

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED
JAN 19 2006

DEPARTMENT OF REAL ESTATE

By [Signature]

* * *

In the Matter of the Application of)
) NO. H-1829 FRESNO
JUSTIN ALLAN KAUTZ,)
) OAH NO. N-2005100819
Respondent.)
_____)

DECISION

The Proposed Decision dated December 20, 2005, 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. There is no statutory restriction on when application may again be made for this license. If and when application is again made for this license, all competent evidence of rehabilitation presented by Respondent will be considered by the Real Estate Commissioner. A copy of the Commissioner's Criteria of Rehabilitation is appended hereto for the information of Respondent.

This Decision shall become effective at 12 o'clock noon
on FEB - 9 2006.

IT IS SO ORDERED 1-17-06.

JEFF DAVI
Real Estate Commissioner

[Signature]

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

JUSTIN ALLAN KAUTZ

Respondent.

Case No. H-1829 FRESNO

OAH No. N2005100819

PROPOSED DECISION

On November 22, 2005, in Sacramento, California, Leonard L. Scott, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

David B. Seals, Counsel, represented the complainant.

Justin Allan Kautz, respondent, appeared in his own behalf.

Evidence was received, the record was closed and the matter was submitted.

FACTUAL FINDINGS

1. John W. Sweeney (Sweeney), Deputy Real Estate Commissioner, Department of Real Estate (Department), State of California, filed the Statement of Issues against respondent. Sweeney acted in his official capacity.

2. On or about August 12, 2004, respondent filed an application for a real estate salesperson's license with the Department.

Respondent has not presented evidence of successful completion of the courses required by Business and Professions Code section 10153.4 to the Department.

3. On or about August 11, 1999, in the Superior Court, County of San Luis Obispo, State of California, in the matter entitled *People v. Justin Allan Kautz*, case number M000285721, respondent was convicted, on his plea of guilty, of a violation of Vehicle Code section 23152, subdivision (a), (driving under the influence of alcohol or drugs), a misdemeanor. He was placed on bench probation for three years with various terms and conditions, including serving 48 hours in jail, completion of the first offender program, and payment of various fines and fees.

The facts and circumstances of the offense are that on or about June 18, 1999, a police vehicle traveling the opposite direction noticed respondent's vehicle because the high beams were on. The police officer flashed his headlights but respondent failed to dim his headlights. The police officer turned around and followed respondent's vehicle. Respondent was weaving back and forth, so the police officer turned on his overhead red lights and his wig-wag headlights. Respondent continued to drive for some distance before pulling over and stopping. Respondent had been drinking with a friend before he drove that night. He admitted that he did not learn from this experience.

4. On or about October 22, 2004, in the Superior Court, County of Tulare, State of California, in the matter entitled *People v. Justin Allan Kautz*, case number VCF 107826, respondent was convicted by a jury of violations of Health and Safety Code section 11550, subdivision (a), (using a controlled substance-cocaine) and Vehicle Code sections 23152, subdivision (a), (driving under the influence of alcohol or drugs), and 23152, subdivision (b), (driving with 0.08 or higher blood alcohol), misdemeanors. Respondent was placed on probation for five years with various terms and conditions, including serving 90 days in jail, completion of an 18-month DUI program, registration as a narcotic offender, and payment of fines and fees. Respondent is still on probation for this offense, but has paid the fines, performed community service in lieu of jail, and is attending the required class.

The facts and circumstances of the offense are that on or about March 2, 2003, respondent was stopped while driving a motor vehicle while under the influence of alcohol and drugs.

It was not proven that respondent was also convicted of a violation of Vehicle Code section 14601.1, subdivision (a), (driving while privileges suspended). Although Paragraph number IV of the Statement of Issues alleged that respondent was also convicted of a violation of Vehicle Code sections 14601.1, subdivision (a), (driving while privileges suspended), the evidence did not support that allegation. The charge was included in the original Felony Complaint, but was not included in the later Information, and is not mentioned in the Corrected Clerk's Minute Order of Verdict, which memorializes the jury's verdict on each charge.

5. Respondent is a high school graduate and attended, but did not complete, junior college.

Respondent has worked for Quick Loan Funding in Irvine, California, for about six months. Before that, he worked as a waiter in the Fresno area for nine or more years.

Respondent continues to drink wine occasionally. He attended the Alcoholics Anonymous meetings required by his probation but has not otherwise participated in a 12-step program or sought counseling for his problems with alcohol abuse.

6. Respondent presented letters of reference from his boss at Quick Loan Funding and from his stepfather.

7. Respondent presented only some limited evidence of his efforts to rehabilitate himself since the October of 2004 criminal conviction. The conviction is recent; he will be on probation for several more years. It is clearly too soon to determine whether he is rehabilitated, since he is still under the control of the criminal court.

LEGAL CONCLUSIONS

1. The California appellate courts have held that a single driving under the influence conviction is not a crime involving moral turpitude, even though the person who drives under the influence subjects the other users of the roadway to the risk of death or serious injury due to a severely diminished capacity to drive safely. However, the appellate courts have held that repeated convictions for driving under the influence constitute moral turpitude because the repeated crimes demonstrate an extreme disregard for the lives of others. (See *People v. Forester* (1994) 29 Cal.App.4th 1746, 1757 [35 Cal.Rptr.2d 705]; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1208 [26 Cal.Rptr.2d 23, 864 P.2d 103]; and *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 897-899 [157 Cal.Rptr. 693, 598 P.2d 854])

The California Supreme Court in *People v. Ochoa* (1993) 6 Cal.4th 1199, 1208 [26 Cal.Rptr.2d 23, 864 P.2d 103] held that a person who continues to drive while under the influence in spite of repeated prior driving under the influence convictions knows or should know the serious risks which such conduct imposes upon other drivers and that continuing to drive in such circumstances is indicative of a "conscious indifference or 'I don't care attitude' concerning the ultimate consequences of his actions."

Similarly, the California Supreme Court in *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 897-899 [157 Cal.Rptr. 693, 598 P.2d 854] cited *Coulter v. Superior Court* (1979) 21 Cal.3d 144, 152-154, for the proposition that: "One who wilfully consumes alcoholic beverages to the point of intoxication, knowing that he thereafter must operate a motor vehicle, thereby combining sharply impaired physical and mental faculties with a vehicle capable of great force and speed, reasonably may be held to exhibit a conscious disregard of the safety of others. The effect may be lethal whether

or not the driver had a prior history of drunk driving incidents.”

The Court further noted that: “one who voluntarily commences, and thereafter continues, to consume alcoholic beverages to the point of intoxication, knowing from the outset that he must thereafter operate a motor vehicle demonstrates, in the words of Dean Prosser, ‘such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton.’ (*Prosser*, § 2, at pp. 9-10.)”

The court in *People v. Forester* (1994) 29 Cal.App.4th 1746, 1757 [35 Cal.Rptr.2d 705] discussed the meaning of the term moral turpitude and cited the California Supreme Court in *People v. Castro* (1985), 38 Cal.3d 301, 315 [211 Cal.Rptr. 719, 696 P.2d 111] as follows: “‘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.’” The court noted that “moral turpitude does not depend on dishonesty ... a witness’ moral depravity of *any kind* has some ‘tendency in reason’ to shake one’s confidence in his honesty.”

The Court in *Forester* went on to state that continuing to drive while intoxicated despite the knowledge of the serious risks it imposes upon other drivers is indicative of a “conscious indifference” or an “I don’t care attitude” concerning the consequences of the activity (*People v. Ochoa* (1993) 6 Cal. 4th 1199, 1208 [26 Cal. Rptr. 2d 23, 864 P.2d 103]) from which can be inferred “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.”

Repeated driving under the influence convictions constitute moral turpitude because of the conscious disregard of the risks such driving imposes upon others, because it is “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. Castro*, *supra*)

Therefore, respondent’s repeated convictions for driving under the influence of alcohol, including his conviction for driving with a 0.08 or higher blood alcohol, are crimes involving moral turpitude, as found in Findings 3 and 4.

2. California Code of Regulations, title 10, section 2910, lists the criteria for determining whether there is a substantial relationship between a criminal conviction and a real estate license. Section 2910 states:

(a) When considering whether a license should be denied, suspended or revoked on the basis of the conviction of a crime, or on the basis of an act described in Section 480(a)(2) or 480(a)(3) of the Code, the crime

or act shall be deemed to be substantially related to the qualifications, functions or duties of a licensee of the Department within the meaning of Sections 480 and 490 of the Code 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.
- (3) Willfully attempting to derive a personal financial benefit through the nonpayment or underpayment of taxes, assessments or levies duly imposed upon the licensee or applicant by federal, state or local government.
- (4) The employment of bribery, fraud, deceit, falsehood or misrepresentation to achieve an end.
- (5) Sexually related conduct affecting a person who is an observer or non-consenting participant in the conduct, or convictions which require registration pursuant to the provisions of Section 290 of the Penal Code.
- (6) Willfully violating or failing to comply with a provision of Division 4 of the Business and Professions Code of the State of California.
- (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.
- (8) Doing of any unlawful act with the intent of conferring a financial or economic benefit upon the perpetrator or with the intent or threat of doing substantial injury to the person or property of another.
- (9) Contempt of court or willful failure to comply with a court order.
- (10) Conduct which demonstrates a pattern of repeated and willful disregard of law.

(11) Two or more convictions involving the consumption or use of alcohol or drugs when at least one of the convictions involve driving and the use or consumption of alcohol or drugs.

(b) The conviction of a crime constituting an attempt, solicitation or conspiracy to commit any of the above enumerated acts or omissions is also deemed to be substantially related to the qualifications, functions or duties of a licensee of the department.

(c) If the crime or act is substantially related to the qualifications, functions or duties of a licensee of the department, the context in which the crime or act were committed shall go only to the question of the weight to be accorded to the crime or acts in considering the action to be taken with respect to the applicant or licensee.

3. Respondent's convictions for driving under the influence, including the conviction for driving with a 0.08 or higher blood alcohol, are substantially related to the licensed activity pursuant to California Code of Regulations, title 10, section 2910, subdivision (a), paragraphs: (10) conduct demonstrating a repeated and willful disregard of law; and (11) two or more convictions regarding alcohol, at least one of which involved a motor vehicle, as found in Findings 3 and 4.

Respondent's conviction for using a controlled substance, in conjunction with his other convictions, is substantially related to the licensed activity pursuant to California Code of Regulations, title 10, section 2910, subdivision (a), paragraph (10), conduct demonstrating a repeated and willful disregard of law, as found in Finding 4.

4. California Code of Regulations, title 10, section 2911, lists the criteria for determining whether respondent is rehabilitated. Section 2911 states:

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.
- (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 educational 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. Respondent failed to present substantial evidence of rehabilitation pursuant to the criteria in California Code of Regulations, title 10, section 2911, subdivisions: (a) less than two years since the 2004 criminal conviction; (c) convictions have not been expunged; (e) not successfully completed probation; (f) not abstained from the use of alcohol for at least two years; (h) no evidence of a stable family life; (i) not completed formal educational courses for economic self-improvement; (l) no evidence of involvement in community betterment efforts; and (n) not changed his attitude since the convictions, as found in Findings 3 through 7.

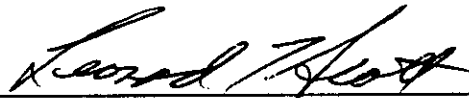
6. Cause for denial of respondent's license application was established for violation of Business and Professions Code section 480, because all of his convictions are for crimes that are substantially related to the licensed activity, as found in Findings 3 and 4, and Legal Conclusion 3.

7. Cause for denial of respondent's license application was established for violation of Business and Professions Code section 10177, subdivision (b), because repeated convictions for driving under the influence, including the driving with a 0.08 or higher blood alcohol, are for crimes involving moral turpitude, as found in Findings 3 and 4, and Legal Conclusion 1.

ORDER

The application of respondent Justin Allan Kautz for a real estate salesperson's license is denied pursuant to Legal Conclusions 6 and 7, separately and for both of them.

Dated: December 20, 2005



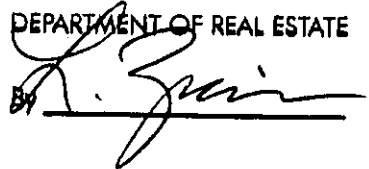
LEONARD L. SCOTT
Administrative Law Judge
Office of Administrative Hearings

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FILED
SEP 18 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 JUSTIN ALLAN KAUTZ,)
13 Respondent.)

No. H-1829 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 JUSTIN ALLAN KAUTZ (hereinafter "Respondent") alleges as
18 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 August 12, 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.

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II

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

III

On or about August 11, 1999, in the Superior Court of California, County of San Luis Obispo, Respondent was convicted of violation of California Vehicle Code Section 23152(a) (Driving Under the Influence of Alcohol or Drugs), a crime involving moral turpitude and/or which is substantially related under Section 2910, Title 10, California Code of Regulations (hereinafter the "Regulations") to the qualifications, functions or duties of a real estate licensee.

IV

On or about October 22, 2004, in the Superior Court of the State of California for the County of Tulare, Respondent was convicted of violation of California Health and Safety Code Section 11352(a) (Using a Controlled Substance - Cocaine), California Vehicle Code Section 23152(a) (Driving Under the Influence of Alcohol or Drugs), California Vehicle Code Section 23152(b) (Driving With 0.08 or high Blood Alcohol), and Vehicle Code Section 14601.1(a) (Driving While Privileges Suspended), all crimes involving moral turpitude and/or which are substantially related under Section 2910 of the Regulations to the qualifications, functions or duties of a real estate licensee.

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

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

13
14 
15 JOHN SWEENEY
16 Deputy Real Estate Commissioner

16 Dated at Fresno, California,
17 this 13th day of September, 2005.