

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of:

ROGER PAUL GREENING,

Respondent.

) DRE No. H-6607 SAC

) OAH No. 2017110620

FILED

SEP 11 2018

DEPARTMENT OF REAL ESTATE

By X. Kuo

DECISION

The Proposed Decision dated August 15, 2018, 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, but the right to a restricted salesperson license is granted to Respondent.

Pursuant to Government Code Section 11521, the Department of Real Estate may order reconsideration of this Decision on petition of any party. The party seeking reconsideration shall set forth new facts, circumstances, and evidence, or errors in law or analysis, that show(s) grounds and good cause for the Commissioner to reconsider the Decision. If new evidence is presented, the party shall specifically identify the new evidence and explain why it was not previously presented. The Department'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.

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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.

OCT 02 2018

This Decision shall become effective at 12 o'clock noon on _____.

IT IS SO ORDERED September 10, 2018

DANIEL SANDRI
ACTING REAL ESTATE COMMISSIONER

Daniel / Sandri

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

ROGER PAUL GREENING,

Respondent.

Case No. H-6607 SAC

OAH No. 2017110620

PROPOSED DECISION

Administrative Law Judge Wilbert E. Bennett, State of California, Office of Administrative Hearings, heard this matter on July 24, 2018, in Sacramento, California.

Kyle T. Jones, Counsel, Department of Real Estate (Department), represented complainant Tricia D. Parkhurst, Supervising Special Investigator. The Bureau of Real Estate became the Department of Real Estate on July 1, 2018.

Respondent Roger Paul Greening was present, and was represented by Jeffrey S. Kravitz, Attorney at Law.

Evidence was received, the record was closed, and the matter was submitted for decision on July 24, 2018.

FACTUAL FINDINGS

Procedural Background

1. On January 17, 2018, complainant filed the Accusation in her official capacity. Complainant seeks to impose disciplinary action against respondent's real estate salesperson license based on a felony conviction for assault with force likely to produce great bodily injury, a misdemeanor conviction for reckless driving related to the consumption of alcohol, and his failure to report those convictions to the Department within 30 days.

2. Respondent is presently licensed and/or has license rights under the real estate law as a real estate salesperson.

Criminal Convictions

3. On November 24, 2015, in the Santa Cruz County Superior Court, Case No. F26521, respondent was convicted, by jury verdict, of violating Penal Code section 245, subdivision (a)(4) (assault with force likely to produce great bodily injury), a felony. Pursuant to said conviction, respondent was placed on formal probation for a period of three years on certain terms and conditions, including service of 365 days in the county jail with a credit of two days for time served, with alternative service authorized after serving 90 days in custody, completion of 20 hours of community service, completion of a 52-week Batterer's Program, restitution to the victim in the amount of \$1,335.86, a prohibition against the possession or consumption of alcohol, and payment of applicable fines and fees.

4. The facts and circumstances underlying this conviction involved an incident which occurred on March 15, 2014, when respondent committed an assault upon a person with whom he had a dating relationship. (No police report associated with this offense was introduced into evidence.)

5. On July 15, 2016, in the Placer County Superior Court, Case No. 62-134073, respondent was convicted, by nolo contendere plea, of violating Vehicle Code section 23103 (reckless driving related to the consumption of alcohol), a misdemeanor. Pursuant to said conviction, respondent was placed on conditional probation for two years on certain terms and conditions, including service of four days in the county jail with a credit of four days, completion of a Driving Under the Influence Panel, completion of a 12-hour Alcohol Education class, a prohibition against driving with any measurable amount of alcohol in his system, and payment of applicable fines and fees.

6. The facts and circumstances underlying this conviction involved an incident which occurred on July 20, 2014, as respondent was leaving the Rollins Lake Campground. A security guard blocked respondent's exit from the campground because of his perception that respondent was intoxicated. After the action by the security guard, respondent then turned his vehicle around, and a campground employee then managed to obtain respondent's car keys because of his perceived level of intoxication, which prevented further driving by respondent. Thereafter, California Highway Patrol officers made personal contact with respondent, who then exhibited signs and symptoms of alcohol intoxication, including slurred speech, alcoholic breath, unsteady gait, red and watery eyes, and poor performance on field sobriety tests.

Failure to Report Convictions Within 30 Days

7. Respondent failed to report his November 2015 felony conviction or his July 2016 misdemeanor conviction to the Department within 30 days, as required by Business and Professions Code section 10186.2, subdivisions (a)(1)(B) and (2). At hearing, respondent provided no explanation for his failure to do so, other than that he was "in survival mode," and focused on matters of immediate concern, including his pending bankruptcy and loss of lifetime savings. Respondent's failure to report each of his convictions constitutes separate

violations of the reporting obligations associated with licensure, and provides cause for discipline pursuant to Business and Professions Code section 10186.2, subdivision (b).

Factors in Aggravation, Mitigation, or Rehabilitation

8. Respondent is 56 years old, and has been licensed as a real estate salesperson since March 2006. He started working full-time in the real estate field in 2010, after working on a part-time basis during the previous four years. He has not changed his place of employment since 2010. His employing broker is Home Sold California Corporation, in Rancho Cordova. Respondent has no record of prior license discipline. He is amenable to the issuance of a restricted real estate salesperson license, and stated that his employing broker and his employing broker's office manager are supportive of his employment retention in that capacity.

Prior to obtaining real estate licensure, respondent served in the infantry in the United States Army (1984-1987), and was honorably discharged. Between 1987 and 1994, he worked in construction, while specializing in carpentry. Between 1994 and 2010, he was a big-rig truck driver for Raley's Supermarkets. Since 2010, respondent has made real estate investments and remodeled homes for house flipping purposes, in addition to providing services for clients, as a real estate licensee in the buying and selling of homes.

9. Respondent submitted supporting letters from his employing broker, Mercedes Tucker, and from Reuben Nazareno, his employing broker's office manager. Ms. Tucker is the designated broker/officer for Home Sold California Corporation, doing business as Real Estate America, which includes a staff of 36 salespersons. Ms. Tucker described respondent as "an honest and hard-working sales agent," who is "well-liked by his clients, staff and colleagues." She further stated that if respondent is granted a restricted salesperson license, "we would keep him with our office and sign any necessary forms for the DRE." Mr. Nazareno, who is licensed as a real estate salesperson, described respondent in a similar manner. He stated that respondent "is very remorseful about these incidents," as reflected in their discussions regarding his criminal convictions in this case.

10. Respondent submitted a supporting letter from Terry Gilbert, program director of the court-ordered anger management and batterer's intervention programs which respondent was required to attend. Mr. Gilbert stated the following:

I have every confidence that Mr. Greening will not re-offend in this manner ever again. His key approach to issues of this nature are: Accountability, using emotional intelligence, show[ing] remorse for one's actions, and taking responsibility.

11. Respondent submitted supporting character reference letters from two persons who know him in a personal capacity: his friends and neighbors, Alan Anderson, Jr., and David Wade, Jr. Alan Anderson, Jr. is an architect, who recently retired from a position with

the California Department of Transportation. He was respondent's neighbor between 2003 and 2016. Mr. Anderson stated, in pertinent part, as follows:

I was in attendance at the trial where a jury found [respondent] responsible for an injury to [his girlfriend's] wrist. [Respondent] and I have discussed the events of that fateful evening on numerous occasions. [Respondent] truly regrets his actions and accepts personal responsibility for "having crossed the line" not only legally, but also his own, more restrictive, personal code of conduct. [Respondent] has repeatedly expressed to me that he wishes he had had the strength to walk away from the relationship with [his girlfriend] long before this ever happened.

David Wade, Jr., is a program director for a supported living program that works with developmentally disabled adults. Mr. Wade has been respondent's neighbor for five years, during which time respondent has had occasion to discuss his conviction with Mr. Wade and his wife. Mr. Wade stated that respondent "assured us that he was taking responsibility for his role in this situation," and that respondent "seemed to be truly remorseful for his actions that night." Mr. Wade further stated a belief that respondent "has truly learned a valuable lesson . . . and would not commit such an offence [sic] in the future."

12. Respondent testified regarding the convictions alleged as grounds for license discipline. His two-year probation for drunk driving expired on July 15, 2018, and his three-year probation for assault is scheduled to expire on November 24, 2018. He stated that the drunk driving offense was aberrant and not likely of recurrence. He has not sustained any other alcohol-related convictions since the 1990's. With respect to the assault offense, which was perpetrated upon his girlfriend, respondent acknowledged personal responsibility and awareness of his own wrongdoing. In explaining the underlying circumstances, respondent stated that a verbal dispute, prompted by jealousy and fueled by alcohol consumption, escalated into a physical altercation at a public beach. He admitted that he initiated the physical contact in this incident when he "instinctively" grabbed his girlfriend's elevated left wrist with his right hand. He expressed embarrassment and remorse for the incident, while stating, "I should have walked away because you can't equate the strength of a man to the strength of a woman." He specifically expressed remorse that he had caused injury. In this regard, it is significant that the criminal court sentencing judge, in his minute order, noted that respondent was "amenable and remorseful." While respondent testified that he and his girlfriend had consumed alcohol at the time of the offense in question, he did not ascribe his criminal conduct as attributable to the consumption of alcohol nor did he eschew responsibility because of his alcohol consumption. Respondent stated that the court-ordered anger management and domestic violence programs helped him "to identify [his] boundaries and [his] emotional triggers," and that there is no likelihood of recurrence of such conduct.

13. In evaluating respondent's rehabilitation from his relatively recent criminal offenses, it is significant that he has taken an essential step towards rehabilitation: full acknowledgment of wrongdoing. (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."].) He expressed remorse and accepted full responsibility for his criminal conduct. Respondent's supporting letters were strong and positive, and were submitted by persons familiar with his previous conduct and with his subsequent attitudes and behavioral patterns.

14. In considering the state of respondent's post-conviction rehabilitation, his failure to report his convictions to the Department is concerning. A real estate licensee is expected to comply with numerous reporting obligations and responsibilities. Such obligations include the legal duty to report *any* felony or misdemeanor conviction or *any* pending felony charge to the Department, within 30 days, pursuant to Business and Professions Code section 10186.2. Respondent should have been aware of his obligations and responsibilities as a licensee, regardless of his personal circumstances.

15. The Department has developed criteria for evaluating whether a licensee has been rehabilitated since he or she sustained the conviction(s) or committed the act(s) constituting grounds for license discipline. (Cal. Code Regs., tit. 10, § 2912.) The criteria relevant here are: (1) the passage of at least two years since the licensee's most recent conviction or wrongful act; (2) expungement of criminal conviction(s); (3) successful completion or early discharge from probation; and (4) change in attitude from that which existed at the time of the commission of the criminal acts in question. (Cal. Code Regs., tit. 10, § 2912, subds. (a)(1), (c), (e), & (m).) The Department's regulatory criteria specifically note that the passage of less than two years from the most recent conviction date is inadequate to demonstrate rehabilitation, and that the two-year minimum period may be increased based upon the nature and severity of the crimes committed by the licensee.

16. The application of these criteria indicates that respondent is on the road to rehabilitation, but has not been fully rehabilitated. An insufficient amount of time has passed for him to demonstrate full rehabilitation, in light of the seriousness and recency of his convictions and his continued status on criminal probation. His most recent conviction (for drunk driving) occurred only 25 months ago, and the probation associated with that conviction was completed only last month. He remains on probation until November 2018 for a prior (and more serious) conviction for assault with force likely to produce great bodily injury. It is undeniable that respondent's testimony demonstrated the "change in attitude" required for a showing of rehabilitation by his acceptance of full responsibility for his criminal behavior. However, a showing of rehabilitation also requires sustained exemplary conduct over an extended period of time. (See, *In re Menna* (1955) 11 Cal.4th 975, 991.) Nor does compliance with criminal probation requirements, standing alone, constitute sufficient evidence of rehabilitation because of the expectation of good behavior associated with probation. (See, *In re Gossage* (2000) 23 Cal. 4th 1080, 1099. [little weight is given to person's good behavior while on probation because such conduct is expected].) On balance, respondent appears to be taking appropriate steps towards rehabilitation by complying with his criminal probation requirements and by demonstrating attitudinal change regarding his prior criminal conduct, but he has a ways to go. Thus, although respondent's ability to show

full rehabilitation may lie ahead, he has demonstrated sufficient rehabilitation to warrant the issuance of a restricted license.

17. In consideration of all of the above factors, it would be consistent with the public interest to allow respondent to retain a real estate license, on a restricted basis. As discussed below, cause exists to discipline respondent's license. Complainant, in closing argument, recommended the penalty of revocation based on respondent's conviction of substantially related crimes, without addressing the seminal question whether revocation is necessary to protect the public. On balance, however, respondent has shown sufficient rehabilitation to permit the issuance of a restricted license, with due regard for public protection. Based on the totality of the evidence presented, while his rehabilitation may not be complete, respondent has established that he has been sufficiently rehabilitated from serious criminal offenses so that he may be allowed to retain licensure on a restricted basis. Therefore, respondent's unrestricted license should be revoked, and he should be issued a restricted license with the restrictions specified in the Order below.

Costs of Investigation and Enforcement

18. Complainant offered declarations that supported investigative costs of \$1,707.65 and enforcement costs of \$342.65. The reasonableness of the claimed costs was not challenged by respondent.

The Department is entitled to recover \$2,050.30 in costs.

LEGAL CONCLUSIONS

1. Business and Professions Code section 493 permits the Department to inquire into the circumstances surrounding the commission of a crime, by one of its licensees, to determine if the crime is substantially related to the qualifications, functions, or duties of a real estate licensee. In this case, such an inquiry results in the conclusion that the requisite substantial relationship exists with respect to each of respondent's convictions.

2. A real estate license may be disciplined when the licensee has been convicted of a crime that is substantially related to the qualifications, functions, or duties of a real estate licensee. (Bus. & Prof. Code, §§ 490, subd. (a); 10177, subd. (b).) Respondent was convicted of assault with force likely to produce great bodily injury. (Findings 3 and 4.) Such a crime is deemed to be substantially related to the qualifications, functions, or duties of a real estate licensee. (See, Cal. Code Regs., tit. 10, § 2910, subd. (a)(8) ["Doing of any unlawful act . . . with the intent or threat of doing substantial injury to the person or property of another."].) In this instance, respondent's assault offense, by its terms, involved a threat of substantial injury to the person of another. Therefore, respondent's assault offense constitutes cause for license discipline pursuant to Business and Professions Code sections 490, subdivision (a), and 10177, subdivision (b).

3. Respondent was convicted of a drunk driving offense: reckless driving involving the consumption of alcohol. (Findings 5 and 6.) Such a crime is deemed to be substantially related to the qualifications, functions, or duties of a real estate licensee. (See, Cal. Code Regs., tit. 10, § 2910, subd. (a)(8) ["Doing of any unlawful act . . . with the intent or threat of doing substantial injury to the person or property of another."].) In this instance, by driving in an inebriated condition, respondent's conduct constituted a threat of substantial injury to others. Vehicle Code section 23593, subdivision (a), provides legislative recognition of such a threat: "[I]t is extremely dangerous to human life to drive while under the influence of alcohol." Therefore, respondent's drunk driving offense constitutes cause for license discipline pursuant to Business and Professions Code sections 490, subdivision (a), and 10177, subdivision (b).

4. A real estate license may be disciplined for failure to report a conviction of any felony or misdemeanor to the Department within 30 days. (Bus. & Prof. Code, §10186.1, subds. (a)(1)(B) and (2), and (b).) Respondent failed to report his felony assault conviction, or his misdemeanor drunk driving conviction to the Department within 30 days. (Finding 7.) Therefore, cause for discipline exists pursuant to Business and Professions Code section 10186.2, subdivisions (a)(1)(B) and (2), and (b).

5. A professional license may be disciplined only upon "clear and convincing evidence to a reasonable certainty." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal. App.3d 853-856.)

6. Clear and convincing evidence established cause for discipline of respondent's license pursuant to Business and Professions Code sections 490, subdivision (a), and 10177, subdivision (b), in that respondent was convicted of crimes substantially related to the qualifications, functions, and duties of a real estate licensee, by reason of Findings 3 through 6, and Legal Conclusions 1 through 3.

7. Clear and convincing evidence established cause for discipline of respondent's license pursuant to Business and Professions Code section 10186.2, subdivisions (a)(1)(B) and (2), and (b) in that respondent failed to report his felony assault conviction, or his misdemeanor drunk driving conviction to the Department within 30 days, by reason of Finding 7, and Legal Conclusion 4.

8. In determining the appropriate discipline, the central question is what level of discipline is necessary to protect the public. Disciplinary proceedings to suspend or revoke a real estate license are not conducted for the primary purpose of punishing an individual. (*Small v. Smith* (1971) 16 Cal. App.3d 450, 457.) The matters set forth in Findings 8 through 17 have been considered. It would not be contrary to the public interest to allow respondent to retain his real estate salesperson license on a restricted basis, under appropriate terms and conditions, including close supervision by a real estate broker.

9. Business and Professions Code section 10106 permits the Real Estate Commissioner to request an administrative law judge hearing a disciplinary matter to direct a

licensee to pay a sum not to exceed the reasonable costs of investigation and enforcement of the case, except as otherwise provided by law. Evidence is required to support an award.

10. Complainant provided sufficient evidence to support an award of the costs of investigation and enforcement in the amount of \$2,050.30, as set forth in Finding 18.

ORDER

All licenses and licensing rights of respondent Roger Paul Greening under the Real Estate law are revoked; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to Business and Professions Code section 10156.5 if respondent makes application therefor and pays to the Department of Real Estate the appropriate fee for the restricted license within 90 days from the effective date of this Decision. The restricted license issued to 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 that Code:

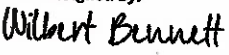
- a. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of respondent's conviction or plea of nolo contendere to a crime which is substantially related to respondent's fitness or capacity as a real estate licensee.
- b. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner 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 the restricted license.
- c. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license or for the removal of any of the conditions, limitations or restrictions of a restricted license until two years have elapsed from the effective date of this Decision.
- d. Respondent shall submit with any application for license under an employing broker, or any application for transfer to a new employing broker, a statement signed by the prospective employing real estate broker on a form approved by the Department of Real Estate which shall certify:
 - (a) That the employing broker has read the Decision of the Commissioner which granted the right to a restricted license; and

(b) That the employing broker will exercise close supervision over the performance by the restricted licensee relating to activities for which a real estate license is required.

- e. Respondent shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that he has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until respondent presents such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.
- f. Respondent shall notify the Commissioner in writing within 72 hours of any arrest by sending a certified letter to the Commissioner at the Department of Real Estate, Post Office Box 187000, Sacramento, CA 95818-7000. 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.

Respondent Roger Paul Greening shall pay \$2,050.30 to the Department of Real Estate as its costs of investigation and enforcement of this case.

Dated: August 15, 2018

DocuSigned by:

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WILBERT E. BENNETT
Administrative Law Judge
Office of Administrative Hearings