

BEFORE THE BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

FILED

FEB 20 2015

BUREAU OF REAL EST.

In the Matter of the Application of
MARK ANTHONY AUGUSTUS,
Respondent.

CalBRE No. H-39362
OAH No. 2014030972

BY *[Signature]*

DECISION

The Proposed Decision dated January 9, 2015, 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 application for a real estate salesperson license is denied, but the right to a restricted real estate salesperson license is granted to respondent.

The right to reinstatement of a revoked real estate license or to the reduction of a penalty 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 MAR 12 2015.

IT IS SO ORDERED 2/13/2015

REAL ESTATE COMMISSIONER

[Signature]
WAYNE BELL

BEFORE THE
BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

MARK ANTHONY AUGUSTUS,

Respondent.

Case No. H-39362 LA

OAH No. 2014030972

PROPOSED DECISION

This matter was heard by David Rosenman, Administrative Law Judge of the Office of Administrative Hearings, on December 11, 2014, in Los Angeles. Complainant was represented by Julie To, Staff Counsel. Respondent Mark Anthony Augustus was present and represented himself.

Oral and documentary evidence having been received and the matter submitted for decision, the Administrative Law Judge finds as follows:

FINDINGS OF FACT

1. The Statement of Issues was made and filed by complainant Maria Suarez in her official capacity as Deputy Real Estate Commissioner, Bureau of Real Estate, State of California (Bureau).
2. On December 11, 2012, respondent filed an application with the Bureau for issuance of a real estate salesperson license.
3. Respondent filed a prior application for licensure with the Bureau (then the Department of Real Estate), which was denied effective March 29, 2007, as discussed in more detail below.

Respondent's Six Criminal Convictions

4. The evidence refers to six convictions of respondent: 1983, 1986, 1990, 1991, and 2008 in state courts; and 1998 in federal court. Four of the state court convictions are alleged in the Statement of Issues as bases for denial of the

application (1983, 1990, 1991 and 2008). The 1986 state court conviction and the 1998 federal court conviction are not in the Statement of Issues but are included in the evidence; more specifically, in the Decision following a hearing when respondent's prior application for licensure was denied. Because the 1986 and 1998 convictions are included in the evidence, they are referred to in this Proposed Decision. Because they were not included in the Statement of Issues, it would be a denial of due process to consider them now as reasons for denial of respondent's present application. Under Government Code section 11504, a Statement of Issues must include the matters known to the agency that would authorize denial of an application for a license. The Bureau does not allege that respondent failed to disclose any of his convictions in his application. In fact, respondent listed in the application a conviction in Nevada along with his other convictions.

5. On December 20, 1983, in the Superior Court of California, County of Los Angeles, in Case No. A626618, respondent was convicted on his plea of nolo contendere of violating Health and Safety Code section 11378.5, possession for sale of the unlawful controlled substance phencyclidine or PCP, a felony and crime involving moral turpitude. Respondent was sentenced to state prison for three years with credit for 75 days already served and 25 days good time credit. This conviction was for a crime substantially related to the qualifications, functions, or duties of a licensed real estate salesperson. Respondent's plea was taken in Municipal Court on November 21, 1983, and sentencing occurred on December 20, 1983 in Superior Court. (Exhibit 8.)

6. According to respondent, selling drugs and gang activity were common in the neighborhood where he grew up and he "got caught up in it." He has not used drugs and stated that there was no simple answer to how he became involved in other drug activity. Respondent also has a poor memory for many events in his past.

7. According to the Decision related to respondent's prior application, on May 19, 1986, in the Superior Court of California, County of Los Angeles, in Case No. 31362905, respondent was convicted of battery upon his ex-girlfriend in violation of Penal Code section 242, a misdemeanor. In this prior Decision, Administrative Law Judge Vincent Nafarrete noted that the 1986 conviction was not alleged as a basis to deny respondent's prior application but, rather, was alleged as a factor in aggravation. ALJ Nafarrete determined that this 1986 conviction was not a factor in aggravation, noting that it occurred over 20 years ago and predated respondent's subsequent convictions for grand theft in 1990 and manufacturing of PCP in 1991 and 1998.

8. In his written statement (Conviction Detail Report in exhibit 10), respondent noted that he had moved away from this ex-girlfriend, some of her clothes were mixed in with his, and she called the police. Respondent testified that this person wrote a support letter. Character reference letters were submitted and are discussed in more detail below.

9. On October 17, 1990, in the Superior Court of California, County of Los Angeles, in Case No. A475364, respondent was convicted on his plea of guilty of violating Penal Code section 487, subdivision (1), grand theft of personal property, a felony and crime involving moral turpitude. Imposition of sentence was suspended and respondent was placed on probation for three years on condition that he serve 60 days in jail, along with other terms and conditions. Credit was given for 60 days actually served. This conviction was for a crime substantially related to the qualifications, functions, or duties of a licensed real estate salesperson. The facts and circumstances leading to this conviction were that, on August 18, 1987, respondent was involved in the theft of an automobile after an acquaintance had a dispute over the sale of the car with the owner. Respondent has no recollection of this information, which is taken from the prior Decision. The defendant in this matter was named Mark Augustus Tolbert. Respondent testified that Tolbert was the last name of his foster parents who later adopted him. He has used the last name Tolbert, although his name was not legally changed. Respondent takes responsibility for this crime, and for all others, as discussed in more detail below.

10. On July 24, 1991, in the Superior Court of California, County of Los Angeles, in Case No. BA030517, respondent was convicted on his plea of guilty of violating Health and Safety Code section 11379.6, unlawful manufacturing of the controlled substance PCP, a felony and crime involving moral turpitude. (Proceedings began in the Municipal Court but were transferred to Superior Court, where the plea and sentencing occurred.) Respondent was sentenced to state prison for five years, with credit for 345 days combined actual custody and good time credit. The conviction also constituted a violation of his probation for his grand theft conviction. Respondent served two and one-half years in prison and was then released on parole in 1993. This conviction was for a crime substantially related to the qualifications, functions, or duties of a licensed real estate salesperson. The facts and circumstances of this conviction were that, on or about December 7, 1990, respondent was involved with others in the illegal manufacturing of PCP at a house belonging to a friend's parents. This information is based on a police report, exhibit 6. In his written explanation (Conviction Detail Report in exhibit 10), respondent noted that someone he knew had drug paraphernalia and chemicals in a garage; this person's sister informed police; and respondent was arrested when he was giving a ride to this other person.

11. As noted in the prior Decision, in January 1998, in the United States District Court, Central District of California, in Case No. CR 95-871-WMB, respondent was convicted on his plea of guilty of violating Title 21 United States Code section 841, subdivision (a)(1), manufacturing of PCP, a felony and crime involving moral turpitude. Respondent was sentenced to federal prison for 96 months. Upon his release, respondent was placed on supervised release for five years on condition, in part, that he obey standard conditions of probation and submit to narcotic testing at the direction and supervision of the probation officer. The court also recommended that respondent be placed in drug and alcohol counseling. The

facts and circumstances leading to this conviction were that, on September 16, 1994, respondent and others manufactured at least one kilogram of PCP. Respondent acknowledges that he was with other people with drugs. The conviction was for a crime substantially related to the qualifications, functions, or duties of a licensed real estate salesperson. There are no court records in evidence related to this conviction. In his application, respondent listed the conviction date as January 12, 1998.

12. On December 9, 2008, in the Superior Court of California, County of Los Angeles, in Case No. 7CW00438, respondent was convicted on his plea of nolo contendere of violating Penal Code section 166, subdivision(a)(4), disobeying a court order, a misdemeanor. At sentencing on February 11, 2009, imposition of sentence was suspended and respondent was placed on summary probation for 36 months on various terms and conditions, including payment of child support in arrears and for current monthly support, and payment of fines and assessments. This conviction was for a crime substantially related to the qualifications, functions, or duties of a licensed real estate salesperson. Respondent stated he did not realize there was a court case related to his late child support payments until he saw it included in the Statement of Issues. However, the court docket (exhibit 4) indicates respondent was present in court on several dates related to this matter. Respondent violated probation by not making required payments. Probation eventually was completed and was terminated on February 28, 2012. Respondent stated that the late payments were due to problems in the way his child support checks were received. He has always accepted responsibility for the child from this prior relationship and raised him for a period of time.

13. Respondent's prior application for a license was filed April 27, 2005. The application was denied and a hearing took place on January 7, 2007. Administrative Law (ALJ) Judge Nafarrete issued a Proposed Decision dated February 4, 2007, denying the application. The Proposed Decision was adopted by the Department of Real Estate, with some corrections to dates, with an effective date of March 29, 2007. (Exhibit 3.) The prior Decision related to four convictions: three state court convictions, 1983, possession of PCP; 1990, grand theft; 1991, manufacture of PCP; and one federal court conviction, 1998, manufacture of PCP; and referenced the 1986 conviction, battery, as not amounting to an act in aggravation. Respondent was still on supervised release for the federal conviction. The Decision lists some work history and personal information which was also included in the present hearing and will be referenced below. The Decision notes that respondent served three years in the U.S. Army, that in or about 1980 he completed two years of community college through a correspondence program, and that no letters of reference were submitted.

14. In the Decision, ALJ Nafarrete concluded that respondent had not shown sufficient rehabilitation under the recognized criteria, and that due to his history of convictions, "a longer period of time since his last conviction is necessary to demonstrate respondent's rehabilitation. Still, he has made an excellent start in his

rehabilitation process by becoming gainfully employed as a loan processor and having a seemingly stable marriage and family life. Due to his criminal history, it behooves respondent to show significant involvement in community or church activities, new and different social and business relationships, and a change in attitude as may be attested to by family and friends. Evidence of his non-use of drugs and employment status would be helpful to his cause as well.” (Exhibit 3, p. 5.)

15. Respondent began his testimony by taking full responsibility for the actions leading to his convictions. Even though he does not recall some of those actions, and minimized some of them in his written statement, respondent acknowledges that he has made mistakes. He stated that, on the one hand, he was a product of his environment, referring to the rough neighborhood where he grew up. On the other hand, respondent stated that his parents did not raise him to engage in those activities. After his last arrest, respondent concluded that he needed to make a change. He no longer associates with those who were involved in the illegal activities.

16. Evidence of respondent’s work history, family, community involvement and change in attitude is found in his testimony, his letter and character reference letters attached to his application (exhibit 2), and his letter attached to his Confidential – Interview Information Statement (exhibit 10). Since February 2003, respondent has worked successively as a loan processor at three companies. Respondent informed his current employer, 1st Global, of his convictions. (He was not asked if he informed the other two.) He received the endorsement of a broker on his prior license application. The endorsement on his pending application is from Donecia Augustus, a licensed broker who is respondent’s wife. Shaunta Montgomery, the operations officer at respondent’s prior employer wrote that she has known respondent for 20 years, they enrolled in a real estate course together, respondent was an asset and a team player, and is reliable, trustworthy and has a strong work ethic. Respondent has attended numerous live courses and webinars relating to real estate and submitted several certificates of completion.

17. Respondent got married in 2003 and has four children; three young men have graduated from high school, two of whom are attending community college and one is at a California State University. His daughter is eleven years old. Respondent gave sincere and convincing testimony of his devotion to raising his children in a way that emphasizes good character and morals. He demonstrated that he has used the mistakes in his own life as a basis to teach his children and others how to make good decisions to avoid such mistakes.

18. Respondent has been involved as a volunteer in numerous school and church-related activities. As examples, he has painted school classrooms and done gardening, and helped with Octoberfests and campus cleanups, even after his children aged out of the schools. With his church, he assists with efforts to feed the poor, marches for cancer support, helping hurricane victims and supporting Habitat for

Humanity. A support letter from Lovie Leslie, who has known respondent for seven years, refers to his volunteer work for an organization to support children who were suicidal or had mental disabilities. She counts his hours of work with the children and in organizing activities as a reason for the program's success.

19. Respondent cited his arrest in 1998 (resulting in the federal conviction for manufacturing PCP) as a turning point for his actions to improve his life. He no longer associates with the people who were involved in his prior lifestyle. He credits some police officers and parole agents with helping him to maintain a law-abiding lifestyle and remaining focused. Many of the reference letters cite his involvement in his church and his demonstrated integrity, diligence and hard work. Respondent has a sister with a developmental disability. He assists her in many ways, including moral support for the family and transportation to appointments and activities.

20. In the course of his testimony, respondent demonstrated a sincere regret for his criminal activities and a mature reflection on the efforts needed to effect a change. He expressed a heartfelt desire to learn from his past and move beyond it. Respondent uses that past as a foundation to maintain his own rehabilitation as well as to be a good example to others, including his children and the rest of his family, and his community.

LEGAL CONCLUSIONS

1. Under Business and Professions Code section 475, subdivision (a)(2), the Bureau may deny a license application due to the applicant's conviction of a crime. Business and Professions Code section 480, subdivision (a), adds that the crime must be substantially related to the qualifications, functions, or duties of the business or profession for which the application is made.

2. Under Business and Professions Code section 10177, subdivision (b), the Bureau may deny an application for a real estate salesperson's license if the applicant has "entered a plea of nolo contendere to, or found guilty of, or been convicted of, a felony, or a crime substantially related to the qualifications, functions or duties of a real estate licensee"

3. Under California Code of Regulations, title 10, section 2910, subdivision (a), in considering whether an application should be denied, a crime shall be deemed "substantially related to the qualifications, functions, or duties of the licensee of the Bureau within the meaning of Sections 480 and 490 of the [Business and Professions] Code if it involves: [¶] . . . [¶] "(8) Doing of any unlawful act with the intent of conferring a financial or economic benefit upon the perpetrator or with the intent or threat of doing substantial injury to the person or property of another; (9) Contempt of court or willful failure to comply with a court order; (10) Conduct which demonstrates a pattern of repeated and willful disregard of law."

4. Respondent's convictions in 1983, 1990, 1991 and 2008, set forth in Factual Findings 5, 9, 10 and 12, are for crimes that are substantially related to the qualifications, functions, or duties of a real estate salesperson under California Code of Regulations, title 10, section 2910, subdivision (a)(8), (9) or (10).

5. Cause exists to deny respondent's application for a real estate salesperson license pursuant to Business and Professions Code sections 475, subdivision (a)(2), 4890, subdivision (a) and 10177, subdivision (b), for convictions of crimes substantially related to the qualifications, functions, or duties of the licensee, for the reasons set forth in Factual Findings 5, 9, 10 and 12, and Legal Conclusions 1 through 4.

6. There is no cause to deny respondent's application based on his convictions in 1986 and 1998 and in Nevada, as set forth in Factual Findings 4 and 11. As discussed in more detail in Factual Finding 4, it would be a denial of due process to respondent as these convictions were not listed in the Statement of Issues as a basis to deny his application.

7. Under Business and Professions Code section 482, subdivision (b), and California Code of Regulations, title 10, section 2911, the Bureau has adopted criteria for the purpose of evaluating the rehabilitation of an applicant who has been convicted of a crime. The relevant criteria are summarized as follows (using the subdivision letters from the regulation for reference):

- a. The passage of not less than two years from the most recent criminal conviction, with a longer period if there is a history of such acts.
- b. Restitution to any person who has suffered monetary losses.
- c. Expungement of the conviction.
- e. Successful completion or early discharge from probation or parole.
- g. Payment of any fine imposed in connection with the criminal conviction.
- h. Stability of family life and fulfillment of parental and familial responsibilities subsequent to the conviction.
- i. Completion of, or sustained enrollment in, formal education 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. New and different social and business relationships from those which existed at the time of the acts leading to the conviction.

n. 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 the applicant's social adjustments.
4. Evidence from psychiatrists 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.

8. It is not necessary for respondent to admit the specific acts of which he was convicted. Such admissions are often considered as an element of rehabilitation. However, the law recognizes that a party need not make a false act of contrition regarding alleged past conduct in order to obtain a professional license, if the person firmly believes in his innocence. (See, *Hall v. Committee of State Bar Examiners* (1979) 25 Cal. 3d 730, 744-45.) Here, respondent's explanations often limited his involvement in criminal acts or depicted his actions as non-criminal. Nevertheless, respondent was sincere in accepting responsibility for his numerous convictions and using that acceptance as a basis to make important changes in his life and attitude.

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. In many of the instances where ALJ Nafarrete indicated that respondent could produce more evidence, he has done so. The 2008 conviction is troubling.

Respondent claimed to be unaware of it, yet he appeared in court several times. He violated his probation. However, ultimately he made all payments due and he completed the probation. The conviction is six years' old. Respondent has met enough of the rehabilitation guidelines detailed above to establish that he is sufficiently rehabilitated from his history of convictions as to justify the issuance of a restricted salesperson license. Of particular note is respondent's change in attitude and the manner in which he has conducted his affairs, including stability of his family life and commitment to his community, which reflect the type of state of mind and actions demonstrating rehabilitation.

ORDER

The application of respondent Mark Anthony Augustus for issuance of a real estate salesperson license is denied; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to Business and Professions Code section 10156.5. The restricted license issued to respondent shall be subject to all of the provisions of Business and Professions Code section 10156.7 and to the following limitations, conditions and restrictions imposed under authority of Business and Professions Code section 10156.6:

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 the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to this restricted license.

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 Bureau 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 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 137000, Sacramento, CA 95813-7000. 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: January 9, 2015



DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings