

FILED

SEP 16 2016

BEFORE THE BUREAU OF REAL ESTATE

BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

By

[Signature]

* * *

In the Matter of the Accusation of	)	CalBRE No. H-40188 LA
	)	
DONYETTE MALCOLM,	)	OAH No. 2016041225
	)	
Respondent.	)	

DECISION

The Proposed Decision dated July 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.

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

Legal Conclusion, page 4, paragraph No. 6, line 2, "...she not steal anything" is amended to read "...she did not steal anything".

The Decision suspends or revokes one or more real estate licenses, but the right to a restricted salesperson license is granted to Respondent.

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 OCT 06 2016.

IT IS SO ORDERED 9/8/2016

WAYNE S. BELL
REAL ESTATE COMMISSIONER



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

In the Matter of the Accusation Against:

DONYETTE MALCOLM,

Respondent.

Case No. H-40188 LA

OAH No. 2016041225

PROPOSED DECISION

Administrative Law Judge Gloria A. Barrios heard this matter on June 21, 2016, in Los Angeles, California.

Julie L. To, Staff Counsel for the Bureau of Real Estate (Bureau), represented Veronica Kilpatrick (Complainant), Deputy Real Estate Commissioner.

Donyette Malcolm (Respondent) was present and represented herself.

The record remained open for submission of court records from Respondent and any response from Complainant. Respondent submitted certified court records from *People v. Donyette Malcolm*, Superior Court of the State of California, County of Los Angeles, case number MA062605 that were marked as Respondent's Exhibit C for identification. There was no objection from Complainant and Exhibit C was admitted. The record was closed and the matter was submitted for decision on July 7, 2016.

FACTUAL FINDINGS

1. Complainant brought the Accusation in her official capacity.
2. Respondent has been licensed as a real estate salesperson, license number 01345066, since July 10, 2002. The license has been renewed through October 18, 2018. The license has not been disciplined previously.
3. On April 21, 2014, Respondent was convicted, after her plea of nolo contendere, of violating Penal Code section 459, (commercial burglary), a misdemeanor, (*People v. Donyette Malcolm*, Superior Court of the State of California, County of Los Angeles, case number MA062605.) Imposition of sentence was suspended, and Respondent

was placed on summary probation for 36 months under terms and conditions including that she pay fines, fees and restitution totaling \$451. The court ordered Respondent to serve one day in jail less credit for one day served. The court also ordered Respondent to perform 10 days of community service and stay 100 yards away from Kohl's in Antelope Valley. On June 20, 2016, the court granted Respondent's motion for early termination of probation and terminated her probation. On June 22, 2016, the court granted Respondent's motion pursuant to Penal Code section 1203.4, to set aside her plea, enter a plea of not guilty, and dismiss the criminal complaint.

4. The facts and circumstances underlying Respondent's conviction are that in December 2013, Respondent received clothing from Angel Tree – Prison Fellowship (Angel) for her two children. Angel is an organization that provides gifts of clothing and toys to families of prisoners. Respondent's father, the children's grandfather, is in prison. The clothing did not fit the children, although Angel had called Respondent a week before delivering the clothing to get the children's sizes. There was no way to exchange the clothing through Angel so Respondent went online to see if she could contact the clothing's manufacturers to request an exchange. She learned that the company that made the clothing sold it at Kohl's. Respondent went to Kohl's in Antelope Valley. Kohl's offered her a store credit or cash refund. Respondent chose a store credit. She showed her identification to Kohl's. Two months later, Respondent received a letter that she was required to go to court. Respondent learned that she was charged with felony commercial burglary. She found out that the clothes Respondent had returned to Kohl's were not in their system as being purchased there. She contacted Angel to obtain some kind of document that confirmed that she had received the clothing through them, but they did not help her. Respondent further explained that Angel delivered the gifts by private delivery, with no receipt. Respondent took the plea so that she would only have a misdemeanor on her record instead of a felony. She maintained she did not steal anything.

5. Respondent testified that she completed probation early and met all terms and conditions ordered by the court. She had her conviction expunged.

6. Respondent is currently employed as a real estate salesperson at Topel Realty (Topel) in Lancaster. Respondent offered a character reference letter from Kerry Topel (K. Topel), a real estate broker at Topel. This letter was received in evidence as administrative hearsay.¹ K. Topel wrote, "I am the owner and broker of Topel Realty. Donyette Malcolm has worked in my office for 4 years as a real estate professional. She has always acted in a professional manner and consistently is a top producer in the office. I have never had any

¹ The term "administrative hearsay" is a shorthand reference to the provisions of Government Code section 11513, subdivision (d), to the effect that hearsay evidence that is objected to, and is not otherwise admissible, may be used to supplement or explain other evidence but may not, by itself, support a factual finding. It may be combined with other evidence to provide substantial evidence sufficient to support a finding. (*Komizu v. Gourley* (2002) 103 Cal.App.4th 1001.)

issues with her transactions. She works hard for her clients and she takes her fiduciary responsibility very seriously. On a professional level, I know she provides for her family, attends church and is generous in helping those in need.” K. Topel knew about Respondent’s conviction. (Respondent’s Exhibit B.)

7. Respondent was named “Top Agent” at Century 21 when she was an agent at Century 21 Yarrow and Associates in Lancaster from 2002 through 2011. Respondent participates in Hill City food drives in Los Angeles and Highland food drives in Palmdale on a yearly basis.

8. Respondent is 44 years old. She is separated from her husband. Respondent has two children, a son who is 19 years old and a daughter who is 20 years old. Her son is autistic. Respondent financially supports herself and her children. Her children reside with Respondent. There is no evidence that she has suffered any other conviction.

9. Complainant introduced evidence as to the Bureau’s cost of its investigation and enforcement of this matter pursuant to Business and Professions Code² section 10106. The requested total amount is \$921.20, which is reasonable under the facts of this case. (Complainant’s Exhibit 5.)

LEGAL CONCLUSIONS

1. The standard of proof for the Bureau to prevail on the Accusation is clear and convincing evidence to a reasonable certainty. (See *Borror v. Dept. of Real Estate* (1971) 15 Cal.App.3d 531; *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853.) This means the burden rests with Complainant to offer proof that is clear, explicit and unequivocal—so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.)

2. Code section 490 provides that the Bureau may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued.

3. Code section 10177, subdivision (b) provides that a real estate licensee may have her license disciplined for conviction of a crime if it is substantially related to the qualifications, functions, or duties of a real estate licensee.

² All further statutory references are to the Business and Professions Code except when noted.

4. The Bureau has issued regulations that specify the types of crimes that are "substantially related" to the qualifications, functions, or duties of a real estate licensee. Respondent's conviction for commercial burglary is "substantially related" under California Code of Regulations, title 10 (CCR), section 2910, subdivision (a)(1) ("the fraudulent taking, obtaining, appropriating or retaining of funds or property belonging to another person."

5. Cause exists to impose discipline on Respondent's real estate salesperson's license pursuant to Code sections 490 and 10177, subdivision (b), because Respondent has been convicted of a crime that is substantially related to the qualifications, functions, and duties of a real estate salesperson, as set forth in Factual Findings 3 and 4, and Legal Conclusions 2 and 3.

6. Respondent argues she did not commit the crime for which she was convicted. Respondent contends she not steal anything. At these administrative proceedings, Respondent cannot impeach her criminal conviction. The entry of a guilty plea in her 2013 criminal conviction is conclusive evidence of her guilt. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 449.) However, the Bureau may examine the underlying circumstances of the conviction in order to fix the appropriate degree of discipline pursuant to Code section 493. In this matter, Respondent appeared to have returned items to a store she had received through a charity. Since the store had no record that these items were purchased, it was assumed that Respondent had committed a theft. She did not steal anything.

7. Although cause for discipline exists, it is necessary to determine whether Respondent has been sufficiently rehabilitated to warrant her continued licensure. Rehabilitation is a "state of mind" and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved "reformation and regeneration." (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.)

8. The Bureau has established criteria for rehabilitation from a conviction of a crime to warrant continued licensure. The criteria, found at CCR, section 2912, are summarized as follows:

- Subdivision (a), passage of at least 2 years since the conviction or the underlying acts;
- Subdivision (b), restitution;
- Subdivision (c), expungement of the conviction;
- Subdivision (d), expungement of the requirement to register as a sex offender;
- Subdivision (e), completion of, or early discharge from, the criminal probation;
- Subdivision (f), abstinence from drugs or alcohol that contributed to the crime;
- Subdivision (g), payment of any criminal fines or penalties;
- Subdivision (h), correction of business practices causing injury;
- Subdivision (i), new and different social and business relationships;
- Subdivision (j), stability of family life;
- Subdivision (k), enrollment in or completion of educational or training courses;
- Subdivision (l), significant involvement in community, church or private programs for social betterment; and

Subdivision (m), change in attitude from the time of conviction to the present, evidenced by: testimony of the licensee and others, including family members, friends or others familiar with his previous conduct and subsequent attitudes and behavior patterns, or probation or parole officers or law enforcement officials; psychiatric or therapeutic evidence; and absence of subsequent convictions.

9. It has been more than two years since Respondent was convicted. (Finding 3.) It has been three years since Respondent committed the underlying act for which she was convicted. Respondent completed probation early. She fulfilled the court ordered terms and conditions, including serving community service, paying fines, fees and restitution. Her conviction has been expunged. Respondent is involved in charities. Her supervising broker attested to Respondent's character.

10. The Real Estate Law and the disciplinary procedures are designed to protect the public. Clients rely upon real estate licensees' integrity to represent their interests. (*Ring v. Smith* (1970) 5 Cal.App.3d 197, 205; *Golde v. Fox* (1976) 98 Cal.App.3d 167, 177; *Harrington v. Department of Real Estate* (1989) 214 Cal.App.3d 394, 402.) There is a valid governmental purpose in limiting licensees of the Bureau to persons with the qualifications of honesty, truthfulness and good reputation. (*Riley v. Chambers*, (1919) 181 Cal. 589, 593-594.) Respondent offered rehabilitation. There is no evidence that she has suffered any other criminal conviction. Respondent's supervising broker supports her. In weighing Respondent's wrongdoing and considering Respondent's mitigation and rehabilitation evidence, the public's interest will be protected if she were allowed to retain her license, albeit on a restricted basis.

11. The Bureau is entitled to recover its cost of prosecution of this matter in the sum of \$921.20 pursuant to Code section 10106 by reason of Finding 9.

ORDER

1. Real estate salesperson's license number 01345066 and all licensing rights under the Real Estate Law of Respondent Donyette Malcolm are revoked; provided, however, a restricted real estate salesperson's license shall be issued to Respondent pursuant to Business and Professions Code section 10156.5, if Respondent makes application therefor and pays to the Bureau 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 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 license shall not confer any property right in the privileges to be exercised, and the Real Estate Commissioner may by appropriate order suspend the right to exercise any privileges granted under this restricted license in the event of:

(a) The conviction of Respondent (including a plea of nolo contendere) of a crime which is substantially related to Respondent's fitness or capacity as a real estate licensee; or

(b) The receipt of evidence that Respondent has violated provisions of the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to 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 years have elapsed from the date of issuance of the restricted license to Respondent.

3. With the application for license, or with the application for transfer to a new employing broker, Respondent shall submit a statement signed by the prospective employing real estate broker on a RE 552 (Rev. 4/88) approved by the Bureau of Real Estate which shall certify as follows:

(a) That the employing broker has read the Decision which is the basis for the issuance of the restricted license; and

(b) That the employing broker will carefully review all transaction documents prepared by the restricted licensee and otherwise exercise close supervision over the licensee's performance of acts for which a license is required.

4. Respondent shall notify the Commissioner in writing within 72 hours of any arrest by sending a certified letter to the Commissioner at the Bureau of Real Estate, Post Office Box 187000, Sacramento, CA 95818-7000. The letter shall set forth the date of Respondent's arrest, the crime for which Respondent was arrested and the name and address of the arresting law enforcement agency. Respondent's failure to timely file written notice shall constitute an independent violation of the terms of the restricted license and shall be grounds for the suspension or revocation of that license.

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5. Respondent shall pay the Bureau its costs of investigation and prosecution of this action in the amount of \$976.70. Repayment of the costs shall be on such terms and conditions as Respondent and the Bureau or the Bureau's designee shall arrange, but 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 all such costs have been paid.

DATED: July 27, 2016

DocuSigned by:
gloria a. barrios
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GLORIA A. BARRIOS
Administrative Law Judge
Office of Administrative Hearings