

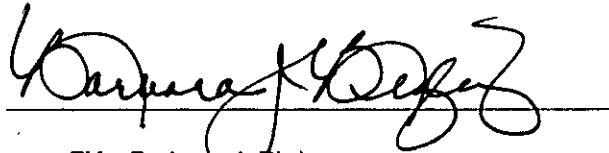
The application for a real estate salesperson license is denied. If and when application is again made for this license, all competent evidence of rehabilitation presented by Respondent will be considered by the Real Estate Commissioner. A copy of the Commissioner's Criteria of Rehabilitation is appended hereto for the information of Respondent.

This Decision shall become effective at 12 o'clock noon on

OCT 26 2010

IT IS SO ORDERED 10/4/2010

JEFF DAVI
Real Estate Commissioner



BY: Barbara J. Bigby
Chief Deputy Commissioner

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED

SEP 30 2010

DEPARTMENT OF REAL ESTATE

By K. Mar

In the Matter of the Statement of
Issues/Application of:

JOHANNA LYNN STICKNEY,

Respondent.

Case No. H-2483 FR

OAH No. 2010050786

PROPOSED DECISION

On July 23, 2010, in Sacramento, California, Ann Elizabeth Sarli, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

John W. Barron, Real Estate Counsel, represented the complainant.

Johanna Lynn Stickney represented herself.

Evidence was received. The matter was submitted and the record closed on July 23, 2010.

FACTUAL FINDINGS

1. On June 30, 2009, Johanna Lynn Stickney (respondent) submitted a Salesperson License Application with the Department of Real Estate of the State of California (Department).
2. On April 23, 2010, Luke Martin, Deputy Real Estate Commissioner of the State of California, executed the Statement of Issues and caused it to be filed with the Department on April 27, 2010. Mr. Martin's actions were done in his official capacity.
3. Respondent timely filed a Request for Hearing pursuant to Government Code sections 11504 and 11509. The matter was set for an evidentiary hearing 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.

Respondent's Criminal Conviction

4. On November 21, 1994, in the Superior Court of the State of California, County of Fresno, respondent was convicted on her plea of **guilty/no contest** of violating section 488 of the California Penal Code (Petty Theft), a misdemeanor. Respondent was sentenced to serve a 30 day jail sentence, with all but one day suspended. She was ordered to pay fines and restitution and was placed on formal probation for two years, as part of a conditional sentence. She failed to abide by the terms and conditions of probation and was required to serve one day in jail.

5. Respondent's criminal conviction arose from her theft of merchandise from Gottschalks Department Store on October 7, 1994, when she was 20 years old. On that day, respondent and another woman, Audra Orbaker, entered the store. Respondent had her baby with her and her baby's stroller. Store surveillance captured the two women selecting a purse which retailed for \$62. Respondent took the vendor's tag off the purse and put it into the purse. Both women then went to a corner of the store where respondent removed the price tag from the purse. Respondent carried the purse on her arm into the elevator where she took the paper stuffing out of the purse. She exited the elevator and Orbaker took a wallet and other items from the stroller and placed them in the purse. Respondent placed the purse on her arm and walked around the store with Orbaker and respondent's baby. They walked into a dressing room and placed a pantsuit, which retailed for \$66, under the cushion of the baby stroller, and exited the store.

6. At hearing, respondent testified that she was convicted of petty theft because she was "with the wrong crowd of people." Respondent testified that she had gone to the mall with Orbaker, thinking Orbaker was her friend. However, Orbaker was really friends with respondent's husband, who was trying to get custody of their child. In order to "hurt" respondent, Orbaker "put stuff in my daughter's stroller when I wasn't looking... and we walked out with it." On cross-examination, when respondent was asked if she stole anything that day she replied "not that I remember, it's been so long... this is not a part of my lifestyle." She testified that Orbaker took her child into the dressing room and she did not know that Orbaker put the pantsuit in the stroller. She testified that the police report was "wrong about the purse" and that no purse was stolen. She testified that "I was just with the wrong person" and that she pled guilty because "I was scared."

7. Respondent's explanations for her criminal conviction were not credible and evidence an utter lack of responsibility, remorse and maturity.

Respondent's Application for Licensure

8. Respondent's June 30, 2009, Salesperson License Application directs the applicant to "Carefully read and provide detailed answers to questions 23-26." The application describes in detail what circumstances constitute a criminal conviction. The directions define "conviction" of a crime as "including a verdict of guilty by a judge or jury, a plea of guilty or of nolo contendere...." The directions continue with the following

admonition: "All convictions must be disclosed, no matter how long ago they occurred, even if the plea or verdict was set aside, the conviction against you was dismissed, or expunged or if you have been pardoned. Convictions occurring while you were a minor must be disclosed unless the record of the conviction has been sealed...."

9. Question number 23 asks the following:

HAVE YOU EVER BEEN CONVICTED OF A MISDEMEANOR OR FELONY? CONVICTIONS EXPUNGED UNDER PENAL CODE SECTION 1203.4 MUST BE DISCLOSED. HOWEVER YOU MAY OMIT TRAFFIC CITATIONS WHICH DO NOT CONSTITUTE A MISDEMEANOR OR FELONY. (emphasis in original)

10. Question number 23 includes two boxes, one marked "NO" and the other marked "YES." The question instructs that if the answer to number 23 is "YES," the applicant should complete question number 27. Question number 27 instructs the applicant to fill in various items of information regarding convictions, including court of conviction, arresting agency, date of conviction, type of conviction, code section violated, code violated, disposition and case number.

11. Respondent checked question number 23 with a "NO" answer, indicating that she had not been convicted of a crime. Respondent did not disclose her 1994 conviction for petty theft.

12. The application concludes with a salesperson's certification. The heading on the certification states "SALESPERSONS CERTIFICATION – Please Read Carefully."(emphasis in original) The certification begins with the attestation "I certify under penalty of perjury under the laws of the State of California that the foregoing answers and statements given in this Application are true and correct..." Respondent signed the certification under penalty of perjury, falsely attesting that her answers on the application were truthful and that she had no criminal convictions.

13. The Department received information from the Department of Justice that respondent had sustained the November 21, 1994, criminal conviction. On January 11, 2010, Department personnel wrote respondent and requested that she complete a Confidential-Interview Information Statement (Statement) and Conviction Detail Report (Report). Respondent completed the Statement and Report on February 24, 2010, and explained therein that "I honestly do not remember the date" of the conviction, but that it was in 1994 or 1995 and was for petty theft. She explained that she had "friends that were a bad influence and I did the wrong thing." She explained that she did not disclose the conviction because "I was under the impression that since it was over seven years that I did not have to disclose."

14. At hearing, respondent testified that she did not intentionally fail to disclose her criminal conviction on the application. She testified that she read the application thoroughly. She was filling it out while she was at the California Credit Information

Solutions (CCIS Livescan), arranging to have her fingerprints taken. Respondent testified that she asked a CCIS Livescan employee if she had to disclose her criminal conviction on the application and that employee told her no, because after seven years she did not need to disclose convictions. She trusted the employee because she believed "they would have the knowledge about processing" applications for licensing and the real estate office where she worked ~~and~~ told her to go there and "they would answer all the questions." She also testified that at the time she filled out the application she did not remember what she had been convicted of.

15. At hearing, respondent offered a letter from the President/CEO of CCIS Livescan which purported to substantiate her claim that she took advice from a CCIS Livescan employee. In pertinent part, the letter stated "we acknowledge that a former employee of CCIS Livescan erroneously advised you to omit certain information on your application for Real Estate License..." On examination, respondent acknowledged that the President/CEO actually had no knowledge of this event, but simply took her word for it and wrote this letter after she called him and explained to him that this is what happened.

16. Respondent's testimony that she omitted her criminal conviction based on advice from a CCIS Livescan employee was not credible. She acknowledged she had read the application, which contains the directive that she must disclose criminal convictions, regardless of how old they are. If indeed she had relied on a CCIS Livescan employee for advice to override this directive, she solicited the advice in order to avoid having to disclose the conviction.

Factors in Mitigation, Aggravation and Rehabilitation

17. In order to determine whether it is appropriate to deny respondent a real estate salesperson's license or to issue her a restricted license, it is necessary to weigh and balance factors in aggravation, mitigation, justification and rehabilitation. There was no evidence introduced which demonstrates any justification for respondent's offense.

18. The only factor in mitigation is respondent's youth at the time of her offense. Respondent had just turned twenty at the time she committed the theft.

19. Respondent produced some evidence of rehabilitation. But, she produced no witnesses or documents supporting rehabilitation. She testified that she has three children whom she "takes care of." She has been employed for five years by real estate broker, Harold Kissler, Manco Abbott Inc. She began as an administrative assistant and now assists the property managers. Mr. Kissler signed the broker certification on her application, indicating that he was willing to serve as her broker. Respondent did not ask him to testify and there is no evidence that he is aware of respondent's conviction or her failure to disclose the conviction to the Department. Respondent is involved in some community activity. She participates in mobile blood drives four times a year. She is involved in the STAR program which buys toys and clothing for children. She cleans up graffiti in parks.

20. Over 15 years have passed since respondent committed the theft that led to her conviction. Ordinarily, respondent's evidence of rehabilitation and the passage of this significant period of time without further criminal activity would be persuasive evidence of rehabilitation. However, just over a year ago, in June of 2009, respondent again exhibited dishonest behavior in omitting her criminal conviction from her application. She compounded this dishonesty at hearing with her incredible explanations of why she completed the application as she did and how she sustained the criminal conviction.

21. Because of her dishonesty in her application and at hearing, respondent has failed to show a change in attitude from that which existed at the time of the conduct in question, a key element in establishing rehabilitation. (California Code of Regulations, title 10, section 2911, subdivision (n)).

LEGAL CONCLUSIONS

1. Business and Professions Code section 480, provides in pertinent part:

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

(a) 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 that 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.

[¶]...[¶]

(c) A board may deny a license regulated by this code on the ground that the applicant knowingly made a false statement of fact required to be revealed in the application for the license.

[¶]...[¶]

2. Business and Professions Code section 10177, provides in pertinent part:

The commissioner may ... deny the issuance of a license to an applicant, who has done any of the following:

(a) Procured, or attempted to procure, a real estate license or license renewal, for himself or herself or a salesperson, by fraud, misrepresentation, or deceit, or by making a material misstatement of fact in an application for a real estate license, license renewal, or reinstatement.

(b) Entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony, or a crime substantially related to the qualifications, functions, or duties of a real estate licensee, 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. Respondent's crime bears a substantial relationship to the qualifications, functions and duties of a real estate licensee. A real estate salesperson is entrusted with and responsible for the real property, financial information, and funds of clients. Theft of property is inapposite to these duties.

4. Respondent's crime meets the criteria of substantial relationship contained in California Code of Regulations, title 10, section 2910. That section provides in pertinent part:

(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.

[¶]...[¶]

(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.

[¶]...[¶]

5. The commissioner established cause for denial of respondent's real estate salesperson license and all licensing rights, pursuant to Business and Professions Code sections 480, subdivision (a), and 10177, subdivision (b), by reason of her criminal conviction, as set forth in Factual Findings 4 through 7.


6. The commissioner established cause for denial of respondent's real estate salesperson license and all licensing rights, pursuant to Business and Professions Code sections 480, subdivision (c), and 10177, subdivision (a), by reason of her failure to disclose her criminal conviction on her application for licensure, as set forth in Factual Findings 8 through 16.

7. It is the Board's responsibility to protect the public from incompetent, unknowledgeable, or negligent applicants as well as dishonest applicants. (*Handeland v Department of Real Estate* (1976) 58 Cal.App.3d 513, 518.) Respondent bears the burden of proving that she is no longer a risk to the public and that she is currently suitable for licensure as a real estate salesperson. As set forth in Factual Findings 17 through 21, respondent failed to meet her burden of proving that she does not now pose a risk to the public.

ORDER

The Application of Johanna Lynn Stickney for a Real Estate Salesperson License is DENIED.

Dated: September 1, 2010


ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings

1 JOHN W. BARRON, Counsel (SBN 171246)
2 Department of Real Estate
3 P. O. Box 187007
4 Sacramento, CA 95818-7007
5 Telephone: (916) 227-0792
6
7

FILED

APR 27 2010

DEPARTMENT OF REAL ESTATE

By K. Mas

8 BEFORE THE DEPARTMENT OF REAL ESTATE
9 STATE OF CALIFORNIA

10 ***

11 In the Matter of the Application of)
12 JOHANNA LYNN STICKNEY,) H-2483 FR
13 Respondent.) STATEMENT OF ISSUES
14)

15 The Complainant, LUKE MARTIN, a Deputy Real Estate Commissioner of the
16 State of California, for Statement of Issues against JOHANNA LYNN STICKNEY, also known
17 as "Johanna Lynn Whaley" (hereafter "Respondent"), is informed and alleges as follows:

18 1

19 Complainant makes this Statement of Issues against Respondent in his official
20 capacity.

21 2

22 Respondent made application to the Department of Real Estate of the State of
23 California for a real estate salesperson license on or about June 30, 2009.

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25 In response to Question 23 of said application, to wit: "Have you ever been
26 convicted of a misdemeanor or felony? Convictions expunged under Penal Code Section 1203.4
27 must be disclosed. However, you may omit traffic citations which do not constitute a

1 misdemeanor or felony”, Respondent concealed and failed to disclose the conviction described
2 in Paragraph 4, below.

3 4

4 On or about November 21, 1994, in the Superior Court of the State of California,
5 County of Fresno, Case No. M94013208-4, Respondent was convicted of violating Section 488
6 of the California Penal Code (Petty Theft), a misdemeanor and a crime which bears a substantial
7 relationship under Section 2910, Title 10, California Code of Regulations (hereafter “the
8 Code”), to the qualifications, functions or duties of a real estate licensee.

9 5

10 Respondent’s failure to reveal in her application for a real estate salesperson
11 license the conviction set forth in Paragraph 4, above constitutes the procurement of or attempt
12 to procure a real estate license by fraud, misrepresentation, or deceit, or by making a material
13 misstatement of fact in said application, which failure is cause for denial of Respondent’s
14 application for a real estate salesperson license pursuant to the provisions of Sections 480(c)
15 (Denial of License by Board – False Statement of Fact on Application) and 10177(a) (Further
16 Grounds for Disciplinary Action – Attempted Procurement of License by
17 Fraud/Misrepresentation/Deceit/Material Misstatement) of the Code.

18 6

19 Respondent’s criminal conviction, described in Paragraph 4, above, constitutes
20 cause for denial of Respondent’s application for a real estate salesperson license pursuant to the
21 provisions of Section 480(a) (Denial of License by Board – Conviction of Crime) and Section
22 10177(b) (Conviction of Crime Substantially Related to Qualifications, Functions or Duties of
23 Real Estate Licensee) of the Code.

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27 ///

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

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LUKE MARTIN
Deputy Real Estate Commissioner

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9 Dated at Fresno, California,
10 this 23rd day of April, 2010.

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