

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * *

FILED
AUG - 6 2004

DEPARTMENT OF REAL ESTATE

By Laurie B.

In the Matter of the Application of)
DAMON PAUL BOWERS,) NO. H-8611 SF
Respondent.) OAH NO. N-2004010522

DECISION

The Proposed Decision dated July 15, 2004, 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 AUGUST 27, 2004.

IT IS SO ORDERED August 5, 2004.

JOHN R. LIBERATOR
Acting Real Estate Commissioner

John R. Liberator

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Application of:

DAMON PAUL BOWERS,

Respondent.

No. H-8611 SF

OAH No. N2004010522

PROPOSED DECISION

Administrative Law Judge Nancy L. Rasmussen, Office of Administrative Hearings, State of California, heard this matter on June 16, 2004, in Oakland, California.

Department of Real Estate Counsel David B. Seals represented complainant Les R. Bettencourt, Deputy Real Estate Commissioner, State of California.

Marchmont J. Schwartz, Attorney at Law, represented respondent Damon Paul Bowers, who was present.

The matter was submitted on June 16, 2004.

FACTUAL FINDINGS

1. Respondent Damon Paul Bowers submitted to the Department of Real Estate (Department) an application for a real estate salesperson license. The application was dated August 20, 2002, and the Department received it on December 26, 2002.

2. Question # 25 on the license application stated: "Have you ever been convicted of any violation of law? Convictions expunged under Penal Code section 1203.4 must be disclosed. However, you may omit minor traffic citations which do not constitute a misdemeanor or felony offense."¹ If the applicant answered in the affirmative, he or she was directed to provide a detailed explanation under # 27, listing each conviction. Respondent did not check either the "Yes" or "No" box in # 25, but he disclosed one conviction under # 27 – his 1996 conviction described in Finding 3. He failed to disclose his 1999 and 2001 convictions described in Findings 5 and 7, respectively. When respondent signed the

¹ An instruction box preceding Questions # 24 through # 26 (set off by a bold line) also stated: "All convictions must be disclosed whether or not the plea or verdict was set aside, the conviction against you was dismissed, or expunged or if you have been pardoned."

application, he certified under penalty of perjury that "the foregoing answers and statements given in this application are true and correct."

3. On April 12, 1996, in the Sacramento Superior and Municipal Courts, respondent was convicted on a plea of no contest of violating Vehicle Code section 23152, subdivision (a) (driving under the influence of alcohol). He was placed on informal probation for three years. Conditions of probation included a 48-hour jail sentence, with the weekend work program recommended, and a requirement that respondent enroll in a DUI first offender program. Respondent enrolled in the DUI program on April 22, 1996, and he completed it on July 31, 1996.

4. The facts and circumstances of the 1996 conviction are that on March 8, 1996, respondent was attempting to drive home to Stockton when he had been drinking. When he was arrested for driving under the influence he was also cited for having an open container of alcohol in his vehicle. Respondent was 21 years old.

5. On or about March 30, 1999, in the Superior Court of California, County of San Luis Obispo, respondent was convicted on a plea of no contest of violating Penal Code section 415 (fighting, causing loud noise, or using offensive words in public place). Respondent was placed on informal probation for one year. On October 31, 2002, the court granted respondent's petition to set aside the conviction under Penal Code section 1203.4.

6. The facts and circumstances of the 1999 conviction are that on December 21, 1998, respondent got into an altercation at a sports bar in San Luis Obispo. His friend and former college football teammate Ryan Green testified at the hearing that it was his (Green's) fault, because he got into a fight and respondent got pulled into it. According to Green, respondent was sober that night because he was the designated driver.

7. On July 17, 2001, in the Superior Court of California, County of Contra Costa, respondent was convicted on a plea of no contest of violating Vehicle Code section 23103/23103.5 (reckless driving reduced from DUI - "wet reckless"). Imposition of sentence was suspended and respondent was placed on court probation for two years. Conditions of probation included serving five days in the work alternative program and completing the Level 2 drinking driver program. Respondent completed his five days in the work alternative program on October 30, 2001. He completed the Level 2 drinking driver program on September 18, 2003, and successfully completed probation sometime after that.

8. The facts and circumstances of the 2001 conviction are that on February 17, 2001, respondent was arrested for driving under the influence of alcohol after a traffic stop for speeding. He was driving home from a restaurant where, he claims, he drank no more than two glasses of beer. Although respondent did not think he was legally drunk, his blood alcohol content was .09 percent.

9. Respondent is not a heavy drinker, and since his 1996 DUI conviction he has tried to avoid driving after drinking. When he is out with friends, he usually acts as the designated driver and does not drink.

10. Respondent is a 29 year-old man who recently left a career in professional football. His father, Gary Bowers, is a licensed real estate broker in Danville. After working for his father on and off for many years, respondent now works for him full-time as an administrative assistant. Respondent's father is eager to have his son join him in a licensed capacity, and he is willing to supervise and oversee his real estate activities. Since respondent's 2001 conviction, the group of people he associates with has changed somewhat because he has left football. He now spends more time with his father's friends from the real estate and mortgage fields.

11. On February 24, 2003, the Department sent respondent a letter informing him that Question # 25 on his license application had not been answered and directing him to answer the questions set forth in the letter. These questions included the same one as Question # 25, with the same proviso about disclosing convictions expunged under Penal Code section 1203.4. A section was provided for respondent to list each conviction with its particulars.

Respondent was in Colorado playing football when this letter arrived, so Gary Bowers opened it. (Respondent's father handled many of his son's business affairs during football season.) Respondent never saw the letter, but his father recapped it when they discussed it over the phone. They assumed the Department wanted more information about the 1996 DUI conviction since that was what respondent had listed on the application. Accordingly, Gary Bowers answered "Yes" to the question "Have you ever been convicted of any violation of law," and he listed the 1996 conviction and information about it. He did not list respondent's 1999 or 2001 conviction. Gary Bowers signed his son's name in the space for the applicant's signature (without disclosing that the signature was not actually that of respondent). He signed his own name below in the space for sponsoring broker, following the certification under penalty of perjury that: "...I have read the applicant's answers to all questions on his/her salesperson license application AND those which have been provided in this application supplement. This information is true and correct to the best of my knowledge." The signatures were dated March 20, 2003. Gary Bowers mailed the form back to the Department on April 7, 2003.

12. On May 7, 2003, the Department sent respondent a letter informing him that his application had been forwarded to the district office for additional processing. On May 15, 2003, Deputy Commissioner Sandra McKenzie in the Oakland district office sent respondent a letter stating: "Your application for a real estate license has been assigned to me for a background investigation of criminal conviction(s) that may or may not have been disclosed in your application or other matters." The letter asked respondent to complete and return the enclosed form RE 515 Confidential - Interview Information Statement (RE 515).

13. Respondent filled out the RE 515, and when he signed it on June 19, 2003, he was certifying that the information in the form was true and correct. In the section for listing criminal convictions, respondent disclosed all three of his convictions.

14. Respondent was evasive and inconsistent in explaining why he failed to disclose his 1999 and 2001 convictions on the license application and why he allowed his father to withhold that information in answering the questions in the Department's February 24, 2003 follow-up letter. On the RE 515, he said it was a "mistake" and an "oversight" not to disclose the 2001 conviction. On direct examination at the hearing, he cited stupidity, shame and inadvertence as reasons why he did not disclose that conviction. (He explained on cross-examination that he feels ashamed even thinking of his wet reckless conviction.) Respondent also stated that he talked to several other real estate licensees who told him they had not disclosed DUI convictions on their applications. Respondent's father testified that he did not list the wet reckless conviction when answering the questions in the follow-up letter because he considered the conviction to be more like a moving violation and he "forgot" about it.

With respect to the nondisclosure of his 1999 conviction, respondent stated on the RE 515: "I believed since it was expunged that it was no longer valid on my record." He reiterated at the hearing that he thought this conviction was expunged. Respondent's father claimed that an attorney told him years ago that when a conviction was expunged it meant it was "erased." Interestingly, respondent's signature on his application is dated August 20, 2002, some two months *before* the "expungement" under Penal Code section 1203.4 was granted. Respondent claimed he filled out the application in a hurry without reading it carefully. He first said he did not read the part of Question # 25 stating that "[c]onvictions expunged under Penal Code section 1203.4 must be disclosed," and if he had read it, he would have listed his 1999 conviction. Then he said that he "glanced at" that language but it did not trigger a need to disclose the conviction.

Respondent's father, and respondent on direct examination, made much of the fact that respondent disclosed all of his convictions on the RE 515 without knowing whether the Department already knew about the 1999 and 2001 convictions. They point to this as evidence of respondent's honesty and lack of intent to withhold information from the Department. However, by the time he filled out the RE 515, respondent had good reason to suspect that the Department knew about or would find out about his other convictions. Deputy Commissioner McKenzie's letter certainly implied that the Department had access to information about convictions that were not disclosed on the application. On cross-examination, respondent conceded that since the processing of his application had dragged on so long, he assumed the Department was doing a thorough background investigation and everything would come out.

Although respondent denies any intent to obtain a license by fraud or concealment, his explanation for disclosing the oldest of his three convictions and not disclosing the two more recent ones, including the conviction for which he was still on probation, is not

credible. He knew at the time he completed the application and signed it under penalty of perjury that he had not fully disclosed the information regarding his criminal record.

15. Respondent had several character witnesses besides his father – a commercial real estate broker, his former swim coach (a real estate salesperson) and his high school football coach, all of whom are long-time friends of respondent. They uniformly praised him as an honest and upstanding young man, not to mention an extraordinary athlete.

16. Respondent has not completed all the courses required under Business and Professions Code section 10153.4.

LEGAL CONCLUSIONS

1. Respondent's driving under the influence offenses are crimes involving moral turpitude that are substantially related to the qualifications, functions or duties of a real estate licensee.² Respondent's 1996 DUI conviction and his 2001 wet reckless conviction each constitute cause to deny his license application under Business and Professions Code sections 480, subdivision (a), and 10177, subdivision (b).

2. A violation of Penal Code section 415 (fighting, causing loud noise, or using offensive words in public place) does not involve moral turpitude, but respondent's commission of that crime in 1998, because it was not his first criminal offense, is substantially related to the qualifications, functions or duties of a real estate licensee.³ Respondent's 1999 conviction constitutes cause to deny his license application under Business and Professions Code section 480, subdivision (a). The conviction does not constitute cause for denial under Business and Professions Code section 10177, subdivision (b).

3. Respondent's knowing nondisclosure of his 1999 and 2001 convictions on his license application constitutes cause to deny the application under Business and Professions Code sections 480, subdivision (c), and 10177, subdivision (a).

4. If respondent had fully disclosed his criminal convictions on the application, he would have been a good candidate for a restricted license. While two DUI offenses present some cause for concern, three years have elapsed since the last offense and it does not appear that respondent has a drinking problem. The 1999 conviction, because it occurred five years ago and is so minor, is almost irrelevant. The major issue in this case is respondent's nondisclosure of his two most recent convictions. Any material omission on a

² The Department's criteria for substantial relationship include: "Two or more convictions involving the consumption or use of alcohol or drugs when at least one of the convictions involve driving and the use or consumption of alcohol and drugs." (Cal. Code Regs, tit. 10, § 2910, subd. (a)(11).)

³ "Conduct which demonstrates a pattern of repeated and willful disregard of the law" is "substantially related." (Cal. Code Regs, tit. 10, § 2910, subd. (a)(10).)

license application signed under penalty of perjury raises serious concerns about the applicant's honesty and integrity, not to mention his trustworthiness in completing official documents. Respondent's lack of candor at the hearing only compounds these concerns. It would be contrary to the public interest to grant him a real estate license at this time, even on a restricted basis.

ORDER

The application of respondent Damon Paul Bowers for a real estate salesperson license is denied.

DATED: July 15, 2004

Nancy L. Rasmussen
NANCY L. RASMUSSEN
Administrative Law Judge
Office of Administrative Hearings

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

FILED

MAY - 3 2004

DEPARTMENT OF REAL ESTATE

By *Laurie E. Z...*

In the Matter of the Application of

DAMON PAUL BOWERS,

} Case No. H-8611 SF

} OAH No.

Respondent

**FIRST AMENDED
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, 1515 CLAY STREET, SUITE 206, OAKLAND, CA 94612** on **WEDNESDAY, JUNE 16, 2004**, 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 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 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 his or her costs. The interpreter must be certified in accordance with Sections 11435.30 and 11435.55 of the Government Code.

Dated: MAY 3, 2004

DEPARTMENT OF REAL ESTATE

By *David B. Seals*
DAVID B. SEALS, Counsel

FILED
JAN 20 2004

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

DEPARTMENT OF REAL ESTATE

Shelly [Signature]

In the Matter of the Application of

DAMON PAUL BOWERS

} Case No. H-8611 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 **THURSDAY--MARCH 4, 2004**, at the hour of **1:30 P.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 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.

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DEPARTMENT OF REAL ESTATE

Dated: JANUARY 20, 2004

By *David B. Seals*
DAVID B. SEALS, Counsel *(S.E.)*

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

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

FILED

DEC 31 2003

DEPARTMENT OF REAL ESTATE

By Jean Bunt

7 BEFORE THE DEPARTMENT OF REAL ESTATE
8 STATE OF CALIFORNIA

9 * * *

10 In the Matter of the Application of)
11 DAMON PAUL BOWERS,) NO. H-8611 SF
12 Respondent.) STATEMENT OF ISSUES

13 The Complainant, LES R. BETTENCOURT, a Deputy Real
14 Estate Commissioner of the State of California, for Statement of
15 Issues against DAMON PAUL BOWERS (hereinafter "Respondent")
16 alleges as follows:

17 I

18 Respondent made application to the Department of Real
19 Estate of the State of California for a real estate salesperson
20 license on or about December 26, 2002 with the knowledge and
21 understanding that any license issued as a result of said
22 application would be subject to the conditions of Section 10153.4
23 of the California Business and Professions Code.

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.

1 III

2 In response to Question 25 of said application, to
3 wit: "Have you ever been convicted of any violation of law? If
4 yes, complete #27 below.", Respondent failed to answer.

5 IV

6 In response to #27 which asked for a explanation of
7 items 24 - 26, Respondent revealed only the conviction described
8 in Paragraph V below.

9 V

10 On or about April 12, 1996, in the Sacramento Superior
11 and Municipal Courts, Respondent was convicted of violation of
12 California Vehicle Code Section 23152(a) (Driving Under the
13 Influence of Alcohol), a crime involving moral turpitude and/or
14 which bears a substantial relationship under Section 2910, Title
15 10, California Code of Regulations (herein "the Regulations"), to
16 the qualifications, functions, or duties of a real estate licensee.

17 VI

18 On or about March 30, 1999, in the Superior Court,
19 County of San Luis Obispo, State of California, Respondent was
20 convicted of violation of California Penal Code Section 415
21 (Fighting, Causing Loud Noise, or Using Offensive Words in Public
22 Place), a crime involving moral turpitude and/or which bears a
23 substantial relationship under Section 2910 of the Regulations, to
24 the qualifications, functions, or duties of a real estate licensee.

25 VII

26 On or about July 17, 2001, in the Superior Court of
27 California, County of Contra Costa, Walnut Creek, Respondent was

1 convicted of violation of California Vehicle Code Section 23103
2 per Section 23103.5 (Wet Reckless), a crime involving moral
3 turpitude and/or which bears a substantial relationship under
4 Section 2910 of the Regulations, to the qualifications, functions,
5 or duties of a real estate licensee.

6 VIII

7 Respondent's failure to reveal the convictions set forth
8 in Paragraphs VI and VII above in said application constitutes
9 the attempt to procure a real estate license by fraud, misrep-
10 sentation, or deceit, or by making a material misstatement of
11 fact in said application, which failure is cause for denial of
12 Respondent's application for a real estate license under Sections
13 480(c) and 10177(a) of the Code.

14 IX

15 The crimes of which Respondent was convicted, as
16 alleged in Paragraphs V through VII, above, constitute cause for
17 denial of Respondent's application for a real estate license
18 under Sections 480(a) and 10177(b) of the Code.

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

25 
26 LES R. BETTENCOURT
Deputy Real Estate Commissioner

27 Dated at Oakland, California,
this 13th day of November, 2003.