

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED
DEC - 3 2004
DEPARTMENT OF REAL ESTATE

By R. Mederholt

In the Matter of the Accusation Against:) Agency No. H-30364 LA
)
BERNARD JOSEPH MacELHENNY,) OAH No. L-2004030357
)
Respondent.)
_____)

PROPOSED DECISION

This matter came on regularly for hearing before Carolyn D. Magnuson, Administrative Law Judge of the Office of Administrative Hearings, in Santa Barbara, California, on September 23, 2004.

Elliott MacLennan, Staff Counsel, represented the Complainant.

David W. Magnusson, Attorney at Law, represented Bernard MacElhenny, who was present at the hearing.

Testimonial and documentary evidence was received, and the matter was submitted at the close of the hearing.

FACTUAL FINDINGS

1. Maria Suarez (Complainant) made the Accusation in her official capacity as a Deputy Real Estate Commissioner of the Department of Real Estate (Department) of the State of California.

2. Bernard Joseph MacElhenny (Respondent) holds real estate broker license number 00266171, issued to him by the Department. The license was in full force and effect at all relevant times.

3. On December 1, 2001, in the Superior Court of the State of California, County of Santa Barbara, the Respondent was convicted by jury verdict of violating Penal Code section 538d, subdivision (b)(2), (impersonating an officer), a crime involving moral turpitude and substantially related to the duties, functions, and qualifications of a departmental licensee.¹

¹ At the same time, Respondent was convicted of two driving violations which are not alleged as a basis for discipline.

4. On March 13, 2002, Respondent was sentenced. Imposition of sentence was suspended, and Respondent was placed on three years' summary probation on the condition, inter alia, that he pay fines and assessments and perform 200 hours of community service. Respondent fully complied with the conditions of his probation, and it was terminated early on September 21, 2004.

5. The facts and circumstances of the crime are that Respondent had business interests in Sonoma County California so he spent a considerable amount of time there. He became friends with the county sheriff who appointed Respondent to be a special deputy for the county and presented Respondent with a badge and identification card showing him to be a Sonoma County special deputy. Some time later, Respondent was stopped by a Santa Barbara County deputy sheriff for a traffic violation. Respondent kept his vehicle registration and proof of insurance in the badge carrier holding his special deputy badge and identification card. In the course of providing those documents to the deputy, Respondent also displayed the badge. When asked about the badge, Respondent told the deputy that he was a sworn peace officer and that he investigated white collar crime for the Sonoma County Sheriff. The deputy checked with the Sonoma County Sheriff and was told that Respondent was not employed by that office.

6. Respondent explained that, because of his business contacts in Sonoma County, he was occasionally able to provide the Sheriff with useful information having to do with white collar crime, and that is what he was referring to when he spoke with the Santa Barbara County deputy sheriff. Respondent also explained that, because he had been given an oath by the Sonoma County Sheriff, Respondent believed that he was a sworn peace officer and that, when he told the deputy sheriff that he was a sworn peace officer, he thought he was being truthful.

7. Respondent is a pillar of the community. He is active in many civic and charitable organizations. Respondent is engaged in the business of real estate brokerage, property management and lending. He employs approximately 60 people.

LEGAL CONCLUSIONS

8. Respondent argues that he should not be disciplined because the crime of which he was convicted is not substantially related to his licensed activities and therefore is not a basis for discipline. (*Peri v. Fox* (1979) 96 Cal.App.3d 802 [158 Cal.Rptr. 256].) Moreover, Respondent asserts that he has met all of the applicable criteria of rehabilitation found in the California Code of Regulations, title 10, section 2911, thereby demonstrating sufficient rehabilitation that discipline is not warranted.

9. Business and Professions Code section 490 provides:

A board 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.

10. Business and Professions Code section 10177, subdivision (b), provides:

The commissioner may suspend or revoke the license of a real estate licensee, or may deny the issuance of a license to an applicant, who has done any of the following

[¶] . . . [¶]

(b) Entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony or a crime involving moral turpitude, and the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal . . .

11. Penal Code section 538d, subdivision (b)(2), provides:

Any person who willfully wears or uses any badge that falsely purports to be authorized for the use of one who by law is given the authority of a peace officer, or which so resembles the authorized badge of a peace officer as would deceive any ordinary reasonable person into believing that it is authorized for the use of one who by law is given the authority of a peace officer, for the purpose of fraudulently impersonating a peace officer, or of fraudulently inducing the belief that he or she is a peace officer, is guilty of a misdemeanor

12. California Code of Regulations, title 22, section 2910, subdivision (a)(4), provides:

(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:

[¶] . . . [¶]

(4) The employment of bribery, fraud, deceit, falsehood or misrepresentation to achieve an end.

13. Respondent was convicted by a jury of violating Penal Code section 538d, subdivision (b)(2). The necessary elements of that crime are:

- Willful use
- Of a badge resembling the authorized badge of a peace officer
- For the purpose of fraudulently inducing the belief that he is a peace officer

Therefore, the crime of which Respondent was convicted has dishonesty as one of its necessary elements. (*People v. Statler* (1985) 174 Cal.App.3d 46, 53 [219 Cal.Rptr. 713].) Honesty is one of the most essential attributes of a real estate licensee. Thus, there is a very strong relationship between Respondent's conviction and his real estate business. Moreover, the conviction also

meets one of the criteria set by the Department as being substantially related to licensed activities.

14. Therefore, under the provisions of Business and Professions Code section 490 and 10177, subdivision (b), grounds exist for the Department to discipline Respondent's license because of his criminal conviction.

15. California Code of Regulations, title 10, section 2912 set out the criteria to be considered in assessing a licensee's rehabilitation. That section provides:

The following criteria have been developed by the department pursuant to Section 482(b) of the Business and Professions Code for the purpose of evaluating the rehabilitation of a licensee against whom an administrative disciplinary proceeding for revocation or suspension of the license has been initiated on account of a crime committed by the licensee

- (a) The passage of not less than two years from the most recent criminal conviction that is "substantially related" to the qualifications, functions or duties of a licensee of the department. (A longer period will be required if there is a history of criminal convictions or acts substantially related to the qualifications, functions or duties of a licensee of the department
- (b) Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the licensee.
- (c) Expungement of the conviction or convictions which culminated in the administrative proceeding to take disciplinary action.
- (d) Expungement or discontinuance of a requirement of registration pursuant to the provisions of Section 290 of the Penal Code.
- (e) Successful completion or early discharge from probation or parole.
- (f) Abstinence from the use of controlled substances, or alcohol for not less than two years if the criminal conviction was attributable in part to the use of a controlled substance or alcohol.
- (g) Payment of any fine imposed in connection with the criminal conviction that is the basis for revocation or suspension of the license.
- (h) Correction of business practices responsible in some degree for the crime or crimes of which the licensee was convicted.
- (i) New and different social and business relationships from those which existed at the time of the commission of the acts that led to the criminal conviction or convictions in question.
- (j) Stability of family life and fulfillment of parental and familial responsibilities subsequent to the criminal conviction
- (k) Completion of, or sustained enrollment in, formal educational or vocational training courses for economic self-improvement
- (l) Significant and conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.

(m) Change in attitude from that which existed at the time of the commission of the criminal acts 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 the licensee's previous conduct and with 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, clinical psychologists, sociologists or other persons competent to testify with regard to neuropsychiatric or emotional disturbances.

(5) Absence of subsequent felony or misdemeanor convictions that are reflective of an inability to conform to societal rules when considered in light of the conduct in question.

16. The evidence established that Respondent has met criteria a, c, e, g, and l. The other criteria are not applicable to Respondent. However, rehabilitation is a qualitative determination, not quantitative. One cannot just add up which criteria have been met and which have not in order to determine whether or not a person has been rehabilitated. These factors are merely indicators that a person has changed his or her ways and is, therefore, unlikely to reoffend. No one of them alone – in fact not all of them together – can guarantee that an individual is truly rehabilitated. Therefore, merely meeting these criteria does not excuse a person from responsibility for his or her prior criminal conduct nor entitle them to an unrestricted license.

17. In Respondent's case, recidivism seems unlikely. Although Respondent maintains that he is factually innocent of the crime of impersonating an officer, as he is entitled to do (*Callaway v. State Bar of California* (1986) 41 Cal. 3d 743.), he nonetheless has accepted the fact of the conviction and displayed considerable pride about the community service he performed as one of his probation conditions. Moreover, Respondent's conduct was the result of highly idiosyncratic circumstances which are unlikely to ever occur again. However, the Respondent's conviction was relatively recent, and Respondent has been on probation for nearly the entire time between the conviction and the instant hearing. When an individual is on probation, it is difficult to discern whether their exemplary conduct is inspired by the probationary conditions and the threat of jail or reflects a fundamental behavioral change. On balance, the public's interests are best protected if Respondent is granted a restricted real estate broker license.

ORDER


WHEREFORE, THE FOLLOWING ORDER is hereby made:

All licenses and licensing rights of Bernard Joseph MacElhenny under the Real Estate Law are revoked; provided, however, a restricted real estate broker license shall be issued to Respondent pursuant to Section 10156.5 of the Business and Professions Code if Respondent makes application

therefore and pays to the Department of Real Estate the appropriate fee for the restricted license within 90 days from the effective date of this Decision. The restricted license issued to Respondent shall be subject to all of the provisions of Section 10156.7 of the Business and Professions Code and to the following limitations, conditions and restrictions imposed under authority of Section 10156.6 of that Code:

1. The restricted license issued to Respondent may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of Respondent's conviction or plea of nolo contendere to a crime which is substantially related to Respondent's fitness or capacity as a real estate licensee.
2. The restricted license issued to Respondent may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that Respondent has violated provisions of the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to the restricted license.
3. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor for the removal of any of the conditions, limitations or restrictions of a restricted license until two years have elapsed from the effective date of this Decision.
4. Respondent shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that Respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If Respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until the Respondent presents such evidence. The Commissioner shall afford Respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

Dated: November 2, 2004


CAROLYN D. MAGNUSON
Administrative Law Judge
Office of Administrative Hearings

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

FILED
AUG - 6 2004
DEPARTMENT OF REAL ESTATE

In the Matter of the Accusation of

BERNARD JOSEPH MAC ELHENNY JR.,

By *K. Mederholt*

Case No. H-30364 LA

OAH No. L-2004030357

}

Respondent

NOTICE OF CONTINUED HEARING ON ACCUSATION

To the above named respondent:

You are hereby notified that a hearing will be held before the Department of Real Estate at Worker Compensation Appeal Board, 6755 Hollister Ave., Ste. 100, Goleta, CA on September 23, 2004, at , at the hour of 1:30 p.m., or as soon thereafter as the matter can be heard, upon the Accusation 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.

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

Dated: AUG - 6 2004

By *E.L.*
ELLIOTT MAC LENNAN, Counsel

cc: Bernard Joseph MacElhenny Jr.
Sacto/OAH/ST

Handwritten signature/initials

FILED
OCT - 2 2003
DEPARTMENT OF REAL ESTATE

ELLIOTT MAC LENNAN, SBN 66674
Department of Real Estate
320 West 4th Street, Ste. 350
Los Angeles, California 90013-1105

Telephone: (213) 576-6911 (direct)
-or- (213) 576-6982 (office)

By *Handwritten signature*

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of)	No. H-30364 LA
BERNARD JOSEPH MAC ELHENNY JR)	<u>ACCUSATION</u>
Respondent.)	

The Complainant, Maria Suarez, a Deputy Real Estate Commissioner of the State of California, for cause of accusation against BERNARD JOSEPH MAC ELHENNY JR., is informed and alleges in her official capacity as follows:

1.

Respondent is presently licensed and/or has license rights as a real estate broker under the Real Estate Law (Part 1 of Division 4 of the California Business and Professions Code) (Code).

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2.

LICENSE HISTORY

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2
3 Respondent was originally licensed by the Department of
4 Real Estate of the State California as a real estate broker on
5 February 26, 1969. Effective June 7, 1995, that license was
6 revoked with a right to the issuance of a restricted real estate
7 broker license which was issued on the same date therein,
8 pursuant to Case No. H-26191 LA, as further described in
9 Paragraph 6, below. On April 10, 2000, Respondent's petition for
10 reinstatement was granted and his real estate broker license was
11 issued without restriction.

12
13 3.

14 On March 13, 2001, in the Superior Court of California,
15 Figueroa Division, County of Santa Barbara, State of California,
16 respondent was convicted of California Penal Code Section
17 538(d)(b)(2) (impersonating an officer), a misdemeanor, which, by
18 its facts and circumstances involves moral turpitude and is
19 substantially related under Section 2910(a)(2) and (4), Chapter
20 6, Title 10 of the California Code of Regulations, to the
21 qualifications, functions or duties of a real estate licensee.

22
23 4.

24 The crime as alleged in Paragraph 3, above, constitutes
25 cause for the suspension or revocation of the license and license
rights of respondent under Code Sections 490 and/or 10177(b).

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5.

PRIOR DISCIPLINE

On October 13, 1987, in Case No. H-23013 LA, an ORDER TO DESIST AND REFRAIN was filed against respondents UNIQUE HOME LOAN, INC. a California corporation, and BERNARD JOSEPH MAC ELHENNY JR., individually and as designated officer of Unique Home Loan, Inc. under Section 10086 of the Code (Engaging in Prohibited Activity, Order to Desist and Refrain) for violations of Business and Professions Code Section 10240(a), and Sections 2725, 2831.1 and 2834 of Title 10, Chapter 6, California Code of Regulations.

6.

PRIOR DISCIPLINE

On April 29, 1991, in Case No. H-24531 LA, an ACCUSATION was filed against respondents BANKERS MORTGAGE REALTY ADVISORS OF SANTA BARBARA, INC. a California corporation, and BERNARD JOSEPH MAC ELHENNY JR., individually and as designated officer of Bankers Mortgage Realty Advisors of Santa Barbara, Inc. that resulted in stipulation discipline effective August 4, 1992, for violations of Business and Professions Code Section 10177(h).

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7.

PRIOR DISCIPLINE

On February 3, 1997, in Case No. H-27007 LA, an

ACCUSATION was filed against respondents BANKERS MORTGAGE REALTY ADVISORS OF SANTA BARBARA, INC., BANKERS MORTGAGE REALTY ADVISORS, INC. the MAC ELHENNY GROUP, California corporations, and BERNARD JOSEPH MAC ELHENNY JR., individually and as designated officer of said corporations. On September 25, 1997, a Decision After Rejection was adopted by the Real Estate Commissioner effective October 21, 1997, for violations against BERNARD JOSEPH MAC ELHENNY JR., of Business and Professions Code Sections 10163, 10177(d), 10231.1 and 10238.3.

8.

IN AGGRAVATION

On March 13, 2001, in the Superior Court of California, Figueroa Division, County of Santa Barbara, State of California, respondent, in addition to the conviction for Penal Code Section 538(d)(b)(2), above, was convicted of California Vehicle Code Sections 22350 (unsafe speed) and 12951(a) (failure to possess a drivers license), infractions.

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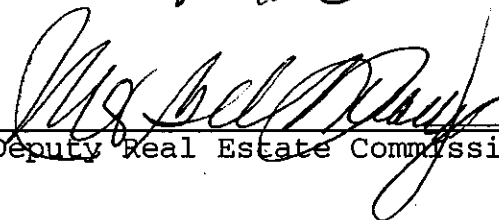
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1 WHEREFORE, Complainant prays that a hearing be
2 conducted on the allegations of this Accusation and that upon
3 proof therof, a decision be rendered imposing disciplinary action
4 against the license and license rights of respondent BERNARD
5 JOSEPH MAC ELHENNY JR. under the Real Estate Law (Part 1 of
6 Division 4 of the Business and Professions Code) and for such
7 other and further relief as may be proper under other applicable
8 provision of law.

9 Dated at Los Angeles, California

10 This *16th* day of September 2013.

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13 Deputy Real Estate Commissioner
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23 cc: Bernard Joseph Mac Elhenny Jr.
24 Sacto
25 Maria Suarez
26 ST
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