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FILED

DEC 21 2009

DEPARTMENT OF REAL ESTATE



8 BEFORE THE DEPARTMENT OF REAL ESTATE
9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Accusation of)

12 BRIAN EDWARD RICHARD,)

13 Respondent.)

DRE No. H-3914 SD

OAH No. 2009031129

14
15 DECISION AFTER REJECTION

16 This matter came on for hearing before Mary Agnes Matyszewski, Administrative
17 Law Judge, Office of Administrative Hearings, State of California, in San Diego, California, on
18 June 2, 2009.

19 Truly Sughrue, Counsel, represented the Complainant. The Respondent appeared
20 in person without counsel.

21 Evidence was received, the record was closed, and the matter was submitted.

22 On June 19, 2009, the Administrative Law Judge rendered a Proposed Decision
23 (hereafter "the Proposed Decision") which the Real Estate Commissioner declined to adopt as his
24 Decision herein. Pursuant to Section 11517 of the Government Code of the State of California,
25 Respondent was served with notice of the Real Estate Commissioner's determination not to
26 adopt the Proposed Decision along with a copy of the Proposed Decision. Respondent was
27

1 notified that the case would be decided by the Real Estate Commissioner on the record, the
2 transcript of the proceedings held on June 2, 2009, and upon written argument offered by
3 Respondent and Complainant.

4 Written argument was submitted by Respondent. Written argument has been
5 submitted on behalf of Complainant.

6 I have given careful consideration to the record in this case, including the
7 transcript of the proceedings of June 2, 2009, and the written arguments offered by Respondent
8 and Complainant.

9 The following shall constitute the Decision of the Real Estate Commissioner in
10 these proceedings.

11 FINDINGS OF FACT

12 1. -- Respondent is licensed by the Department of Real Estate (hereinafter
13 "Department") as a real estate salesperson, License No. 01705437, and has been so licensed
14 since October 3, 2005.

15 2. Complainant, JOSEPH AIU, filed the Accusation in his official
16 capacity on February 11, 2009.

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

22 Respondent's Conviction

23 On or about December 5, 2007, in the Superior Court of the State of
24 California, County of San Diego, Case No. CD 191894, Respondent was convicted on his
25 plea of guilty of violating Penal Code section 487(b)(3) (Grand Theft by Employee), a
26 misdemeanor. Imposition of sentence was suspended and respondent was placed on 18
27 months summary probation. The court sentenced respondent to serve two (2) days in custody

1 with credit for two (2) days served, to pay fines and fees of \$540, to make restitution in the
2 amount of \$3,166.56, to comply with all terms and conditions of probation, and to obey all
3 laws.

4 According to Respondent, he paid all of the restitution and recently filed the
5 paperwork to have his conviction expunged. Respondent's probation in this criminal matter
6 expired on June 5, 2009.

7 The facts and circumstances surrounding the conviction are that over the
8 Christmas holidays in 2004, Respondent, who was working and living in New York, visited
9 his family in San Diego and worked at Nordstrom's during its holiday sale. While working
10 his shift, Respondent allowed customers to purchase items for less than the prices stated on
11 the sales tags. Respondent testified he has absolutely no explanation why he acted in this
12 manner. He had never been in trouble with the law, he was on good terms with his employer,
13 and he has no idea why he committed this crime. Respondent testified it was completely out
14 of character. His best explanation was that he was "young and foolish".

15 When questioned by Nordstrom's loss department the following morning,
16 Respondent admitted the crime. Respondent was interviewed by Nordstrom's and law
17 enforcement investigators and admitted his misconduct to both. Respondent then returned to
18 New York. Respondent testified the law enforcement investigator specifically told
19 Respondent not to contact anyone and that "they" would get back in touch with him once the
20 investigation was completed. Respondent claimed he never heard another word about the
21 incident again and thought it was "over".

22 During the next few months Respondent worked in New York, traveling to
23 Europe on business several times. Respondent then returned to California where he began
24 working in the family real estate business. He married in August 2007. When returning to
25 the United States after his honeymoon in Fiji, Respondent was stopped at the Los Angeles
26 airport by customs officials and informed there was a warrant for his arrest stemming from
27 the Nordstrom's theft. Respondent testified this was the first time he learned charges had

1 been filed against him. Respondent testified he took immediate steps to retain an attorney
2 and respond to the charges.

3 Respondent has volunteered with several community organizations, including
4 Habitat for Humanity and Project Walk.

5 Respondent has obtained his GRI (Graduate Realtor Institute), ABR
6 (Accredited Buyers Representative) and EPRO (Electronic Professional) certifications.

7 LAW APPLIED TO THE FACTS

8 The Department's Accusation alleges Respondent was convicted of a
9 misdemeanor involving moral turpitude which bears a substantial relationship to the
10 qualifications, functions or duties of a real estate salesperson in violation of Sections 490 and
11 10177(b) of the Business and Professions Code (hereinafter "the Code").

12 Section 490 of the Code provides in relevant part:

13 "...a board may suspend or revoke a license on the ground
14 that the licensee has been convicted of a crime, if the crime
15 is substantially related to the qualifications, functions, or
16 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...."

17 Prior to January 1, 2008, Section 10177 of the Code provides in relevant part:

18 "The Commissioner may suspend or revoke the license of
19 any real estate licensee...who has done any of the
20 following:...(b) Entered a plea of guilty or nolo contendere
21 to, or been found guilty of, or been convicted of, a felony or
a crime involving moral turpitude."

22 Respondent's Conviction is Substantially Related to
23 the Qualifications of a Real Estate Broker.

24 The crime of which Respondent was convicted is substantially related to the
25 qualifications, functions, or duties of a real estate licensee. A board may impose license
26 discipline on the ground that the licensee has been convicted of a crime if the crime is
27 substantially related to the qualifications, functions, or duties of the business or profession for

1 which the license was issued. Thus, a determination that a licensee's conviction justifies
2 discipline cannot rest on the moral reprehensibility of the underlying conduct, but requires a
3 reasoned determination that the conduct was in fact substantially related to the licensee's fitness
4 to engage in the profession. (*Gromis v. Medical Board* (1992) 8 Cal.App.4th 589). Licensing
5 authorities do not enjoy unfettered discretion to determine on a case-by-case basis whether a
6 given conviction is substantially related to the relevant professional qualifications. Business and
7 Professions Code section 481 requires each licensing agency to "develop criteria to aid it...to
8 determine whether a crime is substantially related to the qualifications, functions, or duties or the
9 business or profession it regulates." In response to this directive the Department adopted section
10 2910 of Title 10 of the California Code of Regulations. (*Donaldson v. Department of Real Estate*
11 (2005) 134 Cal.App.4th 948). Title 10, Section 2910(a) of the California Code of Regulations
12 provides, in relevant part:

13 " (a) When considering whether a license should be denied,
14 suspended or revoked on the basis of the conviction of a
15 crime, or on the basis of an act described in Section
16 480(a)(2) or 480(a)(3) of the Code, the crime or act shall be
17 deemed to be substantially related to the qualifications,
18 functions or duties of a licensee of the Department within
19 the meaning of Sections 480 and 490 of the Code if it
20 involves:

(1) The fraudulent taking, obtaining, appropriating or
retaining of funds or property belonging to another person."

21 Respondent's misconduct was substantially related to the qualifications,
22 functions, and duties of a real estate licensee because the conviction involved the fraudulent
23 taking, obtaining, appropriating or retaining of funds or property belonging to another
24 person. As provided previously, by reason of Respondent's guilty plea, he stands convicted of
25 each element required to be in order to establish a violation of Penal Code Section 487(b)(3).
26 The elements of Respondent's crimes establish the substantial relationship.
27

1 The substantial relationship of crimes involving dishonesty, is established in
2 regard to the fact that real estate licensees are placed, by the nature of their profession, in a
3 position of utmost trust and by the fact that their profession gives them access to the homes
4 and/or persons personal financial information, of not only their respective clients but also the
5 homes and information of numerous other prospective sellers. In addition, licensees deal with
6 large amounts of money and handle transactions involving, for most of us, our most significant
7 asset, our home.

8 Respondent's Conviction is a Misdemeanor Involving Moral Turpitude.

9 Moral turpitude has been viewed as "dishonest or immoral" acts, not necessarily a
10 crime. (*In re Higbie* (1972) 6 Cal.3d. 562). *In re Craig* provided that moral turpitude is "an act
11 of baseness, vileness, or depravity in the private and social duties which a person owes to his
12 fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty
13 between man and man". (*In re Craig* (1938) 12 Cal.2d 93). Crimes of theft involve moral
14 turpitude. (*In re Honoroff* (1975) 15 Cal.3d 755). Criminal acts of dishonesty committed for
15 financial gain necessarily involve moral turpitude. (*In re Gossage* (2000) 23 Cal.4th 1080; *Golde*
16 *v. Fox* (1979) 98 Cal.App.3d 167). Respondent conviction for grand theft is a crime of moral
17 turpitude per se.

18 BURDEN OF PROOF

19 The burden of proof is clear and convincing evidence to a reasonable certainty
20 (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853). The Department
21 has met this burden. As discussed above, Respondent has been convicted of a substantially
22 related misdemeanor involving moral turpitude. There are grounds for the revocation of
23 Respondent's license under Business and Professions Code Section 490 and Section 10177(b).

24 PUBLIC PURPOSE OF DISCIPLINARY ACTION

25 Business and Professions Code Section 10050 provides, in pertinent part, that
26 "It shall be the principal responsibility of the commissioner to enforce all laws in this
27 part...in a manner which achieves the maximum protection for the purchasers of real

1 property and those persons dealing with real estate licensees.” The proposed discipline of
2 Respondent’s license must be considered in that context. Thus, when the Commissioner
3 denies, suspends or revokes a license based on a criminal conviction that involves moral
4 turpitude, it is a conclusion that the applicant or licensee has engaged in acts that characterize
5 him or her as being unfit or unsuitable for the particular real estate license in question. (*Golde*
6 *v. Fox* (1979) 98 Cal.App.3d 167).

7 REHABILITATION

8 Section 2912 of the Regulations provides the Criteria of Rehabilitation, which is
9 used by the Commissioner of the Department of Real Estate to help determine to what extent a
10 Respondent convicted of a crime has been rehabilitated. Rehabilitation is not an event but rather
11 but a process at earning a second chance. These criteria are only guidelines; each case is to be
12 evaluated individually, and depending on the facts additional rehabilitation may be required. In
13 relation to Section 2912 of the Commissioner’s Regulations, Respondent presently satisfied
14 many of the Criteria of Rehabilitation. However, the conviction only occurred 18 months prior
15 to the hearing. In addition, Respondent was only released from probation on June 5, 2009. The
16 Court in *In re Gossage* held that doing good on probation is “slight evidence of rehabilitation”.
17 (*In re Gossage* (2000) 23 Cal.4th 1080). A truer indication of rehabilitation is demonstrated by
18 sustained conduct over an extended period of time. (*In re Mena* (1995) 11 Cal.4th 975). At this
19 point in time, it is questionable whether Respondent has rehabilitated to a point where it is in the
20 public’s best interest to grant an unrestricted real estate salesperson to Respondent.

21 When all the facts and circumstances are weighed and balanced, it would be
22 contrary to the public interest and welfare to allow Respondent to remain licensed as an
23 unrestricted real estate salesperson.

24 ORDER

25 All licenses and license rights previously issued to Respondent BRIAN
26 EDWARD RICHARD under the Real Estate Law are revoked; provided, however, a restricted
27 real estate salesperson license shall be issued to Respondent pursuant to Section 10156.5 of the

1 Business and Professions Code if Respondent makes application therefore and pays to the
2 Department of Real Estate the appropriate fee for the restricted license within ninety (90) days
3 from the effective date of this Decision. The restricted license issued to Respondent shall be
4 subject to all of the provisions of Section 10156.7 of the Business and Professions Code and to
5 the following limitations, conditions, and restrictions imposed under authority of Section
6 10156.6 of said Code:

7 1. The restricted license issued to Respondent may be suspended prior to
8 hearing by Order of the Real Estate Commissioner in the event of Respondent's conviction or
9 plea of nolo contendere to a crime which is substantially related to Respondent's fitness or
10 capacity as a real estate licensee.

11 2. The restricted license issued to Respondent may be suspended prior to
12 hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner
13 that Respondent has violated provisions of the California Real Estate Law, the Subdivided Lands
14 Law, Regulations of the Real Estate Commissioner or conditions attaching to this restricted
15 license.

16 3. Respondent shall not be eligible to apply for the issuance of an
17 unrestricted real estate license nor for the removal of any of the conditions, limitations or
18 restrictions attaching to the restricted license until two (2) years have elapsed from the effective
19 date of this Decision.

20 4. Respondent shall, within nine (9) months from the effective date of this
21 Decision, present evidence satisfactory to the Real Estate Commissioner that Respondent has,
22 since the most recent issuance of an original or renewal real estate license, taken and successfully
23 completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate
24 Law for renewal of a real estate license. If Respondent fails to satisfy this condition, the
25 Commissioner may order the suspension of the restricted license until Respondent presents such
26 evidence. The Commissioner shall afford Respondent the opportunity for a hearing pursuant to
27 the Administrative Procedure Act to present such evidence.

1 5. Respondent shall submit with any application for a license under an
2 employing broker, or any application for transfer to a new employing broker, a statement signed
3 by the prospective employing real estate broker on a form approved by the Department of Real
4 Estate which shall certify:

5 A. That the employing broker has read the Decision of the Commissioner
6 which granted the right to a restricted license; and

7 B. That the employing broker will exercise close supervision over the
8 performance by the restricted licensee relating to activities for which a real estate license is
9 required.

10 6. Within six (6) months from the effective date of this Decision, Respondent
11 shall take and pass the Professional Responsibility Examination administered by the Department,
12 including the payment of the appropriate examination fees. If Respondent fails to satisfy this
13 condition, the Commissioner may order the suspension of Respondent's license(s) until he passes
14 the examination.

15 This Decision shall become effective at 12 o'clock noon on JAN 11 2010

16
17 IT IS SO ORDERED

18 12/16/09
19 JEFF DAVI
20 Real Estate Commissioner
21 _____
22 _____
23 _____
24 _____
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26 _____
27 _____

FILED

JUL 22 2009

DEPARTMENT OF REAL ESTATE

[Signature]

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Accusation of

BRIAN EDWARD RICHARD,

Respondent.

No. H-3914 SD

OAH No. 2009031129

NOTICE

TO: BRIAN EDWARD RICHARD, Respondent.

YOU ARE HEREBY NOTIFIED that the Proposed Decision herein dated June 19, 2009, of the Administrative Law Judge is not adopted as the Decision of the Real Estate Commissioner. A copy of the Proposed Decision dated June 19, 2009, is attached for your information.

In accordance with Section 11517(c) of the Government Code of the State of California, the disposition of this case will be determined by me after consideration of the record herein including the transcript of the proceedings held on June 2, 2009, and any written argument hereafter submitted on behalf of Respondent and Complainant.

Written argument of Respondent to be considered by me must be submitted within 15 days after receipt of the transcript of the proceedings of June 2, 2009, at the Sacramento

///

1 office of the Department of Real Estate unless an extension of the time is granted for good cause
2 shown.

3 Written argument of Complainant to be considered by me must be submitted
4 within 15 days after receipt of the argument of Respondent at the Sacramento office of the
5 Department of Real Estate unless an extension of the time is granted for good cause shown.

6 DATED: 7-16-09

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8 JEFF DAVI
Real Estate Commissioner

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11 BY: Barbara J. Bigby
12 Chief Deputy Commissioner
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BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

BRIAN EDWARD RICHARD,

Respondent.

Case No. H-3914-SD

OAH No. 2009031129

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on June 2, 2009, in San Diego, California.

Truly Sughrue, Counsel, represented complainant Joseph Aiu, a Deputy Real Estate Commissioner, Department of Real Estate, State of California.

Respondent Brian Edward Richard represented himself and was present throughout the administrative hearing.

The matter was submitted on June 2, 2009.

FACTUAL FINDINGS

Jurisdictional Matters

1. On February 11, 2009, Joseph Aiu, a Deputy Real Estate Commissioner, Department of Real Estate (the Department), State of California, signed the accusation in his official capacity. The accusation sought the suspension or revocation of the real estate salesperson's license issued to Brian Edward Richard (Richard or respondent) for a real estate salesperson's license based upon his December 2007 misdemeanor conviction for grand theft.

The accusation and other required jurisdictional documents were served on respondent, who timely filed a notice of defense.

On June 2, 2009, the administrative record was opened. Jurisdictional documents were presented, official notice was taken, documentary evidence was produced and sworn

testimony was received. Closing arguments were given thereafter, the record was closed, and the matter was submitted.

License History

2. On October 3, 2005, the Department of Real Estate (the Department) issued real estate license no. S/01705437 to respondent.

Respondent's current employing broker is the Richard Realty Group located in Carlsbad, California. The company is family-owned and respondent's employing broker is Trudy Richard.¹ Respondent testified that he has been involved in approximately ten to 15 real estate transactions per year in which escrow closed since his license was issued. Respondent's license expires on October 2, 2009, unless suspended or revoked.

There is no history of any discipline having been imposed against the real estate salesperson's license issued to respondent.

Respondent's Conviction

3. On December 5, 2007, respondent was convicted on his plea of guilty of violating Penal Code section 487, subdivision (b)(3) (grand theft by employee), a misdemeanor involving moral turpitude, in the Superior Court of California, County of San Diego, Central Courthouse, in Case No. CD 191894 entitled *People v. Brian E. Richard*. The offense was initially charged as a felony, but the court granted respondent's motion to reduce the conviction to a misdemeanor prior to sentencing.

Imposition of sentence was suspended and respondent was placed on 18 months summary probation. The court sentenced respondent to serve two days in custody with credit for two days served, to pay fines and fees of \$540, to make restitution in the amount of \$3,166.56, to comply with all terms and conditions of probation, and to obey all laws.

No violation of probation was established. According to respondent, he paid all of the restitution and recently filed paperwork to have his conviction expunged. Respondent's probation in this criminal matter will expire on June 5, 2009. No evidence was introduced at hearing that respondent's probation was terminated earlier, extended or revoked.

Circumstances of the Offense

4. By reason of his guilty plea, respondent stands convicted of each element required to be proven to establish he violated Penal Code section 487, subdivision (b)(3)

¹ Respondent testified that his father, mother and grandmother are all licensed by the Department, but no evidence was introduced indicating whether Trudy was respondent's mother or grandmother.

(grand theft by an employee).² In his plea agreement, respondent admitted that he "took items from Nordstrom's with intent to permanently deprive while employed at Nordstrom's."

Respondent testified that during college he was employed at Nordstrom's. Over the Christmas holidays in 2004, respondent, who was working and living in New York, visited his family in San Diego and worked at Nordstrom's during its holiday sale. While working his shift, respondent allowed customers to purchase items for less than the prices stated on the sales tags.³ Respondent testified that he has absolutely no explanation why he acted in this manner. He had never been in trouble with the law, he was on good terms with his employer, and he has no idea why he committed this crime. Respondent testified that it was completely out of character. His best explanation was that he was "young and foolish."

When questioned by Nordstrom's loss department the following morning, respondent immediately admitted the crime. Respondent testified that he was interviewed by both Nordstrom's and law enforcement⁴ investigators and that he admitted his misconduct to both of them. Respondent then returned to New York, but provided his contact information to both investigators. Respondent testified that the law enforcement investigator specifically told respondent not to contact anyone and that "they" would get back in touch with him once the investigation was completed. Respondent claimed he never heard another word about the incident again and thought it was "over."

During the next few months, respondent worked in New York, traveling to Europe on business several times. Respondent then returned to California where he began working in the family real estate business. He married in August 2007. When returning to the United States after his honeymoon in Fiji, respondent was stopped at LAX by customs and informed that there was a warrant for his arrest stemming from the Nordstrom's theft. Respondent testified that this was the first time he learned that charges had been filed against him. Respondent testified that he took immediate steps to retain an attorney and respond to the charges.

Respondent's Background and Evidence of Rehabilitation

5. Respondent turned 30 the week before this hearing. He attended San Diego State University and is one credit shy of attaining his degree. He testified that he thought he had earned his degree in 2004, but when he recently requested a copy of his diploma he was

² In administrative disciplinary proceedings, a licensee may not seek to impeach a prior criminal conviction by means of an "an inquiry into the circumstances surrounding the offense." On the other hand, the licensee "should be permitted to introduce evidence of extenuating circumstances by way of mitigation or explanation, as well as any evidence of rehabilitation." (*Arneson v. Fox* (1980) 28 Cal.3d 440, 449.)

³ It was unclear from the testimony whether respondent used his employee discount to accomplish this or simply sold the items at below the stated price.

⁴ The evidence did not establish whether the police or sheriff's department investigated this crime.

advised he was one credit shy. Respondent is presently taking steps to enroll in one class in order to earn his degree.

Respondent is involved in several volunteer organizations.⁵ He volunteers at Habitat for Humanity, helping build affordable homes in San Diego. He volunteers with military families and Project Walk, an organization which helps provide paralyzed individuals an opportunity to walk again. Respondent regularly attends church and volunteers at the North San Diego County Board of Realtors, where he was recently elected to represent his district. It is important to note that respondent became involved in these organizations before he learned about the warrant for his arrest.

Respondent credibly expressed true remorse for his crime. He had no explanation for the crime and had always been a good employee at Nordstrom's. In fact, he still remains in contact with his prior supervisor, seeing her often. Respondent testified that he was younger then, right out of college, and had no direction. He testified that the crime was out of character for him. Respondent is now very focused on his career and family. He is recently married, loves his wife, who also works in the family business. Respondent testified at length about the passion he has for real estate; the great lengths he has gone to learn more about the profession, and how to practice ethically. Respondent obtained his GRI (Graduate Realtor institute), ABR (Accredited Buyers Representative) and EPRO (Electronic Professional) certifications. Respondent explained that he took the additional coursework to obtain these certifications to learn as much as possible about the profession to better represent and advise clients. Respondent testified that real estate is not a "job" for him, it is something he feels passionately about, it is his livelihood and it is what he dedicates his time toward and appreciates being able to participate in the profession. Respondent's testimony regarding his love of real estate and his chosen profession was both palpable and credible.

Witness Testimony

6. William Richard, respondent's father testified. Mr. Richard has been a licensed broker since 1999, with no history of discipline. Real estate has been a family business, beginning with his mother's involvement over 30 years ago. Currently, the company employs over 100 agents. Before he became a real estate licensee, Mr. Richard was a pastor for over 13 years. Mr. Richard described respondent as "a great guy, well liked" which was why he was recently elected to represent the district. Mr. Richard described his son as a very honest, forthright individual who immediately told him about the misconduct at Nordstrom's. Mr. Richard testified that the crime was "out of character" for his son. He described the crime as a "lapse in judgment" and had "no idea" why his son committed it. Mr. Richard testified that his son was "pretty upset" about having committed the theft. Today, he described his son as "a rock," someone who is "obsessive compulsive" about taking care of clients. Mr. Richard testified that respondent is "a good honest man, he has grown up, the conviction is in the past, [it is not respondent's] future, but it has been a good life lesson of what not to do which [respondent's] employed and taken into his life."

⁵ Information about these came from both respondent's oral and written testimony (Exh. 4).

7. Jasmin Richard, respondent's wife, testified that when she first met respondent he was still in the "college kid mode" but he is now very mature, very dedicated to family, loves God and has "grown a lot." Jasmin also works at the family real estate office, where she is the transaction coordinator. Her duties require her to process all the paperwork and "keep the process moving along." She oversees all the brokers' documents and has never had any concerns about her husband's paperwork. Jasmin testified that respondent's mindset had been one of being "wild and free" but he has matured. She testified that the conviction and his theft have really affected him and he thinks about it, it is always on his mind. She also described respondent's love of real estate, how it is their family business and their life. Respondent informed her of the crime when it occurred, but since they never heard anything about it again; she assumed the issue was resolved.

LEGAL CONCLUSIONS

Purpose of Disciplinary Action

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

Burden and Standard of Proof

2. 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 allegations by clear and convincing evidence. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 857.)

Applicable Statutes

3. Business and Professions Code section 490 provides in 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"

4. 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 substantially related to the qualifications, functions, or duties of a real estate licensee . . .", and the time for appeal has elapsed

or the judgment of conviction has been affirmed on appeal, irrespective of an order granting probation following that conviction, suspending the imposition of sentence, or of a subsequent order under Section 1203.4 of the Penal Code allowing that licensee to withdraw his or her plea of guilty and to enter a plea of not guilty, or dismissing the accusation or information . . .”

Substantial Relationship

5. A board may impose license discipline 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. Thus, a determination that a licensee’s conviction justifies discipline cannot rest on the moral reprehensibility of the underlying conduct, but requires a reasoned determination that the conduct was, in fact, substantially related to the licensee’s fitness to engage in the profession. (*Gromis v. Medical Board* (1992) 8 Cal.App.4th 589, 598.) Conviction alone will not support a denial of a license unless the crime substantially relates to the qualifications, functions, or duties of the business or profession in question. (*Harrington v. Department of Real Estate* (1989) 214 Cal.App.3d 394, 402.)

Honesty and truthfulness are two qualities deemed by the Legislature to bear on one’s fitness and qualification to be a real estate licensee. “There is more to being a licensed professional than mere knowledge and ability. Honesty and integrity are deeply and daily involved in various aspects of the practice. If a criminal offense reflects unfavorably on a licensee’s honesty, it may be said to be substantially related to his qualifications.” (*Golde v. Fox* (1979) 98 Cal.App.3d 167, 176.)

Licensing authorities do not enjoy unfettered discretion to determine on a case-by-case basis whether a given conviction is substantially related to the relevant professional qualifications. Business and Professions Code section 481 requires each licensing agency to “develop criteria to aid it . . . to determine whether a crime or act is substantially related to the qualifications, functions, or duties of the business or profession it regulates.” In response to this directive, the Department adopted section 2910 of Title 10 of the California Code of Regulations, California Code of Regulations. (*Donaldson v. Department of Real Estate* (2005) 134 Cal.App.4th 948, 955-956.)

Where the Legislature delegates to an administrative agency the responsibility to implement a statutory scheme through rules and regulations, the courts will interfere only when the agency has clearly overstepped its statutory authority or violated a constitutional mandate (*Ford Dealers Association v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 356), and deference should be given to an administrative agency’s interpretation of a statute or regulation involving its area of expertise. (*Communities for a Better Environment v. State Water Resources Control Board* (2005) 132 Cal.App.4th 1313, 1330.)

6. Title 10, California Code of Regulations, section 2910 sets forth the Department’s substantial relationship criteria. Under the Department’s criteria, respondent’s

misconduct was substantially related to the qualifications, functions, and duties of a real estate licensee because the conviction involved the fraudulent taking, obtaining, appropriating or retaining of funds or property belonging to another person (Cal. Code Regs., tit. 10, § 2910, subd. (a)(1)).

Rehabilitation

7. Rehabilitation is a "state of mind" and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved "reformation and regeneration." (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) The evidentiary significance of an applicant's 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.) A candid admission of misconduct and the full acknowledgment of wrongdoing are but a necessary first step in demonstrating rehabilitation. (*In re Trebilcock* (1981) 30 Cal.3d 312, 315.)

8. The Department's criteria of rehabilitation are set forth in Title 10, California Code of Regulations, section 2912. The evidence in rehabilitation under these criteria was set forth in Factual Findings 4-7.

Evaluation

9. Respondent's conviction involved theft and is thus substantially related to the qualifications, functions, and duties of a real estate licensee. However, by all accounts, respondent's action on one day in December 2004 was an anomaly in an otherwise law-abiding and productive life. Respondent has been a real estate licensee for the past four years without incident. He volunteered in several community organizations, long before he was aware that criminal charges had been filed against him. He has served on a local real estate board, having recently been elected by his peers to represent their district. This appointment speaks volumes about the faith and trust his peers place in him.

Respondent has had major life-changing events take place in the past five years; he married, began working in the family business and tirelessly volunteered in his community. Respondent completed additional coursework to better represent clients in the real estate market. Respondent credibly and persuasively expressed remorse for his theft. He clearly and convincingly demonstrated rehabilitation to the extent that it would not be contrary to public protection to allow him to maintain his license. The purpose of discipline is not to punish, but to protect the public by eliminating practitioners who are dishonest, immoral, disreputable or incompetent. (*Fahmy v. Medical Board of California* (1995) 38 Cal.App.4th 810, 817.) Imposing discipline against respondent given the facts as presented here would amount to punishment. Respondent is not a threat to the public.

Cause Does Not Exist to Impose Discipline

10. Cause does not exist to impose discipline against respondent's real estate salesperson's license under Business and Professions Code sections 490 and 10177, subdivision (b).

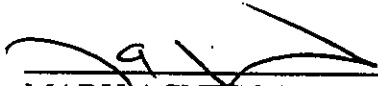
Respondent made a sufficient showing in explanation, mitigation, and rehabilitation to permit him to retain his real estate salesperson's license. No discipline is warranted under these circumstances.

This conclusion is based on all Factual Findings and on all Legal Conclusions.

ORDER

The Department's accusation filed against respondent is dismissed.

DATED: 6-19-09



MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings

1 TRULY SUGHRUE, Counsel
2 State Bar No. 223266
3 Department of Real Estate
4 P. O. Box 187007
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6
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FILED

FEB 18 2009

DEPARTMENT OF REAL ESTATE

By H. Max

8
9 BEFORE THE DEPARTMENT OF REAL ESTATE
10 STATE OF CALIFORNIA

11 * * *

12 In the Matter of the Accusation of
13 BRIAN EDWARD RICHARD,
14 Respondent.

No. H-3914 SD
ACCUSATION

15
16 The Complainant, JOSEPH AIU, a Deputy Real Estate Commissioner of the
17 State of California, for cause of Accusation against BRIAN EDWARD RICHARD (hereinafter
18 "Respondent"), is informed and alleges as follows:

19 1

20 The Complainant, JOSEPH AIU, a Deputy Real Estate Commissioner of the
21 State of California, makes this Accusation in his official capacity.

22 2

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

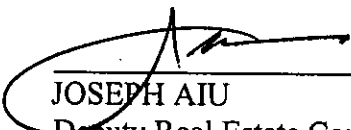
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On or about December 5, 2007, in the Superior Court, County of San Diego, Respondent was convicted of a violation of Section 487(b)(3) of the California Penal Code (Grand Theft), a felony involving moral turpitude and crime which bears a substantial relationship under Section 2910, Title 10, California Code of Regulations, to the qualifications, functions or duties of a real estate licensee.

The facts alleged above constitute cause under Sections 490 and 10177(b) of the Code for suspension or revocation of all licenses and license rights of Respondent under the Real Estate Law.

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.


JOSEPH AIU
Deputy Real Estate Commissioner

Dated at San Diego, California,
this 11 day of February, 2009.