

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED
DEC - 3 2004

DEPARTMENT OF REAL ESTATE

Laurel J. Z...

* * *

In the Matter of the Application of)
JOSE ANTONIO RIVERA,)
Respondent.)

NO. H-4041 SAC
OAH NO. N-2004070306

DECISION

The Proposed Decision dated October 29, 2004, 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. There is no statutory restriction on when application may again be made for this license. If and when application is again made for this license, all competent evidence of rehabilitation presented by Respondent will be considered by the Real Estate Commissioner. A copy of the Commissioner's Criteria of Rehabilitation is appended hereto for the information of Respondent.

This Decision shall become effective at 12 o'clock noon
on DECEMBER 24, 2004.

IT IS SO ORDERED *Waxler* 18, 2004.

JEFF DAVI
Real Estate Commissioner

Jeff Davi

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Statement of
Issues Against:

JOSE ANTONIO RIVERA,

Respondent.

Case No. H-4041 SAC

OAH No. N2004070306

PROPOSED DECISION

Administrative Law Judge Catherine B. Frink, State of California, Office of Administrative Hearings, heard this matter in Sacramento, California, on October 4, 2004.

James L. Beaver, Counsel, represented the complainant.

Respondent was present and was represented by Brady D. McLeod, Attorney at Law, The Miles Law Firm, 3838 Watt Avenue, Suite 301, Sacramento, Ca 95821.

Evidence was received, and the matter was submitted for decision on October 4, 2004.

FACTUAL FINDINGS

1. The complainant, Charles W. Koenig, a Deputy Real Estate Commissioner of the State of California, filed the First Amended Statement of Issues in his official capacity.

2. Jose Antonio Rivera (respondent) filed an application with the Department of Real Estate of the State of California (the Department) for a real estate salesperson license on or about January 23, 2004, with the knowledge and understanding that any license issued as a result of said application would be subject to the conditions of Business and Professions Code section 10153.4.

3. On March 24, 1997, in the Municipal Court, County of San Joaquin, Stockton Judicial District, State of California, Case No. SM191975A, respondent was convicted, upon his plea of guilty, of two misdemeanor counts of violation of Penal Code section 484, subdivision (a), Petty Theft.

4. The events leading to respondent's convictions involved respondent's employment as a vehicle salesperson licensed by the Department of Motor Vehicles (DMV). In August and September 1996, respondent was employed as the special finance manager at Stockton Mazda. With respect to the first offense, respondent was the salesperson acting for the dealership in a transaction involving Stephanie Castillo. Ms. Castillo traded in a 1990 Honda Civic as a down payment on another vehicle. After the paperwork on the transaction was completed, respondent determined that the payoff on the Honda was \$350 more than Ms. Castillo had previously indicated. Respondent had Ms. Castillo bring the difference in cash to the dealership. Respondent took the cash and did not give the client a receipt. He testified that he "rewrote the contract" to reflect the additional amount, but he claims the document was subsequently lost. He contends that he gave the money to the business manager at the dealership. However, he could not provide any corroboration for his alleged actions. The business manager denied receiving the \$350, and there was no indication in the paperwork at the dealership that an additional \$350 was required.

With respect to the second offense, respondent was the salesperson acting on behalf of the dealership in a transaction involving the sale of a 1996 Mazda to Bert Long. Respondent told Mr. Long that he needed \$200 cash for insurance. Mr. Long told respondent he could only afford \$140. Respondent accepted a check from Mr. Long, made out to respondent, in the amount of \$140. Respondent went to the automatic teller machine (ATM), deposited the check, and withdrew some cash which he gave to the insurance agent. Respondent admits that he unlawfully retained some of the money in his personal account, not in the name of the dealership.

5. Criminal acts of dishonesty committed for financial gain necessarily involve moral turpitude. (*In re Gossage* (2000) 23 Cal. 4th 1080, 1098) Therefore, petty theft is a crime of "moral turpitude" within the meaning of Business and Professions Code section 10177(b). Furthermore, the crimes of which respondent was convicted are substantially related to the qualifications, functions and duties of a real estate licensee as defined in California Code of Regulations, title 10, section 2910, subdivisions (a)(1), (a)(4), and (a)(8), in that they involve the fraudulent taking of the property of another; the employment of deceit or falsehood to achieve an end; and the doing of an unlawful act with the intent of thereby conferring a financial or economic benefit upon the perpetrator.

6. As a consequence of the convictions set forth in Finding 3, imposition of sentence was suspended and conditional sentence was granted for three years, subject to various terms and conditions. Respondent was ordered to serve 30 days in county jail, alternative work program recommended; pay a restitution fine of \$100 and an additional fine

of \$100; and comply with other standard terms and conditions. Respondent worked for the Stockton Food Bank for 30 days, eight hours per day. He paid all court-ordered fines and fees and successfully completed probation. By Order dated September 13, 2001, the San Joaquin County Superior Court granted respondent's motion to dismiss the action pursuant to Penal Code section 1203.4.

7. Respondent was not ordered by the court to pay restitution to his victims. Respondent believes that the dealership repaid the victims from commissions the dealer withheld from respondent, but respondent provided no corroborating evidence of this fact.

8. On August 6, 1998, after giving respondent fair notice of the charges, an opportunity for a hearing, and the other due process protections afforded by the Administrative Procedure Act, respondent's license as a vehicle salesperson was revoked by the DMV for acts which, if done by a real estate licensee, would be grounds for the suspension or revocation of a California real estate license pursuant to Business and Professions Code sections 10177, subdivisions (b) (conviction of a crime involving moral turpitude) and (j) (engaged in conduct which constitutes fraud or dishonest dealing). The DMV expressly found that respondent violated Vehicle Code section 11703, subdivision (d), in conjunction with Vehicle Code section 11806, subdivision (d), which together provide that the DMV may revoke a vehicle salesperson's license if the licensee "has been convicted of a crime or committed any act or engaged in any conduct involving moral turpitude which is substantially related to the qualifications, functions, or duties of the licensed activity." The DMV further found that respondent violated Vehicle Code section 11705, subdivision (a)(14), in conjunction with Vehicle Code section 11806, subdivision (d), which together provide that the DMV may revoke a vehicle salesperson's license if the licensee "[h]as caused any person to suffer any loss or damage by reason of any fraud or deceit practiced on that person or fraudulent representations made to that person in the course of the licensed activity."

In addition to respondent's criminal convictions, the DMV found that respondent engaged in fraud and deceit causing loss or damage in three other sales transactions. In the first transaction, respondent was the salesperson acting on behalf of the dealership in a transaction involving the sale of a 1992 Ford Aerostar to Robin Hazelwood on October 7, 1996. At that time, Ms. Hazelwood gave respondent a check in the amount of \$1,500 to be held as a down payment on the Aerostar. Respondent also obtained \$400 in cash from Ms. Hazelwood, which he said would be applied to insurance. Respondent did not give Ms. Hazelwood a receipt for the \$400. When the sales contract was prepared, it did not reflect the \$400 payment. The dealership terminated respondent's employment when the dealer learned about the \$400 cash payment to respondent. The dealer returned the \$1,500 check to Ms. Hazelwood and only required a down payment of \$1,100 for the vehicle.

In the second transaction, respondent was the salesperson acting on behalf of the dealership in a transaction involving the sale of a 1994 Jetta to Dawn Monday. Ms. Monday paid respondent a total of \$1,300, of which \$1,000 was a down payment, and \$200 was for

insurance.¹ The down payment was reflected in the sales contract, but the \$200 was not, and respondent did not otherwise provide Ms. Monday a receipt for this amount. The contract does not reflect that Ms. Monday received an insurance policy. The DMV specifically found that respondent converted the money to his own use. Respondent admitted at hearing that he retained a \$20 or \$25 insurance "finder's fee" for this transaction.

In the third transaction, respondent was the salesperson acting on behalf of the dealership in a transaction involving the sale of a 1992 Mazda to Mattie Williams. Ms. Williams gave respondent \$1,800 in cash, \$300 of which was supposed to be for insurance, and \$1,500 for the down payment. Only the down payment in the amount of \$1,500 is reflected in the sales contract. Ms. Williams was not given a receipt for the \$300. She paid an additional \$300 to the insurance agent before she drove the vehicle off the lot. The DMV specifically found that respondent converted the \$300 to his own use. Respondent admitted at hearing that he retained an insurance "finder's fee" for this transaction.

Respondent testified that the dealer at Stockton Mazda was taking money from all the salespeople, and he now admits that he "took money under the table" to make up the difference.

9. Respondent filed an application with the DMV dated May 13, 2002, for a vehicle salesperson's license. On August 1, 2003, after giving respondent fair notice of the charges, an opportunity for a hearing, and the other due process protections afforded by the Administrative Procedure Act, respondent's application for the issuance of a vehicle salesperson license was denied by the DMV for acts which, if done by a real estate licensee, would be grounds for the suspension or revocation of a California real estate license pursuant to Business and Professions Code sections 10177, subdivisions (b) (conviction of a crime involving moral turpitude); (f) (acted or conducted himself or herself in a manner that would have warranted the denial of his or her application for a real estate license, or has either had a license denied or had a license issued by another agency of this state, another state, or the federal government revoked or suspended for acts that, if done by a real estate licensee, would be grounds for the suspension or revocation of a California real estate license); and (j) (engaged in conduct which constitutes fraud or dishonest dealing). The DMV expressly found that respondent violated Vehicle Code section 11703, subdivision (d), in conjunction with Vehicle Code section 11806, subdivision (d) (criminal conviction). The DMV further found that respondent violated Vehicle Code section 11703, subdivision (a), in conjunction with Vehicle Code section 11806, subdivision (d), which together provide that the DMV may refuse to issue a vehicle salesperson's license if the applicant "was previously the holder, ... of a license issued under this chapter which was revoked for cause and never reissued by the [DMV]." In its August 1, 2003 Decision, the DMV concluded that respondent had not established rehabilitation sufficient to warrant the issuance of a vehicle salesperson's license to respondent, even with conditions. The Decision stated, "Without a clear understanding of the influences causing or contributing to respondent's errant conduct, the extended misconduct of respondent combined with his abuse of

¹ The additional \$100 was not accounted for.

a Department license does not compel a conclusion that he has met his burden of proof in this proceeding.”

10. On respondent’s application for a real estate salesperson license, the following language appears on the printed form after Question 23, in a box for added emphasis:

- ❖ ***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 or 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.

11. Question 24A on the application states as follows:

24A. HAVE YOU EVER HAD A DENIED, SUSPENDED, RESTRICTED OR REVOKED BUSINESS OR PROFESSIONAL LICENSE (INCLUDING REAL ESTATE), IN CALIFORNIA OR ANY OTHER STATE? (DO NOT INCLUDE DRIVER’S LICENSE SUSPENSIONS, ETC.)

IF YES, COMPLETE #24B-24F AND #27A-27D. INCLUDE THE DATE ACTION WAS TAKEN, REASON IT OCCURRED, AND (IF APPLICABLE) WHEN ACTION AGAINST YOU WAS TERMINATED.

12. Question 27 on the application states as follows:

27. DETAILED EXPLANATION OF ITEMS 24-26. COMPLETE ONE LINE FOR EACH VIOLATION AND PROVIDE EXPLANATION BELOW. IF YOU ARE UNABLE TO PROVIDE THIS INFORMATION, A DETAILED EXPLANATION MAY SUFFICE. INDICATE WHETHER EACH CONVICTION WAS A MISDEMEANOR OR FELONY AT THE TIME THE CONVICTION OCCURRED. IF THE CONVICTION STATUS HAS BEEN SUBSEQUENTLY CHANGED OR REDUCED, NOTE THAT

FACT IN THE AREA PROVIDED FOR ADDITIONAL
INFORMATION. *CODE SECTION VIOLATED (i.e., 484)
**CODE VIOLATED (i.e., PENAL CODE)
***DISPOSITION (i.e., PROBATION, PAROLE, FINE,
LENGTH OF TERM, ETC.)

Included as part of Question 27 is a chart with columns to provide information concerning court of conviction, arresting agency, date of conviction, type of conviction (felony or misdemeanor), code section violated, code violated, disposition, and case number. The license application includes an example of how to complete the chart. There are blank lines below the chart for additional information. The instructions for additional information state as follows:

Additional Information: Specify which lines you are referring to.
(Attach extra sheets if more room is needed. *Each additional sheet must be signed by applicant and employing broker when applicable.*)

13. In response to Question 24A of the license application, "Have you ever had a denied, suspended, restricted or revoked business or professional license (including real estate), in California or any other state?" respondent checked, "YES." In response to Question 24B, "Type of license," respondent answered, "Auto Sales." In response to Question 24C, "Action (revoked, etc.)," respondent answered, "Revoked." In response to Question 24D, "License expiration date," respondent answered, "8/6/98." In response to Question 24E, "License ID No.," respondent answered, "S455499." In response to Question 24F, "State," respondent answered, "CA." Respondent did not provide any additional information in the space provided as part of Question 27. In particular, respondent did not disclose the facts set forth in Finding 9 above, namely, that respondent had applied for a vehicle salesperson license in 2002, and that application was denied by the DMV in 2003. In addition, respondent did not provide the information required by Question 24A to be included in Question 27, in that respondent did not "include the date the action was taken, reason it occurred, and (if applicable) when action against you was terminated." Respondent signed the license application on January 20, 2004, thereby certifying under penalty of perjury under the laws of the State of California that the answers and statements on the license application were true and correct.

14. Respondent also failed to provide detailed information concerning his DMV license revocation and subsequent license application denial in the Confidential—Interview Information Statement (RE 515), signed by respondent on May 19, 2004. Question 16 states as follows:

License Discipline—Have you ever suffered a license discipline in this state or in any other state?

If yes, provide the name of the state, the type of license, the identification number of the license, the file number of the disciplinary action, the effective date of the discipline, the cause of the discipline, and the current status of the license disciplined.

In response to Question 16, respondent answered "Yes." The only additional information respondent provided was, "Auto Sales License Revoked in 1998." Respondent never disclosed to the Department the basis for the revocation of his vehicle salesperson license, nor the fact that his subsequent application to obtain a vehicle salesperson license was denied.²

15. Complainant contends that respondent's failure to reveal the denial of his application for a vehicle salesperson license in 2003 on the license application constituted the attempt to procure a real estate license by fraud, misrepresentation or deceit, and by making material misstatements of fact in said application. Complainant further contends that respondent knowingly made a false statement of fact required to be revealed in the license application. At hearing, respondent explained that, at the time he filled out the license application, he was focused on the fact that his vehicle salesperson license had been revoked and had not been "reinstated." He further noted that Questions 24B through 24F only provide space to list one license disciplinary action.

While the instructions for Question 24A require the applicant to fill out both Questions 24B through 24F and Questions 27A through 27D, Questions 27A through 27D appear to pertain to criminal convictions, in that the chart identifies such matters as "Court of Conviction," "Arresting Agency," "Date of Conviction," and "Type of Conviction." In fact, respondent utilized the chart in Question 27 to disclose his criminal convictions (Finding 3), and provided an explanation of his convictions in the area designated "Additional Information."³

Respondent's explanation for his failure to disclose additional facts concerning the revocation of his vehicle salesperson license, including the failure to disclose the denial of his application for a vehicle salesperson license in 2003, is not persuasive. While the application is somewhat confusing, in that Question 27 refers to criminal convictions, Question 24A clearly requires the applicant to provide specific details concerning prior license discipline, in addition to the facts elicited in Questions 24B through 24F, and it directs the applicant to complete Question 27. Question 27 has space, under "Additional Information," to present required supplemental facts. By failing to reveal the denial of his

² Contrary to respondent's testimony at hearing, the proceedings before the DMV in 2003 involved the denial of an application for vehicle salesperson license, not the denial of a reinstatement of his prior license.

³ On his license application, under "Additional Information," respondent stated in part as follows: "I blew the whistle on a dealer that was closed down after my convictions & I got blamed for not having receipted money in so they said I stole it." This description of the facts and circumstances surrounding his convictions does not accurately reflect respondent's conduct or acknowledge any wrongdoing on respondent's part. His lack of candor when providing information on the license application is considered as a factor in aggravation herein.

application for a vehicle salesperson license in 2003 on the license application, respondent attempted to procure a real estate license by making material misstatements of fact in said application. In addition, by omitting this information, respondent knowingly made a false statement of fact required to be revealed in the license application.

16. Respondent is divorced. He has three children for whom he provides support. Respondent has two daughters, ages 8 and 11, who live in Manteca. Respondent's son, age 17, recently moved back to California from Atlanta and is now living with respondent. Respondent has coached sports teams for his daughters and a stepson, and has been involved with school activities. He takes his children with him to church on Wednesdays.

17. Respondent served in the U.S. Army for seven years and was honorably discharged in 1990. While serving in the military, respondent obtained his B.S. degree in Business Administration/Applied Management from Central Texas College.

18. Respondent obtained a vehicle salesperson license in about 1990. Prior to his employment at Stockton Mazda in 1996, respondent worked for Stockton Nissan. Respondent was fired from his job at Stockton Mazda in October 1996. After respondent served his 30 days of work release in connection with his criminal conviction, respondent was employed by Hayward Auto until the revocation of his vehicle salesperson license on August 6, 1998. Thereafter, respondent became a "loan consultant," doing business as Loan Express. Respondent works for various vehicle dealers or salespeople to help find vehicle financing programs for their customers.

19. Respondent has tried to change his business practices by staying away from individuals who were "bad influences" in the past. He became a Christian three years ago, when he realized he was on a "bad path." He attends the Christian Worship Center (CWC) three times per week. Albert Perea, Assistant Pastor at CWC, testified on respondent's behalf at hearing, attesting to respondent's faithful attendance at church services, and his general favorable impression of respondent's honesty.

20. Respondent took a weekend real estate principles course from Real Estate Trainers in Sunnyvale in 2000 and a preparation class for the real estate licensing examination in 2003.

21. Respondent's girlfriend, Veronica Bagnis, testified on respondent's behalf at hearing. She has recently become licensed as a real estate salesperson, employed by Excellence Realty in Stockton, California. She believes respondent would perform the duties of a real estate salesperson in an ethical manner. Ms. Bagnis owns a commercial cleaning company, and respondent has helped with administration and scheduling of workers. He has been trustworthy in the handling of money and payment of bills.

22. If respondent is granted a real estate salesperson license, he would like to engage in residential real estate sales. Ricardo Sanchez, a broker and owner of Excellence Realty,

testified on respondent's behalf at hearing. He is aware of respondent's criminal convictions. When respondent disclosed the convictions to Mr. Sanchez, respondent said he "had not stolen anything, but had done something wrong by not keeping records or receipts." Mr. Sanchez was present at hearing when respondent admitted under oath that he had taken "kickbacks" from certain clients of the dealership. Mr. Sanchez is nevertheless willing to hire respondent if he is granted a license. Mr. Sanchez acknowledged that agents in his office participate in a "lockbox" program, through which they are able to gain access to a person's home when the owner is not present, and when they are not under Mr. Sanchez' direct supervision.

LEGAL CONCLUSIONS

1. Business and Professions Code section 480, subdivisions(a) and (c), state as follows:

(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. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action which a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code.

(2) Done any act involving dishonesty, fraud or deceit with the intent to substantially benefit himself or another, or substantially injure another; or

(3) Done any act which if done by a licensee of the business or profession in question, would be grounds for suspension or revocation of license.

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.

(c) A board may deny a license regulated by this code on the ground that the applicant knowingly made a false statement of fact required to be revealed in the application for such license.

2. Business and Professions Code section 10177, subdivisions (a), (b), (f) and (j), state as follows:

The commissioner may suspend or revoke the license of a real estate licensee, or may deny the issuance of a license to an applicant, who has done any of the following, or may suspend or revoke the license of a corporation, or deny the issuance of a license to a corporation, if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has done any of the following:

(a) Procured, or attempted to procure, a real estate license or license renewal, for himself or herself or any salesperson, by fraud, misrepresentation, or deceit, or by making any material misstatement of fact in an application for a real estate license, license renewal, or reinstatement.

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

(f) Acted or conducted himself or herself in a manner that would have warranted the denial of his or her application for a real estate license, or has either had a license denied or had a license issued by another agency of this state, another state, or the federal government revoked or suspended for acts that, if done by a real estate licensee, would be grounds for the suspension or revocation of a California real estate license, if the action of denial, revocation, or suspension by the other agency or entity was taken only after giving the licensee or applicant fair notice of the charges, an opportunity for a hearing, and other due process protections comparable to the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code), and only upon an express finding of a violation of law by the agency or entity.

(j) Engaged in any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

3. California Code of Regulations, title 10, section 2910, subdivisions (a)(1), (a)(4), (a)(8), and (c), state as follows:

- (a) When considering whether a license should be denied, suspended or revoked on the basis of the conviction of a crime, or on the basis of an act described in Section 480(a)(2) or 480(a)(3) of the Code, the crime or act shall be deemed to be substantially related to the qualifications, functions or duties of a licensee of the Department within the meaning of Sections 480 and 490 of the Code if it involves:
 - (1) The fraudulent taking, obtaining, appropriating or retaining of funds or property belonging to another person.
 - (4) The employment of bribery, fraud, deceit, falsehood or misrepresentation to achieve an end.
 - (8) Doing of any unlawful act with the intent of conferring a financial or economic benefit upon the perpetrator or with the intent or threat of doing substantial injury to the person or property of another.
- (c) If the crime or act is substantially related to the qualifications, functions or duties of a licensee of the department, the 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.

4. California Code of Regulations, title 10, section 2911, states as follows:

The following criteria have been developed by the department pursuant to Section 482(a) of the Business and Professions Code for the purpose of evaluating the rehabilitation of an applicant for issuance or for reinstatement of a license in considering whether or not to deny the issuance or reinstatement on account of a crime or act committed by the applicant:

- (a) The passage of not less than two years since the most recent criminal conviction or act of the applicant that is a basis to deny the departmental action sought. (A longer period will be

required if there is a history of acts or conduct substantially related to the qualifications, functions or duties of a licensee of the department.)

- (b) Restitution to any person who has suffered monetary losses through 'substantially related' acts or omissions of the applicant.
- (c) Expungement of criminal convictions resulting from immoral or antisocial acts.
- (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 conduct which is the basis to deny the departmental action sought is attributable in part to the use of controlled substances or alcohol.
- (g) Payment of the fine or other monetary penalty imposed in connection with a criminal conviction or quasi-criminal judgment.
- (h) Stability of family life and fulfillment of parental and familial responsibilities subsequent to the conviction or conduct that is the basis for denial of the agency action sought.
- (i) Completion of, or sustained enrollment in, formal education or vocational training courses for economic self-improvement.
- (j) Discharge of, or bona fide efforts toward discharging, adjudicated debts or monetary obligations to others.
- (k) Correction of business practices resulting in injury to others or with the potential to cause such injury.
- (l) Significant or conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.

- (m) New and different social and business relationships from those which existed at the time of the conduct that is the basis for denial of the departmental action sought.
- (n) Change in attitude from that which existed at the time of the conduct 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 applicant's previous conduct and with his 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 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.

5. Cause for denial of respondent's application for a real estate salesperson license was established pursuant to Business and Professions Code sections 480, subdivision (a)(1), and 10177, subdivision (b), by reason of Findings 3, 4 and 5, in that respondent has been convicted of two counts of petty theft, crimes of moral turpitude that are substantially related to the qualifications, functions and duties of a real estate licensee.

6. Cause for denial of respondent's application for a real estate salesperson license was established pursuant to Business and Professions Code section 10177, subdivision (f), by reason of Findings 8 and 9, in that respondent has acted or conducted himself in a manner that would have warranted the denial of his application for a real estate license; furthermore, he has had a license issued by another agency of this state revoked, and a subsequent application denied, for acts that, if done by a real estate licensee, would be grounds for the suspension or revocation of a California real estate license.

7. Cause for denial of respondent's application for a real estate salesperson license was established pursuant to Business and Professions Code sections 480, subdivision

(c), and 10177, subdivision (a), by reason of Findings 9, 10, 11, 12, 13, 14 and 15, in that respondent attempted to procure a real estate license by misrepresentation, and by making material misstatements of fact required to be revealed in the application.

8. Pursuant to Business and Professions Code section 482, subdivision (a), the Department has developed criteria to evaluate the rehabilitation of a license applicant after a criminal conviction, which are set forth in California Code of Regulations, title 10, section 2911. In this case, more than seven years have passed since respondent's convictions. Respondent completed probation and paid all court-ordered fines and fees. He obtained expungement of the conviction pursuant to Penal Code section 1203.4 (Finding 6). Respondent's family life is stable, and he is fulfilling parental and familial responsibilities (Finding 16). Respondent has taken a real estate course for economic self-improvement (Finding 20). Respondent has changed his social relationships from those that existed at the time his criminal conduct took place, in that he has undergone a religious conversion and is attending church on a regular basis. (Finding 19). He has been involved in youth community activities to provide social benefit (Finding 16). Respondent provided testimony from witnesses attesting to his good character (Findings 19, 21 and 22).

9. Although respondent professes to have undergone a change in attitude after his criminal convictions, his lack of candor on his license application, and continuing with his "explanations" (or lack thereof) of his conduct that led to his convictions and the revocation of his vehicle salesperson's license, demonstrate that respondent is not fully rehabilitated. Respondent has been convicted of crimes of dishonesty, and he committed dishonest acts while licensed as a vehicle salesperson that led to the revocation of said license and the subsequent denial of his application for a vehicle salesperson's license. Honesty and trustworthiness are qualities of utmost importance in a real estate licensee, who must frequently act in a fiduciary capacity. "Honesty and truthfulness are two qualities deemed by the Legislature to bear on one's fitness and qualification to be a real estate licensee." (*Harrington v. Department of Real Estate* (1989) 214 Cal.App.3d 394, 402.) "If appellant's offenses reflect unfavorably on his honesty, it may be said he lacks the necessary qualifications to become a real estate salesperson." (*Harrington, supra*, at p. 402; *Golde v. Fox*, (1979) 98 Cal.App.3d 167, 176.) "The Legislature intended to insure that real estate brokers and salespersons will be honest, truthful and worthy of the fiduciary responsibilities which they will bear." (*Harrington, supra*, at p. 402; *Ring v. Smith* (1970) 5 Cal.App.3d 197, 205.) Cases of petty theft are of particular concern to the Department, in light of the fact that real estate salespersons have access to residences while the owners are not present, through the use of lock boxes.

10. Under all of the facts and circumstances, it would be contrary to the public interest to permit respondent to become licensed as a real estate salesperson at this time, with or without a restricted license.

ORDER

The application of Jose Antonio Rivera for a real estate salesperson license is denied
by reason of Legal Conclusions 5, 6, 7, 9 and 10.

Dated: 10-29-04

Catherine B. Frink

CATHERINE B. FRINK
Administrative Law Judge
Office of Administrative Hearings

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FILED

SEP 14 2004

DEPARTMENT OF REAL ESTATE

By Thurman G. Zier

8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Application of)

No. H-4041 SAC

12 JOSE ANTONIO RIVERA,)

OAH No. N-2004070306

13 Respondent.)

FIRST AMENDED
STATEMENT OF ISSUES

14
15 Complainant, Charles W. Koenig, a Deputy Real Estate
16 Commissioner of the State of California, for Statement of Issues
17 against JOSE ANTONIO RIVERA (herein "Respondent"), alleges as
18 follows:

19 I

20 Complainant, Charles W. Koenig, a Deputy Real Estate
21 Commissioner of the State of California, makes this Statement of
22 Issues in his official capacity.

23 II

24 Respondent made application to the Department of Real
25 Estate of the State of California for a real estate salesperson
26 license on or about January 23, 2004 with the knowledge and
27 understanding that any license issued as a result of said

1 application would be subject to the conditions of Section 10153.4
2 of the California Business and Professions Code (herein "the
3 Code").

4 III

5 In response to Question 24A of the application, to wit:
6 "Have you ever had a denied, suspended, restricted or revoked
7 business or professional license (including real estate), in
8 California or any other state?", Respondent concealed and failed
9 to disclose the facts described in Paragraph VI, below.

10 IV

11 On or about March 24, 1997, in the Municipal Court of
12 the State of California, County of San Joaquin, Stockton Judicial
13 District, Respondent was convicted of two counts of the crime of
14 THEFT, in violation of Penal Code Section 484(a), each a
15 misdemeanor and a crime involving moral turpitude which bears a
16 substantial relationship under Section 2910, Chapter 6, Title 10,
17 California Code of Regulations (herein "the Regulations"), to the
18 qualifications, functions or duties of a real estate licensee.

19 V

20 On or about August 6, 1998, after giving Respondent
21 fair notice of the charges, an opportunity for a hearing, and the
22 other due process protections afforded by the Administrative
23 Procedure Act, Respondent's license as a vehicle salesperson was
24 revoked by the California Department of Motor Vehicles, for acts
25 which, if done by a real estate licensee, would be grounds for
26 the suspension or revocation of a California real estate license
27 pursuant to the provisions of Sections 10177(b) and 10177(j) of

1 the California Business and Professions Code, upon an express
2 finding of a violation of the provisions of Section 11703(d) and
3 11705(a)(14) of the California Vehicle Code.

4 VI

5 On or about August 1, 2003, after giving Respondent
6 fair notice of the charges, an opportunity for a hearing, and the
7 other due process protections afforded by the Administrative
8 Procedure Act, Respondent's application for the issuance of a
9 vehicle salespersons license was denied by the California
10 Department of Motor Vehicles, for acts which, if done by a real
11 estate licensee, would be grounds for the suspension or
12 revocation of a California real estate license pursuant to the
13 provisions of Sections 10177(b), 10177(f) and 10177(j) of the
14 California Business and Professions Code, upon an express finding
15 of a violation of the provisions of Section 11703(a) and 11703(d)
16 of the California Vehicle Code.

17 VII

18 The crimes of which Respondent was convicted, as
19 alleged in Paragraph IV, above, individually and jointly
20 constitute cause for denial of Respondent's application for a
21 real estate license under Sections 480(a) and 10177(b) of the
22 California Business and Professions Code.

23 VIII

24 The events described in Paragraphs V and VI, above,
25 constitute cause for denial of Respondent's application for a
26 real estate license under Section 10177(f) of the California
27 Business and Professions Code.

IX

In concealing and failing to disclose the facts described in Paragraph VI, above, in Respondent's application for a real estate salesperson license, Respondent attempted to procure a real estate license by fraud, misrepresentation, or deceit, or by making material misstatements of fact in the current application, which constitutes cause for denial of Respondent's application for a real estate license under Sections 480(c) and 10177(a) of the California Business and Professions Code.

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


CHARLES W. KOENIG
Deputy Real Estate Commissioner

Dated at Sacramento, California,
this 9th day of September, 2004.

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

FILED

AUG - 2 2004

DEPARTMENT OF REAL ESTATE

In the Matter of the Application of

JOSE ANTONIO RIVERA,

Case No. H-4041 SAC

OAH No. N-2004070306

Respondent

NOTICE OF HEARING ON APPLICATION

To the above named respondent:

You are hereby notified that a hearing will be held before the Department of Real Estate at **THE OFFICE OF ADMINISTRATIVE HEARINGS, 560 J STREET, SUITE 340/360, SACRAMENTO, CA 95814** on **MONDAY, OCTOBER 4, 2004**, at the hour of **1:30 P.M.**, or as soon thereafter as the matter can be heard, upon the Statement of Issues served upon you. If you object to the place of hearing, you must notify the presiding administrative law judge of the Office of Administrative Hearings within ten (10) days after this notice is served on you. Failure to notify the presiding administrative law judge within ten days will deprive you of a change in the place of the hearing.

You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. If you are not present in person nor represented by counsel at the hearing, the Department may take disciplinary action against you based upon any express admission or other evidence including affidavits, without any notice to you.

The burden of proof is upon you to establish that you are entitled to the license or other action sought. If you are not present nor represented at the hearing, the Department may act upon your application without taking evidence.

You may present any relevant evidence and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Department of Real Estate.

The hearing shall be conducted in the English language. If you want to offer the testimony of any witness who does not proficiently speak the English language, you must provide your own interpreter and pay his or her costs. The interpreter must be certified in accordance with Sections 11435.30 and 11435.55 of the Government Code.

DEPARTMENT OF REAL ESTATE

Dated: AUGUST 2, 2004

By

James L. Beaver
JAMES L. BEAVER, Counsel (LZ)

1 JAMES L. BEAVER, Counsel (SBN 60543)
2 Department of Real Estate
3 P. O. Box 187000
4 Sacramento, CA 95818-7000

5 Telephone: (916) 227-0789
6 -or- (916) 227-0788 (Direct)

FILED
JUN 25 2004

DEPARTMENT OF REAL ESTATE

By Lauriel J. Jiri

8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Application of)
12 JOSE ANTONIO RIVERA,)
13 Respondent.)

No. H-4041 SAC

STATEMENT OF ISSUES

15 Complainant, Peter J. Saverein, a Deputy Real Estate
16 Commissioner of the State of California, for Statement of Issues
17 against JOSE ANTONIO RIVERA (herein "Respondent"), alleges as
18 follows:

19 I

20 Complainant, Peter J. Saverein, a Deputy Real Estate
21 Commissioner of the State of California, makes this Statement of
22 Issues in his official capacity.

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1 II

2 Respondent made application to the Department of Real
3 Estate of the State of California for a real estate salesperson
4 license on or about January 23, 2004 with the knowledge and
5 understanding that any license issued as a result of said
6 application would be subject to the conditions of Section 10153.4
7 of the California Business and Professions Code (herein "the
8 Code").

9 III

10 On or about March 24, 1997, in the Municipal Court of
11 the State of California, County of San Joaquin, Stockton Judicial
12 District, Respondent was convicted of two counts of the crime of
13 THEFT, in violation of Penal Code Section 484(a), each a
14 misdemeanor and a crime involving moral turpitude which bears a
15 substantial relationship under Section 2910, Chapter 6, Title 10,
16 California Code of Regulations (herein "the Regulations"), to the
17 qualifications, functions or duties of a real estate licensee.

18 IV

19 The crimes of which Respondent was convicted, as
20 alleged in Paragraph III, above, individually and jointly
21 constitute cause for denial of Respondent's application for a
22 real estate license under Sections 480(a) and 10177(b) of the
23 Code.

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27 ///

1 WHEREFORE, Complainant prays that the above-entitled
2 matter be set for hearing and, upon proof of the charges
3 contained herein, that the Commissioner refuse to authorize the
4 issuance of, and deny the issuance of a real estate salesperson
5 license to Respondent, and for such other and further relief as
6 may be proper in the premises.

7
8 
9 PETER J. SAVEREIN
Deputy Real Estate Commissioner

10 Dated at Sacramento, California,
11 this 17th day of June, 2004.

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