

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED

MAY 09 2011

DEPARTMENT OF REAL ESTATE
By *[Signature]*

In the Matter of the Accusation of

JEFFESSEN GAERLAN AVERILLA,

Respondent.

NO. H-5458 SAC

OAH NO. 2010100394

DECISION

The Proposed Decision dated April 7, 2011, 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 on grounds of the conviction of a crime.

The right to reinstatement of a revoked real estate salesperson license or to the reduction of a suspension 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 MAY 30 2011.

IT IS SO ORDERED 5/6/2011

BARBARA J. BIGBY
Acting Real Estate Commissioner

[Signature]
By WAYNE S. BELL
Chief Counsel

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In the Matter of the Accusation of:

JEFFESEN GAERLAN AVERILLA,

Respondent.

Case No. H-5458 SAC

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PROPOSED DECISION

Coren D. Wong, an Administrative Law Judge with the Office of Administrative Hearings, State of California, heard this matter on March 28, 2011, in Sacramento, California.

Jason D. Lazark, Real Estate Counsel, represented complainant, Tricia D. Sommers, Deputy Real Estate Commissioner of the State of California (complainant).

Respondent Jeffesen Gaerlan Averilla represented himself.

Evidence was received, the record was closed, and the matter was submitted for decision on March 28, 2011.

SUMMARY

Complainant seeks to discipline respondent's real estate salesperson license based on his misdemeanor conviction for false imprisonment on January 21, 2010. Complainant also alleged a 1994 felony conviction for the sale, or offer for sale, of cocaine as a matter in aggravation. The evidence establishes cause for discipline. Furthermore, the interests of public protection demand the outright revocation of respondent's license.

FACTUAL FINDINGS

1. The Department of Real Estate (Department) issued Real Estate Salesperson License No. S/01328174 to Jeffesen Gaerlan Averilla (respondent) on April 8, 2002. Respondent's license has been active at all times relevant herein and will expire on April 7, 2014, unless renewed or revoked.

2. Complainant filed the accusation in her official capacity on August 31, 2010, seeking to discipline respondent's license based on the criminal conviction described in Factual Finding 3.

Respondent's Criminal Conviction

3. On January 21, 2010, respondent pled nolo contendere to, and was convicted of, a misdemeanor violation of Penal Code section 236, false imprisonment, in the Superior Court of the State of California, County of Sacramento, Case No. 09M10070. Imposition of judgment and sentence was suspended, and respondent was placed on informal probation for three years. He was ordered to spend two days in the Sacramento County Jail; pay restitution to the victim; and pay fines, penalties, and assessments in the amount of \$470.17. He was also required to attend 12 anger management classes.

4. This conviction arose out of a domestic violence incident on October 18, 2009, during which respondent punched his wife, Annette Averilla, in the mouth, causing her lip to swell and bleed. Their son, who was 14 years old at the time, was standing behind his mother, saw his father punch her, and called the police.

Factors in Aggravation, Mitigation, and Rehabilitation

5. Complainant alleged respondent's August 26, 1994, felony conviction in the Superior Court of the State of California, County of Santa Clara, Case No. 174938, for selling, or offering for sale, cocaine in violation of Health and Safety Code section 11352, subdivision (a), as a matter in aggravation. Imposition of sentence was suspended, and respondent was placed on formal probation for three years. He was ordered to spend six months in county jail, and pay fines, penalties, and assessments in the amount of \$522. He was also required to attend substance abuse counseling.

6. Mrs. Averilla testified on behalf of complainant. She explained that on October 18, 2009, she and her husband were arguing over his being jealous of her spending time with her friends without him. At one point, he decided to blow up an air mattress to sleep on in the living room. Mrs. Averilla told him not to do that because their children were asleep and she did not want them to wake up in the morning and see the mattress. Respondent became angrier and grabbed a can of Dr

Pepper soda and poured it on their master bedroom mattress. He then retrieved a container of motor oil from the garage and poured it on the mattress.

At that point, Mrs. Averilla instructed her husband to leave the house. He refused to leave without first grabbing some clothes. Mrs. Averilla wanted him out of the house immediately and began pushing him to get him out. At some point during the pushing and shoving, the couple's then 14-year-old son woke up and came out of his room to where his parents were arguing. He was standing behind his mother when he saw his father punch her in the mouth once with a closed fist. Mrs. Averilla instructed her son to call the police. After he had picked up the phone, his father told him to hang up the phone and not call the police. Respondent then left the house.

7. An officer from the Elk Grove Police Department arrived after Mr. Averilla had left. The officer took pictures of Mrs. Averilla's swollen lip, the dried blood on her lip, and the scratches on her arm. He also took pictures of the mattress stains and a gallon-size container of motor oil. He wrote in his report, "Annette had red swelling and dried blood on her lip that I observed upon contact and a scratch on her right arm."¹

8. The officer took the statement of the couple's son. Their son said he was woken up by his parents' arguing and came out of his bedroom. He saw his dad punch his mom in the face one time. After that, his mom told him to call the police. His dad then told him to hang up the phone and to not call the police. At some point, he heard his dad say, "Give me my clothes. If you don't, I'll burn the house down."

9. The officer also spoke to the couple's daughter, who was 10 years old at the time. She said she woke up to hear her parents arguing and was scared by the way they were yelling and screaming at each other, so she stayed in her bedroom. She came out as her father was leaving. She did not see her father hit her mother.

10. Respondent testified. A detailed discussion of his testimony is not necessary because it was filled with self-contradictions and he is not considered to be a credible witness. For instance, he testified on direct examination that he did not deny what happened on October 18, 2009, but that it was an accident because his wife was "out of control."² During cross-examination, he explained that they were in the midst of a heated argument when he "punched" his wife in the lip. But when

¹ The officer's observations are admissible pursuant to *Lake v. Reed* (1997) 16 Cal.4th 448, 461-462 [police report documenting officer's observations is admissible as administrative hearsay to explain or supplement direct evidence of what he observed].

² Respondent represented himself at the hearing and was allowed to testify in narrative form on direct examination.

specifically asked about punching her, he said it was with an open hand. He then immediately changed his story and said he did not remember whether it was with an open or closed hand. He immediately changed his story again and said it was all with an open hand.

11. Respondent also denied having bloodied his wife's lip. When shown a picture of her bloodied lip, he said that it was not blood that was depicted in the picture but a cold sore. Not only does the picture (page 20 of Exhibit 6) clearly show dried blood on the left side of Mrs. Averilla's bottom lip, but the officer who took the picture saw the blood himself and documented it in his report. (Factual Finding 7.)³

12. The Department has developed criteria for evaluating a licensee's rehabilitation in disciplinary proceedings. Those which are relevant here are: 1) the passage of at least two years since the conviction, and 2) successful completion or early termination of probation. (Cal. Code Regs., tit. 10, § 2911(a) and (e); see, *In re Andreani* (1939) 14 Cal.2d 736, 749 [existence of rehabilitation difficult to establish affirmatively, "but its nonexistence may be 'proved' by a single act."])

13. It has only been 15 months since respondent's conviction, and he will be on criminal probation until January 2013. (Factual Finding 3.) There has not been enough time to evaluate his rehabilitation. (See, *In re Gossage* (2000) 23 Cal.4th 1080, 1099 [little weight is given to a person's good behavior while on probation or parole because such conduct is expected].) Furthermore, he has yet to admit the wrongfulness of his actions, instead explaining that he accidentally hit his wife "because she was out of control." (Factual Finding 10; see, *Seide v. Committee of Bar Examiners of the State Bar of California* (1989) 49 Cal.3d 933, 940 ["Fully acknowledging the wrongfulness of his actions is an essential step towards rehabilitation."]) While respondent did say he regrets what had happened, "remorse does not demonstrate rehabilitation. . . ." (Citation.) (*In re Menna* (1995) 11 Cal.4th 975, 991.)

³ Respondent also provided contradictory testimony about the circumstances under which the letter that is Exhibit 14 was drafted. First, he said he obtained permission to draft the letter from the author's husband on June 25, 2010, at 6:25 p.m. He read that date and time from his cell phone bill while sitting on the witness stand.

But when asked why the letter was dated "06/22/10," respondent tried to explain the discrepancy by stating that his attorney did not want to file the motion to which the letter was attached as an exhibit late. When it was pointed out to him that both he and his attorney signed the Motion on June 24, 2010, and the Motion was filed on June 25, 2010, at 2:10 p.m., he changed his story about when he first spoke with the husband and said they spoke the previous week. That phone call was conveniently placed from a landline at respondent's real estate office, and there is no record of it having actually occurred.

14. As discussed below, cause exists to discipline respondent's license. And respondent has failed to establish that he is sufficiently rehabilitated. (Factual Finding 13.) Furthermore, he was found not to be credible as a witness. (Factual Findings 10 and 11.)⁴ And while it is true that respondent has had only one criminal conviction during the almost nine-year-period that he has held his real estate salesperson license, that conviction was recent and resulted in physical injuries to his wife and emotional trauma to his two young children. Therefore, the interests of public protection demand outright revocation of respondent's real estate salesperson license. (See, *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 773 [public protection is primary purpose of licensing statutes].)

LEGAL CONCLUSIONS

1. The Department may revoke or suspend a real estate salesperson license if the licensee has been convicted of a crime. (Bus. & Prof. Code, §§ 490, subd. (a); 10177, subd. (b).) The crime must be substantially related to the qualifications, functions, or duties of a real estate licensee. (Bus. & Prof. Code, § 10177, subd. (b); see, *Griffiths v. Superior Court*, *supra*, 96 Cal.App.4th at p. 769 [conduct for which discipline sought must relate to practice of particular profession such that conduct "demonstrates an unfitness to practice such profession."]) The Department has adopted regulations to assist with determining whether a particular crime is substantially related to the qualifications, functions, or duties of a licensee. (Cal. Code. Regs., tit. 10, § 2910.)

2. As discussed above, respondent has been convicted of false imprisonment. (Factual Finding 3.) His conviction is substantially related to the qualifications, functions, or duties of a licensee because the underlying crime involved the commission of an unlawful act committed with the intent or threat of doing substantial injury to another. (Cal. Code Regs., tit. 10, § 2910, subd. (a)(8); see, *Donley v. Davi* (2009) 180 Cal.App.4th 447 [conviction for domestic violence is substantially related to qualifications, functions, or duties of real estate licensee].)⁵

⁴ See, *Harrington v. Department of Real Estate* (1989) 214 Cal.App.3d 394, 402 ["Honesty and truthfulness are two qualities deemed by the Legislature to bear on one's fitness and qualification to be a real estate licensee."]

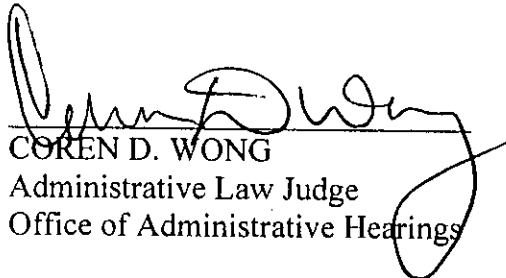
⁵ See, Evidence Code section 452.5, subdivision (b) [a certified copy of an official record of conviction is admissible to prove "the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of prison term, or other act, condition, or event recorded by the record"]; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1460-1461 [Evid. Code, § 452.5, subd. (b) creates a hearsay exception which allows for admission of qualified court record to not only prove fact of conviction but also that offense reflected in record actually occurred].

3. Cause exists for disciplining respondent's real estate salesperson license for the reasons specified in Legal Conclusion 2. And as discussed in Factual Finding 14, respondent has not met his burden of establishing his rehabilitation. Therefore, when all of the evidence is considered, it is clear that public protection demands that his license be revoked.

ORDER

All licenses and licensing rights of respondent Jeffesen Gaerlan Averilla under the Real Estate Law are REVOKED.

DATED: April 7, 2011


COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings

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FILED

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DEPARTMENT OF REAL ESTATE

By K. Mat

8 BEFORE THE DEPARTMENT OF REAL ESTATE
9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Accusation of)
12) No. H-5458 SAC
13 JEFFESEN GAERLAN AVERILLA,) ACCUSATION
14 Respondent.)
15)

16 The Complainant, TRICIA D. SOMMERS, acting in her official capacity as a
17 Deputy Real Estate Commissioner of the State of California, for cause of Accusation against
18 JEFFESEN GAERLAN AVERILLA (herein "Respondent"), is informed and alleges as follows:

19 1.

20 Respondent is presently licensed and/or has license rights under the Real Estate
21 Law Part 1 of Division 4 of the Business and Professions Code (herein "the Code") as a real
22 estate salesperson.

23 2.

24 On or about January 21, 2010, in the Superior Court of the State of California,
25 County of Sacramento, Case No. 09M10070, Respondent was convicted of violating Penal
26 Code § 236 (false imprisonment), a misdemeanor which bears a substantial relationship under

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1 Section 2910, Title 10, California Code of the Regulations (herein "the Regulations") to the
2 qualifications, functions or duties of a real estate licensee.

3 MATTER IN AGGRIVATION

4 3.

5 On or about August 26, 1994, in the Superior Court of the State of California,
6 County of Santa Clara, Case No. 174938, Respondent was convicted of violating Health and
7 Safety Code § 11352(a) (transportation of drugs for sale), a felony involving moral turpitude
8 which bears a substantial relationship under Section 2910, Title 10 of the Regulations to the
9 qualifications, functions or duties of a real estate licensee.

10 4.

11 The facts alleged in Paragraph 2 above constitute grounds under Sections 490
12 and 10177(b) of the Code for suspension or revocation of all licenses and license rights of
13 Respondent under Part 1 of Division 4 of the Code.

14 WHEREFORE, Complainant prays that a hearing be conducted on the
15 allegations of this Accusation and that upon proof thereof, a decision be rendered imposing
16 disciplinary action against all licenses and license rights of Respondent under the Real Estate
17 Law, and for such other and further relief as may be proper under the provisions of law.

18
19
20 
21 TRICIA D. SOMMERS
22 Deputy Real Estate Commissioner

23 Dated at Sacramento, California,
24 this 19th day of August, 2010.