

BEFORE THE  
DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

FILED  
OCT 21 2003

DEPARTMENT OF REAL ESTATE

\* \* \*

In the Matter of the Accusation of )  
RICHARD E MCGINTY, )  
Respondent. )

NO. H-2800 SD  
OAH NO. N-2003020655

By Laurie G. Zinnemann

DECISION

The Proposed Decision dated September 24, 2003, 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 Decision suspends or revokes one or more real estate licenses on grounds of the conviction of a crime.

The right to reinstatement of a revoked real estate license or to the reduction of a suspension is controlled by Section 11522 of the Government Code. A copy of Section 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock noon  
on NOVEMBER 11, 2003.

IT IS SO ORDERED October 15, 2003.

PAULA REDDISH ZINNEMANN  
Real Estate Commissioner

Paula Reddish Zinnemann

BEFORE THE  
DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

RICHARD E. McGINTY,

License No. 01172648

Respondent.

Case No. H-2800 SD

OAH No. 2003020655

**PROPOSED DECISION**

Administrative Law Judge Elizabeth Reed Feyzbakhsh , State of California, Office of Administrative Hearings, heard this matter in San Diego, California on July 29, 2003.

James L. Beaver, Real Estate Counsel, represented complainant.

Richard McGinty, was present throughout the hearing and represented himself.

The parties submitted written closing arguments and the matter was deemed submitted on August 18, 2003.

**FACTUAL FINDINGS**

1. Complainant J. Chris Graves, a Deputy Real Estate Commissioner of the State of California, made the Accusation in his official capacity only, and not otherwise.

2. Richard E. McGinty (respondent) is presently licensed and/or has license rights under the Real Estate Law, Part 1 of Division 4 of the California Business and Professions Code as a Real Estate Broker. His Broker license, number 01172648, will expire on March 10, 2006, unless renewed.

3. Respondent was born on September 9, 1939. He is married and has six adult children. He has an AA degree. Respondent was employed in the banking industry from 1972-1998.

4. On August 20, 2001, in the United States District Court for the Southern District of California (Case Number 01CR1148), respondent was convicted, on a plea of

guilty, of a violating Title 26, United States Code section 7206.1 (Fraud and False Statements), a felony. This is a crime which is substantially related to the qualifications, functions, or duties of a real estate licensee.

5. On June 4, 2001, respondent pled guilty to Count 6 of the Indictment (Case Number 01CR1148) against him. Count 6 states:

“On or about April 15, 1996 in the Southern District of California, defendants Theresa McGinty and Richard McGinty did willfully make and subscribe to a false and fraudulent 1995 U.S. Individual Income Tax Return, Form 1040, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, and which the defendants did not believe to be true and correct as to every material matter in that the said tax return reported on Schedule C Profit or Loss From Business, gross receipts or sales of \$17,000.00 on line 1, of Schedule C, whereas, the defendants then and there well knew and believed they substantially understated their total gross receipts.

All in violation of Title 26, United States Code, section 7206(1).”

6. The plea agreement states, in pertinent part:

**“IN ADDITION TO THE FOREGOING PROVISIONS TO WHICH I AGREE, I SWEAR UNDER PENALTY OF PERJURY THAT THE FACTS IN THE ‘FACTUAL BASIS’ PARAGRAPH ABOVE ARE TRUE.”**

7. The factual basis paragraph in the plea agreement states:

“Defendant has fully discussed the facts of this case with defense counsel. Defendant has committed each of the elements of the crime, and admits that there is a factual basis for this guilty plea. The following facts are true and undisputed.

1. On or about April 15, 1996, in the Southern District of California, RICHARD MCGINTY willfully subscribed, under oath, and filed with the Internal Revenue Service a joint 1995 Individual Tax Return.

2. Said tax return was materially false as to a material matter, to wit: said tax return reported on Schedule C, Profits or Loss from Business, gross receipts or sales of \$17,000.00. On August 20, 2001 respondent was sentenced to three months home detention, three years probation and a fine of \$30,000.”

8. Respondent’s wife formed an independent commercial loan underwriting company in 1994 called Termac Underwriting. His wife was paid a fee for each loan application she underwrote for a commercial loan company owned by Sheldon Woods and Andrew Zweig. Woods and Zweig took up front loan fees and never attempted to fund any loans. Respondent testified that both he and his wife believed that the loans were being funded.

Respondent testified that his wife was required to receive all monetary wires for the business into her company account, distribute commissions and process the loan applications. In addition, respondent claims that his wife often wrote checks to herself, which she cashed and distributed to the principals. Respondent claims that his trouble with the Internal Revenue Service arose because the checks that respondent's wife wrote to herself should have been counted as her income because she was the last endorser on the cashed checks. Because those checks were not included in his wife's report of income, their tax liability was substantially understated.

In 1995, respondent accepted a position at Termac Underwriting. He trained at the business for two weeks. He planned to join the company at the end of the year but decided not to join them because their "behavior seemed strange."

Prior to joining Termac Underwriting, Woods approached respondent and asked him for a \$6,500 loan. Respondent thought it odd but agreed to loan the money. He testified that Woods paid him back, along with \$1,000 interest.

Respondent wrote a letter of recommendation on behalf of their (Woods and Zweig) company, which Woods used to generate business. Every time they used the letter of recommendation, they agreed to pay respondent \$100.

## LEGAL CONCLUSIONS

### *Purpose of Disciplinary Action*

1. The basic reason for disciplinary action in matters of this kind is the protection of the public against unethical and dishonest conduct on the part of those engaged in the real estate business. *Small v. Smith* (1971) 16 Cal.App.3d 450, 456.

### *Burden and Standard of Proof*

2. In an action seeking to impose discipline against the holder of a real estate license, the burden of proof is on complainant to establish the charging allegations by clear and convincing evidence. See, *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 857.

### *Applicable Statutes*

3. Business and Professions Code section 490 provides:

"A board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued. 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.”

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

“The commissioner may suspend or revoke the license of a real estate licensee . . . 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 Section 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. . . .”

#### *Substantial Relationship*

5. Criminal conduct and/or immoral acts must bear a substantial relationship to an occupation or profession to disqualify the wrongdoer from participating in that occupation or profession. See, for example, *Morrison v. State Board of Education* (1969) 1 Cal. 3d 214.<sup>1</sup>

Even though a conviction of a crime may not necessarily relate to the technical or mechanical qualifications of a real estate licensee, honesty and truthfulness are qualifications for the issuance [and retention] of a real estate license. Where a conviction involves an act of deceit and dishonesty in a fundamental sense, it is substantially related to the qualifications of a real estate licensee. See, *Golde v. Fox* (1979) 98 Cal.App.3d 167 [involving a conviction of transporting marijuana from Mexico to the United States for the purpose of personal gain].

6. Title 10, California Code of Regulations, section 2910 provides assistance in determining whether certain criminal conduct or particular dishonest and/or unprofessional acts are substantially (and adversely) related to the qualifications, functions or duties of a real estate licensee. That regulation provides in pertinent part:

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<sup>1</sup> The disabling nature of the conduct must be measured by obligations that exist in the occupation or profession in question, not merely by determining that “moral turpitude” exists or that “immoral conduct” has occurred. As the Supreme Court wrote in *Morrison*: “Surely the Legislature did not intend that identical standards of probity should apply to more than half a million professionals and government employees in widely varying fields without regard to their differing duties, responsibilities, and degree of contact with the public.”

“(a) When considering whether a license should be . . . suspended or revoked on the basis of the conviction of a crime . . . 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.

(4) The employment of bribery, fraud, deceit, falsehood or misrepresentation to achieve an end.

(8) Doing of any unlawful act with the intent of conferring a financial or economic benefit upon the perpetrator. . .

(10) Conduct which demonstrates a pattern of repeated and willful disregard of law.

(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 acts 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.”

#### *Moral Turpitude*

7. Respondent argues that his crime was not a crime of moral turpitude. Frequently the statutory touchstone suggesting a substantial relationship between a criminal conviction or other offensive conduct and the applicant’s fitness to practice a licensed occupation or profession is whether the conviction or conduct involved moral turpitude. See, for example, Business and Professions Code section 10177.

8. Convictions that involve dishonesty necessarily involve moral turpitude. See, *People v. Castro* (1985) 38 Cal. 3d 301.

#### *Cause Was Established to Impose License Discipline*

9. Cause was established under Business and Professions Code section 490 to impose discipline against McGinty’s real estate salesperson’s license. McGinty was convicted of making false statements to the Internal Revenue Service. The conviction has a substantial, adverse relationship to the qualifications, functions and duties of a real estate licensee because the conduct underlying that conviction involved dishonesty and was designed to benefit McGinty financially.

10. Cause was established under Business and Professions Code section 10177 to impose discipline against respondent's real estate broker's license. Respondent was convicted of a crime involving moral turpitude. The conviction has a substantial, adverse relationship to the qualifications, functions and duties of a real estate licensee.

#### *Rehabilitation*

11. Rehabilitation "requires a consideration of those offenses from which one has allegedly been rehabilitated." *Pachecho v. State Bar* (1987) 43 Cal. 3d 1041. Fully acknowledging the wrongfulness of past actions is an essential step towards rehabilitation. *Seide v. Committee of Bar Examiners* (1989) 49 Cal. 3d 933.

12. The Department developed various criteria for the purpose of evaluating the rehabilitation of a licensee on account of a crime committed by the licensee. These criteria are set forth at Title 10, California Code of Regulations, section 2912. Relevant criteria in this matter include:

"(a) The passage of not less than two years from the most recent criminal conviction that is 'substantially related' to the qualifications, functions or duties of a licensee of the department. (A longer period will be required if there is a history of criminal convictions or acts 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 licensee.

(c) Expungement of the conviction or convictions which culminated in the administrative proceeding to take disciplinary action.

...

(e) Successful completion or early discharge from probation or parole.

...

(g) Payment of any fine imposed in connection with the criminal conviction that is the basis for revocation or suspension of the license.

(h) Correction of business practices responsible in some degree for the crime or crimes of which the licensee was convicted.

(i) New and different social and business relationships from those which existed at the time of the commission of the acts that led to the criminal conviction or convictions in question.

(j) Stability of family life and fulfillment of parental and familial responsibilities subsequent to the criminal conviction.

(k) Completion of, or sustained enrollment in, formal educational or vocational training courses for economic self-improvement.

(l) Significant and conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.

(m) Change in attitude from that which existed at the time of the commission of the criminal acts 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 the licensee's previous conduct and with 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, clinical psychologists, sociologists or other persons competent to testify with regard to neuro-psychiatric or emotional disturbances."

#### *Evaluation of McGinty's Rehabilitation*

13. Just over two years has passed since respondent was convicted of a serious crime involving moral turpitude. Respondent has no history of criminal conduct prior to this, nor is there any evidence of criminal activity since the time of the conviction.

Respondent has not yet completed his probation but has complied with all the terms and conditions of probation to this point. Respondent presented evidence from his probation officer that he is complying with all terms of his probation.

Respondent has settled his obligation to the Internal Revenue Service and has paid the settlement amount in full.

Respondent is no longer involved in the business relationship which led to the criminal conviction.

Respondent is married and appears to have a stable family life where he has fulfilled his parental and familial responsibilities subsequent to the conviction.

The troubling aspect of respondent's rehabilitation is his failure to acknowledge any wrongdoing as it relates to his conviction. Respondent pled guilty and the guilty plea



included an admission of certain facts surrounding the case. Respondent is bound by those admissions. Count 6 of the Indictment states, "the defendants then and there well knew and believed that they substantially understated their total gross receipts." Respondent cannot now disregard that admission and assert that he was unaware of the wrongfulness of his conduct. The language of the plea agreement, which was signed by respondent under penalty of perjury, indicates otherwise. The language of the plea and the language of the law are clear in disallowing retrial of the criminal case here.


One of the factors to be considered in making the determination of whether or not a person has been rehabilitated is whether they have acknowledged or taken responsibility for their actions. Respondent has taken no responsibility for his actions. Respondent was not unsophisticated in the filing of tax returns. He was in the banking business for close to 30 years. It was evident from his testimony, that respondent is an intelligent man. It was not convincing that he had unknowingly broken the law. His knowledge and experience in the financial arena is too extensive for that argument to be believable. That having been said, it is also clear that respondent was not a primary player in the criminal activity.

14. In light of the nature and extent of respondent's misconduct, and the failure to acknowledge wrongdoing, insufficient evidence was presented to conclude that it would be in the public interest to allow respondent to retain his real estate broker's license. Respondent has not shown evidence of rehabilitation. More time must pass to establish rehabilitation to the extent that the Department can reasonably conclude that respondent possesses sufficient good moral character to hold a real estate license.

#### ORDER

All licenses and licensing rights granted to respondent Richard E. McGinty, under the Real Estate Law are revoked.

DATED: 9.24.03

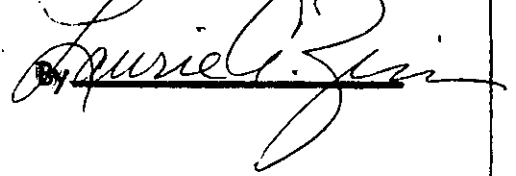
  
ELIZABETH REED FEYZBAKHS  
Administrative Law Judge  
Office of Administrative Hearings

1 JAMES L. BEAVER, Real Estate Counsel  
2 California State Bar No. 60543  
3 Department of Real Estate  
4 P. O. Box 187000  
5 Sacramento, CA 95818-7000

6 Telephone: (916) 227-0789  
7 -or- (916) 227-0788 (Direct)

FILED  
JUL 28 2003

DEPARTMENT OF REAL ESTATE

By 

8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

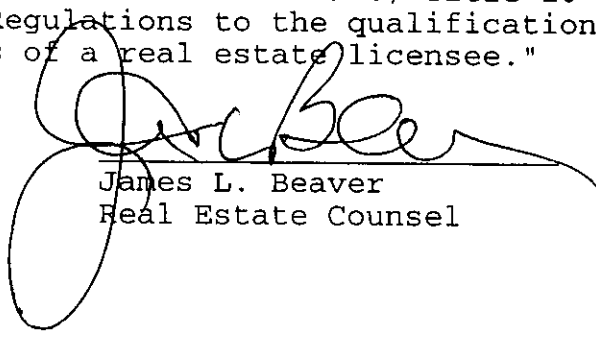
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11 In the Matter of the Accusation of ) DRE No. H-2800 SD  
12 RICHARD E. MCGINTY, ) OAH No. L-2003020655  
13 Respondent. ) AMENDMENT OF ACCUSATION

14 Pursuant to Government Code Section 11507, Complainant  
15 hereby amends by interlineation Paragraph III of the Accusation  
16 filed herein January 21, 2003 to allege follows:

17 "On or about August 20, 2001, in the U.S. District  
18 Court for the Southern District of California,  
19 Respondent was convicted of a violation of Title 26,  
20 United States Code, Section ~~7203~~ 7206(1) (False Tax  
21 Returns), a crime involving moral turpitude which is  
22 substantially related under Section 2910, Title 10  
23 California Code of Regulations to the qualifications,  
24 functions, or duties of a real estate licensee."

25 Dated: July 28, 2003

26   
27 James L. Beaver  
Real Estate Counsel

FILED  
APR 20 2003

**BEFORE THE DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA**

DEPARTMENT OF REAL ESTATE

By *Kathleen Contreras*

*In the Matter of the Accusation of*

RICHARD E. McGINTY,

}  
}

Case No. H-2800 SD

OAH No.

*Respondent*

**FIRST CONTINUED  
NOTICE OF HEARING ON ACCUSATION**

**To the above named respondent:**

*You are hereby notified* that a hearing will be held before the Department of Real Estate at

**THE OFFICE OF ADMINISTRATIVE HEARINGS**

**1350 FRONT STREET, ROOM 6022**

**SAN DIEGO, CALIFORNIA 92101**

on **JULY 29, 2003**, at the hour of **9:00 AM**, or as soon thereafter as the matter can be heard, upon the Accusation served upon you. If you object to the place of hearing, you must notify the presiding administrative law judge of the Office of Administrative Hearings within ten (10) days after this notice is served on you. Failure to notify the presiding administrative law judge within ten days will deprive you of a change in the place of the hearing.

You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. If you are not present in person nor represented by counsel at the hearing, the Department may take disciplinary action against you based upon any express admission or other evidence including affidavits, without any notice to you.

You may present any relevant evidence and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Department of Real Estate.

The hearing shall be conducted in the English language. If you want to offer the testimony of any witness who does not proficiently speak the English language, you must provide your own interpreter and pay his or her costs. The interpreter must be certified in accordance with Sections 11435.30 and 11435.55 of the Government Code.

*Dated:* APRIL 18, 2003

DEPARTMENT OF REAL ESTATE  
By *[Signature]*  
JAMES L. BEAVER, Counsel

**BEFORE THE DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA**

**FILED**  
FEB 21 2003

DEPARTMENT OF REAL ESTATE

By *Kathleen Contreras*

*In the Matter of the Accusation of*

RICHARD E. MCGINTY,

} Case No. H-2800 SD

} OAH No.

\_\_\_\_\_  
*Respondent*

**NOTICE OF HEARING ON ACCUSATION**

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*You are hereby notified* that a hearing will be held before the Department of Real Estate at

**THE OFFICE OF ADMINISTRATIVE HEARINGS**

**1350 FRONT STREET, ROOM 6022**

**SAN DIEGO, CALIFORNIA 92101**

on **MARCH 25, 2003**, at the hour of **1:30 PM**, or as soon thereafter as the matter can be heard, upon the Accusation served upon you. If you object to the place of hearing, you must notify the presiding administrative law judge of the Office of Administrative Hearings within ten (10) days after this notice is served on you. Failure to notify the presiding administrative law judge within ten days will deprive you of a change in the place of the hearing.

You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. If you are not present in person nor represented by counsel at the hearing, the Department may take disciplinary action against you based upon any express admission or other evidence including affidavits, without any notice to you.

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DEPARTMENT OF REAL ESTATE

*Dated:* February 20, 2003

By *Deidre L. Johnson*  
DEIDRE L. JOHNSON, Counsel

RE 501 (Rev. 8/97)

1 LARRY A. ALAMAO, Counsel  
State Bar No. 47379  
2 Department of Real Estate  
P. O. Box 187000  
3 Sacramento, CA 95818-7000  
4 Telephone: (916) 227-0789  
5  
6  
7

FILED  
JAN 21 2003

DEPARTMENT OF REAL ESTATE

By *Kathleen Contreras*

8 BEFORE THE  
9 DEPARTMENT OF REAL ESTATE  
10 STATE OF CALIFORNIA

11 \* \* \*

12 In the Matter of the Accusation of )  
13 RICHARD E. MCGINTY, ) NO. H-2800 SD  
14 Respondent. ) ACCUSATION  
15 )

16 The Complainant, J. CHRIS GRAVES, a Deputy Real Estate  
17 Commissioner of the State of California, for cause of Accusation  
18 against RICHARD E. MCGINTY (hereinafter referred to as Respondent),  
19 is informed and alleges as follows:

20 I

21 The Complainant, J. CHRIS GRAVES, a Deputy Real Estate  
22 Commissioner of the State of California, makes this Accusation in  
23 his official capacity.

24 II

25 Respondent is presently licensed and/or has license  
26 rights under the Real Estate Law (Part 1 of Division 4 of the  
27 Business and Professions Code) (Code) as a real estate broker.

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III

On or about August 20, 2001, in the U. S. District Court for the Southern District of California, Respondent was convicted of a violation of Title 26, United States Code, Section 7203 (False Tax Returns), a crime involving moral turpitude which is substantially related under Section 2910, Title 10, California Code of Regulations to the qualifications, functions, or duties of a real estate licensee.

IV

The facts alleged above constitute cause under Sections 490 and 10177(b) of the Code for suspension or revocation of all licenses and license rights of Respondent under the Real Estate Law.

WHEREFORE, Complainant prays that a hearing be conducted on the allegations of this Accusation and that upon proof thereof, a decision be rendered imposing disciplinary action against all licenses and license rights of Respondent under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code), and for such other and further relief as may be proper under the provisions of law.

  
\_\_\_\_\_  
J. CHRIS GRAVES  
Deputy Real Estate Commissioner

Dated at San Diego, California,  
this 19<sup>th</sup> day of December, 2002