

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED

OCT 26 2020

DEPARTMENT OF REAL ESTATE
By B. Nicholas

* * *

In the Matter of the Application of:)	DRE No. H-6955 SAC
)	
ZACHARY SCOTT BASLER,)	OAH No. 2020060958
)	
Respondent.)	

DECISION

The Proposed Decision dated September 29, 2020, 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, but the right to a restricted real estate salesperson license is granted to Respondent.

Pursuant to Government Code Section 11521, the Department of Real Estate may order reconsideration of this Decision on petition of any party. The party seeking reconsideration shall set forth new facts, circumstances, and evidence, or errors in law or analysis, that show(s) grounds and good cause for the Commissioner to reconsider the Decision. If new evidence is presented, the party shall specifically identify the new evidence and explain why it was not previously presented. The Department's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the effective date of this Decision, whichever occurs first. 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.

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If and when a petition for removal of restrictions is filed, all competent evidence of rehabilitation presented by the Respondent will be considered by the Real Estate Commissioner.

This Decision shall become effective at 12 o'clock noon on NOV 16 2020.

IT IS SO ORDERED 10.22.20

DOUGLAS R. McCAULEY
REAL ESTATE COMMISSIONER

Douglas R. McCauley

**BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA**

In the Matter of the Application of:

ZACHARY SCOTT BASLER, Respondent

Agency Case No. H-6955 SAC

OA# Case No. 2020060958

PROPOSED DECISION

Wim van Rooyen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OA#), State of California, heard this matter by videoconference and telephone on August 25, 2020, from Sacramento, California.

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

Zachary Scott Basler (respondent) represented himself.

Evidence was received and the record held open until September 1, 2020, to allow respondent to submit supplemental evidence and complainant to object and/or reply. On September 1, 2020, complainant's counsel, as a courtesy only, filed respondent's Exhibits E and F, along with complainant's reply, which is marked as Exhibit 8 and does not object to admission of Exhibits E and F. Consequently, on

September 1, 2020, Exhibits E and F were admitted, Exhibit 8 admitted as argument, the record closed, and the matter submitted for decision.

FACTUAL FINDINGS

Jurisdictional Matters

1. On January 16, 2019, respondent filed an application with the Department for a real estate salesperson license (application). The application remains pending, and no license has been issued.

2. On May 18, 2020, complainant, acting in her official capacity, filed the Statement of Issues. The Statement of Issues alleges cause to deny the application based on respondent's 2015 conviction of a crime substantially related to the qualifications, functions, or duties of a real estate licensee. The Statement of Issues further alleges as matters in aggravation two prior criminal convictions in 1992.

3. Respondent timely filed a Notice of Defense. Subsequently, the matter was set for an evidentiary hearing before an ALJ of the OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

Respondent's Criminal Convictions

4. On June 22, 1992, in the Combined Court of the State of Colorado, County of Jefferson, Case No. 92F862, respondent was convicted of violating section 18-4-401 of the Colorado Revised Statutes (theft), a misdemeanor. Respondent was sentenced to 24 hours of community service and ordered to pay fees/fines.

5. On August 5, 1992, in the Culver City Municipal Court, County of Los Angeles, Case No. SA010844, respondent was convicted of violating Penal Code section 487 (theft), a misdemeanor. Respondent was sentenced to 48 days in county jail (time served), and ordered to serve two years of summary probation and pay \$757.85 in restitution.

6. On October 27, 2015, in the Superior Court of California, County of Sacramento, Case No. 15F06499, respondent was convicted on a nolo contendere plea of violating Penal Code sections 459 and 664 (attempted burglary), a felony. Respondent was sentenced to 24 days in county jail (time served), and ordered to serve five years of formal probation, pay restitution, and pay fees/fines. On April 5, 2017, the court reduced the October 2015 conviction to a misdemeanor and converted respondent's formal probation to informal probation.

7. The October 2015 conviction arose from the following events: on October 16, 2015, around 08:40 a.m., Citrus Heights Police Department officers responded to a report that a person was attempting to pry open a residence's window using nails and a screwdriver. Upon their arrival at the home, the officers found respondent, who was extremely sweaty, could not keep his hands/arms still, and had his lower jaw pushed out from his face and moving repeatedly. Respondent denied drug use and initially informed the officers that he was at his uncle's home doing some painting for him. However, after respondent's uncle failed to verify his account, respondent admitted to taking methamphetamine and stated that he was dirty and "just wanted to take a shower." Police arrested and transported respondent to jail, without incident.

Respondent's Evidence

8. Respondent grew up in Denver, Colorado. As a child, he was intelligent and had a 4.0 GPA in school. However, at age 16, he came out as gay. His father then "kicked him out of the house," and hired an attorney to have respondent declared an emancipated minor.

9. Respondent's late teens were "tough," he was homeless for lengthy periods, and he "did a lot of things he is not proud of" to survive. He does not recall the details of his 1992 Colorado theft conviction, but does not deny that he engaged in shoplifting and other related misconduct. He has complied with all requirements of his Colorado sentence.

10. Respondent vividly recalls the 1992 California theft conviction. Angry with his father, respondent stole his credit card and took a trip to Los Angeles, California. After he was caught, he spent more than 30 days in Los Angeles County Jail, where he was repeatedly sexually assaulted. Upon respondent's release from jail, he lived in a supervised living environment at a gay/lesbian center, where he received much-needed counseling, support, and encouragement. He paid all restitution within a year and successfully completed his criminal probation.

11. After 1992, respondent transformed himself and was gainfully employed for many years working at ski resorts, in the banking industry, and as a massage therapist. However, in 2011, his mother was diagnosed with Alzheimer's disease, and he ultimately relocated to Sacramento, California to help care for her. Respondent found it difficult to deal with his mother's progressive deterioration and increasing needs, and eventually started using drugs to cope. His drug of choice was crystal methamphetamine, a highly-addictive stimulant. Although he still took good care of

his mother and eventually secured her a place at a care facility, his drug habit got "out of control" and ultimately led to the October 16, 2015 incident.

12. Respondent does not dispute his October 2015 attempted burglary conviction and its underlying conduct. He was "so out of it" due to the methamphetamine that he thought he was going through the window of his own rental home so as to not wake up the landlord. However, it was actually a house two blocks away. He never intended to steal anything and believes his conduct was more akin to trespass. Nevertheless, he admits that he pled to, and was convicted of, attempted burglary. He also does not deny initially lying to the officers about his reasons for being at the home. At the time, he was not of sound mind and "would have probably said anything to evade arrest." Respondent strongly regrets his misconduct, but also believes that the incident caused him to "hit rock bottom" and forced him to finally address his substance abuse.

13. Respondent has paid all restitution and fines/fees related to the October 2015 conviction. To date, he has successfully complied with all conditions of his criminal probation, which will soon terminate on October 27, 2020. He has had no subsequent criminal convictions or negative interactions with law enforcement.

14. Upon his release from jail following the October 16, 2015 incident, respondent attended daily Alcoholics Anonymous (AA) meetings at the Roseville Alano Club for 90 days. Thereafter, over the next year to 18 months, he continued to attend AA at least three to four times a week, met with his sponsor daily, and worked AA's 12 steps. Respondent has abstained from all substances since October 16, 2015, the date of his last arrest. He feels confident in his sobriety and currently attends AA only a few times a year. However, he frequently talks with, and receives continued support from, his brother, who also lives a sober life.

15. Additionally, respondent received individual therapy from a counselor at One Community Health twice a week for the first year following his release from jail. The therapy addressed both respondent's substance abuse and his underlying emotional issues. Subsequently, the frequency of therapy sessions was reduced to approximately once every three weeks.

16. Around September 2018, respondent was hired by Mark DeGennaro (DeGennaro), a Coldwell Banker real estate broker in Elk Grove, California; first as an intern, and since January 2019, as a full-time executive assistant. In that capacity, respondent performs general administrative duties, takes photographs of the interior and exterior of homes for sale, does marketing, and assists with monthly accounting. He has also taken several online courses related to Coldwell Banker's programs, customer relations management software, and social media marketing. Respondent has never been the subject of any client complaints or work discipline.

17. DeGennaro would like respondent to work on his team as a licensed real estate salesperson. The work would primarily involve residential real estate transactions. Respondent is interested in the opportunity to increase his income and further his career.

18. Respondent actively volunteers in the community. Over the past four years, he has fed the homeless weekly at Deliverance Corner in Sacramento, collaborated with a local health club to obtain slightly-used towels for the homeless, participated in clothing collection drives, collected over a thousand pairs of shoes for Soles4Souls, collected 450 toys for children, helped to digitize 3,000 vinyl records for the blind, and recently solicited approximately \$4,000 in school supply donations for the Elk Grove schools. He frequently visits with seniors at a Board and Cares home and brings them gifts. Additionally, he worked with the Carol Ann Kellner Project to obtain

affordable housing and healthcare for a senior citizen. Furthermore, he taught smoking cessation and pain management classes.

Finally, since January 28, 2020, respondent has served as a member of Sacramento County's HIV Health Services Planning Council, based on an appointment by the Board of Supervisors. That council oversees funding of HIV care and prevention programs, and an initiative to achieve zero new HIV transmissions by 2025. As part of his service on the council, respondent was required to complete a financial disclosure statement and two hours of public service ethics education. Respondent enjoys the opportunity to serve the vulnerable in his community. He also personally benefits from his community service, because it "gets me out of self" and supports his sobriety.

19. Respondent understands why the Department would be concerned about granting him a license given his criminal history and prior substance abuse. However, he believes he has made every effort to meaningfully rehabilitate himself and requests an opportunity to prove himself. He is willing to comply with any conditions of a restricted license the Department deems appropriate.

20. Respondent offered letters of support from Cathi Basler, his stepmother; Maria Gaspar-Baltieri, a personal friend; Charles McDonald, a person whom respondent cared for after Mr. McDonald sustained a shoulder and knee injury; and Janet Rollins, a fellow volunteer from feeding the homeless. Each author is aware of respondent's prior drug use and general misconduct, but respondent candidly admitted that he described the October 2015 conviction as trespass fueled by his methamphetamine use and probably did not use the words "attempted burglary." The letters uniformly laud respondent's integrity, compassion, empathy, hard work, reliability, and transformation into a productive citizen.

Discussion

CONSIDERATION OF THE 1992 CONVICTIONS

21. At hearing, the parties did not address to what extent, if any, respondent's 1992 convictions can be considered in this matter given the enactment of Assembly Bill 2138 and its modifications to Business and Professions Code, section 480. The court need not, and does not, reach that issue in this case. The 1992 convictions, pled only as matters in aggravation, are very remote in time, and arose from unique and isolated life circumstances. Because they do not materially impact the findings and conclusions in this particular case, they are inconsequential to the decision.

CAUSE FOR DENIAL

22. At hearing, respondent did not contest that cause exists to deny his application. Thus, the only question is whether respondent has demonstrated that he is sufficiently rehabilitated.

REHABILITATION

23. The Department has adopted criteria to consider when evaluating the rehabilitation of an applicant for a real estate license. (Cal. Code Regs., tit. 10, § 2911, subd. (a).) Criteria relevant here include:

- (1) The time that has elapsed since commission of the act(s) or offense(s); (A) The passage of less than two years after the most recent criminal conviction or act of the applicant that is a cause of action in the Bureau's Statement of Issues

against the applicant is inadequate to demonstrate rehabilitation . . .

(2) Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the applicant . . .

(3) Expungement of criminal convictions.

[¶] . . . [¶]

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

(6) Abstinence from the use of controlled substances and/or alcohol for not less than two years if the conduct which is the basis to deny the Bureau action sought is attributable in part to the use of controlled substances and/or alcohol.

(7) Payment of the fine and/or other monetary penalty imposed in connection with a criminal conviction or quasi-criminal judgment.

[¶] . . . [¶]

(9) Completion of, or sustained enrollment in, formal education or vocational training courses for economic self-improvement.

[¶] . . . [¶]

(12) Significant or conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.

(13) New and different social and business relationships from those which existed at the time of the conduct that is the basis for denial of the Bureau action sought.

(14) Change in attitude from that which existed at the time of the conduct in question as evidenced by the following:

(A) Testimony and/or other evidence of rehabilitation submitted by the applicant.

(B) Evidence from family members, friends and/or other persons familiar with applicant's previous conduct and with his or her subsequent attitudes and/or behavioral patterns.

(C) Evidence from probation or parole officers and/or law enforcement officials competent to testify as to applicant's social adjustments.

(D) Evidence from psychiatrists or other persons competent to testify with regard to neuropsychiatric or emotional disturbances.

(E) Absence of subsequent felony convictions, 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.

24. Respondent's October 2015 attempted burglary conviction is serious. Even if he did not intend to steal, his poor judgment and drug use at the time led him to unlawfully invade the real property of another. Additionally, he remains on criminal probation, and the conviction has not been expunged. (*In re Gossage* (2000) 23 Cal.4th 1080, 1099 (when a person is on criminal probation, rehabilitation efforts are generally accorded less weight, "[s]ince persons under the direct supervision of correctional authorities are required to behave in exemplary fashion").)

25. Nevertheless, almost five years have passed since respondent's last conviction, and his criminal probation will soon end in October 2020. Based on his successful compliance with all conditions of his criminal sentence and probation, including payment of fines and restitution, his probation was converted from formal to informal over three years ago. He has had no subsequent criminal convictions or any negative interactions with law enforcement.

26. Moreover, respondent has made significant rehabilitative efforts beyond that required by his criminal probation. He meaningfully addressed his substance abuse problem and underlying emotional issues through therapy and AA participation. He has been sober for almost five years; has been gainfully employed in the real estate industry in a non-licensed capacity for two years, without incident; has taken several online courses to improve his work skills, and commendably continues to participate in numerous and extensive community service projects.

27. Finally, respondent's sincere testimony and demeanor at hearing demonstrated genuine remorse, acceptance of responsibility, and insight into the

issues that led to his prior misconduct. (*Seide v. Com. of Bar Examiners of the State Bar of Cal.* (1989) 49 Cal.3d 933, 940 ["Fully acknowledging the wrongfulness of [one's] actions is an essential step towards rehabilitation."].) He enjoys his work and now has a good support system through his brother, therapist, AA, and fellow community service volunteers. The letters of support confirm his changed attitude and meaningful transformation since the October 2015 conviction.

28. Consequently, respondent demonstrated that he is sufficiently rehabilitated to be granted a license. However, given the serious nature of respondent's attempted burglary conviction, and because he will have access to residential property as a real estate salesperson, caution is warranted. Thus, issuance of a restricted license for a longer period of four years is appropriate. Such additional monitoring is necessary to protect public health, safety, and welfare.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Respondent has the burden of proving by a preponderance of the evidence that he is fit for the license he seeks and that his application should be granted. (Evid. Code, § 115.)

Cause for Denial

2. The Department may deny a license to an applicant who has been convicted of a crime substantially related to the qualifications, functions, or duties of a

real estate licensee. (Bus. & Prof. Code, §§ 480, subds. (a)(1), & 10177, subd. (b).)¹ A crime is deemed substantially related "if it involves: . . . (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." (Cal. Code Regs., tit. 10, § 2910, subd. (a)(8).) "The conviction of a crime constituting an attempt . . . to commit any of the above enumerated acts or omissions is also deemed to be substantially related to the qualifications, functions or duties of a licensee of the department." (*Id.*, subd. (b).)

3. Based on Factual Findings 6, 7, 12, and 22, respondent's October 2015 attempted burglary conviction is substantially related to the qualifications, functions, or duties of a real estate licensee under California Code of Regulations, title 10, section 2910, subdivisions (a)(8) and (b), because it involved an attempted unlawful act with the intent of conferring a financial/economic benefit upon respondent or doing substantial injury to the property of another. Therefore, cause exists to deny respondent's application pursuant to sections 480, subdivision (a)(1), and 10177, subdivision (b).

4. The Statement of Issues alleges cause for denial under sections 480, subdivision (a)(2), and 10177, subdivision (j), based on dishonest conduct. Each statute is addressed separately below.

Prior to July 1, 2020, section 480, subdivision (a)(2), provided cause to deny a license if the applicant had done "any act involving dishonesty, fraud, or deceit with

¹ All further statutory references are to the Business and Professions Code, unless otherwise specified.

the intent to substantially benefit themselves or another, or substantially injure another." However, effective July 1, 2020, that language of section 480, subdivision (a)(2), no longer exists. "[T]he courts correlatively hold under the common law that when a pending action rests solely on a statutory basis, and when no rights have vested under the statute, 'a repeal of [the] statute without a saving clause will terminate all pending actions based thereon.'" (*Governing Board v. Mann* (1977) 18 Cal.3d 819, 829.) In essence, the *Mann* Court held that the Department must "dispose of the case under the law in force when its decision is rendered." (*Id.* at 822-823.) Consequently, cause does not exist to deny respondent's application under section 480, subdivision (a)(2).

Section 10177, subdivision (j), continues to provide that the Department may deny a license to an applicant who has "[e]ngaged in any other conduct, whether of the same or of a different character than specified in this section, that constitutes fraud or dishonest dealing." Based on Factual Findings 6, 7, 12, and 22, respondent was convicted of attempted burglary and also admitted lying to officers about his reasons for being at the home. Consequently, cause exists to deny respondent's application pursuant to section 10177, subdivision (j).

Rehabilitation

5. The Department has adopted criteria to consider when evaluating the rehabilitation of an applicant for a real estate license. (Cal. Code Regs., tit. 10, § 2911, subd. (a).) Based on the Factual Findings as a whole, and specifically, Factual Findings 23 through 28, respondent has demonstrated sufficient rehabilitation to be granted a restricted license for a period of four years. Such monitoring is appropriate to protect public health, safety, and welfare.

ORDER

The application of respondent Zachary Scott Basler for a real estate salesperson license in the State of California is DENIED; provided, however, a RESTRICTED real estate salesperson license SHALL BE ISSUED to respondent pursuant to Business and Professions Code section 10156.5. The restricted license shall be subject to all of the provisions of Business and Professions Code section 10156.7 and to the following limitations, conditions, and restrictions imposed under authority of Business and Professions Code section 10156.6:

1. The license shall not confer any property right in the privileges to be exercised, and the Real Estate Commissioner may by appropriate order suspend the right to exercise any privileges granted under this restricted license in the event of: (a) the conviction of respondent (including a plea of nolo contendere) of a crime which is substantially related to respondent's fitness or capacity as a real estate licensee; or (b) the receipt of evidence that respondent has violated provisions of the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner, or conditions attaching to this restricted license.

2. Respondent shall notify the Commissioner in writing within 72 hours of any arrest by sending a certified letter to the Commissioner at the Bureau of Real Estate, Post Office Box 137000, Sacramento, CA 95813-7000. The letter shall set forth the date of respondent's arrest, the crime for which respondent was arrested, and the name and address of the arresting law enforcement agency. Respondent's failure to timely file written notice shall constitute an independent violation of the terms of the restricted license and shall be grounds for the suspension or revocation of that license.

3. With the application for license, or with the application for transfer to a new employing broker, respondent shall submit a statement signed by the prospective employing real estate broker on a form approved by the Department of Real Estate which shall certify as follows: (a) that the employing broker has read the Decision which is the basis for the issuance of the restricted license; and (b) that the employing broker will carefully review all transaction documents prepared by the restricted licensee and otherwise exercise close supervision over the licensee's performance of acts for which a license is required.

4. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor the removal of any of the conditions, limitations, or restrictions attaching to the restricted license until four (4) years have elapsed from the date of issuance of the restricted license to respondent.

DATE: September 29, 2020

DocuSigned by:
Wim van Rooyen
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WIM VAN ROOYEN

Administrative Law Judge

Office of Administrative Hearings

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Department of Real Estate

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