposter. Ms. Choe and Ms. Park also disregarded the three-page wiring manual created by Ms. Park, when they agreed to wire funds from escrow without calling the buyer or his real

estate agent on the telephone to confirm the wire instructions and bank information.

The Trust Account

29. Respondent's monthly status report, generated as of June 29, 2018 (ex. 64, p. 295 & ex. 65), shows how the escrow trust account evolved through the events described above:

<u>Date</u>	<u>Transaction</u>	<u>Amount</u>	<u>Balance</u>
May 24, 2018	third party deposit	+\$16,950	\$16,950
May 31, 2018	refund check issued to buyer	-\$16,950	\$0
June 7, 2018	stop payment on refund check	+\$16,950	\$16,950
June 7, 2018	wire to SunTrust account	-\$16,950	\$0
June 12, 2018	transfer of funds from respondent's general account	+\$16,950	\$16,950
June 14, 2018	check issued to buyer	-\$16,950	\$0
June 27, 2018	wire returned to respondent	+\$16,950	+\$16,950
June 29, 2018	transfer back to respondent's general account	-\$16,950	\$0

30. During the hearing, the Department's corporate examiner assigned to this matter, Edgar Nunez, admitted on cross-examination that at no time was there a shortage in the trust account, given the above accounting treatment of the escrow's

trust account. Put another way, at no time had respondent disbursed more funds than was in the trust account. Key to this was respondent transferring money from its own general account to the escrow's trust fund when the cyber-attack was discovered.

31. Mr. Nunez argued in his testimony that technically there was a shortage on June 7, 2018, because if the buyer had demanded his money that day there would have been no trust funds available to pay him, due to the fact that funds had been sent by wire that day. However, the evidence presented by respondent also shows that because the wire to the SunTrust account sent that day also had been disputed that day, the funds had not been disencumbered from the escrow's trust account.

Other Relevant Facts

32. Respondent timely and accurately reported the incident to the Commissioner within two business days, as required by the Escrow Law. At all times thereafter, respondent reasonably cooperated with the Commissioner's investigation.

33. As discussed above, the buyer received his refund check from respondent within four business days of the discovery of the cyber-attack, which was weeks before respondent received its own reimbursement from the recalled wire.

34. After discovery of the 2018 cyber-attack, Ms. Park implemented new, stricter remedial measures, including more staff training, and creating a more detailed written policy on sending funds from escrow by wire. However, the Commissioner was unable to evaluate these measures because respondent refused to provide copies of pertinent documents to the Commissioner's staff, when requested, or to offer them during the hearing.

35. Other than as described above, respondent has no other record of action taken against it by the Commissioner.

36. Ms. Park testified that approximately 45 percent of respondent's escrow income goes to commissions and salary paid to its employees. A lengthy suspension would create adversity for respondent's employees; Ms. Park suspects a number of them would leave the company if that happened. Ms. Park also testified that a lengthy suspension would result in drastic loss of business, because the company would soon run out of pre-existing escrows and would have no closings, and therefore no income, after a short period. Ms. Park concluded that a 12-month suspension would effectively close respondent's business.

LEGAL CONCLUSIONS

Burden of Proof

1. A hearing under Financial Code section 17604 is governed by the provisions of the Administrative Procedure Act. (Fin. Code, § 17604; Gov. Code, § 11500 et seq.)¹

¹ Further undesignated statutory references are to the Financial Code.

2. The burden of proof in a licensing disciplinary matter such as this is on the party filing the charges, here the Commissioner. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.)

Standard of Proof

3. Evidence Code section 115 provides that "[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." The Escrow Law is silent as to which standard of proof to apply in this matter, and the parties disagree on the appropriate standard. The Commissioner contends the lower "preponderance of the evidence" standard controls; that standard requires evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) Respondent contends the higher "clear and convincing evidence" standard applies; that standard requires clear and convincing evidence to a reasonable certainty, i.e., proof that is clear, explicit, and unequivocal--so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478, 487.)

4. A. The preponderance of the evidence standard is used for "occupational licenses," like those held by vehicle salespersons or food processors; the clear and convincing standard is used for "professional licenses," like those held by doctors, lawyers, and real estate brokers. (Compare *Mann v. DMV* (1999) 76 Cal.App.4th 312, 318-319 [vehicle salespersons] and *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1894 [food processors] with *Ettinger v. Board of Med. Quality Assur.* (1982) 135 Cal.App.3d 853, 856 [doctors], *Furman v. State Bar of Cal.* (1938) 12 Cal.2d 212, 229-230 [lawyers], and *Realty Projects, Inc. v. Smith* (1973) 32 Cal.App.3d 204, 212 [real estate brokers].)

B. Courts distinguish professional licenses from occupational licenses based upon the level of education, training, and testing that an applicant must satisfy to obtain the license. (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916). Courts reason that because a professional license "represents the licensee's fulfillment of extensive educational, training and testing requirements, the licensee has an extremely strong interest in retaining the license," and that in this context, it makes sense to require a higher standard of clear and convincing evidence. (*San Benito Foods v. Veneman, supra*, 50 Cal.App.4th at p. 1894).

C. By contrast, the same cannot be said for an occupational license holder, where the only specific requirements for obtaining a license are that the applicant show character, responsibility, good faith, and sound financial status. (*Mann v. DMV, supra*, 76 Cal.App.4th at p. 319.) Courts will characterize a license as occupational even if the licensee must take certain courses or pass an examination, if the training and testing required are not extensive. (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair, supra*, 201 Cal.App.4th at pp. 916-917.)

5. A. To obtain an escrow agent's license, one must do the following: be a corporation (§ 17200); file an application (§ 17201); pay an application fee (§ 17207); join the Escrow Agents' Fidelity Corporation, if the contemplated escrows will be of the type specified in section 17312, subdivision (c) (§ 17320); meet minimum financial requirements set forth in the Escrow Law (§ 17210); obtain a surety bond (§§ 17202-17203); undergo a background check of the stockholders, directors, officers, and managers (§ 17209, subd. (g)); and employ an escrow manager with at least five-years' experience as an escrow officer (§ 17200.8).

B. The owner of a licensed escrow agent corporation need not have the requisite escrow officer experience; he or she simply needs to hire someone with that experience. Moreover, escrow officers are not licensed by the Commissioner, meaning the individual with the qualifying experience can become an escrow officer without any education, training or testing. Even the smog technician license, deemed by the court in the *Imports Performance* case to be occupational, requires some coursework and examination, though not extensive.

C. In this case, the requirements to obtain an escrow agent license do not include the extensive educational, training, and testing requirements associated with professional licenses, and therefore, it should be viewed as an occupational license requiring the lower preponderance standard. This conclusion is not significant in this case, however, because all of the factual findings herein were established by clear and convincing evidence to a reasonable certainty.

D. Respondent makes a number of arguments in favor of applying the higher standard that are thought-provoking but ultimately unconvincing.

i. For example, respondent cites case law affirming that the purpose of administrative proceedings concerning discipline of a licensee is to protect the public and argues that public protection requires the higher standard to be used in this case, especially since respondent is a fiduciary and handles money for members of the public. (Ex. 66, p. 2.) However, the cases are clear that public protection is paramount in all licensure disciplinary matters, including occupational licenses.

ii. Respondent argues the requirement of an escrow agent to employ an escrow manager with at least five years' experience is an extensive investment of on-the-job training consistent with a professional license. (Ex. 66, p. 4.)

But the key here is that the owner of a licensed escrow agent need only *hire* someone with five years' experience as an escrow officer; the owner is not personally required to have that experience in order to obtain the license, meaning an escrow agent license can be obtained without any education, training or testing.

iii. Respondent also points to the fact that escrow companies owe a fiduciary duty to the principals of an escrow, like attorneys or real estate brokers, and that escrow officers sometimes perform sophisticated legal work, such as drafting deeds and promissory notes. (Ex. 66, pp. 5-6.) But, as discussed above, the individuals performing the actual escrow activities are not licensed, unlike attorneys or real estate brokers, who must meet extensive education, training, and testing requirements, and who must be licensed in order to engage in their respective activities. Moreover, the case law cited above does not consider the existence of a fiduciary duty or the complexity of the involved activity in determining which standard of proof to apply to a given license.

Unauthorized Disbursements

6. A. Section 17414, subdivision (a)(1), provides that it is a violation for an escrow agent to "knowingly or recklessly disburse or cause the disbursal of escrow funds otherwise than in accordance with escrow instructions, or knowingly or recklessly to direct, participate in, or aid or abet in a material way, any activity which constitutes theft or fraud in connection with any escrow transaction."

B. Regulation 1738, subdivision (a), provides:

All money deposited in such "trust" or "escrow" account shall be withdrawn, paid out, or transferred to other accounts only in accordance with the written escrow

instructions of the principals to the escrow transaction or the escrow instructions transmitted electronically over the Internet executed by the principals to the escrow transaction or pursuant to order of a court of competent jurisdiction.

C. Regulation 1738.2 provides:

An escrow agent shall use documents or other property deposited in escrow only in accordance with the written escrow instructions of the principals to the escrow transaction or the escrow instructions transmitted electronically over the Internet executed by the principals to the escrow transaction, or if not otherwise directed by written or electronically executed instructions, in accordance with sound escrow practice, or pursuant to order of a court of competent jurisdiction.

7. A. Under section 17414, subdivision (a)(1), the disbursement must have been done "knowingly" or "recklessly" in violation of the parties' escrow instructions. However, section 17414 does not define "knowingly" or "recklessly," nor are those words defined elsewhere in the Escrow Law.

B. In this case, the parties agreed in provision 19.G. of the purchase agreement, and in their joint instructions to cancel escrow, that the buyer's deposit should be refunded to him. Because respondent wired the refund to the imposter's SunTrust account, the Commissioner argues respondent knowingly violated the parties' express escrow instructions that the refund be sent to the buyer. To address

the fact that respondent's staff did not know they were dealing with an imposter when the funds were wired from escrow, the Commissioner argues it need only show that respondent's staff intended to disburse trust funds and that those funds did not go to the party specified in the written escrow instructions. (Ex. 14, p. 4.) In support of this argument, the Commissioner relies on the definition of "knowingly" provided by Penal Code section 7, subdivision (5), in which it is stated that the word "imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission."

C. However, respondent correctly points out that borrowing the definition of the word "knowingly" from a criminal statute is not a good fit in this administrative case interpreting a provision of the Escrow Law. First, the definition of "knowingly" in Penal Code section 7 is linked directly to crimes otherwise specified in the Penal Code, not regulatory violations in the Escrow Law. Second, even if it is applicable to this case, Penal Code section 7 only clarifies that one can act knowingly even if they do not know the acts in question are illegal. The issue in this case is not whether respondent's staff knew their actions were illegal, but whether they knew they were communicating with an imposter defrauding them, which is entirely different. That distinction is highlighted by the case cited by respondent, *People v. McCalla* (1923) 63 Cal.App. 783, 793 (disapproved of on other grounds), in which the court observed that in the criminal context the word "knowingly" usually refers to knowledge of the essential facts. In this case, respondent's staff did not have knowledge of the essential facts that they were being defrauded by an imposter posing as the buyer. For these reasons, the definition of the word "knowingly" used in Penal Code section 7 is rejected.

D. Based on the above, it was not established that respondent's staff knowingly violated the escrow instructions provided by the parties for refunding the buyer's deposit. Respondent's staff believed they returned the buyer's deposit to him, by wire, at his request. At all times respondent's staff tried to follow the parties' escrow instructions, but were defrauded by a sophisticated cyber-attack. (Factual Findings 9-28.)

8. A. The Commissioner argues in the alternative that respondent violated section 17414, subdivision (a)(1), by recklessly disbursing the buyer's refund to the imposter. The Commissioner refers to the legal dictionary definition of "reckless" as "the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash." (Black's Law Dictionary (7th ed. 1999) p. 1276, col. 2.) Respondent correctly argues "recklessness" requires something worse than negligence, which difference is accounted for by the above definition provided in Black's Law Dictionary. Respondent also cites to a definition of "recklessness" provided in the case of *Delaney v. Baker* (1999) 20 Cal.4th 23, 31-32, which is substantially similar to the definition of "reckless" offered by the Commissioner.

B. In this case, the Commissioner established that respondent recklessly disbursed the buyer's refund to the imposter. Respondent had twice before been victimized by cyber-attacks that were similar to the instant one, albeit not as sophisticated. The Commissioner issued the 2018 Order as a result, which should have heightened respondent's awareness of future cyber-attacks. In response, respondent implemented a number of policy changes to safeguard against future cyber-attacks, including using best efforts to confirm email addresses used on transactions, calling the parties on the telephone to confirm wiring instructions, and being alert to wiring

requests to third parties. Yet respondent's staff, Ms. Choe and Ms. Kim, both disregarded those policies, thus subjecting respondent, the parties, and the buyer's real estate agent to cyber-fraud and the theft of funds from escrow. The various policies in question were known to respondent's staff, and often-times articulated by them to the parties, and even the imposter, yet respondent's staff consciously disregarded the policies and went forward with the wire without following them. (Factual Findings 6-28.)²

² In light of this legal conclusion, it is unnecessary to decide the Commissioner's remaining argument that, because they do not contain the words "knowingly" or "recklessly," regulations 1738, subdivision (a), and 1738.2 provide for strict liability in cases of cyber-attacks without regard to a standard of care. In any event, that argument is dubious, because a regulation must be consistent with, and not in conflict with, an enabling statute, and reasonably necessary to effectuate the purpose of the statute. (*Physicians & Surgeons Laboratory, Inc. v. Department of Health Services* (1992) 6 Cal.App.4th 968, 982, citing Gov. Code, § 11342.2.) Here, the enabling statute, section 17414, subdivision (a)(1), expressly requires that a disbursement must be knowingly or recklessly made in violation of escrow instructions in order to violate the Escrow Law. To interpret regulations 1738, subdivision (a), and 1738.2 as providing strict liability without regard to whether the violation was knowing or reckless would render the regulations in conflict with the enabling statute and essentially allow the regulations to trump or supersede the statute, which is prohibited by Government Code section 11342.2.

Trust Account Shortage

9. A. The Accusation alleges that respondent created a trust account shortage in a trust account in violation of regulation 1738.1, which provides that, "An escrow agent shall not withdraw, pay out, or transfer monies from any particular escrow account in excess of the amount to the credit of such account at the time of such withdrawal, payment, or transfer."

B. Under a strict application of the regulation, no shortage occurred in Escrow Number L-036456-NY. All funds in the trust account attributable to escrow were accounted for. The sums deposited into escrow were equal to the sums disbursed at the cancellation of the escrow. The escrow records reflect a balance between the receipts and disbursements. Respondent made a diligent effort to recover the funds disbursed under the imposter's fraudulent wire instruction and, pending recovery of the money, advanced from its general account the amount necessary to provide adequate funds to reissue a second refund check to the buyer. Respondent accurately accounted for all transactions and the escrow account never reflected a negative balance. (Factual Findings 6-31.)

10. Whether the delay in making the authorized disbursement to the buyer violated any law or regulation and whether respondent is liable to the buyer for its reliance on a fraudulent wiring instruction are not issues in this administrative proceeding. However, as a matter of law, it was not established that respondent violated regulation 1738.1. (Factual Findings 6-31.)

Violation of the Commissioner's 2018 Order

11. A. The Commissioner's 2018 Order was issued under the authority of section 17602, which provides that if a licensed escrow agent has violated the Escrow

Law, the Commissioner shall issue a written order directing the agent to discontinue such violation(s). Pursuant to section 17604, when such an order becomes final, "the licensed escrow agent shall immediately discontinue the practices named in the order."

B. In this case, it was established that, in June 2018, respondent recklessly disbursed escrow funds to an imposter in violation of section 17414, subdivision (a)(1). The Commissioner's 2018 Order directed respondent, in part, to not disburse escrow funds in violation of escrow instructions pursuant to section 17414, based on allegations that in 2017 respondent had recklessly disbursed escrow funds to cyber-attackers on two separation occasions in violation of section 17414. Thus, it was established that respondent's reckless disbursement of escrow funds to an imposter in June 2018, in violation of section 17414, subdivision (a)(1), also violated the Commissioner's 2018 Order, itself a violation of sections 17602 and 17604. (Factual Findings 1-31.)

Disposition

12. A. Section 17608, subdivision (b), allows the Commissioner to suspend or revoke an escrow agent license if the licensee has violated any provision of the Escrow Law or any rule made by the Commissioner under and within the authority of the Escrow Law. Here the Commissioner seeks to suspend respondent's escrow agent license for a period of up to 12 months. As mentioned above, however, licensing statutes are designed to protect the public (*Arneson v. Fox* (1980) 28 Cal.3d 440, 451), not to punish an individual (*Camacho v. Youde* (1979) 95 Cal.App.3d 161, 165).

B. In this case, the Commissioner established that respondent violated the Escrow Law by recklessly disbursing escrow funds to an imposter in violation of section 17414, subdivision (a)(1), which in turn violated the Commissioner's

2018 Order that respondent discontinue further violations of section 17414, which in turn violated sections 17602 and 17604. Cause therefore exists to suspend respondent's escrow agent license. In aggravation, respondent was victimized by cyber-attacks three times in 18 months, the third time resulting from respondent's staff failing to heed new policies enacted after the first two cyber-attacks. As complainant correctly argues, the Commissioner's 2018 Order was not enough of a deterrent to prevent future violations of the same provision of the Escrow Law. Under the principles of progressive discipline, a suspension is warranted in order to protect the public by ensuring respondent will take greater efforts to avoid similar violations in the future. (Factual Findings 1-31.)

C. The remaining issue is the length of an appropriate suspension. Respondent presented significant mitigation in this case. For example, it was victimized by a very sophisticated cyber-attack in 2018, unlike the cyber-attacks described in the Commissioner's bulletin in 2016 or those experienced by respondent in 2017. Respondent has no record of action taken against it by the Commissioner, other than the 2018 Order. Respondent immediately took efforts to recall the wire, which were successful. Respondent replaced the disbursed funds with money from its own general account, without request or demand. Ms. Park immediately and accurately disclosed these events to the Commissioner and thereafter respondent's staff reasonably cooperated with the Commissioner's investigation. (Factual Findings 1-35.)


13. In sum, after the wire was sent to the imposter, respondent's staff and owner accepted responsibility for the situation and did all the things expected of a fiduciary and escrow agent licensee. It must also be acknowledged that, in reality, respondent cannot reasonably be expected to give assurances that it will not be

targeted by fraudulent perpetrators in the future. Finally, as demonstrated by the testimony of Ms. Park, a significant suspension would likely cause the financial ruin of respondent, which would be punitive and not serve the interests of public protection. Under these unique circumstances, only a one-day suspension is warranted, as the next logical step in progressive discipline. This minimal suspension is calculated to reflect the modest level of respondent's misconduct proven in this case, yet serve as a reminder to respondent of the need to do better in the future to avoid similar mishaps. (Factual Findings 1-36.)

ORDER

Respondent Tower Escrow, Inc.'s escrow agent license is suspended for a period of one day

DATE: October 31, 2019

DocuSigned by:


ERIC SAWYER

Administrative Law Judge

Office of Administrative Hearings