

FILED
OCT 14 2005

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NO. H-1796 FRESNO

OAH NO. N-2005060402

This Decision shall become effective at 12 o'clock noon
on NOV - 4 2005

JEFF DAVI
Real Estate Commissioner

Paul

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

EDUARDO ALEJANDRO RUIZ,

Respondent.

Case No. H-1796 FRESNO

OAH No. N2005060402

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on August 17, 2005, in Sacramento, California.

David B. Seals, Counsel, appeared on behalf of John Sweeney, a Deputy Real Estate Commissioner (complainant).

Eduardo Alejandro Ruiz (respondent) was present and was represented by Scott G. Lyon, Attorney at Law.

Evidence was received on August 17, 2005. Submission of this matter was deferred pending receipt of supplemental briefs. Respondent's supplemental brief was received on August 24, 2005, and marked for identification as Exhibit E. Complainant's supplemental brief was received on August 30, 2005, and marked for identification as Exhibit 7. The record was closed and this matter was submitted for decision on August 30, 2005.

FACTUAL FINDINGS

1. On May 11, 2005, complainant, in his official capacity, made the Statement of Issues, which was filed with the Department of Real Estate (Department) on May 17, 2005.
2. On February 19, 2004, respondent filed an application with the Department for a real estate salesperson license.

3. On December 26, 1995, in the Fresno County Courts, State of California, respondent was convicted of violating Vehicle Code section 14601.1, subdivision (a), driving while privileges suspended, a misdemeanor. Respondent was ordered to serve a conditional sentence of 36 months, obey all laws, drive only if licensed and insured, and serve five days in custody.

Respondent explained that he knew he should not have been driving without a license, but he was "young" at the time. Respondent was then 24 years old. Respondent asserted that the court ordered him to obtain a valid driver's license and bring it back to court, which he did. According to respondent, when he went back to court with his valid driver's license, the court dismissed his case.

4. On April 9, 1996, in the Municipal Court, Consolidated Fresno Judicial District, State of California, respondent was convicted of violating Vehicle Code section 40508, subdivision (a), willfully violating a promise to appear, a misdemeanor. Respondent was ordered to serve two days in custody.

Respondent explained that he was supposed to go to court with respect to traffic violations, but he did not do so because he was "immature" and thought they might put him in jail.

5. On April 20, 1998, the Department of Motor Vehicles (DMV), in DMV Case No. RD-97-0003, OAH Case No. N1998010444, adopted a default decision (DMV Decision) denying respondent's application for a vehicle dealer's license pursuant to Vehicle Code sections 11703 and 11703.1, for violating Vehicle Code section 11706, subdivision (a)(5), in conjunction with Vehicle Code section 11703, subdivision (d), and Vehicle Code sections 10751, subdivision (a), and 11705, subdivision (a)(9).¹ The DMV Decision found that respondent, while operating 2000 Plus Auto Sales under a temporary dealer's license, knowingly purchased, sold or otherwise acquired two stolen vehicles. Respondent did not

¹ Government Code section 11520 authorizes the issuance of a default decision, in relevant part, as follows:

(a) If the respondent either fails to file a notice of defense or to appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent; and where the burden of proof is on the respondent to establish that the respondent is entitled to the agency action sought, the agency may act without taking evidence.

[9]...[9]

(c) Within seven days after service on the respondent of a decision based on the respondent's default, the respondent may serve a written motion requesting that the decision be vacated and stating the grounds relied on. The agency in its discretion may vacate the decision and grant a hearing on a showing of good cause. As used in this subdivision, good cause includes, but is not limited to, any of the following:

(1) Failure of the person to receive notice served pursuant to Section 11505.

(2) Mistake, inadvertence, surprise, or excusable neglect.

appear at the administrative hearing with respect to the DMV Decision and took no action after that decision was issued to appeal or seek to overturn it.

According to respondent, he had leased a large lot on which to conduct his vehicle sales business. He subleased portions of that lot to two other businesses, a mechanical shop and a body shop. The police found stolen car parts in the body shop, and accused respondent of operating a "chop shop." Respondent asserted that he was not involved in any way with the chop shop or the stolen vehicles, and that he first learned that the body shop possessed stolen vehicles when the police arrested him. All criminal charges against him relating to the stolen vehicles were dismissed for lack of sufficient evidence.

Respondent explained that the notice of hearing in the DMV administrative action was sent to his parents' house. Since he had just moved out of that house, he did not get the notice and, therefore, did not appear at the administrative hearing. He did not challenge the DMV Decision because his lawyer never told him that he had that option, and, in any event, he had decided that he did not want to sell vehicles anymore and was quitting that business. Respondent's testimony with respect to DMV's denial of his application for a vehicle dealer's license was persuasive.

6. In addition to the vehicle sales business, respondent has worked as a waiter and as a technician for Pepsi Cola, building soda machines and driving a forklift. Eric Benitez (Benitez), Owner/President of Hispanics Realty, Inc., got respondent interested in the real estate business. Respondent took real estate classes and passed the examination. Since November 2004, he has been working for Sylvia Casillas (Casillas), a licensed real estate agent employed by Hispanics Realty, Inc. Respondent helps Casillas by performing various support services, including answering phones, making appointments, setting up files and running errands.

7. Casillas and respondent have had a relationship for nine years, and have lived together for the last seven years. They have two children together, ages five and two. Casillas described respondent as a "good father," who is very attentive to his children. He is seeking his real estate license so that he will be able to provide better for his family. It is Casillas's "dream" that she and respondent will work together as licensed agents.

8. As the Owner/President of Hispanics Realty, Inc., Benitez supervises all its employees. Benitez has known respondent for five years and has observed respondent's work for Casillas at Hispanics Realty, Inc. Benitez described respondent as disciplined, constant and reliable as an assistant. Respondent informed Benitez of his past convictions and problems with the law. Benitez believes that respondent has the capacity to conduct himself as a professional. Benitez would like to see respondent make a better life for himself, and is willing to supervise him if he is granted a real estate license. Although Benitez recognizes that respondent's past misconduct raises some risks, he is willing to assume those risks and hire respondent as a real estate salesperson, if he obtains a license.

9. George Uribe (Uribe) is the licensed broker at Hispanics Realty, Inc. If respondent were granted a real estate salesperson license, Uribe would also be willing to supervise him. Uribe is aware of respondent's convictions, but believes that people, who have gone through a transition, as respondent has, often make the best sales people. He believes that respondent would be a valuable addition to Hispanics Realty, Inc.'s team.

10. Respondent did not submit sufficient documentation to the Department to show that he has successfully completed all the courses required pursuant to Business and Professions Code section 10153.4.²

LEGAL CONCLUSIONS

1. Business and Professions Code section 480, subdivision (a), provides that an applicant may be denied a license for having been convicted of a crime that is substantially related to the qualifications, functions or duties of the business or profession for which the application was made.³ California Code of Regulations, title 10, section 2910, subdivision (a), sets forth criteria for determining whether a crime is substantially related to the qualifications, functions or duties of a real estate licensee, and, in relevant part, provides that a crime shall be deemed to satisfy the requirements of substantial relationship when it involves:

(7) Willfully violating or failing to comply with a statutory requirement that a license, permit or other entitlement be obtained from a duly constituted public authority before engaging in a business or course of conduct.

² Business and Professions Code section 10153.4, in relevant part, provides:

(a) Every person who is required to comply with Section 10153.3 to obtain an original real estate salesperson license shall, prior to the issuance of the license, or within 18 months after issuance, submit evidence, satisfactory to the commissioner, of successful completion, at an accredited institution, of a course in real estate practices and one of the courses listed in Section 10153.2, other than real estate principles, advanced legal aspects of real estate, advanced real estate finance, or advanced real estate appraisal.

³ Business and Professions Code section 480, subdivision (a), in relevant part, provides:

A board may deny a license regulated by this code on the grounds that the applicant has one of the following:

(1) Been convicted of a crime. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action which a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code.

[¶] ... [¶]

The board may deny a license pursuant to this subdivision only if the crime or act is substantially related to the qualifications, functions or duties of the business or profession for which application is made.

[¶]...[¶]

(9) Contempt of court or willful failure to comply with a court order.

Pursuant to these provisions, respondent's convictions bear a substantial relationship to the qualifications, functions and duties of a real estate licensee. These convictions, therefore, establish cause to deny respondent's application under Business and Professions Code section 480, subdivision (a).

2. Business and Professions Code section 10177, subdivision (b), provides that a license may be denied to any applicant who has been convicted of a felony or a crime involving moral turpitude.⁴ "'Moral turpitude' means a general 'readiness to do evil' ..., i.e., 'an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.'" (*People v. Forster* (1994) 29 Cal.App.4th 1747, 1756, citations omitted.) Respondent's crimes of driving while his privileges were suspended and willfully violating a promise to appear were crimes involving moral turpitude. (See *People v. Lang* (1989) 49 Cal.3d 991, 1010-1011.) These convictions, therefore, establish cause to deny respondent's application under Business and Professions Code section 10177, subdivision (b).

3. Business and Professions Code section 10177, subdivision (f), provides that an applicant may be denied a real estate license if the applicant has "[a]cted or conducted himself ... in a manner that would have warranted the denial of his or her application for a real estate license, or has ... had a license denied ... 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 comparable to the Administrative Procedure Act..., and only upon an express finding of a violation of law by the agency or entity."

Respondent does not dispute that, pursuant to section 10177, subdivision (f), DMV's denial of his vehicle dealer's license application may be considered when deciding whether to deny his real estate salesperson license application. Respondent objects, however, to the use of the factual findings in the DMV Decision to "impeach his testimony concerning the alleged stolen vehicles." Citing *Berg v. Davi* (2005) 130 Cal.App.4th 223, complainant

⁴ Business and Professions Code section 10177, in relevant part, provides:

The commissioner may... deny the issuance of a license to an applicant, who has done any of the following...: [¶] ... [¶] (b) Entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony or a crime involving moral turpitude, and the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal, irrespective of an order granting probation following that conviction, suspending the imposition of sentence, or of a subsequent order under Section 1203.4 of the Penal Code allowing that licensee to withdraw his or her plea of guilty and to enter a plea of not guilty, or dismissing the accusation or information.

asserts that the factual findings set forth in the DMV Decision may be relied upon to establish cause to deny respondent's application under 10177, subdivision (f).

In *Berg*, a disbarred attorney was denied a real estate salesperson license under section 10177, subdivision (f), based upon the finding that he had been disbarred for acts that constituted fraud and dishonest dealing and would be grounds for revocation of a real estate license. The Supreme Court disbarred the attorney after summarily denying his petition for review of the State Bar Court's disbarment recommendation. The disbarred attorney challenged the Department's reliance upon the Supreme Court's decision and the State Bar Court's recommendation to deny his application for a real estate salesperson license.

In *Berg, supra*, 130 Cal.App.4th at p. 230, the court explained that section 10177, subdivision (f),

does not always require proof of the underlying bad conduct; it is sufficient to show another license was revoked due to bad conduct. The facts and opinions were not used to prove that Berg committed acts of fraud and dishonest dealing, only to explain the basis of the disbarment. Because the facts of the opinions were admitted only to explain other properly admitted evidence, such use of hearsay was proper in an administrative proceeding under Government Code section 11513, subdivision (d).⁵

The court in *Berg* found that, under section 10177, subdivision (f), to establish cause to deny a real estate license application, it is sufficient for the Department to show that another licensing agency denied a license application for asserted misconduct, without proving that the asserted misconduct actually occurred. The reasoning set forth in *Berg* applies in this case. The DMV denied respondent's application upon the express finding that respondent violated the laws governing vehicle dealer licenses. That denial was for reasons that would be grounds for the suspension or revocation of a California real estate license. (See Business and Professions Code section 10177, subdivision (j), which permits the suspension or revocation of a real estate license for conduct that "constitutes fraud or dishonest dealing.")

As reflected in the DMV Decision, respondent was given fair notice of the charges, an opportunity for a hearing, and all the due process protections of the Administrative Procedure Act. The fact that the DMV Decision was a default decision does not undermine its competence to establish cause for denial of respondent's application under section 10177,

⁵ Government Code section 11513, subdivision (d), provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

subdivision (f). (See *Bohn v. Watson* (1954) 130 Cal.App.2d 24, 33. [“The rule is well settled that where a judgment has been entered upon a default, the essential allegations of the complaint upon which the judgment was entered are competent evidence in another proceeding as judicial admissions.”]) Similarly, the fact that respondent may not have personally received the notice of hearing from DMV and, therefore, did not appear at the administrative hearing, did not deprive him of due process in light of the finding in the DMV Decision that the notice “was given as required by law.” (See *Baughman v. Medical Board of California* (1995) 40 Cal.App.4th 398, 402; and *Evans v. Department of Motor Vehicles* (1994) 21 Cal.App.4th 958, 971.)

In accordance with the conclusions reached by the court in *Berg*, the DMV Decision, by itself, is sufficient to establish cause to deny respondent’s application under section 10177, subdivision (f). Respondent is bound by that decision and cannot collaterally attack it.

Respondent may, however, offer evidence of mitigating circumstances with respect to the violations found in the DMV Decision. (See *Richards v. Gordon* (1967) 254 Cal.App.2d 735, 742-743.) Respondent persuasively testified to his lack of involvement in the chop shop activities of his sublessee, his failure to receive the notice of hearing from the DMV, and his reasons for not challenging the DMV Decision. These factors may be considered as mitigating circumstances in this case.

4. California Code of Regulations, title 10, section 2911 sets forth criteria for determining whether an applicant, who has been denied a license based upon wrongful conduct, has sufficiently rehabilitated to support the issuance of a license.⁶

⁶ California Code of Regulations, title 10, section 2911 provides as follows:

Criteria of Rehabilitation (Denial).

The following criteria have been developed by the department pursuant to Section 482(a) of the Business and Professions Code for the purpose of evaluating the rehabilitation of an applicant for issuance or for reinstatement of a license in considering whether or not to deny the issuance or reinstatement on account of a crime or act committed by the applicant:

- (a) The passage of not less than two years since the most recent criminal conviction or act of the applicant that is a basis to deny the departmental action sought. (A longer period will be required if there is a history of acts or conduct substantially related to the qualifications, functions or duties of a licensee of the department.)
- (b) Restitution to any person who has suffered monetary losses through “substantially related” acts or omissions of the applicant.
- (c) Expungement of criminal convictions resulting from immoral or antisocial acts.
- (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 or alcohol for not less than two years if the conduct which is the basis to deny the departmental action sought is attributable in part to the use of controlled substances or alcohol.

Respondent has met many of the rehabilitation criteria set forth in section 2911. He has not been convicted of any crimes since 1996. He successfully completed the terms of his convictions. He appears to have a stable family life and is fulfilling his parental and familial responsibilities. Since his application for a vehicle dealer's license was denied, he has not associated with the sublessee who ran the body shop on his leased property. He expressed a change in attitude from that which existed at the time of his convictions. The witnesses attested to respondent's maturity, reliability and professionalism. The president and broker at Hispanics Realty, Inc. are willing to supervise him if he is granted a restricted license. While DMV's denial of respondent's application for a vehicle dealer's license raises some concerns, respondent persuasively testified that he was not responsible for the wrongful conduct that lead to that denial. Given these factors, it would not be contrary to the public interest or welfare to issue respondent a conditional restricted real estate salesperson license at this time.

ORDER

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

-
- (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 conviction or 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.
 - (j) Discharge of, or bona fide efforts toward discharging, adjudicated debts or monetary obligations to others.
 - (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, friends or other persons familiar with applicant's previous conduct and with his subsequent attitudes and behavioral patterns.
 - (3) Evidence from probation or parole officers or law enforcement officials competent to testify as to applicant's social adjustments.
 - (4) Evidence from psychiatrists or other persons competent to testify with regard to neuropsychiatric or emotional disturbances.
 - (5) Absence of subsequent felony or misdemeanor convictions that are reflective of an inability to conform to societal rules when considered in light of the conduct in question.

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 two (2) 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 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

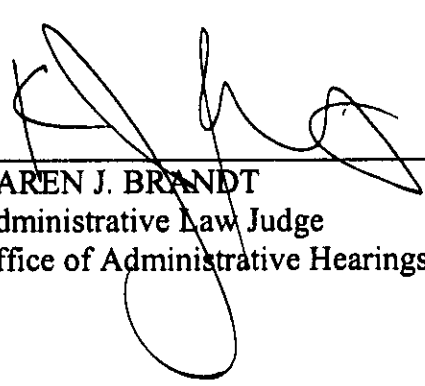
(b) That the employing broker will carefully review all transaction documents prepared by the restricted licensee and otherwise exercise close supervision over the licensee's performance of acts for which a license is required.

4. Respondent's restricted real estate salesperson license is issued subject to the requirements of section 10153.4 of the Business and Professions Code, to wit: respondent shall, within eighteen (18) months of the issuance of the restricted license, submit evidence satisfactory to the Commissioner of successful completion, at an accredited institution, of a course in real estate practices and one of the courses listed in section 10153.2, other than real estate principles, advanced legal aspects of real estate, advanced real estate finance or advanced real estate appraisal. If respondent fails to timely present to the Department satisfactory evidence of successful completion of the two required courses, the restricted license shall be automatically suspended effective eighteen (18) months after the date of its issuance. Said suspension shall not be lifted unless, prior to the expiration of the restricted

license, respondent has submitted the required evidence of course completion and the Commissioner has given written notice to respondent of lifting of the suspension.

5. Pursuant to section 10154, if respondent has not satisfied the requirements for an unqualified license under section 10153.4, respondent shall not be entitled to renew the restricted license, and shall not be entitled to the issuance of another license which is subject to section 10153.4 until four years after the date of the issuance of the preceding restricted license.

DATED: Sept. 20, 2005



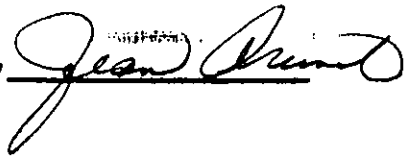
KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings

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FILED
MAY 17 2005

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)
12 EDUARDO ALEJANDRO RUIZ,)
13 Respondent.)

No. H- 1796 FRESNO

STATEMENT OF ISSUES

14
15 The Complainant, John Sweeney, a Deputy Real Estate
16 Commissioner of the State of California, for Statement of Issues
17 against EDUARDO ALEJANDRO RUIZ (hereinafter "Respondent")
18 alleges as follows:

19 I

20 Respondent made application to the Department of Real
21 Estate of the State of California for a real estate salesperson
22 license on or about February 19, 2004 with the knowledge and
23 understanding that any license issued as a result of said
24 application would be subject to the conditions of Section
25 10153.4 of the California Business and Professions Code.

26 ///

27 ///

1 II

2 Complainant, John Sweeney, a Deputy Real Estate
3 Commissioner of the State of California, makes this Statement of
4 Issues in his official capacity.

5 III

6 On or about December 26, 1995, in the Fresno County
7 Courts, State of California, Respondent was convicted of
8 violation of California Vehicle Code Section 14601.1(a) (Driving
9 While Privileges Suspended), a crime involving moral turpitude
10 and/or which is substantially related under Section 2910, Title
11 10, California Code of Regulations (hereinafter the
12 "Regulations") to the qualifications, functions or duties of a
13 real estate licensee.

14 IV

15 On or about April 9, 1996, in the Municipal Court,
16 Consolidated Fresno Judicial District, Respondent was convicted
17 of violation of California Vehicle Code Section 40508(a)
18 (Violation of Promise to Appear), a crime involving moral
19 turpitude and/or which is substantially related under Section
20 2910 of the Regulations to the qualifications, functions or
21 duties of a real estate licensee.

22 V

23 On or about April 1, 1998, the California Department of
24 Motor Vehicles (hereinafter "DMV"), in Case No. RD-97-0003,
25 ordered the Respondent's application for a vehicle dealer's
26 license be denied pursuant to California Vehicle Code Sections
27 11703 and 11703.1 for violation of Section 11706(a)(5) of the

1 Vehicle Code in conjunction with Section 11703(d) and for
2 violation of Sections 10751(a) and 11705(a)(9) of the Vehicle
3 Code.

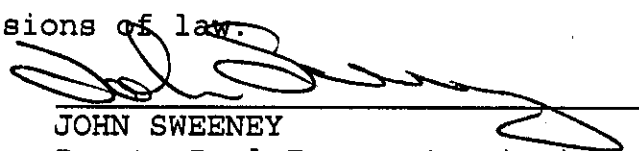
4 VI

5 Respondent's criminal convictions, as alleged in
6 Paragraphs III and IV above, constitute cause for denial of
7 Respondent's application for a real estate license under Sections
8 480(a) and 10177(b) of the California Business and Professions
9 Code.

10 VII

11 The denial of Respondent's license as described in
12 Paragraph V above, constitutes cause for denial of Respondent's
13 application for a real estate license because his acts, if done
14 by a real estate licensee would be grounds for the suspension or
15 revocation of a California real estate license under Section
16 10177(f) of the Business and Professions Code of the State of
17 California.

18 WHEREFORE, the Complainant prays that the above-
19 entitled matter be set for hearing and, upon proof of the charges
20 contained herein, that the Commissioner refuse to authorize the
21 issuance of, and deny the issuance of, a real estate salesperson
22 license to Respondent, and for such other and further relief as
23 may be proper under other provisions of law.

24 
25 JOHN SWEENEY
26 Deputy Real Estate Commissioner

26 Dated at Fresno, California,
27 this 11th day of May, 2005.