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BUREAU OF REAL ESTATE

By S. Black

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BEFORE THE BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of

MICHAEL ANDREW KANE,

Respondent.

) CalBRE No. H-6186 SAC

) OAH No. 2014120555

NOTICE

TO: MICHAEL ANDREW KANE, Respondent, and PAUL CHAN, his Counsel.

YOU ARE HEREBY NOTIFIED that the Proposed Decision herein dated January 20, 2016, of the Administrative Law Judge is not adopted as the Decision of the Real Estate Commissioner. A copy of the Proposed Decision dated January 20, 2016, is attached hereto for your information.

In accordance with Section 11517(c) of the Government Code of the State of California, the disposition of this case will be determined by me after consideration of the record herein including the transcript of the proceedings held on December 15, 2015, and any written argument hereafter submitted on behalf of respondent and complainant.

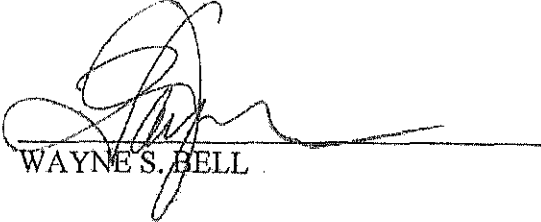
Written argument of respondent to be considered by me must be submitted within 15 days after receipt of the transcript of the proceedings of December 15, 2015, at the Sacramento

1 office of the Bureau of Real Estate unless an extension of the time is granted for good cause shown.

2 Written argument of complainant to be considered by me must be submitted within
3 15 days after receipt of the argument of respondent at the Sacramento Office of the Bureau of Real
4 Estate unless an extension of the time is granted for good cause shown.

5 DATED: 2/12/2016.

6 REAL ESTATE COMMISSIONER

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10 WAYNE S. BELL

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BEFORE THE
BUREAU OF REAL ESTATE
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

MICHAEL ANDREW KANE,

Respondent.

Case No. H-6186 SAC

OAH No. 2014120555

PROPOSED DECISION

This matter was heard before Danette C. Brown, Administrative Law Judge, Office of Administrative Hearings, State of California, on December 15, 2015, in Sacramento, California.

Richard K. Uno, Counsel III, Bureau of Real Estate (bureau), represented complainant Tricia D. Parkhurst, Deputy Real Estate Commissioner of the State of California.

Michael Andrew Kane (respondent) was present and represented by Paul Chan, Attorney at Law.

Evidence was received, the matter was submitted, and the record was closed on December 15, 2015.

FACTUAL FINDINGS

1. On August 7, 1992, the bureau issued real estate broker license number B01143087 to respondent. Respondent's license will expire on December 9, 2016, unless renewed or revoked.

2. On November 24, 2014, complainant made and filed the Accusation in her official capacity. Complainant seeks to revoke respondent's real estate broker license on the grounds that respondent was convicted of a felony on March 5, 2014, and that his felony conviction is substantially related to the qualifications, functions and duties of a real estate licensee.

3. Respondent timely filed a Notice of Defense to the Accusation, pursuant to Government Code section 11506. The matter was set for an evidentiary hearing 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 Criminal Conviction

4. On March 5, 2014, in the Superior Court of California, County of El Dorado, Case No. P13CRF0174, respondent was convicted, upon a plea of no contest, of violating Health and Safety Code section 11366.5, renting or leasing a building for unlawful manufacture of a controlled substance, a felony. Imposition of sentence was suspended, and respondent was placed on three years' formal probation, upon the following terms: serve 180 days in jail, with credit for time served; submit to chemical test of blood, breath or urine; abstain from knowingly possessing, using or having involvement with illegal/restricted dangerous drugs, paraphernalia, including marijuana; do not own or possess firearms; register as a drug offender pursuant to Health and Safety Code section 11590; and pay court fees and fines. Respondent was allowed to serve his jail time on house arrest. He began house arrest on May 28, 2014, and completed it on November 22, 2014.

Circumstances of Conviction

5. The circumstances underlying the conviction are that, in 2010, respondent created a nonprofit corporation named Hangtown Medical. The purpose of Hangtown Medical was to act as a medical marijuana operation and collective which grew and provided quality medical marijuana to members of the collective. There were approximately 15 members of the collective that were friends of respondent's partner, Jeffrey Wakamiya. Respondent viewed Hangtown Medical as a business investment, in anticipation that marijuana would become legal in California. Respondent wanted to have an established business in place when the legalization occurred.

6. In forming Hangtown Medical, respondent consulted with: William Kroger, an attorney that helped compose California's medical marijuana laws; Reichler and Plesser, a law firm that represented a large number of medical marijuana collectives in Northern California; several banks in the Sacramento region to determine if they worked with medical marijuana collectives; and the Offices of the District Attorney in the counties of Sacramento, Placer, El Dorado, Yolo and Sutter.

7. Respondent's role was to run the business aspect of Hangtown Medical involving accounting, legal, and human resources. He was the president of the corporation. The actual day-to-day growing operations were left to Mr. Wakamiya and members of the collective. Hangtown Medical rented a warehouse in Placerville, California for marijuana cultivation. Hangtown Medical yielded two to eight pounds of processed marijuana per harvest. Each member of the collective was given an equal share of the processed marijuana if the member had done work for the collective.

8. On February 20, 2013, detectives with the El Dorado County Sheriff's Office conducted a surveillance of respondent's activities. They followed respondent driving his vehicle from his residence in Gold River to San Jose. Respondent walked into a business called Holistic Health Care Collective with two backpacks. When respondent left, the backpacks were empty and respondent held a white envelope. The officers believed that respondent sold marijuana to Holistic Health Care Collective, and that the envelope contained proceeds from the sale. The officers further believed that respondent profited from sales of marijuana.

9. A search warrant was served on respondent's home the following day. Respondent informed the officers of Hangtown Medical's operations, and that it was formed for the benefit of the members. Respondent told the officers that he possessed a valid medical marijuana recommendation due to back pain. Respondent admitted that he sold marijuana to dispensaries in San Jose because he was treated better there. He added that the market in Sacramento was unstable and he knew that law enforcement was targeting dispensaries in Sacramento. Respondent denied profiting from sales of marijuana. A search of respondent's home revealed \$18,000 in cash, numerous firearms, processed marijuana, a digital scale and packaging materials. Inside the backpacks that respondent carried the previous day were samples of marijuana with respondent's business card on them. Officers found 37 marijuana sales receipts totaling \$123,000. The officers believed that respondent was in possession of and cultivated marijuana for sale. Respondent was arrested and transported to jail.

Respondent's Evidence

10. At hearing, respondent did not dispute his conviction or the underlying circumstances. He took responsibility for his conduct. He expressed remorse for his actions leading to his conviction. After his criminal conviction, he was resolute in never getting involved in the business of marijuana again. The corporation was "wound down." Respondent paid all bills due, and paid the employees. The cost to his reputation, personal life and dignity was great. Respondent learned that even after conducting his due diligence prior to forming Hangtown Medical, being involved in a medical marijuana operation is not legal in California. He stated, "Through this process I've learned a lot ... I went down this road at my own decision. And I am sitting here because of my actions, not anybody else."

11. Respondent hopes to continue his job in the mortgage industry. He currently works as a mortgage professional for Alpine Mortgage. His employer, Douglas Hallstrom, testified credibly and favorably on respondent's behalf. He personally recruited respondent to work for Alpine Mortgage, and considers respondent an asset and one who knows his craft very well. Mr. Hallstrom also wrote a compelling letter on respondent's behalf, described below.

12. Respondent is currently on criminal probation. His probation will end in March 2017. He paid all of his court fees and fines on April 11, 2014.

13. Respondent submitted letters of recommendation which were received in evidence and considered to the extent permitted by Government Code section 11513, subdivision (d).¹

- (a) Douglas Hallstrom, in his signed and dated letter of November 16, 2015, wrote that he has known respondent for over 19 years in the mortgage industry, and is a close friend of respondent. Mr. Hallstrom knew the details of respondent's involvement in Hangtown Medical, and of respondent's arrest and conviction. Despite respondent's conviction, Mr. Hallstrom has maintained his trust and respect for respondent. Mr. Hallstrom asked respondent to join his newly formed mortgage company in September 2015. Respondent addressed the company's staff to disclose his felony conviction. The staff unanimously voted for respondent to join the company. Mr. Hallstrom described respondent as an honest and ethical man.
- (b) Laurie Bisi, owner of Mountain West Financial, in her signed and dated letter of March 26, 2015, wrote that respondent worked as a mortgage loan originator for her company since 2009, and that respondent is licensed by the Nationwide Mortgage Licensing System. As of the date of Ms. Bisi's letter, respondent's license status was deemed "Approved-Deficient," meaning that respondent could originate loans, but had a cloud on his license that needed to be addressed. Ms. Bisi knew of respondent's arrest and conviction. She indicated that respondent's felony conviction could have serious ramifications to respondent's mortgage license, and that respondent was awaiting a hearing date. Ms. Bisi noted that respondent has always handled himself in a professional manner, and that he never commingled his medical marijuana business with his mortgage business.
- (c) John Purinton, Chief Executive Officer of Watry Design, Inc., wrote in his signed and dated letter of March 3, 2014, that he has known respondent since elementary school, and they have been best friends since that time. Respondent was the best man at Mr. Purinton's wedding, and has provided financial help to Mr. Purinton over the years. When Mr. Purinton's wife was sick, respondent was there to lift his spirits and to help with medical bills. Without respondent's financial support, Mr. Purinton would not have been able to feed his family and get his wife the treatments she needed. Mr. Purinton has observed respondent provide love and care for his stepson, even five years after his divorce from his stepson's mother. Mr. Purinton described respondent as optimistic, an entrepreneur, extremely hard worker, and a very passionate man.

¹ Government Code section 11513, subdivision (d), provides, in pertinent part, that "[h]earsay 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."

- (d) Felicity Wood, in her unsigned, dated letter of November 8, 2015, wrote that she is respondent's stepsister, and has known respondent for 23 years. Ms. Wood knew of respondent's conviction, but it did not change Ms. Wood's feelings towards respondent. She described respondent as positive, thoughtful, caring, driven, a go-getter, and a hard worker. She has always thought of respondent as having great integrity. She stated that respondent is not shy about sharing his lessons learned from his ordeal and that he is ready to move on and live a positive and productive life. Ms. Wood has "zero hesitations" about the caliber of respondent's character, and that respondent will continue to be a "stellar addition" to the mortgage broker community.

All of the letter writers have known respondent for approximately 20 years or more, with the exception of Ms. Bisi, who has known respondent for at least six years. They all know of respondent's involvement in the medical marijuana business and his felony conviction. They have direct knowledge of respondent's professionalism, character and integrity before, during and after his conviction. They are in the best position to observe respondent's efforts at rehabilitation. Mr. Hallstrom, with whom respondent currently works in the mortgage industry, has known respondent for 19 years, and has not wavered in his confidence and trust in respondent. Ms. Bisi, another person for whom respondent worked in the mortgage industry, provided positive comments regarding respondent's professionalism, but noted concern about the status of respondent's mortgage license as a result of his felony conviction. Respondent's family member, Ms. Wood, also provided ample observations of the quality of respondent's character and conduct, as did respondent's best friend, Mr. Purinton. The letters are compelling, and are given great weight.

14. Respondent has worked over 20 years in the mortgage industry. After graduating from college, respondent obtained his real estate broker's license. He began working as a loan officer for Independent Financial Corporation. After six or seven months, he worked as a loan officer at Plaza Home Mortgage Bank. After three years, respondent began working as a loan officer for Comstock Mortgage. He worked there for 14 years. Respondent now works as a loan officer for Alpine Mortgage. Respondent is also involved in other real estate-related activities which have involved his real estate broker's license. He owns rental property. He has invested in real property. He was involved in a very large debt restructuring project involving real property. Respondent has no history of discipline with the bureau involving his real estate broker's license. Respondent takes continuing education real estate classes as required by his broker's license.

15. Respondent engages in community service by donating money and clothes to the Sacramento Children's Receiving Home. He stated that he does some "carry forward projects where we'll start with 20 bucks and see how much money we can raise in an hour and drop by and give them cash." Respondent conceded that his job consumes his life, and he spends his time with his wife in hopes of starting a family.

Discussion

16. The Bureau has developed guidelines for use in evaluating the rehabilitation of a licensee, which are set forth in California Code of Regulations, title 10, section 2912. (Cal. Code. Regs., tit. 10, § 2912, subds. (a)-(m).) Criteria of rehabilitation include, but are not limited to: passage of not less than two years since the criminal conviction; restitution paid; expungement of convictions; successful completion of probation; payment of fines and penalties; stability of family life; completion of formal educational or vocational training courses for economic self-improvement; significant and conscientious involvement in the community; and change in attitude from that which existed at the time of the conduct in question. 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).)

17. Considering the Bureau's rehabilitation guidelines that are applicable here, it has been almost two years since respondent's criminal conviction. Respondent paid his court fees and fines in full, one month after his conviction. Respondent will be on criminal probation until March 2017. His felony conviction has not yet been reduced to a misdemeanor, nor expunged.

18. Respondent's family life is stable, and he has commendably worked in the mortgage business since his graduation from college in 1992. In his current employment at Alpine Mortgage, he disclosed his conviction to all of the staff, who unanimously voted in favor of hiring respondent as a mortgage officer.

19. Respondent's involvement in community service is not significant, but it is conscientious, in that he raises and donates money and clothing to the Sacramento Children's Receiving Home.

20. Respondent exhibited a change in attitude from that which existed at the time he operated Hangtown Medical. Respondent testified in a candid and humble fashion. He acknowledged that growing medical marijuana in California is illegal. He previously did not think that his involvement with Hangtown Medical was related to his activities related to his real estate broker's license. He now knows that such activities had an impact on his ability to hold his license. It has been judicially recognized that rehabilitation requires an acknowledgment of wrongdoing. (See, *Seide v. Committee of Bar Examiners of the State Bar of California* (1989) 49 Cal.3d 933, 940 [Fully acknowledging the wrongfulness of his actions is an essential step towards rehabilitation].) Respondent has acknowledged his wrongdoing.

21. Respondent's law-abiding conduct since his criminal conviction is not, standing alone, sufficient to establish rehabilitation. It is well-established that rehabilitative efforts when a person is on criminal probation 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.) Respondent is commended and

urged to continue his efforts at rehabilitation, even well after his completion of probation. Based on the foregoing considerations, it would be in the public interest to allow respondent to hold a real estate broker's license on a probationary basis at this time.

Costs

22. Complainant has requested reimbursement for costs incurred by the bureau in connection with prosecution and investigation of this matter, in the total amount of \$2,044.60 (\$809.90 for prosecution, and \$1,234.70 for investigation). The costs were certified in the manner provided by Business and Professions Code section 10106. The time spent appears to be reasonable, and the activities claimed were necessary to the development and presentation of the case. Respondent did not present evidence regarding his ability to pay costs of prosecution and investigation. Complainant's request for costs is addressed further in the Legal Conclusions below.

LEGAL CONCLUSIONS

Applicable Statutes and Regulations

1. Complainant has the burden of proving the grounds for discipline alleged in the Accusation by clear and convincing evidence to a reasonable certainty. (*Realty Projects, Inc. v. Smith* (1973) 32 Cal.App.3d 204, 212.) Clear and convincing evidence is evidence that leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478.)

2. The department may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued. (Bus. & Prof. Code, § 490, subd. (a).)

3. Business and Professions Code section 10177, subdivision (b), provides, in part, that the commissioner may suspend or revoke a real estate license if the licensee has been convicted of a felony, or a crime substantially related to the qualifications, functions and duties of a real estate licensee, irrespective of an expungement pursuant to Penal Code section 1203.4.

4. California Code of Regulations, title 10, section 2910 provides that in considering whether a license should be suspended or revoked, the crime or act is deemed substantially related to the qualifications, functions and duties of a licensee 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.

Substantial Relationship

5. Respondent's March 5, 2014 felony conviction for renting or leasing a building for unlawful manufacture of a controlled substance, marijuana, involved an unlawful act intended to confer a financial benefit to himself, in that respondent owned and operated an illegal marijuana growing operation. Respondent's conviction bears a substantial relationship to the qualifications, functions, or duties of a real estate licensee as set forth in California Code of Regulations, title 10, section 2910, subdivision (a)(8). The evidence did not establish that respondent's felony conviction was substantially related to the qualifications, functions and duties of a real estate licensee pursuant to California Code of Regulations, title 10, subdivisions (a)(1) and (a)(4).

Causes for Suspension or Revocation

6. Cause for suspension or revocation of respondent's real estate broker license was established pursuant to Business and Professions Code section 10177, subdivision (b), by reason of Finding 4, in that respondent was convicted of a felony.

7. Cause for suspension or revocation of respondent's real estate broker license was established pursuant to Business and Professions Code sections 10177, subdivision (b), and 490, subdivision (a), by reason of Finding 4 and Legal Conclusion 5, in that respondent's conviction is substantially related to the qualifications, functions and duties of a real estate licensee.

Conclusion

8. When all the evidence is considered, restricting respondent's license for three years under the terms and conditions set forth below would adequately protect the public interest, safety and welfare. (Findings 16 through 21.)

Costs of Investigation and Prosecution

9. Business and Professions Code section 10106 provides, in pertinent part, that the commissioner may request the administrative law judge to direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case. Subdivision (c), states:

A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the commissioner or the commissioner's designated representative, shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

10. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 10106. These factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate in light of the alleged misconduct.

11. As set forth in Finding 22, complainant requested that respondent be ordered to pay the costs of the investigation and enforcement incurred up to the date of hearing in the total amount of \$2,044.60. Respondent was successful in defending against some of the charges and allegations in the Accusation. He was also successful in obtaining a reduction in the proposed discipline. When all the relevant factors set forth in *Zuckerman* are considered, ordering respondent to pay \$1,000 in costs would be appropriate. Respondent should be allowed to pay these costs in accordance with a reasonable payment plan approved by the bureau.

12. Under all of the facts and circumstances, and balancing respondent's concerns against the bureau's obligation to protect the public through licensing actions such as this one, assessment of costs in the amount of \$1,000, in bringing and prosecuting the Accusation is reasonable and appropriate.

ORDER

All licenses and licensing rights of respondent Michael Andrew Kane under the Real Estate Law are revoked; provided, however, a restricted real estate broker's license shall be issued to respondent pursuant to section 10156.5 of the Business and Professions Code if

respondent makes application therefor and pays to the Bureau of Real Estate the appropriate fee for the restricted license within 90 days from the effective date of this Decision. The restricted license issued to 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 that Code:

1. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of respondent's conviction or plea of nolo contendere to a crime which is substantially related to respondent's fitness or capacity as a real estate licensee.

2. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner 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 the restricted license.

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

4. Respondent shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until respondent presents such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

5. Respondent shall pay to the bureau costs associated with its investigation and enforcement pursuant to Business and Professions Code Section 10106 in the amount of \$1,000. Respondent may be permitted to pay these costs in a payment plan approved by the bureau.

DATED: January 20, 2016

DocuSigned by:
Danette C. Brown
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DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings