

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

* * *

FILED

OCT 16 2015

BUREAU OF REAL ESTATE

By John C. Gail

In the Matter of the Application of)
) CalBRE No. H-04718 SD
)
DAVID WHEELER RUDOLPH,)
) OAH No. 2015050960
)
Respondent.)

DECISION

The Proposed Decision dated September 8, 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.

Pursuant to Section 11517 (c) (2) of the Government Code, the following correction is made:

Proposed Decision, Page 1, Paragraph 3, Line 1, "represented himself" shall read: "represented by Counsel, David Baker".

The application for a real estate salesperson license is denied, but the right to a restricted real estate salesperson license is granted to respondent.

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 NOV 05 2015.

IT IS SO ORDERED

10/8/2015

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 Application of:

DAVID WHEELER RUDOLPH,

Respondent.

Case No. H-04718 SD

OAH No. 2015050960

PROPOSED DECISION

Beth Faber Jacobs, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 10, 2015, in San Diego, California.

Steve Chu, Real Estate Counsel, represented complainant, Veronica Kilpatrick, Deputy Estate Real Commissioner, Bureau of Real Estate, Department of Consumer Affairs, State of California.

Respondent, David Wheeler Rudolph, represented himself and was present throughout the hearing.

The matter was submitted on August 10, 2015.

FACTUAL FINDINGS

Jurisdictional Matters

1. On August 25, 2014, respondent filed an application with the Bureau of Real Estate to take the real estate salesperson examination and obtain a salesperson license.
2. The application asked if respondent had ever been convicted of any violation of law. Respondent checked the box marked "yes." He indicated that in 2009, he was convicted of a felony in Illinois; and he provided the requested information concerning the conviction.
3. On October 25, 2014, respondent passed his real estate salesperson examination.

4. On May 11, 2014, complainant filed a statement of issues against respondent. The statement of issues requested that respondent's application to become a real estate salesperson be denied on the basis of his 2009 felony conviction, which was for possession of cannabis (marijuana) with the intent to deliver.

5. Respondent timely filed a notice of defense. This hearing followed.

Respondent's Conviction

6. On August 24, 2009, in *People of the State of Illinois v. David W. Randolph*, DuPage County Circuit Court, Case No. 08CF2914, respondent pled guilty and was convicted of a felony, violating 720 ILCS, an Illinois statute that prohibits "possession of cannabis with the intent to deliver."

Based on the conviction, the court sentenced respondent to six years in prison, with credit for four days, and found respondent eligible to participate in the Impact Incarceration Program (Program) in lieu of prison. According to the consent form respondent signed, the Program "involves strenuous physical activities and labor, uniformity of dress and appearance, education, counseling and other terms and conditions," and if respondent failed to satisfactorily complete the Program, he would be required to complete the six year prison sentence. The court also ordered respondent to pay \$36,460 in "fines, fees, costs, penalties, and assessments" and to serve three "mandatory supervised release years."

Respondent's Testimony

7. Respondent is 28 years old. He graduated from high school in 2005 and began attending the University of Illinois in Chicago. His parents provided financial support and contributed toward his schooling. In 2006, he began to sell marijuana in what he called a "misguided way to make money to pay for school." At the time, he did not realize "the far reaching consequences" of his actions. By 2008, respondent's parents had financial difficulties, were losing their family home, and could no longer assist respondent financially. Respondent could no longer afford to attend school and dropped out. He dropped out of school, and exercising poor judgment, increased his involvement with selling marijuana. He was caught, and the consequences changed his life.

8. Respondent testified about the circumstances leading to the conviction. On October 21, 2008, law enforcement officials, including representatives from the Drug Enforcement Administration, executed a search warrant at respondent's apartment. They found two handguns, about 60 pounds of marijuana packaged in one-pound bags, drug paraphernalia, cell phones, approximately \$15,000 cash, and false identification. Respondent was arrested and charged with several offenses. As part of a plea bargain, respondent pled guilty to the single felony offense of possession with intent to deliver.

9. Respondent testified about his experience of being imprisoned for one month and being transferred to the prison alternative Program, which he likened to a "boot camp."

The experience made him feel "ashamed and remorseful," and caused him to want to "get out" and "do something" with his life. "I deserved to be punished and was happy to get through it," he said about the Program. The experience made him decide to change his life. "I do not want to be a criminal," he stated. He complied with all aspects of the boot camp Program, which lasted three months and included drug testing and counseling. Respondent successfully completed the Program and his sentence was reduced to time served as of April 17, 2010. After the boot camp, respondent went on supervised release through home confinement. The supervised release was expected to last two years, but due to his compliance with supervised release, was terminated after one year. Respondent was formally discharged from the Illinois Department of Corrections on December 1, 2011.

10. While on supervised release, respondent did everything he could to make money legally. He worked as a handyman. He helped his parents. He borrowed money to pay his fines and "get out of this mess." He paid the court-ordered fine. He worked for his friend's father as a limousine driver, and worked 10 to 12 hour days to "make an honest living." He was trusted with the limousines and credit cards.

11. According to respondent, he has had to "deal" with the results of his bad decision "every day." As a convicted felon, he has found it "very tough," to get a job. He wanted to start a family and have a "respectable career." Respondent took the real estate broker's examination in Illinois, and in 2013, that state issued him a real estate broker's license. Although his Illinois license was issued without restrictions, he never actually worked with real estate clients in Illinois; instead, he began managing property in Chicago for his uncle.

12. Respondent moved to southern California in 2014 for a "fresh start." After moving to California, he studied for the California real estate examination and enrolled in the local community college where he studied Spanish to enhance his skills.

13. Respondent knows that selling marijuana was wrong; he feels he has suffered the consequences of his conviction and learned from it; and he would like a "second chance" to make an honest living. Respondent was 21 years old when he was convicted, and he has been completely law-abiding since his discharge from probation in 2011. He likes people, and he wants to work. As he stated on his application, "I have grown and taken personal responsibility for my past actions. I am currently engaged, want to start a family and be able to provide them with a stable future." In his letter to the bureau dated March 30, 2015, respondent also conveyed remorse and a desire to "regain the positive relationships in my life and focus on living an honest life that [is] free from crime." He added, in part:

My goal is to obtain my license in order to properly provide a structured and comfortable life for my family, as well as serve as a role model to my son. . . .

Moving to California was a fresh start for my family and I [want] to capitalize on new opportunities to move past the

negativity and unhelpful influences that surrounded me in Chicago. I have connected with a nice group of professions in San Diego, as well as formed new personal relationships have had a very positive influence on my everyday life. . . .

14. Respondent has been offered a position in a property management company in his neighborhood. The owner of the company, Mr. Schwartz, knows about his felony conviction and is still willing to hire him if he obtains a license.

15. Respondent has outstanding student loans and is behind on his payments. He was not sure exactly how much he owes or how far behind he is in payments, but believes it is a few thousand dollars.

16. Respondent's fiancé, Kaitlin, joined him in California in 2014. They are living together and expecting a child. Respondent spoke about wanting to take care of his family.

Additional Evidence

17. Tracey Baker, the wife of respondent's attorney, testified on respondent's behalf. She owns and operates a company that sells cigars on line and in a retail setting. She also owns a property management company that services four apartment buildings. She has known respondent's family for many years, and respondent worked for her during the summers of 2006 and 2007. He is currently assisting her in updating her website and with marketing to get new tenants for the apartments. Over the years, she has given him access to financial information. He handles cash from the rents and cigar buyers. According to Ms. Baker, there has never been a problem with his handling money, and she considers respondent trustworthy.

18. Respondent's fiancé, Kaitlin Crist, wrote a letter of support and testified. She is a licensed nursing home administrator and has been the assistant director of a senior living community since November 2014. She met respondent in Chicago three years ago. In 2014 she moved to California to be with respondent. According to Ms. Crist, respondent has been a good boyfriend, and a motivated and honest person. She wrote, in part: "David has well paid for the mistake he made in the past, and feels that the best form of restitution will be to live an honorable life for his son and be a positive influence and role model."

19. Lee Schwartz has been a real estate licensee since 1990, and has been licensed as a real estate broker since 2004. Mr. Schwartz wrote a letter of support and testified on respondent's behalf. Mr. Schwartz and his business partner own Team Metro Real Estate. There are 10 to 12 licensed agents in the company. Mr. Schwartz recently met respondent through a family friend of his business partner. Team Metro has a mentorship program for new real estate agents. The program involves hands-on training for new associates, shadowing an experienced agent during the first six transactions, and personal guidance as the agent learns the business.

Mr. Schwartz is aware of respondent's conviction and offered to be respondent's sponsoring broker. Mr. Schwartz sees great potential in respondent. He was impressed by his candor about his past, his sincerity, and his enthusiasm. .

LEGAL CONCLUSIONS

The 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. In order to prevail, respondent must demonstrate by a preponderance of the evidence that he is fit to hold a real estate salesperson's license. (Evid. Code, §§ 115, 500.)

2. A preponderance of the evidence establishes that the existence of a factual matter is more likely than not. As one court explained:

"Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it. (People v. Mabini (2000) 92 Cal.App.4th 654, 663.)

Applicable Statutes and Regulations

3. Business and Professions Code section 10177 authorizes the commissioner to deny a license to an applicant when the applicant has been convicted of a felony and the conviction is final. (Bus. & Prof. Code, §10177, subd. (b).)

4. Business and Professions Code section 480, subdivision (a)(1), also authorizes the bureau¹ to deny a license when an applicant has been convicted of a crime that is substantially related to the qualifications, functions, or duties of a real estate licensee.

5. Under Business and Professions Code section 480, subdivision (a)(2), the bureau may deny a license application when an applicant has engaged in any act involving dishonesty, fraud, or deceit with the intent to substantially benefit oneself or another, or substantially injure another.

¹ Section 480 addresses a "board's" authority to impose discipline. Under Business and Professions Code section 22, the reference to a "board" includes a reference to a "bureau" or a "department."

The Substantial Relationship Requirement

6. Business and Professions Code section 481 requires that each licensing agency develop criteria to help determine if a particular crime is substantially related to the qualifications, functions or duties of a licensee.

7. California Code of Regulations, title 10, section 2910 identifies the bureau's criteria for determining whether a crime or act is substantially related. Under the regulation, a crime that involves doing "any unlawful act with the intent of conferring a financial or economic benefit upon the perpetrator" shall be deemed to be substantially related to the qualifications, functions, or duties of a real estate licensee. (Cal. Code Regs., tit. 10, § 2910, subd. (a)(8).)

8. If the act is substantially related, the context in which the act was committed "shall go only to the question of the weight to be accorded" to the act when "considering the action to be taken with respect to the applicant or licensee." (Cal. Code Regs., tit. 10, § 2910, subd. (c).)

9. Respondent's felony conviction for possession of marijuana with the intent to distribute is substantially related to the qualifications, functions, or duties of a real estate salesperson.

Cause Exists to Deny Respondent's Application

10. Cause exists to deny a real estate salesperson's license to respondent under Business and Professions Code sections 480, subdivisions (a)(1) and (a)(2), and 10177, subdivision (b), based on respondent's 2009 conviction for possession of marijuana with the intent to distribute it.

Rehabilitation

11. When cause exists to deny a license, the determination about whether a license should nonetheless be granted involves consideration of different factors, including whether the applicant has demonstrated rehabilitation, and whether the issuance of a license would be consistent with protecting the public. Public protection takes priority over rehabilitation.

12. The bureau has developed criteria for evaluating the rehabilitation of an applicant when considering whether to deny the issuance of a license on account of an act committed by the applicant. (Cal. Code Regs. tit. 10, § 2911.) In part, these criteria include:

(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

Respondent has Demonstrated Sufficient Rehabilitation

13. Taking the rehabilitation criteria into consideration shows the following: Respondent was truthful in his application about his conviction, and has been candid with prospective employers about it. His underlying misconduct took place seven years ago, when he was 21 years old. His conviction occurred in 2009, six years ago. About four years have passed since respondent satisfactorily completed the terms of his criminal probation. He served his time in prison and successfully completed the alternative Program. His supervised release terminated early, and he was discharged from all supervision in 2011, several years earlier than his initial sentence required. Respondent paid all fines and fees required by the court.

Respondent was issued an unrestricted broker's license in Illinois. He has shown stability in his family life; he is engaged, expecting a child, and taking action to improve his family's situation and be a good role model for his child. He took real estate courses to prepare for his license examination and college courses in Spanish to improve his vocational options. Reflecting a change in attitude, respondent has taken steps to regain positive relationships and associate only with law-abiding citizens. His testimony conveyed remorse and humility, and his actions reflect those of an individual seeking to be a productive member of society. Respondent has demonstrated substantial rehabilitation.

14. Complainant's counsel argued that respondent has not adequately demonstrated rehabilitation, and recommended that his application be denied.

Complainant's counsel argued that each item in the rehabilitation criteria list in California Code of Regulations, title 10, section 2911, must be satisfied before respondent can be deemed to have shown rehabilitation. Complainant's contention is rejected. Rehabilitation is a state of mind. The law looks with favor upon rewarding with the opportunity to serve, one who has achieved reformation and regeneration. (*Hightower v. State Bar* (1983) 34 Cal.3d 150, 157.) Fully acknowledging the wrongfulness of past actions is an essential step towards rehabilitation. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940.) Remorse and cooperation are mitigating factors. (*In re Demergian* (1989) 48 Cal.3d 284, 296.) The bureau's rehabilitation criteria list was established "for the purpose of evaluating the rehabilitation of an applicant" as required by Business and Professions Code section 482. (Cal. Code Regs., tit. 10, § 2911.) Business and Professions Code section 482 requires each board and bureau to develop criteria for "evaluating" rehabilitation and "[e]ach board shall take into account all competent evidence of rehabilitation furnished by the applicant." Nothing in the statute or applicable regulation requires that every listed criterion be satisfied before an agency can conclude that an applicant has shown sufficient rehabilitation to warrant licensure. Indeed, not all criteria are applicable to every applicant. The listed criteria present a framework for evaluating an applicant's rehabilitation.

Complainant's counsel argued that respondent failed to take any vocational courses for advancement and contended that taking the coursework necessary to become a real estate

agent could not be used to satisfy the regulation in section 2911, subdivision (i).² Although taking coursework required for licensure may not demonstrate the same level of initiative as completing vocational coursework that is not required for licensure, nothing in the regulations excludes the consideration of coursework that enabled respondent to pass his real estate licensing examinations. Moreover, respondent also took Spanish courses at the community college to enhance his value and accessibility to potential clients. Respondent provided sufficient evidence to establish that he satisfied criterion (i) in support of his claim of rehabilitation.

Complainant's counsel accurately observed, however, that respondent is behind in repaying his student loans and has defaulted in his payments, which shows he has not satisfied subsection (j) of the rehabilitation criteria - discharge of debts or monetary obligations to others. Licensees in good standing pay their debts on time. Any student loan defaults require respondent's immediate attention and correction. Given the totality of the significant rehabilitation respondent has shown, however, it would not be against the public interest to allow respondent to become licensed if he first brings his student loan repayment status to "current."

15. Respondent has demonstrated sufficient rehabilitation to warrant the issuance of a restricted real estate salesperson license consistent with the terms and conditions listed in California Code of Regulations, title 10, section 2930. After respondent becomes current on his student loans, he should be permitted to hold a restricted salesperson license with appropriate terms and conditions that include oversight and accountability. These terms and conditions will give respondent an opportunity to demonstrate continued rehabilitation, enable the bureau to monitor his progress as a new licensee, and protect the public.

ORDER

Respondent's application for a real estate salesperson license is denied; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to Section 10156.5 of the Business and Professions Code. The restricted license 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 the Code:

1. As a condition precedent to the issuance of a restricted license, respondent shall provide the commissioner written evidence that he is up-to-date on the repayment of any and all outstanding student loans and that he is no longer in default in any student loan. Respondent shall thereafter stay current in the repayment of his student loans, and upon request from the commissioner or the commissioner's designee, provide evidence that

² The criterion in subdivision (i) is "[c]ompletion of, or sustained enrollment in, formal education or vocational training courses for economic self-improvement." (Cal. Code Regs., tit. 10, § 2911, subd. (i).)

respondent is continuing to timely repay his outstanding student loans.

2. 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 plea of nolo contendere) of a crime that 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.

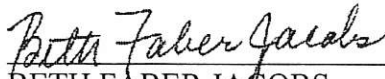
3. With the application for licensure, or with the application for transfer to a new employing broker, respondent shall submit a statement signed by the prospective employing real estate broker on a form RE 552 approved by the Bureau of Real Estate that shall certify as follows:

(a) That the employing broker has read the Decision that 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.

4. 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 the restricted license is issued to respondent.

DATED: September 8, 2015


BETH FABER JACOBS
Administrative Law Judge
Office of Administrative Hearings