

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Application of Issues of:

DAVID LEWIS SMITH,

Respondent.

Case No. H-2100 FRESNO

OAH No. N2007050549

PROPOSED DECISION

On July 6, 2007, at Sacramento, California, this matter was heard before David A. Peters, Administrative Law Judge, Office of Administrative Hearings, State of California.

David B. Seals, Counsel, Department of Real Estate, State of California, represented complainant.

David Lewis Smith (respondent) appeared and represented himself.

Evidence was received and the matter was submitted on July 6, 2007.

FACTUAL FINDINGS

1. On April 10, 2007, Complainant John Sweeney, a Deputy Real Estate Commissioner, Department of Real Estate, (Department), State of California, made the Statement of Issues against respondent in his official capacity.
2. On July 10, 2006, respondent applied to the Department for issuance of a real estate salesperson license subject to the conditions of Business and Professions Code section 10153.4.
3. On May 30, 1997, in the Superior Court of California, County of Santa Clara, respondent was convicted, on his plea of guilty, of three (3) counts of violation of Health and Safety Code section 11379, subdivision (a), (importation, sale, distribution, transportation of controlled substance), a felony. The Court sentenced respondent to eight months in the Santa Clara County jail (served through work furlough) and placed him on three years formal probation. The terms and conditions of respondent's probation included,

among other things, the payment of fines and fees of approximately \$949 and completion of a drug program.

4. The facts and circumstances of respondent's criminal conduct that led to the May 30, 1997 conviction arose on November 2, 21 and 28, 1995. On each occasion, respondent and an accomplice sold or attempted to sell methamphetamine to an undercover police officer.

5. Respondent's felony criminal convictions, for importation, sale, distribution, transportation of controlled substance, are for crimes that bear a substantial relationship to the qualifications, functions, or duties of a real estate licensee, within the meaning of the Department's Criteria of Substantial Relationship, California Code of Regulations, title 10, section 2910, subdivision (a)(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).

6. On February 23, 1999, in the Superior Court of California, County of Santa Clara, respondent was convicted, on his plea of guilty, of a violation of Health and Safety Code section 11550, subdivision (a), (use or under the influence of a controlled substance), a misdemeanor, and Health and Safety Code section 11377, subdivision (a), (possession of controlled substance), as a felony. The Court sentenced respondent to serve six months in a California State Prison, to pay fines and fees of approximately \$1,090, and placed him on three years formal probation. Respondent served six months at the High Desert State Prison, Susanville, California. Respondent was released from prison on August 8, 2000.

7. The facts and circumstances of respondent's criminal conduct that led to the February 23, 1999, convictions arose on April 25, 1998. Police officers from the San Jose Police Department observed respondent's vehicle parked in a darkened parking lot of a gas station. When the police entered the parking lot, respondent turned on his vehicle lights and drove away. Respondent initially refused to respond to the officer's emergency lights. After respondent and his passenger were stopped by the police, respondent denied the use or possession of narcotics or that he was on probation or parole. Following a records check, the officers determined that respondent was on searchable probation. A search of respondent's vehicle produced two zip-lock baggies containing methamphetamine. Respondent was arrested and subsequently tested positive for methamphetamine.

8. Respondent's misdemeanor conviction, for the use or being under the influence of a controlled substance, described in Factual Finding 6, is not for a crime that involves moral turpitude. The crime is not a serious enough breach of duty owed to another or society to be found to involve moral turpitude. (*See In re Stuart Lesansky* (2001) 25 Cal.4th 11, 16.

9. Respondent's misdemeanor conviction, for the use or being under the influence of a controlled substance, is for a crime that bears a substantial relationship to the qualifications, functions, or duties of a real estate licensee, within the meaning of the

Department's Criteria of Substantial Relationship, California Code of Regulations, title 10, section 2910, subdivision (a)(9), (Contempt of court or willful failure to comply with a court order), and subdivision (a)(10), (Conduct which demonstrates a pattern of repeated and willful disregard of law).

10. Respondent's felony conviction for possession of controlled substance, described in Factual Finding 6, is for a crime which bears a substantial relationship to the qualifications, functions, or duties of a real estate licensee, within the meaning of the Department's Criteria of Substantial Relationship, California Code of Regulations, title 10, section 2910, subdivision (a)(9), (Contempt of court or willful failure to comply with a court order), and subdivision (a)(10), (Conduct which demonstrates a pattern of repeated willful disregard of law).

11. Respondent is 40 years of age. He graduated from Mount Pleasant High School, San Jose, California, and completed a truck driving school in 1992. He is married and has two children, a son 17 years of age, with his current wife, and a daughter 16 years of age from a previous relationship. Respondent came back into his son's life four years ago, and on September 5, 2003, respondent married his son's mother. In 2003, respondent and his wife purchased a home where they live with their son. Respondent's daughter lives with her mother. Respondent has resumed contact with his daughter and is paying child support. Respondent purchased a truck and trailer three years ago, and is engaged in the trucking business, hauling produce. Respondent has driven trucks for fifteen years. He and his family are active members of Connections Christian Church, Los Banos, California.

12. Respondent presented some evidence of rehabilitation. He introduced a letter from Health O. Dixon, broker/president of Dixon Financial Corporation, Santa Clara, California. Mr. Dixon commended respondent for having changed his life during the past seven years and for fulfilling his obligations to his family and to his trucking business. Mr. Dixon states: "He now demonstrates characteristics of integrity, reliability, and accountability in his personal life as well as his business ventures." Mr. Dixon would like to hire respondent in his business as a real estate licensee. Respondent testified and called four witnesses to testify on his behalf. Respondent called his wife Paula Marie Pullian-Smith. She testified that after his prison sentence, respondent came back into his son's life and assumed his familial responsibilities. She and respondent were married three years ago. She testified that respondent no longer uses drugs. Respondent called his son Joshua David Smith. He testified that he has a good relationship with his father. His son sees respondent as a role model. He testified that his family attends church on a regular basis. Respondent called Ronny Lee Upp. Mr. Upp, who manages chiropractic offices, has known respondent for 26 years. In high school, Mr. Upp and respondent used drugs together. Mr. Upp no longer uses drugs and has recently renewed his friendship with respondent. They attend and participate in church activities together. Mr. Upp notes that respondent has changed his life and is no longer uses drugs. Respondent called his sister Louisa Smith, who testified to respondent's positive lifestyle changes following his release from prison. Ms. Smith convincingly testified that respondent, since leaving prison, has successfully completed a series of positive goals. These goals included; remaining clean and sober; reuniting with and

supporting his children, and fulfilling his occupational goals reflected in his purchase of a truck and trailer and the running of his trucking business. She testified that one of respondent's remaining goals is to obtain a real estate license.

13. Respondent began using drugs when he was 16 years of age and he continued to use drugs for the next 15 years. He started with marijuana and ended using methamphetamine. Respondent's methamphetamine sales were used to support his habit. Following his criminal convictions on May 30, 1997, and while on probation, respondent continued to use methamphetamine. Respondent quit using drugs on June 15, 1999. Respondent has had seven years in which he has remained clean and sober. He has demonstrated and believes that he has overcome his addictions. For many years respondent did not comply with his child support obligations. Respondent now takes his child support obligations seriously and is currently paying \$600 per month toward his past due child support obligations. He is fully supporting his son who is living with he and his wife.

14. Respondent has made significant progress toward his rehabilitation. He is successfully engaged in the trucking business and owns a fully paid for truck and trailer. Respondent and his wife have purchased a home. He has married his son's mother and is being a good father. He has a good relationship with his son and has developed a relationship with his daughter. Respondent is actively involved in his church.

15. Respondent has made significant progress toward his rehabilitation. Despite his criminal convictions and his many years of drug addiction, respondent's rehabilitation is sufficient to establish that a real estate salesperson license on a restricted basis would not be against the public interest.

LEGAL CONCLUSIONS

1. Business and Professions Code section 480, subdivision (a), provides that the Department may deny a license on the ground that the applicant has "been convicted of a crime . . . (that) . . . is substantially related to the qualifications, functions or duties of the business . . . for which (an) application is made."

2. Business and Professions Code section 10177, subdivision (b) establishes that the Department may deny a license on the grounds that the applicant has, . . . "been convicted of, a felony or a crime involving moral turpitude."

3. Cause exists for denial of licensure to respondent as a real estate salesperson under Business and Professions Code section 10177, subdivision (b), in conjunction with Business and Professions Code section 480, subdivision (a), by reason of the matters set forth in Factual Findings 3 and 5. Respondent's felony conviction for importation, sale, distribution, transportation of controlled substance, is for a crime that bears a substantial relationship to the qualifications, functions, or duties of a real estate licensee.

4. Cause exists for denial of licensure to respondent as a real estate salesperson under Business and Professions Code section 10177, subdivision (b), in conjunction with Business and Professions Code section 480, subdivision (a), by reason of the matters set forth in Factual Findings 6 and 10. Respondent's felony conviction for possession of controlled substance is for a crime that bears a substantial relationship to the qualifications, functions, or duties of a real estate licensee.

5. Cause does not exist for denial of licensure to respondent as a real estate salesperson under Business and Professions Code section 10177, subdivision (b), in conjunction with Business and Professions Code section 480, subdivision (a), by reason of the matters set forth in Factual Findings 6 and 8. Respondent's misdemeanor conviction for use or being under the influence of a controlled substance is not for a crime that involves moral turpitude.

6. California Code of Regulations, title 10, section 2911, sets forth criteria for the evaluation of an applicant for licensure when such a person has committed a crime. In accordance with the Department's regulations, the matters set forth in Factual Findings 3 through 15 were weighed in making the Order below.

7. Respondent presented sufficient evidence of rehabilitation to establish that it would not be against the public interest to issue a real estate license to respondent on a restricted basis.

ORDER

Respondent David Lewis Smith'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. 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 not the removal of any of the conditions, limitations or restrictions attaching to the restricted license until four 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 the issuance of another license which is subject to Section 10153.4 until four years after the date of issuance of the preceding restricted license.

Dated: August 1, 2007



DAVID A. PETERS
Administrative Law Judge
Office of Administrative Hearings

1 DAVID B. SEALS, Counsel (SBN 69378)
2 Department of Real Estate
3 P. O. Box 187007
4 Sacramento, CA 95818-7007

5 Telephone: (916) 227-0789
6 -or- (916) 227-0792 (Direct)

FILED
APR 24 2007

DEPARTMENT OF REAL ESTATE

By *[Signature]*

8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

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11 In the Matter of the Application of)
12 DAVID LEWIS SMITH,)
13 Respondent.)

No. H-2100 FRESNO
STATEMENT OF ISSUES

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

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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 July 10, 2006 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 May 30, 1997, in the Superior Court of California, County of Santa Clara, Respondent was convicted of three (3) counts of violation of California Health and Safety Code Section 11379(a) (Importation, Sale, Distribution, Transportation of Controlled Substance), all felonies and crimes involving moral turpitude and which are 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 February 23, 1999, in the Superior Court of California, County of Santa Clara, Respondent was convicted of violation of California Health and Safety Code Section 11550(a) (Use or Under the Influence of a Controlled Substance), a misdemeanor, and Section 11377(a) (Possession of Controlled Substance), a felony, and both crimes involving moral turpitude and 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 Section
5 10177(b) of the California Business and Professions Code, in
6 conjunction with Section 480(a) of the California Business and
7 Professions Code.

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

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15 
16 JOHN SWEENEY
Deputy Real Estate Commissioner

17 Dated at Fresno, California,
18 this 10th day of April, 2007.