

FILED
OCT 27 2021
DEPARTMENT OF REAL ESTATE
By J. Taggart

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of)	DRE No. H-12545 SF
ANDREW DESMOND,	}	
Respondent.	}	OAH No. 2021060128

NOTICE

TO: ANDREW DESMOND, Respondent, and his Counsel.

YOU ARE HEREBY NOTIFIED that the Proposed Decision herein dated September 8, 2021, of the Administrative Law Judge is not adopted as the Decision of the Real Estate Commissioner. A copy of the Proposed Decision dated September 8, 2021, 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 Thursday, August 12, 2021, 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 Thursday, August 12, 2021, at the

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

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

6 DATED: 10-26-21

7 DOUGLAS R. McCAULEY
8 REAL ESTATE COMMISSIONER

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**BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA**

FILED
OCT 14 2021
DEPARTMENT OF REAL ESTATE
By *J. Taggart*

In the Matter of the Accusation Against:

ANDREW DESMOND, Respondent.

Agency Case No. H-12545 SF

OAH No. 2021060128

PROPOSED DECISION

Administrative Law Judge Traci C. Belmore, State of California, Office of Administrative Hearings, heard this matter on August 12, 2021, by videoconference.

Counsel Kyle T. Jones represented complainant Stephanie Yee, Supervising Special Investigator, Department of Real Estate.

Respondent Andrew Desmond represented himself.

The record closed and the matter was submitted for decision on August 12, 2021.

FACTUAL FINDINGS

1. Respondent Andrew Desmond is currently licensed and/or 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 has been licensed as a real estate salesperson since July 2, 2009, and his license expired on July 1, 2021.

2. On May 19, 2021, complainant Stephanie Yee, in her official capacity as Supervising Special Investigator for the Department of Real Estate (Department), filed an accusation seeking to discipline respondent's license and licensing rights for being convicted of a crime substantially related to the qualifications, functions, or duties of a real estate licensee, and for failing to notify the Department of the conviction.

3. On October 10, 2019, in the Superior Court of California, County of Contra Costa, respondent pled no contest to a violation of Penal Code section 243, subdivision (b), battery of a peace officer, a misdemeanor. Imposition of sentence was suspended, and respondent was placed on court probation for two years with terms and conditions which included prohibitions against possessing firearms, and consuming alcoholic beverages. Respondent's probation is scheduled to end on October 9, 2021.

4. The facts and circumstances underlying the conviction are that on October 23, 2016, respondent was staying at the Marriott hotel in Walnut Creek and was contacted by police officers regarding a complaint that respondent was being loud, disruptive, and was refusing to leave after being asked to do so by hotel staff.

The officers observed that respondent was slurring his words and smelled a strong odor of alcohol coming from his person. Respondent fought with officers when they attempted to detain him, causing injury to two of the officers.

5. Respondent did not notify the Department of his misdemeanor conviction.

Respondent's Evidence

6. Respondent did not dispute that he had suffered a misdemeanor conviction and that he had failed to report that misdemeanor conviction. Respondent credibly testified that this was a one-time incident involving the overuse of alcohol. Respondent reports a sobriety date of March 29, 2017.

7. Respondent is a firefighter and an emergency medical technician (EMT). Respondent credibly testified that he reported his conviction to his employer and to the emergency medical service agency that issued his EMT certificate. As a result of his conviction, he entered into an agreement wherein his EMT certificate was placed on probation.

8. Respondent is currently engaged in psychotherapy, which began in November 2016. He has been evaluated for alcohol abuse on a quarterly basis for two years and reports that those evaluations were all negative.

9. Respondent admits failing to report his misdemeanor conviction but states it was due to ignorance rather than secrecy. Respondent subsequently became a member of his local real estate association's professional standards committee. He believes his failure to report was due to a lack of education.

10. Respondent has taken an ethics course and volunteers for Catholic Charities, with his primary focus on women's shelters.

11. Respondent testified in an open and forthright manner consistent with one who is telling the truth.

Costs

12. In connection with the investigation and enforcement of this accusation, complainant requests an award of costs in the total amount of \$3,170.10. These costs reflect \$391.60 in legal services and \$2,778.50 in investigative services. The request is supported by declarations that comply with the requirements of California Code of Regulations, title 1, section 1042. These costs are reasonable.

LEGAL CONCLUSIONS

1. The burden of proof is on the complainant to show cause for discipline by clear and convincing evidence. (*Small v. Smith* (1971) 16 Cal.App.3d 450,457; Evid. Code, § 500.) The burden is on respondent to show rehabilitation by a preponderance of the evidence. (Evid. Code, §§ 115, 500.)

2. Business and Professions Code sections 490 and 10177, subdivision (b), authorize the Commissioner to suspend or revoke the license of a licensee who has been convicted of a crime that is substantially related to the qualifications, functions, or duties of a licensee. California Code of Regulations, title 10, section 2910, sets forth the criteria to be used when determining whether a crime or act is substantially related to the qualifications, functions, or duties of a real estate licensee.

3. Respondent's conviction for battery on a peace officer is substantially related to the qualifications, functions, or duties of a real estate licensee. (Cal. Code Regs. Tit. 10, § 2910, subd. (a)(6) [doing an unlawful act with the intent or threat of doing substantial injury to the person of another].) Based on the matters set forth in Factual Findings 3 and 4, cause exists to discipline respondent's license pursuant to Business and Professions Code sections 490 and 10177, subdivision (b).

4. Business and Professions Code section 10186.2 establishes the duty of a licensee to report the conviction of the licensee of any felony or misdemeanor within 30 days of the occurrence and provides that failure to do so constitutes cause for discipline. Business and Professions Code section 10177, subdivision (d), authorizes the Commissioner to impose license discipline for willful disregard or violation of the Real Estate Law. As set forth in Factual Finding 5, respondent failed to notify the Department of his conviction. Consequently, cause exists to discipline respondent's license pursuant to Business and Professions Code sections 10177 subdivision (d), and 10186.2.

5. The goal of license discipline proceedings is not punishment but rather protection of the public. (Bus. & Prof. Code, § 10050.1.) Having established that cause for discipline exists, the remaining question is whether respondent has demonstrated that he can be trusted to discharge the duties of a real estate licensee in a manner consistent with public safety.

6. The criteria for evaluating rehabilitation of a licensee who has been convicted of a crime are set forth in California Code of Regulations, title 10, section 2912, and have been considered. The relevant criteria include: the nature and severity of the crime or act; the licensee's criminal history; the time that has elapsed since the commission of the acts; compliance with probation; change in attitude from that which existed at the time of the offenses; payment of restitution; and significant and conscientious involvement in community programs.

7. While it has been slightly less than two years since respondent's conviction, it has been almost five years since the incident occurred. Since the incident, respondent has engaged in therapy, stopped consuming alcoholic beverages, and has participated in community programs. Respondent has demonstrated a change in

attitude, which of the many rehabilitation criteria is "arguably the most important in predicting future conduct." (*Singh v. Davi* (2012) 211 Cal.App.4th 141, 149.)

Respondent has demonstrated that he is sufficiently rehabilitated from his criminal offenses such that he could be trusted to discharge the duties of a real estate salesperson in a manner consistent with public safety. Given these circumstances, it would not be against the public interest to allow respondent to retain a real estate salesperson license on a restricted basis.

Costs

8. Business and Professions Code section 10106 authorizes the Department to recover its reasonable costs of investigation and enforcement in disciplinary proceedings. As set forth in Factual Finding 12, the Department has incurred \$3,170.10 in reasonable costs.

9. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the California Supreme Court established standards for determining whether costs should be assessed in the particular circumstances of each case, to ensure that licensees are not deterred from exercising their right to an administrative hearing. Among those standards are whether the licensee was successful at hearing in getting the charges reduced or outright dismissed; the licensee's 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 to the alleged misconduct. Given those standards there is nothing to support a reduction to the Department's cost recovery in this case.

ORDER

All licenses and licensing rights of respondent Andrew Desmond under the Real Estate Law are revoked; 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 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 101.56.7 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 two years have 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 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 the 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 pay the Department \$3,710.10 for the reasonable costs of investigation and enforcement of this matter.

DATE: 09/08/2021

Traci C. Belmore
TRACI C. BELMORE
Administrative Law Judge
Office of Administrative Hearings