

FILED

MAY - 7 2020

BEFORE THE DEPARTMENT OF REAL ESTATE DEPT. OF REAL ESTATE

STATE OF CALIFORNIA

By [Signature]

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In the Matter of the Accusation of:)	DRE No. H-41466 LA
)	
JONATHAN EDWARD BABIRACKI,)	OAH No. 2019090765
)	
)	
<u>Respondent.</u>)	

DECISION

The Proposed Decision dated March 23, 2020, 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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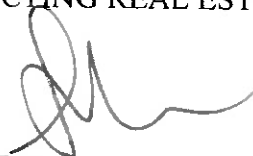
The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock noon on June 5, 2020.

IT IS SO ORDERED

5/4/20

SANDRA KNAU
ACTING REAL ESTATE COMMISSIONER



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

In the Matter of the Accusation against:

JONATHAN EDWARD BABIRACKI, Respondent

Case No. H-41466 LA

OAH No. 2019090765

PROPOSED DECISION

Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on February 20, 2020, in Los Angeles, California.

Lisete Garcia, Counsel, Department of Real Estate (Department), represented Complainant Maria Suarez. Respondent Jonathan Edward Babiracki was present and represented himself.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on February 20, 2020. The ALJ hereby makes the following factual findings, legal conclusions, and order.

FACTUAL FINDINGS

Jurisdictional Matters

1. Complainant filed the Accusation against Respondent and she maintained this proceeding while acting in her official capacity as a Supervising Special Investigator for the Department.

2. On April 6, 2012, the Department licensed Respondent to act as a real estate salesperson. He holds license number 01912297, which is set to expire on October 17, 2020.

3. After he was served with the Accusation, Respondent filed a Notice of Defense, contesting the matter and seeking a hearing. All jurisdictional requirements have been met.

Respondent's Criminal Conviction

4. (A) On July 24, 2017, in the Superior Court of California, County of Los Angeles, Respondent was convicted of making criminal threats in violation of Penal Code section 422, subdivision (a). The plea was based on Respondent's plea of no contest, and he was thereby convicted of a misdemeanor.

(B) Respondent was convicted of a crime that is substantially related to the duties, qualifications, and functions of a real estate salesperson.

5. The court placed Respondent on summary probation for three years, on various terms and conditions. Among the probation terms was a requirement that Respondent perform 10 days of community service. He was ordered to stay away from and not have contact with the victim of the crime and some others related to that

person. That protective order expires when his probation is complete. Respondent was also ordered to pay fines, fees, penalties and costs totaling \$410. Other terms, standard to probation grants, were imposed.

6. The facts and circumstances of the crime are that Respondent and his mother started a business in 2016, but had a falling out. Respondent believed his mother had usurped the business opportunity and had taken his share of the profits and inventory. In the months following the split, he made threatening statements.¹

7. At the time of the hearing, Respondent was current with his probation obligations, having paid his fines and completed his 10 days of community service by picking up trash. His probation is due to terminate in August 2020.

¹ This finding is based on the conviction, and not necessarily Respondent's testimony or the police report. The police report, exhibit 4, was received under the authority of *Lake v. Reed* (1997) 16 Cal.4th 448, which holds that a police report, typically a hearsay document, may in some circumstances provide direct evidence to establish a fact, and the balance of the report may provide "administrative hearsay," that sort of hearsay evidence that can explain or support direct evidence. (Gov. Code, § 11513, subd. (d).) To provide direct evidence, the hearsay statements contained in the report must meet an exception to the hearsay rule. While Respondent's statements to an investigator are allowed as an exception to the hearsay rule, the statements to the investigator from Respondent's mother do not. Respondent's statements tended to deny wrongdoing, and his mother's statements are administrative hearsay. Hence a detailed finding of what transpired is not made here.

Respondent's Failure to Notify the Department of His Criminal Conviction

8. Under the Real Estate Law, Respondent was obligated to notify the Department's predecessor, the Bureau of Real Estate, of his conviction.² He had 30 days from the conviction to do so, in writing. Respondent failed to give the required written notice to the Department. The record indicates that Respondent was ignorant of his obligation.

Other Matters

9. Respondent testified that he has not had contact with his mother and the rest of his family since the underlying incidents occurred in 2016. He stated that there have been many conflicts in his family in the past, and it is plain he is estranged from his mother. As to the business dispute that led to the misconduct, Respondent acknowledged that he should have just walked away from the deal.

10. Respondent now lives with his girlfriend in Orange County, some distance from the northern part of Los Angeles County where his mother resides, minimizing a chance interaction with his mother or the rest of his family.

11. Respondent has no prior discipline record. He asserted that he has had no problems in his professional life, and there is no evidence of such.

² At the time he was convicted, the Department's activities were carried out by the Bureau of Real Estate, then an agency in the Department of Consumer Affairs. The Department resumed its activities on July 1, 2018.

12. The Department has incurred costs in the investigation and prosecution of this matter, in the amount of \$1,522.25. That amount is reasonable on its face.

LEGAL CONCLUSIONS

1. The Department is vested with jurisdiction to proceed in this matter, based on Factual Findings 1 through 3, and Business and Professions Code sections 10100 and 10103.³

2. In this case Complainant must prove her case by clear and convincing evidence, to a reasonable certainty. (*Realty Projects, Inc. v. Smith* (1973) 32 Cal.App.3d 204.) Complainant has carried her burden of proof by the applicable standard.

3. Respondent's conviction is substantially related to the duties, qualifications, and functions of a real estate salesperson based on California Code of Regulations (CCR), title 10, section 2910, subdivision (a)(8),⁴ and Factual Findings 4 through 6. That is, Respondent did an unlawful act with the intent or threat of injuring another.

4. Cause exists to discipline Respondent's license pursuant to Code sections 490 and 10177, subdivision (b), based on Legal Conclusions 1 through 3, and Factual Findings 1 through 6, because he was convicted of a crime—making criminal threats—

³ All further statutory citations shall be to the Business and Professions Code.

⁴ All citations to the CCR are to title 10 thereof.

that is substantially related to the duties, functions, and qualifications of a real estate salesperson.

5. Cause exists to discipline Respondent's license pursuant to Code sections 10186.2, subdivision (b), and 10177, because he failed to disclose, in writing, his conviction within 30 days after it occurred. This Conclusion is based on Factual Findings 4 and 8.

6. (A) The Department is entitled to recover its costs of investigation and prosecution in this matter, pursuant to section 10106 This Conclusion is based on Legal Conclusions 4 and 5. The reasonable amount of costs is \$1,522.25, absent any other considerations.

(B) The reasoning in the case of *Zuckerman v. State Board of Chiropractic Examiners*, (2002) 29 Cal.4th 32, must be considered when assessing costs. That case pertained to a cost regulation with language similar to section 10106, as well as to section 125.3. There the Supreme Court held that an agency must exercise its discretion to reduce or eliminate cost awards in a manner which will ensure that the costs statute does not deter licensees with potentially meritorious claims or defenses from exercising their right to a hearing. The court stated: "Thus, the [licensing agency] must not assess the full costs of investigation and prosecution when to do so will unfairly penalize a [licensee] who has committed some misconduct, but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed." (*Id.*, at p. 45.)

(C) Under *Zuckerman*, the agency must also consider the licensee's subjective good faith belief in the merits of his or her position and whether the

licensee has raised a colorable challenge to the proposed discipline. The Court further required that the agency must determine that the licensee will be financially able to make later payments. It concluded by stating that an agency "may not assess the full costs of investigation and prosecution when it has conducted a disproportionately large investigation to prove that a [licensee] engaged in relatively innocuous misconduct." (*Id.*, footnote omitted.)

(D) As this proposed decision was being prepared, the state government ordered most citizens to stay in their homes and not to go to work. Plainly, economic activity is slowing, and it appears that Respondent would have difficulty in paying costs. Thus, he should be required to make payments of \$65 per month until the costs are paid. If poor circumstances continue to make it difficult to make payments, Respondent may request that the Department waive or adjust the cost payment obligation.

7. The Department has enacted a regulation setting out rehabilitation criteria that should be used when a licensee has been convicted of a substantially related crime. The criteria, set forth in CCR section 2912, state:

(a) The passage of not less than two years from the most recent criminal conviction that is "substantially related" to the qualifications, functions or duties of a licensee of the Bureau. (A longer period will be required if there is a history of criminal convictions or acts substantially related to the qualifications, functions or duties of a licensee of the Bureau.)

- (b) Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the licensee.
- (c) Expungement of the conviction or convictions 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 or alcohol for not less than two years if the criminal conviction was attributable in part to the use of a controlled substance 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.

(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 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.

(3) Evidence from probation or parole officers or law enforcement officials competent to testify as to applicant'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 or misdemeanor convictions that are reflective of an inability to conform to societal rules when considered in light of the conduct in question.

8. (A) Several of the criteria do not apply to Respondent. For example, there is no evidence that drugs or alcohol were involved in the crime, so criterion (f) is not applicable. Likewise, criterion (h) is not applicable because past business practices are not really germane to this case. Respondent does meet criterion (a) because more than two years have passed since the conviction. Further, he has paid his fines and performed his community service. (Criterion (g).) He appears to have a stable living situation, tending to satisfy criterion (j).

(B) The purpose of proceedings of this type are to protect the public, and not to punish an errant licensee. (E.g., *Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164.) In this case, Respondent is five months away from completing his informal probation. The criminal act did not arise in his professional life, but was likely fueled by the manifold emotions that can arise from inter-familial conflicts. Given that he has had no further incidents and has complied with probation for approximately 31 of the 36 months imposed, it appears that the public can be protected by an order that issues a restricted license to Respondent.

ORDER

All licenses and licensing rights of Respondent Jonathan Edward Babiracki under the Real Estate Law are hereby 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 therefor and pays to the Department of Real Estate the appropriate fee for the restricted license within 90 days from the effective date of this Decision. The restricted license issued to Respondent shall be subject to all of the provisions of Section 10156.7 of the Business and Professions Code and to the following limitations, conditions and restrictions imposed under authority of section 10156.6 of that Code:

1. The restricted license issued to Respondent may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of Respondent's conviction or plea of nolo contendere to a crime which is substantially related to Respondent's fitness or capacity as a real estate licensee.

2. The restricted license issued to Respondent may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that Respondent has violated provisions of the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to the restricted license.

3. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor for the removal of any of the conditions, limitations or restrictions of a restricted license until two years have elapsed from the effective date of this Decision.

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

(a) That the employing broker has read the Decision of the Commissioner which granted the right to a restricted license; and

(b) That the employing broker will exercise close supervision over the performance by the restricted licensee relating to activities for which a real estate license is required.

5. Respondent shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that Respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If Respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until the Respondent presents such evidence. The Commissioner shall afford Respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

6. Respondent shall 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 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.

7. Respondent shall pay costs to the Department totaling \$1522.25, by paying \$65 per month to the Department, beginning 90 days from the effective date of this order, and until the balance is paid off. If Respondent's financial circumstances are such that he cannot make the full payment, he may request a waiver of the balance of costs owed, or another payment plan, which the Department in its discretion may act on.

DATE: March 23, 2020

DocuSigned by:
Joseph D. Montoya
JOSEPH D. MONTOYA

Administrative Law Judge

Office of Administrative Hearings