

By: Jeffrey Mason
Chief Deputy Commissioner

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Application of:

HOMAYOUN MAHYARI,

Respondent.

File No.: H-38534 LA

OAH No.: 2013030321

PROPOSED DECISION

This matter came on for hearing before Richard J. Lopez, Administrative Law Judge of the Office of Administrative Hearings, at Los Angeles, California, on April 2, 2013.

James R. Peel, Real Estate Attorney, represented the Complainant.

Respondent appeared in person and represented himself.

Oral and documentary evidence and evidence by way of official notice was received and the matter then argued.

The record was held open pursuant to stipulation to allow Respondent to submit additional documents, as administrative hearsay. Same were timely received on April 12, 2013 and appended to Exhibit A. The matter was deemed submitted on April 13, 2013.

The Administrative Law Judge now finds, concludes and orders as follows:

FACTUAL FINDINGS

Parties

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

2. On April 9, 2012, Homayoun Mahyari, Respondent herein, applied to the Department of Real Estate of the State of California for a real estate salesperson license.

Criminal Conviction

3. On August 28, 1985, in the Superior Court of California for the County of Santa Clara, Respondent was convicted of violating Penal Code sections 484-487 (grand theft), two counts; and of violating Vehicle Code section 28051 (altering indicated mileage), three counts, felonies.

4. Respondent's conviction includes the following elements: the uttering of a false statement; the employment of fraud to achieve an end; doing an unlawful act with the intent of conferring an economic benefit upon Respondent; conduct which demonstrates a pattern of repeated (three counts grand theft, two counts altering) and willful violation of the law. Accordingly, the conviction is substantially related¹ to the duties, functions and qualifications of a real estate licensee.

Disclosure

5. In response to a question of the license application, to wit: "HAVE YOU EVER BEEN CONVICTED OF ANY A MISDEMEANOR OR FELONY: CONVICTIONS EXPUNGED UNDER PENAL CODE SECTION 1203.4 MUST BE DISCLOSED. HOWEVER, YOU MAY OMIT TRAFFIC CITATIONS WHICH DO NOT CONSTITUTE A MISDEMEANOR OR FELONY." Respondent marked the box denoted "No", and failed to reveal the conviction described in Finding 3. Respondent's failure to provide full disclosure was the result of negligence and not the result of intent to conceal the conviction from the Department. The negligent failure to disclose, therefore, does not constitute fraud, misrepresentation or deceit but it is a material misstatement of fact. Respondent failed to exercise due care in filling out the application.²

Rehabilitation and Character

6. Respondent timely completed all court ordered sanctions including payment of all fines and of full restitution of \$5,754.00 and did successfully complete probation. On November 20, 1986, the Court, therefore, granted early termination of probation and on April 13, 1987, pursuant to Respondent's petition the Court expunged the conviction pursuant to Penal Code section 1203.4. On November 16, 1987, the Court reduced the felony conviction to a misdemeanor conviction.

7. Respondent has suffered no other conviction and has been in conformity to society's norms and rules of civil behavior since the time of the conviction.

¹ California Code of Regulations (CCR), subdivision (a) (2), (a) (4), (a) (8) and (a) (10).

² In this case the failure to fully disclose is not actionable under Business and Professions Code sections 475 or 480 but is actionable under Business and Professions Code section 10177 as is set forth in the Legal Conclusions.

8. Respondent did take and complete all necessary pre-licensing courses and did take and pass the examination for real estate licensure. Respondent did also take and complete all necessary pre-licensing courses and did pass examination for a Department of Motor Vehicle (DMV) salesperson and a contractor's license. He is licensed under DMV salesperson license #S720283 and he was licensed on June 18, 2012 by the State Registrar of Contractors, classification b, license #974053. Both licenses are in full force and effect without restriction.

9. Respondent is a member of Saint Anastasia Catholic Church and is there active in ministries designed to provide social benefits or to ameliorate social problems. In particular, he has used his contractor's skill to provide carpentry work and he has done work, at the church, for Children's Hospital. His church membership and participation was attested to, in writing, by Rev. Msgr. Gabriel Gonzales, the church's pastor.

10. Almost three decades have passed since the conviction and Respondent early thereafter changed his attitude and reoriented his moral compass. Given the distance in time from the conviction (1985) and the Penal Code section 1203.4 expungement (1987) Respondent failed to pay needed attention to his application. Otherwise he was open and candid with DRE during the pendency of this proceeding and he was open and candid in his testimony.

LEGAL CONCLUSIONS

Applicable Authority

1. These proceedings are brought under the provisions of section 10100, Division 4 of the Business and Professions Code of the State of California and Government Code section 11500 through 11528.

Violations

2. Cause exists for denial of Respondent's application for a real estate license pursuant to Business and Professions Code section 480, subdivision (a)(1) and 10177, subdivision (b) by reason of Finding 3 when combined with Finding 4.

3. Cause exists for denial of Respondent's application for a real estate license pursuant to Business and Professions Code section 10177, subdivision (a) by reason of Finding 5 in that the unintended failure to disclose constituted a material misstatement of fact.

4. No cause exists for denial of Respondent's application pursuant to Business and Professions Code 480, subdivision (c), by reason of Finding 5 in that the failure to disclose did not constitute knowingly making a false statement of fact.

Licensing Considerations

5. The objective of a license application proceeding is to protect the public³, the licensed profession, maintain integrity, high standards and preserve public confidence in licensees of the Department. The purpose of proceedings of this type is not to punish the Respondent. In particular, the statutes relating to Department licensees are designed to protect the public from any potential risk of harm. The law looks with favor upon those who have been properly rehabilitated.

6. With regard to the public interest, California Code of Regulations, title 10, section 2911 sets forth criteria of rehabilitation that have been developed by the Department, pursuant to Business and Professions Code section 482, subdivision (a), to evaluate the rehabilitation of an applicant in considering whether or not to deny the issuance of a license after a crime or wrongful act committed by the applicant. The conviction is remote and Respondent is rehabilitated from the crime as is demonstrated in Findings 6 through 10. Accordingly, licensure of Respondent on a restricted status for a period of time under the close supervision of a real estate broker is consistent with the public interest. Under a two year restriction, Respondent will carefully review all real estate transaction documents to avoid inadvertent conduct such as the one set forth in Finding 5.

ORDER

The application of Respondent Hodayoun Mahyari for a real estate salesperson license is denied; provided, however, a restricted real estate salesperson license shall be issued to Respondent pursuant to section 10153.5 of the Business and Professions Code. The restricted license issued to the Respondent shall be subjected 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 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 California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to this restricted license.

³ *Camacho v. Youde* (1975) 95 Cal. App. 3d, 165; *Clerical v. Department of Motor Vehicles* (1990) 224 Cal. App. 3rd 1016, 1030-1031; *Fahmy v. Medical Board of California* (1995) 38 Cal. App. 4th 810, 816.

2. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor the removal of any of the conditions, limitations or restrictions attaching to the restricted license until two years have elapsed from the date of issuance of the restricted license to Respondent.

3. With the application for license, or with the application for transfer to a new employing broker, Respondent shall submit a statement signed by the prospective employing real estate broker on a form RE 552 (Rev. 4/88) approved by the Department of Real Estate which shall certify as follows:

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

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

4. Respondent's restricted real estate salesperson's license is issued subject to the requirements of section 10153.4 of the Business and Professions Code, to wit: Respondent shall, within eighteen (18) months of the issuance of the restricted license, submit evidence satisfactory to the Commissioner of successful completion, at an accredited institution, of a course in real estate practices and one of the courses listed in section 10153.5, other than real estate principles, advanced legal aspects of real estate, advanced real estate finance or advanced real estate appraisal. If Respondent fails to timely present to the Department satisfactory evidence of successful completion of the two required courses, the restricted license shall be automatically suspended effective eighteen (18) months after the date of its issuance. Said suspension shall not be lifted unless, prior to the expiration of the restricted license, Respondent has submitted the required evidence of course completion and the Commissioner has given written notice to Respondent of lifting of the suspension.

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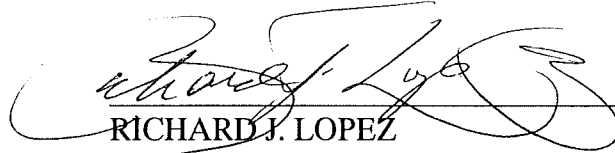
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5. Pursuant to section 10154, if Respondent has not satisfied the requirements for an unqualified license under section 10153.5, Respondent shall not be entitled to renew the restricted license, and shall not be entitled to the issuance of another license which is subject to section 10153.5 until four years after the date of the issuance of the preceding restricted license.

Dated: May 10, 2013


RICHARD J. LOPEZ

Administrative Law Judge
Office of Administrative Hearings

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