

FILED
FEB 05 2007

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE

By *Arne Hansen*

* * *

In the Matter of the Application of)	
JOSEPH JOHN ALVES.,)	NO. H-4561 SAC
Respondent.)	OAH No. N2006110006
_____)	

DECISION

The Proposed Decision dated January 18, 2007, 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. There is no statutory restriction on when application may again be made for this license. If and when application is again made for this license, all competent evidence of rehabilitation presented by Respondent will be considered by the Real Estate Commissioner. A copy of the Commissioner's Criteria of Rehabilitation is appended hereto for the information of Respondent.

This Decision shall become effective at 12 o'clock noon on FEB 26 2007

IT IS SO ORDERED 1-30, 2007.

JEFF DAVI
Real Estate Commissioner

Jeff Davi

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

JOSEPH JOHN ALVES,

Respondent.

Case No. H-4561 SAC

OAH Case No. N2006110006

PROPOSED DECISION

Administrative Law Judge Marilyn A. Woollard, Office of Administrative Hearings (OAH), State of California, heard this matter in Sacramento, California, on December 21, 2006.

James L. Beaver, Real Estate Counsel, Department of Real Estate (Department), represented complainant Charles Koenig, a Deputy Real Estate Commissioner of the State of California (complainant).

Respondent Joseph John Alves was present and represented himself.

Oral and documentary evidence was received. At the conclusion of the hearing, the parties offered oral closing arguments. The record was then closed, and the matter was submitted for decision on December 21, 2006.

FACTUAL FINDINGS

1. On March 24, 2006, respondent filed his application for a real estate salesperson license with the Department.
2. On October 19, 2006, complainant, Charles W. Koenig, filed the Statement of Issues against respondent in his official capacity as a Deputy Real Estate Commissioner of the State of California. Complainant seeks to deny the issuance of a real estate salesperson license to respondent based upon his criminal conviction,

pursuant to Business and Professions Code sections 480, subdivision (a), and 10177, subdivisions (b).¹

3. On October 24, 2006, respondent filed his notice of defense to the Statement of Issues and requested a hearing.

Respondent's Criminal Conviction

4. On April 2, 2002, respondent was convicted in the District Court of the Commonwealth of Kentucky, County of Fayette, of the crime of Theft by Unlawful Taking, a misdemeanor. Respondent was placed on two years of supervised probation and ordered to serve 30 days in jail on a suspended 360 day sentence. Respondent was also ordered to pay \$2,380 in restitution, at a minimum of \$125 a month.

Circumstances of the Crime

5. The conduct underlying respondent's conviction occurred from February 1, 2001, through December 17, 2001, while he was employed as a clerk at Rite-Aid Drug Store. Respondent engaged in a practice of "under-ringing" merchandise, by allowing his new, fraternity brother friends to use his 25 percent employee discount for their purchases. For each transaction, respondent had to type in a new bar code and enter a new sales price that was less than the actual price of merchandise. Respondent would then either remove the merchandise himself or allow others to remove the merchandise from Rite-Aid. By affidavit in support of the criminal complaint, respondent's employer indicated that the value of this merchandise was at least \$2,380.

Evidence of Rehabilitation

6. Following his conviction, respondent served three days in jail and performed 27 days of work release. Respondent's two-year probation, the second year of which was informal, ended April 2, 2004. Respondent testified that he has completed all conditions of probation. Respondent did not provide any receipts, however, to show payment of his fine. Respondent testified that the actual dollar amount involved was only \$1,100, rather than the \$2,380 ordered, as reflected in the criminal court documents. Consequently, there is insufficient evidence to establish that respondent has paid the full amount of restitution ordered.

¹ Respondent did not disclose his theft conviction on his initial application to the Department. On September 5, 2006, respondent disclosed this conviction when he filed his Confidential - Interview Information Statement (DRE 515). Respondent explained that he misunderstood what was asked and that "this conviction was to be dismissed upon completion of sentencing." Complainant did not allege respondent's initial failure to disclose as a basis for denying his application.

Respondent has applied to have his conviction expunged; this matter will be heard by the court in April 2007.

7. Respondent is a 28-year-old native Californian who lived in Lexington, Kentucky, from 2000 through 2005 while attending college at the University of Kentucky. In June 2005, respondent received a Bachelor of Arts degree in classical English literature. Following graduation, respondent returned to California and lived with his parents. Respondent has recently purchased his own home, where he lives alone.

8. Respondent is very athletic and has particular skills as a baseball pitcher. He played college baseball, and worked as a coach at pitching camps in Fayette, Kentucky, for hundreds of youngsters ages 5 to 25.

9. In describing his rehabilitation efforts from his conviction, respondent advised the Department that he "became a professional pitching instructor. Led back to back world series championship teams in 03 and 04. Came to Christ on 8/18/04 and have been actively involved in the church since."

10. Since approximately April 2006, respondent has volunteered twice a week at the Capital Christian Center youth program known as Oxygen, which serves over 1000 children. On Wednesday nights, respondent assists with a small flag football team. On Friday evenings, respondent works as a mentor in small group sessions. Respondent has disclosed his conviction to the children at Oxygen, as a way to demonstrate that everyone makes mistakes and sins, and to use his past as an example of what not to do. Respondent has also assisted as a varsity baseball coach for his church on an occasional basis.

11. Respondent offered no letters or certificates documenting his participation in the Oxygen volunteer program, or other volunteer activities.

12. In February 2005, respondent began working as a loan officer with AmericaQuest. In this position, he established a friendship with coworker Russell Garcia, who is a licensed real estate salesperson. Respondent left this position in November 2005, and currently works as a loan officer with Envisions Lending, a California financial lender.

13. On February 6, 2006, respondent became a licensed notary public. Respondent and Mr. Garcia established a mobile notary limited liability corporation (LLC) that provides notary services to mortgage brokers who have documents signed at borrowers' homes. John Blackstead, a banker and an elder of the Capital Christian Center, is on the board of this LLC. Mr. Blackstead, who knows respondent in both a business and personal capacity, testified about his immediate trust of respondent and about respondent's helpful nature.

14. Respondent has completed courses in Real Estate Principles, Real Estate Practice, and Mortgage Loan Brokering through Duane Gomer Seminars.

15. Respondent's sponsoring broker, Thomasine Black, testified on his behalf. According to Ms. Black, respondent is a very goal-oriented and service-oriented individual who can be trusted because he has not engaged in any illegal activities since his college days. Ms. Black owns a small brokerage, Black and Company, in Lincoln, California, that she is expanding by adding her son, Russell Garcia, and hopefully, respondent. Ms. Black has been a broker for 32 years and considers herself to be a "stickler" for doing "only the most professional thing that will benefit the borrowers." Ms. Black demands this same attitude from the salespersons she supervises.

16. Respondent experienced a religious reawakening over two years ago. It is not apparent, however, that he has experienced a change in attitude about his conviction or that he has accepted full responsibility for the conduct that resulted in his conviction. It was established that respondent's conduct was not an isolated incident, but was the result of a practice that required a conscious decision on his part, for each transaction over a period of approximately ten months. Respondent testified that, at the time, he viewed his conduct as being "charitable" to his friends, rather than as taking money from someone else. Respondent did not realize the magnitude and severity of his actions until he was convicted and jailed.

It is apparent that respondent has taken some positive steps toward rehabilitation. However, respondent's testimony indicated a continued minimization of responsibility for his conduct. For example, respondent testified that he was not the only employee to engage in this practice. Once he was caught, he advised the Department that Rite-Aid "demanded restitution based upon prorating all of the discounts we ever used, even the ones for ourselves." This was the apparent basis for respondent's objection to the amount of restitution ordered and for his insistence that the total amount owed was approximately half of that ordered by the court. As previously indicated, there was no verification that respondent has in fact paid the amount of restitution ordered by the criminal court.² Viewing the evidence as a whole, respondent did not provide sufficient evidence to demonstrate that he is substantially rehabilitated. It is therefore not in the public interest to grant him a restricted license at this time.

LEGAL CONCLUSIONS

1. A preponderance of the evidence establishes cause for the denial of respondent's application for a real estate license under section 10177, subdivision (b) and (j), of the California Business and Professions Code.

² Respondent testified that he had "signed a letter" that the amount was actually \$1,100. Respondent submitted no documentary evidence at the hearing.

2. Pursuant to Business and Professions Code section 10177, the real estate commissioner 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, and the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal, irrespective of an order granting probation following that conviction, suspending the imposition of sentence, or of a subsequent order under Section 1203.4 of the Penal Code allowing that licensee to withdraw his or her plea of guilty and to enter a plea of not guilty, or dismissing the accusation or information.

[¶] . . . [¶]

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

3. 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.) “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 (the) offenses reflect unfavorably on his honesty, it may be said that he lacks the necessary qualifications to become a real estate salesperson.” (*Id.* at 402.) Respondent’s crime of theft by unlawful taking, as set forth in Factual Finding 4, is a crime of moral turpitude.

4. A finding of moral turpitude alone will not support the denial of an application for a real estate license. Business and Professions Code Section 10177, subdivision (b), is “tempered” by Business and Professions Code section 480, which provides in pertinent part that, where an applicant has been convicted of a crime, the crime must be “substantially related to the qualifications, functions or duties of the business or profession for which application is made” before the Department may deny the license. Business and Professions Code section 480 does not provide an independent basis for denying respondent’s application. (*Petropoulos v. Department of Real Estate* (2006) 142 Cal. App. 4th 554, 567.) However, section 480 does limit the type of crimes of moral turpitude that can be the basis for the denial of an application.

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 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:

(4) The employment of bribery, fraud, deceit, falsehood or misrepresentation to achieve an end.

[¶] . . . [¶]

(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.

[¶] . . . [¶]

(10) Conduct which demonstrates a pattern of repeated and willful disregard of law.

6. As indicated in Factual Finding 4, respondent's conviction is for conduct that is substantially related to the qualifications, functions or duties of a real estate salesperson licensee, within the meaning of Section 2910, subdivisions (4), (8), and (10).

7. The Real Estate Commissioner has identified criteria to be used to evaluate an applicant's rehabilitation when considering whether to deny the issuance of a license as a consequence of a crime or act committed by the applicant. These criteria, forth in California Code of Regulations, title 10, section 2911, are as follows:

(a) The passage of not less than two years since the most recent criminal conviction or act of the applicant that is a basis to deny the departmental action sought. (A longer period will be required if there is a history of acts or conduct substantially related to the qualifications, functions or duties of a licensee of the department.)

(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 the 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 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 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.

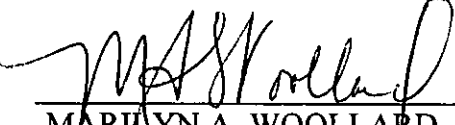
(5) Absence of subsequent felony or misdemeanor convictions that are reflective of an inability to conform to societal rules when considered in light of the conduct in question.

8. The factors identified in Legal Conclusion 7 have been considered in light of the Factual Findings as a whole. As indicated more specifically in Factual Findings 6, 11 and 16, it is not in the public interest to grant respondent a restricted real estate salesperson license at this time.

ORDER

The application of respondent JOSEPH JOHN ALVES for a real estate salesperson license is denied.

DATED: January 18, 2007


MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings

1 JAMES L. BEAVER, Counsel (SBN 60543)
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FILED
OCT 19 2006

DEPARTMENT OF REAL ESTATE

By K. Mar

7 BEFORE THE DEPARTMENT OF REAL ESTATE

8 STATE OF CALIFORNIA

9 * * *

10 In the Matter of the Application of)
11 JOSEPH JOHN ALVES,)
12 Respondent.)

No. H-4561 SAC

STATEMENT OF ISSUES

13
14 The Complainant, Charles W. Koenig, a Deputy Real
15 Estate Commissioner of the State of California, for Statement of
16 Issues against JOSEPH JOHN ALVES (hereinafter "Respondent"),
17 alleges as follows:

18 I

19 Complainant, Charles W. Koenig, a Deputy Real Estate
20 Commissioner of the State of California, makes this Statement of
21 Issues in his official capacity.

22 II

23 Respondent made application to the Department of Real
24 Estate of the State of California for a real estate salesperson
25 license on or about March 24, 2006.

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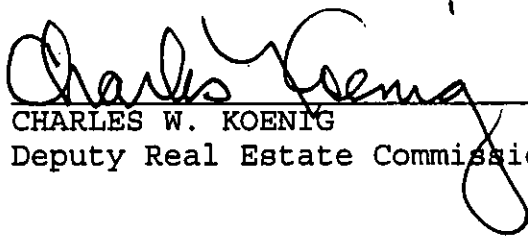
III

On or about April 2, 2002, in the District Court of the Commonwealth of Kentucky, County of Fayette, Respondent was convicted of the crime of Theft By Unlawful Taking, a misdemeanor and a crime involving moral turpitude which bears a substantial relationship under Section 2910 of Chapter 6, Title 10, California Code of Regulations (herein "the Regulations"), to the qualifications, functions or duties of a real estate licensee.

IV

Respondent's criminal conviction described in Paragraph III, above, constitutes cause for denial of Respondent's application for a real estate license under Sections 480(a) and 10177(b) of the California Business and Professions Code.

WHEREFORE, Complainant prays that the above-entitled matter be set for hearing and, upon proof of the charges contained herein, that the Commissioner refuse to authorize the issuance of, and deny the issuance of a real estate salesperson license to Respondent, and for such other and further relief as may be proper in the premises.


CHARLES W. KOENIG
Deputy Real Estate Commissioner

Dated at Sacramento, California,
this 18th day of October, 2006.