

DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * * * *

FILE
JAN - 9 2003
DEPARTMENT OF REAL ESTATE

In the Matter of the Application of) No. H-29624 LA By *[Signature]*
)
) L-2002080831
)
MICHAEL ROSS KAPP,)
)
)
Respondent.)
_____)

DECISION

The Proposed Decision dated December 5, 2002, 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(b)(3) of the Government Code of the State of California, the Proposed Decision is amended as follows:

Page 4, paragraph number 16, line 6,
"theses" is amended to read "these".

Page 6, paragraph number 22, line 1,
and footnote #3, "section 2912" is
amended to read "section 2911".

The application for a real estate salesperson license is denied. There is no statutory restriction on when application may again be made for this license. If and when application is again made for this license, all competent evidence of rehabilitation presented by respondent will be considered by the Real Estate Commissioner. A copy of the Commissioner's Criteria of Rehabilitation is appended hereto for the information of respondent.

This Decision shall become effective at 12 o'clock
noon on January 29, 2003.

IT IS SO ORDERED

January 7, 2003
PAULA REDDISH ZINNEMANN
Real Estate Commissioner

Paula Reddish

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Application (Statement
of Issues) of:

MICHAEL ROSS KAPP,

Respondent.

Case No. H-29624 LA

OAH No. L2002080831

PROPOSED DECISION

On November 5, 2002 in Los Angeles, California, Ann E. Sarli, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

James Peel, Real Estate Counsel, represented the complainant.

Respondent, Michael Ross Kapp, represented himself.

Evidence was received. The record remained open until November 12, 2002, to allow respondent to submit documents. A Certificate of Completion and a Certificate of Achievement were received, marked collectively as Exhibit E, and admitted in evidence. The matter was submitted and the record closed on November 12, 2002.

FACTUAL FINDINGS

1. On July 26, 2002, Maria Suarez, a Deputy Real Estate Commissioner of the State of California, made and filed the Statement of Issues in her official capacity.

2. In making and filing the Statement of Issues, Ms. Suarez acted pursuant to the authority of Business and Professions Code sections 480(a) and 10177(b), which provide, in pertinent part, that the Commissioner may deny issuance of a real estate license and all licensing rights to an applicant or licensee who has been convicted of a crime involving

moral turpitude, which bears a substantial relationship to the duties of a real estate salesperson under section 2910, Title 10, of the California Code of Regulations.

3. Respondent timely filed a Request for Hearing pursuant to Government Code sections 11504 and 11509. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500, et seq.

Respondent's Criminal Convictions

4. Respondent was convicted on August 7, 2000, in the Superior Court of the County of Ventura, State of California, of a violation of California Penal Code section 243(d) (Battery With Serious Bodily Injury), a felony. He was sentenced to three years of formal probation, to serve 280 days in county jail, and to pay restitution of \$200.

5. The facts and circumstances of respondent's conviction were that on April 4, 2000, he was intoxicated and got into a fight with his roommate. Respondent was charged with assault on the roommate with a knife, and it was alleged the roommate suffered great bodily harm. No evidence was introduced as to the nature or extent of the victim's injury. It is inferred from the nature of the conviction that respondent inflicted great bodily harm upon his roommate.

6. Respondent was convicted on July 28, 1999, in the Municipal Court of the County of Ventura, State of California, of a violation of California Penal Code section 148(a) (Resisting or Obstructing Public Officer), a misdemeanor. He was sentenced to three years of conditional revocable release, fines, and penalties. He was ordered to serve 30 days in county jail.

7. The facts and circumstances of respondent's conviction were that in March of 1999, respondent was a passenger in a car. He was intoxicated. He interfered with two peace officers who were dealing with the driver of the vehicle.

8. Respondent was convicted on March 12, 1997, in the Municipal Court of the County of Ventura, State of California, of a violation of California Health and Safety Code section 12305 (Possession of an Explosive), a felony. He was sentenced to three years of probation, fines and penalties. He was sentenced to serve 360 days in jail.

9. The facts and circumstances of respondent's conviction were that on January 18 1997, respondent's storage room was searched pursuant to the terms and conditions of his probation. Officers found an explosive.

10. Respondent was convicted on February 1, 1994, in the Municipal Court of the County of Ventura, State of California, of a violation of California Penal Code section 664/484 (Attempted Petty Theft), a misdemeanor. Respondent was placed on probation.

The facts and circumstances of this conviction were that respondent was intoxicated and attempted to steal liquor from a liquor cabinet.

11. Respondent was convicted on January 11, 1991, in the Municipal Court of the County of Ventura, State of California, of a violation of California Penal Code section 148(a) (Resisting or Obstructing Public Officer), a misdemeanor. Respondent was placed on three years probation and sentenced to serve 20 days in jail.

12. Respondent's crime of attempted petty theft is a crime of moral turpitude within the meaning of Business and Professions Code section 10177(b). Crimes which reveal an applicant's dishonesty involve moral turpitude. *Clerici v. Department of Motor Vehicles* (1990) 224 Cal.App.3d 1016, 1027. Lack of honesty or integrity, such as intentional dishonesty, demonstrates a lack of moral character and satisfies a finding of unfitness to practice a profession. *Matanky v. Board of Medical Examiners* (1978) 79 Cal.App.3d 293, 305.

13. Respondent's crime of attempted petty theft bears a substantial relationship to the qualifications, functions and duties of a real estate licensee. A real estate salesperson is entrusted with and responsible for the real property and funds of clients. Stealing property and dishonesty are acts directly contrary to the duties of the real estate licensee.

14. Respondent's crime of battery with serious bodily injury is a crime of moral turpitude within the meaning of Business and Professions Code section 10177(b). A criminal act involves moral turpitude if it involves a serious breach of a duty owed to another or to society. *In re Stuart K. Lesansky* (2001) 25 Cal.4th 11, 16; (citing *In re Johnson* (1992) 1 Cal.4th 689, 699; *In re Calaway* (1977) 20 Cal.3d 165, 169-170; *In re Higbie* (1972) 6 Cal.3d 562, 569-570). Acts of moral turpitude are acts which involve "bad character" and "readiness to do evil." *People v. Zataray* (1985 First District) 173 Cal.App.3d 390, 400.

The crime of battery with serious bodily injury involves willful infliction of injury or violence upon the person of another. Using force and violence on the body of another, as respondent did here with his roommate, involves "bad character" and "readiness to do evil" as contemplated in *People v. Zataray, Id.* Inflicting injury on a person constitutes a serious breach of duties owed to the victim and to society.

15. Respondent's crime of battery with serious bodily injury is substantially related to the qualifications, functions and duties of a real estate licensee. The real estate licensee has constant contact with members of the public. One who cannot control his aggressive impulses and is willing to seriously injure is a risk to the public. Respondent's crime also meets the criteria of substantial relationship contained in Title 10, California Code of Regulations section 2910.

(a) When considering whether a license should be denied, suspended or revoked on the basis of the conviction of a crime, or on the basis of an act described in Section 480(a)(2) or 480(a)(3) of the Code, the crime

or act shall be deemed to be substantially related to the qualifications, functions or duties of a licensee of the Department within the meaning of Sections 480 and 490 of the Code if it involves:

The listed offenses, which are pertinent therein, are as follows:¹

(8) Doing of any unlawful act with the intent of conferring a financial or economic benefit upon the perpetrator or with the intent or threat of doing substantial injury to the person or property of another.

Respondent's offenses involved the elements and characteristics of the offense set forth above.

16. The Department did not show that respondent's two convictions for resisting/obstructing public officers are crimes of moral turpitude within the meaning of Business and Professions Code section 10177(b). Respondent's crimes involve the "willful" obstruction of a public officer in conduct of his duties. However, they do not involve threats or violence and therefore cannot be said to indicate a "readiness to do evil." Cf *People v. Williams* (1999) 72 Cal.App.4th 1460. Nor, do these~~x~~ offenses involve dishonesty.

17. The Department did not show that respondent's two convictions for resisting/obstructing public officers bear a substantial relationship to the qualifications, functions and duties of a real estate licensee. Although respondent does demonstrate a pattern of willful violation of the law, and these two offenses are a part of that pattern, they do not by themselves establish a pattern of willful violation of the law.

18. Respondent's crime of possession of explosives is a crime of moral turpitude. That offense involves knowing possession of a "high explosive," as opposed to possession of fireworks and pyrotechnic devices. Possession of high explosives is a felony because of the grave danger these devices pose to the public. Possession of dangerous devices is a serious breach of a duty owed to another or to society as contemplated by *In re Stuart K. Lesansky* (2001) 25 Cal.4th 11, 16; (citing *In re Johnson* (1992) 1 Cal.4th 689, 699; *In re Calaway* (1977) 20 Cal.3d 165, 169-170; and *In re Higbie* (1972) 6 Cal.3d 562, 569-570).

19. Respondent's crime of possession of explosives bears a substantial relationship to the qualifications, functions and duties of a real estate licensee. His offense involves a disregard of the safety of the public and an unwillingness to obtain the appropriate permits for dangerous explosives.

Respondent's crime also meets the criteria of substantial relationship contained in Title 10, California Code of Regulations section 2910.²

¹ The paragraph numbering corresponds to the sub-sections of section 2910.

² The paragraph numbering corresponds to the sub-sections of section 2910.

(a) When considering whether a license should be denied, suspended or revoked on the basis of the conviction of a crime, or on the basis of an act described in Section 480(a)(2) or 480(a)(3) of the Code, the crime or act shall be deemed to be substantially related to the qualifications, functions or duties of a licensee of the Department within the meaning of Sections 480 and 490 of the Code if it involves:

(7) Willfully violating or failing to comply with a statutory requirement that a license, permit or other entitlement be obtained from a duly constituted public authority before engaging in a business or course of conduct.

(8) Doing of any unlawful act with the intent of conferring a financial or economic benefit upon the perpetrator or with the intent or threat of doing substantial injury to the person or property of another.

(10) Conduct which demonstrates a pattern of repeated and willful disregard of law.

Respondent's offenses involved the elements and characteristics of the offense set forth above.

Factors in Mitigation, Aggravation and Rehabilitation

20. In order to determine whether it is appropriate to deny respondent a real estate salesperson's license or to issue him a restricted license, it is necessary to weigh and balance factors in aggravation, mitigation, justification and rehabilitation. There was no evidence introduced which demonstrates any justification for respondent's offenses. In mitigation, respondent committed his first offense when he was 19 years old. In aggravation, respondent has a long history of criminal conduct and he committed offenses while he was on probation for previous offenses. In aggravation, respondent was twice convicted of resisting or obstructing a public officer. In aggravation, respondent held a dealer's license through the Department of Motor Vehicles, which was revoked in December of 1999 for "untimely paperwork."

21. Respondent and his father testified that respondent has changed since his last conviction. His legal troubles came about because of his abuse of alcohol. He stopped drinking on April 4, 2000. He attended a drug and alcohol program in June of 2001 and an anger management program in November of 2000. He is in compliance with his probation, and is subject to biweekly random drug and alcohol tests as a condition of probation. His probation expires in April of 2003.

Respondent worked for Fidelity Title for two years. He started as a messenger and now is a sales representative with his own territory. Respondent has been living with his father for two years and, according to his father, has become a changed man. Respondent plays softball and basketball in his free time.

2911

22. Title 10, California Code of Regulations section ~~2912~~ sets forth the criteria developed by the Department of Real Estate pursuant to Business and Professions Code section 482(b) for evaluating rehabilitation of a licensee following a criminal conviction.

The following facts were established with regard to respondent's rehabilitation:³

- a. More than two years have passed from the date of respondent's last conviction to the date of his Application for a salesperson license. However, when an applicant has a lengthy history of criminal acts, a longer period of time is necessary.

One year passed between the time respondent was last convicted and his application for licensure. As of the date of the hearing, two years have elapsed since the last conviction. However, respondent has a criminal history spanning ten years and a longer period of rehabilitation is necessary.

- b. Respondent has paid his court ordered restitution.
- c. Respondent's convictions have not been set aside or expunged.
- e. Respondent's probationary term is not due to expire until April 4, 2003.
- f. Abstinence from the use of controlled substances or alcohol for not less than two years if the conduct which is the basis to deny the departmental action sought is attributable in part to the use of controlled substances or alcohol.

Respondent has abstained from alcohol and drug use for two years.

- g. Respondent paid the monetary penalties imposed by the court in relation to his criminal conviction.
- h. Stability of family life and fulfillment of parental and familial responsibilities subsequent to the conviction or conduct that is the basis for denial of the agency action sought.

Respondent presented evidence that he has a stable family life. He has no family financial obligations.

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

³ The paragraph lettering corresponds to the pertinent sub-section of section 2912.

Respondent has completed courses necessary for his real estate license. He works full time but did not provide documentary evidence of his employer's satisfaction with his job performance.

- j. Discharge of, or bona fide efforts toward discharging, adjudicated debts or monetary obligations to others.

This item is not applicable to respondent.

- k. Correction of business practices resulting in injury to others or with the potential to cause such injury.

This item is not applicable to respondent.

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

Respondent provided no evidence that he is involved in these activities.

- m. New and different social and business relationships from those which existed at the time of the conduct that is the basis for denial of the departmental action sought.

Respondent testified that he does not associate with his former friends. His father, and letters of reference, supported this testimony.

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

- (1) Testimony of applicant.

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

- (3) Evidence from probation or parole officers or law enforcement officials competent to testify as to applicant's social adjustments.

- (4) Evidence from psychiatrists or other persons competent to testify with regard to neuropsychiatric or emotional disturbances.

Respondent, his father, and friends provided evidence that he has changed his attitude since his last conviction.

LEGAL CONCLUSIONS

1. The Board established cause for denial of respondent's real estate salesperson license and all licensing rights, pursuant to Business and Professions Code sections 480(a) and 10177(b), by reason of his criminal offenses, jointly and individually, as set forth in Factual Findings 4, 5, 8, 9 and 10.

2. The Board did not establish cause for denial of respondent's real estate salesperson license and all licensing rights, pursuant to Business and Professions Code sections 480(a) and 10177(b), by reason of the criminal offenses of resisting or obstructing a public officer, as set forth in Factual Findings 16 and 17.

3. Respondent's criminal offenses are crimes of "moral turpitude" within the meaning of Business and Professions Code section 10177(b), as set forth in Factual Findings 12, 14 and 18.

4. Respondent's criminal offenses bear a substantial relationship to the qualifications, functions and duties of a real estate licensee, as set forth in Factual Findings 13, 15 and 19.

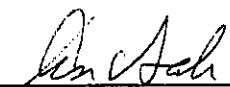
5. Respondent bears the burden of proving that he is no longer a risk to the public and that he is currently suitable for licensure as a real estate salesperson. Due to the extensive and serious nature of his criminal history, and the recent revocation of his DMV license, respondent has the burden of showing sustained, long-term rehabilitation. He has not met that burden.

As set forth in Factual Findings 20 through 23, inclusive, respondent has shown some evidence of rehabilitation. However, too little time has passed since his last conviction. He continues to be under court supervision. For these reasons, it is not now in the public interest to grant respondent a restricted license.

ORDER

The Application of Michael Ross Kapp for a Real Estate Salesperson License is
DENIED.

Dated: December 5, 2002

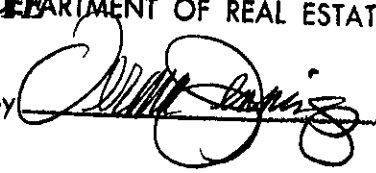


ANN E. SARLI
Administrative Law Judge
Office of Administrative Hearings

SMO

FILED
SEP 12 2002
DEPARTMENT OF REAL ESTATE

**BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA**

By 

In the Matter of the Application of

MICHAEL ROSS KAPP

}

Case No. H-29624 LA

OAH No. L-2002080831

Respondent

NOTICE OF HEARING ON APPLICATION

To the above named respondent:

You are hereby notified that a hearing will be held before the Department of Real Estate at Office of Administrative Hearings, 320 West Fourth Street, Suite 630, Los Angeles, California, on Tuesday, November 5, 2002, at the hour of 1:30 p.m., or as soon thereafter as the matter can be heard, upon the Statement of Issues served upon you. If you object to the place of hearing, you must notify the presiding administrative law judge of the Office of Administrative Hearings within ten (10) days after this notice is served on you. Failure to notify the presiding administrative law judge within ten days will deprive you of a change in the place of the hearing.

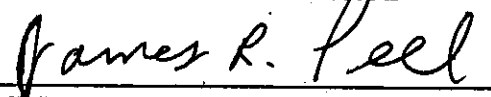
You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. If you are not present in person nor represented by counsel at the hearing, the Department may take disciplinary action against you based upon any express admission or other evidence including affidavits, without any notice to you.

The burden of proof is upon you to establish that you are entitled to the license or other action sought. If you not present nor represented at the hearing, the Department may act upon your application without taking evidence.

You may present any relevant evidence and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Department of Real Estate.

The hearing shall be conducted in the English language. If you want to offer the testimony of any witness who does not proficiently speak the English language, you must provide your own interpreter and pay his or her costs. The interpreter must be certified in accordance with Sections 11435.30 and 11435.55 of the Government Code.

DEPARTMENT OF REAL ESTATE

By 
JAMES R. PEEL, Counsel

Dated: September 12, 2002.

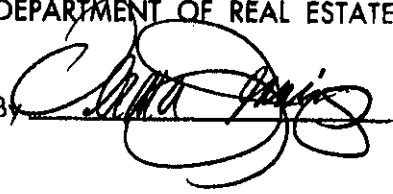
Michael R. Kapp
Sacto./OAH

SACD.
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JAMES R. PEEL, Counsel (SBN 47055)
Department of Real Estate
320 West Fourth Street, Ste. 350
Los Angeles, California 90013-1105

Telephone: (213) 576-6982
-or- (213) 576-6913 (Direct)

FILED
JUL 29 2002
DEPARTMENT OF REAL ESTATE

By 

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Application of)	No. H-29624 LA
MICHAEL ROSS KAPP,)	<u>STATEMENT OF ISSUES</u>
Respondent.)	

The Complainant, Maria Suarez, a Deputy Real Estate Commissioner of the State of California, for Statement of Issues against MICHAEL ROSS KAPP (Respondent) is informed and alleges in her official capacity as follows:

I

On or about September 12, 2001, Respondent applied to the Department of Real Estate of the State of California for a real estate salesperson license with the knowledge and understanding that any license issued as a result of that application would be subject to the conditions of Section 10153.4 of the Business and Professions Code.

///

1 II

2 On or about August 7, 2000, in the Superior Court for
3 the County of Ventura, State of California, Respondent was
4 convicted of violating Penal Code Section 243(d) (Battery With
5 Serious Bodily Injury).

6 III

7 On or about July 28, 1999, in the Municipal Court for
8 the County of Ventura, State of California, Respondent was
9 convicted of violating Penal Code Section 148(a) (Resisting or
10 Obstructing Public Officer).

11 IV

12 On or about March 12, 1997, in the Municipal Court for
13 the County of Ventura, State of California, Respondent was
14 convicted of violating Health and Safety Code Section 12305
15 (Possession of An Explosive).

16 V

17 On or about February 1, 1994, in the Municipal Court
18 for the County of Ventura, State of California, Respondent was
19 convicted of violating Penal Code Section 664/484 (Attempted
20 Petty Theft).

21 VI

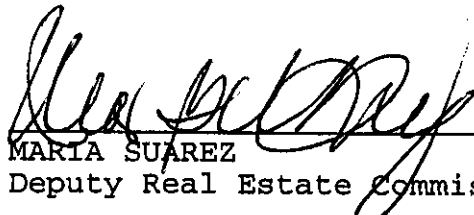
22 On or about January 11, 1991, in the Municipal Court
23 for the County of Ventura, State of California, Respondent was
24 convicted of violating Penal Code Section 148(a) (Resisting or
25 Obstructing Public Officer).

26 ///

1 The Statement of Issues is brought under the provisions
2 of Section 10100, Division 4 of the Business and Professions Code
3 of the State of California and Sections 11500 through 11528 of
4 the Government Code.

5 WHEREFORE, the Complainant prays that the above-
6 entitled matter be set for hearing and, upon proof of the charges
7 contained herein, that the Commissioner refuse to authorize the
8 issuance of, and deny the issuance of, a real estate salesperson
9 license to Respondent, MICHAEL ROSS KAPP, and for such other and
10 further relief as may be proper in the premises.

11 Dated at Los Angeles, California,
12 this 26th day of July, 2002.

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16 
17 MARIA SUAREZ
18 Deputy Real Estate Commissioner
19
20
21
22
23

24 cc: Michael Ross Kapp
25 Maria Suarez.
26 Sacto.
27 LM