

FILED

JUN 12 2018

BUREAU OF REAL ESTATE

By *CalBRE*

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of	)	CalBRE No. H-40909 LA
	)	
DAVID BRYON MIHALCZO,	)	OAH No. 2018011198
	)	
Respondent.	)	

DECISION

The Proposed Decision dated May 2, 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.

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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 7/2/18.

IT IS SO ORDERED June 8, 2018

WAYNE S BELL
REAL ESTATE COMMISSIONER

A handwritten signature in blue ink, appearing to read "Daniel J. Sandri", is written over a horizontal line.

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:

DAVID BRYON MIHALCZO,

Respondent.

Case No. H-40909- LA

OAH No. 2018011198

PROPOSED DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, heard this matter in Los Angeles, California on April 5, 2018. Diane Lee, Real Estate Counsel, represented complainant Maria Suarez, a Supervising Special Investigator of the State of California. Respondent David Bryon Mihalczko represented himself. The matter was submitted for decision on the same day at the conclusion of the hearing.

Complainant seeks to discipline respondent's real estate licenses based on allegations that he has multiple alcohol-related driving criminal convictions that are substantially related to the qualifications, functions, or duties of a real estate licensee. Respondent argued for his continued licensure. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order revoking respondent's real estate licenses and accompanying rights.

FACTUAL FINDINGS

1. Complainant made the Accusation while acting in her official capacity.
2. On June 22, 1993, the Bureau's predecessor—the Department of Real Estate—issued a real estate salesperson license to respondent. On March 14, 1997, respondent obtained Real Estate Broker License number B/01161926, which expires on April 25, 2022.

Cause Alleged to Discipline Respondent's Real Estate Licenses

- 3a. On January 15, 2015, in the Superior Court of California, Riverside County, in case number SWM1402128, respondent was convicted, on his guilty plea, for violating Vehicle Code section 23152, subdivision (b) (driving with a blood alcohol level of 0.08

percent or more), a misdemeanor. The court found respondent's admission of guilt to be knowing and voluntary, suspended imposition of sentence, and placed respondent on summary probation for a period of three years with terms and conditions including committing to the custody of the Riverside County Sheriff for 75 days (with credit for two actual days served and 73 days to be served in LCA Electronic Monitoring Program in lieu of County Jail), attending and completing an SB38 18-month alcohol education program, obeying the law, and paying fines and restitution.

3b. Respondent explained at the administrative hearing that he was speeding. "I got pulled over. I had alcohol in my system absolutely."

4a. While on probation, on May 12, 2017, in the Superior Court of California, San Diego County, in case number CN370513, respondent was convicted, on his guilty plea, of violating Vehicle Code section 23152, subdivision (b) (driving with a blood alcohol level of 0.08 percent or more), a misdemeanor with enhancements pursuant to Vehicle Code sections 23546 (prior driving under the influence conviction within 10 years) and 23578 (driving with blood alcohol level of 0.15 percent or more). The court found respondent's admission of guilt to be knowing and voluntary, suspended imposition of sentence, and placed respondent on summary probation for a period of five years with terms and conditions including committing to the custody of the San Diego County Sheriff for 150 days (with credit for two actual days served) and attending and completing an SB38 Multiple Conviction Program. Pursuant to Vehicle Code section 23546, subdivision (b), the court designated respondent a habitual traffic offender.

4b. Respondent explained at the administrative hearing that he "had interlock in the vehicle," that he had "done time for it to be removed," that he "completed the last driving program," but then "drank to excess." Two Oceanside Police Department officers observed respondent making an abrupt, unsafe lane change and driving his vehicle partially in the bike lane and the number one lane of the roadway. When the officers executed a traffic stop of respondent's vehicle, the officers smelled a strong odor of alcohol emitting from respondent's breath and person. The officers observed respondent lose his balance when he exited his vehicle and lean on his vehicle to maintain his balance. As the officers spoke to respondent, they observed that respondent's speech was slow and slurred and that respondent's eyes were bloodshot and watery. With respondent's consent, the officers administered the preliminary alcohol-screening (PAS) test to obtain a measure of respondent's blood alcohol content, which was 0.189 percent on a first reading and 0.178 percent on a second reading.

Factors in Aggravation, Mitigation, and Rehabilitation

5a. On August 11, 2010, in the Superior Court of California, Orange County, in case number 10SM02346, respondent was convicted of violating Vehicle Code section 23152, subdivision (b) (driving with a blood alcohol level of 0.08 percent or more), a misdemeanor with enhancement pursuant to Vehicle Code section 23538, subdivision (b)(2) (driving with blood alcohol level of 0.20 percent or more). The court placed respondent on

informal probation for a period of three years with terms and conditions including serving two days in county jail (with credit for two actual days served), attending and completing a nine-month, level two First Offender Alcohol Program, and paying fines.

5b. Respondent explained at the administrative hearing that he drove himself home from a bar late at night. "I was texting. I swerved. They pulled me over."

6a. As a licensed real estate salesperson, but before his licensure as a real estate broker, respondent was convicted, on August 29, 1994, in the Superior Court of California, Orange County, in case number 94SF0137 of violating Vehicle Code section 23153, subdivisions (a) (driving under the influence with injury to another person), and (b) (driving with a blood alcohol level of 0.08 percent or more with injury to another person), both felonies. The court placed respondent on probation for a period of three years with terms and conditions including serving 180 days in county jail (with credit for two days actually served). Respondent disclosed this August 29, 1994 conviction in his Broker Application.

6b. Respondent explained at the administrative hearing that he and his best friend who served with him in the Gulf War as Marine Corps servicemen drank alcohol. It was raining and respondent was inebriated when he drove his vehicle into the rear of an 18-wheeler truck injuring both himself and his best friend.

7. Respondent has a 19-year marriage and he has three adolescent children. He has a tenth grade education. He has been self-employed since his 1993 discharge from the United States Marine Corps. His company, which had 30 employees, sold foreclosed properties in Orange County until it closed down in 2007. Respondent owns and manages Section 8 low income housing in San Diego County.

8. Respondent's convictions arise from his history of alcohol consumption. He claims that he never drinks while working and that his drinking did not affect his clients. Respondent is currently enrolled in an alcohol and drug program through the Academy of Defensive Driving (AODD). Respondent admits that he "never took other programs seriously." He claims AODD is "the first one who cleaned me up." Respondent identifies February 2, 2018 as his sobriety date. He attends Alcoholic Anonymous meetings up to two times daily. He has a sponsor, whom he contacts every other day. At the time of the administrative hearing, respondent's last in-person contact with his sponsor was on April 3, 2018. Respondent testified, "At 49 I realize I'm an alcoholic. I wish I wasn't. . . . I'm having some clarity in my life lately. I've learned a lot. I wish I learned it sooner." Respondent did not specify what exactly he has learned. He also asserted that his May 12, 2017 conviction "got the lights to come on."

9. At the administrative hearing, respondent apologized stating, "I'm very sorry for this, but I appreciate where the state wants to protect the consumer. But, I want to keep the license. . . . Sorry it happened. I wish it didn't. I'm just asking for mercy."

Costs of Investigation and Prosecution

10. The Bureau incurred costs of investigation and prosecution totaling \$1,086.30. These costs are reasonable pursuant to Business and Professions Code section 10106.

11. Respondent testified at the administrative hearing that he is solvent.

LEGAL CONCLUSIONS

1. The purpose of this administrative proceeding is not to impose additional punishment on respondent. (See *Camacho v. Youde* (1979) 95 Cal. App. 3d 161, 164.) The Superior Court has already imposed appropriate and significant criminal punishment on respondent. (See Factual Findings 3a and 4a.) The purpose of this administrative proceeding is to protect the public from, among other things, licensees lacking the integrity necessary to fulfill the fiduciary responsibilities of a real estate professional consistent with the Real Estate Law and regulations. (See *Harrington v. Department of Real Estate* (1989) 214 Cal.App.3d 394, 402; see also *Handeland v. Department of Real Estate* (1976) 58 Cal.App.3d 513, 518.)

2. Complainant bears the burden of proving by clear and convincing evidence to a reasonable certainty that respondent has engaged in conduct warranting suspension or revocation of respondent's real estate licenses. (See *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 855-6.) Clear and convincing evidence means the evidence is "so clear as to leave no substantial doubt" and is "sufficiently strong to command the unhesitating assent of every reasonable mind." (*Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1190 [citing *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 332-333].)

3. Business and Professions Code sections 490 and 10177, subdivision (b), authorize the suspension or revocation of 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.

4. California Code of Regulations, title 10, section 2910, subdivision (a), provides that "[w]hen considering whether a license should be . . . suspended or revoked on the basis of the conviction of a crime, . . . the crime . . . shall be deemed to be substantially related to the qualifications, functions or duties of a licensee of the Department within the meaning of Section[] . . . 490 . . . if it involves [¶] . . . [¶] (8) Doing of any unlawful act with . . . the intent or threat of doing substantial injury to the person . . . of another. (9) Contempt of court or willful failure to comply with a court order. (10) Conduct which demonstrates a pattern of repeated and willful disregard of law. (11) Two or more convictions involving the consumption or use of alcohol or drugs when at least one of the convictions involve driving and the use or consumption of alcohol or drugs."

5. Respondent's January 15, 2015 and May 12, 2017 convictions, which complainant allege as cause for discipline of respondent's real estate broker license, are substantially related to the qualifications, functions or duties of a Bureau licensee. Both convictions involve respondent's consumption and use of alcohol and both convictions involve respondent's driving and consumption and use of alcohol. The May 12, 2017 conviction not only occurred while respondent was serving a three-year probationary term ordered on January 15, 2015, it also violated a prior court order requiring respondent's obedience of the law. Respondent's January 15, 2015 and May 12, 2017 convictions demonstrate a pattern of repeated and willful disregard of the law prohibiting drunk driving, especially when respondent's prior convictions in 1994 and 2010 for the same unlawful conduct are taken into consideration.

6. In the case where convictions for crimes are substantially related to the qualifications, functions or duties of a Bureau licensee, the context in which the crimes were committed goes only to the question of the weight to be accorded to the crime when considering the action to be taken with respect to the licensee. (Cal. Code Regs., tit.10, § 2910, subd. (c).)

7. Respondent's January 15, 2015 and May 12, 2017 convictions are consequences of respondent's continuing drunk driving even after experiencing an injury-related collision and even after participating in multiple educational programs about drunk driving and its consequences. Significant weight is accorded respondent's January 15, 2015 and May 12, 2017 convictions.

8. By reason of Legal Conclusions 1 through 7, complainant has established by clear and convincing evidence that cause exists pursuant to Business and Professions Code sections 490 and 10177, subdivision (b), and California Code of Regulations, title 10, section 2910, subdivision (a), to discipline real estate licenses, including real estate broker license number 01161926, on the basis of the January 15, 2015 conviction set forth in Factual Finding 3a.

9. By reason of Legal Conclusions 1 through 7, complainant has established by clear and convincing evidence that cause exists pursuant to Business and Professions Code sections 490 and 10177, subdivision (b), and California Code of Regulations, title 10, section 2910, subdivision (a), to discipline real estate licenses, including real estate broker license number 01161926, on the basis of the May 12, 2017 conviction set forth in Factual Finding 4a.

10. Although cause exists to discipline respondent's real estate licenses and accompanying licensing rights, the Bureau has, pursuant to Business and Professions Code section 482, developed criteria for evaluating the rehabilitation of a licensee against whom an administrative disciplinary proceeding for revocation or suspension of license has been initiated on account of crimes committed by the licensee. The law recognizes that people can and do reform and that in such circumstances they should not be barred from licensure. (See *Tardiff v. State Bar* (1980) 27 Cal.3d. 395, 404.) The Bureau's criteria for rehabilitation,

which are codified in California Code of Regulations, title 10, section 2912, include, among other things, the elapse of time since commission of the acts or offenses; expungement of the convictions which culminated in the administrative proceedings to take disciplinary action; successful completion or early discharge from probation; abstinence from the use of alcohol for not less than two years if the criminal conviction was attributable in part to the use of alcohol; payment of any fine imposed in connection with the criminal conviction that is the basis for revocation or suspension of the license; new and different social and business relationships from those which existed at the time of the commission of the acts that led to the criminal convictions in question; stability of family life and fulfillment of parental and familial responsibilities subsequent to the criminal conviction; completion of, or sustained enrollment in, formal educational or vocational training courses for economic self-improvement; significant and conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems; and change in attitude from that which existed at the time of the commission of the criminal acts in question.

11. Respondent bears the burden of establishing his rehabilitation. (Evid. Code, § 500.)

12. Respondent's most recent criminal conviction occurred one year ago on May 12, 2017, which is less than the two-year period enumerated in the Bureau's rehabilitation criteria. Passage of just one year since his most recent criminal conviction is an inadequate period of time within which respondent can achieve meaningful rehabilitation considering his lengthy history of alcohol consumption and use resulting in his multiple alcohol-related criminal convictions. Importantly, respondent's February 2, 2018 sobriety date more than suggests that until a few months ago, even after his May 12, 2017 conviction, respondent likely failed to abstain from alcohol. Respondent's sobriety is nascent, and it would be premature to declare any successful management of his use and admitted abuse of alcohol.

13. Respondent repeatedly jeopardized his personal safety and the safety of the public by disregarding the legal prohibition against drunk driving and the risk of harm attendant to his operation of motor vehicles while under the influence of alcohol. Such conduct is a serious breach of duty owed to society. Respondent's history of recurring convictions augurs an inability to conform to societal norms as well as the law, which is incongruous with the personal and professional integrity required of real estate professionals.

14. Respondent's January 15, 2015 and May 12, 2017 convictions culminating in this administrative proceeding have not been expunged.

15. Respondent claimed never imbibing while working as mitigation and in support of his continuing licensure. Substantial legal authority has long established, however, that a licensee's misconduct occurring outside the practice of licensed activity is a basis for imposing discipline because such misconduct reflects on a licensee's fitness and qualification. (See e.g. *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 771.) Respondent's convictions involving alcohol consumption reflect on his fitness and

competence to practice real estate because, just as alcohol consumption impairs ability, skills, and judgment needed for safe driving, alcohol consumption impairs ability, skills, and judgment needed to discharge the fiduciary obligations of a real estate practitioner with integrity and within the bounds of the Real Estate Law. Significantly, knowledge of respondent's recurring alcohol-related convictions undermines public confidence in and respect for the real estate profession. As stated in *Golde v. Fox* (1979) 98 Cal.App.3d 167, 176, "[T]here is more to being a licensed professional than mere knowledge and ability. Honesty and integrity are deeply and daily involved in various aspects of the practice." Applying these principles, the Bureau need not wait for harm to the public to occur to discipline respondent's real estate licenses. Public protection includes the prevention of future harm. Delaying or precluding license discipline until harm occurs subverts this vital purpose. It is far more desirable to discipline before a licensee inflicts harms than to discipline after harm has occurred. (See *Griffiths v. Superior Court, supra*, 96 Cal.App.4th at pp. 772-773.)

16. Respondent's 19-year marriage and his children, without more, evince respondent's stable family life and fulfillment of his familial responsibilities. Respondent claims to have "learned a lot" from his recent alcohol education program and to be experiencing "some clarity in [his] life lately." No one, however, vouched for respondent at the administrative hearing. Respondent offered no character references from family members, friends, or other associates. In disciplinary proceedings, such as this, character references from family members, friends, and other associates familiar with respondent's history of alcohol consumption, claimed sobriety and recent clarity of mind, as well as present integrity would have been worthy of careful consideration. (See *Werner v. State Bar of Cal.* (1954) 42 Cal.2d 187, 196-197 and *Preston v. State Bar of Cal.* (1946) 28 Cal. 2d 643, 650-651.)

17. At this time, respondent has not met his burden of establishing a level of meaningful rehabilitation to overcome discipline of his real estate licenses and licensing rights.

Cost Award

18. Business and Professions Code section 10106 authorizes the recovery of the Bureau's prehearing investigation and enforcement costs.

19. Under *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal. 4th 32, 45, the Bureau must exercise its discretion to reduce or eliminate cost so as to prevent cost award statutes from deterring licensees with potentially meritorious claims or defenses from exercising their right to a hearing. "Thus the [Bureau] may not assess the full costs of investigation and prosecution when to do so will unfairly penalize a [licensee] who has committed some misconduct, but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed." (*Ibid.*) The Bureau, in imposing costs in such situations, must consider the licensee's subjective good faith belief in the merits of his or her position and the Bureau must consider whether or not the licensee has

raised a colorable defense. The Bureau must also consider the licensee's ability to make payment.

20. Considering the *Zuckerman* factors, including respondent's solvency, the Bureau shall recover its costs of investigation and prosecution totaling \$1,086.30.

ORDER

1. Respondent David Bryon Mihalcz's real estate licenses, including Real Estate Broker License number 01161926, and accompanying licensing rights are hereby revoked
2. Respondent David Bryon Mihalcz shall pay the Bureau its costs of investigation and enforcement in the amount of \$1,086.30.

DATED: May 2, 2018

DocuSigned by:

JENNIFER M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings