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BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of)	
)	DRE No. H-41002 LA
BRENDA LYN MITCHELL,)	2018060734
)	
Respondent.)	

ORDER DENYING RECONSIDERATION

On November 30, 2018, a Decision adopting the Proposed Decision was filed in the above-entitled matter. The Decision is to become effective on December 20, 2018.

On or about December 17, 2018, Respondent petitioned for reconsideration of the Decision.

I have given due consideration to the petition of Respondent. I find no good cause to reconsider the Decision, and reconsideration is hereby denied.

IT IS SO ORDERED December 18, 2018

DANIEL J. SANDRI
ACTING REAL ESTATE COMMISSIONER

[Signature]

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BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

DEPT. OF REAL ESTATE
By 

* * *

In the Matter of the Accusation of:)	DRE No. H-41002 LA
)	
BRENDA LYN MITCHELL,)	OAH No. 2018060734
)	
Respondent.)	

DECISION

The Proposed Decision dated November 13, 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 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.

This Decision shall become effective at 12 o'clock noon on December 20, 2018.

IT IS SO ORDERED November 27, 2018

DANIEL SANDRI
ACTING REAL ESTATE COMMISSIONER

Daniel J. Sandri

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation
Against:

BRENDA LYN MITCHELL,

Respondent.

DRE No. H-41002 LA

OAH No. 2018060734

PROPOSED DECISION

Ji-Lan Zang, Administrative Law Judge (ALJ), Office of Administrative Hearings heard this matter on October 3, 2018, in Los Angeles, California.

Diane Lee, Counsel, represented Veronica Kilpatrick (complainant), Supervising Special Investigator, Department of Real Estate (Department).

Brenda Lyn Mitchell (respondent) appeared and represented herself.

Oral and documentary evidence was received.

At the hearing, the ALJ was provided with Exhibits A-1, A-2, B, C, D, E, and G, which are respondent's personal medical records. Because the documents contain confidential, private information which cannot be protected by mere redaction, entry of a protective order is appropriate. Therefore, on her own motion and good cause appearing, the ALJ ordered that, following the use of the exhibits in preparation of the Proposed Decision, A-1, A-2, B, C, D, E, and G shall be placed under seal and protected from disclosure to the public. The exhibits shall remain under seal and shall not be opened. This order governs the release of documents to the public. A reviewing court, parties to this matter, their attorneys, and a government agency decision maker or designee under Government Code section 11517 may review the documents subject to this order provided that such documents are protected from release to the public.

The record remained open until October 19, 2018, for respondent to submit court documents relating to the dismissal of her criminal conviction in case number INM1607534, and until October 26, 2018, for agency counsel to submit a response, if any. On October 19, 2018, respondent filed and served the following documents: (1) a petition for dismissal in case number INM1306393, which does not bear a file stamp from the criminal court (marked as Exhibit J); (2) an order for dismissal in case number INM1306393, which does not bear a judge's signature or a file stamp from the criminal court (marked as Exhibit K); (3) a three-

page letter from respondent (marked as Exhibit L); and (4) 20 pages of miscellaneous papers (collectively marked as Exhibit M). On October 19, 2018, complainant's counsel filed responses (lodged as Exhibit 9) to Exhibits J, K, L, and M. Specifically, complainant's counsel raised the following objections: Exhibits J and K do not appear to have been filed with the criminal court; Exhibit K has not been signed by the criminal court; and Exhibit L and M should be excluded because the record was kept open solely for the admission of additional court documents. Complainant's objections to the admission of Exhibits J, K, L, and M are sustained, and those exhibits are not admitted. The record was closed and the matter submitted for decision on October 19, 2018.

FACTUAL FINDINGS

1. On May 9, 2003, the Department issued a real estate broker license to respondent. This license is scheduled to expire on May 8, 2019, unless renewed. Respondent currently holds licensing rights under the Real Estate Law, Part 1 of Division 4, of the Business and Professions Code.

2. On March 28, 2018, complainant filed the Accusation in her official capacity. Respondent timely filed a Notice of Defense. This hearing ensued.

3. A. On August 25, 2015, respondent was convicted on her plea of nolo contendere to violating Vehicle Code section 23103.5, alcohol-related reckless driving, a misdemeanor. (Superior Court of California, County of Riverside, case number INM1306393.)

B. For this conviction, respondent was placed on summary probation for 24 months under terms and conditions, including incarceration for one day, with credit for one day served; payment of \$1,975.82 in fines, fees, and restitution; and completion of a 12-hour alcohol and drug education program.

C. Respondent paid all of the fines, fees, and restitution. She completed the 12-hour alcohol and drug education program and completed her probation. No evidence was presented that this conviction has been dismissed pursuant to Penal Code section 1203.4.

D. The facts and circumstances surrounding respondent's criminal conviction¹ for alcohol-related reckless driving are as follows: On August 12, 2013, the arresting officer

¹The facts and circumstances surrounding respondent's criminal convictions were established by arrest reports which were admitted into evidence subject to *Lake v. Reed* (1997) 16 Cal.4th 448. In *Lake v. Reed*, the California Supreme Court held that certain information contained in a police report is admissible in an administrative proceeding. The personal observations of the investigating officer and any admissions of the arrestee or respondent as contained in the report are admissible for all purposes. However, statements in a police report that are attributable to others, such as witnesses, are admitted for the limited

conducted a traffic stop of respondent's vehicle. When respondent stepped out of her car, she was unsteady on her feet. Respondent's eyes were red and watery, and her speech was slurred. The officer also smelled the odor of alcohol on respondent's person. The arresting officer administered a series of Field Sobriety Tests (FST), which respondent was unable to perform as instructed. Based on these objective signs of intoxication and respondent's poor performance on the FST, the officer arrested respondent for driving under the influence of alcohol.

4. A. On May 25, 2017, respondent was convicted on her plea of nolo contendere to violating Penal Code section 273.5, subdivision (a), inflicting corporal injury on a spouse or a cohabitant, a misdemeanor. (Superior Court of California, County of Riverside, case number INM1607534.)

B. For this conviction, respondent was placed on summary probation for 36 months under terms and conditions, including incarceration for 20 days, with credit for four days served and 16 days to be served in the Work Release Program; performance of 20 hours of community service; payment of \$814.58 in fines, fees, and restitution; attendance at 25 Alcoholics Anonymous (AA) meetings; and completion of a 52-week Domestic Violence Program.

C. Respondent has not performed the court-ordered 20 hours of community service; has not paid the court-ordered fines, fees, and restitution; has not attended any AA meetings; and has not enrolled in the 52-week Domestic Violence Program. The evidence in this case did not establish whether or not respondent has served 16 days in the Work Release Program. Respondent is currently on criminal probation.

D. The facts and circumstances surrounding respondent's criminal conviction for inflicting injury on a spouse or cohabitant are as follows: On September 5, 2016, the arresting officer responded to a call about a domestic violence incident at respondent's residence. The victim was found at the scene clearly in pain and limping. He also had visible bruising and swelling on his right thigh. Based on the information obtained from the victim, the officer went to a country club nearby to arrest respondent. As the officer approached respondent, he noticed that respondent had a strong odor of alcohol on her breath and she slurred her words. When the arresting officer put handcuffs on respondent, she yelled profanities at him. Respondent was transported to jail and charged with inflicting corporal injury on a spouse.

5. At the hearing, respondent testified about the facts and circumstances surrounding her criminal convictions.

purpose of explaining or supplementing other evidence, pursuant to Government Code section 11513, subdivision (d). In this case, the direct observations of the arresting officers were admitted as direct evidence, and the witness statements contained the reports were admitted to the extent that they supplemented or explained other direct evidence.

A. Regarding her conviction for alcohol-related reckless driving, respondent claimed that she was arrested because she was driving too fast. She denied being intoxicated on the night of August 12, 2013. Respondent admitted that she had one or two glasses of wine before she drove, but she did not believe that her blood alcohol content was above the legal limit. When asked during further questioning about her performance on the FST, respondent reported that she had opted out of the FST and that she did not perform it.

B. Regarding her conviction for inflicting corporal injuries on a spouse or cohabitant, respondent denied causing any harm to the victim. She speculated that the victim may have suffered bruising and swelling on his thigh due to a recent knee surgery. Respondent also denied being intoxicated or yelling profanities at the officer during her arrest. Respondent testified that she pled nolo contendere to the charges of inflicting corporal injury on a spouse because she was ill at the time of her criminal trial and wanted to concentrate on her recovery.

C. Respondent's testimony about the facts and circumstances surrounding her criminal convictions was implausible and illogical. Her testimony was also inconsistent with the facts contained in the arrest reports, which are deemed to be more credible, as they are contemporaneous documentation of the incidents which led to respondent's arrests. Respondent essentially denied committing any crime and claimed that she only pled nolo contendere to the domestic violence charges due to illness. However, regardless of the various motives that may have impelled the plea, respondent's criminal convictions are "conclusive proof" of her guilt of the offenses charged, and she may not impeach this conviction in this administrative proceeding. (Bus. & Prof. Code § 493; *Arneson v. Fox* (1980) 28 Cal.3d 440, 452.)

6. Respondent did not report either of these two criminal convictions to the Department within 30 days of the date of her conviction. Respondent explained that based on the advice of her attorney, she believed all of her criminal convictions had been dismissed. Therefore, she did believe that she had to report them. Nevertheless, respondent did not present any evidence that could have formed the basis for her belief that the criminal convictions had been dismissed.

7. Respondent insisted that on October 12, 2018, she had a hearing date to set aside her conviction in case number INM1607534. According to respondent, she had not completed any of the court-ordered probation terms in that case, including performance of community service, attendance at AA meetings, or enrollment in a domestic violence program, because she expected the conviction to be set aside or dismissed. Although the record was held open post-hearing to give respondent the opportunity to submit additional court documents, respondent did not submit evidence establishing that her conviction in case number INM1607534 has been set aside or dismissed.

8. Respondent graduated from University of California, Riverside, in 1986 with a degree in business and finance. She has worked in the real estate field since 1993. Currently, respondent owns her own real estate business.

9. Respondent maintained during the hearing that she does not have a problem with alcohol consumption. She has never attended any AA meetings or participated in any similar programs. Respondent continues to consume alcoholic beverages, and she consumed alcohol the night before the hearing.

10. Complainant submitted evidence of the costs of investigation and enforcement of this matter, summarized as follows: 17.1 hours in investigation activities by two Department employees at rates ranging from \$62 to \$80 per hour (subtotal \$1,067.40); and 3.5 hours of legal services at the rate of \$89 per hour (subtotal \$311.50). The total costs of investigation and enforcement are \$1,378.90. These costs are reasonable.

LEGAL CONCLUSIONS

1. The standard of proof for the Department to prevail on the Accusation is clear and convincing evidence to a reasonable certainty. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853.) Clear and convincing evidence requires proof that is so clear as to leave no substantial doubt and that is sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478, 487.)

2. Under Business and Professions Code section 10177, subdivision (b), a real estate licensee may have her license suspended or revoked for conviction of a crime if it is substantially related to the qualifications, functions, or duties of a real estate licensee. Similarly, under Business and Professions Code section 490, the Department may "suspend or revoke 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."

3. Respondent's convictions for alcohol-related reckless driving and inflicting corporal injuries on a spouse bear a substantial relationship to the qualifications, functions, or duties of a real estate licensee under California Code of Regulations,² title 10, section 2910, subdivisions (a)(8), and (a)(11). Both criminal convictions involved unlawful acts done with the threat of substantial injury to the person or property of another. Both criminal convictions also involved the consumption of alcohol, and one of the convictions involved driving under the influence of alcohol.

4. Based on Factual Findings 3 and 4 and Legal Conclusions 1 to 3, cause exists to suspend or revoke respondent's real estate broker license pursuant to Business and

² All references to the California Code of Regulations are to title 10, and are designated as "10 CCR."

Professions Code sections 490 and 10177, subdivision (b), because she was convicted of crimes substantially related to the qualifications, functions, or duties of a real estate licensee.

5. Based on Factual Finding 6, cause exists to suspend or revoke respondent's real estate broker license pursuant to Business and Professions Code section 10186.2 because she did not report her criminal convictions to the Department in writing within 30 days of the date of conviction.

6. Criteria have been developed by the Department to evaluate the rehabilitation of a licensee who is subject to discipline based on a criminal conviction. These criteria, found at 10 CCR, section 2912, are summarized as follows:

Subdivision (a), passage of at least two years since the criminal conviction; the two-year period may be increased based upon consideration of the nature and severity of the crime(s) and/or act(s) and the licensee's history of "substantially related" criminal convictions and/or license discipline.

Subdivision (b), restitution;

Subdivision (c), expungement of the criminal conviction;

Subdivision (d), expungement of the requirement to register as a sex offender;

Subdivision (e), completion of, or early discharge from, the criminal probation;

Subdivision (f), abstinence of at least two years from drugs or alcohol that contributed to the crime;

Subdivision (g), payment of any criminal fines or penalties;

Subdivision (h), correction of business practices causing injury;

Subdivision (i), new and different social and business relationships;

Subdivision (j), stability of family life;

Subdivision (k), enrollment in or completion of educational or training courses;

Subdivision (l), significant involvement in community, church or private programs for social betterment; and

Subdivision (m), change in attitude from the time of conviction to the present, evidenced by: testimony of the licensee and others, including family members, friends or others familiar with his or her previous conduct and subsequent attitudes and behavior patterns, or probation or parole officers or law enforcement officials; psychiatric or therapeutic evidence; and absence of subsequent convictions.

7. In this case, less than two years have elapsed since respondent's most recent 2017 criminal conviction for inflicting corporal injury on a spouse (case number INM1607534). Although respondent has completed probation for her 2015 criminal conviction for alcohol-related reckless driving (case number INM1306393), she has not complied with any of the terms of her probation in case number case number INM1607534. She has not paid the court-ordered fines, fees, and restitution; she has not performed any community service; and she has not attended AA meetings or enrolled in any domestic violence education program. No evidence was presented that either the 2015 or the 2017 criminal conviction has been dismissed. Respondent also has not been abstinent from alcohol, which contributed to both of her crimes.

8. Most importantly, respondent has not exhibited a change in attitude. Respondent was not remorseful for the acts leading to her criminal convictions or for failing to report her convictions to the Department. Respondent denied committing any crimes, but her denials were not credible. Respondent's lack of candor in her testimony at the administrative hearing and in her failure to report her convictions to the Department suggests that she does not yet accept responsibility for her misconduct. Additionally, problems with alcohol consumption clearly underlie respondent's criminal convictions. Respondent was intoxicated when she was arrested for driving under the influence in 2013. She was again intoxicated when she was arrested for inflicting injury on a spouse in 2016. Yet, respondent refuses to acknowledge any problems with alcohol consumption. Until respondent begins to address these issues, her rehabilitation remains incomplete.

9. In view of respondent's failure to comply with any of the terms of her criminal probation in case number INM1607534, respondent has not provided any assurance that she would be able to comply with the Department's terms and conditions if a real estate license were issued to her on a restricted basis. Therefore, the protection of public health, safety, and welfare requires the revocation of respondent's real estate broker license.

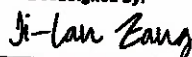
10. Under Business and Professions Code section 10106, the Department may recover costs "not to exceed the reasonable costs of the investigation and enforcement" of this matter. As set forth in Factual Finding 11, the reasonable costs of investigation and enforcement amount to \$1,378.90. Given the nature of the order below, however, respondent will not be required to pay these costs until she is reinstated as a real estate licensee.

ORDER

1. All licenses and licensing rights of respondent, Brenda Lyn Mitchell, under the Real Estate Law are revoked.

2. As a condition precedent to any reinstatement of her license under the Real Estate Law, respondent Brenda Lyn Mitchell shall pay the Department's investigation and enforcement costs of \$1,378.90, at such time and in such manner as the Department may direct.

DATED: November 13, 2018

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JI-LAN ZANG
Administrative Law Judge
Office of Administrative Hearings