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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 FEB 11, 2021.

IT IS SO ORDERED 1-7-21

DOUGLAS R. McCAULEY
REAL ESTATE COMMISSIONER

Douglas R. McCauley

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

In the Matter of the the Accusation Against:

ANDRONICO MALAGAR PELEN II, Respondent

Agency Case No. H-41692 LA

OAH No. 2020070308

PROPOSED DECISION

Brian H. Krikorian, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on October 14, 2020, via Microsoft Teams videoconference.

Andrea Bentler, Counsel, Department of Real Estate (Department), represented complainant.

Andronico Malagar Pelen II (respondent) represented himself.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on October 14, 2020.

FACTUAL FINDINGS

Jurisdictional Matters

1. Complainant Veronica Kilpatrick filed the Accusation in her official capacity as a Supervising Special Investigator of the State of California. Respondent filed a Notice of Defense which contained his request for a hearing on the Accusation.

2. Respondent is licensed by the Department as a real estate salesperson. His real estate salesperson license, number S/01981017, was originally issued on September 24, 2015, and was renewed on September 24, 2019. The license is set to expire on September 23, 2023 unless renewed.

Respondent's Conviction

3. On October 10, 2018, in the Superior Court of California, County of Riverside, Case No. INF1800931, respondent was convicted on a plea of guilty for violation of Penal Code section 368, subdivision (c) (infliction of pain/mental suffering of an elder or dependent adult), a misdemeanor.

4. The court placed respondent on probation for 36 months under certain terms and conditions, including that he serve 60 days in the custody of the Riverside County Sheriff, with 55 days served in a Work Release Program, he pay victim restitution, and he not act in any capacity or provide any services for elders or dependents other than direct family members.

5. The facts and circumstances underlying respondent's conviction are as follows:

6. (A) On November 23, 2015, an ambulance EMT responded to Palm Springs Retirement Home (PSRH), a licensed residential care facility for the elderly, to transport a resident to a scheduled medical appointment. Respondent was a co-administrator of the facility.

(B) Upon arriving at the facility, the EMT found the resident was disoriented and malnourished. She also saw blood, vomit, and fecal matter around the resident's mouth, and a large fresh bandage on the resident's lower back. Respondent was present at the facility when the EMT arrived and provided her with the resident's information. The resident was transported to the hospital, where he was found to have multiple pressure ulcers. The resident died two days later at the hospital. A nurse at the hospital identified the resident's condition as potential elder abuse and made a report to the hospital's social worker.

(C) Daniel Foster, Special Agent with the California Department of Justice, conducted an investigation of the resident's death. Based on his investigation, Special Agent Foster concluded that respondent failed in his duty as a co-administrator of PSRH to ensure the resident was receiving adequate care, and allowed the resident to be housed in conditions which caused him to develop severe pressure ulcers and infections. Special Agent Foster also concluded that since respondent was also a caregiver and assumed a leadership role at PSRH, he was required to act upon the resident's deteriorating state, provide him with adequate care, or make arrangements to have the resident moved to a more advanced facility which could provide a higher level of care. Special Agent Foster concluded that, by failing to do so, respondent directly contributed to the resident's decline and subsequent death. However, the Riverside County Coroner's Office determined that the resident's death was by natural causes including "hypertensive cardiovascular disease" with secondary issue of

pulmonary disease, dementia and prostate cancer. The Coroner did not list as causes of death either the resident's wounds or his sepsis.

(D) A Felony Complaint was filed against respondent and three co-defendants on May 30, 2018. Pursuant to a plea agreement, the charges were reduced to misdemeanor infliction of pain to an elder.

7. PSRH was owned and operated by respondent's mother, who managed four homes over a period of 30 years and had a contract with Adult Protective Services for the County of Riverside. Respondent worked at PSRH in the summer of 2015, a few months before he was licensed by the Department. Respondent was listed as a co-administrator for PSRH. He testified credibly that his primary role was supporting his mother and helping her with administrative tasks. Respondent's responsibilities were limited to buying and stocking groceries and cleaning supplies for all four homes. Respondent was credible in his testimony that he was primarily involved in providing non-caregiving services to residents.

8. Regarding the facts underlying his conviction, respondent testified that he received a phone call early in the morning on November 23, 2015, that a resident was not able to drink water. The resident was under the care of two caregivers. After receiving the phone call, respondent traveled to PSRH and called 9-1-1. The resident was then transferred to the hospital by ambulance. The resident passed away two days later. Respondent's testimony is not credible, because it is inconsistent with the statement of the EMT that she arrived at PSRH to transport the resident for a regularly scheduled medical appointment and found him in distress.

9. Respondent claimed that PSRH was accused by the hospital of elder abuse because the resident showed signs of pressure sores and was found lying on a "medical low bed" at the facility. Respondent testified this type of bed was prescribed

by the resident's doctor. The resident was a hospice patient with regular doctor care and visitation throughout his stay at PSRH. Respondent's testimony, which was uncorroborated, was insufficient to establish mitigation or excuse for his crime.

10. Respondent testified that his family has since sold the business of operating residential care facilities for the elderly and made a collective decision to move on with their lives. Respondent and his family were advised by their attorney to accept a plea bargain for a misdemeanor charge to avoid excessive costs and stress from a trial.

Failure to Report the Criminal Complaint and Conviction

11. As a real estate salesperson licensed by the Department, respondent is required to make a written report to the Department of the filing of a criminal complaint charging him with a felony, or of his conviction of any felony or misdemeanor. Such written report is required to be made within 30 days of the date of the filing of the criminal complaint or the date of the conviction. The failure to timely make a written report constitutes grounds for disciplinary action. (Bus. & Prof. Code, § 10186.2.)

12. Respondent did not make a written report to the Department within 30 days of the May 30, 2018 filing date of the Felony Complaint. He also did not make a written report to the Department within 30 days of the October 10, 2018 date of his misdemeanor conviction.

13. As of May 15, 2019, and all dates thereafter, the Department has no record or written notice received from respondent notifying the Department, pursuant to Business and Professions Code section 10186.2, of the filing of the Felony Complaint or his misdemeanor conviction. (Exh. 5.)

Rehabilitation

14. Respondent is 32 years of age.

15. Respondent has been a licensed real estate salesperson since September 24, 2015. He has no prior disciplinary history with the Department.

16. Respondent is currently employed by real estate broker Bill Taylor. In a letter dated October 12, 2020 (Exhibit 10), Mr. Taylor wrote that respondent was thorough in his real estate business dealings, attentive to his clients, and that he had never received complaints about respondent's conduct. Mr. Taylor stated he was aware of, but had no personal knowledge related to, the misdemeanor conviction. However, in respondent's real estate dealings, Mr. Taylor found respondent to be honest and forthright on all levels.

17. Respondent has complied with the terms of his criminal probation. He completed his Work Release Program on April 22, 2019, and paid all court-ordered fines and restitution. (Exh. 3.) His attorney has filed a petition to the court to expunge his conviction, which is currently pending. No evidence was presented that respondent has any other criminal history.

18. Respondent expressed remorse for not reporting the charges or conviction to the Department sooner. He was traumatized by the criminal case and was afraid for his future. Because of the nearly three-year gap between the incident with the resident in 2015 and his conviction in 2018, respondent was not thinking about the reporting requirements for his real estate license. He testified that Ms. Bentler, Department's counsel, helped him with fully reporting the incident, and he cooperated with the Department's investigation.

19. Respondent submitted three character reference letters from 2018, regarding his conduct while working at PSRH. (Exhs. 7, 8 and 9). The letters were authored by a family member of an elder resident at PSRH, and two other health professionals with knowledge of respondent and his mother. They reflected their belief that respondent and his mother had always shown care and responsibility in taking care of the elder residents.

Costs

20. The Department incurred investigation costs of \$662.60 and enforcement costs of \$460.80, for a total of \$1,123.40. These costs are deemed reasonable, based on the declarations of Veronica Kilpatrick and Andrea Bentler. (Exh. 6).

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Complainant has the burden of proving cause for discipline against respondent by clear and convincing evidence to a reasonable certainty. (*The Grubb Co., Inc. v. Department of Real Estate* (2011) 194 Cal.App.4th 1494, 1505.) This means the burden rests on complainant to adduce proof that is clear, explicit, and unequivocal--so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478, 487.)

Cause for Discipline

2. Pursuant to Business and Professions Code¹ sections 490, subdivision (a), and 10177, subdivision (b), the Department may discipline a real estate licensee who has been convicted of a crime which is substantially related to the qualifications, functions, or duties of a real estate licensee.

3. Cause exists, pursuant to sections 490 and 10177, subdivision (b), to suspend or revoke respondent's real estate salesperson license, in that on October 10, 2018, respondent was convicted of elder abuse, which is a crime substantially related to the qualifications, functions, and duties of a real estate licensee, based on Factual Findings 1-9, and Legal Conclusion 4.

4. Respondent's crime is substantially related to the qualifications, functions, and duties of a real estate license because it involved doing an unlawful act with the threat of doing substantial injury to the person of another. (Cal. Code Regs., tit. 10, § 2910, subd. (a)(8).) Respondent was convicted of violating Penal Code section 368, subdivision (c), which provides that a person is guilty of a misdemeanor who willfully causes or permits the person or health of an elder or dependent adult to be injured or willfully causes or permits an elder or dependent adult to be placed in a situation in which his or her person or health may be endangered.

5. Respondent cannot avoid the consequences of his guilty plea by claiming he was acting on the advice of his attorney. Respondent's entry of the guilty plea in his criminal case is conclusive evidence of guilt upon which the ALJ must rely. "Regardless

¹ All further statutory references are to the Business and Professions Code unless otherwise indicated.

of the various motives which may have impelled the plea, the conviction which was based thereon stands as conclusive evidence of appellant's guilt of the offense charged. To hold otherwise would impose upon administrative boards extensive, time-consuming hearings aimed at relitigating criminal charges which had culminated in final judgments of conviction." (*Arneson v. Fox* (1980) 28 Cal.3d 440, 449.)

6. Pursuant to section 10186.2, a licensee shall report to the Department the bringing of a criminal complaint, indictment or information charging a felony against the licensee, and the conviction of the licensee, including any verdict of guilty, or plea of guilty or no contest, of any felony or misdemeanor. (*Id.*, subd. (a)(1).) The required report shall be made in writing within 30 days of the date of the bringing of the criminal complaint charging a felony, or the conviction. (*Id.*, subd. (a)(2).) Failure to make a report required by this section constitutes cause for discipline. (*Id.*, subd. (b).)

7. Cause exists to suspend or revoke respondent's real estate salesperson license pursuant to section 10186.2, in that respondent failed to timely report to the Department the felony complaint filed against him and failed to timely report his subsequent conviction within 30 days of the date of those events. (Factual Findings 1-12.)

Level of Discipline

8. Administrative proceedings to revoke, suspend or impose discipline on a professional license are noncriminal and nonpenal; 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.) In particular, the statutes relating to real estate licenses are designed to protect the public from any potential risk of harm. (*Lopez v. McMahon* (1988) 205 Cal.App.3d 1510, 1516; *Arneson v. Fox* (1980) 28 Cal.3d 440.).

9. The Department has developed criteria of rehabilitation that are to be considered in evaluating the rehabilitation of a licensee against whom an administrative disciplinary proceeding for revocation or suspension of a license has been initiated. The criteria are set forth at California Code of Regulations, title 10, section 2912, subdivisions (a) through (m).

10. The rehabilitation criteria that are applicable to respondent's case have been considered. Almost five years have elapsed since the 2015 incident resulting in respondent's misdemeanor conviction. Over two years have elapsed since 2018, when respondent was charged with the Felony Complaint, failed to report the Felony Complaint, and his misdemeanor plea and conviction were entered. (§ 2912, subd. (a).) Respondent paid restitution and all fines ordered by the court and completed his required sentence. (§ 2912, subds. (b), (g).) Respondent is scheduled to remain on probation until January 2022. (§ 2912, subd. (e).) He has a pending application for expungement of his conviction. (§ 2912, subd. (c).) Respondent has not completed any educational or vocational training courses for economic self-improvement. (§ 2912, subd. (k).) He is not involved in church or community activities. (§ 2912, subd. (l).) Respondent and his family no longer participate in the adult/elder care business. (§ 2912, subd. (i).)

11. Respondent has demonstrated a change in attitude since the 2015 incident and his 2018 conviction. (§ 2912, subd. (m).) Respondent expressed sincere concern and remorse over the incident that occurred at PSRH, as well as his failure to notify the Department of his felony complaint and the subsequent misdemeanor conviction. Respondent was traumatized by the experience and did not focus on the relationship to his real estate license. Respondent credibly expressed regret for not reporting the felony charges, or conviction, to the Department sooner. He cooperated

with the Department's investigation. Respondent submitted letters from third parties, including his employing broker who indicated that respondent was honest and forthright on all levels in his real estate dealings.

12. Respondent has no prior record of discipline, and no other criminal convictions. The October 2018 conviction was for a misdemeanor, was isolated, and was not directly related to respondent's real estate practice.

13. Based on the totality of the evidence, the appropriate level of discipline is revocation of respondent's salesperson license with a right to a restricted license. A restricted license subject to the terms and conditions set forth in the Order below is appropriate and will ensure public protection.

Cost Recovery

14. Section 10106, subdivision (a), provides that, in any order issued in resolution of a disciplinary proceeding, "the commissioner may request the administrative law judge to direct a licensee found to have committed a violation of this part to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case."

15. Cause exists, pursuant to section 10106, to require respondent to pay the Department for the reasonable cost of enforcement and investigation in this matter. The Department incurred reasonable costs in the total amount of \$1,123.40 through October 14, 2020. (Factual Finding 19.) Respondent shall be required to pay the Department the total cost recovery amount, which is \$1,123.40.

ORDER

All licenses and licensing rights of respondent Andronico Malagar Pelen II 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 pay \$1,123.40 to the Department for its reasonable costs of investigation and enforcement of this matter within 30 days of the effective date of this Decision and Order, unless the Department and respondent agree in writing to payment by an installment plan because of financial hardship.

DATE: 11/09/2020



BRIAN H. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearing