

FILED

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October 28, 2011

DEPARTMENT OF REAL ESTATE

Telephone: (916) 227-0789

By 

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of	)	
	)	H-5701 SAC
MALISSA RENEE BAILEY,	)	
	)	<u>ACCUSATION</u>
Respondent.	)	

The Complainant, TRICIA D. SOMMERS, a Deputy Real Estate Commissioner of the State of California, for cause of Accusation against MALISSA RENEE BAILEY, (Respondent), is informed and alleges as follows:

1

Respondent is presently licensed and/or has license rights under the Real Estate Law, Part 1 of Division 4 of the Business and Professions Code (the Code) as a real estate salesperson whose license has at all times mentioned herein since April 12, 2010, has been, and now is, a restricted real estate salesperson license subject to terms, conditions and restrictions pursuant to Sections 10156.6 and 10156.7 of the Business and Professions Code.

2

Complainant makes this Accusation against Respondent in her official capacity.

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1 3

2 On or about April 12, 2011, in the Superior Court of the State of California,
3 County of Humboldt, Case Number CR 1006396, Respondent was convicted of violating Section
4 23152(a) of the California Vehicle Code (Driving Under the Influence of Alcohol or a Drug), a
5 misdemeanor and a crime which bears a substantial relationship under Section 2910, Title 10,
6 California Code of Regulations, to the qualifications, functions, or duties of a real estate licensee.

7 FACTORS IN AGGRAVATION

8 4

9 On or about November 15, 2002, in the Superior Court of the State of California,
10 County of Shasta, Case No. MCRDCRM 02006742, Respondent was convicted of violating
11 Section 459 of the California Penal Code (Burglary), a misdemeanor.

12 5

13 On or about April 21, 2003, in the Superior Court of the State of California,
14 County of Humboldt, Case Number CR 0311073, Respondent was convicted of violating Section
15 23152(b) of the California Vehicle Code (Driving Under the Influence of Alcohol or a Drug), a
16 misdemeanor.

17 6

18 On or about September 12, 2005, in the Superior Court of the State of California,
19 County of Humboldt, Case Number CR 053066 S, Respondent was convicted of violating
20 Section 243(b) of the California Penal Code (Battery on Peace Officer), and Section 23152(a) of
21 the California Vehicle Code (Driving Under the Influence of Alcohol or a Drug), both
22 misdemeanors.

23 PRIOR ADMINISTRATIVE PROCEEDINGS

24 7

25 Effective April 6, 2010, in Case No. H-5273 SAC, before the Department of Real
26 Estate of the State of California, the Real Estate Commissioner denied Respondent's application
27 for a real estate license, but granted her the right to a restricted license.

The crime for which Respondent was convicted as described in Paragraph, above, constitutes cause under Sections 490 and 10177(b) of the Code for suspension or revocation of all licenses and license rights of Respondent under the Real Estate Law.

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

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

Dated at Sacramento, California

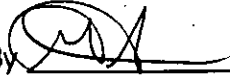
this 20th day of October, 2011.

FILED

BEFORE THE
DEPARTMENT OF REAL ESTATE

March 26, 2012

STATE OF CALIFORNIA DEPARTMENT OF REAL ESTATE

By 

In the Matter of the Accusation of
MELISSA RENEE BAILEY,

)
) NO. H-5701 SAC
)
) OAH NO. 2011110926

Respondent.

DECISION

The Proposed Decision dated February 29, 2012, 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.

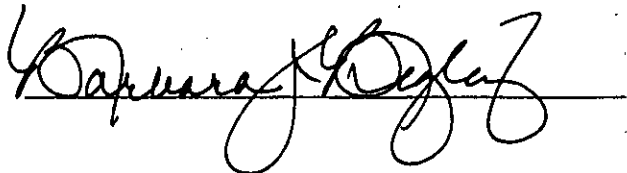
The Decision suspends or revokes one or more real estate licenses on grounds of the conviction of a crime.

The right to reinstatement of a revoked real estate 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 APR 16 2012.

IT IS SO ORDERED 3/16/12.

BARBARA J. BIGBY
Acting Real Estate Commissioner



BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

MALISSA RENEE BAILEY,

Respondent.

Case No. H-5701 SAC

OAH No. 2011-11-0926

PROPOSED DECISION

This matter was heard before Floyd D. Shimomura, Administrative Law Judge, Office of Administrative Hearings, State of California, on February 9, 2012, in Sacramento, California.

Richard Uno, Counsel, represented complainant, Tricia D. Sommers, Deputy Real Estate Commissioner with the Department of Real Estate (department).

Respondent Malissa Renee Bailey (respondent) represented herself.

Evidence was received, argument heard, and the matter submitted on February 9, 2012.

FACTUAL FINDINGS

Jurisdictional Facts

1. On April 12, 2010, the department issued a restricted Real Estate Salesperson License Number S/01856642 to respondent. Because of previous convictions for driving under the influence, respondent's license contained restrictions or conditions. Respondent's restricted license will expire on April 11, 2014 unless renewed or revoked.

2. On October 28, 2011, Deputy Real Estate Commissioner Tricia D. Sommers filed an accusation in her official capacity against respondent seeking suspension and/or revocation of all of respondent's real estate licenses pursuant to Business and Professions Code sections 490 and 10177, subdivision (b), for conviction of a crime substantially related to the qualifications, functions, or duties of a real estate licensee.

3. On November 15, 2011, the department received a request from respondent for a hearing on the accusation.¹

4. Respondent was properly serviced with the pleadings and notice of hearing in this matter.

Respondent's Conviction

5. On April 12, 2011, respondent, after a plea of no contest, was convicted of a misdemeanor in the Humboldt County Superior Court (Case No. CR10006396), driving a vehicle under the influence of alcohol in violation of Vehicle Code section 23152, subdivision (a). Among other things, she was fined \$2,481, sentenced to 120 days in jail (allowed to serve sentence on SWAP), and placed on probation for five years. During probation, she is required to attend and complete an 18-month alcohol program for multiple offenders. The conviction resulted from conduct that occurred in Eureka on September 25, 2010. Respondent had five beers at a "spaghetti feed" benefit for a friend that had passed away. She was pulled over after leaving the benefit.

Aggravating Circumstances

6. On November 15, 2002, respondent, after a plea of nolo contendere, was convicted in the Shasta County Superior Court (Case no. 02006742) for violating Penal Code section 459, a second degree commercial burglary and a misdemeanor.

7. On April 21, 2003, respondent was convicted, after her plea of guilty, in the Humboldt County Superior Court (Case no. CR031107S) for violating Vehicle Code section 23152, subdivision (b), for driving with a blood alcohol content of .08 percent or more, a misdemeanor.

8. On September 12, 2005, respondent was convicted, after a plea of guilty, in the Humboldt County Superior Court (Case no. CR053066S) of violating Penal Code section 243, subdivision (b), battery on a peace officer, and Penal Code section 23152, subdivision (a), driving under the influence of alcohol. Both were misdemeanors.

Rehabilitation

¹ On November 21, 2011, Acting Real Estate Commissioner Barbara J. Bigby issued an order suspending respondent's restricted real estate license under Business and Professions Code sections 10156.7 for conviction of a crime substantially related to the qualifications, functions, or duties of a real estate licensee. There is nothing in the record to indicate that respondent has appealed this suspension and the current appeal relates solely to the accusation filed on October 28, 2011.

9. At the time of hearing, appellant had completed about 10 months of her five-year probation.

10. With regard to her 120-day jail sentence, respondent is doing eight hours of community service every Sunday (SWAP). It will take her about 18 months to complete this part of her sentence.

11. Respondent has paid her fines and assessments in full.

12. At the time of hearing, respondent had completed about 10 months of her 18-month alcohol program for multiple offenders, called Humboldt Alcohol Recovery Treatment, which was ordered by the court. She attends this program weekly.

13. In addition, every week respondent voluntarily attends a chemical recovery program, called Celebrate Recovery. Every other week she meets with her sponsor in the program to work on the "12 steps" to recovery. She has been involved with this program for over a year and has gradually become a leader-in-training. Respondent has participated in two "interventions" with drug users who sought help. In one case, she helped raise about \$10,000 for treatment and recovery. Respondent's sponsor writes that respondent, "is an inspiration to all who know her, and has put forth a good effort in her recovery in all areas. I have every reason to believe that this will continue."

14. Respondent has remained sober since her arrest and states that "[t]his last DUI has changed my life dramatically." She accepts full responsibility and claims to be a different person.

15. Respondent is a loan agent in a family firm established by her father who is a real estate broker. Her father states that respondent has a good reputation in the mortgage field for honesty, integrity, and dependability. He also states that respondent has been active in Toys for Kids through the Humboldt County Board of Realtors.

LEGAL CONCLUSIONS

Clear and Convincing Evidence

1. The standard of proof on a licensing agency in a disciplinary proceeding is clear and convincing evidence. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) The key element of clear and convincing evidence is that it must establish a high probability of the existence of the disputed fact, greater than proof by a preponderance of the evidence. (*People v. Mabini* (2001) 92 Cal.App.4th 654, 662.).

Conviction of Crime

2. The department may suspend or revoke a license when a licensee has been convicted² of a crime that is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued. (Bus. & Prof. Code, §§ 490, subd. (a), 10177, subd. (b).) The department has promulgated criteria for determining when a crime is substantially related to the qualifications, functions or duties of a licensee. (Cal. Code Regs., tit. 10, § 2910, subd. (a).)

3. Respondent's April 12, 2011 criminal conviction for driving while intoxicated is substantially related to the qualifications, functions or duties of a real estate licensee. The conviction fall squarely within California Code of Regulations, title 10, section 2910, subdivision (a)(11) because it was respondent's third alcohol-related conviction and met the criterion of two or more crimes involving the consumption of alcohol where at least one involves driving.

4. Accordingly, it is concluded that the department may suspend or revoke respondent's salesperson's license under Business and Professions Code section 490, subdivision (a), and 10177, subdivision (b).

Rehabilitation

5. In California Code of Regulations, title 10, section 2912, the department has set forth the criteria to be applied when reviewing whether a real estate license should be revoked or suspended when the licensee has been convicted of a crime.³

² A conviction includes a plea or verdict of guilty or a conviction following a pleas of nolo contendere. (Bus. & Prof. Code, § 490, subd. (c).)

³ California Code of Regulations, title 10, section 2912 provides:

Criteria of Rehabilitation (Revocation or Suspension).

The following criteria have been developed by the department pursuant to Section 482(b) of the Business and Professions Code for the purpose of evaluating the rehabilitation of a licensee against whom an administrative disciplinary proceeding for revocation or suspension of the license has been initiated on account of a crime committed by the licensee.

(a) The passage of not less than two years from the most recent criminal conviction that is "substantially related" to the qualifications, functions or duties of a licensee of the department. (A longer period will be required if there is a history of criminal convictions or acts 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 licensee.

(c) Expungement of the conviction or convictions which culminated in the administrative proceeding to take disciplinary action.

6. Respondent has taken many positive steps toward rehabilitation under the department's criteria. Respondent has remained sober since her last DUI arrest. She has paid in full all monetary fines imposed. Respondent continues to be a valued and respected.

(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 criminal conviction was attributable in part to the use of a controlled substance or alcohol.

(g) Payment of any fine imposed in connection with the criminal conviction that is the basis for revocation or suspension of the license.

(h) Correction of business practices responsible in some degree for the crime or crimes of which the licensee was convicted.

(i) New and different social and business relationships from those which existed at the time of the commission of the acts that led to the criminal conviction or convictions in question.

(j) Stability of family life and fulfillment of parental and familial responsibilities subsequent to the criminal conviction.

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

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

(m) Change in attitude from that which existed at the time of the commission of the criminal acts 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 the licensee's previous conduct and with 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, clinical psychologists, sociologists 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.

loan agent in her father's firm. She has continued with her court-ordered alcohol recovery program and has voluntarily participated in another program called Celebrate Recovery where she is assuming a leadership role and intervening to help others. Also, she has been active in community activities such as Toys for Kids. Finally, there is evidence of a change in her attitude toward alcohol and determination to change from her former ways.

7. Nevertheless, respondent still falls short under the Department's criteria for rehabilitation because not enough time has elapsed since her conviction. First, respondent's last conviction occurred on April 12, 2011, less than one year before the hearing. The department's criteria require the "passage of not less than two years since the most recent criminal conviction"⁴ Second, respondent is yet to complete the first full year of her five year probation. The department's criteria require the "[s]uccessful completion ... from ... probation."⁵ Respondent's probation will not end until April 2016. Third, the department's criteria require "[a]bstinence from the use of ... alcohol for not less than two years ..." if respondent's misconduct, as is the case here, is attributable to alcohol. Again, not enough time has passed to meet this criterion.

8. Respondent has made a very good start at rehabilitation. However, her current attempt to retain her restricted salesperson license is premature under the department's criteria for rehabilitation.

Cause Exists to Revoke Licensure

9. Based on clear and convincing evidence, sufficient cause exists to revoke respondent's restricted salesperson's license under Business and Professions Code section 490, subdivision (a) and 10177, subdivision (b). Moreover, there was insufficient evidence of rehabilitation under the department's criteria for rehabilitation.

ORDER

Respondent Malissa Renee Bailey's restricted Real Estate Salesperson License is
REVOKED.

Dated: February 29, 2012

Floyd D. Shimomura
FLOYD D. SHIMOMURA
Administrative Law Judge
Office of Administrative Hearings

⁴ *Id.*, at § 2912, subd. (a).

⁵ *Id.*, at § 2912, subd. (e).

⁶ *Id.*, at § 2912, subd. (f).