

Non-Adoption Options

B. The Alaska Real Estate Commission, in accordance with AS 44.64.060 (e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as follows:

On a motion duly made by Ms. Burke, seconded by Ms. Harvill, it was,

RESOLVED to approve a modified decision in OAH case 14-1114-REC. In accordance with AS 44.64.060(e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty or other disposition of the case as follows:

- That the real estate license be suspended for 365-days;
- That the licensee shall be on probation to run concurrently with the licensee's federal probation;
- Any conduct that leads to the determination of the licensee's probation will be a sanctioned offense and the Real Estate Commission(REC) can impose additional sanctions as appropriate;
- During this time the licensee is required to report to the REC any changes in probation status in the licensee's Federal case including any accusation that the licensee has failed a drug test;
- That within one-year the licensee is required to complete 18 hours of continuing education. The education required by this order shall be in addition to any education the licensee is enrolled in for completion of educational requirements and cannot be counted toward any license renewal. The curricula of the 18 hours shall be approved by the Commission's agent before the licensee registers for the course and shall include topics as determined by the Commission's agent. The licensee is to bear all costs to the education required by this order. It is recommended that the licensee attend one or two REC quarterly meetings and receive continuing education credit in the amount of one hour and can be used as an offset to the 18 hour education requirement.

All in favor; Motion passed.

In the case OAH 14-1114-REC in the matter of Shane O'Hare the proposed decision is adopted as amended/modified by this commission.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 25th day of February, 2015.

By: Signed
Anita Bates
Chair, Alaska Real Estate Commission

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
REFERRAL FROM THE ALASKA REAL ESTATE COMMISSION**

In the Matter of)	
)	
SHANE O'HARE)	OAH No. 14-1114-REC
_____)	Agency No. 2014-000282

DECISION

I. Introduction

Shane O'Hare was convicted of possessing controlled substances with intent to distribute, a federal felony. His role in the criminal enterprise was minimal. He received a very light sentence. He committed the offense before he was licensed. He was not indicted for the offense until after he had applied for and been issued a real-estate salesperson license.

His conduct warrants discipline against his license because it demonstrates a lack of integrity and honesty. In these unusual circumstances, however, revocation is not mandated or warranted. Discipline of a lengthy probationary period and continuing education is ordered to ensure the public that Mr. O'Hare is fit to practice real estate.

II. Facts

Shane O'Hare is a 25-year-old real-estate salesperson. He grew up in, and still lives in, the Palmer/Wasilla area. A few years ago, before he became a licensed real-estate professional, he rented a UPS store mailbox in the valley because he did not have a permanent residence. He let friends who also had no permanent residence use his UPS box to receive packages.¹

One of Mr. O'Hare's high-school friends had a brother named Robin Gattis. Mr. O'Hare became friends with Robin Gattis, and allowed Mr. Gattis to use his UPS mailbox.² Mr. Gattis was a drug dealer.³

Mr. Gattis imported from China and sold a drug called methylone. Methylone is a stimulant that is chemically similar to the drug MDMA. Both MDMA and methylone were often marketed on the street using names like "ecstasy" or "molly."⁴ To keep his supply of drugs from being intercepted, Mr. Gattis asked his supplier in China to ship to different addresses,

¹ O'Hare testimony.
² Administrative Record at 51.
³ *Id.*
⁴ *Id.* at 29.

sometimes shipping to his own address, and sometimes to friends' addresses.⁵ On four different occasions, over a period of about five months in 2011-12, with Mr. O'Hare's knowledge and permission, Mr. Gattis had packages of the drug shipped to Mr. O'Hare's UPS address.⁶

Mr. O'Hare would receive the packages of methyldone and bring them to Mr. Gattis. Mr. Gattis gave Mr. O'Hare some of the pills.⁷ According to Mr. O'Hare, Mr. Gattis told him that the drug was legal in Alaska. In February 2012, after Mr. O'Hare had received the first few packages, Mr. Gattis was arrested by state police for illegal importation of banned substances. The charges were dropped, however, when state officials discovered that the actual chemical formula of the drug imported by Mr. Gattis did not violate state law. Mr. O'Hare testified that this event confirmed his belief that the drug was not illegal. Yet, he admitted that he knew that his assistance to Mr. Gattis was not smart.⁸

When Mr. O'Hare received a package of drugs on April 12, 2012, he delivered it to Mr. Gattis and some friends, who were meeting at a parking lot. One of those friends was Matthew Scott.⁹ Matthew was under 18.

Late on the evening of April 15, 2012, following a party, Mr. Gattis and Matthew were together in Matthew's house. Drug use occurred. Matthew became extremely ill. At 11:00 p.m., Mr. Gattis sent a text message to Mr. O'Hare, who was at home. Mr. O'Hare had not been at the party. Mr. Gattis informed Mr. O'Hare that Matthew was having serious medical problems and he was concerned that Matthew was dying. Mr. O'Hare sent text replies urging Mr. Gattis to call emergency services. Mr. Gattis did not call emergency services. Mr. O'Hare, who did not know the location of Matthew's home, did not call emergency services. Mr. Gattis then sent a text telling Mr. O'Hare that Matthew had died and that he needed to get out. Mr. O'Hare did not report Matthew's death to law enforcement officials. He did not report Mr. Gattis's activity as a drug dealer or involvement in Matthew's death.¹⁰

⁵ *Id.* at 31.

⁶ O'Hare testimony; Administrative Record at 51-53; 33-36.

⁷ O'Hare testimony.

⁸ *Id.*

⁹ Administrative Record at 53.

¹⁰ O'Hare testimony.

After Matthew's death, Mr. Gattis continued to import and sell drugs. Mr. O'Hare knew that Mr. Gattis was continuing to import methydone. Mr. O'Hare, however, had no further involvement in Mr. Gattis's illegal activity.¹¹

Although methydone was not illegal under *state* law in early 2012, it was illegal under *federal* law. Several months later, during the ensuing federal investigation, federal drug enforcement agents called on Mr. O'Hare. Mr. O'Hare was surprised that the agents knew of him. During the first meeting, the agents asked only if he knew Mr. Gattis, and gave him a "target letter"—a letter informing him that he was the target of a federal investigation. Mr. O'Hare obtained a lawyer, and at subsequent meetings, Mr. O'Hare told federal officials all that he knew about Mr. Gattis's criminal enterprise.

On December 12, 2012, a federal grand jury indicted all members of the drug enterprise, including Mr. Gattis and Mr. O'Hare, on several counts of criminal violations, ranging from conspiracy to distribute a controlled substance to international money laundering.¹² On February 15, 2013, Mr. O'Hare entered into a plea-bargain with federal prosecutors, in which he pled guilty to one count of possession of controlled substance with intent to distribute, a felony.¹³ In the plea agreement, Mr. O'Hare admits that he "knew that [methydone] was some kind of prohibited drug."¹⁴ The maximum penalties for this offense include up to 20 years in jail and a fine of up to \$1,000,000.

Mr. O'Hare conviction was entered on January 15, 2014. He did not receive any jail time. He was fined \$2,000 and placed on probation for five years. As a condition of his probation, Mr. O'Hare must submit to periodic drug tests. He was never required to post bail. He complied with all conditions of his pretrial release, and, after he was sentenced, he has complied with all conditions of his probation.¹⁵

During April 2012, while Mr. O'Hare was helping Mr. Gattis import methydone, he was taking prep classes for the real estate salesperson examination. He was working for his mother, real estate licensee Kathleen O'Hare, in a real estate office, doing office work for which no license was required. He took and passed the examination on August 22, 2012, and submitted

¹¹ *Id.*

¹² Administrative Record at 27-46. The First Superseding Indictment named Mr. Gattis in 22 counts. Mr. O'Hare was named in two counts, conspiracy to distribute controlled substance, and possession of a controlled substance with intent to distribute. *Id.*

¹³ Administrative Record at 47-65.

¹⁴ *Id.* at 50.

¹⁵ *Id.* at 67-72.

his application for a salesperson license on August 28, 2012.¹⁶ He was not under indictment at the time, so his answer of “no” to the question on the application that asked whether he was under indictment was truthful. On September 4, 2012, he was issued a real estate salesperson license.¹⁷ After he obtained his license, he continued to work for his mother, but now as a salesperson. Ms. O’Hare testified that Shane’s clients love him. She or Shane have disclosed his conviction to some clients. Other clients have discovered it through their own research. According to Ms. O’Hare, none was concerned.¹⁸

On January 31, 2014, Mr. O’Hare applied for renewal of his license. He marked “yes” to the question on whether he had ever been convicted of a felony.¹⁹ The “yes” answer triggered an investigation. On June 18, 2014, the Division of Corporations, Business and Professional Licensing issued an accusation against Mr. O’Hare. The accusation alleged that Mr. O’Hare’s criminal conduct and conviction “demonstrate[] that O’Hare is unfit to engage in the business of a real estate salesman or, at the very least, affects his ability to practice as a real estate salesperson competently and fairly.” The accusation sought discipline, including revocation or suspension of Mr. O’Hare’s real estate salesperson license. Mr. O’Hare filed a notice of defense, and a one-day hearing was held in Anchorage on October 30, 2014. Robert Auth represented the Division. Steven Wells represented Mr. O’Hare.

III. Discussion

A. What does Mr. O’Hare’s conduct reveal about his character?

The need for a hearing in this case was not to gather facts about Mr. O’Hare’s criminal activity and conviction. Those facts were fully established and not contested by Mr. O’Hare. The parties differ, however, on what those facts, and facts about Mr. O’Hare’s actions after he ceased to be a part of the Gattis criminal enterprise, reveal about Mr. O’Hare’s character.

Below, this decision will first analyze the parties’ views about Mr. O’Hare’s character. It will then turn to the requirements of real estate law to determine whether discipline should be imposed upon Mr. O’Hare.

¹⁶ Administrative Record at 98-99.

¹⁷ *Id.* at 97.

¹⁸ K. O’Hare testimony.

¹⁹ Administrative Record at 17.

1. What inferences about Mr. O'Hare's character can be drawn from his involvement in the Gattis criminal enterprise?

Mr. O'Hare argues that his involvement in the Gattis criminal enterprise was a one-time event that occurred before he became a licensed real-estate professional. In his view, his minimal involvement in the enterprise does not support an inference that he has a tendency to put himself above the law or that he is not trustworthy. It shows only that he misjudged a person's character, which is something that everyone does on occasion. He asks that no inferences be drawn from his criminal conduct and conviction.

The division, on the other hand, notes that in letting Mr. Gattis use his UPS box, Mr. O'Hare made use of property owned by someone else to commit a crime. It asks that an inference be drawn that Mr. O'Hare is likely to use other people's property to commit crimes. It believes that he a risk as a real-estate professional because he would have access to other people's homes. It also believes that he is a risk for committing a property crime because of the well-known connection between drug crimes and property crimes. The division's expert, Peggy McConnachie, testified that it was the repeated nature of Mr. O'Hare's involvement—he received and couriered drugs on four different occasions, and only stopped because a person died—that convinced her that he was not trustworthy.

The division's inference that Mr. O'Hare's use of UPS's property shows he is a risk to use other people's homes for criminal conduct is not well-taken. As a lessee, he had property rights in his UPS box. This does not justify his conduct, but standing alone, his use of the UPS box does not show any propensity to use other people's houses for criminal activity. His use of the UPS box is not a material fact in this inquiry.

Nor did the division prove its point that Mr. O'Hare's involvement in a drug crime supports an inference that he is a risk for committing a property crime. The division did not put on any expert testimony that a person who commits a drug crime similar to that committed by Mr. O'Hare is statistically more likely to commit a property crime than other white-collar criminals. The division asked the Commission to rely on the commonsense understanding of the connection between drug and property crimes. But the common understanding would largely go to drug users, who steal to support their habit. Here, Mr. O'Hare testified that he was not a drug

user, and the division has not proved otherwise.²⁰ Therefore, to the extent that Mr. O’Hare’s conviction supports an inference that he is a risk for further unethical or criminal conduct, that risk is the same as it would be for a run-of-the-mill white collar criminal, not a drug user or peddler.

Yet, although Mr. O’Hare is correct that in comparison to many drug crimes, his criminal conduct was fairly minimal, his conduct cannot be put aside as a mere instance of minimal bad judgment. He has pled guilty to knowingly and intentionally possessing a controlled substance with the intent to distribute it to another person.²¹ He has shown a willingness to participate in a shady enterprise that had danger signals written all over it. In return for being accepted as part of a group, he was willing to turn a blind eye to the conduct of his friend. That he kept his role minimal does not make him trustworthy. Unlike some felonies, such as felony drunk driving that was at issue in *In re Draper*, his participation in this drug enterprise had an inherent element of deception and dishonesty. Therefore, Mr. O’Hare’s conviction supports an inference that Mr. O’Hare’s judgment is sufficiently impaired that he is not trustworthy. We next consider other evidence—specifically, the evidence of Mr. O’Hare’s conduct after his participation in the criminal enterprise ceased—to determine whether that evidence mitigates or enhances the inference.

2. Does Mr. O’Hare’s subsequent conduct cure the concern about his judgment and trustworthiness?

The main purpose of Mr. O’Hare’s defense was to put on testimony regarding his character. Mr. O’Hare admitted that his criminal conduct was an instance of very poor judgment, but he asked the Commission to focus on his conduct after Matthew died. As he emphasizes, after Matthew died, he ceased all contact with Mr. Gattis. Later, when Mr. O’Hare was made a target of the investigation, he fully cooperated with law enforcement officials. In addition, Mr. O’Hare and his mother testified that his experience during the last two years as a real-estate salesperson has shown that he is competent and ethical.

Turning first to the point that Mr. O’Hare has been successful and ethical as a real-estate salesperson, that testimony was not contested by the division. Standing alone, however, that

²⁰ Mr. O’Hare admitted that he had once tried “magic mushrooms” and had tried some of the methylone pills given to him by Mr. Gattis. He strongly denied, however, that he used drugs on any other occasions. O’Hare testimony.

²¹ Administrative Record at 50. At the hearing, Mr. O’Hare denied that knew his action was illegal. His conviction, however, establishes that he can be held responsible for a knowing violation of the law.

good conduct does not reverse the inferences that are supported by his conviction. Although the testimony demonstrated that Mr. O'Hare appears to have a knack for helping people through financial transactions, the testimony did not address his trustworthiness. The testimony that he has been through two years of service with no ethical lapses can be taken into account when determining the appropriate discipline, but it does not prove that Mr. O'Hare's conduct is not subject to discipline.

With regard to Mr. O'Hare's cooperation with law enforcement officials, Mr. O'Hare presented an expert witness, Robert Herz, who testified on his behalf. Mr. Herz is a criminal defense attorney who has considerable experience in federal criminal law, particularly in drug offenses. Through the testimony of Mr. Herz, Mr. O'Hare proved that the deferential treatment that Mr. O'Hare received from federal drug enforcement officials, U.S. attorneys, and the federal judge, is extremely rare in federal drug cases. Everything from Mr. O'Hare's pretrial release without bail to the comment from a U.S. attorney in a sentencing report that Mr. O'Hare "just told the truth," is unusual in federal drug proceedings. Through this testimony, Mr. O'Hare has proved that his treatment at the hands of federal officials showed that the officials considered him to be a cooperative witness whose role in the criminal enterprise could be minimized.

Yet, Mr. Herz's testimony does not shed light on Mr. O'Hare's character for the purpose of whether discipline should be imposed on his real estate license for his conviction. First, Mr. O'Hare's cooperative conduct was in exchange for a lighter sentence. That he should cooperate in order to save himself does not demonstrate that he is trustworthy or of good character. Cooperation in this instance was more compelled than voluntary. Second, Mr. Herz was comparing Mr. O'Hare's treatment to that of most federal drug arrestees. The fact that Mr. O'Hare received treatment far more lenient than most drug offenders, and, according to Mr. Herz, almost unheard of in drug circles, tells us nothing about Mr. O'Hare in comparison to other real estate salespeople.

Far more telling is Mr. O'Hare's voluntary conduct after Matthew's death. When notified that Matthew was extremely ill, Mr. O'Hare did not call emergency services. Nor did he call law enforcement officials when he learned that Matthew had died. Then, even though a person had died, apparently from the dangerous drugs that he had assisted to supply, Mr. O'Hare did absolutely nothing to facilitate removing Mr. Gattis and his drugs from the streets. His inactivity supports an inference that Mr. O'Hare's ethics and character are first and foremost

about protecting himself. He will shield himself from consequences for his own wrongful conduct, even if it means others are at risk. In short, Mr. O'Hare's conduct after he ceased being a part of the criminal enterprise shows that he cannot be trusted to do the right thing to rectify his own errors. In the real estate world, that character flaw could have serious consequences.

At the hearing, Mr. O'Hare argued that the Commission should not consider his failure to take action after Matthew's death. He pointed out that a citizen does not have an obligation to report a crime. Because he had no duty to take action, in his view, the Commission could not impose discipline based on his failure to take action after Matthew's death.

Mr. O'Hare's argument misses the point. He has engaged in intentional felonious activity, which gives rise to an inference that he is not trustworthy. He himself has asked the Commission to consider his actions after Matthew's death because he believes that his activity shows that he is fundamentally of good character. Far from showing good character, however, his conduct strengthens the conclusion that he is not trustworthy. We turn next to analyzing whether the governing law requires or allows the Commission to impose discipline on Mr. O'Hare for his conduct.

B. Should the Commission interpret the governing law to impose discipline on Mr. O'Hare?

1. Is discipline warranted under the statute?

The division alleged seven different theories of discipline in its accusation.²² The seven theories are alleged in the alternative—that is, the division is not alleging seven separate counts and seeking to have seven different disciplinary sanctions imposed cumulatively. The division is seeking only one count of discipline, but suggesting that it could be supported through seven different pathways. Because Mr. O'Hare has argued that the statutes do not allow the Commission to impose discipline for his conduct, the first question to answer here is whether any discipline can be imposed.

The most straightforward path to discipline is under the first statute cited in the accusation: AS 08.88.071(a)(3)(C). This statute authorizes the Commission, after a hearing, to

suspend or revoke the license of a licensee or impose other disciplinary sanctions authorized under AS 08.01.075 on a licensee who . . . (C) has engaged in conduct of which the commission did not have knowledge at

²² See Accusation ¶ 16 (alleging that the following statutes and regulations all provide a pathway to discipline: AS 08.88.071(a)(3)(C); AS 08.88.071(a)(11); AS 08.88.171(c); 12 AAC 64.130(1); 12 AAC 64.130(11); 12 AAC 64.130(15); and 12 AAC 64.900).

the time the licensee was licensed demonstrating the licensee's unfitness to engage in the business for which the licensee is licensed.²³

This statute applies here because Mr. O'Hare has engaged in conduct, unknown to the Commission at the time he was licensed, that demonstrate a degree of unfitness to be a real estate salesperson. The division's other theories will be discussed below when determining whether Mr. O'Hare's conduct warrants revocation.

Although Mr. O'Hare argues that his crime has no nexus to the real estate industry, and therefore does not reflect in any way on his fitness to sell real estate, the legislature does not agree. In 2009, the legislature amended the real estate statutes in part to ensure that drug crimes could be included among the felonies considered barrier crimes for real estate salesperson—that is, crimes that, if committed while licensed, would require revocation of a license. As a policy matter, selling illegal drugs and selling real estate are not compatible. As a California court has observed, a real estate agent convicted of importing illegal drugs with the intent to sell “demonstrated a lack of honesty and integrity in his character.”²⁴ That court also observed that “[h]onesty and integrity are deeply and daily involved in various aspects of the practice [of real estate]” and are “two qualities deemed by the Legislature to bear on one's fitness and qualification to be a real estate licensee.”²⁵

The 2009 amendment demonstrates that the same holds true in Alaska.²⁶ The division's expert, Ms. McConnochie, testified persuasively that trustworthiness and good judgment are essential attributes of a real estate salesperson. Therefore, involvement in a drug felony is generally a sufficient ground for the Commission to impose discipline.

In addition, Mr. O'Hare's specific conduct has a nexus to real estate. His conduct demonstrates a tendency to go along with or be part of a scheme that an ordinary person would question. Although this decision does not agree that Mr. O'Hare is a risk to commit theft while in a home, it does agree with Ms. McConnochie's expert opinion that without discipline, Mr. O'Hare cannot be trusted to follow through on many of the duties assigned to a real estate agent. As examples, she identified the need to structure a transaction, make disclosures, and account for

²³ AS 08.88.071(a)(3)(C).

²⁴ *Golde v. Fox*, 159 Cal.Rptr. 864, 870 (Cal. App. 1979).

²⁵ *Id.*

²⁶ This discussion is *not* interpreting the legislature's 2009 amendment to require revocation for all drug felonies. This discussion is interpreting the legislature's action to show a general policy that would support some level of discipline for commission of a drug felony. Whether the 2009 amendment directly applies to Mr. O'Hare's situation to require revocation is discussed below in section B.2.a.

money. His conduct raises doubt about whether he can be trusted to show good judgment or do due diligence should a client, friend, or colleague seek to involve him or use him in a real estate practice that is in violation of the law or the Real Estate Code of Ethics and Standards of Practice.²⁷

His conduct after his participation in the scheme ended also demonstrates a significant degree of unfitness. The Commission does not maintain a police force that ferrets out all mistakes or errors committed by real estate agents. A licensed professional must admit mistakes and correct his or her errors, even if the admission and correction lead to negative consequences for the professional. Mr. O’Hare’s conduct indicates that he may have a tendency to avoid reporting facts that could harm him, and that he will disclose his own mistakes only when it is to his advantage to do so. Accordingly, the Division has proved that Mr. O’Hare has demonstrated a sufficient lack of fitness regarding the practice of selling real estate to warrant discipline under AS 08.88.071(a)(3)(C).²⁸ This decision turns next to the degree of discipline warranted.

2. What degree of discipline is warranted?

a. Is revocation warranted?

The division makes a powerful argument that the Commission should revoke Mr. O’Hare’s license. First, it notes that under AS 08.88.071(a)(11), revocation would be mandatory for a licensee who committed a felony while licensed if the commission determined that the felony “affects the ability of [the licensee] to practice as a broker, associate broker, or real estate salesperson competently and safely.”²⁹ The division has made a strong case that this statute

²⁷ The finding that Mr. O’Hare’s conduct creates a *risk* that warrants discipline is not contrary to the Commission’s decision in *In re Draper*. OAH No. 12-0186-REC at 9-10 (Real Estate Comm’n 2012). In *Draper*, the Commission rejected the argument that a conviction for felony driving under the influence warranted discipline, even though the conviction demonstrated that the licensee had a tendency to engage in risky behaviors. There, however, the risky behavior was a generalized risk that did not relate to the type of white-collar crime that could occur in a real-estate transaction. Here, the conduct—engaging in a scheme to import and distribute illegal drugs—does raise concerns about whether Mr. O’Hare could be enticed into a scheme of illegal or unethical conduct in a real-estate context.

²⁸ A general rule of administrative law is that an accusation must describe all facts for which discipline may be imposed, so that the respondent has an opportunity to defend against the accusation. Here, the accusation described only Mr. O’Hare’s conviction and the elements of his crime. It did not describe Mr. O’Hare’s conduct in failing to report Matthew’s illness or death or in failing to take action to stop Mr. Gattis’s ongoing criminal conduct after Matthew’s death. This omission does not prevent the Commission from considering this information, however, because Mr. O’Hare opened the door to consideration of his conduct after Matthew’s death, and he did not object or ask to have the accusation amended. And even if these facts could not be considered at this stage for purposes of liability for discipline, the conviction alone is sufficient to impose discipline. His conduct after Matthew’s death can be considered for purposes of determining the appropriate penalty.

²⁹ AS 08.88.071(a)(11). This statute also requires revocation for a felony committed while licensed, if the felony was for forgery, theft, extortion, conspiracy to defraud creditors, or fraud. That drug crimes are not among

would likely apply to a licensee convicted of the drug felony for which Mr. O’Hare was convicted, if the felony was committed while licensed.

Similarly, under the statute that sets the standards for issuance of a real estate salesperson license, AS 08.88.171(c), the Commission would deny a license to an applicant who has been convicted or indicted for a felony “that, in the judgment of the commission, affects the ability of [the licensee] to practice as a broker, associate broker, or real estate salesperson competently and safely.” The division submitted into the record two licensing files in which applicants were denied licenses because of felony drug convictions. Again, the division has made a case that Mr. O’Hare would not have been given a license if he had been indicted for his drug felony at the time of his application.

Because of a remarkable stroke of luck for Mr. O’Hare, neither of these two statutes applies directly to his case. He was not licensed when he committed his crime. He was not yet under indictment when he his license application was considered.

The division does not believe that Mr. O’Hare should profit from this fortuity. It argued that in adopting these two reciprocal statutes, the legislature intended to occupy the field, and that Mr. O’Hare’s unusual case should not be a loophole. It asks the Commission to apply 12 AAC 64.130(15), which permits suspension or revocation for any grounds that would have been grounds for denial of a license, and revoke Mr. O’Hare’s license.³⁰

Although the division’s argument would allow the Commission to revoke, the statutory scheme favors having the Commission use its discretion to analyze the facts of Mr. O’Hare’s conduct to determine the appropriate discipline for the facts of his case. First, the division’s assertion that revocation would be *required* under AS 08.88.071(a)(11) for *any* drug felony is doubtful. In *Draper*, the Commission rejected the division’s argument that all felonies require revocation under AS 08.88.071(a)(11), and instead adopted a rule that it has discretion to determine whether a felony not specifically listed in paragraph (a)(11) warranted revocation.³¹ Although the legislative history of the statute indicates that drug felonies were identified as the type of felony that *could* lead to revocation, that was based in part on the connection between

the enumerated barrier crimes is significant, although it does not undercut the general policy that selling drugs is not compatible with selling real estate.

³⁰ The parties debated at length whether the terms “competently” and “safely,” which are used in the two reciprocal statutes, AS 08.88.071(a)(11) and AS 08.88.171(c), would apply to Mr. O’Hare’s situation. Because this decision relies solely on AS 08.88.071(a)(3)(C) (which uses the term “unfitness”), it will not engage in or resolve that question.

³¹ OAH No. 12-0186-REC at 4 (Real Estate Comm’n 2012).

drug felonies and property crimes—a connection that is not present here. The fact that the statutes do not identify drug felonies as automatic barriers would appear to give the Commission discretion to look behind the circumstances of the particular drug crime to determine if the conducted warranted revocation.

Second, although Mr. O’Hare is lucky that the timing of his crime fell into the void left by AS 08.88.071(a)(11) and AS 08.88.171(c), his situation *is* different. Because he was not licensed when his crime occurred, we know that he did not import drugs for sale and sell real estate at the same time. That difference looms large. Mr. O’Hare has not committed a drug offense since he has been licensed, so the dishonesty and lack of integrity associated with the crime may be in his past, perhaps to some extent because of his license. That could not be true for a licensee who commits the crime while licensed. Moreover, both activities occurring at once would be damaging to the image of the real estate industry. A licensed real estate agent involved in drug crimes would bring disrepute to the industry, in part because the agent would be a risk to mix the two.³² For the same reasons, a person with a history of drug crimes is not a person whom the Commission would readily license—with no experience with the individual, the Commission will generally not risk having a licensee who might mix drugs and real estate. Unlike an unlicensed applicant, however, Mr. O’Hare has two-year’s experience selling real estate with no drug use and no ethical problems. In sum, the fact that revocation is not mandatory, together with Mr. O’Hare’s lucky timing, give the Commission discretion to lift the veil on Mr. O’Hare’s drug felony, and examine the facts of his case to determine whether his specific conduct warrants revocation of his license.

In that regard, the following facts demonstrate that revocation is not warranted:

- His participation in the criminal scheme was minimal;³³
- He was never involved in the selling of drugs;
- He was never involved in the financing of drug procurement;

³² Doing both at once raises the specter of a real estate agent attempting to sell drugs to clients, steal drugs or valuables from homes, “borrow” money from the transaction to finance a drug deal, or using the agent’s access to homes for a safe place to conduct a drug deal. These fears may sound speculative, but the public needs to be assured that the people who have free access to their homes are trustworthy. A general “no drug dealers unless proven safe, fit, and competent” policy provides that assurance and is consistent with the statutes. The point is not that a licensee who is a drug-dealer will mix the two or that the Division would have to prove a mixing to revoke—the point is that any drug conviction implicates integrity and honesty, and that doing both concurrently is significant.

³³ In that regard, Mr. O’Hare’s participation in the Gattis criminal enterprise was far less involved than the criminal conduct at issue in *Golde v. Fox*, or by the two applicants in the licensing cases submitted by the division.

- He was never a significant user, and now he does not use illegal drugs at all;
- He has never been involved in a property crime or shown a susceptibility to be involved in a property crime;
- His participation occurred before he became licensed;
- His experience as a licensee has been successful.

Thus, the evidence would support a conclusion that licensure was a watershed event of maturation for Mr. O’Hare. He was never enmeshed in the drug culture. He has moved away from associations that tangentially connected him to that culture. In addition, in comparison, the matters other than drug crimes for which the Commission will revoke a license—such as fraud, theft, or deceit—are very serious matters that go to the heart of a real-estate transaction.³⁴ Here, our concern about Mr. O’Hare is not nearly as direct. Although his past conduct makes him a risk, all signs indicate that he can become fit to continue to be licensed. Mr. O’Hare’s conduct does not warrant revocation of his license.

b. Does Mr. O’Hare’s conduct warrant some combination of suspension, a fine, a reprimand, or additional education?

Under AS 08.01.075(f), a board is required to “seek consistency in the application of disciplinary sanctions.” At the hearing, the division was asked what would be an appropriate discipline short of revocation. The division suggested a suspension, and indicated that a suspension of one year would be appropriate.

A review of the Commission’s published cases has not revealed any cases similar to Mr. O’Hare’s. In suggesting a year-long suspension, the division did not cite to comparative cases. It appeared that the division requested a long suspension based on a general policy to keep discipline high for drug-related conduct, and because an applicant who had been denied for a drug conviction must wait one-year to reapply. This rationale is not persuasive, however. In this case, we have moved beyond the general issues of integrity and honesty associated with drug crimes. Here, we have accepted that Mr. O’Hare is more comparable to a person with a minimal involvement in a white-collar crime than to a typical drug dealer. The indicia are that Mr. O’Hare can become fit for licensure, and that the public can be protected from any risk that he

³⁴ Cf., e.g., *In re Yoon*, No. 3004-95-11 (Alaska Real Estate Comm’n, Sept. 10, 2003) (revoking license for salesperson who deliberately concealed from buyers serious flooding issue of which he was specifically aware and subsequently engaged in complex fraud in second transaction).

may impose. With judicious application of appropriate discipline, we expect Mr. O’Hare to function as a trustworthy salesperson who is a credit to the real estate industry. This is why the Commission has not revoked his license. Once we make that determination, we should compare his conduct to that of other similar white collar offenses to determine his discipline.

Two relatively recent cases included comprehensive surveys of discipline imposed by the Commission in past decisions and settlements.³⁵ These reviews revealed that the modern practice of the Commission would reserve discipline as severe as a year-long suspension for only the most serious cases.³⁶

Perhaps most informative for purposes of this decision is *In re Griebel*. In *Griebel*, the agent, Ms. Griebel had a role in failing to disclose a known-defect. The Commission found that she engaged in an “unprofessional sharp practice,” which resulted in financial harm to the buyer. Ms. Griebel was not suspended. She received a fine, a reprimand, and was required to take nine hours continuing education.

Here, this decision finds that Mr. O’Hare’s willingness to be part of a very serious criminal scheme concocted by others without doing due diligence, and his unwillingness to self-report unless he benefitted, makes him somewhat of a risk to commit a sharp practice—a practice that might give him some plausible deniability, but is unethical, illegal, or harms consumers. Yet, it would be incongruous to suspend him for a lengthy period because he is a *risk*, when a person who actually *commits* a “sharp practice” in real estate received no suspension.

On the other hand, unlike Ms. Griebel, here, Mr. O’Hare has been convicted of a serious drug-related crime. The Commission must be able to assure the public that Mr. O’Hare is fit and safe to be licensed as a real-estate agent. The best way to accomplish this goal would be impose substantial continuing education requirements, and a lengthy probationary period. The

³⁵ *In re Keating and Griebel*, OAH Nos. 10-0474-REC/10-0475-REC at 15-16, 18-20 (Real Estate Comm’n 2011) (reviewing *In re Phillip Stephens*, No. C-86-10 (Real Estate Comm’n 1988); *In re Darlene Stephens*, No. 3000-94-01 (Real Estate Comm’n 1996); *In re Green*, No. 3004-98-006 (Alaska Real Estate Comm’n 2001); *In re Yoon*; *In re Lightle*, No. 3004-99-004 (Real Estate Comm’n 2006); *In re Moser*, OAH No. 04-0294-REC (Alaska Real Estate Comm’n 2005); *In re Prabucki*, Case No. 3004-04-002 (Real Estate Comm’n, adopted June 10, 2004); *In re Crowley*, No. 3002-10-005 (settlement adopted by Real Estate Comm’n, March 17, 2010); *In re Caro*, No. 3004-10-008 (settlement adopted by Real Estate Comm’n, March 17, 2010)); *In re Bartos*, OAH No. 08-0054-REC (Real Estate Comm’n 2009) (reviewing *In re Mehner*, Case No. 3002-02-005 (Real Estate Comm’n 2004); *In re Enoch*, Case No. 3004-07-010 (Real Estate Comm’n 2008)).

³⁶ *See, e.g., Bartos* at 36 (citing *Mehner*, in which multiple violations that included a serious failure to disclose and substantial misrepresentations, and which resulted in considerable financial harm to the consumer, the Commission imposed only a 120-day suspension). Although *Mehner* also received a substantial fine, the short length of the suspension indicates that the Commission takes suspension from work very seriously and is cautious about lengthy suspensions.

probationary period allows the Commission to keep an eye on Mr. O'Hare, and thus assure the public that he is safe during this time of supervised practice. This will largely be accomplished by relying on Mr. O'Hare's compliance with his federal probation requirements. An unimposed suspension looming should he violate his probation will give the public assurance that Mr. O'Hare will walk the straight and narrow line of integrity and honesty. If Mr. O'Hare is able to complete his additional courses, practice real estate without incident, and comply with the probation requirements of his criminal conviction (which includes drug testing), then the Commission, and the public, can be satisfied that he is fit and safe to be licensed going forward.

Accordingly, Mr. O'Hare's discipline is as follows:

1. Mr. O'Hare's real estate salesperson license is suspended for 180 days.
2. The 180-day suspension is suspended pending successful completion of the period of probation.
3. Mr. O'Hare's license shall be on probation for two years from the effective date of this order. If, after notice and an opportunity for hearing, the Commission or division determines that during this two-year period, Mr. O'Hare has violated a law governing his real-estate license, or violated the terms of his probation in his criminal case, Mr. O'Hare's license shall automatically be suspended for the 180-day term.³⁷ If the conduct that leads to the termination of his probation is a sanctionable offense, the Commission can impose additional sanctions as appropriate. During this time, Mr. O'Hare is required to report to the Commission any changes in his probation status in his federal criminal case, including any allegation that he has failed a drug test.
4. Within one-year from the effective date of this order, Mr. O'Hare shall complete 18 hours of education. The education required by this order must be in addition to any education that Mr. O'Hare is enrolled in for compliance with education requirements, and cannot be counted towards any license renewal or upgrades. The curricula for the 18 hours must be approved by the Commission's agent before Mr. O'Hare registers for the course, and should include topics on ethics, disclosures, and due diligence for a real estate agent. Mr. O'Hare shall bear all costs of the education required by this order.

³⁷ The Commission is deliberately not using words like "substantial" or "material." Mr. O'Hare must obey the law, and his probation will be revoked if he does not. Yet, this order should be given a commonsense interpretation. Mr. O'Hare's probation will not be revoked on a technicality that is truly minor or trivial.

IV. Conclusion

Shane O'Hare's criminal conviction for a federal felony drug charge based on conduct that occurred before he became a licensed real estate salesperson demonstrates a lack of fitness to be a real estate salesperson. His minimal involvement in the criminal scheme, and his minimal involvement in the drug culture in general, however, indicates that he can be considered fit after additional education and supervised practice. The Commission imposes discipline of two year's probation and 18 hours of continuing education. If he violates his probation, he will be automatically suspended for six months.

DATED this 5th of January, 2014.

By: Signed
Stephen C. Slotnick
Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]