

FILED

MAR 26 2015

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

BUREAU OF REAL ESTATE

By *Stevan...*

In the Matter of the Accusation of

FRANKLIN WILLIAM BONK,

Respondent.

) CalBRE No. H-39427 LA

) OAH No. 2014080714

DECISION

The Proposed Decision dated March 5, 2015, 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.

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 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 APR 16 2015

IT IS SO ORDERED

3/24/2015

REAL ESTATE COMMISSIONER

Wayne S. Bell
WAYNE S. BELL

BEFORE THE
BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation
Against:

FRANKLIN WILLIAM BONK,
Real Estate Salesperson License No.
S01385325

Respondent.

Case No. H-39427 LA

OAH No. 2014080714

PROPOSED DECISION

This matter came on regularly for hearing before Eileen Cohn, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on January 22, 2015, at Los Angeles, California.

Cheryl Keily and Judith Vason, Counsel for the Bureau of Real Estate (the Bureau),¹ represented complainant Maria Suarez, Deputy Real Estate Commissioner of the State of California (complainant).

Franklin William Bonk (respondent) represented himself.

Oral and documentary evidence was received, and at the conclusion of the hearing, based upon the stipulation of the parties, the record remained open until February 5, 2015 for receipt of respondent's character reference letters and complainant's written objections to respondent's letters. Respondent's letters and complainant's objections were received on January 29, 2015. Respondent's letters were admitted as Exhibit K and as administrative hearsay. Complainant's objections were admitted as Exhibit L, sustained on the ground of administrative hearsay and overruled on the ground of relevancy. On February 5, 2015, the record was closed and the matter submitted for decision.

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¹ Effective July 1, 2013, the Department of Real Estate became the Bureau of Real Estate as part of the Department of Consumer Affairs.

FINDINGS OF FACT

1. The Bureau issued s real estate salesperson license number S01385325 to respondent on May 28, 2003. Respondent's license was last renewed on January 30, 2012 and expires on January 29, 2016.

2. The complainant, in her official capacity, filed an accusation in the above-referenced matter, citing respondent's conviction and his failure to disclose his conviction. After the Bureau granted respondent more time to file his Notice of Defense, respondent timely filed a request for hearing, and this action ensued.

Respondent's Motion to Continue

3. At hearing the respondent requested a continuance in order to complete the process of getting his criminal conviction felony charge reduced to a misdemeanor or dismissed and his criminal conviction expunged. Complainant opposed the motion on the ground that the expungement of respondent's criminal record was only one factor in considering his rehabilitation and discipline and, as such, not good cause for delaying the hearing.

4. The ALJ considered the parties' oral representations, reviewed complainant's jurisdictional exhibits and denied respondent's motion to continue after determining that respondent had not provided good cause to continue the hearing. (Gov. Code, § 11524.) The ALJ also denied respondent's motion for the reason that the time period required to complete the court process for dismissal and/or expungement was uncertain, as was the outcome.

Respondent's Criminal Conviction

5. On April 16, 2013, respondent was convicted in the Superior Court of the State of California, County of Los Angeles, in Case No. GAO84274, upon a plea of nolo contendere, of violating, Penal Code section 459, second degree burglary, a felony, and Penal Code section 242, battery, a misdemeanor. Respondent was represented by counsel.

6. The facts and circumstances surrounding the convictions occurred on September 18, 2011, after respondent accompanied his wife to the Nordstrom's Rack, tried on shoes, and wearing one shoe and carrying the other in its shoe box, pursued his wife down a store escalator during a heated argument. Respondent was also carrying in his pocket what he thought was an ashtray given to him by his friend, which Nordstrom's security described as a security tag remover. Unbeknownst to respondent he exited the store. As he continued to argue with his wife, two security men stopped him. Not recognizing the men as store security, respondent struggled, was tackled to the ground, and handcuffed. Respondent and store security were injured. The police arrested respondent after he was discharged from the hospital. Respondent insisted that he did not start the physical altercation with store security. Nordstrom' security guards agreed with respondent. At respondent's preliminary hearing on March 13, 2012, his wife contradicted Nordstrom's security guards, testifying that

respondent started the struggle. Based upon his wife's testimony, respondent was held to answer the charges, and the matter proceeded to arraignment, where, respondent entered into a plea agreement to amended charges of felony robbery and misdemeanor battery.

7. At hearing, respondent testified sincerely and candidly about his emotional state at the time of the incident. He was having marital difficulties and he pursued his wife down the escalator because he suspected that she was speaking on the phone with her boyfriend. Looking back, his physical altercation with store security shocked him as it did not comport with his background and history. Respondent's testimony at hearing was consistent with his statement to the booking officer at the jail. Respondent's testimony concerning his marital difficulties was confirmed by his court filings for dissolution of his marriage. Respondent served his wife with a petition for marriage dissolution and custody, a few months after the incident, on March 26, 2012, the day before his arraignment. His divorce was eventually finalized and he shares custody of his two children equally with his former wife.

8. The Court placed respondent on probation for 36 months, which required him, among other things, to stay away from Nordstrom's stores, and participate in a six-month theft counseling program and a 30-day graffiti removal community service program. Due to the battery conviction, the Court ordered him to serve 90 days in Los Angeles County jail, with three days credit for time actually served, and three days credit for good time/work time. The court imposed total fees of \$80 dollars, including a security assessment fee in the amount of \$40 dollars, a criminal conviction assessment in the amount of \$30 dollars and a crime prevention fine in the amount of \$10 dollars. The Court ordered respondent to pay a restitution fine in the amount of \$240 dollars.

Respondent's Renewal Application

9. On September 20, 2011, the District Attorney of Los Angeles County, State of California, filed a criminal complaint against respondent with the Superior Court of the State of California, County of Los Angeles.

10. On November 3, 2011, the Bureau sent a letter to the Glendale police department asking for certified records of the arrest and other information.. On November 16, 2011 the police department provided the Bureau with the arrest report and the name of the court.

11. On January 30, 2012, respondent filed a salesperson license renewal application where, he certified under penalty of perjury, that his answers were true and correct. Respondent answered "No" to question 5, which asked "[a]re there criminal charges pending against you at this time?" Respondent was assured by his attorney that the criminal charges would be dropped based on circumstances, most notably, the aggression of store security. Based upon his attorney's advice, respondent reasoned that the charges would

disappear and he did not have to report them. Later in his testimony, respondent conceded that he was untruthful and that his failure to disclose was contrary to the personal integrity required of a real estate salesperson.

12. The Bureau continued its investigation of respondent and determined that criminal charges were pending at the time respondent signed his renewal application..

13. On June 5, 2012, after respondent spoke with the Bureau investigator, he supplemented his salesperson license renewal application of January 30, 2012, with a conviction detail report, detailing the superior court case, the charges, the conviction, the probation terms, fines, assessment, restitution and community service. Respondent's written explanation for the conviction was consistent with his statement to police and his testimony at hearing.

Mitigation / Rehabilitation

14. Respondent was released early from his jail term, fulfilled the terms of his probation, paid all required restitution, fines and assessments, and on October 13, 2014, about 18 months after it began, the Court terminated his probation. In addition to the Court-ordered restitution, respondent paid Nordstrom's an additional sum in the range of \$500 dollars, even though the store recovered the shoes. At the time of hearing, respondent had initiated the process to expunge his conviction.

15. Respondent provided credible and convincing testimony that his robbery conviction was a one-time incident, extremely divergent from his character, and would never be repeated. Respondent demonstrated at the hearing through his demeanor and testimony that he was committed to the real estate profession, and willing to abide by any restrictions the Board may impose on him as a condition of his license.

16. After his arrest, respondent participated in eight hours of individual therapy with a marriage and family therapist to address his personal issues. He also began attending group counseling with the same family therapist at his church once a week, for two hours, where group members discuss their week, and their progress with their careers and personal life. Respondent still participates in weekly group counseling at his church.

17. Respondent's has practiced as a real estate salesperson and pursued other business endeavors without incident. He represented buyers and sellers in single family and four-unit property purchases. He also managed and received income from multi-family real estate investment property. After his release from jail, to support his family, respondent also received income from assisting his brother, a real estate agent, with clean up, staging properties for sale, and transporting realtors to open houses.

18. Respondent demonstrated that he was committed to his family and community, and that he was advancing his own education Respondent was actively involved with his two children, sharing custody equally with his former wife. He accommodated his

children's educational needs, by moving to a community with a superior school district. His flexible work schedule afforded him the opportunity to take them to school. He participated in his son's boy scout troupe, by assisting the scout master with fundraisers and outreach programs. Respondent enrolled in obtaining credits toward a bachelor of arts degree.

19. Respondent obtained several letters of support from family, long-time friends, and clients, some of which were prepared in anticipation of his sentencing in 2012, and some in preparation for this hearing. The letters confirmed respondent's testimony of his rehabilitation and the uncharacteristic nature of his conviction as contrary to his personal and professional ethics and steadfast commitment to his family and community. An attorney and close family friend for "more than 30 years" wrote of respondent's stable family background, lack of criminal record, and "overwhelming sense of remorse." (Exhibit D.) A long-time friend, law school graduate and staff attorney for the United States Court of Appeals for the Eighth Circuit, who also knew respondent for 30 years wrote that respondent was "hard-working, trustworthy, non-violent and honest." (Exhibit C.) The staff attorney acknowledged respondent's challenges with his failed marriage and business. Respondent's therapist wrote in June 2013 that respondent was a "conscientious individual" who would not repeat his criminal conduct. (Exhibit E.) In January 2015 respondent's brother, a successful real estate agent, wrote of respondent's personal stress at the time of the criminal conviction, his work ethic and trustworthiness in providing assistance with cleaning and providing security for residences being sold. (Exhibit K.) The scout master of his sons' boy scout troupe, a reservist in the United States Marine Corp, wrote of his four-year relationship with respondent, respondent's dedication to scouting, as demonstrated by respondent's role as an assistant scout master, his fund raising and organization skills, and his willingness to drive scouts on road trips. (Exhibit K.) A tax preparer, notary, who also works as respondent's personal assistant, wrote of respondent's dedication to his sons, respondent's kindness and his reliability as a friend. (Exhibit B.)

Costs of Prosecution

20. Complainant seeks recovery of \$1077.90 in costs for prosecution and investigation of this matter. Bureau attorney Cheryl Keily submitted a declaration and supporting detail of legal fees incurred in the prosecution of this case in the amount of \$534 for six hours of legal services performed, at a rate of \$89 an hour, between November 17, 2013, and January 20, 2015. Investigative costs were supported by a declaration of the supervisor of the Bureau's special investigators and supporting detail of investigative charges in the amount of \$543.90. These charges were reasonable.

LEGAL CONCLUSIONS

Conviction of a Substantially Related Crime

1. Complainant's first basis for revoking respondent's real estate salespersons license was his conviction for felony robbery and battery misdemeanor. Criminal

convictions are grounds for revoking a real estate license. Business and Professions Code section 475, subdivision (a) (2), provides that “notwithstanding any other provisions of this code, the provisions of this division shall govern the revocation of a license on the grounds of . . . conviction of a crime.” Business and Professions Code section 480, subdivision (a) (1), defines conviction of a crime as a plea or verdict of guilty or a conviction following a plea of nolo contendere.

2. Business and Professions Code section 10177, subdivision (b), provides that the Bureau may revoke a license of a licensee who has been convicted of, a felony, or a crime substantially related to the qualifications, functions, or duties of a real estate licensee.

3. Under California Code of Regulations, title 10, section 2910, subdivision (a), in considering whether a license should be suspended or revoked, a crime shall be deemed “substantially related to the qualifications, functions, or duties of the licensee of the Bureau within the meaning of Sections 480 and 490 of the [Business and Professions] Code” if it involves: subdivision (a)(1), fraudulently taking, obtaining, appropriating or retaining of funds or property belonging to another, or subdivision (a)(8) doing any act with the intent or threat of doing substantial injury to the person or property of another.

4. Cause exists to revoke respondent’s real estate salesperson license for his conviction of robbery, a felony as set forth in Legal Conclusions 1-2. Cause also exists to revoke respondent’s real estate salesperson license pursuant Legal Conclusion 3 because the robbery and battery convictions are substantially related to the qualifications, functions, or duties of a real estate licensee, as set forth in Factual Findings 5-8.

Failure to Disclose Pending Criminal Charge

5. Failure to disclose a conviction on a license application is a basis to deny the application, under Business and Professions Code sections 475, subdivision (a)(1) and 480, subdivision (c), where the applicant has “knowingly made a false statement of fact required to be revealed in the application for the license,” and under Business and Professions Code section 10177, subdivision (a), where the applicant has attempted to procure a real estate license “by making a material misstatement of fact in an application for a real estate license. . . .”

6. Cause exists to revoke respondent’s real estate salesperson license for his failure to disclose his pending criminal charges based upon Factual Findings 9-13 because respondent knowingly made a false statement of fact or attempted to procure a real estate license by making a material misstatement of fact. At the time respondent submitted his estate license application, he knew he had been arrested and charged with crimes as evidenced by the criminal complaint filed with the Superior Court. Respondent’s anticipation that the charges would be dropped, based upon his attorney’s advice, was understandable given that the case was not on placed on the court docket until March 13, 2012, six weeks after he filed the application on January 30, 2012. Respondent fully cooperated with Bureau investigators and provided them with accurate information about his

arrest and conviction when they contacted him in May 2012. He also amended his application with the required information about his conviction in June 2012. Nevertheless, the renewal application clearly and unambiguously asked respondent to disclose pending criminal charges, and, notwithstanding his optimism that charges would be dropped, at the time of his application respondent knew that charges were pending. The Bureau is entitled to rely upon respondent's disclosure, not its investigation, to obtain true and accurate information about its licensees.

Rehabilitation

7. Once grounds for discipline of the license have been established, the next consideration is whether respondent was rehabilitated from his misconduct. Respondent bears the particular burden of establishing rehabilitation sufficient to compel his licensure. (*In the Matter of Brown* (1993) 2 Cal. State Bar Ct. Rptr. 309.) Under Business and Professions Code section 482, subdivision (b), and California Code of Regulations, title 10, section 2912, the Bureau adopted criteria for evaluating the rehabilitation of a licensee who has been convicted of a crime, or failed as required to disclose material information on a real estate license application. The relevant criteria are summarized as follows (using the subdivision letters from the regulation for reference):

- a. The passage of not less than two years from the most recent criminal conviction, with a longer period if there is a history of such acts or conduct substantially related to the qualifications, functions or duties of a licensee;
- b. Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the licensee;
- c. Expungement of criminal convictions resulting from immoral or antisocial acts;
- e. Successful completion or early discharge from probation or parole;
- g. Payment of any fine or other monetary penalty imposed in connection with the criminal conviction;
- j. Stability of family life and fulfillment of parental and familial responsibilities subsequent to the 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 of applicant;
2. Evidence from family members, friends or other persons familiar with the licensee's previous conduct and with subsequent attitudes and behavioral patterns;
4. Evidence from psychiatrists, clinical psychologists, sociologists or other persons competent to testify with regard to neuropsychiatric or emotional disturbance.
5. Absence of subsequent felony or misdemeanor convictions that are reflective of an inability to conform to societal rules when considered in light of the conduct in question.

8. Rehabilitation is a state of mind and the law looks with favor upon one who has achieved reformation and regeneration with the reward of the opportunity to serve. (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) 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.) 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) 50 Cal.3d 1061, 1070.) 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.)

9. It is not necessary for respondent to admit the specific acts of which he was convicted. Such admissions are often considered as an element of rehabilitation. However, the law recognizes that a party need not make a false act of contrition regarding alleged past conduct in order to obtain a professional license, if the person firmly believes in his innocence. (See, *Hall v. Committee of State Bar Examiners* (1979) 25 Cal. 3rd 730, 744-45.) Here, respondent was steadfast in his claim that he did not intend to shoplift shoes, or assault store security. Nevertheless, he was contrite and sincere in accepting responsibility for the circumstances of his conviction, especially his physical altercation with store security.

10. When determining whether a license should be revoked or restricted, the Bureau places great emphasis on its licensees interacting with members of the public with honesty and integrity. In *Golde v. Fox* (1979) 98 Cal.App.3d 167, the court stated:

The crime here, of course, does not relate to the technical or mechanical qualifications of a real estate licensee, but there is more to being a licensed professional than mere knowledge and ability. Honesty and integrity are deeply and daily involved in various aspects of the practice.

[¶] . . . [¶]

A real estate broker often acts in a confidential and fiduciary capacity for his clientele. The term "honesty" as used in section 10152 is to be given the

broadest possible meaning. (Citation.) The real estate profession has, over a period of years, excluded unfit persons and as a result thereof an appreciable amount of public trust and confidence has been built up. The public exposing themselves to a real estate licensee has reason to believe that the licensee must have demonstrated a degree of honesty and integrity in order to have obtained such a license. (*Id.* at 176-178.)

11. Respondent satisfied critical elements of the Bureau's Criteria for Rehabilitation noted above and Factual Findings 14-19. Respondent is a few months shy of meeting the requirements of subdivision (a) in that his conviction is under two years old. He had not expunged his conviction pursuant to subdivision (c). Respondent satisfied other important indicia of rehabilitation, including subdivision (b), restitution, subdivision (e), completion of probation, and subdivision (g), payment of all fines and restitution. Respondent further satisfied the requirements of subdivision (j), in that respondent has steadfastly worked to stabilize family life for his children after his divorce and actively participated in their life and activities, including moving his residence to a location where his children could access a good education. Respondent satisfied the requirements of subdivision (k) by enrolling in coursework with the goal of obtaining a bachelor of arts degree. Respondent satisfied the requirements of subdivision (l) through his active involvement with his children in boy scouts and church. He also satisfied the requirements of subdivision (m) by the absence of subsequent convictions and his clear and unequivocal testimony and supporting references from his therapist, close family, friends and associates, who knew him and have observed him, that his conviction was inconsistent with his historical conduct. Respondent did not fulfill the requirements of subdivisions (a) and (c) the other criteria were not applicable.

12. Respondent had not met his burden of proof that he was rehabilitated from his conviction and from his failure to disclose his criminal charges to be licensed as a real estate salesperson. Respondent convincingly demonstrated that his conviction was the result of unique and unfortunate life events and that the conviction was an isolated instance of criminal conduct that would not be repeated, as set forth in Factual Findings 6, 7, 14-19. Respondent also demonstrated that he made great strides toward his rehabilitation from his conviction as set forth in Legal Conclusion 11 and Factual Findings 14-19. A restricted license would be warranted if respondent's conviction were the only cause for the Bureau's request to revoke his license due to the circumstances of the conviction, the short time period from his conviction, and the fact that the conviction had not yet been expunged. Nevertheless, respondent's decision to omit pending criminal charges from his application was inexcusable and conflicted with a real estate salesperson's fiduciary duty to the public as set forth in Legal Conclusions 5-6 and 10. Respondent's intentional submission of false information to the Bureau under penalty of perjury presents a serious risk to the public. Real estate transactions require numerous documents to be reviewed and signed and respondent's omission of required information in his own application calls into question his ability to safeguard buyers and sellers of real estate. As such, respondent's license is revoked.

Reimbursement of the Reasonable Costs of Investigation and Enforcement

13. Business and Professions Code section 125.3 provides that upon the request of the Board, the ALJ may direct a licensee found to have committed violations to pay the reasonable costs of investigation and enforcement. *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, held that the imposition of costs for investigation and enforcement under a cost-recovery regulation did not violate due process in a case involving the discipline of a licensed chiropractor. But, the California Supreme Court held that it was incumbent upon the State Board of Chiropractic Examiners to exercise its discretion to reduce or eliminate cost awards in a manner that ensured that the application of the regulation did not “deter chiropractors with potentially meritorious claims or defenses from exercising their right to a hearing.” (*Id.* at p. 49.) The Supreme Court set forth four factors that the licensing agency was required to consider in deciding whether to reduce or eliminate costs: (1) whether the licensee used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed; (2) whether the licensee had a “subjective” good faith belief in the merits of his position; (3) whether the licensee raised a “colorable challenge” to the proposed discipline; and (4) whether the licensee had the financial ability to make payments. (*Id.* at p. 45.) Since the regulation and Business and Professions Code section 125.3 have substantially the same language and seek the same sort of cost recovery, it is reasonable to extend the reasoning in *Zuckerman* to Business and Professions Code section 125.3 to avoid constitutional pitfalls.

14. The *Zukerman* criteria were applied. Directing respondent to pay the Board the full costs for its enforcement costs is reasonable. Respondent utilized the hearing process in good faith, believed in his position, and raised a “colorable,” although deficient, challenge to the proposed discipline. Most notably, the evidence demonstrated that respondent had resources available to pay costs through his management of his own properties and working for his brother to clean and secure homes listed for sale. The Bureau established that it incurred reasonable costs of \$1077.90 in this matter under the provisions of Business and Professions Code section 123.5, as set forth in Factual Finding 20. In light of the *Zuckerman* factors respondent shall pay the Board’s cost in the amount of \$ 1077.90 on a payment plan when and if respondent applies for reinstatement.

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ORDER

Real estate salesperson license number S01385325 of respondent Franklin Bonk is revoked. Respondent Franklin William Bonk shall pay the Bureau the reasonable costs of prosecution and enforcement in the amount of \$1077.90, if the respondent applies for reinstatement.

Date: March 5, 2015



EILEEN COHN

Administrative Law Judge

Office of Administrative Hearings

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