

MAY 20 2019

DEPARTMENT OF REAL ESTATE

BEFORE THE DEPARTMENT OF REAL ESTATE By *g dew*

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of:)	DRE No. H-6708 SAC
)	
JOHN MICHAEL CARDOZA, II,)	OAH No. 2018110822
)	
Respondent.)	

DECISION

The Proposed Decision dated April 08, 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 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.

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.

This Decision shall become effective at 12 o'clock noon on JUN 10 2019

IT IS SO ORDERED May 16, 2019

DANIEL J. SANDRI
ACTING REAL ESTATE COMMISSIONER

Daniel J. Sandri

FILED

MAY 10 2019

DEPARTMENT OF REAL ESTATE
By R. den

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of:

JOHN MICHAEL CARDOZA II,

Respondent.

Case No. H-6708 SAC

OAH No. 2018110822

PROPOSED DECISION

Administrative Law Judge Sean Gavin, Office of Administrative Hearings, State of California, heard this matter on March 19, 2019, in Sacramento, California.

Certified Legal Intern Darlene Tran represented complainant Tricia D. Parkhurst, Supervising Special Investigator of the State of California (complainant), and was supervised by Megan Olsen, Real Estate Counsel.

Attorney Jim Brunello represented John Michael Cardoza II (respondent), who was present.

The record was closed and the case was submitted for decision on March 19, 2019.

FACTUAL FINDINGS

1. On December 8, 2015, the Department of Real Estate (DRE) issued salesperson license number S/01981862 (license) to respondent. The license is in full force and effect and will expire on December 7, 2019, unless renewed or revoked.
2. On September 12, 2018, complainant, acting solely in her official capacity, filed an Accusation against respondent wherein complainant alleged cause to discipline respondent's license on grounds that he was convicted of a crime that is substantially related to the qualifications, functions, or duties of a real estate licensee, and that he failed to report his criminal conviction to the DRE.
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 June 13, 2017, in the Superior Court of California, County of Solano, Case No. VCR229522, respondent was convicted, on his plea of nolo contendere, of violating Vehicle Code section 20002, subdivision (a) (hit and run driving), a misdemeanor. Respondent was sentenced to 36 days in jail, with credit for time served. Respondent was placed on two years of informal probation, which is scheduled to end in June 2019. He was also ordered to pay restitution, fines, and fees.

5. The facts underlying the conviction occurred on May 27, 2017, when respondent was involved in an automobile collision. Following the collision, respondent drove his vehicle away from the crash site to a nearby cross street and turned off the main roadway. Respondent did not call 911 or attempt to approach the other vehicle or driver. The responding police officer only became aware of respondent's presence down the street and away from the crash site after a passerby alerted the officer that a damaged vehicle was parked a few blocks away. The police report notes that "for the 40 minutes [the officer] was on scene assist[ing] the other party, [respondent] made no attempt to come back to the crash site or to notify the police." Approximately 40 minutes after police arrived on the scene, an officer drove to respondent's location, determined he had left the scene of the accident, and arrested him.

Respondent's Failure to Report Criminal Conviction

6. Respondent was required to report his criminal conviction to the DRE, in writing, within 30 days of the conviction. (Bus & Prof. Code, § 10186.2, subds. (a)(1)(B); and (a)(2).) Respondent failed to do so.

Matters in Aggravation

7. On November 29, 2012, in the Superior Court of California, County of Sacramento, Case No. 12T05808, respondent was convicted, on his guilty plea, of violating Vehicle Code section 23152, subdivision (b) (driving with a blood alcohol level of 0.08 percent or more), a misdemeanor (DUI). On May 21, 2015, in the Superior Court of California, County of Sacramento, Case No. 15M02930, respondent was again convicted, on his plea of nolo contendere, of DUI. Respondent was placed on four years of informal probation, which is scheduled to end in May 2019. He was also ordered to pay restitution, fines, and fees. The underlying circumstances of respondent's second conviction occurred on December 17, 2014, when respondent drove his vehicle with a blood alcohol content of 0.25 percent.

Respondent's Evidence

8. Respondent is 32 years old. He lives in Sacramento with his mother, sister, and brother-in-law. Respondent is deeply devoted to his family, taking on the primary

caregiving responsibilities for his mother after she was diagnosed with a severe disability in 2002.

9. In 2008, as a way to encourage his mother to engage in an active lifestyle, respondent suggested that she take a class at Sacramento City College, where he was then a student. Respondent's mother chose a real estate class, and respondent took it with her. In doing so, respondent discovered that he shared her interest in the subject matter. In Spring 2014, he took another real estate course, but he did not yet view real estate as a career path.

10. After respondent's second DUI, in 2015, when he was injured after driving his truck into a concrete wall at approximately 40 miles per hour, he knew that "something needed to change." In January 2015, respondent met Daniel Mueller, a real estate agent with Century 21. Mr. Mueller invited respondent to visit his office to see if he wanted to explore a career in real estate, and respondent accepted. In May 2015, following respondent's second DUI conviction, he began to separate himself from his previous lifestyle. He reduced his hours as a bartender, began interning with Mr. Mueller, studied for his real estate licensure exam, and applied for his real estate salesperson license. Respondent disclosed his DUIs on his application, and the DRE issued him an unrestricted license on December 8, 2015.

11. On May 27, 2017, at approximately 4:30 a.m., respondent was involved in a collision with another vehicle.¹ The impact of the collision was so strong that it broke the front axle of respondent's vehicle and caused his left front tire to dislodge. Respondent feared further danger from other motorists and drove approximately 600 feet to a nearby cross street, where he turned and parked. He stated that he did not intend to flee the scene, but he did not explain why he did not return to the site of the accident on foot after reaching a point of safety with his vehicle. He could see the other vehicle and driver from his vantage point, and at one point he walked about 50 feet down the road in their direction before turning back. At no point did he call 911 or attempt to approach the other driver, either to render assistance or exchange contact information. Instead, respondent observed a police car approaching the scene of the crash on the opposite side of the road and waved his arms above his head to signal his presence. The officer approached him 40 minutes later.

12. At the time of the collision, respondent's driver's license was suspended. Respondent testified that he did not know as of the date of the accident that his license had been suspended. He provided the officer a California Identification Card and not a driver's license. Respondent testified that he had a driver's license, but not with him at that time. He did not explain why he was not carrying his driver's license. Respondent was also not insured at the time of the collision.

¹ Each driver says the other driver swerved into the wrong lane and caused the collision, but the fault for the underlying collision is not an issue in this case and is not addressed in this decision.

13. Respondent has begun a payment plan to pay restitution related to his hit-and-run conviction, paying \$75 per month for the past approximately six months. At the hearing he did not know the total amount owed.

14. Following respondent's conviction for hit-and-run driving, he did not notify the DRE of the conviction. He testified that he was aware of his obligation to notify the DRE of his conviction, but unaware that he was required to do so within 30 days. Rather, respondent believed "it would show" when it came time to renew his license in December 2019. At hearing, respondent produced a copy of his initial Salesperson Exam/License Application with the DRE. This exhibit, which respondent read and signed on May 15, 2015, indicates, in relevant part, "I understand that it is my obligation to notify the Bureau upon licensure within 30 days in writing or by filing form RE 238 of any conviction, indictment, or information charging a felony [...] pursuant to Business and Professions Code Section 10186.2."

CHARACTER WITNESSES

15. Multiple witnesses testified as to respondent's positive characteristics. Mr. Mueller, who has acted as a mentor to respondent for four years but has no formal supervisory role, characterized him as attentive, eloquent, honest, detail-oriented, and forthright. He described respondent's paperwork and documentation skills as "tight." Mr. Mueller does not view respondent as a risk to the public, and he trusts respondent with his own clientele. Mr. Mueller believes that "any daily work that isn't completed is a failure," and he believes respondent also subscribes to that precept.

16. Respondent's mother, Suzanne Archer Cardoza, characterized respondent as "my special-order child" and described the various ways that he assists her with respect to her disability. She has observed that respondent "has grown up" since his second DUI conviction in 2015 and credits his passion for his real estate career as a key positive factor in that growth.

17. Respondent's sister, Stephanie Stacy, also testified on his behalf. Respondent moved into her house after his second DUI conviction, and she has observed a change in his attitude and demeanor as well. She believes respondent has "found a passion in life," and that he is now more responsible, accountable, and helpful than he was prior to embarking on a real estate career. Ms. Stacy's husband, Zachary Stacy, also testified and echoed those sentiments. Mr. Stacy has observed "a passion and pride" in respondent with respect to his real estate career and believes his most recent DUI conviction was "a real wake-up call."

18. Finally, Ms. Corecia Davis, the Vice President of Human Resources at respondent's brokerage, Century 21, testified that she would be available to oversee and enforce any licensing restrictions the DRE placed on respondent's license. Ms. Davis testified as to the robust regulatory enforcement apparatus already in place at Century 21 and opined that incorporating any reasonably foreseeable restrictions on respondent's license would not present a problem.

Discussion

19. Pursuant to California Code of Regulations, title 10, section 2910, subdivision (a)(8), a crime is substantially related to the qualifications, functions, or duties of a licensee if it involves doing an 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. Applying this standard, respondent's crime of hit-and-run driving is substantially related to the qualifications, functions, or duties of a licensee. Pursuant to Vehicle Code section 20002, subdivision (a), hit-and-run driving occurs when a driver of a vehicle involved in an accident resulting in damage to property does not:

"immediately [...] [l]ocate and notify the owner or person in charge of that property of the name and address of the driver and owner of the vehicle involved and, upon locating the driver of any other vehicle involved or the owner or person in charge of any damaged property, upon being requested, present his or her driver's license, and vehicle registration, to the other driver, property owner, or person in charge of that property."

This notification requirement is "designed to prevent the driver of a car involved in an accident from leaving the scene without furnishing information as to his identity and to prevent him from escaping liability." (*People v. Bautista* (1990) 217 Cal.App.3d 1, 7.) While respondent's decision to "stop the vehicle at the nearest location that will not impede traffic or otherwise jeopardize the safety of other motorists" (Veh. Code, § 20002, subd. (a)) was statutorily-authorized conduct and therefore not blameworthy, his subsequent failure to return to the crash site to give his contact information to the other driver was an unlawful act with the intent of conferring a financial or economic benefit upon respondent, namely the avoidance of liability. "It is more than likely that one who is involved in an injury-accident and leaves the scene before giving the required identifying information is seeking to evade civil or criminal prosecution." (*People v. Bautista, supra*, 217 Cal.App.3d at 7.)² In this case, respondent was uninsured, driving with a suspended license, and on criminal probation. Respondent's testimony that he did not know his license was suspended at the time was not credible, especially given that he readily produced to the responding officer a California Identification Card instead of a license and was unable to explain where his license was or why it was not with him. Under these circumstances, it is a reasonable inference that respondent was attempting to avoid liability by leaving the scene and parking blocks away.

20. Pursuant to California Code of Regulations, Title 10, section 2912, the DRE has adopted criteria for determining whether a licensee who has been convicted of a crime that is substantially related to the qualifications, functions, or duties of a real estate licensee is sufficiently rehabilitated such that he is capable of continuing to engage in licensed

² Though *Bautista* dealt with injury-accidents under Vehicle Code section 20001, the same reasoning applies to property-damage accidents under section 20002.

activities in a manner consistent with public protection, safety, and welfare. (Bus. & Prof. Code, § 482, subd. (b)). The relevant criteria include:

(a) The time that has elapsed since commission of the act(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 Bureau's Accusation against the licensee is inadequate to demonstrate rehabilitation.

(b) Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the licensee, or escheat to the State of these monies or other properties if the victim(s) cannot be located.

(c) Expungement of the conviction(s) which culminated in the administrative proceeding to take disciplinary action.

[¶] ... [¶]

(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.

[¶] ... [¶]

(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. . .

21. Respondent has paid the court-imposed fines and has a stable family life wherein he fulfills his familial responsibilities. Nevertheless, he failed to demonstrate satisfaction of many of the applicable rehabilitation criteria: less than two years have passed since the conviction, which is inadequate to demonstrate rehabilitation (subd. (a)); respondent has begun to make restitution, but has not completed it and does not know when he will (subd. (b)); the conviction has not been expunged (subd. (c)); respondent has thus far complied with the terms of his criminal probation, but the two-year term is not yet completed (subd. (e)); respondent has the same social and business relationships now that he had at the time of the conviction and underlying conduct (subd. (i)); and respondent did not present any evidence of involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems (subd. (l)).

22. Additionally, respondent failed to take full responsibility for his conduct (subd. (m)). He denied any wrongdoing with respect to his actions following the traffic collision and he did not demonstrate insight into the seriousness of failing to contact the other driver or report the accident to law enforcement. Such evidence demonstrates the absence of a change in respondent's attitude since he engaged in the criminal conduct. (See *Singh v. Davi* (2012) 211 Cal.App.4th 141, 149 [describing a change in attitude as "[o]f the many criteria, arguably the most important in predicting future conduct"]; see also, *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"].) Respondent also failed to demonstrate that he understood the importance of complying with the DRE's requirement that he report his criminal conviction.

23. Respondent did submit evidence that he has improved his life following his second DUI conviction, but those efforts predate respondent's hit-and-run driving conviction and therefore cannot demonstrate rehabilitation from that crime. For example, respondent quit his job at the bar, built a new peer group of professional associates and mentors, moved in with his sister and brother-in-law, and dedicated himself to his real estate work, his family, and his physical fitness in 2015 and 2016, years prior to the hit-and-run driving conviction. As a result, they demonstrate rehabilitation from respondent's previous lifestyle and not rehabilitation following his most recent criminal activity.

24. Cause exists to discipline respondent's real estate salesperson license based on his substantially-related conviction for hit-and-run driving and his failure to disclose his criminal conviction to the DRE within 30 days of his conviction. Furthermore, respondent did not provide sufficient evidence to demonstrate sufficient rehabilitation such that his continued engagement in the duties of a real estate salesperson would be consistent with public health, safety, and welfare at this time. Consequently, respondent's license should be revoked.

Costs

25. Under Business and Professions Code section 10106, the DRE may recover reasonable costs of the investigation and enforcement of a case. DRE has incurred \$739.50 in total costs of investigation and enforcement, as supported by declarations dated September 13, 2018, and March 15, 2019 describing the general tasks performed, the time spent on each task, and the method of calculating the costs. The reasonableness of the costs is addressed in Legal Conclusions 8 and 9.

LEGAL CONCLUSIONS

1. Complainant has the burden of proof with regard to the matters alleged in the Accusation, and the standard of proof is clear and convincing evidence to a reasonable certainty. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 855-856.) Clear and convincing evidence requires a finding of high probability or evidence so clear as to leave no substantial doubt and sufficiently strong as to command the unhesitating assent of every reasonable mind. (*In re Michael G.* (1998) 63 Cal.App.4th 700, 709, fn. 6.)

2. In a disciplinary action such as this, however, the burden of proof of establishing rehabilitation is on the respondent (*Whetstone v. Board of Dental Examiners* (1927) 87 Cal.App. 156, 164), which is consistent with the general rule placing the burden of proof on one who asserts a claim or defense. (Evid. Code, § 500). The standard of proof for establishing rehabilitation is a preponderance of the evidence because no other law or statute requires otherwise. (Evid. Code, § 115.)

3. Pursuant to Business and Professions Code sections 490 and 10177, subdivision (b), a professional license may be suspended or revoked if the "licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued."

4. Pursuant to California Code of Regulations, title 10, section 2910, subdivision (a)(8), a conviction is deemed to be substantially related to the qualifications, functions, or duties of a real estate licensee if it involves:

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.

5. As articulated in Factual Findings 4, 5, 11, 12, 19, and 24, respondent's conviction for hit-and-run driving is substantially related to the qualifications, functions, and duties of a real estate licensee under California Code of Regulations, title 10, section 2910, subdivision (a)(8). Respondent left the scene after the collision, failed to return, and failed to contact the driver of the other vehicle despite being close enough to see him. He did these

things while unlicensed, uninsured, and on criminal probation. Consequently, respondent's substantially-related conviction establishes cause to discipline his real estate salesperson license under Business and Professions Code sections 490 and 10177, subdivision (b).

6. A real estate licensee who has been convicted of a misdemeanor shall report such conviction to the DRE in writing, within 30 days. (Bus. & Prof. Code, § 10186.2, subds. (a)(1)(B); and (a)(2).) The failure to make such report "[s]hall constitute a cause for discipline." (Bus. & Prof. Code, § 10186.2, subd. (b).)

As articulated in Factual Findings 6, 14, and 24, respondent did not report his conviction to the DRE within 30 days of the date of the conviction. Therefore, complainant established cause to discipline respondent's real estate salesperson license pursuant to Business and Professions Code section 10186.2, subdivision (b).

7. As articulated in Factual Findings 8 through 10, 13, 15 through 18, and 20 through 24, respondent did not demonstrate by a preponderance of the evidence that he has undergone sufficient rehabilitation such that his continued engagement in the duties of a real estate salesperson would be consistent with public health, safety, and welfare at this time. As a result, in order to protect the public health, safety, and welfare, respondent's license must be revoked.

Costs of Prosecution

8. The Board may request the administrative law judge to direct a licensee found to have committed violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case. (Bus. & Prof. Code, § 125.3.) In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth guidelines for determining whether the costs should be assessed in the particular circumstances of each case. These 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 or her 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.

9. As articulated in Factual Finding 25, complainant is seeking \$739.50 in costs. The scope of the investigation was appropriate to the alleged misconduct. Though respondent had a good faith belief in the merits of his position, he was not successful at hearing in having charges dismissed or reduced. Considering the factors set forth in *Zuckerman*, the request for costs in the amount of \$739.50 is reasonable in this matter. Respondent should be permitted to pay these costs according to a payment plan determined by the DRE or its designee if and when his license is reinstated.

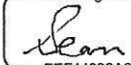
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ORDER

1. The license and licensing rights of respondent John Michael Cardoza II are REVOKED.

2. If and when respondent's license is reinstated, he shall pay to the DRE costs associated with its investigation and enforcement in the amount of \$739.50. Respondent shall be permitted to pay these costs in a payment plan approved by the DRE. Nothing in this provision shall be construed to prohibit the DRE from reducing the amount of cost recovery upon reinstatement of the license.

DATED: April 8, 2019

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SEAN GAVIN
Administrative Law Judge
Office of Administrative Hearings