

**FILED**

**JUL 19 2019**

**DEPT. OF REAL ESTATE**

*Signed* *Danner*

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

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In the Matter of the Accusation of:	)	DRE No. H-03230 FR
	)	
RICKY WILFREDO PORTILLO,	)	OAH No. 2019041040
	)	
Respondent.	)	

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DECISION

The Proposed Decision dated June 14, 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's 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 ~~AUG 07 2019~~.

IT IS SO ORDERED July 15, 2019

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:

RICKY WILFREDO PORTILLO,

Respondent.

Case No. H-03230 FR

OAH No. 2019041040

**PROPOSED DECISION**

Howard W. Cohen, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on May 29, 2019, in Los Angeles.

Julie To, Staff Attorney, represented complainant Brenda Smith, a Supervising Special Investigator, Department of Real Estate (Department), State of California. Respondent Ricky Wilfredo Portillo was present and represented himself.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on May 29, 2019.

**SUMMARY**

Complainant alleges that respondent (a) was convicted of driving with a blood alcohol content exceeding 0.08 percent and of hit-and-run with property damage, both misdemeanors substantially related to the qualifications of a licensee, and (b) failed to inform the Department of the convictions. Respondent admitted both allegations at hearing and offered evidence of mitigation and rehabilitation. For the reasons discussed below, the Accusation is affirmed, respondent's license is revoked, and a restricted license shall issue.

**FACTUAL FINDINGS**

*Parties and Jurisdiction*

1. On September 18, 2007, the Department issued real estate salesperson's license, number S/01824471, to respondent. The license is scheduled to expire on January 4, 2020.
2. Complainant filed the Accusation in her official capacity on January 15, 2019. Respondent filed a notice of defense.

### *Respondent's Conviction*

3. On May 21, 2018, in *People v. Portillo* (Super. Ct. Kern, 2017, No. BM912040A), complaint pled nolo contendere to and was convicted of violating Vehicle Code sections 23152, subdivision (b) (driving under the influence of alcohol [DUI], with a blood alcohol content of 0.08 percent or greater), and 20002, subdivision (a) (hit and run with property damage), both misdemeanors. The court suspended imposition of sentence and placed respondent on probation for three years on terms and conditions including that he pay fines and fees totaling \$2,018, serve two days in custody with credit for one day time served, enroll in a work release program, not operate a vehicle unless duly licensed by the state, not drink and drive, participate in a licensed alcohol education program for at least three months, enroll in DUI school within 21 days, participate in the Mother Against Drunk Driving (MADD) victim impact panel, and make restitution for damages in an amount determined by the probation officer.

4. The circumstances leading to respondent's arrest and conviction are that, very early in the morning on October 14, 2017, respondent's car swerved off a road onto the center median and collided with a "one-way" street sign; the car was immediately afterward driven to respondent's home. At about 5:00 a.m., the Bakersfield Police Department (BPD) had received a call about the accident. A BPD officer went to investigate and found respondent examining the site of the collision. The officer wrote in his police report that he asked respondent where his car was; respondent said he left it at home. The officer wrote that respondent told him that he had been texting his girlfriend while driving and had driven onto the median, and that respondent later changed his description of what happened to say that he had fallen asleep while driving. The officer wrote that respondent told him he had driven home after the collision and had walked back to see what damage had been caused by the collision, his home being nearby. Observing signs of alcohol consumption, the officer administered field sobriety tests and a breath test, which showed 0.149 percent blood alcohol content (BAC). The officer arrested respondent. Two other officers, with respondent's permission, went to respondent's home, entered his garage, and observed damage to the car consistent with the collision.

5. Respondent has satisfied all the terms of his probation, which is still in effect and is scheduled to terminate on May 21, 2021.

### *Respondent's Failure to Report the Criminal Charges and Conviction*

6. Respondent did not report within 30 days to the Department that he had pled nolo contendere to two misdemeanors on May 21, 2018. The Department learned of the plea and conviction and contacted respondent to interview him about the incident.

### *Mitigation and Rehabilitation*

7. Respondent acknowledged his conviction and testified that he is embarrassed by it. He was ashamed when he was convicted; he had never been the subject of any criminal proceeding before, and he did everything the court required him to do. He also acknowledged that he benefitted from taking courses required by the Department of Motor Vehicles in order to

obtain a restricted driver's license. He signed up to receive email updates from the MADD program, and he never drinks and drives.

8. Respondent contested the arresting officer's description of the circumstances leading to his conviction.

a. At hearing, respondent testified that he was not driving his car at the time of the accident. According to respondent, he and his girlfriend had been at a party, where he had consumed alcohol. His girlfriend was driving them home while he slept in the front passenger seat. He was awakened when his girlfriend, who had been texting while driving, swerved onto the median and crashed into the one-way sign. She then drove to his house, where they argued about her decision to text while driving. Respondent walked back to the median to see what damage his car had caused. While he was there, the arresting officer arrived. Respondent testified that he told the officer what happened, and that the statements the officer attributed to respondent in the police report, to the effect that he, not his girlfriend, had been driving, are not accurate. Respondent testified that he asked the officer to come to his home, talk to his girlfriend, and look at the car, but the officer refused. Respondent admits to having been intoxicated at the time of the collision; that, he testified, is why he was not driving the car. He testified that, after the criminal case had been pending for about a year, he followed his attorney's advice and pled guilty to end the case and move on, though he was frustrated with his attorney and with the lack of opportunity to talk to the judge in his case.

b. In a Conviction Detail Report respondent submitted to the Department on September 3, 2019, respondent wrote an account of the accident that largely accords with his testimony at hearing:

My girlfriend was driving my truck and she when ovet [sic] the street median strip and hit a small street sign. This took place around the corner of my house. I got very upset and got out of the truck to see what she had hit. The police got there and didn't bel[e]ve me that I wasn't driving and didn't even care to talk to my girlfriend. . . . I will admit that I had a few beers that night but I wasn't driving. They booked me in. I wanted to fight it but I didn't hired [sic] the right attorney. . . . I was very frustrated and took the attorney's advise [sic] to just take the full DUI charge because I was going to spend a lot of money and maybe lose my case.

(Ex. 6.)

9. Neither the arresting officer nor respondent's girlfriend, now his ex-girlfriend, testified or was present at the hearing.

10. Respondent testified that his attorney advised him he could get the conviction dismissed after three years, which he intends to do; he was not informed that he could petition the court for early termination of probation since he had satisfied all the probation terms.

11. Respondent admitted he failed to notify the Department within 30 days that he had pled no contest to and been convicted of two misdemeanor charges. He testified that he thought he would be required to inform the Department of the conviction when his license comes up for renewal and that he planned to do so; he did not realize he had to report within 30 days. He also readily admitted that he was at fault for not opening some mail he had received from the Department. In October 2018, the Department's Fresno office contacted respondent and told him he had failed to timely report the conviction.

12. Respondent's explanation for failing to timely disclose the criminal charges pending against him is persuasive, though ignorance of the laws governing his licensure does not excuse noncompliance.

13. Respondent has been a real estate salesperson since 2007. The Department has not previously disciplined respondent's license. Respondent loves his work, loves helping families, and is committed to his real estate career. He testified that his business depends entirely on referrals and that he treats his clients well. He supports his mother financially and helps raise his nieces. Respondent is also involved in his community, volunteering at food banks and through his church to feed the indigent.

14. Respondent has been working for Performance Realtors for three years. The owner of Performance Realtors, Freddy Perez, a licensed real estate broker, testified as a character witness on respondent's behalf and offered in evidence a character reference letter, which he adopted at the hearing. Mr. Perez testified that he completely trusts respondent, who is both ethical and professional. Mr. Perez believes that respondent was so busy helping his mother and his brother's children that he lost sight of the fact that he should respond immediately upon receiving the Department's letters. Had respondent told him of the conviction before receiving the October 2018 telephone call from Fresno, Mr. Perez would have advised him to immediately report it to the Department; Mr. Perez attributes respondent's delay in disclosing the matter to him to shame. Losing his license would devastate respondent and his family, Mr. Perez testified; "I love the kid, he's a good kid." Mr. Perez said he is willing to do anything the Department deems necessary to allow respondent to retain his license.

#### *Costs*

15. The Department incurred investigation costs in the amount of \$1,780.50, and enforcement costs, in the form of attorney fees, in the amount of \$387.15, for a total of \$2,167.65. Those costs are deemed reasonable.

### LEGAL CONCLUSIONS

1. The real estate commissioner "has full power to regulate and control the issuance and revocation . . . of all licenses . . ." (Bus. & Prof. Code, § 10071.) "Protection of the public shall be the highest priority for the Department of Real Estate in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent

with other interests sought to be promoted, the protection of the public shall be paramount.” (Bus. & Prof. Code, § 10050.1.)

2. Complainant bears the burden of proof. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99; *Piplan v. Bd. of Supervisors* (1978) 82 Cal.App.3d 652.) The standard of proof is clear and convincing evidence to a reasonable certainty. (*Ettinger v. Bd. of Medical Quality Assurance* (1982) 135 Cal.App.3d 853.) Clear and convincing evidence means evidence “so clear as to leave no substantial doubt” and “sufficiently strong to command the unhesitating assent of every reasonable mind.” (*Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1190 (citing *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 332-333).)

3. The commissioner may suspend or revoke a real estate license if the licensee has pled guilty or no contest to, or been found guilty or convicted of, a crime substantially related to the qualifications, functions, or duties of a real estate licensee, regardless of whether the court granted probation, suspended imposition of sentence, or issued an order under Penal Code section 1203.4 dismissing the matter. (Bus. & Prof. Code, §§ 490, 10177, subd. (b)(1).)

4. A crime or an act is substantially related to the qualifications, functions, or duties of a real estate licensee if done with the threat of injury to property or “with the intent of conferring a financial or economic benefit upon the perpetrator,” or if it results in “two or more convictions involving the consumption or use of alcohol or drugs when at least one of the convictions involve driving and the use or consumption of alcohol or drugs.” (Cal. Code Regs., tit. 10, § 2910, subd. (a), criteria (8), (11).) “[T]he context in which the crime or acts were committed shall go only to the question of the weight to be accorded to the crime or acts in considering the action to be taken with respect to the applicant or licensee. (Cal. Code Regs., tit. 10, § 2910, subd. (c).)

5. Respondent pled nolo contendere to misdemeanor driving under the influence of alcohol and misdemeanor hit-and-run with property damage. The first of those convictions involves the consumption of alcohol while driving, and the second involves doing an unlawful act with the threat of injury to property and the intent of conferring a financial or economic benefit upon the perpetrator. The crimes are, therefore, substantially related to the qualifications, functions, or duties of a licensed real estate salesperson.

6. A licensee must notify the Department of the “conviction of the licensee, including any verdict of guilty, or plea of guilty or no contest, of any felony or misdemeanor.” (Bus. & Prof. Code, § 10186.2, subd. (a)(1).) The notification must be made “in writing within 30 days of the date of the . . . conviction . . .” (Bus. & Prof. Code, § 10186.2, subd. (a)(2).) “Failure to make a report required by this section shall constitute a cause for discipline.” (Bus. & Prof. Code, § 10186.2, subd. (b).)

7. Cause exists to suspend or revoke respondent’s real estate salesperson license under Business and Professions Code sections 490 and 10177, subdivision (b), on the ground that respondent entered a plea of guilty or nolo contendere to and was convicted of a crime

substantially related to the qualifications, functions, or duties of a real estate licensee, based on Factual Findings 3 through 5, and Legal Conclusions 1 through 6.

8. Cause exists to suspend or revoke respondent's real estate salesperson license under Business and Professions Code section 10186.2, subdivision (b), on the ground that respondent failed to notify the Department within 30 days of his plea of not guilty or nolo contendere to the misdemeanor charges against him, based on Factual Findings 3 through 6, and Legal Conclusions 1-6.

9. As cause for revocation of respondent's license was established, respondent bears the burden of proving mitigation or rehabilitation sufficient to warrant continued licensure. (See *Martin v. Alcoholic Beverage Control Appeals Bd.* (1950) 52 Cal.2d 259, 264-265.) The "more serious the misconduct and the bad character evidence, the stronger the applicant's showing of rehabilitation must be." (*In re Gossage* (2000) 23 Cal.4th 1080, 1096.)

10. The criteria for assessing the rehabilitation of a licensee include the time that has elapsed since the commission of the wrongful acts, successful completion of probation, new and different social and business relationships, stability of family life and fulfillment of parental and familial responsibilities, completion of educational courses taken for economic self-improvement, significant involvement in community programs designed to provide social benefits, and changes in attitude demonstrated by evidence of rehabilitation submitted by the licensee and by evidence from family members, friends, or other persons familiar with the licensee's previous conduct and with subsequent attitudes or behavioral patterns. (Cal. Code Regs., tit. 10, § 2912.)

11. Applying the rehabilitation criteria, in respondent's favor are that his license has not previously been disciplined by the Department, he is fulfilling his familial responsibilities, and he contributes to the community through active involvement in feeding the poor. On the other hand, just over one year has passed since respondent was convicted. He is still on criminal probation, though he has satisfied all the probationary terms and conditions and paid restitution. Respondent is not permitted to impeach his plea and conviction in this administrative proceeding. (See *Arneson v. Fox* (1980) 28 Cal.3d 440, 452.) Less weight is accorded the conviction, however, than might otherwise be the case given the underlying circumstances and complainant's burden of proof in this case. The arresting officer did not witness respondent commit the crime, and respondent's version of the event was, if only in part, corroborated when police officers visited respondent's home and inspected the car. Respondent's acknowledgement of and shame at his conviction reflect an acceptance of responsibility for the acts to which he pled, even while he contests the circumstances. His failure to timely inform the Department of the conviction do not reflect well on respondent's ability to carry out one of the duties to the public of required of a real estate licensee; though it may be explained, it cannot be excused, by ignorance of the reporting requirement.

12. All relevant factors having been considered, respondent established that he is, at this time, sufficiently rehabilitated to justify issuing him a restricted real estate salesperson license, based on Factual Findings 7 through 14.



13. Under Business and Professions Code section 10106, subdivisions (a), (c), and (d), complainant is entitled to recover reasonable costs of investigation and prosecution of this matter in the amount of \$2,167.65, as set forth in Factual Finding 15.

## ORDER

All licenses and licensing rights of respondent Ricky Wilfredo Portillo under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license shall be issued to respondent under 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 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 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 respondent presents such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

6. Respondent shall notify the Commissioner in writing within 72 hours of any arrest by sending a certified letter to the Commissioner at the Department of Real Estate, Post Office Box 187000, Sacramento, CA 95818-7000. The letter shall set forth the date of respondent's arrest, the crime for which respondent was arrested and the name and address of the arresting law enforcement agency. Respondent's failure to timely file written notice shall constitute an independent violation of the terms of the restricted license and shall be grounds for the suspension or revocation of that license.

7. It is an express condition of the restricted license that respondent shall pay the Department's costs of investigation and enforcement of this case in the amount of \$2,167.65 within nine months of the issuance of the restricted license.

DATED: June 14, 2019

DocuSigned by:  
*Howard W. Cohen*  
HOWARD W. COHEN  
Administrative Law Judge  
Office of Administrative Hearings