

FILED
OCT 26 2005

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE

By J. Kelly

* * *

In the Matter of the Application of)
KELLY ANN FRANK ZELVER,) NO. H-9318 SF
Respondent.) N-2005080122

DECISION

The Proposed Decision dated September 30, 2005, 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 NOV 15, 2005.

IT IS SO ORDERED 10 21, 2005.

JEFF DAVI
Real Estate Commissioner

[Signature]

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Application of

KELLY ANN FRANK ZELVER,

Respondent.

Case No. H-9318 SF

OAH No. N2005080122

PROPOSED DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on September 1, 2005.

Michael Rich, Counsel, represented complainant E. J. Haberer II, Deputy Real Estate Commissioner of the State of California.

Respondent Kelly Ann Frank Zelver represented herself.

At the conclusion of the hearing on September 1, 2005, the parties agreed that the record would remain open until September 29, 2005, to permit respondent to submit evidence concerning the status of her notary public application. Under a cover memo dated September 7, 2005, respondent sent to the Office of Administrative Hearings a copy of Notary Public Commission Number 1604424, and a letter dated September 1, 2005, from the Notary Public Section of the Office of the Secretary of State. (These documents have been marked collectively as "Respondent's Exhibit B.") On September 19, 2005, complainant's counsel notified the Office of Administrative Hearings that he had received these documents and had nothing further to submit. (These documents have been marked "State's Exhibit 7.") The record was closed and the matter was deemed submitted on September 19, 2005.

FACTUAL FINDINGS

1. Kelly Ann Frank Zelver filed with the Department of Real Estate an application for a salesperson license signed on September 3, 2004.

2. On May 16, 1991, on her plea of no contest, respondent was convicted of violation of Penal Code section 415, subdivision (1) (fighting or challenging another to fight in a public place), a misdemeanor. Imposition of sentence was suspended and respondent was placed on probation for 12 months, subject to the conditions that she serve two days in jail and pay a fine of \$25.

3. This conviction is based on an incident that occurred on May 16, 1991. Respondent was 18 years old. She and her boyfriend had just broken up, and her boyfriend had decided to date one of respondent's friends. Respondent was driving her car when she saw her boyfriend's new girlfriend pull up alongside her. Respondent yelled at her to pull over; when she refused, respondent followed her. The new girlfriend drove to a police station and filed a report, stating that respondent had hit her in the face. Respondent states that, at the time, she was young and "acting stupid."

4. On October 4, 1993, on her plea of no contest, respondent was convicted of violation of Penal Code section 415, subdivision (3) (using offensive words in a public place), a misdemeanor. Imposition of sentence was suspended for 12 months on the condition that respondent pay a fine of approximately \$210.

5. The facts and circumstances of this conviction are that, in August 1993, respondent was involved in a "verbal confrontation" with the same woman identified in Finding of Fact 3, above. Respondent states that, on this occasion, their argument did not involve fighting or anything "physical."

6. On April 29, 2003, respondent signed an application for appointment as a notary public, which she then submitted to the Secretary of State. Question 15 of that application reads: "Have you ever been convicted by any court of a **felony, a misdemeanor, OR have you ever been arrested?*** . . . ***ALL CONVICTIONS MUST BE DISCLOSED INCLUDING CONVICTIONS DISMISSED UNDER SECTIONS 1203.4 OR 1203.4a PENAL CODE.**" (Emphasis in original.) Respondent checked "No" in response to this question. The Secretary of State denied respondent's application for making a substantial and material misstatement or omission on her application. Respondent appealed.

An administrative hearing was held on May 10, 2005. Following the hearing, the administrative law judge issued a proposed decision, denying respondent's application for appointment as a notary public. The proposed decision concluded that, "[w]hile respondent may not have had an intent to deceive the Secretary of State, she at the very least acted carelessly and negligently in completing her application." The proposed decision stated that, under the guidelines of the Secretary of State, respondent would be eligible to reapply after a lapse of one year from the date of the denial.

On May 19, 2005, the Secretary of State adopted the proposed decision of the administrative law judge.

7. In September 2004, while her notary public application was pending, respondent submitted to the department her application for a real estate salesperson license. On her application, respondent disclosed her 1991 and 1993 convictions. She also disclosed that her application for appointment as a notary public had been denied because of her failure to disclose the 1991 and 1993 convictions on her notary public application.

8. While her real estate application was pending, respondent reapplied for a notary public commission. According to respondent, the Secretary of State's office waived its usual requirement that an applicant wait one year before reapplying. Respondent took the test again and passed. She has received her commission as a notary public for the term beginning September 5, 2005, and ending September 4, 2009.

9. Respondent is 32 years old. She has worked for PacCom Management Services, Inc., a property management company, since 1996. Respondent performs several different jobs for PacCom: she manages a portfolio of properties; she is controller for all client bank accounts; and she manages the accounting system. The president of PacCom is Carl Sprague. Mr. Sprague suggested that respondent obtain her notary commission and a real estate sales license. Respondent plans to continue to work for PacCom, but she is hopeful that a real estate license will create new opportunities for her in the company.

10. Respondent testified that her 1991 and 1993 convictions occurred when she was "young and wild." Since then, she states, her life has changed dramatically. She has been in the same job for 10 years, she has married and she has a 10-year-old daughter. Now, going out to dinner on Friday night is the "highlight of [her] life."

11. Respondent felt terrible about herself when her notary public application was denied. She had never intended to deceive anyone about her convictions; she "thought it wouldn't matter because it was so long ago." The denial and her subsequent appeal was an "emotional roller-coaster" for her. Although she regrets her failure to disclose her convictions, she is glad that she learned a valuable lesson. She has learned that she must read documents carefully. Respondent feels that she is a good person, and that she will not make that mistake again. She understands that, as a real estate agent, she must disclose "everything." Respondent testified that Mr. Sprague is very detail-oriented. She also appreciates that she works in a small county (Santa Cruz), and she wants to maintain a good reputation. Respondent has told Mr. Sprague about her convictions and the denial of her first notary public application.

12. Mr. Sprague submitted a letter on behalf of respondent. He states that PacCom has one-quarter of a billion dollars of assets under management. Respondent is responsible for administering the company's accounting system. She serves as the controller for client bank accounts, and manages her own portfolio of properties. Mr. Sprague praises respondent's knowledge and expertise, her professional manner, and her ability to work well with fellow employees, clients and vendors. He has found respondent's honesty and integrity to be above reproach.

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

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.
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. Business and Professions Code section 10177, subdivision (f), provides that a real estate license may be denied if the applicant has "acted . . . in a manner that would have warranted the denial of . . . her application for a real estate license, or has . . . had a license denied . . . by another agency . . . for acts that, if done by a real estate licensee, would be grounds" for denial of a real estate license. Under Government Code section 10177, subdivision (a), a real estate license may be denied for making a material misstatement of fact in a license application.
4. 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 "[d]oing any unlawful act . . . with the intent or threat of doing substantial injury to the person or property of another" (subd. (a)(8)), or "[c]onduct which demonstrates a pattern of repeated and willful disregard of the law" (subd. (a)(10)).
5. Fighting necessarily involves at least the threat of doing substantial injury to another person. Respondent's conviction for violation of Penal Code section 415, subdivision (1), is not a crime of moral turpitude, but this offense is substantially related to the qualifications, functions or duties of a real estate licensee under California Code of Regulations, title 10, section 2910, subdivisions (a)(8) and (a)(10). Respondent's 1991 conviction of this offense constitutes cause to deny respondent's license application under Business and Professions Code section 480, subdivision (a). This conviction does not constitute cause to deny respondent's license application under Business and Professions Code section 10177, subdivision (b).
6. Respondent's conviction for violation of Penal Code section 415, subdivision (3), is not a crime of moral turpitude, but this offense is substantially related to the qualifications, functions or duties of a real estate licensee under California Code of Regulations, title 10, section 2910, subdivision (a)(10). Respondent's 1993 conviction of this offense constitutes cause to deny respondent's license application under Business and Professions Code section 480, subdivision (a). This conviction does not constitute cause to deny respondent's license application under Business and Professions Code section 10177, subdivision (b).

7. Respondent's failure to disclose her convictions on her April 29, 2003 notary public application was a material misstatement of fact that, if made on an application for a real estate license, would have been grounds for denial under Business and Professions Code section 10177, subdivision (a), and therefore constitutes cause to deny respondent's application for a real estate license under Business and Professions Code section 10177, subdivision (f).

8. Respondent has made a strong showing of rehabilitation from her 1991 and 1993 convictions. In the 12 years since her last conviction, there is no evidence that respondent has engaged in any similar conduct. Since 1993, respondent has married, had a daughter, and been a responsible and productive member of society. Since 1996, she has been continuously employed with the same company, and the company's president speaks highly of her pleasant and professional manner, her honesty and her integrity.

Although respondent made a serious error in judgment when she failed to disclose her convictions on her application to the Secretary of State, she appears to have learned her lesson. On her real estate application, respondent fully disclosed her convictions and the Secretary of State's denial of her notary public application. She has satisfied the Secretary of State that she has rehabilitated herself, and she has been issued her commission. The risk is low that respondent will make the same mistake again. It would not be contrary to the public interest to grant respondent a restricted license.

ORDER

The application of respondent Kelly Ann Frank Zelter for a real estate salesperson license is denied; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to section 10156.5 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 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 that 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 (2) 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.
4. Respondent's restricted real estate salesperson license is issued subject to the requirements of section 10153.4 of the Business and Professions Code, to wit: Respondent shall, within eighteen (18) months of the issuance of the restricted license, submit evidence satisfactory to the commissioner of successful completion, at an accredited institution, of a course in real estate principles and one of the courses listed in section 10153.2, other than real estate principles, advanced legal aspects of real estate, advanced real estate finance or advanced real estate appraisal. If respondent fails to timely present to the department satisfactory evidence of successful completion of the two required courses, the restricted license shall be automatically suspended effective eighteen (18) months after the date of its issuance. The suspension shall not be lifted unless, prior to the expiration of the restricted license, respondent has submitted the required evidence of course completion and the commissioner has given written notice to respondent of lifting of the suspension.
5. Pursuant to section 10154, if respondent has not satisfied the requirements for an unqualified license under section 10153.4, respondent shall not be entitled to renew the restricted license, and

shall not be entitled to the issuance of another license which is subject to section 10153.4 until four years after the date of the issuance of the preceding restricted license.

DATED: September 30, 2005



DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings

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FILED
JUL 15 2005

DEPARTMENT OF REAL ESTATE

By Jean Arnold

8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Application of)
12 KELLY ANN FRANK ZELVER,) NO. H- 9318 SF
13) STATEMENT OF ISSUES
14 Respondent.)

15 The Complainant, E. J. HABERER II, a Deputy Real Estate
16 Commissioner of the State of California, for cause of Statement
17 of Issues against KELLY ANN FRANK ZELVER, alleges as follows:

18 I

19 KELLY ANN FRANK ZELVER (hereafter Respondent), pursuant
20 to the provisions of Section 10153.3 of the Business and
21 Professions Code (hereafter the Code), made application to the
22 Department of Real Estate of the State of California for a real
23 estate salesperson license on or about September 10, 2004, with
24 the knowledge and understanding that any license issued as a
25 result of said application would be subject to the conditions of
26 Section 10153.4 of the Code.

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II

Complainant, E. J. HABERER II, a Deputy Real Estate Commissioner of the State of California, makes this Statement of Issues in his official capacity and not otherwise.

III

On or about May 16, 1991, in the Municipal Court of the State of California, County of Santa Cruz, Respondent was convicted of violation of Penal Code Section 415(1) (FIGHTING OR CHALLENGING TO FIGHT IN A PUBLIC PLACE), a crime involving moral turpitude, and/or a crime which bears 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 October 4, 1993, in the Municipal Court of the State of California, County of Santa Cruz, Respondent was convicted of violation of Penal Code Section 415(3) (OFFENSIVE WORDS IN A PUBLIC PLACE), a crime involving moral turpitude, and/or a crime which bears a substantial relationship under Section 2910, Title 10, California Code of Regulations, to the qualifications, functions, or duties of a real estate licensee.

V

Effective on or about June 18, 2005, in Case No. 2003-0940-AD, OAH Case No. N-2005020134, before the Secretary of State, State of California, the application of Respondent for appointment as a Notary Public, signed by her on April 29, 2003, was denied under Section 8214.1, subdivision (a) of the

1 California Government Code, based on the making of a substantial
2 and material misrepresentation or omission in the application to
3 the Secretary of State.

4 VI

5 The grounds for denial of Respondent's application
6 alleged in Paragraph V above were based in whole or in part on
7 acts which, if done by a real estate licensee, would be grounds
8 for the suspension or revocation of a California real estate
9 license, and constitute cause for denial of Respondent's present
10 application for a real estate salesperson license under
11 Section 10177(f) of the Code.

12 VII

13 The crimes of which Respondent was convicted as alleged
14 in Paragraphs III and IV above constitutes cause for denial of
15 Respondent's application for a real estate license under
16 Sections 480(a) and/or 10177(b) of the Code.

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

23
24 
25 E. J. HABERER II
26 Deputy Real Estate Commissioner

27 Dated at Oakland, California
this 7 day of July, 2005.