

BEFORE THE BUREAU OF REAL ESTATE

**FILED**

STATE OF CALIFORNIA

MAY 17 2017

BUREAU OF REAL ESTATE

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In the Matter of the Application of

DAVID J HOWIE,

Respondent.

) CalBRE No. H-6394 SAC

) OAH No. 2016060017

By B. Nicholas

DECISION

The Proposed Decision dated April 19, 2017, 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 broker license is denied, but the right to a restricted real estate broker license is granted to Respondent.

Pursuant to Government Code section 11521, the Bureau of Real Estate may order reconsideration of this Decision on petition of any party. The Bureau's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the effective date of this Decision, whichever occurs first. The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

If and when a petition for removal of restrictions is filed, all competent evidence of rehabilitation presented by the Respondent will be considered by the Real Estate Commissioner.

JUN 07 2017

This Decision shall become effective at 12 o'clock noon on \_\_\_\_\_

IT IS SO ORDERED

5/17/17

WAYNE S. BELL  
REAL ESTATE COMMISSIONER

*David J. Sand*

BEFORE THE  
BUREAU OF REAL ESTATE  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Application of:

DAVID J. HOWIE,

Respondent.

Case No. H-6394 SAC

OAH No. 2016060017

**PROPOSED DECISION**

This matter was heard before Gene Cheever, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on December 8, 2016, and by Marcie Larson, ALJ, Office of Administrative Hearings, on March 27, 2017, in Sacramento, California.<sup>1</sup>

Jason Lazark, Counsel for the Bureau of Real Estate (Bureau), represented Tricia D. Parkhurst (complainant), a Supervising Special Investigator of the State of California.

Christopher Hanson, Attorney at Law, represented respondent David Howie (respondent) who was present at the hearing.

Evidence was received, the record was closed, and the matter was submitted for decision on March 27, 2017.

**FACTUAL FINDINGS**

1. On or about April 14, 2015, respondent signed and thereafter filed with the Bureau, an application for a real estate broker license (application).<sup>2</sup> No license has been issued.

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<sup>1</sup> This matter was heard by ALJ Cheever, on December 8, 2016. The matter did not conclude. During a January 27, 2017 Telephonic Status Conference, the parties were informed that ALJ Cheever was not available to hear the continued hearing and a new ALJ would be assigned the case. The parties were given the option of retrying the case before the new ALJ, or have a new ALJ read the transcript from the first day of hearing and hear the remaining evidence. The parties elected to have a new ALJ read the transcript and hear the remaining evidence.

2. On May 3, 2016, complainant made and thereafter filed the Statement of Issues in her official capacity. Complainant seeks to deny respondent's application based on his criminal convictions for driving under the influence of alcohol (DUI), driving on a suspended license and providing false information to a police officer.

3. Respondent timely filed a Notice of Defense, 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 Criminal Convictions*

##### FEBRUARY 20, 1996 CONVICTION

4. On February 20, 1996, in the Superior Court, County of Placer, respondent was convicted on his guilty plea, of providing false information to a peace officer, a violation of Penal Code section 148.9, subdivision (a), a misdemeanor. Imposition of judgment was suspended. Respondent was placed on one year of informal probation. He was ordered to pay fines, penalties, and assessments in the amount of approximately \$370. On July 28, 2016, respondent's conviction was expunged pursuant to Penal Code section 1203.4.

5. The facts underlying the conviction are that on December 14, 1995, respondent was celebrating his 18<sup>th</sup> birthday with his older brother, in their apartment. Respondent drank three beers. A neighbor called the police and complained about the noise coming from respondent's apartment. Police officers arrived and respondent presented the officers with false identification.

##### AUGUST 19, 1996 CONVICTION

6. On August 19, 1996, in the Superior Court, County of Placer, respondent was convicted on his guilty plea, of DUI, a violation of Vehicle Code section 23152, subdivision (a), a misdemeanor. Respondent was placed on three years of informal probation. He was ordered to enroll in and complete a First Offender DUI program. He was also ordered to pay fines, penalties, and assessments in the amount of approximately \$1,375. On July 28, 2016, respondent's conviction was expunged pursuant to Penal Code section 1203.4.

7. The facts underlying the conviction are that on July 11, 1996, respondent drove his vehicle 50 miles per hour (m.p.h.) in a 35 m.p.h. zone. Respondent's was stopped by a police officer from the City of Roseville. Respondent was under the influence of alcohol. His blood alcohol level was above .08 percent.

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<sup>2</sup> The Statement of Issues incorrectly states that respondent applied for a real estate sales person license.

JANUARY 13, 2000 CONVICTION

8. On January 13, 2000, in the Superior Court, County of Sacramento, respondent was convicted on his guilty plea, of DUI, a violation of Vehicle Code section 23152, subdivision (b), a misdemeanor. Imposition of judgement and sentence was suspended. Respondent was ordered to serve 10 days in jail. He was placed on four years of informal probation. His driver's license was suspended for 18 months. He was ordered to enroll in and complete a DUI offender program. He was ordered to pay fines, penalties, and assessments in the amount of approximately \$1,500.

9. The facts underlying the conviction are that on December 18, 1999, at approximately 4:25 a.m., respondent's vehicle was stopped by a California Highway Patrol (CHP) officer. Respondent was under the influence of alcohol. His blood alcohol level (BAC) was .12 percent.

FEBRUARY 26, 2003 CONVICTION

10. On February 26, 2003, in the Superior Court, County of Sacramento, respondent was convicted on his plea of nolo contendere, of DUI, a violation of Vehicle Code section 23152, subdivision (a), and driving with a suspended license, a violation of Vehicle Code section 14601.2, both misdemeanors. Imposition of judgement and sentence was suspended. Respondent was ordered to serve 120 days in jail, which he was allowed to serve as home detention. He was placed on five years of informal probation. His driver's license was revoked for three years. Respondent was ordered to pay fines, penalties, and assessments in the amount of approximately \$2,000.

11. The facts underlying the conviction are that on September 20, 2002, at approximately 2:00 a.m., respondent's vehicle was stopped by a CHP officer. Respondent was under the influence of alcohol and his driver's license was suspended due to his January 13, 2000 conviction. Respondent's BAC was .16 percent.

JULY 6, 2007 CONVICTION

12. On July 6, 2007, in the Superior Court, County of Sacramento, respondent was convicted on his plea of nolo contendere, of DUI, a violation of Vehicle Code section 23152, subdivision (b), a misdemeanor. Imposition of judgement and sentence was suspended. Respondent was ordered to serve 135 days in jail, which he was allowed to serve on weekends. He was placed on five years of informal probation. He was designated a "Habitual Traffic Offender" and ordered to enroll in and complete a multiple DUI offender program. His driver's license was revoked for three years. Respondent was ordered to pay fines, penalties, and assessments in the amount of approximately \$2,300.

13. The facts underlying the conviction are that on May 12, 2007, respondent's vehicle was stopped by an officer from the Sacramento Police Department. Respondent was under the influence of alcohol. His BAC was .14 and .15 percent.

#### OCTOBER 15, 2009 CONVICTION

14. On October 15, 2009, in the Superior Court, County of Sacramento, respondent was convicted of driving with a suspended license a violation of Vehicle Code section 14601.2, a misdemeanor. Imposition of judgement and sentence was suspended. Respondent was ordered to serve 10 days in jail, which he was allowed to serve through the Sheriff's Work Program. He was placed on three years of informal probation. Respondent was ordered to pay fines, penalties, and assessments in the amount of approximately \$1,355.

15. The facts underlying the conviction are that on August 15, 2009, respondent's vehicle was stopped by a CHP officer, for traveling in excess of the speed limit. Respondent driver's license was suspended due to his July 6, 2007 DUI conviction.

#### *Prior License Denials*

16. On January 9, 2003, respondent filed with the Bureau, an application for a real estate salesperson license. On or about January 29, 2004, Charles Koenig, Deputy Real Estate Commissioner, filed a Statement of Issues. Mr. Koenig alleged that respondent's application was subject to denial due to his February 20, 1996, August 19, 1996, and January 13, 2000 convictions.

17. On April 12, 2004, a hearing was held concerning respondent's request for a license, before ALJ Stephen Smith, Office of Administrative Hearings. Respondent was present at the hearing. On April 27, 2004, ALJ Smith issued a Proposed Decision in which he denied respondent's request for a license. The Bureau adopted the Proposed Decision which became effective on June 9, 2004.

18. On January 21, 2011, respondent filed with the Bureau, an application for a real estate salesperson license. On or about January 12, 2012, Tricia Sommers, Deputy Real Estate Commissioner, filed a Statement of Issues. Ms. Sommers alleged that respondent's application was subject to denial due to his six criminal convictions for DUI, driving on a suspended license and providing false information to a police officer.

19. On June 18, 2012, a hearing was held concerning respondent's request for a license, before ALJ Coren Wong, Office of Administrative Hearings. Respondent was present at the hearing. On June 26, 2012, ALJ Wong issued a Proposed Decision in which he denied respondent's request for a license. The Bureau adopted the Proposed Decision which became effective on August 23, 2012.

#### *Respondent's Evidence*

20. Respondent is 39 years old. His family has a history of alcoholism. Respondent began drinking alcohol and using drugs in the eighth grade. When respondent was 14 years old his mother was killed in an automobile accident. Respondent suffered from depression and used alcohol and drugs to cope. As a teenager, respondent's uncle introduced

him to Alcoholics Anonymous (AA). Respondent attended some meetings, but he did not believe he was an alcoholic. Respondent believed that his DUI convictions were "just bad luck." Respondent had periods of sobriety in between his convictions.

21. The turning point in respondent's recovery occurred on July 8, 2011. Respondent's girlfriend videotaped him during an alcohol-induced blackout. When respondent's girlfriend showed him the video he realized that he was an alcoholic. He stopped drinking alcohol that day. Respondent explained that he "blacked out for the last time." Between July 2011 and October 2016, respondent remained sober through his own determination. He occasionally attended AA, but did not feel that he needed AA to remain sober. Respondent described his participation as "half-hearted."

22. In approximately October 2016, respondent was evaluated by David Roberts, Ph.D., a Clinical Psychologist. Dr. Roberts treated respondent's older brother who is an alcoholic. Respondent decided to see Dr. Roberts for help with coping skills. Respondent had abstained from drinking alcohol for so long that he believed Dr. Roberts would conclude he was not an alcoholic. Respondent testified that the "exact opposite happened." Dr. Roberts informed respondent that he was "absolutely an alcoholic" and that respondent needed help to maintain his sobriety. Dr. Roberts recommended that respondent find an AA support group, obtain an AA sponsor, work the steps of AA and fully commit to the program.

23. Respondent took Dr. Roberts' advice. He obtained a sponsor whom he speaks to daily. Respondent attends two to three AA meetings per week. Respondent is working the AA steps with his sponsor and is committed to the AA program. Respondent also continues to see Dr. Roberts for therapy. Respondent described his life now as "completely different." Respondent recently married his girlfriend with whom he has been with for eight years. They have a one-year old child. Respondent's wife has two children from a previous marriage and respondent has a 19 year old daughter who is in college. For the past two years, respondent has served as the conservator over his older brother's affairs

24. Respondent obtained a Bachelor's degree in Business Administration, with a concentration in real estate and land use. In May 2012, he obtained a Master's degree in Financial Analysis from University of San Francisco. Since 2006, respondent has worked as the Chief Financial Officer (CFO) for California Loan Associates, which is a broker for real estate mortgages. Respondent is also the CFO for Acerro Real Estate Services, Inc. (Acerro), which is affiliated with California Loan Associates. Acerro is a residential real estate transaction company. Respondent has an equity ownership in Acerro, which was incorporated in February 2013. Respondent would like to obtain his broker license so he can take on more responsibility and management of the companies.

#### TESTIMONY OF DR. DAVID ROBERTS

25. Dr. Roberts has worked as a Clinical Psychologist since 1976. He began a private practice in 1981. Currently, his private practice is in Oakland, California. Dr. Roberts has treated approximately 1,200 to 1,500 patients with alcohol and drug addiction

issues. Dr. Roberts opined that the most important first step of recovery from alcoholism is to recognize that alcohol is not working, and life has become unmanageable. The person also must get help. Dr. Roberts explained that AA has the highest rate of being helpful for people in recovery.

26. Dr. Roberts evaluated respondent in October 2016 and prepared a report dated October 6, 2016. Dr. Roberts obtained a history of respondent's alcoholism and family history. Dr. Roberts conducted a mental status examination and administered psychological tests. Dr. Roberts diagnosed respondent "alcohol dependence, in remission." Dr. Roberts explained that respondent is recovering from alcohol addiction and he will be in recovery for the rest of his life.

27. Dr. Roberts stated that before October 2016, respondent was participating in AA "a little bit." Dr. Roberts explained to respondent the importance of participating in AA to support his recovery. Since Dr. Roberts's first meeting with respondent, his participation in AA has been meaningful. Respondent has done everything Dr. Roberts has asked him to do with enthusiasm and respondent is reaping benefits. Dr. Roberts explained that respondent's quality of life is good. Respondent has a supportive wife, a young child and a successful career. Respondent is committed to his sobriety. Dr. Roberts opined that he is very confident respondent has a high chance of remaining clean and sober for the duration of his life.

#### TESTIMONY OF ALLAN FRUMKIN

28. Allan Frumkin is an attorney who represented respondent in his petition to obtain conservatorship over his brother. Mr. Frumkin explained that respondent was investigated prior to obtaining court approval to serve as the conservator of his brother's affairs. An investigator spoke to respondent and family members. Respondent told the investigator about his alcoholism. The investigator also reviewed records and issued an opinion as to whether respondent was "fit" and an appropriate person to serve in the conservator role. After the investigation was conducted, the investigator recommended that the court approve respondent's petition.

#### *Discussion*

29. The Bureau has adopted criteria for determining whether an applicant has been rehabilitated since committing the acts for which denial of licensure is sought. (Cal. Code of Regs., tit. 10, § 2911.) The following criteria relevant to respondent are:

- (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.)

[¶] ... [¶]

(c) Expungement of criminal convictions resulting from immoral or antisocial acts.

[¶] ... [¶]

(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 Bureau action sought.

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

[¶] ... [¶]

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

[¶] ... [¶]

(n) Change in attitude from that which existed at the time of the conduct in question. . .

30. Between 1996 and 2007, respondent received six convictions, including four DUI convictions. Respondent suffered from severe alcoholism and failed to recognize the seriousness of his conduct. It took respondent almost 20 years of alcoholism to come to the realization that he needed to stop abusing alcohol. His realization came in the form a video taken by his girlfriend in July 2011, when respondent was in an alcohol-induced blackout. After watching the video, respondent realized he was an alcoholic. To his credit, respondent remained sober for over five years through his own fortitude and the support of his family. It



was not until Dr. Roberts explained to respondent the importance of AA that respondent fully committed to the program. Respondent has accepted responsibility for his conduct and is committed to remaining sober with the support of his family and his AA community.

Respondent's last conviction occurred over ten years ago. Since that time, respondent obtained his Master's degree. He has worked as the CFO at California Loan Associates since 2006 and at Acerro since 2013. Respondent married his long-time girlfriend and they have a child. Respondent would like to move forward in his career and a broker's license will allow him to do so.

31. The objective of an administrative proceeding relating to licensing is to protect the public. Such proceedings are not for the primary purpose of punishment. (See *Fahmy v. MBC* (1995) 38 Cal.App.4th 810, 817.) The Bureau must be assured that an individual it licenses possesses good judgment and integrity. Based on the evidence, respondent has demonstrated that it would be consistent with the public interest, safety, and welfare to issue him a restricted real estate broker license.

#### LEGAL CONCLUSIONS

1. Business and Professions Code section 480, provides in pertinent part that:

(a) A board may deny a license regulated by this code on the grounds that the applicant has one of the following:

(1) Been convicted of a crime. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action that a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4, 1203.4a, or 1203.41 of the Penal Code.

[¶] . . . [¶]

(b) Notwithstanding any other provisions of this code, a person shall not be denied a license solely on the basis of a conviction that has been dismissed pursuant to Section 1203.4, 1203.4a, or 1203.41 of the Penal Code. An applicant who has a conviction that has been dismissed pursuant to Section 1203.4, 1203.4a, or 1203.41 of the Penal Code shall provide proof of the dismissal.

2. As set forth in Factual Findings 4 through 7, respondent's February 20, 1996 conviction for providing false identification to a police officer, and August 19, 1996 conviction for DUI, were dismissed pursuant to Penal Code section 1203.4. Therefore, pursuant to Business and Professions Code section 480, subdivision (b), cause does not exist to deny respondent's application based on the dismissed convictions.

3. Business and Professions Code section 10177, subdivision (b), provides that an application for a real estate license may be denied if the applicant 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. . . ."

4. In California Code of Regulations, title 10, section 2910, the Bureau has set forth criteria for determining whether a conviction is substantially related to the qualifications, functions or duties of a licensee. Subdivision (a) of section 2910, in relevant part, provides that a conviction will be deemed to be substantially related if it evidences:

(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.

[¶] . . . [¶]

(10) Conduct which demonstrates a pattern of repeated and willful disregard of law.

(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.

5. As set forth in Factual Findings 6 through 13, respondent's four DUI convictions posed a threat of substantial injury to another. His DUI convictions are therefore substantially related to the qualifications, functions, and duties of a real estate salesperson under California Code of Regulations, title 10, section 2910, subdivisions (a)(8) and (a)(11). As the court explained in *Griffiths v. Superior Court (Medical Board of California)* (2002) 96 Cal.App.4th 757, 770, "Driving while under the influence of alcohol . . . shows an inability or unwillingness to obey the legal prohibition against drinking and driving and constitutes a serious breach of a duty owed to society."

Additionally, as set forth in Factual Findings 4 through 15, all of respondent's convictions considered together are substantially related to the qualifications, functions, or duties of a licensee because they constitute "conduct which demonstrates a pattern of repeated and willful disregard of law." (Cal. Code of Regs., tit. 10, § 2910, subd. (a)(10).) Therefore, cause exists to deny respondent's application under Business and Professions

Code sections 480, subdivision (a), for the convictions that have not been dismissed and 10177, subdivision (b), for all of respondent's convictions.

6. When all of the evidence is considered, respondent produced sufficient evidence of rehabilitation to justify granting him a restricted real estate broker license.

#### ORDER

Respondent's application for a real estate broker license is DENIED; provided, however, a restricted real estate broker license shall be issued to respondent pursuant to Section 10156.5 of the Business and Professions Code. The restricted license issued to the respondent shall be subject to all of the provisions of Section 10156.7 of the Business and Professions Code and to the following limitations, conditions and restrictions imposed under authority of Section 10156.6 of said Code:

1. The license shall not confer any property right in the privileges to be exercised, and the Real Estate Commissioner may by appropriate order suspend the right to exercise any privileges granted under this restricted license in the event of:

(a) The conviction of respondent (including a plea of nolo contendere) of a crime which is substantially related to respondent's fitness or capacity as a real estate licensee; or

(b) The receipt of evidence that respondent has violated provisions of the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to this restricted license.

2. Respondent shall notify the Commissioner in writing within 72 hours of any arrest by sending a certified letter to the Commissioner at the Bureau of Real Estate, Post Office Box 137000, Sacramento, CA 95813-7000. The letter shall set forth the date of respondent's arrest, the crime for which respondent was arrested and the name and address of the arresting law enforcement agency. Respondent's failure to timely file written notice shall constitute an independent violation of the terms of the restricted license and shall be grounds for the suspension or revocation of that license.

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3. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor the removal of any of the conditions, limitations or restrictions attaching to the restricted license until three (3) years have elapsed from the date of issuance of the restricted license to respondent.

DATED: April 19, 2017

DocuSigned by:

*Marcie Larson*

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MARCIE LARSON  
Administrative Law Judge  
Office of Administrative Hearings