

FILED

BEFORE THE BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

APR 16 2014

BUREAU OF REAL ESTATE

By *J. Amador*

In the Matter of the Application of)
)
SAMUEL RICHARD MARTINEZ,)
)
Respondent.)
_____)

NO. H-39167 LA

OAH NO. 2013110757

DECISION

The Proposed Decision dated February 24, 2014, 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.

Pursuant to Section 11517(c)(2)(C) of the Government Code, the following corrections are made to the Proposed Decision:

Page 7, the first paragraph of the Order, omit "...; the license shall be immediately revoked, and the revocations shall be stayed..."

Paragraph 5 of the Order is not adopted and shall not be a part of the Decision.

The application for a real estate salesperson license is denied, but the right to a restricted real estate salesperson license is granted to Respondent. Petition for the removal of restrictions from a restricted license is controlled by Section 11522 of the Government Code. A copy of Section 11522 is attached hereto for the information of Respondent.

If and when a petition for removal of restrictions is filed, all competent evidence of rehabilitation presented by Respondent will be considered by the Real Estate Commissioner. A copy of the Commissioner's Criteria of Rehabilitation is appended hereto.

This Decision shall become effective at 12 o'clock noon on MAY 07 2014.

IT IS SO ORDERED 4/15/2014

REAL ESTATE COMMISSIONER

Wayne S. Bell

WAYNE S. BELL

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

In the Matter of the Statement of Issues
Against:

SAMUEL RICHARD MARTINEZ,

Respondent.

BRE Case No. H-39167 LA

OAH No. 2013110757

PROPOSED DECISION

Administrative Law Judge Gloria A. Barrios, Office of Administrative Hearings, State of California, heard this matter on February 3, 2014, in Los Angeles, California.

Maria Suarez (Complainant), Deputy Real Estate Commissioner, was represented by Julie L. To, Staff Counsel for the Bureau of Real Estate (Bureau).

Respondent was present and represented himself.

The record remained open for submission of character reference letters from Respondent and for any response thereto from Complainant. Respondent submitted four character reference letters which were marked collectively as Respondent's Exhibit B and admitted, with Complainant's agreement as administrative hearsay. The record was closed and the matter was submitted for decision on February 14, 2014.

FACTUAL FINDINGS

1. Complainant brought the Statement of Issues in her official capacity.
2. On August 6, 2012, Respondent submitted an application for a real estate salesperson license. The application was denied and the denial is the subject of this hearing.
3. On September 22, 1999, Respondent was convicted, after his plea of nolo contendere, of violating Penal Code sections 484, subdivision (a), (petty theft), a misdemeanor (*People v. Samuel Richard Martinez*) Superior Court of the State of California, County of San Bernardino, case number MWV054436.) Respondent was sentenced to two years probation on condition that he serve eight days in jail, that he pay restitution, fines, and fees totaling \$1,610, and that he stay away from the victim.

4. The underlying circumstances are that on September 9, 1999, Respondent then eighteen years of age, along with male juvenile, stole a bicycle from a third male juvenile.

5. Respondent said that he was a juvenile when he committed the crime. He was tried as an adult because he was eighteen years of age. Respondent admitted that he was involved in a fight between two groups of juveniles including the victim. Respondent saw his friend ride away on the victim's bike. There was no evidence that gangs were involved.

6. On March 7, 2007, Respondent was convicted, after his plea of guilty, of violating Penal Code sections 215, subdivision (a), (car jacking), and 211 (second degree robbery), felonies (*People v. Daniel Gustavo Viveros aka Daniel Martinez, Samuel Richard Martinez*) Superior Court of the State of California, County of San Bernardino, case number FVA027841.) Respondent was sentenced to three years in state prison, and that he pay restitution, fines, and fees totaling \$2,000. Respondent completed his prison sentence. After his prison term, Respondent was ordered on probation for three years. He successfully completed probation in two years.

7. The underlying circumstances are that on October 13, 2006, Respondent was drinking alcohol with his brother, Daniel Gustavo Viveros aka Daniel Martinez (co-defendant) and went out for a walk. Respondent and his brother spotted a couple sitting in their pick up truck. They attacked the couple and stole a necklace from the female victim and their truck. They were arrested while driving the truck.

8. At the time of his arrest, Respondent was twenty-five years old, living with his girlfriend and their three young daughters. He owned a home in Rancho Cucamonga. Respondent was employed as a manager supervising loan officers for a mortgage company. He was successful. Respondent does not remember the exact events of the night in question because he binged drank alcohol to the point that he was incoherent. Respondent blacked out at some point. Although alcohol contributed to his behavior, Respondent does not consider himself an alcoholic. He is a social drinker.

9. Respondent has done much to repair his life personally and professionally since his criminal conviction. He does not associate with persons who are alcoholics. Respondent no longer associates with his brother. While in prison, he obtained his GED (high school equivalency credential acquired by passing general educational development tests.) Respondent was a model prisoner. He points to the fact that he was given employment in the prison. Respondent also completed Christian correspondence studies and earned certificates in Christian Ethics. He participated in religious services. Further, Respondent explained that he was allowed to serve his time at Fire Camp. While at Fire Camp he acquired certificates in forest fire training and education. He helped fight the "Big Sur Fire" in Northern California in 2008. Respondent is proud of the fact that he completed his probation in two years following his release from prison.

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10. After Respondent was released from prison, he went to family court to obtain joint custody along with his former girlfriend of his three daughters. Respondent is very involved with their lives. He maintains a good relationship with his former girlfriend, the mother of his children. His daughters are eight, 14, and 15 years of age. Respondent has satisfactorily completed a seven-week parenting class in 2009 at Olive Branch counseling center. The course covered the importance of an involved parent, building a cooperative relationship, teaching responsibility and effective discipline, managing anger, and problem solving.

11. Respondent takes responsibility for his criminal conduct. As he wrote in a letter to the Bureau; "Over the course of my court proceedings I learned that while in the company of my brother, who was also arrested, I participated in stealing a necklace and pick up truck from victims in the parking lot of a shopping center on Foothill Avenue in Rialto, California. I never saw the victims of my actions in court and so I never had the opportunity to express my sincere apologies to them. I regret that this is the case as I realize that my actions resulted in needless pain and suffering." Respondent has paid all ordered restitution, fines, and penalties.

12. Respondent is currently employed as a transaction coordinator at Sierra Realty in Fontana. He is supervised by Jesse Armendarez, a licensed real estate salesperson. Respondent has been employed by Armendarez since September 2009. His duties are that of a real estate agent's assistant. Respondent receives clients, responds to e-mails, and runs errands. Respondent is also employed at RTA General Contracting installing tile. Both employers know about his recent criminal convictions.

13. Respondent submitted supportive letters from people who confirm his trustworthiness and the high level of respect they hold for him. The letters were from his friends, acquaintances, co-workers and former employers. All of the persons knew the details of Respondent's most recent convictions. Of note is a letter from Lillian Contreras, a real estate broker and owner of Empire Financial Bankers, located in Rancho Cucamonga. Before Respondent had been convicted, he worked for Contreras as a loan officer. She said, "He was always very courteous and professional to his clients and fellow co-workers. As a hard worker he was very dedicated to his profession. I met with a few of his clients in the past and they all had only positive comments about him and his work." Respondent is active in the Fontana Exchange Club, a nonprofit service organization that raises money for the Fontana Police Department, scouting programs, Boys and Girl Clubs and children at risk. He participates in fundraisers such as carnivals and annual Fontana Days activities. Respondent is also an assistant coach at the Fontana Elks Little League. He is also active in his church, Calvary Chapel.

14. On August 6, 2012, Respondent filed an application for a license to operate as real estate salesperson license. Question 25 on the application reads:

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“Have you ever been convicted of any violation of the law? All state and federal misdemeanor and felony convictions, and all military and foreign convictions must be disclosed. Convictions expunged under Penal Code section 1203.4 or a similar statute must still be disclosed.”

Respondent, under penalty of perjury, answered “Yes.” However, he failed to disclose that he had been criminally convicted of petty theft in 1999. Respondent testified that he had forgotten he had a criminal misdemeanor conviction as a juvenile. He was very aware he had two felony strikes against him due to his 2007 crimes and revealed those in detail to the Bureau. Respondent did not intend to mislead the Bureau. He only gave details of what he considered to be his serious 2007 crimes.

LEGAL CONCLUSIONS AND DISCUSSION

1. Respondent has the burden of proof in this matter because he applied for and was denied licensure by the Bureau, then appealed the denial.

The hearing on Respondent’s appeal was held pursuant to a Statement of Issues filed by the Bureau. The Statement of Issues was created pursuant to the authority conferred by Government Code section 11504. A Statement of Issues is the appropriate initial pleading in matters where a respondent requests that an agency take some action regarding whether a right, authority, license or privilege should be granted, issued or renewed and the agency has refused to do so. Section 11504 places the burden of proof upon the Respondent to establish why the agency should grant the applied for right, authority, license or privilege.

This conclusion is supported by the decision in *McCoy v. Board of Retirement* (1986) 183 Cal.App. 3d 1044, where the Court of Appeal, in considering the issue of who has the burden of proof in an administering hearing, stated:

As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by preponderance of the evidence....

Respondent is asserting the affirmative in this matter by claiming that he should be granted the applied-for-license. Therefore he has the burden of proof. The standard of proof is a preponderance of the evidence.

2. Business and Professions Code section 475, subdivision (a) provides:

a) Notwithstanding any other provisions of this code, the provisions of this division shall govern the denial of licenses on the grounds of:

(1) Knowingly making a false statement of material fact, or knowingly omitting to state a material fact, in an application for a license.

(2) Conviction of a crime.

[¶] . . . [¶]

3. Business and Professions Code section 480, subdivision (a) provides:

a) "A board may deny a license regulated by this code on the grounds that the applicant has one of the following:

(1) "Been convicted of a crime. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action which a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code.

[¶] . . . [¶]

(c) A Board may deny a license regulated by this code on the ground that the applicant knowingly made a false statement of fact required to be revealed in the application for the license.

The board 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.

4. Business and Professions Code section 10177 provides:

The commissioner may suspend or revoke the license of a real estate licensee, or may deny the issuance of a license to an applicant, who has done any of the following, or may suspend or revoke the license of a corporation, or deny the issuance of a license to a corporation, if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has done any of the following:

(a) Procured, or attempted to procure, a real estate license or license renewal, for himself or herself or a salesperson, by fraud, misrepresentation, or deceit, or by making a material misstatement of fact in an application for a real estate license, ---license renewal, or reinstatement.

(b) Entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony or a crime involving moral turpitude, and the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal, irrespective of an order granting probation following that conviction, suspending the imposition of sentence, or of a subsequent order under Section 1203.4 of the Penal Code allowing that licensee to withdraw his or her plea of guilty and to enter a plea of not guilty, or dismissing the accusation or information.

[¶] . . . [¶]

5. The Bureau has issued regulations that specify the types of crimes that are “substantially related” to the qualifications, functions, or duties of an applicant for a Bureau license. Respondent’s convictions for car jacking, robbery, and petty theft are “substantially related” under California Code of Regulations, title 10 (CCR), section 2910, subdivision (a)(1), fraudulent taking, obtaining, appropriating or retaining of funds or property belonging to another person.

6. Cause exists to deny Respondent’s application for a real estate salesperson license pursuant to Business and Professions Code sections 475, subdivision (a)(2), 480, subdivision (a)(1), and 10177, subdivision (b), because Respondent has been convicted of crimes that are substantially related to the qualifications, functions, or duties of a real estate salesperson. (Factual Findings 3-7.)

7. Cause exists to deny Respondent’s application for a real estate salesperson license pursuant to Business and Professions Code sections 475, subdivision (a)(1), 480, subdivision (c), and 10177, subdivision (a), because Respondent made a misrepresentation of material fact. (Factual Finding 14.)

8. Although cause for license denial exists, it is necessary to determine whether Respondent has been sufficiently rehabilitated to warrant a license. Criteria have been developed by the Bureau to evaluate the rehabilitation of an applicant who has committed a crime. These criteria, found at CCR section 2911, are summarized as follows:

Subdivision (a), passage of at least 2 years since the conviction or the underlying acts, or longer if there is a history of substantially related acts;

Subdivision (b), restitution;

Subdivision (c), expungement of the conviction;

Subdivision (d), expungement of the requirement to register as an offender;

Subdivision (e), completion of, or early discharge from, the criminal probation;

Subdivision (f), abstinence from drugs or alcohol that contributed to the crime;

Subdivision (g), payment of any criminal fines or penalties;

Subdivision (h), stability of family life;

Subdivision (i), enrollment in or completion of educational or training courses;

Subdivision (j), discharge of debts to others, or earnest efforts to do so;

Subdivision (k), correction of business practices causing injury;

Subdivision (l), significant involvement in community, church or private programs for social betterment;

Subdivision (m), new and different social and business relationships; and

Subdivision (n), change in attitude from the time of conviction to the present, evidenced by: testimony of the applicant and others, including family members, friends or others familiar with his previous conduct and subsequent attitudes and behavior patterns, or probation or parole officers or law enforcement officials; psychiatric or therapeutic evidence; and absence of subsequent convictions.

9. Rehabilitation is a state of mind and the law looks with favor upon one who has achieved reformation and regeneration with the reward of the opportunity to serve. (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) Fully acknowledging the wrongfulness of past actions is an essential step towards rehabilitation. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940.) The evidentiary significance of misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. (*Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1070.) Mere remorse does not demonstrate rehabilitation. A truer indication of rehabilitation is sustained conduct over an extended period of time. (*In re Menna* (1995) 11 Cal.4th 975, 991.) Respondent bears the particular burden of establishing rehabilitation sufficient to compel his licensure. (*In the Matter of Brown* (1993) 2 Cal. State Bar Ct. Rptr. 309.)

10. Respondent's evidence of rehabilitation is formidable enough warrant granting a restricted license. Respondent has done much to rehabilitate himself. He is very involved in the raising of his three daughters. Respondent successfully completed a seven-week parenting course. He is also involved in his community through his participation in the Fontana Exchange Club, the Elks Little League, and his church. Respondent has started his professional life again. Respondent successfully completed probation. He has paid all ordered restitution, fines, and penalties. It has been seven years since Respondent committed the threatening and illegal acts. It has been seven years since Respondent was convicted of these acts. There is no evidence that Respondent has engaged in any repeated act of violence. He no longer associates with alcoholics such as his brother. It is clear Respondent is supported by his employers and many friends. Respondent was contrite, sincere, and has taken responsibility for his actions. He has carried his burden.

ORDER

The application of Respondent Samuel Richard Martinez for an unrestricted license as a real estate salesperson is denied; however, Respondent shall be issued a restricted license by the Real Estate Commissioner to act as a real estate salesperson; ~~the license shall be immediately revoked, and the revocations shall be stayed on the following terms and conditions:~~

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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 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 nor 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 the this Decision.

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

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

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

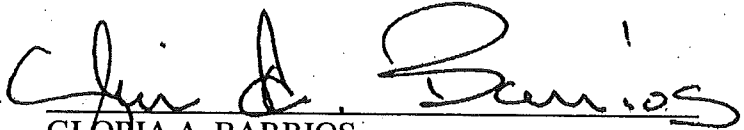
5. Respondent shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that Respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education 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.

Not Adopted

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6. Respondent shall notify the Commissioner in writing within 72 hours of any arrest by sending a certified letter to the Commissioner at the Bureau of Real Estate, Post Office Box 137004, Sacramento, CA 95813-7004. 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: February 24, 2014.

A handwritten signature in black ink, appearing to read "Gloria A. Barrios", written over a horizontal line.

GLORIA A. BARRIOS
Administrative Law Judge
Office of Administrative Hearings