

FILED

AUG - 5 2009

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE

[Signature]

In the Matter of the Application of)
)
GABRIEL HERRERA,)
)
Respondent.)
_____)

NO. H-3944 SD

OAH NO. 2009050659

DECISION

The Proposed Decision dated July 10, 2009, 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 application for a real estate salesperson license is denied, but the right to a restricted real estate salesperson license is granted to Respondent. There is no statutory restriction on when a new application may be made for an unrestricted license. Petition for the removal of restrictions from a restricted license is controlled by Section 11522 of the Government Code. A copy is attached hereto for the information of Respondent.

If and when application is made for a real estate salesperson license through a new application or through a petition for removal of restrictions, all competent evidence of rehabilitation presented by the Respondent will be considered by the Real Estate Commissioner. A copy of the Commissioner's Criteria of Rehabilitation is appended hereto.

This Decision shall become effective at 12 o'clock noon on

AUG 26 2009

IT IS SO ORDERED 7-31-09

JEFF DAVI
Real Estate Commissioner

[Signature]

BY: Barbafa J. Bigby
Chief Deputy Commissioner

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Application of:

GABRIEL HERRERA,

Applicant/Respondent.

Case No. H-3944 SD

OAH No. 2009050659

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on June 18, 2009, in San Diego, California.

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

Applicant/respondent Gabriel Herrera represented himself and was present throughout the administrative hearing.

The matter was submitted on June 18, 2009.

FACTUAL FINDINGS

Jurisdictional Matters

1. In April 2009, complainant Joseph Aiu, a Deputy Real Estate Commissioner, Department of Real Estate (the Department), State of California, signed the statement of issues in his official capacity. The statement of issues sought the denial of the application of Gabriel Herrera (Herrera or respondent) for a real estate salesperson's license based upon his October 2006 conviction for petty theft.

The statement of issues and other required jurisdictional documents were served on Herrera, who timely filed a notice of defense on application.

On June 18, 2009, the administrative record was opened. Jurisdictional documents were presented, after which documentary evidence was produced and sworn testimony was received. Closing arguments were given thereafter, the record was closed, and the matter was submitted.

The Application for Licensure

2. On December 26, 2007, Herrera applied to the Department for the issuance of a real estate salesperson's license.

3. The real estate application contained the following statements:

- **Carefully read and provide detailed answers to questions #24-26. You must provide a yes or no response to all questions.**
- "Convicted" as used in Question 25 includes a verdict of guilty by judge or jury, a plea of guilty or of nolo contendere, or a forfeiture of bail in municipal, superior or federal court. All convictions must be disclosed whether or not the plea of verdict was set aside, the conviction against you was dismissed, or expunged or if you have been pardoned. Convictions occurring while you were a minor must be disclosed unless the record of conviction has been sealed under Section 1203.45 of the California Penal Code or Section 781 of the California Welfare and Institutions Code.

4. Question 25 asked:

"HAVE YOU EVER BEEN CONVICTED OF ANY VIOLATION OF LAW? CONVICTIONS EXPUNGED UNDER PENAL CODE SECTION 1203.4 MUST BE DISCLOSED. HOWEVER, YOU MAY OMIT MINOR TRAFFIC CITATIONS WHICH DO NOT CONSTITUTE A MISDEMEANOR OR FELONY OFFENSE."

5. Herrera disclosed the petty theft conviction.

Herrera signed the application under penalty of perjury, certifying that his answers and statements were true and correct.

Herrera's Conviction

6. On October 20, 2006, Herrera was convicted on his plea of guilty of violating Penal Code section 484-490.5 (petty theft from a merchant), a misdemeanor, in the Superior Court of California, County of San Diego, in Case No. CKN216332 entitled *People v. Gabriel Herrera*.

The court suspended imposition of sentence and placed Herrera on three years probation. Terms and conditions of probation required Herrera to serve one day in custody (with credit given for time served), to pay fines and fees of \$700, to provide five days of public service, to stay away from Chick's Sporting Goods, and to obey all laws.

On January 16, 2009, the court granted Herrera's motion for the early termination of his probation.

Circumstances of the Offense

7. In explanation,¹ Herrera testified that on the morning of August 13, 2006, he went to a parking lot sale held by Chick's Sporting Goods in Oceanside. While he was there, Herrera observed another customer open a box of new shoes, take out the new shoes, take off his own shoes, put the old shoes in the box, put the new shoes on his feet, and walk out of the area where the sale was being held. Herrera followed suit, and he was arrested by a civilian loss prevention officer as he was leaving the sales area. It was not established that Herrera engaged in the same misconduct the day before or that he was attempting to steal the new pair of sneakers for a friend.

Herrera's Background and Rehabilitation

8. Herrera was born on December 20, 1983, in Los Angeles. He grew up in Southern California. Herrera fathered a child while he was in high school and left high school to work to support his family. He obtained a GED in 2002.

Between 2002 and 2006, Herrera worked as a flooring installer and as a licensed vehicle salesperson. He managed Classic Floors in Vista for several years.

Herrera became employed by Cambridge Home Loans in 2006, and very much enjoyed helping licensees in the mortgage business. Herrera wants a license so he can progress in the real estate industry.

Herrera is a single parent with sole custody of a seven-year-old daughter and a three-year-old son. He does not receive any financial support from the mother of the children, who rarely visits with them. Herrera lives with his parents, sister, and children in the parents' home in Vista.

9. According to Herrera, the conviction "cleaned my head" and he "learned how to work hard." He complied with all terms and conditions of probation and earned an early release from probation. His conviction has not been expunged. He studied hard to pass the real estate licensing test. He volunteers time at his daughter's elementary school. Herrera occasionally attends church. He spends a great deal of time at the real estate office, studying in an effort to pursue his goal of becoming a licensed real estate salesperson and, someday, a licensed real estate broker.

10. Eric Kabbera (Kabbera), a licensed real estate broker practicing in Vista, California, doing business as California Standards Realty & Financial, knew Herrera in high

¹ A licensee may not seek to impeach a prior criminal conviction in a disciplinary proceeding by means of "an inquiry into the circumstances surrounding the offense." But, "the licensee, of course, 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.) By reason of his guilty plea, Herrera stands convicted of each element required to be proven to establish his conviction of violating Penal Code section 484-490.5 (petty theft from a merchant).

school. Kabbera and Herrera did not keep in touch after high school. In 2006 or so, Kabbera was reintroduced to Herrera and hired him to assist in the operation of his business. Herrera disclosed the fact of his conviction. Kabbera, who has been licensed as a real estate appraiser and a real estate salesperson, has observed Herrera at work since then. Kabbera described Herrera as an honest individual with a good personality who is a "go-getter." Kabbera testified that Herrera's conviction was "a one time thing and completely out of character."

Kabbera testified that if Herrera were licensed on a restricted basis, he would exercise close supervision over Herrera's activities.

11. Herrera submitted letters from Oahn Hurley, the owner of Classic Floors, David Booker, the owner of Direct Carpet & Tile Sales, Alex Marroquin, the Director of Technology of the Sunrise Company, and Barbara Brijalba, a school teacher. Each of the authors was aware of Herrera's conviction. Each described Herrera as being honest and of good moral character.

Evaluation

12. Herrera was convicted of a theft-related offense. He disclosed the fact of his conviction in his application for licensure. More than two years have passed since Herrera's misdemeanor conviction. He earned an early discharge from probation. Herrera does not have a drug or alcohol problem. His home life is stable. Herrera engaged in a course of study to improve himself after his conviction. He testified in a credible fashion and demonstrated a change in attitude from that existing at the time of the offense giving rise to his conviction. He provided sworn testimony to corroborate his claim that he was of good moral character and he provided written letters to supplement and explain his character for honesty.

It would not be contrary to the public interest to permit Herrera to hold a restricted real estate salesperson's license.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. In a proceeding involving the issuance of a license, the burden of proof is on the applicant to show that he or she is qualified to hold the license. The standard of proof is a preponderance of the evidence. (*California Administrative Hearing Practice* (Cont.Ed.Bar 2d ed. 1997) The Hearing Process, §§ 7.51-7.53, pp. 365-367.)

Applicable Statutes

2. Business and Professions Code section 480 provides in part:

“(a) A board may deny a license regulated by this code on the grounds that the applicant has one of the following:

(1) Been convicted of a crime

. . . .

The board may deny a license pursuant to this subdivision only if the crime or act is substantially related to the qualifications, functions or duties of the business or profession for which application is made”

3. Business and Professions Code Section 10177 provides in part:

“The commissioner . . . may deny the issuance of a license to an applicant, 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”

Substantial Relationship

4. A misdemeanor 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.)

5. 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. (*Donaldson v. Department of Real Estate* (2005) 134 Cal.App.4th 948, 955-956.)

6. Under the Department’s substantial relationship criteria set forth at Title 10, California Code of Regulations, section 2910, subdivision (a) (8) makes the “doing of any unlawful act with the . . . intent or threat of doing substantial injury to the person or property of another” a substantially related offense.

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.)

8. The Department's criteria for rehabilitation, set forth in California Code of Regulations, title 10, section 2911 were discussed and evaluated in Factual Findings 8-12.

Cause Exists to Authorize the Issuance of a Restricted License

9. Cause exists to deny Herrera's application for an unrestricted real estate salesperson's license under Business and Professions Code sections 480, subdivision (a), and 10177, subdivision (b). In October 2006, Herrera was convicted of petty theft from a merchant, a conviction that is substantially related to the functions, qualifications and duties of a real estate licensee. Herrera disclosed that conviction in his application. The conviction is inconsistent with Herrera's history of being a law-abiding person. Herrera established that he has sufficiently rehabilitated himself to the extent it would not be contrary to the public interest to permit Herrera to hold a restricted real estate license.

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

ORDER

Respondent Gabriel Herrera's application for a real estate salesperson's license is denied; provided, however, a restricted real estate salesperson's license shall be issued to respondent under Business and Professions Code section 10156.5. The restricted license issued to respondent shall be subject to all of the provisions of Business and Professions Code section 10156.7 and to the following limitations, conditions and restrictions imposed under authority of Business and Professions Code Section 10156.6:

1. The license shall not confer any property right in the privileges to be exercised, and the Real Estate Commissioner may by appropriate order suspend the right to exercise any privileges granted under this restricted license in the event of:

(a) Respondent's conviction (including a conviction following a plea of nolo contendere) of a crime which is substantially related to respondent's fitness or capacity as a real estate licensee; or

(b) The receipt of evidence 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 this restricted license.

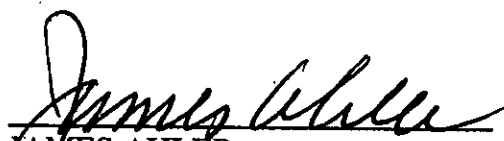
2. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license or the removal of any of the conditions, limitations or restrictions attaching to the restricted license until two years have elapsed from the date of issuance of the restricted license to Respondent.

3. With the application for license, or with the application for transfer to a new employing broker, Respondent shall submit a statement signed by the prospective employing real estate broker on a form RE 552 (Rev. 4/88) approved by the Department of Real Estate which shall certify as follows:

(a) That the employing broker has read the Decision which is the basis for the issuance of the restricted license; and

(b) That the employing broker will carefully review all transaction documents prepared by the restricted licensee and otherwise exercise close supervision over the licensee's performance of acts for which a license is required.

DATED: 7/10/09


JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings

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DEPARTMENT OF REAL ESTATE

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8 BEFORE THE DEPARTMENT OF REAL ESTATE
9 STATE OF CALIFORNIA

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12 In the Matter of the Application of)
13 GABRIEL HERRERA,)
14 Respondent.)

No. H-3944 SD

STATEMENT OF ISSUES

15
16 The Complainant, JOSEPH AIU, a Deputy Real Estate Commissioner of the
17 State of California, for Statement of Issues against GABRIEL HERRERA (hereinafter
18 "Respondent"), is informed and alleges as follows:

19 1

20 Respondent made application to the Department of Real Estate of the State of
21 California for a real estate salesperson license on or about December 26, 2007.

22 2

23 Complainant, JOSEPH AIU, a Deputy Real Estate Commissioner of the State of
24 California, makes this Statement of Issues in his official capacity and not otherwise.

25 3

26 On or about October 20, 2006, in the Superior Court, County of San Diego,
27 Respondent was convicted of a violation of Section 484/490.5 of the California Penal Code

1 (Petty Theft), a misdemeanor involving moral turpitude and crime which bears a substantial
2 relationship under Section 2910, Title 10, California Code of Regulations, to the qualifications,
3 functions, or duties of a real estate licensee.

4 4

5 The crime of which Respondent was convicted, as alleged above, constitutes
6 cause for denial of Respondent's application for a real estate license under Sections 480(a) and
7 10177(b) of the California Business and Professions Code.

8 WHEREFORE, the Complainant prays that the above-entitled matter be set for
9 hearing and, upon proof of the charges contained herein, that the Commissioner refuse to
10 authorize the issuance of, and deny the issuance of, a real estate salesperson license to
11 Respondent, and for such other and further relief as may be proper under other provisions of
12 law.

13
14 
15 JOSEPH AIU
Deputy Real Estate Commissioner

16 Dated at San Diego, California,
17 this 11 day of April, 2009