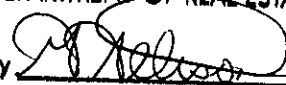


BEFORE THE  
DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

FILED  
APR 12 2011

DEPARTMENT OF REAL ESTATE  
By 

\*\*\*

In the Matter of the Application of )  
 )  
SHANE LEROY HEINZ, )  
 )  
Respondent. )  
\_\_\_\_\_ )

NO. H-5464 SAC  
OAH NO. 2010100741

DECISION

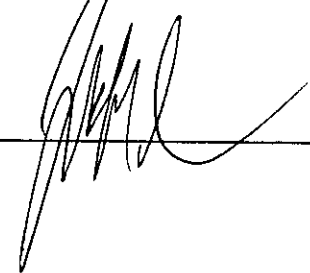
The Proposed Decision dated March 4, 2011, of the Administrative Law Judge of the Office of Administrative Hearings is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

The application for a real estate salesperson license is denied. There is no statutory restriction on when application may again be made for this license. If and when application is again made for this license, all competent evidence of rehabilitation presented by Respondent will be considered by the Real Estate Commissioner. A copy of the Commissioner's Criteria of Rehabilitation is appended hereto for the information of Respondent.

This Decision shall become effective at 12 o'clock noon on MAY 03 2011.

IT IS SO ORDERED 4/12/2011

JEFF DAVIS  
Real Estate Commissioner

  
\_\_\_\_\_

BEFORE THE  
DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

In the Matter of the Statement of Issues  
Against:

SHANE LEROY HEINZ

Respondent.

Case No. H-5464 SAC

OAH No. 2010100741

**PROPOSED DECISION**

Administrative Law Judge Kyungah Kay Suk, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on February 3, 2011.

Jason D. Lazark, Counsel, represented the Complainant, Tricia D. Sommers, Deputy Real Estate Commissioner with the California Department of Real Estate (Department).

Jud Waggoman, Attorney at Law, represented Respondent Shane Leroy Heinz (Respondent), who was present.

Oral and documentary evidence was received. The record closed and the matter was submitted for decision on February 3, 2011.

**FACTUAL FINDINGS**

1. On or about September 1, 2010, Complainant, in her official capacity, made and filed a Statement of Issues against Respondent to deny the issuance of a real estate salesperson license based upon his past criminal convictions and alleged failure to disclose outstanding criminal charges. Respondent timely filed a Notice of Defense on Application requesting a hearing.

2. Respondent filed an application for a real estate salesperson license with the Department on or about July 21, 2009.

### *Respondent's Criminal Conviction*

3. On or about August 20, 1999, in the Superior Court of California, County of Sutter, Case No. CRF99-1595, Respondent pled guilty and was convicted of violating California Penal Code section 273.5, subdivision (a) (willfully inflicting corporal injury upon a spouse), a misdemeanor. Imposition of sentence was suspended and Respondent was placed on three years of summary probation. He was further ordered to obey all laws, not to harass, batter or strike Stacey Heinz, Respondent's former spouse, participate in Batterer's Treatment Program and pay \$100.00 in fine. On or about July 22, 2009, the court dismissed Respondent's misdemeanor conviction pursuant to Penal Code section 1203.4.

4. Case No. CRF99-1595 arose out of an altercation between Respondent and his former spouse on May 31, 1999. Respondent's former spouse claimed that Respondent hit her below her right eye. The responding police officer observed redness and noticeable swelling below the right eye. Respondent's former spouse claimed that she was afraid of Respondent. Sgt. Mitchell from the Yuba City Police Department obtained an Emergency Protective Order (Order) from Judge Parker on June 1, 1999. On June 8, 1999, the Order expired without being served on Respondent.

5. On or about December 8, 1999, in the Superior Court of the State of California, County of Sutter, Case No. CRF99-2719, Respondent pled guilty and was convicted of violating California Penal Code section 415, subdivision (1) (fighting in a public place), a misdemeanor. He also admitted to violating his probation in Case No. CFR99-1595. Imposition of sentence was suspended and Respondent was placed on two years of summary probation. He was further ordered to obey all laws, not to annoy, harass, threaten or batter Stacey Heinz, pay restitution fine of \$130.00 and take 12 weeks of Anger Management Class. On or about July 22, 2009, the court dismissed Respondent's misdemeanor conviction pursuant to Penal Code section 1203.4.

6. Case No. CRF99-2719 arose out of another altercation between Respondent and his former spouse on November 7, 1999. The responding officers found Respondent and his former spouse visibly angry at one another and arguing over household property. Respondent was moving out of the residence and wanted to take his property. Both parties told the police that they were scratched by the other and wanted the other placed under citizen arrest for battery. The officers arrested both parties and took them to county jail. Later that night, officers were again called to the residence of Respondent and his former spouse. The responding officers observed both parties yelling at each other. Respondent was packing up a television set and other household items to try to remove them. Respondent's former spouse was telling him not to remove them because her children needed them. The officers spoke to both parties but could not resolve the issue. The officers told Respondent to only take his personal items. After Respondent left, Respondent's former spouse told police that she feared Respondent would come back and wanted to get a restraining order. The officer requested an emergency protective order which was granted.

7. On or about March 13, 2000, in the Superior Court of the State of California, County of Sutter, Case No. CFR00-0125, Respondent pled guilty and was convicted of violating California Penal Code section 243, subdivision (d) (battery with serious bodily injury), a felony. He also violated his probation from Case No. CRF99-2719. Imposition of sentence was suspended and Respondent was placed on formal probation for three years with terms and conditions that included 270 days in county jail, restitution in the amount of \$995.00, submission to search and chemical test, no possession or consumption of any alcoholic beverage, participation in Batter's Treatment Program or alcohol counseling, no contacting, harassing, battering Anthony Kelly and Stacey Heinz, staying 100 yards from Mr. Kelly's residence and no entering Rugbys Brewery in Marysville and/or Rideout Plumas Group. On or about August 20, 2007, Respondent's felony conviction was reduced to a misdemeanor pursuant to Penal Code section 17. The misdemeanor conviction was then dismissed pursuant to Penal Code section 1203.4.

8. Case No. CFR00-0125 arose out of an altercation between Respondent, his former spouse Stacey Heinz, and her boyfriend Anthony Kelly on December 21 and 22, 1999. When the responding officer arrived at Mr. Kelly's residence on December 21, 1999, Mr. Kelly had dried blood over his face and chin and was holding his nose with his hands. Mr. Kelly stated that Respondent had shoved his way into his residence, pushed Stacy Heinz to the ground and broke his nose. The responding officer returned to Mr. Kelly's residence on December 22, 1999 to take a picture of Stacy Heinz's toe which she claimed was broken from the altercation the previous day with Respondent. The responding officer saw that the toe was blue and swollen.

9. On or about January 29, 2001, Respondent admitted to violating the terms of his probation by testing positive for THC Cannabinoids (Marijuana). He was sentenced to 90 days in county jail.

10. On or about August 17, 2001, Respondent admitted to violating the terms of his probation by testing positive for THC Cannabinoids (Marijuana). He was sentenced to 60 days in county jail.

#### *Respondent's License Application*

11. Question 2 in Part D of the Salesperson License Application (Application) asks "[a]re there criminal charges pending against you at this time? If yes, complete item 5." Respondent responded "no" to Question 2. However, the Department discovered that there was an outstanding bench warrant issued on January 15, 1997, for Respondent's arrest for failure to appear in Albany County Court, Wyoming. On or about January 1, 1997, Respondent received Citation No. 29115U for driving under the influence. He was taken to county jail and issued a citation which ordered Respondent to appear in County Justice Court on January 3, 1997 at 9:00 a.m. Respondent did not make his court appearance.

12. At hearing, Respondent stated that at the time of his DUI arrest, he was stationed in Colorado Springs, Colorado, with the U.S. Military and had gone to Laramie, Wyoming, for New Year's Eve. He asserted that he did not remember being issued a ticket or being required to appear in court although he remembers being taken to jail. He asserted that he forgot about the DUI arrest and was not aware that there was an outstanding bench warrant for his arrest in Wyoming. The Department submitted a copy of Citation No. 29115U which contains the notice to appear in court and has Respondent's signature promising that he would appear in court on January 3, 1997.

13. On or about April 2, 2010, a Motion to Dismiss Misdemeanor Citation was filed in Respondent's DUI case. An Order dismissing the misdemeanor citation without prejudice was issued on or about April 5, 2010.

14. Respondent appeared to be sincere in his testimony that he forgot about his DUI arrest and was not aware of the bench warrant for his arrest. However, real estate salespersons are required to conduct due diligence and fully disclose all matters that legally must be disclosed. The public and the Department rely upon real estate salespersons to make disclosures that are complete and accurate. Similarly, the Department relies upon applicants to make disclosures on their applications that are complete and accurate. Respondent failed to do so here.

#### *Factors in Aggravation, Mitigation and Rehabilitation*

15. Respondent is now 39 years old and although not married, has been in a stable relationship for the past 10 years and has one child. He has a steady job working at the same restaurant for the past 9 years and is one course away from getting his Associate Degree. He was honorably discharged from military service and has taken the requisite courses for a real estate license. He has expunged his criminal convictions and his last criminal violation was over ten years ago. There was no evidence presented to indicate that he has engaged in any criminal activity since. He also offered a declaration from Seth Fuhrer, a real estate broker and President of Nickel Tax & Real Estate Services. Mr. Fuhrer states that he finds Respondent to be "honest, mature and zealous" and is prepared to employ and supervise Respondent as a real estate salesperson in his office.

16. On the other hand, Respondent did not present himself as particularly remorseful or taking responsibility for his past actions. Respondent asserted that he was "rarely physical with his ex-wife" and that he had pled guilty to his crimes under advisement from the public defender. He also continued to challenge the facts underlying the criminal convictions rather than acknowledging any wrongdoing on his part. In the Department's Conviction Detail Report, in response to rehabilitation efforts, Respondent merely replied "divorce." Respondent distanced himself from his former spouse but did not provide evidence that he has been rehabilitated through counseling, treatment programs, or community service. In addition, aside from the declaration of a future employer, Respondent did not provide any character reference that could speak to his rehabilitation from the person he was at the time of his convictions to the person he is today.

## LEGAL CONCLUSIONS

### *Applicable Law, Regulation and Policy*

1. Business and Professions Code section 10152 authorizes the Real Estate Commissioner to require proof of an applicant's honesty and truthfulness before issuing a real estate license, but it does not address the burden of proof in a hearing on the application. In the absence of a statute to the contrary, the burden of proof is on the applicant seeking a license or permit to prove his or her fitness for issuance of the license he or she seeks.<sup>1</sup> In the absence of any law to the contrary, the required standard of proof is a preponderance of the evidence.<sup>2</sup>

2. Business and Professions Code section 480, subdivision (a), provides that the Department may deny issuance of a real estate license on the grounds that the applicant has been convicted of a crime, including a plea or verdict of guilty or a conviction following a plea of nolo contendere, if the crime or act is substantially related to the qualifications, functions, or duties of the business of profession for which application is made.

3. Business and Professions Code section 10177, subdivision (b), provides that the Department may deny the issuance of a license to an applicant who has entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony, or a crime substantially related to the qualifications, functions, or duties of a real estate licensee. Both sections 480, subdivision (a) and 10177, subdivision (b) provide that the denial may occur despite any subsequent order of expungement under section 1203.4 of the Penal Code, allowing the applicant to withdraw his or her plea of guilty or to enter a plea of not guilty, or dismissing the criminal accusation or information.

4. In California Code of Regulations, title 10, section 2910, subdivision (a), the Department has set forth criteria for determining whether a conviction is substantially related to the qualifications, functions or duties of a real estate licensee. These criteria include the following:

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<sup>1</sup> *Martin v. Alcoholic Beverage Appeals Board* (1950) 52 Cal.2d 238; *McCoy v. Board of Retirement* (1986) 183 CalApp.3d 1044, 1051.

<sup>2</sup> Evidence Code section 115 provides:

“Burden of proof” means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

Except as otherwise provide by law, the burden of proof requires proof by a preponderance of the evidence.

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- (8) Doing of any unlawful act with the intent of conferring a financial or economic benefit upon the perpetrator or with the intent or threat of doing substantial injury to the person or property of another.
- (9) Contempt of court or willful failure to comply with a court order.
- (10) Conduct which demonstrates a pattern of repeated and willful disregard of law.

5. As set forth in Factual Findings 3 through 9, Respondent's three criminal convictions are substantially related to the qualifications, functions or duties of a real estate licensee because they constituted unlawful acts with the intent or threat of doing substantial injury to the person of another. Respondent also failed to comply with numerous court orders by violating his probation and showed contempt of court by failing to appear after being arrested for a DUI. Taken all together, Respondent demonstrated a pattern of repeated disregard for the law. Therefore, legal cause exists within the meaning of Business and Professions Code section 480, subdivision (a), and 10177, subdivision (b), for the Department to deny the issuance of a real estate salesperson license to Respondent.

6. Further, Business and Professions Code section 10177, subdivision (a), provides that the Department may deny the application for a real estate license of an applicant who has procured or attempted to procure a real estate license by "fraud, misrepresentation, or deceit, or by making any material misstatement of fact in an application for a real estate license, license renewal, or reinstatement."

7. As set forth in Factual Findings 12 through 15, Respondent failed to disclose he had a pending DUI charge against him from 1997. While this failure to disclose did not constitute intentional fraud, Respondent failed to conduct due diligence and fully disclose all matters that legally must be disclosed. This omission amounts to a material misstatement of fact and provides another basis to deny a real estate salesperson license pursuant to Business and Professions Code section 10177, subdivision (a).

#### *Mitigation, Aggravation and Rehabilitation*

8. Once cause for denial is proved, the applicant must produce persuasive evidence that he is rehabilitated and is a person of good character such that the license should be issued, despite the existence of legal cause to deny issuance of the license. Pursuant to Section 482, subdivision (a) of the Business and Professions Code, the Department has enacted a nonexhaustive list of rehabilitation criteria at section 2911 of title 10, California Code of Regulations, to weigh and evaluate an applicant's evidence of rehabilitation.<sup>3</sup>

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<sup>3</sup> § 2911. Criteria of Rehabilitation (Denial).

The following criteria have been developed by the department pursuant to Section 482(a) of

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the Business and Professions Code for the purpose of evaluating the rehabilitation of an applicant for issuance or for reinstatement of a license in considering whether or not to deny the issuance or reinstatement on account of a crime or act committed by the applicant:

- (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 related to the qualifications, functions or duties of a licensee of the department.)
- (b) Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the applicant.
- (c) Expungement of criminal convictions resulting from immoral or antisocial acts.
- (d) Expungement or discontinuance of a requirement of registration pursuant to the provisions of Section 290 of the Penal Code.
- (e) Successful completion or early discharge from probation or parole.
- (f) Abstinence from the use of controlled substances or alcohol for not less than two years if the conduct which is the basis to deny the departmental action sought is attributable in part to the use of controlled substances or alcohol.
- (g) Payment of the fine or other monetary penalty imposed in connection with a criminal conviction or quasi-criminal judgment.
- (h) 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 agency action sought.
- (i) Completion of, or sustained enrollment in, formal education or vocational training courses for economic self-improvement.
- (j) Discharge of, or bona fide efforts toward discharging, adjudicated debts or monetary obligations to others.
- (k) Correction of business practices resulting in injury to others or with the potential to cause such injury.
- (l) Significant or conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.
- (m) 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 departmental action sought.

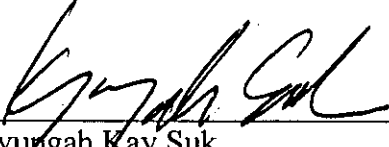


9. As set forth in Factual Findings 16 and 17, Respondent has met some of the criteria for rehabilitation. However, he failed to establish that he has been sufficiently rehabilitated through a change in his attitude, counseling, anger management classes and/or community service.<sup>4</sup> Further, respondent's failure to remember and disclose material information about his own record is an indication that he is not yet ready to perform difficult fiduciary responsibilities of disclosure for others. Given this disclosure failure, it would not be consistent with the public interest, safety and welfare, to issue respondent a real estate salesperson license at this time, even on a restricted basis.

ORDER

The application of Shane Leroy Heinz to the Department of Real Estate for the issuance of a real estate salesperson license is denied.

Dated: March 4, 2011

  
Kyungah Kay Suk  
Administrative Law Judge  
Office of Administrative Hearings

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

- (1) Testimony of applicant.
- (2) Evidence from family members, friends or other persons familiar with applicant's previous conduct and with his subsequent attitudes and behavioral patterns.
- (3) Evidence from probation or parole officers or law enforcement officials competent to testify as to applicant's social adjustments.
- (4) Evidence from psychiatrists or other persons competent to testify with regard to neuropsychiatric or emotional disturbances.
- (5) Absence of subsequent felony or misdemeanor convictions that are reflective of an inability to conform to societal rules when considered in light of the conduct in question.

<sup>4</sup> *Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940 [finding that petitioner's failure to seek continued counseling or assistance in evaluating or treating possible substance abuse problem further suggests his reluctance to acknowledge the wrongfulness of his past transgressions.]

1 Jason D. Lazark, Counsel (SBN 263714)  
2 Department of Real Estate  
3 P. O. Box 187007  
4 Sacramento, CA 95818-7007  
5 General: (916) 227-0789  
6 Direct: (916) 227-0822

**FILED**  
SEP 13 2010  
DEPARTMENT OF REAL ESTATE  
By *[Signature]*

8 BEFORE THE DEPARTMENT OF REAL ESTATE  
9 STATE OF CALIFORNIA

10 \* \* \*

11 In the Matter of the Application of )  
12 SHANE LEROY HEINZ, ) No. H-5464 SAC  
13 Respondent. ) STATEMENT OF ISSUES

14  
15 The Complainant, TRICIA D. SOMMERS, in her official capacity as a Deputy  
16 Real Estate Commissioner of the State of California, for Statement of Issues against SHANE  
17 LEROY HEINZ (herein "Respondent"), alleges as follows:

18 1.

19 On or about July 21, 2009, Respondent made application to the Department of  
20 Real Estate of the Sate of California for a real estate salesperson license.

21 FAILURE TO DISCLOSE OUTSTANDING CHARGES

22 2.

23 In response to Part D, Question 2 of said application, to wit: "Are there criminal  
24 charges pending against you at this time? If yes, complete item 5," Respondent concealed and  
25 failed to disclose that he had an active arrest warrant in Albany, Wyoming for a January 1, 1997  
26 driving under the influence of alcohol charge and a failure to appear in court on the charge.

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3.

In failing to reveal the pending criminal charges against him in his July 21, 2009 application, Respondent procured or attempted to procure a real estate license by fraud, misrepresentation, or deceit, or by making a material misstatement of fact in said application which constitute grounds for denial of Respondent's application for a real estate license under Sections 480(c) and 10177(a) of the Business and Professions Code (herein "the Code").

CRIMINAL CONVICTIONS

4.

On or about March 13, 2000, in the Superior Court of the State of California, County of Sutter, Case Number CRF99-0125, Respondent was convicted of violating California Penal Code Section 243(d) (battery), a felony which bears a substantial relationship under Section 2910, Title 10, California Code of Regulations (herein "the Regulations") to the qualifications, functions or duties of a real estate licensee.

5.

On or about December 8, 1999, in the Superior Court of the State of California, County of Sutter, Case Number CRF99-2719, Respondent was convicted of violating California Penal Code Section 415(1) (fighting in a public place), a misdemeanor which bears a substantial relationship under Section 2910, Title 10 of the Regulations to the qualifications, functions or duties of a real estate licensee.

6.

On or about August 20, 1999, in the Superior Court of the State of California, County of Sutter, Case Number CRF99-1595, Respondent was convicted of violating California Penal Code Section 273.5(a) (inflicting corporal injury upon a spouse), a misdemeanor which bears a substantial relationship under Section 2910, Title 10 of the Regulations to the qualifications, functions or duties of a real estate licensee.

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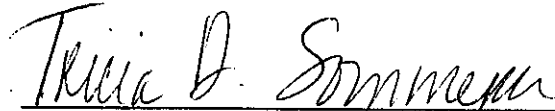
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7.

Respondent's criminal convictions, as described above in Paragraphs 4 through 6 constitute grounds for denial of Respondent's application for a real estate license under Sections 480(a) and 10177(b) of the Code.

WHEREFORE, Complainant prays that the above-entitled matter be set for hearing and, upon proof of the charges contained herein, that the Commissioner refuse to authorize the issuance of, and deny the issuance of a real estate salesperson license to Respondent, and for such other and further relief as may be proper in the premises.



TRICIA D. SOMMERS  
Deputy Real Estate Commissioner

Dated at Sacramento, California,  
this 1<sup>st</sup> day of September, 2010.