

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED
JUN 27 2003

DEPARTMENT OF REAL ESTATE

* * *

In the Matter of the Application of)
ROSEANNE M. SERNA,)
Respondent.)

NO. H-8346 SF

OAH No. N2003040384

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DECISION

The Proposed Decision dated May 27, 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. There is no statutory restriction on when application may again be made for this license. If and when application is again made for this license, all competent evidence of rehabilitation presented by Respondent will be considered by the Real Estate Commissioner. A copy of the Commissioner's Criteria of Rehabilitation is appended hereto for the information of Respondent.

This Decision shall become effective at 12 o'clock noon
on JULY 17, 2003.

IT IS SO ORDERED June 12 2003.

PAULA REDDISH ZINNEMANN
Real Estate Commissioner

Paula Reddish

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Application of:

ROSEANNE M. SERNA,

Respondent.

Case No. H-8346 SF

OAH No. N2003040384

PROPOSED DECISION

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, in Oakland, California on May 12, 2003.

Complainant Les R. Bettencourt, Deputy Real Estate Commissioner, State of California, was represented by David B. Seals, Counsel.

Respondent Roseanne M. Serna was present and was represented by R. James Fisher, Attorney at Law, P.O. Box 2035, Rohnert Park, California 94927.

The matter was submitted on May 12, 2003.

FACTUAL FINDINGS

1. On September 3, 2002, Roseanne M. Serna (respondent) submitted to the Department of Real Estate (Department) an application for a real estate salesperson license. Any license issued pursuant to that application would be subject to the provisions of Business and Professions Code section 10153.4.
2. In response to question number 25 on her application ("Have you ever been convicted of any violation of law?"), respondent did not check either the "yes" or "no" box. Instead, she placed a question mark to the left of the question. Question number 25 instructs the applicant to complete number 27 if "yes" is checked. Although she had not checked "yes," respondent did complete number 27, listing a March 28, 2000 conviction.
3. In response to question number 26 on her application ("Are there any criminal charges pending against you at this time?"), respondent again did not check either the "yes" or "no" box. Once more, she placed a question mark to the left of the question. Although question number 26 also instructs the applicant to complete number 27 if "yes" is checked, respondent made no further entry in number 27 than the one relating to the March 28, 2000 conviction.

4. In fact, respondent did have criminal charges pending against her at the time she filed her application for a real estate license. On August 16, 2002, twelve days before she signed her application, respondent had been arrested for driving under the influence of alcohol. She was handcuffed and taken to the Rohnert Park Police Department. After processing, she was released to a friend. She was given a citation with a court appearance date.

5. Because respondent had not checked either the "yes" or "no" boxes on question numbers 25 and 26, on September 25, 2002 the Department sent respondent a letter asking her to answer those questions and to provide any necessary details. Respondent returned the letter on October 3, 2002. Respondent checked "yes" for both questions and, in response to the second, reported that she had been charged on August 16, 2002 with a violation of Vehicle Code sections 23252(a)/23152(b), and that disposition of the charge was pending.

6. At the time of her arrest on August 16, 2002, respondent was on probation for the conviction she had reported on her application for a real estate license. On March 28, 2000, in the Superior Court of California, County of Sonoma, respondent had been convicted, on her plea of nolo contendere, of a violation of Vehicle Code section 23152(b) (driving with a 0.08% or higher blood alcohol level). Imposition of judgment was suspended and respondent was given a 36-month conditional sentence. Conditions included two days in jail, which she could serve on work release, restriction of her driving privileges for three months, enrollment in and completion of the First Offender Drinking Driver Program, and a prohibition against driving with any alcohol in her system.

7. Based upon her August 16, 2002 arrest, on December 12, 2002, in the Superior Court of California, County of Sonoma, respondent was convicted, on her plea of no contest, of a second violation of Vehicle Code section 23152(b). Once again, imposition of judgment was suspended and respondent was given a 36-month conditional sentence. Conditions included 30 days in jail, which she again was permitted to serve on work release, restriction of her driving privileges for 18 months, enrollment in and completion of the Multiple Offender Drinking Driving Program, and completion of 100 hours of volunteer work.

8. The arrest that led to respondent's first conviction occurred on February 27, 2000. Respondent had been at a birthday party at a pizza parlor. She drank some beer at the party. On the way home, she was stopped after making an illegal left turn. She told the officer she had had two beers. A breathalyzer test reported a blood alcohol level greater than 0.11 percent. The arrest that led to respondent's second conviction occurred after respondent had been out with friends to celebrate having taken the real estate licensing exam. On the way home, with at least four friends in the car, she was stopped by a police officer who had seen her weaving. Again, respondent told the officer she had had two beers.

9. Respondent is 24 years old. She holds an AA degree obtained at Santa Rosa Junior College. She has worked as a teller and customer service representative at two financial institutions. She is currently employed at Home Sellers Realty, where her

stepfather is the broker and her mother is a salesperson. Respondent works as their assistant and does some escrow work. If she were to receive a real estate license, respondent's stepfather would be her sponsoring broker.

10. As a result of her most recent conviction, respondent's driver's license has been suspended until December 10, 2003. After that, her license will be restricted, allowing her to drive only to work and to her drinking driver program. That program, which runs for 18 months, began in January 2003 and will continue until at least June 2004. Respondent had completed a three-month drinking driver program as a result of her first conviction. On her most recent conviction, respondent has paid her fines and has completed the required 100 hours of volunteer work. She was permitted to do community service in lieu of her 30-day jail sentence. It was not clear whether she has completed the 240 hours required.

11. Respondent does not believe she has an alcohol problem. Other than beer, she drinks only on occasion. However, it is not her practice to drink more than two beers when she is out. She testified that when she does drink, she has a designated driver. When she drove after drinking on August 16, 2002, respondent did not think about the fact that she was on probation for an earlier drunk driving conviction.

12. Respondent testified she put a question mark next to question number 26 because she was unsure how to answer it. She did not think to ask her stepfather, and sponsoring broker, how she should answer the question. She describes that failure on her part as "an oversight." During her testimony, respondent gave somewhat conflicting answers about her state of mind when answering the question. At one point, she testified she "didn't know" if charges were pending against her at the time of the application. Later, she said she had received only a citation and no charges were pending. On cross-examination, she testified that she did not know which of the two sections listed on the citation she would be charged with. Based upon respondent's testimony, it is clear that, at the time she completed her application, she knew criminal charges were pending against her. Respondent's failure to list those charges on the application constituted a knowing and material misstatement of fact.

13. Respondent testified that by the time she answered the Department's September 25, 2002 letter asking her to clearly answer question numbers 25 and 26 she had retained a lawyer to defend her on the criminal charges and he advised her how to answer the Department's letter. Respondent views this letter as a supplement to the application.

LEGAL CONCLUSIONS

1. Respondent contends that driving under the influence of alcohol is not a crime of moral turpitude, and that it is not substantially related to the qualifications, functions and duties of a real estate licensee.

It is true that no case has held that misdemeanor driving under the influence of alcohol is a crime involving moral turpitude within the meaning of the Real Estate Law. And

consistently held that a conviction of misdemeanor DUI does not involve moral turpitude per se.¹ But even if a crime does not involve moral turpitude per se, the circumstances under which it was committed may involve moral turpitude. That is certainly the case with respondent's 2002 conviction. Less than three years after she was first convicted of driving under influence, and under circumstances remarkably similar to the first offense, respondent again drank and again drove her car while intoxicated. Respondent permitted herself to become so intoxicated that she created the risk of harm to herself, the others in her car and the safety of the public at large.

"Willful failure to comply with a court order" and "conduct which demonstrates a pattern of repeated and willful disregard of law" are each deemed to be substantially related to the qualifications, functions and duties of a real estate licensee.² Respondent willfully failed to comply with the probationary order that prohibited her from driving with any alcohol in her system (much less enough alcohol to make her legally intoxicated). That conduct also showed a repeated and willful disregard of law.

2. Based upon the foregoing, cause for denial of respondent's application exists pursuant to Business and Professions Code sections 480(a) and 10177(b) in that she was convicted of a crime involving moral turpitude and that bears a substantial relationship to the qualifications, functions and duties of a real estate licensee.

3. Cause for denial of respondent's application also exists pursuant to Business and Professions Code sections 480(c) and 10177(a) in that, as set forth in Finding 12, she knowingly made a material misstatement of fact on her application. Respondent's subsequent revelation of the charges pending against her, coming only after the Department had requested further information, may be seen as a mitigating factor but cannot be found to have cured respondent's initial failure to report.

4. Respondent's second drunk driving conviction occurred just five months ago. She is scheduled to remain on probation for that offense until December 2005. Although respondent completed the obligations imposed upon her in her first probation, she failed to comply with one of the most significant terms—that she not drive with alcohol in her system. Considering the recency of respondent's conviction, the fact that she remains on probation, and the fact that she failed to fully comply with the terms of her earlier probation, it is determined that it would be against the public interest to permit respondent to hold a real estate license at this time.

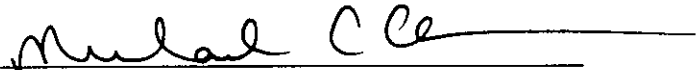
¹ *In re Kelley* (1990) 52 Cal.3d 487, 494; *In re Carr* (1988) 46 Cal.App.4th 1089.

² Title 10, California Code of Regulations section 2910(a)(9) and (a)(10).

ORDER

The application of respondent Roseanne M. Serna for a real estate salesperson license is denied.

DATED: May 27, 2003



MICHAEL C. COHN
Administrative Law Judge
Office of Administrative Hearings

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

FILE
APR 10 2003
DEPARTMENT OF REAL ESTATE

In the Matter of the Application of

ROSEANNE M. SERNA,

Case No. H-8346 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, ELIHU M. HARRIS BUILDING, 1515 CLAY STREET, SUITE 206, OAKLAND, CALIFORNIA 94612 on MONDAY--MAY 12, 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: APRIL 10, 2003

DEPARTMENT OF REAL ESTATE
By David B. Seals
DAVID B. SEALS, Counsel

1 DAVID B. SEALS, Counsel (SBN 69378)
2 Department of Real Estate
3 P. O. Box 187000
4 Sacramento, CA 95818-7000

5 Telephone: (916) 227-0789
6 -or- (916) 227-0792 (Direct)

FILED

MAR 03 2003

DEPARTMENT OF REAL ESTATE

By Jean A. Rundo

8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Application of)
12 ROSEANNE M. SERNA,)
13 Respondent.)

No. H- 8346 SF

STATEMENT OF ISSUES

14
15 The Complainant, Les R. Bettencourt, a Deputy Real
16 Estate Commissioner of the State of California, for Statement of
17 Issues against ROSEANNE M. SERNA (hereinafter "Respondent")
18 alleges as follows:

19 I

20 Respondent made application to the Department of Real
21 Estate of the State of California for a real estate salesperson
22 license on or about September 3, 2002 with the knowledge and
23 understanding that any license issued as a result of said
24 application would be subject to the conditions of Section 10153.4
25 of the California Business and Professions Code.

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II

Complainant, Les R. Bettencourt, a Deputy Real Estate Commissioner of the State of California, makes this Statement of Issues in his official capacity.

III

In response to Question 26 of said application, to wit: "ARE THERE ANY CRIMINAL CHARGES PENDING AGAINST YOU AT THIS TIME?", Respondent failed to answer.

IV

On or about March 28, 2000, in the Superior Court of California, County of Sonoma, Respondent was convicted of violation of California Vehicle Code Section 23152(b) (Driving With a 0.08 or Higher Blood Alcohol), a crime involving moral turpitude which bears a substantial relationship under Section 2910, Title 10, California Code of Regulations (herein "the Regulations"), to the qualifications, functions or duties of a real estate licensee.

V

On or about December 10, 2002, in the Superior Court of California, County of Sonoma, Respondent was convicted of violation of California Vehicle Code Section 23152(b) (Driving With a 0.08 or Higher Blood Alcohol), a crime involving moral turpitude which bears a substantial relationship under Section 2910 of the Regulations, to the qualifications, functions or duties of a real estate licensee.

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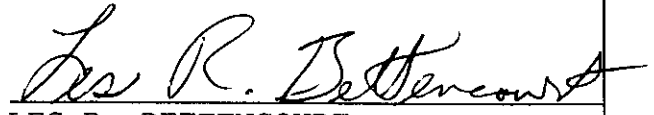
1 VI

2 Respondent's failure to reveal the pending criminal
3 complaint set forth in Paragraph IV above in said application
4 constitutes the attempt to procure a real estate license by
5 fraud, misrepresentation, or deceit, or by making a material
6 misstatement of fact in said application, which failure is cause
7 for denial of Respondent's application for a real estate license
8 under Sections 480(c) and 10177(a) of the California Business and
9 Professions Code.

10 VII

11 The crimes of which Respondent was convicted, as
12 alleged in Paragraphs IV and V above constitute cause for denial
13 of Respondent's application for a real estate license under
14 Sections 480(a) and 10177(b) of the California Business and
15 Professions Code.

16 WHEREFORE, the Complainant prays that the above-
17 entitled matter be set for hearing and, upon proof of the charges
18 contained herein, that the Commissioner refuse to authorize the
19 issuance of, and deny the issuance of, a real estate salesperson
20 license to Respondent, and for such other and further relief as
21 may be proper under other provisions of law.

22
23 
24 LES R. BETTENCOURT
Deputy Real Estate Commissioner

25 Dated at Oakland, California,
26 this 17th day of January, 2003.