

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED
OCT 12 2005
DEPARTMENT OF REAL ESTATE

* * *

By A. E. O.

In the Matter of the Accusation of)
ALEJANDRA GOMEZ,)
Respondent.)
_____)

NO. H-3228 SD
L-2005071053

DECISION

The Proposed Decision dated September 2, 2005, of the Administrative Law Judge of the Office of Administrative Hearings, is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

The Decision suspends or revokes one or more real estate licenses on grounds of the conviction of a crime.

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

This Decision shall become effective at 12 o'clock noon
on NOV 01, 2005.

IT IS SO ORDERED 9-29, 2005.

JEFF DAVI
Real Estate Commissioner

[Signature]

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

ALEJANDRA GOMEZ,

Respondent.

Case No. H-3228 SD

OAH No. L2005071053

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 31, 2005, 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.

Scott G. Lyon, Attorney at Law, represented respondent Alejandra Gomez, who was present throughout the administrative hearing.

The matter was submitted on August 31, 2005.

FACTUAL FINDINGS

Jurisdictional Matters

1. On June 22, 2005, complainant J. Chris Graves, a Deputy Real Estate Commissioner, Department of Real Estate (the Department), State of California, signed the Accusation in his official capacity.

The Accusation and other required jurisdictional documents were served on respondent Alejandra Gomez (Gomez or respondent).

Gomez timely filed a Notice of Defense on Accusation.

On August 31, 2005, 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.

License History

2. On April 15, 2000, the Department issued Salesperson License No. 01278545 to Gomez, which was originally issued as a conditional salesperson's license. There is no history of any administrative discipline having been imposed against Salesperson License No. 01278545.

Gomez' Conviction

3. On August 2, 2004, Gomez was convicted on her plea of no contest of violating Vehicle Code section 23152, subdivision (a) (Driving Under the Influence of Alcohol), Penal Code section 242-243, subdivision (a) (Battery) and Penal Code section 240-241, subdivision (b) (Assault on a Peace Officer), each a misdemeanor, in the Superior Court of California, County of San Diego in Case No. M922673 entitled *People of the State of California v. Alejandra Gomez*.

On August 2, 2004, imposition of sentence was suspended and Gomez was placed on three years summary probation for two offenses and on five years probation for the remaining offense. Gomez was ordered to serve 180 days in custody, which was suspended pending the successful completion of probation. Terms and conditions of probation required Gomez to pay fines and fees of approximately \$2,100, to provide 15 days public service work, to not drive with a measurable amount of alcohol in her blood, to attend and complete a first offender drinking driver program, to attend and complete a MADD impact course, to attend and complete a 20 hour anger management course, to have her license restricted for a period of 90 days, to have no contact with certain victims and to obey all laws.

Gomez remains on probation. She continues to pay her fine at the rate of \$100 per month.

The Offense

4. On March 24, 2004, Gomez went to lunch and consumed alcoholic beverages with a colleague. She was driving home around 8:00 p.m. when the vehicle she was driving struck the rear end of a truck stopped for a traffic signal. Gomez was stunned as a result of the collision. As she was regaining consciousness, she became aware of people in her car. At the time she thought they were stealing her personal property, although in retrospect she realized they were probably trying to turn off her vehicle's engine. Gomez became very upset and began struggling with the persons in her car. Police officers arrived and Gomez was combative and did not follow the police officers' instructions to calm down. She felt the police officers were being abusive when they took her into custody and struggled.

Gomez believed she had no more than four beers. She weighed about 115 pounds at the time. Gomez' blood alcohol level was reported as being 0.24 percent, by weight, of alcohol in her blood, a level that would have required the consumption of far more alcohol.

Gomez' Evidence

5. Gomez is 29 years old. She was raised in Calexico, California. She graduated from Calexico High School in 1994. Thereafter, Gomez attended college for two years and received a degree in business administration. Gomez worked in retail sales thereafter.

6. Gomez became interested in the real estate profession after working as an assistant to a real estate agent in 1999. She attended a real estate course sponsored by Prudential in Riverside, California, and she became licensed as a real estate salesperson in April 2000.

7. Gomez owns five properties – one condominium and four houses – in California and Arizona. Gomez enjoys a close relationship with Michael Shenkman (Shenkman), who is employed by a mortgage broker and has a real estate license of his own.

8. Gomez had no other arrests or convictions.

Gomez expressed genuine remorse for her misconduct resulting in her convictions. Gomez' version of the offense was credible. Gomez certainly drank too much alcohol the afternoon and evening of March 24, 2004, but her testimony, the testimony of Shenkman, and the absence of any other arrests or convictions established the incident was isolated and was not related to alcoholism. Gomez does not believe she has a problem with alcohol, although she acknowledged she was very irresponsible on the evening of March 24.

Gomez had done all that has been asked of her while she has been on probation.

9. Shenkman has known Gomez for more than a year. She admitted the fact of her arrest and conviction to him shortly after they met. Shenkman has never seen Gomez drink and then drive. She refuses to be a passenger in a car driven by a person who has been consuming alcoholic beverages. Gomez has a reputation of being "preachy" about the evils of drinking and driving, according to Shenkman.

10. Gomez is currently employed by RE/MAX Real Estate Consultants in San Diego, California. She has been involved in at least 40 transactions during her licensure.

Gomez' supervising broker, Lorenzo Lombardelli, believes Gomez is of good moral character and he would continue to employ her if she held a restricted license and would provide her with close supervision.

The Contentions

11. Complainant argued the convictions were substantially related to the qualifications, functions and duties of a real estate licensee under California Code of Regulations, title 16, section 2910, subdivision (a)(8) because each conviction involved the doing of any unlawful act with the intent or threat of doing substantial injury to the person or

property of another. In this regard, complainant argued the publicity related to driving under the influence of alcohol in the last 20 years has made it clear to all responsible persons that drinking then driving involves the threat of substantial injury. Complainant also argued the battery convictions involved the intent or threat of substantial injury.

12. Respondent argued there was just one alcohol-related offense, and California Code of Regulations, title 10, section 2910, subdivision (a)(11) was controlling and that regulation required two or more convictions involving the consumption or use of alcohol or drugs, at least one of which involved driving and the use or consumption of alcohol or drugs, to be deemed substantially related. Respondent argued battery convictions did not involve the specific intent to harm anyone or anything.

Evaluation

13. Gomez has not engaged in any misconduct related to the use of her real estate salesperson's license. It was not established that Gomez has any arrests, much less criminal convictions, other than those alleged in the Accusation.

Gomez' has three misdemeanor convictions. Gomez' driving under the influence conviction and her simple battery conviction did not involve moral turpitude as a matter of law, nor was it established that those convictions involved moral turpitude as a matter of fact. However, Gomez' conviction of battery on a peace officer involved moral turpitude as a matter of law, and she cannot collaterally attack the fact or the nature of her conviction in this administrative proceeding. Less than two years have passed since the battery on a peace officer conviction. She remains on probation, and while there has been no violation of probation, Gomez has not paid all her fines.

Under all the circumstances, the revocation of Gomez' unrestricted real estate salesperson's license is mandated under the Department's regulatory scheme, but she established sufficient rehabilitation to be permitted to hold a restricted real estate salesperson's license, particularly in light of her unblemished record as a real estate licensee.

LEGAL CONCLUSIONS

Purpose of Disciplinary Action

1. The object of an administrative proceeding aimed at revoking a license is to protect the public. *Small v. Smith* (1971) 16 Cal.App.3d 450, 457.

Burden and Standard of Proof

2. In a disciplinary proceeding, the burden of proof is upon the party asserting the affirmative. Guilt must be established to a reasonable certainty. Guilt cannot be based on

surmise or conjecture, suspicion or theoretical conclusions, or upon uncorroborated hearsay. *Small v. Smith* (1971) 16 Cal.App.3d 450, 457.

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

4. The key element of clear and convincing evidence is that it must establish a high probability of the existence of the disputed fact, greater than proof by a preponderance of the evidence. *People v. Mabini* (2001) 92 Cal.App.4th 654, 662.

Applicable Statutes

5. Business and Professions Code section 490 provides in pertinent part:

“A board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere”

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

“The commissioner may suspend or revoke the license of a real estate licensee . . . who has done any of the following . . .

(b) Entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony or a crime involving moral turpitude”

Arneson v. Fox

7. A licensee may introduce evidence in mitigation or explanation, as well as evidence of rehabilitation. However, an inquiry into the circumstances surrounding the offense should not form the basis of impeaching a prior conviction. To hold otherwise would impose upon administrative boards extensive, time-consuming hearings aimed at relitigating criminal charges which culminated in final judgments of conviction. *Arneson v. Fox* (1980) 28 Cal.3d 440, 449.

Moral Turpitude

8. A conviction of driving under the influence does not necessarily involve moral turpitude. See, *In re Carr* (1988) 46 Cal.3d 1089; see, also, *Ostrow v. Municipal Court* (1983) 149 Cal.App.3d 668, 675-676.

9. Simple battery does not involve moral turpitude, but battery on a peace officer necessarily involves moral turpitude. *People v. Lindsay* (1989) 209 Cal.App.3d 849, 857; *People v. Williams* (1999) 72 Cal.App. 4th 1460, 1464.

Substantial Relationship

10. While the clear and convincing evidence may not have established a "substantial relationship" under California Code of Regulations, title 10, section 2910, the battery on a peace officer conviction did involve moral turpitude as a matter of law, which is grounds for license discipline under Business and Professions Code section 10177, subdivision (b).

Rehabilitation

11. The Department's criteria of rehabilitation are set forth in California Code of Regulations, title 10, section 2912. The relevant criteria were mentioned and discussed in Factual Findings 5-10 and 13.

Cause Exists to Impose Discipline

12. Cause does not exist to impose discipline against Gomez' real estate salesperson's license under Business and Professions Code section 490. The convictions Gomez suffered were not substantially related under the Department's criteria of substantial relationship.

This conclusion is based on Factual Findings 3, 4, 11 and 12, the specific regulatory language contained in California Code of Regulations, title 10, section 2910, and Legal Conclusions 1-10.

13. Cause exists to revoke Gomez' real estate salesperson's license under Business and Professions Code section 10177, subdivision (b). Gomez was convicted of battery on a peace officer, a crime necessarily involving moral turpitude. However, the incident appears to be isolated, Gomez does not appear to be an alcoholic, Gomez had no other arrests or convictions, Gomez had made sincere efforts to rehabilitate herself, and granting Gomez the opportunity to hold a restricted real estate salesperson's license will not pose a substantial risk of harm to the public.

This conclusion is based on Factual Findings 2-10 and 13 and on Legal Conclusions 1-4 and 6-11.

ORDER

All licenses and licensing rights of respondent Alejandra Gomez under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license shall

be issued to respondent Alejandra Gomez under Business and Professions Code section 10156.5 if respondent Alejandra Gomez makes application for such a license 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 Business and Professions Code section 10156.7 and to the following limitations, conditions and restrictions which are imposed under authority of Business and Professions Code section 10156.6:

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 felony, to a crime involving moral turpitude or 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 two 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 certifies:

(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 she 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, then the Commissioner may order the suspension of the restricted license until respondent presents such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

DATED: 9/2/05



JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings

FILED
JUN 24 2005

DEPARTMENT OF REAL ESTATE

By *[Signature]*

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BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of)	
ALEJANDRA GOMEZ,)	H-3228 SD
Respondent.)	<u>ACCUSATION</u>

The Complainant, J. CHRIS GRAVES, a Deputy Real Estate Commissioner of the State of California, for cause of Accusation against ALEJANDRA GOMEZ (hereinafter "Respondent"), is informed and alleges as follows:

I

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

II

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

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III

On or about August 2, 2004, in the Superior Court, County of San Diego, State of California, in case number M922673, Respondent was convicted of violating Section 23152(a) of the California Vehicle Code (Unlawfully driving a vehicle while under the influence of alcohol), Section 242 and 243(a) of the California Penal Code (Battery by means of unlawful force or violence upon the person of another), and Section 240 and 241 of the California Penal Code (Assault on peace officer performing duties), crimes involving moral turpitude and/or crimes 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 facts alleged in Paragraph III, above, constitute cause under Sections 490 and/or 10177(b) of the Code for suspension or revocation of all licenses and license rights of Respondent under the Real Estate Law.

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

J. Chris Graves
J. CHRIS GRAVES
Deputy Real Estate Commissioner

Dated at San Diego, California,
this 22nd day of June, 2005.