



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 MAY 03, 2022.

IT IS SO ORDERED 4.8.22

DOUGLAS R. McCAULEY  
REAL ESTATE COMMISSIONER

Douglas R. McCauley

**FILED**

**MAR 18 2022**

DEPARTMENT OF REAL ESTATE  
By B. Nicholas

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

**In the Matter of the Accusation Against:**

**KEVIN CHRISTOPHER MCTAVISH, Respondent**

**Agency Case No. H-7064 SAC**

**OAH No. 2021100138**

**PROPOSED DECISION**

Matthew S. Block, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on January 31, 2022, by videoconference from Sacramento, California.

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

Kevin Christopher McTavish (respondent) appeared and represented himself.

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on January 31, 2022.

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. On May 16, 1991, the Department issued real estate broker license number 01108834 to respondent. The license will expire on August 14, 2024, unless renewed or revoked.
2. On August 9, 2021, complainant signed and thereafter filed the Accusation in her official capacity. Complainant seeks to discipline respondent's real estate broker license on the grounds that respondent attempted to procure a license renewal by fraud, misrepresentation or deceit, and that respondent was convicted of a crime that is substantially related to the qualifications, functions, or duties of a real estate licensee.
3. Respondent timely filed a Notice of Defense. The matter was set for an evidentiary hearing pursuant to Government Code section 11500 et seq.

### **Complainant's Evidence**

#### **RESPONDENT'S CRIMINAL CHARGES AND SUBSEQUENT CONVICTION**

4. On October 24, 2019, in the Superior Court of California, County of Santa Barbara, Case No. 19CR10178, respondent was charged with violating Penal Code sections 273.5, subdivision (a) (Corporal Injury to a Spouse), 245, subdivision (a)(4) (Assault by Means of Force Likely to Cause Great Bodily Injury), felonies, and 135 (Concealing Evidence), a misdemeanor.
5. On September 11, 2020, in the Superior Court of California, County of Santa Barbara, Case No. 19CR10178, respondent was convicted of a violation of Penal

Code section 166, subdivision (c)(1) (Contempt of Court), a misdemeanor. He was ordered to serve four days in jail with credit for time served of four days and ordered to pay a fine of \$140. He was not placed on criminal probation.

6. The circumstances surrounding the conviction are that on October 9, 2019, respondent was arrested by officers of the Santa Barbara Police Department after they received a report of a woman screaming the words "you're trying to kill me" at respondent's home. When the officers arrived at the home, respondent was not present, but his wife was. She initially told officers that respondent had gone "mental" and then left the residence but denied that they had been involved in a physical altercation. After the officers told her what the reporting party said, she told them that respondent choked her twice, and caused a bruise on the front of her right thigh<sup>1</sup>. When asked why she initially told the officers that no physical altercation had occurred, she said that she was trying to diffuse the situation.

7. When contacted, respondent told the officers that he and his wife had been out having drinks with friends, and that when they returned home, his wife continued to drink wine until she became extremely intoxicated. He said that she shoved a cell phone in his face and said that she was recording him. He told the officers that he took the phone away from his wife and erased the phone data by completing a hard re-set of the device. He said that he erased the data so his wife could not use the phone anymore and denied doing so to delete content that could have been evidence of a crime. He also admitted to officers that he shoved his wife

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<sup>1</sup> Respondent's wife did not specify how he caused the bruise.

backwards onto a couch but said that he did so only to prevent her from continuing to hit him.

### **APPLICATION FOR RENEWAL OF BROKER LICENSE**

8. On May 18, 2020, respondent submitted an application to the Department to renew his broker license. Respondent checked the box marked "NO" in response to Question 17 of the application, which asks: "Are there criminal charges pending against you at this time, or are you currently awaiting judgment and sentencing following entry of plea or jury verdict?" Respondent's answer was false, because criminal charges were filed against him on October 24, 2019.

### **Respondent's Evidence**

9. Respondent testified at hearing. He said that the facts of the Santa Barbara County case were "fabricated" by his wife while she was intoxicated. He described her as a functional alcoholic who was prone to outbursts of violence. They are now divorced.

10. Respondent admitted taking the cell phone from his wife on the date of his arrest but denied that she had recorded him during the altercation. He testified that he had recently given her the phone, but she was careless with it, so he took it back from her. He completed the hard re-set on the device because she "didn't deserve it."

11. Respondent testified that his conviction is being expunged and that a court hearing has been scheduled for February 8, 2022. In support of this, respondent introduced a Santa Barbara Superior Court form entitled "Declaration and Application

for Change of Plea and Request for Dismissal." Respondent signed and dated the form, but it is unclear whether he filed it with the court. It did not list a court date.

12. Respondent gave varying reasons for failing to disclose his pending criminal charges on his broker renewal application. He testified that he had not been convicted of anything yet at the time, and that his attorney told him the case was going to be dismissed. He also said that during the COVID-19 pandemic, his case was "moved around" to several different district attorneys, and it was "just a matter of the paperwork being done and over." However, he eventually admitted that he did not have the mental energy to keep telling people what happened with his wife.

13. Respondent testified that he was not in physical or mental shape to do much of anything in 2021. He contracted COVID-19 in December of 2020 and spent the first half of 2021 "in bed."

## **Analysis**

14. In California Code of Regulations, title 10, section 2911, the Department has set forth criteria for evaluating the rehabilitation of a licensee who has been convicted of a crime. Applicable criteria include:

- (1) the passage of at least two years since the licensee's most recent conviction;
- (2) the nature and severity of the crime and/or acts;
- (3) expungement of the conviction resulting in administrative disciplinary proceedings;
- (4) payment of any fine imposed in connection with the criminal conviction;
- (5) stability of family life;

- (6) completion of, or sustained enrollment in, formal education or vocational training courses for economic self-improvement;
- (7) significant or conscientious involvement in community, church or privately sponsored programs designed to provide social benefits or to ameliorate social problems; and,
- (8) change in attitude from that which existed at the time of commission of the acts in question.

15. Considering the Department's rehabilitation criteria, it has been less than a year and a half since respondent's conviction, which is an inadequate amount of time to establish rehabilitation. Respondent's actions were serious, in that he became involved in a physical altercation with his wife, resulting in the filing of felony charges and a criminal protective order. Though he denied choking his wife, respondent admitted to law enforcement that he shoved her backwards hard enough that it caused her to fall onto a couch.

16. At hearing, respondent admitted taking a cell phone from his wife during the altercation and completing a hard re-set of the device. He denied doing so to conceal evidence of a crime. However, there appears to be no correlation between his wife's alleged carelessness with the phone and respondent's decision to erase its contents. Respondent did not present any evidence of enrollment in or completion of formal education or vocational training courses. He testified that he used to coach youth athletics but is not presently performing any community service. However, respondent also testified to a recent lengthy illness, which would understandably limit his ability to do so.



17. Respondent and his wife are now divorced, and he lives alone. Given the volatility of the marriage, it would appear that respondent's family life is more stable now than it was at the time of his arrest.

18. Respondent did not disclose his pending criminal charges when he submitted his broker renewal application, and he was unable to sufficiently explain his failure to do so. "The legislature intended to ensure that real estate brokers and salespersons will be honest, truthful and worthy of the fiduciary responsibilities which they will bear." (*Harrington v. Dept. of Real Estate* (1989) 214 Cal.App.3d 394, 402.) Whether respondent's failure to disclose his pending criminal charges was willful or inadvertent, a real estate professional must be able to perform his duties in an honest and careful manner; as a result, neither explanation is acceptable.

19. On September 11, 2020, respondent was convicted of a crime that is substantially related to the qualifications, functions, and duties of a real estate licensee. At hearing, he did not demonstrate any meaningful rehabilitation. Considering all the evidence, it would be contrary to allow respondent to maintain a license, even on a probationary basis.

### **Costs**

20. Complainant has requested reimbursement for costs incurred by the Department in connection with the investigation and enforcement of this matter, in the total amount of \$734.75 (\$467.75 for investigation and \$267 for enforcement). The costs were certified in a manner provided by Business and Professions Code section 10106. The time spent appears to be reasonable, and the activities claimed were necessary to the development and presentation of the case. Complainant's request for costs is addressed further in the Legal Conclusions below.

## LEGAL CONCLUSIONS

### Burden of Proof

1. In this action to discipline respondent's license, complainant bears the burden of proving the allegations in the Accusation. That burden 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 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, 487.)

### Applicable Statutes

2. A real estate licensee may be disciplined for attempting to renew a real estate license by fraud, misrepresentation, or by making a material misstatement of fact in an application for renewal. (Bus. & Prof. Code, § 10177, subd. (a).)

3. A real estate licensee may be disciplined when the licensee has been convicted of a crime that is substantially related to the qualifications, functions, or duties of a real estate licensee. (Bus. & Prof. Code, §§ 490, subd. (a); 10177, subd. (d).)

4. In California Code of Regulations, title 10, Section 2910, the Department has established criteria for determining whether a conviction is substantially related to the qualifications, functions, or duties of a licensee. Subdivision (a)(9) of Section 2910 provides that a conviction will be deemed substantially related if it involves "[c]ontempt of court or willful failure to comply with a court order."

5. As set forth in Factual Finding 5, respondent was convicted of contempt of court. The 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)(9).

### **Causes for Discipline**

6. Based on the Factual Findings and Legal Conclusions as a whole, cause exists to discipline respondent's real estate broker's license pursuant to Business and Professions Code section 10177, subdivision (a), in that respondent attempted to procure a license renewal by fraud, misrepresentation, or deceit when he made a material misstatement of fact in his application by checking the box indicating that no criminal charges were pending against him.

7. Based on the Factual Findings and Legal Conclusions as a whole, cause exists to discipline respondent's real estate broker's license pursuant to Business and Professions Code sections 490, subdivision (a), and 10177, subdivision (b), in that respondent was convicted of contempt of court, which is substantially related to the qualifications, functions, or duties of a real estate licensee.

### **Costs**

8. Business and Professions Code section 10106, subdivision (a), provides that the commissioner may request the administrative law judge to direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case. Subdivision (c) states:

A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the commissioner or the commissioner's designated representative, shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

9. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 10106. These factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith 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 in light of the alleged misconduct. (*Zuckerman v. Board of Chiropractic Examiners, supra*, 29 Cal.4th at p. 45.)

10. As set forth in Factual Finding 20, complainant requested that respondent be ordered to pay costs of investigation and enforcement incurred in the total amount of \$734.75. Certified copies of actual costs of investigation and enforcement were signed by the commissioner's designated representatives and are prima facie evidence of the reasonable costs in this matter. When all the relevant factors in *Zuckerman* are considered, assessment of costs in the amount of \$734.75 is reasonable and appropriate.

## ORDER

Based on the Factual Findings and Legal Conclusions as a whole, real estate broker license No. 01108834, issued to respondent Kevin Christopher McTavish, is hereby REVOKED. Respondent shall pay the Department its investigation costs of \$467.75, and enforcement costs of \$267, in a manner as directed by the Department.

DATE: February 17, 2022

*Matthew Block*

MATTHEW S. BLOCK

Administrative Law Judge

Office of Administrative Hearings