

FILED

AUG 10 2007

DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE

BY: 

* * * * *

In the Matter of the Application of)
)
HUONG PHUONG DAO,)
)
Respondent.)
_____)

No. H-33599 LA
L-2007020697

DECISION

The Proposed Decision dated July 11, 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, but the right to a restricted real estate salesperson license is granted to respondent. There is no statutory restriction on when a new application may be made for an unrestricted license. Petition for the removal of restrictions from a restricted license is controlled by Section 11522 of the Government Code. A copy of Section 11522 is attached hereto for the information of respondent.

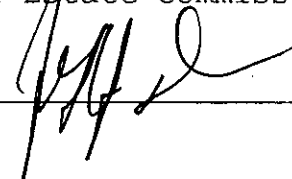
If and when application is made for a real estate salesperson license through a new application or through a petition for removal of restrictions, all competent evidence of rehabilitation presented by the respondent will be considered by the Real Estate Commissioner. A copy of the Commissioner's Criteria of Rehabilitation is attached hereto.

This Decision shall become effective at 12 o'clock noon on August 30, 2007.

IT IS SO ORDERED

8-7-07

JEFF DAVI
Real Estate Commissioner



BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against:

HUONG PHUONG DAO,

Respondent.

Case No. H-33599 LA

OAH No. L2007020697

PROPOSED DECISION

Robert S. Eisman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Los Angeles, California, on June 19, 2007.

Cheryl D. Keily, Counsel, represented Deputy Real Estate Commissioner Maria Suarez (complainant).

Phu Do Nguyen, Attorney at Law, represented Huong Phuong Dao (respondent). Respondent was also present.

Sworn testimony and documentary evidence was received during the hearing.

The matter was submitted on June 19, 2007.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues while acting in her official capacity.
2. On or about June 23, 2005, the Department of Real Estate (department) received an application from respondent for a salesperson license.
3. On or about July 17, 2003, the Bureau of Automotive Repair (bureau), Department of Consumer Affairs, registered respondent as an automotive repair dealer, doing business as Rosemead Smog Check Test Only Center (Automotive Repair Dealer Registration No. AF 228491).

4. On or about July 31, 2003, the bureau licensed respondent to operate a smog check test only station known as Rosemead Smog Check Test Only Center (Smog Check Test Only Station License TF 228491).

5. On December 30, 2004, the chief of the bureau filed an Accusation against respondent's Automotive Repair Dealer Registration and Smog Check Test Only Station License. The accusation alleged as causes for license discipline the following:

- The making of misleading statements (Bus. & Prof. Code, § 9884.7, subd. (a)(1));
- Fraud (Bus. & Prof. Code, § 9884.7, subd. (a)(4));
- Failure to comply with provisions of the Health and Safety Code and related regulations pertaining to smog check inspections and testing (Health & Saf. Code, § 44072, subd. (a) and (c));
- Aiding and abetting unlicensed activity (Health & Saf. Code, § 44072, subd. (f)); and
- Dishonesty, fraud, or deceit (Health & Saf. Code, § 44072, subd. (d)).

The charges were based on allegations that on March 12, 2004, an advanced emission specialist technician employed at respondent's smog check test only station had issued 12 electronic certificates of compliance for vehicles without performing bona fide inspections of the emission control devices and systems on those vehicles. The technician performed the smog checks and issued compliance certificates by means of "cleanpiping."¹

6. On September 15, 2005, the Deputy Director of the Department of Consumer Affairs of the State of California accepted and adopted as the Decision in the disciplinary matter, a Stipulated Settlement and Disciplinary Order entered into by respondent, doing business as Rosemead Smog Check Test Only Center. Pursuant to the stipulated settlement respondent admitted each and every charge in the accusation and agreed to have her Automotive Repair Dealer Registration permanently invalidated and her Smog Check Test Only Station License revoked.

7. Based on the foregoing disciplinary action the department denied respondents application for licensure as a real estate salesperson. Respondent appealed that denial and this hearing ensued.

8. Although Respondent was the registrant and licensee for Rosemead Smog Check Test Only Center, the business was managed by her father who hired the advanced emission specialist technician that engaged in cleanpiping.

¹ Cleanpiping is done by sampling emissions from one vehicle to issue smog certifications to vehicles that are not in compliance or not present in the smog check area during the time of the certification.

9. Respondent's father owned a smog check station in La Puente, California, which was under his name. He was the automotive repair dealer registrant and smog check test only station licensee for that facility. Respondent's father decided to open Rosemead Smog Check Test Only Center so that he would continue to have at least one operational facility if the smog check station in La Puente was closed down for violations of law. Respondent's father acknowledged that he rarely did cleanpiping at La Puente facility, and that most cleanpiping operations occurred at the Rosemead facility.

10. When respondent's father decided to open the Rosemead Smog Check Test Only Center, he asked respondent to sign the necessary documents to obtain an automotive repair dealer registration and a smog check test only station license for the facility. As part of her background and culture, respondent would not and did not question why her father wanted her to sign the applications and procure the license and registration. When her father asked her to do something, respondent saw it as her duty to be respectful and merely obey without question.

Respondent testified that she thought that she was only the owner of the facility, and did not realize that she also held the registration and license for the business. She did not recall completing documents to actually apply for a bureau license or registration, and had no independent knowledge of who was working there.

11. Although respondent was the owner, registrant and licensee of Rosemead Smog Check Test Only Center, she had no other involvement in the business, including its operation, supervision, management, and control. She did not sign any documents related to the routine conduct of business at the facility and neither received any compensation from nor paid bills for the business. Unbeknownst to respondent, she was used by her father so that he could continue to perform smog checks at one facility, if the other was shut down due to his illegal smog check operations. Respondent's father financed the business, exercised all decision making with respect to operation of the smog check facility, and hired the advanced emission specialist technician who actually performed the cleanpiping.

12. Respondent's father was criminally convicted for his involvement in the cleanpiping operations at Rosemead Smog Check Test Only Center. He admitted guilt, paid a fine, and performed community service. He is still on probation for the violations.

13. The evidence did not establish that in applying for and obtaining an Automotive Repair Dealer Registration and Smog Check Test Only Station License, respondent intended to substantially benefit her or another, or substantially injure another. The fact that respondent admitted the charges in the bureau's Accusation, which included fraud, does not establish that respondent intended to substantially benefit herself or another, or substantially injure another.²

² With respect to respondent's admission that she committed fraud, when used in the context of unfair business practices, "fraud" does not refer to the common law tort of

14. Respondent is 27 years old and married. She currently works in the mortgage branch of ING Direct, a financial services company.

Since May 20, 2005, respondent has held a commission in California as a bonded notary public (Commission No. 1580540). No evidence was presented to indicate that respondent's notary public commission is affected by the license discipline imposed on her Automotive Repair Dealer Registration and Smog Check Test Only Station License.

Respondent was a member of the Vietnamese Student Association at California State University, Los Angeles, and is a member of the National Notary Association. Additionally, respondent volunteers her time to work with the elderly in a hospital, and offers assistance by helping the homeless prepare for job interviews and repair their credit reports for improved credit scores.

15. Other than the disciplinary action against respondent's Automotive Repair Dealer Registration and Smog Check Test Only Station License, she has not been charged with any illegal activity, or been arrested or convicted for any violation of law.

16. As a result of the discipline imposed on her Automotive Repair Dealer Registration and Smog Check Test Only Station License, respondent now realizes that when licensed, she is responsible for knowing all the regulations and policies related to licensure, she will be held responsible for all work performed under her license, and that she will be held liable for any violations related thereto.

17. Respondent's manager at ING Direct encouraged her to obtain a real estate salesperson license to help the company and increase respondent's potential for promotion. Respondent also seeks a salesperson license so that she could eventually get a broker's license and open her own real estate office.

fraud. Instead, it refers to an act, which only requires a showing that members of the public "are likely to be deceived." (See Bus. & Prof Code, § 17200; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267.)

Fraud may be either actual fraud or constructive fraud. Actual fraud requires intent by one party to deceive another party or induce the other to enter into a contract.

However, constructive fraud does not require actual fraudulent intent. It includes any breach of duty whereby one misleads another to the other's prejudice or any such act or omission that the law declares to be "fraudulent without respect to actual fraud." (Civ. Code, §§ 1751-1753). Given respondent's lack of knowledge regarding the cleanpiping occurring under her registration and license, it is presumed that respondent's admission pertained to constructive fraud, which does not require or establish intent on the part of respondent.

Respondent has taken more classes than those needed for licensure. She completed courses in real estate principles and practices, economics, escrow, mortgages, and real estate appraisal.

18. Respondent brought no supporting witnesses other than her father, who testified regarding his full-time involvement in the Rosemead and La Puente smog check facilities and his daughter's lack of active participation in or knowledge of the businesses or illegal activities that occurred at the facilities. Respondent testified on her own behalf.

LEGAL CONCLUSIONS

1. Business and Professions Code section 480, subdivision (a), provides, in pertinent part, that a licensing body, such as the Department of Real Estate, may deny a license on the grounds that the applicant committed "any act involving dishonesty, fraud, or deceit with the intent to substantially benefit [herself] or another, or substantially injure another." Section 480, subdivision (a), also provides, as a separate cause for license denial, "any act, which if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license."

2. Business and Professions Code section 10176, subdivision (i), provides that the Commissioner of Real Estate may temporarily suspend or permanently revoke a real estate license, if the licensee has been guilty of conduct that constitutes fraud or dishonest dealing.

3. Business and Professions Code section 10177 provides, in pertinent part that the Commissioner of Real Estate may deny the issuance of a license to an applicant who has done the following:

(f) Acted or conducted [herself] in a manner that would have warranted the denial of his or her application for a real estate license, or has either had a license denied or had a license issued by another agency of this state . . . revoked or suspended for acts that, if done by a real estate licensee, would be grounds for the suspension or revocation of a California real estate license, if the action of denial, revocation, or suspension by the other agency or entity was taken only after giving the licensee or applicant fair notice of the charges, an opportunity for a hearing, and other due process protections . . . and only upon an express finding of a violation of law by the agency or entity.

[¶] . . . [¶]

(h) As a broker licensee, failed to exercise reasonable supervision over the activities of [her] salespersons

4. Under California Code of Regulations, title 10, section 2910, subdivision (a), when considering whether a license should be denied on the basis of an act described in Business and Professions Code section 480, subdivision (a)(3), the crime or act shall

be deemed to be substantially related to the qualifications, functions or duties of a department licensee if it involves:

- (1) The fraudulent taking, obtaining, appropriating or retaining of funds or property belonging to another person.
- (2) Counterfeiting, forging or altering of an instrument or the uttering of a false statement.
- . . .
- (4) The employment of bribery, fraud, deceit, falsehood or misrepresentation to achieve an end.

5. Grounds exist to deny respondent's application for licensure as a real estate salesperson, pursuant to Business and Professions Code sections 480, subdivision (a)(3), and 10177, subdivision (f), in that respondent's registration as an automotive repair dealer (Registration No. AF 228491) was permanently invalidated and respondent's licensure as a smog check test only station (License No. TF 228491) was revoked for acts in violation of law, including the making of misleading statements; fraud; and dishonesty, fraud, or deceit. These are acts or conduct that, if done by a real estate licensee, would be grounds for suspension or revocation of the license. (Factual Findings 3, 4, 5 and 6.)

6. Grounds do not exist to deny respondent's application for licensure, pursuant to Business and Professions Code sections 480, subdivision (a)(2), in that the evidence did not establish respondent's intent to substantially benefit herself or another, or substantially injure another. (Factual Finding 10, 11, and 13.)

6. California Code of Regulations, title 10, section 2911, provides criteria the department developed for the purpose of evaluating the rehabilitation of an applicant in considering whether or not to deny the issuance of a license on account of an act committed by the applicant. The applicable criteria include the following:

- (a) The passage of not less than two years since the most recent . . . act of the applicant that is a basis to deny the departmental action sought. . . .
 . . .
- (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 . . . 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.
 . . .
- (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 . . . familiar with applicant's previous conduct and with [her] subsequent attitudes and behavioral patterns.

7. The most recent act that resulted in the revocation of respondent's automotive repair dealer registration and smog check test only station license was on March 12, 2004, which is more than three years prior to this hearing. No fines or cost recovery are due as a result of that license discipline.

Respondent has learned some important lessons as a result of the prior license discipline, including the responsibilities that one assumes when licensed by the State of California, including the supervision of and responsibility for others who operate under the license. Respondent and respondent's father testified with respect to her lack of knowledge regarding the illegal cleanpiping operations that were conducted at Rosemead Smog Check Test Only Center.

Respondent is active in community programs and has taken more real estate-related coursed than that needed for licensure.

In total, respondent has satisfied the applicable rehabilitation criteria contained in the department's regulation.

8. The objective of a disciplinary proceeding is to protect the public, the licensed profession or occupation, maintain integrity and high standards, and preserve public confidence in real estate licensees.³ The purpose of proceedings of this type is not to punish respondent. The statutes relating to real estate licenses are designed to protect the public from any potential risk of harm.⁴ The law looks with favor upon those who have been properly reformed. To that end, respondent bears the burden to establish her rehabilitation against the acts that she admitted to, which resulted in her past license discipline.

9. In consideration of the entire record, it appears that respondent has established her rehabilitation by a preponderance of the evidence. However, given the naiveté she exhibited while licensed by the Bureau of Automotive Repair, her failure to have others testify on her behalf, and lack of independent evidence with respect to her

³ *Camacho v. Youde* (1975) 95 Cal.App.3d 161, 165; *Clerici v. Department of Motor Vehicles* (1990) 224 Cal.App.3d 1016, 1030-1031; *Fahmy v. Medical Bd. of California* (1995) 38 Cal.App.4th 810, 816.

⁴ *Lopez v. McMahon* (1988) 205 Cal.App.3d 1510, 1516; *Arneson v. Fox* (1980) 28 Cal.3d 440.

character, the public would assume unwarranted risk of respondent was given an unrestricted license at this time. Respondent should be given an opportunity to demonstrate that she can fulfill all the responsibilities of a real estate salesperson prior to receiving an unrestricted license.

10. In light of the foregoing factual findings and legal conclusions, it is deemed that the public would be adequately protected if respondent was granted a restricted license as a real estate salesperson. (See *Brandt v. Fox* (1979) 90 Cal.App.3d 737, 747.)

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Respondent's application for a real estate salesperson license is denied; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to section 10156.5 of the Business and Professions Code. 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 said Code:

1. The license shall not confer any property right in the privileges to be exercised, and the Real Estate Commissioner may by appropriate order suspend the right to exercise any privileges granted under this restricted license in the event of:

(a) The conviction of respondent (including a plea of nolo contendere) of a crime that is substantially related to respondent's fitness or capacity as a real estate licensee; or

(b) The receipt of evidence 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 this restricted license.

2. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor the removal of any of the conditions, limitations or restrictions attaching to the restricted license until 18 months have elapsed from the date of issuance of the restricted license to respondent.

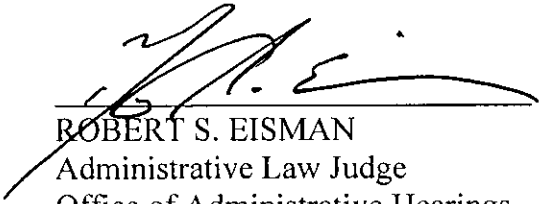
3. With the application for license, or with the application for transfer to a new employing broker, respondent shall submit a statement signed by the prospective employing real estate broker on a form RE 552 (Rev. 4/88) approved by the Department of Real Estate, which shall certify as follows:

(a) That the employing broker has read the Decision which is the basis for the issuance of the restricted license; and

///

(b) That the employing broker will carefully review all transaction documents
prepared by the restricted licensee and otherwise exercise close supervision over the
licensee's performance of acts for which a license is required.

DATED: July 11, 2007.



ROBERT S. EISMAN
Administrative Law Judge
Office of Administrative Hearings

7/02/07

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FILED

JAN 05 2007

DEPARTMENT OF REAL ESTATE

BY: 

8. BEFORE THE DEPARTMENT OF REAL ESTATE

9. STATE OF CALIFORNIA

10. * * *

11. In the Matter of the Application of)	NO. H- 33599 LA
)	
12. HUONG PHUONG DAO,)	
)	<u>STATEMENT OF ISSUES</u>
)	
14. Respondent.)	
)	

15. The Complainant, Maria Suarez, a Deputy Real Estate
16. Commissioner of the State of California, for cause of Statement
17. of Issues against HUONG PHUONG DAO, aka Huong P. Dao,
18. ("Respondent"), is informed and alleges as follows:

20. 1.

21. The Complainant, Maria Suarez, a Deputy Real Estate
22. Commissioner of the State of California, makes this Statement of
23. Issues against Respondent in her official capacity.

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2.

1 Respondent made application to the Department of Real
2 Estate of the State of California for a real estate salesperson
3 license on or about June 23, 2005.
4

3.

6 (LICENSE DISCIPLINE)

7 On or about September 15, 2005, the State of
8 California, Department of Consumer Affairs, Bureau of Automotive
9 Repair, in Case No. 79/05-40, revoked the Smog Check, Test Only
10 Station License of Respondent (dba Rosemead Smog Check Test
11 Only), License No. TF228491 and permanently invalidated the
12 Automotive Repair Dealer Registration, Registration No.
13 AF228491, issued to Respondent (dba Rosemead Smog Check Test
14 Only Center) on the grounds that Respondent violated California
15 Business & Professions Code Sections 9884.7(a)(1) (Making or
16 Authorizing Untrue Statement) and 9884.7(a)(4) (Engaging in
17 Fraud), as well as various provisions of the Health & Safety
18 Code.
19

20 The acts resulting in the disciplinary action taken
21 against Respondent's registration and license, as alleged herein
22 above in Paragraph 3, constitute cause for denial of
23 Respondent's application for a real estate license under

24 ///
25 ///
26 ///
27 ///

1 Business and Professions Code Sections 475(a)(4); 475(a)(3);
2 480(a)(2); 480(a)(3); and/or 10177(f).

3 The Statement of Issues is brought under the
4 provisions of Section 10100, Division 4 of the Business and
5 Professions Code of the State of California and Sections 11500
6 and 11529 of the Government Code.

7 WHEREFORE, Complainant prays that the above entitled
8 matter be set for hearing and, upon proof of the charges
9 contained herein, that the Commissioner refuse to authorize the
10 issuance of, and deny the issuance of, a real estate salesperson
11 license to Respondent HUONG PHUONG DAO and for such other and
12 further relief as may be proper under any other applicable
13 provision of law.

14 Dated at Los Angeles, California

15 this 4th day of January, 2007.

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17
18 
19 
20 Maria Suarez
21 Deputy Real Estate Commissioner
22
23
24

25 Cc: HUONG PHUONG DAO
26 Maria Suarez
27 Sacto.