

BEFORE THE  
BUREAU OF REAL ESTATE  
STATE OF CALIFORNIA

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**FILED**

DEC 9 2013

BUREAU OF REAL ESTATE

By *L. Frost*

In the Matter of the Accusation of

TORIBIO VALDIVIA,

Respondent.

)  
) NO. H-11512 SF  
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)  
) OAH NO. 2013060830  
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DECISION

The Proposed Decision dated November 5, 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.

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 DEC 30 2013

IT IS SO ORDERED

11/22/2013

REAL ESTATE COMMISSIONER

*Wayne S. Bell*  
WAYNE S. BELL

BEFORE THE  
BUREAU OF REAL ESTATE  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation of:

TORIBIO VALDIVIA,

Respondent.

Case No. H-11512 SF

OAH No. 2013060830

**PROPOSED DECISION**

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on October 23, 2013, in Oakland, California.

Jason D. Lazark, Counsel, represented complainant, Robin S. Tanner, a Deputy Real Estate Commissioner of the State of California.

J. Anne Rawlins, Attorney at Law, represented respondent Toribio Valdivia, who was present throughout the administrative hearing.

The matter was submitted for decision on October 23, 2013.

**FACTUAL FINDINGS**

1. Robin S. Tanner made the accusation in her official capacity as a Deputy Real Estate Commissioner of the State of California.

2. Toribio Valdivia (respondent) has been licensed and had licensing rights under the Real Estate Law<sup>1</sup> as a real estate salesperson beginning on July 21, 1993.

3. On July 14, 2011, in the Superior Court of the State of California, County of Santa Clara, respondent was convicted of violating Penal Code sections 242/243, subdivision (e) (domestic violence), and 242/243, subdivision (a) (battery), both misdemeanors. Imposition of sentence was suspended and respondent was placed on formal probation for

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<sup>1</sup> The Real Estate Law is found at Business and Professions Code section 10000 et seq.

three years with terms that included the serving 20 days in the weekend work program, performing 20 hours of volunteer work, completing a 52-week domestic violence counseling program, paying various fines and fees, and not possessing firearms for 10 years. On August 8, 2012, the court modified respondent's probation from formal to informal probation.

4. The facts and circumstances underlying respondent's conviction for domestic violence occurred on September 24, 2010. Respondent suspected his wife of 23 years of having an affair. Respondent awakened his wife at 1:30 a.m. and began accusing her of cheating on him. Respondent grabbed his wife by the hair and arms while she was in bed. When respondent's adult daughter intervened, respondent left the home. Officers who responded to the family home observed scratches on respondent's wife's left eye and right wrist. Respondent's wife denied medical attention, but requested and received an emergency protective order.

Respondent surrendered to police the next day. He told the arresting officer that the previous night he had found letters from his wife's lover and became distraught and angry. Respondent admitted that when he confronted her, he grabbed his wife's hair a couple of times and yelled at her. After his daughter intervened, he left and slept in his car overnight. Respondent also admitted to officers that during a walk a few days earlier, he had told his wife that if they did not have children he would think about killing her and killing himself. He also told officers that he did not really mean it, and he had told that to his wife.

5. The facts and circumstances underlying the battery conviction occurred on January 7, 2011, and involved his wife and another man. Respondent and his brother saw his wife's minivan in the parking lot of a restaurant where they had stopped to eat. Respondent looked into the van and saw his wife and the man with whom she was having the affair. A confrontation ensued. The officers who were called to the scene did not see any injuries; however, respondent was arrested for violating the protective order and battery.

#### *Respondent's Evidence*

6. Respondent does not agree with all of the statements in the police reports, but acknowledges that he could have handled the dispute with this wife differently. He was not "thinking straight" and was very emotional upon discovering that his wife was involved with another man. Respondent admits that on the night he discovered the letters and confronted his wife he should have instead left the family home and spoken to his wife when he had calmed down. He agrees his response constituted criminal behavior. Respondent states that when he saw his wife and her boyfriend in the parking lot of the restaurant he was surprised. He admits that they had a confrontation, but denies having battered anyone. Respondent states he pled no contest to the charge to put the matter behind him and avoid a trial.

7. Respondent completed the 52-week domestic violence counseling program on July 20, 2012. The program administrator reported to respondent's probation officer that respondent benefited from the program and his ability to demonstrate awareness of using abusive behavior past and present was good. Respondent reports having learned a great deal

about how to handle emotionally-charged confrontations in the class. He learned skills and techniques to use to control his anger, such as walking away and counting to 10 before responding.

8. On October 31, 2011, respondent completed 16 sessions of the Parenting without Violence Program, offered by New Beginnings Counseling & Consulting. This program was not court-mandated. Respondent decided that he would benefit from attending the class and learning how to be a better parent to his four children. Respondent also attended the Life Skills class at his church, where he attends services on Sundays. Respondent found the classes helpful and gained further insight from attending them.

9. Respondent completed 30 hours of community service (10 hours beyond what the court required) with the religious non-profit, "Edificando Vidas." Respondent's community service involved cleaning church facilities from September to December 2011.

10. Respondent has paid the court-imposed fines in full and completed the 20 days of the weekend work program. He will remain on summary probation until July 2014.

11. Respondent sees his sons every weekend. He is in touch regularly with his adult daughters, but sees them less often due to their busy schedules. Respondent values his relationship with his children. Respondent and his wife are in the process of divorcing. He has no contact with her because the protective order remains in place.

12. Respondent has been a licensed real estate salesperson for more than 20 years. He has worked with the same broker, Rajbinder Bains, throughout his career. Respondent is a part owner and helps to manage one of the branches of the firm.

13. Bains testified at hearing. He has been a licensed broker for over 25 years and was licensed as a real estate salesperson for a couple of years beforehand. Bains has known and worked with respondent for over 20 years. Respondent is one of the office managers at a branch of the real estate firm. They have a good, professional relationship. Bains considers the conduct underlying respondent's convictions to be out of character. He has never seen him behave unprofessionally and has never received any complaints about respondent from clients. Respondent has a good relationship with the other agents. Bains considers the convictions to be isolated incidents based on his 20 years of experience in working with respondent; Bains does not believe that respondent is a threat to the public. If respondent's license is restricted by the bureau, Bains is willing to supervise respondent.

14. Dora Villa-Sandoval also testified on respondent's behalf at hearing. She has been a licensed real estate salesperson for eight years and is a manager of the office where respondent works. She has known respondent for 15 to 20 years. Villa-Sandoval has worked under Bain's broker's license for the past four years. She sees respondent three to four times per week at work. Respondent's relationship with the other staff members is very good; he is well liked and respected. Villa-Sandoval considers respondent to be a giving, honest and professional man. She is aware of respondent's two convictions and the factual

allegations underlying the convictions. Villa-Sandoval knows respondent well and considers him to be very honest. Villa-Sandoval considers respondent's behavior underlying the convictions to be out of character; she does not consider him to be a violent man. Villa-Sandoval has supervised another salesperson with a restricted license and would be comfortable supervising respondent if his license is restricted.

15. Respondent presented nine character letters from longtime work colleagues, friends and a tenant, all of whom vouch for his honesty, good character and non-violent nature. These individuals are aware of the allegations in the accusation and find his behavior to be out of character. These individuals also believe that respondent learned important lessons from the experience and the classes he is attending, and that he is a competent real estate salesperson. The character letters supplement the testimony by respondent, Bains and Villa-Sandoval and further establish that respondent has a good, non-violent and honest character, is a competent real estate salesperson and has learned from the counseling he has received.

#### *Costs of Investigation and Enforcement*

16. The bureau reasonably incurred \$1,627.55 in the costs of investigation and enforcement of this matter.

### LEGAL CONCLUSIONS

1. Business and Professions Code section 490, subdivision (a), authorizes the suspension or revocation of a license if the licensee has been convicted of a crime that is substantially related to the qualifications, functions or duties of the licensed business or profession. Business and Professions Code section 10177, subdivision (b), which is specific to real estate licenses, authorizes the suspension or revocation of a license if the licensee has been convicted of a crime that is substantially related to the qualifications, functions and duties of a licensee of the Bureau of Real Estate.

2. California Code of Regulations, title 10, section 2910, sets forth 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 doing an unlawful act with the intent or threat of doing substantial injury to the person or property of another (subd. (a)(8)). Respondent's convictions for domestic violence and battery are substantially related to the qualifications, functions or duties of a real estate licensee under California Code of Regulations, title 10, section 2910, subdivision (a)(8). By reason of the matters set forth in Findings 3 through 5, the convictions constitute cause to discipline respondent's real estate salesperson license pursuant to Business and Professions Code sections 490, subdivision (a), and 10177, subdivision (b).

3. California Code of Regulations, title 10, section 2912, sets forth criteria for determining the rehabilitation of a licensee in a disciplinary proceeding. These criteria have

been considered. Respondent was convicted of two misdemeanors in July 2011. In light of his full compliance with probationary conditions, his probation was modified from formal to informal probation in August 2012. (Factual Finding 3.) Probation is scheduled to terminate in July 2014. (Factual Finding 10.) Respondent has paid his fines, completed his weekend work and community service. (Factual Findings 9 and 10.) In addition, respondent completed his 52-week anger management/domestic violence counseling course from which he benefited. (Factual Finding 7.) Respondent also took it upon himself to take a parenting course and life skills course following his arrests. (Factual Findings 8 and 9.)

While respondent's convictions evidence serious misconduct, they appear to be out of character and revolved around the breakup of his marriage of 23 years. Respondent acknowledges that he could have and should have handled himself differently on the occasions leading to his arrests. (Factual Finding 6.) Respondent has learned a great deal about resolving conflict from the classes he attended. (Factual Finding 7 and 8.) Respondent has a stable relationship with his four children and is involved in his community and church. (Factual Finding 11.)

Respondent has been licensed for over 20 years and has never before been subject to discipline. He has enjoyed a very stable employment history, working for the same broker for nearly his entire career. (Factual Finding 13.) His broker, coworkers, colleagues, friends and a tenant, all describe respondent as an honest, non-violent, hardworking professional. They have never seen him exhibit anger and believe his conduct occurred as a result of his divorce and was out of character. (Factual Findings 13 through 15.) His employer and a manager from his office are willing to supervise him if he is permitted to keep a restricted license. (Factual Findings 13 and 14.) Considering all of the evidence presented, it is determined that the public interest would be protected by permitting respondent to retain his real estate salesperson license under the heightened supervision of a restricted license.

#### *Costs*

4. Section 10106 provides, in pertinent part, that the bureau may request that the licensee be ordered to pay a sum not exceeding the reasonable costs of investigation and enforcement upon a finding that the licensee violated the Real Estate Law. The bureau requests reimbursement of fees and costs in the amount of \$1,627.55. The bureau's fees and costs were reasonable. (Factual Finding 16.)

In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth guidelines for determining whether the costs should be assessed in the particular circumstances of each case. Respondent has not established a basis to reduce or eliminate the costs in this matter.

## ORDER

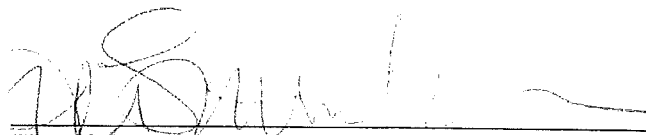
All licenses and licensing rights of respondent Toribio Valdivia under the Real Estate Law are revoked by reason of Legal Conclusions 1 through 3 ; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to Business and Professions Code section 10156.5 if respondent makes application therefore and pays to the Bureau 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 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 that Code:

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 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 three years have elapsed from the effective date of this Decision.
4. Respondent shall submit with any application for a 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 Bureau 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 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.

6. Respondent shall, within six months from the effective date of this decision, take and pass the Professional Responsibility Examination administered by the Bureau of Real Estate including the payment of the appropriate examination fee. If respondent fails to satisfy this condition, the Commissioner may order suspension of respondent's license until respondent passes the examination.
7. Respondent shall notify the Commissioner in writing within 72 hours of any arrest by sending a certified letter to the Commissioner at the Bureau of Real Estate, Post Office Box 187000, Sacramento, CA 95818-7000. The letter shall set forth the date of respondent's arrest, the crime for which respondent was arrested and the name and address of the arresting law enforcement agency. Respondent's failure to timely file written notice shall constitute an independent violation of the terms of the restricted license and shall be grounds for the suspension or revocation of that license.
8. Respondent shall pay to the Bureau of Real Estate costs associated with its investigation and enforcement pursuant to Business and Professions Code section 10106 in the amount of \$1,627.55. Respondent shall be permitted to pay these costs in a payment plan approved by the bureau, with payments to be completed no later than three months prior to the end of the restriction on his license.

DATED: 11/5/13

  
JILL SCHLICHTMANN  
Administrative Law Judge  
Office of Administrative Hearings