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BEFORE THE BUREAU OF REAL ESTATE

FILED

STATE OF CALIFORNIA

OCT 09 2017

BUREAU OF REAL ESTATE

In the Matter of the Accusation of
ANTHONY BRIAN GUTIERREZ,
Respondent.

) CalBRE No. H-40610 LA

) OAH No. 2017050974

By 

DECISION

The Proposed Decision dated September 12, 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.

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

Page 1, Case caption, reads "ANTHONY BRIAN GUTIERREZ, Real Estate Broker License ..." shall be corrected to read "ANTHONY BRIAN GUTIERREZ, Real Estate Salesperson License ..."

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 party seeking reconsideration shall set forth new facts, circumstances, and evidence, or errors in law or analysis, that show(s) grounds and good cause for the Commissioner to reconsider the Decision. If new evidence is presented, the party shall specifically identify the new evidence and explain why it was not previously presented. 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.

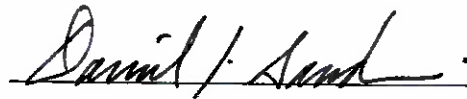
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The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock noon on **OCT 30 2017**.

IT IS SO ORDERED 10/3/17

WAYNE S BELL
REAL ESTATE COMMISSIONER



By: DANIEL J. SANDRI
Chief Deputy Commissioner

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

In the Matter of the Accusation Against:

ANTHONY BRIAN GUTIERREZ,
Real Estate ~~Broker~~ License No. S/01981204,

Salesperson

Respondent.

No. H-40610 LA

OAH No. 2017050974

PROPOSED DECISION

Chantal M. Sampogna, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on August 14, 2017, in Los Angeles.

Michelle Nijm, Counsel for the Bureau of Real Estate (Bureau), represented Veronica Kilpatrick (complainant).

No appearance was made by or on behalf of respondent Anthony Brian Gutierrez.

Complainant requested that respondent's default be entered and that complainant be permitted to prove up the allegations set forth in the Accusation. This matter proceeded as a default under Government Code section 11520. Complainant presented documentary evidence. The record was closed and the matter submitted for decision at the conclusion of the hearing.

SUMMARY

Complainant alleges that respondent's real estate salesperson's license should be revoked based on respondent's criminal convictions and his failure to report these convictions to the Bureau. Respondent was not present at the hearing and offered no evidence of mitigation or rehabilitation. As discussed below, respondent's license shall be revoked.

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FACTUAL FINDINGS

Parties and Jurisdiction

1. On June 2, 2015, the Bureau licensed respondent as a salesperson under license number S/01981204. Respondent's salesperson's license is scheduled to expire on June 1, 2019.

2. On April 20, 2017, while acting in her official capacity as a Supervising Special Investigator of the State of California, complainant served on respondent a Statement to Respondent and a Notice of Defense, pursuant to California Government Code Section 11500, et seq., with the Accusation attached.

3. Respondent signed, wrote his home address on, and timely filed a Notice of Defense and requested a hearing.

4. On May 24, 2017, OAH served on respondent a Notice of Assigned Hearing Dates setting this matter for hearing on August 14, 2017 at 1:30 p.m.

5. On May 25, 2017, complainant served a Notice of Hearing on respondent at his home address, again notifying respondent that the hearing date would be August 14, 2017.

6. Although complainant did not introduce into evidence certified mail receipts for service of notice of the hearing, respondent's signed and addressed notice of defense and the fact that multiple notices of the hearing dates were sent by complainant and by OAH to respondent's home address of record, evidence that respondent was put on notice of the hearing dates.

7. Findings 1 through 6 reflect that respondent's failure to appear at the hearing constituted a default. The hearing proceeded as a default prove-up.

Respondent's Convictions

8. A. On December 2, 2016, in the Superior Court of California, County of Riverside, case number INF1601411, respondent pled guilty to and was convicted of assault with a deadly weapon other than a firearm, in violation of Penal Code section 245, subdivision (a)(1), infliction of corporal injury upon a spouse, in violation of Penal Code section 273.5 subdivision (a), and malicious damage to property, in violation of Penal Code section 594, subdivision (a)(2), and (3), misdemeanors.

B. The court ordered respondent to comply with three years' summary probation, serve two days in county jail less credit given for two days served, perform 20 hours of community service through the Alternative Sentencing Program by June 2, 2017,

complete a 52-week domestic violence program by June 4, 2018, and pay fines and fees totaling \$874. The court issued a Criminal Protective – Domestic Violence order against respondent, ordering him to not harass, strike, threaten, or assault the victim.

C. The circumstances underlying this conviction are the following. On September 10, 2016, at approximately 3:30 p.m., respondent and his wife began arguing due to his wife's belief that respondent was seeing other women. During this argument, respondent began throwing things, including a lit candle, which caused hot wax to fly around the room. Respondent's wife walked out of the house and tried to drive away from the home to allow them each time to cool down. While she was walking to her vehicle, respondent got into his vehicle, sped towards his wife's vehicle and stopped so that his vehicle blocked his wife's entrance into her vehicle. After reversing, respondent then sped his vehicle towards his wife, driving up the curb and into the front yard of their home; his wife had to jump out of the way to avoid being hit. Respondent exited his vehicle and grabbed his wife by the neck and began choking her for several seconds to the point she could not breathe. Respondent eased his grip, picked respondent up by the neck and slammed her against the hood of his vehicle. His wife called 911 and respondent fled the scene. Officer Doyle, a deputy with the Riverside County Sheriff's Department, arrived at the scene and observed the following: scratches on respondent's wife's neck; an imprint of a human body and hand marks on respondent's car, visible because of dirt removed by the imprint, and hand marks on his wife; and tire marks in the dirt area where respondent's wife said she had been standing, and acceleration marks leading from the street to the tire marks in the dirt. Using a locating application on respondent's wife's phone, Officer Doyle located respondent and arrested him. During his interview with Officer Doyle, respondent acknowledged the above actions and behaviors.

Respondent's Failure to Timely Communicate with the Department

9. Respondent did not notify the Bureau of these convictions.

Mitigation, Rehabilitation and Other Relevant Facts

10. Respondent failed to appear at this hearing. Respondent did not present any mitigating, rehabilitation, or other facts.

11. Complainant presented respondent's Interview Information Sheet, received March 24, 2017, in which respondent identified the above convictions, acknowledged his mistake, and committed to never allow another incident like that to occur again. Complainant also presented respondent's Conviction Detail Report, received March 24, 2017, in which respondent attributed the cause of his behavior to him being emotionally hurt and mad because his wife did not believe him.

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Costs of Investigation and Enforcement

12. Pursuant to Business and Professions Code section 125.3, complainant requested costs of investigation and enforcement in the total amount of \$1,521.35. This amount consists of investigation costs (\$787.10), as well as enforcement costs incurred by Counsel for the Bureau (\$734.25).

13. At the hearing, complainant introduced a Certification Statement of Investigation Costs (Certification) in support of the investigation costs incurred directly by the Bureau. The Certification indicates the Bureau incurred costs in the amount of \$787.10 for work performed by a Special Investigator and a Supervising Special Investigator I. This amount is based on 12.05 hours of work billed at the hourly rate of \$62, and .5 hours of work billed at an hourly rate of \$80. Attached to this Certification was detailed information about the general tasks performed and the amount of time spent on each particular task.

14. Complainant introduced a Declaration of Enforcement Costs (Declaration), signed by Michelle Nijm, Counsel for the Bureau, which states that she had reviewed the Bureau's computerized case time management system to determine the work she performed and the amount of time she spent working on this case, the conclusion of which is contained in Exhibit A. Attached to the Declaration is Exhibit A, which describes tasks performed by Ms. Nijm through August 10, 2017, and their costs, and shows a total sum of \$734.25.

15. Costs of investigation and enforcement in the total amount of \$1,521.35 are reasonable in light of the issues involved in this matter.

LEGAL CONCLUSIONS

1. The real estate commissioner "has full power to regulate and control the issuance and revocation . . . of all licenses to be issued . . ." (Bus. & Prof. Code, § 10071.)¹ "Protection of the public shall be the highest priority for the [Bureau] of Real Estate in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." (§ 10050.1.)

2. Complainant bears the burden of proof. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99; *Pipkin v. Bd. of Supervisors* (1978) 82 Cal.App.3d 652.) The standard of proof for the Bureau to prevail on the Accusation is clear and convincing evidence to a reasonable certainty. (See *Borrow v. Department of Real Estate* (1971) 15 Cal.App.3d 531; *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853.)

¹ All further statutory references will be to the Business and Professions Code unless otherwise noted.

3. The Real Estate Commissioner may suspend or revoke a Bureau license if the applicant has been convicted of a crime substantially related to the qualifications, functions or duties of a licensed real estate broker licensee. (§§ 490, subd. (a), 10177, subd. (b).) A conviction after a plea of guilty is a conviction for purposes of suspending or revoking a license. (§ 490, subd. (c).)
4. A crime is substantially related to the qualifications, functions, or duties of a real estate licensee if it involves "any unlawful act . . . with the intent or threat of doing substantial injury to the person or property of another." (Cal. Code Regs., tit. 10, § 2910, subd. (a), criterion (8).)
5. Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm is guilty of assault with a deadly weapon. (Cal. Pen. Code, § 245, subd. (a)(1).)
6. Any person who willfully causes his spouse traumatic injury, such as an injury caused by strangulation, including impeding normal breathing, or a wound, is guilty of infliction of corporal injury on a spouse. (Pen. Code, § 273.5, subs. (a), (b)(1), (d).)
7. Any person who maliciously damages or destroys any real or personal property not his own is guilty of vandalism. (Pen. Code, § 594, subd. (a)(2), (3).)
8. On December 2, 2016, respondent was convicted of misdemeanor assault with a deadly weapon, infliction of corporal injury on a spouse, and vandalism. (Factual Findings 8, 11.) The facts and circumstances of these crimes demonstrate respondent had the intent to commit substantial injury to the person or property of another. (Cal. Code Regs., tit. 10, § 2910, subd. (a), criterion (8).) Respondent's convictions are substantially related to the qualifications, functions or duties of a Bureau licensee. (Cal. Code Regs., tit. 10, § 2910, subd. (a), criterion (8).)
9. Cause exists to suspend or revoke respondent's real estate broker license pursuant to Code section 10177, subdivision (b)(1), on the grounds that respondent was convicted of the above referenced crimes substantially related to the qualifications, functions, or duties of a real estate licensee. (Factual Findings 8, 11.)
10. A licensee must report any conviction, including any plea of guilty, to the Bureau within 30 days of the date of the conviction. (§ 10186.2.)
11. Cause exists to discipline respondent's license under section 10186.2 because respondent failed to notify the Bureau of his convictions within 30 days of the date of his convictions. (Factual Finding 9.)
12. The Bureau has established criteria for assessing a licensee's rehabilitation to determine the degree of discipline to impose on the license. (Cal. Code Regs., tit. 10, § 2912.) Respondent bears the burden of establishing rehabilitation sufficient to warrant his

continued licensure. (*In the Matter of Brown* (1993) 2 Cal. State Bar Ct. Rptr. 309.) Because respondent offered no rehabilitation evidence (Factual Finding 10), continued licensure is not warranted. (Factual Findings 7-11.)

Award of Costs

13. In any order issued in resolution of a disciplinary proceeding, at the request of the Bureau, the Administrative Law Judge may direct the licentiate found to have committed a violation to pay a sum not exceed the reasonable costs of investigation and enforcement. A certified copy of the actual costs, signed by the Bureau or its designated representative is prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing. (Bus. and Prof. Code, §§ 125.3, subds. (a), (c), 10106; see Cal. Code Regs., tit. 1, § 1042, subd. (b).)

14. Factors to be considered in determining the reasonableness of the costs sought pursuant to Business and Professions Code, section 125.3 include: the licentiate's success in getting the charges dismissed or reduced; the licentiate's subjective good faith belief in the merits of his or her position; whether the licentiate raised a colorable challenge to the proposed discipline; the licentiate's financial ability to pay; and whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45.)

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15. The declaration signed by Ms. Nijm constitutes prima facie evidence of the reasonableness of the enforcement costs incurred by the Bureau in the amount of \$734.25. (Bus. & Prof., § 125.3, subd. (c).) Respondent failed to rebut such evidence. Complainant also introduced sufficient evidence to establish the reasonableness of all the investigation costs incurred directly by the Bureau in the amount of \$787.10. (Factual Findings 12-15.) Costs in the total amount of \$1,521.35 are reasonable and are awarded as set forth in the Order below.

ORDER

1. All licenses and licensing rights of respondent Anthony Brian Gutierrez under the Real Estate Law are revoked.
2. Respondent Anthony Brian Gutierrez shall pay the Bureau's investigation and enforcement costs of \$1,521.35, at such time and in such manner as the Bureau may direct.

DATED: September 12, 2017

DocuSigned by:
Chantal M. Samogna
EPCERT19557459

CHANTAL M. SAMPOGNA
Administrative Law Judge
Office of Administrative Hearings