

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

IN THE MATTER OF: CHARLES SHEPARD, Respondent) FINAL ORDER)) OAH Case No. 1403556) Agency Case No. 2012-185
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This matter came before the Real Estate Agency to consider the Proposed Order issued by Administrative Law Judge (ALJ) Dove Gutman on April 16, 2015. Respondent filed exceptions to the Proposed Order on May 1, 2015.

The Commissioner considered Respondent's exceptions but did not find any basis to modify the Proposed Order. After considering the records and the file herein, the Agency adopts the attached and incorporated Proposed Order as the Final Order.

IT IS HEREBY ORDERED as follows:

1. Charles Shepard is assessed a civil penalty in the amount of \$1600.00. The civil penalty is due and payable as provided in ORS 193.745.
2. Charles Shepard shall immediately cease and desist from engaging in any professional real estate activity as defined in ORS 696.010(11) unless Shepard first obtains a license to perform management of rental real estate from the Real Estate Agency.

Dated this 21st day of July 2015.



Gene Bentley
Real Estate Commissioner

Date of Service: 7-22-2015

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:

**CHARLES SHEPARD,
Respondent**

) **PROPOSED ORDER**
)
) OAH Case No.: 1403556
) Agency Case No.: 2012-185

HISTORY OF THE CASE

On December 12, 2013, the Real Estate Agency (REA or Agency) issued a Notice of Intent to Levy Civil Penalty and Order to Cease and Desist (Notice) to Charles Shepard (Shepard or Respondent). On December 18, 2013, Shepard requested a hearing.

On January 27, 2014, REA referred the hearing request to the Office of Administrative Hearings (OAH). Senior Administrative Law Judge (ALJ) Dove L. Gutman was assigned to preside at hearing.

On March 12, 2014, a prehearing telephone conference was held. ALJ Gutman presided. Senior Assistant Attorney General Raul Ramirez represented REA. Dennis Percell, Attorney at Law, represented Shepard. During the prehearing conference, OAH Case Nos. 1403556 and 1403552 were consolidated for hearing.¹

On March 12, 2014, ALJ Gutman issued a Pre-Hearing Order, setting forth, among other things, dates for filing Motions for Summary Determination, Responses and Reply briefs, as well as dates for the contested case hearing.

On May 9, 2014, Mr. Percell, on behalf of Shepard, filed Shepard's Motion for Summary Determination, and Declaration of Charles Shepard. On June 6, 2014, Mr. Ramirez, on behalf of REA, filed REA's Response to Motion for Summary Determination and Cross Motion for Summary Determination, and Exhibits 1 through 17.

On June 26, 2014, Mr. Percell filed Shepard's Reply. On July 18, 2014, Mr. Ramirez filed REA's Reply.

On August 14, 2014, ALJ Gutman issued a Ruling denying the parties' Motions.

On September 4, 2014, Mr. Percell, on behalf of Shepard and Thompson, requested postponement of the hearing, indicating that counsel for REA did not object to the request. On September 4, 2014, ALJ Gutman granted the postponement. Hearing was rescheduled for March

¹ Ryan Thompson (Thompson) is the named party in OAH Case No. 1403552. Mr. Percell is counsel for Thompson. A separate proposed order addresses the issues raised in OAH Case No. 1403552.

3 and 4, 2015.

On March 3, 2015, a hearing was held in Salem, Oregon. ALJ Gutman presided. Mr. Percell represented Shepard and Thompson. Mr. Ramirez represented REA. Shepard and Thompson both provided testimony. The record closed on March 3, 2015.

ISSUES

1. Whether Shepard engaged in professional real estate activity by allowing and directing employees of Umbrella, Inc., under his supervision to manage the Delta Grove Apartments between December 28, 2011 and the end of April 2012, in violation of ORS 696.020(2) (2011 Edition).
2. Whether Shepard should be assessed a civil penalty in an amount not less than \$1,600 and no greater than \$3,500.
3. Whether Shepard shall be ordered to immediately cease and desist from engaging in any professional real estate activity as defined in ORS 696.010(11) unless Shepard first obtains a license to perform management of rental real estate from the Real Estate Agency.

EVIDENTIARY RULINGS

Exhibits A1 through A45, offered by REA, were admitted into evidence without objection. Exhibits 101 through 107, offered by Shepard, were admitted into evidence without objection.

FINDINGS OF FACT

Background

1. Shepard Investment Group, LLC (Shepard LLC), is a domestic limited liability company that was registered with the Oregon Secretary of State on August 8, 2011. (Exs. A11, A12.) Charles Shepard (Shepard) is the Chief Executive Officer and majority owner of Shepard LLC. (Exs. A30, A34.) During the period of December 28, 2011 through April 2012, Shepard was a member and manager of Shepard LLC. (Exs. A13, A29, A30, A34.)

Ryan Thompson (Thompson) is a special President of Shepard LLC. During the period of December 28, 2011 through April 2012, Thompson was not a member, manager, or full-time employee of Shepard LLC.² On June 19, 2012, Thompson became a manager of Shepard LLC.³ (Test. of Thompson; Exs. A28, A29, A30, A34.)

² As of September 21, 2012, Shepard LLC had eight members, which did not include Thompson. (Exs. A28, A29.)

³ As of September 21, 2012, Shepard LLC had nine managers, including Thompson. (Exs. A28, A29.)

2. Umbrella Properties, Inc. (Umbrella Inc.) is a domestic business corporation that was registered with the Oregon Secretary of State on April 1, 1985. Umbrella Inc. was incorporated “[t]o operate a property management operation.” Umbrella Inc. was founded by Shepard. (Test. of Shepard; Exs. A5, A6, R101.) The bylaws of Umbrella Inc. provide, in pertinent part:

Article IV
Directors

Sec. 1 The business affairs of the corporation shall be managed and controlled by a board of one director. ***.

Article V
Meetings of Directors

Sec. 1 One director shall constitute a quorum for the transaction of business at any meeting of the Board of Directors. The consent of one director, if there is only one director, or a majority of the directors, if there is more than one director, shall be required to take any action in [sic] behalf of the corporation.

Article VIII
President

Sec. 1 The president shall be the chief executive officer and head of the corporation, and shall, subject to the control of the Board of Directors, have the general and active management of its business and affairs.

(Ex. A7.)

3. During the period of April 1, 1985 through at least the beginning of 2011, Shepard was the President of Umbrella Inc.⁴ Shepard managed Umbrella Inc., its business activities, and its employees. Shepard directed the employees of Umbrella Inc. to engage in the business activities for which the company was created (i.e., property management activities). Shepard

⁴ During the hearing, Shepard testified that he stepped down as President of Umbrella Inc. sometime in the beginning of 2011. However, on December 31, 2011, Shepard, acting as President of Umbrella Inc., issued a stock certificate from Umbrella Inc. to Shepard LLC. (Ex. A15.) Additionally, in August 2012, Shepard was still listed as President of Umbrella Inc. on the Oregon Secretary of State Business Registry website. (Ex. A5.)

received compensation from Umbrella Inc. from the date of the corporation's inception.⁵ (Test. of Shepard; Exs. A3, A5, A6, A7, A10.)

During the period of April 1, 1985 through at least June 18, 2012, Shepard was the sole director on Umbrella Inc.'s Board of Directors.⁶ Shepard's consent was required for any action taken on behalf of the corporation during that time period. (Test. of Shepard, Thompson; Exs. A5, A7, A28.) Shepard was active in managing Umbrella Inc. through at least September 17, 2012. (Test. of Shepard, Thompson; Exs. A5, A7, A34.)

Thompson is the President and Chief Financial Officer of Umbrella Inc. Thompson became President of Umbrella Inc. at the beginning of 2011. Thompson manages Umbrella Inc., its business activities, and its employees. Thompson directs the employees of Umbrella Inc. to engage in property management activities on behalf of the corporation. Thompson is subject only to the control of Umbrella Inc.'s Board of Directors. Thompson is a full-time employee of Umbrella, Inc. Thompson receives a salary from Umbrella Inc. for the duties he performs. Thompson is paid twice a month. (Test. of Thompson; Exs. A3, A6, A7, A10, A28, A34.)

From the beginning of 2011 through June 2013, Shepard was a paid consultant for Umbrella Inc. Shepard reviewed the company's balance sheets and income statements, and provided advice to Thompson regarding the corporation's business activities. Shepard was paid twice a month. The compensation ended in June 2013. (Test. of Shepard, Thompson; Ex. A34.)

4. Shepard LLC owns 100 percent of Umbrella Inc.⁷ (Ex. A3.)

5. Umbrella Inc. only manages properties owned by Shepard LLC.⁸ (Ex. A3.) Umbrella Inc. manages approximately 3000 residential units and 1000 storage units owned by Shepard LLC. Umbrella Inc. receives compensation from Shepard LLC for the management of the rental properties owned by Shepard LLC. (Test. of Thompson; Ex. A3.)

Umbrella Inc. has approximately 100 employees at different locations. Umbrella Inc.'s employees perform property management duties on behalf of Umbrella Inc. (Test. of Thompson; Ex. A34.) Umbrella Inc. receives all of its income from Shepard LLC. Umbrella Inc. pays its employees and consultants from the income it receives from Shepard LLC. (Exs. A3, A34.)

⁵ During the hearing, Shepard testified that he received compensation from Umbrella Inc. for starting the company, owning real estate, and being a consultant. (Test. of Shepard.)

⁶ During the hearing, Thompson testified that in the June 2012 vote (the vote took place on June 19, 2012), the managers of Shepard LLC were made directors of Umbrella, Inc. (Test. of Thompson; *see* Ex. A28.)

⁷ In its Articles of Incorporation, Umbrella Inc. was authorized to issue 500 shares of common stock. (Ex. A6.) On December 31, 2011, Shepard, acting as President of Umbrella Inc., issued a certificate of 100 shares of Umbrella Inc. stock to Shepard LLC. (Ex. A15.) The record is unclear if and/or when additional shares of stock were issued to Shepard LLC. (*Hearing record.*)

⁸ Shepard LLC owns various properties in Oregon, including rental properties. (Test. of Thompson, Ex. A39.)

Delta Grove Apartments

6. Shepard initially owned Delta Grove Apartments (Delta Grove), located at 1834 Happy Lane, Eugene, Oregon. Delta Grove is rental real estate (an apartment complex). On December 28, 2011, Shepard conveyed Delta Grove to Shepard LLC. (Exs. A4, A31, A32, A43.)

7. Umbrella Inc. manages Delta Grove for Shepard LLC. (Exs. A3, A10, A34.) Shepard LLC pays Umbrella Inc. a management fee of up to 20 percent of gross income (from rent and other sources) for managing Delta Grove.⁹ (Test. of Shepard; Exs. A3, A10, A34.)

Umbrella Inc. employs an onsite manager for Delta Grove. Umbrella Inc. pays the onsite manager for the management duties he or she performs. The onsite manager also receives free rent at Delta Grove. (Exs. A34, A41, A42.)

8. During the period of December 28, 2011 through April 2012, Drusilla Carter was employed by Umbrella Inc. as Delta Grove's onsite manager. Ms. Carter managed Delta Grove on Umbrella Inc.'s behalf by engaging in the following unlicensed property management activities: Signing rental agreements with tenants, accepting rent checks from tenants, preparing deposit slips and summaries, depositing rent checks into Shepard LLC's bank account, and sending copies of the deposit slips and summaries to Umbrella, Inc.¹⁰ (Test. of Thompson; Exs. A34, A44; *see* Exs. A35-A37.) Ms. Carter's actions were under the direction and control of Thompson and Shepard. (Exs. A3, A6, A7, A10, A34.)

9. During the period of December 28, 2011 through April 2012, Umbrella Inc.'s employees (other than Ms. Carter) managed Delta Grove on Umbrella Inc.'s behalf by engaging in the following unlicensed property management activities: Advertising vacancies, paying bills for the owner, arranging contractors, approving new tenants, posting deposits and payments to the corporation's accounting system (Yardi), and filing court papers when needed. (Test. of Thompson; Exs. A34, A44; *see* Exs. A38-A42.) The employees' actions were under the direction and control of Thompson and Shepard. (Exs. A3, A6, A7, A10, A34.)

10. During the period of December 28, 2011 through April 2012, Shepard and Thompson did not personally perform property management activities (i.e., contact tenants, collect rent, advertise, approve new tenants, etc.) for Delta Grove. (Test. of Shepard, Thompson.)

⁹ On November 26, 2008, Shepard entered into a contractual agreement to pay Umbrella Inc. a management fee of 20 percent of gross income for managing Delta Grove. (Ex. A10.) During the hearing, Shepard testified that Shepard LLC currently pays Umbrella Inc. what it needs rather than a set 20 percent fee (i.e., if Umbrella Inc. only needs 19 percent, then it is paid 19 percent). (Test. of Shepard.)

¹⁰ Ms. Carter was the onsite manager from at least December 15, 2011 through at least September 17, 2012, and engaged in property management activities on behalf of Umbrella Inc. (Exs. A34-A37.)

11. On April 2, 2012, Shepard LLC paid Umbrella Inc. \$11,000 for the management fees for Delta Grove for the month of April 2012.¹¹ On April 2, 2012, an employee of Umbrella Inc. posted the payment received from Shepard LLC (and check deposit amount) to the corporation's accounting system. (Exs. A39, A40.)

Complaint

12. On May 8, 2012, Dixie Drake filed a complaint with REA alleging Shepard was engaging in unlicensed property management.¹² (Exs. A1, A2.)

13. REA subsequently initiated an investigation into the complaint. (Exs. A3, A34, A44.)

14. On September 17, 2012, Aaron Grimes, investigator and auditor with REA, met with and interviewed Thompson regarding the allegation of unlicensed property management activity. During the interview, Thompson admitted, among other things, that:

- Shepard is majority owner of Shepard LLC.
- Shepard LLC owns Umbrella Inc. and Delta Grove.
- Shepard LLC pays Umbrella Inc. to manage Delta Grove.
- Umbrella Inc.'s employees perform property management duties for Delta Grove.
- Shepard still comes around and is "active in managing the companies."

(Ex. A34 at 1-2.)

Other information

15. Shepard is not licensed with REA to engage in professional real estate activity in Oregon. (Ex. A44.)

CONCLUSIONS OF LAW

1. Shepard engaged in professional real estate activity by allowing and directing employees of Umbrella, Inc., under his supervision to manage the Delta Grove Apartments between December 28, 2011 and the end of April 2012, in violation of ORS 696.020(2) (2011 Edition).

2. Shepard should be assessed a civil penalty in the amount of \$1,600.

3. Shepard shall be ordered to immediately cease and desist from engaging in any

¹¹ The check was written from the checking account of Umbrella Properties Management, which is a DBA used by Shepard LLC for banking purposes. The check, which totaled \$122,200, included management fees for several other properties. (Exs. A3, A34, A40.)

¹² Ms. Drake submitted examples of Umbrella Inc.'s online advertising of rental properties, including Delta Grove. (See Exs. A4, A32.)

professional real estate activity as defined in ORS 696.010(11) unless Shepard first obtains a license to perform management of rental real estate from the Real Estate Agency.

OPINION

REA seeks to discipline Shepard for the violation alleged in its Notice. REA must prove its allegation by a preponderance of the evidence, and it must establish that the proposed sanction is appropriate. *See* 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); *Metcalf v. AFSD*, 65 Or App 761, 765 (1983) (in the absence of legislation specifying a different standard, the standard of proof in an administrative hearing is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

1. The violation

Real estate activity for compensation in Oregon is a matter of public concern. ORS 696.015. REA is the state agency responsible for licensing, disciplining and regulating real estate licensees and unlicensed real estate activity in Oregon. ORS 696.007 *et seq.* REA may issue a real estate license only to an individual. ORS 696.020(1). REA may assess civil penalties against a person who engages in unlicensed real estate activity in Oregon. ORS 696.990(4).

REA contends that Shepard engaged in professional real estate activity by allowing and/or directing the employees of Umbrella Inc. to manage Delta Grove. Shepard contends to the contrary. I agree with REA.

ORS 696.020, in effect in 2011, is titled “License required for individuals engaged in professional real estate activities; exception; rules” and provides, in pertinent part:

(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.

“Engage” means “to take part; participate.” *Webster’s Third New International Dictionary* 751 (unabridged edition 2002).

ORS 696.010(14), in effect in 2011, provides:

“Professional real estate activity” means any of the following

actions, when engaged in for another and for compensation¹³ or with the intention or in the expectation or upon the promise of receiving or collecting compensation, by any person who:

(h) Engages in management of rental real estate.

“Management of rental real estate” means:

(a) Representing the owner of real estate in the rental or lease of the real estate and includes but is not limited to:

(A) Advertising the real estate for rent or lease;

(B) Procuring prospective tenants to rent or lease the real estate;

(C) Negotiating with prospective tenants;

(D) Accepting deposits from prospective tenants;

(E) Checking the qualifications and creditworthiness of prospective tenants;

(F) Charging and collecting rent or lease payments;

(G) Representing the owner in inspection or repair of the real estate;

(H) Contracting for repair or remodeling of the real estate;

(I) Holding trust funds or property received in managing the real estate and accounting to the owner for the funds or property;

(J) Advising the owner regarding renting or leasing the real estate;

(K) Providing staff and services to accommodate the tax reporting and other financial or accounting needs of the real estate;

(L) Providing copies of records of acts performed on behalf of the owner of the real estate; and

¹³ “Compensation” means any fee, commission, salary, money or valuable consideration for services rendered or to be rendered as well as the promise thereof and whether contingent or otherwise. ORS 696.010(4).

(M) Offering or attempting to do any of the acts described in this paragraph for the owner of the real estate[.]

ORS 696.010(11), in effect in 2011.

As indicated above, 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 in Oregon without holding an active license. Professional real estate activity includes the management of rental real estate for another and for compensation. Management of rental real estate means representing the owner of real estate in the rental or lease of the real estate and includes, but is not limited to, advertising the real estate for rent, procuring prospective tenants to rent the real estate, accepting deposits from prospective tenants, checking the qualifications of prospective tenants, charging and collecting rent or lease payments, and contracting for repair of the real estate.

The question at issue in this matter is whether Shepard, in the performance of his duties for Umbrella Inc., engaged in professional real estate activity without a license.

During the period of December 28, 2011 through April 2012, Shepard LLC owned Umbrella Inc. (a property management company), Delta Grove Apartments (rental real estate) and various other rental properties in Oregon. Shepard LLC paid Umbrella Inc. a fee to manage its rental properties, including Delta Grove.

Shepard was a paid consultant for Umbrella Inc. Shepard's duties at Umbrella Inc. included reviewing the company's balance sheets and income statements, and providing advice to Thompson regarding Umbrella Inc.'s business activities (property management). In addition, pursuant to Thompson's credible admission during REA's investigation, although Shepard had stepped down as President of Umbrella Inc., Shepard was still "active in managing" Umbrella Inc. during the relevant time period at issue.¹⁴ I find, more likely than not, that Shepard continued to actively manage Umbrella Inc. and its employees during the period of December 28, 2011 through April 2012. I further find that Shepard, in his role as paid consultant, was compensated for his management activities.

Managing a business is not a passive activity. It requires involvement and participation. "Manage" means "to direct or carry on business or affairs; supervise, administer." *Webster's* at 1372. By actively managing Umbrella Inc., Shepard directed, carried on, and/or supervised the business activities (property management) of Umbrella Inc., as well as the employees engaging in said activities for the corporation. Additionally, by so doing, Shepard took part and/or participated in the property management activities of the corporation. Shepard was not licensed to engage in professional real estate activity in Oregon.

Under Shepard's direction and supervision, the employees of Umbrella Inc. managed the rental properties of Shepard LLC, including Delta Grove, for compensation. The employees of

¹⁴ Thompson's credible admission is also supported by Shepard's own actions in this matter, including continuing to act as President of Umbrella Inc. during the time period at issue, after purportedly stepping down as President in the beginning of 2011. (*See, e.g., Exs. A5, A15, R104.*)

Umbrella Inc. managed Delta Grove by advertising vacancies for rent, approving new tenants, signing rental agreements with tenants, collecting rent from tenants, preparing deposit slips and summaries, depositing rent into the owner's bank account, paying bills for the owner, arranging contractors for the owner, posting deposits and payments to the corporation's accounting system, and filing court papers when needed. The employees of Umbrella Inc. managed Delta Grove without a license. Shepard, by directing and supervising the employees of Umbrella Inc. in the management of Delta Grove, took part and/or participated in the unlicensed property management activities.

Therefore, the evidence in the record establishes that during the period of December 28, 2011 through April 2012, the employees of Umbrella Inc., under Shepard's direction and supervision, engaged in unlicensed professional real estate activity. The evidence further establishes that Shepard, by directing and supervising the employees of Umbrella Inc. in the management of Delta Grove, took part in the unlicensed professional real estate activity.

Accordingly, I find by a preponderance of the evidence that during the period of December 28, 2011 through April 2012, Shepard engaged in professional real estate activity by allowing and/or directing the employees of Umbrella, Inc., under his supervision to manage Delta Grove Apartments for Shepard LLC for compensation in violation of ORS 696.020(2) (2011 Edition).

Shepard contends that he did not personally engage in any management activities for Delta Grove. However, Shepard, by directing and supervising the employees of Umbrella Inc. in the management of Delta Grove, took part and/or participated in the unlicensed property management activities. Thus, Shepard's argument is unpersuasive.

2. The exemptions to the license requirement

REA contends that the exemptions to the license requirement set forth in ORS 696.030(1)(g) and (1)(aa) are not applicable in this matter. Shepard contends to the contrary. I agree with REA.

ORS 696.030, in effect in 2011, is titled "Exemptions" and provides, in relevant part:

(1) ORS 696.010 to 696.375 *** does not apply to:

(a) A nonlicensed individual who is a full-time employee of a single owner of real estate whose real estate activity involves the real estate of the employer and:

(A) Is incidental to the employee's normal, nonreal estate activities; or

(B) Is the employee's principal activity, but the employer's principal activity or business is not the sale, exchange, lease option or acquisition of real estate.

(g) A nonlicensed individual who is a regular full-time employee of a single corporation, partnership, association, limited liability company or nonlicensed individual owner of real property acting for the corporation, partnership, association, limited liability company or nonlicensed individual owner in the rental or management of the real property, but not in the sale, exchange, lease option or purchase of the real property.

(aa) An individual who is the sole member or a managing member of a domestic or foreign limited liability company duly registered and operating within this state under ORS chapter 63 and who is engaging in the acquisition, sale, exchange, lease, transfer or management of the real estate of the limited liability company.

The statute cited above sets forth exemptions to the license requirement of ORS 696.020(2). The statute permits single entities or individuals to manage their own property personally or by hiring a full-time employee.

Exemption (1)(g)

Exemption (1)(g) allows property management activities by “[a] nonlicensed individual who is a regular full-time employee of a ... limited liability company ... owner of real property acting for the ... limited liability company ... owner...”

In other words, exemption (1)(g) permits a full-time employee of an LLC to manage the LLC’s property for the LLC without needing a license. The exemption does not permit another entity or another entity’s employees to manage the LLC’s property on behalf of the LLC.

As applied in this case, a full-time employee of Shepard LLC can directly manage Shepard LLC’s property (Delta Grove) for Shepard LLC without needing to obtain a license from REA.

During the period of December 28, 2011 through April 2012, Shepard was not a full-time employee of Shepard LLC, managing Delta Grove for Shepard LLC. Instead, Shepard was a paid consultant of Umbrella Inc., managing Delta Grove on behalf of Umbrella Inc. for Shepard LLC. As such, exemption (1)(g) is not applicable to Shepard.

Exemption (1)(aa)

Exemption (1)(aa) allows property management by “[a]n individual who is the sole member or a managing member of a domestic ... limited liability company ... who is engaging

in the ... management of the real estate of the limited liability company.”

Stated another way, exemption (1)(aa) permits a sole member or managing member of an LLC to manage the LLC’s property for the LLC without needing to obtain a license from REA. The exemption does not permit another entity or another entity’s employees to manage the LLC’s property on behalf of the LLC.

Thus, as applied in this case, a sole member or managing member of Shepard LLC can directly manage Shepard LLC’s property (Delta Grove) for Shepard LLC without needing to obtain a license from REA.

During the period of December 28, 2011 through April 2012, although Shepard was a managing member of Shepard LLC, he was compensated for managing Delta Grove on behalf of Umbrella Inc. through his paid employment at Umbrella Inc. Therefore, exemption (1)(aa) is not applicable to Shepard.

Shepard contends that affiliated and subsidiary organizations controlled by the same ownership interest are considered the same entity and, therefore, Shepard LLC is essentially managing its own rental property and is exempt from the licensing requirement. Shepard cites to OAR 863-024-0061 and *Hulsey v. Lindeman*, 65 Fed Appx 633 (9th Cir. 2003) (unpublished decision) in support of his argument. I disagree with Shepard.

The administrative rule – OAR 863-024-0061

OAR 863-024-0061 is titled “Affiliated and Subsidiary Organizations” and provides:

- (1) Affiliated organizations are two or more organizations whose controlling ownership interests are owned by the same licensee, licensees, entity, or entities.
- (2) A subsidiary organization is one in which the majority of the voting stock or controlling ownership interest is owned by another organization.
- (3) Affiliated or subsidiary business organizations engaging in the management of rental real estate may use the same property manager or principal broker, provided that the individual registering the business name submits proof satisfactory to the commissioner that the property manager or principal real estate broker actually manages and controls each affiliated and subsidiary organization.
- (4) As used in this rule, controlling ownership interest means owning 51 percent or more.

As cited above, OAR 863-024-0061 defines “affiliated organization” and “subsidiary

organization” and then goes on to state that “affiliated or subsidiary business organizations engaging in the management of rental real estate may use the same property manager or principal broker, provided that the individual registering the business name submits proof satisfactory to the commissioner that the property manager or principal real estate broker actually manages and controls each affiliated and subsidiary organization.”

The text of the rule describes the circumstances under which affiliated or subsidiary organizations engaging in the management of rental real estate *may employ the same property manager* or principal real estate broker.¹⁵ The rule does not state (nor imply) that affiliated or subsidiary organizations are the *same organization*.

Umbrella Inc. and Delta Grove are separate entities regardless of their status as affiliated or subsidiary organizations under OAR 863-024-0061. To find otherwise would be illogical and would render the entire statutory scheme of registering corporations as separate entities from the individual members who control them and from each other as meaningless.¹⁶

Therefore, I find that OAR 863-024-0061 does not stand for the proposition that affiliated and subsidiary organizations controlled by the same ownership interest are the same entity. Consequently, Shepard’s argument is unpersuasive.

The unpublished opinion - Hulsey v. Lindeman, 65 Fed Appx 633 (9th Cir. 2003).

Hulsey involved an action brought by an employee against his employer to recover compensation allegedly due for finding a buyer for property. The pertinent history is as follows:¹⁷

In November 1996, Yuba Trucking, Inc. (Yuba Trucking) and Floyd Venable entered into a Real Estate Lease with Obligation to Purchase the Venable property, which consisted of eleven parcels. The Real Estate Lease with Obligation to Purchase required Yuba Trucking to purchase the Venable property for \$1 million dollars not later than five years from the date of the agreement. Michael Lindeman (Lindeman), as CEO of Yuba Trucking, Northern Division, signed the Real Estate Lease with Obligation to Purchase.

Yuba Trucking used the names Yuba North and Yuba Northern Division to refer to its operations in Oregon.

In 1997, Lindeman owned 95 percent of Yuba Trucking and controlled the corporation.

¹⁵ In order for OAR 863-024-0061(3) to apply in this case, Shepard must be a licensed real estate property manager. ORS 696.010(18). Shepard is not a licensed real estate property manager. Therefore, OAR 863-024-0061(3) is not applicable in this matter.

¹⁶ The purpose of OAR Chapter 863, Division 24, is “to specify the requirements for obtaining a real estate property manager’s license.” The purpose is not to modify the effect of ORS Chapters 60 (Private Corporations) and 63 (Limited Liability Companies). See OAR 863-024-0000(2).

¹⁷ The history includes facts from *Hulsey v. Lindeman*, Civil No. 00-3118-CO. (D. Or. Feb 9, 2004).

In March 1997, Greg Hulsey (Hulsey), who was an employee of Yuba Trucking, Northern Division, attended a management meeting. At the meeting, Lindeman announced his intention to sell the Venable property. Lindeman also declared and offered that if any persons present could locate a buyer who would pay above \$1.2 million dollars for the Venable property, Lindeman would pay the finder the difference as compensation.

On April 2, 1997, Yuba North, Inc. (Yuba North) was incorporated. Lindeman was President of Yuba North, Inc. (Yuba North), and controlled the corporation. On April 2, 1997, Hulsey was moved onto the payroll of Yuba North.

At some point in time, Hulsey located a buyer, Rock N Ready Mix, Inc., for the Venable property.

On January 6, 1998, Mr. Venable signed warranty deeds conveying two of the Venable parcels to Lindeman individually. At the same time, Mr. Venable signed warranty deeds conveying the nine remaining Venable parcels to the Lincoln Trust Company, for the benefit of (fbo) Michael Lindeman IRA Rollover Account.

On January 13, 2000, Lindeman, as vendor, entered into a land sale contract covering two of the eleven Venable parcels with Rock N Ready Mix, Inc., as vendee. At the same time, the Lincoln Trust Company, as vendor, entered into a land sale contract covering the nine remaining Venable parcels with Rock N Ready Mix, Inc., as vendee. The Venable property sold for just under \$1.8 million dollars.

Lindeman refused to pay Hulsey any compensation for locating the buyer, claiming that any contract for a commission was not valid under Oregon law.

Hulsey brought an action in United States District Court. The magistrate judge, who tried the case with agreement of the parties, granted summary judgment in favor of Lindeman, holding that under Oregon law, Hulsey was not entitled to any commission because he engaged in professional real estate activities without a proper license.

Hulsey appealed the decision, alleging that he fell under exception ORS 696.030(1)(a), to the license requirement of ORS 696.020(1), allowing for his recovery of the commission.

For purposes of the appeal, the parties agreed that Hulsey was Lindeman's employee.

The United States Court of Appeals reviewed the magistrate judge's summary judgment *de novo*. The Court determined as follows:

Oregon Revised Statute § 696.020(1) prohibits individuals from engaging in professional real estate activities without a license. It is undisputed that Hulsey does not have a real estate license. We concur with the magistrate judge's holding that Hulsey's activities regarding the Venable property qualify as professional real estate activities. This holding places Hulsey squarely within Oregon

Revised Statute § 696.020(1).

Hulsey alleges, however, that Oregon Revised Statute § 696.030(1)(a) provides an exception to the general rule in Oregon Revised Statute § 696.020(1). This exception allows an individual to avoid the license requirement if he is “[a] nonlicensed regular full-time employee of a single owner of real estate whose activities involve the real estate of the employer and are incidental to the employee’s normal, nonreal estate activities...” To qualify for this exception, Hulsey must show that he was a regular full-time employee of a single owner of real estate and that his activities involved the real estate of his employer.

The magistrate judge held that Hulsey’s activities did not involve the real estate of his employer. Hulsey found a fee buyer for the Venable property. At the time Hulsey located Rock N Ready, Lindeman’s claim to the Venable property was a lease with an obligation to purchase upon completion of the lease term. Lindeman’s leasehold with the obligation to purchase is real estate. Or.Rev.Stat. § 696.010(14) (defining “real estate” as including “every interest or estate in real property, whether corporeal or incorporeal”). Hulsey’s sale of the land in fee simple “involves” Lindeman’s future interest because ownership in fee simple includes future interests. It is undisputed for the purposes of summary judgment that Lindeman was Hulsey’s employer. Therefore, Hulsey’s activities involved his employer’s real estate and he falls within the statutory exception.

REVERSED and REMANDED.

Hulsey at 633-635.

The court in *Hulsey* addressed the question of whether the leasehold, which included an obligation to purchase the property upon completion of the lease term, was “real estate” as defined in ORS 696.010(14). The court held that the sale of land that is leased and includes a future obligation to purchase “involves” the property owner’s interest in real estate because ownership in fee simple includes not just present but also future interests.

The court in *Hulsey* did not address the question of whether the two companies, both controlled by Lindeman, were the *same entity* for the purposes of determining whether Hulsey was exempt from the requirements of ORS 696.020 under ORS 696.030.

Moreover, the court in *Hulsey* did not address the specific facts, entities or exemptions that are at issue in the present case.

Accordingly, I find that *Hulsey* does not stand for the proposition that affiliated and

subsidiary organizations controlled by the same ownership interest are the same entity. I further find that *Hulsey* is not relevant in the case at issue. As such, Shepard's argument is unpersuasive.

3. The civil penalty

REA contends that Shepard should be assessed a civil penalty for his violations. Shepard contends to the contrary. I agree with REA.

ORS 696.990 is titled "Penalties" and provides, in material part:

(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.

(5) In addition to the civil penalty set forth in subsection (4) of this section, any person that violates ORS 696.020 may be required by the commissioner to forfeit and pay to the General Fund of the State Treasury a civil penalty in an amount determined by the commissioner but not to exceed the amount by which such person profited in any transaction that violates ORS 696.020.

As indicated above, any person that violates ORS 696.020(2) may be required by REA to pay a civil penalty, the amount of which is determined by the number of offenses of unlicensed professional real estate activity the person has engaged in.

REA presented evidence that Shepard LLC paid Umbrella Inc. \$11,000 for the management fees for Delta Grove for the month of April 2012. Those management fees, more likely than not, included fees for collecting rent, preparing deposit slips and summaries for Shepard LLC, depositing rent into Shepard LLC's bank account, making payments on behalf of Shepard LLC, and posting deposits and payments in the company's accounting system.

Thus, the evidence in the record establishes that Umbrella Inc. and its employees engaged in at least three separate offenses of unlicensed professional real estate activity for the month of April 2012. Additionally, Shepard, by directing and supervising Umbrella Inc.'s employees in the management of Delta Grove, took part and/or participated in the unlicensed property management activities for the month of April 2012.

Therefore, I find that a civil penalty in the amount of \$1,600 (\$100 + \$500 + \$1,000) for

the three separate offenses is appropriate in this matter. Consequently, Shepard should be assessed a civil penalty in the amount of \$1,600 for the violations.

4. The Cease and Desist Order

REA contends that Shepard should be ordered to immediately cease and desist from engaging in unlicensed professional real estate activity. Shepard contends to the contrary. I agree with REA.

ORS 696.397 is titled "Cease and desist order" and provides, in pertinent part:

- (1) If the Real Estate Agency has reason to believe that a person has engaged, is engaging or is about to engage in a violation of ORS 696.020 (2) or 696.603 (1), the agency may, subject to ORS 183, issue an order directing the person to cease and desist from the violation or threatened violation.
- (2) A cease and desist order issued under subsection (1) of this section must include:
 - (a) A statement of facts constituting the violation.
 - (b) A provision requiring the person named in the order to cease and desist from the violation.
 - (c) The effective date of the order.
 - (d) A notice to the person named in the order of the right to a contested case hearing under ORS chapter 183.
- (3) A cease and desist order issued under subsection (1) of this section becomes effective 30 days after the date of the order unless the person named in the order requests a hearing on the order.

Pursuant to the authority cited above, if REA has reason to believe that a person has engaged, is engaging or is about to engage in a violation of ORS 696.020(2), the agency may issue an order directing the person to cease and desist from the violation.

As stated previously, during the period of December 28, 2011 through April 2012, Shepard engaged in professional real estate activity by allowing and/or directing the employees of Umbrella, Inc., under his supervision to manage Delta Grove Apartments for Shepard LLC for compensation in violation of ORS 696.020(2). As such, a cease and desist order is appropriate in this case.

Accordingly, Shepard shall be ordered to immediately cease and desist from engaging in unlicensed professional real estate activity as defined in ORS 696.010(11) unless Shepard first

obtains a license to perform management of rental real estate from the Real Estate Agency.

ORDER

I propose the Real Estate Agency issue the following order:

The Notice of Intent to Levy Civil Penalty and Order to Cease and Desist issued on December 12, 2013 is AFFIRMED.

1. Shepard engaged in professional real estate activity by allowing and directing employees of Umbrella, Inc., under his supervision to manage the Delta Grove Apartments between December 28, 2011 and the end of April 2012, in violation of ORS 696.020(2) (2011 Edition).
2. Shepard should be assessed a civil penalty in the amount of \$1,600.
3. Shepard shall be ordered to immediately cease and desist from engaging in any professional real estate activity as defined in ORS 696.010(11) unless Shepard first obtains a license to perform management of rental real estate from the Real Estate Agency.

Dove L. Gutman

Senior 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
1177 Center St. NE
Salem OR 97301-2505

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

CERTIFICATE OF MAILING

On April 16, 2015, I mailed the foregoing Proposed Order issued on this date in OAH Case No. 1403556.

By: First Class Mail

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Lucy for Ryan Clark
Administrative Specialist
Hearing Coordinator

CERTIFICATE OF MAILING

On July 22, 2015, I mailed the foregoing Final Order issued on this date in OAH Case No. 1403556 and Agency Case No. 2012-185.

By: First Class Mail

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