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BUREAU OF REAL ESTATE

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BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

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In the Matter of the Accusation of	)	Case No. H-40060 LA
	)	
CINDY MARGARETTE SMITH,	)	OAH Case No. 2016020250
	)	
Respondent.	)	

DECISION AFTER REJECTION

The California Bureau of Real Estate ("Bureau") filed an Accusation against CINDY MARGARETTE SMITH ("Respondent") on December 10, 2015 in Case No. H-40060 LA. A hearing was held before the Office of Administrative Hearings ("OAH"), State of California, in Los Angeles on May 17, 2016, before Administrative Law Judge ("ALJ") Humberto Flores.

Bureau of Real Estate Staff Attorney Steve Chu represented Complainant Veronica Kilpatrick ("Complainant"), a Supervising Special Investigator of the Bureau. Respondent CINDY MARGARETTE SMITH ("Respondent") appeared personally and represented herself. Oral and documentary evidence was received; argument was heard; the record closed; and the matter was

1 submitted for decision on the same day.

2 On June 16, 2016, ALJ Flores issued a Proposed Decision which I declined to adopt as  
3 my Decision herein.

4 Pursuant to Section 11517(c) of the Government Code of the State of California, on  
5 July 27, 2016, Respondent was served with notice of my determination not to adopt the Proposed  
6 Decision of the ALJ along with a copy of said Proposed Decision. Respondent was notified that I  
7 would decide the case upon the record, the transcript of proceedings held on May 17, 2016, and upon  
8 any written argument offered by Respondent and Complainant. Respondent submitted written  
9 argument on September 13, 2016. Complainant submitted its written argument on September 22,  
10 2016.

11 I have given careful consideration to the record in this case, including the transcript of  
12 the May 17, 2016 proceedings. I have also considered the arguments submitted by both Respondent  
13 and Complainant. The following shall constitute the Decision of the Real Estate Commissioner  
14 (“Commissioner”) in this proceeding:

15 FINDINGS OF FACT

16 *Parties and Jurisdiction*

17 1. The Complainant brought the Accusation in Case No. H-40060 LA in her official  
18 capacity on December 10, 2015, pursuant to Sections 490 and 10177(b) of the Business and  
19 Professions Code.

20 2. Respondent is presently licensed and has license rights under the Real Estate  
21 Law, Part 1 of Division 4 of the Business and Professions Code (“Code”), as a real estate  
22 salesperson, CalBRE license number 01843036.

23 *Criminal Conviction*

24 3. On or about September 4, 2014, in the Superior Court of California, County of  
25 Riverside, Case No. 1NM1406286, Respondent pled guilty to and was convicted for violation of  
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1 California Penal Code ("PC") section 490.5 (Petty Theft of Property From Merchant), a  
2 misdemeanor. Respondent was placed on 36 months of summary probation and ordered to serve  
3 one day in jail and pay fines and fees.

4 4. The facts and circumstances underlying Respondent's conviction were that  
5 Respondent took merchandise from a department store without paying.

6 *OAH Hearing*

7 5. At hearing, Respondent testified, "I'm not a thief. I don't steal. It was a  
8 spontaneous decision..."

9 6. Additionally, Respondent testified that she has completed two years of the court-  
10 ordered probation.

11 7. On cross-examination, Respondent was asked about "previous shoplifting," to  
12 which she responded that, "...it was stupid. I was younger... You know I've taken bubble gum,  
13 things like that, in my life. It's something I will never do again..."

14 8. When Complainant's Counsel asked Respondent about the prior shoplifting  
15 conviction occurring around September 1999, Respondent stated again, "I'm not a thief. I don't  
16 steal..."

17 *Proposed Decision of ALJ Flores*

18 ALJ Flores found that although cause exists to revoke Respondent's real estate  
19 salesperson license pursuant to Business & Professions Code ("Code") sections 490 and 10177(b)  
20 due to the substantial relationship between Respondent's conviction and the qualifications  
21 functions and duties of a real estate salesperson pursuant to California Code of Regulations, title  
22 10, section 2910, subdivision (a)(8), that Respondent had satisfied some of the applicable criteria  
23 of rehabilitation set forth in Regulation 2912. Judge Flores noted that Respondent admitted her  
24 misconduct; accepted responsibility for her acts; expressed remorse; paid the court-ordered fine,  
25 and is otherwise completing all terms of her probation; and that she is remorseful and credible. In  
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1 addition, Judge Flores observed that Respondent established “some mitigation” and asserted that  
2 “Recidivism is unlikely.” ALJ Flores found that the public would be adequately protected if  
3 revocation of Respondent’s license is stayed under certain conditions and Respondent is granted a  
4 restricted real estate salesperson license.

5 LEGAL CONCLUSIONS

6 *Substantial Relationship Between Respondent’s Conviction and the Qualifications, Functions*  
7 *or Duties of a Real Estate Salesperson Pursuant to Title 10, Chapter 6, section 2910*

8 1. California Penal Code Section 490.5 makes punishable the act of petty theft of  
9 merchandise taken from a merchant’s premises.

10 2. Respondent pled guilty to and, on September 4, 2014, was convicted for violation of  
11 PC 490.5. Although Respondent asserted at hearing that she is not a thief and that she does not steal,  
12 her guilty plea was her admission to having stolen, that is, having taken merchandise from a merchant.

13 3. Given Respondent’s admission to and conviction for violation of PC 490.5, cause  
14 exists to suspend, revoke or condition Respondent’s restricted real estate salesperson license pursuant  
15 to Business and Professions Code sections 490 and 10177(b). Respondent pled guilty to and was  
16 convicted for petty theft. Respondent took items from a department store without paying for said  
17 items; this conduct is petty theft and is substantially related to the qualifications, functions or duties of  
18 a real estate licensee pursuant to California Code of Regulations, Title 10, Chapter 6, section 2910. in  
19 particular, subsections 2910(a)(1) (“The fraudulent taking, obtaining, appropriating or retaining of  
20 funds or property belonging to another person.”) and Regulation 2910(a)(8) (“Doing of an unlawful  
21 act with the intent of conferring a financial or economic benefit upon the perpetrator...”

22 a. Regulation 2910 (a)(1) is applicable to Respondent’s conviction as it involves the  
23 fraudulent taking, obtaining, appropriating or retaining of funds or property belonging to another  
24 person,” that is, Respondent took the items without paying the merchant.

1           b. Regulation 2910(a)(8) is applicable to Respondent's conviction as it involves the  
2 doing of an unlawful act with both the intent of conferring a financial or economic benefit upon the  
3 perpetrator, as well as the intent or threat of doing substantial injury to the person or property of  
4 another; in Respondent's case, she took items for her own benefit, but at the expense of the merchant.

5           4. Given the substantial relationship between Respondent's crime and the  
6 qualifications, functions or duties of a real estate licensee, cause exists to discipline Respondent's real  
7 estate salesperson license.

8           *Respondent Has Not Sufficiently Demonstrated Rehabilitation Pursuant to California Code of*  
9 *Regulations, Title 10, Chapter 6, section 2912*

10           1. As cause exists to suspend or revoke Respondent's real estate salesperson license,  
11 Respondent bears the burden of establishing rehabilitation. (*Martin v. Alcoholic Beverage Control*  
12 *Appeals Bd.* (1950) 52 Cal.2d 259, 264-265.) To date, Respondent has neither satisfied the  
13 applicable criterion of the Bureau's Criteria for Rehabilitation set forth in Title 10, Chapter 6 of the  
14 California Code of Regulations ("Regulations"), Regulation 2912, nor demonstrated that a  
15 continuation of the real estate salesperson license is appropriate. Respondent's proffered testimony  
16 yields an insufficient demonstration of rehabilitation to merit continued licensure of Respondent as a  
17 real estate salesperson

18           a. Regulation 2912(a): At the time of the hearing, less than two years had  
19 elapsed since Respondent's September 2014 conviction. At the present date, barely two years have  
20 passed since Respondent's conviction. An insufficient period of time has lapsed to find rehabilitation  
21 to merit Respondent's continued licensure as a real estate salesperson. Respondent has been on  
22 probation for much of the two-year period since the conviction.

23           b. Regulation 2912(c) and 2912(e): Respondent has not yet completed  
24 probation; nor has the conviction been expunged.

1 c. Regulation 2912(i): Respondent proffered no evidence of new social or  
2 business relationships.

3 d. Regulation 2912(k): Respondent proffered no evidence of her education or  
4 vocational training.

5 e. Regulation 2912(m): There is insufficient evidence of a change in  
6 Respondent's attitude between the time of the crime and the present. Respondent continued to state "I  
7 am not a thief," even after her admission to shoplifting fifteen years prior to the 2014 shoplifting  
8 conviction.

9 2. Respondent has made no indication to the Bureau that, two years after the conviction,  
10 that her attitude about her shoplifting history has changed, nor has she sufficiently demonstrated  
11 rehabilitation to merit her continued licensure as a real estate salesperson. Cause exists to suspend,  
12 revoke or condition Respondent's real estate salesperson license pursuant to Business and Professions  
13 Code section 490 and 10177(b).

14 3. The Real Estate Law and the disciplinary procedures provided for in the Real Estate  
15 Law are designed to protect the public and to achieve the maximum protection for those dealing with  
16 real estate licensees. Clients and commercial institutions rely on a licensee's integrity in representing  
17 them. Such licensees must be trustworthy. (*Ring v. Smith* (1970) 5 Cal.App.3d 197, 205; *Golde v.*  
18 *Fox* (1976) 98 Cal.App.3d 167, 177. *Harrington v. Department of Real Estate* (1989) 214 Cal.App.3d  
19 394, 402.) The Bureau's mission of public protection demands a revocation of Respondent's real  
20 estate salesperson license. A real estate licensee who sustains a conviction stemming from a dishonest  
21 act, and then fails to change her attitude about the dishonesty of her past acts, cannot be entrusted to  
22 maintain a real estate license within the real estate industry. Respondent has not successfully  
23 demonstrated rehabilitation, as she continues to assert that she is not a thief, in spite of having  
24 sustained convictions for shoplifting twice in a fifteen-year span. Given the recency of Respondent's  
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1 crime and Respondent's insufficient demonstration of a changed attitude regarding her misconduct,  
2 continued licensure as a real estate salesperson is not appropriate.

3 4. The Real Estate Law and the disciplinary procedures provided for in the Real Estate  
4 Law are designed to protect the public and to achieve the maximum protection for the purchasers of  
5 real property and those dealing with real estate licensees (Code Section 10050; Harrington v. DRE,  
6 id.). The Bureau cannot protect the public by allowing continued licensure of a real estate salesperson  
7 who has in her criminal history a recent conviction for a theft crime. Respondent is still under court-  
8 ordered probation, and the conviction has not been expunged. Moreover, Respondent has not  
9 demonstrated to the Bureau that she has changed her attitude about her crime. Rehabilitation is not  
10 sufficient at this time, and to allow a licensee with a theft conviction to remain licensed by the Bureau  
11 would place the public at risk.

12 5. Revocation of Respondent's real estate salesperson license is appropriate to  
13 adequately protect the public.

14 ORDER

15 WHEREFORE, THE FOLLOWING ORDER is hereby made:

16 All licenses and licensing rights of Respondent CINDY MARGARETTE SMITH  
17 under the Real Estate Law are revoked.

18 This Decision shall become effective at 12 o'clock noon on December 27, 2016.

19 IT IS SO ORDERED Dec. 4, 2016.

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22 REAL ESTATE COMMISSIONER

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25 WAYNE S. BELL

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FILED

JUL 27 2016

BUREAU OF REAL ESTATE

By *Cal Deloia*

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

\* \* \*

In the Matter of the Accusation of	)	CalBRE No. H-40060 LA
	)	
CINDY MARGARETTE SMITH,	)	OAH No. 2016020250
	)	
Respondent.	)	

NOTICE

TO: CINDY MARGARETTE SMITH, Respondent.

YOU ARE HEREBY NOTIFIED that the Proposed Decision herein dated June 16, 2016, of the Administrative Law Judge is not adopted as the Decision of the Real Estate Commissioner. A copy of the Proposed Decision dated June 16, 2016, is attached hereto for your information.

In accordance with Section 11517(c) of the Government Code of the State of California, the disposition of this case will be determined by me after consideration of the record herein including the transcript of the proceedings held on May 17, 2016, and any written argument hereafter submitted on behalf of respondent and complainant.

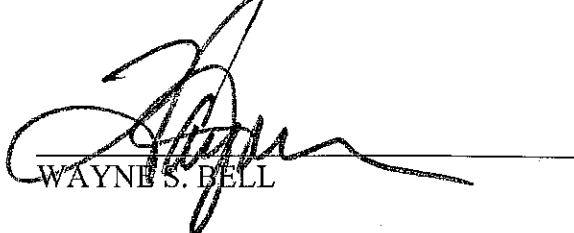
Written argument of respondent to be considered by me must be submitted within 15 days after receipt of the transcript of the proceedings of May 17, 2016, at the Los Angeles office of the Bureau of Real Estate unless an extension of the time is granted for good cause shown.

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Written argument of complainant to be considered by me must be submitted within 15 days after receipt of the argument of respondent at the Los Angeles Office of the Bureau of Real Estate unless an extension of the time is granted for good cause shown.

DATED: July 24, 2016 \_\_\_\_\_.

REAL ESTATE COMMISSIONER



WAYNE S. BELL

BEFORE THE  
BUREAU OF REAL ESTATE  
STATE OF CALIFORNIA

In the Matter of the Accusation of:

CINDY MARGARETTE SMITH,

Respondent.

Case No. H-40060 LA

OAH No. 2016020250

**PROPOSED DECISION**

This matter was heard by Humberto Flores, Administrative Law Judge with the Office of Administrative Hearings, on May 17, 2016, in Los Angeles, California.

Complainant was represented by Steve Chu, Counsel for the Bureau of Real Estate (Bureau). Cindy Margarette Smith (respondent) appeared personally and represented herself.

Evidence was received and the matter was submitted for decision. The Administrative Law Judge finds as follows:

**FACTUAL FINDINGS**

1. Veronica Kilpatrick (complainant) made the Accusation in her official capacity as Supervising Special Investigator for the Bureau of Real Estate.
2. Respondent is presently licensed and/or has licensing rights as a real estate salesperson under the Real Estate Law, Part 1 of Division 4 of the California Business and Professions Code
3. On September 4, 2014, in the Superior Court of California, County of Riverside, Case No. INM1406286, respondent entered a plea of guilty and was convicted of violating Penal Code section 490.5, subdivision (a), petty theft of property from a merchant, a misdemeanor that is substantially related to the duties, functions and qualifications of a real estate salesperson. Imposition of sentence was suspended and respondent was placed summary probation for 36 months on certain conditions including, inter alia, that respondent pay fines and fees totaling \$650. Respondent will remain on probation until September 2017, unless it is terminated earlier.

4. The facts and circumstances underlying the conviction were that respondent took merchandise from a department store without paying for the items. She was detained, arrested, and was released upon signing a promise to appear in the superior court on September 4, 2014. The department store recovered the items that respondent attempted to steal. Respondent admitted her misconduct and was remorseful for her actions. She testified that she was in financial stress and pressure at the time she committed the offense because she was not receiving financial help from her former husband.

5. Respondent admitted that she was arrested for petty theft in 1999, but there was no evidence that this arrest resulted in a conviction.

6. Respondent has been employed for the past two years as a real estate salesperson at Acclaim Properties, Inc. Gary Anderson, vice president and designated broker at Acclaim Properties, wrote a reference letter in support of respondent. In his letter Mr. Anderson indicated that he was aware of respondent's conviction and stated that respondent has always been honest and trustworthy in discharging her employment duties. Mr. Anderson also stated that "[respondent] had a momentary lapse of judgment and has learned her lesson. I feel that she does not pose a negative threat in any way to the general public that she may come into contact with regarding any real estate issues. I am her direct supervisor, and will continue, if she is allowed, to train, educate and supervise her real estate activities."

7. Respondent is a divorced mother of three boys. She has parental custody of her children and is the main financial support for the family. In order to provide for her family, respondent also works part-time as a waitress.

8. Respondent does not participate in community organizations, however she does volunteer work for her children's school and sports activities.

9. Pursuant to Business and Professions Code Section 10106, complainant requests costs of investigation of this matter in the amount of \$866.90, and costs of enforcement in the amount of \$551.80. These costs are reasonable under section 10601.

## LEGAL CONCLUSIONS

1. Cause exists to suspend or revoke respondent's real estate salesperson license under Business and Professions Code sections 490, and 10177, subdivision (b), for a misdemeanor conviction that is substantially related to the duties, functions and qualifications of a real estate salesperson pursuant to California Code of Regulations, title 10, section 2910, subdivision (a)(8).

2. Complainant submitted reasonable costs of investigation under Business and Professions Code section 10106. Therefore, cause exists to grant complainant's request for the costs of investigation and enforcement.

3. California Code of Regulations, title 10, section 2912, sets forth criteria for rehabilitation. The factors set forth in section 2912 are applied as follows:

*(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 department.*

Respondent's conviction occurred one year and nine months ago.

*(b) Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the applicant.*

The court did not order restitution as the department store recovered the items that respondent attempted to steal.

*(c) Expungement of the conviction or convictions resulting from immoral or antisocial acts.*

Respondent's conviction has not been expunged.

*(d) Expungement or discontinuance of a requirement of registration pursuant to the provisions of section 290 of the Penal Code.*

This factor is not applicable to this case.

*(e) Successful completion or early discharge from probation or parole.*

Respondent is still on summary probation.

*(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.*

This factor is not applicable in this case.

*(g) Payment of any fine imposed in connection with the criminal conviction.*

Respondent has paid the fine imposed by the Superior Court.

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

This factor is not applicable in this case.

*(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.*

Respondent's misconduct was an individual act that did not involve social or business relationships.

*(j) Stability of family life and fulfillment of parental and familial responsibilities subsequent to the conviction or conduct that is the basis for denial.*

Respondent is a single parent raising three young boys. Since committing the offense, respondent has been gainfully employed with Acclaim Properties, Inc. Since then, her financial situation has improved. As a result, her family life is now stable.

*(k) Completion of, or sustained enrollment in, formal educational or vocational training courses for economic self-improvement.*

There was no evidence presented addressing this factor.

*(l) Significant and conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.*

Respondent did not present evidence of community involvement. However, she does volunteer for her sons' school and sports activities.

*(m) Change in attitude from that which existed at the time of the commission of the criminal acts. . .*

Respondent admitted her misconduct and accepted responsibility for her actions. Further, respondent expressed genuine remorse during her testimony.

3. Respondent satisfied some of the applicable criteria of rehabilitation set forth in regulation section 2912. Respondent has paid the fine in her criminal case and is otherwise completing all terms of her probation. She is remorseful for her misconduct and testified credibly during the hearing. In addition, respondent established some mitigation. Recidivism is unlikely. In consideration of all of the facts and circumstances of this case, the public would be adequately protected with an order of revocation stayed under appropriate conditions.

## ORDER

All licenses and licensing rights of respondent Cindy Margarete Smith, under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to Section 10156.5 of the Business and Professions Code if respondent makes application thereof and pays to the Bureau of Real Estate the appropriate fee for the restricted license within 90 days from the effective date of this Decision. 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 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 this Decision.

4. Respondent shall submit with any application for a 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 Bureau 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 licensee relating to activities for which a real estate license is required.

5. Respondent shall pay to the Bureau of Real Estate the costs of investigation and enforcement of this matter in the amount of \$1,418.70. In its discretion, the Bureau may allow respondent to pay this amount in installments.

6. 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.

7. 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, California 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 suspension or revocation of that license.

DATED: June 16, 2016

*Humberto Flores*  
HUMBERTO FLORES  
Administrative Law Judge  
Office of Administrative Hearings