

1 REAL ESTATE AGENCY
2 BEFORE THE REAL ESTATE COMMISSIONER
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4 In the Matter of the Real Estate License of
5
6 BENJAMIN F. MCIVER
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}
FINAL ORDER BY DEFAULT
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9 1.

10 1.1 On June 1, 2016, the Real Estate Commissioner issued, by certified mail, a
11 notice of intent to levy a civil penalty and to revoke Benjamin F. McIver's (McIver) property
12 manager license. The Oregon Real Estate Agency (OREA) sent the notice of intent to
13 McIver's last known address of record with OREA and also mailed it to McIver's new address
14 (as determined from the investigation). The notice of intent was also mailed to McIver by
15 regular first class mail in a handwritten envelope to both the address of record and McIver's
16 new address. The certified mailings for both mailings was returned, marked "RETURN TO
17 SENDER UNCLAIMED UNABLE TO FORWARD." Neither of the first class mailings in the
18 handwritten envelopes were returned to OREA.

19 1.2 By letter dated June 19, 2016, McIver requested a hearing in this matter.

20 1.3 On August 17, 2016, the Real Estate Commissioner issued, by certified mail an
21 amended notice of intent. OREA mailed the amended notice of intent to McIver's new address
22 (determined from the investigation). The notice of intent was also mailed to McIver by regular
23 first class mail in a handwritten envelope to McIver's new address. The certified mailing was
24 returned marked, "RETURN TO SENDER UNCLAIMED UNABLE TO FORWARD." The first
25 class mailing in the handwritten envelope was not returned to OREA.

26 1.5 On September 28, 2016, OREA emailed a copy of the amended notice of intent
27 to McIver using the email address on record.

28 1.6 OREA file was forwarded to the Office of Administrative Hearings. A hearing
29 date was set for January 10, 2017 at 9:00 AM. McIver did not appear at the hearing, nor did
30 McIver notify OREA or the Office of Administrative Hearings that he would not appear at the
scheduled hearing.

1 1.7 Copies of the entire investigation file are designated as the record for purposes
2 of default, including any submission from respondent and all information in the administrative
3 file relating to the mailing of notices and any responses received.

4 2.

5 Based upon the foregoing and upon a review of the above described investigation
6 reports, documents and files, the Real Estate Commissioner finds:

7 2.1 Oregon Administrative Rule 863-001-0006 states, in part, that a notice of intent is
8 properly served when deposited in the United States mail, registered or certified mail,
9 addressed to the real estate licensee or to any other person having an interest in a proceeding
10 before the Commissioner at the licensee's or other person's last known address of record with
11 OREA.

12 2.2 Mclver's last known address of record with OREA was 3361 Marvin Dr., Eugene,
13 OR 97404. A certified mailing of the notice of intent was mailed to Mclver at his last known
14 address of record on June 1, 2016. This certified mailing was returned to OREA. The first
15 class mailing to this address was not returned to OREA.

16 2.3 OREA also mailed the notice of intent certified mail to Mclver at his new address
17 (obtained during the investigation) at 2571 Donegal St. Eugene, OR 97404 on June 1, 2016.
18 The certified mailing was returned to OREA. The first class mailing to this address was not
19 returned to OREA.

20 2.4 The amended notice of intent was mailed certified to Mclver at 2571 Donegal St.,
21 Eugene, OR 97404 on August 17, 2016. The certified mailing was returned to OREA, however
22 the first class mailing in the handwritten envelope mailed to this address was not returned to
23 OREA.

24 2.4 The first class mailings of the notice of intent and amended notice of intent in the
25 handwritten envelope have not been returned to OREA. In accordance with ORS
26 40.135(1)(q), there is a presumption that the mailing properly addressed and placed with the
27 U.S. Postal Service was delivered. That presumption has not been overcome by any
28 evidence.

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3.
FINDINGS OF FACT
&
CONCLUSIONS OF LAW

3.1 At all times mentioned herein, Mclver was licensed as a property manager doing business under the registered business name of Mclvers Property Management LLC.

3.2 In December 2015 OREA received a complaint from property owner Steve Robinson (Robinson)

3.3 OREA Investigator/Auditor Peter Bale (Bale) interviewed Robinson on December 22, 2015. Robinson said he had employed Mclver as his property manager since 2002 for his two rentals in Eugene. A tenant moved out of one of Robinson's rentals in August 2015, and Mclver failed to send Robinson the statements or his owner draws. Additionally, Robinson said he didn't receive any documentation or money for September 2015. Robinson confirmed, at the time of the interview, December 22, 2015, he had not heard from Mclver or received any money since July 2015. Robinson was able to access and view his owner statements from Mclver's website on November 13, 2015.

Violation: By failing to disburse owner payments to, or communicate with, property owner, Robinson, from July 2015 to December 22, 2015, Mclver violated ORS 696.890(4)(c), (d), (e) and (f) (2015 Edition) which states, a real estate property manager owes the property owner the following affirmative duties: (c) to exercise reasonable care and diligence; (d) to account in a timely manner for all funds received from or on behalf of the owner; (e) to act in a fiduciary manner in all matters relating to trust funds; and (f) to be loyal to the owner by not taking action that is adverse or detrimental to the owner's interest. Mclver's conduct is grounds for discipline under ORS 696.301(12) and (15).

3.4 In an email dated November 9, 2015, Robinson confirmed he was terminating the property management agreement with Mclver for both of his properties.

3.5 As of December 22, 2015, the OREA licensing database showed the following three Clients' Trust Accounts (CTA) held at US Bank registered by Mclver:

- Mclvers Property Management, LLC Pooled Clients Security Deposits ending in #0559 (CTA Sec 0559)

- 1 • Mclvers Property Management, LLC Pooled Clients' Trust Account Operating
2 ending in #0567 (CTA 0567) and
- 3 • Mclvers Property Management, LLC Pooled Clients' Trust Account Placement
4 ending in #0542 (CTA Placement 0542)

5 3.6 Mclver told Bale during his interview, that CTA Placement 0542 account was
6 closed on January 28, 2014.

7 **Violation:** By failing to notify OREA within 10 days after the date CTA Placement 0542
8 had closed, Mclver violated ORS 696.301(3) (2013 Edition) as it incorporates ORS 696.241(6)
9 (2013 Edition) which states, a property manager or principal broker who closes a clients' trust
10 account, shall notify the agency, within 10 business days after the date the account is closed
11 or transferred, on a form approved by the agency.

12 3.7 During Bale's interview with Mclver on December 24, 2015, Mclver said he
13 realized that he failed to update his address on the OREA licensing database. As of February
14 11, 2016, the OREA licensing database, showed Mclver's main office address as 3361 Marvin
15 Dr., Eugene OR, whereas it should have been 2571 Donegal St, Eugene, OR. Mclver was
16 using the 2571 Donegal St, Eugene location as his main office and was living there as well.

17 **Violation:** By failing to notify OREA prior to moving his business location, Mclver
18 violated ORS 696.301(3) (2015 Edition) as it incorporates ORS 696.200(1)(d) and (2) (2015
19 Edition) which states, a licensed real estate property manager or principal real estate broker
20 shall: (d) before changing a main office location, notify the Agency of the new location on a
21 form approved by the agency and (2) the change of a business location without notification to
22 the agency as required by subsections (1) and (5) of this section is grounds for revocation of a
23 real estate license.

24 3.8 Bale obtained bank statements for CTA Sec 0559 and CTA 0567 from US Bank
25 and reviewed supporting documentation. Within the copies of returned checks provided with
26 the November 2015 CTA 0567 bank statement was check number #3408, dated 10/9/15
27 payable to Eugene Water and Electric Board for \$225.00. The handwritten entry on the check
28 memo was, "2571 Donegal," Lane County records showed Mclver as the owner of this house.
29 Mclver paid for services from Eugene Water and Electric Board for the home/office he used
30 located at 2571 Donegal St, Eugene, out of the owners CTA 0567.

1 **Violation:** By using owner funds to pay for his own personal and/or business expense
2 Mclver violated ORS 696.301(12)(2015 Edition) which states a licensee may be subject to
3 discipline if they have demonstrated incompetence or untrustworthiness in performing any act
4 for which the licensee is required to hold a license. Additionally, Mclver committed an act of
5 fraud or engaged in dishonest conduct substantially related to the fitness of the applicant or
6 licensee to conduct professional real estate activity in violation of ORS 696.301(14) (2015
7 Edition).

8 3.9 During his interview on December 24, 2015, Bale requested CTA reconciliations
9 from Mclver. Mclver was to produce the reconciliations by December 28, 2015, for both CTA
10 Sec 0559 and CTA 0567. Mclver failed to provide the reconciliations to OREA by the
11 December 2015 deadline. Requests for inspection of records were made by Bale and OREA
12 Regulations Manager, on January 6, 2016. Mclver was to produce the requested documents
13 no later than by 5pm on January 6, 2016. Mclver failed to produce the documents by the
14 January 6, 2016 deadline.

15 **Violation:** By failing to produce the requested documents by the deadline, Mclver
16 violated ORS 696.301(3) (2015 Edition) as it incorporates OAR 863-025-0035(2)(b) (5-15-14
17 Edition), which states a property manager must produce records for inspection of the Agency
18 as follows: (b) if the Agency has reasonable grounds to believe that funds of an owner or
19 tenant may be missing or misappropriated or that the property manager is engaging in
20 fraudulent activity, any records demanded or requested by the Agency must be produced
21 immediately.

22 3.10 On January 8, 2016, Mclver wrote to Bale and attached pdf files titled, "Clients'
23 trust account November 2015" and "Clients trust account reconciliation November 2015."

24 3.11 Bale reviewed the CTA documents provided by Mclver. The documents
25 submitted did not include the OREA required reconciliations for either account. The Owners'
26 Reconciliation report was for bank CTA 0567. Within this report were the following items:

- 27 • "Uncleared Money In" totaling \$27,246.00. There were 16 items in the
- 28 "Uncleared Money In" schedule dating as far back as March 12, 2014 and
- 29 • "Uncleared Money Out" totaling \$18,622.94. There were 38 items in the
- 30 "Uncleared Money Out" schedule dating as far back as January 5, 2014.

- 1 • Allowing for these entries the "Bank Ledger Balance as of 11/30/2015" was
2 \$11,766.71. The actual amount in the bank account at that date was \$3,143.65.

3 **Violation:** By allowing "Uncleared Money In" (outstanding deposits) transactions
4 totaling \$27,260.00 to remain in the bank reconciliation for owners' account for CTA 0567 from
5 as far back as March 12, 2014, Mclver violated ORS 696.890(4)(c) and (e) (2013 and 2015
6 Editions) which state a real estate property manager owes the property owner the following
7 affirmative duties: (c) to exercise reasonable care and diligence and (e) to act in a fiduciary
8 manner in all matters relating to trust funds. Mclver's conduct is grounds for discipline under
9 ORS 696.301(12) and (15).

10 **Violation:** By allowing, "Uncleared Money Out" (outstanding checks and payments)
11 transactions totaling \$18,622.94 to remain in the bank reconciliation for CTA 0567, from as far
12 back as January 5, 2014, Mclver violated ORS 696.890(4)(c) and (e) (2013 and 2015 Editions)
13 which state a real estate property manager owes the property owner the following affirmative
14 duties: (c) to exercise reasonable care and diligence and (e) to act in a fiduciary manner in all
15 matters relating to trust funds. Mclver's conduct is grounds for discipline under ORS
16 696.301(12) and (15).

17 3.12 On January 14, 2016, Mclver sent Bale reconciliation reports for September and
18 October 2015 for CTA Sec 0559 and CTA 0567. The reconciliation documents did not include
19 the following required supporting documentation: owners' ledgers, tenants' ledgers, and the
20 receipts and disbursement reports. The reconciliation report did not contain the required three
21 components and was not signed or dated.

22 **Violation:** By failing to properly complete the clients' trust account and security deposit
23 account reconciliation, containing the required three components, Mclver violated ORS
24 696.301(3) (2015 Edition) as it incorporates OAR 863-025-0025(20) and (21) (5-15-2014
25 Edition) which requires a property manager to reconcile each clients' trust account and security
26 deposit account within 30 calendar days of the date of the bank statement, and the
27 reconciliation document must contain the required three components and be signed and dated.

28 3.13 On January 21, 2016, Mclver met with Bale at OREA. During the meeting Mclver
29 printed out the ePayments Batch Report listing for November 2015, which listed the total for
30 the automated transfer of owners' draws paid. Mclver also printed out a list of owners'
balances for November 2015.

1 3.14 Bale created a spreadsheet from the list of owners' balances provided by Mclver.
2 The spreadsheets included the following four negative balances:

- 3 • Marilyn Nichols -\$2,752.25
- 4 • Mike Davis -\$1,075.00
- 5 • Randy and Karen Feldhaus -\$4,645.00
- 6 • Richard Wirkus -\$50.00

7 The spreadsheet included two owner accounts for Mclver, one of which was negative:

- 8 • Ben Mclver \$4,241.87
- 9 • Mclvers PM LLC -\$7,716.49

10 Mclver said the account with the positive balance was for the house he was living in, which he
11 owned, and had previously been a rental home.

12 **Violation:** By allowing negative balances in the November 2015 report of the property
13 owner's ledger accounts for Marilyn Nichols (-\$2,752.25), Mike Davis (-\$1,075.00), Randy and
14 Karen Feldhaus (-\$4,645.00), and Richard Wirkus (-\$50.00), Mclver violated ORS 696.301(3)
15 (2015 Edition) as it incorporates OAR 863-025-0025(12) (5-14-15 Edition), which states a
16 property manager may not disburse funds from a clients' trust account or security deposits
17 account unless there are sufficient funds in the ledger account against which the disbursement
18 is made.

19 **Violation:** By allowing his own funds to be commingled in the property owners clients'
20 trust account Mclver violated ORS 696.301(3)(2015 Edition) as it incorporates OAR 863-025-
21 0025(3)(a) (5-14-2015 Edition) which states, only funds received by the property manager on
22 behalf of an owner may be held in a clients' trust account. Mclver also violated ORS
23 696.301(3) (2015 Edition) as it incorporates ORS 696.241(7) (2015 Edition) which states a
24 property manager may not commingle any other funds with the trust funds held in a clients'
25 trust account, except for earned interest on a clients' trust account as provided in subsections
26 (9) and (10).

27 3.15 To calculate the estimated range of shortfall in the bank account two different
28 calculations were performed.

29 Comparing the bank statement to the total of positive owners' ledger balances:

- 30 • As of November 30, 2015, the balance at US Bank for CTA 0567 was \$3,143.65.
 The total from the spreadsheet created by Bale for positive owners' ledger

1 balances was \$24,139.39. In comparing the bank statement balance of
2 \$3,143.65 against the total of positive owners' ledger balances of \$24,139.39,
3 there is an estimated shortfall of \$20,995.74 in the bank account.

4 Comparing the check register to the total of positive owners' ledger balance:

- 5 • In comparing the total of positive owners' ledger balances of \$24,139.39 against
6 the check register balance as of November 30, 2015, which was \$11,766.71,
7 there is an estimated shortfall of \$12,372.68 in the bank account.

8 The estimated bank account shortfall ranges from \$12,372.68 to \$20,995.74.

9 **Violation:** By causing and/or allowing a short fall to exist in CTA 0567 Mclver
10 demonstrated incompetence or untrustworthiness in performing any act for which the licensee
11 is required to hold a license, in violation of ORS 696.301(12) (2015 Edition). Additionally,
12 Mclver committed an act of fraud or engaged in dishonest conduct substantially related to the
13 fitness of the applicant or licensee to conduct professional real estate activity, in violation of
14 ORS 696.301(14) (2015 Edition) Lastly, Mclver violated ORS 696.890(4)(c),(e), and (f) (2015
15 Edition) which states, a real estate property manager owes the property owner the following
16 affirmative duties: (c) to exercise reasonable care and diligence; (e) to act in a fiduciary
17 manner in all matters relating to trust funds; and (f) to be loyal to the owner by not taking action
18 that is adverse or detrimental to the owner's interest.. Mclver's conduct is grounds for
19 discipline under ORS 696.301(15).

20 3.16 All of the above demonstrate incompetence or untrustworthiness for which
21 Mclver is required to hold a license.

22 **Violation:** ORS 696.301(12) (2015 Edition), which states a licensee's real estate
23 license can be disciplined if they have demonstrated incompetence in performing any act for
24 which the licensee is required to hold a license.

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4.1 The above violations are grounds for discipline pursuant to ORS 696.301. Based on these violations, OREA is revoking Mclver's property manager license. A revocation is appropriate under ORS 696.396(2)(c)(A), (B), and (C) (2015 Edition). According to ORS 696.396, OREA may revoke a real estate license if material facts establish a violation of a ground of discipline under ORS 696.301 that results in significant damage or injury, exhibits incompetence in the performance of professional real estate activity, or exhibits dishonesty or fraudulent conduct.

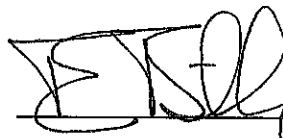
ORDER

IT IS HEREBY ORDERED that Mclver's property manager license is revoked.

IT IS FURTHER ORDERED that pursuant to ORS 696.990(6) and based upon the violation of Mclver failing to produce his property management records, Mclver pay a civil penalty in the sum of \$10,000, and said penalty to be paid to the General Fund of the State Treasury by paying the same to OREA.

Dated this 20th day of JANUARY, 2017.

OREGON REAL ESTATE AGENCY



GENE BENTLEY

Real Estate Commissioner

Date of Service: 1/20/2017

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