

FILED
JUL 9 2004

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE

By Shelly Ely

* * *

In the Matter of the Accusation of)	
KARLOS TAPIA,)	NO. H-8664 SF
Respondent.)	OAH NO. N-2004030409
_____)	

DECISION

The Proposed Decision dated June 3, 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 Decision suspends or revokes one or more real estate licenses on grounds of the conviction of a crime.

The right to reinstatement of a revoked real estate license or to the reduction of a suspension is controlled by Section 11522 of the Government Code. A copy of Section 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 July 26, 2004.

IT IS SO ORDERED June 23, 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 Accusation of:

KARLOS TAPIA,

Respondent.

Case No. H-8664 SF

OAH No. N2004030409

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 19, 2004.

Complainant Les R. Bettencourt, Deputy Real Estate Commissioner of the State of California, was represented by Truly Sughrue, Counsel, Department of Real Estate.

Respondent Karlos Tapia represented himself.

The matter was submitted on May 19, 2004.

FACTUAL FINDINGS

1. Respondent Karlos Tapia is licensed and has license rights under the Real Estate Law as a real estate salesperson. Respondent's license has been renewed through December 28, 2004.
2. On February 14, 2002, respondent was convicted in Santa Clara County, on his plea of nolo contendere, of misdemeanor violations of Penal Code sections 242/243, subdivision (e) (battery against a cohabitant or person in a dating relationship), and 136.1, subdivision (b)(1) (preventing or dissuading reporting of a crime).
3. Upon conviction, imposition of sentence was suspended and respondent was placed on probation for three years on conditions that included payment of \$300 in fines, five days in jail in a weekend work project, and participation in an alcohol treatment or anger management program as directed by the probation officer.
4. The incident that resulted in respondent's conviction occurred in November 2001. After he had spent the night drinking in a bar, respondent got into an argument with his girlfriend. He took her car keys from her and when she then tried to call 911 he hung up

the pay phone she was using. Respondent denies hitting his girlfriend and says that he stopped her from making the 911 call because he wanted to be the one to call the police because he was afraid she would lie to them. Respondent did call 911 from the adjoining pay phone and he remained on the line until the police arrived.

5. Although only required to undertake one program as part of his criminal probation, respondent completed in May 2002 a 10-hour Basic Addiction Education program and in September 2002 a 16-hour Impulse Management Education program, both of which were provided by the National Council on Alcohol and Drug Dependence, Inc. Acknowledging that he had something of an alcohol problem, in November 2002 respondent was accepted into Support Systems Homes, Inc., a transitional 12-step support group home for clients in recovery. Respondent participated in the program's 90-day intensive outpatient program and completed an Alcoholics Anonymous "90/90"—attending 90 AA meetings in 90 days. Respondent continued going to AA meetings occasionally for five or six months after that. Respondent had agreed to a six-month commitment at Support Systems Homes, but left the program after four months because he got married. He last used alcohol on October 25, 2002.

6. Respondent is 34 years old. His wife has two children, ages four and five, whom respondent is in the process of adopting, and he and his wife have an eight-month-old baby. Respondent also has two children from a prior marriage. Those children are 12 and 13. Respondent is current in his child support obligation for those children. He has a good relationship with his two older children and does many activities with them.

7. Respondent has been employed by Marcus and Millichap Real Estate Investment Brokerage Company since April 2000. He does cold calling and marketing, and some sales, with broker Edward Cerna, who is in charge of Marcus and Millichap's San Jose office. Respondent reported his arrest to Cerna the morning after it happened. Cerna has found respondent to be a very good worker and has seen him mature over the past four years. Danon Slinkard is a real estate salesperson who has worked with respondent and Cerna for the past four years. He too says that respondent has grown and matured in that time, both in business and as a family man. Slinkard knows that respondent is heavily involved with his children, and has heard him call his older children's schools to check on their progress. Respondent receives numerous compliments from customers. Neither Slinkard nor Christie Johnson, who has worked with respondent for the past six months, has ever seen respondent act in a violent manner. Johnson has been impressed that respondent never loses his cool at work, even under the most stressful circumstances.

LEGAL CONCLUSIONS

1. Under Business and Professions Code section 10177, subdivision (b), the holder of a real estate license may be disciplined if he has been convicted of a crime involving moral turpitude. Under Business and Professions Code section 490, the licensee may be disciplined if he has been convicted of a crime that is substantially related to the qualifications, functions or duties of a real estate licensee.

2. a) Respondent's battery conviction involved moral turpitude. While the offense of simple battery, which is defined in Penal Code section 242 as "any willful and unlawful use of force or violence upon the person of another," is not a crime necessarily involving moral turpitude,¹ the battery of which respondent was convicted, Penal Code section 243, subdivision (e), was more than simple battery—it was battery on a person with whom he necessarily had an intimate, and therefore a trust, relationship. Because of that, the crime does involve moral turpitude. Cause for disciplinary action thereby exists pursuant to Business and Professions Code section 10177, subdivision (b).

b) Respondent's conviction for preventing or dissuading the reporting of a crime is not necessarily a crime of moral turpitude. The elements of Penal Code section 136.1, subdivision (b)(1), require only that a person attempt to prevent or dissuade another person from reporting a crime to a peace officer. While other forms of dissuading a witness require the individual to act knowingly or maliciously,² and thus do involve moral turpitude, that is not the case with the specific crime of which respondent was convicted. And nothing about the circumstances of respondent's crime leads to the conclusion that it involved moral turpitude. While respondent did prevent his girlfriend from making a call to the police, respondent himself then immediately made that call. That is not the sort of action that ordinarily characterizes an act of moral turpitude. No cause for disciplinary action thereby exists pursuant to Business and Professions Code section 10177, subdivision (b).

3. The Department has established criteria for assisting in determining whether a crime bears a substantial relationship to the qualifications, functions and duties of a real estate licensee. These are found in title 10, California Code of Regulations, section 2910. The Department asserts that respondent's conviction of battery is substantially related under subdivision (a)(8): the doing of any unlawful act with the intent or threat of doing substantial injury to the person of another. And it asserts that respondent's conviction for dissuading a witness is substantially related under subdivision (a)(4): the employment of bribery, fraud, deceit, falsehood or misrepresentation to achieve an end.

4. a) Respondent's battery conviction is not substantially related under section 2910, subdivision (a)(8), as asserted by complainant. While his use of force on his girlfriend did involve the threat (i.e., risk) of harm to her it did not, under the circumstances involve the risk of "substantial injury" to her. But the crime is nevertheless substantially related to the qualifications, functions and duties of a real estate licensee. As set forth in Legal Conclusion 2a), by committing battery against his girlfriend, respondent violated a trust relationship. Real estate licensees are, of course, often called upon to maintain trust relationships. That respondent would violate his relationship of trust with his girlfriend establishes a nexus with his fitness to serve as a real estate salesperson. Cause for disciplinary action thereby exists pursuant to Business and Professions Code section 490.

¹ *People v. Mansfield* (1988) 200 Cal.App.3d 82, 87-88.

² See, e.g., Penal Code section 136.1, subdivisions (a)(1), (a)(2), and (c).

b) Respondent's conviction for dissuading a witness is not substantially related under section 2910, subdivision (a)(4). Respondent did not employ bribery, fraud, deceit, falsehood or misrepresentation to prevent his girlfriend from calling the police; he merely hung up the phone she was using. No cause for disciplinary action thereby exists pursuant to Business and Professions Code section 490.

5. Respondent has established that he has rehabilitated himself since his crime to the extent that it would not be against the public interest to permit him to retain his real estate salesperson license. In making this determination, it is recognized that respondent has not met some of the criteria of rehabilitation the department has codified in title 10, California Code of Regulations, section 2912. In particular, he remains on criminal probation and he has not abstained from alcohol for at least two years. On the other hand, more than two years have passed since respondent's conviction, he has demonstrated he has a stable family life and is fulfilling his parental responsibilities, he has maintained steady and responsible employment, he has complied with the terms of his criminal probation, he has undertaken alcohol treatment programs beyond those required by the terms of his probation, and he has maintained his sobriety for 19 months. He has also shown that he has matured and grown since the time of his crime. While it would not be against the public interest to allow respondent to retain his license, because he remains on criminal probation it would be appropriate to place certain restrictions upon the license.


ORDER

All licenses and licensing rights of respondent Karlos Tapia are 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 ninety (90) days from the effective date of this Decision. 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 that Code:

1. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of respondent's conviction or plea of nolo contendere to a crime which is substantially related to respondent's fitness or capacity as a real estate licensee.
2. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner 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 the restricted license.

3. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor for the removal of any of the conditions, limitations or restrictions of a restricted license until two (2) years have elapsed from the effective date of this Decision.
4. Respondent shall submit with any application for license under an employing broker, or any application for transfer to a new employing broker, a statement signed by the prospective employing real estate broker on a form approved by the Department of Real Estate which shall certify:
- (a) That the employing broker has read the Decision of the Commissioner which granted the right to a restricted license; and
- (b) That the employing broker will exercise close supervision over the performance by the restricted licensee relating to activities for which a real estate license is required.
5. Respondent shall, within nine (9) months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that respondent has, since the most recent issuance of an original or renewed real estate license, taken and successfully completed the continuing education requirements of article 2.5 of chapter 3 of the Real Estate Law for renewal of a real estate license. If respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until respondent presents such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

DATED: June 3, 2004



MICHAEL C. COHN
Administrative Law Judge
Office of Administrative Hearings

FILED
MAR 11 2004

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

DEPARTMENT OF REAL ESTATE

By [Signature]

In the Matter of the Accusation of

KARLOS TAPIA,

} Case No. H-8664 SF

} OAH No.

Respondent

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, CA 94612**

on **MAY 19, 2004**, at the hour of **1:30 PM**, 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: MARCH 11, 2004

By [Signature]
LARRY A. ALAMIAO, Counsel

1 DEIDRE L. JOHNSON, Counsel
SBN 66322
2 Department of Real Estate
P. O. Box 187007
3 Sacramento, CA 95818-7007
4 Telephone: (916) 227-0789

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FEB - 6 2004

DEPARTMENT OF REAL ESTATE

By 

8 BEFORE THE
9 DEPARTMENT OF REAL ESTATE
10 STATE OF CALIFORNIA

11 * * *

12 In the Matter of the Accusation of)
13 KARLOS TAPIA,) NO. H-8664 SF
14 Respondent.) ACCUSATION
15)

16 The Complainant, LES R. BETTENCOURT, a Deputy Real
17 Estate Commissioner of the State of California, for cause of
18 Accusation against KARLOS TAPIA, is informed and alleges as
19 follows:

20 I

21 KARLOS TAPIA (hereafter Respondent) is presently
22 licensed and/or has license rights under the Real Estate Law,
23 Part 1 of Division 4 of the California Business and Professions
24 Code (hereafter Code) as a real estate salesperson.

25 II

26 The Complainant, LES R. BETTENCOURT, a Deputy Real
27 Estate Commissioner of the State of California, makes this

1 Accusation against Respondent in his official capacity and not
2 otherwise.


3 III

4 On or about February 14, 2002, in the Superior Court
5 of the State of California, County of Santa Clara, Respondent
6 was convicted of violation of California Penal Code Section 242-
7 243(e) (DOMESTIC BATTERY), and Penal Code Section 136.1(b) (1)
8 (DISSUADE A WITNESS), misdemeanors, crimes involving moral
9 turpitude, and/or crimes which bear a substantial relationship
10 under Section 2910 of Title 10, California Code of Regulations,
11 to the qualifications, functions, or duties of a real estate
12 licensee.

13 IV

14 The facts alleged above constitute cause under Sections
15 490 and 10177(b) of the Code for suspension or revocation of all
16 license(s) and license rights of Respondent under the Real Estate
17 Law.

18 WHEREFORE, Complainant prays that a hearing be
19 conducted on the allegations of this Accusation and that upon
20 proof thereof a decision be rendered imposing disciplinary action
21 against all license(s) and license rights of Respondent under the
22 Real Estate Law (Part 1 of Division 4 of the Business and
23 Professions Code), and for such other and further relief as may
24 be proper under other provisions of law.

25 
26 LES R. BETTENCOURT
27 Deputy Real Estate Commissioner

28 Dated at Oakland, California,
29 this 3rd day of February, 2004.