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JUN 08 2016

BUREAU OF REAL ESTATE

By Jan Aguirre

BEFORE THE BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of	)	CalBRE No. H-40117 LA
	)	
RICHARD IRWIN KIRCHNAVY,	)	OAH No. 2016020615
	)	
Respondent.	)	

DECISION

The Proposed Decision dated April 27, 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.

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 28 2016.

IT IS SO ORDERED

5/30/2016

REAL ESTATE COMMISSIONER

Wayne S. Bell
WAYNE S. BELL

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

In the Matter of the Accusation Against:

RICHARD IRWIN KIRCHNAVY,

Respondent.

Case No. H-40117 LA

OAH No. 2016020615

PROPOSED DECISION

Administrative Law Judge Irina Tentser, State of California, Office of Administrative Hearings, heard this matter on April 5, 2016, in Los Angeles, California.

Judith Vasan, Counsel, Bureau of Real Estate (Bureau), represented Complainant Maria Suarez (Complainant), a Supervising Special Investigator of the State of California.

Respondent Richard Irwin Kirchnavy (Respondent) appeared and was represented by Fredrick M. Ray, Attorney at Law.

Oral and documentary was received and the matter was submitted on April 5, 2016.

FACTUAL FINDINGS

Procedural Background

1. On January 27, 2016, Complainant filed the Accusation in her official capacity. Complainant seeks to impose disciplinary action against Respondent's real estate licenses based on his 2013 felony convictions for violating federal marijuana laws, including one count of conspiring to manufacture and possess with intent to distribute marijuana and to maintain a drug-involved premises.

2. a. Respondent was licensed as a real estate broker on November 24, 2007. Respondent is presently licensed and/or has license rights under the real estate law as a real estate broker. His real estate broker's license is scheduled to expire November 23, 2019.

b. Respondent is also licensed as an officer of 44Realty Corporation for a period beginning on January 17, 2008 and scheduled to end on January 14, 2020.

3. Respondent was licensed as a real estate salesperson on February 10, 1989. At a date unknown, Respondent's real estate salesperson license was conditionally suspended.¹

Criminal Conviction

4. On February 25, 2013, in the United States District Court, Central District of California, Case No. CR12-548, Respondent was convicted, by guilty plea, of violating Title 21, United States Code section 846 (conspiracy to manufacture to possess with intent to distribute and to distribute marijuana and to maintain a drug-involved premises.)

5. a. Pursuant to the conviction, Respondent was fined in the amount of \$7,500 and was sentenced to prison for a term of eight months, and, upon release from prison, to supervised release for a term of five years on certain probationary terms and conditions, including obedience of all laws, prohibition of unlawful use of a controlled substance, participation in an outpatient substance abuse and treatment and counseling program (as directed by the Probation Officer), and payment of a special assessment of \$100.

b. As of the date of the hearing, Respondent has completed his eight month prison term, has paid his fine, and continues to be on supervised release.

c. Respondent's conviction is substantially related to the functions and duties of a real estate licensee because it involved his ongoing perpetration of an unlawful act motivated for financial gain in willful disregard for the law.

6. The facts and circumstances underlying Respondent's conviction are as follows: On October 6, 2009, Respondent's former employers, Aaron Sandusky (Sandusky) and John Leslie Nuckolls, II (Nuckolls) formed G3 Holistics, Inc. (G3 Holistics) for the purpose of manufacturing and distributing marijuana. They opened three retail stores and signed a lease for a warehouse to manufacture marijuana for sale at these locations.

7. In 2010, Sandusky and Nuckolls hired Respondent to help grow marijuana plants at the warehouse. Law enforcement became aware of the operations through various

¹ Pursuant to Business and Professions Code section 10153.4, subdivision (c), Respondent's real estate salesperson license was conditionally suspended based on his non-compliance with the requirements of subdivision (c) of Section 10153.3 (evidence or certification satisfactory to the commissioner of enrollment in, or successful completion at, an accredited institution of a three-semester unit course, or the quarter equivalent thereof, or successful completion of an equivalent course of study as defined in Section 10153.5, in real estate principles.) The date of Respondent's salesperson license's conditional suspension was not submitted into evidence by the parties. Complainant's Accusation did not specifically address Respondent's real estate salesperson license, only his real estate broker's license. However, the Accusation includes a request that all of Respondent's licenses and license rights be disciplined. Accordingly, Respondent's real estate salesperson license and license rights are addressed in the instant decision.

narcotics investigations. Local officials requested that G3 Holistics close its business and cease operations. Sandusky refused.

8. On November 3, 2011, Respondent stopped working for G3 Holistics after law officials conducted a raid at his work location. Subsequently, on June 14, 2012, Respondent was arrested based on his employment and related marijuana growing activities on behalf of G3 Holistics. Respondent helped Sandusky and Nuckolls manufacture 1,210 marijuana plants for G3 Holistics. Respondent initially earned \$2,000 per month for his marijuana growing services. By the end of his employment term at G3 Holistics, Respondent's monthly wage had increased to \$8,000 per month.

9. Subsequent to his arrest, Respondent cooperated with authorities and acknowledged his failure to obey the law and his responsibility for his conviction.

Factors in Aggravation, Mitigation, or Rehabilitation

10. Respondent is 49 years old and has been happily married to his wife since 1992. He is a graduate of Glendora High School. Prior to his 2013 conviction, he had no criminal history. Respondent has worked in real estate for the past 20 years, the majority of his employment history. Prior to embarking on his career in real estate, Respondent worked as a weapons assembler for General Dynamics. Both Respondent and his wife are licensed real estate brokers who collectively operate Respondent's real estate business, 44Realty Corporation. Respondent and his wife specialize in listing and selling residential real estate. Respondent is a hard and industrious worker. During his employment with G3 Holistics, where he grew marijuana on a full-time basis, he also sold real estate on a full-time basis at 44Realty Corporation.

11. Janine Marie Kirchnavy, Respondent's wife, testified on his behalf. She has been married to Respondent for 24 years. In the years that Respondent and she have worked together in real estate, they have handled between 600 and 700 transactions. She testified that she was aware that Respondent was "in charge" of growing the medical marijuana plants for G3 Holistics and proudly attested to Respondent's "green thumb." She described her surprise that Respondent was arrested and prosecuted for his part in G3 Holistics because she did not think he was "doing something wrong" because the endeavor was legal in the State of California. On the other hand, Respondent's wife testified that both she and Respondent were aware that Respondent was violating federal law throughout his years of employment as a marijuana grower, having consulted an attorney prior to Respondent's involvement with growing marijuana for the collective. She testified that Respondent made a conscious decision to become involved and stay involved in the endeavor despite its federal illegality. She described the financial and emotional devastation and the public embarrassment that she and Respondent suffered after his arrest, conviction, and incarceration. Ultimately, she attested that Respondent would not make the same mistake again and had fully cooperated with authorities after his arrest. She indicated that it would be "devastating" if Respondent lost his real estate broker's license and that she couldn't imagine working without Respondent.

12. Kimberly Wilbrun, Respondent's friend and long-time colleague, testified on his behalf. She is the Vice President of Orange Coast Title Company, a title insurance company underwritten by the California Department of Insurance. In that capacity, she is responsible for insuring loans on properties. She holds a license as a sales representative. She first met Respondent and his wife in 1993 when they worked for ERA Dahler Realty in Ranch Cucamonga, California. She described their relationship as beginning professionally and then turning quickly into a friendship. She continues to conduct business with Respondent and his wife and chose Respondent's wife to handle the sale of her personal residence based on her confidence in her abilities. She described her shock at Respondent's arrest and conviction based on her belief that Respondent's arrest was due to his employment at a medical marijuana dispensary, which was legal in California. She described Respondent as a professional human being with an exceptional work ethic. She attested that Respondent was remorseful and had an exceptional business reputation in the real estate industry. However, she indicated that Respondent did not share the details of his conviction with her and that her knowledge was primarily based on news accounts.

13. Karen Ann Turner, a real estate agent and sales specialist for the past 27 years, testified on Respondent's behalf. She is currently a licensed real estate salesperson for Coldwell Banker Armstrong Properties in California, and has known Respondent and his wife for the past 20 years. She, Respondent, and his wife were co-workers for seven years at Realty Executives, a brokerage. She described Respondent's arrest as "mindboggling" and was still confused how he could be convicted based on his employment at a medical marijuana dispensary. She attested that Respondent was a "goody two shoes" who had a "very fine" business reputation. She was not aware of the details of Respondent's arrest and conviction and described Respondent's embarrassment and reluctance to discuss the matter.

14. Todd Elwyn Rice, Respondent's childhood friend, testified on Respondent's behalf. He has known Respondent since they were 14 years old and was aware that Respondent worked for G3 Holistics, having visited the facility out of curiosity. He testified that his wife was gifted with a marijuana cigarette by G3 Holistics when she was suffering from breast cancer. He admitted that his wife was not a member of G3 Holistics at the time she was given the marijuana and described the event as a "friendly gesture." He was aware of the details of Respondent's arrest and conviction and testified that Respondent "went into it with eyes wide open." He described Respondent's reaction to his arrest and conviction as "stressed out" and shocked that he was prosecuted by the federal government for activities that were legal under State of California law. He attested that Respondent was cooperative with the government subsequent to his arrest and that Respondent stopped working at G3 Holistics immediately after it was raided in November 2011.

15. a. Respondent submitted seven character reference letters in support of his continued licensure. Three of the letters were from witnesses who testified at hearing on his behalf. The remaining four letters were from Scott Baker (Baker), Raymond Ronnebeck (Ronnebeck), Rea Ronnebeck (Rea R.), and Pamela Temple (Temple.)

b. Baker, a retired Sergeant from the California Department of Corrections and Rehabilitation, wrote that has known Respondent for the past 14 years, was one of his closest friends, and attested to his honesty and integrity. Baker opined that Respondent's conviction was a shame since medical marijuana is legal in California. Baker believed that Respondent's involvement with G3 Holistics was motivated by Respondent's sincere interest in helping people.

c. Raymond Ronnebeck, a Senior Management Consultant with Peoples Discount Mortgage, wrote that he did not believe that Respondent's federal case for working for a state approved medical marijuana collective should have any effect on his California real estate license. Ronnebeck has been Respondent's colleague in the real estate industry for the past 12 years and attested to Respondent's respectful, honest, ethical, and supportive behavior.

d. Rea R., a realtor for the past 18 years employed with Intero Real Estate, wrote that she had known Respondent and his wife for the past 12 years. She worked with Respondent and his wife while they were all employed at Realty Executives in 2004. She subsequently went to work for Respondent and his wife when they opened their own office in 2007. She described Respondent as highly respected within the real estate community and wrote that Respondent was her "hero," having supported her throughout a contentious divorce.

e. Pamela Temple, a REO (Real Estate Owned) Asset Manager for Fannie Mae, wrote that her friendship and business relationship with Respondent and his wife spanned 25 years. She indicated that Respondent's employment with G3 Holistics had no effect on her positive feelings towards Respondent, describing him as honest, ethical, and proficient at his job.

16. Respondent testified that, based on attorney advice, he did not believe he would be prosecuted for violation of federal marijuana laws as long as he and G3 Holistics were in compliance with state marijuana dispensary laws. He believed that he would not be prosecuted because of the president's press statements indicating that he would not prosecute for violation of marijuana federal law, but defers to state marijuana laws and federal memoranda from the Attorney General's office (the so-called "Cole memorandum") regarding allocation of prosecutorial resources for violation of federal marijuana laws. (Exh. N.) He admitted that prior to beginning his employment with G3 Holistics, he had discussions with an attorney who told him that marijuana was still illegal under federal law and that he was aware that federal prosecution was an unlikely possibility. He stated that the first time he became aware that the federal government was targeting G3 Holistics was when the dispensary was raided in November of 2011.

17. Respondent further testified that he became involved in the marijuana dispensary business because he had always been interested in horticulture and wanted to help people. Respondent testified that he did not use marijuana, but had obtained a State of

California Medical Marijuana Identification Card during his employment with G3 Holistics in order to comply with state guidelines.

18. Respondent minimized the income he earned as a marijuana grower, testifying that he primarily earned \$2,000 per month during his employment with G3 Holistics. However, Respondent's testimony regarding his marijuana dispensary income was in conflict with his wife's testimony and his sentencing memorandum (Exh. M.) that he earned \$8,000 per month during his medical marijuana dispensary employment tenure.

19. While Respondent expressed some regret for his actions, Respondent's testimony focused on the unfairness of his prosecution by the federal government. He minimized the fact that he knowingly violated federal marijuana laws, indicating that the federal government's decision to prosecute was arbitrary and unfair. His testimony focused on his embarrassment and the devastating effect that his conviction had on his business and life. Respondent expressed his belief that marijuana would be legal on a federal and state level in the next 20 years. He opined that his state license should not be disciplined because his marijuana growing activities were consistent with state law.

Discussion

20. Respondent expended effort in an attempt to comply with state marijuana dispensary laws, and had a good faith belief that his marijuana dispensary employment was in compliance with state laws. Respondent's good faith belief is a mitigating circumstance. However, that mitigating context is offset by the aggravating circumstance that Respondent knew that he was violating federal law by working as a marijuana grower. As such, he assumed the risk knowingly when he chose to violate federal law.

21. For purposes of evaluating his rehabilitation, it is significant that respondent has not fully acknowledged his wrongdoing. (See, *Seide v. Committee of Bar Examiners of the State Bar of California* (1989) 49 Cal.3d 933, 940 ["Fully acknowledging the wrongfulness of his actions is an essential step towards rehabilitation."].) Respondent seemingly blames the federal bureaucracy and believes himself to be a victim of arbitrary prosecution. As such, he has not acknowledged his responsibility in knowingly and willfully violating federal laws during the approximate two-year period he ran the grow operations of a medical marijuana dispensary. Respondent assumed the risk of his actions in choosing to knowingly violate federal law. While Respondent attempts to couch his conduct as motivated by a love of horticulture and a desire to help people, it is undeniable that his employment was also driven by an economic motive. The fact is that Respondent was well compensated.

22. Further, rehabilitation must be demonstrated by sustained conduct over an extended period of time. (See, *In re Menna* (1995) 11 Cal.4th 975, 991.) Because Respondent is currently on probation and will remain so until December 2018, he is not in a position to demonstrate true rehabilitation. Minimal weight is given to his good behavior

while on probation because such behavior is expected. (See, *In re Gossage* (2000) 23 Cal.4th 1080, 1099.) Additional time is necessary to evaluate Respondent's rehabilitation.

Respondent's Legal Contentions

23. a. Respondent's counsel argues that the Bureau should not discipline Respondent's license for a federal marijuana law conviction, because his federal marijuana conviction is not substantially related to the qualifications, functions, or duties of a real estate licensee. Additionally, he argues that because Respondent followed California medical marijuana laws and his activities were legal under state law, he should not be subject to discipline. The arguments are unpersuasive because they disregard the plain language of sections 490 and 10177, subdivision (b), which provide for license discipline for conviction of a crime substantially related to the qualifications, functions, or duties of a real estate licensee. No exception is provided by these applicable sections for conduct in compliance with state medical marijuana laws. The question in this proceeding is whether Respondent was convicted of crimes substantially related to the duties of a real estate licensee under the applicable disciplinary statutes.

b. Applying the Bureau's criteria of substantial relationship to Respondent's actions, the conclusion is yes. (Cal. Code Regs. tit. 10, § 2910). Specifically, Respondent knowingly and repeatedly perpetrated unlawful acts with the intent of conferring a financial benefit to himself by violating federal laws in conducting the marijuana plant growing operations of G3 Holistics over a two year period. (Cal. Code Regs. tit. 10, § 2910, subds. (a)(8) and (a)(10).) The real estate profession is regulated by a number of laws and licensees are charged with complying and obeying those laws, as opposed to disregarding them. Accordingly, Respondent's conviction is substantially related to that of a Bureau licensee because it evidences a knowing willingness by Respondent to disobey the law for financial gain.

Bureau's Rehabilitation Criteria

24. The Bureau has developed criteria for evaluating whether a licensee has been rehabilitated since he suffered the conviction(s) constituting grounds for license discipline. (Cal. Code Regs., tit. 10, § 2912.) The criteria relevant here are (1) the passage of at least two years since the licensee's most recent conviction; (2) expungement of conviction or convictions resulting in administrative disciplinary proceeding; (3) successful completion or early discharge from probation or parole; and (4) change in attitude from that which existed at the time of the commission of the acts in question. (Cal. Code Regs., tit. 10, § 2912, subds. (a), (c), (e), & (m).)

25. Based on the relevant criteria, Respondent rehabilitation is incomplete. Respondent's convictions occurred a little over three years ago, which is relatively too recent to permit a showing of rehabilitation. His willful and knowing engagement in criminal behavior reflects directly upon the honesty and integrity required of a real estate licensee, who must frequently act in a fiduciary capacity. (See, *Harrington v. Dept. of Real Estate*

(1989) 214 Cal. App.3d 394, 402.) Respondent's failure at hearing to forthrightly accept the wrongfulness of his actions is of great concern. In order to demonstrate rehabilitation, Respondent must acknowledge wrongdoing. Respondent instead deflects blame on the federal government's choice to enforce marijuana prohibition for his conviction. Respondent's hearing testimony is therefore inconsistent with a showing of rehabilitation because it does not demonstrate full acceptance of responsibility, or full acknowledgment of wrongdoing.

26. As discussed below, cause exists to discipline respondent's real estate licenses. Respondent has not demonstrated sufficient rehabilitation to mitigate the discipline to be imposed.

Costs of Investigation and Enforcement

27. Complainant offered declarations that supported investigative costs of \$772 and enforcement costs of \$551.80. The reasonableness of the claimed costs was not challenged by Respondent. The combined investigative and enforcement costs of \$1,323.80 are reasonable. The Bureau is entitled to recover \$1,323.80 in costs.

LEGAL CONCLUSIONS

1. Section 490 permits the Bureau to inquire into the circumstances surrounding the commission of a crime, by one of its licensees, to determine if the crime is substantially related to the qualifications, functions, or duties of a real estate licensee. In this case, as described in factual findings 4 and 23, the requisite substantial relationship exists with respect to Respondent's conviction.

2. A real estate license may be disciplined when the licensee has been convicted of a crime that is substantially related to the qualifications, functions, or duties of a real estate licensee. (Bus. & Prof. Code, §§ 490, subd. (a); 10177, subd. (b).) Respondent was convicted of violating federal marijuana law, as described in factual findings 4 through 9. Such crimes, under the factual circumstances presented, are deemed to be substantially related to the qualifications, functions, or duties of a real estate broker and/or salesperson, as described in factual findings 4 and 23. The crimes involved the performance of unlawful acts with the intent of conferring a financial benefit upon the perpetrator and demonstrated a pattern of repeated and willful disregard of law. (See, Cal. Code Regs., tit. 10, § 2910, subds. (a)(8) ["Doing of any unlawful act with the intent of conferring a financial or economic benefit upon the perpetrator"], and (a)(10) ["Conduct which demonstrates a pattern of repeated and willful disregard of law."].) Therefore, cause for discipline exists pursuant to Business and Professions Code sections 490, subdivision (a), and 10177, subdivision (b).

3. A professional license may be disciplined only upon "clear and convincing evidence to a reasonable certainty." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal. App.3d 853-856.)

4. Clear and convincing evidence established cause for discipline of respondent's license pursuant to Business and Professions Code sections 490, subdivision (a), and 10177, subdivision (b), in that Respondent was convicted of crimes substantially related to the qualifications, functions, and duties of a real estate salesperson, as described in factual findings 4 through 9 and 23, and legal conclusions 1 and 2.

5. In determining the appropriate discipline, the central question is what level of discipline is necessary to protect the public. Disciplinary proceedings to suspend or revoke a real estate license are not conducted for the primary purpose of punishing an individual. (*Small v. Smith* (1971) 16 Cal.App.3d 450, 457.) Based upon all of the matters set forth in factual findings 4 through 25 above, including the lack of rehabilitation evidence, public protection requires that Respondent's real estate licenses be revoked.

6. Business and Professions Code section 10106 permits the Real Estate Commissioner to request an administrative law judge hearing a disciplinary matter to direct a licensee to pay a sum not to exceed the reasonable costs of investigation and enforcement of the case, except as otherwise provided by law. Evidence is required to support an award.

7. Section 125.3 entitles the Bureau to recover from Respondent its reasonable costs, including fees of the Attorney General, it has incurred in connection with the investigation and prosecution of this matter. Complainant provided sufficient evidence to support an award of the costs of investigation and enforcement in the amount of \$1,323.80, as described in factual finding 27.

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8. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the Supreme Court set forth four factors required to be considered in deciding whether to reduce or eliminate costs: (1) Whether the licensee used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed; (2) whether the licensee had a “subjective” good faith belief in the merits of his position; (3) whether the licensee raised a “colorable challenge” to the proposed discipline; and (4) whether the licensee had the financial ability to make payments. Applying the *Zuckerman* factors, it is reasonable to require Respondent to pay the Board’s \$1,323.80 in costs.

ORDER

1. All licenses and licensing rights of Respondent Richard Irwin Kirchnavy under the Real Estate Law are REVOKED.
2. Respondent Richard Irwin Kirchnavy shall pay \$1,323.80 to the Bureau of Real Estate as its costs of investigation and enforcement of this case.

Dated: April 27, 2016

DocuSigned by:

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IRINA TENTSER
Administrative Law Judge
Office of Administrative Hearings