

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * *

FILED
MAY 17 2006

DEPARTMENT OF REAL ESTATE

[Signature]

In the Matter of the Application of)
LESMORE MAXWELL BARKER,) NO. H-9472 SF
Respondent.) OAH NO. N-2006010078

DECISION

The Proposed Decision dated April 12, 2006, 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 JUN - 7 2006.

IT IS SO ORDERED

S-9-06

JEFF DAVI
Real Estate Commissioner

[Signature]

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Application of:

LESMORE MAXWELL BARKER,

Respondent.

Case No. H- 9472 SF

OAH No. N2006010078

PROPOSED DECISION

Administrative Law Judge Mary-Margaret Anderson, Office of Administrative Hearings, State of California, heard this matter in Oakland, California, on March 22, 2006.

Department of Real Estate Counsel David B. Seals represented Complainant Charles W. Koenig, Deputy Real Estate Commissioner.

Edgardo Gonzalez, Attorney at Law, represented Respondent Lesmore Maxwell Barker, who was present.

The record was left open to receive a letter from Kim Cleghorn that Respondent wished to submit. The letter was timely received and entered into evidence as Exhibit A.

The record closed on March 29, 2006.

FACTUAL FINDINGS

1. Complainant Charles W. Koenig filed the Statement of Issues in his official capacity as a deputy real estate commissioner for the Department of Real Estate, State of California.

2. On May 31, 2005, Lesmore Maxwell Barker (Respondent) filed an application for a real estate salesperson license with the Department. The application form requires the disclosure of criminal convictions. Respondent complied with the requirement by revealing two criminal convictions, including details such as the court, arresting agency, date and other matters. He also attached a letter containing additional information regarding his criminal record. The application was filed with the understanding that any license issued as a result would be subject to the conditions of Business and Professions Code section 10153.4.

3. On September 20, 2000, in the Contra Costa County Superior Court, Respondent was convicted, by his plea of nolo contendere, of a felony violation of Penal Code section 487, subdivision (a), grand theft of personal property.

As a result, he was placed on probation for three years pursuant to standard terms and conditions. He was also ordered to serve 150 days in jail through a home detention program and pay fines and fees.

On May 31, 2005, Respondent's motion pursuant to Penal Code section 1203.4 was granted. The case was reduced to a misdemeanor and dismissed.

4. Respondent's 2000 conviction arose from actions he took as an employee of Wells Fargo Bank. In January of 1999, Respondent wrote checks on a closed account and deposited them in his Wells Fargo checking account.

5. On February 21, 2001, in the Alameda County Superior Court, Respondent was convicted, by his plea of no contest, of a felony violation of Penal Code section 487, subdivision (a), grand theft of personal property.

Respondent was sentenced on April 4, 2001. He was placed on probation for five years pursuant to standard terms and conditions and ordered to pay \$3,478.01 in restitution to Web Van.

On February 11, 2004, Respondent's motion pursuant to Penal Code section 1203.4 was granted. The case was dismissed.

6. Respondent's 2001 conviction arose from his employment at Web Van as a customer service agent. In November 2000, he discovered that he could embezzle funds by creating accounts with Web Van and issuing refunds or credits to them. Respondent did this numerous times using his own credit cards. He also applied a credit to his mother's credit card without her knowledge. The total loss to the company was \$3,478.01.

Respondent's evidence

7. Respondent was still in high school when he first started working for Wells Fargo, and was 18 when he committed the first theft. When called into the office of the human relations manager, Respondent admitted the acts and asked if he could make payments. He did not hear from the bank and did not realize a criminal complaint had been made until, when stopped for a traffic violation, he was arrested on a warrant. Respondent was required to maintain full-time employment while on home detention/probation and to pay back the bank in full. He did so, and hence was granted a 1203.4 dismissal of that matter.

8. Respondent described his second theft as "a repeat of what I did at Wells Fargo." He knew what he was doing was wrong, and felt tremendous guilt even while doing

it. Respondent asserts that he confessed to a friend at Web Van, which led to his arrest. Again, he made restitution and a 1203.4 petition was granted.

9. Respondent attributes his actions to youth, immaturity, boredom, problems fitting in socially and, to some extent, financial need. He was doing well academically in high school but had problems socially. The crowd he hung around with was only interested in getting "quick money" and he was influenced by this attitude. Respondent maintains that he knew what he was doing was wrong from the outset, but that "it clicked only after the second conviction."

10. Respondent graduated from high school in 2000 and attended some community college classes. He was required to work full time during this period in order to pay restitution, and so was not able to attend school regularly.

Currently, Respondent is 25 years old and working as a regional manager for Homegain.com, a re-marketing firm. He is unmarried and has no children. Respondent resides with his mother and sister and contributes financially to the household. He enrolled at the University of Phoenix in January and will begin courses in business management in April.

11. Respondent now intentionally associates with people who have strong morals and are career and family-centered. He is active in his church and participates in a program for feeding the homeless and assists with the youth choir. Respondent has shared his past criminal problems with the youth at his church and actively mentors children in the youth choir.

12. Respondent testified in a forthcoming and sincere manner, consistent with credibility. His expressions of remorse, regret and commitment to honest conduct were very persuasive.

13. Three witnesses testified on Respondent's behalf. Mary Scott is a teacher's aid in the Pittsburg School District. She worked with Respondent from approximately 2001 until 2004 and they remain friends. She is aware of his Wells Fargo-related conviction. Scott works with disabled children and Respondent helps on field trips. When Scott was hospitalized, Respondent had a key to her house and her ATM card and helped her to manage during that difficult time. Scott is several years older than Respondent, but she seeks his advice and appreciates his support.

14. Verna Jenkins works for G.L.O. Financial. She has been a loan officer for about twelve years. Jenkins met Respondent at church — they both attend New Millennium Christian Center in Richmond. Respondent told Jenkins that he had two felony convictions involving money. They have worked together in a homeless ministry. Respondent has given good advice to Jenkins's older son, who had been associating with troubled youth. The son is now in college in North Carolina. She knows of two other young men whom Respondent has counseled successfully.

15. Brenda Howard has worked for AT&T in business customer service for over five years. She has known Respondent since he was about 13 years old. Howard lost touch with Respondent for several years when he moved to a different city. They reconnected two years ago when he moved back to Antioch, and she learned about his convictions at that time.

Howard has observed that Respondent now associates with older, more mature and educated people. She is ten years older than Respondent and believes him to be very mature. In addition, Howard believes Respondent to be a very truthful person and, despite their age difference, considers him a role model in many ways.

16. Respondent presented a letter from Kim Cleghorn, Managing Broker of RE/MAX in Oakland. Cleghorn wrote that she has been a real estate licensee for seventeen years and a broker for nine. Respondent discussed his felony convictions with her when they first met. Cleghorn would be willing to hire and supervise Respondent as his employing broker. She believes he has "turned his life around."

LEGAL CONCLUSIONS

1. Business and Professions Code section 480, subdivision (a), provides that a real estate 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 profession. Department regulations (Cal. Code Regs., tit. 10, § 2910) contain criteria that define "substantially related" in connection to the real estate profession. Crimes involving dishonesty are unquestionably so related. (Cal. Code Regs., tit. 10, § 2910, subd. (a)(1).)

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 of moral turpitude. Respondent's two convictions are both felonies and crimes of moral turpitude. Hence, cause for denial of licensure exists pursuant to both sections.

2. A primary purpose of the licensing scheme for real estate professions is to protect the public from dishonest and unscrupulous licensees. It is particularly important that real estate salespersons possess the character traits of honesty and integrity and Respondent's criminal convictions for theft are strong evidence that he lacks such qualities.

3. Department regulations (Cal. Code Regs., tit. 10, § 2911) also contain criteria to assist in the difficult assessment of rehabilitation and consequent risk to the public safety presented by an applicant who has been convicted of a crime. Measured against the criteria, evidence of rehabilitation is sufficient in this matter to justify issuance of a restricted license. Both convictions occurred when Respondent was quite young and the most recent is over five years old. Although the thefts are troubling because they involved abuse of positions of trust and one would have thought that the first conviction would have prevented the second,

Respondent was convincing when he stated that, due to his youth and immaturity, it took two incidents for him to truly learn his lesson. Respondent also presented persuasive evidence of a great change in attitude, new associates and community involvement. It is therefore determined that the public interest will be sufficiently protected by the issuance of a restricted license.

ORDER

The application of Lesmore Maxwell Barker for a real estate salesperson license is denied; 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 said 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 which 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 or the removal of any of the conditions, limitations or restrictions attaching to the restricted license until two 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 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 practices and one of the courses listed in section 10153.2, other than real estate principles, advanced aspects of real estate, advanced real estate finance or 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. Said 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.

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: April 12, 2006

Mary Margaret Anderson
MARY-MARGARET ANDERSON
Administrative Law Judge
Office of Administrative Hearings

1 DAVID B. SEALS, Counsel (SBN 69378)
2 Department of Real Estate
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4 Sacramento, CA 95818-7007
5 Telephone: (916) 227-0789
6 -or- (916) 227-0792 (Direct)

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DEPARTMENT OF REAL ESTATE



8 BEFORE THE DEPARTMENT OF REAL ESTATE
9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Application of) No. H-9472 SF
12 LESMORE MAXWELL BARKER,) STATEMENT OF ISSUES
13 Respondent.)
14)

15 The Complainant, Charles W. Koenig, a Deputy Real
16 Estate Commissioner of the State of California, for Statement of
17 Issues against LESMORE MAXWELL BARKER (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 May 31, 2005 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
25 10153.4 of the California Business and Professions Code.

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II

Complainant, Charles W. Koenig, a Deputy Real Estate Commissioner of the State of California, makes this Statement of Issues in his official capacity.

III

On or about September 20, 2000, in the Superior Court of the State of California, in and for the County of Contra Costa, Respondent was convicted of violation of California Penal Code Section 487(a) (Grand Theft of Personal Property), a felony and a crime involving moral turpitude and/or 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.

IV

On or about May 4, 2001, in the Superior Court of California, County of Alameda, Respondent was convicted of violation of California Penal Code Section 487(a) (Grand Theft of Personal Property), a felony and a crime involving moral turpitude and/or which bears a substantial relationship under Section 2910 of the Regulations, to the qualifications, functions or duties of a real estate licensee.

V

The crimes of which Respondent was convicted, as alleged in Paragraphs III and IV above constitute cause for denial of Respondent's application for a real estate license

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1 under Sections 480(a) and 10177(b) of the California Business
2 and Professions Code.

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

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10 
11 CHARLES W. KOENIG
12 Deputy Real Estate Commissioner

13 Dated at Sacramento, California,
14 this 9th day of December, 2005.

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