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SEP 16 2020

DEPT. OF REAL ESTATE

By 

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of:)	DRE No. H-03288 FR
)	
FERNANDO BOCANEGRA,)	OAH No. 2020020460
)	
Respondent.)	

DECISION

The Proposed Decision dated June 4, 2020, 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.

Pursuant to Section 11517(c)(2) of the Government Code, the following corrections are made to the Proposed Decision:

Page 1, Factual Findings, paragraph 1, "On January 17, 2018, Complainant..." shall be amended to read "On December 20, 2019, Complainant..."

Page 3, paragraph 3, "...12 months of U.S. Department of Veterans Affairs (V.A.) counseling, including taking an anger management course, at the Los Angeles Veterans Center..." shall be amended to read "...12 months of U.S. Department of Veterans Affairs (V.A.) counseling at the Los Angeles Veterans Center..."

Page 4, paragraph 8, "Respondent maintained that he is trustworthy, reliable, and honest individual..." shall be amended to read "Respondent maintained that he is a trustworthy, reliable, and honest individual..."

Page 6, second paragraph heading, "(Exh. 5, p. 2.)" shall be amended to read "(Exh. E, p. 2.)"

Page 7, Analysis, paragraph 10, "...acknowledging the benefits of anger management courses he took." shall be amended to read "acknowledging the benefits of V.A.

counseling that he undertook.”

Page 9, Causes for Discipline, paragraph 4C, “...criminal conviction for assault with force...” shall be amended to read “...criminal conviction for battery with force...”

Page 12, second paragraph heading, “Apalysis” shall be amended to read “Analysis.”

The Decision suspends or revokes one or more real estate licenses, but the right to a restricted salesperson license is granted to Respondent.

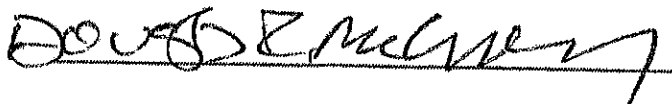
Pursuant to Government Code Section 11521, the Department of Real Estate may order reconsideration of this Decision on petition of any party. The party seeking reconsideration shall set forth new facts, circumstances, and evidence, or errors in law or analysis, that show(s) grounds and good cause for 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.

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 OCT 07 2020.

IT IS SO ORDERED 9.15.20

DOUGLAS R. McCAULEY
ACTING REAL ESTATE COMMISSIONER



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

In the Matter of the Accusation against:

FERNANDO BOCANEGRA,

Respondent

Agency No. H-03288 FR

OAH No. 2020020460

PROPOSED DECISION

Deena R. Ghaly, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on May 6, 2020. The hearing was conducted telephonically.

Laurence D. Haveson, Counsel for the Department of Real Estate (Department), represented Complainant Brenda Smith, a Department Supervising Special Investigator. Respondent Fernando Bocanegra represented himself and was present throughout the hearing.

Oral and documentary evidence was received. This ALJ held the record open until May 13, 2020, for Respondent to submit evidence of rehabilitation and mitigation, and until May 20, 2020, for Complainant to submit a response to Respondent's submission. Respondent submitted a diploma from California State

University, Bakersfield conferring a Bachelor of Arts degree with high honors, a list of online courses, and grades with a handwritten notation, "Pepperdine University," and eight letters of support. The documents were marked Exhibits A through J for identification. Citing hearsay and lack of authentication, Complainant objected to admitting Respondent's exhibits into evidence.

Respondent's exhibits are hearsay and do not meet the strictures of authentication as set out in the Evidence Code. (See Evid. Code, § 1400 et seq.) However, under the relaxed evidentiary standards for administrative hearings, Exhibits A through J are admissible as administrative hearsay (see Gov. Code, § 11513) and are admitted for the purposes of explaining and supplementing direct evidence presented at the hearing through Respondent's testimony.

The record was closed and the matter deemed submitted for decision on May 20, 2020.

FACTUAL FINDINGS

Jurisdiction

1. On January 17, 2018, Complainant filed the Accusation in her official capacity. Complainant seeks to impose disciplinary action against Respondent's real estate salesperson license based on respondent's felony conviction for assault with force likely to produce great bodily injury and his failure to report that conviction to the Department within 30 days.
2. Respondent timely filed a notice of defense, and this matter ensued.

Respondent's Criminal Conviction and Failure to Report

3. On December 15, 2017, in the Superior Court of California, County of Kern, Case Number BF169523A, Respondent pled nolo contendere and was convicted of violating Penal Code section 245, subdivision (a)(4) (assault with force likely to produce great bodily injury), a felony. The court accepted Respondent's plea on condition that he complete 12 months of U.S. Department of Veterans Affairs (V.A.) counseling, including taking an anger management course, at the Los Angeles Veterans Center and suspended a two-year prison sentence pending Respondent's successful completion of the V.A. counseling. On January 7, 2019, after Respondent completed the V.A. counseling program, the court placed him on formal probation for three years and sentenced him to one day of jail time, with credit for one day for time served. Respondent's probation is scheduled to end in January 2022. Nothing in the court records reflect that Respondent has violated the terms of his probation.

4. The facts and circumstances underlying this conviction are that Respondent felt insulted and threatened by an acquaintance and punched him, resulting in the victim losing consciousness and sustaining an injury.

5. Respondent did not report the conviction to the Department.

Respondent's Evidence

6. On the day of the incident, Respondent attended a meeting of fellow volunteer coaches for the local high school wrestling team. The meeting took place at a local bar and restaurant where the topic of conversation turned to music and bands. One of the attendees made what Respondent considered a derogatory remark about Mexicans, and Respondent took offense. After the event, Respondent saw the attendee in the parking lot and perceived the attendee as walking toward him in a threatening

manner. Believing himself in danger, Respondent punched the attendee, knocking him unconscious.

7. A. Respondent has been a licensed real estate salesperson since 2005. In addition to his work, Respondent volunteers with veterans' service organizations and coaches a high school wrestling team. In the past few years, Respondent pursued higher education, recently completing his undergraduate degree with honors; he is currently enrolled in graduate school classes.

B. During the administrative hearing, Respondent stated that his criminal conviction was an anomaly in an otherwise positive and productive life. With the exception of a previous criminal conviction for drunk driving, he has been law-abiding. Respondent maintained that he is trustworthy, reliable, and honest individual and is consistently a source of support and assistance to everyone around him. In addition, Respondent believes he benefitted greatly from an anger management course that was part of his probation terms.

8. Respondent stated that he takes full responsibility for failing to inform the Department about his criminal conviction. At the time, Respondent was preoccupied with the court's requirements regarding his plea and did not focus on his duties as a licensee.

9. Post-hearing, Respondent submitted the following in support of his testimony:

(a) Respondent's diploma from California State University in Bakersfield reflecting that he graduated magna cum laude in May 2019 with an undergraduate degree in psychology.

(b) A transcript of classes purportedly reflecting psychology graduate courses Respondent either completed or are ongoing.

(c) A letter from Angel Terrazas, a fellow U.S. Marines veteran. Mr. Terrazas stated he has known Respondent for 21 years, including serving with him during combat duty. Mr. Terrazas noted that Respondent had proved himself extraordinarily capable and hardworking and that, during their tour together, Respondent was chosen to be in charge of combat operations, a position reserved for soldiers exhibiting excellent judgment and discipline. Mr. Terrazas's letter did not indicate that he was aware of Respondent's criminal conviction.

(d) A letter from Savannah Flores, a preschool teacher who came to know Respondent when they were in school together. Ms. Flores noted that Respondent was a motivated student who had also helped her with her own studies. Ms. Flores also stated that Respondent was extremely generous and community-minded, bringing school supplies to underprivileged children. Ms. Flores is aware of Respondent's criminal conviction, stating "[w]hen I heard of this altercation that took place, I thought it was a joke. He is not a confrontational person; on the contrary, his is a very strong-willed, kind person with a heart of gold who has the gift of making others feel comfortable and welcomed." (Exh. D.)

(e) A letter from Luis Echeverrianeberry, also a fellow Marine and a professor at the California Community College system. Professor Echeverrianeberry has known Respondent over twenty years and expressed unequivocal trust in him. He is aware of Respondent's criminal conviction and stated the following:

When I learned about [Respondent's] incident, I was in disbelief. [Respondent] is the last person who would be the cause to initiate such disorder. His personality is approachable and he is one to extend his selfless service to

anyone around him. In various occasions, I have invited and introduced [Respondent] to various circles of friends and colleagues. Every group I have introduced him to, has continuously welcomed and invited [Respondent] with an open invitation as his presences is valued and appreciated.

(Exh. 5, p. 2.)

(f) A letter from Raymond Gladin, a family friend. In his letter, Mr. Gladin stated that he has known Respondent for seven years. Mr. Gladin described Respondent as a hard worker, polite, levelheaded, and a source of inspiration for Mr. Gladin's family. Mr. Gladin's letter makes no mention of Respondent's criminal conviction.

(g) A letter from Sandra Bocanegra, Respondent's sister. Ms. Bocanegra described Respondent as extremely level headed, hardworking, accomplished, and generous. She described a lifetime of support and kindness from her brother and noted that he has also been an involved and generous uncle to her young son. Regarding the criminal conviction, Ms. Bocanegra stated: "it must of [sic] taken a lot to get a reaction of this sort. I sincerely and truly feel in my heart that has [sic] meant no harm and was simply standing up for himself." (Exh. G.)

(h) A letter from Joey Retes, an 18-year-old high school student who had been on the wrestling team Respondent coached. Mr. Retes praised Respondent's commitment and care for the team members and stressed that Respondent was far more than a coach, that he was a true role model. Mr. Retes's letter also stated that Respondent had gone out of his way to counsel students outside the team, particularly those considering giving up on their education. Mr. Retes' letter did not indicate that he was aware of Respondent's criminal conviction.

(i) A letter from Jenny Frank who supervised Respondent at the Bakersfield Veterans Center where he assisted veterans experiencing emotional and other

difficulties to access V.A. and community resources. In her letter, Ms. Frank noted that clients there often became belligerent. "When [Respondent] encountered these clients, he always handled himself in a professional manner and strived to deescalate situations." (Exh. I.) Ms. Franks' letter did not indicate that she was aware of Respondent's criminal conviction.

(j) A letter from Paul Beckwith, a longtime friend of Respondent's who has known him from their work serving the veterans' community in Bakersfield. Mr. Beckwith knows of Respondent's criminal conviction. Addressing it in his letter, Mr. Beckwith stated: "the label that has been put upon him by the courts in no way, shape, or form represent the type of individual [Respondent] is. [Respondent] is always working on bettering himself and the life of others." (Exh. J.)

Analysis

10. Respondent testified in a forthright manner. Although he does not see himself as the aggressor in the incident underlying his criminal conviction, Respondent saw room for improvement in himself in acknowledging the benefits of anger management course he took. Those of Respondent's supporters aware of his criminal history all believe the underlying incident was out of character. Other letters corroborated his extensive good works for his community, particularly for other veterans and for high school students.

Costs of Investigation and Enforcement

11. A. Complainant seeks recovery of investigation costs of \$1,448.70 and enforcement costs of \$907.80, a total of \$2,356.50. These costs are reasonable.

B. Respondent did not dispute the costs and stated that he would be willing and able to pay them if he were permitted to do so pursuant to a payment plan.

LEGAL CONCLUSIONS

Purpose of Disciplinary Proceedings

1. The Commissioner of Real Estate "has full power to regulate and control the issuance and revocation, both temporary and permanent, of all licenses to be issued" (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." (*Id.* at § 10050.1; see also *Small v. Smith* (1971) 16 Cal.App.3d 450, 457 ["[t]he object of an administrative proceeding aimed at revoking a license is to protect the public, that is, to determine whether a licensee has exercised his privilege in derogation of the public interest, and to keep the regulated business clean and wholesome".].)

2. Administrative proceedings to revoke, suspend, or impose discipline on professional licenses are not intended to punish the licensee, but rather to protect the public. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 785–786.)

Burden and Standard of Proof

3. Complainant bears the burden of proving by clear and convincing evidence to a reasonable certainty that Respondent has engaged in conduct warranting suspension or revocation of his real estate license. (See *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 855–856.) A conviction based on a nolo contendere plea "stands as conclusive proof of [a respondent's] guilt of the specific offense charged in the indictment." (*Arneson v. Fox* (1980) 28 Cal.3d 440, 451–52.)

Causes for Discipline

4. A. Business and Professions Code sections 490 and 10177, subdivision (b), authorize the suspension or revocation of a license on the ground that the licensee has been convicted of a crime substantially related to the qualifications, functions, or duties of a real estate licensee.

B. California Code of Regulations, title 10 (Regulation), section 2910 sets out which crimes are substantially related to the skills, qualifications, and duties of a real estate licensee. A substantially related crime includes "an unlawful act with the intent or threat of doing substantial injury to the person or property of another." (Reg. §2910, subd. (a)(8).) Respondent's crime of assault is substantially related to the qualifications, functions, and duties of a real estate licensee.

C. Cause exists to discipline Respondent's real estate salesperson license pursuant to Business and Professions Code sections 490 and 10177, subdivision (b) based on his December 2017 criminal conviction for assault with force likely to cause great bodily injury. (Factual Finding 3 and Legal Conclusions 4A & 4B.)

5. A. Business and Professions Code section 10186.2 authorizes the revocation or suspension of a license for failure to timely report a criminal conviction.

B. Cause exists to discipline Respondent's salesperson license pursuant to Business and Professions Code section 10186.2. Respondent admitted that he failed to report his criminal conviction. (Factual Finding 5 and Legal Conclusion 5A.)

6. Regulation 2910 sets forth the Department's criteria of rehabilitation for consideration when determining whether discipline should be imposed and, if so, the nature and extent of the discipline to be imposed against a licensee who has committed a crime. The regulation reads:

The following criteria have been developed by the Bureau pursuant to Section 482(b) of the Business and Professions Code for the purpose of evaluating the rehabilitation of a licensee against whom an administrative disciplinary proceeding for revocation or suspension of the license has been initiated on account of a crime committed by the licensee.

(a) The passage of not less than two years from the most recent criminal conviction that is "substantially related" to the qualifications, functions or duties of a licensee of the Bureau. . . .

(b) Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the licensee.

(c) Expungement of the conviction or convictions which culminated in the administrative proceeding to take disciplinary action.

(d) Expungement or discontinuance of a requirement of registration pursuant to the provisions of Section 290 of the Penal Code.

(e) Successful completion or early discharge from probation or parole.

(f) Abstinence from the use of controlled substances or alcohol for not less than two years if the criminal conviction was attributable in part to the use of a controlled substance or alcohol.

(g) Payment of any fine imposed in connection with the criminal conviction that is the basis for revocation or suspension of the license.

(h) Correction of business practices responsible in some degree for the crime or crimes of which the licensee was convicted.

(i) New and different social and business relationships from those which existed at the time of the commission of the acts that led to the criminal conviction or convictions in question.

(j) Stability of family life and fulfillment of parental and familial responsibilities subsequent to the criminal conviction.

(k) Completion of, or sustained enrollment in, formal educational or vocational training courses for economic self-improvement.

(l) Significant and conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.

(m) Change in attitude from that which existed at the time of the commission of the criminal acts in question as evidenced by any or all of the following:

(1) Testimony of applicant.

(2) Evidence from family members, friends or other persons familiar with the licensee's previous conduct and with subsequent attitudes and behavioral patterns.

(3) Evidence from probation or parole officers or law enforcement officials competent to testify as to applicant's social adjustments.

(4) Evidence from psychiatrists, clinical psychologists, sociologists or other persons competent to testify with regard to neuropsychiatric or emotional disturbances.

(5) Absence of subsequent felony or misdemeanor convictions that are reflective of an inability to conform to societal rules when considered in light of the conduct in question.

Analysis

7. Respondent engaged in illegal conduct that was not consistent with that expected of a licensed real estate broker. (See *Harrington v. Department of Real Estate* (1989) 214 Cal.App.3d 394, 402 ["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."]) Rehabilitation depends upon a track record of

conduct that convinces the Department the public would be safe if it grants the privileges of licensure to Respondent.

8. Rehabilitation is a "state of mind" and the law looks favorably on rewarding one who has achieved "reformation and regeneration" with the opportunity to serve. (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) An indication of rehabilitation is sustained conduct over an extended period of time. (*In re Menna* (1995) 11 Cal.4th 975, 991.) The evidentiary significance of misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. (*Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1070.)

9. Considered as a whole, Respondent's evidence does not present the upward trajectory of change and improvement typical of rehabilitation. His criminal conviction occurred two and half years ago, beyond the minimum required to maintain his license but still a relatively short time. Respondent is still serving his probationary period, and his criminal conviction therefore has not been expunged. Respondent's evidence of military and community service, support, and commitment to his family, education, and some self-awareness occurred before, during, and after the criminal conviction. These positive attributes and accomplishments are not the result of the conviction but in spite of it. The overall picture corroborates Respondent's testimony that the conviction is an anomalous event in an otherwise positive and productive life. It stands to reason that continuing good conduct before and after a criminal conviction should militate toward maintained licensure at least as much as similar efforts that are undertaken only after a criminal conviction has occurred.

10. Under the circumstances, revoking Respondent's license is too severe. Nonetheless, his capacity to cause real harm cannot be overlooked. Imposing restrictions on Respondent's license as set out in the order below is consistent with the

Department's responsibility to protect the public while still affording Respondent the opportunity to practice his chosen profession.

Costs

11. Cause exists to grant Complainant's request for reimbursement of the costs of investigation and enforcement. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the Supreme Court rejected a constitutional challenge to a cost recovery provision. In so doing, however, the Court directed the administrative law judge and the licensing agency to evaluate several factors to ensure that the cost recovery provision did not deter individuals from exercising their right to a hearing. The Department must consider a licensee's ability to pay, and the Department may not assess disproportionately large investigation and prosecution costs when it has conducted a disproportionately large investigation to prove that a licensee engaged in relatively innocuous misconduct. (*Id.* at p. 45.)

12. Complainant's costs are found to be reasonable. Respondent has not challenged or requested that they be reduced. (Factual Finding 11.) Under the terms of the Order below, Respondent will be able to continue his work as a real estate salesperson, albeit under restrictions. Paying the costs pursuant to a reasonable payment plan is warranted.

ORDER

1. All licenses and licensing rights of Respondent Fernando Bocanegra 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:

The restricted license issued 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.

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.

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.

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.

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.

2. Respondent shall pay costs in the amount of \$2,356.50 pursuant to a payment plan to be determined by the Department.

DATE: June 4, 2020

DocuSigned by:
Deena R. Ghaly
DEENA R. GHALY

Administrative Law Judge

Office of Administrative Hearings