

FILED

SEP 25 2023

DEPT. OF REAL ESTATE

By



BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Accusation of:)	DRE No. H-42289 LA
)	
RAFAEL ESPINOZA PIMENTEL,)	OAH No. 2022050784
)	
Respondent.)	

DECISION

The Proposed Decision dated October 3, 2022, of the Administrative Law Judge of the Office of Administrative Hearings, is operative as the Decision of the Real Estate Commissioner in the above-entitled matter pursuant to California Government Code section 11517(c)(2) wherein “[i]f the agency fails to act . . . within 100 days of receipt of the proposed decision, the proposed decision shall be deemed adopted by the agency.”

The Decision revokes one or more real estate licenses, but the right to a restricted salesperson license and restricted mortgage loan originator (“MLO”) license endorsement are granted to Respondent.

Pursuant to California 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 California Government Code section 11522. A copy of California

Government Code 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 October 16, 2023.

IT IS SO ORDERED 9.19.23

DOUGLAS R. McCAULEY
REAL ESTATE COMMISSIONER



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

In the Matter of the Accusation Against:

RAFAEL ESPINOSA PIMENTEL, Respondent.

Agency Case No. H-42289 LA

OAH No. 2022050784

PROPOSED DECISION

Harden Sooper, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on September 7, 2022.

Diane Lee, Counsel, represented complainant Jason Parson, Supervising Special Investigator of the Department of Real Estate (Department), State of California.

John D. Bishop, Attorney at Law, represented respondent Rafael Espinosa Pimentel, who was present.

The ALJ received oral and documentary evidence. The record was closed and the matter was submitted for decision on September 7, 2022.

On his own motion, the ALJ moved to seal Exhibit 7, as it contains criminal history information not authorized for public release. On September 26, 2022, the ALJ issued a protective order sealing Exhibit 7.

During a review of the evidence, the ALJ redacted dates of birth, driver's license numbers, addresses, telephone numbers, and email addresses from Exhibits 3 through 6, D, E, G, and H for confidentiality purposes.

SUMMARY

Complainant seeks to discipline respondent's real estate salesperson's license for his 2021 criminal convictions for driving under the influence. Complainant established cause to discipline respondent's license for committing crimes substantially related to the qualifications, functions, and duties of a licensee and for respondent's failure to timely report his criminal convictions to the Department. Respondent presented sufficient evidence of rehabilitation to warrant issuance of a restricted salesperson's license for a period of two years. The license restriction will adequately protect public safety and the integrity of the real estate profession.

FACTUAL FINDINGS

Jurisdictional Matters

1. On September 9, 2009, the Department issued respondent real estate salesperson license number 01869949. On July 2, 2014, respondent's mortgage loan originator license endorsement was approved. The license was in full force and effect during the incidents giving rise to the Accusation and is scheduled to expire on September 8, 2025, unless renewed.
2. On June 28, 2022, complainant filed the First Amended Accusation (Accusation) in his official capacity. The Accusation seeks to discipline respondent's

license for his two 2021 misdemeanor criminal convictions and for his failure to report the convictions to the Department.

3. Respondent timely filed a Notice of Defense, requesting a hearing.

Respondent's 2021 Criminal Convictions

AUGUST 20, 2019 INCIDENT

4. On May 4, 2021, in the Superior Court of California, County of Orange, case number 19NM13539, respondent was convicted upon his plea of guilty of two Vehicle Code violations: (1) Vehicle Code section 23152, subdivision (a), driving a vehicle while under the influence (DUI) of alcohol, a misdemeanor; and (2) Vehicle Code section 23152, subdivision (b), driving a vehicle with a blood-alcohol content equal to or greater than 0.08 percent, a misdemeanor. Respondent further admitted as true a special allegation pursuant to Vehicle Code section 23538, subdivision (b), that his blood-alcohol content was 0.20 percent or more.

5. The court ordered respondent to pay fines and fees totaling approximately \$2,000. The court did not place respondent on probation in this matter.

6. The facts and circumstances underlying the convictions occurred on August 20, 2019, when respondent drove his vehicle while under the influence of alcohol and had a blood-alcohol content of at least 0.20 percent. Fullerton Police Officer Eric Garcia observed respondent's car stopped about three feet from the curb, with respondent sitting with his back against a nearby fence. Respondent smelled of alcohol, had bloodshot, watery eyes, and slurred his words when he spoke. Respondent admitted drinking alcohol earlier that day. He could not sit up straight without falling over and was unable to complete field sobriety tests due to his level of

intoxication. Based on witness statements and his observations of respondent, Officer Garcia arrested respondent for DUI.

MARCH 18, 2020 INCIDENT

7. On May 4, 2021, in the Superior Court of California, County of Orange, case number 20HM04020, respondent was convicted upon his plea of guilty of four Vehicle Code violations: (1) Vehicle Code section 23152, subdivision (a), DUI, a misdemeanor; (2) Vehicle Code section 23152, subdivision (b), driving a vehicle with a blood-alcohol content equal to or greater than 0.08 percent, a misdemeanor; (3) Vehicle Code section 20002, subdivision (a), hit and run with property damage, a misdemeanor; and (4) Vehicle Code section 16028, subdivision (a), failure to maintain insurance or proof of financial responsibility, an infraction. Respondent further admitted as true a special allegation pursuant to Vehicle Code section 23538, subdivision (b), that his blood-alcohol content was 0.20 percent or more.

8. The court suspended imposition of sentence and placed respondent on summary probation for five years under terms and conditions including serving 120 days in county jail, attending and completing an 18-month DUI program, attending and completing victim impact counseling, paying fines and fees totaling approximately \$2,000, and paying victim restitution.

9. The facts and circumstances underlying the convictions occurred on March 18, 2020, when respondent drove his vehicle while under the influence of alcohol and had a blood-alcohol content of at least 0.20 percent. When contacted in a private parking lot off Highway 55 by California Highway Patrol Officer John Patterson, respondent's eyes were bloodshot, his speech was slurred, and he smelled of alcohol. Respondent refused to answer any questions or participate in any field sobriety tests.

Respondent's nearby vehicle had fresh collision damage consistent with a recently reported collision involving a second vehicle on Interstate 405 in Irvine. Based on witness statements and his observations of respondent, Officer Patterson arrested respondent for DUI.

Respondent's Failure to Report Criminal Convictions

10. Respondent did not timely report to the Department his May 4, 2021 misdemeanor criminal convictions. Based on a search of Department records, Heather DeYoung, Staff Services Manager I, concluded respondent did not submit within 30 days a record or written notice of his criminal convictions. (Ex. 8.)

The Department's Investigation

11. On February 11, 2022, Special Investigator Eric Chang interviewed respondent about his 2021 criminal convictions. Regarding the August 20, 2019 incident, respondent provided inconsistent statements to Investigator Chang. For example, initially he claimed the police pulled him over in front of his house. He later stated to Investigator Chang he was already parked when the police arrived. (Ex. 9.) Both versions of events conflict with Fullerton Police Officer Garcia's observations, as documented in his report. (Ex. 4.) Regarding the March 18, 2020 incident, respondent admitted to Investigator Chang he was involved in a traffic collision while on a freeway. He denied the collision was a "hit and run," claiming he asked the other involved party to follow him off the freeway to exchange information.

Factor in Aggravation – Respondent's 2007 Criminal Conviction

12. On April 24, 2007, in the Superior Court of California, County of Riverside, case number RIM480013, respondent was convicted of one count of violating Vehicle

Code section 23103, subdivision (a), reckless driving, a misdemeanor. This criminal conviction is alleged in the Accusation as an aggravating factor for discipline consideration.

Rehabilitation

13. Respondent is 40 years old. He is married to his wife of 11 years and has one minor child.

14. Respondent works as a mortgage loan originator at America's Moneyline (AM) in Aliso Viejo. He has worked in the mortgage industry for approximately 17 years. He has no prior license discipline.

15. Dean Lob, owner of AM, testified in support of respondent's character and work ethic. Between AM and Pacific Home Loans, another mortgage company owned by Mr. Lob, respondent has worked for Mr. Lob for about 12 years. Mr. Lob was aware of respondent's DUI convictions. In a letter dated June 13, 2022, Mr. Lob wrote, "[respondent] has shown a steadfast and resolute demeanor in moving past his mistakes in a constructive and positive manner." (Ex. A.)

16. Weimar Gonzalez, a loan officer at AM, also testified in support of respondent's character and work ethic. Mr. Gonzalez has known respondent for over 10 years and became respondent's colleague at AM approximately two years ago. In a letter dated September 1, 2021, Mr. Gonzalez wrote, "there is no way I would have ever been where I am today without the assistance, guidance, and generosity of [respondent]." (Ex. C.) Mr. Gonzalez was aware of respondent's DUI convictions.

17. Respondent's sobriety date is March 19, 2020, the day following his most recent DUI arrest. He attends two Alcoholics Anonymous (AA) meetings each week.

Patrick Scanlan, respondent's AM colleague and his AA sponsor, testified and wrote a letter in support of respondent's character, work ethic, and sobriety. (Ex. B.) Mr. Scanlan was aware of respondent's DUI convictions.

18. Respondent has complied with the terms of his DUI probation. He served 45 days of house arrest in lieu of 120 days in county jail. He paid all fines and fees, totaling approximately \$7,000. He completed the Mothers Against Drunk Driving (MADD) victim impact program. Between July 1, 2020 and June 29, 2021, he participated in an alcohol monitoring program and tested negative for alcohol for the duration of the program. As of June 2022, respondent completed 12 months of the court-ordered 18-month DUI program. (Ex. D.) He is scheduled to complete the program in late 2022. Respondent's informal probation is scheduled to continue until May 2026. He has no subsequent arrests or criminal convictions.

19. Respondent expressed remorse for his misconduct, attributing his previous alcohol abuse to the death of his two grandfathers. Through AA and counseling, respondent has since learned to use healthy coping mechanisms. He is focused on the well-being of his two-year-old son. He associates with friends who do not drink alcohol and is involved with several churches in Orange County. Through friends, family, colleagues, and AA, respondent has a support system to help him maintain his sobriety.

Costs

20. The Department seeks reimbursement of \$672 in prosecution costs and \$777.40 in investigation costs. The prosecution costs are based on seven hours incurred by an attorney. Of the investigation costs, 18.95 hours totaling \$758 were

incurred by Investigator Chang, and 0.20 hours totaling \$19.40 were incurred by a supervising investigator working on the matter.

21. Respondent did not present evidence of his inability to pay the costs. He uses his income from AM to support himself, his wife, and their son.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The standard of proof for disciplinary actions against a professional license is clear and convincing evidence to a reasonable certainty. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.)

2. Clear and convincing evidence "requires a finding of high probability," and has been described as "requiring that the evidence be "so clear as to leave no substantial doubt," and "sufficiently strong to command the unhesitating assent of every reasonable mind." [Citation.]" (*In re Angelia P.* (1981) 28 Cal.3d 908, 919.)

Applicable Law

3. A real estate license may be suspended or revoked when a licensee has been convicted of a crime that is substantially related to the qualifications, functions, or duties of a real estate licensee. (Bus. & Prof. Code, §§ 490, subd. (a); 10177, subd. (b)(1).)

4. A crime or act may be deemed to be substantially related to the qualifications, functions, or duties of a licensee if it involves two or more convictions involving the consumption or use of alcohol or drugs when at least one of the

convictions involves driving and the use or consumption of alcohol or drugs. (Cal. Code Regs., tit. 10 (CCR), § 2910, subd. (a)(11).)

5. Real estate licensees are required to report all misdemeanor convictions to the Department. (Bus. & Prof. Code, § 10186.2, subd. (a)(1)(B). The report must be in writing and submitted within 30 days of the date of conviction. (*Id.*, subd. (a)(2).)

Causes for Discipline

SUBSTANTIALLY RELATED CRIMES

6. Complainant established by clear and convincing evidence that respondent's 2019 and 2020 DUI offenses were substantially related to the qualifications, functions, and duties of a real estate licensee because they both involved driving and the consumption of alcohol. In both the August 20, 2019 and March 18, 2020 incidents, respondent drove a vehicle while under the influence of alcohol and with a blood-alcohol content of at least 0.20 percent. Cause therefore exists to suspend or revoke respondent's license under Business and Professions Code section 10177, subdivision (b), in conjunction with CCR, section 2910, subdivision (a)(11).

FAILURE TO REPORT CRIMINAL CONVICTIONS

7. Complainant established by clear and convincing evidence that respondent failed to timely report his criminal convictions to the Department. After searching Department records, Staff Services Manager I Heather DeYoung concluded respondent did not submit a written report of his criminal convictions within 30 days of the date of conviction. Cause therefore exists to suspend or revoke respondent's license under Business and Professions Code section 10186.2, subdivision (a)(1)(B).

Disposition

8. Determining the appropriate discipline of respondent's license requires consideration of respondent's rehabilitation. To determine whether a licensee has made a showing of rehabilitation, the Department will consider the following criteria, as set forth in CCR, section 2912, subdivisions (a) through (m):

(a) The time that has elapsed since commission of the act(s) or offense(s):

(1) The passage of less than two years after the most recent criminal conviction or act of the licensee that is a cause of action in the Bureau's Accusation against the licensee is inadequate to demonstrate rehabilitation.

(2) Notwithstanding subdivision (a)(1), above, the two-year period may be increased based upon consideration of the following:

(A) The nature and severity of the crime(s) and/or act(s) committed by the licensee.

(B) The licensee's history of criminal convictions and/or license discipline that are "substantially related" to the qualifications, functions, or duties of a real estate licensee.

(b) Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the licensee, or escheat to the State of these monies or other properties if the victim(s) cannot be located.

- (c) Expungement of the conviction(s) which culminated in the administrative proceeding to take disciplinary action.
- (d) Expungement or discontinuance of a requirement of registration pursuant to the provisions of Section 290 of the Penal Code.
- (e) Successful completion or early discharge from probation or parole.
- (f) Abstinence from the use of controlled substances and/or alcohol for not less than two years if the criminal conviction was attributable in part to the use of a controlled substance and/or alcohol.
- (g) Payment of any fine imposed in connection with the criminal conviction that is the basis for revocation or suspension of the license.
- (h) Correction of business practices responsible in some degree for the crime or crimes of which the licensee was convicted.
- (i) New and different social and business relationships from those which existed at the time of the commission of the acts that led to the criminal conviction or convictions in question.

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(j) Stability of family life and fulfillment of parental and familial responsibilities subsequent to the criminal conviction.

(k) Completion of, or sustained enrollment in, formal educational or vocational training courses for economic self-improvement.

(l) Significant and conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.

(m) Change in attitude from that which existed at the time of the commission of the criminal acts in question as evidenced by any or all of the following:

(1) Testimony and/or other evidence of rehabilitation submitted by the licensee.

(2) Evidence from family members, friends and/or other persons familiar with the licensee's previous conduct and with subsequent attitudes and/or behavioral patterns.

(3) Evidence from probation or parole officers and/or law enforcement officials competent to testify as to licensee's social adjustments.

(4) Evidence from psychiatrists, clinical psychologists, sociologists or other persons competent to testify with regard to neuropsychiatric or emotional disturbances.

(5) Absence of subsequent felony convictions, misdemeanor convictions, or other conduct that provides grounds to discipline a real estate licensee, which reflect an inability to conform to societal rules when considered in light of the conduct in question.

9. Under the Department's rehabilitation criteria set forth in CCR, section 2912, respondent did not establish he is fully rehabilitated, but he presented significant evidence of rehabilitation. Less than two years have elapsed since respondent's criminal convictions. He remains on informal probation for DUI until May 2026. However, respondent has been sober for more than two years. He paid all the fines and fees associated with his criminal convictions. He has a stable family life with his wife and son, and he associates with friends who do not drink alcohol. He is involved with several Orange County churches. He demonstrated a changed attitude in that he not only complied with his DUI probation terms, but he became sober after his most recent DUI arrest. He has no subsequent arrests or criminal convictions. Respondent's 2007 criminal conviction for reckless driving occurred over 15 years ago and therefore carries little weight as an aggravating factor for discipline in this matter.

10. Given respondent's significant, if not complete, evidence of rehabilitation, revocation of respondent's license is not warranted. Instead, it is appropriate to place restrictions on respondent's license for a probationary period. These restrictions will adequately protect public safety and the integrity of the real estate profession.

Costs

11. Pursuant to Business and Professions Code section 10106, complainant is entitled to recover the reasonable costs of prosecution and enforcement of this

matter. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 (*Zuckerman*), the Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like section 10106. These factors include: 1) the licentiate's success in getting the charges dismissed or the severity of the discipline imposed reduced; 2) the licentiate's subjective good faith belief in the merits of his or her position; 3) whether the licentiate raised a colorable challenge to the proposed discipline; 4) the licentiate's financial ability to pay; and 5) whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Zuckerman, supra*, 29 Cal.4th at p. 45.)

12. Complainant requests reimbursement of \$1,449.40 in enforcement and investigation costs. The requested costs are unreasonable under the *Zuckerman* factors. Respondent was successful in reducing the severity of the discipline imposed. He had a subjective good faith belief in the merits of his position and raised a colorable challenge to the severity of the proposed discipline. Respondent did not present evidence of his inability to pay the costs and the Department's investigation was appropriate in light of the alleged misconduct. It is therefore appropriate to reduce the costs to \$1,000.

ORDER

All licenses and licensing rights of respondent Rafael Espinosa Pimentel under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license with a mortgage loan originator (MLO) endorsement 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 and MLO endorsement

(collectively, 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 the Commissioner a total of \$1,000 in reimbursement of enforcement and investigation costs. Respondent shall pay such reimbursement in installments and on such terms as the Commissioner may determine, with due regard for respondent's financial resources.

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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: 10/03/2022

Harden Sooper

HARDEN SOOPER

Administrative Law Judge

Office of Administrative Hearings