

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Application of:

DAVID STEVEN AYERDI,

Respondent.

Case No. H-9310 SF

OAH No. N2005080903

PROPOSED DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on November 30, 2005.

David B. Seals, Counsel, represented complainant E. J. Haberer II, Deputy Real Estate Commissioner.

Alan A. Dressler, Attorney at Law, 633 Battery Street, Ste. 635, San Francisco, CA 94111, represented respondent David Steven Ayerdi, who was also present.

The record was left open to December 16, 2005, to permit respondent to file a closing brief. (Complainant presented oral argument at the hearing and waived submission of a written brief.) Respondent's brief was received on December 15, 2005, and marked for identification as respondent's Exhibit F. The matter was deemed submitted on December 15, 2005.

FACTUAL FINDINGS

1. On October 1, 2004, respondent David Steven Ayerdi filed with the department an application for a real estate salesperson license. The department denied the application. Respondent appealed.

2. On May 24, 2001, respondent was convicted on his plea of guilty of a violation of 18 U.S.C. § 201 (bribery of a public official), a violation of 18 U.S.C. § 1546(a) (fraud and misuse of visas), and a violation of 18 U.S.C. § 641 (theft of property of the United States), all felonies. Respondent was sentenced to 12 months and one day in prison, with a recommendation from the court that respondent serve his sentence in a community confinement facility, followed by three years of supervised release. Respondent was ordered to pay a \$300 "special assessment," but no other fine or restitution order was imposed.

3. The conviction arose out of respondent's employment with the United States Immigration and Naturalization Service. Respondent started with the INS as an intern in 1992, while he was still an undergraduate at the University of California, Berkeley. He joined INS as an immigration inspector when he graduated from Berkeley in 1994.

Between 1996 and 2000, respondent made several trips to the Philippines at the invitation of an acquaintance named Pacita de los Reyes.

In February 2000, on one of those trips to the Philippines, respondent was introduced to Ramon Arenas. At that time, respondent was assigned to the San Francisco International Airport.

In March 2000, Arenas asked respondent for help obtaining "ink and stamps." (The INS uses special stamps and ink to endorse documents that permit individuals to enter the United States. Both the stamps and the ink are controlled security items.) Respondent agreed to sell Arenas one stamp and two bottles of ink for \$100,000. Respondent also agreed to stamp the passports of two Philippine nationals to allow them entry into the United States.

Respondent asked for money in advance, before he delivered the stamp and ink, and \$7,500 was wired to his personal bank account in San Francisco. Respondent withdrew the money from his account and made arrangements to deliver the stamp and ink to a new individual – not Arenas – at the St. Francis Hotel in San Francisco. On March 29, 2000, respondent took the stamp and ink to the St. Francis Hotel to deliver the items as promised. Respondent met with the designated individual, accepted \$10,000 in cash, and gave the individual the stamp and the ink. Respondent did not know that, prior to March 29, the proposed transaction had been disclosed to United States authorities. After respondent accepted the cash payment and delivered the stamp and ink, he was arrested by an undercover federal agent.

Respondent testified that, although he agreed to do so, he never stamped the passports of the two Philippine nationals who had sought entry into the United States.

Respondent testified that, when he was released from custody the day after his arrest, he retrieved the \$7,500 and returned it to federal agents.

4. On March 30, 2000, Cristina Andreozzi, a special agent with the Office of the Inspector General for the United States Department of Justice, submitted a sworn affidavit to a United States Magistrate in support of an application for a criminal complaint against respondent. The affidavit contains (among other things) certain admissions made by respondent to federal agents after he was arrested.

According to the affidavit, respondent admitted to agents that, in February 2000, he received from Arenas the passports of two Philippine nationals who were not eligible to enter the United States. Respondent admitted that he stamped the passports with his Immigration stamp and returned the passports to Arenas and that, approximately two weeks later, the two

Philippine nationals arrived at his Immigration booth at the San Francisco International Airport, where he improperly admitted them into the United States.

At the hearing, respondent testified that the affidavit is incorrect. He testified that, in his criminal proceeding, the court found that he did not stamp the two passports.

According to the affidavit, respondent brought two stamps to the St. Francis Hotel on March 29, 2000, an "Immigration admission stamp" and an "Immigration green card stamp," in addition to the two bottles of security ink.

At the hearing, respondent testified that he brought one stamp and two bottles of ink to the hotel.

5. Respondent resigned from the INS under the threat of termination.

6. In November 2000, respondent went to work for McGuire real estate in San Francisco. He had no prior real estate experience. Nancy McKain, a vice-president of McGuire, was respondent's first supervisor. Respondent did not immediately disclose the pending federal charges when he started working for McGuire, because he was not asked to disclose pending charges. Within a few months, however, respondent told McKain about the charges. The company agreed to keep respondent on. After he pled guilty, respondent told McKain that he was going to be convicted.

7. After his conviction in May 2001, respondent served the first nine months of his sentence at Cornell Corrections, a half-way house in San Francisco, and the remaining three months at home on house arrest. Respondent was required to work as a condition of living at Cornell Corrections, so he continued to work full-time at McGuire. He did not violate any rules at Cornell House or at home.

8. When he returned home after nine months at Cornell Corrections, respondent was the primary caregiver for his partner, Alex deBonhome, who suffered from AIDS. DeBonhome died in May 2004.

9. In February 2002, Barbara J. Callan became respondent's supervisor at McGuire. Callan has been a licensed real estate salesperson since 1986. She is a partner in McGuire and she is the company's highest producer. In 2002, Callan was looking for an executive assistant and she thought that respondent "would be perfect." Respondent disclosed his convictions to Callan before she hired him. Respondent has continued to work as Callan's assistant up to the present time.

As Callan's assistant, respondent prepares marketing mailings, handles escrow files through closing, coordinates the preparation of homes for sale, prepares comparative market analyses, coordinates the efforts of title companies, contractors and inspectors, prepares disclosure packages, and maintains the website that he created for Callan.

10. In early 2002, respondent submitted a real estate salesperson application. According to respondent, a deputy real estate commissioner informed him that he would be ineligible for a license while he was on supervised release. Respondent withdrew his application.

11. In July 2003, respondent petitioned the court for early termination of supervised release, after completing one of the three years ordered by the court. His petition was denied as premature, without prejudice to reapply in 2004.

12. Respondent petitioned for early termination of supervised release again in 2004. At that time, he had completed two of the three years imposed on him. Respondent informed the court that he wanted to pursue a career in real estate, and that he could not obtain a license while he was still on supervised release. He stated that, even after the termination of his supervised release, it might take another year or more to establish his rehabilitation through the department's administrative process; respondent was concerned that his employment opportunity with McGuire real estate might not exist if he were required to complete all three years of his supervised release. Respondent urged the court to terminate his supervised release early so that he could "continue his efforts at rehabilitation by advancing his career in the real estate industry." McKain, Callan and deBonhome all wrote letters to the court in support of respondent's petition.

On June 16, 2004, the court terminated respondent's supervised release, without objection by the United States Attorney or respondent's probation officer.

13. Respondent submitted his application for a real estate salesperson license on October 1, 2004. Question 27 of that application asks the applicant for detailed information about any convictions the applicant has suffered. Under "date of conviction," respondent wrote "12/00." Under "code section violated," respondent wrote "201." Under "disposition," respondent wrote "probation 2 years." In his responses to question 27, respondent gave the wrong conviction date; omitted any reference to his convictions for fraud and theft; and omitted any reference to his prison term.

14. Respondent is 33 years old. He was born in San Francisco and has lived in the Bay Area all his life. Before going to U.C. Berkeley, respondent attended Raoul Wallenberg Traditional High School in San Francisco. Since the death of deBonhome, respondent has been living alone. He keeps in close contact with his mother, Marisol Granados, and his sister, Ingrid Ayerdi.

Respondent testified that the year 2000 was a very difficult time for him; it was very stressful and there was "lots of depression." DeBonhome's condition was deteriorating; respondent was working full-time, and he was also deBonhome's primary caregiver. Asked why he committed the crimes, respondent replied, "[i]t was a mistake. There was a lot going on in my life. I'd been going to the Philippines for years and never done anything wrong."

Respondent testified that his convictions have been on his mind for the last five years. He states that working for the INS was "my only career and it was all thrown away because of the biggest mistake in my life."

Since 2000, respondent has found that he "really likes real estate" and he "wants to excel at it." Respondent feels that McGuire is a "prestigious" firm, and he is grateful for the opportunity to show that he is honest. He wants the opportunity to "prove that I'm good and have what it takes." Respondent feels that he has learned from his experience, and he does not want to "throw this away."

Since his supervised release was terminated, respondent has participated in fund raisers for breast cancer, AIDS, and a child abuse prevention center. Some of his charity work has been related to his job at McGuire, but some has not. Since 2002, respondent has been contributing \$1,000 per month toward his mother's support.

Respondent emphasized that he never had any legal problems prior to his May 2001 convictions, and has never been arrested since then. He feels that he can comply with all department rules and that he will lead a law-abiding life.

15. Barbara J. Callan testified on respondent's behalf. She states that she has not had any problems with respondent's decisions, and she feels that he is honest and trustworthy. Respondent has been "received very well" by clients, inspectors, office staff and other sales agents and brokers; Callan states that "they admire him." She has received many compliments to respondent following their closings. Callan has no concerns about respondent's honesty.

Callan also submitted a letter to the department on respondent's behalf. In her letter, Callan states (among other things) that with respondent's help, she has become the company's top-selling agent. She states that respondent has "exhibited unparalleled integrity [and] honesty" Callan would be willing to supervise respondent on a restricted license.

16. Ingrid Ayerdi, respondent's sister, testified on his behalf. Ayerdi lives with her mother and younger sister. Ayerdi testified that the family has always been close, and has remained close since respondent's conviction. Respondent calls and visits their mother regularly, and contributes money to their mother each month.

Ayerdi knew deBonhome, and testified that his condition worsened in 1999 and 2000. When respondent was living at Cornell Corrections, Ayerdi and her mother cared for deBonhome.

Ayerdi testified that respondent was never arrested and never in trouble before his arrest in March 2000, and he has not been in trouble since then.

Ayerdi has talked to respondent about his crimes. Ayerdi stated that respondent regrets it "everyday of his life," and has told her that he will never do it again. Respondent seems stable to Ayerdi; she has no concerns about him getting into trouble with the law.

LEGAL CONCLUSIONS

1. Business and Professions Code section 480, subdivision (a), provides that a license may be denied if the applicant has been convicted of a crime that is substantially related to the qualifications, functions or duties of the licensed business or profession. California Code of Regulations, title 10, section 2910, sets forth the criteria for determining whether a crime is substantially related to the qualifications, functions or duties of a real estate licensee. A crime is deemed to be substantially related if it involves "[t]he fraudulent taking, obtaining, appropriating or retaining of funds or property belonging to another person" (subd. (a)(1)), "[t]he employment of bribery, fraud, deceit, falsehood or misrepresentation to achieve an end" (subd. (a)(4)), or "[d]oing 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" (subd. (a)(8)).

2. Business and Professions Code section 10177, subdivision (b), provides that a real estate license may be denied if the applicant has been convicted of a felony or a crime involving moral turpitude.

3. Respondent's convictions for violations of 18 U.S.C. § 201 (bribery of a public official), 18 U.S.C. § 1546(a) (fraud and misuse of visas), and 18 U.S.C. § 641 (theft of public property) are substantially related to the qualifications, functions or duties of a real estate licensee under California Code of Regulations, title 10, section 2910, subdivisions (a)(1), (a)(4) and (a)(8). The convictions are also for felonies and crimes of moral turpitude. The convictions, therefore, constitute cause to deny respondent's application under Business and Professions Code section 480, subdivision (a), and under Business and Professions Code section 10177, subdivision (b).

4. Respondent asserts that he has rehabilitated himself in accordance with the department's regulations,¹ and there is evidence that tends to support his claim. Respondent pled guilty to the crimes without the benefit of a plea bargain. It has been over four years since his convictions. Respondent has successfully completed all of the terms of his sentence, and he was released from probation a year early. He is close to his family and provides significant financial support to his mother. Since 2000, he has been gainfully employed by real estate salespersons who speak highly of his work and his character. Respondent believes that his crimes represent an "aberrant" episode in his life "that occurred while his life partner was dying of AIDS." He seems to sincerely regret the "mistake" he made.

¹ California Code of Regulations, title 10, section 2911.

Evidence of rehabilitation, however, must be measured against the severity of the crime. The more serious the crime, the stronger an applicant's showing of rehabilitation must be.² In the case of an applicant for a real estates salesperson license, it is difficult to imagine crimes more serious than bribery of a public official, fraud, and theft of public property. These crimes imply a fundamental lack of honesty and integrity, and bear closely and directly on the fiduciary responsibilities of a real estate salesperson. A strong showing of rehabilitation is required.

Respondent's evidence falls short. Little weight can be given to respondent's exemplary behavior since his arrest in 2000, or his conviction in 2001. Three of those years were spent under the constraints of confinement or supervised release, and respondent's application to the department has been pending for over a year. Good behavior is expected under those circumstances.³ In addition, respondent's behavior was exemplary *before* he committed the crimes, further diminishing the confidence that can be placed in his post-conviction conduct.

And questions persist about respondent's honesty. Respondent's explanation of why he committed the crimes – stress and depression caused by deBonhome's deteriorating condition – is not probable; respondent's crimes were not committed impulsively, and no evidence suggests that deBonhome's illness posed a financial crisis for him or for respondent. Respondent's testimony in this hearing that he did not stamp the passports of two Philippine nationals, as he had promised Arenas he would, is inconsistent with his admission to federal agents in 2000. And respondent's incomplete disclosure of his convictions on his application is troubling. Just months before he submitted his application, respondent told the federal court that a career in real estate would allow him to "continue his efforts at rehabilitation." It is reasonable to expect that a person in respondent's position would have been scrupulous in disclosing all the facts concerning his convictions and punishment. Respondent's failure to do so reflects poorly on his claim that he is rehabilitated.

It is undoubtedly true that respondent feels remorse, and that he sincerely regrets his actions. Given the severity of his crimes, however, and the nature of the license he seeks, a substantial period of good conduct is required to demonstrate rehabilitation. It would be contrary to the public interest to issue respondent a real estate salesperson license at this time, even on a restricted basis.

² *In re Gossage* (2000) 23 Cal.4th 1080, 1096.

³ *In re Gossage, supra*, 23 Cal.4th at 1099.

ORDER

The application of David Steven Ayerdi for a real estate salesperson license is denied.

DATED: January 6, 2006



DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings

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FILED
JUL -6 2005

DEPARTMENT OF REAL ESTATE

By *D. Seal*

8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Application of)
12 DAVID STEVEN AYERDI,)
13 Respondent.)

No. H-9310 SF

STATEMENT OF ISSUES

14
15 The Complainant, E. J. Haberer II, a Deputy Real
16 Estate Commissioner of the State of California, for Statement of
17 Issues against DAVID STEVEN AYERDI (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 October 1, 2004.

23 II

24 Complainant, E. J. Haberer II, a Deputy Real Estate
25 Commissioner of the State of California, makes this Statement of
26 Issues in his official capacity.
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III

On or about May 24, 2001 in the United States District Court, Northern District of California, Respondent was convicted of violation of 18 U.S.C. 201 (Bribery of a Public Official), 18 U.S.C. 1546(a) (Fraud and Misuse of Visas), and 18 U.S.C. 641 (Theft of Public Property), all felonies crimes involving moral turpitude and/or which bear 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.

IV

The crimes of which Respondent was convicted, as alleged in Paragraph III above, constitute cause for denial of Respondent's application for a real estate license under Sections 480(a) and 10177(b) of the Code.

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


E. J. HABERER II
Deputy Real Estate Commissioner

Dated at Oakland, California,
this 27 day of June, 2005.