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BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED

APR 24 2019

DEPARTMENT OF REAL ESTATE
By *E. Krupp*

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In the Matter of the Application of:	)	DRE No. H-6696 SAC
MICHAEL JAMES WISCHMEYER,	)	OAH No. 2018090354
Respondent.	)	

DECISION

The Proposed Decision dated March 25, 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 matter.

The application for a real estate salesperson license is denied. The earliest date on which the applicant may reapply for a license is one year from the effective date of this Decision. If and when application is again made for this license, all competent evidence of rehabilitation presented by the Respondent will be considered by the Real Estate Commissioner.

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

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11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

MAY 15 2019

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

IT IS SO ORDERED April 22, 2019

DANIEL J. SANDRI
ACTING REAL ESTATE COMMISSIONER

Daniel J. Sandri

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

MICHAEL JAMES WISCHMEYER,

Respondent.

Case No. H-6696 SAC

OAH No. 2018090354

PROPOSED DECISION

This matter was heard before Administrative Law Judge Erin R. Koch-Goodman, Office of Administrative Hearings, State of California, on January 30, and February 21, 2019, in Sacramento, California.

Adriana Z. Badilas, Real Estate Counsel, Department of Real Estate (Department), represented Tricia Parkhurst (complainant), Supervising Special Investigator, Department.

Frank M. Buda, Attorney at Law, Law Office of Frank M. Buda, represented Michael James Wischmeyer (respondent), who was present at hearing.

Evidence was received, the record closed, and the matter submitted for decision on February 21, 2019.

FACTUAL FINDINGS

1. On January 5, 2018, respondent filed an application with the Department for a real estate salesperson license, disclosing three criminal convictions, and a prior application denial for licensure by the Department in 2015. On February 26, 2018, the Department sought additional information from respondent. On March 7, 2018, respondent submitted additional information to the Department, including a completed Interview Information Statement and three Conviction Detail Reports, identifying the following convictions: a 1998 Driving While Impaired (DWI) in North Carolina, and a 2010 Driving Under the Influence (DUI) and a 2015 Embezzlement in Nevada.

2. On June 8, 2018, complainant, in her official capacity, made and served the Statement of Issues on respondent, seeking to deny his application based upon his convictions of crimes substantially related to the duties, qualifications, and functions of a real

estate licensee. On July 6, 2018, respondent submitted a request for hearing and notice of defense.

Criminal Convictions

3. On July 17, 1998, in the Superior Court, Wake County, State of North Carolina, Case No. 97CR044147, respondent was convicted, on a guilty plea, of violating North Carolina General Statute (GS) 20-138.1, subdivision (a) (DWI), a misdemeanor. The court sentenced respondent to 30 days in jail, suspended, and one year of probation and ordered respondent to pay fines and fees (\$180).

4. The circumstances of the underlying crime occurred on July 12, 1997, when respondent attended an all-day concert with friends, and drank beer all day, until at least early afternoon. When they left the concert, respondent's friends were drunk and respondent offered to drive his friend's vehicle. On the way back to his friend's house, respondent was stopped by the police and found to be driving while under the influence of alcohol.

5. On August 23, 2010, in the Justice Court of Tahoe Township, County of Douglas, State of Nevada, Case No. 10-CR-0239, respondent was convicted, on a no contest plea, of violating Nevada Revised Statute (NRS) 484.379¹, subdivisions (1)(a), (b), and (c) (DUI), a misdemeanor. The court sentenced respondent to 90 days in jail, suspended, and placed respondent in Traffic Court Probation. In addition, the court ordered respondent to complete 50 hours of community service; obtain a substance abuse evaluation; attend DUI School, one Victim Impact Panel, and individual therapy (at least once per week for six months); and pay fines and fees (\$1,697). Respondent completed all terms of sentencing on September 6, 2011.

6. The circumstances of the underlying crime occurred on April 1, 2010, when respondent was stopped by Douglas County Deputy Sheriff E. Eissinger for driving 55 miles per hour (mph) in a 25 mph zone. Deputy Eissinger made contact with respondent, and observed bloodshot and watery eyes, slurred speech, and a strong odor of alcohol. Deputy Eissinger administered Field Sobriety Tests to respondent; respondent complied and displayed signs of intoxication. A Preliminary Breath Test was completed; respondent had a Blood Alcohol Content (BAC) of .151-percent. Respondent was arrested and transported to jail.

7. On September 1, 2015, in the Justice Court of Tahoe Township, County of Douglas, State of Nevada, Case No. 15-CR-0472, respondent was convicted, on a no contest plea, of violating NRS 205.300 (embezzlement), a misdemeanor. The court ordered respondent to pay a fine (\$640) and restitution (\$1,373.51).

¹ NRS 484.379 was replaced by NRS 484C.110 on October 1, 2009.

8. The circumstances of the underlying crime occurred between May 24, 2015, and June 7, 2015, while respondent was working as a bartender for Cabo Wabo, a bar inside Harrah's Casino. While at work, for 15 days and during 104 transactions, respondent charged his friends for drinks (e.g., 10 drinks at \$5 each for a total of \$50), but then recorded fewer drinks into the computer register (e.g., 8 drinks at \$5 for a total of \$40), keeping the difference for himself (e.g., \$10). The total respondent kept from the till was approximately \$1,373.51.

Matter in Aggravation

9. On October 5, 2015, respondent filed an application with the Department for a real estate salesperson license, disclosing two Nevada criminal convictions: the 2010 DUI and the 2015 Embezzlement. On March 18, 2016, the Department sought additional information from respondent regarding his criminal history. On April 4, 2016, respondent submitted additional information to the Department, including a completed Interview Information Statement and three Conviction Detail Reports, identifying three criminal convictions: a 1998 DUI in North Carolina, and the 2010 DUI and the 2015 Embezzlement in Nevada. On May 24, 2016, the Department issued a Notice of Denial to respondent, based upon his convictions of crimes substantially related to the duties, qualifications, and functions of a real estate licensee. Respondent did not appeal.

Respondent's Evidence

10. Respondent is 44 years old. He lives in South Lake Tahoe, and is single, but engaged to be married. Today, respondent works, on and off, as a framer for Smith Construction; but primarily, respondent is self-employed, rehabilitating houses to market as short-term rentals. Currently, respondent owns two short-term rental homes in the South Lake Tahoe area. He has also helped his fiancée purchase and rehabilitate a third short-term rental home in the South Lake Tahoe area. Respondent would like to become licensed as a contractor and real estate agent, so he can purchase, rehabilitate, and sell homes. On January 7, 2019, respondent applied to the Contractors State License Board for a Class B – General Contractors license; the license is pending.

11. At hearing, respondent acknowledged his three convictions, expressing his regret about his decisions to drink and drive. He explained the circumstances of his embezzlement conviction as "giving his friends free drinks and keeping the extra cash"; he voiced embarrassment about his behavior. He was apologetic about his failure to include his 1998 conviction on his 2015 application, indicating that he simply forgot about the conviction; but at no time was he attempting to hide anything from the Department. Respondent recalls completing the application quickly without the necessary attention to detail.

12. Respondent has tried to make amends for his crimes by volunteering in the Lake Tahoe community, by picking up litter for Keep Tahoe Blue and the League to Save Lake Tahoe; as well as donating his time and photography to a charity run once a year and

local Ted Talks once or twice a year. Respondent has also attempted to expunge his convictions. Under North Carolina law, respondent is expressly precluded from doing so. A conviction under G.S. 20-138.1, subdivision (a) (DWI) is classified, under G.S. 20-4.01, subdivision (24a), as an offense involving impaired driving, and cannot be expunged by operation of GS 15A-145.5, subdivision (a)(8a). However, under Nevada law, pursuant to NRS 179.245, subdivision (1)(e), respondent had the ability to expunge his 2010 DUI conviction, after seven years, but under subdivision 5, only "[i]f the court finds that, in the period prescribed in subsection 1, the petitioner has not been charged with any offense for which the charges are pending or convicted of any offense, except for minor moving or standing traffic violations." In respondent's case, he was convicted of embezzlement less than seven years after his DUI conviction, making his DUI ineligible for expungement. That said, under NRS 179.245, subdivision (g), respondent's embezzlement conviction was eligible for expungement on or after September 1, 2016. On or about November 20, 2017, respondent contacted the Law Office of David R. Houston, Reno, Nevada, to obtain assistance in expunging his 2015 embezzlement conviction. Mr. Houston continues to pursue expungement of the 2015 conviction for respondent, representing, in a letter, that the process should be completed in early 2019.

13. At hearing, respondent offered letters of recommendation and character testimony from Laura Wischmeyer Cochran, sister; Melissa Perez, fiancée; and Duggan Smith, real estate broker, contractor, property investor, and friend. Ms. Cochran believes her brother to be "caring, loving, honest, genuine and trustworthy." She is aware of his convictions, and recalls respondent expressing remorse for his crimes. Nonetheless, Ms. Cochran "believe[s] that Michael is an ethical, honest, and professional individual."

14. Ms. Perez has known respondent for 15 years; they have been romantically involved for the past three years. Ms. Perez sees respondent as:

loving, hardworking, honest, genuine and a true example of what you would look for in [a] friend, husband, brother, father, business partner, and person. He exemplifies the characteristics of a person who is kind, compassionate and trustworthy, he has learned from prior mistakes. He lives life to the fullest and makes sure everything is completed with the utmost diligence. I have also worked with him in business, managing our investments. In [e]very step of the process he has been honest, diligent, professional, and I have never seen him under the influence of any substances in any of our business dealings. He has integrity and ethics.

Ms. Perez is aware of respondent's convictions, and recalls respondent expressing remorse for his crimes. Mr. Perez believes respondent "has moved on to exemplify his true beliefs in being a genuine, honest, trustworthy person."

15. Mr. Smith is respondent's supervisor at Smith Construction. He is also respondent's friend of 20 years, and best friend for the last five years. Mr. Smith described respondent as "thoughtful, honest, reliable, trustworthy, and a role model for my kids to look up to." Mr. Smith is aware of respondent's convictions, and recalls respondent expressing remorse for his crimes; however, Mr. Smith acknowledged learning about respondent's 1998 DWI conviction when respondent's 2015 application was denied. Nonetheless, Mr. Smith "still believe[s] that Michael is an honest and professional individual [and] ethical and truthful person." Mr. Smith is a real estate broker and is willing to closely supervise respondent as a real estate agent.

16. Respondent also offered a letter of recommendation from Colonel J.W. McClung, United States Marine Corps, Retired, a family friend. Colonel McClung has watched respondent grow up, noting respondent enlisted in the Marines, completing recruit training and an enlistment in the Marine Corps Reserves (1993-1997). Colonel McClung described respondent as "organized, responsible; [with] outstanding people skills; confident, highly motivated, proactively helpful, and extremely ambitious." Colonel McClung makes no mention of respondent's convictions or his rehabilitation following his convictions. As such, his letter is entitled to less weight with regard to the authors' assessment of respondent's character. (*Seide v. Committee of Bar Examiners of the State Bar of California* (1989) 49 Cal.3d 933, 940 ["If the character witnesses were not aware of the extent or seriousness of petitioner's criminal activities, their evaluation of his character carry less weight"].)

Discussion

17. In 1998, respondent was convicted of DWI in North Carolina, and in 2010, respondent was convicted of DUI in Nevada: both alcohol related offenses. Respondent expressed remorse for his conduct and has completed all court ordered rehabilitation. In 2015, respondent was convicted of embezzlement in Nevada, and he has paid fines and restitution to his prior employer. Respondent was motivated to "give free drinks to his friends" visiting from Australia, because he was trying to impress/be kind to them. That said, embezzlement involves fraud, deception, and dishonesty, raising concerns about respondent's ability to be honest with potential clients and the Department. The Department cites to respondent's 2015 application to support its concern, noting respondent failed to disclose his 1998 DWI conviction therein. Also troublesome, while respondent willingly admitted his criminal convictions, he offered no recognition of the harm he caused to the public by his criminal conduct, including the potential loss of life and property damage caused by driving drunk on two separate occasions.

18. At hearing, respondent offered four letters of support and three character witnesses. All letters attribute fine qualities to respondent. Three witnesses, and their letters, acknowledge respondent's convictions, still finding him to possess unimpeachable qualities. However, none of the witnesses offered any explanation or insight into why respondent drank alcohol and then drove a vehicle in 1998, and again in 2010, and how, since then, he has implemented life changes to ensure he will not act with the same disregard for himself,

his passengers/friends, and the public, in the future. There was also no plausible evidence offered as to what motivated respondent to steal money from his employer in 2015, and/or why he would not make such a decision again in the future. Respondent knew his character witnesses when he made the decision to embezzle money from his employer, but those friends did not deter respondent from engaging in illegal conduct. If respondent needed money, for any reason, it appears that his sister, girlfriend, and best friend were more than able to assist him. But because respondent did not turn to his supporters in his time of need, whether for money or counsel, the Department has no assurances that respondent will not, once again, make the independent decision to defraud a potential client or the Department.

19. Notwithstanding the above, respondent has completed all terms of sentencing. He has not had contact with law enforcement since his conviction in 2015. Respondent continues to partake in real estate coursework. He has also engaged in supporting the South Lake Tahoe community by volunteering his time.

20. Unfortunately, respondent cannot expunge his North Carolina conviction, because North Carolina law includes such a prohibition. However, he could have expunged his 2010 DUI conviction after seven years, if he had not been convicted of another crime in the same timeframe, but he did. Currently, he is working on getting his 2015 embezzlement conviction expunged, but the process is not yet complete. Even still, respondent was convicted of embezzlement less than four years ago, when he was 40 years old and an adult. In 2015, respondent was old enough to understand right from wrong, but he engaged in fraudulent activity anyway. Today, respondent has not yet shown the Department he can be trusted. Considering all of the above, respondent has failed to demonstrate that he is a good candidate for licensure at this time.

LEGAL CONCLUSIONS

1. "As in ordinary civil actions, the party asserting the affirmative in an administrative hearing has the burden of proof going forward and the burden of persuasion by a preponderance of the evidence." (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.) Respondent bears the burden of proof that his application should be approved.

Applicable Laws

2. Business and Professions Code section 480, subdivision (a)(1), allows a board to "deny a license on the grounds that the applicant has: 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."

3. Business and Professions Code section 10177 authorizes a board to deny the issuance of a license to an applicant, who has:

(b)(1) Entered a plea of guilty or no contest 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.

[¶] . . . [¶]

(j) Engaged in any other conduct, whether of the same or of a different character than specified in this section, that constitutes fraud or dishonest dealing.

4. requires: California Code of Regulations, title 10, section 2910, subdivision (a),

When considering whether a license should be denied, . . . the crime or act shall be deemed to be substantially related to the qualifications, functions, or duties of a licensee of the Bureau within the meaning of Sections 480 and 490 of the Code, if it involves:

(1) The fraudulent taking, obtaining, appropriating or retaining of funds or property belonging to another person.

[¶] . . . [¶]

(4) The employment of bribery, fraud, deceit, falsehood or misrepresentation to achieve an end.

[¶] . . . [¶]

(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.

Substantial Relationship

5. Respondent was convicted of DWI in 1998 in North Carolina and in 2010 in Nevada, as set forth in Factual Findings 3 and 5. Both convictions are alcohol related, and are substantially related to the qualifications, functions and duties of a real estate licensee pursuant to California Code of Regulations, title 10, section 2910, subdivision (a)(10) and (11).

6. Respondent was convicted for embezzlement in 2015 in Nevada, as set forth in Factual Finding 7. An embezzlement conviction is substantially related to the qualifications, functions and duties of a real estate licensee pursuant to California Code of Regulations, title 10, section 2910, subdivision (a)(1), (4), (8), and (10).

Cause for Discipline

7. Based upon Factual Findings 3, 5, and 7, cause for denial of respondent's application for a real estate salesperson license exists pursuant to Business and Professions Code sections 480, subdivision (a), and 10177, subdivision (b), in that respondent has three convictions, 1998 DWI, 2010 DUI, 2015 embezzlement, that are substantially related to the qualifications, functions, or duties of a real estate licensee.

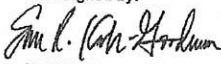
7. Based upon Factual Finding 8, cause for denial of respondent's application for a real estate salesperson license exists pursuant to Business and Professions Code section 10177, subdivision (j), in that respondent has engaged in conduct that constitutes fraud or dishonest dealing.

8. The Department has developed guidelines for use in evaluating the rehabilitation of an applicant. (Cal. Code. Regs., tit. 10, § 2911, subs. (a)(1)-(14).) In consideration of these guidelines, the following facts are relevant. Between 1998 and 2015, respondent was convicted of three misdemeanor crimes. Respondent was twice convicted of driving under the influence of alcohol; he completed court mandated rehabilitation. In 2015, he was convicted of embezzlement, a crime involving fraud. He has paid fees and restitution to his employer, Cabo Wabo. His conviction for embezzlement was on September 1, 2015: three and one-half years ago. He is unable to expunge his two alcohol-related convictions, one because the law prohibits such action, and one as a consequence of his own bad act. He is currently working on getting his 2015 embezzlement conviction expunged, but the process is not yet complete. Notwithstanding the above, respondent has provided inadequate evidence to suggest he will make good, honest decisions going forward; in other words, an insufficient amount of time has passed since respondent, at age 40, chose to steal money from his employer in order to "impress his friends." In 2015, respondent should have known better. As such, respondent has not yet shown the Department he can be trusted. Considering all of the above, it would be inconsistent with the public safety and welfare to issue respondent a real estate salesperson license at this time, even on a probationary basis.

ORDER

The application of respondent Michael James Wischmeyer for a license to act as a real estate salesperson in the State of California is DENIED.

DATED: March 25, 2019

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ERIN R. KOCH-GOODMAN
Administrative Law Judge
Office of Administrative Hearings