

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

By Laura B. Owen

* * * * *

In the Matter of the Accusation of)	No. H-34621 LA
)	L-2008020025
HERMES DAVID ESCOBAR,)	
)	
)	
Respondent.)	
_____)	

DECISION

The Proposed Decision dated April 18, 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.

The Decision suspends or revokes one or more real estate licenses, but the right to a restricted license is granted to Respondent.

The right to reinstatement of a revoked real estate license or to the reduction of a suspension is controlled by Section 11522 of the Government Code. A copy of Section 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock
noon on JUN 23 2008.

IT IS SO ORDERED 5-29-08

JEFF DAVIS
Real Estate Commissioner

[Signature]

BEFORE THE
DEPARTMENT OF REAL ESTATE .
STATE OF CALIFORNIA

In the Matter of the Accusation of:

HERMES DAVID ESCOBAR,

Respondent.

Case No. H-34621LA

OAH No. 2008020025

PROPOSED DECISION

This matter was heard by Michael R. Diliberto, Administrative Law Judge of the Office of Administrative Hearings, on March 20, 2008, in Los Angeles, California. Complainant, Joseph Aiu, was represented by James A. Demus, Staff Counsel, Department of Real Estate ("Department"). Respondent Hermes David Escobar appeared and represented himself.

Oral and documentary evidence was received and the matter was submitted for decision on March 20, 2008. The Administrative Law Judge makes his factual findings, legal conclusions and orders as follows.

FACTUAL FINDINGS

1. Complainant Joseph Aiu, Deputy Real Estate Commissioner of the Department of Real Estate, filed the Accusation in his official capacity.
2. Respondent is licensed by the Department as a real estate salesperson and has been so licensed since April 2, 2002.¹ Respondent's license was renewed on April 3, 2006 and will expire on April 4, 2010, unless renewed.
 - 3a. On April 4, 2006, in the California Superior Court, Riverside County, in Case No. RIM473920, Respondent was convicted, on his plea of guilty, of violating Penal Code section 490.5 (petty theft), a misdemeanor.
 - 3b. The court placed Respondent on probation for two years, under various terms and conditions, including incarceration in the Riverside County Jail for four days (which Respondent served by completing the Sheriff's Labor Program), payment of fines and restitution totaling \$374.00, and submitting to searches of his person and property with or without reasonable cause by any law enforcement or probation officer.

¹ Official notice was taken of the State of California Department of Real Estate's license information on its website database to establish the date the Department issued Respondent's real estate license.

3c. The facts and circumstances underlying the conviction are that on February 23, 2006, Respondent opened a box of AA batteries and placed the batteries inside his jacket.

Respondent paid for two food items, but he did not pay for the batteries, which were priced at about \$5.00. When the police arrived, the security guard conducted a private citizen's arrest, and Respondent was transported to the police station, where he was later released with his promise to appear in court on April 4, 2006.

3d. Respondent's crime involved theft and dishonesty and is a crime of moral turpitude substantially related to the qualifications, functions and duties of a real estate licensee. Respondent not only pled guilty to the crime, but also admitted to the police officer at the crime scene that he took the batteries without paying for them because he ran out of money.

4. At the hearing, Respondent denied that he committed the crime and was less than forthright when testifying about his criminal conduct. His testimony contradicted statements he made on the day of the crime when he admitted the theft, as well as his guilty plea. His lack of candor at the hearing supports a finding that he has not accepted full responsibility for his crime.

5. Respondent's criminal conviction is recent, having occurred less than two years ago, he remains on probation, and his crime has not been expunged. He offered little evidence of any further efforts he has made to rehabilitate himself.

6a. Thus far, Respondent has complied with the terms and conditions of his probation. He paid all court-ordered fines and restitution. He sought to expunge the crime from his record, but the Superior Court advised him that he would have to wait until his probation ends on April 3, 2008. There was no evidence that Respondent has committed any other crime or that he has had any other encounters with the criminal justice system. Respondent's criminal conduct did not occur while he was engaged in activities for which a real estate salesperson's license is required. And, the evidence shows that he has been a licensee for over three years with no other record or any complaints involving his license.

6b. Respondent is 55 years old. During the last six years, he has worked as a sales associate at four different real estate companies, without any reported incidents or complaints. He is currently employed as a sales associate, and has worked at that company since January 19, 2007. His work history at each company appears to be without incident. Respondent has lived in the Moreno Valley community for over twelve years. He is married, with two adult sons. He cares for a partially deaf son. At the time of the crime, Respondent was depressed and having marital problems with his wife.

LEGAL CONCLUSIONS

1. Business and Professions Code section 10177, subdivision (b), in conjunction with Business and Professions Code section 490, allow the Commissioner of Real Estate to suspend or revoke a real estate salesperson's license when the applicant has been convicted of a crime of moral turpitude that is substantially related to the qualifications, functions, or duties of a real estate licensee.²

2. Cause exists to suspend or revoke Respondent's real estate salesperson's license pursuant to Business and Professions Code section 10177, subdivision (b), in conjunction with Business and Professions Code section 490 based on Factual Findings 3a-3d and Legal Conclusions 3 and 4 below.

3a. The Commissioner of Real Estate cannot suspend or revoke a license unless the crime is substantially related to the qualifications, functions or duties of a real estate licensee. California Code of Regulations, title 10, section 2910, defines acts or instances that shall be deemed substantially related to the qualifications, functions, or duties of a licensee, to be considered in determining whether to suspend or revoke a real estate salesperson's license.

3b. Under section 2910, subdivision (a)(1), the fraudulent taking, obtaining, appropriating or retaining of funds or property belonging to another person is substantially related to the qualifications, functions, or duties of a real estate salesperson. Respondent admitted to the police officer at the crime scene that he took the batteries because he ran out of money. Respondent had a specific intent to steal the batteries from the store. Respondent's act of shoplifting is an act that is substantially related to the qualifications, functions, or duties of a real estate salesperson. (Factual Findings 3a.-3d.)

4. Respondent's crime of petty theft is a crime of moral turpitude on its face. He pled guilty to the crime and admitted the theft.

5. California Code of Regulations, title 10, section 2912, includes criteria to evaluate the rehabilitation of a licensee, in considering whether to revoke or suspend a licensee based on a crime committed by the licensee. Respondent has not satisfied the Department's applicable criteria for rehabilitation. For example, less than two years have passed since the date of Respondent's conviction (§ 2912, subd. (a).) A court has not expunged his conviction. (§ 2912, subd. (c).) Respondent has not completed his probation (§ 2912, subd. (e).) Respondent did

² The 2007 amendment to Business and Professions Code section 10177, subdivision (b) substituted "a crime substantially related to the qualifications, functions, or duties of a real estate licensee" for "a crime involving moral turpitude." However, this change in the statute was not made retroactive. "[A] statute may be applied retroactively only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application." (*Meyers v. Phillip Morris Companies, Inc.* (2002) 28 Cal. 4th 828, 844.)

not show new and different social and business relationships from those which existed at the time of the criminal conviction. (§ 2912, subd. (i).) Respondent did not establish significant and conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits. (§ 2912, subd. (l).) Further, there is an absence of corroborating evidence to determine whether Respondent has experienced a significant change in attitude from that which existed at the time he committed his crime. (§ 2912, subd. (m).) (Factual Findings 4-6.)

Although his lack of candor at the hearing shows that he has not accepted full responsibility for his crime, there was no evidence that his license has been the subject of any other complaints and Respondent does not have a criminal history, aside from this crime. Taking into consideration Respondent's depressed mental state at the time of the crime, and the fact that this crime appears to be an isolated event, it would not be against the public interest to issue a restricted license subject to appropriate terms and conditions. (Factual Findings 4-6.)

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

All licenses and licensing rights of Respondent under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson 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 ninety 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 the 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.

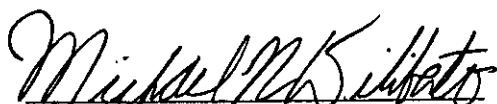
4. Respondent shall submit with any application for license under an employing broker, or any application for transfer to a new employing broker, a statement signed by the prospective employing real estate broker on a form approved by the Department of Real Estate which shall certify:

(a) That the employing broker has read the Decision of the Commissioner which granted the right to a restricted license; and

(b) That the employing broker will exercise close supervision over the performance by the restricted licensee relating to activities for which a real estate license is required.

5. 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: April 18, 2008


MICHAEL R. DILIBERTO
Administrative Law Judge
Office of Administrative Hearings

Suits

JAMES DEMUS, Counsel (SBN 225005)
Department of Real Estate
320 West 4th Street, Suite 350
Los Angeles, California 90013-1105

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DEPARTMENT OF REAL ESTATE

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BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of)	No. H-34621 LA
HERMES DAVID ESCOBAR,)	<u>A C C U S A T I O N</u>
Respondent.)	

The Complainant, Joseph Aiu, a Deputy Real Estate Commissioner of the State of California, for cause of Accusation against HERMES DAVID ESCOBAR, ("Respondent") alleges as follows:

1.

The Complainant, Joseph Aiu, a Deputy Real Estate Commissioner of the State of California, makes this Accusation in his official capacity.

2.

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

3.

On or about April 4, 2006, in the Superior Court of California, County of Riverside, in case no. RIM473920, Respondent was convicted of violating California Penal Code Section 490.5 (petty theft), a misdemeanor. The underlying facts of this crime involve moral turpitude, which bears a substantial relationship under Section 2910, Title 10, Chapter 6, California Code of Regulations to the qualifications, functions or duties of a real estate licensee.

4.

The crime of which Respondent was convicted, as described in Paragraph 3 above, constitutes cause under Sections 490 and 10177(b) of the Code for the suspension or revocation of the license and license rights of Respondent under the Real Estate Law.

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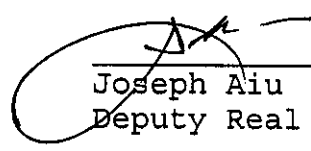
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1 WHEREFORE, Complainant prays that a hearing be
2 conducted on the allegations of this Accusation and that upon
3 proof thereof, a decision be rendered imposing disciplinary
4 action against all the licenses and license rights of
5 Respondent, HERMES DAVID ESCOBAR, under the Real Estate Law
6 (Part 1 of Division 4 of the Business and Professions Code) and
7 for such other and further relief as may be proper under other
8 applicable provisions of law.

9 Dated at San Diego, California

10 this 20 day of December,

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13 _____
14 Joseph Aiu
15 Deputy Real Estate Commissioner
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25 cc: HERMES DAVID ESCOBAR
26 Bravo Realty.com
27 Joseph Aiu
Sacto.