

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
DEPARTMENT OF BUSINESS REGULATION  
JOHN O. PASTORE COMPLEX  
1511 PONTIAC AVENUE  
CRANSTON, RI 02920**

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**IN THE MATTER OF:**

**Donald Bennett,**

**Respondent.**

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**DBR No. : 08-L-0092**

**DECISION**

Hearing Officer: Catherine R. Warren, Esquire

Hearing Held: February 25, 2010

Appearances:

For the Department of Business Regulation: Ellen Balasco, Esquire

For Donald Bennett, Respondent: Stephen Germani, Esquire

**I. INTRODUCTION**

The above-entitled matter came before the Department of Business Regulation (“Department”) pursuant to a Notice of Hearing and Appointment of Hearing Officer issued to Donald Bennett (“Respondent”) on April 8, 2009. A prehearing conference was held on February 11, 2010 and a hearing was held on February 25, 2010. Both parties were represented by counsel during the hearing. The attorneys rested on the record and did not file briefs.

**II. JURISDICTION**

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 5-20.5-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

### **III. ISSUE**

Whether the suspension of the Respondent's real estate salesperson's license ("License") should be lifted or should the License be revoked pursuant to R.I. Gen. Laws § 5-20.5-1 *et seq.*

### **IV. MATERIAL FACTS AND TESTIMONY**

The following exhibits were admitted into evidence:

1. The Respondent's criminal background information ("BCI") which shows the following:

- A. On November 4, 2002, the Respondent pled *nolo contendere* to simple assault or battery and received one (1) year probation.
- B. On February 4, 2008, the Respondent was charged with certain felonies.
- C. On February 13, 2009, the Respondent pled *nolo contendere* to the following charges:
  - i. Felony assault for which he received a full sentence of seven (7) years with one (1) year to serve and six (6) years suspended and probation.
  - ii. Conspiracy/felony for which he received a full sentence of seven (7) years with one (1) year to serve and six (6) years suspended and probation.
  - iii. Eluding the police for which he received a one (1) year suspended sentence and one (1) year probation.

See Department's Exhibit One (1).

2. Consent Agreement dated May 2, 2008 entered into between the Department and the Respondent providing for a conditional salesperson's license for Respondent until April 30, 2010 based on the charges filed against the Respondent on February 4, 2008 (and which were later resolved by the pleas set forth in Department's Exhibit One (1)). See Department's Exhibit Two (2).

3. Amended Consent Agreement dated April 13, 2009 entered into between the Department and the Respondent after the Respondent's *nolo contendere* pleas on February 13, 2009. Said Amended Consent Agreement states that the Respondent's License is suspended effective April 14, 2009 and the Department will stay any further action against the Respondent while he is incarcerated and that upon the Respondent's release from prison he may request the reinstatement of

the administrative hearing process afforded him in the Order to Show Cause dated April 8, 2009 on the basis of his *nolo contendere* pleas in 2009.<sup>1</sup>

4. Letter from Respondent dated December 10, 2009 to the Department requesting that upon his release from the ACI, he will seek to lift the suspension of his License (as set forth in the Amended Consent Agreement). See Respondent's Exhibit Three (3).

William DeLuca ("DeLuca"), Chief, Racing and Athletics and Acting Administrator, Real Estate, testified for the Department. He testified that the Respondent was first licensed as a real estate salesperson on January 29, 2004 and renewed that license in 2006. He testified that for the 2008 renewal application, the Respondent informed the Department of the charges pending against him and as a result, the Respondent and the Department entered into the Consent Agreement. See Department's Exhibit Two (2). He testified that after the resolution of charges, the Respondent and Department entered into the Amended Consent Agreement that provided for the suspension of the Respondent's License. He testified that the Department had concerns over the Respondent's criminal conduct.

On cross-examination, DeLuca testified that the Respondent cooperated with the Department during this matter.

The Respondent testified on his behalf. He testified that he was first licensed in 2004 as a real estate salesperson. He testified that he committed an assault [in February, 2008] which resulted in a plea deal in order to expedite the matter and take responsibility

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<sup>1</sup> There is a discrepancy in the record regarding when the Respondent entered his pleas related to the February, 2008 incident. The Department's Exhibit One (1) indicates that said pleas were made on February 13, 2009 but the Department's Amended Consent Order and Order to Show Cause states that the pleas were made on March 30, 2009 with the Respondent notifying the Department on March 31, 2009. However, the Department's Exhibit One (1) indicates that the Respondent was sentenced on March 27, 2009 with the execution of sentence being on April 14, 2009. The Amended Consent Agreement and Order to Show Cause both include the Respondent's sentences so the conclusion is that the Respondent notified the Department after his sentencing and not after his plea. See Department's Exhibit Two (2).

for actions. He testified that after he was arrested he continued to work without a problem as a real estate salesperson until he signed the Amended Consent Agreement providing for the suspension of his License. He testified that while at the ACI, he took classes such as non-violent conflict resolution and victims' impact and sensitivity which he felt was able to help him. See Respondent's Exhibit Two (2) (certificates of completion). He testified that he has learned his lesson from his conviction and has a passion for this business and has a family to support so this type of incident wouldn't happen again. The Respondent testified that prior to the February, 2008, he worked as a real estate agent and had a local real estate radio talk show from September, 2006 until February, 2008. He testified that he is currently taking a continuing education course so that he would be able to meet continuing education requirement for the renewal of his License. He testified that he is involved in various local charities. He testified that prior to being licensed as a real estate salesperson, he was involved in a real estate deal that went bad which inspired him to go into real estate and help people.

On cross-examination, the Respondent testified that his attorney is the supervising real estate broker at Blackstone Ocean Property which will hire him if he is able to reinstate his License. The Respondent's counsel confirmed that representation and also indicated that he would be willing to sign an affidavit of supervision for the Respondent.

On questioning from the undersigned, the Respondent testified that he struck a man that was unknown to him and it was a bad situation. The Department's attorney represented on the record that the Respondent had addressed all of the Department's questions about the February 4, 2008 incident. She further represented that the Department is satisfied that it received sufficient evidence from the Respondent that the

February, 2008 incident was an isolated event and that information when taken in concert with the letter of references written on Respondent's behalf, the Department doesn't believe that the Respondent has an anger management issue or control issue and based on the Respondent's ACI coursework, he has addressed any anger management issue and this type of incident would be unlikely to occur in the future.

The Respondent submitted several letters of reference from colleagues and clients indicating that despite the Respondent's convictions, they felt the Respondent was very professional and trustworthy and should be re-licensed. See Respondent's Exhibit Two (2) (letters of reference).

Stephen Antoni ("Antoni") testified on the Respondent's behalf. He testified that he has been a real estate licensee since 1998 at REMAX. He testified that the Respondent worked for him for two (2) years and they did the real estate radio show together. He testified that the Respondent was very professional and he considers him a friend. He testified that he is aware of the Respondent's felony assault conviction and believes it is an isolated incident.

In reviewing the file after the hearing, the undersigned realized that on November 4, 2002, the Respondent pled *nolo contendere* to simple assault or battery and received one (1) year probation. The Respondent was first licensed by the Department in 2004. The Department confirmed that the Respondent was licensed in 2004 based on the explanatory letter that the Respondent submitted regarding the 2002 plea and the Respondent and Department did not enter into a consent agreement at that time.

## V. DISCUSSION

### A. Respondent's Convictions Fall Within R.I. Gen. Laws § 5-20.5-14(a)(14)

R.I. Gen. Laws § 5-20.5-14(a) provides that the Department may deny an application for a real estate salesperson's license for certain reasons. R.I. Gen. Laws § 5-20.5-14(a)(14) provides as follows:

(a) . . . The director has [the] power to refuse a license for cause . . .

(14) Being convicted in a court of competent jurisdiction of this or any other state, or federal court, of forgery, embezzlement, obtaining money under false pretenses, bribery, larceny, extortion, conspiracy to defraud, or any similar offense or offenses, or pleading guilty or nolo contendere to any such offense or offenses.

In discussing what is considered a similar offense under the statute, the Department has previously found as follows:

All of the crimes listed in R.I. Gen. Laws § 5-20.5-14(a)(14) involve an element of deceit which compromise a licensee's honesty, trustworthiness, and/or competence. Under the analysis set forth regarding legislative intent and statutory construction, the purpose of the Act in authorizing the Department to take administrative action against a license is to protect the public from dishonest, untrustworthy and incompetent individuals. *In the Matter of John A. Scungio*, DBR No. 00-L-0003 (6/15/01) at 7.

In this situation, the Respondent has been convicted<sup>2</sup> of 1) felony assault and 2) conspiracy/felony. R.I. Gen. Laws § 5-20.5-14(a)(14) specifically provides that pleas of *nolo contendere* be considered by the Department. While assault might not on first blush appear to contain an element of dishonesty and deceit (see *Scungio*), the Respondent also pled *nolo contendere* to conspiracy to commit a felony. See Department's Exhibit One (1). A conspiracy to commit a felony contains an element of deceit, etc. Thus, the Respondent's convictions fall under the purview of R.I. Gen. Laws § 5-20.5-14(a)(14).

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<sup>2</sup> A plea of *nolo contendere* followed by a prison sentence is a conviction. See R.I. Gen. Laws § 12-18-3.

See *Scungio; In the Matter of Catalano*, DBR No.02-L-0060 (11/25/02); and *In the Matter of Antony Constantine*, DBR No. 98-L-0004 (7/15/98). As such, Respondent's convictions can be considered by the Department in determining whether Respondent's application should be denied.

#### **B. Further Relevant Statutes**

R.I. Gen. Laws § 5-20.5-3(c) states in part as follows:

In the case of an applicant for a real estate salesperson's license, he or she must also file a statement under oath from the broker in whose employ the applicant desires to enter that in his or her opinion the applicant is competent and trustworthy and is recommended as a suitable person to be granted a salesperson's license.

R.I. Gen. Laws § 5-20.5-4(b) states in part as follows:

The director, in his or her sole discretion, may require any additional evidence or proof, as to the honesty, trustworthiness, integrity, good reputation, and competency of any applicant.

As the Department held in *Scungio*<sup>3</sup> (page six (6)):

In determining the policies and purposes of the Act intended by the legislature, it is necessary to examine R.I. Gen. Laws § 5-20.5-1 *et seq.* in its entirety. An analysis of the purposes and policies in the Act supports construing the Act to allow the Department to protect the public interest by licensing those individuals who are "desirable with due regard to the paramount interest of the public, as to honesty, trustworthiness, integrity, good reputation, and competency..." R.I. Gen. Laws § 5-20.5-4. . . . The Department would be remiss in its regulatory duties if it did not consider the impact of a licensee's criminal conviction on the public interest. For the reasons stated above, the legislative intent gleaned from the statute clearly demonstrates that the Department, in order to protect the public interest, is authorized to license only those individuals who demonstrate honesty, trustworthiness, integrity, good reputation and competency prior to licensure as well as while licensed.

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<sup>3</sup> The language of R.I. Gen. Laws § 5-20.5-4 cited to in *Scungio* was amended in 2004. See P.L. 2004, ch. 608, § 1. The amendment does not change the legislative intent that the Department is to license applicants that are honest, trustworthy, and have integrity, a good reputation, and competency.

In evaluating an applicant's felony convictions, the Department must make a determination as to whether the applicant is honest, trustworthy, and has integrity. See *In the Matter of Nathaniel Wetherbee*, DBR No. 03-L-0053 (6/29/04) ("*Wetherbee II*") and *In the Matter of Nathaniel Wetherbee*, DBR No. 02-L-0053 (1/6/03) ("*Wetherbee I*").

**C. Felony Convictions: the Stanton Criteria**

The Department follows the four (4) criteria set forth in *In the Matter of William J. Stanton*, DBR No. 98-L-0035 (12/15/98) when determining whether to license felons. *Stanton* found as follows:

Considerations in this area include: (i) when the misconduct took place, (ii) whether the misconduct was a misdemeanor or a felony, (iii) the type of sentence imposed, (iv) the age of the applicant at the time of the misconduct, (v) the reason(s) given by the applicant for committing the misconduct and the applicant's acknowledgement of responsibility for the crime(s), and (vi) whether the misconduct relates to the license for which applicant has applied. *Stanton*, at 5-6.

**1. Nature and Circumstances of the Misconduct**

The first criteria delineated in *Stanton* include the nature and circumstances of the crime. The Respondent committed the felonies in 2008. While the Respondent testified that he was remorseful for his actions, the undersigned is unable to judge the nature and circumstances of the Respondent's crimes because the Respondent provided no explanation of his crimes on the record. While the Department represented it felt the Respondent fully explained the nature of his crimes to the Department, the undersigned cannot make any such evaluation as there was no testimony on the record regarding the nature and circumstances of the crime. The Department may feel that the Respondent provided a full explanation to the Department but the Department did not enter into any



type of resolution with the Respondent (e.g. a conditional license) but rather went to hearing and sought a denial of the Respondent's request to reinstate his License.

**2. Conduct and Reformation; Present Character**

The second and third factors to be considered under *Stanton* are the applicant's subsequent conduct and reformation and his present character. While Antoni testified on behalf of the Respondent and the Respondent provided several enthusiastic letters of recommendation on his behalf, the undersigned cannot evaluate the Respondent's conduct and reformation since the Respondent did not testify regarding the circumstances of the commission of his crimes.

**3. Present Qualifications**

The fourth factor to consider under *Stanton* is the applicant's present qualifications and competence in the area of the license requested. The Respondent has a job offer if he regains his License.

**D. Whether the Respondent Should be Licensed**

*Stanton* held that these four (4) factors are not to be given equal weight in determining whether to deny an application. Instead, a combination of these factors provides guidance for deciding whether to grant or deny a license. Unlike in *Stanton*, the Respondent in this matter has not provided a full explanation of his crimes to the undersigned. The Department found as follows in *Wetherbee II*:

Turning to the first *Stanton* criterion, Respondent [Wetherbee] still has not proffered an explanation for the conduct that led to his conviction for embezzlement. Although Respondent has attached a sheet in his application *describing* the conviction and the sentence imposed, he has yet to *explain fully* why and how it happened. Respondent never *explained* his misconduct during the previous hearing and has not contributed anything new at this hearing. Without an explanation, the Department cannot adequately assess the

Respondent's 'honesty, trustworthiness, integrity, good reputation, and competency.' R.I. Gen. Laws § 5-20.5-4(b).

Moreover, Respondent's failure to be forthcoming with an explanation of his conduct reflects poorly on Respondent's present character (the third *Stanton* criterion). *Wetherbee II*, at 3.

The Respondent's felonies are serious and violent and involved a conspiracy. Because of the Respondent's failure to testify as to the nature of the crimes, etc., I cannot make a determination regarding the nature and circumstances of the crimes. See also *Wetherbee I*. Nor can I make a determination as to the Respondent's subsequent conduct and reformation because without Respondent's testimony regarding the explanation of his crimes, I cannot evaluate the nature and circumstances of his crimes and convictions and any subsequent conduct and/or reformation. In *Wetherbee II*, the applicant presented character witnesses. However, the hearing officer concluded that because of the applicant's failure to be forthcoming with the events surrounding his crime and conviction, such testimony did not meet the applicant's burden to prove he was presently of good character. The same conclusion applies to this matter. In addition, the Respondent currently is on probation. In *In the Matter of: David Catalano*, DBR No. 02-L-0060 (10/25/02), the respondent was still on probation, failed to give a complete explanation of his criminal charges and plea, and did not fully accept responsibility for such and as a result his license application was denied.

While the Respondent did not hide the charges or convictions from the Department, the undersigned cannot make a full evaluation under the *Stanton* criteria because of the Respondent's failure to explain the nature and circumstances of his crimes and conviction. Furthermore, the undersigned is unable to make a determination as to the Respondent's honesty, trustworthiness, and competency without the meeting of the

*Stanton* criteria. Finally, while the Respondent has an offer of employment from a Rhode Island licensed real estate broker, this cannot overcome the failure of the Respondent to meet the other *Stanton* criteria.

Based on the *Stanton* criteria, the Respondent has not demonstrated that he has met the criteria for licensing.

## VI. FINDINGS OF FACT

1. On or about on April 8, 2009, a Notice of Hearing and Appointment of Hearing Officer was issued by the Department to the Respondent.

2. A prehearing conference was held on February 11, 2010 and a hearing on was held on February 25, 2010.

3. On February 4, 2008 the Respondent was charged with certain felonies.

4. On February 13, 2009, the Respondent pled *nolo contendere* to 1) felony assault for which he received a full sentence of seven (7) years with one (1) year to serve and six (6) years suspended and probation; and 2) conspiracy/felony for which he for which he received a full sentence of seven (7) years with one (1) year to serve and six (6) years suspended and probation.

5. Under the Amended Consent Agreement, the Respondent's License was suspended as of April 14, 2009.

6. The Respondent was incarcerated at the ACI and upon his release from prison sought to have his License suspension lifted resulting in this hearing process.

7. Pursuant to R.I. Gen. Laws § 5-20.5-14(14), the Respondent's felony convictions may be considered in deciding whether to grant Respondent's request to reinstate his License.

8. The facts contained in Section IV and V are reincorporated by reference herein.

**VII. CONCLUSIONS OF LAW**

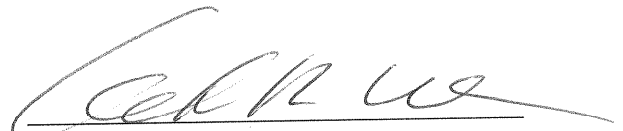
Based on the testimony and facts presented:

1. The Department has jurisdiction over this matter pursuant to R.I. Gen. § 5-20.5-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*
2. The Department has met its burden in establishing there exists a sufficient basis to deny Respondent's request to reinstate his License pursuant to R.I. Gen. Laws § 5-20.5-1 *et seq.*, R.I. Gen. Laws § 5-20.5-14(a)(14), and case law.

**VIII. RECOMMENDATION**

Based on the above analysis, the Hearing Officer recommends that the Respondent's request for reinstatement of his License be denied and the License be revoked.

Dated: MAY 27, 2010

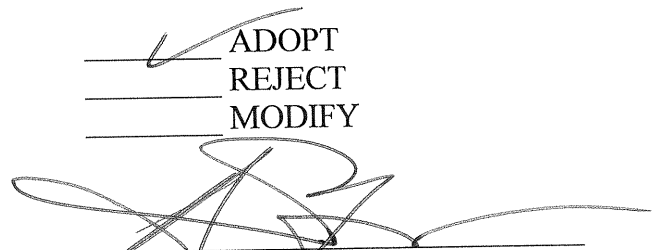
  
Catherine R. Warren  
Hearing Officer

**ORDER**

I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

ADOPT  
 REJECT  
 MODIFY

Dated: 05-22-2010

  
A. Michael Marques  
Director

**NOTICE OF APPELLATE RIGHTS**

**THIS DECISION CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.**

**CERTIFICATION**

I hereby certify on this 28<sup>th</sup> day of May, 2010 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail, postage prepaid to –

Stephen Germani, Esquire  
931 Jefferson Blvd., Suite 2006  
Warwick, RI 02886

and by electronic-delivery to –

Ellen Balasco, Esquire,  
Maria D'Alessandro, Associate Director  
William DeLcua, Acting Administrator  
Department of Business Regulation  
Pastore Complex, 1511 Pontiac Avenue, Building 68,  
Cranston, Rhode Island.

  
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