

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED

SEP 15 2010

DEPARTMENT OF REAL ESTATE

By K. Conturas

In the Matter of the Accusation of)

RAY W. SOWARDS,)

Respondent.)

NO. H-10830 SF

OAH NO. N-2010020605

DECISION

The Proposed Decision dated August 11, 2010, 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, but the right to a restricted license is granted to Respondent.

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

October 5, 2010.

IT IS SO ORDERED 9/15, 2010.

JEFF DAVI
Real Estate Commissioner

Barbara J. Bigby
BY: Barbara J. Bigby
Chief Deputy Commissioner

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In the Matter of the Accusation of:

RAY W. SOWARDS,

Respondent.

Case No. H-10830 SF

OAH No. 2010020605

PROPOSED DECISION

Administrative Law Judge Dianna L. Albini, Office of Administrative Hearings, State of California, heard this matter in Oakland, California, on July 13, 2010.

Annette E. Ferrante, Real Estate Counsel, represented Complainant E. J. Haberer II, Deputy Real Estate Commissioner.

Respondent Ray W. Sowards appeared and represented himself.

The record was closed and the matter was submitted on July 13, 2010.

FACTUAL FINDINGS

1. Respondent Ray W. Sowards is presently licensed and has license rights under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code) as a real estate broker.

2. The California State Bar issued respondent a license to practice law in 1989. His license was suspended from July 30, 2009, to January 30, 2010.

3. On January 9, 2009, the California State Bar Court (Bar Court) approved an order on respondent's stipulation and found that by underreporting income on his tax returns and by falsely testifying at a United States Tax Court trial, respondent violated Business and Professions Code section 6106 (acts involving moral turpitude, dishonesty or corruption). Acts involving moral turpitude, dishonesty or corruption, and underpaying federal and state tax liabilities all constitute acts that are substantially related to the qualifications, functions or duties of a real estate licensee.

4. On June 30, 2009, in the Supreme Court of the State of California, respondent was suspended from the practice of law for two years. Imposition of the suspension was

stayed and he was placed on two years probation. The terms and conditions of the suspension included a suspension from the practice of law for the first six months of the two-year probationary period, the successful completion of the multistate professional responsibility examination prior to June 30, 2010, and payment of fines and fees.

Respondent has completed his six-month probation and passed the multistate professional responsibility examination. He remains on probation until June 30, 2011. Respondent is negotiating the outstanding balance owed to the Internal Revenue Service. He is currently making payments for California state taxes which were assessed to be approximately \$76,000.

5. The facts and circumstances surrounding respondent's suspension from the California State Bar arose from a 2003 decision issued by the United States Tax Court (Tax Court). As part of the stipulated settlement with the Bar Court, respondent admitted that he "falsely testified about his income for the years 1995, 1996, and 1997, that he falsely testified about his wife's alleged consulting business, the creation of an alleged trust and payments related to an alleged business loan."

6. The facts and circumstances regarding respondent's conduct that resulted in the 2003 Tax Court Order stemmed from a business arrangement with Robert Strong, a self described tax expert. The details of the business arrangement were that Strong had agreed to loan respondent an amount not to exceed \$10,000 per month commencing in January 1, 1995, and extending through December 31, 2001. Unbeknownst to respondent, Strong's wife submitted federal 1099 forms to the Internal Revenue Service reflecting the amount of the loan as income. Respondent claims he did not receive the 1099's. Respondent accepts full responsibility for his conduct in misrepresenting his testimony to the Tax Court, but he does not feel he is responsible for the outstanding federal and state tax liability.

7. In approximately 1997, after 28 years of marriage, respondent learned his wife was involved in an extra-marital affair. He filed for divorce, but did not finalize the proceeding. Respondent began to abuse alcohol between 1997 through 2004. In approximately 2004, his six children held an intervention. It was only at this point that respondent became fully aware of the extent of his self-destructive behavior. Respondent made a promise to his children and by seeking counsel from friends who had participated in the Alcoholics Anonymous (AA) program he has been able to stay sober since 2004. He does not attend any formal alcohol abuse program but has learned to talk with friends, take walks and otherwise divert his attention elsewhere. He works every day on his sobriety.

Respondent is legally married, but has been separated from his wife since June of 1997. He continues to provide her with financial support and medical insurance. Respondent, a self-employed attorney and broker, has been involved in real estate since approximately 1991. Currently his main source of income is from attorney fees generated in his estate planning practice. He primarily utilizes his real estate license to benefit his estate planning clients. Respondent's income from his law practice has declined recently and he wishes to maintain his broker license in order to support himself and his wife. Respondent

has been a member of the Milpitas Chamber of Commerce for the past 10 years. He is up to date on his legal and real estate continuing education courses.

LEGAL CONCLUSIONS

1. Pursuant to Business and Professions Code section 10177, subdivision (f), the Commissioner may suspend or revoke the license of a real estate licensee who has had a license issued by another agency of this state suspended or revoked for acts that if done by a real estate licensee would be grounds for suspending or revoking a California real estate license, if the suspension was taken "only after giving the licensee or applicant fair notice of the charges, an opportunity for a hearing, and other due process protections comparable to the Administrative Procedure Act, . . . and only upon an express finding of a violation of law by the agency or entity." By reason of the matters set forth in Factual Findings 2 through 5, respondent's license to practice law in California was suspended for acts which, if done by a real estate licensee, would be grounds for suspending or revoking a California real estate license pursuant to Business and Professions Code section 10177, subdivision (j).

Cause exists to suspend or revoke respondent's real estate broker license by reason of the suspension of his license to practice law.

2. Pursuant to Business and Professions Code section 10177, subdivision (b), the Commissioner may suspend or revoke a real estate broker license on the ground that the licensee pled guilty or was convicted of a crime that was substantially related to the qualifications, functions, or duties of a real estate licensee. Pursuant to Business and Professions Code section 490, subdivision (a), the Commissioner may suspend or revoke a license on the ground that a licensee has been convicted of a crime that is substantially related to the qualifications, functions, or duties of a real estate licensee.

Respondent has not been convicted of a crime. The findings by the State Bar, the California Supreme Court and the U.S. Tax Court were the result of civil actions and not a criminal conviction. For the reasons set forth in Findings 2, 3, and 4, cause does not exist pursuant to Business and Professions Code section 10177, subdivision (b), or section 490, subdivision (a), to discipline respondent's real estate broker or salesperson license.

Respondent's affirmative defenses

3. Respondent argues the Commissioner's action is barred by the statute of limitations. Pursuant to Business and Professions Code section 10101, a real estate license disciplinary action must be filed within three years from the occurrence of the grounds for disciplinary action. However, if the acts or omissions for a disciplinary action involve fraud, misrepresentation or a false promise, the accusation shall be filed within one year after the date of discovery, but in no event later than 10 years from the occurrence of the alleged grounds for discipline. The three-year statute of limitations period in which the Department must file an accusation commences is the date of the final judgment, not the date of the acts or omissions underlying that final judgment. (*Herrera v. Department of Real Estate* (2001))

88 Cal.App.4th 776.) The three-year period did not commence for purposes of a real estate license disciplinary action until the order was entered by the California Supreme Court on June 30, 2009. Complainant timely filed the Accusation.

4. Respondent argues the Commissioner's action is barred because the Tax Court trial was unfairly conducted and violated his due process rights. Specifically, respondent claims that he was unfairly denied the opportunity to present certain evidence about the loan from Strong in order to contradict the assertion that this money was income. He also contends that the Bar Court erroneously relied upon the record in the Tax Court because it excluded such evidence in reaching its judgment. Respondent asserts that evidence of the unfairness of the exclusionary rulings in the previous proceedings must be considered in this proceeding in order to make a determination under Business and Professions Code 10177, subdivision (f). Criticism of the conduct of a trial court may be appropriate in a motion for new trial or in an appeal, but it has no place in a subsequent licensing disciplinary proceeding. (*Richards v. Gordon* (1967) 254 Cal.App. 2d 735.)

Respondent overlooks the fact that he stipulated to the findings in the Tax Court for purposes of the State Bar disciplinary decision. Respondent's affirmative defense of lack of due process and failure of the Tax Court to consider admissible evidence has no merit.

5. Respondent argues the Commissioner's action is barred because the Bar Court violated his right to due process. However, in *Berg v. Davi* (2005) 130 Cal.App. 4th 223, the Appellate Court held that a Bar Court disbarment proceeding provided adequate due process protections, for purposes of Business and Professions Code 10177, subdivision (f). Respondent's affirmative defense that he was not afforded due process by the Bar Court is without merit.

Other matters

6. Rehabilitation is a "state of mind" and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved "reformation and regeneration." (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) The evidentiary significance of an applicant's misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. (*Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1070.) A candid admission of misconduct and the full acknowledgment of wrongdoing are but a necessary first step in demonstrating rehabilitation. (*In re Trebilcock* (1981) 30 Cal.3d 312, 315.)

The Department's criteria of rehabilitation are set forth in California Code of Regulations, title 10, section 2912, and the relevant sections have been considered. Respondent's conduct involving his underpayment of taxes and false testimony in the Tax Court are very serious. However, respondent has never been convicted of a crime or misappropriated funds from his clients. Respondent completed his six-month suspension and although he remains on probation until June of 2011, he is able to practice law. Respondent has completed all of his continuing education courses and passed the professional

responsibility examination. He continues to make monthly payments toward his outstanding California State Franchise Tax Board obligation and is in negotiations with the Internal Revenue Service to resolve the outstanding balance. Respondent takes responsibility for his conduct and he had abstained from alcohol for six years..

When all the facts are considered and weighed, for the reasons set forth in Findings 6 and 7, it is concluded that would be not be contrary to the public interest to permit respondent to be issued a salesperson license on a restricted basis. The Department's concerns of the lack of the ability to supervise respondent will be satisfied and the public will be adequately protected by the following order which allows respondent to be issued a salesperson license on a restricted basis.

ORDER

All licenses and licensing rights of respondent Ray Sowards under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to Business and Professions Code section 10156.5 if he makes application therefor and pays to the Department of Real Estate the appropriate fee for the restricted license within 90 days from the effective date of this decision. The restricted license issued to respondent shall be subject to all of the provisions of Business and Professions Code section 10156.7 and to the following limitations, conditions and restrictions imposed under the authority of Business and Professions Code section 10156.6:

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, including by a 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 or for the removal of any of the conditions, limitations or restrictions of a restricted license until two 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 six months from the effective date of this decision,
take and pass the Professional Responsibility Examination administered by
the Department including the payment of the appropriate examination fee. Of
respondent fails to satisfy this condition, the Commissioner may order
suspension of respondent's license until respondent passes the examination.
6. Respondent shall, within nine 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 renewal 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: 8/11/10



DIANNA L. ALBINI
Administrative Law Judge
Office of Administrative Hearings

FILED

DEC 29 2009

DEPARTMENT OF REAL ESTATE

By K. Mar

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9 BEFORE THE DEPARTMENT OF REAL ESTATE

10 STATE OF CALIFORNIA

11 * * *

12 In the Matter of the Accusation of)
13 RAY W. SOWARDS,) H-10830 SF
14 Respondent.) ACCUSATION
15

16 The Complainant, E. J. HABERER, II, a Deputy Real Estate Commissioner of
17 the State of California, for cause of Accusation against RAY W. SOWARDS, (Respondent), is
18 informed and alleges as follows:

19 1

20 Complainant makes this Accusation against Respondent in his official capacity.

21 2

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

25 3

26 On or about June 30, 2009, in the Supreme Court of the State of California,
27 Case No. S172627, the Court ordered that Respondent be suspended from the practice of law for

1 two years, with a stay of execution, placed him on two years probation with conditions,
2 including actual suspension of six months.

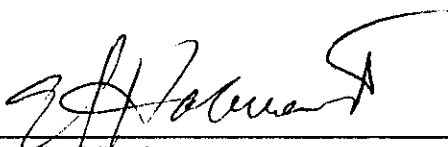
3 4

4 On January 9, 2009, before the State Bar Court of California, Case
5 No. 09-O-12794, the Court approved an order on stipulations regarding facts, conclusions of
6 law and disposition. In the conclusions of law, the Court found that by under reporting income
7 on his tax returns and by falsely testifying at trial, Respondent committed acts involving moral
8 turpitude, dishonesty, or corruption in willful violation of Section 6106 of the Business and
9 Professions Code.

10 5

11 The facts alleged in Paragraphs 3 and 4, above, constitute cause under Section
12 490 and 10177(b) and (f) of the Code for suspension or revocation of Respondent's license
13 under the Real Estate Law.

14 WHEREFORE, Complainant prays that a hearing be conducted on the
15 allegations of this Accusation and that upon proof thereof, a Decision be rendered imposing
16 disciplinary action against all licenses and license rights of Respondent under the Code, and
17 for such other and further relief as may be proper under provisions of law.

18
19
20 
21 E. J. HABERER, II
Deputy Real Estate Commissioner

22 Dated at Oakland, California,
23 this 17th day of December, 2009.