

NEW JERSEY REAL ESTATE COMMISSION

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| NEW JERSEY REAL ESTATE COMMISSION, |) | DOCKET NO.: BER-16-024 |
| |) | REC REF. NO.: 10003647 |
| Complainant, |) | |
| |) | |
| v. |) | FINAL ORDER OF |
| |) | DETERMINATION |
| VICTOR CABA, a licensed New Jersey |) | |
| real estate salesperson, Ref. No. 9909617 |) | |
| |) | |
| Respondent. |) | |

This matter was heard at a hearing by the New Jersey Real Estate Commission (“Commission”) at the Department of Banking and Insurance, State of New Jersey in the Commission Hearing Room, 20 West State Street, Trenton, New Jersey on May 9, 2017 and July 11, 2017.

BEFORE: Commissioners Linda K. Stefanik, Sanjeev Aneja, Jacob Elkes, William Hanley, Denise M. Illes, and Kathryn Godby Oram.¹

APPEARANCES: John Rossakis, Regulatory Officer (“RO Rossakis”), appeared on behalf of the complainant, the New Jersey Real Estate Commission staff (“REC”). Jeffrey Simms, Esq. appeared on behalf of Respondent Victor Caba (“Respondent”).

STATEMENT OF THE CASE

The REC initiated this matter on its own motion through service of an Order to Show Cause (“OTSC”) dated January 5, 2017, pursuant to N.J.S.A. 45:15-17, N.J.S.A. 45:15-18, N.J.S.A.

¹ The referenced Commissioners attended both the May 9, 2017 and July 11, 2017 hearings. Additionally, Commissioner Eugenia K. Bonilla attended the May 9, 2017 hearing; however, she did not attend the July 11, 2017 hearing. As such, Commissioner Bonilla did not participate in the July 11, 2017 hearing relating to this matter, which determined the ultimate decision of the Commission.

45:15-19.1,² and N.J.A.C. 11:5-1.1 et seq. The OTSC alleges that the Respondent failed to notify the Commission within 30 days of his April 3, 2015 arrest and being charged with one count of Impersonating a Police Officer and one count of Unlawful Possession of a Handgun,³ in violation of N.J.S.A. 45:15-17s. The OTSC additionally alleges that the Respondent violated N.J.S.A. 45:15-17s in that he falsely represented to the Commission that no criminal charges had been filed against him since his last New Jersey real estate license was issued or renewed by answering Question One on his 2015-2017 renewal qualifying questionnaire in the negative.⁴ Further the OTSC alleges that the Respondent failed to notify the Commission within 30 days of his March 11, 2016 guilty plea⁵ to the charge of Possession of an Imitation Firearm, a crime of the fourth degree, in violation of N.J.S.A. 45:15-17s.⁶ Lastly, the OTSC alleges that the conduct underlying

² On page one of the OTSC, it states that the OTSC is being issued pursuant to N.J.S.A. 45:15-19.1, which provides that the Commission shall revoke the license of a licensee who is convicted, in a court of competent jurisdiction, of certain enumerated offenses. However, this appears to be an error as the OTSC does not seek the revocation of the Respondent's license based upon this statutory citation nor did the REC seek such relief at the hearing. On page two of the OTSC, however, it is alleged that the Respondent's license is subject to revocation pursuant to N.J.S.A. 45:15-17e as the conduct underlying the Respondent's arrest and eventual conviction demonstrates unworthiness, bad faith, and dishonesty.

³ The Complaint Warrant in this matter, which was entered into evidence and contained in Exhibit S-1, provides that the Respondent's original charges were Unlawful Possession of a Handgun, in violation of N.J.S.A. 2C:39-5b, a crime in the second degree and Impersonating a Law Enforcement Officer, in violation of N.J.S.A. 2C:28-8b a crime in the fourth degree. It appears from a review of the Judgment of Conviction, which was entered into evidence as Exhibit S-5, that the Respondent, on October 1, 2015, was indicted under Indictment Number 15-10-00778-I on one count of Unlawful Possession of Imitation Firearm, in violation of N.J.S.A. 2C:39-4e, a crime in the fourth degree, and Impersonating a Law Enforcement Officer, in violation of N.J.S.A. 2C:28-8b, a crime in the fourth degree.

⁴ Question One on the Respondent's 2015-2017 renewal qualifying questionnaire asked "[s]ince your last New Jersey real estate license was issued or renewed have you been arrested (other than for motor vehicle violations), indicted, charged with a violation of a crime, misdemeanor, or disorderly persons offense or convicted of a crime, misdemeanor or disorderly persons offense in this state, any other state or by the federal government?"

⁵ The Judgment of Conviction, entered into evidence as Exhibit S-5, provides that the Respondent was convicted and sentenced on March 3, 2016. Thus, the OTSC's reference to a March 11, 2016 guilty plea appears to be a typographical error.

⁶ During the hearing in this matter, the REC withdrew the allegation that the Respondent failed to notify the Commission within 30 days of his guilty plea and conviction, in violation of N.J.S.A. 45:15-17s. As such, this allegation will not be addressed throughout this Final Order of Determination.

the Respondent's arrest and subsequent conviction demonstrates unworthiness, bad faith, and dishonestly, in violation of N.J.S.A. 45:15-17e.

In a letter dated February 13, 2017, the Respondent filed an Answer to the OTSC, wherein he admitted to and denied certain allegations as set forth in the OTSC. Accordingly, on February 14, 2017, the Commission reviewed the pleadings, deemed this matter contested, and directed that a hearing be scheduled. A hearing was originally scheduled on May 9, 2017; however, the Respondent requested an adjournment so that he could obtain counsel. The Commission granted the Respondent's request and a hearing was then scheduled for July 11, 2017, at which time the following exhibits were admitted into evidence by the REC:⁷

- S-1 Passaic Police Department Special Investigations Division: Fax Cover Sheet, dated April 22, 2015, CJIS 2000 Response, dated April 22, 2015, Report Cover Sheet, dated April 3, 2015, and Detective Jason Cancel ("Detective Cancel") #343 Report, File # 2015-18999, dated April 2, 2015 ("Detective Cancel Report"); Passaic Police Department Arrest Report, dated April 3, 2015; Passaic Police Department Tow Report, dated April 3, 2015; Complaint Warrant in the matter of State of New Jersey v. Victor M. Caba, dated April 3, 2015; and Copy of Warrant No. 704747, dated April 3, 2015;
- S-2 NorthJersey.com News Article titled "Passaic Man Charged with Impersonating a Cop," dated April 6, 2015; and email correspondence between a realtor and the REC related to the same NorthJersey.com News Article;

⁷ The Respondent, through his attorney, Jeffrey Simms, objected to the entry of the "Police Report," contained within Exhibit S-1. Mr. Simms objected on the grounds that he believed this report to be irrelevant and hearsay if the Detective was not available at to be questioned at the hearing in this matter. However, the Commission noted that hearsay is permitted at the hearing and subsequently, voted in favor of moving Exhibits S-1 through S-6 into evidence.

- S-3 Arrest Notification Letter from REC Investigator Clark K. Masi (“Investigator Masi”) to the Respondent, dated May 12, 2015;
- S-4 Fax Cover Sheet from Heroes Realty, Victor Caba, to Investigator Masi, dated May 21, 2015, Respondent’s response letter to Investigator Masi’s May 12, 2015 Arrest Notification Letter, dated May 21, 2015; and Docket Information Sheets in relation to Case No. 15001594, Indictment/CDR No. W 20150003531607;
- S-5 Fax Cover Sheet from Modern Realty Group, LLC (“Modern Realty”), Victor Caba, to Investigator Masi, dated April 1, 2016; Judgment of Conviction, in the matter of State of New Jersey v. Victor Caba, Superior Court of New Jersey, Passaic County, dated March 3, 2016;⁸ and
- S-6 License renewal qualifying questionnaire and answers from 2013 and 2015, which were completed by the Respondent, dated July 18, 2013 and April 6, 2015, respectively.

TESTIMONY OF THE WITNESS

Victor Caba

The Respondent testified on his own behalf at the hearing. The Respondent stated that he was first licensed as a real estate salesperson in New Jersey in 2004. The Respondent indicated that his initial application for licensure in New Jersey was originally denied for “moral turpitude” and he subsequently appealed. The Respondent stated that the question on his initial application asked whether he had been convicted of fraud, forgery, or embezzlement, and the Respondent stated that he was never convicted of any of these charges. The Respondent stated that his previous

⁸ The Judgment of Conviction provided by the REC and entered into evidence at the hearing in this matter as Exhibit S-5 contained only the first page of the document. The Respondent’s counsel provided the Commission with the full document of the Judgment of Conviction, which contains two pages. The Commission admitted this second page of the Judgment of Conviction into evidence during the hearing.

convictions were for CDS (drugs) and other offenses such as “possession of stolen property, car.” The Respondent indicated that after his initial application denial was appealed, the Respondent was granted his real estate salespersons license on a probationary basis for a term of five years, which ended in 2009.

The Respondent indicated that on April 3, 2015, he was arrested after being pulled over by a police officer⁹ for what he believed at the time was a standard traffic violation. However, the Respondent additionally testified that he found out after he was arrested that Detective Cancel was informed that the Respondent had been dressing up and impersonating a police officer prior to the Respondent being stopped by Detective Cancel. The Respondent further testified that after he was stopped, he was asked for identification, including his license and registration, and he subsequently, provided said identification to Detective Cancel. However, the Respondent testified that he had a wallet on his person that said, “Essex County Investigator,”¹⁰ even though he had never been an Essex County Investigator, and another wallet that contained his identification. The Respondent stated that when asked for his identification, he provided Detective Cancel with his wallet, which contained his identification;¹¹ however, the Respondent further testified that he

⁹ The individual that stopped the Respondent during the traffic stop was Detective Cancel. For consistency and clarification purposes, Detective Cancel will be referred to throughout the Respondent’s testimony even though he was not specifically named by the Respondent during the hearing in this matter.

¹⁰ While the Respondent testified that the one wallet in his possession during the traffic stop said “Essex County Investigator,” the list of items confiscated from the Respondent during the traffic stop, which is set forth in Detective Cancel’s Report, contained in Exhibit S-1, provides that the “one black folding wallet contain[ed] a “star” badge displaying ‘Deputy Sheriff Essex County,’ ‘State of New Jersey’ and the New Jersey seal / this is the wallet [the Respondent] displayed to me upon the motor vehicle stop.” Exhibit S-1 at 5. Additionally, Detective Cancel’s Report also provides that he confiscated “one black folding wallet containing a police badge displaying ‘POLICE CAPTAIN, RETIRED, VICTOR CABA, 758’ ‘STATE OF NEW JERSEY’ and the New Jersey seal / this is the wallet [the Respondent] took out of his pocket which contained his New Jersey driver’s license and other cards.” *Id.* at 6.

¹¹ During the hearing, the Respondent was directed to Detective Cancel’s Report, which provides that the Respondent’s driver’s license was suspended at the time of this traffic stop. The Respondent noted that it was suspended for unpaid parking violations. The Respondent further noted that he was driving for a year or two with the suspended license, he believed that his license was suspended about three times prior to that specific suspension.

showed Detective Cancel the other wallet as well. The Respondent testified that during this traffic stop, he also had in his possession, a badge that indicated that he was with the Essex County Sheriff's Department;¹² however, the Respondent stated that he was never a police officer and he never informed the Detective Cancel that he was a police officer. When Detective Cancel asked where the Respondent obtained this badge, the Respondent stated that he would not tell him where and from whom he obtained the badge because it was given to him by a friend. The Respondent testified that it was his police officer friends that provided him with the badge(s); however, he would not "name names," as these police officers work with the Respondent and are his coworkers and friends of his family, whom he has known for years. The Respondent testified that these police officers would take him to the shooting range and performed other training with him. The Respondent stated that these friends ordered the badges for him and it was similar to giving him a PBA card. The Respondent indicated that he was going to take the badge to Florida with him. The Respondent claimed the badges had no purpose other than that he wanted them.

During his testimony, the Respondent further noted that he had a black jacket in his possession during the traffic stop that contained an embroidered Fraternal Order of Police badge.¹³ Moreover, the Respondent stated that he had another badge on his belt¹⁴ and another badge that said "Victor Caba, Retired Police Captain."¹⁵ Additionally, the Respondent had a set of handcuffs,

¹² It is unclear from the Respondent's testimony whether this badge was an additional badge or if it was the badge contained in one of his wallets or the badge contained on his belt. See Fn 10 and 14.

¹³ Detective Cancel's Report provides that he confiscated "one black jacket with the Newark Police F.O.P. badge and 'FRATERNAL ORDER OF POLICE,' 'NEWARK POLICE' embroiled on it about the left chest area of the jacket / located on passenger seat of vehicle." Exhibit S-1 at 6.

¹⁴ This "badge" appears to be the "one black badge holder with a 'star' badge displaying 'Essex County Sheriffs Dept.', 'State of New Jersey' and the New Jersey seal / this was affixed to [the Respondent]'s belt on the right side next to his handgun" set forth in Detective Cancel's Report. Exhibit S-1 at 5.

¹⁵ This "badge" appears to be the "one black folding wallet containing a police badge displaying 'POLICE CAPTAIN, RETIRED, VICTOR CABA, 758, STATE OF NEW JERSEY' and the New Jersey seal" set forth in Detective Cancel's Report. Exhibit S-1 at 6.

a handgun in a holster, a radio with his name on it, and two additional badges displayed in his window.¹⁶ The Respondent stated that the handgun in his possession was a “training gun” that looked like a real gun, but only fired blanks and made noise. The Respondent stated that if people saw him with this “training gun,” it would be reasonable for people to assume or believe that it was a real gun. The Respondent stated that some of this equipment was ordered by the Respondent over the internet.

In addition to the items on his person or in his vehicle during the traffic stop, the Respondent testified that he was dressed as a detective that day. The Respondent stated that he started dressing up as a detective/police officer on Halloween and continued to do so on a few occasions when he was around his police officer friends. The Respondent testified that he had just come from the barber shop where he had been with those same police officer friends prior to being stopped by Detective Cancel. The Respondent did not indicate a reason why he continued to dress up as a detective/police officer after Halloween and only stated that doing so “was stupid.” The Respondent further stated that there was a lot more to the situation than what was contained in Detective Cancel’s Report. However, while the Respondent contended that his actions were “stupid,” he did not intend to harm anyone. The Respondent stated that he never wielded the gun, never took out a badge, or forced someone to do something by claiming he was a police officer.

¹⁶ Detective Cancel’s Report lists the following items additionally confiscated from the Respondent during the traffic stop in this matter: “one ‘EKOL Firat Magnum’ 9mm P.A.K. blank handgun bearing serial # [redacted] equipped with an ammunition magazine containing (7) seven 9mm blank bullets; the handgun was within a black holster / affixed to [the Respondent]’s belt on his right side;” “one set of ‘Peerless handcuffs / affixed to his belt about his lower back area within a holder;” “one ‘Motorola’ portable radio model #RMM2050 with a label displaying ‘Victor Caba’ taped to it / located in the cup holder within the center console of vehicle;” “one handcuff key / located within [the Respondent]’s key chain to the vehicle;” “one ‘New Jersey State PMA Member’ shield #M77500 / affixed to his front windshield;” and “one ‘Bergen County Sheriff N.J.’ patch taped to a shield holder / affixed to his rear window.” Exhibit S-1 at 5-6.

The Respondent stated that he had all of these items in his possession because they made him feel important and because he wanted to be a police officer.

The Respondent initially testified that he was originally arrested and charged with Possession of an Imitation Firearm and Impersonation of a Police Officer. However, the Respondent clarified his testimony, and stated that he was originally charged with Possession of an Unlicensed Firearm, which was eventually pleaded down to fourth degree Unlawful Possession of an Imitation Firearm¹⁷ because it was not a real gun. The Respondent noted that a \$175 fine and a probation term of five years were imposed upon him as a result of his conviction. The Respondent stated that he has approximately three and one-half years remaining on his probation and it is set to end in 2020. The Respondent stated that he does what he has been asked to do during his probation and reports once in person and once over the phone per month. The Respondent stated that he only missed one probation check-in after he was in an accident, which was excused. The Respondent stated that he pays his probation fees every month and attended a one-time mental health counseling evaluation under the terms of his probation. The Respondent further noted that his probation officer has been to his home and knows of his medical conditions.

During the Respondent's testimony, the Respondent accepted responsibility for the allegation regarding his "failure to report." The Respondent stated that it was his responsibility and obligation, as the realtor, to submit his renewal qualifying questionnaire and to report his arrest to the Commission. However, the Respondent stated that his assistant filled out the renewal qualifying questionnaire and once it was submitted, there was nothing he could do. The

¹⁷ As previously noted, the Complaint Warrant in this matter provides that the Respondent's original charges were Unlawful Possession of a Handgun, in violation of N.J.S.A. 2C:39-5b, a second-degree crime, and Impersonating a Law Enforcement Officer, in violation of N.J.S.A. 2C:28-8b, a fourth-degree crime. The Judgment of Conviction provides that the Respondent, on October 1, 2015, was indicted under Indictment Number 15-10-00778-1 on one count of Unlawful Possession of Imitation Firearm, in violation of N.J.S.A. 2C:39-4e, a crime in the fourth degree, and Impersonating a Law Enforcement Officer, in violation of N.J.S.A. 2C:28-8b, a crime in the fourth degree.

Respondent testified that he waited and would have explained that he never intentionally failed to disclose his arrest. However, the Respondent was directed to the Respondent's letter in Exhibit S-4 that was sent to Investigator Masi and which stated that "[u]nder my attorney advise I did not report my arrest until my first hearing on 5/8/15. to know about the discovery my hearing was reschedule for 5/29/15 still is an ongoing case, I will keep you update." The Respondent admitted that he lied in this letter and that his attorney did not advise him to lie on his renewal qualifying questionnaire.

The Respondent further testified regarding his physical health. Specifically, the Respondent stated that on September 2, 2014, he suffered from a stroke and was in the intensive care unit for a period of eight days. Additionally, the Respondent testified that while the doctors were attempting to determine the cause of the stroke, an MRI was performed, which found cancer on his left kidney, which was removed in 2015. The Respondent additionally stated that he has an implant that monitors his heart, and that he sleeps with two machines, which monitor the electricity to his heart. The Respondent noted that he has been admitted to the hospital at least 10 times and "at any given moment, [he] can have a stroke." The Respondent additionally noted that he is required to take 13 pills per day for his medical conditions.

The Respondent testified that he has a family to support, which includes his mother, daughter, grandson, son-in-law, and girlfriend. The Respondent stated that he has no additional employment to support his family other than his real estate business, which he has been doing for over 15 years. The Respondent stated that because of his health problems, he cannot physically perform other types of work, such as working in a factory.

FINDINGS OF FACT

Based on the pleadings, the testimony of the Respondent, and the documentary evidence duly admitted into the record, the Commission makes the following findings of fact.

1. The Respondent is a licensed New Jersey real estate salesperson¹⁸ who was first licensed in March 2004, and is currently licensed with Modern Realty, licensed New Jersey broker, whose office is located at 646 Moonachie Avenue, Wood Ridge, New Jersey 07075. Prior to being employed with Modern Realty, the Respondent was licensed with Heroes Realty Inc., whose office is located at 181 Patterson Avenue #185, Wallington, New Jersey 07057 until his employment with Heroes Realty Inc. was terminated on January 19, 2016.
2. On or about April 3, 2015, the Respondent was arrested and charged with one count of Impersonating a Law Enforcement Officer, in violation of N.J.S.A. 2C:28-8b, a crime in the fourth degree, and one count of Unlawful Possession of a Handgun, in violation of N.J.S.A. 2C:39-5b, a crime in the second degree.
3. The Respondent failed to notify the Commission within 30 days of the April 3, 2015 charges issued against him.
4. On or about April 6, 2015, the Respondent answered the required qualifying questionnaire in order to renew his real estate salespersons license for the 2015-2017 license term with Heroes Realty Inc. He answered Question One of the qualifying questionnaire in the negative, which asked "Since your last New Jersey real estate license was issued or renewed have you been arrested (other than for motor vehicle

¹⁸ The caption of the OTSC provides that the Respondent is a "New Jersey real estate broker-salesperson;" however, no evidence was presented and the testimony of the Respondent at the hearing did not indicate that the Respondent was licensed by the Commission as a broker-salesperson. The Respondent testified that he was originally licensed as a real estate salesperson in New Jersey in 2004.

violations), indicted, charged with a violation of a crime, misdemeanor, or disorderly persons offense of convicted of a crime, misdemeanor or disorderly persons offense in this state, any other state or by the federal government?"

5. On or about October 1, 2015, under Indictment number 15-10-00778-I, the Respondent was indicted on one count of Unlawful Possession of Imitation Firearm, in violation of N.J.S.A. 2C:39-4e, a crime in the fourth degree, and one count of Impersonating a Law Enforcement Officer, in violation of N.J.S.A. 2C:28-8b.
6. On or about March 3, 2016, the Respondent pleaded guilty to and was convicted of one count of Unlawful Possession of Imitation Firearm, in violation of N.J.S.A. 2C:39-4e, a crime in the fourth degree, and was sentenced to a probation term of five year.

CONCLUSIONS OF LAW

In light of the above findings of fact, the Commission makes the following conclusions of law with regard to the charges contained in the OTSC and summarized above.

1. The conduct underlying the Respondent's arrest and eventual conviction demonstrates dishonesty and unworthiness for licensure, in violation of N.J.S.A. 45:15-17e.
2. The Respondent failed to notify the Commission within 30 days of being charged with a crime, in violation of N.J.S.A. 45:15-17s, as alleged in the OTSC.
3. The Respondent obtained his real estate license renewal by misrepresentation and deceit when he falsely represented that no criminal charges had been filed against him since the time of his last license renewal when he answered Question One on his 2015-2017 renewal qualifying questionnaire in the negative, in violation of N.J.S.A. 45:15-17n.

DETERMINATION

At the conclusion of the hearing and executive session in this matter, the Commission voted in favor of finding the violations and imposing the sanctions described in this Final Order of Determination. In arriving at the determination in this matter, the Commission took into consideration the testimony of the Respondent and the undisputed documentary evidence admitted at the hearing. The Commission also considered the circumstances underlying the Respondent's conviction.

The Real Estate License Act, N.J.S.A. 45:15-1 et seq. ("Act"), charges the Commission with the "high responsibility of maintaining ethical standards among real estate brokers and sales[persons]" in order to protect New Jersey real estate consumers. Goodley v. New Jersey Real Estate Commission, 29 N.J. Super. 178, 181-182 (App. Div. 1954). The nature and duties of a real estate business are grounded in interpersonal, fiduciary, and business relationships and demand the utmost honesty, trust, and good conduct. Maple Hill Farms, Inc. v. New Jersey Real Estate Commission, 67 N.J. Super. 223, 232 (App. Div. 1961); Division of New Jersey Real Estate Commission v. Ponsi, 39 N.J. Super. 526, 527 (App. Div. 1956). Courts have long recognized that the real estate sales industry should exclude individuals who are incompetent, unworthy, and unscrupulous, in order to protect the public interest. See Division of New Jersey Real Estate Commission v. Ponsi, supra, 39 N.J. Super. at 532-533. Thus, the Commission has the power to suspend, revoke, or place on probation the license of any licensee for "any conduct which demonstrates unworthiness, incompetency, bad faith, or dishonesty." N.J.S.A. 45:15-17e.

While the Respondent was ultimately convicted of Unlawful Possession of Imitation Firearm, in violation of N.J.S.A. 2C:39-4e, a crime in the fourth degree, the conduct underlying the Respondent's criminal conviction was serious in nature and demonstrated dishonesty and

unworthiness for licensure. Specifically, the undisputed facts and evidence demonstrate that the Respondent was stopped by Detective Cancel on a motor vehicle traffic stop after Detective Cancel was informed that the Respondent had been impersonating a law enforcement officer. Although the Respondent contended during his testimony that he never identified himself as a law enforcement officer during the traffic stop, Detective Cancel's Report provides that when Detective Cancel approached the Respondent's vehicle, the Respondent "was holding a wallet open displaying a police badge and police identification." Exhibit S-1 at 5. Moreover, Detective Cancel's Report states that when the Respondent was asked if he was a law enforcement officer, the Respondent replied in the affirmative. Ibid. Additionally, even if the Respondent's recitation of the circumstances surrounding his arrest were correct, Detective Cancel confiscated numerous items from the Respondent after his arrest that would lead a reasonable person to believe that the Respondent either was an actual law enforcement officer or was attempting to portray himself as a law enforcement officer. These items include one wallet that contained a star badge and displayed "Deputy Sheriff Essex County;" a belt badge holder with star badge that displayed "Essex County Sheriff's Dept.;" a 9mm blank handgun and ammunition magazine that contained seven 9mm blank bullets; a set of handcuffs and handcuff key; a portable radio displaying the Respondent's name; another wallet that contained a police badge and displayed "POLICE CAPTAIN, RETIRED, VICTOR CABA, 758;" a New Jersey State PBA Member shield in the Respondent's front window; a "Bergen County Sheriff N.J." patch taped to a shield holder in the Respondent's back window; and a black jacket with the "Newark Police F.O.P." badge and "FRATERNAL ORDER OF POLICE, NEWARK POLICE" embroidered on the left chest area of the jacket. Id. at 5-6.

During his testimony, the Respondent was repeatedly asked why he would need these items, and the Respondent failed to articulate any legitimate reason as to why he would need or want to possess any of them. Regardless of the Respondent's underlying motivations, there is no reason as to why a civilian would need to possess these items other than to wrongly portray himself to others as a law enforcement officer. Moreover, the Respondent testified that he dressed up as a law enforcement officer on other occasions as well. As such, this was not an isolated incident but rather a pattern of wrongful and dishonest behavior, unbecoming of a real estate licensee. The Respondent clearly knew that he was not a law enforcement officer and yet, he continued to perpetuate the image that he was one to the general public by purposely and continually dressing up as a law enforcement officer with an imitation firearm that appeared to be genuine. The Respondent's conduct underlying his ultimate conviction thus demonstrates dishonesty and unworthiness, in violation of N.J.S.A. 45:15-17e, and compels the revocation of the Respondent's real estate license.

The OTSC additionally alleges that the Respondent is in violation of N.J.S.A. 45:15-17s in that he failed to notify the Commission of the filing of formal criminal charges against him within 30 days. N.J.S.A. 45:15-17s requires licensees to notify the Commission within 30 days of having been indicted or of the filing of any formal criminal charges. On April 3, 2015, the Respondent was arrested and initially charged with Unlawful Possession of a Handgun, in violation of N.J.S.A. 2C:39-5b, a crime in the second degree, and Impersonating a Law Enforcement Officer, in violation of N.J.S.A. 2C:28-8b, a crime in the fourth degree. The Respondent admitted during his testimony that it was his responsibility to advise the Commission of his arrest and yet, he failed to do so within 30 days of the date of his arrest.

Moreover, it should be noted that the Respondent testified that he lied to the Commission when he was originally contacted by Investigator Masi regarding the Respondent's arrest. In response to Investigator Masi's question in his May 12, 2015 Arrest Notification letter, which asked why the Respondent failed to notify the Commission within 30 days of the filing of the criminal charges issued against him, the Respondent, in his May 21, 2015 response letter stated that his attorney advised him not to report his arrest. See Exhibits S-3 and S-4. However, the Respondent testified that this statement was materially untrue as his attorney did not advise him to withhold reporting his arrest.

Even so, the Respondent, as a real estate licensee, has a responsibility to be aware of and abide by the statutes and regulations that apply to his real estate license. The Respondent was tasked to be knowledgeable as to the specific notice requirements that related to the filing of formal criminal charges against him. The Respondent failed to adhere to these notice requirements, and as such, the Commission finds that the Respondent is in violation of N.J.S.A. 45:15-17s for failing to timely notify the Commission of the filing of formal criminal charges against him.

Lastly, the OTSC alleges that the Respondent is in violation of N.J.S.A. 45:15-17n in that he falsely represented that no criminal charges had been filed against him since his last license renewal when he answered Question One of his 2015-2017 renewal qualifying questionnaire in the negative. N.J.S.A. 45:15-17n prohibits a licensee from "[p]rocurring a real estate license, for himself or anyone else, by fraud, misrepresentation or deceit." The facts in this matter demonstrate that the Respondent was arrested on April 3, 2015 and originally charged with Unlawful Possession of a Handgun, in violation of N.J.S.A. 2C:39-5b, a crime in the second degree, and Impersonating a Law Enforcement Officer, in violation of N.J.S.A. 2C:28-8b, a crime in the fourth degree. Three days later, on April 6, 2015, the Respondent answered the qualifying questionnaire

for his real estate license renewal for the 2015-2017 license term. Question one on the renewal qualifying questionnaire asked: "Since your last New Jersey real estate license was issued or renewed have you been arrested (other than for motor vehicle violations), indicted, charged with a violation of a crime, misdemeanor, or disorderly persons offense or convicted of a crime, misdemeanor or disorderly persons offense in this state, any other state or by the federal government?" Despite being arrested and charged with two crimes just three days prior to submitting his renewal qualifying questionnaire, the Respondent misrepresented his criminal history by answer this question in the negative.

During the hearing, the Respondent admitted to his failure to report his arrest and charges and stated that although it was his responsibility to complete the renewal application and answer the renewal qualifying questionnaire, his assistant completed it on his behalf. The Respondent further testified that "what was done was done" and he waited for the Commission to contact him regarding this misrepresentation. As such, the Commission finds that the Respondent is in violation of N.J.S.A. 45:15-17n for obtaining his real estate license renewal through misrepresentation and deceit.

Pursuant to N.J.S.A. 45:15-17, the Commission may impose a penalty of not more than \$5,000 for the first violation of the Act, and a penalty of not more than \$10,000 for any subsequent violation. In Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123 (1987), the Supreme Court established the following seven factors in order to evaluate the imposition of fines in administrative proceedings and these factors are applicable to this matter, which seeks the imposition of penalties under the Act: (1) the good or bad faith of the respondent; (2) the respondent's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) any injury to the public; (5) the duration of the illegal activity or conspiracy; (6) the existence of criminal or treble actions; and (7) any

past violations. Id. at 137-139. Each of these factors is discussed below. No one Kimmelman factor is dispositive for or against fines and penalties. See Kimmelman, supra, 108 N.J. at 139 (“[t]he weight to be given to each of these factors by a trial court in determining . . . the amount of any penalty, will depend on the facts of each case”).

First, the Respondent’s failure to notify the Commission of the formal criminal charges issued against him and his false representations on his renewal qualifying questionnaire demonstrate bad faith. The Respondent testified that he was aware of his responsibility to report his arrest and charges, and yet, he failed to do so until he was directly contacted by the Commission through Investigator Masi’s May 12, 2015 Arrest Notification letter. Moreover, the Respondent acknowledged that he knew his assistant answered Question One on his renewal qualifying questionnaire incorrectly, and yet, he never contacted the Commission to amend the material misrepresentation contained on same. As such, the Respondent was able to enjoy the benefit of his renewed real estate license because of this misrepresentation. Additionally, and as previously noted, when contacted by Investigator Masi, the Respondent attempted to place the blame on his attorney for the Respondent’s own failure to report. The Respondent admitted during the hearing, which was well over two years after this initial statement was made, that this statement was untrue. This factor weighs in favor of a significant monetary penalty.

The Respondent did not provide any specific testimony or proofs in relation to the second Kimmelman factor, which address the Respondent’s ability to pay the fines imposed. Respondents who claim an inability to pay civil penalties bear the burden of proving their incapacity. Goldman v. Shah, OAL Dkt. No. BK1 11903-05, Initial Decision (04/15/08), Final Decision and Order (09/02/08). However, the Respondent did testify that he suffers from a myriad of medical issues that would make it difficult to find alternative employment, such as working in a factory. The

Respondent additionally testified that he has no employment other than his real estate business, and that his real estate license allows him to financially support various family members, including his mother, daughter, grandson, son-in-law, and girlfriend. Even if the Respondent's testimony in this matter was sufficient proof to support a claim that he was unable to pay a fine imposed by the Commission, the Respondent's ability to pay is only a single factor to be considered in determining an appropriate fine and does not obviate the need for the imposition of an otherwise appropriate monetary penalty. See e.g., in the insurance context, Commissioner of Banking and Insurance v. Malek, OAL Dkt. No. BK1 4520-05, Initial Decision (12/6/05), Final Decision and Order No. E06-12 at 6-7 (1/18/06) (increasing fine recommended by ALJ from \$2,500 to \$20,000 even though producer argued an inability to pay fines in addition to restitution).

The third Kimmelman factor addresses the amount of profits obtained or likely to be obtained from the illegal activity. The greater the profits an individual is likely to obtain from illegal conduct, the greater the penalty must be if penalties are to be an effective deterrent. Kimmelman, supra, 108 N.J. at 138. In this case, Respondent obtained his ability to engage in real estate profession as a New Jersey real estate licensee as a direct result of his misrepresentation on his 2015-2017 renewal qualifying questionnaire. However, no evidence was presented at the hearing regarding the extent of the monies earned by the Respondent from when his license was renewed by the Commission after April 2015 through the present.

The fourth Kimmelman factor addresses the injury to the public. In order to protect consumers, the Commission is charged with the "high responsibility of maintaining ethical standards among real estate brokers and sales[persons]." Goodley v. New Jersey Real Estate Comm'n, supra, 29 N.J. Super. at 182. The Respondent's failure to comply with the Commission's notification requirements are contrary to the principle intent behind the Act: to "protect consumers

by excluding ‘undesirable, unscrupulous and dishonest persons . . . from the real estate business.’” Sammarone v. Bovino 395 N.J. Super. 132 (App. Div.), 193 N.J. 275 (2007); see also Tobias v. Comco/America, Inc. 96 N.J. 173, 180 (1984); Kazmer-Standish Consultants, Inc. v. Schoeffel Instruments Corp. 89 N.J. 286, 290 (1982); and Markheim-Chalmers, Inc. v. Masco Corp. 332 N.J. Super. 452, 457 (App. Div. 1999). Therefore, the public is harmed when individuals fail to comply with Commission regulations. When a licensee is unable to conduct himself in accordance with the high standards expected of him and his profession, the public’s confidence in the real estate industry is eroded.

In this matter, the Respondent was unable to conduct himself in accordance with the high standards expected of him and those in his profession when he provided a false answer on his renewal qualifying questionnaire. Moreover, the Respondent additionally failed to notify the Commission within 30 days of the criminal charges issued against him. The responsibility falls on the licensee to be aware of the applicable statutory and regulatory requirements of those in their profession. The Commission must encourage licensees to abide by the rules that are in place in order to protect consumers and ensure ethical conduct by those in the real estate profession. The Respondent’s failure to abide by these rules weighs in favor of a significant a monetary penalty.

The fifth Kimmelman factor to be examined is the duration of the illegal activity. Based on the testimony provided, the Respondent’s failure to notify the Commission within 30 days of the date of the criminal charges being filed against him and his false representations that he had not been charged with a crime on his renewal qualifying questionnaire both occurred in the 30 days subsequent to his April 3, 2015 arrest, and appear to be isolated in nature. However, it should be noted that the Respondent continued to perpetuate this misrepresentation to the Commission when he failed to correct his renewal application or notify the Commission of the charges issued

against him until he was contacted by Investigator Masi by the Arrest Notification letter dated May 12, 2015. See Exhibit S-3. Even then, the Respondent continued his material misrepresentation by informing Investigator Masi by letter dated May 21, 2015 that the Respondent's attorney advised him not to notify the Commission of his arrest and charges. See Exhibit S-4. However, during the hearing in this matter, which was over two years after this statement was made, the Respondent acknowledged that this statement was not true and in fact, he answered Question One on his 2015-2017 license term renewal qualifying questionnaire incorrectly because he had his assistant complete the renewal qualifying questionnaire on his behalf. The Respondent additionally noted during his testimony that he was aware that the answer was incorrect, and he decided to wait until it was brought to his attention by the Commission, rather than immediately and proactively contacting the Commission to correct his application.

Sixth, the Respondent has not been party to criminal proceedings related to his failure to notify the Commission of the criminal charges filed against him.

As to the final factor, there is no evidence of prior real estate violations committed by the Respondent.

In light of these factors and penalties previously assessed by the Commission, the Respondent shall pay a fine in the total amount of \$1,500, representing \$500 for one violation of N.J.S.A. 45:15-17s regarding his failure to timely notify the Commission of the criminal charges filed against him, and \$1,000 for obtaining the renewal of his real estate license through misrepresentation and deceit, when he falsely represented that no criminal charges had been issued against him on his 2015-2017 license term renewal qualifying questionnaire, in violation of N.J.S.A. 45:15-17n. These fines are fully warranted, not excessive or unduly punitive, and are necessary to demonstrate the appropriate level of opprobrium for the Respondent's conduct.

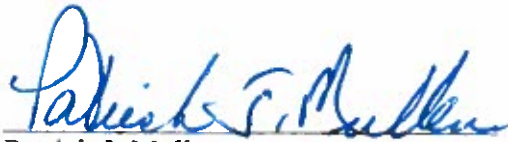
Moreover, these penalties are consistent with prior Commission decisions. See, e.g., NJREC v. Shayvionne Harris, Dkt. No. BER-15-12, Final Order (02/08/17) (Respondent fined \$500 per violation of N.J.S.A. 45:15-17s for failure to timely notify the Commission of criminal charges and conviction); NJREC v. Patricia Gabriel, Dkt. No. OCE-15-019, Final Order (02/14/17) (Respondent was fined \$500 for failure to timely notify the Commission of criminal charges); and NJREC v. Charles Chichizola, Dkt. No. BER-15-018, Final Order (02/14/17) (Respondent fined \$500 per violation of N.J.S.A. 45:15-17s for failure to timely notify the Commission of criminal charges and conviction); and NJREC v. Terry Shapiro, Dkt. No. SOM-16-027, Final Order (06/28/17) (Respondent fined \$1,000 for the procuring a real estate license by misrepresentation, in violation of N.J.S.A. 45:15-17n).

Accordingly and pursuant to N.J.S.A. 45:15-17, the Commission imposes the following sanctions:

- I. The Respondent's real estate license is revoked until January 1, 2022. Respondent shall not be eligible for any real estate license during the revocation period.
- II. The Respondent shall pay a total fine in the amount of \$1,500, which is comprised of a fine of \$500 for failing to timely notify the Commission of the filing of criminal charges against him, in violation of N.J.S.A. 45:15-17s, and a fine in the amount of \$1,000 for obtaining his real estate salesperson license renewal by misrepresentation and deceit, in violation of N.J.S.A. 45:15-17n.

SO ORDERED this 28th day of November, 2017.

By: Linda K. Stefanik, President
Sanjeev Aneja, Commissioner
Jacob Elkes, Commissioner
William Hanley, Commissioner
Denise M. Illes, Commissioner
Kathryn Godby Oram, Commissioner



Patrick J. Mullen
Director of Banking

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