

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED

FEB 17 2009

DEPARTMENT OF REAL ESTATE

By H. Max

In the Matter of the Accusation of)
) NO. H-3731 SD
FRANK J. McNEILL,)
) OAH NO. 2008080477
Respondent.)
_____)

DECISION

The Proposed Decision dated January 20, 2009, 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.

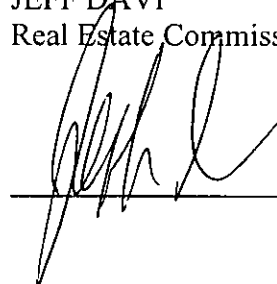
The Decision suspends or revokes one or more real estate licenses on grounds of the conviction of a crime, but also grants the right to a restricted real estate salesperson license to respondent.

The right to reinstatement of a revoked real estate license or to the reduction of a suspension is controlled by Section 11522 of the Government Code. A copy of Section 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 MAR 10 2009

IT IS SO ORDERED 2-11-09

JEFF DAVI
Real Estate Commissioner



BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of:

FRANK J. McNEILL,

Respondent.

Case No. H-3731 SD

OAH No. 2008080477

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on January 8, 2009, in San Diego, California.

Truly Sughrue, Counsel, represented complainant Joseph Aiu, a Deputy Real Estate Commissioner, Department of Real Estate, State of California.

Michael W. Meaney, Attorney at Law, represented respondent Frank J. McNeill, who was present throughout the administrative hearing.

The matter was submitted on January 8, 2009.

FACTUAL FINDINGS

Jurisdictional Matters

1. Complainant Joseph Aiu, a Deputy Real Estate Commissioner, Department of Real Estate (the Department), State of California, signed the accusation in his official capacity. The accusation sought to impose discipline upon the real estate broker's license issued to Frank McNeill (McNeill or respondent) based upon McNeill's January 2007 convictions for contempt and false imprisonment.

The accusation and other required jurisdictional documents were served on McNeill, who timely filed a notice of defense.

On January 8, 2009, the administrative record was opened. Jurisdictional documents were presented, after which documentary evidence was produced and sworn testimony was received. Closing arguments were given thereafter; the record was closed, and the matter was submitted.

License Status

2. The Department first licensed McNeill as a real estate salesperson in the mid-1980s. The Department issued a real estate broker's license to McNeill in 1990.

Frank J. McNeill is currently licensed as a real estate broker, holding broker license no. B/00975801. That license is current and expires on October 11, 2009, unless suspended or revoked.

There is no history of any administrative discipline having been imposed previously against McNeill's real estate licenses.

McNeill's Conviction

3. On January 22, 2007, McNeill was convicted on his plea of guilty of violating Penal Code section 236/237 (violating the personal liberty of another by means of menace), a felony, and Penal Code section 273.6, subdivision (a) (knowingly violating a court order), a misdemeanor, in the Superior Court of California, County of San Diego, in Case No. SCS201754 entitled *People v. Frank Joseph McNeill*.¹ In return for the plea to count 5 (the knowingly violating a court order charge) and count 13 (violating the personal liberty of another by means of menace), the remaining charges were dismissed. The prosecutor agreed that the felony conviction could be reduced to a misdemeanor after McNeill's successfully completed 18 months of probation.

On April 9, 2007, the Superior Court placed McNeill on three years formal probation. Terms and conditions of probation required McNeill to serve 120 days in custody (which was stayed pending the successful completion of probation, with credit given for two days previously served); to provide 20 days public work service; to comply with a previously issued protective order relating to avoiding contact with Suzanne McNeill, his ex-wife; to pay fines and fees of approximately \$680; to pay restitution in the amount of \$6,176 to Suzanne McNeill; to comply with the probation officer's orders; to maintain full-time employment; to attend and complete a 52-week domestic violence course; to seek and undergo counseling; and to obey all laws.

McNeill has been something less than a model probationer. His physical contact with his ex-wife at a Charger game and his breaking into the house where his ex-wife lived and taking personal property he claimed he owned resulted in McNeill's confinement in the county jail from September 4, 2007, through January 8, 2008; McNeill's failure to pay child

¹ On April 9, 2007, McNeill filed a motion to withdraw his plea, claiming that he was of unsound mind when he entered his plea and that he was unaware he could challenge the admissibility of potentially incriminating audiotapes. Several declarations in support of the motion were filed. The prosecution opposed the motion. On April 11, the Superior Court denied McNeill's motion and imposed probation. McNeill appealed. On August 7, 2008, the Court of Appeal, Fourth Appellate District, Division One, State of California, denied McNeill's appeal in an unpublished opinion. On October 28, 2008, the Supreme Court of California denied McNeill's petition for review. The convictions are final.

support when due resulted in an additional four days in custody in February 2008. McNeill has not completed his 52-week domestic violence class, although he is close to doing so. McNeill has not paid all fines and has not made full restitution, although he is relatively current with regard to his monthly payments on his fines and restitution. McNeill believed he was a couple of months behind in child support payments at the time of the hearing. His felony conviction has not been reduced to a misdemeanor. McNeill's probation expires on April 8, 2010, unless revoked, modified or extended.

Circumstances of the Offense

4. McNeill testified that he never falsely imprisoned his ex-wife and that he "entered into the plea because the district attorney at the time was negotiating with me and they just came up with that charge," he testified that the contempt of court conviction "was part of the package."²

5. The appellate court's opinion disposing of guilty plea issue discussed more specifically the factual basis underlying McNeill's two convictions as follows:

"In February 2006, [McNeill] violated a court order that [Suzanne] had obtained to prevent domestic violence by placing a telephone call to [Suzanne] (count 5). In March 2006, [McNeill] approached [Suzanne] at a park and made several obscene gestures at her, while saying the nickname of [Suzanne's] male friend (count 13)."

The appellate court's opinion stated that at the preliminary hearing in the matter, Suzanne testified that McNeill removed items from her home in December 2005, that on March 4, 2006, McNeill attempted to forcibly take her purse and cell phone and that he took her calendar; that McNeill spoke to her on several occasions between February and July 2006 in violation of the court order, and that in July 2006, he grabbed her by the arm when he was dropping off one of the sons.

6. Understanding the context of these offenses is important. McNeill married his ex-wife, Suzanne, in 1990. They have three sons, ages 13, 11, and 10. The marriage was stable for many years. However, McNeill and Suzanne experienced irreconcilable differences in the latter stages of their marriage. McNeill became very depressed and reacted to his marital difficulties with agitated anxiety. He and Suzanne separated in October 2005. McNeill responded very poorly to the separation, engaging in impulsive and disorganized behavior directed towards Suzanne. Suzanne got a boyfriend shortly after the separation. McNeill lost his local support system and most of his savings in the dissolution proceeding. He and Suzanne battled over custody and visitation. Suzanne remarried, but the division of community property was not resolved amicably and remained contested.

² In administrative disciplinary proceedings, a licensee may not seek to impeach a prior criminal conviction by means of "an inquiry into the circumstances surrounding the offense." On the other hand, "the licensee, of course, should be permitted to introduce evidence of extenuating circumstances by way of mitigation or explanation, as well as any evidence of rehabilitation." (*Arneson v. Fox* (1980) 28 Cal.3d 440, 449.)

7. This impact of this difficult marital situation on McNeill was explained by Peter McDade, Ph.D., a licensed clinical psychologist, as follows:

"It is my opinion that Mr. McNeill's impulsive behavior leading to his arrest and conviction record during the early stage of his divorce process needs to be considered in context of his loss of his long standing marriage and stability with his wife, her immediate dating relationship and introduction of a man into the lives of his sons, the shame he instigated by the loss of his self-value related to his standing in his community and parish, and, most significantly, the loss of daily life with his sons."

McNeill's Background and Evidence of Rehabilitation

8. McNeill was born on May 14, 1964, in Galveston, Texas. He graduated from a Las Vegas high school in 1984. He attended the University Nevada Las Vegas (UNLV) in 1982-1983 and the University of San Diego (USD) in 1983-1986. He received a bachelor's degree in Business Administration from USD in 1986.

McNeill became a licensed real estate salesperson in 1986. After working for others for approximately four years, McNeill became a licensed real estate broker around 1990, when he married Suzanne. McNeill has been licensed as a real estate broker since, and has specialized in the sale of residential real property in Coronado. McNeill, at one time, employed several real estate salespersons, but he presently works by himself out of his home office. McNeill estimated that he closed about 15 transactions a year before the recent downturn in the real estate market, with most of the transactions involving expensive homes in Coronado. McNeill enjoyed considerable financial success, often grossing in excess of \$500,000 per year. However, as a result of the current market, McNeill has just two listings. McNeill has closed just one transaction in the last 12 months. He is attempting to learn more about the real estate market in Mission Hills, Point Loma and Downtown San Diego to expand his services.

9. McNeill testified that he believed he had engaged in wrongdoing in connection with his conduct following his separation from Suzanne, although he was vague on the specifics, testifying he "took some things" and "did not walk away" from Suzanne when he should have. McNeill testified he was unable to remain current on his child support obligation due to the downturn in the real estate market and, rather than take the matter up with the judicial system, he decided that he would simply owe child support arrearages and make the payments later. He testified he now knows this was a poor strategy and that he must seek permission from the court if he needs to deviate from existing court orders.

10. McNeill testified his involvement in the domestic violence program and in his individual counseling has been very helpful. He has managed to become more aware of his surroundings, decrease the chaos in his life, decrease his stress level, and increase his positive self-image through counseling and daily physical exercise. McNeill recently completed a five-week parenting program; his attendance at that program was voluntary, and not court-mandated.

McNeill visits his sons every Monday and Wednesday, and has custody of them every other weekend. A third party is present during visitation under the current court order. He believes his relationship with his sons and his interaction with them during visitation is improving. McNeill stopped taking anti-depressant medications several months ago.

11. McNeill described his current situation as "hitting a rough patch." McNeill understood why the Department was concerned about his fitness, given the nature and extent of his misconduct and convictions, and pointed to his unblemished professional record as evidence that his personal problems did not interfere with his professional life. McNeill testified he was committed to improving his personal situation, and the finalization of community property issues in January 2009 would help him in putting his difficult martial situation to rest.

12. McNeill submitted several letters in support. The first, from Attorney C. Patrick Callahan, stated that McNeill was helpful to Callahan's family and to his clients professionally, that McNeill served on the Coronado Schools Foundation, and that McNeill had shown a deep commitment and involvement in the local community. The second, from Dr. Peter McDade, stated that McNeill's condition has continued to stabilize since his convictions, that McNeill never posed a risk of physical harm to anyone, and that McNeill's judgment was never negatively impacted by drugs or alcohol. The third, from Linda Griffin, MFT, stated that McNeill had completed 48 of the 52 domestic violence classes and that he "participates appropriately in the sessions."

Application of the Department's Substantial Relationship Criteria

13. The Department developed regulatory criteria to evaluate whether a license should be suspended or revoked on the basis of a conviction or other act.³ In this regard, subdivision (a) of that regulation provides, in part, that a crime or act "shall be deemed to be substantially related to the qualifications, functions or duties of a licensee of the Department" if it involves:

"(8) Doing of any unlawful act with the intent of conferring a financial or economic benefit upon the perpetrator or with the intent or threat of doing substantial injury to the person or property of another.

(9) Contempt of court or willful failure to comply with a court order.

(10) Conduct which demonstrates a pattern of repeated and willful disregard of law. . . ."

³ California Code of Regulations, title 10, section 2910.

Subdivision (c) of that regulation provides:

“If the crime or act is substantially related to the qualifications, functions or duties of a licensee of the department, the context in which the crime or acts were committed shall go only to the question of the weight to be accorded to the crime or acts in considering the action to be taken with respect to the applicant or licensee.”

14. McNeill’s convictions are substantially related to the qualifications, functions and duties of a real estate licensee under the Department’s regulatory criteria in that the convictions involved the threat of injury to another, willful failure to comply with court order, and conduct demonstrated a pattern of repeated and willful disregard of the law.

15. The context in which the convictions occurred – McNeill’s response to an extremely difficult marital situation – goes only to the weight to be given to the convictions in assessing a sanction, not to the existence of a substantial relationship.

Application of the Department’s Criteria of Rehabilitation

16. The Department developed criteria to evaluate the rehabilitation of a real estate licensee facing a disciplinary action as a result of a criminal conviction.⁴

In this matter, less than two years has passed since McNeill’s convictions; McNeill is making restitution, but he has not made full restitution to Suzanne; McNeill has violated probation at least twice; the conviction has not been expunged; no business practice was responsible for the crimes, so no correction of any business practices was indicated; McNeill’s family life is becoming more stable than it was; McNeill established stronger relationships in his parish following his convictions; McNeill is attempting to widen his marketing area; McNeill expressed a change in attitude from that which existed at the time of the acts in question, as evidenced by his testimony and letters from professionals within the community. McNeill has not suffered any felony or misdemeanor convictions since January 2007 although, as previously stated, he did violate the terms of his probation.

Evaluation

17. Real estate licensees are involved in a very competitive business that often includes stressful interactions and negotiations with other licensees and members of the public. Significant amounts of money may be at stake. Licensees must adhere to professional standards of practice and must comply with the Real Estate Law and directives from the Commissioner and the Department.

Disciplinary procedures are designed to protect the public not only from conniving real estate licensees, but also from the uninformed, negligent or unknowledgeable licensee. The regulations are designed to ensure that licensees are not only honest and truthful, but that

⁴ California Code of Regulations, title 10, section 2912.

the licensees will possess the integrity and judgment required to handle their substantial fiduciary responsibilities.

Within this context, it is not irrational or unreasonable for Department to apply special scrutiny to a licensee who was convicted of a crime involving the deliberate and unjustified injury to another, to a licensee who knowingly violated a lawful court order, or to a licensee whose behavior evidenced a pattern of misconduct.

McNeill reacted very poorly to an extremely difficult personal situation, and his ongoing inappropriate and frankly illegal responses raised questions about his stability, judgment, and willingness to obey the law. McNeill's convictions were substantially related to the qualifications, functions, and duties of a real estate licensee. The context within which the convictions occurred necessitates some measure of disciplinary action be imposed to protect the public. Given McNeill's unblemished professional record, an outright revocation of his real estate license is not required, and McNeill should be permitted to continue in the real estate profession under close supervision until he gains further distance from his problems and establishes further rehabilitation. McNeill will be able to petition the Department for reinstatement of his broker's license in the future when his current situation is well behind him and he has proven that his personal life will not interfere with his professional obligations.

LEGAL CONCLUSIONS

Purpose of Disciplinary Action

1. The object of an administrative proceeding aimed at revoking a real estate license is to protect the public. (*Small v. Smith* (1971) 16 Cal.App.3d 450, 457.)

Burden and Standard of Proof

2. In an action seeking to impose discipline against the holder of a real estate license, the burden of proof is on complainant to establish the charging allegations by clear and convincing evidence. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 857.) Guilt must be established to a reasonable certainty. Guilt cannot be based on surmise or conjecture, suspicion or theoretical conclusions, or upon uncorroborated hearsay. (*Small v. Smith* (1971) 16 Cal.App.3d 450, 457.)

Applicable Statutes

3. Business and Professions Code section 490 provides in part:

"A board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued. A

conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere”

4. Business and Professions Code section 10177 provides in part:

“The commissioner may suspend or revoke the license of a real estate licensee . . . who has done any of the following . . .

. . .

(b) Entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony, or a crime substantially related to the qualifications, functions, or duties of a real estate licensee, and the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal, irrespective of an order granting probation following that conviction, suspending the imposition of sentence, or of a subsequent order under Section 1203.4 of the Penal Code allowing that licensee to withdraw his or her plea of guilty and to enter a plea of not guilty, or dismissing the accusation or information”

Substantial Relationship

5. Conviction alone will not support a denial of a license unless the crime substantially relates to the qualifications, functions, or duties of the business or profession in question. (*Harrington v. Department of Real Estate* (1989) 214 Cal.App.3d 394, 402.)

6. Where the Legislature delegates to an administrative agency the responsibility to implement a statutory scheme through rules and regulations, the courts will interfere only when the agency has clearly overstepped its statutory authority or violated a constitutional mandate (*Ford Dealers Association v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 356), and deference should be given to an administrative agency’s interpretation of a statute or regulation involving its area of expertise. (*Communities for a Better Environment v. State Water Resources Control Board* (2005) 132 Cal.App.4th 1313, 1330.)

7. California Code of Regulations, title 10, section 2910 sets forth the Department’s substantial relationship criteria. McNeill’s January 2007 convictions of false imprisonment and contempt of court are substantially related to the qualifications, functions, and duties of a real estate licensee. (Factual Findings 3-7 and 13-15.)

Rehabilitation

8. Rehabilitation is a state of mind and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved reformation and regeneration. (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) The evidentiary significance of an applicant’s 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.)

9. The Department's criteria of rehabilitation are set forth in California Code of Regulations, title 10, section 2912. The factual matters related to these criteria are set forth in Factual Findings 8-12 and 16.

Cause Exists to Impose Discipline

10. Cause exists to impose discipline against McNeill's real estate broker's license under Business and Professions Code sections 490 and 10177, subdivision (b). In January 2007, McNeill was convicted of false imprisonment, a felony, and willful violation of a court order, a misdemeanor, each crime being substantially related to the qualifications, functions and duties of a real estate licensee under the Department's regulations. The convictions occurred within the last two years. McNeill remains on probation for those convictions. McNeill demonstrated some appreciation for his misconduct and appears to be making an effort to prevent similar misconduct from reoccurring. McNeill has been licensed by the Department for more than 20 years; no prior disciplinary action has been taken against his license. Under all the circumstances, it would not be contrary to the public interest to revoke McNeill's real estate broker's license, and to permit him to hold a restricted real estate salesperson's license on condition that his professional activities remain under the close supervision of his employing broker.

This conclusion is based on all Factual Findings and on all Legal Conclusions.

ORDER

All licenses and licensing rights of respondent Frank J. McNeill under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license shall be issued to respondent under Business and Professions Code section 10156.5 if respondent makes application therefor and pays to the Department of Real Estate the appropriate fee for that restricted license within 90 days from the effective date of this Decision. The restricted license issued to respondent shall be subject to Business and Professions Code section 10156.7 and shall be further subject to the to the following limitations, conditions and restrictions imposed under 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 any 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 notify the Commissioner of Real Estate, in writing, of any arrest for any crime or of any alleged violation of probation within seventy-two (72) hours of such an arrest or allegation. Respondent's written notice to the Commissioner shall include the date of the alleged crime or violation, the nature of the alleged crime or violation, and the name, address, and telephone number of the law enforcement agency or court making the arrest or alleging a violation of probation.

4. 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.

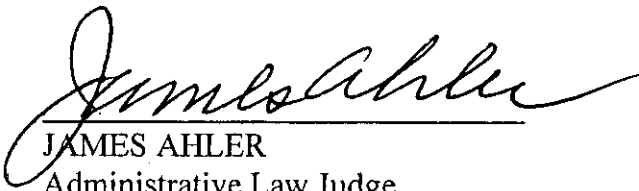
5. Respondent shall submit with any application for license under an employing broker, or any application for transfer to a new employing broker, a statement signed by respondent's prospective employing real estate broker on a form approved by the Department of Real Estate which shall certify:

(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.

6. 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 respondent presents such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

DATED: 1/20/09.


JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings

1 TRULY SUGHRUE, Counsel
2 State Bar No. 223266
3 Department of Real Estate
4 P.O. Box 187007
5 Sacramento, CA 95818-7007
6 Telephone: (916) 227-0781

FILED
OCT 23 2007

DEPARTMENT OF REAL ESTATE

By Anne Shawver

8 BEFORE THE DEPARTMENT OF REAL ESTATE
9 STATE OF CALIFORNIA

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12 In the Matter of the Accusation of)
13 FRANK MCNEILL,) No. H-3731 SD
14 Respondent.) ACCUSATION

15 The Complainant, JOSEPH AIU, a Deputy Real Estate
16 Commissioner of the State of California, for cause of Accusation
17 against FRANK MCNEILL (hereinafter "Respondent"), is informed and
18 alleges as follows:
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21 The Complainant, JOSEPH AIU, a Deputy Real Estate
22 Commissioner of the State of California, makes this Accusation in
23 his official capacity.

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II

Respondent is presently licensed and/or has license rights under the Real Estate Law, Part 1 of Division 4 of the Business and Professions Code (hereinafter "Code"), as a real estate broker.

III

On or about January 22, 2007, in the Superior Court, County of San Diego, Respondent was convicted of a violation of Section 273.6 of the California Penal Code (Disobeying a Court Order), a misdemeanor, and a violation of Sections 236/237(A) of the California Penal Code (False Imprisonment), a felony. Both crimes involve moral turpitude which bears a substantial relationship under Section 2910, Title 10, California Code of Regulations, to the qualifications, functions, or duties of a real estate licensee.

IV

The facts alleged above constitute cause under Sections 490 and 10177(b) of the Code for suspension or revocation of all licenses and license rights of Respondent under the Real Estate Law.

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WHEREFORE, Complainant prays that a hearing be conducted on the allegations of this Accusation and that upon proof thereof, a decision be rendered imposing disciplinary action against all licenses and license rights of Respondent under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code), and for such other and further relief as may be proper under the provisions of law.

JOSEPH AIU
Deputy Real Estate Commissioner

Dated at San Diego, California,
this 19 day of February, 2007