

FILED

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FEB 17 2012

DEPARTMENT OF REAL ESTATE

By *[Signature]*

In the Matter of the Application of)
)
 BILLY SIENG PHONG,)
)
 Respondent.)

NO. H-5679 SAC
OAH NO. 2011100234

DECISION

The Proposed Decision dated December 15, 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 an application may again be made for this license. If and when an 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 MAR 08 2012

IT IS SO ORDERED 2/15/12

BARBARA J. BIGBY
Real Estate Commissioner

[Signature]

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED

FEB 10 2012

DEPARTMENT OF REAL ESTATE

In the Matter of the Statement of Issues
Against:

BILLY SIENG PHONG,

Respondent.

Case No. H-5659 SAC *P. Jones*

OAH No. 2011100234

PROPOSED DECISION

This matter was heard before Rebecca M. Westmore, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, on December 1, 2011, in Sacramento, California.

Kenneth C. Espell, Real Estate Counsel II, represented complainant, Tricia D. Sommers, a Deputy Real Estate Commissioner with the Department of Real Estate (department).

Billy Sieng Phong (respondent) appeared and represented himself.

Evidence was received, the record was closed, and the matter was submitted for decision on December 1, 2011.

FACTUAL FINDINGS

1. On May 20, 2010, respondent applied for a real estate salesperson license.
2. On August 31, 2011, complainant filed the Statement of Issues in her official capacity.¹ The department seeks to deny respondent's application based upon three felony convictions sustained by respondent between November 1999 and July 2001.

¹ At hearing, complainant requested that the date of "August 30, 2004" on page 1, line 21 of the Statement of Issues be amended to read "May 20, 2010." Respondent did not object to this amendment.

3. Respondent timely filed a Notice of Defense to the Statement of Issues, pursuant to Government Code section 11506. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

Respondent's Convictions

4. On November 10, 1999, in Sacramento Superior Court, Case No. 99F08122, respondent, upon a plea of nolo contendere, was convicted of violating Penal Code section 496, subdivision (a), receiving stolen property, a felony. Imposition of sentence was suspended, and respondent was placed on five years formal probation. The court sentenced respondent to serve 365 days in county jail, and ordered him to pay \$160,465 in restitution. On January 24, 2003, respondent admitted to violating the terms and conditions of his probation, and the court sentenced respondent to an additional 30 days in county jail. On September 25, 2007, respondent's motion to reduce his felony conviction to a misdemeanor was granted pursuant to Penal Code section 17, subdivision (b). On February 19, 2010, respondent's conviction was dismissed pursuant to Penal Code section 1203.4.

5. On June 5, 2001, in Santa Clara Superior Court, Case No. CC087168, respondent, upon a plea of nolo contendere, was convicted of violating Penal Code sections 459/460, subdivision (b), second degree burglary, 484/487, subdivision (a), grand theft, and 12022.6, subdivision (a)(1), taking, damaging or destroying property valued over \$65,000 during the commission of a felony, all felonies. Imposition of sentence was suspended, and respondent was placed on five years formal probation. The court sentenced respondent to serve nine months in county jail, and ordered him to pay restitution in the amount of \$33,000 to Alps Electronics, and \$46,560 to 3Com, and fines and fees totaling \$640.50.

6. Respondent's convictions arose from his conduct in 1999 when he participated in multiple commercial burglaries at Alps Electronics, 3Com and Bank of America Mortgage Company in San Jose and Newark, California. Respondent stole numerous computers, 39 Hewlett Packard (HP) laser jet printers, 39 Cannon fax machines, 25 Compaq monitors, 65 Hitachi laptop hard drives, three 18.2-gig Quantium hard drives, re-writable CD ROMs that had not yet been released for sale by HP, and computer-related equipment, valued over \$200,000, which he stored in four rented storage lockers. Respondent then sold the computers, computer equipment, approximately 500 re-writable CD ROMs, and pirated install software disks, on e-Bay, an internet marketplace. At hearing, respondent stipulated: (1) to the felony convictions, and (2) that his conduct which resulted in the criminal convictions was substantially related to the qualifications, functions and duties of a real estate salesperson.

Prior Disciplinary Action

7. Effective November 14, 2002, in Case No. H-3654 SAC, the department adopted the proposed decision of an Administrative Law Judge, and denied respondent's application for a real estate salesperson license based on his 1999 and 2001 felony convictions.

8. Effective November 10, 2005, in Case No. H-4287 SAC, the department adopted the proposed decision of an Administrative Law Judge, and denied respondent's application for a real estate salesperson licensed based on his 1999 and 2001 felony convictions.

Factors in Mitigation, Aggravation and Rehabilitation

9. Respondent is 31 years old. He is married, and together with his wife they are raising their four-month-old child. At hearing, respondent asserted that his criminal activities took place within a three-month period in 1999 when he was 19 years old. He admitted that he was employed by eBay as a customer support representative during the time he engaged in the commercial burglaries, and sold the stolen property on eBay. Respondent served jail time in Sacramento County and after his release, was convicted and served time in Santa Clara County. Respondent was ordered to pay restitution in the amount of \$80,000. He has been paying at the rate of \$350 per month, and has not been late on a payment. He currently owes \$36,000. Since his release from incarceration, respondent has operated a cellular telephone company, operated his own restaurant business, which he sold in 2006, and worked as a floor manager at a casino in Marysville, California. He is currently completing his degree in Ministerial Studies at Epic Bible College, which he attended from fall 2005 through the summer of 2007, and has now attended since fall 2010. He is also interning with Pastor Lane at New Song Community Church (New Song) in Lincoln, California. Respondent also helps his father manage family properties in Marysville, California. Respondent believes his commitments since his release demonstrate honesty, integrity, and serving and giving, and asked "Can't we just get over it?" Respondent believes that he has "indeed been rehabilitated," and asserted that his past does not define who he is today. He would like an opportunity to obtain his real estate license so that he can help his wife and "be the best [he] can be." If he is not granted his real estate license, respondent asserted that "I will keep reapplying because I am persistent and I deserve that chance."

10. In his Confidential - Interview Information Statement (RE 515) dated May 22, 2011, respondent was asked to "LIST ALL JOBS HELD DURING THE LAST FIVE YEARS BEGINNING WITH THE MOST RECENT. IF YOU HAVE BEEN DISMISSED, DISCHARGED OR FORCED TO RESIGN BY EMPLOYER, GIVE DETAILS BELOW." Respondent failed to disclose his ownership of a cellular telephone business. At hearing, respondent admitted that Cellular Express is still in business, but asserted that because his brother was managing the business, he "didn't

see it as an issue,” and “do[esn’t] see how that is relevant.” Respondent was also asked to identify “PROPERTY OWNED,” but failed to list properties owned by himself and his wife. Respondent asserted that “I won’t put that down because I don’t know how technical you guys want me to be so it’s a matter of how you interpret it.” Finally, respondent was asked “DO YOU HAVE ANY PAST DUE DEBTS, LIENS, JUDGMENTS SETTLED/OUTSTANDING, OR BANKRUPTCY ACTION PENDING?” Respondent failed to disclose his unpaid restitution in the amount of \$36,000. Initially, respondent asserted that his restitution payments are not past due because he continues to pay on time. However, when pressed on cross-examination about why he did not identify it as an outstanding judgment, he asserted that he understood the question to mean a judgment in a civil case.

11. Lane Olson has been a Pastor for 31 years, and currently serves at New Song. He testified on respondent’s behalf at hearing. Approximately six months ago, Pastor Olson recruited respondent from Epic Bible College in Sacramento, California, to teach a finance course at New Song. According to Pastor Olson, respondent was recommended to him by good friends and instructors, and is “imminently qualified” to teach the course. He described respondent as accountable and trustworthy. Pastor Olson was unaware of the details surrounding respondent’s criminal history, but asserted that it would not change his opinion of respondent as “it’s possible for God’s presence to change everything.”

12. Phuong Nguyen is currently licensed by the department as a real estate broker. She has owned and operated Win Win Realty since December 2010. Ms. Nguyen has been “very very good friends” with respondent since 2006. According to Ms. Nguyen, respondent volunteered as a Youth Minister at Immanuel Baptist Church in Sacramento, California for 10 years, during which time he led the church, delivered sermons and “brought a lot of people to Christ.” Respondent also raised funds for a mission trip to Africa in 2007, participated in outreach for the youth programs, and donated to the church’s youth. Ms. Nguyen described respondent as a “strong [youth] leader,” and believes that his volunteer work with the church shows integrity and commitment. Ms. Nguyen is aware of some of the details surrounding respondent’s criminal history, but believes “that people do change.” Ms. Nguyen is willing to supervise respondent if he is granted his real estate salesperson license.

13. Kwan Kim has been the Senior Pastor for Epic Center Fellowship for one and one-half years. Prior to this commitment, he began working as a youth leader for the church approximately 14 years ago. He also works for the State of California as an Information Technology manager. Mr. Kim and respondent have been “brothers in Christ” for “many years,” during which time they have built up a church and congregation, served the homeless, and provided financially to churches. Mr. Kim and respondent are “accountability partners” in the ministry, and in the word of God, and meet once a week to answer questions regarding every aspect of their lives, including stewardship, their spouses and families, sexual purity, daily scripture readings, and dealings with others. Their goal is to “share our lives,” and “to build

one another up in Christian values." Mr. Kim spoke highly of respondent's commitment to volunteer his time, talents and finances to churches and their congregations over the past 10 years. Mr. Kim met respondent one year prior to his jail sentence, and is aware of respondent's criminal past. He described respondent as "selfish and hard" when they first met. He now believes respondent is "not that same person," because respondent has since married, had a child, and "provides for others who don't deserve that support." Mr. Kim described respondent as selfless, encouraging, honest, and a "man of integrity."

14. Mohammad Siddique has been a real estate broker since 2004, and currently has 57 real estate agents working for him at Titan Real Estate Services, including respondent's wife. He has been friends with respondent for approximately eight years, during which time respondent has referred clients to him. Mr. Siddique believes that respondent has shown him "a lot of integrity," and has "kept to [his] word," and he has never had a reason to question respondent. He is somewhat familiar with respondent's past criminal history, but has felt no reason to ask respondent about it because respondent has "always been honest with me since day one." Mr. Siddique is willing to hire and supervise respondent if he is permitted to obtain his real estate license.

15. Heidi Phong is respondent's wife. They have been "acquainted" since 2007. Mrs. Phong is employed as an associate-broker for Mohammad Siddique, and also serves as a Children's Minister at New Song. Mrs. Phong served at Immanuel Baptist Church as a Children's Minister while respondent led the English Ministry, coordinated as a lay pastor, and participated in fundraising events and outreach for the youth. They also served together on a mission trip to Vietnam in January 2008. Together they continue to financially support Immanuel Baptist Church and New Song. Mrs. Phong described times when respondent was tolerant and patient when his tenants in Marysville could not afford to pay their rent, and asserted that respondent is "caring to members of our churches." She has no concerns regarding respondent's ethics, and to her husband stated "I trust you completely and wholly." She described respondent as patient, trustworthy, lenient, very loving and helpful. Mrs. Phong is not familiar with respondent's criminal history, and "didn't ask him," but she believes he is a "changed person." She asserted that "I fully and completely trust him" because "he serves the community and is patient and kind." Mrs. Phong does not see any reason why respondent cannot be trusted or cannot obtain his real estate license. Now that she and respondent have a child, she needs respondent's help with all of her clients.

16. In California Code of Regulations, title 10, section 2911, the department has set forth the criteria for rehabilitation that it reviews when determining whether an applicant who has been convicted of a crime should be issued a real estate license. It has been 10 years since respondent's last conviction, and five years since he completed the terms of his formal probation. He still owes \$36,000 in restitution, which he continues to pay monthly. His conviction in Sacramento has

been expunged. Respondent appears to have a stable family life and is fulfilling his familial obligations, and has sustained enrollment in formal educational or vocational training courses for economic self-improvement. He no longer associates with his co-defendant Andy Hoang, and is significantly involved in church programs designed to provide social benefits, and to ameliorate social problems. Respondent enjoys an excellent reputation amongst his family, friends, and church colleagues for honesty, integrity, and trustworthiness. He has two real estate brokers who are willing to supervise him if he is granted a real estate salesperson license.

17. Respondent is to be commended for the steps he has taken towards his rehabilitation. He has demonstrated a strong commitment to serve his community. However, respondent's three felony convictions resulted from repeated acts of dishonesty when he participated in commercial burglaries, as well as enormous violations of trust when he sold the stolen property on his employer's internet marketplace. He has not yet completed payment of restitution (Factual Finding 9), did not provide complete and accurate information to the department on his most recent application for licensure (Factual Finding 10), and made flippant comments at hearing regarding just getting over this (Factual Finding 9). Real estate salespersons are expected to act with honesty and integrity toward their clients, the public and the department. They 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. In light of respondent's very serious criminal past, and his failure to demonstrate sufficient rehabilitation, it would not be in the public interest to issue respondent a real estate salesperson license at this time.

LEGAL CONCLUSIONS

Applicable Statutes and Regulations

1. Business and Professions Code section 480, subdivision (a)(1), provides that the department "may deny a license regulated by this code on the grounds that the applicant has ... been convicted of a crime."
2. Business and Professions Code section 10177, subdivision (b), provides that a real estate license may be denied based upon a felony conviction.
3. California Code of Regulations, title 10, section 2910, provides, in pertinent part, that:
 - (a) When considering whether a license should be denied, suspended or revoked on the basis of the conviction of a crime, or on the basis of an act described in Section 480(a)(2) or

480(a)(3) of the Code, the crime or act shall be deemed to be substantially related to the qualifications, functions or duties of a licensee of the Department within the meaning of Sections 480 and 490 of the Code if it involves:

(1) The fraudulent taking, obtaining, appropriating or retaining of funds or property belonging to another person.

[¶] ... [¶]

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

[¶] ... [¶]

(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.

[¶] ... [¶]

Cause for Denial

4. Respondent's convictions for receiving stolen property (Factual Finding 4), second degree burglary, grand theft, and taking, damaging or destroying property valued over \$65,000 during the commission of a felony (Factual Finding 5), are all crimes substantially related to the qualifications, functions and duties of a real estate agent. Therefore, a separate cause exists for each criminal conviction to deny respondent's application pursuant to Business and Professions Code sections 480, subdivision (a)(1), and 10177, subdivision (b), in conjunction with California Code of Regulations, title 10, section 2910, subdivisions (a)(1), (a)(4), and (a)(8).

Fitness for Licensure

5. The determination whether a person is presently fit for licensure should be made only after consideration of the conduct of the licensee and consideration of any factors introduced in justification, aggravation or mitigation. "The licensee, of course, should be permitted to introduce evidence of extenuative circumstances by way of mitigation or explanation, as well as any evidence of rehabilitation" (*Arneson v. Fox* (1980) 28 Cal.3d 440, 449; *Brandt v. Fox* (1979) 90 Cal.App.3d 737, 747). The criteria to evaluate the rehabilitation of a license applicant, after a criminal conviction, are set forth in California Code of Regulations, title 10, section 2911.²

² The following criteria have been developed by the department pursuant to

Section 482(a) of 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 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 educational 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 existed at the time of the conduct that is the basis for denial of the departmental action sought.
- (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.

6. 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. In the absence of any law to the contrary, the required standard of proof is a preponderance of the evidence. (*Martin v. Alcohol Beverage Control Appeals Bd.* (1959) 52 Cal.2d 265.) In addition, rehabilitation is akin to an affirmative defense; the burden of proof of establishing an affirmative defense is on the proponent of that defense. (*Whetstone v. Board of Dental Examiners* (1927) 87 Cal.App. 156, 164.) As set forth in Factual Finding 17, respondent has failed to sustain his burden to establish that he can be licensed at this time without harm to the public.

ORDER

The application of Billy Sieng Phong for a real estate salesperson license is DENIED.

Dated: December 15, 2011


REBECCA M. WESTMORE
Administrative Law Judge
Office of Administrative Hearings

-
- (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.

FILED

August 31, 2011

1 KENNETH C. ESPELL, (SBN 178757)
2 Real Estate Counsel II
3 Department of Real Estate
4 P. O. Box 187007
5 Sacramento, CA 95818-7007

DEPARTMENT OF REAL ESTATE

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7 -or- (916) 227-0868 (Direct)

8
9 **BEFORE THE DEPARTMENT OF REAL ESTATE**
10 **STATE OF CALIFORNIA**

11 * * *

12 In the Matter of the Application of)
13 BILLY SIENG PHONG,) H-5679 SAC
14 Respondent.) STATEMENT OF ISSUES
15)

16 The Complainant, TRICIA D. SOMMERS, a Deputy Real Estate Commissioner
17 of the State of California, for Statement of Issues against BILLY SIENG PHONG (hereinafter
18 "Respondent"), is informed and alleges as follows:

19 1

20 Respondent made application to the Department of Real Estate of the State of
21 California for a real estate salesperson license on or about August 30, 2004.

22 2

23 On or about November 10, 1999, in the Superior Court, County of Sacramento,
24 State of California, in case number 99F08122, Respondent was convicted of a violation of
25 Section 496(a) of the California Penal Code (Knowingly receiving stolen property), a felony
26 and a crime which bears a substantial relationship under Section 2910, Title 10, California Code
27 of Regulations, to the qualifications, functions, or duties of a real estate licensee.

1
2 On or about July 25, 2001, in the Superior Court, County of Santa Clara, State of
3 California, in case number CC87168, Respondent was convicted of a violation of Section
4 487(a) of the California Penal Code (Grand Theft), and Section 459 and 460(b) (Burglary in the
5 Second Degree) with a California Penal Code Section 12022.6(a)(1) Enhancement for theft in
6 excess of \$50,000.00, each a felony which bears a substantial relationship under Section 2910,
7 Title 10, California Code of Regulations, to the qualifications, functions, or duties of a real
8 estate licensee.

9
10 The crimes of which Respondent was convicted, as alleged in Paragraphs 2 and
11 3, above, individually and/or collectively, constitute cause for denial of Respondent's
12 application for a real estate license under Sections 480(a) and/or 10177(b) of the California
13 Business and Professions Code.

14 PRIOR PROCEEDINGS

15
16 Respondent made application to the Department of Real Estate of the State of
17 California for a real estate salesperson license on or about May 30, 2001, with the knowledge
18 and understanding that any license issued as a result of said application would be subject to the
19 conditions of Section 10153.4 of the Code.

20
21 Effective November 14, 2002, in Case No. H-3654 SAC, before the California
22 Department of Real Estate [OAH Case No. N-2002050061], the court finding that the
23 convictions set forth in paragraphs 2 and 3, above, bear a substantial relationship under Section
24 2910, Title 10, California Code of Regulations, to the qualifications, functions, or duties of a
25 real estate licensee, the application of Respondent for a conditional real estate salesperson
26 license was denied for violation of Section 480(a) and Section 10177 (b) of the Code.

27 ///

Respondent once again made application to the Department of Real Estate of the State of California for a real estate salesperson license on or about August 30, 2004.

Effective November 10, 2005, in Case No. H-4287 SAC, before the California Department of Real Estate [OAH Case No. N-2005060210], the court finding that the convictions set forth in paragraphs 2 and 3, above, bear a substantial relationship under Section 2910, Title 10, California Code of Regulations, to the qualifications, functions, or duties of a real estate licensee, the application of Respondent for a real estate salesperson license was denied for violation of Section 480(a) and Section 10177 (b) of the Code.

WHEREFORE, the 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 under other provisions of law.

Tricia D. Sommers
TRICIA D. SOMMERS
Deputy Real Estate Commissioner

Dated at Sacramento, California,
this 4th day of August, 2011.