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APR 10 2018

BEFORE THE BUREAU OF REAL ESTATE  
STATE OF CALIFORNIA

BUREAU OF REAL ESTATE

By

*Cal Delo*

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In the Matter of the Accusation of	)	CalBRE No. H-40768 LA
MARCELA CLEMENTE,	)	OAH No. 2017120476
Respondent.	)	

DECISION

The Proposed Decision dated March 16, 2018, 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 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.

This Decision shall become effective at 12 o'clock noon on 4/30/18.

IT IS SO ORDERED April 5, 2018

WAYNE S. BELL  
REAL ESTATE COMMISSIONER

Daniel J. Sandri

By: DANIEL J. SANDRI  
Chief Deputy Commissioner

BEFORE THE  
BUREAU OF REAL ESTATE  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Marcela Clemente,

Respondent.

BRE No. H-40768 LA

OAH No. 2017120476

**PROPOSED DECISION**

Administrative Law Judge Deena Ghaly, Office of Administrative Hearings, heard this matter on February 27, 2018 in Los Angeles, California.

Bureau of Real Estate (Bureau) Counsel Steve Chu represented Maria Suarez (complainant), a Bureau Supervising Special Investigator.

Marcela Clemente, also known as Marcela Torres, (respondent) represented herself and was present throughout the hearing.

Oral and documentary evidence was received, the record closed, and the matter submitted on the hearing date.

**FACTUAL FINDINGS**

*Background*

1. The complainant brought the Accusation in her official capacity.
2. The Bureau issued real estate salesperson license number 01109724 to respondent on May 15, 1991. Unless renewed, her license will expire on October 22, 2019. Respondent timely filed a notice of defense requesting a hearing regarding the allegations raised in the Accusation and this matter ensued.

*Respondent's Criminal Convictions*

3. On May 26, 2006, in the Superior Court of California, County of Orange, case no. 06NM06723 M A, respondent was convicted on her guilty plea of violating Vehicle Code

section 23152, subdivision (a) (driving under the influence), a misdemeanor, and Vehicle Code section 23152, subdivision (b) (driving with a blood alcohol level of 0.08 percent or higher), a misdemeanor. The court suspended imposition of sentence and placed respondent on summary probation for three years on terms and conditions including paying fines and fees pursuant to a monthly installment plan and completing an alcohol education program and a Mothers Against Drunk Driving victim impact program. Respondent complied with the court's orders and the case was closed on June 25, 2009.

4. The facts and circumstances giving rise to the May 2006 conviction occurred on March 26, 2006. Respondent had been out for dinner and drinks and was driving home when she was pulled over by the police and found to be intoxicated.

5. On June 8, 2016, in the Superior Court of California, County of Orange, case no. 16NM09462 M A, respondent was convicted on her guilty plea of violating Vehicle Code sections 23152, subdivision (a) (driving while under the influence of alcohol with one prior conviction), 23152, subdivision (b) (driving with blood alcohol of .08 percent or more with one prior conviction), and 20002, subdivision (a) (hit and run with property damage), all misdemeanors. The court suspended sentence and placed respondent on summary probation for three years on terms and conditions including submitting to search and seizure by police or probation-related personnel, driving with a valid driving license and no measurable amount of alcohol in blood, completing a three month First Offender Alcohol Program, and a Victim Impact Counseling program, and paying fines, fees and restitution. A 30-day jail sentence was stayed permanently. An additional five day sentence was stayed pending successful completion of probationary terms. Since January 2017, respondent has been making \$75 monthly payments in connection with the conviction. She estimates owing an additional \$1500. Respondent is scheduled to complete the criminal probationary period in June 2019.

6. The facts and circumstances underlying the June 2016 conviction were that on March 24, 2016, respondent had been out with co-workers having dinner and drinks. As she was driving home, respondent collided with another car. She did not stop. The other driver (Driver 2) pursued her as he called the police. Responding officers directed Driver 2 to discontinue his pursuit and pursued respondent. Respondent continued to drive on until she reached her home where she stopped her car. Upon initial approach, responding officers noted a strong smell of alcohol emanating from respondent and her vehicle as well as damage to her vehicle on her car doors that correlated with the details of the collision as provided by Driver 2. A third officer, J. Hsu, arrived on the scene 18 minutes after the first responding officers. Officer Hsu asked respondent whether she had been in an accident and respondent admitted she had but had failed to stop to exchange information with Driver 2 because he was gesturing at her aggressively and she became afraid. Officer Hsu asked why she had not stopped at a nearby gas station, which was well-lit and where there were several customers using the gas pumps. Respondent stated she did not feel safe until she was back home.

7. At the hearing, respondent stated she did not stop to exchange information with Driver 2 because she did not feel or hear the collision. Confronted with her statement as it appeared in the police report, respondent offered a third explanation essentially conflating her prior statements: she was unaware of the collision and did not pull over when she saw Driver 2 gesturing at her because his actions made her feel unsafe.

8. Respondent's testimony that she was unaware that she had collided with another car is not credible. It is inconsistent with her first statement made to the police admitting to the accident. That statement, made shortly after the incident and corroborated by responding officers' observations of vehicle damage consistent with Driver 2's reports as well as respondent's guilty plea to the hit and run offense, is credible.

#### *Factors Relevant to Rehabilitation and Costs*

9. Respondent has been a real estate salesperson for more than 26 years. She and her husband have four children, all in their late teens and early twenties and living at home. Her earnings account for more than half of the household's approximately \$95,000 annual income. Respondent credibly testified that she has worked at her profession to provide for her family and make a better life for them. Her statements were corroborated by a letter (Exh. A) from a friend, Belle Cervantes. Ms. Cervantes has worked with respondent since their early days in the industry more than twenty years ago. She describes respondent as a hard worker, a dedicated wife and mother, and a loyal friend.

10. Since respondent's last arrest, she has been more conscious of the dangers of driving while intoxicated. In a "completion letter" (Exh.B) from her most recent court-ordered alcohol education program, her counselor described her as engaged and motivated and notes that through 90 days of monitoring, she maintained continuous abstinence from alcohol and psychoactive drugs. Since completing that program, however, respondent has not stopped consuming alcohol. Respondent testified that she still drinks occasionally.

11. Respondent has become more spiritual and self-aware, regularly attending church and, with her children nearly grown, taking better care of herself.

12. Complainant submitted two exhibits in support of the Bureau's claim for investigation and enforcement costs: Exhibit 8 establishes investigation costs of \$903.55 and Exhibit 9 establishes enforcement costs of \$534.00. In total, the Bureau seeks cost recovery of \$1,437.55. The investigation costs, primarily consisting of obtaining and reviewing criminal records and corresponding with respondent and the Bureau's counsel, are reasonable for the size and scope of the matter as are the enforcement costs, which are primarily for drafting pleadings and preparing for the hearing.



## LEGAL CONCLUSIONS

1. Protection of the public is the Bureau's highest priority in exercising its licensing, regulatory and disciplinary functions. (Bus. & Prof. Code § 1005.1.)
2. The burden of proof is on the Bureau to show cause that license revocation or suspension is warranted. (*Ettinger v. Medical Board of Quality Assurance* (1982) 135 Cal. App. 3d 853, 855.) The standard of proof is clear and convincing evidence, which is "so clear as to leave no substantial doubt." (*Mathieu v. Norrell Corporation* (2004) 115 Cal. App. 4th 1174, 1190 (citations omitted).)
3. The Bureau can suspend or revoke the license of a licensee who has entered a plea of guilty or nolo contendere to, or been found guilty or convicted of, a crime substantially related to the qualifications, functions or duties of a real estate licensee. (Bus. & Prof. Code, §§ 10177, subd.(b)(1), 490, subds. (a), (b).)
4. Crimes substantially related to the qualifications, functions or duties of a real estate licensee include those undertaken with the intent of conferring a financial or economic benefit upon the perpetrator and two or more convictions involving the consumption or use of alcohol or drugs, when at least one of the convictions involves driving and the use or consumption of alcohol or drugs. (Cal. Code Regs., tit. 10 (Regulations), § 2910, subd. (a)(8), (11).)
5. Cause exists to revoke or suspend respondent's license based on her criminal convictions. Her crime of hit and run involved evading responsibility, including financial consequences of damaging property, and thus constitutes an unlawful act intended to confer a financial benefit. Respondent's two DUI convictions involved driving and alcohol consumption. (Factual Findings 3 & 5 and Legal Conclusions 3 & 4.)
6. Regulation section 2912 establishes the Bureau's criteria for determining evaluating the rehabilitation of a licensee against whom an administrative disciplinary proceeding has been initiated on the grounds that the licensee has been convicted of a substantially related crime. The evidence in the context of the relevant criteria is summarized below:

Subdivision (a)(1) and (2) - The passage of at least two years since the criminal act or conviction, subject to an increased period depending on the nature and severity of the crime and whether there has been a prior history of substantially related criminal convictions. Respondent's last criminal act occurred in March 2016, just under the minimum time requirement under this criterion. (Factual Finding 6.) Although she has one previous conviction for driving while intoxicated, that conviction alone does not constitute a prior history of substantially related criminal convictions because, under applicable regulations, a minimum of two convictions involving alcohol consumption, with at least one involving driving a vehicle, constitute a substantially related crime. (Factual Finding 3 and Legal Conclusion 4.)

Subdivisions (b), (c), (e), (f), and (g) – Evidence of payment of restitution, expungement of criminal convictions, successfully completion or early discharge from probation, abstinence from the use of alcohol or controlled substances, payment of fines associated with the convictions. Respondent has ongoing restitution and fine payment obligations, remains on probation, and occasionally uses alcohol. (Factual Findings 5 & 10.) No evidence regarding expungement was presented.

Subdivisions (j), (l), and (m)(1)-(5) – Stability of family life and fulfillment of parental and familial responsibilities, significant involvement in community, church or other organizations for the public good, and a change in attitude from that which existed at the time of the commission of the crimes. Respondent has always been dedicated to her family and is a reliable friend. Moreover, respondent has become more conscious of the dangers of drinking and driving and more self-aware generally; however, she continues to drink and to date, has failed to take full responsibility for her conduct, especially with respect to the hit and run conviction. (Factual Findings 7-11.)

7. Considering the relevant criteria in total, there are insufficient indicia of rehabilitation at this time to allow respondent to maintain her license and still adequately protect the public. (Legal Conclusion 6.)

8. Under Business and Professions Code section 10106, a licensee may be ordered to pay the reasonable costs of the investigation and enforcement of the case. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal. 4th 32, the California Supreme Court considered whether a similar cost recovery provision impermissibly discouraged licensees from exercising their due process rights to a hearing before their licenses could be revoked or suspended. The Court determined that cost recovery for investigation and prosecution is permissible as long as certain conditions are met: assessment of the costs will not unfairly penalize a licensee who is found to have committed some wrongdoing but has used the hearing process to reduce the charges or the severity of the discipline; the licensee has a subjective belief in the merits of her position; the licensee has the means to pay the costs; and the costs are not disproportionately large when considered in the context of the innocuousness of the charge at issue. (*Zuckerman, supra*, 29 Cal. 4th at p. 45.)

9. Here, respondent demonstrated belief in the merits of her position but failed to raise challenges sufficient to dismiss the charges against her or to reduce the penalty. Additionally, based on the evidence on this record, she has sufficient means to pay the Bureau's costs for investigation and enforcement, which have been deemed to be reasonable. (Factual Findings 9-12 and Legal Conclusions 6-8.)

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## ORDER

All licenses and licensing rights of respondent Marcela Clemente, also known as Marcela Torres, under the Real Estate Law are revoked. Respondent is ordered to pay costs in the amount of \$1,437.55 under terms and conditions determined by the Bureau.

DATED: March 16, 2018

DocuSigned by:

*Deena R. Ghaly*

DEENA GHALY

Administrative Law Judge  
Office of Administrative Hearings