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DEPARTMENT OF REAL ESTATE

By *X. Kuyep*

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BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * *

In the Matter of the Application of
BERTA MARINA ULLOA MARQUEZ,
Respondent.

DRE No. H-12224 SF
OAH No. 2018050390

STIPULATION AND WAIVER
AND DECISION AFTER REJECTION

This matter came on for hearing before Holly M. Baldwin, Administrative Law Judge, Office of Administrative Hearings, State of California, in Sacramento, California, on July 9, 2018.

Jason D. Lazark, Counsel, represented the Complainant, Robin S. Tanner, in her official capacity as a Supervising Special Investigator with the Department of Real Estate ("the Department"). Respondent, BERTA MARINA ULLOA MARQUEZ, appeared and represented herself. Evidence was received, the record was closed and submitted on July 9, 2018.

On July 25, 2018, the Administrative Law Judge rendered a Proposed Decision which the Acting Real Estate Commissioner (hereinafter "the Commissioner") declined to adopt as his Decision herein. Pursuant to Section 11517 of the Government Code of the State of California, Respondent was served with notice of the Commissioner's determination not to adopt the Proposed Decision along with a copy of the Proposed Decision. Respondent was notified that the case would be decided by the Commissioner upon the record, the transcript of

1 proceedings, and upon written argument offered by Respondent and Complainant.

2 Written argument was not submitted by Respondent. Written argument was not
3 submitted on behalf of Complainant. The parties wish to settle this matter without further
4 proceedings.

5 The following shall constitute the Decision of the Commissioner in these
6 proceedings.

7 The Findings of Fact and Legal Conclusions in the Proposed Decision dated July
8 3, 2018, and attached hereto as Exhibit A are hereby adopted in full as part of this Decision.

9 Pursuant to Section 11517(c)(2)(B) of the California Government Code, the
10 Order in the Proposed Decision dated July 3, 2018, is hereby amended as follows:

11 ORDER

12 The application of Respondent BERTA MARINA ULLOA MARQUEZ, for a
13 real estate salesperson license is denied; provided, however, a restricted real estate
14 salesperson license shall be issued to Respondent pursuant to Section 10156.5 of the
15 Business and Professions Code ("the Code"). The restricted license issued to Respondent
16 shall be subject to all of the provisions of Section 10156.7 of the Code and to the
17 following limitations, conditions and restrictions imposed under authority of Section
18 10156.6 of the Code:

19 1. The license shall not confer any property right in the privileges to be
20 exercised, and the Commissioner may by appropriate order suspend the right to exercise
21 any privileges granted under this restricted license in the event of:

22 (a) The conviction of Respondent (including a plea of nolo
23 contendere) of a crime that is substantially related to

24 Respondent's fitness or capacity as a real estate licensee; or

25 (b) The receipt of evidence that Respondent has violated

26 provisions of the California Real Estate Law, the subdivided
27

1 lands law, regulations of the Commissioner or conditions
2 attaching to this restricted license.

3 2. Respondent shall not be eligible to apply for the issuance of an unrestricted
4 real estate license nor the removal of any of the limitations, conditions, or restrictions of a
5 restricted license until two (2) years have elapsed from the date of the issuance of the
6 restricted license to Respondent.

7 3. With the application for license, or with the application for transfer to a new
8 employing broker, Respondent shall submit a statement signed by the prospective employing
9 broker on a form approved by the Department wherein the employing broker shall certify as
10 follows:

11 a. That broker has read the Stipulation and Waiver which is the basis
12 for the issuance of the restricted license; and

13 b. That broker will carefully review all transaction documents
14 prepared by the restricted licensee and otherwise exercise close supervision over the licensee's
15 performance of acts for which a license is required.

16 4. Respondent shall notify the Commissioner in writing within 72 hours of any
17 arrest by sending a certified letter to the Commissioner at the Department of Real Estate, Post
18 Office Box 137000, Sacramento, CA 95813-7000. The letter shall set forth the date of
19 Respondent's arrest, the crime for which Respondent was arrested and the name and address
20 of the arresting law enforcement agency. Respondent's failure to timely file written notice
21 shall constitute an independent violation of the terms of the restricted license and shall be
22 grounds for the suspension or revocation of that license.

23 * * *

1 I have read the Stipulation and Waiver and Decision After Rejection and its terms
2 are understood by me and are agreeable and acceptable to me. I understand that I am waiving
3 rights given to me by the Administrative Procedure Act, and I willingly, intelligently, and
4 voluntarily waive those rights.

5
6 8-24-18
7 DATED


8 BERTA MARINA ULLOA MARQUEZ
9 Respondent

10 * * *

11 The foregoing Stipulation and Waiver and Decision After Rejection is hereby
12 adopted as my Decision and Order in this matter and shall become effective at 12 o'clock noon

13 on OCT 11 2018.

14 IT IS SO ORDERED September 14, 2018.

15 DANIEL J. SANDRI
16 ACTING REAL ESTATE COMMISSIONER

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BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Application of:

BERTA MARINA ULLOA MARQUEZ,

Respondent.

Case No. H-12224 SF

OAH No. 2018050390

PROPOSED DECISION

Administrative Law Judge Holly M. Baldwin, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on July 9, 2018.

Jason D. Lazark, Real Estate Counsel, represented complainant Robin S. Tanner, Supervising Special Investigator, Department of Real Estate, State of California.

Respondent Berta Marina Ulloa Marquez was present at the hearing, representing herself.

The matter was submitted for decision on July 9, 2018.

FACTUAL FINDINGS

1. On November 15, 2016, the Bureau of Real Estate received respondent Berta Marina Ulloa Marquez's application for a real estate salesperson license, which she signed on September 29, 2016.
2. On March 20, 2018, complainant Robin S. Tanner filed the statement of issues in her official capacity as Supervising Special Investigator.¹ Complainant seeks to deny the application based on respondent's two convictions and her failure to disclose them on the license application. Respondent filed a notice of defense, and this hearing followed.

¹ At the time the statement of issues was filed, the agency was the Bureau of Real Estate. The Bureau of Real Estate became the Department of Real Estate ("Department") on July 1, 2018.



3. On August 9, 1991, respondent was convicted in the Superior Court of California, County of Alameda, of petty theft, a misdemeanor. (Pen. Code, § 484, subd. (a).) Respondent was placed on probation for a period of two years. Respondent testified that her recollection of this incident was "foggy" — she remembers being arrested for shoplifting, but does not remember any other details. The evidence did not otherwise establish the facts and circumstances of this offense.

4. On March 8, 1999, respondent was convicted in the Superior Court of California, County of San Mateo, on a plea of nolo contendere, of commercial burglary, a misdemeanor. (Pen. Code, § 460, subd. (b).) Imposition of sentence was suspended and respondent was placed on court probation for two years, and ordered to serve two days in jail and to pay fines and fees.

The facts and circumstances of the offense are that respondent entered a Mervyn's store with the intent to steal merchandise, pursuant to a scheme with her "sister-in-law" Elizabeth Rodriguez (the women's husbands are cousins), who was a store employee, and who lived with respondent at the time. Respondent went to Rodriguez's store register. Rodriguez then brought out a bag of items that she had previously placed in the "on hold" area, and began ringing up some, but not all, of those items on her register. Respondent left the store with a bag containing all of the merchandise, some of which had not been rung up and paid for.

5. Question 28 of the license application states: "HAVE YOU EVER BEEN CONVICTED (SEE PARAGRAPH ABOVE) OF ANY VIOLATION OF THE LAW AT THE MISDEMEANOR OR FELONY LEVEL? IF YES, COMPLETE ITEM 34 WITH INFORMATION ON EACH CONVICTION." (Emphasis in original.)

The "paragraph above" referred to in Question 28 is text enclosed within a large box, and states:

"Convicted" as used in question 28 below includes:

- All state, commonwealth, possession or federal misdemeanor and felony convictions, and all military and foreign convictions.
- A verdict of guilty by judge or jury, a plea of guilty, a plea of nolo contendere (or "no contest"), or a forfeiture of bail in the courts.
- ...
- Convictions must be disclosed no matter how long ago they occurred and whether the convicted person was a minor (under 18 years of age, if tried as an adult).

6. Respondent checked "no" in response to Question 28 and signed the application under penalty of perjury. Respondent's answer to this question was false, in that

she has two prior convictions as set forth in Findings 3 and 4. In response to Item 34, which asked for details of convictions, respondent wrote "N/A."

Respondent's Evidence

7. Respondent's testimony about the facts and circumstances of her 1999 conviction is inconsistent with the police report and the elements of the crime to which she pleaded nolo contendere.

The criminal complaint brought against respondent charged commercial burglary under Penal Code section 460, subdivision (b), including the element of entering the store with the intent to commit larceny or any felony. Respondent signed a plea agreement in which she pleaded nolo contendere to that violation.

The police report contains statements made by respondent and Rodriguez to the arresting officer. Respondent admitted that on the previous night, Rodriguez had asked her to come to the store the next day and pick up items, in return for receiving free merchandise, and that respondent had agreed. Rodriguez's statement to the officer was consistent with respondent's.

At the hearing, respondent presented a different version of events, which was not persuasive due to its inconsistency with her admissions in the police report. Respondent testified that she had not discussed a plan the night before, that she had no intent to steal when she entered the store, and that when she brought her selected items to the register, Rodriguez asked her to bring home items that had been put on hold. Respondent testified that she noticed Rodriguez was ringing up only some of the items, and that she "should have said no," but that she "panicked and froze."

8. Respondent completed two years of probation for the 1991 conviction. She also completed two years of probation for the 1999 conviction, and paid the court-ordered fines and fees.

9. Respondent offered varying explanations for her failure to disclose the convictions on her application. At hearing, respondent testified that she did not think she had an obligation to disclose, because she thought that convictions "disappear" from her criminal record after 10 years. That understanding is incorrect, and respondent's explanation is not persuasive, in light of the clear instructions on the application that all convictions must be disclosed, no matter how long ago they occurred. Respondent admits that she looked at the instructional text box above Question 28 before completing her application. When asked whether she read the specific instruction that convictions must be disclosed no longer how long ago they occurred, she said she must have read it wrong or missed it.

10. During the Department's investigation of the application, respondent offered somewhat different explanations. She completed an Interview Information Statement and

Conviction Detail Reports, and was interviewed in person by Clarence Watmore, a special investigator for the Department.

Watmore's testimony regarding respondent's statements was consistent with his report and the forms completed by respondent. Respondent stated that she did not have to disclose the 1991 conviction because it was more than 10 years old, and that she may have forgotten about the 1999 conviction.

When asked at the hearing about her statements on the Conviction Detail Reports, respondent said she meant to indicate that she may have forgotten the 1991 conviction. Respondent testified that there was a miscommunication or misunderstanding.

11. Respondent is 50 years old. She has two daughters, ages 22 and 29, and the younger daughter lives with her. Respondent has been separated from her husband for a number of years.

12. Nineteen years have elapsed since respondent's last criminal conviction.

13. Respondent has not had any contact with Rodriguez for more than 11 years.

14. Respondent earned an associate's degree from Chabot College in approximately 2013, and a business certificate from Chabot College in approximately 2014.

15. Respondent has worked for 17 years at Pabco Gypsum, a manufacturer of wallboard and sheetrock, in the sales and billing department.

16. If she obtains a real estate salesperson license, respondent plans to work in residential sales. Respondent has taken a number of real estate educational courses, and passed her real estate examination. Respondent has not identified an employing broker. After passing her examination, respondent began communicating with the Keller Williams office in Dublin. Keller Williams knows she is participating in the administrative hearing process in an attempt to obtain a license, but has not determined whether or not they would employ respondent if she obtains a license.

17. Respondent is not currently performing any community service. In 2008 or 2009, she volunteered at a homeless shelter for six months.

LEGAL CONCLUSIONS

First Cause for Denial — Failure to Disclose Convictions

1. The Real Estate Commissioner (Commissioner) may deny an application for a real estate license if the applicant has "knowingly made a false statement of fact that is required to be revealed in the application for the license" (Bus. & Prof. Code, § 480,

subd. (d)), or attempted to procure a real estate license “by fraud, misrepresentation, or deceit, or by making a material misstatement of fact in an application for a real estate license” (*id.*, § 10177, subd. (a)).² As set forth in Finding 6, respondent made a false statement of fact on her application by failing to disclose her two convictions. Accordingly, cause exists under these sections to deny respondent’s application for licensure.

Second Cause for Denial — Substantially Related Convictions

2. The Commissioner may deny an application for a real estate license if the applicant has been convicted of a crime that is substantially related to the qualifications, functions, or duties of a real estate licensee. (Bus. & Prof. Code, §§ 480, subd. (a), 10177, subd. (b).) Respondent’s convictions set forth in Findings 3 and 4 are substantially related because they involve the fraudulent taking or appropriating of property belonging to another person, and the doing of an unlawful act with the intent of conferring a financial benefit upon the perpetrator. (Cal. Code Regs., tit. 10, § 2910, subds. (a)(1) & (a)(8).) Accordingly, cause exists under these sections to deny respondent’s application for licensure.

Licensure Determination

3. The purpose of administrative proceedings regarding professional licenses is not to punish the applicant or licensee, but to protect the public. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 785-786; *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 768.) The legislature intends that real estate licensees will be honest, truthful, and worthy of the fiduciary obligations they will bear. (*Harrington v. Department of Real Estate* (1989) 214 Cal.App.3d 394, 402.)

4. Respondent bears the burden of proof to establish, by a preponderance of the evidence, that she is qualified for the license she seeks to obtain. (*Martin v. Alcoholic Beverage Control Appeals Bd.* (1959) 52 Cal.2d 259, 265; Evid. Code, § 115.)

5. In California Code of Regulations, title 10, section 2911, the Commissioner has established criteria to be used in evaluating the rehabilitation of an applicant with a criminal record. The relevant criteria to be considered in this case include: the passage of more than two years since the most recent conviction; successful completion of probation; payment of fines and monetary penalties; stability of family life and fulfillment of parental responsibilities; completion of educational and vocational training courses; significant or conscientious involvement in community programs designed to provide social benefits or ameliorate social problems; new and different social relationships from those which existed at the time of the criminal offenses; and a change in attitude from that which existed at the time of the offenses.

² Complainant amended the statement of issues at the hearing. In paragraph 5 of the statement of issues, on page 2 at line 19, the reference to “sections 480(c) and 10177(a) of the Business and Professions Code” was stricken and replaced with “sections 480(a) and (d) and 10177(a) of the Business and Professions Code.”

Respondent has satisfied many, but not all, of these criteria. It has been 19 years since her last conviction. She completed probation for both convictions, and paid the fines and fees. She is providing family support for her younger daughter. She has completed an associate's degree and business certificate, as well as real estate educational classes. Respondent volunteered in the past for a community organization, but not recently. She has ceased to associate with the person who was involved in her last conviction. In addition, respondent has had stable employment for the past 17 years. Respondent testified that she has tried to be a better person since the time of her convictions. But, she did not offer any character witnesses or documentary evidence in support of her rehabilitation.

Despite the above efforts, respondent has failed to demonstrate a change in attitude, which of the many rehabilitation criteria is "arguably the most important in predicting future conduct." (*Singh v. Davi* (2012) 211 Cal.App.4th 141, 149.) Respondent's theft and burglary convictions occurred long ago, but she was required to disclose them on her application and failed to do so, despite clear instructions. She then evidenced a lack of candor in explaining the circumstances of her most recent conviction, and her reasons for failure to disclose. Respondent's testimony reflected both a failure to accept full responsibility for her actions, and a lack of candor in the license application process.

In addition, respondent's conduct during the license application process has not demonstrated the attention to detail required to correctly interpret and complete important documents under penalty of perjury, an essential requirement for a real estate licensee.

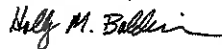
For all the above reasons, it is concluded that granting respondent a license, even on a restricted basis, would not be consistent with protection of the public.

ORDER

Respondent Berta Marina Ulloa Marquez's application for a real estate salesperson license is denied.

DATED: July 25, 2018

DocuSigned by:



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HOLLY M. BALDWIN
Administrative Law Judge
Office of Administrative Hearings