

FILED

SEP 10 2019

DEPT. OF REAL ESTATE

By Zinc

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Application of
SHARAREH BIBIYAN-COHEN,
Respondent.

)
) DRE No. H-41337 LA
)
) OAH No. 2019050065
)

ORDER NUNC PRO TUNC MODIFYING DECISION

It having been called to the attention of the Real Estate Commissioner that there are errors in the Decision dated August 5, 2019, effective August 28, 2019, and good cause appearing therefor, the Decision is amended as follows:

Page 1, paragraph 4 of the Decision, is amended in its entirety to read as follows:

"The application for a mortgage loan origination license endorsement is denied."

Page 2, paragraph 1 of the Decision, the first sentence is stricken.

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1 This Order, nunc pro tunc to August 5, 2019, shall become effective immediately.

2 IT IS SO ORDERED September 4, 2019.

3 DANIEL SANDRI
4 ACTING REAL ESTATE COMMISSIONER

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FILED

AUG - 8 2019

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

DEPT. OF REAL ESTATE

By *[Signature]*

* * *

In the Matter of the Application of:)	DRE No. H-41337 LA
)	
SHARAREH BIBIYAN-COHEN,)	OAH No. 2019050065
)	
Respondent.)	

DECISION

The Proposed Decision dated July 18, 2019, 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.

Pursuant to Section 11517(c)(2) of the Government Code, the following corrections are made to the Proposed Decision.

Respondent's, Testimony, Page 6, Line 1, "events relating her..." is amended to read "events relating to her..."

The application for a real estate salesperson license is denied. The earliest date on which the applicant may reapply for a license is one year from the effective date of this Decision. If and when application is again made for this license, all competent evidence of rehabilitation presented by the Respondent will be considered by the Real Estate Commissioner.

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 **AUG 28 2019**.

IT IS SO ORDERED August 5, 2019

DANIEL SANDRI
ACTING REAL ESTATE COMMISSIONER

Daniel J. Sandri

**BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA**

In the Matter of the Statement of Issues against:

SHARAREH BIBIYAN-COHEN, Respondent

Agency Case No. H-41337 LA

OAH No. 2019050065

PROPOSED DECISION

Ji-Lan Zang, Administrative Law Judge, Office of Administrative Hearings, heard this matter on July 8, 2019, in Los Angeles, California.

Judith B. Vasan, Real Estate Counsel, represented Chika Sunquist (complainant), Supervising Special Investigator, the Department of Real Estate (Department).

Ashton Cohen, Attorney at Law, represented Sharareh Bibiyan-Cohen (respondent), who appeared at the hearing.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on July 8, 2019.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Respondent is presently licensed and/or has license rights under the Real Estate Law, Part 1 of Division 4 of the Business and Professions Code, as a real estate salesperson (License number 01130610). The Department originally issued a real estate salesperson license to respondent on February 29, 1992. Respondent's real estate salesperson license is scheduled to expire on November 12, 2021, unless renewed.¹

2. Respondent filed her application, dated May 11, 2018, with the Department for a mortgage loan originator (MLO) license endorsement under the National Mortgage Licensing System (NMLS)² identification number 172522. That license application is now pending.

3. Complainant filed the Statement of Issues in her official capacity. Complainant alleges that respondent's MLO license endorsement application should be denied on the grounds that she suffered two felony convictions. Respondent timely filed a Notice of Defense and a Request for Hearing. This hearing ensued.

¹ Evidence was submitted during the administrative hearing pertaining to respondent's real estate salesperson license history, which was not relevant to this proceeding.

² The Department uses the NMLS to manage all mortgage loan originator license endorsements.

Respondent's Criminal Convictions

4. On August 23, 1993, respondent was convicted, on her guilty plea, of violating Title 31 United States Code sections 5316(1)(A) and 5322(a), willful failure to report attempted transport of currency in excess of \$10,000 out of the United States. (United States District Court, Central District of California, case number CR 93-037 AWT.)

5. For this conviction, respondent was placed on probation for three years under certain terms and conditions, including in part, serving the first four months in a home detention program subject to electronic monitoring. On January 25, 1994, and again on April 20, 1994, respondent traveled to Arizona without the knowledge or permission of her probation officer. As a result, respondent's probation was revoked on April 7, 1995. Respondent was sentenced to imprisonment for six months followed by supervised release for two years. Respondent completed her term in prison and her supervised release. There was no evidence that respondent's 1993 federal felony conviction has been expunged.³

6. The facts and circumstances underlying this conviction, as established by the statement of facts to which respondent had stipulated as a part of her plea agreement, are as follows: On January 4, 1993, respondent about to board a flight bound for Israel with her brother. Customs Inspector Frank Salazar approached respondent and her brother and explained that he was conducting a check for

³ An expungement is generally not available in federal cases. There is one narrow exception under Title 18 United States Code section 3607 (c), where a person who is guilty of a minor drug offense under the Controlled Substances Act may have his record expunged.

currency carried by passengers leaving the United States. Inspector Salazar also explained to respondent that carrying currency over \$10,000 must be reported to customs officers. When questioned by Inspector Salazar how much currency she was carrying, respondent told him that she had \$2,000. This statement was false. After a search of respondent's carry-on bag and purse, Inspector Salazar found that respondent was carrying \$82,950 in United States currency. (Exh. 8, p. 18.)

7. On August 14, 1994, respondent was convicted on her guilty plea of violating Arizona Revised Statute sections 13-1802,⁴ 13-1801, 13-701, 13-702, and 13-801, theft, a class 4 felony. (Superior Court of Arizona, Maricopa County, case number CR94-90081.)

8. For this conviction, respondent was placed on probation for four years, under certain terms and condition, including in part, restitution payments to the victims, Colonia National Bank, in the amount of \$1,004.24, and AT&T Universal Card Services in the amount of \$1,118.14. On November 6, 2009, the Superior Court of Arizona dismissed or expunged this conviction.

9. The facts and circumstances underlying this conviction are that respondent obtained services or goods from several Office Max stores in Arizona by using a fraudulent credit card.

⁴ Arizona Revised Statute section 13-1802, subdivision (A)(3), states in relevant part: "A person commits theft if, without lawful authority, the person knowingly obtains services or property of another by means of any material misrepresentation with intent to deprive the other person of such property or services."

Respondent's Testimony

10. Respondent is 56 years old. She asserted that her felony convictions occurred well over 30 years ago, at a time when she was young and immature. Respondent also claimed that she committed her crimes under the direction of her brother because in the Persian culture, to which respondent adhered, she was required to obey her brother.

11. With respect to her conviction for failure to report the attempted transportation of more than \$10,000 out of the United States, respondent claimed that she had intended to report the currency she was carrying in New York, where her flight had a stopover before reaching its final destination of Israel. Respondent also testified that the Los Angeles airport did not post any signs indicating that carrying currency above \$10,000 had to be reported. Therefore, according to respondent, she was unaware of any reporting requirements. Only during cross-examination did respondent admit that when questioned by Inspector Salazar, she had told the inspector she was carrying \$2,000, when in fact, respondent was carrying over \$80,000.

12. With respect to her conviction in Arizona, respondent claimed that her brother had given her credit cards in both of their names. However, respondent reported that she did not know the credit card numbers were stolen and used the credit cards at Office Max stores to purchase printers and other items. When questioned during cross-examination regarding the details of these events, respondent, at one point, stated that she did not remember the specifics of the incident because she had, in her own words, "blocked it out of [her] life."

13. Respondent's testimony regarding the facts and circumstances surrounding her felony convictions was not credible. Respondent's version of the

events relating her failure to report the attempted transportation of more than \$10,000 out of the United States is contradicted by the statement of facts to which respondent had stipulated as a part of her plea agreement. In that statement of facts, respondent admitted that Inspector Salazar had informed her of the requirement to report currencies over \$10,000, regardless of whether any signage was posted at the airport. With regard to her 1994 felony conviction in Arizona for theft, respondent's explanation that she had unknowingly used a credit card with stolen numbers is rejected as self-serving and implausible. Respondent's evasion and supposed inability to recall the details of the incident that led to her felony theft conviction further damaged her credibility.

14. Respondent testified that she is seeking an MLO license endorsement in order to help her husband, Bernard Cohen, in his business. Respondent believes that obtaining her MLO license endorsement will enable her and her husband to attain their goal of early retirement.

Testimony of Bernard E. Cohen

15. Bernard E. Cohen is respondent's husband and the owner of BEC Investments, where respondent has worked as an office manager for the past 25 years. Mr. Cohen described his wife as honest, kind, and extremely helpful to him in his business. Mr. Cohen believes that his wife was manipulated by her brother when she committed her crimes.

LEGAL CONCLUSIONS

Standard and Burden of Proof

1. Respondent generally bears the burden of proof at the hearing regarding a statement of issues. (*Coffin v. Department of Alcoholic Beverage Control* (2006) 139 Cal.App.4th 471, 476.) The standard of proof is a preponderance of the evidence. (Evid. Code, § 115; *Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 322-323.) "Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' (citations omitted) The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the *quality* of the evidence. The *quantity* of evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) (Emphasis in original.)

Applicable Law

2. Business and Professions Code section 10166.05 provides, in relevant part:

Notwithstanding any other provision of law, the commissioner shall not issue a license endorsement to act as a mortgage loan originator to an applicant unless the commissioner makes all of the following findings:

[¶] [¶]

(b) (1) The applicant has not been convicted of, or pled guilty or nolo contendere to, a felony in a domestic, foreign, or military court during the seven-year period preceding

the date of the application for licensing, or at any time preceding the date of application, if the felony involved an act of fraud, dishonesty, a breach of trust, or money laundering. Whether a particular crime is classified as a felony shall be determined by the law of the jurisdiction in which an individual is convicted.

(2) For purposes of this subdivision, an expunged or pardoned felony conviction shall not require denial of an application. However, the commissioner may consider the underlying crime, facts, or circumstances of an expunged or pardoned felony conviction when determining the eligibility of an applicant for licensure under this subdivision or subdivision (c).

(c) The applicant has demonstrated such financial responsibility, character, and general fitness as to command the confidence of the community and warrant a determination that the mortgage loan originator will operate honestly, fairly, and efficiently within the purposes of the article

3. Business and Professions Code section 10166.051 provides, in relevant part:

In addition to any penalties authorized by regulations adopted pursuant to Section 10166.15, the commissioner

may do one or more of the following, after appropriate notice and opportunity for hearing:

[¶] [¶]

(b) Deny, suspend, revoke, condition, or decline to renew a mortgage loan originator license endorsement, if an applicant or endorsement holder fails at any time to meet the requirements of Section 10166.05 or 10166.09, or withholds information or makes a material misstatement in an application for a license endorsement or license endorsement renewal.

4. California Code of Regulations, title 10, section 2945.3, provides, in relevant part:

A conviction for any felony within seven (7) years of a real estate licensee's application for a mortgage loan originator license endorsement is cause for denial of the application. A felony conviction at any time in the applicant's personal history where such felony involved an act of fraud, dishonesty, a breach of trust, or money laundering is cause for denial of the application. These restrictions constitute a ban on the real estate licensee's ability to apply for a license endorsement. These restrictions are not subject to mitigation or rehabilitation.

Cause for Denial of Respondent's MLO License Endorsement

5. A. Cause exists to deny respondent's MLO license endorsement application pursuant to Business and Profession Code sections 10166.05, subdivision (b), and 10166.051, subdivision (b), on the grounds that respondent suffered two felony convictions that involved acts of dishonesty. (Factual Findings 4 through 9.)

B. During closing argument, respondent contended that respondent's conviction for violating Title 31 United States Code sections 5316(1)(A) and 5322(a) does not constitute a felony involving an act of fraud, dishonesty, a breach of trust, or money laundering, within the meaning of Business and Professions Code section 10166.05, subdivision (b)(1). This argument was unpersuasive. The Court of Appeal in *Chodur v. Edmonds* (1985) 174 Cal.App.3d 565, 570, citing *Hogg v. Real Estate Commissioner* (1942) 54 Cal.App.2d 712, 717, relied on the common understanding of dishonesty to define the term as "involving fraud, deception, betrayal, faithlessness; absence of integrity; a disposition to cheat, deceive, or defraud." In this case, the elements of respondent's crime involved the deceitful act of willful failure to report attempted transport of excess currency. This deceitful act was further compounded when respondent knowingly provided a false statement to a customs officer that she was carrying \$2,000, when in fact she was carrying over \$80,000. Respondent engaged in conduct that demonstrated an absence of integrity and a disposition to cheat, deceive, or defraud. Therefore, respondent's conviction for violating Title 31 United States Code sections 5316(1)(A) and 5322(a) involved an act of dishonesty within the meaning of Business and Professions Code section 10166.05, subdivision (b)(1).

C. Respondent also argued that her 1994 Arizona conviction for theft should not be considered because it has been dismissed or expunged. However, under

Business and Professions Code section 10166.05, subdivision (b)(2), while an expunged or pardoned felony conviction may not necessitate an automatic denial, the commissioner may consider the underlying crime, facts, or circumstances of an expunged or pardoned felony conviction when determining the eligibility of an applicant. As set forth in Factual Finding 13, respondent's explanation of the facts and circumstances surrounding her 1994 Arizona conviction for theft was implausible and lacking in credibility. Moreover, respondent's assertion that she did not harbor any intent to steal the goods from Office Max amounts to a denial of having committed the crime. However, by way of her guilty plea to and conviction of violating Arizona Revised Statute section 13-1802, subdivision (A)(3), respondent is guilty of the crime of theft, which is inherently a crime of dishonesty and necessarily includes the element of intent. Respondent's conviction is "conclusive proof" of her guilt of the offenses charged, and she may not impeach that conviction in this administrative proceeding. (Bus. & Prof. Code § 493; *Arneson v. Fox* (1980) 28 Cal.3d 440, 452.)

6. Cause exists to deny respondent's MLO license endorsement application pursuant to Business and Profession Code sections 10166.05, subdivision (b), and 10166.051, subdivision (c), on the grounds that respondent has not demonstrated such financial responsibility, character, and general fitness as to command the confidence of the community and warrant a determination that the mortgage loan originator will operate honestly, fairly, and efficiently within the purpose of this article. (Factual Findings 4 through 13.) At the administrative hearing, respondent laid the blame for her crimes on her brother, and she failed to provide credible or reasonable explanations of her past conduct. Respondent's lack of candor at the administrative hearing is troubling, in that her dishonesty during her testimony is recent and suggests that she has not yet accepted personal responsibility for her crimes.

7. Pursuant to California Code of Regulations, title 10, section 2945.3, respondent's felony convictions involving acts of dishonesty constitute a ban on her ability to apply for a MLO license endorsement, and these restrictions are not subject to mitigation or rehabilitation.

ORDER

The application of respondent, Sharareh Bibiyan-Cohen, for a mortgage loan originator license endorsement is denied.

DATE: July 18, 2019

DocuSigned by:
Ji-Lan Zang
Ji-Lan Zang

Administrative Law Judge
Office of Administrative Hearings