

FILED

MAY 24 2022

DEPT. OF REAL ESTATE

By

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of)	
)	DRE No. H-42008 LA
YESENIA AVILA PACHECO,)	
)	OAH No. 2021080110
Respondent.)	

ORDER NUNC PRO TUNC MODIFYING
DECISION OF THE REAL ESTATE COMMISSIONER

It having been called to the attention of the Real Estate Commissioner that there is an error in the Decision dated December 14, 2021, and good cause appearing therefore, the Order is amended as follows:

Page 2, line 5 of the Decision is amended to read:

"This Decision shall become effective at 12 o'clock noon on January 09, 2022."

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1 This Order, nunc pro tunc to December 14, 2021, shall become effective
2 immediately.

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4 IT IS SO ORDERED

5 5.19.22

6 DOUGLAS R. McCAULEY
7 REAL ESTATE COMMISSIONER

8 Douglas R. McCauley
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FILED

DEC 20 2021

DEPT. OF REAL ESTATE

By John Agui

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of:)	DRE No. H-42008 LA
)	
YESENIA AVILA PACHECO,)	OAH No. 2021080110
)	
Respondent.)	

DECISION

The Proposed Decision dated November 18, 2021, 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 JAN 09 2021.

IT IS SO ORDERED 12.14.21

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:

YESENIA AVILA PACHECO,

Respondent.

Agency Case No. H-42008 LA

OAH No. 2021080110

PROPOSED DECISION

David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by video conference on October 21, 2021.

Complainant Maria Suarez was represented by Kathy Yi, Staff Counsel.
Respondent Yesenia Avila Pacheco represented herself.

Testimony and documentary evidence was received. The record closed and the matter was submitted for decision on October 21, 2021.

SUMMARY

Complainant seeks imposition of discipline on respondent's real estate salesperson license due to her 2020 criminal conviction for receiving aid by

misrepresentation, based on her receipt in 2016 of over \$5,000 in food stamp benefits to which she was not entitled. Respondent's criminal probation was terminated early and the charge was dismissed/expunged in September 2021. Based on the underlying circumstances of the crime and factors of respondent's rehabilitation, the right to apply for a restricted license is granted.

FACTUAL FINDINGS

Jurisdictional Matters

1. Complainant brought the Accusation in her official capacity as a Supervising Special Investigator of the State of California.
2. Respondent received a real estate salesperson license, license number S/02067622, from the Department of Real Estate (Department) on September 9, 2018. The license will expire September 28, 2022, unless renewed. There is no history of discipline against the license.
3. After receiving the Accusation, respondent filed a notice of defense requesting a hearing. This hearing was then scheduled.
4. All jurisdictional requirements have been met.

Criminal Conviction; Underlying Circumstances

5. On February 26, 2020, in the Superior Court of California, County of Ventura, respondent was convicted on her plea of guilty of violating Welfare and Institutions Code section 10980, subdivision (c)(2), aid by misrepresentation of over \$400, a misdemeanor. The plea was the result of a negotiation whereby other charges

were dismissed and the charge to which respondent pleaded was reduced from a felony to a misdemeanor. The court sentenced respondent to informal probation for 36 months on terms and conditions, including serving 60 days in county jail with credit for one day served, with approval for the work release program, paying restitution to the Department of Human Services and the Ventura County Human Services Agency in an amount to be determined, and paying fines and fees.

6. According to the criminal complaint, between January and November 2016, by means of false statements respondent received \$5,137 in food stamps benefits to which she was not entitled. Respondent was arrested on an outstanding warrant when she was stopped for a traffic infraction in May 2019. The crime is substantially related to the qualifications, functions, and duties of respondent's license.

7. Respondent described the circumstances in her Conviction Detail Report and Interview Information Statement, signed June 8, 2020, and submitted to the Department. (Exhibit 5.) Respondent wrote she unintentionally failed to report income from some of her multiple jobs in 2016 and received extra food stamp money. She repaid the money. Respondent acknowledged she made a mistake and learned to become a better person. As of her June 8, 2020 Statement, respondent had paid the restitution, fines, and fees, but had not completed community service. (Although community service was not included in her initial sentence, it is inferred respondent was subsequently ordered to perform it.)

Other Relevant Evidence

8. Respondent explained she had 10 jobs in 2016 but relied on her memory in completing the application for food stamps benefits. Respondent realized when she later reviewed her tax documents, she had not included income from two of those

jobs. Respondent testified credibly she had changed addresses and was not aware of the warrant until the traffic infraction occurred and she was arrested on the warrant.

9. In her testimony at the hearing, respondent took full responsibility for her actions, noting her acts in 2016 and the repercussions are still on her mind. She stated things “were escalating” in her life at that time and admitted she had relied on her memory and had not checked her records when she completed the application. Respondent acknowledged she made a mistake and had paid for it. Respondent repaid the Department of Health Services approximately \$4,800 before being ordered by the court to pay restitution. She paid \$555 in restitution to the court and paid for the work release program. She paid a total of \$1,800 to the probation agency.

10. With the help of a public defender, on September 3, 2021, respondent obtained an order under Penal Code section 1203.4 granting her petition and her guilty plea was set aside, a plea of not guilty was entered, and the criminal complaint was dismissed. This procedure is often referred to as expungement.

11. Respondent provides financial support for her three daughters, ages 20, 13 and 6. The 20-year-old has a job and attends college. Respondent was a single mom for 10 years but is now back with the father of her children.

12. Respondent works part time in the restaurant business, stating she often has been hired first as a server and then been promoted. From March 2017 to April 2019, she was the shift lead at Veggie Grill, and in May 2018 she began as a barista at Novo Café, both in Westlake Village. She also performs real estate transactions, 90 percent of which are for the Latino community. Respondent stated she could have gathered numerous letters of recommendation but did not explain why she had not.

13. Three years ago, respondent became active in her church in Simi Valley. She is currently the secretary and head of the Women's Ministry and assisted in starting a Bible study. Although she has not taken any formal courses, respondent has consulted with a financial adviser who introduced her to a program to help save for retirement.

14. The Department incurred costs of investigation of this matter of \$1,236.55 and costs of enforcement of \$412.80, for total costs of \$1,649.35.

LEGAL CONCLUSIONS

Cause for License Discipline

1. The standard of proof for complainant to prevail on the Accusation is clear and convincing evidence to a reasonable certainty. (See *Borror v. Dept. of Real Estate* (1971) 15 Cal.App.3d 531; *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853.)

2. As causes for license discipline, the Accusation cites Business and Professions Code sections 490 and 10177, subdivision (b), whereby a real estate licensee may have her license suspended or revoked for conviction of a crime if the crime is substantially related to the qualifications, functions, or duties of a real estate licensee.

3. Under California Code of Regulations, title 10 (CCR), section 2910, subdivision (a), a crime is substantially related to the qualifications, functions, or duties of a real estate licensee if it involves the fraudulent obtaining of funds (subd. (a)(1)), or the employment of falsehood or misrepresentation to achieve an end (subd. (a)(4)).

4. There is cause to suspend or revoke respondent's real estate salesperson license pursuant to Business and Professions Code sections 490 and 10177, subdivision (b), because respondent was convicted of a crime substantially related to the qualifications, functions and duties of her license, due to her 2020 conviction of violating Welfare and Institutions Code section 10980, subdivision (c)(2), aid by misrepresentation, as set forth in Factual Findings 5 and 6.

Rehabilitation Factors

5. Criteria have been developed by the Department to evaluate the rehabilitation of a licensee who has committed a crime. The criteria are found at CCR, section 2912. The relevant criteria are summarized and applied to respondent as follows.

6. Subdivision (a), the time elapsed since commission of the offense. Respondent's underlying act was in 2016, about five years ago. However, the criterion then refers to the passage of less than two years after the criminal conviction as being "inadequate to demonstrate rehabilitation." Respondent's criminal conviction occurred in February 2020, 21 months ago. Therefore, under one application of this criterion, sufficient time has passed (i.e., five years since the offense), but under another application, insufficient time has passed (i.e., less than two years since the criminal conviction). The other criteria of rehabilitation are considered, as noted below.

7. Subdivision (b), restitution. Respondent paid most of the restitution before it was required by the court. She paid the remainder after the court order.

8. Subdivision (c), expungement of the conviction. Respondent's 2020 conviction was dismissed under Penal Code section 1203.4, often referred to as expungement.

9. Subdivision (e), completion of, or early discharge from, the criminal probation. In February 2020, respondent was placed on probation for 36 months. The expungement of her criminal conviction occurred 19 months after probation was imposed; that is, 17 months early.

10. Subdivision (g), payment of any criminal fines or penalties. Respondent has complied with all probation terms, including payment of fines and fees ordered by the court.

11. Subdivision (j), stability of family life and fulfillment of parental and familial responsibilities. Respondent has been the financial support for her three daughters for the last 10 years, and recently re-united with their father. She referred to the ten jobs she had in 2016, and other part-time jobs starting in 2018 in the restaurant business. Respondent also uses her license to perform real estate transactions.

12. Subdivision (l), significant, conscientious involvement in community, church or private programs for social betterment. There was convincing evidence establishing respondent's significant, conscientious involvement in programs at her church.

13. Subdivision (m), change in attitude from the time of the criminal acts to the present, in the form of evidence of rehabilitation from respondent and others, and the absence of subsequent improper conduct. Respondent testified her actions committing welfare fraud in 2020 were due to her failure to check her records, a mistake from which she has learned, and which she is not likely to repeat. Although respondent indicated she could have gathered reference letters, she did not submit

any. Respondent has had no subsequent criminal convictions or discipline of her license.

14. Respondent was convicted of violating Welfare and Institutions Code section 10980, subdivision (c)(2), which applies when a person has "willfully and knowingly, with the intent to deceive, by means of false statement or representation, or by failing to disclose a material fact, or by impersonation or other fraudulent device, obtained or retained aid" Even though respondent claims she was convicted due to a mistake, the elements of the crime include taking willful action with an intent to deceive. To some extent, respondent minimizes the seriousness of the crime.

15. Respondent must present evidence both of a state of mind and a state of facts showing she has been rehabilitated. (*Resner v. State Bar* (1967) 67 Cal.2d 799, 811; *In re Adreani* (1939) 14 Cal.2d 736, 749.) Remorse for one's conduct and the acceptance of responsibility are the cornerstones of rehabilitation. 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.) However, mere remorse does not demonstrate rehabilitation. A truer indication of rehabilitation 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) Cal.3d 1061, 1070; *In re Trebilcock* (1981) 30 Cal.3d 312.) The absence of a prior disciplinary record is a mitigating factor. (*Chefsky v. State Bar* (1984) 36 Cal.3d 116, 132, fn. 10.)

16. It is troubling that respondent did not bring supporting evidence from sources other than herself. "Favorable testimony of acquaintances, neighbors, friends, associates and employers with reference to their observation of the daily conduct and

mode of living” can be helpful in determining whether a person is rehabilitated. (See *In the Matter of Brown* (1993) 2 Cal. State Bar Ct. Rptr. 309, 317 – 318.)

17. The court in *Singh v. Davi* (2012) 211 Cal.App.4th 141, 149, determined that, of the many rehabilitation criteria, arguably the most important in predicting future conduct is the one related to change in attitude from that which existed at the time of the criminal conduct. Singh had complied with the applicable rehabilitation criteria and, specifically as to a change in attitude, Singh had assumed responsibility, exhibited remorse, and submitted positive and supportive letters from friends and family.

Discussion and Outcome

18. Respondent presents a mixed record regarding her rehabilitation. The crime included the intent to deceive and receive benefits to which respondent was not entitled, a serious matter. Respondent could have, but did not, review records of her income before filling out the aid application incorrectly. Regarding the criterion for passage of time, it has been five years since her criminal acts, however, the criminal conviction occurred just 21 months ago. The criminal court granted respondent’s petition to dismiss the charges 19 months into her 36-month probation. It is inferred the court no longer perceived a need for respondent to remain under its supervision to be rehabilitated. Misdemeanor probation of more than one year is no longer authorized, with some exceptions, after the recent enactment of Assembly Bill 1950. (*People v. Quinn* (2021) 59 C.A.5th 874, 885 [the Legislature has determined shorter periods of probation are sufficient for purposes of rehabilitation]). The inference probation was no longer necessary for purposes of rehabilitation is supported by respondent’s cooperation in agreeing to plead guilty and her prompt payment of restitution and fines, most of which were paid before she was ordered on probation.

Respondent has satisfied many of the applicable criteria of rehabilitation, but notably she did not submit evidence from other sources except for the court's dismissal order.

19. Respondent accepted responsibility and expressed remorse. There are no indications of any other improper conduct since 2016. Respondent established sufficient rehabilitation to be allowed to apply for a restricted real estate salesperson license. The public will be protected under such circumstances. Under Business and Professions Code sections 10156.5 and 10156.6, the Commissioner may issue a restricted license with conditions and a limited term. Under Business and Professions Code sections 10156.7, a restricted license does not confer any property right to the holder, and it may be suspended without a hearing pending final determination after a hearing. Standard terms for the restricted license are found in CCR, section 2930.

20. Costs of investigation and enforcement can be recovered by complainant under Business and Professions Code section 10106. The actual costs of investigation and enforcement of this matter are \$1,649.35, as set forth in Factual Finding 14.

21. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 (*Zuckerman*), the Supreme Court directed the administrative law judge and the licensing agency to evaluate several factors to ensure that the cost recovery provision did not deter individuals from exercising their right to a hearing. Accordingly, the Department must not assess the full costs where it would unfairly penalize the respondent who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty; the Department must consider a respondent's subjective good faith belief in the merits of his or her position and whether the respondent has raised a colorable challenge; the Department must consider a respondent's ability to pay; and the Department may not assess disproportionately large investigation and prosecution

costs when it has conducted a disproportionately large investigation to prove that a respondent engaged in relatively innocuous misconduct. (See *Zuckerman, supra*, at p. 45.) Here, respondent used the hearing process to obtain a reduction in the severity of the penalty; that is, a restricted license and not license revocation. Therefore, a reduction in costs of 10 percent (\$164.93) is appropriate. Costs of \$1,484.42 are recoverable from respondent.

ORDER

All licenses and licensing rights of respondent Yesenia Avila Pacheco under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to Business and Professions Code section 10156.5 if respondent makes application therefore 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 Business and Professions Code section 10156.7 and to the following limitations, conditions and restrictions imposed under authority of Business and Professions Code section 10156.6:

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 obtain from her present employing real estate broker and shall submit with any application for transfer to a new employing real estate broker, a statement signed by the real estate broker on a form approved by the Department of Real Estate which shall certify that the employing broker has read the Decision of the Commissioner which granted the right to a restricted license; and 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 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.

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6. Respondent shall pay costs of investigation and enforcement in the amount of \$1,484.42 to the Department during the period of restricted licensure under a schedule established by the Department. Respondent's failure to pay costs shall constitute an independent violation of the terms of the restricted license and shall be grounds for the suspension or revocation of the restricted license.

DATE: 11/18/2021

David Rosenman

DAVID B. ROSENMAN

Administrative Law Judge

Office of Administrative Hearings