

FILED

BEFORE THE BUREAU OF REAL ESTATE

FEB 22 2017

STATE OF CALIFORNIA

BUREAU OF REAL ESTATE

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By *Ca Salorio*

In the Matter of the Application of

HECTOR JAVIER MARTINEZ,

Respondent.

) CalBRE No. H-40372 LA

) OAH No. 2016100238

DECISION

The Proposed Decision dated January 4, 2017, 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 application for a real estate salesperson license is denied, but the right to a restricted real estate 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.

If and when a petition for removal of restrictions is filed, all competent evidence of rehabilitation presented by the Respondent will be considered by the Real Estate Commissioner.

This Decision shall become effective at 12 o'clock noon on MAR 3 4 2017

IT IS SO ORDERED 2/13/17

WAYNE S. BELL  
REAL ESTATE COMMISSIONER



By: DANIEL J. SANDRI  
Chief Deputy Commissioner

BEFORE THE  
BUREAU OF REAL ESTATE  
STATE OF CALIFORNIA

In the Matter of the Statement of Issues  
Against:

HECTOR JAVIER MARTINEZ,

Respondent.

Case No. H-40372 LA

OAH No. 2016100238

**PROPOSED DECISION**

This matter was heard on December 1, 2016, by Erlinda G. Shrenger, Administrative Law Judge with the Office of Administrative Hearings, in Los Angeles.

Diane Lee, Staff Counsel, represented Maria Suarez (complainant), a Supervising Special Investigator for the Bureau of Real Estate (Bureau), State of California.

Craig B. Forry, Esq., represented Hector Javier Martinez (respondent), who was present.

Oral and documentary evidence was received and argument was heard. The matter was submitted for decision on December 1, 2016.

**FACTUAL FINDINGS**

1. Complainant filed the Statement of Issues in her official capacity on September 6, 2016.

2. On February 10, 2015, respondent applied to the Bureau for a real estate salesperson license. The Bureau denied the application. Respondent filed a Notice of Defense on Application in which he requested a hearing to establish his qualification for licensure.

*Respondent's Convictions*

3. (A) On May 24, 1993, in the Superior Court, County of Los Angeles, case number PA011946, respondent was found guilty by a jury and convicted of two counts of violating Vehicle Code section 23110, subdivision (b) (throwing substance at a vehicle), and one count of violating Penal Code section 245, subdivision (c) (assault on peace officer or

firefighter), all misdemeanors. The court ordered respondent to serve six months in county jail for each count of violating Vehicle Code section 23110 with the sentences to run consecutively, pay \$200 to the restitution fund, and pay \$400 restitution to the victim for the damaged windshield. Respondent failed to disclose these convictions on his license application.

(B) The facts underlying these convictions are: On November 11, 1992, police officers responded to a request for back up from firefighters who were at the scene of a protest and demonstration where the protestors (including gang members) blocked the street and set trash containers on fire. The protest was in response to an officer involved shooting that occurred two days earlier. The police officers arrived at the scene in a marked patrol vehicle. They saw respondent look in their direction and throw a large dark object (a rock) which broke the front windshield of the patrol vehicle. Respondent ran from the scene. The officers saw respondent back at the scene a few minutes later with several gang members. When the officers drove by respondent's location, they saw respondent run out of a courtyard and make a throwing motion towards the patrol vehicle. One to two seconds later, the officers heard an object strike their vehicle. The officers who later arrested respondent found a large rock in his jacket pocket.

4. On February 28, 1996, in the Yakima County District Court, State of Washington, case number D00078528 YPD, respondent was convicted on his plea of guilty to violating RCW Y.6.68.010 (shoplifting).<sup>1</sup> The court ordered respondent to pay a fine of \$250, serve 30 days in jail (with 30 days suspended), and stay away from Safeway. The facts underlying this conviction occurred on February 24, 1996. According to respondent, he had placed a toothbrush in his pocket while he held other items in his hand. He paid for the other items but walked out of the store without paying for the toothbrush. He was questioned by the store's loss prevention employee upon leaving the store. Respondent failed to disclose this conviction on his license application.

5. On November 7, 1996, in the Everett Municipal Court, State of Washington, case number CR0016760 EPD, respondent was convicted of violating RCW 10.48.010 (disorderly conduct), a misdemeanor. Respondent was placed on two years' probation. The facts underlying this conviction occurred on October 27, 1996. According to respondent, he was intoxicated with alcohol and acting disorderly and did not leave when asked to do so.

6. (A) On January 31, 1997, in the Superior Court of Washington, King County, case number 96-1-05679-7 KNT, respondent was convicted on his plea of guilty to violating RCW 9A.48.070(1)(a) (malicious mischief in the first degree), a felony. Respondent was sentenced to serve 60 days in county jail (credit given for 22 days) and then ordered to serve 12 months in community supervision, have no contact with the victims for a maximum of five years, and complete anger management counseling.

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<sup>1</sup> RCW stands for Revised Code of Washington.

(B) The facts underlying the conviction occurred on November 26, 1996. Respondent and E.R. had been in a romantic relationship for 14 months before she left respondent and moved to her sister's apartment. Respondent went to the sister's apartment, knocked on the door and demanded to see E.R. When E.R. would not open the door, respondent became enraged, got into his car and drove at high speed until the car struck a fence and then a residence. Respondent yelled to E.R. for help. The police were called to the scene and respondent fled. Respondent later returned to the apartment. E.R. and her sister called the police and did not answer the door. They were frightened as respondent repeatedly rattled the door knob and shoved at the door. The police found respondent in a nearby parking lot, where he was lying on the ground between two cars. When told to show his hands, respondent got up and ran, ignoring commands by the police to stop. He climbed through a large hedge before being apprehended by another police officer.

7. On July 3, 1997, in the Lynnwood Municipal Court, Snohomish County, State of Washington, case number C00008542 LWP, respondent was found guilty at a bench trial and convicted of violating RCW 9A.36.041 (assault in the fourth degree). Respondent was ordered to pay a \$310 fine, have no contact with 7-Eleven or Tropicana, and commit no criminal violations. The facts underlying the conviction occurred on April 11, 1997, when respondent was involved in a fight at a 7-Eleven store parking lot. Respondent failed to disclose this conviction on his license application.

8. On September 19, 1997, in the Snohomish County District Court, State of Washington, case number 121314C WSP, respondent was found guilty at a bench trial and convicted of violating RCW 46.61.502 (driving under the influence). Respondent was given a two-year suspended sentence and placed on two years' probation under terms and conditions including that he not drive with an alcohol concentration of 0.08 percent or greater, not refuse to submit to a blood or breath test, complete an alcohol evaluation within 90 days, and attend a DWI Victim's Panel within 90 days. The facts underlying the conviction occurred on February 1, 1997. Respondent failed to disclose this conviction on his license application.

9. On August 14, 1998, in the Everett Municipal Court, State of Washington, case number CR0029933 EPD, respondent was convicted of violating RCW 10.48.010 (disorderly conduct), a misdemeanor. The court sentenced respondent to serve 90 days' jail time (with 80 days suspended) and ordered that he commit no similar violation within two years. The facts underlying this conviction occurred on July 25, 1998.

10. On November 24, 1999, in the Everett Municipal Court, State of Washington, case number CRP099201 EPD, respondent was convicted of violating RCW 46.52.020 (hit-and-run). The court ordered, in part, that respondent serve 365 days' jail time (with 363 days suspended) and pay a \$5,000 fine (with \$4,400 suspended). The facts underlying this conviction occurred on October 3, 1998. Respondent failed to disclose this conviction on his license application.

11. (A) On August 25, 2006, in the Superior Court of California, County of Los Angeles, case number 6SR03168, respondent was convicted on his plea of no contest to violating Vehicle Code section 23152, subdivision (a) (driving with blood-alcohol level of 0.08 percent or more), a misdemeanor. Imposition of sentence was suspended. Respondent was placed on summary probation for 36 months under terms and conditions including that he pay a fine of \$390 or serve 13 days in county jail (less credit for one day), pay other fines, fees, and assessments, or in lieu of jail of fine, perform 12 days of Cal Trans service, and complete a three-month first-offender alcohol counseling program.

(B) The facts underlying this conviction occurred on May 25, 2006. Two motorcycle police officers saw respondent drive his vehicle at approximately 80 miles per hour in a 35 mile per hour zone. The officers conducted a traffic stop of respondent's vehicle. During their contact with respondent, they smelled the odor of an alcoholic beverage coming from inside his vehicle. After having respondent exit his vehicle, the officers spoke to respondent. They smelled the odor of an alcoholic beverage on his breath, saw he had a difficult time standing and his eyes were bloodshot, and heard that his speech was slurred. The officers administered field sobriety tests, which respondent failed to perform satisfactorily. Respondent became emotionally unstable and cried during most of the tests. Based on their observations, the officers concluded that respondent was under the influence of an intoxicant and unable to safely operate a motor vehicle. The results of respondent's breath test measured his blood-alcohol level at 0.20 percent and 0.19 percent.

#### *Respondent's Application*

12. The application form submitted by respondent to the Bureau contained a series of questions for respondent to answer, including Question 27, which asks, "Have you ever been convicted (see paragraph above) of any violation of the law at the misdemeanor or felony level? If yes, complete Item 33 with information on each conviction." The instructions for Question 27 state, in part, that convictions "must be disclosed no matter how long ago they occurred." (Exh. 2.)

13. Respondent answered "Yes" to Question 27 of the application. Therefore, he was required to provide detailed information regarding his convictions in Item 33 of the application. In response to Item 33, respondent disclosed his convictions which are described in Findings 5, 6, 9, and 11, above. However, respondent failed to disclose his convictions which are described in Findings 3, 4, 7, 8, and 10, above.

14. In responding to Item 33, respondent relied on a report he obtained from the Washington State Patrol, Identification and Criminal History Section (Report). Respondent had obtained the Report when he was completing his application for a notary license. He used the criminal history information in the Report to complete his application for a notary license and the real estate license application that is the subject of this case. Regarding the application for a real estate license, the Washington state convictions that respondent failed to disclose on that application (Findings 4, 7, 8, and 10) were not included in the Report. (See Exhibit I.) As for the failure to disclose the May 24, 1993 conviction, which occurred

23 years ago in California, respondent testified that he did not remember it when completing his real estate license application.

### *Rehabilitation*

15. Respondent is 42 years old. He received a general education diploma (G.E.D.). Respondent attended college but did not graduate.

16. After his last conviction in Washington in 1999, respondent moved back to California because he realized he needed to change the direction of his life. He became reacquainted with his high school sweetheart, who is now his wife. Respondent and his wife have been married since 2000. They have three children (ages 14, 12, and 6). Respondent's children and his marriage are the positive influences in his life. He strives to be the best father and husband he can be. He is active in his children's lives and activities, especially in their track and field activities. He is a certified U.S. track and field coach. He volunteers with track and field clubs for youth and children. He presented letters from those clubs which commend his active involvement and positive influence on the youth and children. (Exhs. E, F.)

17. As noted above, respondent applied for a notary license. The California Secretary of State issued notary public commission number 2002399 to respondent. (Exh. J.) The term of the commission was December 30, 2012, to December 29, 2016. In addition, respondent has been a registered tax preparer since 2003. (Exh. K.) No evidence was presented of any complaints or disciplinary actions against respondent's notary license or tax preparer registration.

18. All but one of respondent's convictions occurred in the 1990s and his most recent conviction occurred in 2006. Respondent does not dispute and accepts responsibility for his criminal convictions. The court records established, in general, that respondent complied with the terms of probation for his convictions.

19. Respondent attributes his criminal conduct to alcoholism. He started drinking alcohol when he was 18 years old and was surrounded by alcoholism in his family and among his friends. His social relationships changed when he moved back to California. Today, respondent attends Alcoholics Anonymous (AA) meetings when he can fit them into his schedule. Respondent's sobriety date is August 18, 2008. He does not have an AA sponsor. However, he has a list of persons who help him maintain his sobriety, including two other AA members, a friend from his church, and his pastor. Respondent's drunk driving conviction in 2006 was an isolated incident resulting from an incident involving his older son from a prior marriage. Respondent admitted he became upset and got drunk that day.

20. Respondent appeared sincere when testifying that he is a different person today than he was in the 1990s. Respondent's wife is an important positive influence in his life. His wife introduced him to her church, where respondent has received counseling, support and mentorship from the church's elders. He has been a member of the church since

2006. Respondent realizes he has too much to fight for and too much to lose if he reverts back to his past misconduct. He is determined and motivated not to repeat his past mistakes.

## LEGAL CONCLUSIONS

1. Business and Professions Code section 10177, subdivision (b), provides, in pertinent part, that the Bureau may deny the issuance of a license to an applicant who has entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony, or a crime substantially related to the qualifications, functions, or duties of a real estate licensee. Similarly, Business and Professions Code section 480, subdivision (a)(1), provides that a board may deny a license on the grounds that the applicant has been convicted of a crime, including a conviction following a plea of nolo contendere. Pursuant to Business and Professions Code section 475, subdivision (a)(2), conviction of a substantially related crime is a ground for denial of a license.

2. Cause exists to deny respondent's application for a real estate salesperson license under Business and Professions Code sections 10177, subdivision (b), 480, subdivision (a)(1), and 475, subdivision (a)(2), in that respondent was convicted of crimes that are substantially related to the qualifications, functions, and duties of a real estate licensee, based on Factual Findings 3-11.

3. The Bureau's criteria of substantial relationship are set forth at California Code of Regulations, title 10, section 2910, subdivision (a). Respondent's convictions taken together or separately are for substantially related crimes because they involved doing an unlawful act with the intent of conferring a financial or economic benefit upon the perpetrator or with the intent or threat of doing substantial injury to the person or property of another (subd. (a)(8)); they involved conduct which demonstrates a pattern of repeated and willful disregard of law (subd. (a)(10)); and/or they involved two or more convictions involving the consumption or use of alcohol or drugs when at least one of the convictions involve driving and the consumption of alcohol or drugs (subd. (a)(11)).

4. Business and Professions Code section 10177, subdivision (a), provides that the Bureau may deny the issuance of a license to an applicant who has "[p]rocured, or attempted to procure, a real estate license or license renewal, for himself or herself, by fraud, misrepresentation, or deceit, or by making a material misstatement of fact in an application for a real estate license, license renewal, or reinstatement." Business and Professions Code section 475, subdivision (a)(1), provides that a license may be denied on the grounds of "[k]nowingly making a false statement of material fact, or knowingly omitting to state a material fact, in an application for a license." Business and Professions Code section 480, subdivision (c), provides, in part: "A board may deny a license . . . on the ground that the applicant knowingly made a false statement of fact required to be revealed in the application for the license."



5. (A) Cause exists to deny respondent's application for a real estate salesperson license under Business and Professions Code section 10177, subdivision (a), in that respondent made a material misstatement of fact in his application by failing to disclose all of his criminal convictions in the application, based on Factual Findings 12-14. The term "misrepresentation" means more than verbal misstatements or positive assertions. "A representation may be either expressed or implied . . . and may arise from silence . . . or nondisclosure." (*Hale v. Wolfson* (1969) 276 Cal.App.2d 285, 291.)

(B) However, cause does not exist to deny respondent's application for a real estate salesperson license under Business and Professions Code sections 475, subdivision (a)(1), and 480, subdivision (c). It was not established that respondent knowingly or intentionally made a false statement of fact when he failed to disclose all of his convictions in the application. (Factual Findings 12-14.)

6. The statutes relating to real estate licenses are designed to protect the public from any potential risk of harm. (*Lopez v. McMahon* (1988) 205 Cal.App.3d 1510, 1516; *Arneson v. Fox* (1980) 28 Cal.3d 440.)

7. The Bureau's criteria for the purpose of evaluating the rehabilitation of an applicant for a license, which are set forth at California Code of Regulations, title 10, section 2911, have been considered. Respondent has established sufficient rehabilitation for issuance of a restricted salesperson license. All but one of respondent's convictions occurred in the 1990s, approximately 17 to 23 years ago, and 10 years have passed since his most recent conviction in 2006. (Cal. Code Regs., tit. 10, § 2911, subd. (a).) Respondent has a stable family life and is fulfilling his parental responsibilities. (Cal. Code Regs., tit. 10, § 2911, subd. (h).) Providing for his family and being a good father for his three children is the motivating factor for respondent to keep his life on the right track. He appeared sincere in expressing his determination to do so. He is active in doing volunteer work. (Cal. Code Regs., tit. 10, § 2911, subd. (l).) He has new and different social relationships. (Cal. Code Regs., tit. 10, § 2911, subd. (m).) Respondent has demonstrated a change in attitude since the time of his earlier convictions. (Cal. Code Regs., tit. 10, § 2911, subd. (n).) Although respondent made a material misstatement of fact by failing to disclose all of his convictions in the application, he did not do so intentionally and provided reasonable explanations which mitigated the failure to disclose (i.e., the Report did not list all of his Washington convictions and he forgot about the 1993 conviction which occurred 23 years ago). At this time, Respondent cannot establish he is fully rehabilitated. But he has shown sufficient rehabilitation and a significant change in attitude for issuance of a restricted salesperson license under the terms and conditions set forth in the Order below, which will protect the public from any potential risk of harm.

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## ORDER

Respondent Hector Javier Martinez's application for a real estate salesperson license is denied; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to Section 10156.5 of the Business and Professions Code. The restricted license issued to respondent shall be subject to all of the provisions of Section 10156.7 of the Business and Professions Code and to the following limitations, conditions and restrictions imposed under authority of Section 10156.6 of said 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 this restricted license.

2. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor the removal of any of the conditions, limitations or restrictions attaching to the restricted license until two 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 form RE 552 (Rev. 4/88) approved by the Bureau of Real Estate which shall certify as follows:

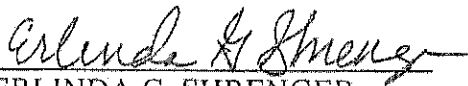
(a) That the employing broker has read the Decision which is the basis for the issuance of the restricted license; and

(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 137000, Sacramento, CA 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 the suspension or revocation of that license.

DATED: January 4, 2017

  
ERLINDA G. SHRENGER  
Administrative Law Judge  
Office of Administrative Hearings