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NOV 13 2017

BUREAU OF REAL ESTATE

By *Al Deloris*

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

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In the Matter of the Accusation of DAVID MOSKOWITZ, Respondent.))))	CalBRE No. H-40565 LA OAH No. 2017060520
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DECISION

The Proposed Decision dated October 10, 2017, 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, but the right to a restricted broker license is granted to Respondent.


Pursuant to Government Code section 11521, the Bureau of Real Estate may order reconsideration of this Decision on petition of any party. The party seeking reconsideration shall set forth new facts, circumstances, and evidence, or errors in law or analysis, that show(s) grounds and good cause for the Commissioner to reconsider the Decision. If new evidence is presented, the party shall specifically identify the new evidence and explain why it was not previously presented. The Bureau's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the effective date of this Decision, whichever occurs first.

The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 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 12/1/17.

IT IS SO ORDERED 11/7/17

WAYNE S, BELL
REAL ESTATE COMMISSIONER



By: DANIEL J. SANDRI
Chief Deputy Commissioner

BEFORE THE
BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of:

DAVID MOSKOWITZ,

Respondent.

Case No. H-40565 LA

OAH No. 2017060520

PROPOSED DECISION

This matter was heard by Humberto Flores, Administrative Law Judge with the Office of Administrative Hearings, on September 12, 2017, in Los Angeles, California.

Complainant was represented by Steve Chu, Counsel for the Bureau of Real Estate (Bureau). David Moskowitz (respondent) appeared personally and was represented by Mary Work, Attorney at Law.

Evidence was received and the matter was submitted for decision. The Administrative Law Judge finds as follows:

FACTUAL FINDINGS

1. Complainant, Maria Suarez, made the Accusation in her official capacity as Supervising Special Investigator for the State of California.
2. Respondent is presently licensed and/or has licensing rights as a real estate broker under the Real Estate Law, Part 1 of Division 4 of the California Business and Professions Code.
3. On February 2, 2016, in the Superior Court of California, County of Los Angeles, Case No. 5BR04023, respondent entered a plea of nolo contendere and was convicted of violating Penal Code section 243, subdivision (e)(1), domestic battery, a misdemeanor that is substantially related to the duties, functions and qualifications of a real estate broker. Imposition of sentence was suspended and respondent was placed on summary probation for 36 months on certain conditions including, inter alia, that he complete a domestic violence treatment program, pay a fine and court fees totaling \$720 and complete 352 hours of community labor. Respondent was also ordered to attend weekly domestic violence counseling sessions with a licensed therapist. Respondent is in compliance with his probationary conditions.

4. The facts and circumstances underlying the conviction occurred on November 20, 2015, when respondent was leaving his daughter at school after a weekend visitation. When respondent and his daughter arrived at the school they noticed that respondent's ex-wife was at the school dropping off her step-daughter. Respondent's daughter ran to her mother and respondent followed. Respondent and his ex-wife began discussing a visitation issue regarding the upcoming holidays. The conversation became heated because of a disagreement over which parent would have physical custody during Thanksgiving. Respondent grabbed his daughter by the arm and said he was going to take her home to his house. Respondent's wife then grabbed their child's other arm and the parents engaged in a tug-of-war. Their daughter yelled that she wanted to go to school and her parents let go of her arms. Respondent became angrier and yelled obscenities at his ex-wife and threatened her. He then grabbed his ex-wife's sweater near her throat and pushed her against a retaining wall. Respondent denied putting his hand on his ex-wife's throat and choking her.

5. The police report indicates that respondent's ex-wife told the investigating police officer that respondent grabbed her by the throat and squeezed it hard enough to restrict her breathing. He also threatened to kill her. The investigating police officer noted in his report that respondent's ex-wife stated that "her throat still hurt but she did not have any visible injuries." (Exhibit 4.) Respondent's ex-wife did not testify at the hearing. Therefore, her statements to the police officer are considered hearsay under *Lake v. Reed* (1997) 16 Cal.4th 448. Respondent's daughter and other percipient witnesses also gave hearsay statements to the investigating officer, none of whom testified at the hearing. Their statements are not admissible as exceptions to the hearsay rule. The Supreme Court in *Lake v. Reed, supra*, sets forth how an administrative law judge should weigh the contents and statements contained in a police report. Generally, the personal observations of the investigating law enforcement officer and any statements attributed to respondent are admissible for all purposes. Statements made to the investigating officer by percipient witnesses are considered hearsay unless these statements would be admissible under a recognized exception to the hearsay rule. A hearsay statement by a non-party witness is admissible as administrative hearsay under Government Code section 11513, subdivisions (c), and may support other admissible evidence, but it cannot, by itself support a factual finding.¹

¹ Government Code section 11513, subdivision (c), addresses the admissibility of evidence generally in administrative hearings. It states: "The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

6. Respondent has no other convictions and no history of prior violent behavior. Respondent admitted that his ex-wife was not at fault for his physical aggression on the day of the incident. He testified that he has since apologized to his ex-wife, and in May 2017, respondent completed the court ordered "reunification therapy," with Kenneth E. Newelt, MFT. This therapy was a condition precedent for respondent to resume his custodial visits with his daughter. Mr. Newelt wrote three letters setting forth respondent's progress in his therapy sessions. In his letter dated October 18, 2016, Mr. Newelt states in part:

Mr. Moskowitz's participation in sessions continues to be exemplary. He has continued to show commitment to the process, is always open to feedback and therapeutic insights, and utilizes the techniques for stress and anxiety management. Our sessions over the past few months have evolved to concentration on reunification with his daughter. We have discussed all aspects of this including coping skills and planning to deal with all issues that arise upon reunification and thereafter. We have spent a great deal of time discussing conflict avoidance. It appears that Mr. Moskowitz has spent a great deal of time considering these issues and has been open to guidance and discussions in this regard.

Mr. Moskowitz continues to exhibit a great deal of personal insight, and is able to express and process his feelings well. We are continuing to work on stress management techniques, and focus on reunification with his daughter. His prognosis is excellent. (Exhibit C.)

7. On September 6 and 7, 2017, respondent was evaluated by Mark Ingram Psy.D., to determine whether respondent has had a change in attitude from that which existed at the time that he committed the offense, and whether respondent poses a risk of violence when performing his duties as a real estate broker. Dr. Ingram testified at the hearing that respondent has learned about himself during therapy, which contributed to a change in attitude and behavior. He has become more aware of his angry feelings and has learned various methods to cope with his anger. Dr. Ingram further opined that there is no empirical evidence proving that an individual who behaves violently in one set of specific circumstances will behave violently in another, or that the individual has a predisposition to commit violent acts. The best evidence, according to Dr. Ingram is the individual's history. He noted that respondent has no prior history of violence in his personal or professional life. During his evaluation of respondent, Dr. Ingram administered several psychological tests designed to measure an individual's tendency to exhibit anger and aggression, and to act out aggressively when provoked. Respondent's overall scores were consistent with individuals who have lower internalized and externalized anger, and lower aggressive tendencies, even when provoked.

8. Aaron G. Leider is the broker/owner of Keller Williams-Brentwood, a real estate company that employs respondent. Mr. Leider testified that he supervises respondent and that respondent has worked for his organization since 2005. Mr. Leider described respondent as a man of integrity, and a consummate professional who has significant experience and knowledge in commercial transactions. In fact, respondent heads the commercial real estate division of Keller Williams-Brentwood. Finally, even though respondent has handled some contentious commercial transactions in the past, Mr. Leider stated that he has never received a complaint from anyone, including clients or colleagues, accusing respondent of losing his temper in a professional setting or otherwise.

9. During his testimony, respondent admitted that what he did was wrong and that his ex-wife was not responsible for his violent outburst on the day of the incident. Further, respondent realizes that his actions on the day of the incident were completely contrary to the best interests of his daughter. Respondent expressed remorse during his testimony, indicating that the loss of visitation rights with his daughter taught him a painful lesson. Because of his misconduct, the court ordered respondent to undergo the reunification therapy (described in Factual Finding 6) as a pre-condition to regaining custody/visitation rights to his daughter. Respondent is now doing everything in his power to comply with all terms and conditions of probation.

10. Respondent submitted reference letters from colleagues who attested to respondent's integrity, professionalism, and knowledge when performing his duties as a real estate broker. They also noted respondent's efforts in mentoring other brokers and salespersons who are employed or associated with Keller Williams-Brentwood.

11. Respondent volunteers his time to an organization called "Ride On." This organization provides a therapeutic modality called "Hyppotherapy" that benefits developmentally and physically disabled children.

12. Pursuant to Business and Professions Code section 10106, complainant introduced evidence of costs of investigation in the amount of \$675.90, and costs of enforcement totaling \$724.35. These costs are deemed reasonable under section 10106.

LEGAL CONCLUSIONS

1. Cause exists to suspend or revoke respondent's real estate broker's license under Business and Professions Code sections 490 and 10177, subdivision (b), and California Code of Regulations, title 10, section 2910, subdivision (8), based on respondent's conviction and his conduct underlying his conviction, as set forth in Factual Findings 3 and 4.

2. Cause exists under Business and profession Code section 10106 to order respondent to pay costs of investigation and enforcement totaling \$1,400.25.

3. California Code of Regulations, title 10, section 2912, sets forth criteria for establishing rehabilitation. The rehabilitation criteria set forth in section 2912, have been developed and to be considered by the Bureau pursuant to Section 482 of the Business and Professions Code for the purpose of evaluating rehabilitation of a licensee who has committed a crime, and are set forth as follows:

(a) The time that has elapsed since commission of the act(s) or offense(s):

(1) The passage of less than two years after the most recent criminal conviction or act of the licensee that is a cause of action in the Bureau's Accusation against the licensee is inadequate to demonstrate rehabilitation.

(2) Notwithstanding subdivision (a)(1), above, the two-year period may be increased based upon consideration of the following:

(A) The nature and severity of the crime(s) and/or act(s) committed by the licensee.

(B) The licensee's history of criminal convictions and/or license discipline that are "substantially related" to the qualifications, functions, or duties of a real estate licensee.

(b) Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the licensee, or escheat to the State of these monies or other properties if the victim(s) cannot be located.

(c) Expungement of the conviction(s) which culminated in the administrative proceeding to take disciplinary action.

(d) Expungement or discontinuance of a requirement of registration pursuant to the provisions of Section 290 of the Penal Code.

(e) Successful completion or early discharge from probation or parole.

(f) Abstinence from the use of controlled substances and/or alcohol for not less than two years if the criminal conviction was attributable in part to the use of a controlled substance and/or alcohol.

(g) Payment of any fine imposed in connection with the criminal conviction that is the basis for revocation or suspension of the license.

- (h) Correction of business practices responsible in some degree for the crime or crimes of which the licensee was convicted.
- (i) New and different social and business relationships from those which existed at the time of the commission of the acts that led to the criminal conviction or convictions in question.
- (j) Stability of family life and fulfillment of parental and familial responsibilities subsequent to the criminal conviction.
- (k) Completion of, or sustained enrollment in, formal educational or vocational training courses for economic self-improvement.
- (l) Significant and conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.
- (m) Change in attitude from that which existed at the time of the commission of the criminal acts in question as evidenced by any or all of the following:
 - (1) Testimony and/or other evidence of rehabilitation submitted by the licensee.
 - (2) Evidence from family members, friends and/or other persons familiar with the licensee's previous conduct and with subsequent attitudes and/or behavioral patterns.
 - (3) Evidence from probation or parole officers and/or law enforcement officials competent to testify as to licensee's social adjustments.
 - (4) Evidence from psychiatrists, clinical psychologists, sociologists or other persons competent to testify with regard to neuropsychiatric or emotional disturbances.
 - (5) Absence of subsequent felony convictions, misdemeanor convictions, or other conduct that provides grounds to discipline a real estate licensee, which reflect an inability to conform to societal rules when considered in light of the conduct in question.

4. Respondent was convicted of a violent misdemeanor 20 months ago. He remains on probation, which is scheduled to terminate in February 2019. Respondent is thus far in compliance with the enumerated terms of probation, including payment of the fine. He also completed the court-ordered community labor. In addition, respondent has undergone reunification therapy, domestic violence counseling, and has been evaluated by a psychologist. Through his efforts at rehabilitation set forth in Factual Findings 6 and 7, respondent has regained visitation rights with his daughter. Respondent realizes that he must continue his rehabilitation efforts to regain the shared physical custody that he once enjoyed.

Through his testimony, reference letters from colleagues and friends, letters from his therapist, testimony from his evaluating psychologist, respondent proved that he has significantly changed his attitude since he committed the crime for which he was convicted. Finally, respondent presented evidence of his volunteer efforts at the Ride On Hypotherapy program.

5. As set forth above, respondent has met most of the relevant criteria of rehabilitation set forth in California Code of Regulations, title 10, section 2912. Since his conviction, respondent has sought and participated in extensive therapy and counseling, which included domestic violence counseling, and substantial personal therapy. With the help of therapy and counseling, respondent has come to understand that his actions were wrong, and that his misconduct was the cause of losing shared custody and visitation with his daughter. These consequences have had a devastating effect on respondent. Respondent's expression of remorse at the hearing was credible.

6. The cause of respondent's violent behavior was the disputatious relationship with his ex-wife resulting from a custody/visitation battle over their young daughter. One cannot necessarily extrapolate physical aggression that occurs within a domestic setting or a contentious divorce into a general proclivity for violence. The dynamics of a troubled domestic relationship and the emotions therein are so different in kind and intensity from ordinary business and social interactions that such a generalization is not warranted. This is especially true when the custody of a young child and visitation rights are involved after the dissolution of a marriage. There was no evidence that respondent has been physically aggressive with anyone else. Other than the incident which led to his conviction, respondent has no history of violent or aggressive behavior. Further, there was no evidence that the problems associated with the custody and/or visitation disagreements with his ex-wife affected respondent's ability to perform his professional duties. To the contrary, respondent submitted evidence of integrity and professionalism in his work. Recidivism is unlikely.

7. The imposition of discipline in this case requires a balancing of public protection, the seriousness of the offense, and the evidence of mitigation and rehabilitation. Based on all of the facts and circumstances of this case, the public would be adequately protected by allowing respondent to continue working as a real estate broker under a restricted real estate broker's license.

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ORDER

All licenses and licensing rights of respondent David Moskowitz, under the Real Estate Law are revoked. 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 thereof 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 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. Respondent is hereby ordered to pay \$1,400.25 to the Bureau of Real Estate as costs investigation and of enforcement.
3. Respondent shall continue to comply with all of his probationary conditions imposed by the court in his criminal case.
4. 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.
5. 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 years have elapsed from the effective date of this Decision.
6. 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.
7. Respondent shall report in writing to the Bureau of Real Estate as the Real Estate Commissioner shall direct by his Decision herein or by separate written order issued while the restricted license is in effect such information concerning Respondent's activities for which a real estate license is required as the Commissioner shall deem to be appropriate

to protect the public interest. Such reports may include, but shall not be limited to, periodic independent accountings of trust funds in the custody and control of Respondent and periodic summaries of salient information concerning each real estate transaction in which the Respondent engaged during the period covered by the report.

8. Respondent shall notify the Commissioner in writing within 72 hours of any arrest by sending a certified letter to the Commissioner at the Department of Real Estate, Post Office Box 137000, Sacramento, California 95813-7000. The letter shall set forth the date of respondent's arrest, the crime for which respondent was arrested, and the name and address of the arresting law enforcement agency. Respondent's failure to timely file written notice shall constitute an independent violation of the terms of the restricted license and shall be grounds for suspension or revocation of that license.

DATED: October 10, 2017

DocuSigned by:
Humberto Flores
HUMBERTO FLORES
Administrative Law Judge
Office of Administrative Hearings