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DEPARTMENT OF REAL ESTATE

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

By K. Max

In the Matter of the Application of)	
)	CASE NO. H-5282 SAC
NEIL COWAN,)	
)	OAH NO. 2009110440
Respondent.)	
_____)	

DECISION

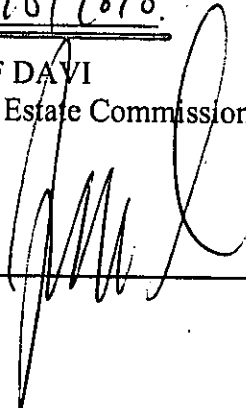
The Proposed Decision dated February 2, 2010, of the Administrative Law Judge of the Office of Administrative Hearings is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

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
APR - 6 2010

IT IS SO ORDERED _____

3/10/2010
JEFF DAVI
Real Estate Commissioner



BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

NEIL COWAN,

Respondent.

Case No. H-5282 SAC

OAH No. 2009110440

PROPOSED DECISION

This matter was heard before Administrative Law Judge Dian M. Vorters, State of California, Office of Administrative Hearings, on January 12, 2010, in Sacramento, California.

John W. Barron, Counsel, Department of Real Estate, represented complainant.

Neil Cowan appeared on his own behalf.

The case was submitted for decision on January 12, 2010.

FACTUAL FINDINGS

1. Complainant, Tricia D. Sommers, a Deputy Real Estate Commissioner of the State of California, filed the Statement of Issues in her official capacity on October 23, 2009.

2. Respondent made application to the Department of Real Estate of the State of California (Department) for a real estate salesperson license on or about June 18, 2009. The application is subject to the provisions of Business and Professions Code section 10153.4.

Criminal Conviction History

3. On October 29, 2007, respondent was convicted in the Superior Court of California, County of Riverside, in Case Number INF058589, on his plea of guilty to violating Health and Safety Code section 11360, subdivision (a) (sell/furnish/transport more

than 28.5 grams marijuana), a felony.¹ The court placed respondent on three years summary probation, with terms and conditions requiring him to serve 30 days in jail, obey all laws, register as a drug offender, not own or possess firearms or deadly weapons, submit to search and seizure, and pay fines/restitution. Approximately one year later, on January 27, 2009, the court granted respondent's motion to reduce the felony charge to a misdemeanor violation of Health and Safety Code section 11360, subdivision (b).² The court then placed respondent on two years summary probation, with terms and conditions requiring him to obey all laws, not use controlled substances, and submit to fluid testing and search and seizure. Respondent's probation is scheduled to end in February 2011.

The facts and circumstances of the conviction, according to respondent, were that on April 27, 2007, respondent attended a rock concert/festival in Southern California. He was approached by a girl who asked if he had a joint he could sell to her. He stated that he would give her a joint but that he was "not selling." When he gave her the joint, she handed him a \$20 bill and he and several friends were arrested.

In a letter to the Department dated July 28, 2009, and at hearing, respondent denied ever selling drugs. He stated that he was convicted of misdemeanor possession of marijuana. In fact, though the charge was later reduced, respondent was arrested and convicted of selling more than one ounce of marijuana as a felony. He was living in Nevada at the time and was convicted of transporting marijuana into the State of California and selling it. His current denials conflict with his earlier plea and the substance of his conviction.

4. On February 23, 2001, respondent was convicted in the Superior Court of California, County of Butte, in Case Number NCR86487, on his plea of no contest to violating Penal Code section 602.5 (trespass), a misdemeanor. The court placed respondent on two years summary probation, with terms and conditions requiring him to complete 40 hours on a Court Work Program, obey all laws; stay 100 yards away from the dormitory, and pay fines/restitution.

The facts and circumstances of the conviction are that on March 31, 2000, respondent was evicted from a residential hall at California State University, Chico, for failure to pay rent. He continued to sneak into the dormitory at night and his roommates allowed him to sleep there. On May 5, 2000, he was found asleep in his old room and was arrested. Joan Cowan, respondent's mother testified that she took responsibility for the offense as she and respondent's father were financially unable to pay respondent's living expenses. She was unaware that he had been evicted until respondent's arrest.

¹ Health and Safety Code section 11360, subdivision (a) provides that any person who "transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any marijuana" is guilty of a felony which is punishable by imprisonment in state prison.

² Health and Safety Code section 11360, subdivision (b) provides that any person who gives away, offers to give away, transports, offers to transport, or attempts to transport not more than 28.5 grams of marijuana, other than concentrated cannabis, is guilty of a misdemeanor.

5. On February 1, 2001, respondent was convicted in the Superior Court of California, County of San Joaquin, in Case Number MM101107A, on his plea of guilty to violating Vehicle Code section 20002, subdivision (a) (hit and run), a misdemeanor. Imposition of sentence was suspended and the court placed respondent on three years probation, with terms and conditions requiring him to serve two days in jail, obey all laws, and pay fines/restitution.

The facts and circumstances of the conviction are that on September 10, 2000, respondent lost control of his vehicle during manual shifting and collided into a brick planter box at a residence. After colliding with the object, he left the scene without contacting the homeowner. Law enforcement found respondent's car later that day and upon questioning, respondent agreed to repair the planter box. Respondent did contact the homeowner and repaired the box. The homeowner requested no further action be taken against respondent, however, he was prosecuted. Respondent testified that he had a new Mustang and "didn't realize the power of it." He replaced the brick planter box because he "felt bad." Yet he "still got charged." He described it as a "terrible mistake" that will never happen again.

Matters in Aggravation

6. According to respondent, he was arrested two months ago in Auburn (Placer County), for obtaining prescription pills by fraud. He obtained a prescription from a man and his girlfriend, Lisa Cooley, met at a bar. The man stated that he was a doctor's assistant. Respondent filled the prescription at the Wal-Mart pharmacy. Respondent knew that this man was not licensed to prescribe controlled medications; however, he explained that his girlfriend was in "major pain," and they had no insurance. Subsequently, "the doctor got busted and they came to get a statement from us and we got arrested." Respondent went to court on the charges in the first week of January 2010. Respondent was unclear as to the current status of the case. He stated that the judge and district attorney told him he would receive notice in the mail if he was going to be charged.

Mitigation / Rehabilitation

7. Respondent is 29 years of age. In preparation for applying for his California real estate license, he completed the following courses: Real Estate Principles, on May 11, 2007; Legal Aspects of Real Estate, on March 14, 2009; and Real Estate Practice, on November 12, 2008. He stated he was "passionate about real estate" and that is "all I want to do."

8. Respondent attended Butte College from 1999 to 2001, but ultimately chose not to pursue a degree. In June 2001, he moved to Las Vegas, Nevada to join his parents, who moved from California to Las Vegas in 2000. In Nevada, respondent initially worked in restaurants and obtained his Nevada real estate license. He believes his Nevada real estate license is inactive as the fee is paid by the broker monthly, and he is no longer there.

Respondent left Las Vegas with his parents in 2007. He obtained restaurant work and assists his parents in their work as agents for Lyon Real Estate in Rocklin.

9. Respondent's parents, Joan and Bruce Cowan, are licensed real estate sales persons. They began working at Lyon Real Estate in August 2008. Mrs. Cowan testified that respondent is a valued member of their team. He is learning short-sales from his mother and assists with paperwork and marketing searches. His name does not appear on any listing documents. Mr. Cowan testified that Mrs. Cowan and the broker, Sterling Royal, review all of respondent's paperwork. Mr. Royal did not sign respondent's application, but he wrote a letter on January 11, 2010, regarding respondent's "outstanding work ethic."

10. In December 2008, respondent participated in a canned food drive to which he brought a niece and nephew. He felt the experience would be beneficial for them. He and his girlfriend also purchased numerous toys for the Loomis Fire Department toy drive.

11. Respondent submitted character letters from professionals associated with Lyon Real Estate including Broker George Snyder, Agents Chris Masters/Shawn Sanassarian, and Agent Dave Taylor.³ Collectively, these letters describe respondent as a positive and professional member of the family team, with potential to develop into a top producing agent. None of these letters reference respondent's history of criminal activity. Respondent also submitted letters written by his sister, Amy Petras and his parents. These letters collectively describe respondent as respectful, caring, and dedicated to the highest standards. Finally, respondent submitted a letter he wrote to the administrative court on the day of the hearing. In it, he acknowledged that "Years ago I made some terrible mistakes." He asserted that he had "changed" and learned to "really think about things before I do them." He feels he deserves to hold a real estate license.

12. Based on all of the facts set forth in Factual Findings 3 through 11, respondent has not demonstrated the level of rehabilitation sufficient to ensure public safety. His convictions took place when he was between the ages of 21 and 27. He is now 29, hence, it cannot be said that sufficient time has passed to demonstrate greater maturity. He is on criminal court probation for furnishing marijuana through February 2011. His very recent conduct involving an illegal prescription drug transaction reflects continuing poor judgment and is considered a matter in aggravation.

³ These letters were admitted as administrative hearsay pursuant to Government Code section 11513, subdivision (d), which states in pertinent part, "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. ..."

LEGAL CONCLUSIONS

Applicable Laws

1. Business and Professions Code section 480, subdivision (a)(1), authorizes a board to deny a license on the grounds that the applicant has 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. 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. Business and Professions Code section 10177, subdivision (b), authorizes a board to deny the issuance of a license to an applicant, who has entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony, or a crime substantially related to the qualifications, functions, or duties of a real estate licensee.

3. California Code of Regulations, title 10, section 2910, subdivision (a) states that "the 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 Business and Professions Code sections 480 and 490, if it involves:

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

[¶] ... [¶]

- (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.

Cause for Discipline

4. The crimes of furnishing marijuana, trespass, and hit and run, for which respondent was convicted, as set forth in Factual Findings 3, 4, and 5, are substantially related to the qualifications, functions and duties of a real estate licensee pursuant to California Code of Regulations, title 10, section 2910, subdivisions (a)(1), (4), and (8).

5. Cause for denial of respondent's application for a real estate salesperson license exists pursuant to Business and Professions Code sections 480 and 10177, subdivision (b), in conjunction with California Code of Regulations, title 10, section 2910, subdivision (a)(8), by reason of Factual Finding 3, and Legal Conclusion 4, in that respondent's marijuana furnishing conviction constitutes an unlawful act perpetrated for financial or economic benefit.

6. Cause for denial of respondent's application for a real estate salesperson license exists pursuant to Business and Professions Code sections 480 and 10177, subdivision (b), in conjunction with California Code of Regulations, title 10, section 2910, subdivisions (a)(4) and (8), by reason of Factual Finding 4, and Legal Conclusion 4, in that respondent's trespass conviction involves the employment of deceit and was an unlawful act perpetrated for financial benefit.

7. Cause for denial of respondent's application for a real estate salesperson license exists pursuant to Business and Professions Code sections 480 and 10177, subdivision (b), in conjunction with California Code of Regulations, title 10, section 2910, subdivisions (a)(4) and (8), by reason of Factual Finding 5, and Legal Conclusion 4, in that respondent's hit and run conviction involves the employment of deceit and constitutes an unlawful act with intent to substantially injure another's property.

Rehabilitation

8. The department has developed guidelines for use in evaluating the rehabilitation of an applicant for issuance of a license, which are set forth in California Code of Regulations, title 10, section 2911. (Cal. Code. Regs., tit. 10, § 2911, subds. (a)-(n).) Additionally, the context in which qualifying crimes or acts were committed goes to the question of the weight to be accorded the offending conduct in considering the disciplinary action to be taken. (Cal. Code Regs., tit. 10, § 2910, subd. (c).)

9. In consideration of these guidelines, less weight is given to respondent's first conviction at age 20, for trespass, on grounds he slept in the dormitory when his fees were unpaid. However, six months later, he was convicted of hit and run after losing control of his Mustang in a residential neighborhood. He did not stop and present himself to the home owner. Law enforcement located his car later, whereupon he agreed to repair the damage to avoid prosecution. His initial decision to flee the scene was irresponsible. It is noted that six years lapsed before respondent was again arrested for felony marijuana trafficking at a festival. He apparently fell prey to a sting operation. However, it demonstrates that at age 27, while holding a Nevada real estate license, he continued to make unwise choices. Finally, at hearing, he admitted to a recent arrest for passing a fraudulent prescription.

10. Respondent is currently on criminal court probation which should end in February 2011. When a person is on criminal probation or parole, rehabilitation efforts are accorded less weight, "[s]ince persons under the direct supervision of correctional authorities are required to behave in exemplary fashion..." (*In re*

Gossage (2000) 23 Cal.4th 1080, 1099.) Compliance with the law when one is on court ordered release “does not necessarily prove anything but good sense.” (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473.) Hence, respondent’s recent conduct of knowingly passing a fraudulent prescription, while on probation, would tend to indicate ongoing poor judgment.

11. Although respondent appears to be an asset to his parents’ real estate business, his work is highly supervised, and he did not present evidence of his independent sales initiatives as a licensed agent in Nevada. At age 29, he did not present sufficient evidence of present maturity to allay concerns regarding trustworthiness and public safety.

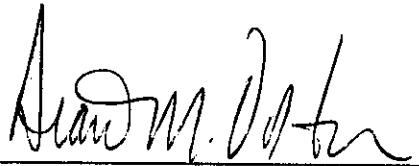
Conclusion

12. Respondent’s conduct is not aligned with the expectations of a real estate licensee. “The legislature intended to ensure that real estate brokers and salespersons will be honest, truthful and worthy of the fiduciary responsibilities which they will bear.” (*Harrington v. Dept. of Real Estate* (1989) 214 Cal.App.3d 394, 402.) It would not be consistent with the public safety and welfare to issue respondent a real estate salesperson license at this time, even on a probationary basis.

ORDER

The application of respondent Neil Cowan, for a license to act as a real estate salesperson in the State of California is DENIED.

Dated: February 2, 2010



DIAN M. VORTERS
Administrative Law Judge
Office of Administrative Hearings

1 JOHN W. BARRON, Counsel (SBN 171246)
2 Department of Real Estate
3 P. O. Box 187007
4 Sacramento, CA 95818-7007
5 Telephone: (916) 227-0792
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7

FILED

OCT 28 2009

DEPARTMENT OF REAL ESTATE

By K. Max

8 BEFORE THE DEPARTMENT OF REAL ESTATE
9 STATE OF CALIFORNIA

10 ***

11 In the Matter of the Application of)
12 NEIL COWAN,) H-5282 SAC
13 Respondent.) STATEMENT OF ISSUES
14)

15 The Complainant, TRICIA D. SOMMERS, a Deputy Real Estate Commissioner
16 of the State of California, for Statement of Issues against NEIL COWAN, (hereafter
17 "Respondent"), is informed and alleges as follows:

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19 Complainant makes this Statement of Issues against Respondent in her official
20 capacity.

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22 Respondent made application to the Department of Real Estate of the State of
23 California for a real estate salesperson license on or about June 18, 2009.

24 3

25 On or about October 29, 2007, in the Superior Court of the State of California,
26 County of Riverside, Case No. INF058589, Respondent was convicted of violating
27 Section 11360(B) of the California Health & Safety Code (Transport/Sale of Marijuana), a

1 felony and a crime that bears a substantial relationship under Section 2910, Title 10, of the
2 California Code of Regulations (hereafter "the Code"), to the qualifications, functions or duties
3 of a real estate licensee.

4 4

5 On or about February 23, 2001, in the Superior Court of the State of California,
6 County of Butte, Case No. NCR86487, Respondent was convicted of violating Section 602.5
7 of the California Penal Code (Trespassing), a misdemeanor and a crime that bears a substantial
-8 relationship under Section 2910, Title 10, of the Code, to the qualifications, functions or duties
9 of a real estate licensee.

10 5

11 On or about February 1, 2001, in the Superior Court of the State of California,
12 County of San Joaquin, Case No. MM101107A, Respondent was convicted of violating Section
13 20002(a) of the California Vehicle Code (Hit and Run), a misdemeanor and a crime that bears a
14 substantial relationship under Section 2910, Title 10, of the Code, to the qualifications, functions
15 or duties of a real estate licensee.

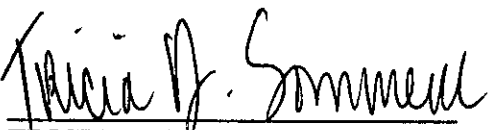
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17 Respondent's criminal convictions, described in Paragraphs 3 through 5, above,
18 constitute cause for denial of Respondent's application for a real estate salesperson license
19 pursuant to the provisions of Section 480(a) and 10177(b) of the Code.

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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 under the provisions of the law.


TRICIA D. SOMMERS
Deputy Real Estate Commissioner

Dated at Sacramento, California,
this 22nd day of October, 2009.