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FILED

AUG 07 2020

DEPT. OF REAL ESTATE

By Zmi-jr

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of:)	DRE No. H-41551 LA
)	
DIANE BARBARA RANDALL,)	OAH No. 2020030554
)	
Respondent.)	

DECISION

The Proposed Decision dated June 25, 2020, 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.

Page 1 Caption, ("Agency Case No. H-41551") is amended to read "Agency Case No. H-41551 LA).

The Decision suspends or revokes one or more real estate licenses, but the right to a restricted 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.

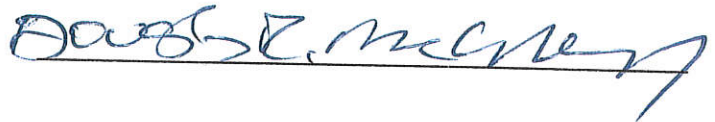
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The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock noon on SEP 07 2020.

IT IS SO ORDERED 7.30.20

DOUGLAS R. McCAULEY
REAL ESTATE COMMISSIONER



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

In the Matter of the Accusation against:

DIANE BARBARA RANDALL, Respondent

Agency Case No. H-41551

OAH No. 2020030554

PROPOSED DECISION

Thomas Y. Lucero, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter by telephone on April 16, 2020.

Kevin Sun, Staff Attorney, represented complainant, Maria Suarez, a Supervising Special Investigator of the State of California. The ALJ took official notice that Ms. Suarez brought the accusation in her official capacity. Diane Barbara Randall, respondent, represented herself.

Oral and documentary evidence was received. The record was left open for respondent's submission of documents by May 14, 2020, and for response by complainant by May 21, 2020. The ALJ granted respondent's motion for more time and the dates were continued so that respondent's submission was required by May 26, 2020, and response by complainant was required by June 2, 2020.

Respondent submitted additional documents on May 27, 2020. There was no objection by complainant. In light of the many logistical challenges posed by the current pandemic health crisis and its widespread effects, the ALJ deems the documents timely submitted.

Marked as Exhibit A is respondent's May 20, 2020 letter to counsel for DRE, Mr. Sun, which was admitted into evidence as administrative hearsay under Government Code section 11513, subdivision (d).

Marked as Exhibit B is a May 22, 2020 character reference letter by Janet Calamite, which was admitted into evidence as administrative hearsay.

Marked collectively as Exhibit C are respondent's May 24, 2020 cover letter and a May 22, 2020 character reference letter by Marilyn P. Nicholson, the latter admitted into evidence as administrative hearsay.

Marked and admitted into evidence as Exhibit D is the Notice of Assigned Hearing Dates for this proceeding.

Marked and admitted into evidence as Exhibit E is a Department of Motor Vehicles (DMV) Notice of Completion, Certificate DL 101 regarding respondent, stamped filed on July 27, 2018 in the Superior Court of the State of California, County of Santa Barbara (Santa Barbara Superior Court).

Marked and admitted into evidence collectively as Exhibit F are four certifications from the Office of the District Attorney, County of Santa Barbara, each stating hours of volunteer work respondent completed at the Braille Institute and each stamped filed on different dates in 2019 in the Santa Barbara Superior Court.

The record closed and the matter was submitted for decision on June 2, 2020.

STATEMENT OF THE CASE

The Department of Real Estate (DRE) licenses respondent as a real estate salesperson. In February 2018, respondent was convicted of driving with a Blood Alcohol Content (BAC) in excess of the legal limit. In September 2018, respondent was convicted of shoplifting.

Each conviction was a change in respondent's background information. Under certain provisions of the Real Estate Law, Business and Professions Code sections 10000 through 10580, respondent was required to inform DRE within 30 days of these changes in her background. She did not.

Based on the conduct that led to the convictions and the failure to keep DRE informed, there is cause to discipline respondent's license. Respondent in substantial part met her burden, however, of showing rehabilitation from her misconduct. Restrictions on respondent's license will adequately protect the public.

ISSUES

1. Is there cause for discipline of respondent's license based on the type and severity of respondent's wrongdoing and her failure to keep DRE informed?
2. If there is cause for discipline, what is the appropriate measure of discipline in light of aggravating and mitigating circumstances and respondent's efforts at rehabilitation?

SUMMARY OF DECISION

By commission and omission, respondent is subject to license discipline. She showed substantial efforts and partial success at rehabilitation, such that license restrictions are warranted.

FACTUAL FINDINGS

1. Respondent timely filed a Notice of Defense on Accusation on December 26, 2019.

2. As set out in Exhibit 2, DRE issued respondent salesperson license number S/01419188 on March 22, 2004. The license expired on March 21, 2020. "The lapsing or suspension of a license by operation of law . . . , or the voluntary surrender of a license by a licensee shall not deprive the department of jurisdiction to proceed with any investigation of or action or disciplinary proceeding against such licensee, or to render a decision suspending or revoking such license." (Bus. & Prof. Code, § 10103.)

Convictions

3. As set out in Exhibit 5, on February 28, 2018, in the Superior Court of California, County of Santa Barbara, case number 18CR00126, on her plea of no contest, respondent was convicted of violating Vehicle Code section 23152, subdivision (b) (driving with a BAC of 0.08 percent or higher), a misdemeanor. The court suspended sentence and placed respondent on unsupervised probation for three years on terms and conditions, including that respondent: (i) serve two days in jail, with credit for two days served; (ii) pay a \$1,690 fine, \$500 of which was exonerated by

respondent's time in jail, and a restitution fine of \$175; and (iii) attend a three-month first offender program; and (iv) abstain from alcohol for one year.

4. As described in Exhibit 4, police stopped respondent after observing her drive erratically on December 7, 2017. They found her BAC was 0.109 percent, well above the legal limit of 0.08 percent.

5. As set out in Exhibit 3, on September 19, 2018, in the Superior Court of California, County of Santa Barbara, case number 18CR08994, on her plea of no contest, respondent was convicted of violating Penal Code section 459.5, subdivision (a) (shoplifting), a misdemeanor. The court suspended sentence and placed respondent on unsupervised probation for one year on terms and conditions, including that respondent: (i) pay a \$140 fine and fees of \$215; and (ii) perform 30 hours of community service.

6. As described in Exhibit 4, respondent was observed at a hardware store on August 10, 2018 as she took nine plants with a value near \$30 to her car without paying. When confronted, she had ready a receipt for different goods she had purchased on a different day. Store security took her into custody and called police.

7. As set out in Exhibit 6, as of August 6, 2019, respondent had not reported to DRE her 2018 convictions or any change in her background information. At the hearing, respondent stated she intended no concealment, but was unaware of her reporting obligation.

8. DRE incurred in this matter reasonable costs: (i) \$492.50 for investigation, as set out in Exhibit 7; and (ii) \$1,001.25 for enforcement, as set out in Exhibit 8.

Rehabilitation

9. After respondent completed the first offender program ordered by the court, she decided to reside in sober living facilities. She began at one in downtown Los Angeles, but it was uncongenial and she moved to another. She moved to her current sober living facility because it is more affordable.

10. Respondent is a recovering alcoholic. Her sobriety date is July 26, 2019. She regularly attends meetings and has a sponsor in the Alcoholics Anonymous (AA) 12-step program. Respondent finds an AA sponsor's availability and support crucial to maintaining sobriety. Respondent has completed several of the 12 steps and has the corresponding tokens. Respondent demonstrated considerable self-awareness related to her abuse of alcohol. She knows that she must not be without an AA sponsor and that she cannot do without other means to support her sobriety, such as sober living facilities.

11. Respondent is divorced and has lived in Santa Barbara for over 20 years. She earned degrees in environmental arts and interior design after attending Pepperdine University and UCLA, the University of California at Los Angeles. She has two adult children, both doing well. Respondent described how she spent all her savings to give each of children a good childhood and formal education. Her children are partly estranged from her, which causes respondent emotional difficulties. But her son in particular respondent supported financially through his graduation from law school and while he took the Bar Examination three times.

12. Respondent stated that she regards volunteering as part of life. Before the pandemic closed public gathering places, respondent would volunteer on Fridays at her church in Santa Barbara to make soup to feed the homeless. She liked that in

this way she could mingle and cooperate with other parishioners. Respondent also volunteered for Adam's Angels, a volunteer group directed by a real estate agent which packages and distributes food for the needy.

13. Respondent has also found fulfilling her court-ordered participation on outings at the Braille Institute, where she would assist the blind and those with low vision. Exhibit G includes four certifications filed by the Santa Barbara Office of the District Attorney, showing that respondent voluntarily completed dozens more hours of community service at the Braille Institute than the 30 hours the court ordered.

14. Respondent never drank alcoholic beverages while engaged in real estate business. It has always been her practice not to accept or extend invitations to drink alcoholic beverages with clients. As she testified at the hearing, respondent recognized she had a problem with alcohol, but she managed to keep the problem separate from her real estate activity.

15. Respondent is eager to continue working in real estate not only for financial reasons, but also because she has developed a clientele, individual homeowners who regard her as providing crucial help in selling and buying real property suited to their lifestyle.

16. Exhibit B is a May 22, 2020 character reference letter in which Janet Caminite, Associate Manager at Berkshire Hathaway Homeservices California Properties, wrote that she has known and worked with respondent in real estate for 10 years. She describes respondent as always professional and responsible and ever willing to engage with others, both other real estate licensees and clients.

17. Exhibit C is a May 22, 2020 character reference letter from a client, Marilyn P. Nicholson, who has known respondent for about 10 years. She wrote that

respondent worked for about five years to show many houses, until they found one Ms. Nicholson especially appreciates. Ms. Nicholson considers respondent "more than an agent" and a great resource, able for instance to recommend tradesman.

18. Exhibit D is a May 20, 2020 email from Julia Walden, who has known respondent for over 30 years, since they attended school together. She describes respondent as "kind, giving and caring" and "committed to her family and work."

19. Exhibit F is a DMV completion certificate showing that respondent completed the court-ordered three-month program for alcohol-related offenses.

Costs

20. DRE incurred reasonable costs totaling \$1,493.75: (i) \$492.50 for investigation, as set out in Exhibit 7; and (ii) \$1,001.25 for prosecution and enforcement, as set out in Exhibit 8.

21. Respondent, however, has limited financial resources, and would have great difficulty reimbursing DRE for costs. She is currently looking for work.

PRINCIPLES OF LAW

1. Complainant bears the burden of showing by "clear and convincing proof to a reasonable certainty" that license discipline is warranted. (*Ettinger v. Medical Board of Quality Assurance* (1982) 135 Cal.App.3d 853, 855.) Complainant met that burden in this case.

2. Under Business and Professions Code sections 490, subdivision (a), and 10177, subdivision (b)(1), DRE may discipline a license based on conviction of a crime

substantially related to a licensee's qualifications, functions, or duties under the Real Estate Law.

3. Business and Professions Code section 10186.2 requires that licensees provide DRE with written reports:

Under subdivision (a)(1)(B), regarding the conviction of the licensee, including upon a plea of no contest, of any felony or misdemeanor;

Under subdivision (a)(2), the written report must be within 30 days of conviction;

Under subdivision (b), failure to report constitutes cause for discipline.

4. California Code of Regulations, title 10, (Regulation) section 2910, provides that certain types of misconduct are substantially related to the qualifications, functions, or duties of a real estate licensee, including:

Under subdivision (a)(1), "fraudulent taking . . . of . . . property belonging to another person."

Under subdivision (a)(4), "employment of . . . falsehood . . . to achieve an end."

Under subdivision (a)(8), "any unlawful act with the intent of conferring a[n] . . . economic benefit upon the perpetrator."

5. Under Business and Professions Code section 10106, subdivision (a), respondent may be ordered "to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case."

ANALYSIS

6. Respondent's convictions are substantially related to her qualifications, functions, or duties under the Real Estate Law.

A. Shoplifting is substantially related under the three categories of wrongdoing described in Regulation 2910, quoted above.

B. Driving with a BAC in excess of the legal limit is likewise substantially related to real estate practice under subdivision (a)(8) of Regulation 2910. Drinking and driving might easily end in injury and even death for drivers, including the one who was drinking, and innocent bystanders.

7. Regulation 2912, concerned with the rehabilitation criteria that DRE has developed, suggests that respondent has made progress toward, but not completed, rehabilitating herself.

A. Under subdivision (a), the relatively little time elapsed since respondent's two offenses gives scant assurance her efforts have met success. Her convictions were relatively close to each other in time, so that, to the extent that rehabilitation has occurred, it started in earnest after the date of the most recent offense.

(i) It is not reassuring that in the same year that she was convicted for drinking and driving, there was respondent's shoplifting conviction. At the time of the second conviction, and still today, respondent is on criminal probation. This fact, and respondent's probation status itself, obscures whether her current conduct may be considered evidence of rehabilitation. People on probation have incentive to act as if they respect the law. (*In Re Gossage* (2000) 23 Cal.4th 1080, 1099.)

(ii) Under subdivision (a)(2)(A), a period of more than two years after the drinking and driving conviction should be considered, because of the severity of the wrongdoing. As stated above, drinking and driving can result in grave harm, even death.

(iii) In respondent's favor under subdivision (a)(2)(B), her two convictions should not be considered a pattern of criminality, and in any case she had no history of wrongdoing before. The offenses may have some relation, one to the other, but they are nevertheless very different in kind and may be considered to some extent aberrations, especially the shoplifting.

(iv) Of most concern is that the offense of driving under the influence was attributable to an addiction. Respondent has undertaken encouraging steps, rather strenuous and of significant duration, to defeat dependence, chemical or psychological, but addiction to alcohol is notoriously insidious. Many, though determined to stay sober, relapse unexpectedly. To respondent's credit, her sincerity and forthright testimony at the hearing suggest that she understands that her sobriety must be preserved, notwithstanding forces, like the negative emotions she has felt at times regarding her children, may tempt her otherwise.

B. Under subdivision (f), respondent's abstinence tells much in her favor. While alcoholism is treacherous, respondent has reached a high level of awareness in fighting it. She has self-awareness enough to know that she should not be without an AA sponsor and that her efforts are aided a great deal by other means, such as sober living facilities. In more than one way, respondent has gone beyond the criminal court's order, having abstained from alcohol for a year after conviction as the court ordered, but continuing in abstinence to the present. She is trying hard.

C. Notable under subdivision (h) is that respondent has no need to correct a business practice, in that she never drank with clients or while complying with business obligations. She has no record of license discipline, which constitutes a mitigating factor. (*Segretti v. State Bar of California* (1976) 15 Cal.3d 878, 888.)

D. Under subdivision (j), respondent expressed her desire to be close to her children. Respondent maintained stable relations with them, and though her son in particular has shown signs of estrangement, respondent continues to desire stable family relations and continues with attempts to re-establish them on a surer footing.

E. Under subdivision (l), respondent has volunteered a good deal. Here too she has gone beyond the criminal court's order in performing community service. Before she was prevented by the current health crisis, respondent was involved in substantial community and church activities.

F. Subdivision (m), regarding an "attitude [changed] from that which existed at the time of the commission of the criminal acts," is of great import. Fulfilling many or even all other rehabilitation criteria is good; but a change in attitude is crucial. As the court stated, citing other extensive authority, in *Hightower v. State Bar* (1983) 34 Cal.3d 152, 157, "[r]ehabilitation . . . is a state of mind," the achievement of reformation and regeneration." (Internal quotation marks omitted.) Respondent addressed her good character and change of attitude at some length, as permitted under subdivision (m)(1). Other evidence for respondent's good character, such as in her character reference letter, is hardly abundant, but it all tends unmistakably in the right direction, to show she is "an esteemed member of [her] community and . . . profession." (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.)

Failure to Report

8. Respondent's failure to report her two convictions is of considerable concern. Respondent's explanation for her failure to report was not reassuring but it was honest. Respondent acknowledged her fault and faulty understanding of her obligation to keep DRE informed.

9. DRE's policy on a licensee's obligation to self-report is set out explicitly in statutory law for compelling reasons. There are many thousands of licensees. Even if a small percentage of them act irresponsibly, the threat of harm is considerable. It is vital to the public good that DRE be able to deter or stop the detriment they cause. With its limited resources, DRE must be able to rely upon licensees for information that allows it to act for the public good, as a check and balance to irresponsible conduct. A licensee does substantial damage when the licensee not only commits criminal conduct, but fails to keep DRE informed, potentially frustrating DRE's mission to remedy bad acts by licensees that endanger the public or that debase the real estate profession. DRE must be able, with licensees' cooperation, to cull out those who are dishonest, immoral, disreputable, or incompetent. (*Fahmy v. Medical Bd. of California* (1995) 38 Cal.App.4th 810, 817.)

10. Respondent has learned from her experience, expressing remorse for all of her misconduct, including her failure to inform DRE of her misdeeds. With respect to both her criminal conduct and her professional failure to advise, the evidence indicates, on balance, that respondent is unlikely to repeat any misconduct. A restricted license, not outright revocation, is warranted.

Conclusions of Law

11. The type and severity of the wrongdoing for which respondent was convicted, as well as her failure to keep DRE informed of the change in her background information as a result, are cause for discipline of her license.

12. A license restricted for four years is the appropriate measure of discipline in these circumstances, especially in light of respondent's extensive and continuing efforts at rehabilitation.

Costs

13. Under *Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, several factors are to be evaluated for an award of costs so that an award does not deter individuals from exercising their right to a hearing. DRE must not assess full costs where it would unfairly penalize a respondent who has committed some misconduct, but who has sought a hearing to obtain the dismissal of some charges or a reduction in the severity of the penalty. DRE and state agencies in general must consider subjective good faith in a respondent's presentation of the case and whether a respondent has raised a colorable challenge to the disciplinary case. Not least, DRE is required to consider a respondent's ability to pay.

14. Respondent in this case presented her defense in good faith, acknowledging that she was at fault, but urging that leniency is appropriate because of her long, good record as a licensee, her extensive efforts to solve the precipitating problem, her former alcohol abuse, and her remorse. Perhaps most important, respondent does not currently have the means to reimburse DRE. In the circumstances, a payment plan should be considered.

ORDER

All licenses and licensing rights of respondent Diane Barbara Randall, salesperson license number S/01419188, under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to Section 10156.5 of the Business and Professions Code if respondent makes application therefor and pays to the Department of Real Estate the appropriate fee for the restricted license within 90 days from the effective date of this Decision. The restricted license issued to respondent shall be subject to all of the provisions of Section 10156.7 of the Business and Professions Code and to the following limitations, conditions and restrictions imposed under authority of Section 10156.6 of that Code:

1. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of respondent's conviction or plea of nolo contendere to a crime which is substantially related to respondent's fitness or capacity as a real estate licensee.
2. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner 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 the restricted license.
3. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor for the removal of any of the conditions, limitations or restrictions of a restricted license until four years have elapsed from the effective date of this Decision.

4. Respondent shall submit with any application for license under an employing broker, or any application for transfer to a new employing broker, a statement signed by the prospective employing real estate broker on a form approved by the Department of Real Estate which shall certify:

(a) That the employing broker has read the Decision of the Commissioner which granted the right to a restricted license; and

(b) That the employing broker will exercise close supervision over the performance by the restricted licensee relating to activities for which a real estate license is required.

5. Respondent shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until the respondent presents such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

6. Respondent shall pay the Commissioner as reimbursement of costs a total of \$1,493.75, which respondent shall pay on such payment plan as may be agreed with the Commissioner.

7. 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 187000, Sacramento, CA 95818-7000. 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.

DATE: June 25, 2020

DocuSigned by:
Thomas Lucero
THOMAS X. LUCERO
Administrative Law Judge
Office of Administrative Hearings