

FILED
MARCH 27, 2009
DEPARTMENT OF REAL ESTATE

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

By CS

* * * * *

In the Matter of the Application of) No. H-35407 LA
GONZALO FERNANDEZ ORTEGA,) L-2008120082
Respondent.)

DECISION

The Proposed Decision dated February 24, 2009, 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.

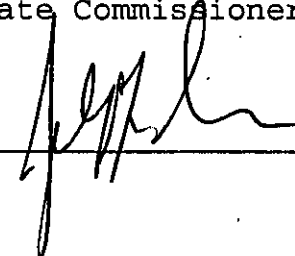
If and when application is made for a real estate salesperson license through a new application or through a petition for removal of restrictions, all competent evidence of rehabilitation presented by the Respondent will be considered by the Real Estate Commissioner. A copy of the Commissioner's Criteria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

This Decision shall become effective at 12 o'clock noon on APRIL 16, 2009.

IT IS SO ORDERED

3/24/09

JEFF DAVI
Real Estate Commissioner



BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

GONZALO FERNANDEZ ORTEGA,

Respondent.

Case No. H-35407 LA

OAH No. 2008120082

PROPOSED DECISION

This matter was heard before Administrative Law Judge Dian M. Vorters, State of California, Office of Administrative Hearings, on January 27, 2009, in Los Angeles, California.

Lisette Garcia, Counsel, Department of Real Estate, represented the complainant.

Gonzalo Fernandez Ortega appeared on his own behalf.

The case was submitted for decision on January 27, 2009.

FACTUAL FINDINGS

1. Complainant, Maria Suarez, a Deputy Real Estate Commissioner of the State of California, filed the Statement of Issues in her official capacity on October 23, 2008.

2. On or about July 25, 2007, respondent made application to the Department of Real Estate of the State of California (Department) for a real estate salesperson license. The application is subject to the provisions of Business and Professions Code section 10153.4.

Criminal Conviction History

3. On February 2, 2001, respondent was convicted in the Superior Court of California, County of Orange, in Case Number 00WF2712, on his plea of guilty, of violating two counts of Penal Code section 529.3 (false personation – causing victim to become liable), both felonies; and Vehicle Code section 14601.1, subdivision (a) (driving on a suspended/revoked license), a misdemeanor. Imposition of sentence was suspended, and respondent was placed on three years informal probation, with terms and conditions, including 45 days alternative work service, and fines/restitution in the amount of \$1,000.

The court later converted a balance of 25 days work service to community service. On April 15, 2004, the court reduced the Penal Code section 529.3 convictions to misdemeanors (Pen. Code, §17, subd. (b)), ruled that respondent had complied with all terms of probation, and dismissed all three convictions. (Pen. Code, § 1203.4.)

The facts and circumstances of the convictions were these: Prior to November 1999, respondent's driver's license was suspended. A friend of respondent's named Arthur, allowed respondent to use his license in the event respondent was stopped. Respondent was stopped by law enforcement on November 17, 1999, and September 23, 2000. After the first stop, respondent gave Arthur \$300 to pay the fines related to the citation. However, at the time of the second stop, respondent learned that Arthur had not paid the prior citation and as a result, Arthur's license status was suspended. Respondent was arrested for using a false driver's license.

4. On March 27, 1987, respondent was convicted in the Superior Court of California, County of Los Angeles, in Case Number 87M00258, on his plea of guilty, of violating Penal Code section 602, subdivision (j) (trespassing),¹ a misdemeanor. Respondent was ordered to pay fines of \$500. No jail time or alternative work service was ordered.

The facts and circumstances of the conviction were these: Respondent and a friend, who worked at a retail store, agreed that respondent would select merchandise, go to his friend's cashier line, and receive an unauthorized discount. In December 1986, respondent went to the store, selected merchandise consisting of seat covers, a food processor, a portable stereo, and some toys. The merchandise value came to approximately \$300, however, respondent was charged \$0. Respondent left the store without paying for the value of the goods and was arrested outside.

At hearing, respondent testified that at the time of the theft, he was twenty five years old, a full-time student at DeVry, and working part-time. The goods were to be Christmas presents for family members. He stated, "In 1987 I was in school and did something really dumb."

Licensing Application

5. Respondent signed an application for licensure as a real estate salesperson on July 23, 2007, under penalty of perjury that the "foregoing answers and statements given in this application are true and correct . . ." Respondent did disclose his February 2001 convictions in Case No. 00WF2712. Respondent did not disclose his 1987 conviction in Case No. 87M00258. At hearing, respondent explained that it was not his intent to mislead

¹ The 1987 version of Penal Code section 602, subdivision (j), makes it a misdemeanor to "Enter any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent or by the person in lawful possession."

the department, that the trespass conviction occurred 20 years ago, and at the time he completed the application, he had forgotten about this matter.

Mitigation/Rehabilitation

6. Respondent is 46 years old. He is not on probation for any offense. In 2004, he hired an attorney to have his 2001 convictions successfully expunged. He holds a valid, unrestricted California Driver's License. Respondent is divorced and has two children, a daughter, age 12, who lives with him and an adult son who is age 21. Respondent paid child support for his son from age six to 18. Respondent coached soccer for three years and previously coached little league for nine years.

7. Respondent obtained his Bachelor of Arts degree in Engineering in 1987. He currently works as a broker's assistant at Figueroa Financial Real Estate where he has been since March 2008. He has known the owner, John Figueroa, since 2000 and has assisted him in the past at a company called Monta Vista Mortgage. Respondent has disclosed his convictions to Mr. Figueroa and has discussed working with Mr. Figueroa as a real estate salesperson if a license is granted. Respondent is also interested in originating loans under a broker. Respondent has completed the real estate principles course.

LEGAL CONCLUSIONS

Applicable Statutes and Regulations

1. Business and Professions Code section 480, subdivisions (a) and (c) state, in relevant part::

(a) A board may deny a license regulated by this code on the grounds that the applicant has one of the following:

(1) Been convicted of a crime. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action which a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code.

(2) Done any act involving dishonesty, fraud or deceit with the intent to substantially benefit himself or another, or substantially injury another;

[¶]...[¶]

The board may deny a license pursuant to this subdivision only if the crime or act is substantially related to the qualifications, functions or duties of the business or profession for which application is made.

[¶]...[¶]

- (c) A board may deny a license regulated by this code on the ground that the applicant knowingly made a false statement of fact required to be revealed in the application for such license.

- 2. Business and Professions Code section 10177, subdivisions (a) and (b),² state in relevant part:

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:

- (a) Procured, or attempted to procure, a real estate license or license renewal, for himself or herself or any salesperson, by fraud, misrepresentation, or deceit, or by making any material misstatement of fact in an application for a real estate license, license renewal, or reinstatement.
- (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, irrespective of an order granting probation following that conviction, suspending the imposition of sentence, or of a subsequent order under section 1203.4 of the Penal Code allowing that licensee to withdraw his or her plea of guilty and to enter a plea of not guilty, or dismissing the accusation or information.

- 3. California Code of Regulations, title 10, section 2910 states, in relevant part:

- (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

² The language of Business and Professions Code section 10177, subdivision (b), was modified by the legislature, effective January 1, 2008, such that the Department is no longer required to prove that misdemeanor convictions occurring after that date involve moral turpitude. Respondent's application for licensure was filed July 25, 2007, hence, the Department has alleged and must establish moral turpitude for his misdemeanor criminal convictions.

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:

[¶] ... [¶]

- (2) Counterfeiting, forging or altering of an instrument or the uttering of a false statement.

[¶] ... [¶]

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

[¶] ... [¶]

- (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.

[¶] ... [¶]

- (c) If the crime or act is substantially related to the qualifications, functions or duties of a licensee of the department, the context in which the crime or acts were committed shall go only to the question of the weight to be accorded to the crime or acts in considering the action to be taken with respect to the applicant or licensee.

Moral Turpitude

4. The California Supreme Court has divided crimes of moral turpitude into two groups. "The first group includes crimes in which dishonesty is an element (i.e., fraud, perjury, etc.). The second group includes crimes that indicate a 'general readiness to do evil.'" (*People v. Castro* (1985) 38 Cal.3d 301, 315; *People v. Chavez* (2000) 84 Cal.App.4th 25, 28.) Acts of moral turpitude encompass "everything done contrary to justice, honesty, modesty or good morals." (*Rice v. Alcoholic Beverage Control Appeals Board* (1979) 89 Cal.App.3d 30, 36.)

Certain crimes establish moral turpitude on their face. (*People v. Brown* (1985) 169 Cal.App.3d 800, 806.) For these crimes, the court need not look to the circumstances surrounding the offense because they "necessarily involve intent to defraud or intentional dishonesty" or are "so repugnant to accepted moral standards that it is clear that moral turpitude is involved." (*Ibid.*) Moral turpitude must be inherent in the crime itself to warrant cancellation or suspension of a license because of the conviction. (*Lorenz v. Board of Medical Examiners* (1956) 46 Cal.2d 684, 686.) "If other acts committed at the same time as the offense for which a licensee is convicted constitute unprofessional conduct, the licensee may be disciplined for those acts. He must, however be charged with such acts." (*Ibid.*) In disciplinary proceedings, where the nature of the conviction is central, rather than collateral to the proceeding, "notice must be afforded the employee before the matter is tried." (*Padilla v. State Personnel Board* (1992) 8 Cal.App.4th 1136, 1140.)

Respondent's convictions for false personation in violation of Penal Code section 529.3, are felonies and also involve moral turpitude. (Bus. & Prof. Code, § 10177, subd. (b).) Respondent's misdemeanor convictions for trespass in violation of Penal Code section 602, subdivision (j), and driving on a suspended/revoked license in violation of Vehicle Code section 14601.1, subdivision (a), do not amount to a crimes of moral turpitude, for the reasons stated above. The underlying acts were not separately alleged by complainant and will be considered as facts in aggravation only.

Substantial Relationship

5. Respondent's felony convictions for false personation in violation of Penal Code section 529.3, as set forth in Finding 3, are substantially related to the qualifications, functions and duties of a real estate licensee as defined in California Code of Regulations, title 10, section 2910, subdivisions (a)(2), (4) and (7), uttering a false statement, employing fraud, deceit, falsehood or misrepresentation to achieve an end, and willfully violating a statutory requirement that a license be obtained before engaging in a course of conduct.

Cause for Discipline

6. Cause for denial of respondent's application for a real estate salesperson license exists pursuant to Business and Professions Code sections 480, subdivision (a)(1), and 10177, subdivision (b), in conjunction with California Code of Regulations, title 10, section 2910, subdivisions (a)(2), (4) and (7), by reason of Factual Finding 3, and Legal Conclusions 4 and 5, in that respondent has been convicted of felony false personation, a crime that is substantially related to the qualifications, functions and duties of a real estate salesperson.

7. Cause for denial of respondent's application for a real estate salesperson license exists, pursuant to Business and Professions Code sections 480, subdivision (c), and 10177, subdivision (a), by reason of Factual Finding 5, in that respondent failed to fully disclose his history of convictions in his license application.

8. Cause for denial of respondent's application for a real estate salesperson license was not established by reason of his misdemeanor convictions for trespass (Pen. Code, §602, subd. (j)) and driving on a suspended license (Veh. Code, §14601.1, subd. (a)), in that these crimes do not involve moral turpitude (Finding 4), as is required for misdemeanor convictions occurring prior to January 1, 2008. (Bus. & Prof. Code, §10177, subd. (b); *Petropoulos v. Dept. of Real Estate* (2006) 142 Cal.App.4th 554, 565, 567.)

Fitness For Licensure

9. The department has developed guidelines for use in evaluating the rehabilitation of an applicant for issuance of a license. (Cal. Code Regs., title 10, § 2911, subds. (a)-(n).) Additionally, the context in which qualifying crimes or acts were committed goes to the question of weight to be accorded the offending conduct in considering the disciplinary action to be taken. (Cal. Code Regs., tit. 10, § 2910, subd. (c).)

10. In consideration of these guidelines, in 2001, respondent was convicted of false personation, a crime that is substantially related to the qualifications and duties of a real estate salesperson. In 1999 and 2000, respondent used his friend Arthur's driver's license, with Arthur's knowledge and consent. When respondent was first stopped, he reimbursed Arthur for the price of the ticket in the amount of \$300. When respondent was next stopped, he learned that the prior ticket had not been paid and he was arrested for using another's license. The last incident occurred eight years ago. Respondent has paid all of his court ordered fines/restitution. He is not on probation for any qualifying offense. His 2001 convictions were reduced to misdemeanors and dismissed by the Superior Court on April 15, 2004.

11. With respect to the omission in his application for licensure, respondent testified that he did not intentionally fail to disclose the March 1987 conviction for misdemeanor trespass, but simply forgot about the matter. At hearing, respondent did not attempt to mitigate or downplay the details of the incident which took place in December 1986. At the time of the offense, respondent was 25 years old and in his last year of college. Given that the matter occurred 20 years ago and considering respondent's candor at hearing, his explanation is credible.

12. Respondent is now 46 years old. He has earned a degree in engineering. He has an adult son and is helping to raise his 12-year-old daughter. He has worked as a broker's assistant for the last year and has established a relationship with the owner, Mr. Figueroa. He appears to have taken responsibility for his past bad choices. In preparation for his license, respondent has completed the real estate principles course. Several years have passed since respondent has had any negative contact with law enforcement. Given the positive and productive lifestyle respondent has created for himself and his family, he has shown the requisite rehabilitation for successful licensure.

Conclusion

13. Respondent has sustained his burden to establish that he can be licensed at this time without harm to the public, with appropriate restrictions and conditions.

ORDER

The application of Gonzalo Fernandez Ortega, for a real estate salesperson license is denied by reason of Legal Conclusions 4 through 7; provided, however, that pursuant to Legal Conclusions 9 through 13, a conditional restricted real estate salesperson license shall be issued to respondent pursuant to Business and Professions Code section 10156.5. The restricted license issued to respondent shall be subject to all of the provisions of Business and Professions Code section 10156.7, 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 Lands 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 three (3) 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:

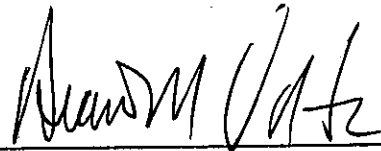
(a) That the employing broker has read the Decision which is the basis for the issuance of the restricted license; and

(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 Business and Professions Code section 10153.4, 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 a course in real estate practices and one 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.

5. Pursuant to Business and Professions Code 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.

Dated: February 24, 2009



DIAN M. VORTERS
Administrative Law Judge
Office of Administrative Hearings

576
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FILED
OCT. 23, 2008
DEPARTMENT OF REAL ESTATE

By C.B.

7
8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Application of) NO. H-35407 LA
12)
13 GONZALO FERNANDEZ ORTEGA,) 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 GONZALO FERNANDEZ ORTEGA ("Respondent"), is informed and
19 alleges in her official capacity as follows:

20 I

21 On or about July 25, 2007, Respondent made application
22 to the Department of Real Estate of the State of California for
23 a real estate salesperson license with the knowledge and
24 understanding that any license issued as a result of said
25 application would be subject to the conditions of Business and
26 Professions Code Section 10153.4.

FIRST CAUSE FOR DENIAL
(CRIMINAL CONVICTIONS)

II

On or about February 2, 2001, in the Superior Court of California, Orange County, Case No. 00WF2712, Respondent was convicted of violating two counts of Penal Code Section 529.3 (false personation-causing victim to become liable), felonies, and one count of Vehicle Code Section 14601.1(a) (driving on a suspended/revoked license), a misdemeanor. The underlying facts of said crimes involve moral turpitude and bear a substantial relationship to the qualifications, functions or duties of a real estate licensee pursuant to Section 2910, Title 10, Chapter 6, of the California Code of Regulations.

III

On or about March 27, 1987, in the Superior Court of the State of California, Los Angeles County, Case No. 87M00258, as part of a plea agreement, Respondent pled guilty to and was convicted of violating Penal Code Section 602(J) (trespass), a misdemeanor. The underlying facts of said crime involve moral turpitude and bear a substantial relationship to the qualifications, functions or duties of a real estate licensee pursuant to Section 2910, Title 10, Chapter 6, of the California Code of Regulations.

IV

The crimes of which Respondent was convicted, as alleged in Paragraphs II and III above, constitute cause for denial of Respondent's application for a real estate license

1 under Business and Professions Code Sections 475(a)(2), 480(a)
2 and 10177(b).

3 SECOND CAUSE FOR DENIAL
(FAILURE TO REVEAL CONVICTION)

4 V

5 In response to Question 25 of the license application,
6 to wit: "HAVE YOU EVER BEEN CONVICTED OF ANY VIOLATION OF LAW?
7 CONVICTIONS EXPUNGED UNDER PENAL CODE SECTION 1203.4 MUST BE
8 DISCLOSED. HOWEVER, YOU MAY OMIT MINOR TRAFFIC CITATIONS WHICH
9 DO NOT CONSTITUTE A MISDEMEANOR OR FELONY OFFENSE", Respondent
10 did not mark a response and failed to reveal the conviction
11 described in Paragraph III above.

12 VI

13 Respondent's failure to disclose the conviction, as
14 set forth in Paragraph III above, in his license application,
15 constitutes the attempt to procure a real estate license by
16 fraud, misrepresentation, or deceit, or by making a false
17 statement of material fact required to be revealed in said
18 application, which is grounds for denial of the issuance of a
19 license under Business and Professions Code Sections 475(a)(1),
20 480(c) and 10177(a).

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

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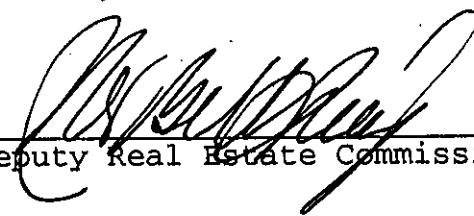
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1 WHEREFORE, the Complainant prays that the above-
2 entitled matter be set for hearing and, upon proof of the
3 charges contained herein, that the Commissioner refuse to
4 authorize the issuance of, and deny the issuance of, a real
5 estate salesperson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

8 Dated at Los Angeles, California

9 this 30th day of September, 2008.

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12 Deputy Real Estate Commissioner
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24 cc: Gonzalo Fernandez Ortega
25 Maria Suarez
26 Sacto.
27