

FILED

SEP 13 2018

BUREAU OF REAL ESTATE

BEFORE THE DEPARTMENT OF REAL ESTATE By 

STATE OF CALIFORNIA

In the Matter of the Application of)	DRE No. H-40983 LA
)	
SANDY EMILY BENITES,)	OAH No. 2018040821
)	
)	
<u>Respondent.</u>)	

DECISION

The Proposed Decision dated August 1, 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 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 Department 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 Department'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 October 4, 2018.

IT IS SO ORDERED September 10, 2018

DANIEL SANDRI
ACTING REAL ESTATE COMMISSIONER



BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

SANDY EMILY BENITES,

Respondent.

Case No. H-40983 LA

OAH No. 2018040821

CORRECTED PROPOSED DECISION

Chantal M. Sampogna, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 3, 2018, in Los Angeles.

Steve Chu, Counsel, represented Brenda Smith (complainant), Supervising Special Investigator of the State of California, Department of Real Estate (Department).¹

Sandy Emily Benites (respondent) was present and represented herself.

Oral and documentary evidence was received. The record was closed and the matter submitted at the conclusion of the hearing.

SUMMARY

Complainant alleges that respondent's real estate salesperson's license application should be denied based on respondent's criminal conviction and misrepresentation on respondent's license application. Respondent admitted complainant's factual allegations and offered evidence of mitigation and rehabilitation. As discussed below, respondent's application will be denied, but she will be issued a restricted salesperson license.

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¹ The Bureau of Real Estate became the Department of Real Estate on July 1, 2018. (Senate Bill 173 (Stats. 2018, ch. 828); Bus. & Prof. Code, § 10050.)

FACTUAL FINDINGS

Parties and Jurisdiction

1. On March 13, 2017, respondent submitted an application to the Department for a real estate salesperson license. The Department denied the application, and respondent appealed.
2. Complainant brought the Statement of Issues in her official capacity as a Supervising Special Investigator for the Department. Respondent timely submitted a Notice of Defense.

Respondent's Conviction

3. A. On March 17, 2008, in the Superior Court of California, County of Kern, case number BM726112A, respondent pled nolo contendere to and was convicted of grand theft by an employee, in violation of Penal Code section 487, subdivision (b)(3), a misdemeanor.

B. The court suspended imposition of sentence and placed respondent on summary probation for three years, ordered her to serve 30 days in county jail with a stay of execution and a referral to a work release program, and pay fines and fees totaling \$335. On August 6, 2008, respondent completed the work release program. Respondent completed her probation after two years. On February 18, 2010, respondent's conviction was dismissed pursuant to Penal Code section 1203.4.

C. The circumstances underlying this conviction occurred in December 2006 and January 2007. While working as a sales clerk for All American Sports Fan (employer), respondent sold approximately \$860 of the employer's merchandise, consisting of approximately 20 hats and two sport jerseys, and kept the money for herself. When she began working for the employer approximately three weeks prior, she observed the other employees that worked the evening shifts unplug the employer's video surveillance system, fill bags with the employer's merchandise, and then sell the merchandise to others and keep the money for themselves. Respondent behaved the same way to be accepted by the other employees. Respondent was 18-years-old at the time, living in a supportive home with her parents and older sibling. She acknowledged her criminal behavior when interviewed by her manager in January 2007, and testified at hearing that her behavior was immature and without justification.

Respondent's License Application

4. A. On respondent's application to obtain a real estate salesperson license, she answered "no" to question number 28, which asked if she had ever been convicted of any violation of the law at the misdemeanor or felony level. Respondent failed to disclose her 2008 conviction.

B. Directly above question 28, the application states that a conviction includes convictions later expunged under Penal Code section 1203.4, and those convictions must be disclosed no matter how long ago they occurred. The Department discovered respondent's 2008 conviction and directed respondent to complete its form RE 515D, Conviction Detail Report. Respondent submitted this form to the Department, stating her criminal behavior was an immature mistake and that she was under the impression that because her case had been expunged, she no longer had to disclose it.

Mitigation, Rehabilitation, and Other Relevant Facts

5. A. Respondent took responsibility for her criminal behavior. At hearing, she expressed remorse about her dishonest criminal behavior and dishonesty in her license application, how her behaviors affected her employer, the public, and the Department, and have limited her opportunities to provide a better life for her daughter. Respondent is committed to her career in real estate and testified that she would perform all requirements of a restricted license.

B. Respondent has changed her lifestyle since her criminal behavior. Since her conviction, respondent worked in customer service for Account Control Technology for approximately seven years. She performed her duties adequately, but was disciplined and ultimately terminated for violating the employer rules, i.e., the dress code, unapproved time at Starbucks, and excessive internet use. Respondent then began work in real estate and has been an office assistant for Eric Mora, a licensed salesperson for 12 years, with Performance Realtors. Respondent completed her license course work, passed her salesperson examination, and works full-time for Mr. Mora. Respondent enjoys her work environment, which she finds supportive, informative, and not competitive or stressful. Respondent has performed her duties well, informed Mr. Mora of her conviction, and Mr. Mora is willing to supervise her if she is granted a restricted license. In regards to her application to the Department, respondent testified that she skimmed the application and did not read the paragraph above question 28, which directs that applicants disclose all convictions, and acknowledged that such behavior was inconsistent with the duties required of a salesperson, and was dishonest.

C. Respondent lives with her long-term boyfriend and their three-year-old daughter. She and her boyfriend have a stable and supportive relationship, and have lived together for five years; they are both employed and provide for their daughter. Respondent continues to have a supportive relationship with her parents who live approximately five miles from respondent; they see each other regularly as respondent's mother helps care for respondent's daughter, and respondent helps her parents with medical and other needs. Respondent has not been involved in community programs.

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LEGAL CONCLUSIONS

1. Respondent bears the burden of proving she meets all prerequisites necessary for the requested license. (*Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1221.) This burden requires proof by a preponderance of the evidence. (Evid. Code, § 115.)
2. 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.)² “Protection of the public shall be the highest priority for the Department 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.)
3. The Real Estate Commissioner may deny an application for a license if the applicant has been convicted of a crime substantially related to the qualifications, functions or duties of a licensed real estate salesperson. (§ 475, subd. (a)(2).)
4. A crime is substantially related to the qualifications, functions, or duties of a real estate licensee if it involves the fraudulent taking, obtaining, appropriating or retaining of funds or property belonging to another person, or any unlawful act with the intent of conferring a financial or economic benefit upon the perpetrator. (Cal. Code Regs., tit. 10, § 2910, subsd. (a)(1), (8).)
5. The Real Estate Commissioner may deny an application for a license if the applicant has engaged in conduct that constitutes fraud or dishonest dealing, or a dishonest act with the intent to substantially benefit herself. (§§ 480, (a)(2), 10177, subd. (j).)
6. Cause exists to deny respondent’s real estate salesperson license application under sections 475, subdivision (a)(2), 480, subdivision (a)(2), and 10177, subdivision (j), because respondent was convicted of grand theft, a crime that involved the fraudulent taking of property belonging to another person and that is substantially related to the qualifications, functions, or duties of a real estate licensee. (Factual Finding 3.)
7. The Department may deny a license based on the applicant knowingly making a false statement of material fact in an application for a license. (§§ 475, subd. (a)(1), 480, subd. (d), 10177, subd. (a).)
8. Cause exists to deny respondent’s real estate salesperson license application under sections 475, subdivision (a)(1), 480, subdivision (d), and 10177, subdivision (a), because respondent knowingly made a false statement of material fact on her application for a license. (Factual Finding 4.)

² All statutory references will be to the Business and Professions Code unless otherwise designated.

9. Cause for denial of respondent's application having been established, respondent bears the burden of proving that she is sufficiently rehabilitated to warrant licensure. (See *Martin v. Alcoholic Beverage Control Appeals Bd.* (1950) 52 Cal.2d 259, 264-265; *In the Matter of Brown* (1993) 2 Cal. State Bar Ct. Rptr. 309.) 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), but remorse, while necessary, is insufficient to demonstrate rehabilitation. A truer indication of rehabilitation than a mere expression of remorse 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) 50 Cal.3d 1061, 1070.)

10. The criteria for assessing the rehabilitation of a license applicant include whether at least two years have passed since the most recent conviction or act, any restitution the applicant has made, expungement of convictions for immoral acts, successful completion of probation, payment of fines imposed in connection with a criminal conviction, stability of family life and fulfillment of familial responsibilities, completion of educational courses taken for economic self-improvement, involvement in community programs designed to provide social benefits, new and different social and business relationships, and changes in attitude as reflected by, for example, evidence from family members or others familiar with respondent's previous conduct and changes in behavior and the absence of subsequent convictions. (Cal. Code Regs., tit. 10, § 2911.)

11. The duty to make a full disclosure in an application for a professional license is an absolute duty. (*Spears v. State Bar of Cal.* (1930) 211 Cal. 183, 187.) Justification for a failure to perform that duty is not found in the excuse that the applicant believed the disclosure was not necessary. Whether a failure to disclose is caused by intentional concealment, reckless disregard for the truth, or an unreasonable refusal to perceive the need for disclosure, such an omission is itself strong evidence that the applicant lacks integrity or intellectual discernment required of a professional. (See *In re Gehring* (1943) 22 Cal.2d 708.) Lacking the required integrity or intellectual discernment is a basis for license discipline. (See *Handeland v. Department of Real Estate* (1976) 58 Cal.App.3d 513, 518 [law protects public not only from intentional misdeeds, but also from uninformed, negligent, or unknowledgeable salesman].) The real estate business is a complex one requiring license holders to operate in sophisticated and complex business environments while entrusted with the money and financial security of others, to make full and honest disclosures, and to complete and execute complex and difficult forms. Respondent's failure to understand she needed to report her conviction, demonstrates a lack of attention to detail that is required for unrestricted licensure.

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12. Respondent has established her rehabilitation and has fully acknowledged the wrongfulness of her criminal behavior. Respondent's substantially related conviction involves dishonesty and theft from her employer. It has been over 11 and one-half years since respondent's criminal behavior, she successfully completed her probation a year early, and has had her conviction expunged. Since her conviction, respondent has been employed, pursued her education and work experience in real estate, works full-time in a real estate office with a licensed sales person who is willing to supervise her on a restricted license, and is maintaining a stable relationship with her boyfriend and parents, and parenting her young daughter. However, in consideration of her recent misstatement on her license application, which demonstrates repeated dishonest behavior related to employment, respondent has not demonstrated the public would be protected if she were issued an unrestricted license. The interests of public protection therefore require that respondent's application be denied, provided a license restricted for a period of two years' be issued subject to the limitations, conditions, and restrictions identified in the Order below. (Factual Findings 3-5.)

ORDER

The application of respondent Sandy Emily Benites for a real estate salesperson license is denied; provided, however, a restricted real estate salesperson license shall be issued to respondent for a period of two years pursuant to section 10156.5. The restricted license shall be subject to all of the provisions of section 10156.7 and the following limitations, conditions, and restrictions imposed under authority of section 10156.6 (see Cal. Code Regs., tit. 10, §2930, subds. (13, 19.):

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. While working as a real estate salesperson under her restricted license, and with any application for an unrestricted license or transfer to a new employing broker, respondent shall submit to the Department a statement signed by any current or prospective

employing real estate broker on a form RE 552 (Rev. 4/88) approved by the Department, 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 Department 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: August 27, 2018

DocuSigned by:
Chantal M. Samogna
CHANTEL M. SAMPOGNA
Administrative Law Judge
Office of Administrative Hearings