



This Decision shall become effective at 12 o'clock noon of ~~NOV 19 2018~~.

IT IS SO ORDERED October 25, 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:

ROMMEL PORCIUNCULA HERNANDEZ,  
Broker License No. B/01298460,

Respondent.

No. H-41037 LA

OAH No. 2018070348

**PROPOSED DECISION**

Administrative Law Judge Chantal M. Sampogna, Office of Administrative Hearings, State of California, heard this matter on August 23, 2018, in Los Angeles, California.

Julie L. To, Counsel, represented Veronica Kilpatrick (complainant), Supervising Special Investigator of the State of California, Department of Real Estate (Department).<sup>1</sup>

Rommel Porciuncula Hernandez (respondent) appeared and represented himself.

**SUMMARY**

Complainant alleges that respondent's real estate broker's license should be revoked based on respondent's criminal convictions and misstatements on his license renewal application, and that respondent should be ordered to pay reasonable costs. Respondent admitted complainant's factual allegations and offered evidence of mitigation and rehabilitation. As discussed below, respondent's license will be revoked and he will be ordered to pay costs.

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<sup>1</sup> 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 November 2, 2004, the Department issued broker license number B/01298460 to respondent. This license is scheduled to expire on November 1, 2020, unless renewed.

2. On May 9, 2018, complainant filed the Accusation while acting in her official capacity as a Supervising Special Investigator of the State of California. Respondent timely submitted a Notice of Defense.

### *Respondent's Convictions*

3. A. On February 25, 2014, in the Superior Court of California, County of San Diego, in case number S268167, respondent pled guilty to and was convicted of carrying a concealed firearm, in violation of Penal Code section 25400, subdivision (a)(2), a misdemeanor.

B. The court suspended imposition of sentence and placed respondent on informal probation for three years, ordering him to destroy all weapons in his possession, and pay fines and fees totaling \$833.

C. The circumstances underlying this conviction occurred on August 18, 2013. Respondent exited the Navy Exchange, a gift shop on Naval Air Station North Island (a military base), with a fishing reel (valued at \$89.99), without paying for the item. A loss prevention officer witnessed respondent unwrap the fishing reel, place it in his back pocket, and exit the store. This officer stopped respondent, searched his bag, and found the fishing reel, a black Glock 27 handgun with one nine round magazine, and three Concealed Weapon Permits (CWP) for Nevada, Florida, and Utah. Respondent did not have, and has never had, a California CWP.<sup>2</sup> This officer apprehended respondent, at which time he apologized and said "I should not have done it." (Ex. 5.) Soon after, Officer Sellers, of the San Diego Regional Police Department, responded to the scene and interviewed respondent. Respondent explained he thought his family had paid for the fishing reel, and acknowledged knowing he was not allowed to carry the gun while on a military base.

4. A. On September 29, 2017, in the Superior Court of California, County of Riverside, in case number RIF1701467, respondent pled guilty to and was convicted of assault of a person by means of force likely to produce great bodily injury, in violation of Penal Code section 245, subdivision (a)(4), a felony.

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<sup>2</sup> Respondent repeatedly testified that he had a CWP, but when Department Counsel and the ALJ inquired further as to whether he had, or had had, a California CWP, respondent evaded answering the question, repeating he had a CWP in three states. It was only later in his testimony that he acknowledged he has never had a California CWP.

B. The court placed respondent on formal probation for three years, committed respondent to the custody of the Riverside County Sheriff for 90 days, to be served through the Work Release Program, with credit for four days served, and to not possess any firearm, deadly weapon, or ammunition, and to pay fines and fees totaling \$814.58. Respondent is currently on probation with a balance of \$500 remaining towards fines and fees.

C. 1) The circumstances underlying this conviction occurred on February 22, 2017. On that evening, respondent and his family ate dinner at a restaurant. Two juveniles, approximately 13 years-old, who had just purchased a laser pointer at a local store, began pointing the laser pointer towards respondent and his family through the restaurant window. Respondent exited the restaurant and started to yell at them, "I'll fucking shoot you. I know it was you," lifted his shirt, and brandished a silver and black hand gun tucked into his waistband. (Ex. 7.) The juveniles ran and flagged down police officer Leon, a Riverside County Sheriff, and reported someone had just brandished a firearm.

2) Soon after, Officer Leon entered the restaurant and approached respondent and his family and asked if anyone had a firearm. Respondent and his mother answered no. Respondent's mother then stood up and walked away from the table with her purse, and was detained. Upon search of her purse, Officer Leon discovered a Kimber Arms .45 caliber 1911 Ultra Carry II Firearm, a semi-automatic handgun, located in her purse, matching the juveniles' description; the firearm was loaded with a magazine containing seven unexpended .45 caliber projectiles and the eighth unexpended projectile was in the chamber of the handgun, allowing it to be used instantly. Upon searching respondent, Officer Leon also discovered a fictitious CWP. Officer Leon arrested both respondent and his mother. Respondent denied brandishing a weapon, acknowledged yelling at the juveniles, and acknowledged he was carrying a fictitious California CWP he had purchased on the internet.<sup>3</sup>

#### *Respondent's Renewal Application*

5. A. On August 12, 2016, respondent filed a renewal broker's application with the Department. In response to question 16 of this application, which asks "Within the six year period prior to filing this application, have you ever been convicted (see paragraph above) of any violation of the law at the misdemeanor or felony level?" respondent answered "no." The paragraph above question 16 explains to the applicant that as used in question 16, "conviction" includes a plea of guilty.

B. On his November 20 and December 10, 2017, Conviction Detail Reports, respondent provided the following explanation to the Department about his criminal

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<sup>3</sup> Upon further research, Officer Leon discovered respondent had previously been convicted on December 26, 1983, of carrying a concealed weapon in a vehicle, in violation of Penal Code section 12025, subdivision (a), and on November 14, 1987, of carrying a loaded firearm, in violation of Penal Code section 12031, subdivision (a).

behavior. In response to his 2013 criminal behavior, respondent wrote, "Naval base doesn't [sic] honor CCW (Conceal Carry Weapon) licenses!" and further reported that he has a conceal carry weapon license. In response to his 2017 criminal behavior, respondent explained that he and his family were at a restaurant, juveniles were flashing a red laser into their eyes, he confronted the juveniles who were taunting him, and he verbally assaulted the juveniles, but there was no physical contact. "I was provoke [sic] to engaged [sic] with verbal assault!!! The Juveniles Have Started the Whole Circumstances." Respondent reported that he learned from this crime to keep his mouth shut, and that he had failed to report these crimes to the Department because they were recent. (Ex. 8.)

### *Mitigation, Rehabilitation, and Other Relevant Facts*

6. At the time of his 2013 crime, respondent had a Florida, Nevada, and Utah CWP, but did not, and has never had, a California CWP. Respondent testified that at the time of his 2017 crime, he felt intimidated by the juveniles. He explained that he had given his firearm to his mother before they left for the restaurant for her to store in the house, that he did not know the firearm was in her possession, and that he did not brandish the weapon or ever have it in his possession while at the restaurant. He could not provide any explanation to Officer Leon, or at hearing, as to how the juveniles would have known, and been able to describe, his firearm if he had not brandished it. He testified that he lives with his mother, works at her perfume store, and she pays all of his expenses because his conviction was her fault, that he did nothing wrong, and that he continues to be "so pissed off" with his mother. Respondent acknowledged his misstatements on his renewal application and explained that he answered the questions quickly and thought it was no big deal. Respondent testified that his convictions have taught him that at his age, he needs to keep his cool and walk away from conflict, and that it is time to not have a firearm; at the same time, respondent testified on more than one occasion that he continues to pursue his California CWP.

### *Costs*

7. Pursuant to section 10106, complainant requested costs of investigation and enforcement in the total amount of \$1,384.75. This amount consists of investigation costs (\$962), as well as enforcement costs incurred by Counsel for the Department (\$422.75).

8. At the hearing, complainant introduced a Certified Statement of Investigation Costs (Statement) in support of the investigation costs incurred directly by the Department. The Statement indicates the Department incurred costs in the amount of \$962 for work performed by its Supervising Special Investigator (.6 hours), and Special Investigator (14.75 hours), billed at the hourly rates of \$80, and \$62, respectively. Attached to this Statement was detailed information about the general tasks performed and the amount of time spent on each particular task.

9. Complainant introduced a Certified Statement of Costs (Declaration), signed by Julie L. To, Counsel for the Department, which states that she had reviewed the Department's computerized case time management system to determine the work she

performed and the amount of time she spent working on this case. Attached to the Declaration is a Good Faith Estimate of Reasonable Costs print out, which describes tasks performed by Ms. To through August 1, 2018, and their costs, which totaled \$422.75.

10. Costs of investigation and enforcement in the total amount of \$1,384.75 are reasonable in light of the issues involved in this matter.

## LEGAL CONCLUSIONS

1. Complainant bears the burden of proof. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113.) 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, 857.)

2. The real estate commissioner (commissioner) “has full power to regulate and control the issuance and revocation . . . of all licenses to be issued . . .” (Bus. & Prof. Code, § 10071.)<sup>4</sup> “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. A crime is substantially related to the qualifications, functions, or duties of a real estate licensee if it involves the willful violation or failure to comply with a statutory requirement that a license or permit be obtained from a duly constituted public authority before engaging in a course of conduct, the commission of any unlawful act with the intent of threat of doing substantial injury to the person or property of another, contempt of court or willful failure to comply with a court order, and conduct which demonstrates a pattern of repeated and willful disregard of law. (Cal. Code Regs., tit. 10, § 2910, subd. (a)(7)-(10).)

4. Respondent’s convictions for carrying a concealed weapon and assault of a person by means of force likely to produce great bodily injury are substantially related to the qualifications, functions, or duties of a real estate licensee because these convictions involve respondent’s willful violation to comply with the licensing requirements related to a weapon’s permit, his commission of an unlawful act with the threat of doing substantial injury to juveniles, his willful failure to comply with his 2014 court order to destroy all weapons in his possession, and his demonstrated pattern of repeated and willful disregard of law. (Factual Findings 3-4.)

5. The Department may 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

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<sup>4</sup> All statutory references are to the Business and Professions Code unless otherwise designated.

duties of the business or profession for which the license was issued. (§§ 490, subd. (a), 10177, subd. (b)(1).)

6. Cause exists to revoke respondent's license under sections 490, subdivision (a), and 10177, subdivision (b)(1), because respondent was convicted of crimes substantially related to the qualifications, functions, or duties of a real estate licensee. (Factual Findings 3-4.)

7. The Department may revoke the license of a licensee who has made a material misstatement of fact in an application for license renewal. (§ 10177, subd. (a).)

8. Cause exists to revoke respondent's broker license under section 10177, subdivisions (a), because respondent provided misstatements on his renewal application. (Factual Finding 5.)

9. A licensee's failure to report to the Department his conviction, including any plea of guilty of any felony or misdemeanor, within 30 days of the conviction is cause for discipline. (§ 10186.2.)

10. Cause exists to revoke respondent's license under section 10186.2, because respondent did not report his 2017 conviction to the department within 30 days of the conviction. (Factual Finding 5.)

11. The Department has established criteria for assessing a licensee's rehabilitation to determine the degree of discipline to impose on the license. (Cal. Code Regs., tit. 10, § 2912.) The criteria for assessing the rehabilitation of a license applicant include whether at least two years have passed since the most recent conviction, any restitution the applicant has made, expungement of convictions which culminated in the disciplinary action, 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, 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, § 2912.)

12. Respondent bears the burden of establishing rehabilitation sufficient to warrant his continued licensure. (*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 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; see also *In re Schwartz* (1982) 31 Cal. 3d 395, 400-401,

citing *In re Conflenti* (1981) 29 Cal.3d 120, 124-125 [where petitioner's criminal acts occurred just two years prior to his discipline hearing, evidence of rehabilitation was insufficient to demonstrate rehabilitation].) "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.)

13. Considering all the relevant criteria, respondent has not established rehabilitation to a degree sufficient to provide reasonable assurance the public's safety and welfare will be safeguarded by allowing respondent to continue practicing as a broker, even under a restricted contractor's license. Only one year has passed since his conviction for his most recent felony which could have resulted in the death of juveniles; he has not completed this probation or paid his fines, or had either conviction expunged; respondent's family life is not stable, as he continues to blame his mother for his 2017 conviction, and he relies on his mother to pay his expenses, failing to demonstrate fulfillment of familial responsibilities; respondent has not completed educational courses taken for economic self-improvement, and has not been involved in community programs designed to provide social benefits; most significantly, respondent demonstrated no change in attitude, and continues to blame others for his criminal behavior. In addition, respondent places no importance in the Department's rules requiring licensees to report convictions to the Department or to truthfully complete renewal applications. Public protection warrants the revocation of respondent's broker's license at this time. (Factual Findings 3-6.)

14. Under Code section 10106, the Department may recover costs "not to exceed the reasonable costs of the investigation and enforcement" of this matter. The Department is entitled to recover its reasonable costs in the amount of \$1,384.75. (Factual Findings 7-10.)

15. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the Supreme Court rejected a constitutional challenge to a cost recovery provision similar to section 125.3. In so doing, however, the Supreme Court directed the administrative law judge and the licensing agency to evaluate several factors to ensure that the cost recovery provision did not deter individuals from exercising their right to a hearing. Thus, the Department must not assess the full costs where it would unfairly penalize a licensee who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty; the Department must consider a licensee's subjective good faith belief in the merits of his or her position and whether the licensee has raised a colorable challenge; the Department must consider a licensee's ability to pay; and the Department may not assess disproportionately large investigation and prosecution costs when it has conducted a disproportionately large investigation to prove that a licensee engaged in relatively innocuous misconduct. (*Id.* at p. 45.) In this case, complainant's request for costs was reasonable, respondent did not raise a colorable challenge to the Accusation, and respondent did not demonstrate it would unfairly penalize him to require him to pay the full costs, nor that he was unable to earn the income, or have the necessary funds available, to pay these costs.

ORDER

1. All licenses and licensing rights of respondent Rommel Porciuncula Hernandez under the Real Estate Law are revoked.
2. Respondent Rommel Porciuncula Hernandez shall pay the Department's investigation and enforcement costs of \$1,384.75, at such time and in such manner as the Department may direct.

DATED: September 24, 2018

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