

FILED

SEP 23 2015

BUREAU OF REAL ESTATE

By John Gail

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Application of)	CalBRE No. H-39802 LA
KIMBERLY KELLY SCHNEIDER,)	
)	OAH No. 2015040950
Respondent.)	

DECISION

The Proposed Decision dated August 21, 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.

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

Findings, Page 2, Paragraph 3 (C), Line 3 and Paragraph 4 (D), Line 1:

'Department' shall read: "Bureau".

Findings, Page 7, Paragraph 3 (A), Line 1: "Department" shall read: "Bureau".

Condition "6" 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.

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 OCT 14 2015.

IT IS SO ORDERED 9/14/2015

REAL ESTATE COMMISSIONER

Wayne S. Bell
WAYNE S. BELL

BEFORE THE
BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

KIMBERLY KELLY SCHNEIDER,

Respondent.

Case No. H-39802 LA

OAH No. 2015040950

PROPOSED DECISION

The hearing in the above-captioned matter was held on July 13, 2015 at Los Angeles, California, before Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings. Complainant was represented by Steve Chu, Counsel, Bureau of Real Estate. Respondent appeared and represented herself.

Evidence was received and the case was argued, but the record was left open so that Respondent could submit further documents in support of her defense. Those documents were timely submitted and there being no objection, are received as exhibit A.

Some personal information was redacted by the ALJ from the documents in the exhibits, such as information on the copy of Respondent's social security card and driver's license, found in exhibit 2, or the addresses of Respondent and her former boyfriend, found in exhibit A.

The matter was deemed submitted for decision on July 24, 2015. The following factual findings, legal conclusions, and orders are hereby made by the ALJ.

FACTUAL FINDINGS

The Parties and Jurisdiction

1. Complainant Maria Suarez, Deputy Real Estate Commissioner, Bureau of Real Estate (Bureau), filed the Statement of Issues (SOI) in the above-captioned matter in her official capacity.

2. (A) Respondent, who has been or is also known as Kimberly Kelly Rino Schneider and Kimberly Kelly Rino¹, submitted an application for a real estate salesperson's license to the Bureau on October 25, 2013.

(B) On December 16, 2013, Bureau staff wrote Respondent, informing her that her application could not be processed because she had not submitted fingerprints. On December 30, 2013, staff wrote to Respondent, stating that her application was being processed, but that the Bureau had not then received a reply from the California Department of Justice. The December 30, 2013 letter went on to describe possible time lines for a response regarding the fingerprinting, and essentially asked for Respondent's patience with the process.

(C) At some point, Respondent was informed that her file had been sent to an investigator, Kathreen Russell, in the Bureau's Los Angeles office. On August 25, 2014, Respondent wrote the Department, inquiring about the status of the application. She stated that as of that date she had heard nothing else.

(D) On November 12, 2014, the Department received a Salesperson Change Application from Respondent along with other documents, which pertained to Respondent taking back her maiden name.

(E) Respondent again wrote to the Bureau, on February 10, 2015. She pointed out that she had passed the real estate exam in October 2013, and then sent in an application and related documents, and the application fee. She stated that she met with Ms. Russell, who suggested that Respondent withdraw her application and then resubmit after January 15, inferentially, of 2015. The investigator had recommended that because she believed that a law that was going to take effect in January 2015 would increase Respondent's opportunities to obtain a license.

(F) Respondent's February 2015 letter further stated that she had learned that she was not eligible for a certificate of rehabilitation, which was apparently what Russell had been talking about when she informed Respondent about the then-pending legislation. Respondent was not eligible because she had not been convicted of a felony or served state prison time. Toward the end of the letter she stated she was unsure how to reopen her case, as she no longer had the application form she had previously mailed in.

(G) The letter was accompanied by another license application, dated February 13, 2015. That second application revealed two convictions on Respondent's part. Respondent's February 2015 letter and application bear Bureau received stamps, for "accounting," dated March 9, 2015.

¹ Respondent now uses Kimberly K. Rino, her maiden name.

3. Complainant signed the SOI on April 8, 2015; it was filed at the Bureau on April 13. The SOI references the 2013 license application, and does not mention the subsequent 2015 application. Respondent filed a Notice of Defense, along with a written response to the SOI. This proceeding then ensued.

Respondent's 2012 Conviction

4. Complainant alleges that on April 3, 2012, Respondent was convicted in the Superior Court of California, County of Los Angeles, of felony insurance fraud, in violation of Penal Code section 550, subdivision (b)(1). (Ex. 1, at SOI, ¶p 3.) That is not quite accurate, because on that day the People moved to amend the criminal complaint to reduce the charge of violating Penal Code section 550 to a misdemeanor pursuant to Penal Code section 17, subdivision (b). She was thus convicted of a misdemeanor.

5. On January 26, 2011, in the Superior Court, County of Los Angeles, Respondent pled guilty to one count of violating Penal Code section 550, subdivision (b)(1), and the court then deemed the matter a felony. (Ex. 3, p. 3.) The court also noted that this was pursuant to a negotiated disposition. Respondent was not sentenced on that day; sentencing was put over for a year, to January 26, 2012.

6. (A) The sentencing date was then continued to March 27, 2012, and again to April 3, 2012. As noted above, the People then moved to amend the complaint, alleging a misdemeanor crime.² The court dismissed the three original charges pursuant to Penal Code section 1385. The court then pronounced sentence as to the misdemeanor, by suspending the imposition of sentence, and placing Respondent on summary probation for two years with terms and conditions. Those included payment of fines, penalties, fees, and assessments totaling \$190, but the court stayed payment. Respondent was ordered to pay restitution of \$5,501.14 to Mercury Insurance, and to perform 180 hours of community service. Proof of compliance with the restitution and service requirements was filed at that time.

(B) Respondent's crime was substantially related to the duties, qualifications, and functions of a real estate salesperson, as it evidenced dishonesty.

7. Respondent complied with all probation terms. On October 1, 2012, Respondent moved to terminate probation, and a hearing on her request was set for April 3, 2013. At the hearing the court set aside Respondent's plea, dismissed the case, and terminated her probation, pursuant to Penal Code section 1203.4.

² The original criminal complaint alleged three counts of insurance fraud in violation of Penal Code section 550, subdivision (a)(1), (a)(4), and (a)(5). The interlineated count 4 pertained to a violation of section 550, subdivision (b)(1). The criminal complaint alleged that the violations occurred in August 2009.

8. At the hearing, Respondent explained the facts and circumstances of the crime. Her oldest son, then approximately 16 years old, was driving with several of his friends, when he collided with another car that had several people in it. Respondent learned that her insurance on the car had lapsed two days before. In a panic over the specter of thousands of dollars in claims, she back dated paperwork to reinstate the policy, a ploy that was found out by the insurance carrier. In the end, the claims totaled \$5,501.14, the amount she had to pay the insurance carrier. While Respondent did not provide a timeline of the incident, the court documents assert the crime occurred on August 8, 2009, and the criminal proceeding was filed in October 2010.

Respondent's 2013 Conviction

9. On October 28, 2013, in the Superior Court of California, County of Los Angeles, Respondent was convicted of disturbing the peace in violation of Penal Code section 415, subdivision (2). The conviction was entered based on her plea of nolo contendere, and as a result she was convicted of a misdemeanor.

10. The court suspended sentence and placed Respondent on three years summary probation. Among the probation terms was a requirement that Respondent complete a 26 week parenting class and a 26 week anger management class. She was ordered to pay \$210 in fines and assessments.

11. The facts and circumstances of the matter are that Respondent had an informal arrangement with her ex-boyfriend regarding custody of their daughter, then two years old. On Sunday, April 28, 2013, the father took the girl to the beach with another couple and their child. Respondent tried to contact her ex-boyfriend on at least three occasions to find out what was going on with their child. He did not respond to her calls or texts, even though he received her messages. When he and his friends came home at approximately 8:00 p.m. to his residence in Arcadia, Respondent was waiting. She got out of her car, stormed over to where he was, and grabbed her daughter. She scratched her ex-boyfriend's arm in the process, and she also used vulgar language to describe him. She then left and went to her home, in Calabasas.

12. Respondent complied with all the terms and conditions of her probation. On April 16, 2015, the court terminated Respondent's probation, set aside her nolo contendere plea, and dismissed the case against her pursuant to Penal Code section 1203.4.

Respondent's 2013 License Application

13. As noted above, Respondent submitted her 2013 license application on October 25, 2013. In the application, she disclosed her 2012 conviction for insurance fraud.

14. A question on the application, number 26, asked if she had any criminal charges pending against her. Respondent answered no, which was not true, as the proceeding that led to her 2013 conviction was then pending against her; she had made her first court appearance in the matter in September 2013.

15. At the hearing Respondent stated that when she filled out the 2013 license application, she had disclosed her fraud conviction, had read the interrogatory, and simply misunderstood what the Bureau wanted to know, given that she had disclosed the fraud conviction. It is noted that her second application disclosed both of her convictions.

Other Matters

16. Respondent was previously licensed as a real estate salesperson, but she let the license lapse in June 2009. As a result of her first conviction, she lost her job. It took several years for her to find another job as good; financial hardship had followed her insurance fraud conviction. However, she is now the executive secretary to the chairman of a firm that handles real estate investments. Having a salesperson's license would increase her utility at her place of employment.

17. Respondent was questioned about her current work and living situation, in part to develop evidence pertinent to the Bureau's rehabilitation criteria. She testified that in addition to caring for two younger children, she cares for an older son who suffers from autism, and she described his symptoms, which pose significant challenges for a caretaker. For this reason, she has little time for activities outside her home or job, and hence is not in a position to perform community, charitable, or church activities of the type that can indicate a rehabilitated lifestyle. Likewise, she has come to the conclusion that her obligations make it difficult to have personal relationships.

18. Respondent took responsibility for her wrongdoing. In speaking to the circumstances, she did not make excuses for her misconduct. It was plain that she paid a heavy price for her attempt to deceive her insurance company. It does not appear that she would act in such a dishonest manner in the future; she is conscious of what she has to lose.

19. Respondent's testimony was credible in terms of her demeanor. She testified in a straightforward way, answering questions directly, without apparent prevarication. As noted on the record, the ALJ has substantial experience holding hearings for regional centers, which provide benefits to autistic individuals. Respondent's testimony regarding her son was consistent with what the ALJ has learned through experience and training. (Govt. Code, § 11425.50, subd. (c).)

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LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter pursuant to section 10100 of the Business and Professions Code,³ based on Factual Findings 1 through 3.
2. Respondent's conviction for insurance fraud is for a crime of moral turpitude, as it involved a dishonest act, based on Factual Findings 4 through 6, and 8. (See *In Re Rothrock* (1944) 25 Cal.2d 588 [crimes of dishonesty show moral turpitude].)
3. Respondent's conviction for insurance fraud is substantially related to the duties, qualifications, and functions of a real estate salesperson, based on Factual Findings 4 through 6, and 8, and Legal Conclusion 2 and California Code of Regulations (CCR), title 10, section 2910, subd. (a)(1), (a)(2), and (a)(4).⁴
4. Based on Factual Findings 4 through 6 and 8, and Legal Conclusions 1 through 3, cause exists to deny Respondent's application pursuant to sections 475, subdivision(a)(2), 480, subdivision (a), and 10177, subdivision (b), for conviction of a crime substantially related to the duties, qualifications, and functions of a real estate licensee.
5. (A) In all the circumstances, Respondent's conviction for disturbing the peace is not substantially related to the duties, qualifications, and functions of a real estate salesperson. The Respondent's conduct appears as an aberrant act, and akin to a crime of passion, given the manifold emotions that must have been stirred by her concerns for her child, and her former boyfriend's discourteous failure to return Respondent's phone calls so as to inform her of his plans for their daughter, who was apparently due to return to Respondent's home. The evidence shows that Respondent lives a fair distance from the father's home, and given Respondent's obligations to her disabled son, the uncertainty as to when her daughter would be returned may have increased Respondent's anger and anxiety. At bottom, the injury suffered by her ex-boyfriend does not amount to "substantial injury." (CCR § 2910, subd. (a)(8).) And, it was not established that Respondent acted with intent to cause substantial injury, a further requirement under the aforementioned regulation.

(B) Since the disturbing the peace conviction is not substantially related to the duties, qualifications, and functions of a real estate salesperson, it does not provide cause to deny Respondent's application for licensure.

³ All subsequent statutory references are to the Business and Professions Code unless otherwise noted.

⁴ All further citations to the CCR shall be to title 10 thereof.

6. Cause exists to deny the license application pursuant to sections 475, subdivision (a)(1), 480, subdivision (d), and 10177, subdivision (a), in that she made a false statement of material fact in her license application, based on Factual Findings 13 to 15. However, this is mitigated in that the misstatement was not made with an intent to mislead, based on Factual Findings 15 and 18.

7. The Bureau has regulations to be used in evaluating whether an applicant with a criminal record has been rehabilitated; they are found at CCR section 2911, and are summarized hereafter, and applied to this case.

(A) The ~~Department~~^{Bureau} looks for the passage of at least two years since the last conviction, with a longer period where there is more than one conviction. (CCR § 2911, subd. (a).) Here Respondent's first conviction—the only one substantially related—was entered over three years ago.⁵ Probation terminated over two years ago. (Factual Findings 4 through 7.)

(B) Restitution to any person who has suffered monetary losses. (Subd. (b).) Respondent made full restitution in compliance with the Superior Court's order prior to the entry of her misdemeanor conviction in the first case. (Factual Finding 6(A).)

(C) Expungement of a conviction, and discontinuance of registration requirements. (Subd. (c), (d).) The insurance fraud conviction was expunged within one year of its entry. She was not obligated to register as a sex offender. (Factual Finding 7.)

(D) Successful completion of probation. (Subd. (e).) Respondent completed her probation without incident. (Factual Findings 6(A) and 7.)

(E) Abstinence from the use of alcohol or controlled substances. (Subd. (f).) This subdivision is not relevant to this case.

(F) Payment of fines and penalties. (Subd. (g).) Respondent meets this criterion as she paid all of her fines, fees and assessments in each case prior to completing probation. (Factual Finding 6(A) and 7.)

(G) Stability of family life and fulfillment of parental responsibilities. (Subd. (h).) Respondent cares for her disabled son, and her other minor children. (Factual Finding 17.)

(H) Completion of, or enrollment in education or training programs. (Subd. (i).) There was no evidence on this point.

⁵ Even if the second conviction is considered, it is nearly two years old, it has been expunged, Respondent fulfilled all probation terms, and it has been expunged.

(I) Discharge of, or bona fide efforts to discharge, debts and obligations to others. (Subd. (j).) This does not appear relevant to this case.

(J) Correction of business practices resulting in injury to others. (Subd. (k).) This is not applicable to Respondent's case.

(K) Significant involvement in community and church programs designed to provide social benefits. Respondent cannot demonstrate such involvement, but as noted, the demands of caring for a developmentally disabled child hinder such activities. (Factual Finding 17.)

(L) New and different social relationships. (Subd. (m).) There was no evidence on this point, other than Respondent's testimony to the effect that the need to care for her son tends to get in the way of personal relationships. (Factual Finding 17.)

(M) Change in attitude from that held at the time of the criminal act. (Subd. (n).) It appears that Respondent has come to recognize the nature of her wrongdoing, based on Factual Finding 18.

8. Proceedings of this type exist to protect the public, and not to punish an errant licensee, or potential licensee. (*Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164; *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 784-786.) While Respondent was convicted of a serious crime, she has made full restitution, complied with all probation terms, and has obtained an early termination of probation. As noted above, the incident with Respondent's ex-boyfriend is not substantially related. On balance, the ALJ concludes that Respondent did not set out to mislead the Bureau about her criminal record when she filed the original application. The entire record indicates that the public can be protected through the issuance of a restricted license to Respondent.

ORDER

The application of Respondent Kimberly Kelly Schneider, also known as Kimberly Kelly Rino, for a real estate salesperson's license is denied; provided, however, that a restricted real estate salesperson's license shall be issued to Respondent pursuant to section 10156.5 of the Business and Professions Code. 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. The restricted 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, Regulation of the Real Estate Commissioner or conditions attaching to the restricted license.

2. 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 (3) years have elapsed from the issuance of the restricted license to the Respondent.

3. During the period that the restricted license is in effect Respondent shall obey all laws, rules, and regulations governing the rights, duties, and responsibilities of a real estate licensee in the State of California.

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 crimes 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.

5. Respondent shall 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 RE 552 (Rev. 4/88) approved by the Bureau of Real Estate which shall certify:

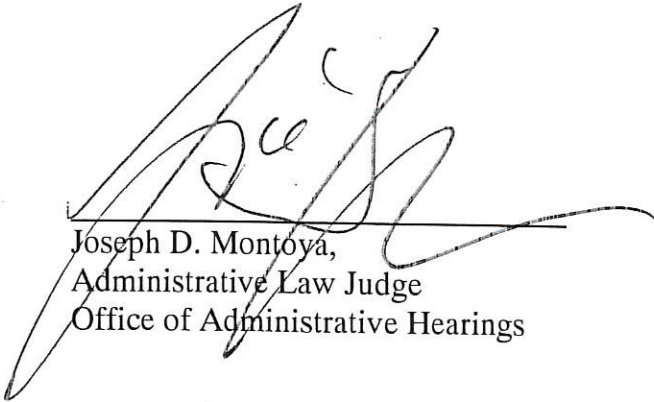
(A) That the employing broker has read the Decision which is the basis for issuing the restricted license; and,

(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.

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6. Pursuant to Section 10154, if Respondent has not satisfied the requirements for an unqualified license under Section 10153.4, 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 10153.4 until four years after the date of the issuance of the preceding restricted license.

August 21, 2015



Joseph D. Montoya,
Administrative Law Judge
Office of Administrative Hearings