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JUN - 1 2016

BUREAU OF REAL ESTATE

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BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Accusation of)	CalBRE NO. H-39918 LA
TOM SWE OO,)	OAH NO. 2015090343
Respondent(s).)	

ORDER STAYING EFFECTIVE DATE

On May 4, 2016, a Decision was rendered in the above-entitled matter to become effective June 1, 2016.

IT IS HEREBY ORDERED that the effective date of the Decision of May 4, 2016, is stayed for a period of 10 days to consider Respondent's petition for reconsideration.

The Decision of May 4, 2016, shall become effective at 12 o' clock noon on June 13, 2016.

DATED: 5/31/2016

REAL ESTATE COMMISSIONER

[Signature]
WAYNE S. BELL

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BUREAU OF REAL ESTATE

By 

BEFORE THE BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of)
TOM SWE OO,) CalBRE No. H-39918 LA
Respondent.) OAH No. 2015090343

DECISION

The Proposed Decision dated March 28, 2016 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 to the Proposed Decision.

Proposed Decision, Page 2, Paragraph 2, Line 5, "Respondent objected" is amended to read "Complainant objected".

Proposed Decision, Page 2, Paragraph 4, Line 4, "Respondent objected" is amended to read "Complainant objected".

The Decision suspends or revokes one or more real estate licenses.

Pursuant to Government Code section 11521, the Bureau of Real Estate may order reconsideration of this Decision on petition of any party. The Bureau's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the effective date of this Decision, whichever occurs first. 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 Sections 11521 and 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 JUN - 1 2016

IT IS SO ORDERED 5/4/2016

REAL ESTATE COMMISSIONER



WAYNE S. BELL

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

In the Matter of the Accusation Against:

TOM SWE OO,

Respondent.

No. H-39918 LA

OAH No. 2015090343

PROPOSED DECISION

Thomas Y. Lucero, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on February 4, 2016, in Los Angeles, California.

Maria Suarez, complainant, was represented at the hearing by Judith B. Vasan, Staff Counsel.

Tom Swe Oo, respondent, was self-represented.

Oral and documentary evidence was received. The record was left open so that respondent could submit documents by February 19, 2016 and complainant could respond by February 26, 2016. Respondent thus had leave to submit documents regarding the closure of the liquor store he operated at times pertinent to the accusation.

Respondent submitted several sets of documents, the first five sets timely, one set past the February 19, 2016 deadline. In response to the first set of documents respondent filed, complainant timely filed "Complainant's Reply to Respondent's Additional Documents." The response was marked for identification as Exhibit 8. Respondent timely submitted four additional sets of documents. Complainant timely filed "Complainant's Reply to Respondent's Second Submission of Additional Documents," which was marked for identification as Exhibit 9. Respondent filed a third set of documents after the February 19, 2016 deadline allowed at hearing.

Complainant did not object to:

(i) A one-page "Public Information Record" from the City of Downey, California, with a notation it was printed on February 4, 2016, regarding the closure of Price's Liquor; the document was marked and admitted into evidence as Exhibit B;

(ii) a two-page "License Query System Summary" from the California Department of Alcoholic Beverage Control (ABC) indicating it was copied from the internet on February 16, 2016; the document was marked and admitted into evidence as Exhibit C.

Respondent submitted with Exhibit B a "Fax Transmission" message to the ALJ dated February 7, 2016. Respondent submitted with Exhibit C another "Fax Transmission" message to the ALJ, also dated February 7, 2016. Respondent submitted a third "Fax Transmission" message to the ALJ dated February 16, 2016. The three messages are marked collectively Exhibit D. Respondent objected that the "Fax Transmission" messages were filed without leave and do not provide information for which the record was left open. The objections were sustained as to each message.

Respondent submitted a fourth "Fax Transmission" message to the ALJ dated February 25, 2016, including a one-page declaration by respondent as a response to Exhibit 9. This "Fax Transmission" message and declaration were marked for identification as Exhibit E. Exhibit E was not admitted.

Respondent submitted documentation with information regarding three residences: (i) on South Second Avenue in Arcadia, California, (ii) on Centola Road in Phelan, California, (iii) on Yuba Road in Phelan, California. The documentation was collectively marked Exhibit F. Respondent objected that the documentation was submitted without leave and does not provide information for which the record was left open, it contains hearsay, and the information is irrelevant. The objections were sustained. Exhibit F was not admitted into evidence.

The record was deemed closed and the matter was submitted for decision on February 26, 2016.

FACTUAL FINDINGS

1. Complainant brought the accusation in her official capacity as a Supervising Special Investigator of the State of California. Respondent filed a timely Request for Hearing.

2. On January 15, 1991, the Bureau of Real Estate (Bureau) issued respondent real estate broker license no. 00934890. The license is set to expire on January 14, 2019. (Exhibit 2.)

Convictions

3. On March 26, 2014, respondent was convicted, on a plea of nolo contendere, in the Superior Court of California, County of Los Angeles, case no. 3DY03967, of violating Penal Code sections 664 and 496, subdivision (a) (attempting to receive stolen property), a misdemeanor. Respondent was placed on summary probation for 36 months, ordered to

serve 40 days in county jail, with credit for 16 days served, and ordered to pay fines and assessments totaling \$205. (Exhibit 4.)

4. The facts and circumstances underlying the conviction are that in January 2013, a woman at the liquor store operated by respondent told him she was a single mother in need of money to buy food for her children. She offered him and he bought alcoholic beverages she said were left over from a Christmas party. She was actually an undercover agent of the Department of Alcoholic Beverage Control (ABC) and duly reported the crime. (Exhibit 6.)

5. On September 30, 2014, respondent was convicted, on a plea of nolo contendere, in the Superior Court of California, County of Los Angeles, case no. 4DY05851, of violating Business and Professions Code section 23300 (unlicensed sale of alcoholic beverages), a misdemeanor. Respondent was placed on summary probation for 36 months and ordered to pay fines, fees, and assessments totaling \$245. (Exhibit 3.)

6. The facts and circumstances underlying the conviction are that on March 24, 2014, respondent was operating a liquor store in Downey, California despite that the store's license to sell alcoholic beverages had been suspended some months previously. A customer asked respondent to sell him an alcoholic beverage the customer said respondent kept properly refrigerated, as other storekeepers did not. Respondent at first refused, telling the customer about the suspended license, but then he gave in to flattery and made the sale. Undercover agents of the ABC appeared and reported the crime. (Exhibit 6.)

Failure to Disclose

7. Respondent failed to disclose the convictions. In his Broker Renewal Application, Exhibit 5, he submitted to the Bureau on December 23, 2014, he answered no to this question:

Within the six-year period prior to filing this application, have you ever been convicted . . . of any violation of the law at the misdemeanor or felony level?

Respondent's testimony at hearing to explain the answer was evasive and unclear. He thought the question meant that misdemeanors and felonies were the same, or that the inquiry was about hybrid "misdemeanor-felonies," but in any case he did not believe he should admit to any kind of felony.

8. At the Bureau's request, on May 3, 2015, respondent filled in and submitted two copies of a form provided by the Bureau, the "Conviction Detail Report," Exhibit 6.

A. On the first copy respondent set out the same facts set out in Finding 6 above regarding selling liquor with a suspended license. Under "Explanation of Crime(s)," respondent wrote:

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I want to keep a good relationship with my customer also I felt sympathy on him. Due to his continuous winding and grinding I finally sold the liquor. That was my weakness.

In response to the form's question, "was this conviction disclosed on your original license application?" respondent checked no and wrote:

I thought misdemeanor is not felony nor crime.

The form has a box asking about rehabilitation efforts:

Rehabilitation Efforts – What positive changes have you made in your life since this conviction? (Criteria for rehabilitation is stated in Regulations 2911 and 2912 of Regulations of the Real Estate Commissioner.) Additionally, please provide names and contact information of any witnesses who can corroborate your rehabilitation efforts.

In the box respondent wrote in response:

Since the conviction happened, I teach myself first; the Law and Order comes in the first important Roll rather than the customer relationship.

B. On a second copy of the form respondent set out the same facts set out in Finding 4 regarding purchasing alcoholic beverages from a customer. Under "Explanation of Crime(s)," respondent wrote:

I felt my sympathy on that lady; that was my big mistake. I should not trust anybody; [f]inally, I found out Alcoholic Beverage Control was trying to set me up to convict the crime. That is not the fair conduct of doing the business.

In response to the form's question, "was this conviction disclosed on your original license application?" respondent again checked no and wrote:

I thought Misdemeanor is not a Felony, nor a crime.

In the box asking about his rehabilitation efforts, respondent identified an "Office Manager" and provided his telephone number. Respondent wrote further:

Since this conviction, I do not trust anybody; I try to find out deep down to the bottom myself.

Rehabilitation and mitigation

9. At hearing respondent's testimony was consistent with what he wrote in the two copies the "Conviction Detail Report." He acknowledged it was wrong to sell alcohol

despite a suspended liquor license. Respondent added, however, that the license was not his. He co-owned the liquor store with his domestic partner, but in 2014 they were at odds. They had planned to marry, but respondent changed his mind after concluding she had an expensive addiction to gambling. The liquor license was in her name. (Exhibit C.) Respondent therefore considered her his employer. She told him at times before the conduct that led to his convictions that he must take measures to make the store more profitable. As a result of this instruction from his co-owner and partner, respondent made the illegal sale and purchased alcoholic beverages from customers, the conduct that led to his two convictions.

10. Respondent denied he did wrong in purchasing alcohol from a person he considered a customer. He admitted he had bought alcohol from customers on other occasions. He said in this instance he was innocent but convicted because ABC tricked him. For years, ABC had sent minors to buy alcoholic beverages at the store, but respondent had been careful and always avoided selling to minors. Sending an adult to sell him liquor was ABC's new tactic and only worked, as respondent said, because he did not know or suspect the goods he agreed to buy were stolen.

11. In 1991 and 1992, respondent obtained government funding to operate a residence he owned as a half-way house for homeless women. There they would receive training and assistance to allow them to enter or re-enter the work force and avoid homelessness. The half-way house was shut down when government funding became unavailable.

12. Currently and for several years past respondent has been a volunteer at municipal Fourth-of-July events in La Palma, California. He spends generally two days helping to set up chairs and tables and other temporary amenities and another day following the event on clean-up. Respondent also donates used goods to charitable organizations at least four times per year.

13. Respondent has been struggling financially for some years. The liquor store he operated closed in September 2014. (Exhibit B.) He has earned little from real estate transactions or any source since then. His financial troubles are worse because his former domestic partner took money that respondent considered his. He claims ownership of an eight-bedroom house in Arcadia, California, where they used to live. (Exhibit A.) She filed suit to deprive him of ownership. Respondent has little that might fund a defense and fears he may lose in the litigation not only the Arcadia house, but other assets as well.

14. The Bureau incurred in this case reasonable investigation costs of \$703.95, and reasonable prosecution costs of \$427.20, a total of \$1,131.15. (Exhibit 7.)

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LEGAL CONCLUSIONS

1. The Bureau has the burden of showing by “clear and convincing proof to a reasonable certainty” that license discipline is warranted. (*Ettinger v. Medical Board of Quality Assurance* (1982) 135 Cal.App.3d 853, 855.)

The Convictions as Cause for Discipline

2. Under Business and Professions Code section 490, subdivision (a), the Bureau may discipline a license based on a criminal conviction so long as the crime is substantially related to the qualifications, functions, or duties of the licensed profession.

3. Under Business and Professions Code section 10177, subdivision (b), the Bureau may discipline the license of a real estate licensee who has “[e]ntered a plea of guilty . . . , or been found guilty of, or been convicted of . . . a crime substantially related to the qualifications, functions, or duties of a real estate licensee”

4. California Code of Regulations, title 10, section 2910, subdivision (a), sets out matters for the Bureau’s consideration in deciding whether a “crime or act shall be deemed to be substantially related to the qualifications, functions or duties of a licensee of the Bureau” under Business and Professions Code section 490:

[¶] . . . [¶]

(8) Doing of any unlawful act with the intent of conferring a financial or economic benefit upon the perpetrator [¶] . . . [¶]

(10) Conduct which demonstrates a pattern of repeated and willful disregard of law. . . .

(b) The conviction of a crime constituting an attempt, solicitation or conspiracy to commit any of the above enumerated acts or omissions is also deemed to be substantially related to the qualifications, functions or duties of a licensee of the department.

(c) If the crime or act is substantially related to the qualifications, functions or duties of a licensee of the department, the context in which the crime or acts were committed shall go only to the question of the weight to be accorded to the crime or acts in considering the action to be taken with respect to the applicant or licensee.

5. Cause exists under Business and Professions Code section 490, subdivision (a), to discipline respondent’s license based on the convictions. Respondent may have been motivated mostly by flattery in one case, and by sympathy in the other, but in both cases he was also following his domestic partner’s mandate to generate more profit, as set out above

in Finding 9. Respondent's convictions are thus deemed substantially related to the qualifications, functions, or duties of a licensee under California Code of Regulations, title 10, section 2910, subdivision (a)(8).

6. Cause exists to discipline respondent's license under Business and Professions Code section 10177, subdivisions (b). Respondent was found guilty of two crimes that, as indicated above, are substantially related to his qualifications, functions, or duties as a real estate licensee.

Rehabilitation and Mitigation

7. Whether respondent should be licensed despite the convictions depends on whether he is rehabilitated from the crimes. The crimes are serious. Strong evidence is therefore required to show by a preponderance of the evidence that respondent is rehabilitated. *In re Glass* (2014) 58 Cal. 4th 500, 520. "[T]he more serious the misconduct and the bad character evidence, the stronger the . . . showing of rehabilitation must be." (*In re Gossage* (2000) 23 Cal.4th 1080, 1096.)

8. The Bureau's pertinent criteria for evaluating rehabilitation are set out in California Code of Regulations, title 10, section 2912, providing 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 Bureau. (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 Bureau.)
- (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.
- (d) Expungement or discontinuance of a requirement of registration pursuant to the provisions of Section 290 of the Penal Code.
- (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.

- (h) Correction of business practices responsible in some degree for the crime or crimes of which the licensee was convicted.
- (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.

9. Respondent meets few of the rehabilitation criteria.

A. Less than two years have passed since his most recent conviction, in September 2014. (Cal. Code Regs., tit. 10, § 2912, subd. (a).)

B. Respondent has not successfully completed probation. He is still on probation for each conviction. (Cal. Code Regs., tit. 10, § 2912, subd. (e).)

C. On the other hand, as indicated in Findings 11 and 12, respondent has been previously and continues to be involved in his community. (Cal. Code Regs., tit. 10, § 2912, subd. (l).)

D. Most importantly, respondent's attitude has not changed significantly from the attitude at the time of his wrongdoing. (Cal. Code Regs., tit. 10, § 2912, subd. (m).) This is particularly true of the March 2014 conviction for attempting to receive stolen property. Respondent blames ABC instead of his own wrongful conduct. He denies his guilt. Such a denial, which amounts to a collateral attack on a conviction, is improper and ineffective. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 452.) Respondent did not carry his burden to show he is rehabilitated from his crimes.

Failure to Disclose

10. Business and Professions Code section 498 provides that the Bureau "may revoke, suspend, or otherwise restrict a license on the ground that the licensee secured the license . . . by knowingly omitting to state a material fact."

11. Cause exists to discipline respondent's license based on non-disclosure, as set out in Finding 7. It is immaterial that respondent may not understand the difference between a felony and a misdemeanor. The application sought information on either type of crime. By failing to reveal the information, respondent was "knowingly omitting to state a material fact" within the meaning of Business and Professions Code section 498.

12. In light of the seriousness of the crimes, from which respondent is not rehabilitated, and the failure to disclose information in applying to renew his license, revocation of respondent's license is appropriate.

13. Business and Professions Code section 10106, subdivision (a), authorizes the Bureau's recovery of reasonable costs in circumstances like those here, but an order requiring respondent to pay costs would be beyond his financial means, and unduly punitive. *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45 [an agency "must not assess the full costs of investigation and prosecution when to do so will unfairly penalize" a licensee]. In these circumstances, an order that respondent pay costs is not warranted.

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ORDER

All licenses and licensing rights of respondent, Tom Swe Oo, under the Real Estate Law are revoked.

Dated: March 28, 2016

DocuSigned by:
Thomas Y. Lucero
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THOMAS Y. LUCERO
Administrative Law Judge
Office of Administrative Hearings