

1 Department of Real Estate  
2 320 W. 4th Street, Suite 350  
3 Los Angeles, CA 90013-1105

4 Telephone: (213) 576-6982

**FILED**

**JUN 22 2022**

**DEPT. OF REAL ESTATE**

By 

8 **DEPARTMENT OF REAL ESTATE**

9 **STATE OF CALIFORNIA**

10 \*\*\*

11 In the Matter of the Application of )

12 RAFAEL FRANCISCO ACOSTA, )

13 Respondent. )

DRE No. H-05253 SD

OAH No. 2021100773

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15 STIPULATION AND WAIVER AND DECISION AFTER REJECTION

16 The California Department of Real Estate (“Department”) filed a Statement of  
17 Issues against RAFAEL FRANCISCO ACOSTA (“Respondent”) on October 6, 2021. On January  
18 12, 2022, a hearing was held and evidence was received; the case was deemed submitted that same  
19 day.

20 On January 19, 2022, the Proposed Decision of the Administrative Law Judge  
21 Abraham M. Levy (“ALJ Levy”) was issued, and determined, among other things, that  
22 Respondent’s application for a real estate salesperson license should be denied; provided, however,  
23 Respondent is issued a restricted salesperson license by the Real Estate Commissioner pursuant to  
24 California Business and Professions Code sections 10156.7 and 10156.6 and certain terms and  
25 conditions herein.

26 On April 8, 2022, the Commissioner rejected the Proposed Decision of January 19,  
27 2022.

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The parties wish to settle this matter without further proceedings.

IT IS HEREBY STIPULATED by and between Respondent RAFAEL FRANCISCO ACOSTA, pro per, and the Department, acting by and through Kevin H. Sun, Counsel for the Department of Real Estate, as follows for the purpose of settling and disposing of the Statement of Issues filed by the Department.

1. It is understood by the parties that the Real Estate Commissioner may adopt the Stipulation and Waiver and Decision After Rejection as his decision in this matter, thereby denying Respondent’s application for a real estate salesperson license and license rights; provided, however, Respondent is issued a restricted salesperson license pursuant to California Business and Professions Code section 10156.5, and said restricted real estate salesperson license is subject to all the provisions of California Business and Professions Code section 10156.7 and certain terms and conditions imposed under authority of California Business and Professions Code section 10156.6, as set forth in the below “Decision and Order.” In the event the Commissioner in his discretion does not adopt the Stipulation, the Stipulation shall be void and of no effect; the Commissioner will review the transcript and the evidence in the case, and will issue his Decision after Rejection as his Decision in this matter.

2. By reason of the foregoing and solely for the purpose of settlement of the Statement of Issues without further administrative proceedings, it is stipulated and agreed that the following shall be adopted as the Commissioner’s Decision:

FACTUAL FINDINGS

The Factual Findings of the Proposed Decision of January 19, 2022 are adopted herein.

LEGAL CONCLUSIONS

The Legal Conclusions of the Proposed Decision of January 19, 2022 are adopted herein.

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ORDER

The application of Respondent RAFAEL FRANCISCO ACOSTA for a real estate salesperson license is denied; provided, however, a restricted real estate salesperson license shall be issued to Respondent California Business and Professions Code section 10156.5. The restricted licensed issued to Respondent shall be subject to all the provisions of California Business and Professions Code section 10156.7 and to the following limitations, conditions, and restrictions imposed under authority of California Business and Professions Code section 10156.6.

1. The restricted license shall not confer any property right in the privileges to be exercised, including, but not limited to, the right of renewal, 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) to a crime that bears a substantial relationship 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 three (3) years have elapsed from the date of issuance of the restricted license to Respondent. Respondent shall not be eligible to apply for any unrestricted licenses until all restrictions attaching to the license have been removed.

3. 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 broker on a form approved by the Department of Real Estate, such as the Restricted Salesperson Change Application (RE 214A), wherein the employing broker shall certify as follows:

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1 a. That broker has read this Decision and Order, which is the basis  
2 for the issuance of the restricted license, and Proposed Decision, which is incorporated, in part,  
3 herein; and

4 b. That broker will carefully review all transaction documents  
5 prepared by the restricted licensee and otherwise exercise close supervision over the licensee's  
6 performance of acts for which a license is required.

7 4. Respondent shall notify the Real Estate Commissioner in writing within 72 hours  
8 of any arrest by sending a certified letter to the Real Estate Commissioner at the Department of  
9 Real Estate, Post Office Box 137013, Sacramento, CA 95813-7013. The letter shall set forth the  
10 date of Respondent's arrest, the crime for which Respondent was arrested, and the name and  
11 address of the arresting law enforcement agency. Respondent's failure to timely file written notice  
12 shall constitute an independent violation of the terms of the restricted license and shall be grounds  
13 for the suspension or revocation of that license.

14 5. Respondent shall, within nine (9) months from the effective date of this Decision  
15 and Order, present evidence satisfactory to the Commissioner that Respondent has, since the most  
16 recent issuance of an original or renewal real estate license, taken and successfully completed the  
17 continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal  
18 of a real estate license. If Respondent fails to satisfy this condition, Respondent's real estate  
19 license shall automatically be suspended until Respondent presents evidence satisfactory to the  
20 Commissioner of having taken and successfully completed the continuing education requirements.  
21 Proof of completion of the continuing education courses must be delivered to the Department of  
22 Real Estate, Flag Section at P.O. Box 137013, Sacramento, CA 95813-7013.

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25 DATED: 5/13/22

  
\_\_\_\_\_  
Kevin H. Sun  
Counsel for Complainant

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27 \* \* \*

1 I have read the Stipulation and Waiver and Decision after Rejection, and its terms  
2 are understood by me and are agreeable and acceptable to me. I willingly and voluntarily agree to  
3 enter into this Stipulation and Waiver and Decision after Rejection.

4 Respondent can signify acceptance and approval of the terms and conditions of this  
5 Stipulation and Waiver and Decision after Rejection by faxing a copy of the signature page, as  
6 actually signed by Respondent, to the Department at fax number (213) 576-6917. Respondent  
7 agrees, acknowledges, and understands that by electronically sending to the Department a fax copy  
8 of his actual signature as it appears on the Stipulation and Waiver and Decision After Rejection,  
9 that receipt of the faxed copy by the Department shall be as binding on Respondent as if the  
10 Department had received the original signed Stipulation and Waiver and Decision After Rejection.

11  
12 DATED: 4/26/2022

  
13 RAFAEL FRANCISCO ACOSTA  
14 Respondent

15 \* \* \*

16 The foregoing Stipulation and Waiver and Decision After Rejection is hereby  
17 adopted as my Decision in this matter and shall become effective at 12 o'clock noon on  
18 JUL 22 2022.

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20 IT IS SO ORDERED 6.17.22, 2022.

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22 DOUGLAS R. McCAULEY  
23 REAL ESTATE COMMISSIONER

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**FILED**

**APR 12 2022**

**DEPT. OF REAL ESTATE**

By 

BEFORE THE DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

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In the Matter of the Application of	)	DRE No. H-05253 SD
	)	
RAFAEL FRANCISCO ACOSTA,	)	OAH No. 2021100773
	)	
Respondent.	)	
	)	

NOTICE

To RAFAEL FRANCISCO ACOSTA

YOU ARE HEREBY NOTIFIED that the Proposed Decision herein dated January 19, 2022 of the Administrative Law Judge is not adopted as the Decision of the Real Estate Commissioner. A copy of the Proposed Decision dated January 19, 2022 is attached hereto for your information.

In accordance with Section 11517(c) of the Government Code of the State of California, the disposition of this case will be determined by me after consideration of the record herein including the transcript of the proceedings held on January 12, 2022 and any written argument hereafter submitted on behalf of Respondent and Complainant.

Written argument of Respondent to be considered by me must be submitted within 15 days after receipt of the transcript of the proceedings of January 12, 2022 at the Los Angeles

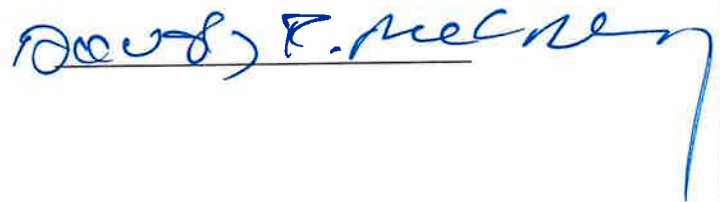
1 office of the Department of Real Estate unless an extension of the time is granted for good cause  
2 shown.

3 Written argument of Complainant to be considered by me must be submitted  
4 within 15 days after receipt of the argument of Respondent at the Los Angeles office of the  
5 Bureau of Real Estate unless an extension of the time is granted for good cause shown.

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DATED: 4. 8., 2022.

DOUGLAS R. McCAULEY  
REAL ESTATE COMMISSIONER



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

**In the Matter of the Application of:**

**RAFAEL FRANCISCO ACOSTA, Respondent**

**Agency Case No. H-05253 SD**

**OAH No. 2021100773**

**PROPOSED DECISION**

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on January 12, 2022, by telephone/videoconference due to the COVID-19 pandemic.

Kevin H. Sun, Counsel, represented complainant Veronica Kilpatrick, Supervising Special Investigator, Department of Real Estate, State of California, (department).

Rafael Francisco Acosta, respondent, appeared on his own behalf.

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on January 12, 2022.



## **SUMMARY**

Complainant seeks the denial of respondent's application for issuance of a real estate salesperson license to respondent due to his felony convictions in 2003 and 2013. As aggravating factors supporting denial of the issuance of the license, complainant also cites respondent's numerous misdemeanor convictions between 2007 and 2012. Based on the evidence of record, cause exists to deny issuance of an unrestricted license to respondent due to his conviction for robbery in 2013. Respondent did not present evidence that he is sufficiently rehabilitated to warrant the issuance of an unrestricted license. However, he presented evidence he is sufficiently rehabilitated to warrant the issuance of a restricted license with terms and conditions to ensure public protection.

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. On March 9, 2020, respondent filed an application with the department for a real estate salesperson license.
2. On October 6, 2021, complainant, in her official capacity, signed and filed the Statement of Issues. Complainant asks that the department's Commissioner refuse to authorize the issuance of a license and deny respondent's application for a real estate salesperson license due to his felony criminal conviction for robbery in 2013 and felony criminal conviction for unlawful taking of a vehicle in 2003. As aggravating factors supporting the department's decision to deny his real estate license, complainant cites respondent's 11 misdemeanor convictions between 2007 and 2012.

On October 15, 2021, respondent filed a Notice of Defense. This hearing followed.

### **Respondent's Felony Convictions**

3. The details of respondent's two felony convictions are found in court records received as evidence. These materials document his convictions as follows:

4. On January 15, 2013, in the Superior Court of California, San Diego County, in Case No. SCE324784, respondent pled guilty to and was convicted of violating Penal Code section 211, robbery, a felony. On this date, the court suspended the imposition of sentence and placed respondent on formal probation for three years under certain terms and conditions, including, in part, 365 days in jail, with early release to a six-month residential treatment program, payment of restitution in the amount of \$650, and payment of fines and fees.

The circumstances of this conviction are detailed below.

5. On August 6, 2003, in the Superior Court of California, San Diego County, in Case No. SCE230060, respondent was convicted of violating Vehicle Code section 10851, subdivision (a), unlawful taking of a vehicle, a felony. On this date, the court suspended the imposition of sentence and placed respondent on probation for three years under certain terms and conditions, including, in part, 240 days in jail, attendance and completion of a substance abuse counseling program, attendance at Alcoholics/Narcotics Anonymous, surrender of driver's license, stay away from the victim's residence, take all prescribed medications, and payment of fines and fees.

## **Respondent's Misdemeanor Convictions**

6. As noted, complainant cites respondent's numerous misdemeanor convictions between 2007 and 2012 as "aggravating factors" to support denial of his application. Respondent does not dispute he was convicted of the crimes alleged in the statement of issues. No evidence was offered that these convictions have been dismissed pursuant to Penal Code section 1203.4. Respondent's misdemeanor convictions are summarized as follows:

7. On December 10, 2007, in the Superior Court of California, San Diego County, in Case No. C276016, respondent pled guilty to and was convicted of violating Health and Safety Code section 11377, subdivision (a), possession of a controlled substance - methamphetamine, a misdemeanor.

On this date, the court suspended the imposition of sentence and placed respondent on summary probation for three years under certain terms and conditions, including, in part, 365 days in jail, the completion of HIV/AIDS education, and payment of fines and fees.

8. On March 19, 2010, in the Superior Court of California, San Diego County, in Case No. SCE299037, respondent pled guilty to and was convicted of violating Health and Safety Code section 11377, subdivision (a). The court placed respondent on summary probation for three years, stayed the imposition of 365 days in custody subject to the successful completion of probation and that he not use alcohol or drugs and pay fines and fees.

9. On May 17, 2010, in the Superior Court of California, San Diego County, in Case No. SCE3299641, respondent pled guilty to and was convicted of violating Penal Code Section 69, resisting a police officer, which was reduced to a misdemeanor

pursuant to Penal Code section 17, subdivision (b)(4). On this date, the court suspended the imposition of sentence and placed respondent on summary probation for three years under certain terms and conditions, including, in part, the imposition of 108 days in jail with credit for time served and payment of fines and fees.

10. On June 30, 2010, the court found respondent violated his probation and sentenced respondent to 365 days in jail to run concurrently with cases SCE299037 and C276016 with 125 days credit for time served.

11. On April 20, 2011, in the Superior Court of California, San Diego County, in Case No. C310225, respondent pled guilty to and was convicted of violating Penal Code Section 148.9, subdivision (a), giving false information to a peace officer, a misdemeanor. Respondent admitted in his plea agreement that he gave a police officer a false name. On this date, the court suspended the imposition of sentence and placed respondent on summary probation for one year under certain terms and conditions, including, in part, the imposition of 29 days in jail which the court stayed per completion of probation with the sentence to run concurrent with Case Numbers C308842 and C309718, according to the plea agreement.

12. On April 20, 2011, in the Superior Court of California, San Diego County, in Case No. C308842, respondent pled guilty to and was convicted of violating Health and Safety Code section 11550, subdivision (a), being under the influence of a controlled substance - methamphetamine, a misdemeanor.

At a subsequent court hearing on April 26, 2012, the court denied probation for this offense and sentenced respondent to 180 days in jail with 67 days credit for time served to run concurrent with cases C310559, C310813, C309718, C315020, and C311752.

13. Also on April 20, 2011, in the Superior Court of California, San Diego County, in Case No. C309718, respondent pled guilty to and was convicted of violating Health and Safety Code section 11550, subdivision (a), being under the influence of a controlled substance - methamphetamine, a misdemeanor.

On April 26, 2012, at a subsequent hearing, the court denied probation under this case and sentenced respondent to 180 days in jail with 85 days credit for time served to run concurrent with cases C310559, C308842, C310813, C315020, and C311752.

14. On May 9, 2011, in the Superior Court of California, San Diego County, in Case No. C310813, respondent pled guilty to and was convicted of violating Health and Safety Code section 11550, subdivision (a), being under the influence of a controlled substance - methamphetamine, a misdemeanor, with a Health and Safety Code section 11550, subdivision (b), enhancement for being convicted of being under the influence of a controlled substance - methamphetamine, with two or more priors.

On April 26, 2012, at a subsequent hearing, the court denied probation under this case and sentenced respondent to 180 days in jail with 81 days credit for time served to run concurrent with cases C310559, C308842, C309718, C315020, and C311752.

15. On May 9, 2011, in the Superior Court of California, San Diego County, in Case No. C310559, respondent pled guilty to and was convicted of violating Health and Safety Code section 11364, possession of paraphernalia used for narcotics, a misdemeanor.

On April 26, 2012, at a subsequent hearing, the court denied probation under this case number and sentenced respondent to 180 days in jail with 81 days credit for

time served to run concurrent with cases C310813, C311752 C315020, C308842 and C309718.

16. On June 16, 2011, in the Superior Court of California, San Diego County, in Case No. C311752, respondent pled guilty to and was convicted of violating Health and Safety Code section 11550, subdivision (a), with a Health and Safety Code section 11550, subdivision (b), enhancement for being under the influence of a controlled substance - methamphetamine, with two or more priors.

On April 26, 2012, at a subsequent hearing, the court denied probation under this case and sentenced respondent to 180 days in jail with 66 days credit for time served to run concurrent with cases C310559, C308842, C309718, C315020, and C310813.

17. On December 12, 2011, in the Superior Court of California, San Diego County, in Case No. C315020, respondent pled guilty to and was convicted of violating Health and Safety Code Section 11550, subdivision (a), being under the influence of a controlled substance, methamphetamine, a misdemeanor.

On April 26, 2012, at a subsequent hearing, the court denied probation and sentenced respondent to 90 days in jail with 49 days credit for time served to run concurrent with cases C310559, C308842, C309718, C310813, and C311752 as well as payment of fines and fees.

18. On October 10, 2012, in the Superior Court of California, San Diego County, in Case No. C323582, respondent pled guilty to and was convicted of violating Health and Safety Code section 11550, subdivision (a), being under the influence of a controlled substance - methamphetamine, a misdemeanor.

On this date, the court suspended the imposition of sentence and placed respondent on summary probation for five years under certain terms and conditions, including, in part, 90 days in jail stayed per completion of 180 days of an outpatient rehabilitation program and payment of fines and fees.

### **Arrest Reports From El Cajon Police and San Diego County Sheriff's Department**

19. Complainant obtained arrest reports relating to the facts and circumstances of the convictions detailed above from the El Cajon Police Department and three arrest reports from the San Diego County Sheriff's Department. These materials were admitted pursuant to *Lake v. Reed* (1997) 16 Cal.4th 448, 461-462.

In summary they show the following:

20. Under Case No. CE299037 respondent was arrested on March 4, 2010, for possession and use of a controlled substance in violation of Health and Safety Code section 11377, subdivision (a). The arrest report indicates only that he was arrested and booked for this offense.

21. On March 18, 2011, respondent was arrested for being under the influence of a controlled substance in violation of Health and Safety Code section 11550, subdivision (a). According to the arrest report, a citizen reported to police on patrol respondent was starting fights in a local park. When police approached respondent, he was wearing only pants and displayed the signs of being under the influence of a stimulant. He admitted that he recently smoked methamphetamine. The reporting officer observed that respondent seemed to be fighting with people who were not there and was punching the air. Respondent told one of the officers his father was "Superman" and he made nonsensical statements including that he had a

pierced penis he used to defend the human race. He said he had not slept since he left jail two days prior and he admitted he had smoked methamphetamine. He became angry when the officer refused to call him "Superman's son" and he ended the interview.

22. Respondent was arrested on April 8, 2011, for giving false information to a police officer in violation of Penal Code section 148.9. According to the arrest report, police responded to a report a person was making a disturbance and smoking in public. When police arrived they encountered respondent and asked him for identification. He said he did not have any identification and then gave the reporting officer two different names with three different spellings. He was arrested and his fingerprints were taken which revealed his true identity. When asked why he gave false names to the officers, respondent said because "I can."

23. Respondent was arrested on April 30, 2011, for being under the influence of a controlled substance in violation of Health and Safety Code section 11550 subdivision (a). The circumstances of this arrest are as follows: Officers on patrol approached respondent and a friend because they were smoking in public in violation of the El Cajon Municipal Code. When the reporting officer asked respondent his name, respondent gave him a false name but when challenged about his true name he gave his correct name. Respondent was arrested for providing false information to a police officer under Penal Code section 148.9. After he was arrested, the reporting officer observed that respondent displayed the signs of being under the influence of a stimulant and was charged with violating Health and Safety Code section 11550, subdivision (a). Respondent admitted he used methamphetamine and had been using the drug on and off since he was 16.



24. Respondent was arrested on September 2, 2011, for being under the influence of a controlled substance in violation of Health and Safety Code section 11550, subdivision (a). Per the arrest report, police were called about a person who was jumping on vehicles in a parking lot. They found respondent without a shirt holding a metal tea pot and sweating profusely. He displayed the objective signs of being under the influence of a stimulant. The reporting officer searched the tea pot and found a pipe inside it with residue the officer was able to identify, based on his training and experience, used for smoking methamphetamine. Respondent admitted to the officer he smoked methamphetamine.

25. Respondent was subsequently arrested on January 4, 2012. An officer on routine patrol recognized respondent and knew he was on probation until 2016. He made contact with respondent to ascertain his probation status. The officer searched respondent and found a stuffed teddy bear in his pocket which contained a glass pipe with burnt residue the officer identified, based on his training and experience, was methamphetamine. Respondent was arrested and issued a citation.

26. Respondent was next arrested on July 30, 2012, for again being under the influence of a controlled substance in violation of Health and Safety Code section 11550, subdivision (a). The circumstances of this arrest are described in the arrest report as follows: police were called to a report of a mentally ill man or man under the influence of drugs on a roof trying to break into an apartment. Police responded and found respondent on the rooftop swearing and wearing only gym shorts. Respondent's friend told the officers that he was trying to prevent respondent from falling off the roof. He admitted both he and respondent were abusers of methamphetamine. Respondent told the reporting officer that he had injected intravenously methamphetamine the day previously. Respondent displayed signs of

being under the influence of this stimulant and was arrested. Respondent told the officer he had used other drugs. The officer observed that respondent's left arm had needle marks from years of needle use.

27. On October 22, 2012, respondent was arrested for being under the influence of a controlled substance in violation of Health and Safety Code section 11550, subdivision (a), and vandalism under Penal Code section 594, subdivision (b)(1). Subsequently he was charged on information with a robbery, a felony, in violation of Penal Code section 211. He was convicted of this felony on January 15, 2013, in Case No. SCE324784 which is detailed above.

As documented in the arrest report, police were called to a report of a person without a shirt and wearing red pants who had kicked the victim's car and then hit the victim and destroyed his cell phone. The victim told responding officers that respondent hit his car as he was driving. The victim did not know respondent. He then parked the car to see what happened and noticed there was a dent. Respondent then yelled at the victim to get off his cell phone; the victim was talking to his wife. According to the victim, respondent punched or pushed the victim who fell down dropping his cell phone which respondent took and broke into pieces. The responding officers observed the victim had visible abrasions to his lower leg where he fell. Based on the description the victim provided of respondent, police found him and approached him. Respondent told the police he was helping the victim find his cell phone. The reporting officer observed that respondent displayed objective signs of being under the influence of a stimulant and alcohol. The reporting officer also noticed that respondent had an abrasion to his right hand. During a search of respondent, the officer found an empty syringe with a bent needle.

28. The San Diego County Sherriff's Department arrest reports document the following: On April 19, 2011 respondent was arrested for a warrant and possession of marijuana. During the search incident to his arrest, respondent was found in possession of a pipe the deputy identified as a pipe with a black residue used to smoke methamphetamine. Respondent was issued a citation for possession of drug paraphernalia pursuant to Health and Safety Code section 11364.

29. On January 3, 2011, the reporting deputy stated he received a call to conduct a follow up investigation at a residence to check for a weapon at the residence. The deputy saw respondent walking from the residence and the deputy began to talk with him. During the conversation respondent displayed the signs of being under the influence of a stimulant. He made incoherent statements about flying with a red cape. During a search of respondent incident to arrest, the deputy found a pipe used to smoke methamphetamine based on his training and experience. Respondent told the deputy he used the pipe to smoke "kryptonite." Respondent was arrested for being under the influence of a controlled substance under Health and Safety Code section 11550, subdivision (a).

30. On June 4, 2011, deputies responded to a call that a man was hiding behind apartments. The reporting deputy contacted respondent who displayed the indicia of being under the influence of a stimulant. The deputy observed that respondent had black, burned fingertips. He was arrested for Health and Safety Code section 11550, subdivision (a). A records check revealed three warrants for respondent's arrest for Health and Safety Code section 11550, subdivision (a), violations and a warrant for violating Health and Safety Code section 11364.

## **Respondent's Evidence**

31. Respondent testified as follows: He is no longer the person who committed these crimes and is rehabilitated. The basis for denying his application is not valid because it does not reflect how he presently lives. He served his time on all of the committed offenses, which occurred from 10 to 20 years ago when he was an addict, and he committed the crimes starting in 2003 when he was 18 years old. He does not drink or smoke and has not for many years now. He identified March 27, 2016, as the date of his sobriety because it corresponds to the date he was released from jail.

32. As proof of his life change, for the last four years, respondent has been gainfully employed and works as general manager for a national moving company that is owned by Gabe Filkey, Chief Executive Officer of Filkey & Associates, a real estate brokerage. Mr. Filkey is supporting respondent's application and would serve as respondent's sponsoring broker. Respondent began as a laborer and earned Mr. Filkey's trust and the trust of customers. As a result of the trust he earned, respondent was given increased responsibilities and promoted. He is now responsible for supervising a staff of laborers in all aspects of their employment. He provides estimates for moves and ensures the safety and security of customers' household possessions. In addition to his work as general manager of the moving company, respondent owns and operates a frozen yogurt store.

To further demonstrate how he has changed his life, respondent also participates in his church and tries to give back to the community.

33. Regarding his recovery from addiction, respondent said he successfully completed a court ordered six-month inpatient program in 2016 to 2017 through

Volunteers of America and agreed to stay six months longer until mid-2017. Respondent said he goes to Alcoholics Anonymous (AA) meetings and associates with AA participants.

But respondent's testimony here was vague. He did not emphasize his participation in AA or talk about his process of recovery or how he ensures his sobriety.

34. Mr. Filkey testified on respondent's behalf and also provided a letter which was received as evidence. Mr. Filkey has been a licensed broker for 17 years and wants to sponsor respondent because he needs good people to work for him. He knows respondent only professionally. Respondent gained his trust over the last four years due to his honesty and trustworthiness. He believes respondent's criminal conduct is in the past.

Mr. Filkey said that respondent is responsible for arranging the moves of 500 to 600 homes a year. He handles cash daily and the personal possessions of customers. Respondent supervises between 15 to 18 laborers in the summer and eight in the winter and respondent has the authority to hire and fire employees and address personnel matters.

Mr. Filkey is aware of respondent's past criminal history.

35. Respondent submitted the following documents:

- A letter from John Lemkey dated January 5, 2022, who hired respondent's moving company to move the contents of his large home from Texas to California. Mr. Lemkey stated that respondent and his team of movers

were professional, honest, and prompt, and he was able to feel confident entrusting his valuables to respondent and his company.

- A letter dated December 16, 2021, from Brandon Ford. Mr. Ford knows respondent through the moving company the last four years. Mr. Ford said he has been sober for four years and is active in Alcoholics Anonymous (AA) but he did not state that he knows respondent through AA. He said that respondent is the single most trustworthy person in his life and he is a hard worker. Mr. Ford fully endorses respondent's real estate application. He did not state he is aware of respondent's criminal history as detailed in the statement of issues.
- A document showing that respondent participated in a toy drive for underprivileged children during this last holiday season.
- Articles of Registration from the California Secretary of State as an LLC for "Awesome Brothers" filed October 28, 2021, and an Internal Revenue Service (IRS) notice dated October 13, 2021, employer tax identification from the IRS for Awesome Brothers LLC and Heavenly Yogurt. These are the two companies owned by respondent.
- A Fictitious Business Name Statement filed with the San Diego County Recorder's Office on November 2, 2021, for Heavenly Yogurt.

### **Parties' Arguments**

36. Complainant argued in closing it is against the public interest to issue respondent a plenary or unrestricted license due to his felony convictions which fall under the criteria set forth in California Code of Regulations, title 10, section 2910,

subdivisions (a)(8) and (a)(10), to deny respondent the issuance of a license. Complainant stressed that the department must ensure a licensee is trustworthy and honest and respondent's two felony convictions call into question his ability to be trustworthy and honest.

37. Respondent said in closing that he previously lived a lifestyle of drug addiction and turmoil. He understands the high responsibility of being a department licensee and regards himself as an honest person. He wants to be able to reassure clients and he will give clients his best. Respondent asked for at least a restricted license.

## **LEGAL CONCLUSIONS**

### **The Department's Authority and Burden and Standard of Proof**

1. The Real Estate Commissioner (Commissioner) "has full power to regulate and control the issuance and revocation . . . of all licenses to be issued . . ." (Bus. & Prof., § 10071.)

2. "Protection of the public shall be the highest priority for the Department of Real Estate in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." (Bus. & Prof., § 10050.1.)

3. Respondent bears the burden of proving he meets all prerequisites necessary for the requested license. (*Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1221.) This burden requires proof by a preponderance of the evidence. (Evid. Code, § 115.)

4. Competent evidence must show respondent's present qualifications and fitness for a license "is in some fashion rationally and substantially related to, affected by the earlier offense." (*Pieri v. Fox* (1979) 96 Cal.App.3d 802, 805-807; Bus. & Prof. § 480, subd. (a)(3).)

### **Applicable Statutes and Regulations**

5. The Commissioner may deny an application for a license if the applicant has been convicted of a crime that is substantially related to the qualifications, functions, or duties of a real estate licensee. (Bus. & Prof., §§ 480, subd. (a)(1), 10177, subd. (b)(1).)

6. A crime or act is substantially related to the qualifications, functions, or duties of a real estate licensee if it is an unlawful act committed with the intent or threat of doing substantial injury to the person or property of another, or is conduct which demonstrates a repeated and willful disregard of the law. (Cal. Code Regs., tit. 10, § 2910, subd. (a)(8) & (a)(10).)

7. Under Business and Professions Code section 480, the Commissioner may deny a license if "[t]he applicant has been convicted of a crime within the preceding seven years from the date of application that is substantially related to the qualifications, functions, or duties of the business or profession for which the application is made, regardless of whether the applicant was incarcerated for that crime, or the applicant has been convicted of a crime that is substantially related to the qualifications, functions, or duties of the business or profession for which the application is made and for which the applicant is presently incarcerated or for which the applicant was released from incarceration within the preceding seven years from the date of application." (*Id.* at subd. (a)(1).) However, the seven-year limitation does



not apply if "[t]he applicant was convicted of a serious felony, as defined in Section 1192.7 of the Penal Code or a crime for which registration is required pursuant to paragraph (2) or (3) of subdivision (d) of Section 290 of the Penal Code." (*Id.* at subd. (a)(1)(A).)

Respondent was convicted on January 13, 2013, of robbery which falls within the seven-year period of respondent's application under Section 480 and thus can serve as a basis for the Commissioner to deny his application. (Notwithstanding, this robbery is considered a serious felony under Penal Code section 1192.7. Thus, the seven-year limitation does not even apply.)

However, respondent's 2003 felony conviction falls outside the seven-year period under Section 480 and is not a basis to deny respondent's application. The crime of unlawful taking of a vehicle is not identified under Penal Code section 1192.7 as a serious felony.

8. Business and Professions Code section 480, subdivision (c), further provides that "a person shall not be denied a license on the basis of any conviction, or on the basis of the acts underlying the conviction, that has been dismissed pursuant to Section 1203.4, 1203.4a, 1203.41, 1203.42, or 1203.425 of the Penal Code, or a comparable dismissal or expungement." (Bus. & Prof., § 480, subd. (c).) The applicant must however provide proof of the dismissal "if it is not reflected on the report furnished by the Department of Justice." (*Ibid.*) Respondent did not provide proof that any of his convictions have been dismissed and thus this section does not apply.

### **Cause Exists, in Part, to Deny Respondent's Application**

9. Cause exists to deny respondent's application for a real estate salesperson license based on his 2013 robbery conviction pursuant to Business and

Professions Code sections 480, subdivision (a)(1), and 10177, subdivision (b)(1), and California Code of Regulations, title 10, section 2910, subdivision (a)(8) and (a)(10). This conviction is substantially related to the qualifications, functions, and duties of a real estate salesperson because it involves the forceful taking of personal property. (See Pen. Code, § 211.)

10. Cause does not exist to deny respondent's application because of his 2003 felony conviction because this conviction falls outside the seven-year period identified under Business and Professions Code section 480 and the crime is not deemed a serious felony per Penal Code Section 1192.7.

11. Respondent's misdemeanor convictions are considered, as complainant asks that they be considered, as factors to assess respondent's rehabilitation consistent with the department's rehabilitation criteria.

### **Disciplinary Considerations**

12. Cause for denial of respondent's application having been established, respondent bears the burden of proving he is sufficiently rehabilitated to warrant licensure. (See *Martin v. Alcoholic Beverage Control Appeals Bd.* (1950) 52 Cal.2d 259, 264-265.)

13. 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.) 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), but remorse, while necessary, is insufficient to demonstrate rehabilitation. A truer indication of rehabilitation than remorse is sustained conduct over an extended period of time. (*In re Menna* (1995) 11

Cal.4th 975, 991.) "The evidentiary significance of 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.)

The department has adopted criteria for evaluating rehabilitation under California Code of Regulations title 10 section 2911, which provides:

(a) The following criteria have been developed and will be considered by the Bureau pursuant to Section 482 of the Business and Professions Code for the purpose of evaluating whether or not an applicant is rehabilitated for purposes of issuance or for reinstatement of a license:

(1) The time that has elapsed since commission of the acts(s) or offense(s):

(A) The passage of less than two years after the most recent criminal conviction or act of the applicant that is a cause of action in the Bureau's Statement of Issues against the applicant is inadequate to demonstrate rehabilitation.

(B) Notwithstanding subdivision (a)(1)(A), above, the two year period may be increased based upon consideration of the following:

(i) The nature and severity of the crime(s) and/or act(s) committed by the applicant.

(ii) The applicant's history of criminal convictions and/or license discipline that are "substantially related" to the

qualifications, functions, or duties of a real estate licensee. However, no rehabilitation shall be required where the sole proven basis or bases for denial of an application is an expunged conviction as described in Business and Professions Code Section 480(c).

(2) Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the applicant, or escheat to the State of these monies or other properties if the victim(s) cannot be located.

(3) Expungement of criminal convictions.

(4) Expungement or discontinuance of a requirement of registration pursuant to the provisions of Section 290 of the Penal Code.

(5) Successful completion or early discharge from probation or parole.

(6) Abstinence from the use of controlled substances and/or alcohol for not less than two years if the conduct which is the basis to deny the Bureau action sought is attributable in part to the use of controlled substances and/or alcohol.

(7) Payment of the fine and/or other monetary penalty imposed in connection with a criminal conviction or quasi-criminal judgment.

(8) 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 Bureau action sought.

(9) Completion of, or sustained enrollment in, formal education or vocational training courses for economic self-improvement.

(10) Discharge of, or bona fide efforts toward discharging, adjudicated debts or monetary obligations to others.

(11) Correction of business practices resulting in injury to others or with the potential to cause such injury.

(12) Significant or conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.

(13) 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 Bureau action sought.

(14) Change in attitude from that which existed at the time of the conduct in question as evidenced by the following:

(A) Testimony and/or other evidence of rehabilitation submitted by the applicant.

(B) Evidence from family members, friends and/or other persons familiar with applicant's previous conduct and with his or her subsequent attitudes and/or behavioral patterns.

(C) Evidence from probation or parole officers and/or law enforcement officials competent to testify as to applicant's social adjustments.

(D) Evidence from psychiatrists or other persons competent to testify with regard to neuropsychiatric or emotional disturbances.

(E) Absence of subsequent felony convictions, misdemeanor convictions, or other conduct that provides grounds to discipline a real estate licensee, which reflect an inability to conform to societal rules when considered in light of the conduct in question.

14. Applying the department's rehabilitation criteria under California Code of Regulations, title 10, section 2911, to the evidence of record, including respondent's criminal history, respondent failed to establish by a preponderance of the evidence that he is sufficiently rehabilitated to warrant the issuance of an unrestricted real estate salesperson license consistent with the need for public protection. The reasons for this conclusion are as follows: From 2003 to 2013, respondent was deeply addicted to methamphetamines and willfully and repeatedly disregarded the law as his two felony convictions and numerous misdemeanor convictions show. In 2012 he committed a very serious crime involving the theft by force of personal property.

Despite his history, respondent did not voluntarily seek treatment, and only after he was convicted of robbery and required to undergo treatment did he do so.

15. The question that needs to be addressed now is whether the evidence of record consistent with the factors for rehabilitation under California Code of Regulations, title 10, section 2911, allow for the issuance of a restricted real estate license pursuant to Business and Professions Code section 10156.5 consistent with the interest of public protection. Based on this record, it is concluded that it not contrary to the interest of public protection to issue respondent a restricted license for these reasons: Respondent's conduct was a result of his deep addiction. This is not to excuse his criminal conduct, but it places his recovery from addiction as the material issue. Although he did not clearly articulate his path of recovery, respondent credibly testified he has been sober since March 27, 2016, which corresponds to his release from custody. Since that time, respondent has changed his attitude and his lifestyle, has been gainfully employed, and has successfully achieved a position of responsibility and trust. Respondent has also opened two businesses. He successfully completed a drug treatment program and continued in that program after he was required to do so. Since 2016, respondent has had no contact with law enforcement. In sum, respondent appears to have matured and moved past his troubling history of addiction.

In light of this record, a restricted license with specific terms and conditions will ensure public protection.

## ORDER

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

1. Respondent's restricted real estate salesperson license is limited to his employment under real estate broker Gabe Filkey, Broker License No. 01722863.
2. The restricted license shall not confer any property right in the privileges to be exercised. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of respondent's conviction or plea of nolo contendere to a crime substantially related to respondent's fitness or capacity as a real estate licensee.
3. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner 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 the restricted license.
4. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor for the removal of any of the conditions, limitations,



or restrictions of a restricted license until three years have elapsed from the effective date of this Decision.

5. Respondent shall submit with any application for license under the employing broker, Mr. Filkey, a statement signed by him on a form approved by the Department of Real Estate, which shall certify:

(a) That he has read the Decision of the Commissioner that granted the right to a restricted license; and

(b) That he will exercise close supervision over the performance by the restricted licensee relating to activities for which a real estate license is required.

6. Respondent shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until the respondent presents such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

7. Respondent shall notify the Commissioner in writing within 72 hours of any arrest and/or issuance of a citation for a crime by sending a certified letter to the Commissioner at the Department of Real Estate, Post Office Box 187000, Sacramento, CA 95818-7000. The letter shall set forth the date of respondent's arrest and/or citation, the crime for which respondent was arrested or cited and the name and

address of the arresting law enforcement agency. Respondent's failure to timely file written notice shall constitute an independent violation of the terms of the restricted license and shall be grounds for the suspension or revocation of that license.

DATE: January 19, 2022

  
Abraham M. Levy (Jan 19, 2022 15:39 PST)

ABRAHAM M. LEVY

Administrative Law Judge

Office of Administrative Hearings