

FILED
NOV 16 2006
DEPARTMENT OF REAL ESTATE
By K. Contreras

NO. H-9636 SF
N-2006080181

The Proposed Decision dated October 27, 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 December 6, 2006.

IT IS SO ORDERED 11-6-, 2006.

JEFF DAVIS
Real Estate Commissioner

Estate Commission

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Application of

MITCHELL ANGELO BAROCIO,

Respondent.

No. H-9636 SF

OAH No. N2006080181

PROPOSED DECISION

On October 4, 2006, in Oakland, California, Perry O. Johnson, Administrative Law Judge, Office of Administrative Hearings, State of California (OAH), heard this matter.

Daniel Kehew, Counsel, represented Complainant Charles W. Koenig.

Omar Krashna, Krashna Law Firm, 1440 Broadway, Suite 308, Oakland, California 93612, represented Respondent Mitchell Angelo Barocio, who appeared at the hearing of this matter.

On October 4, 2006, the parties submitted the matter and the record closed.

FACTUAL FINDINGS

1. On June 30, 2006, Complainant Charles W. Koenig (Complainant), in his official capacity as a Deputy Real Estate Commissioner of the State of California, made the statement of issues against Mitchell Angelo Barocio (Respondent).

2. On September 26, 2005, the Department of Real Estate received Respondent's application for a real estate salesperson license. Respondent had signed the application for license on September 23, 2005. Respondent made the application for licensure with knowledge and understanding that any license issued as a result of the application would be subject to the conditions of Business and Professions Code section 10153.4.

The application remains pending as the Department has refused to issue a license to Respondent due to his past acts and omissions that appear to disqualify him for licensure.

False and Misleading Data in Application for Licensure

3. On September 23, 2005, under penalty of perjury that all answers and statements given by him were true and correct, Respondent signed an application for licensure as a real estate salesperson.

4. In response to item number 25 on the application for licensure as a real estate salesperson, Respondent failed to fully disclose the record of the conviction as detailed herein in Factual Findings 6 and 10, below. In the space on the form under the application's item 27, Respondent provided no information regarding the record of the undisclosed convictions as described in Factual Findings 6 and 10, below.

By his failure to provide the Department with the true record of the undisclosed convictions and the consequences of the convictions, Respondent presented the Department with incorrect and false or misleading information regarding his history of convictions.

5. Respondent's failure to disclose the conviction he received in August 1984, suggests that Respondent attempted to procure a real estate license by fraud, misrepresentation, or deceit, or that he made a material misstatement of facts in the application.

Record of Criminal Convictions

a. August 1984 Receiving Stolen Property Conviction

6. On August 8, 1984, in case number 7480, the California Municipal Court for the County of Contra Costa convicted Respondent, on his plea of guilty, of violating Penal Code section 496 (Receiving Stolen Property), a misdemeanor.

7. The crime of receiving stolen property is substantially related to the qualifications, functions and duties of a real estate licensee.

8. The crime of receiving stolen property involves moral turpitude.

9. As a consequence of the conviction in August 1984, the court ordered Respondent placed in jail for a term of 10 days.

10. The facts and circumstances of Respondent's conduct that led to the August 1984 conviction occurred on October 21, 1983. After his arrest, the county prosecutor filed a criminal complaint that alleged two felony counts under Penal Code sections 459 (Burglary) and 494 (Receipt of Stolen Property).

A Case/Arrest Report by the Walnut Creek Police Department described Respondent's misconduct on October 21, 1983. The arrest report contains Respondent's

admission that he and two companions broke into a parked car and stole an automobile stereo in-deck tape deck and equalizer.

b. January 1997 Drunk Driving Conviction

11. On January 27, 1997, in case number 156559-7, the Municipal Court in and for the County of Contra Costa convicted Respondent, on his plea of guilty, of violating Vehicle Code section 23152, subdivision (b), (Driving Under the Influence of an Alcoholic Beverage), a misdemeanor.

12. The crime of driving under the influence of an alcoholic beverage is substantially related to the qualifications, functions and duties of a real estate licensee.

13. On the September 2005 application for licensure, Respondent wrote, "I had DUI[s] in the City of S.F., Concord, CA [and] Richmond, CA. These were over 10 years ago. . . ." Also, the criminal complaint in case number 156559-7 set out an allegation that within seven years of Respondent's drunk driving offense in October 1996, Respondent was convicted by the San Francisco County Municipal Court on October 23, 1990, of a drunk driving crime (Vehicle Code § 23152, subd. (a)), which occurred on September 13, 1990.

Because the January 1997 conviction was, at least, the second criminal conviction that involved Respondent's abuse of alcoholic beverages, Respondent's last drunk driving offense, which occurred in October 1996, is a crime that involves moral turpitude.

14. As a consequence of the conviction in January 1997, the court placed Respondent on probation for a term of three years. As terms and conditions of the probation, the court ordered Respondent to spend 10 days in jail, but the court recommended that the confinement period should be fulfilled by Respondent in the county work program. Also the court directed Respondent to pay a fine of \$1,190. The court ordered Respondent's driver's license restricted for one year so that he could only drive to and from work or treatment for abuse of alcoholic beverages. In addition, the court directed Respondent to install an Ignition Interlock Device on any vehicle that he operated over a period of one-year. Also the court sent Respondent to jail for 30 days. And the court commanded Respondent to complete a drunk driver counseling program.

15. The facts and circumstances of Respondent's criminal activity that resulted in the January 1997 conviction occurred on October 4, 1996.

Near midnight on October 4, 1996, El Cerrito police observed a pick-up truck traveling at a high rate of speed on San Pablo Avenue. After the police activated the police car's siren and emergency lights, the pick-up truck sped up and dashed around a corner so that tires on one side of the pick-up truck "broke traction." The pick-up truck raced into a parking lot and stopped. Respondent leaped from the pick-up truck to attempt an escape by running away. The pursuing police officer grabbed Respondent as he attempted to scale a fence on private property. Respondent was combative and was forcibly apprehended by

police. After his arrest, police detected a strong odor of alcoholic beverage coming from Respondent. Respondent failed a field sobriety test. Respondent proclaimed the he was "not going to take any tests" to ascertain whether he was under the influence of alcoholic beverages. Because he was uncooperative and combative, police forcibly restrained Respondent while a paramedic withdrew blood. A Blood Alcohol Report from the Criminalistics Laboratory Division of the Sheriff-Coroner Department for Contra Costa County showed Respondent to have a blood alcohol level of 0.15 percent on October 5, 1996 near the time of his arrest.

Respondent's Background and Matters in Mitigation

16. Respondent is 41-years old as he has a date of birth of July 28, 1965.

17. When Respondent committed the theft-type crime in Contra Costa County in 1983, he was 17 years-old.

18. Respondent claims that after his conviction for receiving stolen property, on November 10, 1986, he was involved in a serious automobile collision, which resulted in his hospitalization for 30 days, including 17 days in the Intensive Care unit. The collision caused him to lose vision in his right eye, and he sustained a "broken neck." At the hearing of this matter, Respondent asserts a belief that he sustained some form of brain injury that not only rendered him unconscious for two days, but left him with memory loss. When he completed the Department's application for licensure, he had a lapse of memory regarding his conviction for the theft-type crime. Currently, he claims he has some long-term memory loss.

19. About 15 years before the hearing of this matter, Respondent began a business to conduct carpet cleaning services. The business was incorporated under the name "Thee Best, Inc." In recent years, Respondent expanded the business to carpet and floor restoration company. He owned the carpet cleaning portion of the business about one year ago.

20. Because he is blind in his right eye, Respondent has an impairment for pursuing many forms of employment. In addition to the problem of depth-of-perception and poor vision that a person has with one eye, Respondent cannot easily drive at night.

Matters in Rehabilitation

21. Respondent no longer associates with the two men who joined him in the theft from a parked vehicle from which he took a car stereo.

22. The theft crime was committed by Respondent about 22 years before he signed the application for licensure to act as a real estate professional.

23. Respondent's last drunk driving conviction occurred about eight years before the date he completed the Department's application for a salesperson license.

24. For nearly 14 years, Respondent has been married. He has two children, who are 8 years and 10 years of age. His family affords great personal stability.

25. Respondent claims that he has not consumed any alcoholic beverage since 1997. In that year, he became actively involved in a church ministry called "Victory Outreach." Through the church services and religious good works, Respondent has turned his life around. He proclaims that he has personally been involved in helping other individuals in overcoming alcohol and drug addiction problems. Respondent contends that he is a "leader" in the ministry as he has been a member of the Board of Directors of Victory Outreach since about 1999.

Respondent and his wife profess that Respondent is a "born-again" Christian. He is a fervent member of the International Ministries.

Respondent attends the Victory Outreach Church in Richmond, California, for Friday night services. Also he attends weekly Sunday church services as well as two other night services at New Hope International Church in Concord, California.

At the New Hope International Church facility, Respondent currently attends a weekly 5:00 a.m. fellowship group. On Sunday nights, Respondent attends a recovery group outreach meeting for participants at the Diablo Valley Ranch.

26. Respondent has maintained gainful employment since the time of his last conviction in 1997. Primarily, he has earned a living as a self-employed business owner of a carpet cleaning company, which had a principal place of business in El Sobrante, California. However in 2005, Respondent sold the carpet cleaning business and the building from which the business operated; but, he has retained the floor restoration enterprise that continues under the name

27. A real estate broker's office called "Exit Valero Real Estate" provided Respondent with an eight-week course of instruction in real estate sales skills.

Witnesses in Rehabilitation

28. Respondent called six witnesses to offer evidence at the hearing of this matter.

a. Mrs. Laura Barocio has been married to Respondent since 1992. She has known Respondent since she was about 15 years old.

Before 1997, Mrs. Barocio knew that Respondent began "hanging around the wrong kind of people." Respondent's behavior was not exemplary during the period when he was influenced by individuals of less than stellar reputations. However after his last conviction in 1997, Respondent has changed dramatically with his religious conversions. Mrs. Barocio is aware that Respondent has "compassion for people who are hurting" as he once experienced.

Since 1997 Mrs. Barocio has not seen Respondent consume any alcoholic beverage.

Mrs. Barocio knows Respondent to be a very good father to the couple's two children.

Mrs. Barocio acted as an administrative assistant in Respondent's former carpet cleaning business. She attended to the accounting and bookkeeping operations of Respondent's former business. She knew him to be an honest businessman who treated customers with fairness.

Mrs. Barocio expects to greatly support Respondent in the future as a real estate licensee.

Mrs. Barocio assisted Respondent in completing the Department's application for licensure. Mrs. Barocio understood the rationale of Respondent in not disclosing the conviction in 1984 as being related to the offense that was committed when he was about 17 years old.

b. Mr. Mike Rowland met Respondent through a church organization about eight years ago.

Mr. Rowland is Chairperson of the Boys and Girls Club in El Sobrante. In 2005 Respondent volunteered carpet cleaning services to the facilities of the Boys and Girls Club.

Respondent volunteered time in "Operation Compassion" that is associated with Contra Costa College. The facility is located in El Sobrante. In the past, Respondent participated in a Thanksgiving dinner celebration and other programs to feed the needy. Respondent devoted two to three hours per week for the years 2004 and 2005.

Mr. Rowland only knows Respondent to be a good and compassionate man. He cannot fathom Respondent being the person who has the criminal record that was described at the hearing of this matter.

Mr. Rowland has been a licensed real estate broker since November 2005. He was a real estate salesperson for four years before becoming a broker. Mr. Rowland is willing to be the employing broker for Respondent upon his licensure as a salesperson. Mr. Rowland views Respondent as being a person of great character.

c. Ms. Diana Castillo has known Respondent for about eight years. They met through Victory Outreach. Respondent has been a great example of a person who has overcome mistakes of the past. Respondent is a "born-again" Christian who will not commit the crimes that are part of his past.

d. Ms. Sheila Silveira has known Respondent for several years. Respondent gave Ms. Silveira her first job.

When they first met, Ms. Silveira was in the process of adopting a child. Respondent showed great generosity as an employer by allowing Ms. Silveira to participate in court hearings and other proceedings associated with the adoption process.

Ms. Silveira observed Respondent to be an excellent businessman who "over delivered" for his customers.

Ms. Silveira proclaims that Respondent is a person of good character whose criminal conduct is in the distant past.

Ms. Silveira and Respondent attend New Hope Church.

e. Mr. Robert Herrera is the current owner of "Thee Best Home Maintenance" company. He purchased the business from Respondent when the company was known as "Thee Best Carpet Cleaning."

In about 1996, Mr. Herrera met Respondent through church activities.

Mr. Herrera was a resident at a rehabilitation facility for about one year in the period of 1997-1998. He worked to overcome a drug addiction problem.

In about 1998, Respondent employed Mr. Herrera in the carpet cleaning business. In 2005, Mr. Herrera bought all the interests in the business. Mr. Herrera views Respondent as being an honest business person, who is his mentor.

f. Mr. Michael Trejo has known Respondent for about 25 years.

Mr. Trejo is a licensed mortgage broker now working as a loan officer.

Mr. Trejo characterizes Respondent's past as being very different than his current persona. The past for Respondent compared with his current life-style are like "night and day." The change for Respondent since 1997 has been great.

Since 1997, Mr. Trejo has never seen Respondent consume any alcoholic beverage.

Mr. Trejo knows Respondent to be very generous as a business person. He saw business practices as bestowing great benefits on customers so that Mr. Trejo doubted Respondent's ability to generate a profit.

g. Mr. Gregory Reyes has worked for United Airlines for about 13 years.

Mr. Reyes met Respondent about one year before the date of the hearing of this matter. Mr. Rowland introduced the men.

When Mr. Reyes was going through divorce proceedings, Respondent invited Mr. Reyes and his young son to live at Respondent's home. Mr. Reyes lived with Respondent's family from November 2005 until March 2006.

Matters that Negatively Impact Upon Respondent's Progress towards Rehabilitation

29. Respondent's representation was not credible, at the hearing of this matter that he failed to disclose the fact of the conviction in 1984 for receiving stolen property because that criminal activity and conviction were so remote in his past and occurred when he was 17 years old.

30. Respondent was not believable that he did not fully appreciate the responsibility to fully answer the application's item 25 so that he was required to disclose the conviction described in Factual Finding 6, which pertains to a theft-type crime. The item 25 reads: "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. Under the application's item 27, the Department asked respondent to "COMPLETE ONE LINE FOR EACH VIOLATION AND PROVIDE [AN] EXPLANATION BELOW. . . INDICATE WHETHER EACH CONVICTION WAS A MISDEMEANOR OR FELONY AT THE TIME THE CONVICTION OCCURRED. . . ." (Emphasis in text.)

Respondent was not persuasive at the hearing regarding the existence of any form of mistake on his part when he provided false and misleading responses to the application's items 25 and 27. Respondent claimed that due to a possible brain injury, which resulted from an automobile accident, he had a faulty memory. He further claimed that due to his age at the time of the crime being 17 years of age, he believed the conviction would not remain on his record. First, at the hearing of this matter he showed he had a clear recollection of the criminal activity. Second, Respondent's wife assisted him in preparing the license application and the couple expressed no acceptable and rationale reason for ignoring the directive of the application's item 25.

31. At the hearing of this matter, Respondent did not present any order under Penal Code section 1203.4 that expunged the record of conviction for either of the two convictions sustained by him in August 1984 and January 1997.

LEGAL CONCLUSIONS

1. Business and Professions Code section 480, subdivision (c), provides that the Department may deny a license on the ground that "the applicant knowingly [has] made a false statement of fact required to be revealed in the application for such license."

Business and Professions Code section 10177, subdivision (a), establishes that the Department may deny the issuance of a license to an applicant who has "procured, or attempted to procure, a real estate license . . . by fraud, misrepresentation or deceit, or by making any material misstatement of fact in an application for a real estate license. . . ."

Cause to deny Respondent's application for licensure as a real estate salesperson exists under Business and Professions Code sections 480, subdivision (c), and 10177 subdivision (a), by reason of the matters set forth in Factual Findings 3 through 5.

2. Business and Professions Code section 480, subdivision (a), provides that the Department may deny a license on the ground that the applicant has "been convicted of a crime. . . (that). . . is substantially related to the qualifications, functions or duties of the business . . . for which (an) application is made."

Business and Professions Code section 10177, subdivision (b), establishes that the Department may deny the issuance of a license to an applicant who has "been convicted of . . . a crime involving moral turpitude."

Cause to deny Respondent's application for licensure as a real estate salesperson exists under Business and Professions Code section 10177, subdivision (b), as it interacts with Business and Professions Code sections 480, subdivision (a), by reason of the matters set forth in Factual Finding 6 through 8 and 11 through 13.

3. The matters in mitigation, matters in rehabilitation as well as witnesses in rehabilitation as set forth in Findings 16 through 28 have been considered in making the following order.

4. As set out in California Code of Regulations, title 10, section 2911, Respondent has not successfully attained a majority of the criteria for rehabilitation from the criminal conviction, by reason of matters set out in Factual Findings 29 through 31.

Respondent's false statements on the application for licensure cast doubt on Respondent's honesty and conscientiousness in completing documents as filed with the Department, which is a state government agency.

Respondent must conspicuously pursue life as a mature, restrained and law abiding citizens for a few more years in order to attain the level of personal integrity and good character necessary to secure an unrestricted salesperson license.

5. The failure to provide true and accurate information on the Department's application for licensure, coupled with his criminal history of two criminal convictions, indicate that it would be against the public interest to allow Respondent to hold a real estate salesperson's license, except on a restricted basis for a period of four years.

ORDER

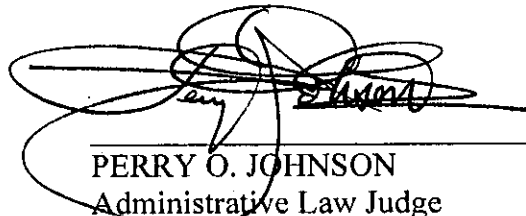
The application for a real estate salesperson license by Respondent Mitchell Angelo Barocio is denied; provided, however, a restricted real estate salesperson license shall be issued to Respondent pursuant to Section 10156.5 of the Business and Professions Code. The restricted license issued to Respondent 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 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 Mitchell Angelo Barocio 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 four 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 practices 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: October 27, 2006



PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings

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FILED
JUL - 5 2006

DEPARTMENT OF REAL ESTATE

By K. Contreras

8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Application of)
12 MITCHELL ANGELO BAROCIO,)
13 Respondent.)

H-9636 SF

STATEMENT OF ISSUES

15 The Complainant, CHARLES W. KOENIG, a Deputy Real
16 Estate Commissioner of the State of California, for Statement of
17 Issues against MITCHELL ANGELO BAROCIO (hereinafter "Respondent"),
18 is informed and alleges as follows:

19 I

20 Complainant, CHARLES W. KOENIG, a Deputy Real Estate
21 Commissioner of the State of California, makes this Statement of
22 Issues against Respondent in his official capacity.

23 II

24 Respondent made application to the Department of Real
25 Estate of the State of California for a real estate salesperson
26 license on or about September 26, 2005, with the knowledge and
27 understanding that any license issued as a result of said

1 application would be subject to the conditions of Section 10153.4
2 of the Business and Professions Code (hereinafter "Code").

3 III

4 In response to Question 27 of said application, to wit:
5 "DETAILED EXPLANATION OF ITEMS 24-26. COMPLETE ONE LINE FOR EACH
6 VIOLATION AND PROVIDE EXPLANATION BELOW," Respondent concealed
7 and failed to disclose the conviction described in Paragraph IV,
8 below.

9 IV

10 On or about August 8, 1984, in the Municipal Court of
11 the State of California, County of Contra Costa, Respondent was
12 convicted of Receiving Stolen Property in violation of Penal Code
13 Section 496, a misdemeanor and crime involving moral turpitude
14 that bears a substantial relationship under Section 2910, Title
15 10, California Code of Regulations (hereinafter "Regulations"),
16 to the qualifications, functions, or duties of a real estate
17 licensee.

18 V

19 On or about January 27, 1997, in the Municipal Court
20 of the State of California, County of Contra Costa, Respondent
21 was convicted of Driving Under the Influence of Alcohol and/or
22 Drugs in violation of Vehicle Code Section 23152(b), a
23 misdemeanor and crime involving moral turpitude that bears a
24 substantial relationship under Section 2910, Title 10, of the
25 Regulations to the qualifications, functions, or duties of a
26 real estate licensee.

27 \\\

1 VI

2 Respondent's criminal convictions, described in
3 Paragraphs IV and V, above, constitute cause for denial of
4 Respondent's application for a real estate license under
5 Sections 480(a) and 10177(b) of the Code.

6 VII

7 Respondent's failure to reveal in said application
8 the conviction set forth in Paragraph IV above constitutes the
9 attempted procurement of a real estate license by fraud,
10 misrepresentation, or deceit, or by making a material misstatement
11 of fact in said application, which failure is cause for denial
12 of Respondent's application for a real estate license under
13 Sections 480(c) and 10177(a) of the Code.

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

20
21 
22 CHARLES W. KOENIG
23 Deputy Real Estate Commissioner
24
25

26 Dated at Sacramento, California
27 this 30th day of June, 2006.