

DEPARTMENT OF REAL ESTATE

* * *

NO. H-4226 SAC
N-2005030088

- 1 -

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 August 3, 2005.

IT IS SO ORDERED 7-12-, 2005.

JEFF DAVI
Real Estate Commissioner

A handwritten signature in dark ink, appearing to read 'Jeff Davi', is written over a horizontal line.

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Application of:

MICHAEL JOSEPH KAUFMAN,

Respondent.

Case No. H-4226 SAC

OAH No. N 2005030088

PROPOSED DECISION

On May 9, 2005, in Sacramento, California, Denny R. Davis, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Deidre L. Johnson, Department of Real Estate Counsel, represented the complainant.

Michael Joseph Kaufman, respondent, represented himself.

Evidence was received; the record was closed and the matter was submitted on May 9, 2005.

FACTUAL FINDINGS

1. Complainant, Charles W. Koenig, Deputy Real Estate Commissioner of the State of California, filed the Statement of Issues against respondent in his official capacity only and not otherwise.

2. On March 20, 2003, respondent was convicted in the Superior Court of El Dorado County of violating California Penal Code section 243(e)(1), (battery on a spouse/cohabitant). Respondent was sentenced to attend a 52-week Domestic Violence/Anger Management program. He successfully completed the program.

3. The facts and circumstances leading to respondent's conviction are as follows: Respondent was married in July 1992. In December 2002, respondent and his wife were separated. He testified that he wished to reconcile, but on December 20, 2002, he learned that his wife was seeing another man. He confronted her, an argument ensued, and he grabbed her arms. She went to the floor. She notified the police. The police arrived and

interviewed respondent, his wife and their daughter. The wife informed the police that respondent pushed her to the floor. The daughter told the police that respondent pushed her mother to the floor. Respondent's anger management group facilitator testified on respondent's behalf. She testified that respondent told her that he slapped his wife and that he pushed her to the floor. A second witness that appeared on behalf of respondent testified that respondent told her that he pushed his wife back and that she fell against the wall. At hearing respondent testified that he did not push his wife to the floor. He speculated that she might have slipped and that she might have fallen to the floor. Respondent's account of the events is not credible. His rendition of the facts is not corroborated by other more credible evidence, including his own witnesses.

4. Respondent made application to the Department of Real Estate for a real estate salesperson's license on September 7, 2004. At question 25, the question asked: "Have you ever been convicted of any violation of law?" Respondent marked "YES". He proceeded to list all convictions. Respondent made full disclosure.

5. Respondent concluded his college studies at San Diego State University in 1982. In 1983, he applied for and was granted a California Real Estate Salesperson license. He worked in real estate for Coldwell Banker for eight years and was never disciplined by the Department. He left the real estate business to join the Callaway Golf Company and permitted his real estate license to lapse.

6. Respondent's evidence of mitigation and rehabilitation was weighed and considered. Respondent is 46 years of age. It has been two and one half years since the incident with his wife on December 20, 2002. He attended and successfully completed a 52-week Domestic Violence/Anger Management program. He admits his conduct was wrong and he is remorseful for his part in the altercation. Respondent and his wife are now divorced but they share the care and maintenance of their daughter. He maintains a happy and constructive relationship with his daughter. Respondent's personal and professional life is stable and productive. He has no prior history of violence and none since the 2002, incident. However, while respondent presented himself to this tribunal as a self-assured individual, he expressed impatience. Additionally, he clearly manifested a measure of indignation, if not anger, during the proceedings before this tribunal. The only reasonable inference to be drawn is that he fails to hold himself responsible for putting in place all events, including delays to his career advancement that flow from his December 20, 2002, misconduct. It was not the police or the judicial proceedings that set these matters in motion, it was respondent. While he has demonstrated rehabilitation, he continues to deny the full measure of his responsibility for his misconduct and the consequences that have resulted from that misconduct.

LEGAL CONCLUSIONS

1. Business and Professions Code section 10177, subdivision (b), provides:

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:

...

(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.

2. Cause exists to deny the issuance of a real estate salesperson's license to respondent under Business and Professions Code section 10177, subdivision (b). Respondent was convicted of violating Penal Code 243(e) (1). The crime involved battery on his spouse which is conduct that involves moral turpitude. However, moral turpitude requires a determination that the crime committed be substantially related to the qualifications, functions and duties of a real estate salesperson as set forth in Business and Professions Code section 480 and Title 10, California Code of Regulations section 2910.

3. Business and Professions Code section 480, subdivision (a) (1) and (3), provide:

(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.

...

(3) Done any act which if done by a licentiate 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.

4. Title 10, California Code of Regulations section 2910, provides:

(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.

(2) Counterfeiting, forging or altering of an instrument or the uttering of a false statement.

(3) Willfully attempting to derive a personal financial benefit through the nonpayment or underpayment of taxes, assessments or levies duly imposed upon the licensee or applicant by federal, state, or local government.

(4) The employment of bribery, fraud, deceit, falsehood or misrepresentation to achieve an end.

(5) Sexually; related conduct affecting a person who is an observer or non-consenting participant in the conduct or convictions which require registration pursuant to the provisions of Section 290 of the Penal Code.

(6) Willfully violating or failing to comply with a provision of Division 4 of the Business and Professions Code of the State of California.

(7) Willfully violating or failing to comply with a statutory requirement that a license, permit or other entitlement be obtained from a duly constituted public authority before engaging in a business or course of conduct.

(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.

(9) Contempt of court or willful failure to comply with a court order.

(10) Conduct which demonstrates a pattern of repeated and willful disregard of law.

(11) Two or more convictions involving the consumption or use of alcohol or drugs when at least one of the convictions involve driving and the use or consumption of alcohol or drugs.

(b) The conviction of a crime constituting an attempt, solicitation or conspiracy to commit any of the above enumerated acts or omissions is also deemed to be substantially related to the qualifications, functions or duties of a licensee of the department.

(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.

5. As stated, moral turpitude requires a determination that the conduct or offense be substantially related to the qualifications, functions and duties of a real estate salesperson. "Whether an offense involves moral turpitude is a question of law. (*Yakov v. Board of Medical Examiners* (1968) 68 Cal.2d 67, 74.). Since the California Supreme Court's decision in *Morrison v. State Board of Education* (1955) 1 Cal.3d 214, "moral turpitude" must be interpreted to mean that the conduct is substantially related to fitness to engage in the particular occupation involved. Thus, since *Morrison*, moral turpitude requires a determination that the offense is substantially related to the qualifications, functions and duties of a real estate salesperson, the very same legal conclusion required by Business and Professions Code section 490. Moreover, the general provisions of the Business and Professions Code prevail over Business and Professions Code section 10177, subdivision (b), so all convictions, including those that are either felonies or involve moral turpitude, must also be substantially related to fitness to engage in the real estate profession. (*Pieri V. Fox* (1979) 96 Cal.App.3d 802, pp. 804-807.)."

6. Respondent's offense of battery was an isolated offense and not part of a pattern of conduct. However, section 2910, subdivision (8), requiring a showing of an unlawful act with the intent of threatening or doing substantial injury to the person of another is shown to exist in this case. Respondent's criminal conduct is deemed substantially related to the qualifications, functions and duties of a real estate salesperson, and it involves moral turpitude, within the meaning of *Morrison v. State Board of Education*. Cause exists to deny the issuance of a real estate salesperson's license to respondent under Business and Professions Code section 2910, subdivision (8)

7. Although respondent continues to deny responsibility for his misconduct by asserting that he did not physically push his wife to the floor, the fact that he has no prior history of similar violence and no similar event has occurred since 2002, coupled with the fact that he has shown rehabilitation, compels the conclusion that respondent warrants a consideration of licensure. Respondent can be licensed at the present time without risk of harm to the public provided such licensure is under terms and conditions.

ORDER

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

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. The conviction of respondent (including 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 nor 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.

not adopted { 3. Respondent shall report quarterly, in writing, to the Department of Real Estate about his fitness to represent the real estate profession.

4. 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.

5. Respondent's restricted real estate salesperson license is issued subject to the requirements of Section 10153.4 of the Business and Professions Code, to wit: Respondent shall, within eighteen (18) months of the issuance of the restricted license, submit evidence satisfactory to the Commissioner of successful completion, at an accredited institution, of two of the courses listed in Section 10153.2, other than real estate principles, advanced legal aspects of real estate, advanced real estate finance or advanced real estate appraisal. If respondent fails to timely present to the Department satisfactory evidence of successful completion of the two required courses, the restricted license shall be automatically suspended effective eighteen (18) months after the date of its issuance. Said suspension shall not be lifted unless, prior to the expiration of the restricted license, respondent has submitted the required evidence of course completion and the Commissioner has given written notice to respondent of lifting of the suspension.

6. Pursuant to Section 10154, if respondent has not satisfied the requirements for an unqualified license under Section 10153.4, respondent shall not be entitled to renew the restricted license, and shall not be entitled to the issuance of another license which is subject to Section 10153.4 until four years after the date of the issuance of the preceding restricted license.

Dated: June 17, 2005



DENNY R. DAVIS

Administrative Law Judge

Office of Administrative Hearings

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FILED
FEB 23 2005

DEPARTMENT OF REAL ESTATE

By K. Contreras

8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Application of)
12 MICHAEL JOSEPH KAUFMAN,) NO. H-4226 SAC
13 Respondent.) STATEMENT OF ISSUES
14)

15 The Complainant, CHARLES W. KOENIG, a Deputy Real
16 Estate Commissioner of the State of California, for Statement of
17 Issues against MICHAEL JOSEPH KAUFMAN (hereinafter Respondent),
18 is informed and alleges as follows:

19 I

20 Respondent pursuant to the provisions of Section
21 10153.3 of the Business and Professions Code, made application to
22 the Department of Real Estate of the State of California
23 (hereafter the Department) for a real estate salesperson license
24 on or about September 7, 2004, with the knowledge and
25 understanding that any license issued as a result of said
26 application would be subject to the conditions of Section 10153.4
27 of the Business and Professions Code.

1 II

2 The Complainant, CHARLES W. KOENIG, a Deputy Real
3 Estate Commissioner of the State of California, makes this
4 Statement of Issues in his official capacity and not otherwise.

5 III

6 On or about March 20, 2003, in the Superior Court,
7 County of El Dorado, Respondent was convicted of a violation of
8 Section 243(e)(1) of the California Penal Code (Battery on a
9 Spouse/Cohabitant/Parent of Defendant's Child ...), a crime
10 involving moral turpitude, and/or a crime which bears a substantial
11 relationship under Section 2910, Title 10, California Code of
12 Regulations, to the qualifications, functions, or duties of a
13 real estate licensee.

14 IV

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

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

25
26 Dated at Sacramento, California
27 this 18th day of February, 2005.


CHARLES W. KOENIG
Deputy Real Estate Commissioner