

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * *

FILED
DEC 03 2003

DEPARTMENT OF REAL ESTATE

In the Matter of the Application of)
JERRY MENDEZ GUTIERREZ,)
Respondent.)

NO. H-8197 SF^{rv} *Shelly Kelly*
OAH No. N2002110089

DECISION

The Proposed Decision dated November 4, 2003, 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. There is no statutory restriction on when a new application may be made for an unrestricted license. Petition for the removal of restrictions from a restricted license is controlled by Section 11522 of the Government Code. A copy is attached hereto for the information of Respondent.

If and when application is made for a real estate salesperson license through a new application or through a petition for removal of restrictions, all competent evidence of rehabilitation presented by the Respondent will be considered by the Real Estate Commissioner. A copy of the Commissioner's Criteria of Rehabilitation is appended hereto.

This Decision shall become effective at 12 o'clock noon
on December 23, 2003.

IT IS SO ORDERED November 18 2003.

PAULA REDDISH ZINNEMANN
Real Estate Commissioner

Paula Reddish Zinnemann

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Application of:

JERRY MENDEZ GUTIERREZ,

Respondent.

Case No. H-8197 SF

OAH No. N2002110089

PROPOSED DECISION

Administrative Law Judge Melissa G. Crowell, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on October 1, 2003.

Michael B. Rich, Counsel, represented complainant Les R. Bettencourt, Deputy Real Estate Commissioner of the State of California.

Thomas C. Lasken, Attorney at Law, represented respondent Jerry Mendez Gutierrez, who was present.

The matter was submitted on October 1, 2003.

FACTUAL FINDINGS

1. Complainant Les R. Bettencourt made and filed the statement of issues in his official capacity as a Deputy Real Estate Commissioner of the State of California, Department of Real Estate.
2. On or about September 11, 2002, respondent Jerry Mendez Gutierrez filed with the Department an application for a real estate salesperson license.
3. On or about December 8, 1987, respondent was convicted in the Municipal Court of the State of California, County of Santa Clara, on his plea of nolo contendere to a violation of Penal Code section 148.9, providing false identification to a police officer, Vehicle Code section 23152(b), driving a vehicle with a blood alcohol level of .08 per cent or more, and Vehicle Code section 2800.1, flight from a pursuing police officer. Each offense was a misdemeanor.

Imposition of sentence was suspended and respondent was placed on three years probation, ordered to attend a first offenders program and to pay various fines and assessments.

4. Respondent was 21 years old at the time of these offenses. He admits the offenses, but does not remember all their details. Respondent drove his mother's vehicle after drinking alcohol at a restaurant. He was stopped by the police. He gave the police an identification that belonged to a friend because he was afraid his mother would get in trouble for a rifle she kept in the trunk.

5. On or about June 7, 1995, respondent was convicted in the Municipal Court of the State of California, County of Santa Clara, on his plea of nolo contendere to a violation of Health and Safety Code section 11550(a), being under the influence of a controlled substance, and Penal Code section 273.5(a), infliction of corporeal injury on a cohabitant, both misdemeanors. The offense of infliction of corporeal injury on a cohabitant is a crime involving moral turpitude and is substantially related to the qualifications, functions and duties of a real estate licensee in that it involves the doing of an unlawful act with the intent or threat of doing substantial injury to the person of another.

Imposition of sentence was suspended and respondent was placed on court probation for two years. Respondent was ordered to serve 180 days in jail and to attend a residential treatment program. Thereafter probation was modified to stay the jail term upon completion of a residential treatment program.

6. This offense involved a former girlfriend, Angelina Soto. After a verbal altercation in a bar, they continued the fight at home. The police were summoned. Respondent attempted to restrain Soto who was damaging the walls. He did so by choking her. Respondent was under the influence of methamphetamine at the time of the offense.

7. Respondent's entered and successfully completed McGowan's residential treatment program. He came to understand that he was a substance abuser and was out of control. Respondent terminated his relationships with those who tempted him with alcohol or drugs. Respondent has maintained sobriety for nine and one-half years. He continues to maintain his associations with the McGowan program, but does not attend meetings there as often as he would like.

8. Soto and respondent had a son. Respondent eventually discontinued the relationship with Soto as they no longer had anything in common. Respondent met Michelle Gutierrez and married her in December of 1995. Gutierrez supported respondent in his attempts to fight Soto for visitation and ultimately custody of his son. Respondent obtained full custody of his son in 2000.

9. On or about April 14, 1997, respondent was convicted in the Municipal Court of the State of California, County of Santa Clara, on his plea of nolo contendere to a violation of Penal Code section 242/243(a), battery, a misdemeanor.

Imposition of sentence was suspended and respondent was placed on formal probation for three years. Respondent was ordered to attend a domestic violence program and to pay various fines and fees. Respondent attended and successfully completed on September 1, 1998, the Domestic Violence Program at Proyecto Primavera. Through this program respondent learned how to control his temper and to communicate his needs, wants and desires in a more constructive manner.

10. This offense involved Michelle Gutierrez. The altercation occurred shortly after the birth of their first child. Gutierrez was angry with respondent as he was leaving the house to attend to his other child. Respondent pulled her hair and hit her.

As committed the offense involved moral turpitude and is substantially related to the qualifications, functions or duties of a real estate licensee in that it involves the doing of an unlawful act with the intent or threat of doing substantial injury to the person of another.

11 Respondent and Michelle Gutierrez separated for six months, but then reunited. They have had another child. Respondent has been employed with the City of San Jose since 1996. He is currently employed as an airport inspector, a position which requires FBI security clearance. Michelle Gutierrez works full time as a real estate salesperson.

12. Respondent has been a member of Los Gatos Christian Church since 1995. Respondent and his family regularly attend services. Respondent also attends adult bible study classes and teaches bible study classes for children. Respondent and his wife attend parenting and blended families' classes as well as mentor other couples. Respondent is also an assistant soccer coach for a church youth team. Respondent's pastor, Don Porter, testified at the hearing. He confirmed respondent's extensive involvement in the church. He is aware of respondent's prior offenses. In his opinion, respondent is honest and truthful and does not pose a risk of harm to the public.

13. Family members and friends confirm that respondent is sober and has learned to control his temper so that he does not pose a risk to the public. Respondent's mother-in-law Connie Juarez was candid that she did not like him when she first met him seven years ago. Today she finds him to be sober, responsible, honest and truthful. Respondent's older brother John Gutierrez testified that respondent has changed greatly since his youth. Respondent is sober, responsible, a good father, honest and truthful.

Respondent's wife Michelle confirmed that they have overcome the marital problems generated by the presence of Ms. Soto in their lives. She confirmed that

respondent is sober and that he has his anger in check and that he never touched her again. They each have taken anger management courses and she has learned a great deal from him in communicating.

14. Armando Delgado, Michelle Gutierrez's employing broker, is respondent's sponsoring broker. Delgado has known respondent socially since 1999. He knows of respondent's convictions. He believes respondent to be honest and truthful, and has no hesitation in hiring respondent or in recommending him to the Department. Although Delgado has a large business he would personally supervise respondent were respondent to obtain a restricted license.

LEGAL CONCLUSIONS

1. Under Business and Professions Code sections 480(a) and 10177(b) the Commissioner may deny an application for a real estate license if the applicant has been convicted of a felony or a crime involving moral turpitude that is substantially related to the qualifications, functions or duties of a real estate licensee. An offense is deemed to be substantially related to the qualifications, functions or duties of a real estate licensee if it involves the doing of an unlawful act 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).) Conduct that demonstrates a pattern of repeated and willful disregard for the law is also deemed to be substantially related to the qualifications, functions or duties of a real estate licensee. (Cal.Code Regs., tit. 10, § 2910, subd. (a)(10).)

2. By reason of the matters set forth in Factual Findings 5 and 6, respondent was convicted of the offense of infliction of corporeal injury on a cohabitant, a crime involving moral turpitude (see *People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1402) and one that is substantially related to the qualifications, functions and duties of a real estate licensee under section 2910(a)(8) of title 10 of the California Code of Regulations. Cause exists to deny respondent's application for licensure under Business and Professions Code sections 480(a) and 10177(b).

3. By reason of the matters set forth in Factual Findings 9 and 10, respondent was convicted of the offense of battery. The offense of simple battery is not a crime that necessarily involves moral turpitude. (*People v. Mansfield* (1988) 200 Cal.App.3d 82, 87-88.) But as committed, the offense involved moral turpitude and is substantially related to the qualifications, functions and duties of a real estate licensee under section 2910(a)(8) of title 10 of the California Code of Regulations. Cause exists to deny respondent's application for licensure under Business and Professions Code sections 480(a) and 10177(b).

5. No cause exists to deny respondent's application for licensure by reason of the conviction of being under the influence of a controlled substance as set forth in Factual Finding 5.

6. All relevant criteria set forth in section 2911 of title 10 of the California Code of Regulations have been considered in making the determination that it would not be contrary to the public interest to grant respondent a real estate salesperson license on a restricted basis. More than six years have elapsed since respondent's most recent conviction. In each of his cases respondent complied with probation and probation was successfully terminated. Respondent successfully completed a residential treatment program for substance abuse and has abstained from the use of drugs and alcohol for more than nine years. Respondent has a very stable family life and is fulfilling his parental and familial obligations. Respondent has taken and completed domestic violence and anger management courses and by all accounts he has his anger and violence under control. Respondent has new and different social relationships. Finally respondent established a significant change in attitude from that which existed at the time of the two offenses. For these reasons, the public will be adequately protected by the following order.

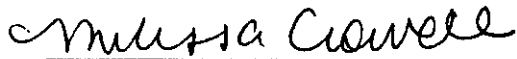
ORDER

Respondent's application for a real estate salesperson license is denied by reason of Legal Conclusions 2 and 3; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to section 10156.6 of the Business and Professions Code. The restricted license issued to respondent shall be subject to all of 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 the Business and Professions 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 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 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 two years have elapsed from the date of issuance of the restricted license to respondent.
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 RE 552 (Rev. 4/88) 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.

DATED: November 4, 2003



MELISSA G. CROWELL
Administrative Law Judge
Office of Administrative Hearings

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

FILED
SEP 04 2003

DEPARTMENT OF REAL ESTATE

In the Matter of the Accusation of

JERRY MENDEZ GUTIERREZ,

By Shelly Elzy

Case No. H-8197 SF

OAH No.

Respondent

**SECOND CONTINUED
NOTICE OF HEARING ON ACCUSATION**

To the above named respondent:

You are hereby notified that a hearing will be held before the Department of Real Estate at **THE OFFICE OF ADMINISTRATIVE HEARINGS, THE ELIHU HARRIS STATE BUILDING, 1515 CLAY STREET, SUITE 206, OAKLAND, CALIFORNIA 94612** on **WEDNESDAY -- OCTOBER 1, 2003**, at the hour of **9:00 AM**, or as soon thereafter as the matter can be heard, upon the Accusation served upon you. If you object to the place of hearing, you must notify the presiding administrative law judge of the Office of Administrative Hearings within ten (10) days after this notice is served on you. Failure to notify the presiding administrative law judge within ten days will deprive you of a change in the place of the hearing.

You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. If you are not present in person nor represented by counsel at the hearing, the Department may take disciplinary action against you based upon any express admission or other evidence including affidavits, without any notice to you.

You may present any relevant evidence and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Department of Real Estate.

The hearing shall be conducted in the English language. If you want to offer the testimony of any witness who does not proficiently speak the English language, you must provide your own interpreter and pay his or her costs. The interpreter must be certified in accordance with Sections 11435.30 and 11435.55 of the Government Code.

DEPARTMENT OF REAL ESTATE

Dated: SEPTEMBER 4, 2003

By Michael B. Rich
MICHAEL B. RICH, Counsel

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

FILED
JAN 24 2003

DEPARTMENT OF REAL ESTATE

In the Matter of the Application of

By Shelly [Signature]

JERRY MENDEZ GUTIERREZ,

Case No. H-8197 SF

OAH No.

Respondent

**FIRST CONTINUED
NOTICE OF HEARING ON APPLICATION**

To the above named respondent:

You are hereby notified that a hearing will be held before the Department of Real Estate at THE OFFICE OF ADMINISTRATIVE HEARINGS, ELIHU M. HARRIS BUILDING, 1515 CLAY STREET, SUITE 206, OAKLAND, CALIFORNIA 94612 on WEDNESDAY--APRIL 16, 2003, at the hour of 9:00 A.M., or as soon thereafter as the matter can be heard, upon the Statement of Issues served upon you. If you object to the place of hearing, you must notify the presiding administrative law judge of the Office of Administrative Hearing within ten (10) days after this notice is served on you. Failure to notify the presiding administrative law judge within ten days will deprive you of a change in the place of the hearing.

You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. If you are not present in person nor represented by counsel at the hearing, the Department may take disciplinary action against you based upon any express admission or other evidence including affidavits, without any notice to you.

The burden of proof is upon you to establish that you are entitled to the license or other action sought. If you are not present nor represented at the hearing, the Department may act upon your application without taking evidence.

You may present any relevant evidence and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Department of Real Estate.

The hearing shall be conducted in the English language. If you want to offer the testimony of any witness who does not proficiently speak the English language, you must provide your own interpreter and pay for his or her costs. The interpreter must be certified in accordance with Sections 11435.30 and 11435.55 of the Government Code.

Dated: JANUARY 24, 2003

DEPARTMENT OF REAL ESTATE
By [Signature]
DAVID B. SEALS, Counsel

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

FILED
OCT 28 2002
DEPARTMENT OF REAL ESTATE

In the Matter of the Application of

By Kathleen Contreras

JERRY MENDEZ GUTIERREZ,

} Case No. H-8197 SF

} OAH No.

Respondent

NOTICE OF HEARING ON APPLICATION

To the above named respondent:

You are hereby notified that a hearing will be held before the Department of Real Estate at

**THE OFFICE OF ADMINISTRATIVE HEARINGS
THE ELIHU HARRIS STATE BUILDING
1515 CLAY STREET, SUITE 206
OAKLAND, CALIFORNIA 94612**

on **DECEMBER 11, 2002**, at the hour of **1:30 PM**, or as soon thereafter as the matter can be heard, upon the Statement of Issues served upon you. If you object to the place of hearing, you must notify the presiding administrative law judge of the Office of Administrative Hearings within ten (10) days after this notice is served on you. Failure to notify the presiding administrative law judge within ten days will deprive you of a change in the place of the hearing.

You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. If you are not present in person nor represented by counsel at the hearing, the Department may take disciplinary action against you based upon any express admission or other evidence including affidavits, without any notice to you.

The burden of proof is upon you to establish that you are entitled to the license or other action sought. If you not present nor represented at the hearing, the Department may act upon your application without taking evidence.

You may present any relevant evidence and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Department of Real Estate.

The hearing shall be conducted in the English language. If you want to offer the testimony of any witness who does not proficiently speak the English language, you must provide your own interpreter and pay his or her costs. The interpreter must be certified in accordance with Sections 11435.30 and 11435.55 of the Government Code.

DEPARTMENT OF REAL ESTATE

Dated: OCTOBER 25, 2002

By Michael B. Rich
MICHAEL B. RICH, Counsel
RE 500 (Rev. 8/97)

1 DEIDRE L. JOHNSON, Counsel
(SBN 66322)
2 Department of Real Estate
P. O. Box 187000
3 Sacramento, CA 95818-7000
4 Telephone: (916) 227-0789

FILED
SEP 19 2002

DEPARTMENT OF REAL ESTATE

By *Kathleen Contreras*

5
6
7
8
9 BEFORE THE
10 DEPARTMENT OF REAL ESTATE
11 STATE OF CALIFORNIA

12 * * *

13 In the Matter of the Application of) NO. H-8197 SF
14 JERRY MENDEZ GUTIERREZ,) STATEMENT OF ISSUES
15 Respondent.)

16 The Complainant, LES R. BETTENCOURT, a Deputy Real
17 Commissioner of the State of California, for Statement of Issues
18 against JERRY MENDEZ GUTIERREZ (hereinafter Respondent) alleges
19 as follows:

20 I

21 Respondent made application to the Department of Real
22 Estate of the State of California for a real estate salesperson
23 license on or about September 11, 2001.

24 II

25 Complainant, LES R. BETTENCOURT, a Deputy Real Estate
26 Commissioner of the State of California, makes this Statement of
27 Issues in his official capacity and not otherwise.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

III

On or about December 8, 1987, in the Municipal Court of the State of California, County of Santa Clara, Respondent was convicted of violation of Penal Code Section 148.9 (FALSE ID TO POLICE OFFICER), Vehicle Code Section 23152(b) (DRIVING UNDER THE INFLUENCE), and Vehicle Code Section 2800.1 (FLIGHT FROM PURSUING PEACE OFFICER), crimes involving moral turpitude, and/or crimes which bear a substantial relationship under Section 2910, Title 10, California Code of Regulations, to the qualifications, functions, or duties of a real estate licensee.

IV

On or about June 7, 1994, in the Municipal Court of the State of California, County of Santa Clara, Respondent was convicted of violation of Health and Safety Code Section 11550(a) (UNDER INFLUENCE OF CONTROLLED SUBSTANCE), and Penal Code Section 273.5(a) (INFLICTING CORPORAL INJURY ON COHABITANT), crimes involving moral turpitude, and/or crimes which bear a substantial relationship under Section 2910, Title 10, California Code of Regulations, to the qualifications, functions, or duties of a real estate licensee.

V

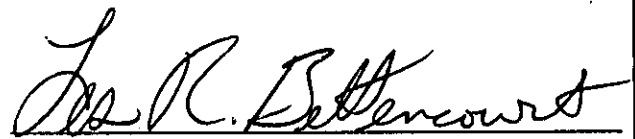
On or about April 14, 1997, in the Municipal Court of the State of California, County of Santa Clara, Respondent was convicted of violation of Penal Code Section 242/243(a) (BATTERY), a crime involving moral turpitude, and/or a crime which bears a substantial relationship under Section 2910,

1 Title 10, California Code of Regulations, to the qualifications,
2 functions, or duties of a real estate licensee.

3 VI

4 The crimes of which Respondent was convicted as
5 described in Paragraphs III, IV, and V above, constitute cause,
6 jointly and severally, for denial of Respondent's application
7 for a real estate license under Sections 480(a) and 10177(b) of
8 the California Business and Professions Code.

9 WHEREFORE, the Complainant prays that the above-
10 entitled matter be set for hearing and, upon proof of the
11 charges contained herein, that the Commissioner refuse to
12 authorize the issuance of, and deny the issuance of a real
13 estate salesperson license to Respondent, and for such other and
14 further relief as may be proper in the premises.

15
16
17
18 
19 LES R. BETTENCOURT
20 Deputy Real Estate Commissioner
21

22 Dated at Oakland, California,
23 this 14th day of September, 2002.
24
25
26
27