

MAY 26 2020

DEPT. OF REAL ESTATE

By Zoni - Jm

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DECISION

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.

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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 **JUN 25 2020**.

IT IS SO ORDERED 5.20.20

DOUGLAS R. MCCAULEY
REAL ESTATE COMMISSIONER

Douglas R. McCauley

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

In the Matter of the Statement of Issues against:

DEBORAH FUNDUM, Respondent.

Agency Case No. H-41558 LA

OAH No. 2020010351

PROPOSED DECISION

Administrative Law Judge Chantal M. Sampogna, Office of Administrative Hearings, State of California, heard this matter on March 16, 2020, in Los Angeles, California.

Kevin Sun, Staff Counsel, represented Maria Suarez (complainant), Supervising Special Investigator of the State of California, Department of Real Estate (Department).

Deborah Fundum (respondent) was present and represented herself.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on March 16, 2020.

ISSUES

1. Whether the crime for which respondent was convicted bears a substantial relationship to the qualifications, functions or duties of a real estate licensee, as defined in California Code of Regulations, title 10, (Regulations) section 2910.
2. Whether the crime for which respondent was convicted constitutes cause for denial of respondent's application for a real estate license under Business and Professions Code sections 480, subdivision (a)(1), and 10177, subdivision (b).¹
3. A. Whether respondent failed to disclose the conviction on her license application.

B. If yes, whether respondent's failure constitutes an attempt to procure a real estate license by fraudulent means, and is therefore cause for denial of respondent's application as provided for in section 10177, subdivision (a).
4. Whether protection of the public requires denial of respondent's application for a salesperson license.

¹ Statutory references are to the Business and Professions Code unless otherwise designated.

SUMMARY

Complainant alleges that respondent's real estate salesperson's license application should be denied based on respondent's 2002 conviction for grand theft by embezzlement, and because respondent failed to disclose this conviction in her September 2018 application. Respondent admitted complainant's allegations, and presented evidence of rehabilitation and the unlikelihood that her criminal behavior would repeat. While outright denial of the application is not warranted, protection of the public requires a restricted license be issued to respondent.

FACTUAL FINDINGS

Jurisdiction

1. On September 26, 2018, respondent submitted an application to the Department for a real estate salesperson license.
2. On December 5, 2019, complainant brought the Statement of Issues in her official capacity. Respondent timely submitted a Notice of Defense.

Respondent's Conviction

3. A. On February 21, 2002, in the Superior Court of California, County of San Bernardino, Case Number FVI014684, respondent pled guilty to, and was convicted of, grand theft by embezzlement, in violation of Penal Code section 487, subdivision (a), a felony.
- B. On April 16, 2002, the court suspended imposition of sentence, ordered respondent to serve 135 days in county jail with credit for 17 days served, and

placed respondent on supervised probation for 60 months under certain terms, including that respondent pay restitution in the amount of \$5,714.99 at the rate of \$98 per month, and fines and fees. Respondent completed her sentence, but failed to complete payments on her restitution, fines and fees, though the evidence did not establish the amounts outstanding.

C. 1) The circumstances underlying respondent's criminal behavior occurred between July 1 and December 31, 2001. By July 2001, respondent had worked for Modern Video (MV) for approximately four years, and as the store manager for approximately two years. Southern California Edison (SCE) had a payment center inside MV, where customers could pay their monthly bills, either by cash, check, or money order. MV contracted with American Payment Systems (APS) to collect payments and transfer them to SCE. As store manager, respondent was responsible for overseeing all financial transactions for MV's SCE payment center, including entering the customer's SCE account number and payment amount into an electronic transaction machine owned by APS, and making the cash, check, and money order deposits to APS. APS reconciled the entered payment amounts and monies received from MV.

2) Beginning in July 2001, respondent began withholding money from SCE customers' payments and keeping the money for her own use to pay bills and other expenses. In later 2001, APS discovered a discrepancy between the monetary value of the electronic transactions entered by, and the monies received from, MV; by January 2002, the discrepancy totaled over \$48,000. Between January 31 and February 4, 2002, APS employees called respondent and directed her to complete the outstanding deposits. On February 4, 2002, respondent deposited over \$42,850.01 of withheld payments into the APS account, but failed to deposit the outstanding

\$5,417.99 of the total balance owed to APS. On February 5, 2002, respondent called the owner of MV and told him about her criminal behavior, and the owner reported the crime to the San Bernardino County Sheriff's Department. Sheriff's Deputy Griffin investigated the matter and interviewed respondent, who admitted her criminal behavior.

False Statement in Application

4. On the Department's real estate salesperson license application, question 28 asks "Have you ever been convicted (SEE PARAGRAPH ABOVE) of any violation of the law at the misdemeanor or felony level? If yes, complete item 34 with information on each conviction." (Ex. 2, p. DRE 3.) The referenced paragraph above states "Convictions must be disclosed no matter how long ago they occurred" (*Ibid*) On September 21, 2018, signing under penalty of perjury, respondent marked "no" and failed to disclose the conviction identified in Factual Finding 3.

Evidence of Rehabilitation

5. On respondent's June 5, 2019 Interview Information Sheet, respondent provided her history of employment, which included her work as a transaction coordinator for Century 21 from October 1, 2007, until October 2018, and for Core Agents Real Estate Team from October 2018 to present. At both places of work, respondent reported to her son, Derek Deville, respondent's sponsoring broker. In the "Applicant/Licensee Remarks" section of the Interview Information Sheet, respondent wrote "No matter what I say there is no excuse for my actions. I have lived with this shame for 18 years." (Ex. 5, p. DRE 000034.)

6. At hearing, respondent testified as to her efforts towards rehabilitation. Since her criminal behavior, respondent has advanced her education by completing

the Executive Programs Certificate of Professional Achievement Sales-Broker License Qualification Courses on September 4, 2014, and passed the real estate salesperson examination on April 10, 2019. Respondent enjoys her work as a transactional coordinator, but is hoping to be granted a license so she can expand her work and responsibilities. Prior to her real estate work, respondent completed a course in medical terminology and worked at a laundromat. Respondent remarried 14 years ago, and has since had a stable family life which now consists of her husband in their owned home, and regular contact with her three children and 12 grandchildren. Respondent is not involved in community programs, though she does attend church.

7. Respondent's remorse for her criminal behavior was consistent from the time she reported her crime to her employer, to her statements in her Interview Information Sheet, to her testimony at hearing. At the time of her criminal behavior, respondent was in an emotionally abusive relationship with her now ex-husband who has schizophrenia, and she was financially providing for her three children, then 20, 17, and 15 years old. However, respondent testified this was not an excuse for her behavior, acknowledges and testified she exercised her worst judgment, was apologetic for her actions that harmed her employer, and she continues to feel humiliation for her behavior. Respondent has no subsequent criminal history. Respondent acknowledged she has not completed her payments for restitution, fines, or and fees, and attributed this failure to a persistent lack of income.

8. At hearing, respondent admitted that her "no" answer to question 28 was a false statement she made knowingly. Respondent admitted that at the time she completed the application she did not read the application requirements for conviction disclosure, and that she made a self-serving assumption she did not need to report her conviction because, at the time of her application, respondent's single

conviction was 16 and one-half years old. Respondent's testimony and demeanor generally during the hearing, and specifically as to this issue, demonstrated that her false statement was due to her belief that her application lacked importance and that, if licensed, her role and contribution to real estate would be insignificant, evidence that respondent's false statement was rooted in a lack of self-worth, rather than in an intent to deceive.

LEGAL CONCLUSIONS

Department's Authority and the Burden and Standard of Proof

1. The Real Estate Commissioner (Commissioner) "has full power to regulate and control the issuance and revocation . . . of all licenses to be issued . . ." (§ 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. Administrative proceedings to revoke, suspend or impose discipline on a professional license are noncriminal and non-penal; they are not intended to punish the licensee, but rather to protect the public. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 785-786.)
4. 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.)

Cause for License Denial

5. The Commissioner may deny an application for a license if the applicant has been convicted of a crime that is substantially related to the qualifications, functions, or duties of a real estate licensee. (§§ 480, subd. (a)(1), 10177, subd. (b)(1).)

6. A crime or act is substantially related to the qualifications, functions, or duties of a real estate licensee if it, among other activities, involves the fraudulent taking or retaining of funds or property belonging to another person; the employment of deceit, falsehood or misrepresentation to achieve an end; or committing any unlawful act with the intent of conferring a financial or economic benefit upon the perpetrator. (Cal. Code Regs., tit. 10, § 2910, subd. (a)(1), (4), & (8).)

7. Applying sections 480, subdivision (a)(1), and 10177, subdivision (b), and Regulations, section 2910, subdivision (a)(1), (4), and (8), to the Factual Findings, respondent's criminal behavior included respondent fraudulently taking and retaining funds belonging to another person, employing deceit, falsehood, and misrepresentation to achieve the accomplishment of her crime, and performing unlawful behavior with the intent of conferring a financial or economic benefit upon herself. (Factual Finding 3.)

8. However, the court in *Pieri v. Fox (Pieri)* (1979) 96 Cal.App.3d 802, held that in addition to the requirements authorizing denial of a license under section 10177, subdivision (b), section 480, subdivision (a)(3), also requires competent evidence showing an applicant's present qualifications and fitness for a license "is in some fashion rationally and substantially related to, affected by the earlier offense." (*Pieri, supra*, 96 Cal.App.3d 802, 805-807.) In *Pieri*, appellant had a single misdemeanor conviction for making a false statement related to unemployment insurance benefits in

1974. The court in *Pieri* found that based on appellant's single isolated act, the record contained no evidence to warrant the "further finding required by section 480, subdivision (a)(3)" that appellant's act was "substantially related in some rational respect" to his 1978 application for a broker's license; therefore, the record failed to establish appellant was presently unfit to engage in the activity for which he sought a license. (*Pieri, supra*, 96 Cal.App.3d at p. 806.)

9. Nearly 18 years have passed since respondent committed her criminal behavior. Based on the isolated nature of the single offense, coupled with respondent's candor with her employer and the deputy sheriff when she admitted her criminal behavior, the evidence does not warrant a conclusion that respondent's 2002 conviction for grand theft by embezzlement presently reflects on her qualifications or fitness for a real estate salesperson's license. (Factual Findings 3, 7.) (§ 480, subd. (a)(3)(B); *Pieri, supra*, 96 Cal.App.3d 802.) Respondent crime which resulted in her 2002 criminal conviction is not substantially related to the qualifications, functions, or duties of a real estate licensee. Cause to deny respondent's application for a real estate salesperson's license based on her 2002 conviction pursuant to sections 480, subdivision (a), and 10177, subdivision (b), was not established.

10. The Commissioner may deny the issuance of a license to an applicant, who has procured, or attempted to procure, a real estate license by fraud, misrepresentation, or deceit, or by making a material misstatement of fact in an application for a real estate license. (§ 10177, subd. (a).)

11. Complainant established by a preponderance of the evidence that cause exists to deny respondent's real estate salesperson license application under section 10177, subdivision (a), because when respondent answered "no" to question 28 on the application and failed to report her 2002 felony conviction respondent attempted to

procure her real estate license by making a material false statement in her application.
(Factual Finding 4.)

Disciplinary Considerations

12. 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, 315.)

13. 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 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.)

14. The criteria for assessing the rehabilitation of a license applicant include consideration of the following factors:

A. whether at least two years have passed since the most recent conviction or act; the nature and severity of the crime or act; the applicant's history of substantially related criminal convictions; payment of restitution and fines in connection with a criminal conviction; expungement of criminal convictions; successful completion or early discharge from probation or parole; and

B. stability of family life and fulfillment of parental and familial responsibilities subsequent to the conviction or conduct that is the basis for the application denial; completion of, or sustained enrollment in, formal education or vocational training courses for economic self-improvement; significant or conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems; new and different social and business relationships from those which existed at the time of the criminal or other conduct that is the basis for the application denial; and

C. a change in attitude from that which existed at the time of the conduct in question as evidenced by respondent's testimony or other evidence of rehabilitation, which may include evidence from family members, friends, or other persons familiar with applicant's previous conduct and her subsequent attitudes or behavioral patterns, or the absence of subsequent convictions or other conduct that provides grounds to discipline a real estate licensee, or which reflect an inability to conform to societal rules when considered in light of the conduct in question. (Cal. Code Regs., tit. 10, § 2911.)

15. As was found in Legal Conclusion 9, respondent's crime which resulted in her 2002 criminal conviction is not substantially related to the qualifications, functions, or duties of a real estate licensee. Respondent's behavior that is subject to discipline is her knowingly and willingly providing a false statement on her application. However, respondent's criminal behavior, and her efforts towards rehabilitation since that behavior, are in evidence and are relevant to an assessment of whether respondent warrants licensure. Accordingly, respondent's criminal behavior and her efforts towards rehabilitation will be included in the analysis of the criteria for rehabilitation.

A. 1) Over 18 years have passed since respondent's criminal behavior and she has no subsequent substantially related convictions. Respondent's crime was serious in that it involved deceit and caused direct financial harm to her employer. Respondent has failed to complete restitution, fines, and fees payments, but has otherwise successfully completed the terms of her sentence. (Factual Findings 3, 5-8.)

2) Only one and one-half years have passed since respondent's misstatement on her application. Respondent's misstatement was serious because she willfully and knowingly failed to properly read her application for licensure and she willfully and knowingly provided false information to the Department. Though her disregard was not based in an intent to commit fraud or to deceive, it demonstrates a basic disregard for the importance of real estate laws and regulations, and a lack of understanding that whatever role respondent fills in real estate, it is a critical role and is governed real estate laws and regulations. (Factual Findings 4, 8.)

B. Respondent has achieved a stable family life, with regular connection with her children and grandchildren, and a successful working relationship with her son, Derek. Respondent successfully completed her real estate classes and examination, and has maintained successful business relationships over the past 12 years. Respondent does not have significant or conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems. (Factual Findings 3, 5-8.)

C. Respondent demonstrated a change in attitude from that which existed at the time of the criminal behavior as evidenced by her testimony and successful efforts towards improving and sustaining her employment in the field of real estate. Though respondent took responsibility for her misstatement on her

application, her disregard of the importance of accuracy and honesty on real estate documents and the recentness of that conduct demonstrates respondent requires supervision in the conduct of her work. Respondent did not present evidence from family members, friends, or other persons' familiar with her previous conduct and with her subsequent attitudes or behavioral patterns, or others. The length of time since respondent's criminal behavior established respondent is able to conform to societal rules. (Factual Findings 3, 5-8.)

D. Respondent fully acknowledged the wrongfulness of, and is remorseful for, her past criminal behavior and false statement. Respondent has sustained the absence of similar, more recent criminal conduct over an extended period of time, though less than two years have passed since respondent's false statement on her application. (Factual Findings 3, 5-8.)

16. Applying the Department's criteria for assessing the rehabilitation of a licensee to respondent's criminal behavior and false statement on her license application, respondent established by a preponderance of the evidence she has achieved sufficient rehabilitation to warrant the granting of a restricted license with appropriate terms as identified in the Order to ensure public protection.

ORDER

The application of respondent Deborah Fundum for a real estate salesperson license is denied; however, a restricted real estate salesperson license shall be issued to respondent for a period of three years pursuant to Business and Professions Code section 10156.5. The restricted license shall be subject to all of the provisions of Business and Professions Code section 10156.7 and the following limitations,

conditions, and restrictions imposed under authority of Business and Professions Code section 10156.6:

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 three years have elapsed from the date of issuance of the restricted license to respondent.

3. With the application for license, or with the application for transfer to a new employing broker, respondent shall submit a statement signed by the prospective employing real estate broker on a form RE 552 (Rev. 4/88) approved by the Department of Real Estate 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. This close supervision shall include, but not be limited to, the employing broker reviewing the accuracy and honesty of all transaction documents and related communications prepared by the restricted licensee.

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.

DATE: April 15, 2020

DocuSigned by:
Chantal M. Samogna
CHANTAL M. SAMPOGNA

Administrative Law Judge

Office of Administrative Hearings