

FILED

AUG 19 2015

BUREAU OF REAL ESTATE

BEFORE THE BUREAU OF REAL ESTATE By Signa Wanner

STATE OF CALIFORNIA

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In the Matter of the Accusation of  
MICHELLE ANN MONTOYA,  
Respondent.

) CalBRE No. H-04679 SD  
)  
) OAH No. 2014120628  
)

DECISION

The Proposed Decision dated July 10, 2015, 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 Decision suspends or revokes one or more real estate licenses.

The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Section 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock noon on SEP 08 2015.

IT IS SO ORDERED

8/13/2015  
REAL ESTATE COMMISSIONER

Wayne Bell  
WAYNE BELL

BEFORE THE  
BUREAU OF REAL ESTATE  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

MICHELLE ANN MONTOYA,

Respondent.

Case No. H-04679 SD

OAH No. 2014120628

**PROPOSED DECISION**

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter in San Diego, California, on June 11, 2015.

Julie To, Real Estate Counsel, represented complainant, Veronica Kilpatrick, a Deputy Real Estate Commissioner, Bureau of Real Estate, Department of Consumer Affairs, State of California.

John Bishop, Attorney at Law, represented respondent Michelle Ann Montoya, who was present.

Ms. Montoya's request to keep the record open to submit signed letters of reference was granted. The record remained open until June 19, 2015, at which time the matter was submitted.<sup>1</sup>

**FACTUAL FINDINGS**

*Jurisdictional Matters*

1. On November 25, 2014, complainant signed the accusation in her official capacity. The accusation alleged that Ms. Montoya suffered a conviction in 2013, did not report it to the bureau and did not disclose it on her renewal application. Complainant requested that respondent's real estate salesperson's license be revoked.

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<sup>1</sup> Ms. Montoya never submitted signed letters of reference. Four of the ones she submitted at hearing did not contain signatures because they were sent via e-mail.

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

#### *Ms. Montoya's License History*

2. On October 5, 1992, the bureau issued a conditional salesperson license to Ms. Montoya. The license was suspended in 1994, reissued in 2010, expired in 2014, and renewed in 2014. The license is current and expires in 2018.

#### *Respondent's Conviction*

3 On April 12, 2013, respondent was convicted on her plea of guilty of violating Vehicle Code section 23152, subdivision (a) (driving under the influence causing injury), a misdemeanor, Vehicle Code section 25153, subdivision (b) (driving under the influence with a blood alcohol of .08 or higher), a misdemeanor, and Penal Code section 237A, subdivision (b) (willful and unlawful harm to child), a misdemeanor, in Riverside Superior Court.

The court suspended the proceedings and placed respondent on summary probation for 36 months. The remaining charge filed against respondent was dismissed as part of her plea agreement. Among the many terms ordered, the court committed respondent to custody for 120 days to be served in a work release program and assessed fees and fines of approximately \$2,300. The court also ordered respondent to pay restitution to the victim, successfully complete a first offender DUI program, attend a MADD victim impact session, enroll in a child abuse treatment program, and surrender her driver's license.

4. The Riverside County sheriff's report was received pursuant to *Lake v. Reed* (1997) 16 Cal.4th 448, 461. The report noted that on July 4, 2012, at 11:40 p.m., sheriff's deputies responded to the scene of an injury motor vehicle accident. Ms. Montoya had rear-ended a vehicle in front of her. Paramedics treated her child, the front seat passenger in Ms. Montoya's car, for facial injuries incurred when the airbag deployed. Ms. Montoya did not want her child transported via ambulance, and the child's father was called to the scene. The father took the daughter for treatment. Ms. Montoya told deputies that traffic abruptly stopped and she struck the car in front of her. Several times, Ms. Montoya denied drinking. She claimed that a drink may have spilled on her, producing the alcohol odor that deputies smelled. She eventually admitted to drinking one glass of wine. Deputies thought Ms. Montoya was impaired and administered field sobriety tests. Ms. Montoya was arrested when she failed those tests.

#### *Witness Testimony*

5. Mr. Montoya testified that his wife went to a friend's home to watch fireworks, and he received a call about the accident. He described the marital difficulties they were having at the time, which was why she had taken some of their seven children with her to see the fireworks and he remained at home with the rest. He described the changes in their relationship after this incident, the counseling they have undergone, the fact that neither

of them drink, his wife's deep remorse for the incident, and how "overall we have come out better people." He was very supportive of his wife.

6. Ms. Montoya testified that she had a fight with her husband and left to go to a friend's house to watch fireworks. She was in a very emotional state and her friend, a client, offered her some wine. She refused many times but eventually agreed to have one glass. Ms. Montoya testified that her criminal defense attorney was able to demonstrate that her gastric bypass surgery caused her to become very intoxicated from just one glass of wine.<sup>2</sup> Ms. Montoya did not feel she was impaired from one glass of wine and drove her children home after the fireworks. Traffic was very heavy. The car in front of her abruptly stopped, and she rear-ended it. Her daughter was injured from the air bag deploying. Ms. Montoya expressed sincere remorse for the injury to her child and for the damage to the other vehicle. She was credibly upset by this event. Ms. Montoya testified about the profound changes she has made regarding not drinking, not driving while upset, and communicating with her husband to avoid conflicts. She attended all court ordered classes and continues to go to Alcoholic Anonymous meetings on occasion, as they are a great place for her to talk about her concerns. She took full responsibility for her actions that led to her conviction. Her testimony was sincere and heartfelt.

Ms. Montoya testified she has never been involved in an accident before, and has not received even a speeding ticket, so did not know she was supposed to report her conviction to the bureau. Moreover, her attorney told her everything was "dropped" so she did not know she had to report it to the bureau and "overlooked" the two questions on the renewal application that she answered incorrectly. She testified that she is an honest person who "made a mistake."

Ms. Montoya does not currently practice real estate. She owns a catering business that does very well in her community. Moreover, she donates many meals and gift certificates to organizations. She provides meals for her church and other community events, and she is always looking to give back to her community. She would like to retain her license as she wishes to sell real estate in the future. Ms. Montoya explained that she is a different person from the one who was in this motor vehicle accident in 2012.

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<sup>2</sup> In administrative disciplinary proceedings, an individual may not seek to impeach a prior criminal conviction by means of an "an inquiry into the circumstances surrounding the offense." (*Arneson v. Fox* (1980) 28 Cal.3d 440, 449.) Accordingly, to the extent respondent's testimony constituted an attempt to deny her guilt in connection with her conviction, such testimony must, as a matter of law, be rejected. Her conviction conclusively established that she drove while under the influence and injured her child. On the other hand, "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." (*Ibid.*)

### *Letters of Reference*

7. Respondent submitted several letters of reference. While four of the authors praised Ms. Montoya and stated that they were aware of her conviction, those letters were not signed and cannot be relied upon in this hearing. Although Ms. Montoya was given an opportunity to provide signed letters from these individuals, she failed to do so.

The one letter that was signed was from Ms. Montoya's colleague, who has known her for several years and was in the same 12-Step program as Ms. Montoya. This author described Ms. Montoya as "hard working" and "a very conscientious Mother [sic]."

### *Costs of Investigation and Enforcement*

8. A certification of investigative costs and a declaration prepared by complainant's attorney were introduced that established that investigative costs totaled \$772.40 and attorney costs totaled \$476.15. The documents accompanying the cost declarations set forth the time spent on each task, the rate billed and the task performed. Total reasonable costs of investigation and enforcement are determined to be \$1,248.55.

## LEGAL CONCLUSIONS

### *Purpose of Disciplinary Action*

1. The object 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 charging 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 sections 490 and 10177 authorize the bureau to revoke a license if the licensee has been convicted of a crime that is substantially related to the qualifications, functions, or duties of the business or profession of a real estate licensee.

4. Business and Professions Code section 10186.2 requires a licensee to report a conviction to the bureau in writing within 30 days of being convicted. Failure to report is cause for discipline.

5. Business and Professions Code section 10177 authorizes the bureau to deny a license if procured by fraud, deceit or a knowingly made false statement.

6. Business and Professions Code section 10106 authorizes the bureau to seek its investigation and enforcement costs.

### *Substantial Relationship*

7. 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.)

8. 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.)

9. 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 an applicant's criminal offense reflects unfavorably on his or her honesty, it may be said to be substantially related to his or her qualifications. (*Golde v. Fox* (1979) 98 Cal.App.3d 167, 176.)

10. California Code of Regulations, title 10, section 2910, sets forth the bureau's substantial relationship criteria. Those criteria were considered in rendering this decision. Ms. Montoya's 2013 conviction for driving under the influence causing injury, driving under the influence with a blood alcohol level of .15 percent or higher, and willful and unlawful harm to a child, separately and together, were substantially related to the qualifications, functions, or duties of the business or profession of a real estate salesperson.

### *Rehabilitation*

11. 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.)

12. Since persons under the direct supervision of judicial or correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that such an individual did not commit additional crimes or continue in appropriate behavior while under supervision. (*In re Gossage* (2000) 23 Cal.4th 1080, 1099.)

13. The Department's criteria for rehabilitation are set forth in California Code of Regulations, title 10, section 2911 and were considered in this decision.

*Cause Exists to Impose Discipline*

14. Ms. Montoya was convicted of substantially related crimes. She failed to report those convictions and thereafter failed to disclose them on her renewal application. While her testimony regarding the circumstances surrounding her drunk driving and the profound changes she made in her life following her conviction were impressive, her explanation for her failure to report or disclose was unpersuasive. A real estate salesperson must know the applicable real estate laws. Ms. Montoya's testimony that she did not know that she was supposed to report the convictions was not a defense. Courts have drawn a distinction between mistakes of fact and mistakes of law; while a mistake of fact usually is a defense, a mistake of law usually is not. (*People v. Meneses* (2008) 165 Cal.App.4th 1648, 1661-1665.) Her testimony that her attorney told her everything was "dropped" was not a defense. Additionally, real estate salespersons must pay careful attention to documents that can be complex and voluminous. Ms. Montoya's testimony that she "overlooked" the questions on the renewal application, an extremely scant document, was troubling. As a licensee, she is responsible for carefully reviewing documents she executes. Finally, Ms. Montoya remains on criminal probation for one more year, and little weight is given to her good conduct while on probation.

Cause exists under Business and Professions Code sections 490, 10177, and 10186.2 to impose discipline against respondent's real estate salesperson's license. Public protection requires revocation.

*The Award of Reasonable Costs*

15. Investigation and enforcement costs totaled \$1,248.55. Complainant provided declarations and supporting documentation to support the costs. Business and Professions Code section 10106 authorizes the bureau to seek reasonable costs of the investigation and enforcement against a licensee who violated the real estate law. *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, a case which analyzed the award of costs under a similar provision, set forth four factors to be considered when evaluating costs: (1) Whether the licensee used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed; (2) whether the licensee had a "subjective" good faith belief in the merits of his position; (3) whether the licensee raised a "colorable challenge" to the proposed discipline; and (4) whether the licensee had the financial ability to make payments. In applying those factors here, it is determined that Ms. Montoya shall pay the bureau the total costs incurred.

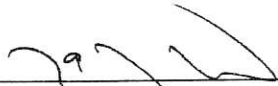
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## ORDERS

All licenses and licensing rights of respondent Michelle Ann Montoya under the Real Estate Law are revoked.

Michelle Ann Montoya shall pay the bureau its costs of \$1,248.55.

DATED: July 10, 2015

  
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MARY AGNES MATYSZEWSKI  
Administrative Law Judge  
Office of Administrative Hearings