

FILED

NOV 19 2018

DEPT. OF REAL ESTATE

BEFORE THE DEPARTMENT OF REAL ESTATE By 

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of:

MOISES CONTRERAS,

Respondent.

) DRE No. H-03194 FR

) OAH No. 2018070764

) DRE No. H-01960 FR

) OAH No. 2018080310

DECISION

The Proposed Decision dated October 19, 2018, 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.

Pursuant to Government Code Section 11521, the Department 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 Department'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 DEC 10 2018

IT IS SO ORDERED November 14, 2018

DANIEL SANDRI
ACTING REAL ESTATE COMMISSIONER

Daniel J. Sandri

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation
Against:

MOISES CONTRERAS,

Respondent.

DRE No. H-03194 FR

OAH No. 2018070764

In the Matter of the Accusation
Against:

MOISES CONTRERAS,

Respondent

DRE No. H-1960 FR

OAH No. 2018080310

PROPOSED DECISION

Ji-Lan Zang, Administrative Law Judge, Office of Administrative Hearings heard these consolidated matters on October 8, 2018, in Los Angeles, California.

Judith B. Vasan, Counsel, represented Brenda Smith (complainant), Supervising Special Investigator, Department of Real Estate (Department).

Jonathan C. Turner, Attorney at Law, represented Moises Contreras (respondent), who was present.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on October 8, 2018.

The matters were consolidated for hearing and decision at the Department's request pursuant to California Code of Regulations, title 1, section 1016, subdivision (d).

FACTUAL FINDINGS

Parties and Jurisdiction

1. On July 22, 2005, respondent submitted an application to the Department for a real estate salesperson license. The Department denied respondent's application based on

allegations of prior criminal convictions. Respondent appealed. Following a disciplinary hearing in case number H-1960 FRESNO (OAH case number 2006080692), on November 6, 2006, the Department, by a Decision and Order (2006 Decision and Order), effective December 4, 2006, denied respondent's application but issued him a restricted real estate salesperson license.

2. On January 10, 2011, respondent petitioned for the removal of restrictions attached to his real estate salesperson license. On July 5, 2011, the Department granted respondent's petition for removal of restrictions and issued respondent an unrestricted real estate license, conditioned upon respondent's (1) submission of a complete application and payment of fees for a real estate salesperson license within the 12-month period following the order and (2) submission of proof of completion of continuing education requirements. Respondent failed to submit a complete application and to pay the fees for a real estate salesperson license. Therefore, respondent's real estate salesperson license remained restricted.

3. Respondent's restricted license will expire on January 24, 2019, unless renewed. Respondent presently holds licensing rights under the Real Estate Law, Part 1 of Division 4, of the Business and Professions Code.

4. On June 11, 2018, pursuant to his authority under Business and Professions Code section 10156.7, the Real Estate Commissioner suspended respondent's license by an Order Suspending Restricted Real Estate License. The order alleged that respondent had violated the terms and conditions of his restricted license. Specifically, Condition 1 of the 2006 Decision and Order, provided, in pertinent part:

... the Real Estate Commissioner may by appropriate order suspend the right to exercise any privileges granted under this restricted license in the event of... the conviction of [r]espondent (including a plea of nolo contendere) of a crime which is substantially related to [r]espondent's fitness or capacity as a real estate licensee. ...

(Ex. 4, pp. 5-6.)

5. On June 22, 2018, complainant filed the Accusation in her official capacity. The Accusation alleged that respondent was convicted of a crime that is substantially related to the qualifications, functions, or duties of a real estate licensee.

6. Respondent timely filed Notices of Defense and requested hearings on the Accusation and the Order Suspending Restricted Real Estate License. On August 27, 2018, pursuant to a motion filed by complainant's counsel, these matters were consolidated. This hearing ensued.

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Respondent's Criminal Conviction

7. On June 27, 2017, respondent was convicted on his plea of nolo contendere to violating Penal Code section 273.5, subdivision (a), inflicting corporal injury on a spouse or cohabitant, a felony. (Superior Court of California, County of Kern, case number BF164948A.) On July 19, 2018, the court reduced the felony to a misdemeanor pursuant to Penal Code section 17, subdivision (b).

8. Respondent was placed on formal probation for three years under terms and conditions, including incarceration for four days, with credit for two days for time served and two days of work time; payment of \$920 in fines, fees and restitution; performance of 100 hours of community service; and completion of a 52-week batterer's intervention program and outpatient substance abuse counseling.

9. Respondent served his time in jail, paid all of the court-ordered fines, fees, and restitution, and performed the required 100 hours of community service. He also completed the 52-week batterer's intervention program and the outpatient substance abuse counseling. Although respondent reported that he is no longer on formal probation due to the reduction of his felony conviction to a misdemeanor, respondent did not present any evidence that he has completed, or has been discharged from, his three-year probation. No evidence was presented that respondent's conviction has been dismissed pursuant to Penal Code section 1203.4.

10. The facts and circumstances surrounding respondent's conviction¹ are as follows: On July 2, 2016, at respondent's residence, respondent and his ex-girlfriend had a verbal argument, which escalated into physical struggle over the ex-girlfriend's cellphone. As his ex-girlfriend turned to leave, respondent tackled her from behind, which caused her to fall face down on the tiled floor. Later that day, respondent's ex-girlfriend sought treatment at a hospital, and the incident was reported to the Bakersfield Police Department. The responding officer observed that respondent's ex-girlfriend suffered the following injuries: (1) purple bruising in the left eyelid and redness in the left eye; (2) an approximate one centimeter laceration in the middle inner portion of the lower lip; (3) an approximate one-

¹These facts and circumstances were established by an arrest report, dated July 4, 2016, which was admitted into evidence subject to *Lake v. Reed* (1997) 16 Cal.4th 448. In *Lake v. Reed*, the California Supreme Court held that certain information contained in a police report is admissible in an administrative proceeding. The personal observations of the investigating officer and any admissions of the arrestee or respondent as contained in the report are admissible for all purposes. However, statements in a police report that are attributable to others, such as witnesses, are admitted for the limited purpose of explaining or supplementing other evidence, pursuant to Government Code section 11513, subdivision (d). In this case, the direct observations of the responding officer were admitted as direct evidence, and the witness statements contained therein were admitted to the extent that they supplemented or explained other direct evidence, including admissions made by respondent at the hearing.

half centimeter laceration in the middle outer portion of the lower lip; (4) one circular two-inch by two-inch bruise on the left shoulder; (5) two one-centimeter by one-centimeter circular purple bruises in the inner left bicep; (6) two circular bruises on the right inner portion of the bicep; (7) circular redness on the right outer portion of the elbow; and (8) circular bruises on the inner portion of the left knee. (Ex. 7, p. 8.) Pictures taken by respondent's girlfriend immediately after the incident also showed that she suffered "large dark bruising on her shoulder, bicep, [and] breast." (*Id.* at p. 11.) On July 5, 2016, respondent turned himself in to the police department, and he was arrested.

Respondent's Testimony Regarding His Criminal Conviction

11. At the hearing, respondent claimed that his ex-girlfriend was the aggressor during the July 2, 2016 incident. According to respondent, he and his ex-girlfriend had recently broken up. However, on July 2, 2016, after consuming several beers, he invited her to a dance club and then to his residence. At his house, respondent and his ex-girlfriend sat down in the master bedroom and began to discuss why their relationship had ended. Respondent's account of what occurred next is jumbled. Respondent testified that his ex-girlfriend became upset and threw her cellular phone at him. She then came up to respondent and attempted to strike and bite him. Respondent purportedly held his ex-girlfriend down to calm her, and then he retreated into the master bedroom closet. However, respondent stated that his ex-girlfriend, despite his retreat, somehow followed him into the living room and pinned him down. Again, after calming her down, respondent walked his ex-girlfriend to the hallway, where she reportedly struck him in the face with her cellular phone. Respondent admitted that, at this point, although his ex-girlfriend had already turned to walk away, he tackled her from behind, which caused her to fall face down on the tiled floor of the hallway. When he saw that his ex-girlfriend was bleeding in the face, respondent reportedly got off her, apologized, and offered to help. However, respondent claimed that the ex-girlfriend refused any help and left.

12. During cross-examination, respondent denied that after tackling his ex-girlfriend from behind, he pounded her face into the floor. He denied punching ex-girlfriend on her upper body. He also denied that his ex-girlfriend suffered any injuries to her eyes.

13. Respondent's testimony regarding the facts and circumstances surrounding the July 2, 2016 incident was dissembling and not credible. According to respondent, his only act of physical violence was to tackle his girlfriend from behind, which caused her to fall and cut her lips. However, according to the arrest report, the injuries suffered by respondent's ex-girlfriend were extensive, with bruising that covered large parts of her body, including her biceps, shoulders, breast, elbows, and knee. Her left eye was also red, and she had purple bruising in her left eyelid. Respondent's version of the events of July 2, 2016 incident fails to explain how his ex-girlfriend had sustained those additional injuries if she only fell down and cut her lips.

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Evidence of Mitigation/Rehabilitation

14. Respondent is 46 years old. He graduated from University of California, Los Angeles in 1995. Subsequently, respondent worked as a substitute teacher in Delano, California. In 2009, he received a master's degree in education from Fresno Pacific University and obtained an administrator's credential to become a principal. After receiving his administrator's credential, respondent worked for the Department of Corrections at Wasco State Prison.

15. Due to budget cuts, respondent was laid off from the Department of Corrections in 2011, and he began to work full time as a real estate salesperson for Miramar International (Miramar). Prior to 2011, respondent worked part time in real estate and conducted transactions based on referrals from family and friends. At Miramar, respondent worked on distressed properties, and his performance in his first year earned him an award as the salesperson of the year.

16. In 2014, respondent returned to full time work for the Department of Corrections as an educator. He was eventually promoted to the position of Vice Principal at Pleasant Valley Prison. As a result of his arrest in 2016, respondent lost his job at Pleasant Valley Prison. According to respondent, his administrator's credential has expired, and the credential is currently, in his own words, "under review."

17. Respondent testified that he had entered into the relationship with his girlfriend during a stressful time in his life, when he was undergoing a divorce and custody battle with his ex-wife. Respondent claimed that, during the span of the ten-month relationship with his ex-girlfriend, she was the abuser and he was the victim of domestic violence. Respondent stated that his ex-girlfriend had prior violent outbursts, during which she had thrown an iron at him, scratched him, and thrown other household items through the window at their residence. Respondent claimed that he always responded by retreating and that he had never injured his ex-girlfriend during any of these prior incidents. During further questioning, respondent was asked as to what had triggered his actions on the night of July 2, 2016, if he had always retreated during the prior incidents of domestic violence. After a few moments of hesitation, respondent answered that the end of the dating relationship had triggered his actions because he had felt protective towards his ex-girlfriend while they were in a relationship together.

18. The credibility of respondent's claims regarding the history of his relationship with his ex-girlfriend is difficult to assess, given that she did not testify at the hearing. Nevertheless, it is undisputed that on July 2, 2016, respondent tackled his ex-girlfriend at a moment when he was not physically in danger because she had already turned to walk away. The evidence in the case also demonstrates that respondent's ex-girlfriend suffered severe physical injuries as a result of that attack. According to respondent's account, because they were no longer dating, he transformed overnight from being the victim of domestic violence who wanted to protect his abuser to being the perpetrator who attacked his ex-girlfriend with

such violence that she suffered bruising all over her face and body. This version of the events simply does not ring true.

19. Respondent claimed that he takes full responsibilities for his actions. He averred that a similar incident would not recur because he now understands what domestic violence is and he would never again place himself in an unhealthy relationship. Respondent maintained that if he were in an unhealthy relationship again, he would now ask for help.

20. In a letter dated September 14, 2018, Amy Christiansen, owner of Behavioral Intervention Services, wrote that respondent had completed the 52-week batterer intervention program with "perfect attendance and complied with all course requirements." (Ex. B, p. 2.) Additionally, Ms. Christiansen noted, "It is highly unlikely that [respondent] will ever place himself in this position [as a victim of domestic violence] again. However, he agrees that he did not handle the situation in a positive manner and that he would handle the issues very differently now." (*Id.*)

21. Respondent submitted several character reference letters. All of the authors are aware of respondent's criminal conviction but praised respondent's character. Most significantly, Dan Shanyfelt, Chief Executive Officer of Miramar Realty, wrote that respondent is "a kind hearted, honest, caring and contributing member of our community." (Ex. E, p. 16.) Mr. Shanyfelt also stated that he would hire respondent as a salesperson at Miramar if he were issued a restricted license. Leticia Pacheco, respondent's ex-wife, also wrote a letter dated September 13, 2018, in support of respondent. She noted in her letter that respondent was never physically violent towards her and that he "is a good man and a good father to his kids." (*Id.* at p. 26.)

22. Respondent now enjoys a stable family life. He shares custody of his two children with his ex-wife. He also serves as a volunteer at various events at his children's schools.

Costs

23. Complainant submitted evidence of the costs of investigation and enforcement of this matter, summarized as follows: 37.55 hours in investigation activities by three Department employees at rates ranging from \$62 to \$80 per hour (subtotal \$2,387.50); and 9.6 hours of legal services at the rate of \$89 per hour (subtotal \$854.40). The total costs of investigation and enforcement are \$3,241.90. These costs are reasonable.

24. Since his real estate license was suspended in June 2018, respondent has been unemployed, and he is currently receiving unemployment benefits.

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LEGAL CONCLUSIONS

The Accusation

1. The standard of proof for the Department to prevail on the Accusation is clear and convincing evidence to a reasonable certainty. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853.) Clear and convincing evidence requires proof that is so clear as to leave no substantial doubt and that is sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478, 487.)
2. Under Business and Professions Code section 10177, subdivision (b), a real estate licensee may have his license suspended or revoked for conviction of a crime if it is substantially related to the qualifications, functions, or duties of a real estate licensee. Similarly, under Business and Professions Code section 490, subdivision (a), the Department 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."
3. During closing argument, respondent's counsel asserted that respondent had pled nolo contendere pursuant to *People v. West* (1970) 3 Cal.3d 595, and therefore, he did not make any admissions as to the underlying facts of the case. This argument is a misreading of *People v. West*, in which the California Supreme Court held that it is proper for a defendant to enter a plea to a lesser charge that was not factually supported to take advantage of more lenient sentencing. Significantly, the Court noted: "A defendant who knowingly and voluntarily pleads guilty or nolo contendere can hardly claim that he is unaware that he might be convicted of the offense to which he pleads; his plea demonstrates that he not only knows of the violation but is also prepared to admit each of its elements. [Citations omitted]." (*Id.* at p. 612.) Pursuant to Business and Professions Code section 10177, subdivision (b), the Legislature has authorized the Department to impose administrative discipline based on a conviction of any offense substantially related to the qualifications, functions, or duties of a real estate licensee. There is no language in *People v. West* that can be interpreted to mean that the entry of a plea of nolo contendere to a criminal charge should be treated as anything but a conviction. Regardless of the various motives that may have impelled the plea, the conviction stands as conclusive evidence of respondent's guilt of the offense charged. The Department is not required to re-litigate the issue of respondent's guilt. (Bus. & Prof. Code, § 490, subd. (a); *Arneson v. Fox* (1980) 28 Cal.3d 440, 452.) Based on the foregoing, respondent's argument is found to be without merit and therefore rejected.
4. Respondent's conviction for inflicting corporal injury upon a spouse or cohabitant bears a substantial relationship to the qualifications, functions, or duties of a real

estate licensee under California Code of Regulations,² title 10, section 2910, subdivision (a)(8), in that the conviction involved an unlawful act done with the intent or threat of substantial injury to the person of another.

5. Based on Factual Findings 1 through 10 and Legal Conclusion 1 through 4, cause exists to suspend or revoke respondent's real estate salesperson license pursuant to Business and Professions Code sections 490, subdivision (a), and 10177, subdivision (b), because respondent was convicted of a crime that is substantially related to the qualifications, functions, or duties of a real estate licensee.

6. Criteria have been developed by the Department to evaluate the rehabilitation of a licensee who is subject to discipline on account of a crime. These criteria, found at 10 CCR, section 2912, are summarized as follows:

Subdivision (a), passage of at least two years since the conviction; the two-year period may be increased based upon consideration of the nature and severity of the crime(s) and/or act(s) and the licensee's history of "substantially related" criminal convictions and/or license discipline.

Subdivision (b), restitution;

Subdivision (c), expungement of the conviction;

Subdivision (d), expungement of the requirement to register as a sex offender;

Subdivision (e), completion of, or early discharge from, the criminal probation;

Subdivision (f), abstinence of at least two years from drugs or alcohol that contributed to the crime;

Subdivision (g), payment of any criminal fines or penalties;

Subdivision (h), correction of business practices causing injury;

Subdivision (i), new and different social and business relationships;

Subdivision (j), stability of family life;

Subdivision (k), enrollment in or completion of educational or training courses;

Subdivision (l), significant involvement in community, church or private programs for social betterment; and

Subdivision (m), change in attitude from the time of conviction to the present, evidenced by: testimony of the licensee and others, including family members, friends or others familiar with his previous conduct and subsequent attitudes and behavior patterns, or probation or parole officers or law enforcement officials; psychiatric or therapeutic evidence; and absence of subsequent convictions.

7. Respondent has complied with a few of the Department's rehabilitation criteria. He paid all fines imposed in connection with his criminal conviction (subd. (g)); and he now enjoys a stable family life (subd. (j)). However, respondent has failed to meet other criteria for rehabilitation. Less than two years have elapsed since his conviction for inflicting corporal injury upon a spouse or cohabitant. Indeed, even though respondent's conviction

² All references to the California Code of Regulations are to title 10, and are designated "10 CCR."

was reduced to a misdemeanor, the two-year period of rehabilitation should be lengthened in light of the serious nature of his crime and his prior history of license discipline. Respondent remains on probation and has not obtained a dismissal pursuant to Penal Code section 1203.4.

8. Most importantly, respondent has not shown a change of attitude from that which existed at the time of his crime. Respondent minimized his misconduct by characterizing it as a failure to recognize and leave an unhealthy relationship. However, respondent's criminal conviction and the underlying facts demonstrate that he was not merely a passive victim caught in a bad relationship. In fact, by respondent's own admission, on the night of July 2, 2016, he tackled his ex-girlfriend from behind, after she had already turned to leave. Respondent's action was aggressive, overt, and self-directed. Respondent was also less than candid when he denied causing injuries to his ex-girlfriend beyond a cut lip, when the arrest report showed that the injuries his ex-girlfriend suffered as a result of the domestic violence incident were severe and extensive. Ms. Christiansen's letter further confirms that respondent's participation in the batterer's intervention program has focused on his perceived role as the victim rather than the perpetrator in the domestic violence incident. Until respondent becomes more candid and gains greater insight into the elements underlying his criminal offense, his rehabilitative efforts remain incomplete. And until then, respondent is not a fit and proper person to hold a real estate salesperson license.

The Order Suspending the Restricted Real Estate License

9. Pursuant to Business and Professions Code section 10156.7, subdivision (b), the real estate commissioner may, without a hearing, issue an order suspending a licensee's restricted license pending final determination made after formal hearing.

10. Based on Factual Findings 1 through 10 and Legal Conclusion 9, cause exists to suspend respondent's restricted real estate salesperson license pursuant to Business and Professions Code section 10156.7, subdivision (b). By virtue of his conviction, respondent violated Condition 1 of the 2006 Decision and Order that restricted his real estate salesperson license.

11. Respondent suffered his criminal conviction while his real estate salesperson license was restricted. Respondent's actions demonstrate an inability to comply with the law and with the conditions of his license discipline. To protect public interest, health, and welfare, the Order Suspending Restricted Real Estate License is affirmed.

Costs

12. Under Business and Professions Code section 10106, the Department may recover costs "not to exceed the reasonable costs of the investigation and enforcement" of this matter. As set forth in Factual Finding 23, the reasonable costs of investigation and enforcement amount to \$3,241.90.

13. Given the nature of the order below, however, respondent will not be required to pay these costs until he is reinstated as a licensee of the Department.

ORDER

1. All licenses and licensing rights of respondent Moises Contreras under the Real Estate Law are revoked. If and when respondent's license is reinstated, he shall pay to the Real Estate Commissioner the costs associated with the investigation and enforcement of this case pursuant to Business and Professions Code section 10106 in the amount of \$3,241.90.

2. The Order Suspending the Restricted Real Estate License of respondent Moises Contreras is affirmed.

DATED: October 19, 2018

DocuSigned by:
Ji-Lan Chang
JI-LAN CHANG
Administrative Law Judge
Office of Administrative Hearings