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FILED

NOV 09 2023

DEPARTMENT OF REAL ESTATE

By B. Nicholas

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of:) DRE No. H-7192 SAC
)
ANDRE F. JIMENEZ,) OAH No. 2023030678
)
Respondent.)
_____)

ORDER DENYING RECONSIDERATION

On September 19, 2023, a Decision was rendered in the above-entitled matter. The Decision was to become effective on October 17, 2023, and was stayed by separate Order to November 17, 2023.

On October 16, 2023, Respondent petitioned for reconsideration of the Decision of September 19, 2023.

I have given due consideration to the petition of Respondent. I find no good cause to reconsider the Decision of September 19, 2023, and reconsideration is hereby denied.

IT IS SO ORDERED 11/9/23.

DOUGLAS R. McCAULEY
REAL ESTATE COMMISSIONER



FILED

BEFORE THE DEPARTMENT OF REAL ESTATE

SEP 26 2023

STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE
By B. H. Chisler

* * *

In the Matter of the Accusation of:)	DRE No. H-7192 SAC
)	
ANDRE F JIMENEZ,)	OAH No. 2023030678
)	
Respondent.)	

DECISION

The Proposed Decision dated July 21, 2023, 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, but the right to a restricted 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.

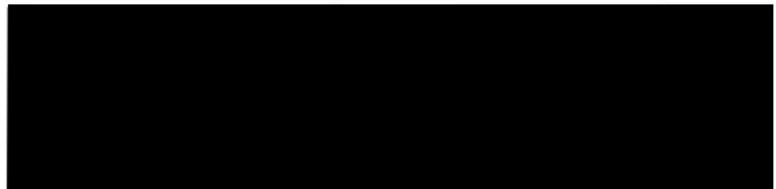
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The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock noon on OCT 17 2023.

IT IS SO ORDERED 9.19.23

DOUGLAS R. McCAULEY
REAL ESTATE COMMISSIONER



FILED

AUG 18 2023

DEPARTMENT OF REAL ESTATE
By J. Nagas

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

In the Matter of the Accusation Against:

ANDRE F. JIMENEZ, Respondent

Agency Case No. H-7192 SAC

OAH No. 2023030678

PROPOSED DECISION

Matthew S. Block, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on June 27, 2023, by videoconference and teleconference from Sacramento, California.

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

Andre F. Jimenez (respondent) appeared and represented himself.

Evidence was received, the record closed, and the matter was submitted for decision on June 27, 2023.

FACTUAL FINDINGS

Jurisdictional Matters

1. On January 5, 2005, the Department issued real estate salesperson license No. 01462391 (license) to respondent. The license will expire on January 2, 2025, unless renewed or revoked.
2. On February 22, 2023, complainant filed the Accusation in her official capacity. Complainant seeks to discipline respondent's license based on respondent's October 2022 conviction for a crime that is alleged to be substantially related to the qualifications, functions, and duties of a real estate licensee. Complainant also seeks an award of the Department's reasonable costs of investigation and enforcement, pursuant to Business and Professions Code section 10106.
3. Respondent timely filed a Notice of Defense. 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.

Complainant's Evidence

4. On May 9, 2022, in the Superior Court of the State of California, County of Sacramento, Case No. 21FE013931, respondent was convicted upon a plea of no contest of violating Penal Code section 25100, subdivision (c) (criminal storage of a firearm in the third degree), a misdemeanor. Imposition of sentence was suspended, and respondent was placed on informal probation for one year with terms and conditions, including that he pay a fine and serve 60 days in jail, with the option of serving the time in an alternative sentencing program.

5. The circumstances underlying the conviction are that on August 12, 2021, police officers served a search warrant at respondent's residence after viewing several alarming Instagram posts by a member of respondent's family regarding school shootings and the killing of police officers. The posts also included photographs of the family member wearing camouflage clothing and holding various weapons.

6. One of the photographs depicted the family member posing with a handgun. The serial number of the firearm was visible in the photograph, and police were able to use it to determine that the firearm was lawfully registered to respondent. During the search of his home, the officers located two unsecured handguns in respondent's bedroom, one of which was the one depicted in the Instagram post. The firearms were accessible to respondent's minor child.

Respondent's Evidence

RESPONDENT'S TESTIMONY

7. Respondent testified at hearing. He has worked as a Title Specialist at Insurance Auto Auctions in Rancho Cordova since November 1997. He has worked as a real estate agent for Village Financial Group in El Dorado Hills since March 2019.

8. Respondent believes that his conviction is a "great injustice" and that the law enforcement officers serving the search warrant violated his Second Amendment rights. Respondent's home is not located in a safe area, and he owns firearms to protect himself and his family. When the officers serving the search warrant first knocked on his door, he retrieved a handgun from the gun safe in his bedroom because he did not know they were police officers. When he realized that they were, he walked back into his bedroom and placed the handgun in an armoire under some shirts.

9. Respondent paid his court fine and served his disciplinary sentence. He successfully completed probation in his criminal case in May 2023.

LETTERS OF SUPPORT

10. Respondent submitted numerous letters of support from family, friends, and colleagues. They generally describe respondent as a responsible professional and loving father to his children. One of the letters, written by Benjamin LeDoux, spoke in detail of respondent's Christian faith and active participation in church and a men's fellowship group. Two of the letters specifically addressed respondent's ownership of firearms. The first was written by Suzanna Parker, who is respondent's cousin. She wrote, in pertinent part:

[Respondent] has provided for his children and been by their side every step of the way. Their comfort and more importantly, their safety has always been his number one priority that's how I know he has always been a responsible gun owner. I've never witnessed any irresponsible handling of his weapons nor have I seen any irrational behavior on [respondent's] part.

11. The second letter was written by Morgann Williams, who knows respondent on both a personal and professional level. Ms. Williams wrote, in pertinent part:

[Respondent] is a very giving and caring person, and he has always been careful with the guns he owns including having them locked up in a safe. He and I have been to a small shooting range, and he made sure to show me about gun

safety and how to handle each gun before we proceeded to fire the weapons.

Analysis

12. Complainant alleged cause exists to discipline respondent's license because his conviction for a violation of Penal Code section 25100, subdivision (c), is substantially related to the qualifications, functions, and duties of a real estate licensee. Complainant argued that the conviction is substantially related pursuant to California Code of Regulations, title 10, section 2910, subd. (a)(8), because it involved the "[d]oing 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."

13. California Penal Code section 25100, subdivision (c), provides in its entirety:

Except as provided in Section 25105, a person commits the crime of "criminal storage of a firearm in the third degree" if the person keeps any firearm within any premises that are under the person's custody or control and negligently stores or leaves a firearm in a location where the person knows, or reasonably should know, that a child is likely to gain access to the firearm without the permission of the child's parent or legal guardian, unless reasonable action is taken by the person to secure the firearm against access by the child.

14. Complainant proved by clear and convincing evidence that respondent was convicted of criminal storage of a firearm in the third degree, and that the conviction is substantially related to the qualifications, functions, and duties of a real estate licensee. Respondent left two firearms unsecured in his bedroom that were accessible by his minor child. While there is no evidence that respondent intended to harm anyone, leaving the firearms unsecured was an unlawful act that posed a threat of substantial injury to others. Additionally, respondent's testimony that he only retrieved the firearm from a locked safe moments before the search for self-protection is inconsistent with the fact that the officers serving the search warrant found multiple unsecured firearms.

15. In California Code of Regulations, title 10, section 2912, the Department has set forth criteria to evaluate the rehabilitation of a licensee who has been convicted of a crime. Applicable criteria include the passage of at least two years since the licensee's most recent conviction; expungement of the conviction resulting in administrative disciplinary proceedings; successful completion or early discharge from probation or parole; payment of any fine imposed in connection with the criminal conviction; stability of family life; completion of, or sustained enrollment in, formal education or vocational training courses for economic self-improvement; significant or conscientious involvement in community, church or privately sponsored programs designed to provide social benefits or to ameliorate social problems; and change in attitude from that which existed at the time of commission of the acts in question.

16. Respondent's misdemeanor conviction is less than two years old, and it has not been expunged. However, it is respondent's only criminal conviction. He paid his court fine, served his disciplinary terms, and successfully completed probation in May 2023. He has no prior record of discipline with the Department. He is well-

regarded by his colleagues and is a productive member of society who works two jobs to provide for his family. He is an active member of his church and participates in a Christian men's fellowship program. Licensing statutes are not intended to punish an individual but to protect the public, maintain the integrity and high standards of the profession, and preserve public confidence in licensure. (*Fahmy v. Medical Bd. of California* (1995) 38 CalApp.4th 810, 817.) When all the evidence is considered, discipline is warranted. However, issuance of a restricted license is more appropriate than license revocation.

Costs

17. Complainant has requested reimbursement for costs the Department incurred in connection with investigating and enforcing this matter in the total amount of \$1,526.50 (\$1,154.50 for investigation and \$372 for enforcement). 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. Bd. 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.) If complainant meets this burden, respondent must establish rehabilitation. Rehabilitation is akin to an affirmative defense; consequently, the

burden of proof of establishing an affirmative defense is on the respondent.

(*Whetstone v. Bd. of Dental Examiners* (1927) 87 Cal.App. 156, 164.)

Applicable Statutes and Regulations

2. A real estate licensee may be disciplined when he 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. (b).)

3. 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, function, or duties of a licensee. Subdivision (a)(8) of section 2910 provides that a conviction will be deemed substantially related if it involves the "[d]oing 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."

Cause for Discipline

4. Based on the Factual Findings and Legal Conclusions as a whole, cause exists to discipline respondent's license pursuant to Business and Professions Code sections 490, subdivision (a), and 10177, subdivision (b). Respondent was convicted of criminal storage of a firearm in the third degree, which is substantially related to the qualifications, functions, or duties of a real estate licensee because it was an unlawful act that involved the threat of substantial injury to the person or property of another.

Costs

5. Business and Professions Code section 10106, subdivision (a), provides that the commissioner may request the ALJ 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 costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

6. 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. Bd. of Chiropractic Examiners, supra*, 29 Cal.4th at p. 45.)

7. Complainant is requesting costs in the total amount of \$1,526.50. 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. Respondent was unsuccessful at getting charges dismissed or reduced at hearing and failed to raise a

colorable challenge to the proposed discipline. Respondent works two jobs to earn extra income for his family, but there was no evidence presented of an inability to pay the requested costs. When all the relevant criteria in *Zuckerman* are considered, assessment of costs in the amount of \$1,562.50 is reasonable and appropriate.

ORDER

Real estate salesperson license No. 01462391 issued to respondent Andre F. Jimenez is REVOKED; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to section 10156.5 of the Business and Professions Code if respondent makes application therefor and pays to the Department of Real Estate the appropriate fee for the restricted license within 90 days from the effective date of this Decision.

The restricted license issued to respondent shall be subject to all the provisions of section 10156.7 of the Business and Professions Code and to the following limitations, conditions, and restrictions imposed under authority of section 10156.6 of that Code:

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 and privileges granted under this restricted license in the event of: (a) the conviction of respondent (including by 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. 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 three years have elapsed from the date of issuance of the restricted license to respondent.

5. Pursuant to Business and Professions Code section 10106, respondent shall pay the Commissioner reasonable investigation and enforcement costs in the amount of \$1,562.50. The Commissioner may, in its sole discretion, order respondent to make payments pursuant to an approved payment plan during his probation.

6. The Commissioner may suspend respondent's license pending a hearing held in accordance with section 11500 et seq. of the Government Code, if payment is

not timely made as provided for herein, or as provided for in a subsequent agreement between respondent and the Commissioner. The suspension shall remain in effect until payment is made in full or until respondent enters into an agreement satisfactory to the Commissioner to provide for payment, or until a decision providing otherwise is adopted following a hearing held pursuant to this condition.

DATE: July 21, 2023

Matthew Block

MATTHEW S. BLOCK

Administrative Law Judge

Office of Administrative Hearings