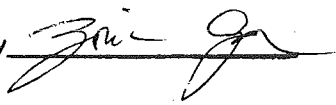


Santa Clara

FILED

JUL 17 2013

BUREAU OF REAL ESTATE

By 

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * * *

| | | |
|------------------------------------|---|---------------------|
| In the Matter of the Accusation of |) | Case No. H-38073 LA |
| |) | OAH No. 2012060973 |
| GILBERTO MARIN, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

DECISION AFTER REJECTION

Amy C. Yerkey, Administrative Law Judge ("ALJ") Office of Administrative Hearings, State of California, heard this matter on January 7, 2013 in Los Angeles, California.

Robin Trujillo ("Complainant"), Deputy Commissioner of the California Department of Real Estate ("Department") was represented by Julie L. To, Real Estate Counsel.

GILBERTO MARIN ("Respondent") appeared personally and represented himself.

Oral and documentary evidence was received, and the matter was submitted for Decision on January 7, 2013.

On February 4, 2013, the ALJ issued 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 said Proposed Decision. Respondent was notified that I would decide the

1 case upon the record, the transcript of proceedings held on January 7, 2013, and upon any written
2 argument offered by Respondent and Complainant. Respondent and Complainant each submitted
3 argument.

4 I have given careful consideration to the record in this case, including the transcript of
5 proceedings of January 7, 2013. I have also considered the arguments submitted by Respondent and
6 by Complainant. The following shall constitute the Decision of the Real Estate Commissioner
7 (“Commissioner”) in this proceeding:

8 FINDINGS OF FACT

9 1. The Complainant brought the Accusation in her official capacity. Respondent
10 timely submitted a Notice of Defense, which contained a request for a hearing.

11 2. Respondent has been licensed as a real estate salesperson since July 24, 2007.

12 3. On April 20, 2011, in the Orange County Superior Court, in Case No.
13 11WM05819, Respondent was convicted on his plea of guilty to one count of violating Penal Code
14 Section 245 (a)(1) (assault with a deadly weapon) and one count of violating Penal Code Section
15 273.5(a) (willful infliction of corporal injury on a spouse), both misdemeanors. The court
16 suspended imposition of sentence and ordered Respondent to complete three years informal
17 probation on terms and conditions which included 10 days jail time, eight hours of community
18 service, completion of a 52 week domestic violence batterers’ treatment program and fines totaling
19 \$840.00.

20 4. The facts underlying this conviction are that on April 18, 2011, Respondent got
21 into an argument with his wife and hit her over the head with a coffee mug. His wife sustained
22 injuries that included a gash to her head that bled profusely and required stitches. According to
23 Respondent, he did not intend to hit her with the mug, but rather she got hit in the scuffle between
24 the two of them. This was his first conviction and the only time the police have been called to
25 make a report in their seventeen year marriage.

26 5. Respondent testified at hearing. The ALJ found that he displayed a calm and
27 docile demeanor, and was forthcoming about his family situation. Respondent explained that he

1 and his wife had been arguing about money, and their economic difficulties were causing a lot of
2 tension in the household. Respondent is the sole financial provider for the family, which includes
3 him, his wife and their children. They all continue to live together. Respondent testified that he
4 completed the required batterers' treatment program, and there have been no similar altercations
5 between him and his wife since the incident in 2011. He says he avoids conflict and knows that he
6 can call the police if necessary. He described specific coping mechanisms he applies under stress
7 to modulate his anger and avoid physical violence. Among these, Respondent testified that he
8 regularly attends church and seeks support through his religious community.

9 6. Respondent testified that he is employed as a real estate agent at Keller-Williams
10 in Downey. Respondent said his employer is aware of his criminal conviction, but Respondent did
11 not provide a letter or testimony from his employer. He was previously employed as a welder, but
12 was in an accident last year which injured his arm, and left him unable to perform manual labor.
13 Respondent's daughter who is in college now and lives in the family home wrote a letter of
14 support attesting to his good character and hard work ethic. No witnesses appeared to testify in
15 support of Respondent and the only letter of support was from his daughter.

16 7. Respondent provided proof that he was current with installment payments
17 towards the fine. He has not yet completed probation.

18 8. Respondent has no previous discipline against his license. The ALJ opined that
19 Respondent did not appear to have any residual anger management issues which might arise
20 during his work with his clients or the public, though her assessment was based on limited
21 evidence. While Respondent admitted he argued with his wife from time to time, his conviction
22 for inflicting physical injuries on her stemmed from an isolated incident.

23 LEGAL CONCLUSIONS

24 1. The crimes of which Respondent was convicted, assault with a deadly weapon and
25 willful infliction of corporal injury on a spouse, are substantially related to the qualifications, functions
26 and duties of a real estate licensee pursuant to Title 10, Chapter 6 of the California Code of
27

1 Regulations, Regulation 2910(a) (doing an unlawful act with the intent or threat of doing substantial
2 injury to the person or property of another).

3 2. Cause exists to suspend or revoke Respondent's real estate salesperson license under
4 Business and Professions Code ("Code") sections 490 and 10177 (b), due to his misdemeanor
5 convictions for crimes which are substantially related to the qualifications, functions and duties of a
6 real estate licensee pursuant to Title 10, Chapter 6 of the California Code of Regulations, Regulation
7 2910 (a), subsection (8).

8 3. As cause exists to suspend or revoke Respondent's real estate license,
9 Respondent bears the burden of establishing his rehabilitation. (*Martin v. Alcoholic Beverage*
10 *Control Appeals Bd.* (1950) 52 Cal.2d 259, 264-265.) Application of the Department's Criteria for
11 Rehabilitation set forth in the Department's Regulation 2912 establishes the following:

12 Two years have passed since Respondent's conviction in April of 2011, he remains on
13 probation, and his conviction has not been expunged. (Reg. 2912(a), (c), (e)) Respondent was not
14 ordered to pay restitution, but was ordered to pay \$840.00 in fines in installments and has been
15 adhering to a payment schedule which had not been completed as of hearing. (Reg. 2912(b) (g))
16 Respondent's conviction did not involve business practices or a requirement of registration pursuant to
17 Section 290 of the Penal Code. (Reg. 2912(d), (h) There was no evidence that use of controlled
18 substances or alcohol contributed to the circumstances leading to his conviction. (Reg. 2912(f)) In
19 terms of family life, Respondent is still married to and living with his wife of many years, along with
20 their children. One of his adult children who live with him provided a letter describing Respondent as
21 a person of good character who does not typically resort to violence. (Reg. 2912(j)) Respondent also
22 derives support from his church and community and attended a batterers' treatment program.

23 4. The purpose of disciplining a professional or occupational license is to protect the
24 public, not to punish the licensee. (*Camacho v. Youde* (1975) 95 Cal.App.3d 161, 165; *Clerici v.*
25 *Dept. of Motor Vehicles* (1990) 224 Cal.App.3d 1016, 10130-10131.) The Real Estate Law and the
26 disciplinary procedures provided for in the Real Estate Law are designed to protect the public and to
27 achieve the maximum protection for the purchasers of real property and those dealing with real estate

licensees. (Business and Professions Code Section 10050; *Harrington v. Department of Real Estate* (1989) 214 Cal.App.3d 394) In this case, Respondent was convicted of violating Penal Code Section 273.5 (inflicting injury on a spouse), a crime which involves injuring a person with whom the assailant has a special relationship of trust and violating the expectation of stability and safety inherent in a domestic relationship. (*People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1402) Respondent’s licensure poses a risk that he might violate similar special relationships of trust with his clients or with other with whom he does business, and that he might lose his temper and strike out at them.

5. Respondent has satisfied a number of the rehabilitation criteria. His conviction appears to have been due to a single aberrant act and he has had no other criminal convictions prior to or since that time. In light of the absence of any other convictions, disciplinary actions, or other evidence suggesting misconduct of a similar or different nature by Respondent, as well as the ALJ’s favorable impression of Respondent’s demeanor while testifying, it appears that the public would be adequately protected if Respondent were issued a restricted salesperson license. While Respondent’s conduct and conviction are not to be condoned, and he still remains on probation, a restricted salesperson license would alert his employing broker of the need for additional supervision and would provide the Department and the public it protects with the opportunity to suspend Respondent’s license immediately, prior to hearing, should further violations arise.

ORDER

All licenses and licensing rights of Respondent GILBERTO MARIN under the Real Estate Law are revoked; provided, however, a restricted salesperson license shall be issued to Respondent pursuant to Section 10156.5 of the Business and professions Code if Respondent makes application there for 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 1. The restricted license issued to Respondent may be suspended prior to hearing by
2 Order of the Real Estate Commissioner in the event of Respondent's conviction or plea of nolo
3 contendere to a crime which is substantially related to Respondent's fitness of capacity as a real estate
4 licensee.

5 2. The restricted license issued to Respondent may be suspended prior to hearing by
6 Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that
7 Respondent has violated provisions of the California Real Estate Law, the Subdivided Lands Law,
8 and Regulations of the Real Estate Commissioner conditions attaching to the restricted license.

9 3. Respondent shall not be eligible to apply for the issuance of an unrestricted real
10 estate license nor for the removal of any of the conditions, limitations or restrictions of a restricted
11 license until two years have elapsed from the effective date of this Decision.

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

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

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

21 5. Respondent shall, within nine months from the effective date of this Decision,
22 present evidence satisfactory to the Real Estate Commissioner that Respondent has, since the most
23 recent issuance of an original or renewal real estate license, taken and successfully completed the
24 continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a
25 real estate license. If Respondent fails to satisfy this condition, the Commissioner may order the
26 suspension of the restricted license until the Respondent presents such evidence. The Commissioner
27 shall afford Respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to

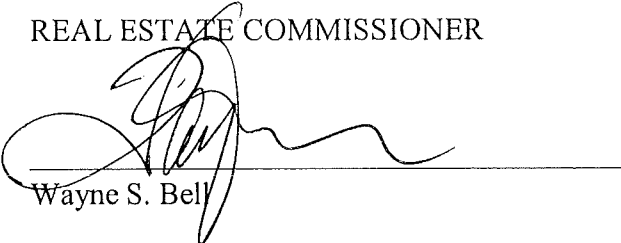
1 present such evidence.

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

9 This Decision shall become effective at 12 o'clock noon on August 6, 2013

10 IT IS SO ORDERED July 12, 2013.

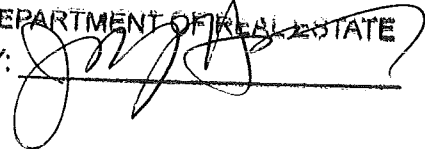
11 REAL ESTATE COMMISSIONER

12
13
14 
Wayne S. Bell

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

FILED

MAR 21 2013

DEPARTMENT OF REAL ESTATE
BY: 

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

| | | |
|------------------------------------|---|--------------------|
| In the Matter of the Accusation of |) | |
| GILBERTO MARIN, |) | NO. H-38073 LA |
| Respondent. |) | OAH NO. 2012060973 |

NOTICE

TO: GILBERTO MARIN, Respondent,

YOU ARE HEREBY NOTIFIED that the Proposed Decision herein dated February 4, 2013, of the Administrative Law Judge is not adopted as the Decision of the Real Estate Commissioner. A copy of the Proposed Decision dated February 4, 2013, 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 January 7, 2013, and any written argument hereafter submitted on behalf of Respondent and Complainant.

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

GILBERTO MARIN,

Respondent.

Case No. H-38073

OAH No. 2012060973

PROPOSED DECISION

Administrative Law Judge Amy C. Yerkey, State of California, Office of Administrative Hearings, heard this matter on January 7, 2013, in Los Angeles, California.

Julie To, Real Estate Counsel, represented Robin Trujillo (Complainant), a Deputy Real Estate Commissioner for the Department of Real Estate (Department), State of California.

Gilberto Marin (Respondent) represented himself.

The matter was submitted for decision on January 7, 2013.

FACTUAL FINDINGS

1. Complainant brought the Accusation in her official capacity.
2. Respondent has been licensed as a real estate salesperson since July 24, 2007. Complainant seeks to revoke Respondent's license.¹
3. On April 11, 2011, the Orange County Superior Court, in case number 11WM05819, convicted Respondent on his guilty plea, of violating Penal Code sections 245, subdivision (a)(1) (assault with a deadly weapon) and 273.5, subdivision (a) (willful

¹ Although the Accusation refers to authority which permits the Commissioner to request imposition of costs, no such request was made at the hearing, nor was any evidence provided as to costs. Accordingly, the issue will not be addressed here; and Respondent will not be ordered to pay investigation and enforcements costs associated with this proceeding to Complainant.

infliction of corporal injury on a spouse), both misdemeanors. The court suspended imposition of sentence, and ordered Respondent to complete three years informal probation, on terms and conditions which included 10 days jail time, eight hours of community service, completion of a domestic violence batterers' treatment program, and fines and fees totaling \$840.

4. The facts underlying this conviction are that on April 18, 2011, Respondent engaged in an argument with his wife. The incident occurred in the morning, when Respondent was about to leave home to take his daughter to school. He said something to his daughter, and his wife thought that the comment was directed at her. Respondent's wife became enraged and physically blocked the door so that Respondent could not leave. Respondent's wife grabbed him by his neck to prevent him from exiting. Respondent had a mug full of hot coffee in his hand, and he struggled to prevent the coffee from spilling on either him or his wife. During the conflict, Respondent hit his wife on the head with the coffee cup. The injury caused her head to bleed. Although she did not seek immediate medical or emergency assistance, the following day, Respondent's wife received several stitches to close the wound. She also later called the police, who arrested Respondent.

5. Respondent testified at the hearing. He displayed a calm and docile demeanor, and was forthcoming about his family situation. Respondent explained that his family has been experiencing financial hardship for some time, and that his wife is upset that they can no longer afford the lifestyle that they were previously accustomed to. Respondent maintained that his wife has been physically and emotionally abusive to him on a number of occasions, even though he does not instigate or engage in the abuse. Respondent has considered alternative living arrangements, but has stayed married and resides in the family home to protect and provide for his children. Respondent has completed the required domestic violence classes, and would consider couples counseling; however, his wife refuses to attend. There have been no similar altercations between Respondent and his wife since the incident in 2011. Respondent avoids conflict and knows that he can call the police if necessary. Respondent regularly attends church and has support through his religious community.

6. Respondent is employed as a real estate agent by Keller Williams in Downey. His employer is aware of his conviction. Respondent is the sole financial provider for his family, and he supports them with his work as a real estate agent. He was previously employed as a construction worker, but was in an accident last year which injured his arm, and left him unable to perform manual labor. Respondent has no previous discipline against his license. Respondent credibly denied that he has any residual anger management issues which might arise during his work with his clients or the public. There was no evidence to suggest that Respondent has anger issues which would affect his ability to safely interact with the public in the capacity of a real estate agent. On the contrary, there was evidence which showed that Respondent works diligently in his current employment, and that he provides good service for his clients.

LEGAL CONCLUSIONS

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

2. California Code of Regulations, title 10, section 2910, subdivision (a)(8), provides that a crime is substantially related to the qualifications, functions, or duties of a real estate salesperson's license if it involves "[d]oing of any unlawful act with the intent . . . or threat of doing substantial injury to the person or property of another."

3. Respondent was convicted of assault and causing injury to his spouse. Respondent's conduct involved unlawful acts that resulted in substantial injury to another person. As such, Respondent's conduct establishes that his conviction is substantially related to the qualifications, functions, and duties of a real estate salesperson.

4. Cause exists to discipline Respondent's real estate salesperson license pursuant to Business and Professions Code sections 10177, subdivision (b), and 490, because he was convicted of crimes that are substantially related to the qualifications, functions, and duties of a real estate salesperson by reason of Factual Findings 3 through 4 and Legal Conclusions 1 through 3.

5. California Code of Regulations, title 10, section 2912, provides criteria to evaluate a licensee's rehabilitation, including: (a) the passage of not less than two years from the most recent criminal conviction that is "substantially related" to the qualifications, functions, or duties of a licensee; with a longer period required if there is a history of criminal convictions or acts substantially related to the licensee's qualifications, functions, or duties; (b) restitution to any person who has suffered monetary losses through the licensee's substantially related act; (c) expungement of the conviction which culminated in the administrative proceeding to take disciplinary action; (d) successful completion or early discharge from probation; (e) payment of any fine imposed in connection with the criminal conviction that is the basis for discipline; (f) correction of business practices responsible in some degree for the crime or crimes of which the licensee was convicted; (g) significant and conscientious involvement in community, church, or privately-sponsored programs designed to provide social benefits or to ameliorate social problems; and, (h) a change in attitude from that which existed at the time of the commission of the criminal acts, as demonstrated by the licensee's testimony or other applicable evidence.

6. The purpose of disciplining a professional or occupational license is to protect the public, not to punish the licensee. (*Camacho v. Youde* (1975) 95 Cal.App.3d 161, 165; *Clerici v. Dept. of Motor Vehicles* (1990) 224 Cal.App.3d 1016, 1030-1031.) Respondent has satisfied a sufficient number of the rehabilitation criteria to justify minimal discipline

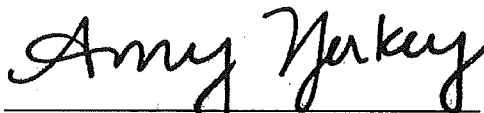
imposed against his license. For example, approximately 21 months have passed since Respondent's conviction, and he has had no other criminal convictions or misconduct prior to or during that time. Respondent's conviction was a single aberrant act which is unlikely to recur. Although Respondent remains on probation until April 2014, he has satisfied all other probation conditions. Respondent is a peaceful individual, and goes out of his way to avoid conflict. In addition, Respondent presented evidence indicating his good character; e.g., he regularly attends church. Respondent is a contributing member of society and his real estate reputation is good. These factors as well as Respondent's demeanor and comportment at the hearing, dictate that the public would be adequately protected by imposing a public reproof on the license held by Respondent.

ORDER

Respondent Gilberto Marin is hereby publicly reproofed.

Not
Adopted

Dated: February 4, 2013



AMY C. YERKEY
Administrative Law Judge
Office of Administrative Hearings