

JUN 14 2023

DEPT. OF REAL ESTATE

By _____



BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Application of:)	DRE No. H-42490 LA
)	
MARCOS NUNEZ,)	OAH No. 2023020452
)	
Respondent.)	

DECISION

The Proposed Decision dated May 4, 2023, 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.

Pursuant to Section 11517(c)(2) of the Government Code, the following corrections are made to the Proposed Decision.

Page 11, paragraph number 6, shall read:

California Code of Regulations, title 10, section 2910, in pertinent part, provides, "When considering whether a license should be denied . . . on the basis of the conviction of a crime, . . . the crime or act should be deemed to be substantially related to the qualifications, functions, or duties of a licensee of the Department . . . if it involves: [¶] . . . [¶] (8) Doing any unlawful act . . . with the intent or threat of doing substantial injury to the person or property of another."

The last sentence of page 12, paragraph number 8 shall read, "Given the number of years that has elapsed, 12, nine, and four years, respectively, moderate weight is accorded the convictions."

The first sentence of page 13, paragraph number 12 shall read, "Twelve years have elapsed since the September 4, 2010 incident and resulting September 8, 2010 conviction."

The second sentence of page 13, paragraph number 12 shall read, "Nine years have elapsed since the January 7, 2014 conviction based on the 12-year-old incident occurring on July 26, 2010."

The application for a real estate salesperson license is denied, but the right to a restricted real estate salesperson license is granted to Respondent.

Pursuant to Government Code Section 11521, the Department 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 Department'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.

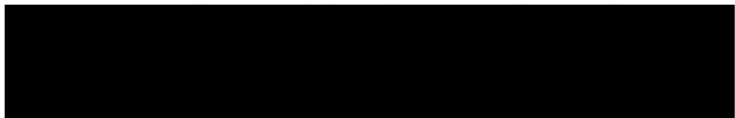
If and when a petition for removal of restrictions is filed, all competent evidence of rehabilitation presented by the Respondent will be considered by the Real Estate Commissioner.

This Decision shall become effective at 12 o'clock noon on July 5, 2023.

IT IS SO ORDERED

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DOUGLAS R. McCAULEY
REAL ESTATE COMMISSIONER



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

In the Matter of the Application of:

MARCOS NUNEZ, Respondent.

Agency Case No. H-42490 LA

OAH No. 2023020452

PROPOSED DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by telephone and videoconference on April 6, 2023. This matter was submitted for decision on April 19, 2023.

Diane Lee, Real Estate Counsel, Department of Real Estate (Department) represented complainant Veronica Kilpatrick, a Supervising Special Investigator for the State of California. Respondent Marcos Nunez represented himself.

Testimony and documents were entered in evidence at the hearing. Pursuant to an April 7, 2023 Post-Hearing Order, the record remained open after the hearing concluded for respondent's submission of character references and correspondence from legal counsel and for complainant's response to the submission. Respondent timely submitted a packet containing signed as well as unsigned character reference letters, which are collectively marked for identification and admitted as Exhibit A. A packet containing an Attorney Client Fixed Fee Retainer Agreement and a May 29,

2020 Antelope Valley College Certificate of Achievement is marked for identification and admitted as Exhibit B. An additional packet containing several documents in connection with an August 27, 2018 conviction is marked for identification and admitted as Exhibit C.

Government Code section 11513, subdivision (c), provides "[a]ny 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."

Objections raised in *Complainant's Reply to Respondents Additional Documents*, which is marked for identification only as Exhibit 12, are overruled in accordance with Government Code section 11513, subdivision (c), as follows: Character reference letters, signed or not, are relevant. (See *Werner v. State Bar of Cal.* (1954) 42 Cal.2d 187, 196-197; *Preston v. State Bar of Cal.* (1946) 28 Cal.2d 643, 650-651.) Respondent testified, during both direct and cross examination, about the facts and circumstances surrounding an August 27, 2018 conviction complainant alleges as cause for denial of licensure. The Assistance League of Los Angeles CRVC Time Sheet, Victim Restitution Request, and respondent's one page statement with a Saturday, February 24, 2018 reference, all included in Exhibit C, are documents pertinent to adjudication of that allegation and are therefore relevant. During cross-examination, respondent testified he earned a certificate in real estate from Antelope Valley College. The May 29, 2020 Antelope Valley College Certificate of Achievement included in Exhibit B corroborates respondent's testimony and is therefore relevant.

Documents respondent produced in response to the April 7, 2023 Post-Hearing Order were not limited to character references or correspondence from legal counsel,

as complainant notes. Nonetheless, the probative value of those documents warrants their admission to insure a fair and just determination of respondent's fitness for licensure. (See *Ross v. Figueroa* (2006) 139Cal.App.4th 856, 861 [recognizing in matters involving unrepresented litigants, an insistence on formality threatens to undermine fairness].)

FACTUAL FINDINGS

Jurisdictional Matters

1. On May 25, 2021, respondent submitted to the Department a Salesperson Exam/License Application (May 25, 2021 Application), which is pending. No license has been issued.
2. On January 11, 2023, complainant, acting in an official capacity, filed the Statement of Issues alleging cause for denial of the May 25, 2021 Application pursuant to Business and Professions Code sections 475, subdivision (a)(2), 480, subdivision (a), and 10177, subdivision (b).
3. On February 2, 2023, respondent filed a Notice of Defense on Application requesting a hearing.
4. Thereafter, this administrative proceeding ensued. All jurisdictional requirements are satisfied.

Respondent's Background

5. From 2008 through 2014, respondent was homeless.

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6. In 2014, respondent commenced working as a sales manager at Cricket Wireless with responsibility for handling monies, employee training, and customer service operations. Cricket Wireless was the subject of three corporate acquisitions and in each instance respondent's superiors retained him to perform the functions of a Small Area Manager.

7. Currently, for the last five months, respondent is employed at a Macy's store as a Retail Sales Specialist managing a Loreal fragrance counter and selling its products.

8. In 2018, respondent earned an associate degree in business from Antelope Valley College. He then attended California State University, Bakersfield for one semester. In 2020, respondent received a Certificate of Achievement Real Estate Salesperson from Antelope Valley College. On September 28, 2021, respondent successfully passed the real estate salesperson examination.

Alleged Cause for License Denial

9. a. On September 8, 2010, in the Superior Court of California, Los Angeles County, case number KA091840, respondent was convicted on his guilty plea of three counts of burglary, in violation of Penal Code section 459, all felonies. The court found a factual basis for respondent's convictions, suspended imposition of sentence, and placed respondent on three years' formal probation with terms and conditions, including serving 365 days in Los Angeles County Jail (less credit for five days actually served and five days good time), staying away from Target stores, and paying fees and fines. On February 11, 2020, pursuant to Proposition 47, the court found respondent completed his sentence, and pursuant to Penal Code section

1170.18, subdivision (g), redesignated respondent's three felony convictions as shoplifting misdemeanor convictions under Penal Code section 459.5.

b. The facts and circumstances of respondent's September 8, 2010 criminal conviction are as follows: On September 4, 2010, while in a Target store, respondent hid a bottle of Dolce and Cabana men's cologne in his pants pocket and exited the store without paying for the merchandise. Respondent told a Los Angeles County deputy sheriff responding to the incident about stealing from the store several other occasions and reselling stolen merchandise for cash. At hearing respondent testified, "It was my means for providing a roof over my head. I knew it was wrong. I was easily groomed and manipulated and I longed to be a part of something. As cliché as that sounds, it was a stupid mistake."

10. a. On January 7, 2014, in the Superior Court of California, San Bernardino County, case number FCH1000453, respondent was convicted on his nolo contendere plea of second degree commercial burglary, in violation of Penal Code section 459, a felony. The court placed respondent on 36 months' supervised probation with terms and conditions, including serving 365 days in San Bernardino County Jail (with credit for 185 days served) and paying restitution and fees and fines.

b. The facts and circumstances of respondent's January 7, 2014 criminal conviction are as follows: On July 26, 2010, E., whom respondent described as a mother figure at hearing, drove respondent in a stolen vehicle to retail stores, including Target and Wal-Mart, where they individually and jointly stole merchandise, including bottles of cologne and tooth brushes. They returned stolen merchandise for store credit payable to them in the form of gift cards. While in a Wal-Mart parking lot, E. reversed the vehicle she drove and backed into another motorist's vehicle. E. fled

the location. The motorist pursued E.'s fleeing vehicle and notified law enforcement about E. and respondent's location, thus resulting in their apprehension.

11. a. On August 27, 2018, in the Superior Court of California, Los Angeles County, case number 8AN02139, respondent was convicted on his nolo contendere plea of hit and run driving resulting in property damage, in violation of Vehicle Code section 2002, subdivision (a), a misdemeanor. The court found a factual basis for respondent's plea, suspended imposition of sentence, and placed respondent on 36 months' summary probation with terms and conditions, including performing five days of mandatory community labor and paying fees and fines totaling 1,495.

b. The facts and circumstances of respondent's August 27, 2018 criminal conviction are as follows: On February 23, 2018, while driving from a manager's meeting late at night, respondent dropped his phone and, as he attempted retrieving the phone, he hit and damaged his neighbor's parked car. The neighbor is known to have a temper, according to respondent's hearing testimony. Consequently, respondent was concerned about waking the neighbor because he feared a confrontation. Respondent left a note containing his pertinent information on the neighbor's car. The neighbor did not see the note. By the time respondent approached the neighbor the next day, respondent learned the neighbor had already filed a police report.

Factors in Aggravation, Mitigation, and Rehabilitation

12. a. Complainant alleges in aggravation, on June 1, 2007, in the Superior Court of California, Santa Barbara County, case number 1235953, respondent was convicted on his nolo contendere plea of possession of a weapon (knife) on school grounds, in violation of Penal Code section 626.10, subdivision (a), a

misdemeanor. The court suspended imposition of sentence and placed respondent on three years' unsupervised probation with terms and conditions, including performing 45 hours of community service and paying fees and fines totaling \$120.

b. The facts and circumstances of the June 1, 2007 criminal conviction were not clearly established by the evidence admitted at hearing. However, respondent testified he more than likely carried a knife "as a safety measure" because he "grew up in a really rough area."

13. a. Complainant further alleges in aggravation, on May 25, 2010, in the Superior Court of California, Los Angeles County, case number 9CA10303, respondent was convicted on his nolo contendere plea of one count of theft with a prior theft conviction, in violation of Penal Code section 666-484, subdivision (a), a misdemeanor. The court found a factual basis for respondent's plea, suspended imposition of sentence, and placed respondent on two years' summary probation with terms and conditions, including serving 30 days in Los Angeles County Jail (less credit for five days actually served and four days for good time) and paying fees and fines totaling \$181. On March 19, 2018, pursuant to Penal Code section 1203.4, the court set aside and vacated respondent's nolo contendere plea and dismissed the one-count complaint of theft against respondent.

b. The facts and circumstances of the May 25, 2010 criminal conviction were not clearly established by the evidence admitted at hearing.

14. At hearing counsel for complainant acknowledged the convictions discussed in Factual Findings 12a and 13a are "older" and "not in play." These convictions are, respectively, 16 and 13 years old. Given these substantial passages of

time, the evidentiary significance of the convictions discussed in Factual Findings 12a and 13a is diminished. (See *Kwasnik v. State Bar* (1990) 50 Cal.3d 1061.)

15. In connection with the August 27, 2018 conviction discussed in Factual Finding 11, respondent's automobile insurance carrier paid the neighbor \$1,000.

16. Respondent addressed the circumstances informing his criminal misconduct testifying, "I'm here to acknowledge the mistake I did. . . . I know my record isn't the best. . . . We all have our backgrounds. With me, I never had guidance or anyone to turn to, other than my grandparents who raised me. From there it was just a very abusive upbringing and constantly being kicked out for no reason. My mom was just not very happy with me. I wasn't a child she wanted to have so it was just extremely difficult. I wish I could go back and fix everything, and I can't. . . . I understand we all have it rough and people maybe had it rougher than me and didn't do the mistakes I did but at that time it was all I knew. It was the surroundings and the people I was with. I was so easily groomed because I wanted to be loved and I wanted to be a part of some type of family. I was used and that is what happened. I apologize."

17. Respondent additionally addressed his rehabilitation testifying, "I have tried to be a better person and change my life around. This is something I really want to do. I know I would be great but I have this history and its always going to be there and I'm always going to be judged because of it. I have come leaps and bounds. I've gone to school and graduated with honors. I have held management positions. I have dealt with large sums of money. I got my certificate just to show you guys I have drive and motivation. I want a chance to prove myself and to work. That doesn't translate well on paper with my history. I'm truly sorry. I know I am not that person. It took a lot of time to get to where I'm at and I've done it with support from friends. . . . I feel I

have changed tremendously; to try to be model citizen not just for myself but for everybody.

18. Respondent reports greater stability in his life. He maintained a decade-long relationship with his now-former partner. They lived with his partner's family. "I had a home," he testified. Having a home allowed respondent "to maintain [his] path." He testified, "It took me a very long time to get here and I'm proud to be where I am. It wasn't easy. . . . I have become so giving because my life was so dark. . . . My life has been rough but I can't keep dwelling on it. I'm generally not the person that's on paper."

19. Respondent no longer associates with "the wrong people." He is currently staying with a friend and her family until his apartment is ready for him to occupy one month from the time of the hearing in this matter. Respondent considers himself "a home body," whose social activities include reading, watching movies, barbequing with coworkers, and caring for his dog. He communicates regularly with friends in the real estate industry.

20. Respondent presented 11 character reference letters attesting to his triumph over hardship and worthiness for a second chance, work ethic, managerial skills, and compassion for others. Authors of letters describing respondent as honest and trustworthy do not acknowledge any awareness of respondent's prior misconduct or criminal convictions.

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LEGAL CONCLUSIONS

Standard and Burden of Proof

1. Respondent bears the burden of establishing his fitness and qualification to perform the functions and duties of a real estate salesperson. (Gov. Code, § 11504; *Coffin v. Alcoholic Beverage Control Appeals Bd.* (2006) 139 Cal.App.4th 471, 476.)

2. The standard of proof is the preponderance of the evidence. (Evid. Code, § 115.) Preponderance of the evidence means evidence that has more convincing force than that opposed to it. (See *Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) "[T]he sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the *quality* of the evidence. The *quantity* of evidence presented by each side is irrelevant." (*Id.* at p. 325, original italics.) In meeting the burden of proof by a preponderance of the evidence, respondent "must produce substantial evidence, contradicted or un-contradicted, which supports the finding." (*In re Shelley J.* (1998) 68 Cal.App.4th 322, 339.)

Applicable Law

3. Administrative consideration of respondent's license application is not penal in nature; the purpose of this administrative proceeding is not to impose additional punishment on respondent. The appropriate court has already imposed appropriate and significant criminal punishment on respondent. Rather, the purpose of this administrative proceeding is to protect the public. (*Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164.)

4. The Real Estate Law is intended, among other things, to ensure licensed real estate professionals are worthy of the fiduciary responsibilities they will bear.

Integrity, trustworthiness, and honesty are essential qualifications to perform the fiduciary duties of a real estate professional. If conduct reflects unfavorably on the worthiness of a person to be a fiduciary, he or she lacks the necessary qualifications to become a licensed real estate professional. (See *Harrington v. Department of Real Estate* (1989) 214 Cal.App.3d 394.)

5. Thus, Business and Professions Code sections 480, subdivision (a)(1), and 10177, subdivision (b)(1), authorize the denial of an application for licensure on grounds the applicant has been convicted of a crime substantially related to the qualifications, functions, or duties of a real estate licensee. A conviction means "a plea or verdict of guilty or a conviction following a plea of nolo contendere." (Bus. & Prof. Code, § 480, subd. (a)(1).)

6. California Code of Regulations, title 10, section 2910, in pertinent part, provides, "When considering whether a license should be denied . . . on the basis of the conviction of a crime, . . . the crime or act should be deemed to be substantially related to the qualifications, functions, or duties of a licenses of the Department . . . if it involves: [¶] . . . [¶] (8) Doing any lawful act . . . with the intent or threat of doing substantial injury to the person or property of another."

7. In the case where a conviction for a crime is substantially related to the qualifications, functions or duties of a real estate licensee, the context in which the crime was committed goes only to the question of the weight to be accorded to the crime when considering the action to be taken with respect to the licensee. (Cal. Code Regs., tit.10, § 2910, subd. (c).)

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Discussion

8. As discussed in Factual Findings 9b and 10b, respondent stole merchandise from retail stores to confer a financial or economic benefit upon himself. His misconduct colliding into his neighbor's parked car discussed in Factual Findings 11b caused substantial property damage. The resulting September 8, 2010, January 7, 2014, and August 27, 2018 criminal convictions are substantially related to the qualifications, functions, and duties of a real estate licensee. Given the number of years that has elapsed, 23, nine, and five years, respectively, moderate weight is accorded the convictions.

9. Cause exists pursuant to Business and Professions Code sections 480, subdivision (a)(1), and 10177, subdivision (b), and California Code of Regulations, title 10, section 2910, subdivisions (a)(8) and (c), to deny respondent's May 25, 2021 Application for a real estate salesperson license. On September 8, 2010, January 7, 2014, and August 27, 2018, respondent was convicted of crimes substantially related to the qualifications, functions, or duties of a real estate licensee.

10. Although cause exists to deny respondent's May 25, 2021 application, the Department, pursuant to Business and Professions Code section 482, subdivision (a)(1), has promulgated criteria for evaluating respondent's rehabilitation. People can and do reform. In such circumstances they should not be barred from licensure. (See *Tardiff v. State Bar* (1980) 27 Cal.3d 395, 404.)

11. The Department's criteria for evaluating the rehabilitation of an applicant for licensure who has a criminal record include, among other things, the lapse of time since committing the act or offense (the passage of less than two years after the most recent criminal conviction or act is inadequate to demonstrate rehabilitation);

expungement of criminal convictions; payment of the fine or other monetary penalty imposed in connection with a criminal conviction; stability of family life subsequent to the conviction; completion of, or sustained enrollment in, formal educational or vocational training courses for economic self-improvement; new and different social relationships; and change in attitude from that which existed at the time of the commission of the conduct in question. (See Cal. Code Regs., tit.10, § 2911.)

12. Twenty years have elapsed since the September 4, 2010 incident and resulting September 8, 2010 conviction. Nine years have elapsed since the January 7, 2014 conviction based on the 23-year-old incident occurring on July 26, 2010. Approximately five years have elapsed since the February 23, 2018 incident and resulting August 27, 2018 conviction. Respondent complied with the terms and conditions of court-ordered probation. Respondent's September 8, 2010, January 7, 2014, and August 27, 2018 convictions are unexpunged. Respondent is not under any correctional supervision.

13. Respondent's homelessness, while a contributing factor, neither excuses nor justifies his prior misconduct, and respondent acknowledges that testifying: "I understand we all have it rough and people maybe had it rougher than me and didn't do the mistakes I did but at that time it was all I knew." Respondent is now housed. He has been gainfully employed since 2014. Respondent has pursued higher education and earned an undergraduate degree in 2020. For his further economic self-improvement, respondent prepared for and passed the real estate salesperson examination in 2021. Respondent has disassociated himself from those with whom his misconduct occurred. He reports having new and different associates. His life is stable. The law looks with favor upon rewarding one who has achieved reformation and

regeneration with the opportunity to serve. (*Hightower v. State Bar* (1983) 34 Cal.3d 150, 157.)

14. At hearing, respondent confronted his past and took full responsibility for his prior misconduct. "I'm here to acknowledge the mistake I did," respondent testified. Respondent apologized. Fully acknowledging the wrongfulness of past actions is an essential rehabilitative factor. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940.) Respondent's rehabilitative efforts are evident in both his conduct and changed state of mind. State of mind is an important aspect of rehabilitation. (*In the Matter of Brown* (1993) 2 Cal. State Bar Ct. Rptr. 309, 317; *Resner v. State Bar* (1967) 67 Cal.2d 799, 811).

15. The record as a whole supports granting respondent a five-year restricted license. Doing so is consistent with protection of the public.

ORDER

Respondent Marcos Nunez's May 25, 2021 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 which 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 five years 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 Bureau 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.

4. 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, CA 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 ground for the suspension or revocation of that license.

DATE: **05/04/2023**

Jennifer Russell

JENNIFER M. RUSSELL

Administrative Law Judge

Office of Administrative Hearings