

FILED

OCT - 5 2020

DEPT. OF REAL ESTATE

By [Signature]

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of:	)	DRE No. H-41587 LA
	)	
TIN TRUNG VO,	)	OAH No. 2020020704
	)	
Respondent.	)	

DECISION

The Proposed Decision dated August 17, 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.

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 November 4, 2020.

IT IS SO ORDERED

9-24-20

DOUGLAS R. McCAULEY
REAL ESTATE COMMISSIONER

Douglas R. McCauley

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

In the Matter of the Accusation Against:

TIN TRUNG VO, Respondent

Case No. H-41587 LA

OAH No. 2020020704

PROPOSED DECISION

Thomas Y. Lucero, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter by telephone/videoconference on July 20, 2020.

Diane Lee, Staff Counsel at the Department of Real Estate (DRE), represented complainant, Veronica Kilpatrick, a Supervising Special Investigator for the State of California. David R. Ginsburg, Attorney at Law, represented Tin Trung Vo, respondent.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on July 20, 2020.

STATEMENT OF THE CASE

1. Respondent objected to conducting the hearing by electronic means. Respondent was aware that the Governor, by executive order, suspended Government

Code section 11430.30, subdivision (b), which states that a hearing by electronic means shall not be conducted over a party's objection.

2. Notwithstanding the executive order, respondent contended a hearing by telephone or videoconference contravenes the California and United States Constitutions by infringing the right of a party to confront participants in the hearing in person.

3. Respondent not only objected but moved to dismiss the case. The ALJ took the motion under submission. At the conclusion of the hearing, respondent renewed the objection and motion, adding as grounds that DRE presented no evidence, or no substantial evidence, upon which a decision might be based. The ALJ took the renewed objection and motion under submission and now overrules the objection and denies the motion.

4. So long as technology allows parties to participate meaningfully by listening and speaking to others, especially witnesses, during the proceedings, a hearing by electronic means does not deprive the parties or hearing participants of any rights. The proceedings, duly recorded, demonstrate respondent and all participants were able to communicate during and participate meaningfully in the hearing. Nothing hindered due process of law.

5. DRE's prima facie case was based on a certified history of respondent's broker license and the certified court records of three felony convictions. Other evidence showed respondent is responsible for a business where a malfunctioning machine killed an employee. Convicted under the Labor Code for an unsafe workplace leading to death, respondent failed to report the convictions to DRE. DRE may impose license discipline for a felony conviction and for failure to report it.

6. Respondent presented evidence of extenuating circumstances and good character. The license discipline warranted in this case takes circumstances and character into account.

ISSUES

1. Are respondent's convictions substantially related to the qualifications, functions, or duties of the real estate profession?
2. If respondent did not intend harm by his conduct leading to the fatal accident, can discipline of his license be imposed nevertheless?
3. Is respondent's failure to report his convictions within 30 days cause for license discipline?
4. If license discipline is warranted, how far should it extend and, more specifically, what factors, such as evidence of good character, improved practices, and remorse, justify terms that might condition respondent's continuing as a licensee?

SUMMARY OF DECISION

Responsibility for a fatal accident has extraordinary and extensive significance. The accident that terminated the life of a person respondent employed also foreclosed any opportunity to know circumstances from the perspective of the deceased and affects evidence from respondent regarding circumstances in extenuation of conduct leading to the accident. Evidence of respondent's remorse and good character before and after the accident are significant, but there is great difficulty in accepting that such evidence might in fairness outweigh responsibility for an accidental death.

Compounding the difficulty is respondent's failure to inform DRE of his convictions. Respondent's broker license is properly revoked.

FINDINGS OF FACT

1. Respondent timely sought a hearing in response to the accusation that DRE filed on January 29, 2020.
2. On May 9, 2002, as set out in Exhibit 2, DRE issued respondent broker license number B/01335734. The license expired on June 6, 2014, but was renewed on May 18, 2016. The license was set to expire on May 17, 2020. Under Governor Newsom's orders the expiration date was extended, first to July 16, 2020, under Executive Order N-52-20, and then to December 31, 2020, under Executive Order N-69-20.

Convictions

3. The record of the criminal court proceedings against respondent are set out in Exhibit 3.
 - A. On July 13, 2018, in the Superior Court of California, County of Riverside, case number RIF 1700485, on a plea of nolo contendere, respondent was convicted of three felonies under Labor Code section 6425, subdivision (a), for willfully violating an occupational health or safety standard or order resulting in the death of an employee.
 - B. On August 23, 2018, the court imposed sentence, placing respondent on formal probation for 60 months on terms and conditions, including that respondent: (i) obey all laws; (ii) serve 180 days in jail, 179 of which to be served in

the Riverside County Sheriff's Work Release Program; (iii) pay fines and fees of \$410; (iv) pay a victim restitution amount that was to be determined by the Probation Department or, in case of dispute, by the court; and (v) complete any counseling or rehabilitation or treatment program deemed appropriate by respondent's probation officer.

C. The court suspended proceedings following the August 23, 2018 sentencing.

D. Respondent was fitted and monitored with an electronic ankle bracelet. On December 12, 2018, he was released from the Electronic Monitoring Program, having completed 90 days of his 180-day sentence under Penal Code section 4019. Noting that respondent was monitored starting on September 13, 2018, General Comments were submitted on December 12, 2018, by Chelsey Clemons, Case Manager, and approved by Diane Phillips, Lead Case Manager:

The participant communicated well with program staff, provided verification for approved activities, was compliant with program requirements and was current in payment of program supervision fees. The participant did not incur any incident reports while on the program.

E. Because of his good conduct during probation, respondent is no longer obligated to report to a probation officer.

F. Respondent continues to report for incarceration, to serve his 16-month sentence, and to pay fines imposed by Cal/OSHA (the Division of Occupational Safety and Health in the Department of Industrial Relations).

4. Underlying the convictions is a fatal industrial accident on the morning of November 20, 2014, at American Building Innovation (ABI), a California corporation, whose principal is respondent. Danny Lam, an ABI employee, died while trying to work with a framing and wall-fabricating machine manufactured by a German company, Weinmann Holzbausystemtechnik GMBH (Weinmann). ABI purchased the machine in 2010 but kept it in storage for a few years. ABI successfully operated the machine before the day of the accident, but in the days before the accident the machine shut down from an apparent malfunction. Respondent telephoned and otherwise communicated with Weinmann for instructions to correct any problems and had these instructions implemented, reconfiguring the machine and its safety features.

5. Respondent's only encounter with law enforcement outside probation was a moving violation. An automated camera recorded respondent's towing a trailer whose momentum prevented him from stopping in time for a stoplight.

Efforts to Avoid an Accident

6. In setting up the premises where the accident later happened, respondent hired personnel of Cal/OSHA. Respondent followed their safety recommendations. Respondent likewise followed advice from Weinmann on the safe assembly and use of the machine. Weinmann personnel visited ABI three times to assist in the machine's set-up and maintenance and to train ABI personnel on its operation. Respondent believes he did all he could to ensure that employees of ABI were protected from on-the-job injury.

7. Respondent deeply regrets consulting Weinmann. Convinced his efforts would improve operations and promote safety, respondent made great effort to make consultations possible, telephoning to Germany in the small hours of the night to

reach Weinmann before the company closed for business for the day, after which ABI's day began. Respondent believes the accident would not have happened if he had not done as Weinmann recommended.

8. Respondent is the more regretful as he knew Mr. Lam well. They carpooled together because they lived relatively far from work and not far from each other. As a result, they developed a personal relationship and were not simply business acquaintances.

9. Mr. Lam's widow and their minor child sued ABI and Weinmann for wrongful death in the Superior Court of the State of California, County of Riverside, case number RIC 1602724. As set out in Exhibit B, the court in that case denied a motion for summary judgment in which Weinmann sought to show it had no liability. ABI has settled the case for \$300,000, half of which it has paid to date.

Failure to Report to DRE

10. DRE's September 10, 2019 License Certification, Exhibit 5, shows that respondent did not report the convictions to DRE within 30 days as required under Business and Professions Code section 10186.2.

11. Many things influenced respondent's decision on a plea bargain. He was not averse to proceeding to trial because there was plenty of evidence he believed would exonerate him and ABI. Respondent discussed his real estate license with his lawyer, accepting counsel's advice that conviction would not adversely affect the license. Were respondent convinced otherwise, his decision might have tipped toward trial. In this context, respondent mistakenly believed he need not report convictions to DRE, as he told a DRE representative who advised him a report was required.

According to respondent, the DRE representative then said he need not file a report, since DRE was, at that point months after the convictions, apprised.

Character Evidence

12. Respondent is married with three children, ages 18, 16, and 13. He is the family's breadwinner. His ability to earn a living would be harmed without his real estate license.

13. There was no evidence that any of respondent's real estate clients ever complained about him. Respondent has no record of discipline. Nevertheless, as respondent testified, he is paying a heavy price for his part in Mr. Lam's accident. The company respondent controls is claimed to be liable for substantial tort damages and must pay fines. There is also a stigma to being a convicted felon. That fact exacts a severe personal toll. On a yet deeper personal level, respondent must live with the sorrow of having failed or been unable to prevent tragedy, losing a man with whom respondent was well acquainted.

14. Respondent's chief contentions were: Considering that DRE called no witnesses in its case and relied only on the convictions to support disciplinary action, it failed to present a prima facie case for discipline. As respondent intended no harm to the accident victim, respondent had no ill intent that might justify disciplinary action. If nevertheless any evidentiary findings adverse to respondent are made, discipline is not appropriate or should be minimal, in light of respondent's conduct meant to avoid an accident and similar mitigating circumstances, his good character both before and after the accident, and his deep remorse for the loss of life.

Costs

15. DRE incurred a total of \$1,551.50 in reasonable costs, as shown in Exhibit 6: \$1,008 for enforcement and \$543.50 for investigation.

PRINCIPLES OF LAW

1. The evidentiary burden is on complainant, who must show 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 the burden.

2. Business and Professions Code section 490 provides that discipline of a license may be warranted if the licensee has been convicted of a crime substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued.

3. Business and Professions Code section 10177, subdivision (b), provides that license discipline may be imposed upon a licensee's felony conviction or because, as under Business and Professions Code section 490, the licensee has been criminally convicted of a crime substantially related to the qualifications, functions, or duties of a real estate licensee.

4. Labor Code section 6425, subdivision (a), provides in pertinent part:

Any employer . . . having direction, management, control, or custody of any employment, place of employment, or of any other employee, who willfully violates any occupational safety or health standard, order, or special order, or Section

25910 of the Health and Safety Code, and that violation caused death to any employee . . . is guilty of a public offense punishable by imprisonment in a county jail for a term not exceeding one year, or by a fine not exceeding one hundred thousand dollars (\$100,000), or by both that imprisonment and fine; or by imprisonment in the state prison for 16 months, or two or three years, or by a fine of not more than two hundred fifty thousand dollars (\$250,000), or by both that imprisonment and fine

5. Business and Professions Code section 10186.2 provides that license discipline is warranted if a licensee fails to report to DRE in writing within 30 days a felony charge or criminal conviction.

6. 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

Substantial Relationship

1. Respondent willfully violated three instances of an occupational safety or health standard, order, or special order, and those violations caused death to a person he employed. This type of offense is substantially related to the real estate profession.

A. Respondent was in charge of business premises and, more specifically, commercial property equipped with industrial machinery. He was

obligated to recognize unsafe conditions of property and equipment. Following recognition of unsafe conditions, respondent was obligated to communicate with others to avoid their being harmed. A real estate broker transacting the purchase and sale of a residence must similarly identify and disclose unsafe conditions like the presence of mold, asbestos, lead paint, or a heater that might leak carbon monoxide. Respondent's obligation in the presence of unsafe conditions where the accident occurred was of the same kind.

B. In addition to property and machinery, respondent had control over employees such as Mr. Lam. Real estate brokers commonly employ others, and not just unlicensed personnel. Brokers are licensed to supervise licensed salespersons. There is a substantial relationship between a broker's supervision of others and the failure of supervision that led to Mr. Lam's accident.

Extenuating Circumstances

2. Whether Weinmann bears blame for Mr. Lam's accident may extenuate respondent's conduct. The circumstance that respondent and Mr. Lam were on friendly terms indicates that respondent did not intend that Mr. Lam should be involved in a fatal accident. Also in extenuation, respondent acted to avoid accidents and the fatal accident in particular, consulting Cal/OSHA in setting up the business premises and Weinmann to stop the machine involved in the accident from malfunctioning. But respondent cannot escape blame.

3. Respondent's contention based on intent has some plausibility. It is clear respondent had no ill intent toward Mr. Lam. In contrast, a person convicted of certain crimes, assault for instance, intends harm. Respondent lacked any such harmful intent. This lack is not the end of the inquiry, however. First, a criminal conviction may result

from reckless or unthinking conduct. A driver who disregards stoplights, for instance, may not intend to kill, but may still be convicted for causing the death of another. Respondent intended to keep ABI in business though it was not clear that it could do so safely using the Weinmann-manufactured machine. Respondent failed to see that his intent favoring operations might clash with his innocent intent toward Mr. Lam. Intent is complex and one type of intent does not negate the intent underlying a conviction.

4. In *Arneson v. Fox* (1980) 28 Cal.3d 440, 451-452, the California Supreme Court analyzed extenuating evidence and intent. similar to respondent's and the inference the respondent in that case drew, that he was not to blame for a course of fraudulent property transactions set up by others:

At the administrative hearing, appellant and his counsel were permitted to testify regarding the circumstances which surrounded appellant's offense. Appellant acknowledged that the transactions conducted by the officers of U.S. Financial constituted security fraud, because these transactions were made for the purpose of misrepresenting the company's profits which then were reflected in its financial statements. Appellant, however, argued that the record lacked any evidence of his own improper intent. As characterized by his counsel "It would come down to a question as to whether [appellant] realized that he was helping in something that was illegal." Notwithstanding his conviction, he attempted to introduce evidence which

would raise doubt as to his guilt of the federal offense. As we have previously noted, this he may not do.

Appellant continues to assert that administrative discipline would be improper in the absence of any positive proof of his wrongful intent beyond the indictment and nolo conviction themselves. Yet as we have seen, the nolo conviction stands as conclusive proof of appellant's guilt of the specific offense charged in the indictment. No extrinsic independent evidence thereof need be introduced. Nor is appellant permitted to impeach that conviction. (*Matanky v. Board of Medical Examiners* (1978) 79 Cal.App. 3d 293] at p. 302.) We conclude that the record amply supports the commissioner's finding that appellant's offense bore a substantial relationship to the qualifications, functions or duties of his profession.

5. Under Business and Professions Code sections 490 and 10177, subdivision (b), and in light of respondent's felony convictions for violation of Labor Code section 6425, subdivision (a), cause exists to discipline respondent's license.

6. Cause exists for discipline of respondent's license based also on his violation of Business and Professions Code section 10186.2, for failure to inform DRE of his convictions within 30 days. DRE relies on its licensees to report a significant change in their standing before the law. Respondent's explanation that he failed to report in part because of bad advice does not excuse the failure. Real estate brokers are charged with knowing the Real Estate Law and are trusted with far-reaching authority, such as that exercised in supervising real estate salespersons. Respondent

sought to deflect blame. He should have recognized that this sort of deflection is incompatible with the type of licensure and the responsible position entrusted to him.

Mitigation

7. Respondent's evidence of innocent intent is properly considered with the evidence of good character. Respondent's demeanor during the hearing showed the sincerity of his sorrow that the accident occurred. He answered questions directly and at length, without straying into the irrelevant or inconsequential. He strove for complete accuracy and truthfulness, providing the detail without prompting that his only encounter with law enforcement since conviction has been a minor traffic infraction.

8. Respondent's good record on criminal probation, as noted by personnel of the probation department, likewise speaks to his desire to obey the law in every way. Respondent's post-accident conduct is consonant with his attempts before the accident to make the workplace safe and compliant with safety orders enforced by Cal/OSHA.

9. Respondent did not attempt to introduce evidence of difficulty in paying a cost award or relating to factors discussed in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32.

CONCLUSIONS OF LAW

1. Respondent's convictions bear a substantial relationship to the qualifications, functions, or duties of the real estate profession. Real estate

professionals are concerned with the safety of employees and others and with safe conditions of property.

2. License discipline is warranted because respondent, given the opportunity, did not contest three charges that he willfully violated an occupational safety or health standard, order, or special order, a violation that caused an employee's death. Respondent's innocent intent toward the deceased employee does not overcome evidence of misconduct that was criminally willful or, put another way, underlain by criminal intent.

3. Respondent's reliance on advice of his criminal counsel and resulting failure to report his convictions within 30 days is cause for license discipline. A real estate broker's obligation to pay attention to reporting requirements is clear and not excused by reliance on the advice of a non-licensee.

4. Respondent's evidence of good character was not abundant, but was convincing, including his attention to safe practices in the workplace, and remorse over the accident and the life lost. The evidence indicates that respondent may, without undue jeopardy to public safety continue as a licensee, but under supervision with a salesperson license, rather than a broker's, and should observe terms and conditions of probation for two years.

ORDER

All licenses and licensing rights of respondent, Tin Trung Vo, 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 two 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 reimburse the Department of Real Estate for costs in the amount of \$1,551.50 on such terms as the Department of Real Estate may determine.

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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: August 17, 2020

DocuSigned by:
Thomas Y. Lucero
THOMAS Y. LUCERO

Administrative Law Judge
Office of Administrative Hearings