

FILED

JAN 17 2018

BUREAU OF REAL ESTATE

By AL Selais

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Application of)	CalBRE No. H-40714 LA
)	
PAUL DAVID WENDER,)	OAH No. 2017080425
)	
)	
<u>Respondent.</u>)	

DECISION

The Proposed Decision dated November 21, 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 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. 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 2/6/18.

IT IS SO ORDERED 1/4/18

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 Application of:

PAUL DAVID WENDER,

Respondent.

Case No. H-40714 LA

OAH No. 2017080425

PROPOSED DECISION

Irina Tentser, Administrative Law Judge, Office of Administrative Hearings, heard this matter on October 27, 2017, in Los Angeles, California.

James R. Peel, counsel for the Bureau of Real Estate (Bureau), represented Supervising Special Investigator, Maria Suarez (complainant).

Gregory J. Kaapuni, attorney, represented Paul David Wender (respondent), who was present at the hearing.

Oral and documentary evidence was received and the matter was submitted for decision on October 27, 2017.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in her official capacity.
2. On August 8, 2016, respondent filed his application for licensure as a real estate salesperson with the Bureau. The application was denied, respondent filed a timely Notice of Defense, and this hearing resulted.

Criminal Convictions

3. On September 22, 2011, in the Superior Court of California, County of Ventura, case no. 2011027977MA, respondent was convicted on his plea of nolo contendere of violating Penal Code section 273.5, subdivision (a) (corporal injury to cohabitant), a misdemeanor. The court sentenced respondent to: formal probation for three years; serve six days in jail (with credit for six days served); attend Alcoholics Anonymous as directed by his Probation Officer; attend 52 sessions within 55 weeks of domestic violence counseling with

an approved provider; complete 16 hours of community service by April 1, 2012; pay restitution, criminal justice administration fee of \$356.34, probation investigation fee of \$656, Ventura County Women's Shelters \$300, State Restitution Fund \$100, State Domestic Violence Fund \$400, and a monthly formal probation fee of \$50; not operate a motor vehicle with any intoxicant in his body; not drink or possess any alcoholic beverages; not be where alcohol is the chief item for sale; and submit to breath, blood or urine tests when requested by a Peace Officer or Probation Officer; not annoy, molest, or harass the victim; and obey all laws.

4. Respondent complied with some probationary terms, including attending 52 sessions of domestic violence counseling and completing his community service hours. However, Respondent failed to comply with the terms of his probation by operating a vehicle while intoxicated. As a result, on April 6, 2015, the court ordered respondent's probation to terminate unsuccessfully following his February 8, 2015 conviction for violating Vehicle Code section 23152, subdivision (a) (driving under the influence (DUI).) (Factual Finding 7.) On June 30, 2016, the court denied respondent's request for expungement pursuant to Penal Code section 1203.4, subdivision (e).

5. The facts and circumstances underlying the 2011 conviction are that on August 3, 2011, respondent and his then-girlfriend/cohabitant had an argument after she caught him communicating with other women online. The argument escalated into yelling after Respondent's girlfriend threatened to leave him. Respondent begged his girlfriend to stay while holding her arm. Police arrived and separated them. Respondent was taken into custody because he had left a red mark on his girlfriend's arm while he was restraining her.

6. Based upon respondent's 2011 conviction:

a. On November 4, 2011 the California Department of Public Health revoked respondent's certification as a Nurse Assistant.

b. On March 8, 2013, the Bureau of Security and Investigative Services revoked respondent's Security Guard registration.

7. On February 18, 2015, in the Superior Court of California, County of Ventura, case no. 2014028864MA, respondent was convicted on his plea of guilty of violating Vehicle Code section 23152, DUI, a misdemeanor. The court sentenced respondent to: formal probation for three years; serve four days in jail (or complete the approved Work Release Program in lieu of jail term); complete the 90-day Driving Under the Influence Program (First Conviction Program); pay fines, fees, and restitution; not operate a motor vehicle with any intoxicant in his body; and submit to breath, blood or urine tests when requested by a Peace Officer or Probation Officer.

8. Respondent complied with the terms of his probation, which was successfully terminated early on June 1, 2016. On June 30, 2016, the court ordered respondent's DUI conviction dismissed and it was expunged pursuant to Penal Code section 1203.4.

9. The facts and circumstances underlying the 2015 DUI conviction are that on September 7, 2014, when respondent and his ex-girlfriend (who was also the victim of his 2011 conviction) met at a bar, drank alcoholic beverages, and made out in respondent's car. After his ex-girlfriend left the car, respondent noticed that her purse was still in his car. He drove while intoxicated to his ex-girlfriend's house to return her purse. Once respondent reached her house, he was assaulted by her boyfriend. Respondent drove to a police station to report the assault. Based on the severity of his injuries, respondent was transported to the hospital. At the hospital, respondent admitted to driving while intoxicated, resulting in his arrest and 2015 DUI conviction.

10. At hearing, respondent took full responsibility and expressed sincere remorse for his actions. He describes himself as feeling remorseful every day for his actions toward his ex-girlfriend. By way of explanation, not justification, he testified that during the several years surrounding his convictions he was going through an extremely difficult time in his life because of unresolved issues related to his sexual assault by his former employer in 2006. He also attributed his poor handling of the situation to his youth; respondent was 20 years old in 2011 at the time of his fight with his then 18 or 19-year-old ex-girlfriend. Respondent credibly testified that he deeply regrets his violent actions towards his ex-girlfriend and dangerous action of operating a vehicle while intoxicated. Respondent testified that he no longer drives after consuming alcoholic beverages and has been involved in a stable and loving relationship for the past two years.

Rehabilitation

11. Between February 2014 and May 2016, respondent attended regular psychotherapy sessions with Brenda Skelly, L.C.S.W.¹ to constructively manage issues associated with depression and past trauma. (Exh. A.) Respondent also completed anger management counseling through the Cornerstone Counseling Agency. At hearing, respondent testified that he takes medication for anxiety and receives psychotherapy at COPE clinic with Ebrahim Hazany, M.D. on a monthly basis for treatment of Post-Traumatic Stress Disorder and depression. He described his mood as stable and positive as a result of ongoing treatment. Respondent has acquired coping skills through therapy and anger management courses, which include leaving the room when a conflict begins to escalate. Respondent's acquired knowledge, use of coping tools, and ongoing treatment make recurrence of his past mistakes unlikely.

12. Four witnesses testified in support of respondent's licensure.

a. Judy Seeger is a licensed real estate agent for Pinnacle Estate Properties in Westlake, California. She has employed respondent as a real estate assistant for almost three years. His duties include assisting her with open houses. In her opinion, respondent is personable, professional, polite, and kind. Respondent gets along with the rest of her employees and Ms. Seeger would recommend him for licensure based on his competency

¹ L.C.S.W. is an acronym for Licensed Clinical Social Worker.

and his genuinely caring nature. Ms. Seeger was generally aware of respondent's past criminal history, but was not familiar with the specifics of his crimes. After being made aware of the details at hearing, Ms. Seeger reiterated her endorsement of respondent despite his convictions and revocations, stating that he has always been respectful and has never become angry with her despite her exacting standards. She would hire respondent as a real estate salesperson if he were licensed.

b. Gerald M. Halweg, President and Chief Executive Officer of Tile Institute of America, is a family friend who has known respondent for more than 20 years. He characterizes respondent's background as "good" and "solid." Mr. Halweg described respondent as a trustworthy member of the community who, as a student, mentored younger students at Ascension Lutheran Church [in Thousand Oaks, California.] Mr. Halweg recommended respondent to Ms. Seeger, his former real estate agent, after respondent informed him he was looking for a job. At the time, Mr. Halweg would have hired respondent if he had positions available at his company. Mr. Halweg was aware of respondent's DUI conviction. He was not aware of respondent's corporal injury conviction, but testified that neither conviction changes his positive opinion of respondent.

c. Respondent's father, David Wender, movingly and convincingly testified in support of his son's licensure. Since 1977, Mr. Wender has owned and operated an accounting practice in Thousand Oaks. Respondent has previously worked for his father performing various duties, including making bank deposits and delivering tax documents to clients. Respondent was ashamed and reluctant to tell his parents about his sexual molestation by his former employer. Mr. Wender described the negative impact of the trauma on respondent, testifying that between 2011 and 2015 respondent acted like a different person, was uncomfortable with himself, and acted out in ways that Mr. Wender found unexplainable. Since 2015, however, Mr. Wender has observed a positive change in respondent, describing respondent's behavior towards his parents as "very good." Mr. Wender observed that respondent is trying to move on with his life despite the barriers respondent's past conduct has caused him. He testified that respondent had always been good with people and as a child was described as a child who was "5 going on 40," because of his ease in relating to adults. Respondent is involved with and assists Mr. Wender with charitable activities with the Knights of Columbus and the Rotary Club, including picking up supplies and helping cook at various events and street fairs. Mr. Wender is proud of respondent and opined that respondent is a good and productive member of society.

d. Kerry Galvin, the assistant director of Hillcrest Christian School, testified in support of respondent. In 2015, Ms. Galvin and respondent met and became friends while attending Alcoholics Anonymous. Soon after meeting, they began dating. Ms. Galvin testified that she was aware of respondent's convictions and sexual molestation. She testified that respondent had never acted in an aggressive manner with her during an argument; had never touched her without her consent; and only drank alcohol on holiday occasions. Ms. Galvin described respondent as genuine, honest, personable and resilient. She wanted to pursue a relationship with respondent despite knowing his past issues. Ms.

Galvin opined that respondent is personable and likes his real estate job because it allows him to meet new people.

13. Respondent is 30 years old and a life-long resident of Southern California. Throughout his childhood, respondent was involved in church and community service. Respondent attended Moorpark College in Ventura County, California for two years and is two courses away from receiving his associate's degree. He completed an Emergency Medical Technician course as part of his prior interest in becoming a firefighter.

14. Respondent has learned from his past mistakes, is committed to continuing to deal with his mental health, and is serious about establishing a career in real estate.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter pursuant to Business and Professions Code² section 10100, based on Factual Findings 1 and 2.

2. The burden of proof is on the respondent to show, through clear and convincing evidence, that he is entitled to licensure. (*Ettinger v. Bd. of Med. Quality Assurance* (1982) 135 Cal.App.3d 853.)

3. A real estate license may be denied when the applicant has been convicted of a crime that is substantially related to the qualifications, functions, or duties of a real estate licensee. (Bus. & Prof. Code, §§ 480, subd. (a)(1); 10177, subd. (b).) Respondent was convicted of corporal injury to cohabitant and DUI. (Factual Findings 3 through 5, 7 through 9.) Such crimes, under the factual circumstances presented, are substantially related to the qualifications, functions, or duties of a real estate salesperson. Specifically, respondent's corporal injury conviction involved doing an unlawful act with the intent and threat of doing substantial injury to another person. (Cal. Code Regs., tit. 10, § 2910, subds. (a)(8).) Further, respondent willfully failed to comply with the terms of his corporal injury court-ordered probation. (Cal. Code Regs., tit. 10, § 2910, subds. (a)(9).) Finally, respondent's DUI conviction was based on his consumption of alcoholic beverages and then driving. (Cal. Code Regs., tit. 10, § 2910, subds. (a)(11).)

4. Clear and convincing evidence established cause for denial of respondent's license pursuant to sections 480, subdivision (a)(1), and 10177, subdivision (b), in that respondent was convicted of crimes substantially related to the qualifications, functions, and duties of a real estate salesperson. (Factual Findings 3 through 5, 7 through 9; Legal Conclusions 1 through 3.)

² All subsequent statutory references are to the Business and Professions Code unless otherwise noted.

5. Clear and convincing evidence established cause for denial of respondent's license pursuant to section 10177, subdivision (f), in that respondent's Security Guard registration and Nurse Assistant certification were revoked. (Factual Finding 6.)

6. In evaluating whether respondent should be granted a real estate salesperson license under the circumstances, the central question is whether respondent has attained the necessary level of rehabilitation to ensure public protection. Respondent has the burden of showing rehabilitation. Respondent has met some of the relevant rehabilitation criteria. He has paid the fines associated with his conviction. (California Code of Regulations (CCR) § 2911, subs. (a)(2) and (a)(7).) Respondent is in a stable relationship. (CCR § 2911, subd. (a)(8).) He also has demonstrated the necessary change in attitude which makes future recurrence of criminal conduct unlikely. (CCR § 2911, subd. (a)(14).) In addition, he meets the most important rehabilitation criteria because it has been more than two years since his 2015 conviction. (Factual Findings 7 through 9.) CCR section 2911, subdivision (a)(1)(A), provides for passage of two or more years since the last conviction, stating that any lesser time period is "inadequate to demonstrate rehabilitation." Importantly, respondent's 2015 DUI conviction was expunged after the court found that respondent had successfully completed the probation stemming from his 2015 DUI conviction, terminated the probation early, and granted respondent's motion to dismiss. (CCR §2911, subs. (a)(3) and (a)(5); Factual Finding 8.)

7. 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.) Fully acknowledging the wrongfulness of past actions is an essential step towards rehabilitation. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940.) Mere remorse does not demonstrate rehabilitation. A truer indication of rehabilitation is sustained conduct over an extended period of time. (*In re Menna* (1995) 11 Cal.4th 975, 991.) The evidentiary significance of misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. (*Kwasnik v. State Bar* (1990) Cal.3d 1061, 1070.) Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that an individual did not commit additional crimes while on probation. (*In re Gossage* (2000) 23 Cal.4th 1080, 1099.)

8. Here, more than three years have passed since the events which led to respondent's 2015 conviction. Respondent has successfully completed probation for that 2015 conviction, and the conviction has been expunged. Accordingly, sufficient time has passed since respondent's most recent conviction to fully evaluate his rehabilitation. Respondent's assertion that he has achieved the requisite change in attitude and has behaved in an exemplary fashion are credited and demonstrated by the stability of his work and family life. Respondent's testimony explaining that his convictions and failure to comply with the terms of his corporal injury conviction were partially based on unresolved issues and trauma caused by being the victim of sexual molestation in 2006 provides a tragic and compelling context to his crimes. The revocation of respondent's security guard registration and nurse assistant certification are noted. However, the revocations are provided little weight because

they were not based on additional bad acts by respondent, but were the unfortunate administrative consequence of his 2011 conviction. Further, respondent's deep remorse and sincere commitment to his rehabilitation is evidenced by his actions in that he continues to participate in psychotherapy to ensure that his life continues on a positive trajectory and that he does not repeat past mistakes. Based on the totality of the circumstances, respondent's convictions and resulting license revocations do not warrant the outright denial of his license application, which would be unduly punitive. Rather, in this instance, the paramount goal of public protection will be adequately ensured by granting a restricted real estate salesperson license to respondent.

ORDER

Respondent Paul David Wender's application for a real estate salesperson license is denied; provided, however, a restricted real estate salesperson license shall be issued to respondent under Business and Professions Code section 10156.5. The restricted license shall be subject to all of the provisions of Business and Professions Code section 10156.7 and to the following limitations, conditions, and restrictions imposed under authority of Business and Professions Code section 10156.6:

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 that 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 three years have elapsed from the date of issuance of the restricted license to respondent.

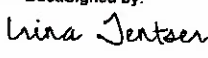
3. With the application for licensure, or with the application for transfer to a new, employing broker, respondent shall submit a statement signed by the prospective employing real estate broker on form RE 552 (Rev. 4/88) approved by the Bureau of Real Estate, which shall certify as follows:

(a) That the employing broker has read the Decision that 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: November 21, 2017

DocuSigned by:

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IRINA TENTSER
Administrative Law Judge
Office of Administrative Hearings