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FILED

AUG 03 2012

DEPARTMENT OF REAL ESTATE

By *L. Frost*

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Application of)	
)	CASE NO. H-5766 SAC
DAVID J. HOWIE,)	
)	OAH NO. 2012020560
Respondent.)	
_____)	

DECISION

The Proposed Decision dated June 26, 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 application for a real estate salesperson license is denied. 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 **AUG 23 2012**

IT IS SO ORDERED

August 13 2012

Real Estate Commissioner

[Signature]

By WAYNE S. BELL
Chief Counsel

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Application of:

DAVID J. HOWIE,

Respondent.

Case No. H-5766 SAC

OAH No. 2012020560

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on June 18, 2012, in Sacramento, California.

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

Respondent David J. Howie represented himself.

Evidence was received, the record was closed, and the matter was submitted for decision on June 18, 2012.

SUMMARY

This is respondent's second application for a real estate salesperson license. Complainant seeks to deny the application on the same grounds as before -- multiple drunk driving convictions -- as well as new driving-related convictions, including his fourth drunk driving conviction. Cause exists to deny the application. While respondent candidly admitted that he has had a drinking problem for close to 20 years, the evidence established that he has yet to take his sobriety seriously. Additionally, he remains on criminal probation. Therefore, respondent did not demonstrate that he is capable of performing the duties of a real estate licensee in a manner that is consistent with public health, safety, and welfare, even on a restricted basis, and his application is denied.

FACTUAL FINDINGS

1. On January 9, 2003, respondent submitted a Salesperson License Application to the Department of Real Estate (Department). The Department denied that application in a

Final Decision issued May 14, 2004, which became effective June 9, 2004. Respondent submitted a second Salesperson License Application to the Department on January 21, 2011 (Application).

2. On January 12, 2012, complainant, acting solely in her official capacity as a Deputy Real Estate Commissioner of the State of California, filed a Statement of Issues seeking to deny respondent's Application on the grounds that he has multiple convictions for drunk driving and driving while his driver's license was suspended or revoked.

Prior Convictions

3. On February 20, 1996, in the Superior Court of the State of California, in and for the County of Placer, Case No. A35662B, respondent pled guilty to, and was convicted of, a misdemeanor violation of Penal Code section 148.9, subdivision (a), giving false information to a peace officer. Imposition of sentence was suspended, and respondent was placed on informal probation for one year. He was ordered booked into the Placer County Jail and then immediately released. He was also ordered to pay fines, penalties, and assessments in the total sum of \$370.

4. The factual basis for respondent's conviction arose out of his encounter with the Roseville Police Department on December 14, 1995. When an officer asked for identification, respondent provided his brother's driver's license in an attempt to conceal his true identity. Respondent was subsequently arrested.

5. On August 19, 1996, in the Superior Court of the State of California, in and for the County of Placer, Case No. R-42269, respondent pled guilty to, and was convicted of, a misdemeanor violation of Vehicle Code section 23152, subdivision (a), driving under the influence of drugs or alcohol or the combined influence of drugs and alcohol. Imposition of sentence was suspended, and respondent was placed on three years informal probation. He was ordered to spend 2 days in the Placer County Jail; pay fines, penalties, and assessments in the total sum of \$1,375; and enroll in and complete the First Offender Alcohol Program. Respondent's driver's license was suspended for one year.

6. The factual basis for respondent's conviction arose out of his arrest by the Roseville Police Department on July 11, 1996, for drunk driving.

7. On January 13, 2000, in the Superior Court of the State of California, in and for the County of Sacramento, Case No. 00T00113, respondent pled guilty to, and was convicted of, a misdemeanor violation of 23152, subdivision (b), driving with a blood alcohol content of .08 or greater. He admitted his prior drunk driving conviction. Imposition of sentence and judgment was suspended, and respondent was placed on four years informal probation. He was ordered to spend 10 days in the Sacramento County Jail and pay fines, penalties, and assessments in the total sum of \$1,457, \$100 of which was suspended pending revocation of probation. He was also ordered to enroll in and complete the SB 38 Program,

and his driving privileges were restricted to driving to and from work and the SB 38 Program for a period of 12 months.

8. The factual basis for respondent's conviction arose out of his arrest by the California Highway Patrol (CHP) on December 19, 1999, for drunk driving. His blood alcohol content measured .12 percent at the time of arrest.

9. On February 26, 2003, in the Superior Court of the State of California, in and for the County of Sacramento, Case No. 02T05022, respondent pled nolo contendere to, and was convicted of, misdemeanor violations of Vehicle Code sections 14601.2, subdivision (a), driving on a suspended or revoked driver's license, and 23152, subdivision (a), driving under the influence of drugs or alcohol or the combined influence of drugs and alcohol. He admitted his two prior drunk driving convictions. Imposition of judgment and sentence was suspended, and respondent was placed on five years informal probation. He was ordered to spend 120 days in the Sacramento County Jail and pay fines, penalties, and assessments in the total sum of \$1,791, \$100 of which was suspended pending revocation of probation. His driver's license was revoked for three years. He was designated a "Habitual Traffic Offender" pursuant to Vehicle Code section 14601.3.

10. The factual basis for respondent's conviction arose out of a traffic stop by the CHP on September 20, 2002. During the traffic stop, the officer noticed that respondent was exhibiting objective symptoms of being under the influence of alcohol. The officer asked respondent to perform a series of field sobriety tests, which respondent was unable to do to the officer's satisfaction. A check of the Department of Motor Vehicles' records showed that respondent's driver's license was suspended. Respondent's blood alcohol content measured .14/.15 percent at the time of arrest.

11. On July 6, 2007, in the Superior Court of the State of California, in and for the County of Sacramento, Case No. 07T03062, respondent pled nolo contendere to, and was convicted of, a misdemeanor violation of Vehicle Code section 23152, subdivision (b), driving with a blood alcohol content of .08 percent or greater. He admitted his two prior drunk driving convictions. Imposition of judgment and sentence was suspended, and respondent was placed on five years informal probation. He was ordered to spend 135 days in the Sacramento County Jail and pay fines, penalties, and assessments in the total sum of \$2,527.87, \$100 of which was suspended pending revocation of probation. He was designated a "Habitual Traffic Offender" and ordered to complete the SB 38 Program. Respondent's driver's license was revoked for three years.

12. The factual basis for respondent's conviction arose out of a traffic stop by the Folsom Police Department on May 12, 2007. During the traffic stop, the officer noticed that respondent was exhibiting objective symptoms of being under the influence of alcohol. The officer asked respondent to perform a series of field sobriety tests, which respondent was unable to do to the officer's satisfaction. Respondent's blood alcohol content measured 14/.15 percent at the time of arrest.

13. On October 15, 2009, in the Superior Court of the State of California, in and for the County of Sacramento, Case No. 2009172684, respondent pled nolo contendere to, and was convicted of, a misdemeanor violation of Vehicle Code section 14601.2, subdivision (a), driving on a suspended or revoked license. He was ordered to spend 10 days in the Sacramento County Jail.

14. The factual basis for respondent's conviction is that he was stopped by the CHP on August 15, 2009, for speeding. The officer checked the Department of Motor Vehicles' records and discovered that respondent's driving privileges were revoked as a result of a prior drunk driving conviction.

Factors in Aggravation, Mitigation, and Rehabilitation

15. Respondent is 34 years old. He has a 15-year-old daughter who is a freshman in high school. She is a straight A student. Respondent is currently engaged to be married. He recently received his Master of Science degree in Financial Analysis from the University of San Francisco. He currently works as a staff accountant for California Loan Associates, Inc. If granted a real estate license, respondent intends to continue working for California Loan Associates, Inc.

16. Respondent testified openly and candidly about his self-described 20-year history of drinking alcohol. He stated that he first began drinking alcohol when he was 15 years old after his mother died the previous year. That event caused him to fall into a state of depression, which ultimately led him to begin drinking alcohol. He claimed that he attends Alcoholics Anonymous (AA) meetings "occasionally," but explained "[I] don't really have time to go a lot" when asked for more details. When pressed further, he admitted that he last attended AA meetings in the summer of 2011 for "maybe" a two-month period. When asked about his date of sobriety, respondent testified hesitatingly: "it was in July . . . umm . . . shortly after the fourth of July 2011." Respondent initially claimed that he has completed the 12 steps of recovery for AA, but then conceded that he has never progressed past the fourth step when pressed for details.

17 The Department has adopted criteria for consideration when evaluating an applicant's rehabilitation since his criminal convictions for which the Department seeks to deny his application. (Cal. Code of Regs., tit. 10, § 2911.) One such criteria that is relevant here is whether respondent has undergone a change in the attitude that existed at the time the underlying crimes were committed and that contributed to the occurrence of the crime. (Cal. Code of Regs., tit. 10, § 2911, subd. (n); *In re Andreani* (1939) 14 Cal.2d 736, 749 [existence of rehabilitation is difficult to establish affirmatively, "but its nonexistence may be 'proved' by a single act."])

Respondent has four drunk driving convictions. Additionally, his last conviction for driving while his driver's license was suspended or revoked was the result of his continuing to drive despite his driver's license having been revoked as a result of his fourth drunk driving conviction. He completely failed to take any responsibility for the former conviction,

explaining that he should have had a restricted driver's license at the time of his arrest, but the employees at the SB 38 Program he was attending failed to submit the appropriate paperwork to the Department of Motor Vehicles in a timely manner. (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."]))

Respondent has a long, troubling history with alcohol. And while he openly admitted his history, the evidence established that he has not yet fully committed himself to his sobriety. He has not attended any AA meetings since last summer. When he did attend, his attendance was paltry at best. Respondent's support group consists solely of his aunt, uncle, and fiancé. He exchanges emails with his aunt on a weekly basis and speaks to his uncle on a monthly basis. His fiancé prints out random excerpts written by other alcoholics on internet discussion pages dedicated to treating alcoholism for respondent to read. Both his aunt and uncle are alcoholics who have been sober for 20 or more years, but respondent explained that each attends AA meetings only one a year.

Respondent asked during the hearing that the Department outline factors for establishing his rehabilitation in the future should his Application be denied. The Department identified such factors in its Final Decision denying his prior application:

The primary purpose of professional licensing schemes is the protection of the public, and the protection of future harm to consumers. (Footnote omitted.) A significant period of credibly sustained sobriety, with the time weighed in part against the length of time Mr. Howie abused alcohol, crime free living, successful completion and/or early termination of probation, a more direct approach to accepting that there is a problem with alcohol abuse and a reasonable approach to treatment of the problem would constitute more persuasive evidence of rehabilitation than what was presented here. Successful completion of, early termination of probation and/or expungement of the convictions are also important evidence of rehabilitation, but are not yet present. Mr. Howie may well make a fine candidate for licensure in the future, but he failed to prove that he is such at this time.

Not only did respondent fail to follow the Department's previous recommendations, but he received another drunk driving conviction and driving on a suspended or revoked driver's license conviction. Such conduct demonstrates his inability and/or unwillingness to comply with the laws that regulate public safety, health, and welfare.¹

¹ Because of respondent's lack of commitment to his sobriety and the fact he is still on probation, the character reference letter he submitted was given no weight. (See, *In re Menna* (1995) 11 Cal.4th 975, 988 [character references must be considered in light of the

18. For the reasons discussed below, cause exists to deny respondent's Application. When all relevant evidence is considered, respondent failed to demonstrate that he is capable of performing the duties of a real estate licensee in a manner that is consistent with public health, safety, and welfare, even on a restricted basis. Additionally, he is still on probation as a result of his 2007 drunk driving conviction. (See, *In re Gossage* (2000) 23 Cal.4th 1080, 1099 [determining one's rehabilitation necessarily requires an analysis of his behavior while no longer on probation or parole because good conduct is expected while under court supervision].) Therefore, respondent's application for a real estate license must be denied.

LEGAL CONCLUSION

1. An application for a real estate license may be denied 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. Code, §§ 480, subd. (a); 10177, subd. (b).) Respondent was convicted of giving false information to a peace officer (Factual Finding 3), drunk driving on four occasions (Factual Findings 5, 7, 9, and 11), and driving while his driver's license was suspended or revoked on two occasions (Factual Findings 11 and 13). Each of his underlying crimes is substantially related to the qualifications, functions, or duties of a real estate licensee. (See, Cal. Code of Regs., tit. 10, § 2911, subds. (a)(4) ["The employment of bribery, fraud, deceit, falsehood or misrepresentation to achieve an end."], (a)(7) ["Willfully violating or failing to comply with a statutory requirement that a license, permit, or other entitlement be obtained from a duly constituted public authority before engaging in a business or course of conduct."], (a)(10) ["Conduct which demonstrates a pattern of repeated and willful disregard of law."], (a)(11) ["Two or more convictions involving the consumption or use of alcohol or drugs when at least one of the convictions involve driving and the use or consumption of alcohol or drugs."]) Therefore, each conviction constitutes separate cause to deny his application pursuant to Business and Professions Code sections 480, subdivision (a), and 10177, subdivision (b), individually and collectively.

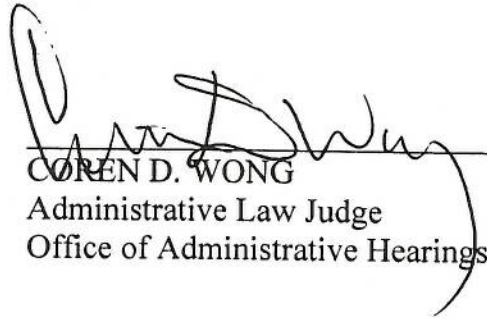
2. Cause exists to deny respondent's Application for the reasons discussed in Legal Conclusion 1. For the reasons explained in Factual Findings 17 and 18, he did not establish sufficient rehabilitation to demonstrate his ability to perform the duties of a real estate licensee in a manner that is consistent with public health, safety, and welfare, even on a restricted basis. Therefore, his application for a real estate license must be denied.

respondent's bad conduct].) Besides, the author of the letter expressed no knowledge of respondent's extensive criminal history. (See, *Seide v. Committee of Bar Examiners of the State Bar of California*, *supra*, 49 Cal.3d 933, 940 ["If the character witnesses were not aware of the extent and seriousness of petitioner's criminal activities, their evaluations of his character carry less weight."])

ORDER

Respondent David J. Howie's application for a real estate salesperson license is
DENIED.

DATED: June 26, 2012



COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings

CRITERIA OF REHABILITATION (*Denial*)

RE 573 (Rev. 10/03)

Your application for a real estate license or your petition to reinstate your real estate license has been denied. The reason(s) for denial is on the grounds set forth in the attached Decision or Order Denying Reinstatement. Set forth below is the Criteria of Rehabilitation. These criteria have been developed by the Department of Real Estate as guidelines to assist an applicant or former licensee to establish a rehabilitation program and in the presentation of his or her case should application again be made for licensure or a petition filed for either reinstatement of a license or removal of restrictions from a restricted license.

Not all of the factors listed in the criteria will be applicable in the case of every person who has had a license application or petition for reinstatement or removal of restrictions denied. Nor will each factor necessarily be given equal weight in evaluating the person's rehabilitation. Each person must decide which of these factors are applicable to his or her case and should then take appropriate steps toward rehabilitation to the end of satisfying the Real Estate Commissioner that it would not be against the public interest to grant the license in question.

2911. Criteria of Rehabilitation (*Denial*). 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 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 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 which 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.
 - (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.