

FILED

MAR 07 2019

DEPARTMENT OF REAL ESTATE
By K. Knapp

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against:	DRE No. H-6626 SAC
RANSOME CARL MCKISSICK, JR.,	OAH No. 2018050333
Respondents.	

In the Matter of the Accusation Against:	DRE No. H-6627 SAC
RANSOME CARL MCKISSICK, JR.,	OAH No. 2018050335
Respondent.	

DECISION

The Proposed Decision dated February 8, 2019, 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 matters.

The Decision suspends or revokes one or more real estate licenses.

The Statement of Issues filed against Respondent is dismissed.

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. 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.

This Decision shall become effective at 12 o'clock noon on MAR 28 2019.

IT IS SO ORDERED March 5, 2019

DANIEL J. SANDRI
ACTING REAL ESTATE COMMISSIONER



BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

RANSOME CARL MCKISSICK, JR.,

Respondent.

Case No. H-6626 SAC

OAH No. 2018050333

In the Matter of the Accusation Against:

RANSOME CARL MCKISSICK, JR.,

Respondent.

Case No. H-6627 SAC

OAH No. 2018050335

PROPOSED DECISION

These consolidated matters were heard before Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings, State of California, on December 3, 2018, in Sacramento, California. The parties agreed and requested that one decision be prepared in these matters, rather than separate decisions.

Richard K. Uno, Counsel, represented Chika Sunquist (complainant), Supervising Special Investigator, Department of Real Estate¹ (Department), State of California.

Marc Voisenat represented Ransome Carl McKissick, Jr., (respondent), who was present.

Evidence was received, the record was closed, and the matter was submitted for decision on January 11, 2019.²

¹ The Bureau of Real Estate became the Department of Real Estate, effective July 1, 2018. (Bus. & Prof. Code, § 10050.)

² The record was held open until January 11, 2019, for the parties to submit hearing briefs, which were timely submitted. Complainant's brief and reply were marked as Exhibits 31 and 32, and respondent's brief was marked as Exhibit C for identification.

FACTUAL FINDINGS

Licensing and Disciplinary History

1. Respondent is presently licensed and/or has license rights as a real estate salesperson under the Real Estate Law, Part 1, Division 4 of the California Business and Professions Code. The Department issued respondent a restricted salesperson license on September 21, 2016. Respondent's license will expire on September 2020, unless renewed or revoked.

2. The Department originally issued a salesperson license to respondent on December 18, 1999, and a broker license on January 23, 2001. The Department issued a Decision and Order effective November 2, 2012, whereby it revoked respondent's licenses and denied his application to become the designated broker-officer of a licensed real estate corporation, following an administrative hearing in the consolidated matters of Accusation No. H-11145 SF, Accusation No. H-2432 FR, and Statement of Issues No. H-11182 SF. The bases for the 2012 revocation and denial of respondent's application included findings that respondent engaged in misconduct including but not limited to violations of Business and Professions Code section 10176, subdivisions (a) (making a substantial misrepresentation), and (i) (other conduct including fraud or dishonest dealing); and that in 2011, he was convicted on his no contest plea of two misdemeanor violations of Government Code section 6203 (knowingly making false statements in a certificate or writing). Respondent's acts of misconduct resulting in the 2012 revocation and denial of his license application were all substantially related to the qualifications, functions, or duties of a real estate licensee.

3. On March 27, 2015, respondent petitioned for reinstatement of his revoked broker license. The Real Estate Commissioner found that respondent failed to demonstrate he was sufficiently rehabilitated to warrant reinstatement of his revoked real estate broker license, but that it would not be against the public interest to issue a restricted real estate salesperson license to respondent. The Real Estate Commissioner issued an Order effective March 25, 2016, denying reinstatement of respondent's petition for reinstatement of his revoked real estate broker license, and granting the right to a restricted real estate salesperson license upon successful completion of the requisite licensure examination and submission of licensing fees. Respondent met these requirements and on September 21, 2016, the Department issued respondent a restricted real estate salesperson license, which the Department now seeks to revoke based on the allegations in the pending Accusation.

Application and Related Allegations

4. On October 1, 2016, respondent submitted an application to the Department for a mortgage loan originator license endorsement (MLO endorsement). Respondent answered "No" in response to Question B of the application, which asks: "Has a bonding company ever denied, paid out on, or revoked a bond for you?" Respondent also answered "No" in response to Question D of the application, which asks: "Do you have any unsatisfied judgments or liens against you?"

5. On March 8, 2018, complainant, acting in her official capacity, filed the Statement of Issues in this matter, seeking to deny respondent's application for an MLO endorsement based on allegations that respondent concealed and failed to disclose information requested in the application by answering "No" to Questions B and D.

6. On March 8, 2018, complainant, acting in her official capacity, filed the Accusation³ in this matter, seeking to discipline respondent's salesperson license based on allegations that respondent concealed and failed to disclose information requested in the application by answering "No" to Questions B and D.

Statement of Issues

7. Respondent moved on the day of hearing to withdraw his application for an MLO endorsement. Complainant objected. Respondent's motion was taken under submission. The hearing then proceeded, and the parties presented evidence and argument on the substantive issues related to both the Accusation and the Statement of Issues. Following the hearing, the parties submitted written argument on the issue of whether the Department has jurisdiction to proceed with the Statement of Issues following respondent's request to withdraw his application, and if not, whether complainant may proceed with the Accusation. Complainant conceded in written argument that the Department does not have jurisdiction to proceed with the Statement of Issues following respondent's request to withdraw his application for an MLO endorsement. For the reasons set forth in Legal Conclusions 4 through 7, the Statement of Issues must be dismissed, and complainant retains authority to prosecute the Accusation.

Accusation

8. The Accusation alleges that respondent failed to disclose unsatisfied judgments, bond payouts, and a tax lien, when he falsely answered "No" to Questions B and D, and that he thereby violated Business and Professions Code sections 10176, subdivision (a) (substantial misrepresentation); 10176, subdivision (c) (continued course of misrepresentation); and 10176, subdivision (i), and 10177, subdivision (j) (fraud or dishonest dealing). The factual and legal allegations are discussed below.

9. Question B: The evidence is undisputed that respondent falsely answered "No" to the question whether "a bonding company ever denied, paid out on, or revoked a bond" for respondent. On or about October 2008, Surety Bonding Company of America paid out a total of \$15,000 on two separate bond claims against respondent. Respondent offered no explanation of why he failed to disclose the bond payout in his application, other than that he answered "No" in error.

³ At hearing, complainant amended the Accusation by interlineation to delete the term "Statement of Issues" and add the word "Accusation" on page 1, lines 15 and 18.

10. Question D: Respondent contended that he had no unsatisfied judgments or liens against him at the time he submitted his application, and he therefore correctly answered "No" to Question D. Regarding disclosure of liens, respondent introduced into evidence an Internal Revenue Service (IRS) Certificate of Release of Federal Tax Lien in the amount of \$33,318.16, dated June 4, 2013. The Certificate of Release corresponds with the IRS Notice of Federal Tax Lien dated February 19, 2008, introduced by complainant. Given that the IRS released the tax lien prior to respondent's submission of his application on October 1, 2016, it follows that respondent did not fail to disclose the existence of the lien in his application.

11. With respect to the allegation that respondent failed to disclose unsatisfied judgments, the evidence established that respondent had eight⁴ money judgments against him which were discharged in bankruptcy and not disclosed by respondent in his application. The eight judgments were entered against respondent during the years 2004 through 2009, and were in amounts ranging from \$2,700 to \$200,000. Respondent contended he was not required to disclose any of these as "unsatisfied judgments" in his application because they were discharged in bankruptcy before he submitted his application. Respondent also testified that this was his belief at the time he completed his application. Respondent did not provide persuasive legal support for his contention that judgments discharged in bankruptcy need not be disclosed in the application as "unsatisfied judgments," as set forth in Legal Conclusions 8 and 9.

12. On March 15, 2017, pursuant to a request by the Department for additional information regarding his application, respondent submitted Civil Litigation Detail Reports (Reports) in which he provided summaries of separate legal actions. Information provided by respondent in each of the Reports was incorrect in that he answered "Yes" to the question: "Was this civil litigation issue disclosed in your original MLO license endorsement application?" This response is false, in that respondent did not disclose his civil litigation or the resulting judgments in his application. Next to his "Yes" answer, respondent noted on most of the Reports "too many to list; discharged." This notation is both confusing and possibly inconsistent with respondent's false "Yes" answer to the question whether he disclosed the civil litigation in his original application.

⁴ The Accusation alleges that there were 10 unsatisfied judgments which respondent was required to disclose in his application. The documentary evidence introduced by complainant established that one of the judgments had been vacated and another had been dismissed prior to respondent's submission of his application. Specifically, the judgment in Santa Clara County Superior Court, Case No. 110 CV-161297, was dismissed as against respondent on February 13, 2014; and the judgment in Santa Clara County Superior Court, Case No. 114 CV 266710, was vacated on October 13, 2014. These judgments were incorrectly referenced in paragraphs 14 and 15 of the Accusation as Case Nos. 2010-CV-161297 and 2014-1-CV-266710, respectively.

Discussion

13. Question B: The evidence established that respondent falsely answered "No" to the question whether "a bonding company ever denied, paid out on, or revoked a bond" on behalf of respondent, in that Surety Bonding Company of America paid out a total of \$15,000 on two separate bond claims against respondent on or about October 2008. In his testimony, respondent explained this discrepancy only by stating that he answered "No" in error – implying that he made a mistake. Given the fact that two separate bonds totaling \$15,000 were paid on behalf of respondent in 2008, it is not credible to assert that respondent made an inadvertent error when he answered "No." It is unlikely that respondent forgot about these bond payouts, even though they occurred approximately eight years before he submitted his application. The most reasonable explanation, and the finding here, is that respondent knew of the bond payouts and dishonestly answered "No" in an effort to enhance his application. For these reasons, respondent is subject to discipline because he falsely and dishonestly answered "No" to Question B, when the true and honest answer would have been to answer "Yes" and to then disclose the two bond payouts on his behalf.

14. Question D: Respondent was unpersuasive in his testimony that he believed the bankruptcy discharge excused him from disclosing the unsatisfied judgments in his application. Respondent's testimony on this point was self-serving, and ignored the fact that it was his responsibility as an applicant to make sure his answers were accurate, and to clarify disclosure requirements before submitting the application if there was any doubt. The most reasonable explanation, and the finding here, is that respondent dishonestly answered "No" in an effort to enhance his application. For these reasons, respondent is subject to discipline because he falsely and dishonestly answered "No" to Question D, when the true and correct answer would have been to answer "Yes" and to then disclose the eight unsatisfied judgments.

15. Respondent's false answers of "No" to Questions B and D establish a pattern of false statements and dishonesty. This pattern of dishonesty is also evident in the causes for his prior discipline by the Department, and his false statements in his March 15, 2017 Reports to the Department that he had disclosed specific litigation in his application, when he had not. (Factual Findings 2 and 12.) Respondent did not offer any significant evidence of rehabilitation to show that he has changed his pattern of misconduct. Based on respondent's misconduct in his failure to honestly answer Questions B and D, it would be inconsistent with the public interest to allow respondent to maintain his license as a real estate salesperson.

Costs of Investigation

16. Complainant submitted into evidence a Certified Statement of Investigation Costs in the amount of \$2,833.30, signed by Chika Sunquist, Supervising Special Investigator I. The Accusation did not allege or request costs. Costs are addressed in Legal Conclusion 18, below.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. In an Accusation seeking to discipline a professional license, the agency has the burden of proof to establish the allegations in the Accusation by “clear and convincing evidence.” (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) Complainant met the burden of proof with respect to the allegations in the Accusation.

2. When a respondent asserts an affirmative defense against allegations in an Accusation, the respondent bears the burden of proof by a preponderance of the evidence. (*Whetstone v. Board of Dental Examiners* (1927) 87 Cal.App. 156, 164.) Respondent did not meet the burden with respect to establishing any affirmative defenses to the allegations in the Accusation.

3. The burden of proof with respect to the Statement of Issues is not addressed here because the Department lacks jurisdiction to proceed with the Statement of Issues. The Statement of Issues must therefore be dismissed.

Jurisdiction to Proceed with Statement of Issues

4. The Department, like all administrative agencies, has only such powers as have been conferred upon it, expressly or by implication, by the Legislature. (*Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 299-300; *Friends of Kings River v. County of Fresno* (2014) 232 Cal.App.4th 105, 117.) When an agency acts in excess of the powers conferred on it, its action is deemed void. (*Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 213.) The Legislature has not expressly or implicitly conferred on the Department continuing jurisdiction to act on a Statement of Issues after the respondent has asked to withdraw the underlying application.

5. In contrast, the Legislature specifically chose to confer such authority on boards and bureaus operating under the Department of Consumer Affairs. The Legislature provided in Business and Professions Code section 118, subdivision (a), as follows: “The withdrawal of an application for a license after it has been filed with a board in the department shall not, unless the board has consented in writing to such withdrawal, deprive the board of its authority to institute or continue a proceeding against the applicant for the denial of the license”

6. The Department of Real Estate is not a Department of Consumer Affairs entity. Effective July 1, 2018, the Bureau of Real Estate (which was under the Department of Consumer Affairs) became the Department of Real Estate, independent of the Department of Consumer Affairs. Business and Professions Code section 118, does not apply to the Department of Real Estate. There is no statute analogous to Business and Professions Code section 118 applicable to the Department of Real Estate. For these reasons, the Department has no jurisdiction to proceed with the Statement of Issues because respondent moved to

withdraw the underlying application. The Statement of Issues must for these reasons be dismissed.

Jurisdiction to Proceed with Accusation

7. Respondent's withdrawal of his application and the dismissal of the Statement of Issues do not expunge the fact that respondent made false and dishonest statements to the Department when he answered "No" to Questions B and D, and submitted the application to the Department. The fact that respondent withdrew his application after the Department filed both the Accusation and the Statement of Issues, does not deprive the Department of jurisdiction or complainant of authority to prosecute the Accusation based on the false statements that respondent submitted to the Department in his application.

Disclosure of Unsatisfied Judgments

8. Respondent's argument that he was not required to disclose judgments as "unsatisfied" because they were discharged through bankruptcy conflates the difference between (1) satisfaction of a judgment and (2) discharge of a debt through bankruptcy. Code of Civil Procedure section 724.010, subdivision (a), states that "satisfaction of judgment" can be achieved by "payment of the full amount required to satisfy the judgment or by acceptance by the judgment creditor of a lesser sum in full satisfaction of the judgment." Under federal bankruptcy law, a discharge of debts "voids any judgment . . . to the extent that such judgment is a determination of the personal liability of the debtor . . . whether or not discharge of the debt is waived . . ." (11 USCA § 524.) Code of Civil Procedure section 699.510, subdivision (c)(1), clearly distinguishes between satisfaction of judgment and discharge through bankruptcy, where it states that a writ of execution may not issue against a judgment debtor if the liability has ceased with regard to the judgment because of either of the following occurrences: "(A) the judgment debtor has obtained a discharge of the judgment pursuant to [the Bankruptcy Code]; or (B) the judgment creditor files an acknowledgment of satisfaction of judgment . . ." Section 699.510 points to the fact that satisfaction of judgment and discharge through bankruptcy are distinctly different, even though they both operate to extinguish a debtor's liability.

9. The Legislature understands how to specify that a debt discharged through bankruptcy need not be disclosed as an unsatisfied judgment, as it has done in an analogous context with the Contractors' State License Board. Specifically, the Legislature provided in Business and Professions Code section 7071.17, subdivision (f), that the requirements of a license applicant to obtain a bond in the amount of any "unsatisfied final judgment," and of licensees to notify the registrar of any "unsatisfied final judgment" within 90 days, do not apply when the financial obligation has been discharged through bankruptcy. In contrast, there are no comparable provisions in the statutes and regulations governing applications for an MLO endorsement or licensure by the Department which would exempt from disclosure debts that have been discharged through bankruptcy. (See Bus. & Prof. Code, § 10150, subd. (a); Cal Code Regs., tit. 10, § 2758.3.) For all of these reasons, it is clear that discharge of

debts through bankruptcy did not excuse respondent from disclosing in his application the eight unsatisfied judgements alleged in the Accusation.

Statutes Applicable to Accusation

10. The Department may suspend or revoke the license of a real estate licensee for attempting to obtain a real estate license or endorsement as a mortgage loan originator by “making any substantial misrepresentation.” (Bus. & Prof. Code, § 10176, subd. (a).)

11. The Department may suspend or revoke the license of a real estate licensee for attempting to obtain a real estate license or endorsement as a mortgage loan originator by “[a] continued and flagrant course of misrepresentation . . .” (Bus. & Prof. Code, § 10176, subd. (c).)

12. The Department may suspend or revoke the license of a real estate licensee for attempting to obtain a real estate license or endorsement as a mortgage loan originator by conduct “which constitutes fraud or dishonest dealing.” (Bus. & Prof. Code, § 10176, subd. (i).)

13. The Department may suspend or revoke the license of a real estate licensee, or may suspend or revoke the license of a corporation, if an officer, director, or person owning or controlling 10 percent or more of the Corporation’s stock has engaged in conduct “that constitutes fraud or dishonest dealing.” (Bus. & Prof. Code, § 10177, subd. (j).)

Causes for Discipline

14. Cause exists to discipline respondent’s real estate salesperson’s license pursuant to Business & Professions Code section 10176, subdivision (a), in that respondent made “substantial misrepresentations” when he falsely answered “No” to Questions B and D of his application, and submitted it to the Department.

15. Cause exists to discipline respondent’s real estate salesperson’s license pursuant to Business & Professions Code section 10176, subdivision (c), in that respondent engaged in a “continued . . . course of misrepresentation” when he falsely answered “No” to Questions B and D of his application, and submitted it to the Department.

16. Cause exists to discipline respondent’s real estate salesperson’s license pursuant to Business & Professions Code sections 10176, subdivision (i), and 10177, subdivision (j), in that respondent engaged in conduct “which constitutes fraud or dishonest dealing” when he falsely answered “No” to Questions B and D of his application, and submitted it to the Department.

17. Based on the proven causes for discipline, jointly and individually, it would be inconsistent with the public interest to allow respondent to maintain his license as a real estate salesperson. Respondent’s license must therefore be revoked.


Costs of Investigation and Enforcement

18. 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 the law. The Accusation did not reference or request costs. Administrative due process requires that an “agency shall give the person to which the agency action is directed notice and an opportunity to be heard” (Gov. Code, § 11425.10, subdivision (a)(1).) Respondent was not given notice that the Department would seek costs, and it would therefore be a violation of due process to make any cost assessment against respondent.

ORDER

1. The Statement of Issues is DISMISSED.
2. All licenses and licensing rights of respondent Ransome Carl McKissick, Jr., under the Real Estate Law are REVOKED.
3. No costs of investigation or enforcement are assessed.

DATED: February 8, 2019

DocuSigned by:

26BAECCBE5EF478...

TIMOTHY J. ASPINWALL
Administrative Law Judge
Office of Administrative Hearings