

**FILED**

BEFORE THE DEPARTMENT OF REAL ESTATE

NOV 13 2019

STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE  
By B. Nicholas

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In the Matter of the Accusation of:

) DRE No. H-3208 FR

ALBERT LIMA BARCELOS,

) OAH No. 2019040061

Respondent.

DECISION

The Proposed Decision dated October 11, 2019, 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 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 04 2019.

IT IS SO ORDERED November 12, 2019

DANIEL J. SANDRI  
ACTING REAL ESTATE COMMISSIONER

*Daniel J. Sandri*

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

**In the Matter of the Accusation of:**

**ALBERT LIMA BARCELOS, Respondent**

**Case No. H-3208 FR**

**OAH No. 2019040061**

**PROPOSED DECISION**

This matter was heard before Dena Coggins, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, on August 27, 2019, in Sacramento, California.

Truly Sughrue, Counsel for the Department of Real Estate (Department), represented Brenda Smith (complainant), a Supervising Special Investigator of the State of California.

Albert Lima Barcelos (respondent) represented himself at the hearing.

Oral and documentary evidence was received. Respondent was given until September 10, 2019, to submit additional documents, and complainant was given until September 13, 2019, to object to those documents. No additional document was submitted by respondent. The record was closed and the matter was submitted for decision on September 13, 2019.

## FACTUAL FINDINGS

### Jurisdictional Matters

1. Respondent was licensed and had license rights under the Real Estate Law, Part 1 of Division 4 of the Business and Professions Code as a real estate salesperson at all relevant times. Respondent's real estate salesperson license was issued on June 23, 2011, and the license expired on July 13, 2019.

2. On October 25, 2018, complainant signed and subsequently filed the Accusation in her official capacity. Complainant seeks to discipline respondent's real estate salesperson license on the ground that he engaged in conduct that constitutes fraud or dishonest dealing while performing his duties as a licensed real estate salesperson.

3. Respondent timely filed a Notice of Defense, pursuant to Government Code section 11506. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

### July 16, 2017 Incident

4. Pamela Y. and respondent were coworkers and have known each other for over ten years. In June 2017, following the recent passing of her husband, Pamela Y. entered into a listing agreement with respondent to sell her home. Respondent listed the home on the market in June 2017. Pamela Y. later filed a complaint with the Department alleging that respondent, while hosting an open house for the sale of her home, stole tools from her garage.

5. Araceli Amezola testified at the hearing. She has a bachelor's degree in criminology and has been a special investigator for the Department for two and one-half years. Her duties include investigating complaints made by consumers against real estate licensees. As part of her investigations, she collects evidence and interviews witnesses. She was previously employed as a probation officer for the County of Fresno, where she prepared reports and recommendations for sentencing.

6. Ms. Amezola was assigned to investigate Pamela Y.'s complaint against respondent. She interviewed Pamela Y. on September 5, 2017, and memorialized the interview in a memorandum, dated the same day.

7. On October 11, 2017, Ms. Amezola interviewed respondent. Respondent told her he has known Pamela Y. for several years and believed they had a friendly relationship. He helped her with her real estate needs, which included listing her home for sale. On July 16, 2017, respondent held an open house of Pamela Y.'s home while she was out of town. Pamela Y. informed respondent he could help himself to drinks or food in the home, which caused him to believe they had a "good" relationship. During the open house, respondent's brother informed him that their father had been in a car accident and requested respondent go to the scene of the accident and check on their father. Respondent panicked and took tools stored in the garage when he left, which he thought might be helpful when responding to the accident. Respondent put the tools in a box then left the open house to help his father.

8. Respondent told Ms. Amezola that on the evening of the open house, Pamela Y. contacted respondent and asked if anyone had been in her garage. Respondent told her he took tools from her garage he thought would be helpful when responding to the accident. He informed her he would return the tools to her as soon as he had a chance. The next morning, Pamela Y. called respondent to check on his

father. They agreed respondent would return the tools that afternoon. At noon, Pamela Y. called respondent with a "different tone" and demanded that he return the tools immediately. Respondent agreed and went to Pamela Y.'s home to return them. While at the home, respondent noticed a police officer there. Respondent returned the tools to Pamela Y. and left the scene.

9. Respondent provided a written statement to Ms. Amezola, dated October 11, 2017, that was consistent with the oral statements he made to her. In his written statement, respondent explained that he was aware that Pamela Y. wanted to sell her home because her husband had recently passed away and she no longer wanted to live in the home. When buyers or agents viewed her home, she wanted respondent to "follow any one [sic] who is in the property around – even if they had there [sic] agent with them." Respondent "advised her to put away any items that were valuable or move items that she did not want seen by any clients."

10. In an Atwater Police Department report, dated July 17, 2017, the responding police officer memorialized his discussion with respondent that occurred at Pamela Y.'s home on that same date. Respondent admitted taking the tools and stated he did not intend to keep them. He acknowledged the wrongfulness of his conduct, but believed Pamela Y. would not care because he had "known her for so long and she told him he could make himself at home in her home." The officer observed respondent apologize to Pamela Y. for taking the tools.

### **Respondent's Testimony**

11. Respondent testified at the hearing. Respondent owns a dairy in Atwater, California, which has been his primary source of income since 1995.

12. Respondent's testimony about the July 16, 2017 incident was consistent with the statements he made to Ms. Amezola and to the police. He admitted he took tools from Pamela Y.'s garage during the open house. He denied intending to steal the tools. Respondent acknowledged that he should have received permission before taking the tools, but he believed he could take the tools because they were friends. He believed they were friends because they were former coworkers who talked about personal matters at work, he helped Pamela Y.'s daughter sell her home, and he and Pamela Y. had previously looked at open houses together. He agreed that it was his duty as Pamela Y.'s real estate agent to act honestly and with utmost care. Respondent planned to return the tools the day after he took them.

### **Discussion**

13. Respondent's conduct on July 16, 2017, is troubling. While working as a real estate salesperson, he hosted an open house at Pamela Y.'s property, and without her permission, took Pamela Y.'s tools from her garage. He did not inform Pamela Y. that he had taken the tools until she called and asked whether someone had been in the garage. He did not return the tools until the following day, when Pamela Y. demanded that he return them. Despite knowing Pamela Y. was concerned about items being taken from her property by potential buyers, respondent, while acting as her real estate agent, took her personal items from her home for his own benefit. As a real estate agent, respondent is entrusted with access to confidential information, valuable assets, and sentimental property of others, including his clients. He is required to use good judgment, be trustworthy, and act in the best interest of his clients. Here, respondent abused his position of trust. Complainant established by clear and convincing evidence that respondent's act of taking the tools without permission from

his client's home was a dishonest act and provides sufficient grounds to discipline his license.

14. While respondent's misconduct is serious and warrants discipline, respondent immediately admitted to taking the tools when he spoke to Pamela Y. on the evening he removed them. He returned the tools to her the next day and apologized for his actions. He took full responsibility for the wrongfulness of his conduct and he cooperated with law enforcement and the Department's investigator in their investigation of the matter. Additionally, there was no evidence that respondent's license has been previously disciplined.

15. When all the evidence is considered, granting respondent a restricted real estate salesperson license on the terms and conditions set forth below would be appropriate to ensure that the public health, safety and welfare are adequately protected.

### **Costs**

16. Pursuant to Business and Professions Code section 10106, complainant requested that respondent be ordered to pay its investigation and enforcement costs, in the amount of \$3,910, for 57 investigation hours, and enforcement costs, in the amount of \$1,335 for 15 enforcement hours, for a total amount of \$5,245.

17. Complainant submitted a Certified Statement of Investigation Costs, prepared by complainant, that describes the investigative activity, number of hours spent on the task, and hourly rate charged to investigate the matter. The specified investigative costs include 12.5 hours of "report writing" and 23.6 hours of "deputy review." Also, complainant submitted the Certified Statement of Costs by Ms. Sughrue, detailing the costs of enforcement (prosecution) and a description of the general tasks



performed and time spent on each task. Respondent did not contest the reasonableness of the costs, and did not represent that he cannot pay the requested costs.

18. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the Court identifies the factors to be considered in determining the reasonableness of costs pursuant to statutory provisions like Business and Professions Code section 10106. The factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced; the licensee's subjective good faith belief in the merits of his or her position; whether the licensee has raised a colorable challenge to the proposed discipline; the financial ability of the licensee to pay; and whether the scope of the investigation was appropriate to the alleged misconduct.

19. The scope of the investigation (57 hours of investigation) was not reasonable based upon the complexity of the investigation. Complainant submitted only two memoranda prepared by Ms. Amezola for two interviewed witness—respondent and Pamela Y. No reports were produced at hearing nor did Ms. Amezola indicate that she prepared a report, or what, if any, information appeared in the report that was essential to her investigation, despite spending 12.5 hours "report writing." No evidence was presented at hearing that indicates 12.5 hours of report writing was needed to perform the investigation. Further, the evidence presented at hearing does not support 23.6 hours of "deputy review." The issues that were investigated were not complex. Respondent admitted to the alleged misconduct on the day it occurred to the responding police officer and later to Ms. Amezola. For these reasons complainant's request for investigative costs are reduced by half.

20. When all the factors in *Zuckerman* are considered, reasonable investigative costs are \$1,955. The cost of enforcement of the matter was reasonable. There is no need to reduce the requested cost of enforcement.

### LEGAL CONCLUSIONS

1. Administrative proceedings to revoke, suspend, or impose discipline on a professional license are noncriminal and non-penal. They are not intended to punish the licensee, but rather to protect the public. (*Sulla v. Board of Registered Nursing* (2012) 205 Cal.App.4th 1195, 1206.)

2. Complainant has the burden of proving each of the grounds for discipline alleged in the Accusation, and must do so by clear and convincing evidence. (*Ettlinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) Clear and convincing evidence is evidence that leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478.) As explained below, complainant met her burden of proof as to the alleged cause for discipline.

3. Business and Professions Code section 10176, subdivision (i), provides:

The commissioner may, upon his or her own motion, and shall, upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this state, and he or she may temporarily suspend or permanently revoke a real estate license at any time where the licensee, while a real estate licensee, in performing or

attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following: . . .

- (i) Any other conduct, whether of the same or of a different character than specified in this section, which constitutes fraud or dishonest dealing.

4. Business and Professions Code section 10177, subdivision (j), provides that the commissioner may suspend or revoke the license of a real estate licensee if he has "engaged in any other conduct, whether the same or a different character than specified in this section, that constitutes fraud or dishonest dealing."

5. As set forth in Factual Findings 7 through 9, 12, and 13, respondent committed a dishonest act when he, while performing an act within the scope of his duties as a real estate licensee, took tools from a client's home without her permission. Therefore, cause exists to discipline respondent's real estate license, pursuant to Business and Professions Code sections 10176, subdivision (i) and 10177, subdivision (j).

6. However, based on all evidence presented at the hearing, it would not be against the public interest to allow respondent to retain his license on a restricted basis.

### **Cost Recovery**

7. Business and Professions Code section 10106 provides that in any order issued in resolution of a disciplinary proceeding before it, the commissioner may request the administrative law judge to direct a licensee found to have committed a

violation of Real Estate Law to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

8. As set forth in Factual Findings 16 through 20, based on the facts and circumstances of this matter, and considering the Board's obligation to protect the public through licensing actions such as this one, assessment of costs in the amount of \$3,290 (\$1,955 investigation costs and \$1,335 in enforcement costs) against respondent is reasonable and appropriate.

### ORDER

All licenses and licensing rights of respondent Albert Lima Barcelos 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 Department 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 Department 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

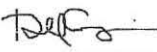
(b) That the employing broker will exercise close supervision over the performance by the restricted licensee relating to activities for which a real estate license is required.

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 pay the Department of Real Estate the amount of \$3,290, as reimbursement for the costs of investigation and enforcement of this matter, within 30 days of the effective date of this Decision. Respondent may pay these costs according to a payment plan approved by the Bureau of its designee.

DATE: October 11, 2019

DocuSigned by:  
  
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DENA COGGINS

Administrative Law Judge

Office of Administrative Hearings

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Department of Real Estate

OCT 15 2019

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