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DEPARTMENT OF REAL ESTATE

By *[Signature]*

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

\* \* \*

In the Matter of the Application of	)	No. H-3065 SD
	)	
KYLE PAUL WHISSEL,	)	OAH No. N-2004100506
	)	
Respondent.	)	

STIPULATION AND WAIVER

AND

DECISION AFTER REJECTION

This matter was heard before James Ahler, Administrative Law Judge of the Office of Administrative Hearings, State of California, on November 10, 2004, in San Diego, California

Michael B. Rich, Counsel, represented the Complainant (hereinafter "Department").

John P. Murphy, Attorney at Law, represented Kyle Paul Whissel (hereinafter "Respondent"), who was present throughout the hearing.

1 Evidence was received, the hearing was closed, and the  
2 matter was submitted.

3 On December 21, 2004, the Commissioner of the  
4 Department of Real Estate declined to adopt the Proposed  
5 Decision of November 10, 2004.

6 The parties wish to settle this matter without further  
7 proceedings.

8 IT IS HEREBY STIPULATED by and between the Respondent  
9 and the Department, acting by and through Michael B. Rich,  
10 Counsel for the Department, as follows for the purpose of  
11 settling and disposing of the Statement of Issues filed by the  
12 Department.

13 It is understood by the parties that the Commissioner  
14 of the Department of Real Estate may adopt the Stipulation and  
15 Waiver as his decision in this matter, thereby imposing the  
16 penalty and sanctions on Respondent's application for a real  
17 estate license as set forth hereinafter in the "Decision and  
18 Order." In the event the Commissioner in his discretion does  
19 not adopt the Stipulation and Waiver, the Stipulation and Waiver  
20 shall be void and of no effect; the Commissioner will review the  
21 transcript and the evidence in the case, and will issue his  
22 decision after Rejection as his decision in this matter.

23 By reason of the foregoing and solely for the purpose  
24 of settlement of the Statement of Issues without further  
25 administrative proceedings, it is stipulated and agreed that the  
26 following shall be adopted as the Commissioner's Decision:  
27

1 FACTUAL FINDINGS

2 1. Complainant J. Chris Graves (hereinafter  
3 "Complainant"), in his official capacity as a Deputy Real Estate  
4 Commissioner of the State of California, made the Statement of  
5 Issues against Respondent. Complainant signed the Statement of  
6 Issues on August 23, 2004.

7 2. On May 21, 2003, Respondent signed a Salesperson  
8 License Application and submitted it to the Department. In the  
9 application, Respondent disclosed his prior criminal conviction.

10 3. In response to Question 27 on the application,  
11 which asked for detailed explanations related to any  
12 convictions, Respondent represented that in January 2003, he  
13 suffered a misdemeanor conviction in San Diego County,  
14 California, for violating Penal Code section 550(b)(1), for  
15 which he was placed on three years probation to the court and  
16 fined \$400.

17 4. On December 18, 2002, Respondent was convicted on  
18 his guilty plea of violating Penal Code section 550, subdivision  
19 (b)(1) (Presenting a False Statement in a Claim for Insurance  
20 Payment), a felony, in the Superior Court of California, County  
21 of San Diego, in Case No. CD 170979 entitled *People of the State*  
22 *of California vs. Kyle Paul Whissel*. The change of plea form  
23 indicated, "DA agrees to reduction to misdemeanor per 17(b)(5)  
24 at PH's if no outstanding restitution matters."

25 5. On January 30, 2003, imposition of sentence was  
26 suspended and Respondent was placed on three years summary  
27 probation. The probation expires on January 20, 2006, and

1 Respondent remains on court ordered probation as part of the  
2 sentence resulting from his conviction. In addition, Respondent  
3 was sentenced to perform 20 days of community service and pay  
4 fines and fees totaling \$600.00. The charge was reduced to a  
5 misdemeanor pursuant to penal Code section 17, subdivision  
6 (b) (5).

7 Matters in Aggravation

8 6. In 2001-2002, Respondent was attending UCSD as a  
9 full-time student and was working full time in retail sales at  
10 electronics stores. At some point, Respondent leased two  
11 vehicles, a 2001 Toyota Celica and a 2002 Chevrolet Trailblazer.  
12 He was paying insurance on both vehicles and had difficulty  
13 making the monthly lease payments. He attempted to sell 2001  
14 Toyota Celica for approximately six months without any success.  
15 His car payments were approximately \$800 per month, his rent  
16 payment was \$900 per month, he was making insurance payments on  
17 two vehicles, he was a full time student and he found himself in  
18 financial difficulties.

19 7. The crime was not impulsive and required  
20 sophistication and planning. For several months, an  
21 acquaintance asked Respondent for the 2001 Toyota Celica, saying  
22 he could have it dismantled and Respondent could claim that it  
23 was stolen. Respondent maintained that he resisted these  
24 overtures for several months, and then capitulated. Respondent  
25 gave the acquaintance the keys to the Celica, then telephoned  
26 his automobile insurance carrier and advised that his car had  
27 been stolen.

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Matters In Mitigation

8. One week after making the false claim, a detective with the police department called Respondent and told him that the police had evidence to establish that the Celica had not been stolen. The detective gave Respondent the opportunity to confess, he did so. Respondent thereafter called the insurance carrier and advised the carrier as to what had taken place. Respondent was thereafter was arrested, charged with several crimes, and convicted.

Matters in Rehabilitation

9. Respondent attended UCSD from 1999-2003. Respondent continued working full time while attending college. He graduated with a Bachelor of Arts degree in Economics in 2003.

10. Respondent described his offense as a one-time matter that ended up costing him more than \$20,000. Respondent testified, "I can't believe how stupid I was and how much I screwed my life up." The Administrative Law Judge found his testimony to be sincere.

11. Respondent paid all fines and fees. He performed the 20 days public service. He has complied with all terms and conditions of probation.

12. Respondent now owns and manages his own real properties (a home in El Cajon, which he lives in and rents rooms out to others; two other properties on the residential property which he rents to others; and two properties in

1 Buffalo, New York). Respondent testified he was "always  
2 intrigued by real estate," but now it is his passion.

3 13. Respondent's father, Robert Whissel (Robert),  
4 testified that after being diagnosed with Stage III cancer in  
5 November 2003, he was totally bedridden for five months. During  
6 this period of time, Respondent provided his father with care  
7 and support.

8 14. Robert Whissel was extremely upset by the incident  
9 resulting in Respondent's conviction. Robert Whissel testified  
10 that he was "shocked to say the least. . . I had no idea where  
11 this came from." Robert Whissel testified that Respondent was  
12 and is very remorseful and that the incident has "changed his  
13 whole personality." Robert Whissel testified that his son is  
14 trustworthy.

15 15. Robert Whissel has been a licensed real estate  
16 broker for about 20 years and owns Whissel Investment  
17 Properties, Inc., a brokerage business, which he operates out of  
18 his home. He has employed numerous licensed persons during that  
19 time. Respondent aids his father to operate the business by  
20 providing invaluable administrative assistance and research.

21 16. Tony Sisouvanh (hereinafter "Sisouvanh") testified  
22 that he has known Respondent for more than 15 years. According  
23 to Sisouvanh, "It wasn't like [Respondent] to do such a thing."  
24 Sisouvanh said he was disappointed. After the incident,  
25 Sisouvanh observed Respondent become even more responsible and  
26 helpful to others.

27

1           17. The criminal incident appears to be inconsistent  
2 with Respondent's otherwise law-abiding lifestyle. Respondent  
3 testified in a believable manner. He was contrite and  
4 remorseful. Respondent did not attempt to blame others for his  
5 misfortune, but took full responsibility. He is making an  
6 effort to rehabilitate himself.

7                                   LEGAL CONCLUSIONS

8           1. Cause exists to deny Respondent's application for a  
9 real estate salesperson license pursuant to sections 480(a) and  
10 10177(b) of the Business and Professions Code, in that he was  
11 convicted of a crime involving moral turpitude that was  
12 substantially related to the qualifications, functions and  
13 duties of a real estate licensee, as based on Factual Findings 4  
14 through 7, inclusive.

15                                   ORDER

16                   Respondent's application for a real estate  
17 salesperson's license is denied; provided, however, a restricted  
18 real estate salesperson's license shall be issued to Respondent  
19 pursuant to section 10156.5 of the Business and Professions  
20 Code. The restricted license issued to Respondent shall be  
21 subject to all of the provisions of section 10156.7 of the  
22 Business and Professions Code and to the following limitations,  
23 conditions, and restrictions imposed under authority of section  
24 10156.6 of said Code:

25           1. The license shall not confer any property right  
26           in the privileges to be exercised, and the Real Estate  
27           Commissioner may by appropriate order suspend the

1 right to exercise any privileges granted under this  
2 restricted license in the event of:

3 (a) The conviction of Respondent (including a plea of  
4 not contendere) of a crime which is substantially  
5 related to Respondent's fitness or capacity as a  
6 real estate licensee; or

7 (b) The receipt of evidence that Respondent has  
8 violated provisions of the California Real Estate  
9 Law, the Subdivided Lands Law, Regulation of the  
10 Real Estate Commissioner, or conditions attaching  
11 to the restricted license.

12 2. Respondent shall not be eligible to apply for the  
13 issuance of an unrestricted real estate license nor  
14 for the removal of any of the conditions, limitations  
15 or restrictions attaching to the restricted license  
16 until two years have elapsed from the date of issuance  
17 of a restricted license to Respondent.

18 3. With the application for license, or with the  
19 application for transfer to a new employing broker,  
20 Respondent shall submit a statement signed by the  
21 prospective employing real estate broker on a form RE  
22 552 (Rev. 4/88) approved by the Department of Real  
23 Estate which shall certify as follows:

24 (a) That the employing broker has read the Decision  
25 of the Commissioner which is the basis of the  
26 issuance of the restricted license; and

27 (b) That the employing broker will carefully review



1 all transaction documents prepared by the  
2 restricted licensee and otherwise exercise close  
3 supervision over the licensee's performance of  
4 acts for which a license is required.

5 4. Respondent's restricted real estate salesperson's  
6 license is issued subject to the requirements of  
7 section 10153.4 of the Business and Professions Code,  
8 to wit:

9 Respondent shall, within eighteen (18) months of the  
10 issuance of the restricted license, submit evidence  
11 satisfactory to the Commissioner of successful  
12 completion, at an accredited institution, of two of  
13 the courses listed in section 10153.2, other than real  
14 estate principles, advanced legal aspects of real  
15 estate, advanced real estate finance or advanced real  
16 estate appraisal. If Respondent fails to timely  
17 present to the Department satisfactory evidence of  
18 successful completion of the two required courses, the  
19 restricted license shall be automatically suspended  
20 effective eighteen (18) months after the date of its  
21 issuance. Said suspension shall not be lifted unless,  
22 prior to the expiration of the restricted license,  
23 Respondent has submitted the required evidence of  
24 course completion and the Commissioner has given  
25 written notice to Respondent of lifting of the  
26 suspension.

27 5. Pursuant to section 10154, if Respondent has not

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satisfied the requirements for an unqualified license under section 10153.4, Respondent shall not be entitled to renew the restricted license, and shall not be entitled to the issuance of another license which is subject to section 10153.4 until four (4) years after the date of the issuance of the preceding restricted license.

1/12/05  
DATED

Michael B. Rich  
MICHAEL B. RICH, COUNSEL  
Department of Real Estate

\* \* \*

I have read this Stipulation and have discussed the terms with my counsel. The terms are understood by me and are agreeable and acceptable by me. I willingly and voluntarily agree to enter into this Stipulation.

01/06/04  
DATED

Kyle Paul Whissel  
KYLE PAUL WHISSEL  
Respondent

I have reviewed the Stipulation and Agreement as to form and content and have advised my client accordingly.

1-4-05  
DATED

John P. Murphy  
JOHN P. MURPHY  
Attorney for Respondent

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DECISION AND ORDER

The foregoing Stipulation and Waiver and Decision  
After Rejection is hereby adopted by the Commissioner of the  
Department of Real Estate as his Decision and Order.

This Decision shall become effective at 12 o'clock  
noon on FEBRUARY 28, 2005.

IT IS SO ORDERED

2-2-05

JEFF DAVI  
Real Estate Commissioner



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DEC 22 2004

DEPARTMENT OF REAL ESTATE

By Shelly Ely

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BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

\* \* \*

In the Matter of the Application of )  
KYLE PAUL WHISSEL, ) No. H-3065 SD  
Respondent. ) L-2004100506

NOTICE

TO: KYLE PAUL WHISSEL, Respondent and JOHN P. MURPHY, his Counsel.

YOU ARE HEREBY NOTIFIED that the Proposed Decision herein dated November 22, 2004, of the Administrative Law Judge is not adopted as the Decision of the Real Estate Commissioner. A copy of the Proposed Decision dated November 22, 2004, is attached for your information.

In accordance with Section 11517(c) of the Government Code of the State of California, the disposition of this case will be determined by me after consideration of the record herein including the transcript of the proceedings held on November 10,

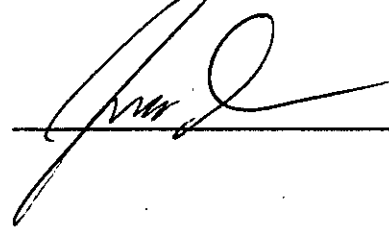
1 2004, and any written argument hereafter submitted on behalf of  
2 Respondent and Complainant.

3           Written argument of Respondent to be considered by me  
4 must be submitted within 15 days after receipt of the transcript  
5 of the proceedings of November 10, 2004, at the Sacramento office  
6 of the Department of Real Estate unless an extension of the time  
7 is granted for good cause shown.

8           Written argument of Complainant to be considered by me  
9 must be submitted within 15 days after receipt of the argument of  
10 Respondent at the Sacramento office of the Department of Real  
11 Estate unless an extension of the time is granted for good cause  
12 shown.

13           DATED: December 21, 2004

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15           JEFF DAVI  
16           Real Estate Commissioner

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BEFORE THE  
DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

In the Matter of the Application of:

KYLE PAUL WHISSEL,

Applicant/Respondent.

Case No. H-3065-SD

OAH No. L2004100506

**PROPOSED DECISION**

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on November 10, 2004, in San Diego, California.

Michael B. Rich, Counsel, represented Complainant J. Chris Graves, a Deputy Real Estate Commissioner, Department of Real Estate, State of California.

John P. Murphy, Attorney at Law, represented Applicant/Respondent Kyle Paul Whissel, who was present throughout the administrative hearing.

The matter was submitted on November 10, 2004.

**FACTUAL FINDINGS**

*Jurisdictional Matters*

1. On August 23, 2004, complainant J. Chris Graves, a Deputy Real Estate Commissioner, Department of Real Estate (the Department), State of California, signed the Statement of Issues in his official capacity.

The Statement of Issues and other required jurisdictional documents were served on applicant/respondent Kyle Paul Whissel (Whissel or Respondent).

Whissel timely filed a Notice of Defense on Application.

On November 10, 2004, the administrative record was opened. Jurisdictional documents were presented. Sworn testimony and documentary evidence was received. Closing arguments were given, the record was closed and the matter was submitted.

*The Application for Licensure*

2. On May 21, 2003, Whissel applied to the Department for the issuance of a real estate salesperson's license.

3. The application contained the following statements:

- **Carefully read and provide detailed answers to questions #24-26. You must provide a yes or no response to all questions.**
- "Convicted" as used in Question 25 includes a verdict of guilty by judge or jury, a plea of guilty or of nolo contendere, or a forfeiture of bail in municipal, superior or federal court. All convictions must be disclosed whether or not the plea of 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 conviction has been sealed under Section 1203.45 of the California Penal Code or Section 781 of the California Welfare and Institutions Code.

4. Question 25 asked:

**"HAVE YOU EVER BEEN CONVICTED OF ANY VIOLATION OF LAW? CONVICTIONS EXPUNGED UNDER PENAL CODE SECTION 1203.4 MUST BE DISCLOSED. HOWEVER, YOU MAY OMIT MINOR TRAFFIC CITATIONS WHICH DO NOT CONSTITUTE A MISDEMEANOR OR FELONY OFFENSE."**

5. Whissel marked the "YES" box below that question.

6. In response to Question 27, which asked for detailed explanations related to any convictions, Whissel represented his history included a January 2003 misdemeanor conviction in San Diego County, California, for violating Penal Code section 550(b)(1), for which he was placed on three years probation to the court and fined \$400.

7. In an Interview Information Statement submitted to the Department dated December 10, 2004, Whissel provided a work history, a description of his education, a description of his association with a community groups, a description of assets, a description of his criminal conviction, and a one page letter detailing the offense, his explanation for it, and his rehabilitative efforts. The deputy commissioner conducting the interview checked several boxes indicating Whissel was remorseful, candid, honest, sincere, demonstrated a good attitude and was professional at the interview.

*Whissel's Convictions*

8. On December 18, 2002, Whissel was convicted on his guilty plea of violating Penal Code section 550, subdivision (b)(1) (Presenting a False Statement in a Claim for

Insurance Payment), a felony, in the Superior Court of California, County of San Diego, in Case No. CD 170979 entitled *People of the State of California vs. Kyle Paul Whissel*. The change of plea form indicated, "DA agrees to reduction to misdemeanor per 17(b)(5) at PH's if no outstanding restitution matters."

On January 30, 2003, imposition of sentence was suspended and Whissel was placed on three years summary probation. That probation expires on January 20, 2006. Whissel was ordered to perform 20 days community service, pay a fines and fees of \$600, and obey all laws. The charge was reduced to a misdemeanor under Penal Code section 17, subdivision (b)(5).

#### *Circumstances of the Offense*

9. In 2001-2002, Whissel was attending UCSD as a full-time student and was working full time in retail sales at electronics stores. At some point, he was leasing two vehicles, a 2001 Toyota Celica and a 2002 Chevrolet Trailblazer. He was paying insurance on both vehicles. He attempted to sell 2001 Toyota Celica for approximately six months without any success. His car payments were approximately \$800 per month, his rent payment was \$900 per month, he was making insurance payments on two vehicles, he was a full time student and he found himself in financial difficulties.

For several months, an acquaintance asked Whissel for the 2001 Toyota Celica, saying he could have it dismantled and Whissel could say it was stolen. Whissel resisted these overtures for several months, and then capitulated. Whissel gave the acquaintance the keys to the Celica, then telephoned the Automobile Club and advised that his car had been stolen.

About a week later, a detective with the police department called Whissel and told him that he had evidence to establish that the Celica had not been stolen. The detective gave Whissel the opportunity to confess, he did so. Whissel thereafter called the Automobile Club and told them what had taken place. Whissel was arrested, charged with several crimes and convicted thereafter.

#### *Whissel's Testimony and Other Evidence*

10. Whissel is currently 22 years old. He lives in El Cajon, San Diego County, California. He graduated from University High School, where he participated in football, basketball, volleyball, ASB government and was a Special Olympics volunteer.

While Whissel in high school he worked at fast food restaurants, theatres and then at electronics stores. After graduating from high school, Whissel attended UCSD from 1999-2003. Whissel continued working full time while attending college. He graduated with a Bachelor of Arts degree in Economics in 2003.



11. The circumstances surrounding the offense giving rise to Whissel's conviction are described in Factual Finding 9. Whissel described it as a one time offense that ended up costing him more than \$20,000. Whissel testified, "I can't believe how stupid I was and how much I screwed my life up." This testimony was sincere.

12. Whissel paid all fines and fees. He provided 20 days public service. Whissel has complied with all terms and conditions of probation. His probation expires on January 29, 2006.

13. Whissel is obviously a very energetic, bright individual. He is involved in managing his own properties (a home in El Cajon, which he lives in and rents rooms out to others; two other properties on the residential property which he rents to others; and two properties in Buffalo, New York). Whissel testified he was "always intrigued by real estate," but now it is his passion.

14. Whissel's father, Robert Whissel (Robert), testified. Robert was diagnosed with Stage III cancer in November 23003. He was totally bedridden for five months. During this period of time, Whissel provided his father with care and support.

Robert owns Whissel Investment Properties, Inc., a real estate brokerage, which he operates out of his home. Robert has been a licensed real estate broker for about 20 years. He has employed numerous licensed persons during that time. Whissel provides Robert with invaluable administrative assistance and research.

Robert was really upset by the incident resulting in Whissel's conviction. He was "shocked to say the least . . . I had no idea where this came from." Robert testified that Whissel was and is very remorseful and that the incident has "changed his whole personality."

Robert testified his son is trustworthy.

15. Tony Sisouvanh (Sisouvanh) has known Whissel for more than 15 years. According to Sisouvanh, "It wasn't like [Whissel] to do such a thing. Sisouvanh said he was disappointed. After the incident, Sisouvanh observed Whissel become even more responsible and helpful to others.

#### *Evaluation*

16. In December 2002, Whissel was [charged with a felony and] convicted of a misdemeanor involving moral turpitude. The underlying offense occurred in September 2002. Whissel will remain on probation until January 20, 2006, unless he is successful in having his probation terminated earlier than that.

While Whissel did not engage in a spur of the moment offense, and while the offense took some sophistication and planning, the incident appears to be inconsistent with Whissel's otherwise law-abiding lifestyle. He has paid all fines and made all restitution.

Whissel has been gainfully employed since high school. He owns several properties and is a landlord. Whissel provides both personal and professional comfort and support to his father, a licensed real estate broker who suffers from cancer. Whissel testified in a believable manner. He was contrite and remorseful. Whissel did not attempt to blame others for his misfortune, but took full responsibility. It is clear he is making an effort to rehabilitate himself.

In considering whether a license should be denied on the basis of the conviction of a crime, California Code of Regulations, title 10, section 2910 deems a conviction to be substantially related to the qualifications, functions or duties of a Department licensee if the crime involves the fraudulent taking of funds belonging to another, the employment of fraud, deceit, falsehood or misrepresentation to achieve an end, the doing of any unlawful act with the intent of conferring a financial benefit upon the perpetrator, or the conviction of a crime constituting an attempt, solicitation or conspiracy to commit any of these acts.

On this basis, the conviction of Presenting a False Statement in a Claim for Insurance Payment conviction has a substantial relationship to the qualifications, functions and duties of a Department licensee.

The issue then becomes whether Whissel has rehabilitated himself to the extent it would not be contrary to public protection to issue him a real estate salesperson's license.

Using the Department's regulatory criteria to evaluate Whissel's rehabilitation,<sup>1</sup> the following appears: slightly more than two years has passed since Whissel's conviction; Whissel made restitution; Whissel has paid all fines; Whissel remains on probation and he has not been discharged from probation early; his conviction has not been expunged; Whissel's family life is stable; Whissel completed his Bachelor of Art degree at UCSD; Whissel discharged his debts; Whissel's involvement in the care of his father constitutes a significant and conscientious involvement in a program designed to provide social benefits; Whissel's family and friends have noted a change in his attitude; Whissel is contrite and remorseful.

How much rehabilitation is enough? In reevaluating this matter, it appears that the public interest would not be harmed if Whissel were to be issued a restricted license. While it was a close question, requiring Whissel to reapply for a license simply to have him show that he successfully completed his probation and obtained an expungement of his conviction was not required to protect the public. These matters can be covered in the conditions of probation attaching to the issuance of a restricted license.

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<sup>1</sup> See, California Code of Regulations, title 10, section 2911.

## LEGAL CONCLUSIONS

### *Burden and Standard of Proof*

1. In a proceeding involving the issuance of a license, the burden of proof is on the applicant to show that he or she is qualified to hold the license. The standard of proof is a preponderance of the evidence. See, *California Administrative Hearing Practice* (Second Edition), "The Hearing Process," sections 7.51-7.53, pp. 352-354, and the cases cited therein.

### *Applicable Statutes*

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

"(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. . .

...

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

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 . . . "

3. 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 . . .

...

(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 . . . "

### *Moral Turpitude/Substantial Relationship*

4. In *People v. Castro* (1985) 38 Cal. 3d 301, the California Supreme Court divided crimes of moral turpitude into two groups. The first group included crimes in which dishonesty was an element (i.e., fraud, perjury, etc.). The second group included crimes that indicated a "general readiness to do evil" from which a readiness to lie can be inferred. *People v. Chavez* (2000) 84 Cal.App.4th 25, 28.

5. Theft and moral turpitude are practically synonymous. *People v. Hunt* (1985) 169 Cal.App.3d 668, 675, fn. 5.

6. In *Harrington v. Department of Real Estate* (1989) 214 Cal.App.3d 394, 402, where the appellate court wrote:

“Conviction alone will not support a denial of a license unless the crime substantially relates to the qualifications, functions, or duties of the business or profession in question.”

and

“Honesty and truthfulness are two qualities deemed by the Legislature to bear on one’s fitness and qualification to be a real estate licensee. If appellant’s offenses reflect unfavorably on his honesty, it may be said he lacks the necessary qualifications to become a real estate salesperson. [Citation.] The Legislature intended to ensure that real estate brokers and salespersons will be honest, truthful and worthy of the fiduciary responsibilities which they will bear. [Citation.]”

7. California Code of Regulations, title 10, section 2910 sets forth the Department of Real Estate’s criteria to be used to determine if a substantial relationship exists between a conviction and the qualifications, functions or duties of a licensee. The application of these criteria is set forth in Factual Finding 16.

#### *Rehabilitation*

8. “Rehabilitation . . . is a ‘state of mind’ and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved ‘reformation and regeneration.’” *Pachecho v. State Bar* (1987) 43 Cal. 3d 1041, 1058.

The evidentiary significance of an applicant’s misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. *Kwasnik v. State Bar* (1990) Cal. 3d 1061, 1070.

Relative youth at the time of the misconduct is a mitigating circumstance. Admission of improper acts, recognizing the wrongfulness of the acts, expressing regret and cooperating with investigating agencies is a mitigating circumstance. See, *Segretti v. State Bar of California* (1976) 15 Cal. 3d 878, 888.

9. California Code of Regulations, title 10, section 2911 provides relevant criteria for rehabilitation. The applicable factors were discussed in Factual Finding 16.

*Cause Exists to Issue a Restricted License*

10. Cause exist to deny Whissel's application for an unrestricted real estate salesperson's license under Business and Professions Code section 480, subdivision (a) and Business and Professions Code section 10177, subdivision (b), but cause also exists to issue Whissel a restricted real estate salesperson license. Whissel was convicted of a crime involving moral turpitude and the conviction is fairly recent; however, the crime appears to have been an isolated event and Whissel has done everything in his power to atone for his misdeeds. Granting a restricted license under all the circumstances would not be contrary to the public interest.

This conclusion is based on all Factual Findings and on all Legal Conclusions.

ORDER

The application for an unrestricted Real Estate Salesperson License filed by Kyle Paul Whissel with the Department of Real Estate on May 21, 2003, is denied; provided, however, a restricted real estate salesperson license shall be issued to applicant under Business and Professions Code section 10156.5. The restricted license shall be subject to all of the provisions of Business and Professions Code section 10156.7 and shall be subject to the following limitations, conditions and restrictions imposed under Business and Professions Code section 10156.6:

1. The issuance of a restricted real estate salesperson 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) Whissel's conviction (including a conviction following a plea of guilty or nolo contendere) of any crime which is substantially related to Applicant's fitness or capacity as a real estate licensee; or

(b) The receipt of evidence that Whissel 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. Whissel shall successfully complete probation in Case No. CD 170979 entitled *People of the State of California vs. Kyle Paul Whissel* in the Superior Court of California, County of San Diego, and upon completion of probation he shall make application under Penal Code section 1203.4. Whissel shall forward evidence of his successful completion of probation and his application under Penal Code section 1203.4 to the Real Estate Commissioner no later than February 1, 2006. Evidence of his completion and application shall be provided by certified mail, return receipt requested, to Department of Real Estate headquarters in Sacramento, CA.

NOT ADOPTED

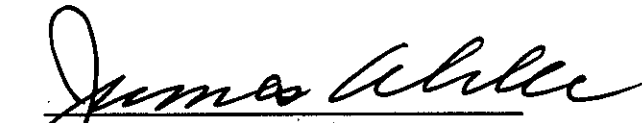
3. Whissel shall not be eligible to apply for the issuance of an unrestricted real estate salesperson license nor for the removal of any of the conditions, limitations or restrictions attaching to the restricted license until three years have elapsed from the date of issuance of the restricted license.

4. With the application for license, or with the application for transfer to a new employing broker, Whissel 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 Whissel's performance of acts for which a license is required.

DATED: 11/22/04.

  
JAMES AHLER  
Administrative Law Judge  
Office of Administrative Hearings

RECEIVED  
NOV 23 2004  
SACRAMENTO LEGAL

NOT BOARDED

BEFORE THE DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

FILED  
OCT 20 2004

DEPARTMENT OF REAL ESTATE

In the Matter of the Application of

KYLE PAUL WHISSEL

Case No. H-3065 SD

OAH No.

By Shelly Ely

Respondent

FIRST AMENDED  
NOTICE OF HEARING ON APPLICATION

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 WEDNESDAY--NOVEMBER 10, 2004, at the hour of 9:00 A.M., or as soon thereafter as the matter can be heard, upon the Statement of Issues 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.

The burden of proof is upon you to establish that you are entitled to the license or other action sought. If you are not present nor represented at the hearing, the Department may act upon your application without taking evidence.

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.

DEPARTMENT OF REAL ESTATE

Dated: OCTOBER 20, 2004

By Michael B. Rich  
MICHAEL B. RICH, Counsel (S.E.)

BEFORE THE DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

FILED  
OCT 14 2004

DEPARTMENT OF REAL ESTATE

In the Matter of the Application of

By Shelly Ely

KYLE PUAL WHISSEL

} Case No. H-3065 SD

} OAH No.

\_\_\_\_\_  
Respondent

**NOTICE OF HEARING ON APPLICATION**

**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 **THURSDAY--NOVEMBER 10, 2004**, at the hour of **9:00 A.M.**, or as soon thereafter as the matter can be heard, upon the Statement of Issues 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.

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DEPARTMENT OF REAL ESTATE

Dated: OCTOBER 14, 2004

By Michael B. Rich  
MICHAEL B. RICH, Counsel (S.E.)



1 MICHAEL B. RICH, Counsel  
State Bar No. 84257  
2 Department of Real Estate  
P. O. Box 187007  
3 Sacramento, CA 95818-7007  
4 Telephone: (916) 227-0789  
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FILED  
SEP 17 2004  
DEPARTMENT OF REAL ESTATE  
By *Shelly Ely*

8 BEFORE THE DEPARTMENT OF REAL ESTATE  
9 STATE OF CALIFORNIA

10 \* \* \*

11 In the Matter of the Application of )  
12 KYLE PAUL WHISSEL, ) No. H-3065 SD  
13 Respondent. ) STATEMENT OF ISSUES  
14

15 The Complainant, J. CHRIS GRAVES, a Deputy Real Estate  
16 Commissioner of the State of California, for Statement of Issues  
17 against KYLE PAUL WHISSEL (hereinafter "Respondent"), is informed  
18 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 May 21, 2003, 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 10153.4  
25 of the Business and Professions Code.

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II

Complainant, J. CHRIS GRAVES, a Deputy Real Estate Commissioner of the State of California, makes this Statement of Issues in his official capacity and not otherwise.

III

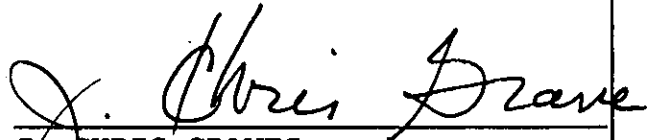
On or about January 30, 2003, in the Superior Court, County of San Diego, State of California, Respondent was convicted of a violation of Section 550(b)(1) of the California Penal Code (False or fraudulent insurance claim with intent to defraud), a felony reduced to a misdemeanor pursuant to Section 17(b) of the California Penal Code involving moral turpitude 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.

IV

The crime of which Respondent was convicted, as alleged in Paragraph III, constitutes cause for denial of Respondent's application for a real estate license under Sections 480(a) 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 charges  
3 contained herein, that the Commissioner refuse to authorize the  
4 issuance of, and deny the issuance of, a real estate salesperson  
5 license to Respondent, and for such other and further relief as  
6 may be proper under other provisions of law.  
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9                     
10                   J. CHRIS GRAVES  
                    Deputy Real Estate Commissioner

11 Dated at San Diego, California,  
12 this 23<sup>rd</sup> day of August, 2004.  
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