

BEFORE THE
DEPARTMENT OF MOTOR VEHICLES
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

TUNG THANH NGUYEN,

Respondent.

Case No. RS-13-0012

OAH No. 2013060599

PROPOSED DECISION

Administrative Law Judge Perry O. Johnson, Office of Administrative Hearings, State of California, heard this matter on September 12, 2013, at Oakland, California.

Leonard Broseker, Senior Staff Counsel, represented complainant Mary Garcia.

Christopher Dobbins, Attorney at Law, represented respondent Tung Thanh Nguyen, who was present at the hearing of this matter.

At the hearing of this matter, under the authority of Government Code section 11507, Complainant amended the Statement of Issues at line 22 on page one of the pleading by altering the date as printed on the page from "July 25, 2012," to "July 21, 2012." The pleading was also amended on the same page at line 28 by changing the date printed on the page from "November 10, 2011" to "May 5, 2010."

On September 12, 2013, the matter was deemed submitted and the record closed.

FACTUAL FINDINGS

1. On May 14, 2013, Mary Garcia (complainant), Chief, Occupational Licensing Branch, Licensing Operations Division, Department of Motor Vehicles made the Statement of Issues in her official capacity against respondent Tung Thanh Nguyen (respondent).

2. On July 21, 2012, respondent filed an application with the Department of Motor Vehicles for the issuance to him of a vehicle salesperson's license. The

application remains pending as the department has refused to issue a salesperson license to respondent due to his past acts and omissions that appear to disqualify him for licensure.

The Department's Past Revocation of A Previous License Issued to Respondent

3. Effective April 22, 2011, respondent's vehicle salesperson license (S-674654) was revoked for cause by the department in Case No. S-10-0345. The license revocation was grounded upon the fact of respondent's criminal conviction as described in Factual Finding 4, below. The department has not reissued the license since the revocation action.

Record of Criminal Conviction

4. On May 5, 2010, the Superior Court of the State of California in and for the County of Santa Clara convicted respondent, on his plea of nolo contendere, of violating California Penal Code section 550, subdivision (b)(1) (presenting a false statement regarding an insurance payment or benefit), a misdemeanor.

5. The crime for which respondent was convicted in May 2010 involves moral turpitude.

6. The crime of presenting a false statement regarding an insurance payment or benefit is substantially related to the qualifications, functions and duties of a licensed vehicle salesperson.

7. The facts and circumstances giving rise to respondent's conviction on May 2010, occurred during June and July 2009.

During June 2009, respondent acquired a motorcycle, but he did not insure the vehicle for collision damage. After he was involved in a collision, which damaged the motorcycle, respondent procured insurance coverage that was to be effective on June 12, 2009. On June 16, 2009, respondent filed a claim through the insurance policy whereby he reported that the collision had occurred on June 14, 2009. Along with the claim for insurance proceeds, respondent submitted photographs of the damaged motorcycle. During the processing of the claim, an insurance adjuster noticed that the photographs depicted an imprinted date stamp showing the photographs were taken on June 10, or two days before the effective date of the insurance policy. An estimate of repair represented the cost to fix the motorcycle reflected costs of \$4,475.

During July 2009, when an insurance company investigator notified respondent regarding "a problem with his claim" and alluded to respondent's act of insurance fraud, respondent withdrew the claim proceeds under the then recently purchased policy for the motorcycle.

8. As a consequence of the May 2010 conviction, the court conducted a sentencing proceeding on July 23, 2010. At the July 2010 hearing, the superior court granted respondent's motion, under Penal Code section 17, subdivision (b), to reduce the charged felony offense to a misdemeanor for purposes of the conviction. The superior court suspended imposition of sentence and placed respondent on probation for two years. The superior court noted that the insurance company had been paid restitution by respondent. (The restitution pertained to the cost of insurance company's investigation.) The court ordered respondent to complete four days in jail; but granted respondent a stay of the confinement until September 20, 2010. Also, the superior court permitted respondent to perform community service in lieu of county jail. And, the court ordered respondent to pay fines and fees of approximately \$700.

Matters in Mitigation and Respondent's Background

9. Respondent is 35 years old.

10. Respondent attended DeAnza Community College during 1999-2000. He secured his high school equivalence diploma while enrolled at the community college.

11. For approximately 12 years, respondent has maintained a relationship with his "fiancé." During the years of the relationship, respondent fathered two children, who are now five years and two years old. And respondent has assumed a "father's" role for his fiancé's two children, who are currently 18 years old and 16 years old.

12. During 2010, respondent developed a disabling lumbar spine impairment. In approximately June 2011, he underwent surgery, which respondent does not believe was successful in ridding him of constant pain. Over the span of one year, respondent received physical therapy that was supplemented by narcotic medications.

Respondent's back disorder rendered him eligible for state disability aid payment. However, the state disability income ended sometime in the recent past.

Respondent compellingly expressed at the hearing of this matter that during the therapy, he became burdened by a dependency for the narcotics that were used for relief of his severe back pain. His dependency on narcotic drugs led to him being admitted during December 2012 into residential treatment facility that aided him to be weaned off the medications. The residential drug treatment program ended during February 2013.

As of the date of the hearing, respondent continued to be impaired by ongoing low back pain. Currently he is taking a non-narcotic medication, which treats his nerve damage. And to reinforcement the process of breaking the dependency on narcotics, he is taking a single tablet to aid the regimen for weaning him off narcotics. Respondent

points out that he has lost more than 40 pounds due to his physical and emotional ailments over the past few years.

13. Respondent has approximately a decade's work experience in the vehicle sales industry. He worked at Los Gatos Acura for approximately six years. At the time the previously-issued salesperson's license was revoked, respondent held the role of general sales manager for that dealership.

14. Respondent has no record of criminal conduct other than the matter described above.

Matters in Rehabilitation

15. Respondent compellingly and poignantly expressed remorse for the criminal acts that resulted in the May 2010 conviction.

16. The criminal acts that led to his conviction occurred during June and July 2009, which was a period of time occurring approximately four years before the Statement of Issues.

17. Regarding respondent's May 2010 conviction, the superior court placed respondent on a term of probation of two years. Respondent paid all fines and fees associated with the conviction, and respondent successfully completed the court-ordered community service work. Importantly, respondent's term of probation due to the conviction expired in May 2012. (Notwithstanding his vivid testimony regarding meeting all aspects of probation, at the hearing of this matter respondent presented no certified court record to establish the actual termination of probation due to the conviction.)

18. Respondent's long-term romantic relationship and commitment to his fiancé, along with the children residing in the family home, provide respondent personal stability. Respondent states that his family is the "most important thing" in his life. Respondent resides with his family in San Jose.

19. Respondent poignantly argues that his experience with law enforcement and the criminal court system due to his past criminal conduct constituted a life-transformative phase. He believes that he has been markedly changed by the consequence of his bad acts, which have resulted in harming not only to his personal interests but also to many other individuals.

20. Respondent alluded to expending time and effort towards rendering volunteer acts for the Wheel Chair Foundation. He offered a letter, dated August 21, 2012, by Milan Petrovich, who acted as the chairman of the organization. (The letter, however, is vague regarding the nature of respondent's volunteer services; when respondent actually began the

volunteer work; whether he continues to provide the volunteer work at this time, which is one year after the date of the letter; and whether respondent continues to offer the volunteer work to the Wheel Chair Foundation at this point in time.)

21. Respondent declared at the hearing of this matter that even though he has been “out of the business” for two years there are former customers who continue to contact respondent. At the hearing, he claimed that “yesterday” a former customer telephoned him to ask about purchasing a car as that person through past dealings with respondent had purchased three cars from dealers which had employed respondent. Respondent has an aptitude for vehicle sales, which continues to be recognized by others. (Yet, respondent offered no documentary proof of the exact nature of the support he has extended as a vehicle sales professional to customers, dealers or other licensees.)

22. At the hearing of this matter, respondent claimed that there are at least two dealerships that have expressed an interest in hiring respondent after the department has issued him a vehicle salesperson’s license. Those dealerships are Hyundai of Concord and Los Gatos-Acura. (Although he claimed that senior management at both dealers possess knowledge of his past conviction for insurance fraud, respondent presented no documentary evidence to support his assertion. Nothing in the record indicates that respondent has informed dealers regarding his criminal acts that occurred less than five years ago.)

Matters that Negatively Impact Upon Respondent’s Progress Towards Rehabilitation

23. Respondent has a history of a criminal conviction, which involves moral turpitude, that occurred on May 5, 2010. The conviction, therefore, occurred within five years of the date of the Statement of Issues, which is dated May 14, 2013

24. The term of probation associated with respondent’s conviction ended in May 2012, which was one year before the date of the Statement of Issues.

25. Respondent did not offer into evidence at the hearing of this matter a certified copy of a court order under Penal Code section 1203.4, which shows the May 2010 to have been expunged.

26. Respondent produced no witness at the hearing to give evidence regarding his changed behavior, his attitude towards the past criminal activity, or his current reputation for honesty, integrity and trustworthiness.

27. Respondent did not present evidence that since the date of the conviction in May 2010 that he has enrolled in, or completed, an educational or training course.

28. At the hearing of this matter, respondent offered no corroborating documentary evidence that he has held any significant gainful employment since the

department revoked during April 2011 an earlier issued vehicle salesperson's license. (It is noted that respondent has been disabled by back pain for a significant period since the license was revoked. And, at the hearing, respondent asserted that he worked for a period weeks under a temporary vehicle salesperson's license until the department wrote a letter, dated July 21, 2012, that denied his recent application for licensure. For those few weeks during the summer of 2012, respondent served as a sales manager at the Livermore Honda dealership.)

29. Respondent offered no competent, independent evidence that he has had significant or conscientious involvement in community, church or privately sponsored programs designed to provide social benefits or to ameliorate social problems. At the hearing of this matter, respondent claimed that he volunteers time at a local YMCA; however, he provided no letter or certificate from managers of the YMCA that documents the precise nature of his volunteer work.

Ultimate Finding

30. The weight of the evidence supports the determination that it would be against the public interest to permit respondent to hold a vehicle salesperson's license, even on a probationary basis.

LEGAL CONCLUSIONS

Standard of Proof

1. The party asserting the affirmative in an administrative hearing has both the burden of proof of going forward as well as the burden of persuasion by a preponderance of the evidence. (Gov. Code, § 11504; *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.)

The burden of proof is on respondent Tung Thanh Nguyen, by a preponderance of the evidence, to establish that the Application for Occupational License should be granted because he is qualified for the license for which he applied and that complainant has no cause to deny the application.

Causes for Denial

REVOCATION OF PREVIOUSLY ISSUED VEHICLE SALESPERSON'S LICENSE

2. Vehicle Code section 11703, subdivision (a), sets forth that the department may refuse to issue a license to certain licensees where the applicant if the applicant "was previously the holder . . . of a licensed issued under [the Vehicle Code] which was revoked for cause and never reissued by the department"

Vehicle Code section 11806, subdivision (d), establishes that the department may revoke a vehicle salesperson's license upon finding that a "cause for refusal . . . or revocation exists under the provision of sections 11302 to 11909." Vehicle Code section 11703, subdivision (a), falls within the statutory provisions contemplated in Vehicle Code section 11806, subdivision (d).

3. Cause exists to deny respondent's license application pursuant to Vehicle Code section 11703, subdivision (a), as that section interacts with Vehicle Code section 11806, subdivision (d), by reason of the matters set forth in Factual Finding 3.

CRIMINAL CONVICTION

4. Vehicle Code section 11703, subdivision (d), provides that the department may refuse to issue a license to certain licensees where the applicant "has been convicted of a crime . . . involving moral turpitude [that] is substantially related to the qualifications, functions, or duties of the licensed activity."

As set forth in Factual Finding 5, respondent was convicted of an offense that involves moral turpitude. Moral turpitude is "an elusive concept incapable of precise general definition [And, conduct deemed to fall within the term's meaning involves] an act of baseness, vileness, or depravity in the private and social duties which a [person] owes to his fellowmen, or to society in general, [and] contrary to the accepted and customary rule of right and duty between man and man." (*In re Craig* (1938) 12 Cal.2d 93, 97.) Moral turpitude also has been viewed as "dishonest or immoral" acts, not necessarily a crime. (*In re Higbie* (1972) 6 Cal.3d. 562, 570.) A criminal act of fraud, which has as a primary aim the personal enrichment, or personal gain, through an act of deceit upon another person, involves moral turpitude. (*In re Schwartz* (1982) 31 Cal.3d 395, 400- 401.) Moral turpitude connotes a disposition involving "general readiness to do evil." (*People v. Castro* (1985) 38 Cal.3d 301, 314.)

Under the department's Occupational Licensing and Disciplinary Guidelines, which are incorporated by reference in section 440.04 of title 13 of the California Code of Regulations, the offense for which respondent was convicted bears a substantial relationship to the qualifications, functions, or duties of a vehicle salesperson because it involves the use of fraud, deceit, falsehood or misrepresentation in order to achieve an end. Also, respondent's crime has a substantial relationship to the responsibilities, duties and functions of a vehicle salesperson because the crime entailed an "unlawful act with the intent of conferring a financial or economic benefit upon" respondent.

5. Cause exists to deny respondent's license application pursuant to Vehicle Code section 11703, subdivision (d), as that section interacts with Vehicle Code section 11806, subdivision (d), by reason of the matters set forth in Factual Findings 4 through 6.

6. In this matter, under the authority of California Code of Regulations, title 13, section 440.04, consideration must be given to the directions set forth in the department's Occupational Licensing and Disciplinary Guidelines (guidelines).

The criminal offense that led to respondent's conviction for crime of presenting a false statement regarding an insurance payment or benefit, as proscribed by Penal Code section 550, subdivision (b)(1), is deemed a "Type A" crime within the meaning of the department's guidelines.

As to Type A crimes, the subject guidelines prescribe that where there is "a single conviction within the last five (5) years, [such fact] should almost always result in the outright denial of an occupational license, even if terms and conditions of . . . probation have been complied with." In this matter, respondent has a record from May 2010 regarding a conviction for insurance fraud, which is a crime that entails deceit, falsehood and misrepresentation for the purpose of wrongfully procuring money or merchandise. Hence, respondent's conviction date occurred within five years of the Statement of Issues.

7. The matter of rehabilitation is critical to this matter. Despite his effort to diminish the significance of his criminal conduct, the nature of insurance fraud involves a serious offense. Respondent's testimony at the hearing regarding the criminal does not show that he fully grasps the severity of his offense. In fact, at the hearing, respondent attempted to cast himself in exceedingly favorable light by asserting that before he had received insurance proceeds based on his claim for damage to his motorcycle he had independently aborted the claim. But, an important matter that respondent neglects in rendering his testimony is that an insurance loss prevention investigator for a credit card-issuing bank first informed respondent that the investigator or an insurance adjuster had detected the glaring discrepancy of the date-bearing photographs submitted with his claim and that the investigator suspected respondent's misconduct because of obvious incriminating aspects of the claim before respondent requested the insurance company to close his claim file. Also lack of rehabilitation is evident in that only one year had elapsed between the end of the term of the probation due to the conviction and the statement of issues. His rehabilitation has not been attained in that the record lacks a court order under Penal Code section 1203.4 that expunges respondent's conviction record. And, he has not reached rehabilitation because he has had no gainfully employment or involvement with activities designed to benefit society (His inability to work or to become involved with volunteer work had been probably due to respondent's physical and emotional disabilities, which are due to his back disorder and his dependence on narcotic medications in recent years.) Hence, it must be determined that respondent has failed to provide sufficient substantial evidence that establishes rehabilitation on his part.

8. Respondent has not met the obligation to show clear evidence of having attained rehabilitation from his conviction of the offense of presenting a false statement regarding an insurance payment or benefit, which is a violation of Penal Code section 550, subdivision (b)(1). The weight of evidence indicates that he failed to be bound by the precept that “honesty and integrity are the primary traits of good moral character that must reasonably relate to the occupation of vehicle salespersons” when he engaged in the serious criminal offense less than five years ago. (*Brewer v. Department of Motor Vehicles* (1979) 93 Cal.App.3d 358, 366.) And at the hearing of this matter, respondent did not offer persuasive evidence to meet the burden of proof to establish that he currently possesses the integrity, good character and honesty to possess a vehicle salesperson’s license.

The evidence, therefore, demonstrates that it would be against the public interest for respondent to hold a vehicle salesperson, even on probationary basis.

ORDER

The application of respondent Tung Thanh Nguyen for a vehicle salesperson’s license is denied by reason of Legal Conclusions 3 and 5.

DATED: September 24, 2013

PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings