

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED
JULY 28, 2008
DEPARTMENT OF REAL ESTATE

* * * * *

In the Matter of the Application of) No. H-34336 LA
JOSE AGUSTIN DURAN,) L-2008030688
Respondent.)

By C. Bay

DECISION

The Proposed Decision dated June 20, 2008, of the Administrative Law Judge of the Office of Administrative Hearings, is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

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

Page 1, paragraph No. 2, line 1, "June 25, 2005" is amended to read "January 25, 2005".

* Page 8, paragraph No. 4, line 5, "two of the courses listed in Section 10153.2," is amended to read "...a course in real estate practices and one of the courses listed in Section 10153.2,..."

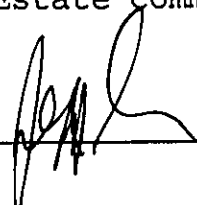
The application for a real estate salesperson license is denied, but the right to a restricted real estate salesperson license is granted to respondent. There is no statutory restriction on when a new application may be made for an unrestricted license. Petition for the removal of restrictions from a 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 August 18, 2008.

IT IS SO ORDERED 7-22-08

JEFF DAVI
Real Estate Commissioner



BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against:

JOSE AGUSTIN DURAN,

Respondent.

Case No. H 34336 LA

OAH No. L2008030688

PROPOSED DECISION

Administrative Law Judge Deborah Myers of the Office of Administrative Hearings heard this matter on May 28, 2008, in Los Angeles, California.

Lisette Garcia, Staff Counsel, represented Robin Trujillo (Complainant). Jose Augustin Duran (Respondent) represented himself.

Oral and documentary evidence was received, and the matter was submitted for decision on the hearing date.

The Administrative Law Judge makes the following factual findings and legal conclusions:

FACTUAL FINDINGS

1. Complainant brought this action in her official capacity as a Deputy Real Estate Commissioner, State of California.
2. On ~~June~~ ^{January} 25, 2005, Respondent applied to the Department of Real Estate (Department) for a real estate salesperson license, subject to the conditions of Business and Professions Code section 10153.4. The application was denied and this hearing ensued.
3. On September 10, 2002, in the Superior Court of California, County of Los Angeles, in Case no. 2DW04528, Respondent was convicted, on his nolo contendere plea, of violating Penal Code section 273.5, subdivision (a) (inflict corporal injury on a spouse), a misdemeanor.
4. The court suspended imposition of sentence and placed Respondent on summary probation for 36 months under certain terms and conditions, including

serving 30 days in house arrest and paying \$300 in fines and fees. Respondent was further ordered to stay 100 yards away from the victim, her place of residence and employment; to complete a one year domestic violence program; and to attend two Alcoholics Anonymous (AA) meetings per week for six months.

5. The facts and circumstances surrounding the conviction are that, on September 8, 2002, Respondent and his wife came home from a party. Respondent had consumed a large amount of alcohol, was very drunk and became jealous of his wife's past relationship with an ex-boyfriend. Respondent punched his wife on her head, face and upper torso with his closed right fist. His wife tried to protect herself with a pillow, but Respondent punched her on her lower left eye area with his right fist. His wife managed to scratch him in self-defense. Respondent's parents, who were in the house, heard a commotion, intervened and called the police. Respondent's wife's face was swollen and bruised as a result of Respondent's conduct.

6. As a factor in aggravation, on December 8, 1998, in the Superior Court of California, County of Los Angeles, in Case No. 8DW09418, Respondent was convicted, on his nolo contendere plea, of violating Business and professions Code section 25662, subdivision (a), (possession of alcohol by a minor), a misdemeanor, and Downey Municipal Code section 10112 (in park after closing hours), an infraction.

7. The court suspended imposition of sentence and placed Respondent on summary probation for 12 months under certain terms and conditions, including payment of a \$346 fine.¹

8. The facts and circumstances surrounding the conviction are that Respondent, at age 18, was in possession of a beer at a city park after 10:00 p.m. when the park had closed. To legally drink alcohol, one must be 21 years old.

9. As a further factor in aggravation, on September 17, 2003, in the Superior Court of California, County of Los Angeles, in Case No. 3DW04380, Respondent was convicted, on his nolo contendere plea, of violating Downey Municipal Code section 3331 (discharge fireworks), a misdemeanor.

10. The court suspended imposition of sentence and placed Respondent on summary probation for 12 months under certain terms and conditions, including payment of a \$456 fine.²

¹ For reasons not disclosed by the record, Respondent paid more than that amount: \$300 on June 8, 1999 and \$257 on August 25, 1999. On September 3, 1999, the court granted Respondent's motion to terminate probation.

² Respondent paid the fine on March 19, 2004.

11. The facts and circumstances surrounding the conviction are that Respondent purchased fireworks and discharged them on July 3, 2003, before July 4 when it is legal to do so.

12. As a further factor in aggravation, on March 7, 2007, in the Superior Court of California, County of Los Angeles, in Case No.6WW03283, Respondent was convicted, on his nolo contendere plea, of violating Vehicle Code section 23152, subdivision (a), (driving under the influence of alcohol), a misdemeanor.

13. The court suspended imposition of sentence and placed Respondent on summary probation for 36 months under certain terms and conditions, including serving two days in county jail, payment of fees and fines totaling \$1,491, completing a nine-month alcohol program, and obeying all laws and orders of the court. The record did not establish whether the Department of Motor Vehicles suspended his driver's license for his failure to submit to a breath or blood test.

14. The facts and circumstances surrounding the conviction are that, on June 12, 2006, Respondent drove a vehicle while intoxicated. He failed to use his left hand turn signal as required. The police officer detained Respondent, who smelled of alcohol and had red, watery eyes. During his field sobriety tests, Respondent exhibited slow responses, stiff body movements and horizontal nystagmus, all of which are signs of intoxication. Respondent refused to submit to a breath or blood alcohol test.

15. Respondent has completed the terms of his 1998, 2002 and 2003 probations, but the underlying convictions have not been expunged. With respect to the September 10, 2002 spousal battery conviction, Respondent demonstrated immediate compliance with his probationary orders. He completed his electronic monitoring by October 17, 2007. By the November 1, 2002, progress report hearing, which Respondent's wife attended, Respondent established that he enrolled in his domestic violence counseling program and provided a progress report of his AA attendance. As a result of Respondent's compliance, the court modified the protective order by deleting "sections 3D through 3G." The reasonable inference of this modification is that Respondent was allowed to see his wife and child and return to the family home. Respondent completed all the terms of his probation by November 19, 2003.

16. Respondent remains on probation for his 2007 conviction. On November 28, 2007, Respondent enrolled in his nine-month first offender drinking driving program through Harbor Area High Gain in Long Beach. The program requires his attendance in group meetings two hours, twice a month, in addition to individual counseling sessions and Alcoholics Anonymous (AA) meetings once a week. His sobriety date is February 3, 2008, and he has a sponsor. While Respondent has not yet completed the program, he has learned how alcohol affects his body and

mind. Respondent has learned tips on how to fight his cravings. He has watched videos demonstrating the devastating effects of alcohol related accidents, which he described as "an eye-opener" for him. However, he has not paid his probation fines.

17. In 2006, Respondent and his wife finalized their divorce. They share joint legal and physical custody of their eight-year-old son. Respondent is a responsible father, pays child support and volunteers as an assistant coach for his son's baseball team. He and his ex-wife now have a good relationship and speak to each other several times a week concerning their child. Respondent is now engaged to another woman, and he is looking forward to a new life.

18. At the administrative hearing, Respondent accepted responsibility for his wrongdoing and believed he has learned from his mistakes. He was ashamed of himself and how he hurt his family. Respondent regretted hurting his ex-wife. He explained that, prior to his conduct described in Finding 5, he and his wife had separated for several months. After they reconciled, Respondent became jealous when he saw his wife with her ex-boyfriend, whom she refused to stop dating. Respondent explained he did not know how to react appropriately to his jealousy, and he struck her. Respondent wished he had reacted differently, knowing the pain he inflicted on his wife, his family, and himself. Respondent complied with the terms of his probation, discussed in Finding 15. He believed his family has seen him change for the better.

19. Respondent completed vocational training by attending real estate courses. He passed the Department's licensure exam. He plans to enroll in real estate management courses at ITT Tech. Respondent works as a self-employed painter and has worked for his father, a contractor, since high school.

20. Respondent submitted 10 character reference letters written by his family and friends which described his growth and maturity since his divorce. Respondent's father believed in his son's abilities and would be willing to drive him to and from his client appointments until Respondent's driver's license is restored. Respondent's family and friends support his application for licensure as they believe he is responsible and has learned from his mistakes.

21. Alvin Mullins (Mullins), a real estate broker with Century 21 'Your Home Team' in Buena Park, testified in support of Respondent's licensure. Mr. Mullins is willing to take responsibility for hiring and supervising Respondent should Respondent become licensed as a real estate salesperson. He has known Respondent and his family since 1992 when Respondent was in high school. He believes Respondent is a great father. Since 1993, Mr. Mullins has hired Respondent and his father, a contractor, to help renovate his properties. Mr. Mullins has supervised Respondent's and his father's performance during various aspects of those remodels, including painting and tiling kitchens and bathrooms, and replacing the roofs on those properties. More recently, in 2004, Respondent worked in Mr. Mullins' real estate

office as an assistant by helping him to organize his files. Mr. Mullins had no complaints about Respondent's performance. Mr. Mullins is aware of Respondent's legal problems. He witnessed Respondent prevail through those "bad times" and his resulting depression. Mr. Mullins observed Respondent turn himself around, describing Respondent as a "much better person today," and one who has paid for the mistakes he made. Mr. Mullins does not believe that Respondent will make those mistakes again.

LEGAL CONCLUSIONS

1. Cause exists to deny Respondent's application for a real estate salesperson license, pursuant to Business and Professions Code section 475, subdivision (a)(2), section 480, subdivision (a) and section 10177, subdivision (b), for having a criminal conviction which is substantially related to the qualifications, functions or duties of a licensee under California Code of Regulations, title 10, section 2910, subdivisions (a)(8), as set forth in Findings 3 through 5.

2. Business and Professions Code section 475 authorizes the denial of a license if the licensee is convicted of a crime. Business and Professions Code section 480, subdivision (a), and section 10177, subdivision (b), authorize the Commissioner to suspend or revoke a license when the licensee has been convicted of a crime substantially related to the qualifications, functions or duties of a real estate licensee.

3. Respondent's conviction for violating Penal Code section 273.5, is substantially related to the qualifications, functions or duties of a real estate license pursuant to California Code of Regulations, title 10, section 2910, subdivisions; (a)(8), committing an unlawful act with the intent of doing substantial injury to the person of another. Further, because of Respondent's additional convictions, which are alleged as factors in aggravation, Respondent's corporal injury on a spouse conviction is substantially related to the qualifications, functions or duties of a real estate license pursuant to subdivision (a)(10), for demonstrating a pattern of repeated disregard for the law, as set forth in Factual Findings 6 through 14.

4. Penal Code section 273.5, subdivision (a) provides that:

Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony.

5. Complainant alleged that Respondent's conviction involved moral turpitude. Although that element is not necessary for Complainant to have grounds to deny Respondent's application, it would establish an additional factor in aggravation and a more serious affront to the public safety. *People v. Rodriguez*, (1992) 5 Cal. App. 4th 1398, established that a felony conviction for violating Penal Code section

273.5, subdivision (a) can involve moral turpitude because it evinced a general readiness to do evil.

The assailant must, at the very least, have set out, successfully, to inure a person of the opposite sex in a special relationship for which society demands, and the victim may reasonable expect, stability and safety, and in which the victim, for these reasons among others, may be especially vulnerable. To have joined in, and thus necessarily be aware of, that special relationship, and then to violate it willfully and with intent to injure, necessarily connotes the general readiness to do evil that has been held to define moral turpitude. *Rodriguez, supra*, at 1402.

6. In this case, unlike *Rodriguez*, Respondent's conviction for that crime was a misdemeanor. The issue is whether Respondent's misdemeanor conviction rises to the level of moral turpitude. An evaluation of the facts and circumstances underlying that crime shows that Respondent's conduct does not necessarily involve moral turpitude. Respondent's conduct included factors in mitigation, his intoxicated state and his jealousy toward his unfaithful wife, which would have impaired his reasoning and judgment. With such impaired reasoning and judgment, it cannot be said that Respondent evinced "a general readiness to do evil." Therefore, Complainant did not establish that Respondent's conviction involved moral turpitude.

7. As factors in aggravation, Respondent has three additional criminal convictions, as set forth in Factual Findings 6 through 14.

8. The next question is whether Respondent has established sufficient rehabilitation to justify the issuance of a real estate license. Rehabilitation is a "state of mind" and the law looks with favor upon rewarding with the opportunity to serve one who has achieved "reformation and regeneration." *Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058. Fully acknowledging the wrongfulness of past actions is an essential step towards rehabilitation. *Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940.

9. The Department has enacted regulations for use in the assessment of whether an applicant is rehabilitated, which are found at California Code of Regulation, title 10, section 2911, subdivisions (a) through (n). Respondent has met many of the criteria for rehabilitation, as set forth in Factual Findings 15 though 20.

10. Almost six years have passed since Respondent's spousal battery conviction which is alleged as the basis for denial of his application. This far exceeds the Department's guidelines of two years. (§2911, subd. (a).) Respondent successfully completed his probation for that conviction. (§2911, subd. (e).) Respondent paid his probationary fines. (§2911, subd. (g).) He developed a stable

family life by divorcing his wife and working out an amicable relationship with her, which benefits his son. Respondent fulfills his parental obligations by sharing joint legal and physical custody of his son, paying child support and volunteering as an assistant coach for his son's sports team. (§2911, subd. (h).) He completed vocational training by attending real estate courses and passing the real estate exam. (§2911, subd. (i).)

11. Most significantly, Respondent demonstrated a change in attitude by expressing genuine remorse and deep regret for having hurt his wife and his family. Respondent timely completed his one year domestic violence program, attended AA meetings for six months, and improved his relationship with ex-wife. As a result of his early compliance with court orders and his wife's support, the court modified its previous protective order. Further, Respondent provided oral and documentary evidence from family and friends who have witnessed his personal growth and his new attitude toward his ex-wife. Respondent's sponsoring broker and long time family friend believed Respondent has made great strides in his rehabilitation and is willing to hire him and supervise him as a real estate salesperson. (§2911, subd. (n).)

12. However, Respondent's convictions have not been expunged (§2911, subd. (c).) Nor has he abstained from the use of alcohol for a period of two years when his spousal battery was attributable in part to the use of alcohol. However, Respondent is now addressing his alcohol problem, is attending an alcohol program and AA meetings and is working with a sponsor. (§2911, subd. (f).)

13. Based on Legal Conclusions 9 through 12, Respondent has established sufficient rehabilitation to justify the issuance of a real estate license that, when conditions as set forth below, will adequately protect the public interest.

ORDER

WHEREBY THE FOLLOWING ORDER is hereby made:

Respondent Jose Agustin Duran's application for a real estate salesperson license is denied; provided, however, a restricted real estate salesperson's license shall be issued to Respondent pursuant to section 10165.5 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 the authority of Section 10156.6 of said Code:


1. 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 Land Law, Regulations of the Real Estate Commissioner or conditions attaching to this restricted license.

2. 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.

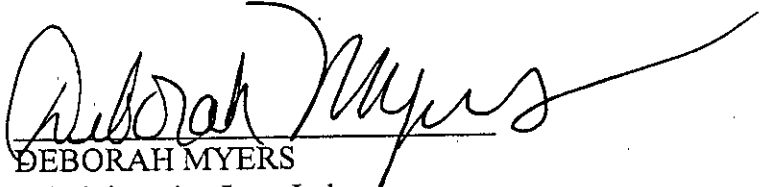
3. With the application for license, or with the application for transfer to a new employing broker, Respondent shall submit a statement signed by the prospective employing real estate broker on a form RE 552(Rev. 4/88) approved by the Department of Real Estate which shall certify as follows:

- (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.

4. 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 license revoked herein, 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 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 issuance of the license revoked herein. 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.

5. 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.

Date: June 20, 2008


DEBORAH MYERS
Administrative Law Judge
Office of Administrative Hearings

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FILED
SEP 27 2007
DEPARTMENT OF REAL ESTATE

By C

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Application of) NO. H-34336 LA
JOSE AGUSTIN DURAN,) STATEMENT OF ISSUES
Respondent.)

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

I

Respondent made application to the Department of Real Estate of the State of California, on or about January 25, 2005, for a real estate salesperson license, with the knowledge and understanding that any license issued as a result of said application would be subject to the conditions of Business and Professions Code Section 10153.4.

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II

1 On or about September 10, 2002, in the Superior Court
2 of California, County of Los Angeles, Downey Courthouse, Case
3 No. 2DW04528, on a plea of nolo contendere, Respondent was
4 convicted of violating Penal Code Section 273.5(A) (inflict
5 corporal injury on spouse), a misdemeanor. The underlying facts
6 of said crime involve moral turpitude and bear a substantial
7 relationship under Section 2910, Title 10, Chapter 6, California
8 Code of Regulations, to the qualifications, functions or duties
9 of a real estate licensee.
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12 MATTERS IN AGGRAVATION

13 III

14 On or about December 8, 1998, in the Superior Court of
15 California, County of Los Angeles, Downey Courthouse, Case
16 No. 8DW09418, on a plea of nolo contendere, Respondent was
17 convicted of violating Business and Professions Code Section
18 25662(A) (minor/possession of alcohol) and Downey Municipal Code
19 Section 10112 (in park after closing hours), misdemeanors.

20 IV

21 On or about September 17, 2003, in the Superior Court
22 of California, County of Los Angeles, Downey Courthouse, Case
23 No. 3DW04380, on a plea of nolo contendere, Respondent was
24 convicted of violating Downey Municipal Code Section 3331
25 (discharge fireworks), a misdemeanor.

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V

On or about March 7, 2007, in the Superior Court of California, County of Los Angeles, Whittier Courthouse Judicial District, Case No. 6WW03283, on a plea of nolo contendere, Respondent was convicted of violating Vehicle Code Section 23152(A) (driving under the influence of drugs or alcohol), a misdemeanor.

VI

The crime of which Respondent was convicted, as alleged in Paragraph II above, constitutes cause for denial of Respondent's application for a real estate license under Business and Professions Code Sections 475(a)(2), 480(a), 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 California Government Code.

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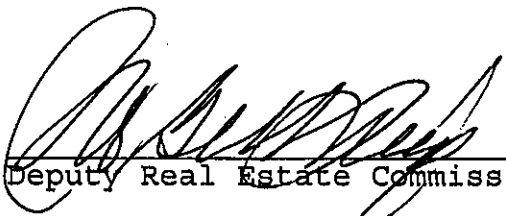
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1 WHEREFORE, the Complainant prays that the above-
2 entitled matter be set for hearing and, upon proof of the
3 charges contained herein, that the Commissioner refuse to
4 authorize the issuance of, and deny the issuance of, a real
5 estate salesperson license to Respondent, JOSE AGUSTIN DURAN,
6 and for such other and further relief as may be proper in the
7 premises.

8 Dated at Los Angeles, California

9 this 21st day of September, 2007.

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14 Deputy Real Estate Commissioner
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24 cc: Jose Agustin Duran
25 Your Home Team Real Estate, Inc./Alvin Lee Mullins
26 Sacto.
27 Maria Suarez