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NOV 14 2012

DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE

BY: 

* * * * *

In the Matter of the Accusation of) No. H-37784 LA
ERIC NICHOLAS ENGELBERT,) OAH No. 2012030242
Respondent.)
_____)

DECISION

The Proposed Decision dated October 22, 2012, 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.

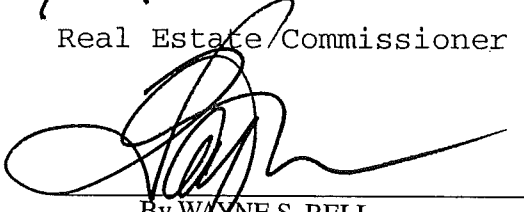
The Decision suspends or revokes one or more real estate licenses, but the right to a restricted license is granted to Respondent.

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 DEC 04 2012.

IT IS SO ORDERED

11/9/2012
Real Estate Commissioner


By WAYNE S. BELL
Chief Counsel

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of Against:

ERIC NICHOLAS ENGELBERT,

Respondent.

Case No. H-37784 LA

OAH No. 2012030242

PROPOSED DECISION

This matter was heard by Mark Harman, Administrative Law Judge of the Office of Administrative Hearings, on August 13, 2012, in Los Angeles, California.

Maria Suarez (Complainant) was represented by Julie To, Staff Counsel, California Department of Real Estate (Department).

Eric Nicholas Engelbert (Respondent) represented himself.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on August 13, 2012.

FACTUAL FINDINGS

1. Complainant made the Accusation in her official capacity as a Deputy Real Estate Commissioner of the State of California.
2. Complainant seeks to discipline Respondent's broker's license based on his June 2011 conviction of three marijuana-related offenses, including two felonies. Respondent contends that his conviction was the result of his failed attempt to operate a medical marijuana grower's collective/cooperative within the requirements of state law, and that he has demonstrated substantial rehabilitation since his arrest and conviction. He contends he poses no danger to the public.
3. Respondent became licensed as a real estate salesperson on July 2, 1998. He became licensed as a real estate broker on January 15, 2003, and he presently uses a fictitious business name, ENE Financial, in his licensed activities. The Department has taken no prior disciplinary action against Respondent's licenses.

4. On June 16, 2011, in the Superior Court of California, County of Orange, case no. 10HF0753, Respondent was convicted, following his guilty plea, of violating Health and Safety Code sections 11358 (cultivating marijuana) and 11359 (possession of marijuana for sale), both felonies, and Health and Safety Code section 11357, subdivision (c) (possession of marijuana), a misdemeanor. These crimes are substantially related to the qualifications, functions, and duties of a real estate licensee because the underlying conduct was willful and repetitive, despite Respondent's efforts to comply with legal requirements.

5. Imposition of sentence was suspended and Respondent was placed on formal probation for three years under certain terms and conditions, including incarceration for 45 days, or in lieu of incarceration, performance of 45 days of Cal Trans work; payment of fines and fees totaling \$380, plus the cost of probation; and payment of \$5,000 to the Victim Witness Emergency Fund. Respondent has completed all terms and conditions of his probation. Per the court's order, Respondent may petition the court to withdraw his plea as to the two felonies after two years (June 2013) as long as there are no new violations of law or of the terms of his probation. The misdemeanor count will remain and Respondent's probation may become informal at that time.

6. The facts and circumstances underlying the convictions are as follows: Respondent injured his back while engaged in bodybuilding activities in college. His condition continues to cause great pain and requires regular treatment. Respondent's doctor recommended medical marijuana, which Respondent preferred over taking strong opioid pain killers. Approximately three years ago, he decided to invest in cultivation of marijuana. He consulted an attorney, and organized a small collective of four other qualified patients, i.e., persons who also had received doctors' recommendations and valid identification cards. Respondent owned two residences where he and another collective member grew marijuana. Their first "grow" was unsuccessful, but the second grow produced more than the four members required. Respondent then solicited other collectives to purchase the balance of the marijuana the collective could not use. On February 11, 2010, police officers raided both growing locations. They went to Respondent's residence and confiscated 20 mature plants, approximately 35 pieces of "hydrofarm" growing equipment and drying equipment, along with \$1,880. Respondent was not arrested. His attorney negotiated with the District Attorney's office for 17 months to reach a plea bargain and to keep Respondent from going to jail.

7. Respondent is 38 years old. He has no other convictions. He graduated from Indiana University with a bachelor's degree in 1996. He learned the mortgage loan business while working for various brokers until he went out on his own in 2003. He learned how to do both residential and commercial loan underwriting and processing. He presently works from his home, arranging, originating, and processing loans funded by private investors.

8. Respondent father's died in 2007, leaving a substantial estate that provides Respondent with income of approximately \$12,000 per month. Respondent is a high-ranked athlete on the amateur golf circuit, who competes in tournaments nationally and internationally. He is a member of the Mesa Verde Country Club.

9. Respondent discontinued using medical marijuana for his back pain, and he has disassociated from the persons with whom he was involved in the collective. He does not use prescription medications for pain, relying instead on acupuncture, massage, and chiropractic treatments.

10. Respondent was married in April 2012 and his family life is stable. He believes he has learned from this experience. Although he believes that he was doing everything in accordance with the marijuana collective guidelines, he realizes that the gray areas in the law are traps for the unwary, and he does not want to risk what he has obtained by doing any similar risky activities in the future.

LEGAL CONCLUSIONS

1. Cause exists to suspend or revoke Respondent's real estate salesperson license under Business and Professions Code sections 490, and 10177, subdivision (b), for felony and misdemeanor convictions of crimes that are substantially related to the duties, functions, and qualifications of a real estate licensee, as set forth in factual finding numbers 4, 5, and 6.

2. Respondent asserts that he within the guidelines of the law despite his conviction. An administrative proceeding cannot be used as a forum for impeaching a conviction (*Arneson v. Fox* (1980) 28 Cal.3d 440, 449), and the effect of his conviction is unchanged by his explanation; however, the law authorizes a Respondent to offer evidence of extenuating circumstances and of rehabilitation. The Department has established criteria for the purpose of evaluating the rehabilitation of a licensee. Respondent has established that he has satisfied many, if not all, of the applicable criteria. Although it has been just a little more than a year since his conviction (Cal. Code Regs., tit 10, § 2912, subd. (a)); Respondent's crimes occurred nearly three years ago (February 2010). Respondent has paid the criminal fine and probation costs. (Cal. Code Regs., tit 10, § 2912, subd. (g).) Respondent has had no contact with former collective members. (Cal. Code Regs., tit 10, § 2912, subd. (i).) He married recently and the relationship is stable. (Cal. Code Regs., tit 10, § 2912, subd. (j).) Evidence regarding completion of continuing education requirements was not presented. (Cal. Code Regs., tit 10, § 2912, subd. (k).) Respondent's community involvement appears limited to activities as an amateur golfer. (Cal. Code Regs., tit 10, § 2912, subd. (l).)

4. Respondent has demonstrated some remorse, despite maintaining his innocence. He believes that, rather than a threat, he is a positive influence on society. Respondent appears to understand that mistakes have consequences and that he must take responsibility for his conduct. (Cal. Code Regs., tit 10, § 2912, subd. (m).) He has no other felony or misdemeanor convictions. (Cal. Code Regs., tit 10, § 2912, subd. (m)(c).) His conviction, while serious, arises out of a unique incidence of bad judgment in an otherwise law-abiding life. Despite the short time since his conviction, and his continuing to be on probation until 2014, revocation of his license is unnecessary in order to protect the public

interest in maintaining high standards of service and competency; rather, the public's safety and interest will be protected by the issuance of a restricted license.

ORDER

All licenses and licensing rights of Respondent, Eric Nicholas Engelbert, under the Real Estate Law are revoked; however, a restricted real estate broker license shall be issued to Respondent pursuant to section 10156.5 of the Business and Professions Code if Respondent makes application therefor and pays to the Department of Real Estate the appropriate fee for the restricted license within 90 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 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 the 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 or for the removal of any of the conditions, limitations or restrictions of a restricted license until three years have elapsed from the effective date of this Decision.

4. Respondent shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that she 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 Respondent presents such evidence. The Commissioner shall afford Respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

5. Respondent shall, within six months from the effective date of this Decision, take and pass the Professional Responsibility Examination administered by the Department including the payment of the appropriate examination fee. If Respondent fails to satisfy this condition, the Commissioner may order suspension of Respondent's license until he passes the examination.

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

DATED: October 22, 2012

A handwritten signature in cursive script, reading "Mark Harman", written over a horizontal line.

MARK HARMAN

Administrative Law Judge

Office of Administrative Hearings