

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

IN THE MATTER OF: ROBERT M. BUTLER, Licensee) FINAL ORDER)) OAH Case No. 2017-ABC-00537) Agency Case No. 2015-132
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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 August 16, 2017. No exceptions were filed to the Proposed Order.

For the foregoing reasons, the Commissioner adopts the Ruling on Motion For Summary Determination and Proposed Order as the Final Order. The Commissioner finds that each violation independently supports imposition of a public reprimand under ORS 696.301.

ORDER

IT IS HEREBY ORDERED that the Butler's principal real estate broker license be, and hereby is reprimanded.

Dated this 11th day of SEPTEMBER 2017.



Gene Bentley
Real Estate Commissioner

Date of Service: 9/11/2017

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 DETERMINATION AND**
ROBERT M. BUTLER) **PROPOSED ORDER**
)
) OAH Case No. 2017-ABC-00537
) Agency Case No. 2015-132

HISTORY OF THE CASE

On April 12, 2017, the Real Estate Agency (Agency) issued a Notice of Intent to Reprimand (Notice) to Robert M. Butler. On April 25, 2017, Mr. Butler requested a hearing.

On May 1, 2017, the Agency referred the matter to the Office of Administrative Hearings (OAH). On June 8, 2017, Administrative Law Judge (ALJ) Samantha Fair convened a telephone prehearing conference. Mr. Butler appeared. The Agency appeared and was represented by Senior Assistant Attorney General Raul Ramirez. Phillip Johnson from the Agency also appeared. ALJ Fair scheduled the hearing for September 26, 2017, and set deadlines for submission of motions, witness lists and exhibits.

On July 14, 2017, the Agency filed a Motion for Summary Determination (Motion). On July 31, 2017, Mr. Butler filed an Answer Against Oregon Real Estate Agency's Motion for Summary Determination (Response).

On August 10, 2017, the OAH issued a Ruling on Motion for Summary Determination (Ruling). In the Ruling, ALJ Fair granted the Agency's Motion on the allegation of intentionally interfering with the exclusive representation relationship of another licensee and the allegation of demonstrating incompetence or untrustworthiness and found that the issuance of a reprimand was an appropriate sanction. In the Ruling, ALJ Fair denied the Motion on the allegation of intentional interference with the contractual relations of others, and ALJ Fair indicated that, if the Agency withdrew this allegation, than a proposed order could be issued that would incorporate the Ruling.

On August 15, 2016, the Agency withdrew the allegation in its Notice regarding intentional interference with the contractual relations of others and requested that a proposed order be issued.

ISSUES

1. Whether there are any genuine issues as to any material facts and, if not, whether the

Agency is entitled to a favorable ruling as a matter of law. OAR 137-003-0580.

2. Whether Mr. Butler violated provisions of the Oregon Real Estate License Law¹ by:

- Intentionally interfering in the exclusive representation relationship of another licensee; and
- Demonstrating incompetence or untrustworthiness in performing an act for which the licensee is required to hold a license.

ORS 696.301.

3. If so, whether the Agency may reprimand Mr. Butler's principal real estate broker's license. ORS 696.301.

DOCUMENTS CONSIDERED

For purposes of the issuance of this ruling, the ALJ considered the following:

- The Motion and Exhibits 1 through 11, submitted by the Agency;
- The Response, the Declaration of Robert Butler, and Exhibits A through C, submitted by Mr. Butler; and
- The pleadings.

STATEMENT OF FACTS

1. The Agency issued Mr. Butler a principal real estate broker's license number PB.780203594, which expired on January 31, 2016. (Exs. 1 at 1; 10 at 1.) During the relevant period, he operated a real estate brokerage company named Butler Brokers, Inc. (Butler Brokers). (Ex. 2 at 2.) Mr. Butler uses his company's computer to conduct his personal business, and his brothers know of this personal use. (Butler Dec. at 1.)

2. The Agency issued Reet Vaga a principal real estate broker's license. Ms. Vaga works with Kamali Sotheby's International Realty (Kamali). (Exs. 2 at 2; 4 at 1.)

3. On April 17, 1996, Dorothy Butler executed an Agreement of Trust for the creation of a trust entitled "The Bert M. Butler Trust" (Trust). (Ex. 3 at 1, 6.) She transferred to the Trust two parcels of real property, one of which was Lot 12, Neahkanie Meadow, Tillamook County, Oregon (Property). (*Id.* at 1, 7.) The Trust was for the benefit of Ms. Butler's husband, Bert Butler, during his lifetime, and thereafter, for the benefit of her children: Stewart Butler (Stewart), Mr. Butler, and Thomas Butler (Thomas). (*Id.* at 1.) Ms. Butler named her three children as successor co-trustees for the Trust after her death. (*Id.* at 5.)

¹ ORS 696.015(2) provides "ORS 696.010 to 696.495, 696.600 to 696.785, 696.800 to 696.870, 696.990 and 696.995 may be cited as the Oregon Real Estate License Law."

4. On September 6, 2013, Ms. Vaga listed the Property for sale on behalf of Ms. Butler. After Ms. Butler's death in 2014, Stewart and Thomas requested that Ms. Vaga continue the listing, and they signed for extensions and modifications of the original listing agreement.² (Ex. 5 at 1.)

5. On January 15, 2015, Ms. Vaga received a purchase offer of \$250,000 from Jeffrey and Margaret Hoffman (Hoffmans) for the Property. Ms. Vaga submitted the offer to Stewart and Thomas, who showed it to Mr. Butler. (Exs. 5 at 1; 2 at 2, 5-15.) Thomas and Stewart decided to make a counter offer to the Hoffmans. (Ex. 2 at 2.) Only Thomas and Stewart were listed on the paperwork regarding the proposed sales transaction. (*Id.* at 5-14.)

6. On January 19, 2015, Mr. Butler sent an email to Ms. Vaga, Thomas, Stewart and others in which he rejected the counter offer proposed by Thomas and Stewart; objected to the validity of the extension of Ms. Vaga's listing agreement; and rejected Ms. Vaga's recommendation to limit any counteroffer to \$270,000. In the email, he further indicated that he would send a copy of his rejection of Thomas and Stewart's counteroffer to Ticor Title Company (Ticor). (Ex. 2 at 17.) Mr. Butler sent the email from Butler Brokers' email account and noted the author of the email as:

Robert Butler

Butler Brokers Inc.
Commercial Real Estate

(*Id.*)

7. On January 27, 2015, Ticor informed Ms. Vaga, Thomas, and the attorney representing Stewart and Thomas that it would not issue title insurance for the proposed sale unless Mr. Butler joined the transaction as a seller or advised Ticor, in writing, that he would not join the transaction but confirm that the completed transaction would not be a serious breach of trust. Ticor further stated that these options were necessary to prevent post-closing challenges to the transaction. (Exs. 6 at 1; A at 1.) On February 5, 2015, Ticor again informed Ms. Vaga that it would not move forward on the sales transaction until resolution of Mr. Butler's objections to the sale. (Ex. at 2.) Upon being informed of the problems raised regarding the transaction, the Hoffmans withdrew their offer on February 8, 2015. (Exs. 2 at 20; 5 at 1.)

8. On February 9, 2015, Mr. Butler filed a complaint against Ms. Vaga and Kamali with the Agency. (Ex. 2 at 22.) Included with the complaint was a February 2, 2015 email sent to Ms. Vaga and Kamali in which Mr. Butler demanded copies of all signed documents regarding the Trust, including the original listing, price changes and listing extensions, and noted that prior demands for such documents had been unsuccessful. The email was sent from Butler Brokers' email account and noted the author of the email as:

² ORS 130.610(1) provides "Cotrustees who are unable to reach a unanimous decision may act by majority decision."

Robert Butler, co-trustee Bert Butler Trust

Butler Brokers Inc.
Commercial Real Estate

(*Id.* at 23.)

9. On February 13, 2015, Stewart and Thomas, as co-trustees, filed an Amended Complaint for Declaratory Judgment (Complaint) against Mr. Butler, as trustee, in the Circuit Court for the County of Tillamook, Oregon. In the Complaint, Stewart and Thomas sought a declaratory judgment against Mr. Butler that would authorize Stewart and Thomas, as the majority of the trustees pursuant to ORS 130.610(1), to sell the Property. (Ex. 7.)

10. On March 3, 2015, an email was sent from Butler Broker's email account to Stewart and Thomas with a copy to Mr. Butler and the attorney representing Stewart and Thomas. The email included an attachment of a document entitled "Regarding the Bert M. Butler Trust agreement selling [the Property's] conditions to close to Hoffman's as Purchaser's." (Exs. 8 at 1-2; B at 1; C at 1.) The body of the email contained the following:

This allows the sale to the Hoffman's to go through promptly with little additional legal fees. The fact you two and yours attorneys do not respond does not speak well for your interest in mitigating damages to the estate and 'continuing' as de facto trustees failing in your duty to loyalty: ORS 130.655 UTC 802

Robert Butler

Butler Brokers Inc.
Commercial Real Estate

(Exs. 8 at 1; B at 1.) The attachment was a document for all three co-trustees to sign demonstrating their agreement to a list of conditions that would allow the Hoffman sale to proceed. The conditions included:

5. Stewart and Tom withdraw [the Complaint] from Tillamook Circuit Court
6. The [Trust] and Stewart and Tom guarantee payment to [Mr. Butler] one third of the net trust proceeds of the sale. * * *
7. [Mr. Butler] withdraws in writing the two pending real estate licensee complaints against Kamali Sotheby's and holds Reet Vega harmless from other possible proceeding violations (e.g. "steering") As a condition of this agreement, and subsequent sale by the trust to "Hoffman" Kamali Sotheby's, will pay at the time of completion of "Hoffman" escrow to Butler Brokers Inc., Portland, Oregon, a referral

fee of \$7,500.00[.]

(Exs. 8 at 2; C at 1.)

11. On March 23, 2015, Thomas filed a complaint against Mr. Butler with the Agency. (Ex. 2 at 1.)

12. On June 8, 2015, a Circuit Court Judge signed a Declaratory Judgment that authorized Stewart and Thomas, as co-trustees, to take “all necessary steps to sell and convey the [Property] to a qualified purchaser.” (Ex. 9 at 1-2.)

13. Kamali was the sole procuring cause of the Hoffmans’ purchase offer. (Ex. 2. At 3.) Mr. Butler and Butler Brokers did not list the Property for sale, did not market the Property, did not obtain the purchase offer, did not refer the Hoffmans to Ms. Vaga, and did not provide any services in regards to the proposed sale of the Property. (Exs. 2 at 3; 10 at 3.)

CONCLUSIONS OF LAW

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

2. Mr. Butler violated provisions of the Oregon Real Estate License Law by:

- Intentionally interfering in the exclusive representation relationship of another licensee; and
- Demonstrating incompetence or untrustworthiness in performing an act for which the licensee is required to hold a license.

3. The Agency may reprimand Mr. Butler’s principal real estate broker’s license for these two violations.

OPINION

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, Exhibits 1 through 11, the Response, the Declaration, Exhibits A through C, and the pleadings. Pursuant to OAR 137-003-0580(7), I reviewed the evidence in the light most favorable to Mr. Butler, the non-moving party. I determined there are no genuine issues as to the material facts of the Agency's allegations of Mr. Butler intentionally interfering with the exclusive representation relationship of another licensee and of Mr. Butler demonstrating untrustworthiness in performing an act for which the licensee is required to hold a license. The Agency is entitled to a favorable ruling on its Motion regarding these allegations. Because the ruling on the Motion resolves all remaining issues in this matter, this proposed order is issued and the hearing is canceled.

Violations of Oregon Real Estate License Law

The Agency proposes to reprimand Mr. Butler's principal real estate broker's license based on allegations that Mr. Butler violated the Oregon Real Estate License Law.³ 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 sanction Mr. Butler. 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).

ORS 696.301 provides, in part:

³ Pursuant to ORS 696.775, the Agency continues to have jurisdiction to conduct disciplinary proceedings and take action against a licensee even after the expiration of the license.

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:

* * * * *

(7) Intentionally interfered with the exclusive representation or exclusive brokerage relationship of another licensee.

* * * * *

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

ORS 696.010 provides, in part:

(14) "Professional real estate activity" means any of the following actions, when engaged in for another and for compensation or with the intention or in the expectation or upon the promise of receiving or collecting compensation, by any person who:

- (a) Sells, exchanges, purchases, rents or leases real estate;
- (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;
- (d) Lists, offers, attempts or agrees to list real estate for sale;

* * * * *

(i) Purports to be engaged in the business of buying, selling, exchanging, renting or leasing real estate;

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

(k) Assists or directs in the negotiation or closing of any transaction calculated or intended to result in the sale, exchange, leasing or rental of real estate;

(L) Except as otherwise provided in ORS 696.030 (12), advises, counsels, consults or analyzes in connection with real estate values, sales

or dispositions, including dispositions through eminent domain procedures;

(m) Advises, counsels, consults or analyzes in connection with the acquisition or sale of real estate by an entity if the purpose of the entity is investment in real estate; or

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

A. Interference with Exclusive Representation

Ms. Vaga, working thru Kamali, held the listing agreement for the Property. Although Mr. Butler may have objected to her representation and her advice, his objections do not alter the fact that Ms. Vaga exclusively represented the Trust in its listing of the Property for sale, originally via her listing agreement with Ms. Butler as the trustee and the subsequent extension of the listing by the cotrustees Thomas and Stewart.

Butler Brokers is Mr. Butler's brokerage company. Mr. Butler and Butler Brokers performed no real estate activities or any services in regards to the listing and proposed sale of the Property to the Hoffmans. Despite its complete lack of performance of any services related to the proposed sale of the Property, Mr. Butler insisted that Kamali, the brokerage company for Ms. Vaga, pay a \$7,500 fee to Butler Brokers as a condition of the proposed sale, which would result in an approximately 50 percent reduction in Ms. Vaga's earned commission for the sale.

Mr. Butler argues that he only acted as a cotrustee, not a licensee, in connection with the sale of the Property. However, ORS 696.301 prohibits a licensee from engaging in specific, enumerated acts. It does not provide an exclusion if the licensee engages in these activities for reasons other than a role as a broker, agent, or property manager. Mr. Butler held a real estate principal broker's license. As such, he is required to abide by the Oregon Real Estate License Law when engaged in real estate activities and activities substantially related to a licensee's fitness. *See* ORS 696.301(14) (prohibitions on conduct that is substantially related to a licensee's fitness).

Mr. Butler further argues that his March 3, 2016 email attachment was a settlement offer, and therefore not subject to the Oregon Real Estate License Law. Mr. Butler fails to provide any legal support for this argument. The email attachment was a settlement offer, but the terms of the settlement concerned the sale of the Property (a real estate activity) with a list of conditions for such sale that included a demand for payment to Butler Brokers, his brokerage company that was not a party or a representative of a party to the Hoffman transaction and had rendered no services to support the distribution of such a payment.

Mr. Butler also argues that the Agency's failure to define "referral fee" defeats its motion for summary determination because that term can mean anything. The Oregon Real Estate License Law does not provide a definition for a "referral fee" other than a brief mention to a "referral fee" in ORS 696.290(5) as a payment to a tenant when the tenant refers a new tenant to the landlord. ORS 696.290(1) references a "finder's fee" as a payment of any share of a

licensee's compensation from a real estate transaction. Because Mr. Butler was demanding that Kamali pay a fee of \$7,500 to Butlers Brokers as a condition of the sale of the Property, Mr. Butler's "referral fee" was actually a "finder's fee." The actual name used for the fee in the March 3, 2016 email attachment does not create an issue of material fact, as, no matter its name, the fee would result in Kamali (and thus Ms. Vaga) paying Butler Brokers a portion of its compensation from the proposed Hoffman sale.

By making a demand for payment from Kamali, the brokerage company through which Ms. Vaga worked, for a fee never earned by Butler Brokers, Mr. Butler intentionally interfered in Ms. Vaga's exclusive representation relationship with the Trust for the sale of the Property. Mr. Butler's conduct violated ORS 696.301(7).

B. Incompetence or Untrustworthiness

ORS 696.290(1)(a)⁴ provides:

Except as provided in paragraph (b) of this subsection, a real estate licensee may not offer, promise, allow, give, pay or rebate, directly or indirectly, any part or share of the licensee's compensation arising or accruing from any real estate transaction or pay a finder's fee to any person who is not a real estate licensee licensed under ORS 696.022.

ORS 696.290(1)(a) requires that any portion of a licensee's compensation arising from a real estate transaction cannot be paid to any person who is not a real estate licensee. As shown above, Mr. Butler made a demand for payment from the brokerage company with which Ms. Vaga worked as a condition of the sale of the Property to the Hoffmans. Such an action, requiring the brokerage company to pay a portion of an earned commission to Butler Brokers, can only be made to another licensee. Therefore, Mr. Butler performed an act for which he is required to hold a license.

As shown above, Mr. Butler's demand that Kamali make a payment to Butler Brokers violated ORS 696.301(7). Additionally, Mr. Butler's demand was for the financial benefit of his brokerage company that had performed no services to warrant the receipt of any such payment. His willingness to violate the Oregon Real Estate License Law for the unwarranted financial benefit of his own company demonstrated his untrustworthiness in performing an act for which he is required to hold a license. Mr. Butler's conduct violated ORS 696.301(12).

Issuance of a Reprimand

In its Notice of Intent to Reprimand, the Agency proposes to sanction Mr. Butler by issuing a reprimand against his principal real estate broker's license. Pursuant to ORS 696.301, the Agency may suspend or revoke a license or reprimand a licensee for violations of the Oregon Real Estate License Law. As shown above, the Agency established that Mr. Butler violated the Oregon Real Estate License Law. Therefore, the Agency is entitled to sanction Mr. Butler's principal real estate broker's license, and the issuance of a reprimand against Mr. Butler, as

⁴ ORS 696.290(1)(b) provides for the payment of a finder's fee to a nonresident licensed real estate broker.

proposed by the Agency, is the least onerous of possible sanctions. As such, the Agency is not abusing its discretion in seeking to reprimand Mr. Butler.

Based upon his violations of ORS 696.301(7) and (12), the Agency may issue a reprimand against Mr. Butler's principal real estate broker's license.

RULING AND ORDER

The Real Estate Agency's Motion for Summary Determination is granted. The hearing, scheduled for September 26, 2017, is canceled.

I proposed the Real Estate Agency issue the following order:

Robert M. Butler's principal real estate broker's license is hereby reprimanded for his violations of ORS 696.301(7) and (12).

Samantha A. 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:

Janae Weston
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 August 16, 2017 I mailed the foregoing RULING ON MOTION FOR SUMMARY DETERMINATION AND PROPOSED ORDER issued on this date in OAH Case No. 2017-ABC-00537.

By: First Class Mail

Robert M Butler
824 SW 18th Avenue
Portland OR 97205

By: Electronic Mail

Janae Weston, Agency Representative
Real Estate Agency
530 Center St NE Ste 100
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Phillip Johnson, Agency Representative
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Raul Ramirez, Assistant Attorney General
Department of Justice
1162 Court St NE
Salem OR 97301

Alesia K Vella
Hearing Coordinator

CERTIFICATE OF MAILING

On September 11, 2017, I mailed the foregoing Final Order issued on this date in OAH Case No. 2017-ABC-00537 and Agency Case No. 2015-132.

By: First Class Mail

ROBERT M BUTLER
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PORTLAND, OR 97205-0000

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