

FILED

MAY 29 2013

DEPARTMENT OF REAL ESTATE

By L. Jones

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of)
) NO. H-11463 SF
MATTHEW CHRISTOPHER WERSEL,)
) OAH NO. 2012100329
Respondent.)
_____)

DECISION

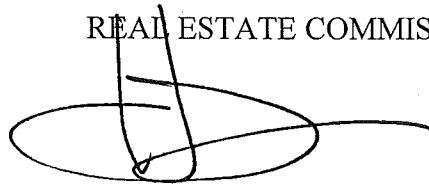
The Proposed Decision dated April 11, 2013, of the Administrative Law Judge of the Office of Administrative Hearings is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

This Decision shall become effective at 12 o'clock noon on JUN 18 2013

IT IS SO ORDERED

May 24, 2013

REAL ESTATE COMMISSIONER



By: Jeffrey Mason
Chief Deputy Commissioner

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

MATTHEW CHRISTOPHER WERSEL

Respondent.

DRE No. H-11463 SF

OAH No. 2012100329

PROPOSED DECISION

Administrative Law Judge Paul Slavitt, Office of Administrative Hearings, State of California, heard this matter on March 13, 2013, in Oakland, California.

Richard K. Uno, Real Estate Counsel, represented complainant Robin Tanner, Deputy Real Estate Commissioner of the State of California.

Mary E. Work, Attorney at Law, represented respondent Matthew Christopher Wersel, who was present.

The matter was submitted on March 13, 2013.

FACTUAL FINDINGS

1. Complainant Robin Tanner, Deputy Real Estate Commissioner, filed the accusation in her official capacity.
2. Respondent currently is licensed by the Department of Real Estate (department) as a real estate salesperson. The license was issued in 2003, and will expire on June 8, 2016, unless renewed.

Criminal Convictions

3. On or about May 3, 2000, in the Los Angeles County Superior Court, respondent was convicted on his plea of nolo contendere of a misdemeanor violation of Vehicle Code section 23152, subdivision (a), (driving under the influence). The court records and police report of the incident are not in evidence. However, respondent reported that he was sentenced to three years court probation, ordered to pay fines and fees, and to attend a first offender's program.

4. According to respondent, the facts underlying the conviction are that he was attending a party on the campus of Pepperdine University, where he had been drinking. He left

the party to go to the store, and was stopped by campus police for alleged speeding. During the course of investigation, it was determined that respondent might be under the influence. He failed the field sobriety tests administered at the scene and was arrested.

5. With reference to the 2000 conviction, respondent explained that he was 20 years old, and attending a campus party. He describes himself and his behavior at the time as "young and stupid." He testified that as a result of the incident he was "scared straight." He decided to transfer to another college to find a new environment. He attended Alcoholics Anonymous (AA) meetings as part of his probation in the 2000 case, and states that he abstained from alcohol for years thereafter.

6. On June 7, 2011, in the Santa Clara County Superior Court, respondent was convicted on his plea of nolo contendere of a misdemeanor violation of Vehicle Code section 23152, subdivision (b), (driving under the influence with a blood alcohol level of .08 percent or greater). Respondent was sentenced to three years court probation, with conditions including 19 days in jail, to be served through community service; payment of fines and fees; and completion of a nine-month first offender program.

7. The facts underlying the conviction are that on January 28, 2011, the Los Gatos Police Department began receiving 911 calls concerning a possible drunk driver on the highway in a black SUV. These calls were soon followed by a report of a hit and run accident on city streets, involving a car that matched the description of the car in the earlier drunk driver calls. The victim of the hit and run had recorded the license plate of the suspect car. The police determined that the car was registered to respondent.

Within a short time, police located respondent at his home, and his car—a black SUV—in the driveway. Upon contacting respondent, the police determined that respondent was highly intoxicated, and unable to perform field sobriety tests. They arrested him for both driving under the influence and the hit and run accident. Respondent's blood alcohol level at the time of arrest is unknown. The hit and run charge was dismissed at the time of respondent's plea to the DUI violation.

There were no personal injuries reported in the collision. Damage to the vehicles was minor, and respondent provided his insurance information to the victim.

8. With reference to the 2011 conviction, respondent had been at a business dinner in San Jose, and had a substantial amount to drink. He was returning to his home in Los Gatos when the accident happened. Respondent was at an intersection in one of two parallel left turn lanes. He believes that he hit the car in the other left turn lane while executing his turn. Respondent did not notice the impact at the time. He does not know whether he failed to notice because he was impaired by alcohol, affected by medications he was taking, or simply did not feel the impact or see the other car because of the relative size of the vehicles involved. (Respondent was driving a large SUV, while the victim was in a compact car.)

9. At the time of the 2011 incident, respondent suffered from a longstanding neurological disorder, Trigeminal neuralgia, which caused him significant pain in the jaw and face. The pain, which recurred intermittently, was excruciating. Despite the numerous medications and painkillers he was prescribed, the pain was unrelenting. Respondent felt increasingly depressed, defeated, and nearly suicidal. His alcohol use became a refuge from the depression, and a means of self-medication.

10. Over a period of years, respondent submitted to three neurological surgeries attempting to address the condition. The first two surgeries provided only short-term relief. In late 2011, he underwent a surgery to sever the trigeminal nerve, effectively rendering the left side of his face numb. Respondent now is pain free. He no longer needs the many medications he took before. As such, a significant cause for his alcohol use has been alleviated.

Other Matters

11. Respondent is married and lives in San Francisco. In college, he began to focus on a career in commercial real estate. His mother is a licensed salesperson who helped him get his first job after he received his license. He currently works for CBRE, Inc., a large commercial brokerage, in its San Jose office.

12. Although respondent remains on probation until June 2014, he has completed all of its terms and conditions, including payment of fees and fines, and completion of the nine-month drinking driver program.

13. To comply with probation in his 2000 conviction, respondent attended AA. However, over time he stopped. Following the 2011 incident, he resumed his participation in AA, and testified that he continues to attend. Previously, he had a sponsor, but says that he prefers the group experience, and no longer has sponsor. Respondent states that he now is abstinent.

14. Todd Rudee is the sales manager for the CBRE San Jose office. He has overseen respondent's work since respondent's first employment in the San Jose office in 2007. He finds respondent to be very knowledgeable, honest and trustworthy.

He has been aware of this accusation since November or December 2012. He has reviewed the accusation, and it does not raise any concerns about respondent's employment or performance at the company. He would continue to employ respondent even if the department were to issue a restricted license as a result of this proceeding. He states that the company's management concurs.

15. Jeff Pick coaches and trains teenaged and younger baseball players. He has known respondent for eight or nine years. He learned of respondent's DUI case shortly after it occurred.

Respondent volunteers to help Pick in coaching young ballplayers and baseball teams. Pick stated that beyond respondent's coaching skills, he is a good model for the young players. Respondent is a "good ear" for the players, listening to them, and providing advice on how to handle success and failure. He finds respondent to be honest and trustworthy. Should the occasion arise, Pick would consult respondent professionally as a realtor because he trusts him.

Pick stated that about a year ago, he, respondent and some friends traveled to St. Louis to watch a professional baseball game there. At that time, he saw respondent drink beer at the game. Respondent acknowledges this instance, which he characterizes as isolated and regrettable.

16. Stephanie Wersel has been married to respondent for six years. She has known respondent since high school; however, they did not become a couple until she completed college about ten years ago.

Wersel's testimony corroborated much of the evidence concerning respondent's medical condition, mental state and alcohol use prior to both the 2011 conviction, and his last surgery. She states that respondent abstained from alcohol immediately after his arrest, and now is free of medications, as well. Wersel sees that respondent is embarrassed and ashamed of his DUI conviction, is taking responsibility for his actions, and understands that he made a mistake that should not have happened, and cannot happen again.

Following his last surgery, and now pain free, respondent's attitude has improved. He takes better care of himself, and appears better able to handle stress in his life. Wersel sees no reason why respondent cannot capably continue his career in real estate.

Finally, Wersel explained that although she is employed as an attorney, respondent has been the principal wage earner in the family, and that the loss of his license would have a significant financial impact.

17. Respondent and his wife attend St. Peter and Paul's Church in San Francisco.

18. Letters in evidence and the testimony of respondent's sister indicate that his family remains supportive.

19. Respondent disclosed the 2000 conviction on his original salesperson's license application, and each subsequent renewal application, and the conviction has not been an impediment to licensure.

Costs

20. In connection with the investigation and prosecution of this accusation, the department submitted a certification of costs for investigation in the sum of \$440.15, and enforcement/attorneys' fees in the sum of \$1,335, a total of \$1,775.15. The case of

Zuckerman v. Board of Chiropractic Examiners (2002) 29 Cal.4th 32 sets forth the factors to be considered in determining the reasonableness of costs. Those factors include whether the respondent has been successful at the hearing in getting charges reduced or dismissed; respondent's subjective good faith belief in the merits of his position; whether the respondent has raised a colorable challenge to the proposed discipline; the financial ability to pay the cost award; and whether the scope of the investigation was appropriate to the alleged conduct of the respondent.

21. No evidence was offered to dispute the reasonableness of the fees requested. As such, the total costs of \$1,775.15 are deemed reasonable.

LEGAL CONCLUSION

1. Pursuant to Business and Professions Code section 10177, subdivision (b), the Commissioner may suspend or revoke the license of any real estate licensee who has entered a plea of guilty or nolo contendere to a crime substantially related to the qualifications, functions, or duties of a real estate licensee. Under title 10, California Code of Regulations, section 2910, a crime or act is deemed substantially related to the qualifications, functions or duties of a licensee if it involves conduct which demonstrates a pattern of repeated and willful disregard of law, or if the licensee has two or more convictions involving the consumption or use of alcohol or drugs when at least one of the convictions also involved driving. Cause for discipline exists because respondent twice has been convicted of driving under the influence, and in the second such offense left the scene of an accident, all as set forth in Factual Findings 3 through 6.

2. In title 10, California Code of Regulations, section 2912, the department has established criteria to be considered when evaluating an applicant's rehabilitation from the acts or crime that forms the basis for discipline. These include the following:

(a) The passage of not less than two years since the most recent criminal conviction or act of the applicant that is a basis to deny the departmental action sought. (A longer period will be required if there is a history of acts or conduct substantially related to the qualifications, functions or duties of a licensee of the department.)

(b) Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the applicant.

....

(e) Successful completion or early discharge from probation or parole.

(f) Abstinence from the use of controlled substances or alcohol for not less than two years if the conduct which is the basis to deny the departmental action sought is attributable in part to the use of controlled substances or alcohol.

(g) Payment of the fine or other monetary penalty imposed in connection with a criminal conviction or quasi-criminal judgment.

(h) Stability of family life and fulfillment of parental and familial responsibilities subsequent to the conviction or conduct that is the basis for denial of the agency action sought.

(i) Completion of, or sustained enrollment in, formal education or vocational training courses for economic self-improvement.

....

(l) Significant or conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.

....

(n) Change in attitude from that which existed at the time of the conduct in question as evidenced by any or all of the following:

(1) Testimony of applicant.

...

(2) Evidence from family members, friends or other persons familiar with applicant's previous conduct and with his subsequent attitudes and behavioral patterns.

....

(5) Absence of subsequent felony or misdemeanor convictions that are reflective of an inability to conform to societal rules when considered in light of the conduct in question.

3. In this case, less than two years have passed since respondent's conviction; and he remains on probation until June 2014. However, other factors weigh in respondent's favor.

a. With reference to restitution, there is no evidence to suggest any bodily injuries resulting from the subject collision. Respondent had insurance to cover any property damage incurred by the victim.

b. Respondent has paid all fees and fines associated with his criminal sentence, and is otherwise compliant with probation.

c. Respondent's family life appears stable. His wife has stood by him throughout his medical problems and surgeries, as well as the criminal prosecution and this accusation proceeding. His parents and sister remain supportive as well.

d. With regard to church and community involvement, respondent devotes considerable time to his activities coaching young baseball players. He and his wife attend church in San Francisco.

e. Testimony suggests that respondent takes his conviction seriously, has a better attitude about life generally, and renewed enthusiasm for his life.

f. Respondent has not re-offended, or been charged with a probation violation since his conviction.

g. Respondent generally has remained abstinent from alcohol since his offense--the 2012 in which respondent drank beer at a ball game being an isolated case.

4. Respondent's offense is serious. He was driving so erratically that other drivers were reporting to 911. He caused a collision and left the scene. While his previous medical condition might have contributed to his drinking, it does not excuse it. The public is entitled to know that real estate licensees will be respectful of, and compliant with the law.

Respondent understands the gravity of his offense, and is motivated to remain abstinent. He has the support of his wife and family. He values his profession and his work with his current employer, who also is supportive of him. As such, the public interest will be protected if respondent is issued a restricted license.

5. Business and Professions Code section 10106, subdivision (a), provides that the department may request, and the administrative law judge may order that in the event a licensee is found to have committed a violation, he shall pay the reasonable cost of investigation and enforcement. Based on the provisions of section 10106, subdivision (a), and the matters set forth in Findings 13 and 14, respondent shall be ordered to pay costs in the amount of \$1,775.15.

ORDER

Respondent Matthew Christopher Wersel's real estate salesperson's license is revoked; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to of Business and Professions Code section 10156.5, if respondent makes application therefor and pays to the department 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 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 or 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 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 nor 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, which shall certify:

(a) That the employing broker has read the decision of the commissioner which granted the right to a restricted license; and

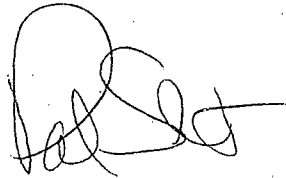
(b) That the employing broker will exercise close supervision over the performance by the restricted licensee relating to activities for which a real estate license is required.

5. Respondent shall, within nine months from the effective date of this decision, present evidence satisfactory to the commissioner that respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed: 1) the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license; and 2) such other courses as the commissioner may deem reasonable and proper to ensure that respondent is well informed about the duties and responsibilities of his license. If respondent fails to satisfy this condition, the commissioner may order the suspension of the

restricted license until the respondent presents such evidence.
The commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

Respondent shall pay the department the sum of \$1,775.15 for the reasonable costs of investigation and prosecution.

DATED: April 11, 2013



PAUL J. SLAVIT
Administrative Law Judge
Office of Administrative Hearings

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