

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

IN THE MATTER OF:) **FINAL ORDER**
)
THOMAS BOYLE) OAH Case No. 1303511
) Agency Case No. 2013-447

This matter came before the Real Estate Agency to consider the Proposed Order issued by ALJ Barber on April 25, 2014. The Proposed Order provided instructions on how to file exceptions. Licensee did not file exceptions to the Proposed Order.

HISTORY OF THE CASE

On December 2, 2013, the Real Estate Agency (Agency) issued a Notice of Intent to Levy Civil Penalty to Thomas Boyle (Licensee). On December 9, 2013, Licensee requested a hearing.

On December 20, 2013, the Agency referred the hearing request to the Office of Administrative Hearings (OAH), which assigned Administrative Law Judge (ALJ) Rick Barber to preside at hearing. The hearing was scheduled for April 17, 2014.

Hearing was held as scheduled on April 17, 2014, in Salem, Oregon. Licensee appeared, representing himself, and testified.¹ The Agency was represented by Senior Assistant Attorney General Raul Ramirez. Compliance Specialist Lindsey Nunes testified for the Agency. The record closed on April 17, 2014.

ISSUES

1. Whether Licensee engaged in professional real estate activity at a time when he did not hold an active license, thereby violating ORS 696.020(2).
2. Whether, if Licensee did violate the statute, he should be required to pay a civil penalty pursuant to ORS 696.990(4) and (9).

EVIDENTIARY RULING

Exhibits A1 through A12, offered by the Real Estate Agency, were admitted into evidence without objection.²

¹ Licensee's wife attended the hearing, but did not testify.

² At hearing, the Agency presented a better copy of the first page of Exhibit A1. Exhibit A12 was presented to show the form of the paper copy of the license Licensee received and, because A12 is an expired license of a different licensee, has no other evidentiary value. After the hearing, addresses, names

STIPULATED FINDINGS OF FACT

1. Licensee's license with the Agency expired on July 31, 2012.
2. Licensee's license with the Agency was renewed on October 19, 2012.
3. Licensee continued to engage in professional real estate activity during the 79-day period his license was expired.

FINDINGS OF FACT

4. Licensee applied for his Broker License on March 22, 2011. The application was received by the Agency, and became effective, on March 24, 2011. Licensee's authorized principal broker was Dennis Clark at Century 21 Gold Country Realty. The license expired on July 31, 2012, the end of Licensee's birth month. (Ex. A1).

5. Licenses with the Agency can be valid for up to 24 months without renewal, depending on how close to the birth month the application is filed and accepted. July is Licensee's birth month. Because Licensee was licensed in March 2011, he was licensed for the rest of the year up to the end of July 2011, and for the entire following year until July 31, 2012. (Test. of Nunes). Licensee's principal broker explained this timing to him. Licensee also received a paper copy of his license, which showed the expiration date of the license. (Test. of Licensee; Ex. A12).

6. In a rule change effective September 1, 2011, the Agency required all licensees to have an email address and to provide that address to the Agency. The Agency ran a printout of all licensees who did not have an email on record with the Agency; Licensee was on that list. Well in advance of the effective date of the rule change, the Agency mailed (through the US Postal Service) notices to those without email addresses. The letter notice stated in part:

IMPORTANT!

All Real Estate Licensees Must Provide an Active Email Address By July 5, 2011

All licensees must provide an active email address by July 5, 2011 in order for the Agency to convert the data to the new database. OAR 863-014-0062(1) states that "Each active, inactive and expired real estate agent licensee must maintain on file with the Agency a current mailing address and email address and notify the Agency within 10 calendar days of a change to a mailing or email address."

* * * * *

and license numbers were redacted on the OAH's copy of the exhibit and a redacted version was sent to the Agency and to Licensee.

This update is required for all licensees, even if you believe that you have provided the Agency with an email address in the past. Report your email address online by July 5, 2011.

(Ex. A2). A later postcard notice reiterated the information about needing an email address. It was sent by regular mail to those who still had not provided an email address to the Agency. Licensee's name was on that list. (Ex. A5; Test. of Nunes). Licensee does not know whether he ever received these mailed notices. (Test. of Licensee).

7. In addition to the two notices sent specifically to Licensee (and others on the list), the Agency disseminated information about the rule change on its website and in its online "News Journal" publication, both before and after the September 1, 2011 deadline for providing email addresses. (Ex. A3, A4). In early March, 2012, the Agency's new electronic database went into effect. (Test. of Nunes).

8. In 2012, when Licensee's company (Century 21 Gold Country) was bought out by Century 21 Lifestyles and all licenses were being transferred, Licensee's secretary told Licensee that Agency records showed his license was expired. Licensee immediately contacted the Agency to find out why it was expired. Licensee renewed his license effective October 19, 2012. (Test. of Licensee).

9. One of Nunes' jobs is to review all renewal applications in which the licensee/applicant has answered "yes" to one of the questions on the form. In Licensee's case, Nunes reviewed the application because of the following question and answer:

14. During any period of time when your license has been inactive or expired, have you conducted professional real estate activity?

* * * * *

Yes. Comments: The state did not have my email address and I was unaware that my license had expired. I guess I expected some written notification. I have been actively engaged can furnish any info you require.

(Ex. A6 at 2). Nunes investigated this answer and concluded that Licensee had performed professional real estate activity when he was not licensed. (Test. of Nunes).

10. The period from August 1, 2012 through October 18, 2012 is 79 days, inclusive. (Ex. A8).

CONCLUSIONS OF LAW

1. Licensee engaged in professional real estate activity at a time when he did not hold an active license, thereby violating ORS 696.020(2).

2. Licensee must pay a civil penalty of \$800 pursuant to ORS 696.990(4) and (9).

OPINION

The Agency contends that Licensee engaged in professional real estate activity during a 79-day period when his real estate license had expired, and that he should be required to pay a civil penalty under ORS 696.990(4) and (9). It must prove its case by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

The essential facts of the case are not in dispute, and were in fact stipulated to by the parties. Licensee's license expired on July 31, 2012, and he did not renew it until October 19, 2012. During the intervening 79 days, Licensee engaged in professional real estate activity without a license.

ORS 696.020 states in part:

License required for individuals engaged in professional real estate activities; exception; rules. (1) The Real Estate Agency may issue a real estate license only to an individual.

(2) *An individual may not engage in, carry on, advertise or purport to engage in or carry on professional real estate activity, or act in the capacity of a real estate licensee, within this state unless the individual holds an active license as provided for in this chapter.*

(Emphasis added). Licensee does not dispute that he engaged in real estate activity while his license was expired. Rather, he contends that he failed to renew his license because he was not given proper notice that his license was going to, and did, expire.

Licensee's allegation that he was not given proper notice of the expiration of his license mis-states the law and is not a defense to the imposition of a civil penalty.

First, Licensee has a duty under OAR 863-014-0062(4) to maintain a current license when engaging in professional real estate activity. The same rule provides that the Agency does not have an obligation to notify licensees of their license or application status.

Second, Licensee was aware (based on his conversation with Clark) that his license must be renewed during his birth month of July. The date itself should have reminded him to renew his license.

Third, the expiration date was printed on the hard copy of the license he received in 2011. Whether the hard copy of the notice was on his wall or in his files, it provided notice that his license would expire on July 31, 2012.

Fourth, contemplating the upgrade of the database, the Agency went to great measures to make sure that its licensees became aware of the changeover to using email exclusively. The rule was enacted in September 2011, and online publications had been advising licensees that the Agency required an email address from them. There were two "snail mail" notices sent to the licensees, including this Licensee, who did not have an email address on file with the Agency. Although Licensee does not remember receiving them, he is also unable to deny that he might have. Based upon Nunes' testimony, I conclude that he more likely than not received the notices.

Finally, even if Licensee did not receive the notices, the administrative rules themselves were amended to require all licensees to provide an email address to the Agency. OAR 863-014-0062(1). As a real estate practitioner, it was Licensee's responsibility to keep up on all applicable changes in the law.

Licensee argues that he believed the Agency already had his email address. However, the first notice that was mailed to him informed all licensees to send in an email address again even if one had been previously provided. (Ex. A2). The Agency has proved that Licensee engaged in professional real estate activity while unlicensed.

The Civil Penalty. Having concluded that Licensee violated ORS 696.020(2), what remains is to determine the appropriate civil penalty. The Agency has correctly identified the parameters of the penalty as being from \$600 to \$1500³, based upon ORS 696.990, which states in part:

Penalties. * * *

* * * * *

(4) Any person that violates ORS 696.020 (2) may be required by the Real Estate Commissioner to forfeit and pay to the General Fund of the State Treasury a civil penalty in an amount determined by the commissioner of:

(a) Not less than \$100 nor more than \$500 for the first offense of unlicensed professional real estate activity; and

(b) Not less than \$500 nor more than \$1,000 for the second and subsequent offenses of unlicensed professional real estate activity.

* * * * *

(9) For the purposes of subsection (4) of this section, any violation of ORS 696.020 (2) that results from a failure of a real estate licensee to renew a license within the time allowed by law constitutes a single offense of unlicensed professional real estate activity for each 30-day period after expiration of the license during which the individual engages in professional real estate activity. A

³ This has been modified from the ALJ's original proposed order, which mistakenly identified the penalty range as \$600 to \$1000

civil penalty imposed for a violation of ORS 696.020 (2) that results from a failure of a real estate licensee to renew a license within the time allowed by law is not subject to the minimum dollar amounts specified in subsection (4) of this section.

There are two 30-day periods in the 79 days when the license was lapsed.⁴ Under the statute, then, the aggregate civil penalty would be as low as \$600 (\$100 for the first period, plus \$500 for the second) or as high as \$1500 (\$500 plus \$1000).

Neither side argued for a specific penalty amount, and the Agency has left it to my discretion to propose a penalty. In doing so, I take the following factors into account. First, it is a very important matter to maintain contact with a professional licensing agency. As Licensee indicated, a period of unlicensed real estate activity puts his company, as well as himself, at risk. Licensee failed to keep track of his licensure and must be penalized for that error under the rules.

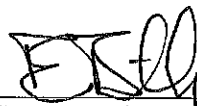
However, it is also evident that Licensee takes responsibility for his error. Although he has contested the imposition of the penalty and some matters concerning the type of notification he felt he should have received, he has also been candid about his failure to timely renew and has maintained good communication with the Agency in the process of addressing the issues.

For the first violation, a civil penalty of \$300 is appropriate. For the second violation, a penalty of \$500 is appropriate, for an aggregate civil penalty of \$800.

ORDER

Based on the foregoing, Licensee is assessed a civil penalty in the amount of \$800.00. The civil penalty is due and payable as provided under ORS 183.745.

IT IS SO ORDERED THIS 4th day of September, 2014



Gene Bentley
Commissioner

Date of Service: 9-4-2014

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.

⁴ The Agency argues that the additional 19 days could be considered as a sort of "aggravation" of the penalty for the two that are clearly specified.