FILED

JUN 22 2017

BUREAU OF REAL ESTATE

By M Robertt

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of	CalBRE No. H-12037 SF
ADRIENNE PAOLINI MC GRATH,	OAH No. 2017020187
Respondent.	

DECISION

The Proposed Decision dated May 19, 2017, 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.

Pursuant to Section 11517(c)(2) of the Government Code, the following corrections are made to the Proposed Decision:

Page 1, Paragraph 3, Line 1 is corrected to read:

"Dawn C, Sweatt, Esq., of Berliner Cohen, LLP, Attorneys at Law…;

Page 14, Findings 30, Line 4 and 11 are corrected to read:

"…under Penal Code Section 12022.6…";

Page 20, Legal Conclusions 6, Paragraph 3, Line 5, is correction to read:

"… respondent's unlawful act and her licensed status.";

Page 23, Legal Conclusions 11, Line 1, is corrected to read:

"11. Respondent's communication with the bureau…".

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

Pursuant to Government Code section 11521, the Bureau of Real Estate may order reconsideration of this Decision on petition of any party. The Bureau's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the

effective date of this Decision, whichever occurs first. 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 Sections 11521 and 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 JUL 13 2017.

IT IS SO ORDERED 6/21/17

WAYNE S. BELL
REAL ESTATE COMMISSIONER

By: DANIEL J. SANDRI
Chief Deputy Commissioner

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

In the Matter of the Accusation of: ADRIENNE PAOLINI MCGRATH, Respondent.	Case No. H-12037 SF OAH No. 2017020187

PROPOSED DECISION

Administrative Law Judge Perry O. Johnson, Office of Administrative Hearings, State of California, heard this matter on April 19, 2017, in Oakland.

Real Estate Counsel Megan Lee Olsen represented Robin S. Tanner, Supervising Special Investigator of the Bureau of Real Estate, State of California.

Dawn C. Sweatt, Esq., of Berlinger Cohen LLP, Attorneys at Law, Ten Almaden Blvd., 11th Floor, San Jose, California, represented Adrienne Paolini McGrath, who was present at the hearing.

On April 19, 2017, the parties submitted the matter for decision and the record closed.

Amendment to Accusation

At the hearing of this matter, in accordance with Government Code section 11507, complainant amended the Accusation by deleting paragraph number 4[1] as a separate and distinct cause for discipline against respondent.

[1] Complainant's Accusation in BRE Case No. H-12037 SF sets out in paragraph number 4: "[r]espondent's criminal convictions, as described in paragraph 2, above, also constitute grounds for suspension or revocation of all licenses and license rights of [r]espondent based on [section] 10177 [subdivision] (j) (Fraud or Dishonest Acts) of the Code."

FACTUAL FINDINGS

1. Respondent 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 salesperson. Respondent's real estate salesperson license will expire on March 13, 2020.

2. On January 10, 2017, complainant Robin S. Tanner (complainant), in her official capacity as a supervising special investigator of the Bureau of Real Estate, State of California (the bureau), made the Accusation against respondent Adrienne Paolini McGrath (respondent).

Complainant seeks to have discipline imposed against respondent's real estate salesperson license on the ground that she was convicted of crimes that are substantially related to the qualifications, functions, or duties of a real estate licensee. Respondent timely filed a Notice of Defense, pursuant to Government Code section 11506. Hence, the matter proceeded to hearing.

Respondent's Criminal Convictions

3. On July 7, 2016, under case number C1353903, by way of the matter titled "*People v. Adrienne Suzanne McGrath,*" in the California Superior Court for Santa Clara County, on a plea of nolo contendere, respondent was convicted of violating both Insurance Code section 11760, subdivision (a) (making false or fraudulent statements for purpose of reducing premium, rate or cost of workers' compensation insurance), a misdemeanor, and Unemployment Insurance Code section 2110.3 (willful failure to pay disability insurance tax so as to defraud the California Employment Development Department (EDD)), a felony. And, in accordance with a plea bargain agreement, respondent made an admission to an enhancement of the penalty on the convictions that "in the commission and attempted commission of the offenses charged, with intent to do so, [respondent] took, damaged or destroyed property of a value exceeding two hundred thousand dollars ($200,000), within the meaning of Penal Code section 12022.6, subdivision (a)(2)." (The convictions were grounded respectively upon Count 1 and Count 8 in a felony complaint consisting of 14 distinct counts and no less than eight "Aggravated White Collar Crime Enhancement" allegations.")

4. The crime of making a false or fraudulent statement for the purpose of reducing premium, rate, or cost of workers' compensation insurance is substantially related to the qualifications, functions, and duties of a real estate licensee. And, the felony offense of willful failure to pay disability insurance tax thereby defrauding EDD (tax evasion) is substantially related to the qualifications, functions, and duties of a real estate licensee.

5. On the date of the convictions in July 2016, the superior court conducted a "Plea" hearing. At that hearing, the superior court recorded the filing of an amended

criminal complaint against respondent. At that hearing, the court noted that upon the motion of the district attorney, count one in the felony complaint would be treated as a misdemeanor. Also as a condition for receiving respondent's plea, the superior court required that "restitution [be] paid in full" by respondent. Other "plea conditions" included a directive that respondent undergo incarceration for 60 days, with respondent's confinement being eligible for her inclusion in community services through the Sheriff's Weekend Work Program. Another condition of probation entailed respondent being subject to a three-year term of formal probation, which required her to periodically report to a probation officer. The superior court observed that a *Harvey Stipulation*[2] applied to the felony criminal complaint's allegations numbered 2, 3, 5 through 7, and 9 through 14. Also, the superior court noted the probable prospective consideration of Penal Code section 17 that would enable reduction by a superior court order of a felony conviction record to a misdemeanor conviction record. On the July 2016 minute order, the superior court made reference to an attached page regarding the "amount of restitution" respondent was required to pay the crime victims. The attachment noted crime victims and amounts of restitution to be as follows:

Crime Victim	*Amount of Restitution*
American International Group (dba Chartis Insurance and Granite State Insurance)	$245,000
Guard Insurance Group (dba NorGUARD Insurance Company)	$61,312.62
State of California (Employment Development Dept.)	$96,326.13

[2] A *Harvey Stipulation* springs from a California Supreme Court decision that held a superior court, absent an explicit agreement by the affected defendant, in imposing sentence under a plea bargain, may not consider evidence of any crime as to which charges were dismissed as a "circumstance in aggravation" supporting the upper term on the remaining counts. (*People v. Harvey* (1979) 25 Cal.3d 754, 758; *People v. Munoz* (2007) 155 Cal.App.4th 160, 166.) A *Harvey* waiver permits the sentencing court to consider the facts underlying dismissed counts of a criminal complaint as well as dismissed enhancements when determining the appropriate disposition for the offense or offenses of which the defendant stands convicted, (*People v. Munoz* (2007) 155 Cal.App.4th 160, 167. The agreement generally includes language such as: (HARVEY WAIVER) I STIPULATE THE SENTENCING JUDGE MAY CONSIDER MY PRIOR CRIMINAL HISTORY *AND THE ENTIRE FACTUAL BACKGROUND OF THE CASE*, INCLUDING ANY UNFILED, DISMISSED OR STRICKEN CHARGES OR ALLEGATIONS OR CASES WHEN GRANTING PROBATION, ORDERING RESTITUTION OR IMPOSING SENTENCE." (*People v. Munoz* (2007) 155 Cal.App.4th 160, 167.) (Italics added.)

On September 1, 2016, under the above-stated case number affecting respondent, the superior court conducted a "Probation and Sentencing" proceeding. At that proceeding, on the motion of the district attorney, the superior court dismissed from the felony complaint against respondent the allegations numbered 2, 3, 5 through 7, and 9 through 14. Also, at that September 2016 proceeding, the superior court continued to recognize application of the *Harvey Stipulation* as to the dismissed counts in the felony complaint. Further, the superior court confirmed application upon respondent of Penal Code sections 29800 and 30305, which prohibits a convicted felon from owning, possessing, or receiving any firearm or any ammunition. Also, the superior court suspended imposition of sentence and placed respondent onto a three-year term of formal probation, whereby she was to report to a probation officer within two days of the date of the September 1, 2016, proceeding. Also, the superior court directed that in lieu of jail confinement respondent was to spend 60 days in confinement in the Sheriff's Weekend Work Program with half-time granted for good conduct and payment of fees to the probation office as required under Penal Code section 1209. Further, the superior court ordered respondent to pay fines and fees to the superior court in an amount of approximately $650. The superior court noted that respondent had paid and satisfied an order of restitution to her crime victims in an amount of more than $400,000. The superior court directed respondent to submitted to pre-processing for the term of probation by September 12, 2016. And, the superior court granted a stay of the confinement term until September 26, 2016.

6. A County of Santa Clara Office of the District Attorney (DA), Bureau of Investigation (BOI), Incident Report, dated March 25, 2013, best describes the facts and circumstances regarding respondent's criminal acts that resulted in respondent's convictions. (Respondent is incorrect in her arguments at the hearing of this matter that the Incident Report is unreliable as it suggests a "totem pole" analogy whereby hearsay is built upon hearsay and more hearsay so as to lead to an entirely unstable set of unreliable statements. Respondent's arguments are neither persuasive nor compelling in the context of modern administrative adjudication proceedings whereby in attending to resolving the question of whether a criminal conviction is grounded upon facts and circumstances that are substantially related[3] to a regulated occupation or profession, a licensing agency must make an inquiry

[3] At the essential level of the inquiry in refuting respondent's faulty argument is the statutory directive in administrative adjudication that "[a]ny relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions." (Gov. Code, §11513, subd. (c).) And, it is long established that a law enforcement officer's report, even if unsworn, constitutes "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." (*Lake v. Reed* (1996) 16 Cal.4th 448, 461; *MacDonald v. Gutierrez* (2004) 32 Cal.4th 150, 158-159.) And, Business and Professions Code section 493, in part, states, ". . . the board *may inquire into the circumstances surrounding the commission of the crime in order to fix the degree of discipline* or to determine if the conviction is substantially related to the qualifications, functions, and duties of the licensee in question." (Emphasis added.) Also, *Hildebrand v.*

into the context of the prosecutorial allegations and law enforcement reports that led to the conviction of an affected holder of an agency issued license, registration or certificate.)

The DA's BOI's Incident Report shows that since 2004 respondent had been president and Chief Executive Officer for a corporation, formed in the State of Nevada[4], called Mitchell Development Enterprises, Inc. (corporation). The corporation was the business vehicle by which respondent and her husband, Sully McGrath, carried out building construction services under a general building contractor's license issued by the California Contractors' State License Board (CSLB).

In approximately April 2011, the Santa Clara County DA's office received an informant's tip that respondent's corporation was engaged in unlawful and unethical practices whereby an unfair business advantage was gained by respondent's corporation through: (a) workers' compensation insurance premium fraud, and (b) unemployment insurance tax fraud.

Workers' compensation insurance premium fraud was committed by respondent, as an employer, by her making material misrepresentations to workers' compensation insurance carriers with the intent to cause respondent's corporation's premiums to be set by the insurance carrier at a lower rate or for the insurance carrier to bill for a much lower aggregate amount of the premiums than respondent's corporation was actually obligated to pay.

Dept of Motor Vehicles (2007) 152 Cal.App.4 th 1562, 1569-1570) held that the public employee records exception to the Hearsay Rule (Evid. Code §1280, subd.(a)) is not limited to police officers. "'Public employee' means an officer, agent, or employee of a public entity." (Evid.Code, § 195.) Moreover, *Fisk v. Department of Motor Vehicles* (1981) 127 Cal.App.3d 72, established that, "the essential 'circumstantial probability of trustworthines' justifying the common law exception to the hearsay rule for official statements 'is related in its thought to the presumption that public officers do their duty. When it is a part of the duty of a public officer to make a statement as to a fact coming within his official cognizance, the great probability is that he does his duty and makes a correct statement. The fundamental circumstance is that an official duty exists to make an accurate statement, and that this special and weighty duty will usually suffice as a motive to incite the officer to its fulfillment It is the influence of the official duty, broadly considered, which is taken as the sufficient element of trustworthiness, justifying the acceptance of the hearsay statement.' [Citation.]" (*Fisk, supra,* 127 Cal.App.3d at pp. 78-79.)

[4] The California Secretary of State's office shows that respondent's corporation is a "foreign corporation," which has its principal executive office in Minden, Nevada. The principal office in California, and the place for the corporation's agent for receipt of service of process, was first located in Campbell, California, with respondent for all times identified as "president." Documents filed with other state agencies and insurance carriers show respondent's corporation to have a principal place of business in Los Gatos.

Methods of insurance premium fraud that respondent employed in making fraudulent statements fell into the following practices: omitting from required reports the wages actually paid to employees; or falsely reporting the hourly rate actually paid to employees; or understating or underreporting the total wages paid to all employees; or falsely reporting employees worked in less risky job endeavors (e.g. stating an employee works as an office clerk when in fact the individual works as a roofer); or failing to report the total number of employees for all work days; or failing to report work-related injuries sustained on respondent's construction job sites.

The DA's BOI's Incident Report correctly observed workers' compensation insurance premium costs unlawfully avoided by respondent gave her corporation as "an employer in the construction trades an advantage in bidding for construction projects that [respondent's corporation's] law-abiding competitor would not have."

A particularly egregious instance of the effects of workers' compensation insurance premium fraud by respondent's corporation was highlighted in the Incident Report, through an account of a laborer named Miguel V, who fell at a remodel job site of respondent's corporation. After his fall in December 2010, Miguel V filed a workers' compensation claim due to a torn Achilles tendon requiring surgery and ongoing medical treatment. When Miguel V contacted respondent's husband, Sully, who acted as the responsible managing officer for the corporation, the injured worker heard Sully declared that he was not "giving his money away." Despite two other workers, who had been long-term associates to respondent's corporation, giving support to having witnessed Miguel V's fall, respondent and her husband refused to acknowledge responsibility for any cost relating for the worker's injury. Respondent, over her signature, reported in writing that her corporation would deny any workers' compensation benefit to the worker because Miguel V was a "1099 independent contractor." Yet, a competing general contractor, who had previously employed the worker, established that Miguel V was working for respondent's corporation as a laborer on the date of the injury. Through other investigative work by the District Attorney's law enforcement agents, respondent's corporation was found to have been Miguel V's employer on the date of the injury and respondent's corporation was held liable for workers' compensation benefits due Miguel V. Of note is that during the investigation into the matter pertaining to Miguel V, records of the Department of Industrial Relations established that ten complaints by other laborers were filed between August 2008 and October 2010 for respondent's corporation's non-payment of wages and related workers' compensation insurance lapses.

Fraud constituting evasion of unemployment compensation insurance tax occurs when an employer, such as respondent's corporation, does not file with the California EDD accurate Quarterly Wage and Withholding Report (DE-9c) forms and then fails to file an accurate Annual Reconciliation Statement with EDD. An audit by the Santa Clara County District Attorney's office found that respondent's corporation underreported employee wages to EDD for 2008, 2009, 2010, and 2012. And respondent's corporation failed to report any employee wages to EDD for 2008 First Quarter, 2009 Second through Fourth Quarters, 2010,

2011, and 2012 First Quarter. The analysis by District Attorney's office personnel showed unreported wages to EDD in an amount of $1,854,905.74.

The Santa Clara County DA's Incident Report raised the matter of respondent's corporation's acts occurring after 2010 when respondent and her husband, Sully McGrath, formed an business alliance with Metaview Wholesale Investments, which was engaged in "flipping" houses. (Flipping houses occurs as a business endeavor where a person buys run-down or well-used residential structures, then makes significant remodeling improvements so as to resell the refurnished house for enhanced profits.) In this instance, after respondent's corporation performed construction services on houses purchased by Metaview, respondent used her real estate salesperson license to advertise and sell the houses through her employing broker, Alain Pinel Realtors, Inc. (Alain Pinel).

Matters in Mitigation and Respondent's Background

7. Respondent is 48 years old. She appears to be a mature and intelligent person.

8. In 1993 or 1994, San Jose State University awarded respondent a bachelor's of science degree in Journalism (Advertising).

9. For five or six years after graduating from college, respondent worked for various advertising companies.

10. After she acquired licensure in March 2000, as a real estate salesperson, respondent caused her license to be associated with the corporate real estate broker franchise known as Alain Pinel, at an office in Saratoga, California. In time, the corporate real estate broker moved its office to Los Gatos, where respondent has been associated for approximately 17 years "off and on." (During the several months set aside for her maternity leave regarding the birth of two of her three youngest children, and for several months after the commencement of the criminal prosecution as described below, respondent did not work as a real estate licensee though the office of Alain Pinel.)

11. Over the nearly two decades for which she has been licensed as a real estate professional, respondent claims that she has personally closed approximately 35 real estate resale transactions, having a total gross value of $50 million with Alain Pinel. (At the hearing, however, respondent produced no earning records, company statements, accountant's reports, or copies of tax returns to corroborate her claim of that large amount of sales.)

12. On February 18, 2004, the Contractors' State License Broad (CSLB), State of California, issued a general (classification B) building contractor's license to Mitchell Development Enterprises, Inc., (as Mitchell Development), under license number 832343. Since February 2004, respondent has held the joint title of "CEO/President" for the general contractor corporation (classification "B"), which has a principal business office in Los Gatos, California. The license is renewed to February 28, 2018.

13. Respondent and Sully McGrath have been married for more than 19 years. Respondent has three children with Mr. McGrath and she acts as stepmother to two older children of Mr. McGrath from his previous marriage.

Matters in Rehabilitation

14. Respondent paid the prescribed restitution to the crime victims before July 7, 2016. The total amount of restitution paid by respondent was in an amount of $402,638.75.

15. Respondent has paid an amount of more than $690 as the superior court's fines and fees as related to the September 2016 sentencing proceeding. And, she is current with the cost of the formal probation monitoring of $25 each month. (Although respondent presented no letter from a county probation officer, she asserted that after an initial meeting in October 2016, with her second assigned probation officer, she was excused further meetings with the probation officer. She is required only to report to the probation officer those instances when she is to leave the county or state.)

16. Respondent completed the terms of confinement in the way of performing Weekend Work through the Sheriff's Office. She was able to complete the term of "work program" in a span of 28 days.

17. Respondent remains married. She has three children, having ages of 17, 15 and 9 years. Those younger children reside at the family home in Los Gatos. Respondent has support from her family, which includes two adult stepdaughters, who are 21 and 24 years of age.

18. After the July 2016 convictions, respondent's corporation hired a company, Avitus Group, to perform all payroll, workers' compensation insurance, and human resources (HR) functions and responsibilities. Avitus Group is located in the State of Montana. Respondent sends "paperwork" to Avitus Group and that company prepares all important reports and records regarding to employees of respondent's corporation.

19. Respondent has faithfully attended seminars in real estate legal topics as offered by Alain Pinel.

Witness in Mitigation and Rehabilitation

20. Mr. Jeffrey Vernon Burnett (Mr. Burnett) offered testimony at the hearing in support of respondent.

Mr. Burnett is a real estate salesperson licensee. He serves as the Regional Vice President for Alain Pinel, and he is based at the Los Gatos office for the company. He has been the manager of the corporate real estate broker's office for 22 years, although he has been employed by Alain Pinel for 26 years.

Mr. Burnett has known respondent for approximately 20 years. He met respondent through activities of their respective children through school functions. Mr. Burnett was the manager of the Alain Pinel office when respondent was hired approximately 17 years ago as a salesperson by the corporate real estate broker.

Mr. Burnett concurred with respondent's claim that she has closed 35 to 40 real estate transactions over the period of her employment with Alain Pinel. And, he agreed that the gross volume for respondent's real estate transactions is in the area of $50 million.

Mr. Burnett notes that should the bureau issue respondent a restricted real estate salesperson license that he would assert personal interest in monitoring respondent's activities as a real estate salesperson. And, the corporate real estate broker's office would have respondent's activities reviewed by no less than three management level licensees.

Despite his keen interest in retaining the services of respondent as a highly productive real estate salesperson, Mr. Burnett has little insight into the seriousness of respondent's criminal acts that resulted in her convictions during mid-2016. And, Mr. Burnett lacks knowledge of respondent's actual role in the fraudulent and dishonest dealings through the building construction company in which she had not only a significant ownership interest but also had performed key management and administrative functions for the construction company known as Mitchell Development. Mr. Burnett was not persuasive when he declared "no," to the question of whether the facts and circumstances of respondent's criminal conduct should result in revocation of the real estate license held by her.

Matters that Negatively Impact Upon Respondent's Progress towards Rehabilitation

21. Respondent was convicted approximately six months before the date of the Accusation in this matter which was issued in January 2017. And, the date of the superior court's sentencing hearing occurred only four months before the date of the Accusation. Hence, too little time has passed for the bureau to evaluate respondent's progress towards rehabilitation.

22. On September 1, 2016, respondent's term of formal probation was set for three years. As of the date of the hearing in this matter, respondent remained subject to formal probation. Although the superior court's minute order suggests that should respondent "do well" during the term of formal probation that the felony conviction may be reduced to a misdemeanor conviction for the tax evasion crime. But, the superior court's reduction of the felony conviction to a misdemeanor conviction around September 1, 2017, is based upon conjecture or speculation. Hence, as of the hearing date for this matter, respondent was subject to a felony conviction record and a single misdemeanor conviction record. And of importance is that respondent's term of probation, whether for respective conviction for a felony and a misdemeanor, or convictions for two misdemeanor offenses, is not due to expire before September 2019.

23. Respondent made certain claims at the hearing of this matter that demonstrate that she is not a wholly truthful and candid person. At the hearing of this matter, respondent portrayed the circumstances that underpinned her convictions as being grounded in the Santa Clara County's District Attorney's office's errors and incorrect evaluation of Mitchell Development and the prosecutor's misinterpretation or overzealous efforts regarding respondent corporation's relationship to construction workers who engaged in the house building projects of respondent's corporation. And, even though the record is clear regarding the unlawful acts by respondent and her husband to defraud insurance carriers of workers' compensation insurance premiums and to evade taxes owed to EDD, respondent unbelievably asserted at the hearing of this matter that the problems arose out of a complaint by an envious wife of another building contractor and the unethical business practice of Terry Houghton, the chief executive for Metaview, the investment company that engaged in house flipping.

Respondent gave an unbelievable account at the hearing in her attempt to diminish her senior management and decision-making roles in the criminal acts attributed to respondent's corporation. From the outset of her testimony through more than three-quarters of the time for the hearing, respondent sought to portray herself as the corporation's "paper pusher" in the areas of human resources and attending to accounts receivable/accounts payable. But, through the District Attorney's Incident Report, respondent was described as not only the corporation's president/chief executive officer but also in some instances she acted as treasurer and the key decision-maker for the corporation's unethical and unlawful business practices, which led to the crimes for which respondent was convicted. Moreover, many documents (for example, applications with workers' compensation carriers) show respondent as owning more than 50 percent of the corporation's stock (for example, in a workers' compensation policy with the State Compensation Insurance Fund, respondent, as president and treasurer, who owned 90 percent of the business.)

And, respondent was wholly untruthful when she testified that the basic underpinning of any unlawful act on her part should be construed only as "accounting errors," rather than as fraudulent misconduct or deceitful artifice intended to harm either workers' compensation insurance carriers or the EDD system of collecting specialized taxes from employers.

24. At the hearing of this matter, respondent was false in her testimony that casts her as being now completely removed from the affairs of the construction company known as Mitchell Development Enterprises, Inc. Respondent falsely testified that she has "removed herself from the corporation." She went so far as testifying that she had taken steps to notify, by certified mail, the CSLB that she was no longer an officer of the construction company. But, in fact, as of the date of the hearing of this matter, respondent remained listed in the records of the CSLB as "president" and "chief executive officer" of Mitchell Development. And, then during another part of her testimony she asserted that she hired a Montana state company called Avidus Group to handle EDD and workers' compensation report; yet she stated that she personally sends "paper work" to Avidus Group for it to digest the

information, to effect payroll disbursements and to file documents pertaining to workers' compensation insurance as well as EDD tax matters.

25. Respondent communicated falsely and incorrectly with bureau's personnel when she completed the 515D form (Conviction Detail Report). On that bureau form, October 13, 2016, respondent failed to accurately acknowledge her culpability for the criminal acts regarding fraudulently misrepresenting information for the purpose of lowering workers' compensation premiums and the criminal acts pertaining to evading tax for EDD purposes. Contrary to recognizing the crimes to which she was convicted, respondent unbelievably set out under the 515D form's heading "Explanation of Crimes": "[t]he DA said the subcontractors were not subcontractors and should have been employees even though they were independents." Contrary to respondent's statement, the District Attorney's investigative report identified and interviewed numerous workers[5], who clearly were laborers, who filed claims against respondent's company for unpaid wages. The DA's Incident report provided an account where the DA investigators made surveillance on August 1, 2012, of a Mitchell Development construction project and identified Sully McGrath "observing" at the site while "at least seven Hispanic males" worked on the exterior of the construction project. (The project, known as "1907 Hicks," was listed for sale by respondent on the Alain Pinel's website for sale at $2,289,000.) On August 2, 2012, the investigator continued surveillance of 1907 Hicks to detect "at least nine [laborers] working in and around the property." Respondent's extensive testimony, which was grounded upon an assertion that EDD erroneously characterized "subcontractors" and unlicensed contractors as employees, was fallacious and contrary to law as further detailed in the Legal Conclusions, below.

Respondent's entries on the bureau's "Confidential-Interview Information Statement (RE 515) form were incomplete and misleading. Under the question for "Civil Court," respondent entered only "2013" for the date of a civil lawsuit in which she was a party. For the column titled "Docket/Case #," respondent placed only a question mark (?), although she

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[5] Eudoro Ramos with a claim for unpaid wages of $1,250; Fernando Cervantes with a claim for unpaid wages of $1,000; Pedro Delagado with a claim for unpaid wages of $240; Vicente Rodriguez with a claim for unpaid wages of $240; Albert De Avila with a claim for unpaid wages of $3,522; Genaro Esparza with a claim for unpaid wages of $4,375; Osvaldo Gama with a claim for unpaid wages of $3,602; Marcelino Valdez with a claim for unpaid wages of $2,836; Donald Haskell with a claim for unpaid wages of $1,370; Tom Hartwick with a claim for unpaid wages of $840. (In the case of Tom Hartwick, when respondent personally wrote a letter, dated October 31, 2008, to the Labor Standards Division of EDD that Hartwick was not an employee, an administrative hearing ensued on March 29, 2010. From the hearing, the administrative law judge determined Hartwick to be an employee of respondent's corporation with an Order directing respondent's corporation to pay $840 for the unpaid wages as well $157.64 as interest and $4,800 in "waiting time penalties." Nearly three years after the wages were due Hartwick, the case was dismissed on January 10, 2011, when respondent's corporation agreed to pay $3,000 to Hartwick.)

was obligated to contact the court clerk of the superior court to secure the information for entry onto the bureau's form. And under the heading "Brief Description of Suit," respondent gave an unintelligible response as, "sued in a cross complaint from some else [sic] that was sued." Further, to the form's question, "[d]o you hold or have you ever held any kind of professional license, certificate, credential, or registration ('license') in this state?," respondent failed to identify that general building contractor's license (class B) as issued by the CSLB for Mitchell Development to which she has been identified as "president and CEO" since February 2004 as well as the corporation's principal shareholder. On the RE515 form under the section titled, "Criminal Convictions and/or Pending Action Summary," under the heading "Charge" respondent set forth only "9/1/16." In addition on page four of the RE515 form, as to information required under the "Criminal Conviction" heading for the column that asks, "was disclosure made on RE license application?," respondent made an unintelligible note on the RE515 form, dated October 13, 2016, as, "Not on application. Self reported." (Respondent had filed a license renewal application on or about March 13, 2016.) And on the form dated October 13, 2016, under the section titled "Disposition [and] Date," respondent provided false and misleading information as only "9/1/16." And, as a final misleading statement on the RE515 form's last page under the caption, "Licensee Remarks," respondent disingenuously remarked, "the charge was not Real Estate related."

Respondent's poor responses on the bureau's RE515 form and RE515D form were particularly egregious in that the documents were mailed to respondent for her to take time to complete the forms in the comfort of her home and then to return the completed documents to the bureau.

26. On October 21, 2016, respondent engaged in a telephonic interview with bureau investigator, Johannes Wong. Under the analysis for this decision, it is found that respondent gave inexact or misleading information during that interview with the bureau's investigator. The report by Mr. Wong includes respondent's account regarding her corporation's dealings with Terry Houghton of Metaview. Among other things, respondent told Mr. Wong that "[o]nce Houghton was named [as a party in separate civil and criminal actions], he needed a scapegoat so [Houghton] named [respondent], her husband Sully, and Mitchell Development because [Houghton] knew [about respondent's and her husband's] recent troubles in regards to their underpayment of insurance, etc. . . [¶] . . . The reason [respondent] was reported for underpayment of taxes and insurance fraud . . . was because [respondent] was contacted by Houghton for help in rebuilding a home in Saratoga that had sat vacant for a number of years prior to being acquired by [Houghton]." But, in fact, respondent's criminal acts occurred years before any involvement between respondent's corporation with Terry Houghton. And, the workers' compensation insurance premium fraud and EDD tax evasion occurred for construction projects other than the remodel work that resulted in an alliance between Mitchell Development and Metaview.

Also, respondent informed Mr. Wong that she "does not belong to any community groups or volunteer her time." But, at the hearing respondent claimed that she was actively

involved with her teenage children's youth sports functions, that she was an active volunteer for her oldest child's "Grad Night" function for the Los Gatos High School as well as other civic functions.

27. By her testimony at the hearing, respondent demonstrated that since the date for the convictions, she had not embraced a change in attitude towards the criminal misconduct that led to the July 2016 convictions.

Despite the clarity of the felony complaint's allegations to which she entered nolo contendere pleas, and the detailed District Attorney's report, respondent disingenuously conveyed at the hearing of this matter that the bases of the convictions were not "entirely clear" to her. She unpersuasively asserted that the "DA was saying" that "subcontractors" as used by her corporation were her corporation's employees for whom workers' compensation insurance premiums were owed and for whom taxes on wages had to be paid to EDD. Respondent unbelievably insisted that mere laborers, or "unlicensed" contractors, were independent contractors for whom respondent's corporation should never have been required to either pay workers' compensation insurance premiums or taxes to EED. (Despite the clarity of the law of the State of California, respondent doggedly adhered to a wholly misinformed view of the requirements of any employer for workers' compensation insurance coverage and EDD tax.)

28. At the hearing of this matter, respondent lied under oath when she testified that when her corporation hired workers for various projects she knew that those persons had previously held licenses or owned construction businesses, yet she was wrongly convicted of the crimes set out in the felony complaint filed against her. Also, respondent lied under oath when she testified that she had no intention to deceive workers' compensation insurance carriers regarding the number of workers who should have been covered by an insurance policy at any given time. And, respondent lied under oath when she testified that she had no intention to deceive EDD about the money (wages) paid to persons, who the district attorney classified as employees rather than as independent contractors.

Matter in Aggravation

29. On April 10, 2013, the Santa Clara County District Attorney's Office filed a felony complaint, dated April 9, 2013, naming respondent and her husband as defendants. Not until August 13, 2013, did the bureau receive from respondent a form titled "Indictment, Conviction, and Disciplinary Action Notification" form. The form inaccurately set out, "charged with felony on '5/1/13'." By the form, which she mailed to the bureau, respondent claimed that she gave the bureau notice of the felony complaint that had been filed against her.

In accordance with Business and Professions Code section 10186.2, subdivisions (a)(1)(A) and (a)(2), respondent had a legal obligation to report within 30 days to the bureau the fact that a criminal complaint charging a felony had been filed against her. Respondent

violated the letter of the law when she allowed approximately 126 days to elapse before the bureau received her notice of the fact of the felony complaint against her.

30. On July 7, 2016, respondent entered nolo contendere pleas, and was convicted, of violating Insurance Code section 11760, subdivision (a), a misdemeanor, and Unemployment Insurance Code section 2110.3, a felony, and she admitted to the "Aggravated White Collar Crime Enhancement" under Penal Code section 12002.6, subdivision (a)(2). On October 4, 2016, the bureau received from respondent another "Indictment, Conviction, and Disciplinary Action Notification" form, dated September 30, 2016. Respondent's incomplete and inaccurate entries set out no entry under the heading of "Code Section Violated" and she inexactly wrote under "Code Violated" the following: "11760" as a misdemeanor and ""2110.3" as a felony. (Respondent's entries on the form did not make reference to the enhancement penalty prescribed under Penal Code section 12002.6.) By the form sent by her, respondent claimed that she gave the bureau notice of the fact that convictions had been entered against her.

In accordance with Business and Professions Code section 10186.2, subdivisions (a)(1)(B) and (a)(2), respondent had a legal obligation to report within 30 days to the bureau the fact of any record of conviction for either a misdemeanor or a felony. Respondent violated the letter of the law when she allowed approximately 90 days to elapse before the bureau received the notice of the fact of her convictions for a felony and a misdemeanor.

31. The facts and circumstances of respondent's criminal conduct, which led to her convictions on July 7, 2016, established that respondent engaged in conduct that constituted fraud or dishonest dealings. Despite the amendment to the Accusation that deleted as an explicit cause for discipline the conduct as defined at Business and Professions Code section 10177, subdivision (j), respondent nevertheless has a record of commission of actual fraud and dishonest dealings. Her conduct is especially egregious in that the acts were perpetrated against a department of the State of California, as well as hard-working laborers.

Costs of Investigation and Prosecution

32. Through a declaration dated March 9, 2017, Supervising Special Investigator II Robin S. Tanner established that before the commencement of the hearing in this matter complainant incurred costs of investigation for the Accusation against respondent in an amount of $1,165. And, through a declaration, dated April 18, 2017, Real Estate Counsel II Megan Lee Olsen established that the cost of prosecution for the Accusation against respondent is an amount of $814.35.

The total costs of investigation and prosecution of the Accusation against respondent amount to $1,979.35.

Factors Affecting the Commissioner's Recovery of Costs

33. In determining the reasonableness of costs, an analysis under the guidance of an important appellate court decision[6] is helpful.

Respondent did not advance meritorious defenses in the exercise of her rights to a hearing in this matter.

Respondent cannot be seen, under the facts set out above, to have committed slight or inconsequential misconduct; but rather the offenses committed by respondent (worker's compensation fraud and evasion of tax due EDD) are serious criminal offenses.

The hearing did not result in respondent obtaining dismissal of charges, or the elimination of the bases alleged, in support of the imposition of discipline as sought by complainant. Rather, at the hearing of this matter, respondent gave testimony that was distorted, untrue and intentionally rendered to mislead the trier of fact.

Respondent offered no competent, corroborating documentary evidence establishing that she is impaired by current dire financial condition. Nor did respondent offer any objective documentary evidence that her expenses exceed her income and the value of her assets in a way that a grave financial hardship will be imposed upon her should she be required to pay the bureau's incurred costs. Over the years respondent has earned large commissions regarding the $50 million in real estate sales made by her. And respondent remains a principal operative in a construction company that is licensed by the CSLB. Above all, respondent did not present records or reports by a certified public accountant or other reliable documents that shows her to be financially unable to pay the costs incurred by the bureau in the investigation and prosecution of this matter.

34. Respondent is obligated to pay the bureau the reasonable and appropriate costs of $1,979.35.

LEGAL CONCLUSIONS

Standard of Proof

1. Proof by "clear and convincing evidence" is the standard of proof to be applied to facts in dispute under the Accusation from which disciplinary action may result against the license and licensing rights held by respondent. (*The Grubb Company, Inc. v. Department of Real Estate* (2011) 194 Cal.App.th 1494, 1503-1504.)

Although administrative adjudication does not involve juries, a sound definition for the "clear and convincing evidence" standard of proof concept is set out in the Judicial

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[6] *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32.

Council of California Civil Jury Instructions (CACI), section 201. That section in CACI defines "clear and convincing evidence" as evidence that is "more likely true." And the CACI section proclaims that clear and convincing proof requires a higher burden of proof for which the party must persuade the trier of fact that it is "*highly probable that the fact is true.*" (CACI No. 201 (2014 edition.) (Emphasis added.) Moreover, the California Supreme Court enunciated approximately 115 years ago a view of the clear and convincing evidence standard. In *Sheehan v. Sullivan* (1899) 126 Cal. 189, 193, the supreme court prescribed a spectrum of formulations in framing the concept of "clear and convincing" evidence, which is sometimes expanded to "clear and convincing evidence to a reasonable certainty." The state supreme court noted "clear and convincing evidence" may be expressed as such proof that:

> 'Must be clear, satisfactory, and convincing;' 'clear and satisfactory;' 'clear and convincing;' 'very satisfactory;' 'strong and convincing;' 'clear, unequivocal, and convincing;' 'clear, explicit, and unequivocal;' '*so clear as to leave no substantial doubt*;' '*sufficiently strong to command the unhesitating assent of every reasonable mind.*' (*Sheehan v. Sullivan, supra*, 126 Cal. 189, 193; cf. *In re Angelia P.* (1981) 28 Cal.3d 908, 919.)

(Emphasis added.)

After an examination of the evidence in light of the controlling standard of proof, the Factual Findings and Order, herein, are established to rest upon clear and convincing evidence to a reasonable certainty. Such proof establishes respondent's unprofessional and unlawful acts and omissions in the matters recorded herein that support complainant's allegations as contained in the Accusation in this matter.

Cause for Disciplinary Action - Criminal Convictions

2. Business and Professions Code section 490 provides that the Real Estate Commissioner "may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued . . . ."

And, Business and Professions Code section 10177, subdivision (b), provides that a license may be suspended or revoked if the licensee has been convicted of a felony or a crime substantially related to the qualifications, functions, or duties of a real estate licensee.[7]

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[7] Note, *Cartwright v. Bd. of Chiropractic Examiners* (1976) 16 Cal.3d 762, 767 [in order for conduct to form the basis for revocation of a license it must have a demonstrable bearing upon fitness to practice the profession for which licensure is sought]; *In re Stuart K. Lesansky* (2001) 25 Cal.4th 11.)

FRAUD BY RESPONDENT AS TO WORKERS' COMPENSATION INSURANCE

3. Respondent's misdemeanor conviction is grounded upon her past acts of fraud. The law violated by her states, "[i]t is *unlawful* to make or cause to be made any *knowingly false or fraudulent statement*, whether made orally or in writing, *of any fact material* to the determination of the premium, rate, or cost of any policy of workers' compensation insurance, for the purpose of reducing the premium, rate, or cost of the insurance. (Ins. Code, § 11760, subd. (a).) Generally, the crime is a felony.

The statute makes the crime punishable generally in accordance with the following that, "[a]ny person convicted of violating this subdivision shall be punished by imprisonment in a county jail for one year, or pursuant to subdivision (h) of Section 1170 of the Penal Code for two, three, or five years, or by a fine not exceeding fifty thousand dollars ($50,000), or double the value of the fraud, whichever is greater, or by both that imprisonment and fine." (Ins. Code, § 11760, subd. (a)

Fraud is the gravamen of the offense proscribed by Insurance Code section 11760, sudivision (a), and it is commonly designated as "workers' compensation insurance premium fraud." (*People v. Kanan* (1962) 208 Cal.App.2d 635.)

Despite respondent's well-crafted testimony, and thoroughly refined arguments, having an undercurrent of elegance, which were aimed at underscoring respondent's minimalist recasting of her past bad acts, the nature of the crime of insurance premium fraud, as described by the Santa Clara County's law enforcement investigative findings, establishes that respondent committed offenses that were not inconsequential or minimal. The offense of advancing false statements to effect workers' compensation insurance premium fraud shows respondent to have a character and propensity for deceit, criminal planning, and an inclination for commission of a theft-type offense. Workers' compensation insurance premium fraud must be viewed as a theft-like offense because first the crime enables an employer to gain insurance coverage from an insurer who is exposed to risks of paying for injuries and other benefits to workers where such risks were not properly covered. Second, workers' compensation insurance premium fraud exposes injured workers to losses or dramatically reduced benefits related to industrial injury. And, as to the deprivation to injured workers, the Santa Clara County's DA's investigative report highlights respondent's husband's unethical acts of denying an injured worker the benefits of proper insurance coverage. Third, workers' compensation fraud is a theft-like crime in that those employers who honestly report the actual number of employees and pay the full measure of insurance premiums so as to cover all workers, are put at an economic disadvantage relative to the dishonest and fraudulent acts as perpetuated by unethical employers such as respondent.

Respondent argues that she and her company, Mitchell Development, were wrongly subject to prosecution because the persons, who were deemed to be employees, and who were entitled to receive the benefit of workers' compensation insurance coverage, were independent contractors or former licensed contractors, who had allowed licenses to lapse or

expire with the Contractors' State License Board. The argument was fallacious and wholly disingenuous. First, the law in this state is that the default position requires that any person working for another individual is to be classified as an "employee" until sufficient proof exists to positively demonstrate that person only is responsible for the finished project, and not subject to controls or detailed directions from an "employer" in executing a project, in order to be deemed as an "independent contractor." (*S.G. Borello & Sons, Inc. v. DIR* (1989) 48 Cal3d. 341.) Of paramount importance is that Labor Code section 3351 provides the absolute inclusive rule for workers' compensation coverage. That statutory provision defines a covered "employee" as "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed . . . ." Labor Code section 3357 augments that definition by stating: "[a]ny person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee." Labor Code section 3357 creates a presumption that any person rendering services for another, "other than as an independent contractor,"[8] is an employee, unless expressly excluded from the workers' compensation statutory scheme. The law requires that any person, other than a duly licensed independent contractor or an insured employee of an unquestionably established independent contractor, who comes to a contractor's project site must be insured by a policy of workers' compensation insurance held by the subject contractor.

Further to refuting respondent's arguments that she and her company were not culpable because the workers were independent contractors rather than employees is the very nature of Insurance Code section 11760, subdivision (a). That statutory provision, by its terms, makes it a crime *to falsely represent any fact* "material to the determination of the premium rate, or cost of any policy of workers' compensation insurance, for the purpose of reducing the premium, rate, or cost of the insurance." Insurance Code section 11760 does not require that the prosecution establish a defendant was obligated to provide workers' compensation coverage, only that respondent made intentional misrepresentations for the purpose of reducing the cost of coverage. (*People v. Riddles* (2017) 9 Cal.App.5th 1248, 1254.)

TAX EVASION BY RESPONDENT AS TO UNEMPLOYMENT INSURANCE OF THE CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT

4. Respondent has a felony conviction for tax evasion regarding EDD disability income taxes on employer paid wages. (Unemp. Ins. Code, § 2110.3.) The statute by which the felony conviction was entered against her prescribes:

> Any employing unit, including any individual member of a partnership employing unit, any officer of a corporate or

[8] The definition of independent contractor appears at section 3353 of the Labor Code. That section provides: " 'Independent contractor' means any person who renders service for a specified recompense for a specified result, under the control of his principal *as to the result of his work only* and not as to the means by which such result is accomplished."

> association employing unit, any manager or managing member of a limited liability company, or any other person having charge of the affairs of a corporate, association, or limited liability company employing unit, *that knowingly undertakes or agrees to pay without deduction from remuneration paid to its workers* the amount of any contributions to the Disability Fund required of the workers under this division and that willfully fails or is willfully financially unable to pay the amount to the department on the date on which the contributions become delinquent is in violation of this chapter.

(Emphasis added.)

Learned treatises consistently point out that "[o]ffenses, especially fraud, are common in connection with unemployment compensation." (2 Witkin, Cal. Crim. Law 4th Crimes – Gov. §163 (Unemployment Compensation Offenses) (2012); 80 A.L.R.3d 1280 "Criminal Liability for Unemployment Fraud.")

RESPONDENT'S ADMISSION TO FACTS JUSTIFYING ENHANCEMENT

5. The September 1, 2016, superior court's minute order sets out that respondent made an admission to the felony complaint's paragraph prescribing a basis for enhancement of the penalty due to respondent's felony conviction. The enhancement is set out under Penal Code section 12022.6, subdivision (a)(2). That statute states,

> (a) When any person takes, damages, or destroys any property in the commission or attempted commission of a felony, with the intent to cause that taking, damage, or destruction, the court shall impose an additional term as follows:
>
> [¶] . . . [¶]
>
> (2) If the loss exceeds two hundred thousand dollars ($200,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of two years.

It is long settled that the purpose of section 12022.6 manifests the legislature's goal "to deter large-scale crime." (*People v. Hughes* (1980) 112 Cal.App.3d 452, 459.) Very importantly, the section 12022.6 enhancement cannot be imposed unless it is shown that the victim has actually suffered a loss. (*People v. Kellett* (1982) 134 Cal.App.3d 949, 959.) This latter principle militates against respondent's argument that her conduct harmed no one. To the contrary, respondent's felony acts created a crime victim in the form of the People of the

State of California and the Employment Development Department. Her crime victims for the workers' compensation insurance premium fraud were the defrauded insurance carriers and the policy holders who provide accurate information for the proper assessment of premiums.

Substantial Relationship between Respondent's Convictions and Her Real Estate Salesperson License

6. The bureau has developed criteria for substantial relationship between a conviction of a crime and the qualifications, functions, and duties of a real estate licensee. In this matter, a substantial relationship between respondent's convictions and the license that respondent holds may be grounded in California Code of Regulations, title 10, section 2910, subdivisions (a)(1), (a)(3), (a)(4), and (a)(8).

A criminal act is deemed to be substantially related if it involves a licensee's "fraudulent taking, obtaining, appropriating or retaining . . . property belonging to another person." (Cal. Code Regs., tit. 10, § 2910, subd. (a)(1).) When respondent made false and fraudulent statements for the purpose of reducing premium due to workers' compensation insurance carriers, she engaged in the fraudulent taking or appropriating of premium payments owed to insurance corporations, which is a person under the law. And, when she sought to prefect the "willful failure to pay disability insurance tax" owed to EDD, respondent's acts constituted the fraudulent "retaining" of tax money that belonged to a state agency, and consequently, the People of the State of California.

California Code of Regulations, title 10, section 2910, subdivision (a)(3), establishes that "[w]illfully attempting to derive a personal financial benefit through the nonpayment or underpayment of taxes, assessments or levies duly imposed upon the licensee or applicant by federal, state, or local government" constitutes a substantial relationship between respondent's unlawful act and his licensed status. Respondent's felony conviction under Unemployment Insurance Code section 2110.3 (willful failure to pay unemployment compensation insurance tax so as to defraud the California Employment Development Department (EDD)), establishes a violation of this bureau regulation.

California Code of Regulations, title 10, section 2910, subdivision (a)(4), states that, "the employment of . . . fraud, deceit, falsehood or misrepresentation to achieve an end" constitutes a substantial relationship between respondent's unlawful act and her licensed status. Both workers' compensation insurance fraud and evasion of tax relating to unemployment insurance employee benefits due to EDD involve fraud, deceit, falsehood, and misrepresentation. Accordingly each criminal conviction of respondent constitutes a respective violation of the regulation.

California Code of Regulations, title 10, section 2910, subdivision (a)(8), prescribes a criterion for substantial relationship as: "doing of any unlawful act with the intent of conferring a financial or economic benefit upon the perpetuator or with the threat of doing substantial injury to the person or property of another." When respondent engaged in

workers' compensation insurance premium fraud she was seeking to confer a financial or economic benefit upon her corporation and she was doing an unlawful act with intent to do substantial injury to workers' compensation insurance companies and honest employers who pay workers' compensation premiums. And, when she evaded taxes associated with unemployment insurance benefits to workers, respondent was seeking to confer a financial or economic benefit upon her corporation and she was doing unlawful acts that entailed a threat of doing substantial injury to a state agency and the constituency served by the Employment Development Department.

Ultimate Determination regarding Substantial Relation

7. Honesty and truthfulness are two qualities deemed by the Legislature to bear on one's fitness and qualification to be a real state licensee. If a licensee's criminal offenses reflect unfavorably on her honesty, the crimes may be said to be substantially related to her qualifications. (*Golde v. Fox* (1979) 98 Cal.App.3d 167, 176.) The real estate profession has, over a period of years, excluded unfit persons and as a result thereof an appreciable amount of public trust and confidence has been built up. The public exposing themselves to a real estate licensee has reason to believe that the licensee must have demonstrated a degree of honesty and integrity in order to have obtained such a license. (*Id.* at pp. 177–178.)

8. Respondent was not credible at the hearing of this matter when she asserted she was not culpable for commission of the offenses for which she was convicted. Her representations exist as an impermissible collateral attack against the basis of the facts upon which the superior court determined respondent to be guilty of the crimes of serious criminal offenses. Respondent has a record of criminal convictions to which she willingly entered nolo contendere pleas less than 10 months before the date of the hearing in this matter.

In July 2016, respondent entered nolo contendere pleas to workers' compensation fraud (that is, fraud in making fraudulent statements regarding material facts relating to an effort to reduce premium payments for workers' compensations insurance) and felony evasion of tax in the form of unemployment insurance through the state's EDD.

A nolo contendere plea to a felony crime is "the same as that of a plea of guilty for all purposes." (*See* Pen. Code, § 1016 (3); a plea of nolo contendere to a felony crime is "the same as that of a plea of guilty for all purposes." *Rusheen v. Drews,* (2002) 99 Cal. App. 4th 279, 287 n. 21.) All allegations of the offense are admitted by a defendant when she enters her pleas. (*Arenstein v. California State Bd. of Pharmacy,* (1968) 265 Cal. App. 2d 179, 189-190; *People v. Arwood* (1985) 165 Cal.App.3d 167.) Further, a plea of guilty or nolo contendere is a conclusive admission of guilt that admits every element of the offense charged and waives any right to raise questions about the evidence. (*People v. Fulton* (2009) 179 Cal.App.4th 1230, 1237.) And, a nolo contendere plea is admissible as a party admission. (*See* Evid. Code, § 1300 stating, "Evidence of a final judgment adjudging a person guilty of a crime punishable as a felony is not made inadmissible by the hearsay rule when offered in a civil action to prove any fact essential to the judgment whether or not the judgment was based on a plea of nolo contendere.").

In an administrative proceeding, a respondent cannot challenge the validity of a prior conviction. (*Thomas v. Dept. of Motor Vehicles* (1970) 3 Cal.3d 335; *Matanky v. Board of Medical Examiners* (1979) 79 Cal.App.3d 293.) "A final judgment of conviction is a fact; and, its effect cannot be nullified . . . either by [an] order of probation or by [a] later order dismissing the action after judgment." (*In re Phillips* (1941) 17 Cal.2d 55.) It has long been established that it is improper for a licensee to come before a licensing agency after a criminal conviction to attempt to impeach a plea of guilty or a no contest plea and a resulting conviction. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 449-452.)

Lack of Respondent's Rehabilitation

9. The bureau has developed 15 criteria to be used to evaluate rehabilitation of a licensee who has been convicted of a crime. (Cal. Code Regs., tit. 10, § 2912). These criteria attempt to gauge whether the licensee has changed so that a repeat of her criminal behavior is unlikely. And, very important to this matter is that the evidence does not establish respondent has had a change in attitude or altered disposition and character that led her to commit the crimes described above. "Of the many criteria, arguably the most important in predicting future conduct is subdivision [(m) of California Code of Regulations, title 10, section 2912, namely]: 'Change in attitude from that which existed at the time of [the commission of the criminal acts in question] . . . .'" (*Singh v. Davi* (2012) 211 Cal.App.4th 141, 149.) Respondent's presentation at the hearing of this matter demonstrated that she has not embraced a change in attitude from her outlook when she committed the crimes that resulted in the July 2016 convictions.

Respondent's progress towards rehabilitation is impaired by her refusal to accept full and unequivocal responsibility for her past serious criminal conduct. Respondent was not credible at the hearing of this matter when she asserted that she was not culpable for the criminal act for which she experienced a conviction in July 2016. Respondent's representations at the hearing of this matter operate as a collateral attack against the factual bases upon which the superior court determined respondent to be guilty of her workers' compensation insurance premium fraud and felony tax evasion regarding EDD benefits. The matters set out in Factual Finding 23 outline the aspects of respondent's collateral attack of the convictions against her.

And, respondent's failure to accept personal responsibility is shown through her system of attempting to ignore the seriousness of her offenses and to shift blame for her criminal misdeeds.

Other Determinations

10. *In re Menna* (1995) 11 Cal.4th 975, 991, established that rehabilitation may be determined, in part, by demonstrating sustained lawful conduct over an extended period of time. Respondent's material, multiple misrepresentations in her testimony at hearing and in communications with the bureau preclude a determination that she has attained rehabilitation.

Further to the above, too little time has elapsed since the date of her convictions for the bureau to consider respondent's full rehabilitation. *In re Gossage* (2000) 23 Cal.4th 1080, 1104-1105, established, among other things, that from the standpoint of a licensing agency's regulatory oversight of licensees, rehabilitation from the adverse implication of a criminal conviction cannot begin to be accurately assessed until the licensee is beyond the restrictions of criminal probation and the prospect of incarceration no longer looms over the head of the licensee. In this matter, respondent will not be released from probation (whether formal (supervised) or informal) for the criminal convictions until approximately September 2019. Hence, a rational and thorough assessment of respondent's progress towards rehabilitation cannot take place until a point in the future. Because of the recent date of respondent's convictions, too little time has elapsed for the bureau to reasonably determine that respondent has been rehabilitated from her past criminal offenses.

11. Respondent's communications with the department during its investigation of this matter, and her testimony at the hearing of this matter, indicate that respondent has a disposition to shade facts in her favor and to not tell the full truth about her past criminal conduct. At this time, respondent does not appreciate the obligation to be completely honest with the bureau and to make full disclosure about errors she committed in the past regardless of the embarrassment she may now experience.

Dispositive Determination

12. By clear and convincing evidence, cause exists for disciplinary action against the license issued to respondent under Business and Professions Code section 10177, subdivision (b), in conjunction with Business and Professions Code section 490, by reason of the matters set forth in Factual Finding 4, along with Legal Conclusions 2 through 11.

Ultimate Determination

13. It would not be in the public interest to allow respondent to continue to hold a real estate salesperson license, even on a restricted basis.

Cost Recovery

14. Pursuant to Business and Professions Code section 10106, the bureau may recover reasonable costs of the investigation and enforcement of a case. The bureau incurred $1,979.35 in total costs of investigation and enforcement of this matter. The costs of enforcement are supported by bureau personnel's declarations that describe the general tasks performed, the time spent on each task, and the method of calculating the costs.

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 did not establish a basis to reduce or eliminate the costs in this matter as set forth in Factual Finding 33. In the absence of evidence to the contrary, these costs are found to be reasonable and appropriate.

ORDER

1. The license (number S/01276958) and all license rights of Adrienne Paolini McGrath are revoked.

2. Respondent shall pay the Bureau of Real Estate the amount of $1,979.35, as reimbursement for the costs of investigation and enforcement of this matter, within 30 days of the effective date of the decision. Respondent may pay these costs according to a payment plan approved by the Bureau or its designee.

DATED: May 19, 2017

DocuSigned by:
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PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings