

FILED
JUL 20 2006

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE

By S. Ely

* * *

In the Matter of the Application of)

ANTHONY WILLIAM SMITH,

Respondent.)

NO. H-1906 FR

OAH No. N-2006050081

DECISION

The Proposed Decision dated June 21, 2006, of the Administrative Law Judge of the Office of Administrative Hearings is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

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

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

This Decision shall become effective at 12 o'clock noon
on AUG 09 2006.

IT IS SO ORDERED

7-18

2006.

JEFF DAVI
Real Estate Commissioner

[Signature]

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Application of
(Statement of Issues):

ANTHONY WILLIAM SMITH,

Respondent.

Case No. H-1906 FR

OAH No. N2006050081

PROPOSED DECISION

Administrative Law Judge Marilyn A. Woollard, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on June 13, 2006.

Michael B. Rich, Real Estate Counsel, Department of Real Estate, represented complainant John W. Sweeney, a Deputy Real Estate Commissioner of the State of California (complainant).

Respondent Anthony William Smith was present and represented himself.

Oral and documentary evidence was received. At the conclusion of the hearing, the parties offered oral closing arguments. The record was then closed, and the matter was submitted for decision on June 13, 2006.

FACTUAL FINDINGS

1. On February 2, 2005, respondent Anthony William Smith filed his application for a real estate salesperson license with the Department of Real Estate.

2. On April 12, 2006, complainant John W. Sweeney filed the Statement of Issues in his official capacity only, and asserted that respondent's criminal convictions, individually and collectively, constitute cause for the denial of his real estate license application under Business and Professions Code sections 480, subdivision (a) and/or 10177, subdivision (b).

3. On April 17, 2006, respondent filed a Notice of Defense on Application and a request for a hearing pursuant to Government Code sections 11504 and 11506. The matter was set for an evidentiary hearing on June 13, 2006, before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500, et. seq.

4. On January 19, 1995, respondent was convicted by the Merced County Municipal Court in Case Number M133751A of a violation of Penal Code Section 490.1 (petty theft – value not exceeding \$50) based upon his plea of guilty, and of a violation of Vehicle Code Section 23152, subdivision (a) (driving under the influence of alcohol [DUI]), based upon his plea of nolo contendere. The facts underlying these misdemeanor convictions occurred when respondent, then 18 years old, and his friends went on a late night “beer run.” Respondent’s friends stole a case of beer and he drove the vehicle away.¹

Respondent was placed on 36 months of probation which ended in January of 1998. Respondent was ordered to serve three days in county jail, to pay approximately \$1750 in fines and fees, and to enroll in and attend a Level I Alcohol Program. On June 30, 1995, the Court received respondent’s Notice of Completion of Level I Program. Respondent eventually paid all his fines.

5. On December 31, 1998, respondent was convicted by the Merced County Municipal Court in Case Number MM158987 of a misdemeanor violation of Vehicle Code Section 23152, subdivision (b) (driving under the influence while having a blood alcohol level of .08 percent or more), based upon his plea of nolo contendere.

Respondent was placed on 60 months of probation which ended in December of 2003. Respondent was ordered to serve 10 days in county jail on weekends, to pay approximately \$1750 in fines and fees, to enroll in and attend a Level II Alcohol Program, to abstain totally from using alcohol, and not to drive with any alcohol in his blood and only if properly licensed and insured. Respondent did not comply with some of these conditions and several bench warrants were issued. On July 29, 1999, and December 9, 1999, respondent was order to serve 15 additional days in jail. Respondent’s fines were paid in full on August 16, 2001.

6. On December 9, 1999, respondent was convicted by the Merced County Municipal Court in Case Number MM163344, of a violation of Vehicle Code

¹ Respondent did not initially disclose the 1995 petty theft on his application but supplied the Department with the underlying court documents. He later explained to DRE that he did not understand that he had been convicted of the theft. The Department accepted this explanation and did not charge him with failure to disclose in the Accusation.

section 12500, subdivision (a) (unlawful operation of a vehicle without a driver's license), a misdemeanor, based upon his plea of nolo contendere.

Respondent was ordered to pay a fine of \$100. On September 5, 2001, respondent received a modification of his fine, and was ordered to pay \$277. On December 2, 2002, respondent's fines were paid in full.

7. On July 19, 2001, respondent was convicted by the Merced County Superior Court in Case Number MM177375, of a misdemeanor violation of Vehicle Code Section 23152, subdivision (a) (driving under the influence of alcohol), with two admitted prior DUI convictions (1995 and 1998). Respondent was still on probation for his previous DUI at the time of this offense occurred on June 12, 2001.

Respondent was placed on 60 months probation, ordered to serve 130 days of house arrest, to pay approximately \$1650 in fines and fees, to enroll in and attend a Level II Alcohol Program, to abstain totally from using alcohol, to submit to chemical testing, and not to drive with any alcohol in his blood and only if properly licensed and insured. Respondent's driving license was suspended for three years.

On September 12, 2003, the court received a Notification of Completion of SB 38 – Multiple Offender for respondent. Respondent has regained his California Driver's license. Respondent's probation for this conviction will end on July 19, 2006.

8. Respondent seeks a restricted real estate salesperson's license. Respondent understands that, if licensed, he must complete all courses required pursuant to Section 10153.4 of the Business and Professions Code, within 18 months of the issuance of a restricted license.

9. Respondent is currently 30 years old. He is a high school graduate who was employed as a bartender and as a bar manager from July of 1998 through December 2004.

10. On November 2004, respondent began working at Ranchwood Homes as a new home sales trainee with broker Rudy Trevino, who is also the mayor of Atwater, California. Mr. Trevino agreed to be respondent's sponsoring broker and he submitted a letter of support on respondent's behalf. Mr. Trevino reported that respondent was at the head of the real estate classes he offered and that he was a mature family man and a considerate and caring person. Another Ranchwood employee, Barbara Murtos, also submitted a letter in which she praised respondent's work ethic and willingness to place his client's needs ahead of future gain.

11. In March 2006, respondent resigned his position with Ranchwood to become a loan officer for Charter Funding. Kathy Collins, co-owner of Charter Funding, submitted a letter in support of respondent, who she met in October 2004 in

a business capacity as the preferred lender for a subdivision at which respondent was assigned. Ms. Collins described respondent as a quick learner who impressed her with his dedication and devotion to his career and family.

12. Respondent is married and has an 11 month old son. He is also raising his two stepchildren, ages 10 and 12, who have assumed his name.

13. Respondent is actively involved in the Yosemite Church in Merced. His pastor, Dan Horst, wrote a letter of support in which he described observing respondent's positive growth over the past 15 years. Respondent is involved at Yosemite Church as a counselor for the five day "Amazing Race" youth trip to visit various parks in southern California scheduled for late June 2006.

14. Respondent volunteers in the community as a coach for youth flag football, little league baseball, and church league basketball. Respondent offered a letter he received from Jake Meneley, Recreation Supervisor for the Merced City Parks and Community Services Department. In this letter, Mr. Meneley thanked respondent for "generously volunteering" his time and effort as a coach for the Youth Flag Football League over the past three seasons, from 2003 through 2005.

15. In his license application, respondent denied any drug problems, but agreed that he had a drinking problem in the past as reflected in his DUI convictions.

Respondent has completed three court-ordered DUI programs in 1995, 1998 and 2003. His first DUI program was of 15 week duration; his remaining multiple-offender programs were each 18 weeks in duration. Respondent acknowledges that it took him time to incorporate what he learned in the first two courses, as evidenced by his convictions for other DUIs after completing these courses. Respondent considers his "sobriety date" to be December 7, 2004.

Until his sobriety date, respondent typically drank for social reasons with his customers or friends in the bar atmosphere. He did not use alcohol compulsively and, since he stopped drinking, he has not felt any compulsion to drink. Respondent attributes his sobriety primarily to changing his employment from bartending, and to the support of his family and his church. Respondent has also engaged in some counseling with a licensed counsel through his church. While respondent has attended a few meeting of Alcoholics Anonymous (AA), he has never had a sponsor or worked the Twelve Steps.

16. Respondent's life direction, as well as his attitude about his previous lifestyle, has changed significantly since his last conviction in 2001. Specifically, respondent has recognized the detrimental role his long-term employment as a bartender played in his life. In this job, he worked late hours closing the bar and used alcohol, thus impairing his ability to drive in a safe and legal manner. While this career offered him financial stability, it destabilized other important parts of his life.

By leaving bartending and engaging in other gainful employment, respondent prioritized his family and eliminated the source of his drinking and legal problems. Respondent has demonstrably shifted his life goals to parenting and to being a productive member of his church and his community.

17. It has been over five years since respondent's last arrest for driving under the influence of alcohol. He has had no arrests for this or any other conduct since this time. He has abstained from the use of alcohol for one and a half years. He has engaged in education and training in real estate and in loan applications, and has demonstrated responsibility and professionalism in his employment. Respondent has a history of active involvement in his church and community. Under these circumstances, it would not be against the public interest to issue him a restricted license.

LEGAL CONCLUSIONS

1. Section 480, subdivision (a) of the Business and Professions Code provides in pertinent part as follows:

(a) 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.

(2) Done any act involving dishonesty, fraud or deceit with the intent to substantially benefit himself or another, or substantially injure another; or

(3) Done any act which if done by a licensee of the business or profession in question, would be grounds for suspension or revocation of licensee.

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.

2. Section 10177, subdivision (b), of the Business and Professions Code provides in pertinent part as follows:

The commissioner may suspend or revoke the license of a real estate licensee, or 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. . . .

3. A preponderance of the evidence establishes cause for the denial of respondent's application for a real estate license under sections 480 subdivision (a) and 10177, subdivision (b), of the California Business and Professions Code.

Moral Turpitude and Substantial Relationship

4. A criminal act involves moral turpitude if it involves a serious breach of a duty owed to another or to society. (*In re Stuart K. Lesansky* (2001) 25 Cal. 4th 11, 16 [citing *In re Johnson* (1992) 1 Cal.4th 689, 699; *In re Calaway* (1977) 20 Cal.3d 165, 169-170; *In re Higbie* (1972) 6 Cal.3d 562, 569-570].) Acts of moral turpitude are acts which involve "bad character" and "readiness to do evil." (*People v. Zataray* (1985) 173 Cal. App.3d 390, 400.) Crimes which reveal an applicant's dishonesty involve moral turpitude. *Clerici v. Department of Motor Vehicles* (1990) 224 Cal.App.3d 1016, 1027.

As set forth in Factual Finding 4, respondent's 1995 conviction for petty theft was for a crime of moral turpitude. *In Re Rothrock* (1944) 25 Cal.2d 588. As set forth in Factual Findings 4, 5, and 7, respondent's 1995, 1998, and 2001 misdemeanor convictions for driving under the influence (DUI) are crimes of moral turpitude. Drunk driving exposes all members of the public who come into contact with the driver to serious risk of personal injury or death.

5. The regulations of the Department of Real Estate establish criteria for substantial relationship when considering whether a license should be denied on the

basis of the conviction of a crime, or of any act described by section 480, subdivision (a)(2), or 480, subdivision (a)(3) of the Business and Professions Code. Specifically, California Code of Regulations, title 10, Section 2910 provides, in pertinent part, that, a 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.

¶ ... ¶

(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 involves driving and the use or consumption of alcohol or drugs.

6. As indicated in Factual Findings 4 through 7 above, respondent's petty theft involved the appropriation of another's property, and his overall conduct involved three DUI convictions, two of which occurred while on probation and in violation of specific conditions of probation. Consequently, respondent's conduct and convictions are substantially related to the qualifications, functions or duties of a licensee as indicate in Legal Conclusion 5.

Evidence Regarding Rehabilitation

7. In considering whether or not to deny the issuance of a license as a consequence of a crime committed by the applicant, the criteria have been identified in the regulations of the Real Estate Commissioner, California Code of Regulations, title 10, and are to be used for the purpose of evaluating the applicant's rehabilitation (California Code of Regulations, title 10, in section 2911).²

²The criteria set forth in section 2911 are as follows:

- (a) The passage of not less than two years from the most recent criminal conviction or act of the applicant that is a basis to deny the departmental action sought....
- (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

The facts outlined in Factual Findings 4 through 17, and the rehabilitation criteria have been considered. It has been five years since the conduct underlying respondent's most recent conviction. Respondent has paid all fines ordered on his convictions. Respondent has made dramatic life changes since December 2004 by removing himself from an environment conducive to drinking and by stopping the use of alcohol. He has actively pursued education and training in new careers in real estate and loans and has dedicated himself to his family. For at least the past three years, respondent has undertaken volunteer community activities of coaching. Of concern is the fact that respondent will not be released from probation until July of 2006, and that he has only been free from the use of alcohol for a year and a half. Nonetheless, on balance, it is in the public interest at this time to grant respondent a restricted salesperson's license, with ongoing oversight by the Department.

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 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 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 the 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.

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 Section 10156.5 of the Business and Professions Code. The restricted license issued to the 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. 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 two 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 the lifting of the suspension.

2. The license shall not confer any property rights 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 pursuant to 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.

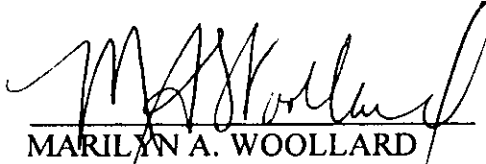
3. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor the removal of any of the conditions, limitations or restrictions attaching to the restricted license until two years have elapsed from the date of the issuance of the restricted license to respondent.

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

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

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

DATED: June 21, 2006


MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings

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FILED
APR 12 2006

DEPARTMENT OF REAL ESTATE

By S. Kelly

8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Application of)
12 ANTHONY WILLIAM SMITH,) H-1906 FR
13 Respondent.) STATEMENT OF ISSUES
14)

15 The Complainant, JOHN W. SWEENEY, a Deputy Real Estate
16 Commissioner of the State of California, for Statement of Issues
17 against ANTHONY WILLIAM SMITH (hereinafter "Respondent"), is
18 informed and 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 2, 2005, 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 Business and Professions Code.

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II

Complainant, JOHN W. SWEENEY, a Deputy Real Estate Commissioner of the State of California, makes this Statement of Issues in his official capacity and not otherwise.

III

On or about January 19, 1995, in the Municipal Court, County of Merced, State of California, in case number M133751A, Respondent was convicted of violating Section 490.1 of the California Penal Code (Petty theft - value not exceeding \$50.00) and Section 23152(a) of the California Vehicle Code (Unlawfully driving a vehicle while under the influence of alcohol), crimes involving moral turpitude and/or crimes which bear a substantial relationship under Section 2910, Title 10, California Code of Regulations, to the qualifications, functions, or duties of a real estate licensee.

IV

On or about December 31, 1998, in the Municipal Court, County of Merced, State of California, in case number MM158987, Respondent was convicted of violating Section 23152(b) of the California Vehicle Code (Driving under the influence while having a blood alcohol level of .08% or more), a crime involving moral turpitude and/or a crime which bears a substantial relationship under Section 2910, Title 10, California Code of Regulations, to the qualifications, functions, or duties of a real estate licensee.

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1 V

2 On or about December 9, 1999, in the Municipal Court,
3 County of Merced, State of California, in case number MM163344,
4 Respondent was convicted of violating Section 12500(a) of the
5 California Vehicle Code (Unlawful operation of a vehicle without
6 a driver's license), a crime involving moral turpitude and/or a
7 crime which bears a substantial relationship under Section 2910,
8 Title 10, California Code of Regulations, to the qualifications,
9 functions, or duties of a real estate licensee.

10 VI

11 On or about July 19, 2001, in the Superior Court,
12 County of Merced, State of California, in case number MM177375,
13 Respondent was convicted of violating Section 23152(a) of the
14 California Vehicle Code (Unlawfully driving a vehicle while
15 under the influence of alcohol), a crime involving moral
16 turpitude and/or a crime which bears a substantial relationship
17 under Section 2910, Title 10, California Code of Regulations, to
18 the qualifications, functions, or duties of a real estate
19 licensee.

20 VII

21 The crimes of which Respondent was convicted, as
22 alleged in Paragraphs III, IV, V, and VI, above, individually
23 and/or collectively, constitute cause for denial of Respondent's
24 application for a real estate license under Sections 480(a)
25 and/or 10177(b) of the California Business and Professions Code.

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1 WHEREFORE, the Complainant prays that the above-
2 entitled matter be set for hearing and, upon proof of the
3 charges contained herein, that the Commissioner refuse to
4 authorize the issuance of, and deny the issuance of, a real
5 estate salesperson license to Respondent, and for such other and
6 further relief as may be proper under other provisions of law.

7
8 
9 JOHN W. SWEENEY
 Deputy Real Estate Commissioner

10
11 Dated at Fresno, California,
12 this 29th day of March, 2006.