

FILED

SEP 12 2013

BEFORE THE BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE
BY: 

In the Matter of the Accusation of)	BRE No. H-38517 LA
)	
TAM PHUOC KIEU,)	OAH No. 2012120400
)	
)	
)	
Respondent.)	
_____)	

DECISION

The Proposed Decision dated August 12, 2013, 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 on grounds of the conviction of a crime.

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
October 2, 2013.

IT IS SO ORDERED 9/12/2013

REAL ESTATE COMMISSIONER



WAYNE BELL

**BEFORE THE
BUREAU OF REAL ESTATE
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

TAM PHUOC KIEU,

Respondent.

No. H-38517 LA

OAH No. 2012120400

PROPOSED DECISION

On June 26, 2013, Janis S. Rovner, Administrative Law Judge, heard this matter at the Office of Administrative Hearings (OAH) in Los Angeles, California.

Amelia Vetrone, Staff Counsel, represented complainant Maria Suarez, Deputy Real Estate Commissioner of the Bureau of Real Estate (Bureau), Department of Consumer Affairs, State of California. Dick R. Runels, Attorney at Law, represented Tam Phuoc Kieu (respondent), who was present throughout the hearing.

Oral and documentary evidence was received and argument was heard. The record was closed and the matter was submitted for decision on June 26, 2013. The administrative law judge issues the following factual findings, legal conclusions and order.

FACTUAL FINDINGS

Jurisdiction

1. The predecessor to the Bureau issued a real estate broker license to respondent on September 25, 2006. The broker license has been in effect since that time and will expire on September 24, 2014, unless renewed. Respondent held a real estate salesperson license from September 5, 2003 until September 24, 2006. Respondent also holds an individual mortgage loan originator endorsement.
2. On October 2, 2012, complainant Maria Suarez filed the Accusation, alleging the reasons the Bureau seeks to suspend or revoke respondent's license, in her official capacity while acting on behalf of the Bureau. Respondent timely filed his notice of defense requesting a hearing on the Accusation, and this hearing ensued.

Criminal Convictions

3. On April 7, 2011, in the Superior Court of California, County of Orange, case number 10WF1314, respondent was convicted on his guilty pleas of making criminal threats in violation of Penal Code section 422, a misdemeanor, and two misdemeanor counts of assault with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1). The court found that a factual basis existed for accepting respondent's plea.

4. The court suspended imposition of sentence and placed respondent on informal probation for three years. Probationary terms and conditions included the following: violate no law; obey all laws, orders, rules and regulations of the court and jail; submit to a search and seizure of his person and property at any time by law enforcement or probation officer with or without a warrant and with or without reasonable cause; do not own, use or possess any type of dangerous or deadly weapon for ten years; cooperate in any plan for psychiatric, psychological, alcohol or drug counseling; pay fines and fees of approximately \$860; pay restitution in the amount determined and as directed by the victims; serve 60 days in jail with 60 days credit for time served including 40 actual days served and 20 days for good conduct; attend and complete a domestic violence batterers' treatment program, which must include alcohol and parenting components; complete 20 days of Cal Trans work; and comply with the court's protective order to have peaceful contact with the victims of his crimes.

5a. Respondent's crimes occurred on Sunday, June 20, 2010, when he returned home in the early evening. His wife Tyanne Pham (wife or Pham), 12-year-old daughter Talia, and 17-year-old son Tim were at home. Pham was ill and respondent began cooking dinner for his wife and children. Tim was in his bedroom playing video games. After about an hour, respondent went to Tim's room and told him to stop playing video games, put away his clothes and clean up the bedroom because it was a mess. Respondent was angry and frustrated because Tim played video games too much, talked back to him, and was rebellious.

5b. Respondent left the room and returned a short time later. He became angry with this his son for not complying with respondent's request that he clean up the bedroom. A physical altercation took place between the two. Respondent slammed a guitar down on the bed after threatening to hit Tim with it. Respondent told police that evening that he slapped his son during the altercation. Tim grabbed respondent to keep from getting hit again, they fell to the floor and began wrestling with each other. Tim hit his forehead on a piece of furniture when they fell to the ground and suffered a head laceration that required stitches. Respondent was on top of Tim and pinned him to the floor by placing his forearm across Tim's throat. His wife Pham heard the two arguing, came into the room, and pulled respondent off of Tim.

5c. Pham forced respondent into the hallway and living room, closed the hallway door, and stood in front of it so respondent could not reenter the hallway that led to Tim's bedroom. They began arguing and respondent yelled at Pham to get out of the way so that he

could return to Tim's room. When she refused he went to the kitchen and got a knife. He came back into the living room, pointed the knife at her and again told Pham to move. After she refused, respondent approached her with the knife, and swung the knife as if he were going to stab her, instead plunging the knife into the door once or twice. The police arrived after respondent's wife called them to report that respondent was "threatening the family with a knife." They interviewed respondent, Pham, Tim and Talia¹ that evening before arresting respondent. There are varying accounts of the facts surrounding the crimes, some of which are derived from statements that respondent, Tim and Pham made to the police on the night of the crime. Most importantly, respondent pled guilty to his crimes and admitted in his criminal plea agreement that he assaulted his son with a guitar and his wife with a knife, and made criminal threats to Tim. (Exhibit 3.)

Police Report and Credibility of Witnesses

6a. Neither respondent nor his son testified with complete candor at the hearing. In both instances, their testimony regarding respondent's criminal conduct was at odds in important respects with statements they made to police who arrived at the house immediately after the incident. Generally, Pham's statements to police the evening of the incident as reflected in the police report are credited over respondent's testimony because her statements to police were very detailed, they were made immediately after the actual events, and they corroborate in important respects both police observations as recounted in the police report and respondent's guilty pleas and plea agreement.² Respondent, for example, confirmed in his plea agreement that he assaulted his son with a guitar and assaulted his wife with a knife. (Exhibit 3.)

6b. Tim's statements to police immediately after the incident, although very detailed, were so inconsistent with his testimony at hearing that both his testimony and statements to police are discredited. Tim offered scant details of the incident in his testimony at hearing, agreeing with respondent's testimony, which he observed at hearing, on almost every issue. Tim told police right after the incident that respondent had hit him with a guitar on the shoulder and rib cage about five times and that respondent was choking him after they had fallen to the floor. At hearing, Tim testified that respondent did not hit him with a guitar; rather, he testified that respondent slammed the guitar down on the bed, a fact which Tim did not mention to police immediately after the incident. Respondent also contradicted his own

¹ Talia told police she stayed in her room the entire time and did not see anyone fighting, but she did hear respondent, Pham and Tim arguing.

² The police report, which consists, in part, of statements made by respondent, his wife and son to police who responded to the crime scene, was received into evidence for all purposes without objection. Even if the statements in the police reports made by respondent's wife and son are treated as hearsay, they may be used for the purpose of supplementing or explaining other non-hearsay evidence, including respondent's guilty pleas and his admissions to police officers. (See Gov. Code, § 11513, subd. (d).)

statement to the police right after the incident by testifying at hearing that he had not hit (slapped) his son during the altercation. Respondent admitted only that he yelled at his son and there was a physical altercation that lasted just minutes in which he and his son fell to the ground and wrestled with each other until his wife came into the room. According to respondent, he helped his son up and nothing more occurred that day. Contrary to his wife's specific statements to police, respondent denied in his statements to police, and at hearing, that he had pointed a kitchen knife at his wife or that he had plunged it into the hallway door when they were arguing in the living room after they left Tim's room.

6c. Respondent did not make detailed statements to police immediately after the incident except to deny that he assaulted his wife. He was described by one officer in the police report as being "vague and evasive" when the officer questioned him. (Exhibit 4.) His wife's detailed statements to police describe respondent's conduct as significantly more extensive and serious than respondent described both to police and in his testimony at hearing.

Rehabilitation and Mitigation

7. Respondent has suffered no other criminal convictions. He has been licensed by the Department and engaged in the real estate business for ten years without any record of complaints, lawsuits or discipline against his license.

8. Respondent emigrated to the United States from Vietnam in or about 1980. At the time of his crimes, he was operating as a broker in Orange County with ten agents working for him. As the financial and housing market plummeted, respondent's real estate business was less viable. He had to close his real estate office recently due to financial problems. Respondent is currently looking for a job where he can make consistent money, but he continues to sell real estate working out of his home. He wishes to remain in the real estate business.

9. Respondent was represented by private counsel in his criminal case and says he pled guilty to avoid any problems.

10. Respondent stated that his culture generally believes that children must obey their parents completely, implying that his son had not been obedient on the day respondent fought with him.

11. Respondent remains on probation until April 7, 2014, and his crimes have not been expunged pursuant to Penal Code section 1203.4. He served 40 days in jail when he was arrested for his crimes. He completed the court-ordered one-year domestic violence class. Respondent learned different anger management methods in the class and now controls his anger. While Tim mentioned in his statement to police that respondent had engaged in previous incidents of domestic violence involving his son and wife, this is a fact which was not proven. (Exhibit 4.) Further, there is no record of any similar incidents after the crimes referred to in Factual Finding 3, *ante*. His son, who is now 20 years old and more

mature, currently lives with respondent and there is no record that respondent has engaged in behavior similar to that which gave rise to his criminal conduct. Respondent also attended alcoholics' anonymous for one year and a parenting class for 20 weeks. It was not shown that respondent has a continuing problem with alcohol abuse, but his wife told police that respondent was drunk when he returned home the day of his crimes. Respondent and his wife have been separated for about six months.

12. Respondent prays every day and regularly reads the bible. He attends church and sings in the choir. He is not involved in any other civic or charitable activities.

Factors in Aggravation

13. Respondent did not express remorse for his actions or the effect his conduct had on his family. Respondent's testimony at hearing was not completely candid and he did not accept responsibility for his actions.

LEGAL CONCLUSIONS

1a. Under Business and Professions Code sections 490 and 10177, subdivision (b),³ cause exists to deny respondent's application for licensure as paragraphs 2 and 3 of the Accusation allege, based on Factual Findings 3 through 6c and 13. Sections 490, subdivision (a) and 10177, subdivision (b), allow the Bureau to suspend or revoke a license if the licensee has been convicted of a crime that is substantially related to the qualifications, functions, or duties of the licensed business or profession.

1b. Under California Code of Regulations, title 10,⁴ section 2910, subdivision (a)(8), "doing any unlawful act . . . with the intent or threat of doing substantial injury to the person or property of another" is substantially related to the qualifications, functions or duties of a real estate salesperson. Respondent's crimes are "substantially related" because he made criminal threats to his son and assaulted his son and wife with deadly weapons. There are circumstances in which acts of domestic violence might not be considered "substantially related" because the personal dynamics involved in family relationships do not inevitably lead to the conclusion that respondent will repeat similar conduct when performing the duties of a licensee. This is not such a case. In this instance, respondent's conduct was significantly serious as to pose of risk of extending beyond his personal life.

³ Unless otherwise specified, all statutory references are to the Business and Professions Code.

⁴ All further references to the California Code of Regulations, title 10, are cited as CCR.

2. Respondent's attorney essentially argued that respondent did not assault his wife or make criminal threats toward his son. This amounts to an impermissible collateral attack on his convictions. In *Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 190, the court stated:

A voluntary plea of guilty is the equivalent of a conviction of the crime [citation]; all allegations of the offense are admitted by a defendant when he enters his plea. (Citation.) A plea of guilty in a criminal prosecution is "a conclusive admission of [his] guilt and of every element entering into the offense charged" (People v. Whitton, 112 Cal.App.2d 328, 333 [246 P.2d 60]) and "constitutes no less than a confession of every factor comprising the charge contained in the pleading." (People v. Ward, 118 Cal.App.2d 604, 608 [258 P.2d 86].) According to Berg v. United States (9th Cir. 1949) 176 F.2d 122, a plea of guilty means guilty "as charged" in the information, and by it "all averments of fact are admitted. . . . The effect is the same as if the defendant had been tried before a jury and had been found guilty upon evidence covering all material facts."

Further, as the court in *Arneson v. Fox* (1980) 28 Cal.3d 440 stated, "Regardless of the various motives which may have impelled the plea, the conviction which was based thereon stands as conclusive evidence of appellant's guilt of the offense charged." (*Id.* at 449.)

3. Respondent has the burden of showing that he is rehabilitated from his criminal conduct. Applicable rehabilitation criteria are found in CCR section 2912, which reads in pertinent part:

(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 of the department. (A longer period will be required if there is a history of criminal convictions or acts substantially related to the qualifications, functions or duties of a licensee of the department.)

(b) Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the licensee.

(c) Expungement of the conviction or convictions which culminated in the administrative proceeding to take disciplinary action.

[¶] . . . [¶]

(e) Successful completion or early discharge from probation or parole.

(f) Abstinence from the use of controlled substances or alcohol for not less than two years if the criminal conviction was attributable in part to the use of a controlled substance or alcohol.

(g) Payment of any fine imposed in connection with the criminal conviction that is the basis for revocation or suspension of the license.

[¶] . . . [¶]

(i) New and different social and business relationships from those which existed at the time of the commission of the acts that led to the criminal conviction or convictions in question.

(j) Stability of family life and fulfillment of parental and familial responsibilities subsequent to the criminal conviction.

(k) Completion of, or sustained enrollment in, formal educational or vocational training courses for economic self-improvement.

(l) Significant and conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.

(m) Change in attitude from that which existed at the time of the commission of the criminal acts in question as evidenced by any or all of the following:

(1) Testimony of applicant.

(2) Evidence from family members, friends or other persons familiar with the licensee's previous conduct and with subsequent attitudes and behavioral patterns.

(3) Evidence from probation or parole officers or law enforcement officials competent to testify as to applicant's social adjustments.

(4) Evidence from psychiatrists, clinical psychologists, sociologists or other persons competent to testify with regard to neuropsychiatric or emotional disturbances.

(5) Absence of subsequent felony or misdemeanor convictions that are reflective of an inability to conform to societal rules when considered in light of the conduct in question.

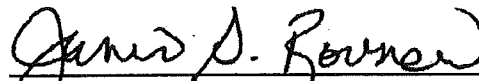
4. Respondent has satisfied a few, but not most, of the Bureau's rehabilitation criteria: Just over two years have elapsed since respondent's convictions. He has had no other convictions before or after the crimes at issue here. That his criminal conduct was serious in nature must be taken into account in finding that sufficient time has not elapsed since the date of his convictions. (CCR § 2912, subd. (a); Factual Findings 3 through 6c.) Respondent has not completed his criminal probation. It was also not shown that he made restitution or paid court-imposed fines, penalties and fees. He has completed court-ordered domestic violence, alcohol and parenting programs. (CCR § 2912, subds. (b), (c), (e) and (g); Factual Finding 11.) Respondent's convictions have not been expunged. (CCR § 2912, subd. (c); Factual Finding 11.) He has not abstained from the use of alcohol though it was not shown that he has a continuing issue with alcohol abuse. It is inferred that the court ordered him to attend a counseling program with a component addressing use of alcohol, in part, because respondent's wife told police he was drunk at the time of his crimes. (CCR § 2912, subd. (f); Factual Findings 6a through c and 11.) While respondent does not have new and different social and business relationships, these relationships do not appear to have contributed to his criminal conduct. (CCR § 2912, subd. (i).) Respondent has some stability in life, but also much uncertainty. His son currently lives with him and respondent is looking for a job that will provide him with steady income. He and his wife are separated and he no longer has his own real estate brokerage business, though he conducts some real estate business from his home. (CCR § 2912, subd. (j); Factual Findings 8 and 11.) Respondent did not show that he has completed additional education or vocational training to improve his economic status. (CCR § 2912, subd. (k).) He has not shown significant or conscientious involvement in community, privately-sponsored programs to provide social benefits or ameliorate social problems, but he is a religious man and attends church. (CCR § 2912, subd. (l); Factual Finding 12.) Unfortunately, it cannot be concluded that respondent has truly shown a change in attitude from that which existed at the time of his crimes. He did not express any remorse about the effect his criminal conduct had on his family, and his lack of candor demonstrates that he has not accepted responsibility for his crimes. (CCR § 2912, subd. (m); Factual Findings 3 through 6c, 11 and 13.)

5. It is true that respondent has had no other criminal convictions or record of complaints in his ten years of engaging in the real estate business. (Factual Finding 11.) He has also benefitted from the one-year court-ordered domestic violence program that he completed. Of most significance, however, is that respondent's criminal conduct was serious, his testimony about his convictions at hearing was not entirely candid, he is still on probation, and he did not express remorse for the victims of his crimes. Considering these factors and all evidence in this matter, it would not be in the public interest for respondent to retain his license.

ORDER

All licenses and licensing rights of respondent Tam Phuoc Kieu under the Real Estate Law are revoked.

DATED: August 12, 2013



JANIS S. ROVNER
Administrative Law Judge
Office of Administrative Hearings