

FILED

MAR 30 2017

BUREAU OF REAL ESTATE

By CD Deloio

BEFORE THE BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of)	CalBRE No. H-04815 SD
JACK EVAN PROBER,)	OAH No. 2016110567
Respondent.)	

DECISION

The Proposed Decision dated March 3, 2017, 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.

Pursuant to Government Code section 11521, the Bureau of Real Estate may order reconsideration of this Decision on petition of any party. The Bureau's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the effective date of this Decision, whichever occurs first. 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 Sections 11521 and 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 APR 19 2017.

IT IS SO ORDERED 3/27/17

WAYNE S. BELL
REAL ESTATE COMMISSIONER

Daniel J. Sandri

By: DANIEL J. SANDRI
Chief Deputy Commissioner

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

In the Matter of the Accusation Against:

JACK EVAN PROBER,

Respondent.

Case No. H-04815 SD

OAH No. 2016110567

PROPOSED DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on February 2, 2017.

James R. Peel, Counsel, Bureau of Real Estate, represented complainant, Veronica Kilpatrick, Supervising Special Investigator, Bureau of Real Estate, Department of Consumer Affairs, State of California.

David Geffen, Attorney at Law, represented respondent, Jack Evan Prober, who was present at the hearing.

The matter was submitted on February 2, 2017.

FACTUAL FINDINGS

Background

1. On November 23, 2002, the bureau issued a salesperson license to respondent. On July 11, 2008, the bureau issued broker license number 01349070 to respondent. On March 10, 2010, the bureau filed an accusation against respondent in case number H-4082 SD.

As a result of a stipulated settlement and disciplinary order, respondent's license was suspended for 30 days, stayed for 2 years on terms and conditions.¹ The broker license expired on July 10, 2016.²

¹ The bureau presented no additional information as to the cause for the license discipline.

2. On July 21, 2016, complainant, in her official capacity, signed the accusation seeking disciplinary action against respondent's broker license. The accusation alleged that respondent was convicted of conspiracy to commit bank bribery, a crime substantially related to the qualifications, functions, or duties of a real estate licensee. Complainant also requested recovery of investigation and enforcement costs.

3. At the start of the hearing, respondent advised that pursuant to his plea agreement, he is barred from practicing real estate while he is on one year of supervised release. Respondent requested the hearing be continued until termination of his supervised release, so he could better establish evidence of rehabilitation. The continuance was denied for failure to establish good cause.

Respondent's 2016 Conviction

4. On January 25, 2016, in the United States District Court, Southern District of California, respondent was convicted, on his plea of guilty, of a felony violation of 18 U.S.C. § 371, conspiracy to commit bank bribery. The court sentenced respondent to 18 months imprisonment, followed by one year of supervised release. The court ordered respondent to pay a \$60,000 fine and restitution of \$396,530, jointly and severally with his co-defendants.

5. The circumstances of the offense were taken from respondent's plea agreement. I.H. operated several San Diego businesses that participated in the secondary mortgage market. I.H. purchased primarily distressed mortgages from primary lenders and serviced the loans by collecting payments from borrowers. In addition, he pooled the loans and sold shares to investors. In 2007, I.H. invited respondent to participate as an investor in the pooled loans purchased by I.H.'s companies. I.H. and his companies purchased mortgage notes from two large banks. These banks sold their distressed or non-performing second mortgages to third-party investors, including I.H. Beginning in 2009 and continuing to June 2013, respondent agreed with I.H. and others to commit bank bribery. It was the purpose of the conspiracy that the group would pay hundreds of thousands of dollars in bribes to two employees at these banks, who would use their influence to ensure that I.H.'s bids to purchase mortgage loans were accepted.

Respondent's Testimony

6. Respondent is 58 years old. In 2007, I.H., who was respondent's neighbor, asked respondent if he was interested in investing in one of his companies that purchased distressed loans. The company purchased distressed loans from Chase and GMAC bank, and respondent agreed to invest. In 2011, changes were made at these banks as they were attempting to sell off large numbers of loans. I.H.'s company's offers to purchase loans were no longer being accepted by the banks. I.H. made arrangements with two of the banks'

² The expiration of a license does not deprive the commissioner jurisdiction to render a decision suspending or revoking such license. (Bus. & Prof. Code, § 10103.)

employees who handled the sell-off of the loans to receive a \$500 kickback for each loan I.H. purchased. Respondent said this occurred sometime in October 2011. In January 2012, after I.H. had already been paying kickbacks to the bank employees, I.H. told respondent about the scheme. Respondent said that at that time, he was in debt to I.H. for \$200,000. He explained that after he initially invested with I.H., the housing market declined and he lost much of his money. I.H. fronted respondent money so he could continue to invest. Respondent had an argument with I.H. about the bribery scheme, but I.H. told respondent he was naïve. Respondent testified that at that point, he should have walked away; but because he was in debt to I.H., he did not. Respondent said this scheme continued through 2012, during which I.H. purchased 50 or 60 loans a month. Overall, respondent's investments only comprised approximately three percent of I.H.'s company. In 2014, the ex-girlfriend of I.H.'s brother and business partner reported the scheme to the F.B.I.

7. Respondent said he cooperated with the investigation and pled guilty. He served 10 months in prison and was released to a half-way house. He will begin his year of supervised release in April 2017. Respondent has paid the fine and his portion of the restitution, \$35,000. Respondent is involved in a community non-profit, Jobs for Autism, which helps find jobs for autistic children. Respondent helps run a charity basketball game to support the organization. Respondent would like to retain his real estate license once his supervised release ends and he is able to resume practice.

8. Respondent's testimony was clear, contrite, and credible. He expressed remorse for his actions and did not try to deflect his individual responsibility.

Cost Recovery

9. Complainant requested cost recovery against respondent pursuant to Business and Professions Code section 10106. The declaration by complainant certified investigative costs in the amount of \$911.20. Complainant's counsel submitted a declaration for prosecution costs in the amount of \$312. The certifications that were provided complied with the requirements of California Code of Regulations, title 1, section 1042, subdivision (b). Total enforcement and investigation costs are \$1,223.20.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Complainant bears the burden of proving that the charges in the accusation are true. (Evid. Code § 115.) The standard of proof in an administrative action seeking to suspend or revoke a professional license is "clear and convincing evidence." (*Ettinger v. Bd. of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.)

Relevant Statutory Authority

2. Business and Professions Code section 490 provides in relevant part:

(a) In addition to any other action that a board is permitted to take against a licensee, a board may suspend or revoke a license 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.

(b) Notwithstanding any other provision of law, a board may exercise any authority to discipline a licensee for conviction of a crime that is independent of the authority granted under subdivision (a) only if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the licensee's license was issued.

3. Pursuant to Business and Professions Code section 10177, subdivision (b), the commissioner may suspend or revoke a license if the licensee has been convicted of a felony, or a crime substantially related to the qualifications, functions, or duties of a real estate license.

Substantial Relationship

4. Business and Professions Code section 481 provides:

Each board under the provisions of this code shall develop criteria to aid it, when considering the denial, suspension or revocation of a license, to determine whether a crime or act is substantially related to the qualifications, functions, or duties of the business or profession it regulates.

5. California Code of Regulations, title 10, section 2910 provides in part:

(a) When considering whether a license should be . . . suspended or revoked on the basis of the conviction of a crime . . . the crime . . . 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:

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

Cause Exists to Impose Discipline

6. Cause exists to revoke or suspend respondent's license pursuant to Business and Professions Code sections 490, subdivision (a), and 10177, subdivision (b). Clear and convincing evidence established respondent's conviction for conspiracy to commit bank bribery is substantially related to the qualifications, functions, or duties of a licensee. (Cal. Code Regs., tit. 10, § 2910, subd. (a)(4).)

Measure of Discipline

7. The purpose of an administrative proceeding seeking the revocation or suspension of a professional license is not to punish the individual; the purpose is to protect the public from dishonest, immoral, disreputable or incompetent practitioners. (*Ettinger v. Bd. of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.)

8. California Code of Regulations, title 10, section 2912, sets forth the bureau's criteria for rehabilitation, which were considered. Respondent suffered one felony conviction in January 2016, for which he served 10 months in prison. He was recently released to a halfway house. His supervised release will not end until April 2018, during which time he is barred from the practice of real estate. Respondent paid his imposed fine and restitution. He demonstrated some community involvement.

9. Rehabilitation is a "state of mind" and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved "reformation and regeneration." (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) The evidentiary significance of an applicant's misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. (*Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1070.) Similarly, the absence of prior discipline is an important mitigating circumstance, but it is only a particularly strong factor when the professional has engaged a professional practice for a substantial period of time. (*Waysman v. State Bar* (1986) 41 Cal.3d 452, 457). Evidence of good conduct during a period of supervision such as parole or probation is an important factor in rehabilitation, but good behavior normally expected of someone who is under supervision of the criminal justice system. (*In re Gossage* (2000) 23 Cal.4th 1080, 1099.) Thus, evidence of good behavior while someone is still on parole or probation diminishes the weight of his or her alleged good conduct.

10. Respondent's testimony was sincere and contrite. However, based on the recent conviction, the seriousness of the offense, the lack of evidence of good conduct over a sustained period of time, and his previous disciplinary history, it is not in the public interest for respondent to continue to hold a real estate license at this time.

Costs of Investigation and Enforcement

11. Complainant is seeking recovery of the reasonable costs of prosecution. The California Supreme Court in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29

Cal.4th 32 held that a regulation imposing costs for investigation and enforcement under California Code of Regulations, title 16, section 317.5, which is similar to Business and Professions Code section 10106, did not violate due process. But it was incumbent on the board in that case to exercise discretion to reduce or eliminate cost awards in a manner such that costs imposed did not “deter [licensees] with potentially meritorious claims or defenses from exercising their right to a hearing.”

The Supreme Court set forth five factors to consider in deciding whether to reduce or eliminate costs: Whether the licensee used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed; whether the licensee had a “subjective” good faith belief in the merits of his or her position; whether the licensee raised a “colorable challenge” to the proposed discipline; whether the licensee had the financial ability to make payments; and whether the scope of the investigation was appropriate in light of the alleged misconduct. The reasoning of *Zuckerman* must be applied to Business and Professions Code section 10106 since the language in the cost recovery regulation at issue in *Zuckerman* and section 10106 are substantially the same.


Applying the *Zuckerman* criteria, respondent did not receive a reduction in the severity of the discipline imposed, although he raised a “colorable challenge” to the proposed discipline. The scope of the investigation was appropriate in light of the alleged misconduct. Respondent did not address his ability to pay costs. Respondent is ordered to pay \$1,223.20 in costs.

ORDER

All licenses and licensing rights of respondent, Jack Evan Prober, under the Real Estate Law are revoked.

Respondent is ordered to pay \$1,223.20 in costs.

DATED: March 3, 2017

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ADAM L. BERG
Administrative Law Judge
Office of Administrative Hearings