

BEFORE THE
STRUCTURAL PEST CONTROL BOARD
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

DANIEL RAY SMITH

Respondent:

Case No. 2010-84

OAH No. 2010080212

DECISION AND ORDER

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Structural Pest Control Board, Department of Pesticide Regulation, as its Decision in this matter.

The Decision shall become effective on May 29, 2011.

IT IS SO ORDERED April 29, 2011.



President
Structural Pest Control Board

BEFORE THE
STRUCTURAL PEST CONTROL BOARD
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

DANIEL RAY SMITH,
Stockton, California 95204

Field Representative's License
Number FR 35981, Branch 2

Respondent.

Case No. 2010-84

OAH No. 2010080212

PROPOSED DECISION

This matter was heard before Rebecca M. Westmore, Administrative Law Judge, Office of Administrative Hearings, State of California, on January 27, 2011, in Sacramento, California.

Leslie A. Burgermyer, Deputy Attorney General, represented complainant, Kelli Okuma, Registrar/Executive Officer of the Structural Pest Control Board (board), Department of Pesticide Regulation (department), State of California.

Daniel Ray Smith (respondent) appeared and represented himself.

Evidence was received, the record was closed, and the matter was submitted for decision on January 27, 2011.

FACTUAL FINDINGS

Jurisdictional Matters

1. On May 30, 2003, the board issued Field Representative's License Number FR 35981, Branch 2, to respondent. Respondent's license will expire on June 30, 2011, unless renewed or revoked.
2. On June 10, 2010, complainant filed the Accusation in her official capacity. Complainant seeks to revoke respondent's field representative's license based on eight criminal convictions, and based on respondent's failure to disclose six of those convictions in his original application to the board.

3. Respondent timely filed a Notice of Defense to the Accusation. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

Respondent's Convictions

4. On December 22, 1994, in San Joaquin Municipal Court, Case No. ST013340A, respondent, upon a plea of nolo contendere, was convicted of violating Vehicle Code section 2800, failure to obey a peace officer, a misdemeanor. Imposition of sentence was suspended, and respondent was given a three year conditional sentence. The court ordered respondent to pay a \$250 fine.

5. On November 12, 1997, in San Joaquin Municipal Court, Case No. SF72296A, respondent, upon a plea of nolo contendere, was convicted of violating Health and Safety Code section 11357, subdivision (b), possession of marijuana, a misdemeanor. Respondent was ordered to pay a \$100 fine.

6. On January 7, 1998, in San Joaquin Municipal Court, Case No. SM197591A, respondent, upon a plea of nolo contendere, was convicted of violating Penal Code section 242, battery, a misdemeanor. Respondent was given a three year conditional sentence. The court sentenced him to serve 180 days in county jail, and ordered him to pay \$232 in fines and fees.

7. On February 23, 1998, in San Joaquin Superior Court, Case No. SC062571A, respondent, upon a plea of nolo contendere, was convicted of violating Health and Safety Code section 11378, possession for sale of a controlled substance, to wit: methamphetamine, a felony. Imposition of sentence was suspended, and respondent was placed on five years supervised probation. The court sentenced respondent to 365 days in county jail, and ordered him to register as a controlled substance offender, pursuant to Health and Safety Code section 11590; participate in a treatment program; and pay a \$330 restitution fine.

8. On September 5, 2000, in San Joaquin Superior Court, Case No. SM201337A, respondent, upon a plea of nolo contendere, was convicted of violating Penal Code section 243, subdivision (e), battery on a non-cohabitating spouse, a misdemeanor. Respondent was placed on three years conditional probation, and ordered to stay away from his wife.

9. On September 5, 2000, in San Joaquin Superior Court, Case No. SF079915A, respondent, upon a plea of nolo contendere, was convicted of violating Health and Safety Code section 11379.6, subdivision (a), manufacture of a controlled substance, to wit: methamphetamine, a felony. Respondent also received a three-year enhancement pursuant to Health and Safety Code section 11370.2. Respondent was sentenced to six years in state prison, stayed; committed to the California Rehabilitation Center (CRC); and ordered to pay a \$400 restitution fine. On April 1, 2003, respondent was discharged from his commitment at CRC, and the criminal proceedings were suspended in the furtherance of justice.

10. On December 2, 2009, in San Joaquin Superior Court, Case No. SF113284A, respondent, upon a plea of guilty, was convicted of violating Health and Safety Code section 11377, subdivision (a), possession of a controlled substance, to wit: methamphetamine, a felony. Imposition of sentence was suspended, and respondent was placed on five years formal probation. The court ordered respondent to participate in a treatment program, and pay \$480 in fines and fees.

11. On January 12, 2010, in Sacramento Superior Court, Case No. 10M00310, respondent, upon a plea of nolo contendere, was convicted of violating Penal Code section 496, subdivision (a), receiving stolen property, a misdemeanor. Imposition of sentence was suspended, and respondent was placed on three years informal probation. The court sentenced respondent to serve 30 days in county jail; recommended him to the sheriff's work program; and ordered him to pay a \$200 restitution fine.

Respondent's conviction arose from his conduct on January 9, 2010, when he was stopped by Galt patrol officers for missing vehicle registration tags. The car had previously been reported as stolen. A search of the vehicle revealed a screwdriver in the center console; a clear plastic straw with trace amounts of a white powdery substance in the glove compartment, along with respondent's checkbook and mail addressed to respondent; two California license plates; and an unopened Makita Cordless combo kit in the trunk. A search of respondent revealed a Vicodin tablet in his right front jeans pocket. Respondent indicated to the officers that the pill belonged to his girlfriend, and he did not know how it got into his jeans pocket. Respondent also indicated that BMW East Bay of Pleasanton had loaned him the vehicle; he was unaware of the license plates in the trunk; and the screwdriver and plastic straw did not belong to him. The white powdery substance tested presumptive positive for methamphetamine.

Respondent's Applications

12. On February 20, 2003, respondent submitted to the board an Application for Structural Pest Control Field Representative Examination. Question 16 on the application asked, "Have you ever been convicted of a felony or of a misdemeanor other than a violation of traffic laws? If YES, explain." Respondent checked the box marked "NO," and signed the application under penalty of perjury, certifying that the information he had provided was true and correct.

13. On May 15, 2003, respondent submitted to the board an Application for Field Representative's License. Question 8 on the application asked, "Have you ever been convicted of a felony or misdemeanor other than violation of traffic laws? If YES, attach a signed detailed statement." Respondent checked the box marked "NO," and signed the application under penalty of perjury, certifying that the information he had provided was true and correct.

14. Respondent's answers on his applications were false and misleading, in that when he submitted the applications, he had been convicted of the two felonies and four misdemeanors described in Factual Findings 4 through 9, above.¹ At hearing, respondent denied knowing that some of his convictions were felonies, yet asserted that "I thought the convictions would be expunged and dropped to misdemeanors." According to respondent, "I just found out that I had to have a hearing to get them dropped. Unfortunately it didn't happen." Respondent admitted and apologized for the lies on his applications, and stated "I was ashamed of [my criminal history] and was hoping not to face it."

Factors in Aggravation, Mitigation and Rehabilitation

15. Respondent is 49 years old. In or about 1987, respondent began receiving experimental treatments for Liposarcoma. His last treatment was in 1997. His cancer has been in remission for 10 years; however, he goes back to Houston, Texas annually for regular check-ups. He started using methamphetamine in 1994/1995, when a friend invited him for a drink, and a female provided them with methamphetamine. According to respondent, "it was the first time ... I had any energy from walking death. I felt good." Respondent asserted, "I wish I had never done it." He asserted that he learned a lot from the court-ordered Proposition 36 program that he attended twice a week and is "still trying to follow program rules." Respondent last used controlled substances on December 2, 2009. He admitted that each of his offenses were committed while he was still on probation, and confirmed that he is now on probation through December 12, 2013.

16. Respondent has been unemployed for the past two years, but supports himself through his rental properties. He has not used his Field Representative's license for almost three years. His last job at Area Wide Exterminators Pest Control involved training technicians, bookkeeping, office work, and spraying problem areas inside and outside homes.

LEGAL CONCLUSIONS

Applicable Case Law, Statutes and Regulations

1. The burden of proof is on complainant to establish by clear and convincing evidence that respondent's license should be suspended or revoked. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) "Clear and convincing evidence" requires a high probability of the existence of the disputed fact, greater than proof by a preponderance of the evidence. Evidence of a charge is clear and convincing as long as there is a high probability that the charge is true. (*People v. Mabini* (2001) 92 Cal.App.4th 654, 662.)

¹ At hearing, complainant asserted that there was no mechanism in place to conduct a background check of respondent at the time he filed his original applications with the board. According to complainant, they first became aware of respondent's criminal background on January 12, 2010, when they received a subsequent arrest notification from the Department of Justice.

Cause for Discipline

2. Business and Professions Code section 8649 provides:

Conviction of a crime substantially related to the qualifications, functions, and duties of a structural pest control operator, field representative, applicator, or registered company is a ground for disciplinary action. The certified record of conviction shall be conclusive evidence thereof.

3. Business and Professions Code section 8655 provides, in pertinent part:

A plea ... of guilty ... to a charge substantially related to the qualifications, functions, and duties of a structural pest control operator, field representative, applicator, or registered company is deemed to be a conviction within the meaning of this article or Section 8568 of this chapter. The board may order the license or registration suspended or revoked, or may decline to issue a license, when the time for appeal has elapsed”

Respondent’s misdemeanor convictions for failure to obey a peace officer (Factual Finding 4); and possession of marijuana (Factual Finding 5); and felony convictions for possession of methamphetamine (Factual Findings 7, 9 and 10), are crimes that are substantially related to the qualifications, functions or duties of a field representative. It is imperative that field representatives be sober and responsible and refrain from committing serious felonies. Therefore, cause exists to suspend or revoke respondent’s license, pursuant to Business and Professions Code sections 8649 and 8655.

Respondent’s misdemeanor convictions for battery (Factual Findings 6 and 8) and receiving stolen property (Factual Finding 11) are for crimes that are also substantially related to the qualifications, functions and duties of a field representative. Field representatives are required to interact with the public, and are expected to have the ability to control their anger. In addition, field representatives have access to customer’s homes and personal belongings, and are expected to be responsible and to respect the property of others. Therefore, cause exists to suspend or revoke respondent’s license, pursuant to Business and Professions Code sections 8649 and 8655.

4. Business and Professions Code section 8637 provides, in pertinent part, that “[m]isrepresentation of a material fact by the applicant in obtaining a license ... is a ground for disciplinary action.”

Respondent’s failure to disclose two felony convictions and four misdemeanor convictions in his original application for examination constitutes a misrepresentation of material facts. Therefore, cause exists to suspend or revoke respondent’s license, pursuant to Business and Professions Code section 8637.

Respondent's failure to disclose two felony convictions and four misdemeanor convictions in his original application for licensure constitutes a misrepresentation of material facts. Therefore, cause exists to suspend or revoke respondent's license, pursuant to Business and Professions Code section 8637.

Fitness for Licensure

5. California Code of Regulations, title 16, section 1937.2, subdivision (b),² sets forth the criteria for determining whether a licensee who has been convicted of a crime has been sufficiently rehabilitated to permit him to retain his license. When respondent's convictions are reviewed in light of these rehabilitation criteria, factors weighing in respondent's favor include his participation in a court-ordered drug education program. Factors weighing against respondent's rehabilitation include that he has an extensive history of drug use beginning in 1994. He stopped using controlled substances approximately one year ago. It has only been one year since his last conviction involving serious wrongdoing, at which time he was 49 years old. He will be on probation until December 12, 2013. (See *In re Gossage* (2000) 23 Cal.4th 1080, 1099 ["Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a bar applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole."].) No evidence was presented to demonstrate that respondent is involved in his community. He has not been gainfully employed for three years.

² California Code of Regulations, title 16, section 1937.2, subdivision (b), provides, in pertinent part, that, when considering the suspension or revocation of a structural pest control license on the grounds that the licensee has been convicted of a crime, the board, in evaluating the rehabilitation of such person and his or her or its present eligibility for a license will consider the following:

- (1) Nature and severity of the act(s) or offense(s).
- (2) Total criminal record.
- (3) The time that has elapsed since commission of the act(s) or offense(s).
- (4) Whether the licensee or registered company has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against the licensee or registered company.
- (5) If applicable, evidence of expungement proceedings pursuant to Section 1203.4 of the Penal Code.
- (6) Evidence, if any of rehabilitation submitted by the licensee or registered company.

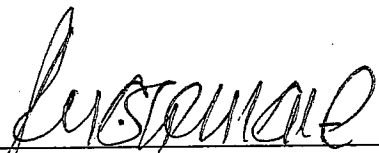
6. At hearing, respondent apologized and expressed remorse for the misrepresentations on his original applications. However, mere remorse does not demonstrate rehabilitation. A truer indication of rehabilitation is presented by sustained conduct over an extended period of time. (*In re Menna* (1995) 11 Cal.4th 975, 991.)

7. The purpose of probation is not to begin the rehabilitation process, but rather to allow the board to monitor a licensee who has demonstrated sufficient rehabilitation while at the same time meeting the board's obligation to ensure the health, safety and welfare of the public. Respondent failed to present sufficient evidence of rehabilitation to justify the retention of his existing license, even on a probationary basis.

ORDER

Field Representative License Number FR 35981, Branch 2, issued to respondent Daniel Ray Smith is hereby REVOKED.

DATED: February 8, 2011


REBECCA M. WESTMORE
Administrative Law Judge
Office of Administrative Hearings

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FILED

Date 6/10/10 By Kelli Okuma

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9 **BEFORE THE**
STRUCTURAL PEST CONTROL BOARD
10 **DEPARTMENT OF PESTICIDE REGULATION**
STATE OF CALIFORNIA

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13 In the Matter of the Accusation Against:
DANIEL RAY SMITH
14 2239 Country Club Boulevard
Stockton, CA 95204
15
16 Field Representative's License
Number FR 35981, Branch 2
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18 Respondent.

Case No. 2010-84

ACCUSATION

19 Complainant alleges:

20 **PARTIES**

- 21 1. Kelli Okuma (Complainant) brings this Accusation solely in her official capacity as
22 the Registrar/Executive Officer of the Structural Pest Control Board, Department of Pesticide
23 Regulation.
24 2. On or about May 20, 2003, The Structural Pest Control Board issued Field
25 Representative's License Number FR 35981, Branch 2, to Daniel Ray Smith (Respondent). The
26 license was in full force and effect at all times relevant to the charges brought herein and will
27 expire on June 30, 2011, unless renewed.

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JURISDICTION

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2 3. This Accusation is brought before the Structural Pest Control Board (Board),
3 Department of Pesticide Regulation, under the authority of the following laws. All section
4 references are to the Business and Professions Code (Code), unless otherwise indicated.

5 4. Code section 8620 states, in pertinent part, that the Board may suspend or revoke a
6 license when it finds that the holder, while a licensee or applicant, has committed any acts or
7 omissions constituting cause for disciplinary action or in lieu of suspension may assess a civil
8 penalty.

9 5. Code section 8624 states , [i]f the board suspends or revokes an operator's license and
10 one or more branch offices are registered under the name of the operator, the suspension or
11 revocation may be applied to each branch office.

12 6. Section 8654 of the Code states:

13 Any individual who has been denied a license for any of the reasons
14 specified in Section 8568, or who has had his or her license revoked, or whose
15 license is under suspension, or who has failed to renew his or her license while it
16 was under suspension, or who has been a member, officer, director, associate,
17 qualifying manager, or responsible managing employee of any partnership,
18 corporation, firm, or association whose application for a company registration has
19 been denied for any of the reasons specified in Section 8568, or whose company
20 registration has been revoked as a result of disciplinary action, or whose company
21 registration is under suspension, and while acting as such member, officer,
22 director, associate, qualifying manager, or responsible managing employee had
23 knowledge of or participated in any of the prohibited acts for which the license or
24 registration was denied, suspended or revoked, shall be prohibited from serving as
25 an officer, director, associate, partner, qualifying manager, or responsible
26 managing employee of a registered company, and the employment, election or
27 association of such person by a registered company is a ground for disciplinary
28 action.

22 7. Code section 8625 states:

23 The lapsing or suspension of a license or company registration by operation
24 of law or by order or decision of the board or a court of law, or the voluntary
25 surrender of a license or company registration shall not deprive the board of
26 jurisdiction to proceed with any investigation of or action or disciplinary
27 proceeding against such licensee or company, or to render a decision suspending or
28 revoking such license or registration.

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1 substance, to wit, Methamphetamine] with enhancement pursuant to Health and Safety Code
2 section 11370.2 for prior, a felony.

3 d. On or about September 5, 2000, Superior Court of California, County of San Joaquin,
4 in the case entitled, *People of the State of California v. Daniel Ray Smith* (Super. Ct. San Joaquin
5 County, 2000, Case No. SM201337A), Respondent was convicted on his plea of no contest of
6 violating Penal Code section 243, subdivision (e) [battery on non-cohabiting former spouse,
7 fiancée, or person with whom he had a dating relationship], a misdemeanor.

8 e. On or about February 23, 1998, Superior Court of California, County of San Joaquin,
9 in the case entitled, *People of the State of California v. Daniel Ray Smith* (Super. Ct. San Joaquin
10 County, 1997, Case No. SC62571), Respondent was convicted on his plea of no contest of
11 violating Health and Safety Code section 11378 [possession of controlled substance for sale,
12 to wit, Methamphetamine], a felony.

13 f. On or about January 7, 1998, Municipal Court of California, County of San Joaquin,
14 in the case entitled, *People of the State of California v. Daniel Ray Smith* (Muni. Ct. San Joaquin
15 County, 1997, Case No. SM197591A), Respondent was convicted on his plea of no contest of
16 violating Penal Code section 242 [battery], a misdemeanor.

17 g. On or about November 12, 1997, in the Municipal Court of California, County of San
18 Joaquin, in the case entitled, *People of the State of California v. Daniel Ray Smith* (Muni. Ct.
19 San Joaquin County, 1997, Case No. SF72296A), Respondent was convicted on his plea of no
20 contest of violating Health and Safety Code section 11357, subdivision (b) [possession of a
21 controlled substance, to wit, Marijuana], a misdemeanor.

22 h. On or about December 22, 1994, in the Municipal Court of California, County of San
23 Joaquin, in the case entitled, *People of the State of California v. Daniel Ray Smith* (Muni. Ct.
24 San Joaquin County, 1994, Case No. ST013340A), Respondent was convicted on his plea of nolo
25 contendere of violating Vehicle Code section 2800 [failing to obey a police officer], a
26 misdemeanor.

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1 SECOND CAUSE FOR DISCIPLINE

2 (Misrepresentation of a Material Fact)

3 16. Respondent's license is subject to denial under Code section 8637, in that in
4 Respondent misrepresented a material when in his Application for Field Representative's
5 License, dated May 13, 2003, and his Application for Structural Pest Control Field Representative
6 Examination, dated February 20, 2003. Respondent executed both forms under penalty of
7 perjury as to the truth and accuracy of the statements and answers. On each form, Respondent
8 checked the box "No" to the following question: "Have you ever been convicted of a felony or of
9 a misdemeanor other than a violation of traffic laws?" The truth and facts are Respondent has
10 been convicted of crimes, as set forth in paragraph 10, subparagraphs c through h, above.

11 OTHER MATTERS

12 17. Pursuant to Code section 8654, if discipline is imposed on Field Representative
13 License Number FR 35981, Branch 2, issued to Respondent, then Respondent shall be prohibited
14 from serving as an officer, director, associate, partner, qualifying manager, or responsible
15 managing employee for any registered company during the time the discipline is imposed, and
16 any registered company which employs, elects or associates with Respondent shall be subject to
17 disciplinary action.

18 PRAYER

19 **WHEREFORE**, Complainant requests that a hearing be held on the matters herein alleged,
20 and that following the hearing, the Structural Pest Control Board issue a decision:

- 21 1. Revoking or suspending Field Representative's License Number FR 35981, Branch 2,
22 issued to Daniel Ray Smith;
- 23 2. Prohibiting Daniel Ray Smith from serving as an officer, director, associate, partner,
24 or qualifying individual of any licensee;
- 25 3. Ordering Daniel Ray Smith to pay the Board the reasonable costs of the investigation
26 and enforcement of this case, pursuant to Code section 125.3; and,

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4. Taking such other and further action as deemed necessary and proper.

DATED: 6/10/10

Kelli Okuma

KELLI OKUMA
Registrar/Executive Officer
Structural Pest Control Board
Department of Pesticide Regulation
State of California
Complainant

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