

**BEFORE THE
REAL ESTATE AGENCY
STATE OF OREGON**

IN THE MATTER OF: MISTY A. HEATER, Respondent) FINAL ORDER)) OAH Case No. 1504333) Agency Case No. 2013-781
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This matter came before the Real Estate Agency to consider the Ruling on Motion for Summary Determination and Proposed Order issued by Administrative Law Judge (ALJ) Samantha Fair on February 24, 2016. No exceptions were filed to the Proposed Order.

After considering the records and the file herein, the Agency adopts the attached Ruling on Motion for Summary Determination and Proposed Order as the Final Order, with the following modification.

The Agency withdraws the allegation of Heater's failure to report her criminal conviction as a basis for the license revocation from the Final Order.

IT IS HEREBY ORDERED that Misty Ann Heater's real estate broker license is revoked.

Dated this 6th day of APRIL 2016.



Gene Bentley
Real Estate Commissioner

Date of Service: 4/6/2016

NOTICE: You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days of the service of this order. Judicial review is pursuant to the provisions of ORS 183.482 to the Oregon Court of Appeals.

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
REAL ESTATE AGENCY**

IN THE MATTER OF:) **RULING ON MOTION FOR SUMMARY**
MISTY A. HEATER) **DETERMINATION AND PROPOSED**
) **ORDER**
)
) OAH Case No.: 1504333
) Agency Case No.: 2013-781

HISTORY OF THE CASE

On July 13, 2015, the Real Estate Agency (Agency) issued a Notice of Intent to Revoke to Misty Heater, proposing to revoke her real estate broker license. On August 6, 2015, Ms. Heater requested a hearing.

On October 7, 2015, the Agency referred the matter to the Office of Administrative Hearings (OAH). The OAH assigned Administrative Law Judge (ALJ) Dove Gutman to preside at hearing. On November 19, 2015, ALJ Gutman convened a telephone prehearing conference. Steven Cox, attorney for Ms. Heater, appeared. The Agency appeared and was represented by Senior Assistant Attorney General Raul Ramirez. On November 19, 2015, ALJ Gutman issued a Pre-Hearing Order, scheduling the hearing for April 12, 2016, and setting deadlines for submission of motions, witness lists and exhibits.

On January 20, 2016, the Agency filed a Motion for Summary Determination (Motion). On February 9, 2016, Mr. Cox notified ALJ Gutman that, at Ms. Heater's request, he would not be filing a response to the Motion.

On February 12, 2016, the OAH reassigned the matter to ALJ Samantha Fair to rule on the Motion. The record closed on February 12, 2016.

ISSUES

1. Whether there is a genuine issue as to any material fact and whether the Agency is entitled to a favorable ruling as a matter of law. OAR 137-003-0580.
2. Whether Ms. Heater demonstrated incompetence or untrustworthiness in any act for which the licensee is required to hold a license. ORS 696.301(12).
3. Whether Ms. Heater committed an act of fraud or engaged in dishonest conduct substantially related to the fitness of the licensee to conduct professional real estate activity. ORS 696.301(14).

4. Whether Ms. Heater has been convicted of a felony or misdemeanor substantially related to the licensee's trustworthiness or competence to engage in professional real estate activity. ORS 696.301(11).

5. Whether Ms. Heater failed to notify the Agency of a criminal conviction or adverse judgment. ORS 696.301(3) and OAR 863-015-0175.

6. Whether the Agency should revoke Ms. Heater's real estate broker license. ORS 696.301 and 696.396(2).

EVIDENTIARY RULINGS

Exhibits 1 through 7, offered by the Agency, were admitted into the record.

FINDINGS OF FACT

1. Ms. Heater was a licensed real estate broker associated with Village Properties, LLC (Village) from May 2010 until January 24, 2013. (Ex. 1 at 2.) Village provides real estate and property management services. (Ex. 7 at 1.) While working with Village, Ms. Heater served as its marketing manager, which provided her access to all employees' login credentials. (Exs. 1 at 2; 3 at 2.)

2. Ms. Heater provided Village notice that she had secured a new job at Cascade Sotheby's International Realty (Cascade) as a licensed real estate broker. (Ex. 3 at 2.) At the conclusion of her final day with Village on January 24, 2013, Mark Halvorsen, Village owner and principal broker, deactivated Ms. Heater's login credentials. (Exs. 1 at 2; 7 at 1.)

3. After she left Village, Ms. Heater joined Cascade as a licensed real estate broker and continued working for Cascade at least through October 28, 2013. (Exs. 1 at 2; 3 at 2.)

4. Using the login credentials of Rick O'Bill, another Village employee, Ms. Heater accessed Village's website and made the following changes on the following dates:

- On February 9, 2013, she deleted 14 leads,¹ removed Village's toll-free number from eBay, and reviewed a coaching session;²
- On February 22, 2013, she deleted 17 leads; and
- On March 1, 2013, she deleted 14 toll-free number campaigns.³

¹ Leads are the client contact information for prospective clients contacting Village or for clients who have already booked with Village. (Ex. 1 at 3.)

² Coaching sessions are recorded phone calls between clients and Village employees. (Ex. 1 at 3.)

³ Campaign numbers are toll-free numbers that appear on various places on the internet that lead clients to Village's reservation line. (Ex. 1 at 3.)

(Exs. 1 at 3; 5 at 2.) Ms. Heater deleted high-value search terms and changed destination uniform resource locators (URLs) to return the internet user to the main homepage rather than Village's intended destination. (Ex. 4 at 4.) Her alterations to Village's website resulted in the removal of Village's contact phone numbers on its website. These actions resulted in the disabling of some of Village's marketing efforts and prevented clients from contacting Village. (Exs. 1 at 3; 3 at 2.) Village had not authorized Ms. Heater to perform any of these actions. (Ex. 1 at 4.)

5. For one campaign used for vacation rentals that Ms. Heater deleted, Village experienced 246 fewer calls during the period of February 1, through March 15, 2013, than for that same period in 2012. When factoring in lead and conversion rates with the average stay value for a vacation rental, Village potentially lost \$34,880 from the deleted campaign. (Ex. 4 at 1-3.)

6. On June 28, 2013, the Deschutes County Sheriff's Office arrested Ms. Heater and charged her with computer crime, identity theft and criminal mischief for her February through March 2013 activities on Village's website. (Exs. 1 at 3; 5 at 1-5.)

7. On December 6, 2013, Ms. Heater pled no contest to one count of unauthorized use of a computer. Deschutes County Circuit Court Judge Roger DeHoog sentenced her to 12 months of probation and dismissed the other charges. The judge issued Ms. Heater a written Judgment of Conviction on that date. (Exs. 2 at 1-3; 7 at 1.) Ms. Heater did not report the conviction to the Agency.⁴

8. During an interview with the Board's investigator in 2014, Ms. Heater stated that she only deleted expired campaigns at the direction of Mr. Halvorsen. She denied making any other changes to Village's website. (Ex. 1 at 3-4.)

CONCLUSIONS OF LAW

1. There is no genuine issue as to any material fact and the Agency is entitled to a favorable ruling as a matter of law.

2. Ms. Heater demonstrated untrustworthiness in an act for which the licensee is required to hold a license.

⁴ Pursuant to OAR 137-003-0615(1), the administrative law judge hereby takes judicial notice of this factual information. This information is based upon the Agency's investigator statement contained in the Notice. (Notice at 4.) Any party who wishes to object to taking notice of this information may do so by filing a written objection, setting forth the specific reasons for the objection, within seven days of the date on which this decision is issued. If an objection is received and sustained, then this information will be removed from the record.

3. Ms. Heater committed an act of fraud or engaged in dishonest conduct substantially related to the fitness of the licensee to conduct professional real estate activity.
4. Ms. Heater has been convicted of a misdemeanor substantially related to the licensee's trustworthiness to engage in professional real estate activity.
5. Ms. Heater failed to notify the Agency of a criminal conviction.
6. The Agency should revoke Ms. Heater's real estate broker license.

OPINION

The Agency proposes to revoke Ms. Heater's real estate broker's license, based on allegations of untrustworthiness and dishonest conduct, a criminal conviction and a failure to notify the Agency of the criminal conviction. As the proponent of the allegations, the Agency has the burden to establish, by a preponderance of the evidence, that the allegations are correct and that it is entitled to revoke Ms. Heater's license. ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position"); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

Standard of Review for Motion for Summary Determination

OAR 137-003-0580 addresses motions for summary determination. It provides, in relevant part:

- (6) The administrative law judge shall grant the motion for a summary determination if:
 - (a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and
 - (b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.
- (7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.
- (8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing.

* * * * *

(12) If the administrative law judge's ruling on the motion resolves all issues in the contested case, the administrative law judge shall issue a proposed order in accordance with OAR 137-003-0645 incorporating that ruling * * *.

Pursuant to OAR 137-003-0580(6)(a), in making my ruling, I considered the Agency's Motion and Exhibits 1 through 7. Pursuant to OAR 137-003-0580(7), I reviewed the evidence in the light most favorable to Ms. Heater, the non-moving party. I determined there are no genuine issues as to the material facts of the Agency's allegations that are relevant to resolution of the legal issues and the Agency is entitled to a favorable ruling. Because the ruling on the Motion resolves all issues in this matter, a proposed order is issued and the hearing is canceled.

Untrustworthy and Dishonest Conduct

ORS 696.301 provides, in part:

Subject to ORS 696.396, the Real Estate Commissioner may suspend or revoke the real estate license of any real estate licensee, reprimand any licensee or deny the issuance or renewal of a license to an applicant who has done any of the following:

* * * * *

(11) Has been convicted of a felony or misdemeanor substantially related to the licensee's trustworthiness or competence to engage in professional real estate activity.

(12) Demonstrated incompetence or untrustworthiness in performing any act for which the licensee is required to hold a license.

* * * * *

(14) Committed an act of fraud or engaged in dishonest conduct substantially related to the fitness of the applicant or licensee to conduct professional real estate activity, without regard to whether the act or conduct occurred in the course of professional real estate activity.

ORS 696.010(14) defines professional real estate activity. It provides, in part:

"Professional real estate activity" means any of the following actions * * *
*:

* * * * *

(b) Offers to sell, exchange, purchase, rent or lease real estate;

(c) Negotiates, offers, attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of real estate;

* * * * *

(h) Engages in management of rental real estate;

* * * * *

(j) Assists or directs in the procuring of prospects, calculated to result in the sale, exchange, leasing or rental of real estate;

* * * * *

(n) Performs real estate marketing activity as described in ORS 696.600.

ORS 696.600(2) provides:

“Real estate marketing activity” means procuring or offering to procure prospects to purchase, sell, lease or rent real estate by telemarketing, mail or otherwise.

During the period February 9 through March 1, 2013, Ms. Heater repeatedly accessed her former employer’s internet site and web pages without authorization. During the course of accessing Village’s internet site and web pages, she altered the site and web pages by deleting client contact information, Village’s contact information, and toll-free number campaigns. She also reviewed a phone conversation between a client and a Village employee. Her actions prevented prospective clients from contacting Village, prevented Village from contacting prospective clients, and violated the privacy of a phone interaction between a client and a Village employee. These actions led to her arrest and eventual conviction of unauthorized use of a computer, a Class A misdemeanor.⁵

⁵ ORS 164.377 provides, in part:

(4) Any person who knowingly and without authorization uses, accesses or attempts to access any computer, computer system, computer network, or any computer software, program, documentation or data contained in such computer, computer system or computer network, commits computer crime.

(5)(a) A violation of the provisions of subsection (2) or (3) of this section shall be a Class C felony. Except as provided in paragraph (b) of this subsection, a violation of the provisions of subsection (4) of this section shall be a Class A misdemeanor[.]

Ms. Heater's conduct included such specific actions as deleting information and reviewing a phone recording. She performed these actions on three separate dates and used another individual's login credentials to gain access to Village's information. Such conduct was deliberate, not inadvertent, and made with the intent to prevent prospective clients from contacting Village and to prevent Village from contacting prospective clients. By interfering in the ability of prospective clients to communicate with Village, Ms. Heater interfered with Village's real estate marketing activities and interfered in Village's ability to negotiate leasing of real estate and managing properties. Thus, Ms. Heater engaged in dishonest and untrustworthy conduct in matters substantially related to professional real estate activity in violation of ORS 696.301(12) and (14). Because this conduct led to her conviction, Ms. Heater's conduct also violated ORS 696.301(11).

Reporting a Criminal Conviction

ORS 696.301 provides, in part:

Subject to ORS 696.396, the Real Estate Commissioner may suspend or revoke the real estate license of any real estate licensee, reprimand any licensee or deny the issuance or renewal of a license to an applicant who has done any of the following:

* * * * *

(3) Disregarded or violated any provision of * * * any rule of the Real Estate Agency.

OAR 863-015-0175 provides, in part:

(1) A real estate licensee must notify the commissioner of the following:

(a) Any criminal conviction (felony or misdemeanor), including a "no contest" plea or bail forfeiture;

* * * * *

(3) The notification required by this rule must be in writing and must include a brief description of the circumstances involved, the names of the parties, and a copy of the adverse decision, judgment, or award and, in the case of a criminal conviction, a copy of the sentencing order. If any such judgment, award, or decision is appealed, each subsequent appellate court decision is subject to this rule's notification requirements.

(4) The notification required by this rule must be made within twenty 20 calendar days after receiving written notification of an adverse judgment,

award, or decision described in this rule. Notification must be made under this rule whether or not the decision is appealed[.]

On December 6, 2013, Ms. Heater pled no contest to the misdemeanor charge of unauthorized use of a computer and received written notification of the conviction and her sentence on that same date. She failed to notify the Agency of this conviction in violation of OAR 863-015-0175(1)(a).

Revocation of License

ORS 696.396 provides, in part:

(1) The Real Estate Commissioner shall provide by rule for the progressive discipline of real estate licensees and an objective method for investigation of complaints alleging grounds for discipline under ORS 696.301.

(2) The rules adopted by the commissioner under this section:

* * * * *

(c) May not authorize imposition of a suspension or a revocation of a real estate license unless the material facts establish a violation of a ground for discipline under ORS 696.301 that:

(A) Results in significant damage or injury;

(B) Exhibits incompetence in the performance of professional real estate activity;

(C) Exhibits dishonesty or fraudulent conduct[.]

As shown above, Ms. Heater's conduct during the period February 9 through March 1, 2013, violated ORS 696.301(3), (11), (12) and (14). Based upon those violations, the Agency has the authority to discipline Ms. Heater, up to and including revocation of her license. ORS 696.396(2)(c) prohibits suspension or revocation of a license except for violations of ORS 696.301 that involve specific material facts, such as dishonest conduct. Because Ms. Heater's conduct violated ORS 696.301 and involved dishonest conduct, the Agency may revoke her license.

Pursuant to ORS 696.396(1), the Agency promulgated an administrative rule to provide for the discipline of licensees. OAR 863-027-0020 provides, in part:

(2) The commissioner will evaluate all relevant factors to determine whether to issue a non-disciplinary educational letter of advice or to

discipline a licensee through reprimand, suspension or revocation under ORS 696.301, including but not limited to:

- (a) The nature of the violation;
- (b) The harm caused, if any;
- (c) Whether the conduct was inadvertent or intentional;
- (d) The licensee's experience and education;
- (e) Whether the licensee's conduct is substantially similar to conduct or an act for which the licensee was disciplined previously;
- (f) Any mitigating or aggravating circumstances;
- (g) The licensee's cooperation with the investigation;
- (h) Any agency hearing orders addressing similar circumstances; and
- (i) The licensee's volume of transactions.

* * * * *

(5) The commissioner may impose suspension or revocation only if the licensee has committed an act that constitutes grounds for discipline under ORS 696.301 and such act also meets the requirements of 696.396(2)(c).

Ms. Heater's conduct was intentional, not inadvertent, and designed to prevent Village from pursuing active business leads. Because Village could not actually determine how many prospective clients would have used its services but for Ms. Heater's actions, there was no way for Village to determine its actual income loss from her conduct. However, based upon prior performance during the same period, Village was able to document reduction in volume of client contacts. Considering such factors as rental value of properties and average netting of successful prospective clients, Village could determine potential loss in income, such as \$34,880 from one deleted campaign number. It is reasonable to conclude that Ms. Heater's conduct caused actual harm to Village with the amount of the harm being undeterminable.

Ms. Heater had at least three years of experience prior to her engaging in this conduct, so lack of experience would not excuse her conduct. Aside from the lack of evidence of any prior discipline, there was no evidence of any mitigating circumstances. As an aggravating factor, Ms. Heater's conduct violated the trust her former employer bestowed on her when it provided her access to its employees' login credentials. Finally, during her interview with the Board, Ms. Heater misrepresented her conduct that led to the conviction. She advised the Board investigator

that Village authorized her access and alterations. In light of her conviction, such representations could not be accurate.

Considering all the factors listed in OAR 863-027-0020(2) and that Ms. Heater's conduct was intentional, dishonest and criminal, revocation of Ms. Heater's real estate broker license is appropriate. The Agency should revoke her license.

RULING AND ORDER

The Real Estate Agency's Motion for Summary Determination is granted. The hearing, scheduled for April 12, 2016, is canceled.

I propose the Real Estate Agency issue the following order:

Misty A. Heater's real estate broker license is revoked.

Samantha Fair

Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the Administrative Law Judge's Proposed Order. If the Proposed Order is adverse to you, you have the right to file written exceptions and argument to be considered by the Real Estate Commissioner in issuing the Final Order. Your exceptions and argument must be received by the 20th day from the date of service. Send them to:

Denise Lewis
Oregon Real Estate Agency
530 Center Street NE Ste 100
Salem, OR 97301-2505

The Real Estate Commissioner will issue a Final Order, which will explain your appeal rights.

CERTIFICATE OF MAILING

On February 24, 2016, I mailed the foregoing RULING ON MOTION FOR SUMMARY DETERMINATION AND PROPOSED ORDER issued on this date in OAH Case No. 1504333.

By: First Class Mail

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CERTIFICATE OF MAILING

On April 06, 2016, I mailed the foregoing Final Order issued on this date in OAH Case No. 1504333 and Agency Case No. 2013-781.

By: First Class Mail

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