

FILED
FEB 27 2006

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE

By K. Contreras

* * *

In the Matter of the Application of)
JOSE MANUEL CHAVEZ,) NO. H-4377 SAC
Respondent.) N-2005110149

DECISION

The Proposed Decision dated February 3, 2006, 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 application for a real estate salesperson license is denied, but the right to a restricted real estate salesperson license is granted to Respondent. There is no statutory restriction on when a new application may be made for an unrestricted license. Petition for the removal of restrictions from a restricted license is controlled by Section 11522 of the Government Code. A copy is attached hereto for the information of Respondent.

If and when application is made for a real estate salesperson license through a new application or through a petition for removal of restrictions, all competent evidence of rehabilitation presented by the Respondent will be considered by the Real Estate Commissioner. A copy of the Commissioner's Criteria of Rehabilitation is appended hereto.

This Decision shall become effective at 12 o'clock noon on March 17, 2006.

IT IS SO ORDERED 2/17, 2006.

JEFF DAVIS
Real Estate Commissioner

[Signature]

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

JOSE MANUEL CHAVEZ,

Respondent.

Case No. H4377 SAC

OAH No. N2005110149

PROPOSED DECISION

Administrative Law Judge Marilyn A. Woollard, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on December 19, 2005.

Daniel E. Kehew, Real Estate Counsel, Department of Real Estate, represented complainant Charles W. Koenig, Deputy Real Estate Commissioner of the State of California (complainant).

Respondent Jose Manuel Chavez was present and represented himself.

At the conclusion of the hearing, the record remained open to allow respondent the opportunity to submit a letter of recommendation. On January 11, 2006, this letter was received in evidence without objection from complainant as respondent's Exhibit B. The record was then closed, and the matter was submitted for decision on January 11, 2006.

FACTUAL FINDINGS

1. Respondent Jose Manuel Chavez filed his application for a conditional real estate salesperson license with the Department of Real Estate on April 7, 2005.
2. Complainant Charles W. Koenig filed the Statement of Issues in his official capacity as a Deputy Real Estate Commissioner of the State of California, on October 14, 2005, and asserted that respondent's criminal conviction established cause for the denial of his application under Business and Professions Code sections 480, subdivision (a) and 10177, subdivision (b).

3. On October 27, 2005, respondent filed a notice of defense on application and a request for a hearing pursuant to Government Code sections 11504 and 11509. The matter was set for an evidentiary hearing on December 19, 2005, before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500, et. seq.

Respondent's Conviction

4. On March 7, 2003, respondent was convicted in the Alameda County Superior Court of a misdemeanor violation of Penal Code section 484, subdivision (a) (petty theft), based upon his plea of nolo contendere.¹ The conduct underlying this conviction occurred on January 3, 2003, when respondent and a co-worker stole miscellaneous merchandise from their employer Fry's Electronics. Respondent was sentenced to six months in county jail, three years of probation, and \$390 in fines. Respondent testified that he only served six days of jail time.

At the time of his arrest, respondent was employed at Fry's Electronics as a video accessory sales person. The total value of the items taken (a Sony net mini disc play and a Sony 74 minutes minidisk color pack) was \$209. On detention by Fry's loss prevention officer, respondent admitted taking these items. The unpaid merchandise was recovered from respondent's car.

Evidence of Rehabilitation

5. Respondent is a high school graduate who was nineteen years old at the time of his conviction. Respondent testified about his change in attitude and life since his conviction. Respondent found himself in a situation where he had access to material goods and took some items on an impulse. Respondent no longer participates in the type of risk-taking behavior that led to his conviction.

Respondent married in March 2003 and has become a father. Since his conviction, respondent's focus has been on improving his work situation and being a good employee. Respondent has worked with Delta Express Couriers, Inc., since approximately September 2003. He is Delta's evening supervisor in outbound operations. In respondent's view, the amount of trust and management responsibility in his current position is similar to that accorded to a licensee. At Delta, respondent is responsible for millions of dollars in inventory, from televisions to furniture. He manages 14 employees and is responsible for opening and closing the business. Respondent is one of two Delta employees who are entrusted with a 24-hour security code and key to enter Delta's facility. Respondent typically works from 1:00 p.m. to

¹ At the hearing, complainant's counsel amended Paragraph III of the Statement of Issues to correctly identify the date of his conviction by striking January 30, 2002, and adding March 7, 2003.

10:00 p.m.; occasionally, he will open Delta's facility at 6:00 a.m., and close at 10 p.m.

6. Respondent became interested in a career in real estate from talking to friends in the business. He has completed his real estate principles course but needs to complete two other courses before he would be eligible for an unconditional license. Ultimately, respondent is interested in becoming a broker and opening his own office. Respondent has talked to several brokers about working for them; however, he could not recall if he fully disclosed the facts of his conviction to them. Respondent also hopes that a real estate career will offer him more time to be at home with his family and to take vacations, than his current employment.

7. Respondent has lived in the Antelope area for approximately three years. He owns his home. Previously, respondent was involved in coaching soccer and worked for a church fair. He occasionally attends church. Due to his work schedule, respondent has not been involved in any community service work recently.

8. Respondent was not ordered to participate in, and has not independently sought out, any counseling regarding his theft and impulse control issues. Respondent does not experience the type of impulses or materialistic temptation that led him to steal from Fry's. He has participated in some marriage counseling.

9. Respondent remains on probation until March 2006. He has had no violations and is not required to check in with a probation officer. Respondent plans to have his conviction expunged after he is released from probation. Respondent is no longer involved with the co-worker with whom he stole items from Fry's.

10. Delta Express Courier's owner Al Olivares submitted a letter in support of respondent that corroborates his testimony. Mr. Olivares wrote that in the four years respondent has worked as his night operations manager, he has been "a trustworthy, responsible and reliable asset to Delta Express."² Mr. Olivares indicated that respondent is in charge of Delta's daily inventory which "consists of thousands of packages. The average value of our inventory is hundreds of thousands of dollars and many times much more. Jose is also in charge of a large television account. He has successfully shipped four thousand plus big screen television without making a single mistake."

Respondent also provided a letter of personal recommendation from Theresa Olivares, attesting to her belief in his ability to function appropriately as a real estate license.

² Respondent also worked with Delta Express in 2002.

11. In the three years since respondent's petty theft, he has taken positive steps to change his life. Respondent has matured from the nineteen-year-old who acted on an impulse and stole merchandise from Fry's. Specifically, respondent's personal life has stabilized; he is now married, and has responsibility for the care and upbringing of his young daughter. Further, respondent's testimony, as supported by the letter from his employer Mr. Olivares, establishes that he has assumed significant responsibility for hundred of thousands of dollars worth of consumer goods on a daily basis, and that he has fulfilled this responsibility in an honest and trustworthy manner. While respondent has one more month of informal probation to complete all the terms of his sentence, on balance, he has demonstrated that it would not be against the public interest to entrust him with a restricted license at this time.

LEGAL CONCLUSIONS

1. Section 480, subdivisions (a) of the Business and Professions Code provides in pertinent part as follows:

(a) A board may deny a license regulated by this code on the grounds that the applicant has one of the following:

(1) Been convicted of a crime. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere....

(2) Done any act involving dishonesty, fraud or deceit with the intent to substantially benefit himself or another, or substantially injure another; or

(3) Done any act which if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of licensee.

The board may deny a license pursuant to this subdivision only if the crime or act is substantially related to the qualifications, functions or duties of the business or profession for which application is made. . . .

2. Section 10177, subdivision (b), of the Business and Professions Code provides in pertinent part as follows:

The commissioner may suspend or revoke the license of a real estate licensee, or may deny the issuance of a license to an applicant, who has done any of the following: . . .

(b) Entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony or a crime

involving moral turpitude....

3. Cause is established to deny respondent's application for a real estate license under California Business and Professions Code sections 480 subdivision (a), and 10177, subdivision (b) by reason of Factual Finding 4.

Moral Turpitude and Substantial Relationship

4. A criminal act involves moral turpitude if it involves a serious breach of a duty owed to another or to society. (*In re Stuart K. Lesansky* (2001) 25 Cal. 4th 11, 16 [citing *In re Johnson* (1992) 1 Cal.4th 689, 699; *In re Calaway* (1977) 20 Cal.3d 165, 169-170; *In re Higbie* (1972) 6 Cal.3d 562, 569-570].) Acts of moral turpitude are acts which involve "bad character" and "readiness to do evil." (*People v. Zataray* (1985) 173 Cal. App.3d 390, 400.) Crimes which reveal an applicant's dishonesty involve moral turpitude. (*Clerici v. Department of Motor Vehicles* (1990) 224 Cal.App.3d 1016, 1027.) Lack of honesty or integrity, such as intentional dishonesty, demonstrates a lack of moral character and satisfies a finding of unfitness to practice a profession. (*Matanky v. Board of Medical Examiners* (1978) 79 Cal. App. 3d 293, 305.) Crimes of dishonesty, including petty theft, demonstrate moral turpitude. (*In re Rothrock* (1994) 25 Cal.2d 588.)

Honesty and trustworthiness are qualities of utmost importance in a real estate licensee, who must frequently act in a fiduciary capacity. "Honesty and truthfulness are two qualities deemed by the Legislature to bear on one's fitness and qualification to be a real estate licensee." (*Harrington v. Department of Real Estate* (1989) 214 Cal.App.3d 394, 402.) "If appellant's offenses reflect unfavorably on his honesty, it may be said he lacks the necessary qualifications to become a real estate salesperson." (*Harrington, supra*, at p. 402; *Golde v. Fox* (1979) 98 Cal.App.3d 167, 176.) "The Legislature intended to insure that real estate brokers and salespersons will be honest, truthful and worthy of the fiduciary responsibilities which they will bear." (*Harrington, supra*, at p. 402; *Ring v. Smith* (1970) 5 Cal.App.3d 197, 205.)

As indicated in Factual Finding 4, respondent's petty theft conviction involved the intentional theft of merchandise from his employer and is a crime of moral turpitude.

5. The regulations of the Department of Real Estate establish criteria for substantial relationship when considering whether a license should be denied on the basis of the conviction of a crime, or of any act described by section 480, subdivision (a)(2), or 480, subdivision (a)(3) of the Business and Professions Code. Specifically, California Code of Regulations, title 10, Section 2910 provides, in pertinent part, that, a crime or act "shall be deemed to be substantially related to the qualifications, functions or duties of a licensee of the Department within the meaning of Sections 480 and 490 of the Code if it involves: ...

(1) The fraudulent taking, obtaining, appropriating or retaining of funds or property belonging to another person.

(8) Doing of any unlawful act with the intent of conferring a financial or economic benefit upon the perpetrator or with the intent or threat of doing substantial injury to the person or property of another.

As indicated in Factual Finding 4 above, respondent's conduct and his conviction for petty theft involved the fraudulent taking of property belonging to another and involved intent to confer economic benefit on himself. Consequently, respondent's conduct and convictions are substantially related to the qualifications, functions or duties of a licensee.

Evidence Regarding Rehabilitation

6. In considering whether or not to deny the issuance of a license as a consequence of a crime committed by the applicant, the Real Estate Commissioner has identified criteria to be used for the purpose of evaluating an applicant's rehabilitation. (California Code of Regulations, title 10, § 2911.)³ The facts outlined in Factual Findings 5 through 11, and the regulatory criteria have been considered.

³ The criteria are as follows:

- (a) The passage of not less than two years from the most recent criminal conviction or act of the applicant that is a basis to deny the departmental action sought....
- (b) Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the applicant.
- (c) Expungement of criminal convictions resulting from immoral or antisocial acts.
- (d) Expungement or discontinuance of a requirement of registration pursuant to the provisions of Section 290 of the Penal Code.
- (e) Successful completion or early discharge from probation or parole.
- (f) Abstinence from the use of controlled substances or alcohol for not less than two years if the conduct which is the basis to deny the departmental action sought is attributable in part to the use of controlled substances or alcohol.
- (g) Payment of the fine or other monetary penalty imposed in connection with a criminal conviction or quasi-criminal judgment.
- (h) Stability of family life and fulfillment of parental and familial responsibilities subsequent to the conviction or conduct that is the basis for denial of the agency action sought.
- (i) Completion of, or sustained enrollment in, formal education or vocational training courses for economic self-improvement.
- (j) Discharge of, or bona fide efforts toward discharging, adjudicated debts or monetary obligations to others.
- (k) Correction of business practices resulting in injury to others or with potential to cause such injury.
- (l) Significant or conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.
- (m) New and different social and business relationships from those which existed at the time of the conduct that is the basis for the denial of the departmental action sought.
- (n) Change in attitude from that which existed at the time of the conduct in question as evidenced by any or all of the following:

- (1) Testimony of applicant.
- (2) Evidence from family members, friends, or other persons familiar with

As indicated in these Findings, and particularly Factual Finding 11, respondent has taken positive steps toward rehabilitation of the behavior which led to his convictions. Respondent has assumed significant responsibility for the personal property of his employer and has demonstrated that he can be trusted. At this time, it is in the public interest to grant him restricted license.

ORDER

Respondent's application for a real estate salesperson license is denied; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to Section 10156.5 of the Business and Professions Code. The restricted license issued to the 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 said Code:

1. Respondent's restricted real estate salesperson license is issued subject to the requirements of Section 10153.4 of the Business and Professions Code, to wit: Respondent shall, within eighteen (18) months of the issuance of the restricted license, submit evidence satisfactory to the Commissioner of successful completion, at an accredited institution, of two of the courses listed in Section 10153.2, other than real estate principles, advanced legal aspects of real estate, advanced real estate finance or advanced real estate appraisal. If respondent fails to timely present to the Department satisfactory evidence of successful completion of the two required courses, the restricted license shall be automatically suspended effective eighteen (18) months after the date of its issuance. Said suspension shall not be lifted unless, prior to the expiration of the restricted license, respondent has submitted the required evidence of course completion and the Commissioner has given written notice to respondent of the lifting of the suspension.

2. The license shall not confer any property rights in the privileges to be exercised, and the Real Estate Commissioner may by appropriate order suspend the right to exercise any privileges granted under this restricted license in the event of:

applicant's previous conduct and with his subsequent attitudes and behavioral patterns.

(3) Evidence from probation or parole officers or law enforcement officials competent to testify as to applicant's social adjustments.

(4) Evidence from psychiatrists or other persons competent to testify with regard to neuropsychiatric or emotional disturbances.

(5) Absence of subsequent felony or misdemeanor convictions that are reflective of an inability to conform to societal rules when considered in light of the conduct in question.

(a) The conviction of respondent, including pursuant to a plea of nolo contendere, of a crime which is substantially related to respondent's fitness or capacity as a real estate licensee; or

(b) The receipt of evidence 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 this restricted license.

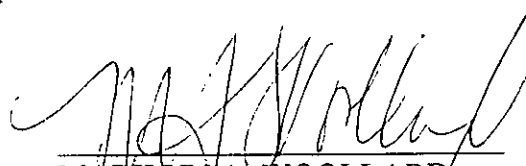
3. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor the removal of any of the conditions, limitations or restrictions attaching to the restricted license until three years have elapsed from the date of the issuance of the restricted license to respondent.

4. With the application for a license, or with the application for transfer to a new employing broker, respondent shall submit a statement signed by the prospective employing real estate broker on a form RE 552 ((Rev. 4/88) approved by the Department of Real Estate which shall certify as follows:

(a) That the employing broker has read the Decision which is the basis for the issuance of the restricted license; and

(b) That the employing broker will carefully review all transaction documents prepared by the restricted licensee and otherwise exercise close supervision over the licensee's performance of acts for which a license is required.

DATED: February 3, 2006


MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings

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DEPARTMENT OF REAL ESTATE
By: *K. Contreras*

8 BEFORE THE DEPARTMENT OF REAL ESTATE
9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Application of)
12 JOSE MANUEL CHAVEZ,) H-4377 SAC
13 Respondent.) STATEMENT OF ISSUES
14)

15 The Complainant, CHARLES W. KOENIG, a Deputy Real
16 Estate Commissioner of the State of California, for Statement of
17 Issues against JOSE MANUEL CHAVEZ (hereinafter "Respondent"), is
18 informed and alleges as follows:

19 I

20 Complainant, CHARLES W. KOENIG, a Deputy Real Estate
21 Commissioner of the State of California, makes this Statement of
22 Issues against Respondent in his official capacity.

23 II

24 Respondent made application to the Department of Real
25 Estate of the State of California for a real estate salesperson
26 license on or about April 7, 2005, with the knowledge and
27 understanding that any license issued as a result of said

1 application would be subject to the conditions of Section 10153.4
2 of the Business and Professions Code (hereinafter "Code").

3 III

4 On or about January 30, 2002, in the Superior Court of
5 California, County of Alameda, Respondent was convicted of Petty
6 Theft in violation of Penal Code Section 484(a), a misdemeanor
7 and crime involving moral turpitude that bears a substantial
8 relationship under Section 2910, Title 10, California Code of
9 Regulations (hereinafter "Regulations"), to the qualifications,
10 functions, or duties of a real estate licensee.

11 IV

12 Respondent's criminal conviction, described in
13 Paragraph III, constitutes cause for denial of Respondent's
14 application for a real estate license under Sections 480(a) and
15 10177(b) of the Code.

16 WHEREFORE, Complainant prays that above-entitled matter
17 be set for hearing and, upon proof of the charges contained
18 herein, that the Commissioner refuse to authorize the issuance
19 of, and deny the issuance of a real estate salesperson license
20 to Respondent, and for such other and further relief as may be
21 proper under other provisions of law.

22
23 
24 CHARLES W. KOENIG
25 Deputy Real Estate Commissioner

26 Dated at Sacramento, California
27 this 6th day of October, 2005.