

BEFORE THE  
DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

FILED  
MAR 18 1998  
DEPARTMENT OF REAL ESTATE

\* \* \*

By Kathleen Contreras

In the Matter of the Accusation of )  
DAVID AUGUSTINE DOWNING, )  
Respondent. )  
\_\_\_\_\_ )

NO. H-7499 SF  
OAH NO. N-1997100386

**DECISION**

The Proposed Decision dated February 18, 1998, 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 Decision suspends or revokes one or more real estate licenses on grounds of the conviction of a crime.

The right to reinstatement of a revoked real estate license or to the reduction of a suspension is controlled by Section 11522 of the Government Code. A copy of Section 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock noon  
on April 7, 1998.

IT IS SO ORDERED 3/9, 1998.

JIM ANTT, JR.  
Real Estate Commissioner

J. L. Antt, Jr.

BEFORE THE  
DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

In the Matter of the Accusation of:	)	Case No. H-7499 SF
	)	
DAVID AUGUSTINE DOWNING	)	OAH NO. N1997100386
	)	
Respondent.	)	
_____	)	

PROPOSED DECISION

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, in Oakland, California on February 11, 1998.

Complainant Les R. Bettencourt, Deputy Real Estate Commissioner, was represented by David Seals, Counsel.

Respondent David Augustine Downing was present and was represented by Lawrence A. Callaghan, Attorney at Law.

FINDINGS OF FACT

1. David Augustine Downing (respondent) is currently licensed and has license rights under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code) as a real estate salesperson. Respondent's license has been renewed through January 29, 1999.
2. On September 14, 1995, in the Superior Court of California, Contra Costa County, respondent was convicted of violating Health and Safety Code sections 11379.6 (manufacturing a controlled substance) and 11383(c) (possession of components with intent to manufacture methamphetamine). These crimes are both felonies involving moral turpitude and which bear a substantial relationship to the qualifications, functions and duties of a real estate licensee.
3. A person convicted of violating Health and Safety Code section 11379.6 may not be granted probation except "in an unusual case where the interests of justice would best be served." (Pen. Code, § 11379.6, subds. (a) & (b)(3).) At the time of respondent's conviction, the court found that unusual circumstances existed in his case, thereby making respondent eligible for probation. He was then placed on three years' probation with conditions that included one year in jail with credit for time already served, a restitution fine of \$2,500, participation in an outpatient treatment program as

required by the probation officer and submission to drug and alcohol testing at the direction of the probation officer.

4. Respondent's conviction occurred after his house was searched in December 1994 and narcotics-related materials were seized. The main focus of that search was respondent's friend and housemate, Kelly Salas. Respondent testified that the materials found at the house belonged to Salas, although respondent knew they were there. Salas pled guilty. Respondent went to trial and was convicted of the same charges.

5. Respondent is 32 years old. He first became involved in real estate while doing construction work for a housing relocation company. In January 1994, respondent began training in a real estate office and he took his real estate courses in the summer of 1994. He received his license in January 1995. After his release from jail in December 1995, respondent returned to work as an assistant to real estate salesperson Lynne French at John M. Grubb Company. Respondent had worked with French prior to his conviction and she had been impressed with his work habits, loyalty and honesty. Because respondent had struck her as someone who was trying to turn his life around, French had supported him at the time of his criminal sentencing hearing.

6. Respondent continues to work as French's assistant. He aids her in all aspects of the business; showing properties, communicating with clients and handling escrows. French has supervised respondent very closely. She has found him to be ethical and very caring for their clients. No complaints about his fiduciary responsibilities have ever been raised. Hearsay evidence was presented to show that respondent's broker/manager at John M. Grubb, Malcolm Butler, shares a similar view of respondent. He describes respondent as not doing "anything less than providing the highest level of ethical conduct, not only to his clients, but to his workmates as well."

7. When he was in jail, respondent worked as a volunteer tutor, teaching reading and writing to other inmates. Respondent no longer associates with Kelly Salas. He does not use drugs (while respondent admits drug use during the early 1990's, he was not a drug user at the time of his 1994 arrest) and rarely drinks. Although the terms of the criminal probation permitted respondent's probation officer to require him to attend a drug rehabilitation program and to submit to random drug testing, no such requirements have been imposed. In fact, despite the serious nature of his crime, respondent was placed on "computer probation." He has never had to meet with his probation officer; his only contact with the probation department is mailing in monthly payments towards his required restitution. As of the date of the hearing, respondent had paid all but \$310 of that restitution. Respondent also provides between \$700 and \$1,000 per month in support to his mother, who is disabled and unable to work.

## DETERMINATION OF ISSUES

1. Cause for disciplinary action against respondent exists pursuant to Business and Professions Code sections 490 and 10177(b) by reason of the convictions set forth in Finding 2.

2. The evidence presented demonstrated that respondent has rehabilitated himself to the extent that it would not be against the public interest to permit him to retain his real estate salesperson license. Although the crimes of which he was convicted were serious, the sentencing court recognized there were unusual circumstances that allowed respondent to be placed on criminal probation. While in jail, respondent volunteered to work as a tutor for other inmates. Since his release from jail he has been able to successfully resume his career in real estate and has proven himself to be a hard-working, honest and ethical employee. Respondent no longer associates with his former friend Kelly Salas. He has complied with the terms of his criminal probation and has only a small amount of restitution outstanding. He provides financial support for his mother. All these factors are indicative of respondent's rehabilitation efforts. But because respondent remains on criminal probation, it is determined that protection of the public's interest requires that respondent also remain on probation to the Real Estate Commissioner for a period of time.

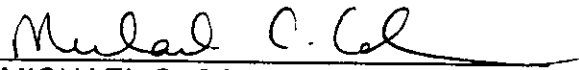
## ORDER

All licenses and licensing rights of respondent David Augustine Downing are revoked; provided, however, a restricted real estate salesperson 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 Department of Real Estate the appropriate fee for the restricted license within ninety (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 one (1) year has elapsed from the effective date of this Decision.
4. Respondent shall submit with any application for license under an employing broker, or any application for transfer to a new employing broker, a statement signed by the prospective employing real estate broker on a form approved by the Department of Real Estate which shall certify:
  - (a) That the employing broker has read the Decision of the Commissioner which granted the right to a restricted license; and
  - (b) That the employing broker will exercise close supervision over the performance by the restricted licensee relating to activities for which a real estate license is required.
5. Respondent shall, within nine (9) 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 renewed 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.
6. Respondent shall, within six (6) months from the effective date of this Decision, take and pass the Professional Responsibility Examination administered by the Department including the payment of the appropriate examination fee. If respondent fails to satisfy this condition, the Commissioner may order suspension of respondent's license until respondent passes the examination.

DATED: February 15, 1998

  
MICHAEL C. COHN  
Administrative Law Judge  
Office of Administrative Hearings

BEFORE THE DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

FILED  
JAN 9 1998  
DEPARTMENT OF REAL ESTATE

In the Matter of the Accusation of

DAVID AUGUSTINE DOWNING,

By Kathleen Contreras

Case No. H-7499 SF

OAH No. \_\_\_\_\_

Respondent

CONTINUED

NOTICE OF HEARING ON ACCUSATION

To the above named respondent:

You are hereby notified that a hearing will be held before the Department of Real Estate at \_\_\_\_\_

The Office of Administrative Hearings, World Savings Tower,

1970 Broadway, Second Floor, Oakland, California 94612

on Wednesday -- February 11, 1998, at the hour of 10:00 AM,  
or as soon thereafter as the matter can be heard, upon the Accusation served upon you. If you object to the place of  
hearing, you must notify the presiding administrative law judge of the Office of Administrative Hearings within ten  
(10) days after this notice is served on you. Failure to notify the presiding administrative law judge within ten days  
will deprive you of a change in the place of the hearing.

You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You  
are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent  
yourself without legal counsel. If you are not present in person nor represented by counsel at the hearing, the  
Department may take disciplinary action against you based upon any express admission or other evidence including  
affidavits, without any notice to you.

You may present any relevant evidence and will be given full opportunity to cross-examine all witnesses  
testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the  
production of books, documents or other things by applying to the Department of Real Estate.

The hearing shall be conducted in the English language. If you want to offer the testimony of any witness who  
does not proficiently speak the English language, you must provide your own interpreter and pay his or her costs. The  
interpreter must be certified in accordance with Sections 11435.30 and 11435.55 of the Government Code.

Dated: January 9, 1998

DEPARTMENT OF REAL ESTATE

By

David B. Seals  
DAVID B. SEALS

Counsel

FILED  
OCT 24 1997

BEFORE THE DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE

By Shelly Ely

In the Matter of the Accusation of

DAVID AUGUSTINE DOWNING

Case No. H-7499 SF

OAH No. \_\_\_\_\_

Respondent

NOTICE OF HEARING ON ACCUSATION

To the above named respondent:

You are hereby notified that a hearing will be held before the Department of Real Estate at \_\_\_\_\_

Office of Administrative Hearings, World Savings Tower,

1970 Broadway, Second Floor, Oakland, CA 94612

on Wednesday -- January 14, 1998, at the hour of 9:00 AM,  
or as soon thereafter as the matter can be heard, upon the Accusation served upon you. If you object to the place of  
hearing, you must notify the presiding administrative law judge of the Office of Administrative Hearings within ten  
(10) days after this notice is served on you. Failure to notify the presiding administrative law judge within ten days  
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You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You  
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interpreter must be certified in accordance with Sections 11435.30 and 11435.55 of the Government Code.

DEPARTMENT OF REAL ESTATE

Dated: October 24, 1997

By

David A. Peters  
DAVID A. PETERS

Counsel

1 DEIDRE L. JOHNSON, Counsel  
State Bar No. 66322  
2 DEPARTMENT OF REAL ESTATE  
P. O. Box 187000  
3 Sacramento, CA 95818-7000  
4 Telephone: (916) 227-0789

FILED  
OCT 2 1997  
DEPARTMENT OF REAL ESTATE

By *Kathleen Contreras*

8 BEFORE THE  
9 DEPARTMENT OF REAL ESTATE  
10 STATE OF CALIFORNIA

11 \* \* \*

12 In the Matter of the Accusation of )  
13 DAVID AUGUSTINE DOWNING, ) NO. H-7499 SF  
14 Respondent. ) ACCUSATION  
15 \_\_\_\_\_ )

16 The Complainant, Les R. Bettencourt, a Deputy Real  
17 Estate Commissioner of the State of California, for cause of  
18 Accusation against DAVID AUGUSTINE DOWNING, is informed and  
19 alleges as follows:

20 I

21 DAVID AUGUSTINE DOWNING (hereafter Respondent) is  
22 presently licensed and/or has license rights under the Real  
23 Estate Law, Part 1 of Division 4 of the California Business and  
24 Professions Code (hereafter the Code) as a real estate salesperson  
25 whose license was suspended pursuant to Section 10153.4 of the  
26 Code on or about July 31, 1996.

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2 II

3 The Complainant, Les R. Bettencourt, a Deputy Real  
4 Estate Commissioner of the State of California, makes this  
5 Accusation against Respondent in his official capacity and not  
6 otherwise.

7 III

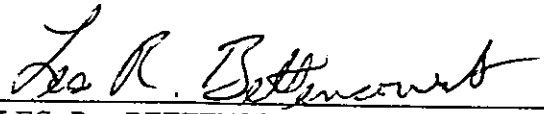
8 On or about September 14, 1995, in the Superior Court  
9 of California, County of Contra Costa, Respondent was convicted of  
10 violation of Section 11379.6 (MANUFACTURE OF CONTROLLED SUBSTANCE)  
11 and Section 11383C (POSSESSION OF COMPONENTS WITH INTENT TO  
12 MANUFACTURE METHAMPHETAMINE) of the California Health and Safety  
13 Code, felonies, crimes involving moral turpitude, and crimes  
14 which are substantially related under Section 2910, Title 10,  
15 California Code of Regulations to the qualifications, functions or  
16 duties of a real estate licensee. Said convictions became final  
17 after appeal on or about March 31, 1997.

18 IV

19 The facts alleged in Paragraph III above constitute  
20 cause under Sections 490 and 10177(b) of the Code for suspension  
21 or revocation of all license(s) and license rights of Respondent  
22 under the Real Estate Law.

23 WHEREFORE, Complainant prays that a hearing be conducted  
24 on the allegations of this Accusation and that upon proof thereof  
25 a decision be rendered imposing disciplinary action against all  
26 license(s) and license rights of Respondent, under the Real Estate  
27 Law (Part 1 of Division 4 of the Business and Professions Code)

1 and for such other and further relief as may be proper under other  
2 provisions of law.

3  
4  
5   
6 LES R. BETTENCOURT  
7 Deputy Real Estate Commissioner  
8

9 Dated at San Francisco, California,  
10 this 16th day of September, 1997.  
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