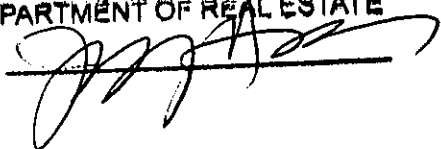


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FILED

JAN 11 2012

DEPARTMENT OF REAL ESTATE
BY: 

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * * *

In the Matter of the Application of)
)
DAVID WAYNE BRIZENDINE,)
)
)
Respondent.)

No. H-37064 LA
L-2011031556

DECISION AFTER REJECTION

Howard Posner, Administrative Law Judge ("ALJ") of the Office of Administrative Hearings, heard this matter on May 19, 2011, in Los Angeles, California. Julie To, Staff Counsel, represented Complainant Robin Trujillo ("Complainant"), a Deputy Real Estate Commissioner for the California Department of Real Estate ("Department"). Robert K. Steinberg, Attorney at Law, represented Respondent DAVID WAYNE BRIZENDINE ("Respondent"), who was present.

Oral and documentary evidence was received, and the matter was submitted on May 19, 2011. On June 20, 2011, the ALJ submitted a Proposed Decision which I declined to adopt as my Decision herein.

Pursuant to Section 11517(c) of the Government Code of the State of California, Respondent was served with notice of my determination not to adopt the Proposed Decision of the ALJ, along with a copy of the Proposed Decision. Respondent was notified that I would

1 decide the case upon the record, the transcript of proceedings held on May 19, 2011, and upon
2 any written argument offered by Respondent and Complainant. Respondent and Complainant
3 submitted further written argument.

4 I have given careful consideration to the record in this case, including the
5 transcript of proceedings of May 19, 2011. I have also considered the arguments submitted by
6 Respondent and Complainant. The following shall constitute the Decision of the Real Estate
7 Commissioner in this proceeding:

8 FINDINGS OF FACT

9 1. Complainant, Robin Trujillo, a Deputy Real Estate Commissioner of the State
10 of California, filed the Statement of Issues in her official capacity.

11 2. On March 11, 2010, Respondent submitted an application for a real estate
12 salesperson license to the Department. In response to Part D, Question No. 1 of his application,
13 to wit: "HAVE YOU EVER BEEN CONVICTED OF A MISDEMEANOR OR FELONY?
14 CONVICTIONS EXPUNGED UNDER PENAL CODE SECTION 1203.4 MUST BE
15 DISCLOSED. HOWEVER, YOU MAY OMIT TRAFFIC CITATIONS WHICH DO NOT
16 CONSTITUTE A MISDEMEANOR OR FELONY," Respondent answered "NO." In so doing,
17 Respondent failed to reveal the conviction set forth below.

18 3. On October 3, 2005, in the Los Angeles County Superior Court, Case No.
19 SA053034, Respondent was convicted on his plea of no contest to violating Penal Code Section
20 261.5(b), unlawful sexual intercourse with a minor not more than three years younger than
21 himself, a misdemeanor. The court found that there was a factual basis for the plea.
22 Respondent was sentenced to 36 months probation, ordered to complete 52 weeks of therapy,
23 and ordered to stay away from any victims or witnesses involved in the case. No fines,
24 penalties or restitution was ordered. Probation was terminated early, and the conviction
25 dismissed pursuant to Penal Code Section 1203.4 on April 17, 2007.

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1 4. The incident that resulted in the conviction occurred June 24, 2004, when
2 Respondent was 18¹, and the minor with whom he had sexual relations ("the minor") was 15 or
3 16. Respondent and another male friend got together with the minor and her female friend
4 women for an evening. They ended up at a party with several older young adults at the home of
5 Respondent's friend. There was alcohol consumed at this party. Respondent testified that he
6 knew the young women were still in high school, and thought the victim was about 16. He and
7 the minor drank countless multiple shots of rum. Respondent admits that he and the victim
8 went into a separate room and were engaging in sexual activity. Respondent also admits that
9 they were both very drunk. Respondent testified that he does not remember actually having
10 intercourse and thought he did not. However, he also testified that in light of both his and the
11 minor's extreme inebriation, he conceded that it was possible that penetration might have
12 occurred and he just does not remember. He also does not deny that that is where the conduct
13 was heading. Respondent testified that he pled no contest because he thought, and still thinks,
14 that he broke the law by having sexual relations with a minor, regardless of whether or not the
15 act was consummated. He also believes that his conduct was wrong, given the totality of the
16 circumstances, and the minor's age.

17 5. The reports of the sheriffs' deputies and detectives who made the arrest and
18 investigated the incident were admitted into evidence, subject to the limitations of *Lake v.*
19 *Reed*.² There were four witnesses interviewed, including Respondent, the minor, his friend and
20 her friend. Memories and observations of the non-participating witnesses recounted in the
21 reports differ only as to some specific details. The friends came into the room where
22 Respondent and the minor were on the floor, engaged in sexual activities and interrupted what
23 they were doing. The minor's friend, who apparently was the only sober one, became
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25 ¹ He was born December 11, 1985.

26 ² These reports were admitted subject to the limitations set forth in *Lake v. Reed* (1997) 16 Cal.4th 448, which holds
27 that a police officer's written report, although hearsay, is admissible (as direct evidence) in an administrative
hearing to the extent it contains the officer's personal observations, forensic reports, or statements that are otherwise
admissible, such as admissions of the party who is adverse to the agency conducting the hearing. Other than
officers' personal observations and Respondent's statements, the reports may only be used as administrative
hearsay, to supplement or explain other evidence, but not to support independent findings of fact.

1 extremely upset and concerned for the safety of the minor, who appeared to be severely
2 impaired due to her inebriation. According to the report, the friend notified the police. The
3 night of the arrest, the investigator found that the minor was too inebriated to interview. She
4 was observed to have bruises on her head and knees, which were attributed (by all accounts) to
5 her bumping into things and falling down due to her impaired state. When she was interviewed
6 the next day, she denied having intercourse, which she indicated she thought she would
7 remember. She also did not recall her interactions with the sheriff's deputies the night before.

8 6. There is no dispute that at the time Respondent had sexual relations with the
9 minor, that they were both drunk, and that she was drunk to the point of banging into things and
10 hurting herself. In this context, her extreme intoxication and impairment, at very minimum, the
11 sexual activities posed a risk or threat of substantial harm or injury. The total facts and
12 circumstances were therefore such that the conviction was substantially related to the
13 qualifications, functions and duties of a real estate licensee³.

14 7. Respondent did not disclose the criminal conviction in his application for a
15 license. Respondent admits that he was unduly hasty in his initial reading of the questions in the
16 application. Respondent testified that when he submitted the application he believed that the
17 whole case had been dismissed on April 17, 2007, since he had completed the required therapy and
18 condition of his probation. He said he read the word "expunged" in Section D, Question 1 and
19 therefore did not think he had to disclose the conviction. Respondent explained that his lawyer told
20 him as they left the courtroom on April 17, that the dismissal made the criminal case "as if it had
21 never happened." Plaintiff's father, Daniel Brizendine, who was involved with every step of the
22 court proceedings and dealt with the defense lawyer more than Respondent did, testified to the
23 same conversation. The ALJ found that Respondent's testimony, and that of his father, was

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25 reasonable and credible. Nonetheless, Respondent's answer to the question on the application was
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³ Title 10, Chapter 6, Regulation 2910(a)(8) is discussed in the Legal Conclusions below.

1 not correct, and his misstatement was material.⁴

2 8. After Respondent's application was initially submitted to the Department on or
3 about March 11, 2010, there were follow-up communications from the Department requesting
4 further documentation and updating him on the status of the review process. Respondent had
5 occasion to review the application, and read Section D, Question 1 more carefully. After reading
6 the lengthier explanation, which explained that certain "dismissals" should also be disclosed,
7 Respondent realized he should obtain copies of the court documents to be sure he had not made a
8 mistake. Respondent went to the courthouse and obtained a copy of the criminal docket on June
9 15, 2010. He then called the Department the same day, and asked for clarification of the meaning
10 of the terms "expunged" and "dismissed". He notified the Department of his omission, and
11 provided a copy of the docket reflecting the dismissal pursuant to Penal Code Section 1203.4.
12 Respondent also wrote the Department a letter pointing out his error. He appeared for an interview
13 with the Enforcement section and cooperated fully with the Department's process.

14 9. The ALJ found that Respondent did not attempt to obtain a real estate license by
15 misrepresentation or deceit, or by "knowingly making a false statement of fact" required to be
16 revealed in his application. However, as Respondent fully admits, he did make a material
17 misstatement of fact in his application, due to a combination of haste in completing the application,
18 and a misunderstanding of the legal status of his conviction.

19 10. At hearing, Respondent described changes he has made in his life since he was
20 18. Respondent dealt with his 2004 arrest as a wakeup call. He broke off contact with his circle of
21 acquaintances, and has not seen anyone who was at the June 24, 2004 party since that night. He no
22 longer is a fan of the partying lifestyle he was involved in when he was 18. He completed the
23 required therapy sessions. In 2005, Respondent moved from the Los Angeles area to San Diego,
24 where he attended Mesa City College and worked at a restaurant. In 2007, he moved to Denver,

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26 ⁴ Even if the conviction were not substantially related to the qualifications, functions and duties of a real estate
27 licensee, the Department was entitled to investigate the facts and circumstances surrounding the conviction as part
of the application process to make that determination, and the fact of the conviction was "material." See Business
and Professions Code Section 493.

1 where he attended college and worked as a server in one restaurant, then as assistant manager at
2 another. There was no evidence about what, if any, degree he obtained. He returned to his
3 mother's house in Santa Monica in 2009 and completed correspondence courses in real estate
4 principles, real estate practice, and escrow in early 2010.

5 11. Respondent's parents, including his mother, father and step father, all support
6 Respondent's obtaining a real estate license. Respondent's father, Daniel Brizendine, testified in
7 support of Respondent, and his mother and stepfather provided letters on his behalf. Respondent's
8 parents divorced when he was a teenager, causing stress and considerable "acting out."
9 Respondent's father described some of the challenges Respondent faced as a teenager, his legal
10 struggles as an 18 year old, and ways in which he has matured over the past seven years. His
11 parents and step father find Respondent to be an honest and hardworking individual and are proud
12 of the strides he has made in maturing into a responsible and trustworthy adult.

13 12. Respondent has worked as an assistant in real estate offices in Santa Monica.
14 Real Estate licensee Daniel Lackey offered a declaration attesting to the fact that he hired
15 Respondent to assist him in his real estate office, where Respondent participated in a training
16 program that covered practices, procedures and ethics. Mr. Lackey knows about Respondent's
17 criminal past and finds him to be an honest, straightforward young man. Mr. Lackey trusts
18 Respondent with his business and the key to his desk, and believes that given the chance,
19 Respondent will be a great realtor who upholds standards of integrity and ethics.

20 13. Real estate licensee Regina Vannicola testified at hearing on behalf of
21 Respondent. She is also aware of his criminal past and questions relating to his application.
22 Respondent has worked as her assistant in her real estate office, and she would very much like for
23 him to get his license so she can put him to further use as an a sales associate. She has worked
24 closely with him, and trusts him with her personal and business information. Ms. Vannicola is a
25 top producing agent and regular instructor for the Keller Williams training program. In her
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27 leadership role, she has seen many agents, and finds him to be trustworthy, knowledgeable and

1 helpful.

2 14. Respondent described a charitable endeavor he started called "Treats for the
3 Streets." This is an informal program in which he collects shoes and coats for homeless persons.
4 In one event, he held a birthday party for himself at which he required donation of shoes or coats as
5 a "cover charge."

6 LEGAL CONCLUSIONS

7 1. Grounds exist to deny Respondent's application for a real estate license for
8 making a material misstatement of fact in his application. Business and Profession Code
9 Section 10177(a) permits the denial of an application for a real estate license when the
10 applicant, "Procured, or attempted to procure, a real estate license ... by fraud,
11 misrepresentation, or deceit, or by making a material misstatement of fact in an application for
12 a real estate license..." In this case, Respondent answered "No," when asked if he had ever
13 been convicted of a misdemeanor or felony. Whether or not it was due to his haste and/or
14 misunderstanding of the status of his conviction, Respondent made a material misstatement of
15 fact in his application.

16 a) Although the conviction was dismissed pursuant to Penal Code Section
17 1203.4, the application and accompanying materials clearly asked about such convictions.
18 Indeed, in reviewing his application and materials more closely a few months after his initial
19 submission, Respondent, in hindsight, recognized his mistake. He promptly went to the court to
20 obtain correct records and immediately notified the Department.

21 b) Respondent explained that he erroneously believed that his conviction and the
22 entire criminal case had been dismissed when he completed the terms of probation, based on
23 express statements made to him at that time by the court and by his attorney. The ALJ found
24 Respondent's explanation to be reasonable and credible, and opined that Respondent did not
25 knowingly make a material misstatement of fact. However, the Real Estate Law is designed to
26 protect the public not only from conniving or dishonest agents, but also from those who are
27 negligent. *Handeland v. DRE* (1976) 58 Cal.App.3d 513. Business and Professions Code

1 Section 10177(a) does not require that the material misstatement of fact in the application be
2 made with the intent to defraud or deceive.

3 2. Grounds exist to deny Respondent's application pursuant to Business and
4 Professions Code Sections 10177(b) or 480(a) due to his 2005 conviction for violating Penal
5 Code Section 261.5(b), a crime that, pursuant to the facts and circumstances of this case, is
6 substantially related to the qualifications, functions and duties of a real estate licensee pursuant
7 to Title 10, Chapter 6 of the California Code of Regulations, Regulation 2910(a)(8).

8 (a) For all legal purposes, including these administrative proceedings,
9 Respondent's conviction is conclusive evidence of having committed the acts constituting a
10 violation of Penal Code Section 261.5(b), to wit: that he had unlawful sex with a minor who
11 was not more than three years younger than him. Therefore, violation of Penal Code Section
12 261.5(b) is not, as a matter of law, a per se "substantially related crime."

13 (b) However, pursuant to Business and Professions Code section 493, the
14 Department may examine the facts and circumstances leading to the conviction to determine
15 whether or not the conduct leading to the conviction is "substantially related to the
16 qualifications, functions and duties of a real estate licensee," and to determine the appropriate
17 measure of discipline. (Business and Professions Code Section 493). A consideration of the
18 underlying facts and circumstances leading to the conviction were such that while Respondent
19 may not have intended to harm the minor, there was a threat or risk of substantial injury due to
20 the sexual conduct with the minor in her severely impaired state.

21 3. Having found that grounds exist to deny Respondent's application for a real
22 estate salesperson license pursuant to Business and Professions Code Sections 10177(b) and
23 10177(a), the question becomes what measure of discipline is necessary to adequately protect
24 the public in this case. The Legislature intended to ensure that real estate licensees will be
25 honest, truthful and worthy of the fiduciary responsibilities which they will bear. (Business and
26 Professions Code Section 10152; *Ring v. Smith* (1970) 5 Cal.App.3d 197, 205; *Golde v. Fox*
27 (1976) 98 Cal.App.3d 167, 177; *Harrington v. Department of Real Estate* (1989) 214

1 Cal.App.3d 394, 402.) The purposes of these disciplinary proceedings is not to further punish
2 the applicant, but rather to protect the public.

3 4. Regulation 2911 offers guidelines to measure the extent of an applicant's
4 rehabilitation from misconduct forming the basis for discipline. Consideration of the
5 criteria of rehabilitation is instructive and shows as follows:

6 (a) It has been more than six years since Respondent's conviction.
7 (Regulation 2911(a)). Almost two years have passed since the misstatement in the
8 application.

9 (b) Respondent was not ordered to make any restitution to the court or to the
10 minor. (Regulation 2911(b))

11 (c) Respondent's conviction was expunged and dismissed pursuant to Penal
12 Code Section 1203.4 (Regulation 2911(c))

13 (d) It is important to note that Respondent was never required to register as a
14 sex offender. (Regulation 2911(d))

15 (e) Respondent's probation was successfully terminated more than four years
16 ago. There was no finding that he posed a risk to the public of committing sex offenses.
17 (Regulation 2911(e))

18 (f) By his own admission, Respondent's abuse of alcohol as an 18 year old
19 contributed to his misconduct leading to his conviction. He testified that he no longer
20 drinks to excess, and is no longer a "fan" of the partying culture. (Regulation 2911(f)).

21 (g) Respondent was not ordered to pay fines, but did successfully complete
22 therapy sessions ordered in relation to his conviction. (Regulation 2911(g))

23 (h) In terms of stability of family life, Respondent's parents divorced when he
24 was young. He and his parents credibly attribute his youthful rebellion and misconduct in
25 his late teens in part to emotional issues relating to that. Respondent's father attended the
26 administrative hearing to personally testify as to the positive maturing process Respondent
27 has undergone in the past seven years. Respondent also has the support and encouragement

1 of his mother and step-father, who each submitted written statements on his behalf. His
2 parents find him to be a mature, hardworking, trustworthy man. (Regulation 2911(h))

3 (i) Respondent completed courses and training in real estate, and has been
4 employed for the last several years as an assistant to several real estate agents. (Regulation
5 2911(i))

6 (j) There was no evidence offered of any adjudicated debts or monetary
7 obligations owed to others, so this factor is not relevant to this case (Regulation 2911(j))

8 (k) In terms of correction of business practices, Respondent's criminal
9 conviction was not related to business practices. However, Respondent did take
10 responsibility for neglecting to correctly answer the question about convictions in his real
11 estate application. He testified at hearing that he recognizes that errors in completing
12 important legal paperwork can be devastating in the practice of real estate. Upon
13 recognizing his mistake, he consulted with the Department and promptly provided court
14 documentation to correct his error. Regina Vannicola, a real estate agent, personally
15 appeared to testify on Respondent's behalf, and Daniel Lackey, another agent who formerly
16 employed Respondent, submitted a detailed letter. They both attest to Respondent's
17 excellent business acumen and trustworthiness. (Regulation 2911(k))

18 (l) Respondent testified about his charitable community endeavor in which
19 he collects used clothing and distributes it to homeless individuals in need.

20 (m) Respondent has entirely new and different social and business
21 relationships than he did when he was 18 years old and newly out of high school. He
22 separated himself from his past after his conviction, and no longer socializes with the same
23 crowd. Respondent spends much of his time working as an assistant to agents in real estate
24 offices. Real estate agents Regina Vannicola and Daniel Lackey have worked with him.
25 They are both aware of his conviction and the errors in his application. As set forth in the
26 findings of fact above, they each find Respondent to be honest and trustworthy, and that he
27 carries out his professional responsibilities with excellence and integrity. While they are not

1 brokers, they each manage offices and would provide professional mentorship to
2 Respondent.

3 (n) Respondent's testimony and supporting documentation clearly and
4 convincingly establish a change in attitude from that which existed at the time he committed
5 the acts leading to his conviction. Respondent demonstrated genuine understanding of and
6 regret for his misconduct. However, Respondent's recent failure to accurately answer the
7 questions in his application raises concern that he may be in need of some additional
8 supervision.

9 5. The Real Estate Law and the disciplinary procedures provided for in the Real
10 Estate Law are designed to protect the public and to achieve maximum protection for purchasers
11 of real property and those dealing with real estate licensees. Real estate licensees act as
12 fiduciaries in their dealings with the public. Real estate agents hold money and other personal
13 property on behalf of clients, and are responsible for full and accurate disclosure of material
14 facts pertaining to the loans obtained and transactions conducted on behalf of their clients.

15 6. Respondent has established rehabilitation from his criminal conviction.
16 However, Respondent also made a material misstatement of fact in his application for his
17 license. Respondent's failure to disclose his expunged conviction might be enough to
18 warrant denial of his license. *Harrington v. Department of Real Estate* (1989) 214 Cal.App.3d
19 394, 402.) In this case, Respondent admits he should have been more diligent in reading the
20 application more closely. His testimony at hearing, corroborated by his father's, reflects a
21 credible good faith misunderstanding. More importantly, upon realizing that he was wrong,
22 Respondent promptly admitted it. In fact, not only did he admit it, but he carefully went
23 through the effort to go to the court house and obtain a copy of his records, immediately call the

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26 Department (the same day) and seek further advice as to his obligations to disclose. He
27 provided the Department with the actual records along with his explanation.

7. Respondent has established that he has greatly matured and stayed on a path towards a successful professional life since his conviction when he was 18. He recognizes that he must be cautious and careful in reviewing and signing legal documents, and has demonstrated a willingness to seek out guidance and accept supervision from more experienced professionals. Therefore, it would not be inimical to the public interest to grant Respondent a restricted salesperson license, subject to terms and conditions as set forth in the below order.

ORDER

Respondent DAVID WAYNE BRIZENDINE'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. 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 by 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

1 restrictions attaching to the restricted license until two years have elapsed from the date of
2 issuance of the restricted license to Respondent.

3 3. With the application for license, or with the application for transfer to a
4 new employing broker, Respondent shall submit a statement signed by the prospective
5 employing real estate broker on a form RE552 (Rev.4/88) approved by the Department of
6 Real Estate which shall certify as follows:

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

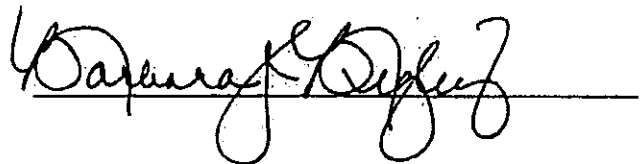
9 (b) That the employing broker will carefully review all transaction
10 documents prepared by the restricted licensee and otherwise exercise close supervision over
11 the licensee's performance of acts for which a license is required.

12 4. Respondent shall notify the Commissioner in writing within 72 hours of
13 any arrest by sending a certified letter to the Commissioner at the Department of Real
14 Estate, Post Office Box 187000, Sacramento, CA 95818-7000. The letter shall set forth the
15 date of Respondent's arrest, the crime for which Respondent was arrested, and the name and
16 address of the arresting law enforcement agency. Respondent's failure to timely file written
17 notice shall constitute an independent violation of the terms of the restricted license and
18 shall be grounds for the suspension or revocation of that license.

19 This Order shall become effective at 12 o'clock noon on JAN 31 2012.

20 IT IS SO ORDERED 1/10/12.

21 BARBARA J. BIGBY
22 Acting Real Estate Commissioner

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FILED

AUG 17 2011

DEPARTMENT OF REAL ESTATE

BY: 

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Application of

DAVID WAYNE BRIZENDINE,

Respondent.

No. H-37064 LA

OAH No. 2011031556

NOTICE

TO: DAVID WAYNE BRIZENDINE, Respondent, and LEONARD K. STEINBERG, his Counsel..

YOU ARE HEREBY NOTIFIED that the Proposed Decision herein dated June 20, 2011, of the Administrative Law Judge is not adopted as the Decision of the Real Estate Commissioner. A copy of the Proposed Decision dated June 20, 2011, is attached for your information.

In accordance with Section 11517(c) of the Government Code of the State of California, the disposition of this case will be determined by me after consideration of the record herein including the transcript of the proceedings held on May 19, 2011, any written argument hereafter submitted on behalf of Respondent and Complainant.

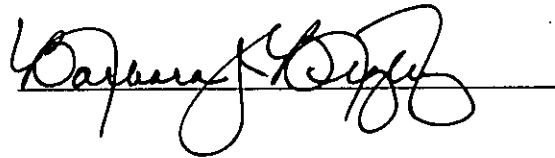
Written argument of Respondent to be considered by me must be submitted within 15 days after receipt of the transcript of the proceedings of May 19, 2011, at the

1 Los Angeles office of the Department of Real Estate unless an extension of the time is granted
2 for good cause shown.

3 Written argument of Complainant to be considered by me must be submitted
4 within 15 days after receipt of the argument of Respondent at the Los Angeles office of the
5 Department of Real Estate unless an extension of the time is granted for good cause shown.

6 DATED: 8/15/11

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8 BARBARA J. BIGBY
Acting Real Estate Commissioner

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BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Statement of Issues of:

David Wayne Brizendine

Respondent.

Case No. H-37064 LA

OAH No. 2011031556

PROPOSED DECISION

Administrative Law Judge Howard Posner, Office of Administrative Hearings, State of California, heard this matter in Los Angeles, California on May 19, 2011.

Julie L. To, Staff Counsel, represented Complainant Robin Trujillo, Deputy Real Estate Commissioner in the Department of Real Estate (Department).

Attorney Leonard K. Steinberg represented David Wayne Brizendine (Respondent).

Oral and documentary evidence was received and the matter was submitted May 19, 2011.

The Department of Real Estate brings this Statement of Issues to deny Respondent's application for a real estate salesperson license. For the reasons set out below, the license should be granted.

FACTUAL FINDINGS

Jurisdiction and Background

1. Complainant issued this Statement of Issues in her official capacity.
2. On March 11, 2010, Respondent applied for a real estate salesperson license. The Department refused to grant the application, Respondent timely requested a hearing, and this proceeding ensued.

Criminal Conviction

3. On October 3, 2005, in Los Angeles County Superior Court, case number SA053034, Respondent was convicted on his no contest plea of unlawful sexual intercourse with a minor not more than three years older or three years younger than himself, violating Penal Code section 261.5, subdivision (b), a misdemeanor. The court found there was a factual basis for Respondent's plea. Respondent was sentenced to 36 months probation, ordered to complete 52 weeks of therapy, and ordered to stay away from any victims or witnesses involved in the case. Probation was terminated and the conviction dismissed under Penal Code section 1203.4 on April 17, 2007.

4. The incident that resulted in the conviction occurred June 24, 2004, when Respondent was 18 (he was born December 11, 1985) and the minor was 15 or 16. The circumstances of the crime, including her exact age, cannot be established with certainty because of a dearth of reliable evidence. Respondent and the minor were drunk. At hearing, Respondent did not remember clearly what actually happened, though he believes that penetration had either occurred or was about to occur when the minor's friend (a 15-year-old girl) interrupted them and they immediately broke off what they were doing. Respondent also remembers that the minor was "aggressive" with him, much fondling occurred, and she suggested oral sex. The only evidence other than Respondent's testimony are the reports of sheriff's deputies and detectives who made the arrest and investigated the incident on the night of the incident and the day after it.¹ The Department did not refer to any specific item in the reports.

5. On the night he was arrested, Respondent told the deputies that no intercourse had taken place. According to the deputies' reports, the minor also said, both on the night of the arrest and the next day, that no intercourse had occurred. The same reports indicate that the minor's girlfriend was the only witness who asserted that intercourse had occurred, apparently on the basis of a momentary glimpse into a dark room. The statements by both girls are hearsay. Forensic evidence in the form of "sexual assault kits" were taken from both Respondent and the minor, but were not introduced in evidence. The only reliable evidence that intercourse took place is the conviction itself, which is conclusive on the issue. But the evidence is insufficient to establish either that intercourse occurred without the minor's consent or that Respondent threatened her with harm or intended to harm her.

¹ These documents were admitted on the Department's motion under *Lake v. Reed* (1997) 16 Cal.4th 448, which holds that a police officer's written report, although hearsay, is admissible in an administrative hearing to the extent it contains the officer's personal observations, forensic reports, or statements that are otherwise admissible, such as admissions of the party who is adverse to the agency conducting the hearing. The documents were therefore admitted subject to those limitations, so that other than the officers' statements about their own observations and their reports of the statements made by Respondent, the reports are hearsay, which under Government Code section 11513, subsection (d) may be used to supplement or explain other evidence but are not sufficient by themselves to support findings.

6. Respondent's application did not initially disclose any criminal conviction. Question 1 of Part D of the application asked, "Have you ever been convicted of a misdemeanor or felony? Convictions expunged under Penal Code Section 1203.4 must be disclosed." Below the question, in less prominent type, the application explains, "All convictions must be disclosed, no matter how long ago they occurred, even if the plea or verdict was set aside, the conviction was dismissed or expunged, or you have been pardoned."

7. When Respondent submitted the application he believed the case, rather than the conviction, was what had been dismissed on April 17, 2007, and did not disclose the conviction because he thought he had not been convicted of anything. His lawyer had told him, when they left the courtroom on April 17, that the dismissal made the criminal case "as if it had never happened." Plaintiff's father, Daniel Brizendine, who was involved with every step of the court proceedings and dealt with the defense lawyer more than Respondent did, testified to the same conversation. This testimony is reasonable and credible.

8. More importantly, Respondent himself corrected the error before the Department discovered the conviction. In the process of applying for a passport, he had occasion to revisit the criminal case, and asked his father whether it should have been disclosed on the license application. Daniel Brizendine testified that he told Respondent the criminal case had been dismissed and did not need to be disclosed. Respondent nonetheless went to the courthouse on June 15, 2010 and obtained a printout of the court's minutes, at which point he realized he had erroneously failed to disclose a conviction. He called the Department's Sacramento office that day to inform the Department about the conviction. These circumstances establish that Respondent did not attempt to obtain a real estate license by misrepresentation or deceit, or knowingly make a false statement of fact required to be revealed in his application.

Mitigation and Rehabilitation

9. Respondent's parents divorced when he was a teenager, causing stress and considerable acting out, as corroborated by Daniel Brizendine and letters from Respondent's mother and stepfather, Albert Smith.

10. Respondent dealt with his 2004 arrest as a wakeup call. He broke off contact with his circle of acquaintances — he has not seen anyone who was at the June 24, 2004 party since that night — and in 2005 moved to San Diego, where he attended Mesa City College and worked at a restaurant. In 2007 he moved to Denver, where he attended college and worked as a server in one restaurant, then as assistant manager at another. There was no evidence about what, if any degree he obtained. He returned to his mother's house in Santa Monica in 2009 and completed correspondence courses in real estate principles, real estate practice, and escrow in early 2010.

11. In 2010 Respondent met Dan Lackey, an agent at Keller Williams Realty in Santa Monica, who hired Respondent as an assistant while Respondent went through Keller Williams' in-house training program. Lackey stated in a declaration that he was aware of Respondent's criminal record, and indeed had his own legal troubles when he was 19 years old. At some point Respondent became the assistant for another Keller Williams agent, Regina Vannicola, who testified that Respondent was reliable, trustworthy, and more than competent. He helps her set up open houses, enters names in databases, and does other administrative functions. She has entrusted him with her credit card for more than a year. In an October 2010 letter to the Department, she said she trusted him with her personal and professional information and the keys to her desk. She knows about his criminal conviction. Respondent socializes principally with other Keller Williams employees.

12. The testimony of Vannicola and Daniel Brizendine, the declarations of Albert Smith, and a letter from Patricia McKiou, vice president of Prop Services West in Hollywood, all describe someone who has changed from an immature and troubled teen to a mature, responsible and trustworthy man of 25.

13. Respondent has started "Treats for the Streets," a program in which he collects shoes and coats for homeless persons. Last December 11, he held a "birthday party" for himself at which he required a donation of shoes or coats as a "cover charge."

LEGAL CONCLUSIONS

1. There is no cause to deny the application based on Business and Professions Code sections 480 or 10177. Section 480, subdivision (a)(1) allows a board to deny a license to an applicant who has been "convicted of a crime," even if the conviction has been expunged or dismissed under Penal Code section 1203.4. But subdivision (a)(3)(B) of section 480 provides that the Department "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." Section 10177, subdivision (b), which applies specifically to the Department, similarly allows it to deny a license to an applicant who has been convicted of "a crime substantially related to the qualifications, functions, or duties of a real estate licensee[.]" California Code of Regulations title 10, section 2910² sets out the criteria for determining whether a crime is substantially related to the qualifications, functions or duties of a licensee. The Department has the burden of proving that Respondent's conviction meets one of the criteria in CCR section 2910. "In disciplinary administrative proceedings the burden of proof is on the party asserting the affirmative, and guilt cannot be based on surmise or conjecture." (*Derasmo v. Smith* (1971) 15 Cal.App.3d 601, 610.)

2. The Department has not met its burden of showing substantial relationship. Two provisions of CCR section 2910 are potentially applicable to this matter: subdivision

² Further references to the California Code of Regulations will cite it as "CCR."

2910(a)(5), which provides that a crime is substantially related to the qualifications, functions or duties of a licensee if it involves “[s]exually related conduct affecting a person who is an observer or non-consenting participant in the conduct[;]” and subdivision (a)(8), which provides that a license can be denied if the applicant has been convicted of a crime involving “any unlawful act...with the intent or threat of doing substantial injury to the person or property of another.” The Department has not carried the burden of proving either ground for substantial relationship.

a. The Department apparently does not contend that Respondent’s conviction involved a non-consenting participant under subdivision (a)(5), did not produced evidence showing lack of consent, and cannot carry the burden of proving lack of consent under these circumstances. *Donaldson v. Department of Real Estate* (2005) 134 Cal.App.4th 948, 963-964, held that a conviction under Penal Code section 261.5 for intercourse with a minor could not by itself establish intercourse with a “non-consenting participant” for purposes of CCR section 2910, subdivision (a)(5), and that if the Department intended to interpret the statute and regulations so that a conviction under section 261.5 automatically established lack of consent, it was required to do so by adopting new regulations under the Administrative Procedure Act. (*Id.* at 965-966.)³ There was no evidence establishing lack of consent (Factual Finding 5).

b. The Department briefly mentioned, as a basis for finding that the crime was substantially related to the qualifications, functions or duties of a real estate salesperson because Respondent was “doing harm,” apparently a reference to CCR section 2910, subdivision (a)(8).” But neither threat of substantial injury nor intent to cause substantial injury is an element of Penal Code section 261.5 subdivision (b) (which differs in this way from the statutes describing rape, e.g. Penal Code section 261, subdivision (a)(2), which prohibits sexual intercourse “accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another”), and there is no evidence that Respondent either threatened substantial injury or intended to cause it (Factual Finding 5). If the Department were to assert a rule of interpretation that any conviction for sex with a minor involves intent to cause substantial injury as such, it would be doing what *Donaldson v. Department of Real Estate* prohibits it from doing: adopting a per se rule that establishes a new criterion for substantial relationship without following the Administrative Procedure Act’s adoption procedures. *Donaldson*’s prohibition of a per se rule of inferring non-consent could thus be nullified by imposing a per se rule of inferring intent to cause substantial harm.

5. Cause does not exist to deny the application under Business and Professions Code sections 480 or 10177. Section 480, subdivision (c) allows a board to “deny a license regulated by this code on the ground that the applicant knowingly made a false

³ When *Donaldson* was decided, subdivision (a)(5) said “[s]exually related conduct causing physical harm or emotional distress to a person who is an observer or non-consenting participant in the conduct.” The amendment does not change the effect of *Donaldson* on the present Statement of Issues.

statement of fact required to be revealed in the application for the license.” Section 10177, subdivision (a), which applies specifically to the Department, allows it to deny a license to an applicant who has “attempted to procure” a real estate license “by fraud, misrepresentation, or deceit, or by making a material misstatement of fact in an application for a real estate license[.]” As set out in Factual Findings 7 and 8, Respondent did not knowingly make a false statement of fact or attempt to procure a license by making a material misstatement of fact.

6. Even if there were cause to deny the license, the license should nonetheless be granted because the evidence would carry the burden of showing rehabilitation under the criteria set out in CCR section 2912. The relevant criteria include:

- (a) The passage of not less than two years since the most recent criminal conviction[.] [¶]...[¶]
- (c) Expungement of criminal convictions resulting from immoral or antisocial acts. [¶]...[¶]
- (e) Successful completion or early discharge from probation or parole. [¶]...[¶]
- (i) Completion of, or sustained enrollment in, formal education or vocational training courses for economic self-improvement. [¶]...[¶]
- (l) Significant or conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.
- (m) New and different social and business relationships from those which existed at the time of the conduct that is the basis for denial of the departmental action sought.
- (n) Change in attitude from that which existed at the time of the conduct in question[.]

7. Respondent’s conviction was more than five years ago (Factual Finding 3) and the misdemeanor itself was committed seven years ago. He completed probation in 2007, when his conviction was dismissed under Penal Code 1203.4 (Factual Finding 3). He has enrolled in college and completed courses in real estate (Factual Findings 7 and 8). He has organized his personal charity to aid the homeless (Factual Finding 13). He has had no contact with the acquaintances who were part of his circle in 2004 and now socializes with persons in the real estate sales business. He and the witnesses and writers of character letters, all say that he is now a serious, responsible person instead of an irresponsible teenager. (Factual Findings 10-12). Thus even if cause existed to deny his application, Respondent has shown rehabilitation. It is consistent with the public interest to grant Respondent a real estate salesperson’s license without restrictions.

ORDER

Not adopted
The application of David Wayne Brizendine for a real estate salesperson's license is granted.

DATED: June 20, 2011

Howard Posner

HOWARD POSNER

Administrative Law Judge

Office of Administrative Hearings

1 JULIE L. TO, Counsel (SBN 219482)
2 Department of Real Estate
3 320 West 4th Street, Suite 350
4 Los Angeles, California 90013-1105

5 Telephone: (213) 576-6982
6 (Direct) (213) 576-6916

FILED

FEB 09 2011

DEPARTMENT OF REAL ESTATE

BY: 

7
8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Application of) NO.H-37064 LA
12)
13 DAVID WAYNE BRIZENDINE,) STATEMENT OF ISSUES
14)
15 Respondent.)

16 The Complainant, Robin Trujillo, a Deputy Real Estate
17 Commissioner of the State of California, for Statement of Issues
18 against DAVID WAYNE BRIZENDINE is informed and alleges as
19 follows:

20 1.

21 The Complainant, Robin Trujillo, a Deputy Real Estate
22 Commissioner of the State of California, makes this Statement of
23 Issues against Respondent in her official capacity.

24 2.

25 On or about March 11, 2010, Respondent made
26 application to the Department of Real Estate of the State of
27 California for a real estate salesperson license.

1 FIRST CAUSE FOR DENIAL

2 CRIMINAL CONVICTION

3 3.

4 On or about October 3, 2005, in the Superior Court of
5 the State of California, County of Los Angeles, in Case No.
6 SA053034, Respondent was convicted of violating Penal Code
7 Section 261.5(B) (unlawful sexual intercourse with a minor ±3
8 years of age of perpetrator), a misdemeanor. Respondent was
9 sentenced to 36 months probation, ordered to complete 52 weeks
10 of sex therapy, and ordered to stay away from any victims or
11 witnesses involved in the case.

12 4.

13 This crime, by its facts and circumstances, bears a
14 substantial relationship under Section 2910, Title 10, Chapter
15 6, California Code of Regulations, to the qualifications,
16 functions or duties of a real estate licensee.

17 5.

18 The crime of which Respondent was convicted
19 constitutes cause for denial of Respondent's application for a
20 real estate license under Business and Professions Code Sections
21 475(a)(2), 480(a), and 10177(b).

22
23 SECOND CAUSE FOR DENIAL

24 FAILURE TO DISCLOSE

25 6.

26 In response to Part D, Question 1 of his license
27 application, to wit: "HAVE YOU EVER BEEN CONVICTED OF A

1 MISDEMEANOR OR FELONY? CONVICTIONS EXPUNGED UNDER PENAL CODE
2 SECTION 1203.4 MUST BE DISCLOSED. HOWEVER, YOU MAY OMIT TRAFFIC
3 CITATIONS WHICH DO NOT CONSTITUTE A MISDEMEANOR OR FELONY"

4 Respondent answered "No," and failed to reveal the conviction
5 described in Paragraph 3 above.

6 7.

7 Respondent's failure to reveal the conviction set
8 forth herein, above, in his license application, constitutes the
9 attempt to procure a real estate license by fraud,
10 misrepresentation, or deceit, or by making a material
11 misstatement of fact, or knowingly making a false statement of
12 material fact required to be revealed in said application, which
13 is grounds for denial of the issuance of a license under
14 Business and Professions Code Sections 475(a) (1), 480(c),
15 and/or 10177(a).

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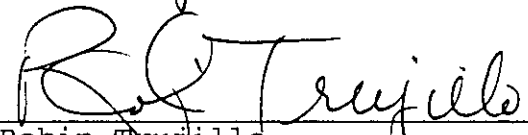
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1 WHEREFORE, the Complainant prays that the above-
2 entitled matter be set for hearing and, upon proof of the
3 charges contained herein, that the Commissioner refuse to
4 authorize the issuance of, and deny the issuance of, a real
5 estate salesperson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

8 Dated at Los Angeles, California

9 this 4 day of February, 2011.

10 
11 Robin Trujillo
12 Deputy Real Estate Commissioner
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26 cc: DAVID WAYNE BRIZENDINE
27 Robin Trujillo
Sacto