

stay

**FILED**

MAR 22 2016

BUREAU OF REAL ESTATE

By S. Black

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BEFORE THE BUREAU OF REAL ESTATE  
STATE OF CALIFORNIA

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In the Matter of the Accusation of  
JAMES CARL PROVOST,  
Respondent.

Case No. H-11827 SF  
OAH No. 2015070546

ORDER DENYING PETITION FOR RECONSIDERATION

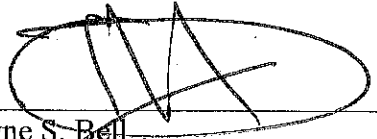
On February 4, 2016, a Decision was rendered in the above-entitled matter. The Decision was to become effective February 29, 2016, and was stayed by separate Order to March 30, 2016.

On March 7, 2016, Respondent petitioned for reconsideration of the Decision of February 4, 2016.

I have given due consideration to the petition for reconsideration of Respondent. I find no good cause to reconsider the Decision February 4, 2016, and reconsideration is hereby denied. Therefore, the Decision of the Real Estate Commissioner of February 4, 2016, shall become effective at 12 o'clock noon on March 30, 2016.

IT IS HEREBY ORDERED March 22, 2016

REAL ESTATE COMMISSIONER

  
Wayne S. Bell

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**FILED**

FEB 23 2016

BUREAU OF REAL ESTATE

By S. Black

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BEFORE THE BUREAU OF REAL ESTATE  
STATE OF CALIFORNIA

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In the Matter of the Accusation of  
  
JAMES CARL PROVOST,  
  
Respondent.

No. H-11827 SF

ORDER STAYING EFFECTIVE DATE

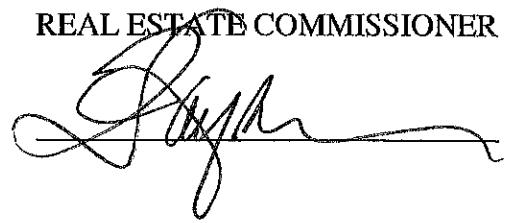
On February 4, 2016, a Decision was rendered in the above-entitled matter to become effective on February 29, 2016.

On February 22, 2016, Respondent filed a Request for Stay of Effective Date so that he may file a Petition for Reconsideration of the Decision of February 4, 2016.

IT IS HEREBY ORDERED that the effective date of the Decision is stayed for a period of thirty (30) days. The Decision of February 4, 2016, shall become effective at 12 o'clock noon on March 30, 2016.

DATED: 2/23/2016

WAYNE S. BELL  
REAL ESTATE COMMISSIONER



**FILED**

FEB 08 2016

BUREAU OF REAL ESTATE

By B. Nicholas

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

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In the Matter of the Accusation of

JAMES CARL PROVOST,

Respondent.

) No. H-11827 SF

) OAH No. 2015070546

DECISION

The Proposed Decision dated January 4, 2016, 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.

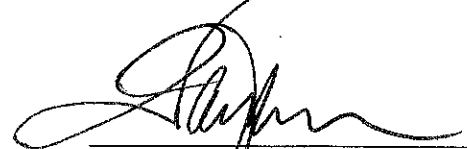
The Decision suspends or revokes one or more real estate licenses.

The right to reinstatement of a revoked real estate license or to the reduction of a penalty 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 FEB 29 2016.

IT IS SO ORDERED 2/4/2016

REAL ESTATE COMMISSIONER

  
Wayne S. Bell

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

In the Matter of the Accusation Against:

JAMES CARL PROVOST,

Respondent.

Case No. H-11827 SF

OAH No. 2015070546

**PROPOSED DECISION**

Administrative Law Judge Wilbert E. Bennett, State of California, Office of Administrative Hearings, heard this matter on December 2, 2015, in Oakland, California.

Richard K. Uno, Counsel, Bureau of Real Estate (Bureau), represented complainant Robin S. Tanner, Deputy Real Estate Commissioner.

Respondent James Carl Provost appeared personally and was represented throughout the hearing by Mary E. Work, Attorney at Law.

Evidence was received, the record was closed, and the matter was submitted for decision on December 2, 2015.

At the commencement of the hearing, complainant amended the Accusation by interlineation at page 2, line 17, by striking "any" and substituting therefor "the," and by adding "alleged in Paragraph 3." immediately after "conviction"; and at page 2, line 19, by deleting "2."

## FACTUAL FINDINGS

### *Procedural Background*

1. On March 19, 2015, complainant filed the Accusation in her official capacity. Complainant seeks to impose disciplinary action against respondent's real estate broker license based on convictions for driving while under the influence of alcohol and for discharging a firearm at an unoccupied vehicle, and his failure to report the former conviction to the Bureau within 30 days.

2. Respondent is presently licensed and/or has license rights under the real estate law as a real estate broker.

### *Criminal Convictions*

3. On April 9, 2012, in the Sonoma County Superior Court, Case No. SCR-610561, respondent was convicted, by nolo contendere plea, of violating Vehicle Code section 23152, subdivision (b) (driving while under the influence of alcohol), a misdemeanor. Pursuant to said conviction, respondent was placed on conditional sentence probation for a period of three years on certain terms and conditions, including service of two days in jail, with a credit of two days for time served, obedience to all laws, attendance of 15 Alcoholics Anonymous meetings within 60 days, completion of a First Offender Drinking Driver Program, and payment of applicable fines and fees totaling \$2,291. On October 16, 2013, respondent's probation was summarily revoked based on violation of probation for the offense set forth in Findings 5 and 6 below.

4. The facts and circumstances underlying this conviction involved respondent's driving while under the influence of alcohol on February 5, 2012. On that occasion, witnesses reported to police that respondent was driving his vehicle in an erratic manner, including weaving between lanes on Highway 101 and crossing into oncoming traffic lanes on city streets. After respondent parked his vehicle in a hotel parking lot, the responding Santa Rosa Police Department officers observed objective symptoms of intoxication, including staggered gait, slurred speech, and alcoholic breath, and noted poor performance on field sobriety tests. Respondent was arrested, and was later administered two breath tests at the county jail, which indicated blood alcohol levels of .19 percent and .20 percent.

5. On August 25, 2014, in the Sonoma County Superior Court, Case No. SCR-641224, respondent was convicted, by nolo contendere plea, of violating Penal Code section 247, subdivision (b) (willfully discharging firearm at unoccupied vehicle), a felony. Pursuant to said conviction, respondent was placed on formal probation for a period of three years on certain terms and conditions, including service of 90 days in jail, stayed on condition of referral to a 90-day work release program, completion of 100 hours of community service, a prohibition against owning or possessing any firearms or other weapons, a prohibition against possessing or using alcohol, a prohibition against frequenting places where alcohol is the primary item of sale, and payment of applicable fines and fees,

including a restitution fine in the amount of \$25,742.57 to the Santa Rosa Police Department as reimbursement for SWAT involvement in responding to the offense.

6. The facts and circumstances underlying this conviction involved an incident which occurred on October 9, 2013. On that occasion, respondent willfully discharged a firearm at two unoccupied vehicles belonging to his wife and a locksmith retained by his wife to gain access to respondent's locked residence. (The criminal information also alleged that respondent willfully discharged a firearm in a grossly negligent manner which could result in injury and death to a person.) Santa Rosa Police Department officers responded to a reported domestic disturbance wherein several shots had been fired, after respondent's wife had called 911 and reported that respondent had shot at her and a locksmith. Several neighbors had also made 911 calls reporting that as many as four or five shots had been fired, and that a female was outside screaming. The responding officers established a secure perimeter at the scene, evacuated the homes in the immediate area, and initiated a SWAT call-out. The police investigation determined that the locksmith had drilled out the lock on the front door of the residence, and had then heard a shot being fired as he was opening the door. The locksmith reported that he heard a second shot and then ran down the street, and heard at least one more shot.

The incident occurred after respondent's wife had left the residence following an argument regarding "blended" family difficulties, and had then sought re-entry into the locked house. During the interim period, respondent had become heavily intoxicated. Following the police intervention, at his wife's request an emergency protective order was issued against respondent, who was arrested the next morning and booked into the Sonoma County Jail for attempted murder. A police search of respondent's residence revealed the loaded 12-gauge shotgun used by respondent, and five spent 12-gauge shell casings.

#### *Failure to Report Conviction Within 30 Days*

7. Respondent failed to report his 2012 drunk driving conviction to the Bureau within 30 days, as required by Business and Professions Code section 10186.2, subdivisions (a)(1)(B) and (a)(2). At hearing, respondent provided no testimony regarding this reporting failure. According to Bureau records, respondent never notified the Bureau of this conviction.

#### *Factors in Aggravation, Mitigation, or Rehabilitation*

8. Respondent is 45 years old, recently remarried, and involved in a blended family group which includes four children, ages 15, 18, 20, and 21. He has held a real estate broker license since 2001. Prior to that, he obtained a real estate salesperson license in 1993. Currently, he specializes in commercial property management. Respondent submitted testimony from a professional associate and a client regarding his reputation and character. This testimony is hereafter summarized in pertinent detail.

Jock McNeill, who has been a licensed real estate broker since 2004, purchased respondent's property management business the same year in which he became licensed. Prior to that, he was respondent's employee between 1999 and 2004. He described respondent as "a friend and mentor," who "is very determined and passionate about helping people fulfill their real estate goals." In a supporting letter, he stated, "I have witnessed many examples of [respondent's] professionalism and integrity throughout my real estate career."

Greg Moore is a Sonoma County client for whom respondent has provided commercial property management services since the 1990's. In a supporting letter, he stated that, as a broker, respondent "has an excellent reputation in our local community for being ethical, fair, and honest."

9. Respondent testified regarding his alcoholism, which he attributed as the reason for his convictions. He stated that as a result of his 2012 drunk driving conviction, he was required to complete a Drinking Driver Program and to attend 15 Alcoholics Anonymous (AA) meetings. After that, he made changes to his drinking habits: he continued to consume alcohol but "did not do drinking and driving." Since his August 2014 conviction, he has maintained sobriety, except for one relapse when he was upset with his wife's drinking. He admitted this relapse to his probation officer, because it constituted a violation of probation. Respondent identified a sobriety date of October 12, 2014. He continues to maintain the 12-step AA program, and attends AA meetings three or four times a week. He is on the fourth step of the program, and is working to make amends to the people whom he has harmed. Respondent asserts that his participation in counseling and commitment to sobriety mean that there is no risk of recurrence of the aberrant behavior which led to his convictions.

10. Respondent submitted supporting letters from two professionals involved in treatment sessions with him since the firearm discharge incident in October 2013. The letters were admitted as administrative hearsay to supplement or explain other evidence, pursuant to Government Code section 11513, subdivision (d). Richard H. Von Feldt, Psy.D, Kaiser Permanente, Santa Rosa Chemical Dependency Services, stated that respondent "was highly motivated to prosper in his recovery," and "had a sincere attitude towards his recovery." Under the direction of Dr. Von Feldt, respondent completed a short-term and a long-term alcohol treatment program commencing in January 2014, and concluding in March 2015. Mark Paradis, Ph.D., a licensed psychologist, conducted 60 therapy sessions with respondent between October 27, 2013, and June 2015. Dr. Paradis stated that respondent "will continue to move forward in a positive direction as long as he maintains his sobriety."

11. Respondent testified regarding the circumstances underlying his convictions. With respect to the 2012 drunk driving conviction, he stated that, at the time of the offense, he was using alcohol as a "coping device" to deal with a contentious divorce. He did not relate any specific details regarding the incident in question, nor did he indicate his current attitude towards the offense. With respect to the 2014 firearm discharge conviction, he stated that, at the time of this offense, he had an argument with his new wife regarding the

difficulties of a “blended” family. He consumed an excessive amount of alcohol on that occasion. After his wife left their house and returned, respondent was awakened to the sound of a lock being drilled out. According to respondent, he was unaware that his wife had engaged a locksmith to gain re-entry into their locked house, and assumed that the locksmith was a burglar. He discharged the firearm in his house, and then fired into his wife’s unoccupied vehicle and the locksmith’s unoccupied vehicle. He stated that it was apparent that nobody was in either vehicle, and that he fired his gun in anger. He averred that his multiple firearm discharges were not the result of the domestic dispute, but resulted from his excessive alcohol consumption. He offered no reason for firing into his wife’s unoccupied vehicle, but stated that he fired into the locksmith’s unoccupied vehicle, believing it to be a burglar’s vehicle, “to disable it or to mark it so that [police] could identify the car.”

12. In assessing respondent’s rehabilitation, several factors must be considered in addressing his assertion that his rehabilitation is complete. Respondent has taken appropriate steps to address the alcoholism which he attributes as the cause for his criminal conduct. However, it must be noted that his most recent crime occurred while he was on probation for a previous crime, to wit: his firearm discharge offense occurred while he was on probation for his drunk driving offense. The firearm discharge offense, which was related to alcohol consumption, occurred after he had attended numerous AA meetings required by his first probation. Additionally, since his firearm discharge conviction on August 25, 2014, he violated that criminal probation by his admitted alcohol relapse prior to his October 12, 2014 sobriety date. Such behaviors in violating criminal probation do not make respondent a good candidate for a restricted license, which requires strict adherence to the terms of restriction. Furthermore, respondent’s journey in alcohol recovery does not necessarily obviate the necessity for license discipline or indicate complete rehabilitation, although it indicates that he is on the road to rehabilitation. It has not been an entirely successful journey, as reflected by respondent’s relapse after the firearm discharge conviction. Based on respondent’s testimony, that relapse occurred on an unspecified date between August 25, 2014, and October 12, 2014, after he had attended numerous AA meetings and had commenced therapy sessions and alcohol treatment programs with Dr. Paradis and Kaiser Permanente. Significantly, Dr. Paradis conditioned his supporting letter regarding respondent’s favorable prospects upon the maintenance of “his sobriety.”

13. In evaluating respondent’s rehabilitation, several considerations are paramount. The nature, gravity, and recency of respondent’s crimes create a heavy burden for him in demonstrating rehabilitation and current fitness for licensure. Such crimes were highly anti-social in nature, and involved issues of alcoholism, violence, and anger management. The required amount of evidence of rehabilitation varies according to the seriousness of the misconduct at issue. (See, *In re Menna* (1995) 11 Cal.4th 975, 987.) In evaluating rehabilitation, minimal weight is given to good behavior while on probation because such behavior is expected. (See, *In re Gossage* (2000) 23 Cal.4th 1080, 1099.) Mere remorse does not show rehabilitation, which must be demonstrated by sustained conduct over an extended period of time. (See, *In re Menna, supra*, 11 Cal.4th at p. 991.) Additionally, rehabilitation requires an acknowledgment of wrongdoing. (See, *Seide v. Committee of Bar Examiners of the State Bar of California* (1989) 49 Cal.3d 933, 940



["Fully acknowledging the wrongfulness of his actions is an essential step towards rehabilitation."].) In this case, respondent did not acknowledge the extent to which he placed lives in jeopardy by driving while under the influence of alcohol with blood alcohol levels bordering twice the legal limit, and by recklessly discharging his firearm, at least three times, in the presence of others. Respondent's testimony that he fired into the locksmith's car "to disable it or to mark it" for later identification as a suspected burglar's car is lacking in credibility. It may properly be characterized as respondent's attempt to put a rational veneer on an irrational set of behaviors triggered by his consumption of alcohol.

14. The Bureau has adopted criteria for evaluating whether a licensee has been rehabilitated since he committed the act, misconduct, or omission that constitutes grounds for license discipline. (Cal. Code Regs., tit. 10, § 2912.) The criteria relevant here are: (1) the passage of at least two years since the licensee's most recent conviction; (2) restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the licensee; (3) expungement of conviction or convictions resulting in administrative disciplinary proceeding; (4) successful completion or early discharge from probation or parole; (5) abstinence from the use of alcohol for not less than two years if the criminal conviction was attributable in part to the use of alcohol; (6) payment of any fine imposed in connection with the conviction; (7) stability of family life and fulfillment of personal and familial responsibilities subsequent to the conviction; (8) significant and conscientious involvement in community programs designed to provide social benefits; and (9) change in attitude from that which existed at the time of the commission of the acts in question. (Cal. Code Regs., tit. 10, § 2912, subs. (a), (b), (c), (e), (f), (g), (j), (i) & (m).)

15. The application of these criteria does not point favorably towards respondent's rehabilitation. At the outset, it must be noted that an insufficient amount of time has passed for him to demonstrate complete rehabilitation, in light of the seriousness and recency of his offenses. His most recent conviction occurred only 16 months ago. He remains on criminal probation until August 2017. He has previously violated the terms of criminal probation by engaging in criminal behavior on his first probation and by consuming alcohol on his second probation, thereby breaching the trust imposed upon him by the court system. His convictions are not expunged. His abstinence from alcohol is less than two years. He still owes \$23,000 as a restitution fine to the Santa Rosa Police Department, which must be paid off as a condition of his criminal probation. He did not acknowledge the extent to which his actions jeopardized the lives of others. On the positive side of the ledger, it appears that respondent's family life has stabilized and that he is fulfilling his parental and familial responsibilities. He is involved in community programs designed to provide social benefits, such as the Santa Rosa Chamber of Commerce, and the New Life Recovery Program. In considering all pertinent factors, including his positive steps to address alcoholism, it appears that respondent is on the road to rehabilitation, but has a ways to go.

16. In consideration of all of the above factors, it would not be consistent with the public interest to allow respondent to retain a real estate license, even on a restricted basis. As discussed below, cause exists to discipline respondent's license and he has failed to demonstrate sufficient rehabilitation to mitigate the discipline to be imposed. As noted by

the case law referenced in Finding 13 above, rehabilitation must be demonstrated by an acknowledgment of wrongdoing and sustained conduct over an extended period of time. Based on the absence of a showing of rehabilitation, respondent's license must be revoked in order to assure public protection.

#### *Costs of Investigation and Enforcement*

17. Complainant offered declarations that supported investigative costs of \$940.00 and enforcement costs of \$658.60. The reasonableness of the claimed costs was not challenged by respondent.

The Bureau is entitled to recover \$1,598.60 in costs.

#### LEGAL CONCLUSIONS

1. Business and Professions Code section 493 permits the Bureau to inquire into the circumstances surrounding the commission of a crime, by one of its licensees, to determine if the crime is substantially related to the qualifications, functions, or duties of a real estate licensee. In this case, such an inquiry results in the conclusion that the requisite substantial relationship exists with respect to each of respondent's convictions.

2. A real estate license may be disciplined when the licensee has been convicted of a crime that is substantially related to the qualifications, functions, or duties of a real estate licensee. (Bus. & Prof. Code, §§ 490, subd. (a); 10177, subd. (b).) Respondent was convicted of willfully discharging a firearm at an unoccupied vehicle under factual circumstances involving his reckless discharge of a firearm inside his residence and into the unoccupied vehicles of his wife and a locksmith whom she had engaged to gain access into respondent's locked residence after he had consumed an excessive amount of alcohol. (Findings 5 and 6.) Such a crime is deemed to be substantially related to the qualifications, functions, or duties of a real estate licensee because it involved the performance of unlawful acts with the intent or threat of doing substantial injury to the person or property of another. (See, Cal. Code Regs., tit. 10, § 2910, subd. (a)(8) ["Doing of an unlawful act with the intent ... or threat of doing substantial injury to the person or property of another."].) That crime, under the circumstances presented, is deemed to meet the substantial relationship criterion for another reason: it reflected a willful failure to comply with a court order because it constituted a violation of a criminal probation imposed by the court for a conviction for driving while under the influence of alcohol. (See, Cal. Code Regs., tit. 10, § 2910, subd. (a)(9) ["Contempt of court or willful failure to comply with a court order."].) Therefore, for each of the aforementioned reasons, cause for discipline exists pursuant to Business and Professions Code sections 490, subdivision (a), and 10177, subdivision (b).

3. As noted in Legal Conclusion 2, respondent was convicted of driving while under the influence of alcohol. (Findings 3 and 4.) When that crime is considered together

with respondent's conviction for firearm discharge, under circumstances involving alcohol consumption, the substantial relationship criterion is again deemed to be satisfied. (See, Cal. Code Regs., tit. 10, § 2910, subd. (a)(10) ["Conduct which demonstrates a pattern of repeated and willful disregard of law."], and (a)(11) ["Two or more convictions involving the consumption or use of alcohol ... when at least one of the convictions involve driving and the use or consumption of alcohol ..."].) Therefore, cause for discipline exists pursuant to Business and Professions Code sections 490, subdivision (a), and 10177, subdivision (b).

4. A real estate license may be disciplined for failure to report a conviction of any felony or misdemeanor to the Bureau within 30 days. (Bus. & Prof. Code, § 10186.1, subs. (a)(1)(B), (a)(2), and (b).) Respondent failed to report his misdemeanor drunk driving conviction to the Bureau within 30 days. (Findings 3 and 7.) Therefore, cause for discipline exists pursuant to Business and Professions Code section 10186.2, subdivisions (a)(1)(B), (a)(2), and (b).

5. A professional license may be disciplined only upon "clear and convincing evidence to a reasonable certainty." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal. App.3d 853-856.)

6. Clear and convincing evidence established cause for discipline of respondent's license pursuant to Business and Professions Code sections 490, subdivision (a), and 10177, subdivision (b), in that respondent was convicted of crimes substantially related to the qualifications, functions, and duties of a real estate broker, by reason of Findings 3 through 6, and Legal Conclusions 1 through 3.

7. Clear and convincing evidence established cause for discipline of respondent's license pursuant to Business and Professions Code section 10186.2, subdivisions (a)(1)(B), (a)(2), and (b) in that respondent failed to report his misdemeanor conviction to the Bureau within 30 days, by reason of Findings 3 and 7, and Legal Conclusion 4.

8. In determining the appropriate discipline, the central question is what level of discipline is necessary to protect the public. Disciplinary proceedings to suspend or revoke a real estate license are not conducted for the primary purpose of punishing an individual. (*Small v. Smith* (1971) 16 Cal.App.3d 450, 457.) Based upon all of the matters set forth in Findings 8 through 16 above, including the lack of sufficient rehabilitation evidence, it is determined that public protection requires that respondent's real estate broker license be revoked.

9. Business and Professions Code section 10106 permits the Real Estate Commissioner to request an administrative law judge hearing a disciplinary matter to direct a licensee to pay a sum not to exceed the reasonable costs of investigation and enforcement of the case, except as otherwise provided by law. Evidence is required to support an award.

10. Complainant provided sufficient evidence to support an award of the costs of investigation and enforcement in the amount of \$1,598.60.

ORDER

1. All licenses and licensing rights of respondent James Carl Provost under the Real Estate Law are REVOKED.
2. Respondent James Carl Provost shall pay \$1,598.60 to the Bureau of Real Estate as its costs of investigation and enforcement of this case.

Dated: January 4, 2016

DocuSigned by:

*Wilbert E. Bennett*

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WILBERT E. BENNETT  
Administrative Law Judge  
Office of Administrative Hearings