

FILED

NOV - 7 2017

BUREAU OF REAL ESTATE

By *[Signature]*

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

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In the Matter of the Accusation of	)	CalBRE No. H-03046 FR
JAVIER ESPARZA,	)	OAH No. 2017041072
Respondent.	)	

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DECISION

The Proposed Decision dated September 26, 2017 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, but the right to a restricted salesperson license is granted to Respondent.

Pursuant to Government Code section 11521, the Bureau of Real Estate may order reconsideration of this Decision on petition of any party. The party seeking reconsideration shall set forth new facts, circumstances, and evidence, or errors in law or analysis, that show(s) grounds and good cause for the Commissioner to reconsider the Decision. If new evidence is presented, the party shall specifically identify the new evidence and explain why it was not previously presented. The Bureau's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the effective date of this Decision, whichever occurs first.

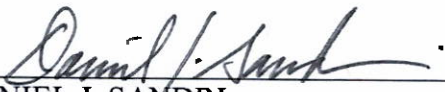
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The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock noon on 11/27/17.

IT IS SO ORDERED 10/31/17

WAYNE S. BELL  
REAL ESTATE COMMISSIONER

By   
DANIEL J. SANDRI  
Chief Deputy Commissioner

BEFORE THE  
BUREAU OF REAL ESTATE  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation of:

JAVIER ESPARZA,

Respondent.

Case No. H-03046 FR

OAH No. 2017041072

**PROPOSED DECISION**

Carmen D. Snuggs, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on August 29, 2017 in Los Angeles.

Steve Chu, Counsel for the Bureau of Real Estate (Bureau), appeared on behalf of complainant Brenda Smith, Supervising Special Investigator for the Bureau.

Respondent Javier Esparza appeared on his own behalf.

Oral and documentary evidence was received, the record was closed, and the matter was submitted on August 29, 2017.

**FACTUAL FINDINGS**

*Parties and Jurisdiction*

1. Complainant filed the Accusation in her official capacity. Respondent timely filed a notice of defense.

2. The Bureau issued real estate salesperson license number S/01407978 to Respondent on February 20, 2004. The license is scheduled to expire on June 15, 2018, unless renewed.

*Respondent's Conviction*

3. On November 12, 2015, in the Superior Court of California, County of Kern, case number BM870593A, Respondent was convicted on his nolo contendere plea of violating Vehicle Code sections 23152, subdivision (a) (driving under the influence), a misdemeanor, and section 20002, subdivision (a) (hit and run), a misdemeanor. The court

suspended imposition of sentence, and placed Respondent on summary probation for three years on condition that, among other things, he: a) pay a fine of \$2,018; b) serve 15 days in custody, less credit for four days served; c) in lieu of jail, enroll in a work release program; d) make restitution for damages; and e) enroll in and complete a 9-month alcohol education program and participate in a victim impact panel.

4. The facts and circumstances underlying Respondent's conviction are that on September 12, 2015, Respondent drove his vehicle while under the influence of alcohol. He struck two vehicles, which caused a multiple-vehicle collision, and left the scene of the accident.

5. Respondent paid all fines and completed the alcohol education and victim impact programs. He paid restitution of \$25,000 to the parties involved in the collision. Respondent's probation is scheduled to terminate in November 2018.

6. Complainant alleged, as an aggravating factor, that on September 16, 1997, in the Superior Court of California, County of Los Angeles, case number 6MP04947, Respondent was convicted on his nolo contendere plea of violating Vehicle Code section 23103.5, subdivision (a) (plea to reckless driving in lieu of driving under the influence), a misdemeanor. The court suspended imposition of sentence, and placed Respondent on summary probation for three years on condition that, among other things, he pay a fine of \$780 and serve two days in custody, less credit for two days' time served.

7. The facts and circumstances underlying Respondent's conviction are that on August 23, 1997, Respondent drove his vehicle while under the influence of alcohol. He was arrested after taking a breath test.

8. Respondent paid his fine in full, and his probation terminated in 2000.

#### *Mitigation and Rehabilitation*

9. Respondent testified that he used bad judgment when he drove under the influence of alcohol both in 1997 and in 2015, and when he left the scene of the accident in 2015. On the date of his arrest in 1997, Respondent thought he was capable of driving. In 2015, he left the scene of the accident because he panicked. Respondent knew he had caused a lot of damage and believed the other parties involved in the accident were upset. He walked down the street from the accident to a shopping center to wait for the police to arrive. Respondent's driver's license, restricted because of his 2015 conviction, is now. Respondent has not petitioned for expungement of his convictions.

10. Respondent denied having a problem with alcohol. He expressed remorse and described his conduct of driving while under the influence as careless and irresponsible. He stated that he will never drive under the influence of alcohol again, and has not done so since the time of his arrest in 2015. The last time Respondent consumed alcohol was a month before this hearing while on vacation. Respondent submitted a letter from his girlfriend that attests to Respondent's realization and acceptance of his wrongdoing. She also states that

Respondent has "changed dramatically" his lifestyle and decisions due to the accident, corroborating Respondent's testimony regarding his change in attitude since his most recent conviction. However, the letter fails to mention what specific changes Respondent has made.

11. Working as a real estate salesperson is Respondent's second job. He uses the income he earns from selling real estate to supplement the income he receives from working as a heavy equipment operator. Respondent lives with and supports his three children, his girlfriend, and her two children, whom he considers his stepchildren. Respondent wants to retain his license because he is the sole provider for his family at this time. Respondent offered documentary evidence to support his claims that his girlfriend is currently on disability leave from her job, his stepchildren suffer from serious medical conditions, and he is currently paying college tuition for his two older children. Respondent is not able to volunteer for community service because of the time required by his familial responsibilities.

12. In addition to the letter from his girlfriend, Respondent offered a letter from his real estate broker, Saul Bernal, who has employed Respondent since October 2014. Mr. Bernal attests to Respondent's work ethic and competency as a real estate salesperson. He states that Respondent has transacted business with clients and agents without incident. Both letters describe Respondent as hardworking, trustworthy, and of good character.

13. Respondent has no other convictions. He has no history of license discipline.

#### *Costs*

14. Complainant submitted documentation showing that the Bureau has incurred \$607.50 in investigative costs for nine and one-half hours of Bureau employees' time at varying hourly rates. In addition, counsel for the Bureau has billed the Bureau \$801 in enforcement costs, consisting of nine hours of attorney time at \$89 per hour. The Bureau's total investigation and enforcement costs are \$1,408.50. This amount is reasonable.

### LEGAL CONCLUSIONS

1. The Bureau is the state agency responsible for licensing and regulating real estate salespersons. (Bus. & Prof. Code, §10050, subd. (a)(2).<sup>1</sup> The Bureau's highest priority in exercising its licensing and disciplinary functions is public protection. (*Id.* at § 10050.1.)

2. Complainant bears the burden of proof. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99; *Pipkin v. Bd. of Supervisors* (1978) 82 Cal.App.3d 652.) The standard of proof for the Bureau to prevail on the Accusation is clear and convincing evidence to a reasonable certainty. (See *Borror v. Department of Real Estate* (1971) 15

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<sup>1</sup> Further references to statute are to the Business and Professions Code.

3. The Bureau may revoke or suspend a real estate salesperson's license if the licensee has been convicted of a crime that is substantially related to the qualifications, functions, or duties of a real estate licensee. (§§ 490, subd. (a), 10177, subd. (b).) A crime is substantially related to the qualifications, functions, and duties of a licensee within the meaning of section 490 if it involves an unlawful act with the threat of doing substantial injury to the person or property of another. (Cal. Code Regs. (CCR), tit. 10, § 2910, subd. (a), criterion (8).)<sup>2</sup> Suffering two convictions involving the consumption or use of alcohol when at least one of the convictions involves driving under the influence is also deemed substantially related to the qualifications, functions, and duties of a licensee. (CCR, § 2910, subd. (a), criterion (11).)

4. Respondent's misdemeanor convictions for driving under the influence of alcohol and hit and run as set forth in Factual Findings 3 through 5 are substantially related to the qualifications, functions and duties of a real estate salesperson pursuant to CCR section 2910, subdivision (a), criteria 8 and 11. Respondent's conduct had the potential to cause, and did cause, substantial injury to the person or property of another, and both convictions in 2015 involved the use of alcohol. (Factual Findings 3 through 5.)

5. Cause exists to suspend or revoke Respondent's real estate salesperson license pursuant to sections 490, subdivision (a), and 10177, subdivision (b), for his 2015 convictions of crimes substantially related to the qualifications, functions, and duties of the licensee, as set forth in Factual Findings 3 through 5.

6. The purpose of imposing discipline is to protect the public. Disciplinary proceedings to suspend or revoke a real estate license are not conducted for the purpose of punishing an individual. (*Small v. Smith* (1971) 16 Cal.App.3d 450, 457.)

7. The rehabilitation criteria the Bureau must consider when determining license discipline are set forth at CCR section 2912. Respondent meets the following applicable criteria: Respondent has paid all fines and restitution ordered by the court. (CCR, §2912, subs. (b) & (g); Factual Finding 5.) He has a stable family life and fulfills his parental and familial responsibilities. (CCR, §2912, subd. (j); Factual Finding 11.) Respondent professed a change in attitude toward drinking and driving, and has not engaged in conduct since the acts leading to his 2015 convictions that would provide grounds for disciplining a licensee. (CCR, §2912, subd. (m); Factual Findings 10 and 13.) Respondent has not suffered any subsequent convictions since 2015. (CCR, §2912, subd. (m); Factual Finding 13.) However, because he remains on probation until November 2018, Respondent's good behavior is accorded little weight because persons under supervision of correctional authorities are required to behave in exemplary fashion. (*In re Gossage* (2000) 23 Cal.4th 1080, 1099.)

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<sup>2</sup> Further references to the CCR are to title 10.

8. Respondent does not meet the following rehabilitation criteria: Less than two years have passed since Respondent's most recent substantially related convictions. (CCR, § 2912, subd. (a); Factual Finding 3.) Respondent's convictions have not been expunged, and he is scheduled to remain on probation until November 2018. (CCR, § 2912, subds. (c) & (e); Factual Findings 5 and 9.) He has not abstained from the use of alcohol for two years, and he is not significantly involved in community programs designed to provide social benefits or to ameliorate social problems. (CCR, § 2912, subds. (f) & (l); Factual Findings 9 and 11.)

9. Respondent satisfied the key element of rehabilitation: remorse and acceptance of responsibility for his conduct. (Factual Findings 9 and 10.) These are the cornerstones of rehabilitation, which is a "state of mind" reflecting "reformation and regeneration." (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) Fully acknowledging previous wrongdoing is critical to rehabilitation (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940), and Respondent has done that. He unequivocally accepted responsibility for his criminal behavior, appreciates its seriousness, and is genuinely sorry for it. (Factual Findings 9 and 10.) Based on Respondent's evidence regarding his change in attitude and his acknowledgement of how his conduct could affect his family (Factual Findings 9 through 11), it appears unlikely that he will re-offend. Respondent has been licensed for thirteen years without any history of license discipline, and his broker attests to Respondent's ability to interact honestly and competently with the public. (Factual Findings 2, 11, and 13.) However, Respondent suffered two alcohol related convictions in 2015, and he has not abstained from alcohol for a period of time sufficient for the Bureau to grant Respondent full licensing rights. (Factual Findings 3 through 8, and 10, and Legal Conclusion 7.) Respondent provided no evidence of what specific actions he is taking to avoid suffering another conviction for driving while under the influence, and his probation is not scheduled to terminate until late 2018. (Factual Finding 8.) While remorse and acceptance of responsibility are necessary to show rehabilitation, a truer indication of rehabilitation is sustained conduct for an extended period of time. (*In Re Menna* (1995) 11 Cal.4th 975, 971). Respondent cannot demonstrate sustained appropriate conduct while not on probation. On the balance, though respondent has not shown that he is entitled to an unrestricted license, he has demonstrated enough rehabilitation to show that the public will be protected if he is issued a properly-conditioned restricted license.

#### *Costs*

10. The Bureau may recover from Respondent the reasonable costs of investigation and enforcement. (§10106.)

11. Respondent offered no evidence to demonstrate under *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, that a reduction or an elimination of costs is warranted. As such, Respondent shall pay the Bureau's costs of \$1,408.50 in full.



## ORDER

All licenses and licensing rights of Respondent Javier Esparza under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license shall be issued to Respondent pursuant to Section 10156.5 of the Business and Professions Code if Respondent makes application therefor and pays to the Bureau of Real Estate the appropriate fee for the restricted license within 90 days from the effective date of this Decision. The restricted license issued to 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 that Code:

1. The restricted license issued to Respondent may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of Respondent's conviction or plea of nolo contendere to a crime which is substantially related to Respondent's fitness or capacity as a real estate licensee.

2. The restricted license issued to Respondent may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner 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 the restricted license.

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

4. Respondent shall submit with any application for license under an employing broker, or any application for transfer to a new employing broker, a statement signed by the prospective employing real estate broker on a form approved by the Bureau of Real Estate which shall certify:

(a) That the employing broker has read the Decision of the Commissioner which granted the right to a restricted license; and

(b) That the employing broker will exercise close supervision over the performance by the restricted licensee relating to activities for which a real estate license is required.

5. Respondent shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that Respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If Respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until the Respondent

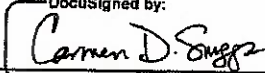


presents such evidence. The Commissioner shall afford Respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

6. Respondent shall notify the Commissioner in writing within 72 hours of any arrest by sending a certified letter to the Commissioner at the Bureau of Real Estate, Post Office Box 137000, Sacramento, CA 95813-7000. The letter shall set forth the date of Respondent's arrest, the crime for which Respondent was arrested and the name and address of the arresting law enforcement agency. Respondent's failure to timely file written notice shall constitute an independent violation of the terms of the restricted license and shall be grounds for the suspension or revocation of that license.

7. Respondent shall, within 90 days from the effective date of this Decision, or according to a payment plan approved by the Bureau, pay to the Bureau of Real Estate, or other entity as designated by the commissioner, its costs of investigation and enforcement in the amount of \$1,408.50.

DATED: September 26, 2017

DocuSigned by:  
  
CARMEN D. SNUGGS  
Administrative Law Judge  
Office of Administrative Hearings