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SEP 17 2004
DEPARTMENT OF REAL ESTATE

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * * * *

In the Matter of the Application of) No. H-30859 LA
MARCELO ZERTUCHE,) L-2004050137
Respondent.)

DECISION

The Proposed Decision dated August 3, 2004, of the Administrative Law Judge of the Office of Administrative Hearings, is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

The application for a real estate salesperson license is denied, but the right to a restricted real estate salesperson license is granted to respondent. There is no statutory restriction on when a new application may be made for an unrestricted license. Petition for the removal of restrictions from a restricted license is controlled by Section 11522 of the Government Code. A copy of Section 11522 is attached hereto for the information of respondent.

If and when application is made for a real estate salesperson license through a new application or through a petition for removal of restrictions, all competent evidence of rehabilitation presented by the respondent will be considered by the Real Estate Commissioner. A copy of the Commissioner's Criteria of Rehabilitation is attached hereto.

This Decision shall become effective at 12 o'clock noon on October 7, 2004.

IT IS SO ORDERED

Sept. 9, 2004.

JOHN R. LIBERATOR
Acting Real Estate Commissioner

John R. Liberator

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

MARCELO ZERTUCHE,

Respondent.

Board No. H- 30859 LA

OAH No. L2004050137

PROPOSED DECISION

This matter came on regularly for hearing on July 13, 2004, at Los Angeles, California, before Christopher J. Ruiz, Administrative Law Judge, Office of Administrative Hearings, State of California. Respondent Marcelo Zertuche (Respondent) was present and represented himself. Complainant Maria Suarez, Deputy Real Estate Commissioner, was represented by Martha Rosett, Counsel for Department of Real Estate (Department).

Oral and documentary evidence was received and the matter was submitted for decision.

FACTUAL FINDINGS

The Administrative Law Judge finds the following facts:

1. Complainant Maria Suarez, Deputy Real Estate Commissioner, brought the Statement of Issues in her official capacity.

2. (a) On March 2, 1999, in the Municipal Court of the Los Cerritos Judicial District, County of Los Angeles, State of California, Case No. 9LC00079, Respondent was convicted, by plea of nolo contendere, of violating California Vehicle Code section 23152(B) (Driving with .08% alcohol in blood) and Health and Safety Code section 11550(a) (Under the influence of controlled substance), both misdemeanors. Respondent was sentenced to three years probation, ordered to pay fines of \$1271.00, and ordered to enroll in a first-offender alcohol and other drug education program. His driver's license was suspended for 6 months.

(b) The underlying events leading to the convictions were as follows: Respondent went to a Christmas party, drank too much, used a controlled substance, and then

drove. Respondent testified that this was a rare use of the unspecified controlled substance. Respondent was arrested on December 20, 1998.

3. (a) On December 26, 2002, in the Superior Court of California, County of Los Angeles, Case No. 2LC03584, Respondent was convicted, by plea of nolo contendere, of violating California Vehicle Code section 23152(B) (Driving with .08% alcohol in blood), a misdemeanor. Respondent was placed on summary probation for three years, ordered to serve 96 hours in jail, ordered to pay fines of \$1308.00, and ordered to complete an 18 month licensed second-offender alcohol and other drug education program. Respondent testified that his driver's license was revoked for one year. Respondent is presently on probation.

(b) The underlying events leading to the convictions were as follows: Respondent went to a Bar-B-Q and drank beer. He later began driving to the store and was arrested at a sobriety checkpoint.

4. On February 3, 2003, Respondent made an application to the Department for a real estate salesperson license. Respondent has not completed all of the courses required pursuant to Business and Professions Code section 10153.4.

5. Respondent takes full responsibility for his two convictions. Respondent has been married for over 6 years and has two daughters, ages 6 and 4. He would accept a restricted license.

6. Respondent completed a court ordered 18 month second-offender alcohol program.

7. Respondent has paid all fines related to his two convictions.

8. As of July 13, 2004, Respondent's driver's license is unrestricted.

9. Respondent considers himself a social alcoholic. In the past, he has had trouble when he drinks at a social event and then chooses to drive. He has never used alcohol at work. He has been sober since November 15, 2002. Respondent attends Alcoholics Anonymous at least once a month. He would like to attend more frequently, but he is presently working many hours.

10. Respondent presently holds a full time job at Samson Products where he sells fire protection equipment. He has worked there since February 2000.

11. Respondent attends church regularly.

12. Respondent has been employed at various times over the last four years at Plaza Realty.

13. Respondent made a good witness on his own behalf. He is well-spoken and appeared remorseful for his past conduct. Respondent was very credible. He made direct eye contact with both counsel for the Department and the Administrative Law Judge. He answered questions honestly and candidly. He has been sober for about 1 and ½ years. He now realizes the severity of his past conduct. Respondent understands the negative impact alcohol has had on his life. He understands how devastating it would be to his life, and the lives of his family, if he were to drink and drive in the future.

LEGAL CONCLUSIONS AND DISCUSSION

Based upon the foregoing factual findings, the Administrative Law Judge makes the following legal conclusions:

1. Cause exists to deny Respondent's application for a real estate salesperson license pursuant to Business and Professions Code section 480(a)¹ because respondent has been convicted of a crime which is substantially related to the qualifications, functions, or duties of a real estate salesperson.

Substantial Relationship

California Code of Regulations, title 10, section 2910, defines by regulation instances where acts are deemed to be substantially related to the qualifications, functions, or duties of a licensee. Under subsection (a)(11), two or more convictions involving the consumption or use of alcohol and driving are substantially related to the qualifications, functions, or duties of a licensee. Therefore, Respondent's two convictions for driving under the influence of alcohol are substantially related to the qualifications, functions, or duties of a real estate salesperson. Factual Findings 2-3.

2. Cause does not exist to deny Respondent's application for a real estate salesperson license pursuant to Business and Professions Code section 10177(b) based on Respondent's two convictions. Respondent's two convictions for driving under the influence of alcohol do not rise to the level of a crime involving moral turpitude.

Moral Turpitude

a. A criminal conviction can form the basis for denial of an application for a real estate salesperson's license if the crime is a felony or a crime involving moral turpitude. Business and Professions Code section 10177(b). Respondent's two convictions in 1999 and 2002 are not felonies.

¹ The Statement of Issues references Business and Professions Code section 480(c) (emphasis added). However, there are no allegations of any failure by Respondent to disclose information on his application. At issue in this case are the convictions themselves. The Statement of Issues clearly describes the two convictions as being the basis for not issuing the license. Therefore, the court addresses 480(a) and not subsection(c). There has been no denial of Due Process to Respondent as he had a full and fair opportunity to address the allegations.

b. Although not amenable to a precise definition, "moral turpitude" connotes a readiness to do evil, an act of baseness, vileness or "depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *People v. Forster* (1994) 29 Cal.App.4th 1746, 1757, quoting from *People v. Mansfield* (1988) 200 Cal.App.3d 82, 87.

c. Conviction of some crimes, by their very nature, establishes moral turpitude per se, such as murder and fraud. Other crimes, such as drunk driving, do not necessarily establish moral turpitude per se; however, the particular circumstances of the underlying offense must be reviewed to determine if the conviction involved moral turpitude. See, *In re Kelley* (1990) 52 Cal.3d 487 and *Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630.

d. In this case, Respondent has two convictions for driving under the influence of alcohol, one of which also involved the use of a controlled substance. Both convictions involved a situation where Respondent went to a social event, drank too much, and then drove. In *People v. Forster* (1994) 29 Cal.App.4th 1746, the question was not about license applications but, rather, whether a prior conviction could be used to impeach the defendant. (Only prior felony convictions involving moral turpitude could be used for this purpose.) In *Forster's* prosecution for driving under the influence (one count under Vehicle Code section 23152(a) and a second count under section 23152(b)) and driving with a suspended license, he was impeached with evidence that he had 3 or more prior convictions for driving under the influence within the last 7 years before his latest conviction, a violation of Vehicle Code section 23175. In finding that this amounted to moral turpitude, the court reasoned that this was a recidivist crime involving extremely dangerous activity, and a person guilty of violating section 23175 is presumptively aware of the life-threatening nature of the activity and the grave risks involved. Continuing to drive under the influence, despite such knowledge, indicates a conscious indifference and disregard of the ultimate consequences, from which can be inferred that the conduct amounts to moral turpitude. In this case, Respondent simply made poor decisions while attending social functions. These crimes do not rise to the level of moral turpitude. Factual Findings 2-3.

3. Criteria have been developed by the Department pursuant to section 482(a) of the Business and Professions Code for the purpose of evaluating the rehabilitation of a licensee against whom an administrative disciplinary proceeding has been initiated on account of a crime committed by the licensee. These criteria, found at California Code of Regulations, title 10, section 2911, are summarized as follows:

- Subsection(a) passage of at least two years since the conviction;
- Subsection(b) restitution;
- Subsection(c) expungement of the conviction;
- Subsection(d) expungement of the requirement to register as an offender;
- Subsection(e) completion of the criminal probation;
- Subsection(f) abstinence from drugs or alcohol that contributed to the crime;

Subsection(g) payment of any criminal fines or penalties;
Subsection(h) stability of family life;
Subsection(i) enrollment in or completion of educational or training courses;
Subsection(j) discharge of debts to others;
Subsection(k) correction of business practices causing injury;
Subsection(l) significant involvement in community, church or private programs for social betterment
Subsection(m) new and different social and business relationships; and
Subsection(n) change in attitude from the time of conviction to the present, evidenced by testimony of the applicant and others, including family members, friends or others familiar with his previous conduct and subsequent attitudes and behavior patterns.

4. Respondent has addressed, and satisfied, some of these criteria of rehabilitation. More than two years have passed since the convictions. The convictions have not been expunged. Respondent is presently on criminal probation. He has paid the criminal fines. Respondent has not used alcohol for a substantial period of time. Respondent has a stable family life. Respondent does participate in Alcoholics Anonymous.

5 Even though Respondent is currently on probation, a total review of the facts supports a restricted license. The court believes that Respondent has learned his lesson and has turned his life around. Respondent was arrested on both occasions after drinking socially. There were no injuries or property damage. Respondent clearly understands the severe impact any future misconduct would have on his life. As such, the chances of recidivism appear unlikely and allowing Respondent a restricted license would not endanger the health, safety, and welfare of the public. Factual Findings 2-13.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Respondent's application for a real estate salesperson license is denied; provided, however, a restricted real estate salesperson license shall be issued to Respondent pursuant to section 10156.5 of the Business and Professions Code. The restricted license issued to the 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 said Code:

1. Respondent's restricted real estate salesperson license is issued subject to the requirements of section 10153.4 of the Business and Professions Code, to wit: Respondent shall, within eighteen (18) months of the issuance of the restricted license, submit evidence satisfactory to the Commissioner of successful completion, at an accredited institution, of two of the courses listed in section 10153.2, other than real estate principles, advanced legal aspects of real estate, advanced real estate finance or advanced real estate appraisal. If

Respondent fails to timely present to the Department satisfactory evidence of successful completion of the two required courses, the restricted license shall be automatically suspended effective eighteen (18) months after the date of its issuance. Said suspension shall not be lifted unless, prior to the expiration of the restricted license, Respondent has submitted the required evidence of course completion and the Commissioner has given written notice to Respondent of lifting of the suspension.

2. Pursuant to section 10154, if Respondent has not satisfied the requirements for an unqualified license under section 10153.4, Respondent shall not be entitled to renew the restricted license, and shall not be entitled to the issuance of another license which is subject to section 10153.4 until four years after the date of the issuance of the preceding restricted license.

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

a) The conviction of Respondent (including a plea of nolo contendere) of a crime which is substantially related to Respondent's fitness or capacity as a real estate licensee; or

(b) The receipt of evidence 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 this restricted license.

(c) Any use of alcohol by Respondent.

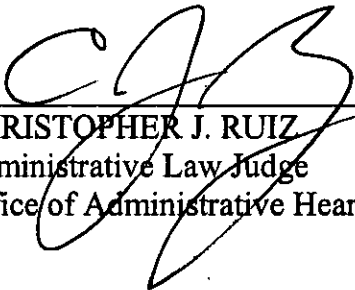
4. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor the removal of any of the conditions, limitations or restrictions attaching to the restricted license until two years have elapsed from the date of issuance of the restricted license to Respondent.

5. With the application for license, or with the application for transfer to a new employing broker, Respondent shall submit a statement signed by the prospective employing real estate broker on a form RE 552 (Rev. 4/88) approved by the Department of Real Estate which shall certify as follows:

(a) That the employing broker has read the Decision which is the basis for the issuance of the restricted license; and

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

DATED: August 3, 2004.



CHRISTOPHER J. RUIZ
Administrative Law Judge
Office of Administrative Hearings

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BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Application of) Case No. **H-30859 LA**
MARCELO ZERTUCHE,)
) OAH No. L-2004050137
)
_____) Respondent(s)

FILED
JUN 10 2004
DEPARTMENT OF REAL ESTATE

NOTICE OF HEARING ON APPLICATION

To the above-named Respondent(s):

You are hereby notified that a hearing will be held before the Department of Real Estate at the Office of Administrative Hearings, 320 West Fourth Street, Suite 630, Los Angeles, CA 90013-1105 on **TUESDAY, JULY 13, 2004**, 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 are 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

Dated: June 10, 2004

By


MARTHA J. ROSETT, Counsel

cc: Marcelo Zertuche
Plaza Realty, Inc.
Sacto.
OAH

1 MARTHA J. ROSETT, Counsel (SBN 142072)
2 Department of Real Estate
3 320 West Fourth St. #350
4 Los Angeles, CA 90013

4 (213) 576-6982
5 (213) 576-6914



8 BEFORE THE DEPARTMENT OF REAL ESTATE
9 STATE OF CALIFORNIA

10 * * * *

11 In the Matter of the Application of) No. H-30859 LA
12)
13 MARCELO ZERTUCHE,) STATEMENT OF ISSUES
14)
15 Respondent.)

16 The Complainant, Maria Suarez, a Deputy Real Estate
17 Commissioner of the State of California, for Statement of Issues
18 against MARCELO ZERTUCHE (hereinafter "Respondent"), alleges in
19 her official capacity as follows:

20 1.

21 On or about February 3, 2003, pursuant to the
22 provisions of Section 10153.3 of the Business and Professions
23 Code (hereinafter "Code"), Respondent made application to the
24 Department of Real Estate of the State of California for a real
25 estate salesperson license with the with the knowledge and
26 understanding that any license issued as a result of said
27 application would be subject to the conditions of Section 10153.4

1 of the Code.

2 2.

3 On or about December 26, 2002, in the Superior Court of
4 California, County of Los Angeles, in Case No. 2LC03584,
5 Respondent was convicted of violating Vehicle Code Section
6 23152(b) (driving with .08% or more alcohol in blood), a
7 misdemeanor crime which by its circumstances is a crime of moral
8 turpitude which is substantially related to the qualifications,
9 functions and duties of a real estate licensee. Respondent was
10 placed on summary probation for three years, the terms of which
11 included serving 96 hours in jail, payment of fines, and
12 completion of an 18-month licensed second-offender alcohol and
13 other drug education and counseling program.

14 3.

15 On or about March 2, 1999, in the Los Cerritos Judicial
16 District Municipal Court, County of Los Angeles, State of
17 California, in Case No. 9LC00079, Respondent was convicted of one
18 count of violating Health and Safety Code Section 11550(a) (under
19 the influence of controlled substance) and one count of violating
20 Vehicle Code Section 23152(b) (driving with .08% or more of
21 alcohol in blood), misdemeanors. Respondent was sentenced to
22 three years probation, the terms of which included suspension of
23 his driver license for 6 months, payment of fines, enrollment in
24 a drug program, and enrollment in a first offender alcohol and
25 other drug education program.

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27 //

4.

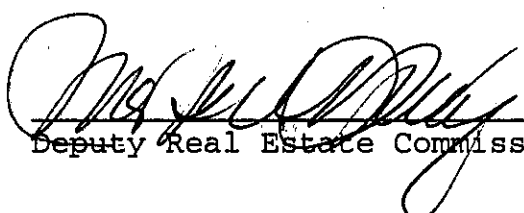
Respondent's conviction, as set forth in Paragraph 2 above, constitutes grounds to deny his application for a real estate license pursuant to Code Sections 480(c) and 10177(b).

These proceedings are brought under the provisions of Section 10100, Division 4 of the Business and Professions Code of the State of California and Sections 11500 through 11528 of the Government Code.

WHEREFORE, the Complainant prays that the above-entitled matter be set for hearing and, upon proof of the charges contained herein, that the Commissioner refuse to authorize the issuance of, and deny the issuance of, a real estate salesperson license to Respondent MARCELO ZERTUCHE and for such other and further relief as may be proper under the law.

Dated at Los Angeles, California

this 21st day of April, 2004.


Deputy Real Estate Commissioner

cc: Marcelo Zertuche
Plaza Realty (Guido A. Sacerio)
Sacto.
Maria Suarez
DW