

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED

SEP 11 2018

DEPARTMENT OF REAL ESTATE

By *X. Knapp*

* * *

In the Matter of the Accusation of:

ELIJAH AIZENBERG,

Respondent.

) DRE No. H-6650 SAC

) OAH No. 2018030797

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.

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.

This Decision shall become effective at 12 o'clock noon on OCT 02 2018.

IT IS SO ORDERED September 10, 2018

DANIEL SANDRI
ACTING REAL ESTATE COMMISSIONER



BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

ELIJAH AIZENBERG,

Respondent.

Case No. H-6650 SAC

OAH No. 2018030797

PROPOSED DECISION

This matter was heard before Dena Coggins, Administrative Law Judge, Office of Administrative Hearings, on July 31, 2018, in Sacramento, California.

Kyle Jones, Counsel for the Department of Real Estate (Department),¹ represented Tricia D. Parkhurst (complainant), a Supervising Special Investigator of the State of California.

Respondent Elijah Aizenberg (respondent) represented himself at the hearing.

Evidence was received, the record was closed, and the matter was submitted for decision on July 31, 2018.

FACTUAL FINDINGS

1. Respondent is presently licensed and has license rights under the Real Estate Law, Part 1 of Division 4 of the Business and Professions Code as a real estate salesperson. Respondent's real estate salesperson license was issued on April 8, 2014, and the license expired on April 7, 2018.

2. On February 26, 2018, complainant signed the Accusation in her official capacity, and filed it on March 20, 2018.² Complainant seeks to discipline respondent's real

¹ The Bureau of Real Estate became the Department of Real Estate on July 1, 2018.

² Before the hearing commenced, complainant moved to amend page one of the Accusation to change the case number relating to the conviction at issue from 2:12-CR-410-GEB to 2:12-CR-410-MCE. The motion was unopposed; the motion was granted and the Accusation was amended.

estate salesperson license on the grounds that: (1) he was convicted of a crime that is substantially related to the qualifications, functions, or duties of a real estate licensee; and (2) he engaged in conduct that constitutes fraud or dishonest dealing.

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 Conviction

4. On January 19, 2018, in the United States District Court in the Eastern District of California, Case No. 2:12-CR-410-MCE, on a plea of guilty, respondent was convicted of violating Title 18 of the United States Code section 1344, bank fraud, a felony. Respondent received credit for time served and he was placed on supervised release for a term of 24 months. Respondent was ordered to pay an assessment of \$100. No restitution was ordered.

5. The facts and circumstances surrounding respondent's conviction are that respondent knowingly devised, participated in, and executed a material scheme to defraud Bank of America, N.A., and to obtain money from the bank by means of materially false and fraudulent pretenses, representations and promises, and the concealment of material facts. Specifically, beginning on a date no later than on or about November 2007, and continuing to and including at least February 2008, respondent recruited two others (co-defendants) to obtain a \$490,000 home equity line of credit (HELOC) in the name of one of the co-defendants, who had no ownership interest in the property. Respondent created fraudulent documents and received fraudulently obtained proceeds from the scheme. After respondent received blank pre-signed checks tied to the HELOC account from one of the co-defendants, respondent caused the HELOC funds to be disbursed to the co-defendants and others using the pre-signed checks. The co-defendant who secured the HELOC defaulted on the loan and caused a loss to the lender in an amount over \$527,000.

Respondent's Evidence

6. Respondent is 39 years old. He was a mortgage officer and managed four offices from about 2000 to 2009, before starting a career as a real estate agent in 2014 at Intero Real Estate Services. According to respondent, he has never processed a "bad loan" or violated any rules or laws of real estate. He testified he takes his job seriously and that he has integrity and a great reputation in his community. He further testified that his clients are happy with his work, he has never had a grievance filed against him, and he acts as a mentor to other real estate agents. He has not been employed since about May 2018, when he resigned from his position at Intero Real Estate Services after his conviction was disclosed to the public by the media.

7. Respondent is married with two minor children and is the main provider for his family. He wants to be a good example for his children. Respondent volunteers in his community and sponsors a community youth baseball league.

8. When asked whether he committed bank fraud, respondent testified, "I was charged for it," but denied committing the crime. Respondent explained that he was cooperating with law enforcement relating to an organized crime syndicate prior to his conviction, and was an undercover agent for the Federal Bureau of Investigation from 2008 through 2012. In order to protect the safety of himself and his family from the organized crime syndicate, he had to be charged with bank fraud. However, he denied actually committing bank fraud. Respondent admitted to being good friends with one of his co-defendants who asked him to deposit checks into respondent's account, but claims that he was not aware of what his co-defendant was doing. He said he felt guilty for depositing the checks into his account. He stated, "I learned my lesson," which meant he has learned to be cautious and now knows he is not supposed to deposit money from another person into his bank account.

9. Respondent is currently on supervised release, which is ordered through January 2020. Respondent paid the \$100 court assessment relating to his conviction.

10. Edith Heaney Miller testified at the hearing and submitted a character reference letter. Mrs. Miller is the co-owner/operator of Intero Real Estate Services, a brokerage in Nevada County. She is not a licensed broker. Mrs. Miller first met respondent in 2014. She described respondent as a quick study, problem-solver, and hard-worker, who was promoted into assistant manager and manager positions. In her reference letter, Mrs. Miller described respondent as a "very dedicated father, loyal husband, and trusted friend." She went on to say that respondent is "an asset to the real estate community." Mrs. Miller is aware of respondent's conviction.

11. Respondent submitted nine additional character reference letters from friends, business associates, colleagues, and clients. The letters were admitted as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d). The letter writers describe respondent as professional, trustworthy, honorable and fair in his business dealings, ethical, and as a "man of integrity," who has satisfied repeat customers. Although not noted in their letters, respondent testified that the letter writers are aware he was convicted of bank fraud. He told the letter writers he did not actually commit the crime.

12. Respondent testified that it would be difficult to pay the investigation and enforcement costs requested by the Department, discussed more fully below, because he has not been working for nearly three months. His wife has been employed as an ultrasound technician for 17 years. He explained that she works part-time, but has started working extra hours while he has been unemployed. Also, he is relying on his savings account to pay his expenses.

Discussion

13. The Department has developed criteria to evaluate whether a licensee, against whom an administrative disciplinary proceeding for revocation or suspension of the license has been initiated based on a crime he committed, is rehabilitated. (Cal. Code of Regs., tit. 10, § 2912.) The following criteria relevant to respondent are:

(a) The time that has elapsed since commission of the acts(s) or offense(s):

(1) The passage of less than two years after the most recent criminal conviction or act of the licensee that is a cause of action in the [Department's] Accusation against the licensee is inadequate to demonstrate rehabilitation.

[¶] . . . [¶]

(e) Successful completion or early discharge from probation or parole.

[¶] . . . [¶]

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

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

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

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

[¶] . . . [¶]

(l) Significant and conscientious involvement in community, church or privately-sponsored programs

designed to provide social benefits or to ameliorate social problems.

(m) Change in attitude from that which existed at the time of the commission of the criminal acts in question as evidenced by any or all of the following:

(1) Testimony and/or other evidence of rehabilitation submitted by the licensee.

(2) Evidence from family members, friends and/or other persons familiar with the licensee's previous conduct and with subsequent attitudes and/or behavioral patterns.

[¶] . . . [¶]

(5) Absence of subsequent felony convictions, or misdemeanor convictions, or other conduct that provides grounds to discipline a real estate licensee, which reflect an inability to conform to societal rules when considered in light of the conduct in question.

14. Respondent submitted many character reference letters from friends, business associates, and colleagues that support his testimony that he has a good business reputation, integrity, and is fair in his business dealings. He is involved in his community and fulfills his parental and familial responsibilities. Prior to leaving his current employment, he was the main provider for his family. Also, the evidence did not show that he has received any subsequent criminal convictions or that he has been involved in any other conduct that shows an inability to conform to societal rules. Respondent has also paid the court assessment related to his conviction.

15. However, respondent's conviction for bank fraud is recent and the circumstances underlying the conviction are deeply concerning. Respondent devised, participated in, and executed a scheme to defraud a bank by recruiting others to obtain a HELOC for a property without having an ownership interest in the property. He created fraudulent documents as part of the scheme and used the fraudulently obtained HELOC funds to disburse money to others. Although the events underlying his conviction took place over 10 years ago, he was not convicted of the crime until January 2018. Thus, it has been less than one year since his conviction. Moreover, he is still on supervised release, and will be until January 2020. As a result, there has been an insufficient amount of time to evaluate his rehabilitation. See *In re Gossage* (2000) 23 Cal.4th 1080, 1099 ["Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a bar applicant did not commit additional crimes . . . while on probation or parole."]

16. According to respondent, he did not commit bank fraud and his conviction was a ploy by respondent and law enforcement to protect himself and his family from organized crime. However, evidence submitted by respondent from the criminal case shows that respondent was the subject of a federal investigation involving mortgage fraud, and it was not until respondent became aware of the investigation that he began cooperating with law enforcement. The evidence submitted in his criminal case did not support his testimony that the only reason he was charged with bank fraud was to protect himself and his family.

Respondent provided a statement to the Department that was attached to his February 24, 2018 application to renew his license. In his statement, respondent discussed the circumstances surrounding his conviction. He stated, "Because we couldn't obtain the HELOC application for the past 4 years my attorney assured me it's in my best interest to plea [*sic*] guilty to avoid going into a [trial]. In return the district US attorney promised to keep my case sealed and write the letter to BRE [Department] to protect my License." Respondent made no mention of a ruse to plead guilty to bank fraud in order to protect himself or his family because of his cooperation with law enforcement. Respondent's failure to accept responsibility for his actions demonstrates a lack of rehabilitation. (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"].)

Furthermore, respondent pled guilty to bank fraud. Respondent's denial that he committed bank fraud is an attempt to impeach his conviction. Respondent's plea is conclusive evidence of guilt for the purpose of imposing administrative discipline or denial of licensure. (See *Arneson v. Fox* (1980) 28 Cal.3d 440, 449 [proof of a conviction "stands as conclusive evidence of [his] guilt of the offense charged"].)

17. 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.) When all of the evidence is weighed and considered, respondent did not present sufficient evidence of rehabilitation to demonstrate it would be consistent with the public health, safety and welfare to impose any disciplinary action other than the revocation of his real estate salesperson license, at this time.

Costs of Investigation and Enforcement

18. Pursuant to Business and Professions Code section 10106, complainant has requested costs of investigation and enforcement in the amount of \$1,118.90. Specifically, the Board incurred \$258.10, in Attorney General costs for enforcement of the matter, and \$860.80 for investigation costs. The costs of investigation and enforcement are supported by declarations dated March 1, 2018, and July 30, 2018, and are accompanied by documents describing the general tasks performed, the time spent on each task, and the method of calculating the costs.

19. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the Court identified the factors to be considered in determining the reasonableness of costs pursuant to statutory provisions. The factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced; the licensee's subjective good faith belief in the merits of his position; whether the licensee has raised a colorable challenge to the proposed discipline; the financial ability of the licensee to pay; and whether the scope of the investigation was appropriate to the alleged misconduct. In this case, all of the charges were established. Although respondent had a subjective good faith belief in the merits of his position, his belief was not supported by the evidence he submitted. Respondent raised no persuasive challenge to the proposed discipline and he did not establish an inability to pay the costs of investigation and enforcement, as he is financially supported by his wife and his savings. Under all of the facts and circumstances, assessment of the costs requested by the Department is reasonable and the activities claimed were necessary to the investigation and enforcement of the case.

LEGAL CONCLUSIONS

1. Complainant has the burden of proving each of the grounds for discipline alleged in the Accusation. (*Small v. Smith* (1971) 16 Cal.App.3d 450, 457.) And he must do so by producing clear and convincing evidence to a reasonable certainty in support of those allegations. (*Realty Projects, Inc. v. Smith* (1973) 32 Cal.App.3d 204, 212 [discussing the appropriate standard of proof in license discipline proceedings].) Clear and convincing evidence is evidence that leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478.)

2. A real estate salesperson license may be suspended or revoked if the holder has been convicted of a crime that is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued. (Bus. & Prof. Code, §§ 490, subd. (a); 10177, subd. (b).) A licensee has licensing rights for two years following the expiration of a license. (Bus. & Prof. Code, § 10201.) Pursuant to Business and Professions Code section 118, the Department has continuing jurisdiction over an expired license "to institute or continue a disciplinary proceeding against the licensee upon any ground provided by law or to enter an order suspending or revoking the license or otherwise taking disciplinary action against the licensee on any such ground." The Department therefore has continuing jurisdiction over respondent's license.

3. In California Code of Regulations, title 10, section 2910, the Department has set forth criteria for determining whether a conviction is substantially related to the qualifications, functions, or duties of a licensee. Subdivision (a)(4) of section 2910, in relevant part, provides that a conviction will be deemed to be substantially related if it evidences "the employment of bribery, fraud, deceit, falsehood or misrepresentation to achieve an end."

4. As set forth in Factual Findings 4 and 5, respondent's bank fraud conviction involved the fraudulent taking, obtaining, appropriating or retaining of funds or property belonging to another and involved fraud to achieve an end. Therefore, respondent's bank fraud conviction is substantially related to the qualifications, functions, and duties of a real estate salesperson under California Code of Regulations, title 10, section 2910, subdivision (a)(4). Consequently, cause exists to revoke respondent's license under Business and Professions Code sections 490, subdivision (a), and 10177, subdivision (b).

5. Business and Professions Code section 10177, subdivision (j), provides that a real estate license may be suspended or revoked if the licensee "engaged in any other conduct, whether of the same or a different character than specified in this section, that constitutes fraud or dishonest dealing." As set forth in Factual Findings 4 and 5, respondent's conduct that led to his conviction constituted fraud. Accordingly, cause exists to revoke respondent's license under Business and Professions Code section 10177, subdivision (j).

6. Respondent did not provide sufficient evidence to show he has been sufficiently rehabilitated to warrant any other discipline besides revocation at this time. After considering all of the evidence, in order to ensure that the public health, safety, and welfare are adequately protected, respondent's license must be revoked.

7. As set forth in Factual Findings 18 and 19, complainant reasonably incurred investigation and enforcement costs totaling \$1,118.90. Accordingly, assessment of costs in the amount of \$1,118.90 against respondent is reasonable and appropriate.

ORDER

1. The license and licensing rights of Elijah Aizenberg under the Real Estate Law are revoked.


2. Within 30 days of the final decision in this matter, respondent shall pay the Department of Real Estate the amount of \$1,118.90, as reimbursement for the costs of investigation and enforcement of this matter or enter into a payment plan approved by the Department.

DATED: August 15, 2018

RECEIVED
Bureau of Real Estate

AUG 16 2018

Sac Legal

DocuSigned by:

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DENA COGGINS
Administrative Law Judge
Office of Administrative Hearings