

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

IN THE MATTER OF:

AMBER M WOLF

) **FINAL ORDER INCORPORATING**
) **MODIFIED RULING ON MOTION FOR**
) **PARTIAL SUMMARY**
) **DETERMINATION AND PROPOSED**
) **ORDER**
) OAH Case No. 2017-ABC-00405
Agency Case No. 2016-219 & 2016-258

This matter came before the Commissioner to consider the Amended Ruling on Motion for Partial Summary Determination and Proposed Order Issued by Administrative Law Judge Rick Barber on July 19, 2017. The July 19, 2017, Amended Ruling and Proposed Order recommended revocation of Respondent's real estate license. The Amended Ruling and Proposed Order advised Respondent of the opportunity to file exceptions. Respondent did not file exceptions to the Proposed Order. After considering the record, and the file herein, the Agency issues this Final Order which incorporates the ALJ Rick Barber's Modified Ruling and Proposed Order as follows.

HISTORY OF THE CASE

On March 2, 2017, the Real Estate Agency (Agency) issued a Notice of Intent to Revoke to Amber Wolf (Licensee). On March 6, 2017, Licensee requested a hearing. On March 16, 2017, the Agency referred the hearing request to the Office of Administrative Hearings (OAH). The OAH assigned Administrative Law Judge (ALJ) Rick Barber to preside at hearing. ALJ Barber convened a prehearing conference on April 12, 2017. The parties agreed to an August 1, 2017 hearing date and also set a schedule for the Motion for Summary Determination the Agency intended to file.

On June 9, 2017, Senior Assistant Attorney General Raul Ramirez filed a Motion for Partial Summary Determination on behalf of the Agency.¹ Licensee's Response was due on June 30, 2017. On July 1, 2017, Licensee sent an email to Mr. Ramirez requesting an extension of time (to July 3) to submit her Response due to a family emergency. Mr. Ramirez submitted three emails from Licensee that he received on the evening of July 3, 2017. On July 5, 2017, ALJ Rick Barber granted the extension, accepted the three emails as Licensee's Response,² and gave

¹ Upon receipt of the motion, noting that the caption said it was a "Partial" motion but also noting that the Agency requested, at the end of the motion, a Proposed Order, I wrote to Mr. Ramirez to ask whether the word "partial" was in error. In a return email, he assured me that it was only a partial motion. Therefore, the hearing remains scheduled.

² The three emails, sent to Mr. Ramirez between 8:57 PM and 11:11 PM on July 3, are all accepted as Licensee's Response, although it appears that the third email was her final copy.

the Agency until July 10, 2017 to file a Reply. The Agency filed its Reply on July 10, 2017, and the matter was taken under advisement at that time.

On July 18, 2017, the OAH issued its Ruling on Motion for Summary Determination, noting that it was a partial motion only (with other issues from the notice to be addressed at hearing), and concluding that the August 1, 2017 hearing would remain on the hearing docket.

On July 19, 2017, Mr. Ramirez forwarded a letter from Real Estate Commissioner Gene Bentley, indicating the Agency's desire to dismiss the remaining issues from its Notice, without prejudice. Specifically, as Commissioner Bentley's letter states, the Agency withdraws "the following alleged violations contained in the Notice of Intent: Page 4, Lines 1-29; Page 5, Lines 6-11; and Page 8, Lines 4-7."

As a result of the Commissioner's July 19, 2017 letter, ALJ Rick Barber canceled the August 1, 2017, hearing and the Ruling on Motion for Summary Determination was amended to be issued as a Proposed Order.

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 Licensee demonstrated incompetence or untrustworthiness in the practice of the real estate profession, violating ORS 696.301(12).
3. Whether Licensee committed an act of fraud or engaged in dishonest conduct in her real estate practice, violating ORS 696.301(14).
4. Whether Licensee engaged in conduct below the standard of care in her practice of the real estate profession, violating ORS 696.301(15).
5. Whether Licensee created a reasonable probability of damage or injury to a person by making misrepresentations or false promises, violating ORS 696.301(1).
6. Whether Licensee failed in her affirmative duty to deal honestly and in good faith with others in the real estate transactions at issue, thereby violating ORS 696.301(3), as it incorporates ORS 696.810(2)(a) and (c).

NATURE OF THE REVIEW

Pursuant to OAR 137-003-0580, a Motion for Summary Determination may be filed by the agency or a party not less than 28 days before the date set for hearing, requesting a ruling on the legal issues in the contested case. The rule sets forth the standard by which ALJ Rick Barber

reviewed the motion. It states, in pertinent part:

Motion for Summary Determination

(1) Not less than 28 calendar days before the date set for hearing, the agency or a party may file a motion requesting a ruling in favor of the agency or party on any or all legal issues (including claims and defenses) in the contested case. The motion, accompanied by any affidavits or other supporting documents, shall be served on the agency and parties in the manner required by OAR 137-003-0520.

(2) Within 14 calendar days after service of the motion, the agency or a party may file a response to the motion. The response may be accompanied by affidavits or other supporting documents and shall be served on the agency and parties in the manner required by OAR 137-003-0520.

* * * * *

(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.

(9) A party or the agency may satisfy the burden of producing evidence through affidavits. Affidavits shall be made on personal knowledge, establish that the affiant is competent to testify to the matters stated therein and contain facts that would be admissible at the hearing.

(10) When a motion for summary determination is made and supported as provided in this rule, a non-moving party or non-moving agency may not rest upon the mere allegations or denials contained in that party's or agency's notice or answer, if any. When a motion for summary determination is made and supported as provided in this rule, the administrative law judge or the agency must explain the requirements for filing a response to any unrepresented party or parties.

(11) The administrative law judge's ruling may be rendered on a single issue and need not resolve all issues in the contested case.

(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 or a final order in accordance with 137-003-0665 if the administrative law judge has authority to issue a final order without first issuing a proposed order.

OAR 137-003-0580. ALJ Rick Barber reviewed and decided the motion interpreting the facts in a way that is most favorable to Licensee, the non-moving party.

DOCUMENTS REVIEWED

In preparation for ruling on the motion, ALJ Rick Barber reviewed the Agency's Motion, with the Affidavit of Frances Hlawatsch (Ex. 1) and the other exhibits, 2 through 6; Licensee's Response (three emails); and the Agency's Reply. ALJ Rick Barber also reviewed the Notice and Licensee's hearing request.

FINDINGS OF FACT

1. Licensee has been licensed by the Agency as a broker, with Oregon Realty Co. from August 5, 2015 until April 26, 2016, and then with Oregon First from April 26, 2016 through June 23, 2016. Her broker license expired on December 31, 2016.. Licensee applied for a principal broker license in June 2016 but has not completed her application. (Aff. of Hlawatsch). Licensee studied for her real estate broker license at Lane Community College and began selling real estate in 2002. (Licensee Response).

2. On February 8, 2016, Licensee contracted with engineer Dan Cook to inspect the foundations on two manufactured homes, one in Molalla and the other in Mulino. Cook inspected both foundations on February 26, 2016. In Cook's opinion, the foundation on the Molalla home was in good shape, and only needed tie-downs to pass inspection. The Mulino home's foundation, however, was in serious disrepair. (Ex. 3).

3. On February 26, 2016, Cook summarized his positive findings on the foundation of the Molalla property in his inspection report:

It appears that the home is adequately supported for vertical, lateral and overturning loads on the foundation system. The foundation does conform to the "Permanent Foundation Guide for Manufactured Housing" a handbook by U.S. Department of Housing and Urban Development (HUD), September 1996.

Corrective measures necessary would be installation of two tie-down straps at each end of the support beams * * *

(Ex. 3 at 9).

4. On March 3, 2016, after describing several problems with the foundation on the Mulino property, Cook concluded in his multi-page report:

It appears that the home is not adequately supported for vertical nor for lateral and overturning loads on the foundation system. The foundation does not conform to the "Permanent Foundation Guide for Manufactured Housing" a handbook by U.S. Department of Housing and Urban Development (HUD), September 1996.

It is not possible at this time to determine the extent of corrective measures required since the stability of the hillside is unknown. We recommend the site be assessed by a licensed Geotechnical Engineer.

(Ex. 3 at 6).

5. Licensee received money orders from both of her clients to pay for Cook's inspections, but did not give the money orders to Cook or otherwise pay him for his services. Licensee kept the funds from the Molalla inspection, and either kept the funds or returned the funds to her client on the Mulino inspection. (Aff. of Hlawatsch, Ex. 3 at 11).

6. Licensee, perceiving that Cook's inspection report on the Mulino property would preclude financing on the property, decided to alter his report. Purchasing an inexpensive software program that allowed her to change or edit PDF documents, Licensee removed the pages describing the problems with the Mulino foundation, and inserted the following conclusion (taken verbatim from the Molalla letter) in the altered Mulino property one-page letter:

It appears that the home is adequately supported for vertical, lateral and overturning loads on the foundation system. The foundation does conform to the "Permanent Foundation Guide for Manufactured Housing" a handbook by U.S. Department of Housing and Urban Development (HUD), September 1996.

(Ex. 4). Licensee did not falsify Cook's signature on the altered March 3, 2016 Mulino letter (because, she told Hlawatsch, she knew forgery would be wrong), but included his engineer's stamp and submitted the altered letter with the closing documents at escrow. She also changed Cook's telephone number by one digit on the altered letter to prevent anyone from calling Cook and asking questions about the alterations. (Aff. of Hlawatsch).

7. Licensee mailed the altered Cook letter to the loan processor, Finance of America, where it was reviewed by Jonna Cyr, the person processing the loan. Cyr observed some irregularities in the document and, being familiar with Cook's report in the Molalla case, saw that the wording was exactly the same in both reports. Cyr and her manager contacted Cook to seek an explanation for the reports, and Cook told them his report on the Mulino property had been altered. Cook sent Cyr the actual report on the Mulino property. (Ex. 6).

8. Agency Investigator Frances Hlawatsch interviewed Licensee on July 27, 2016.

Licensee initially denied altering Cook's report, but eventually admitted that she had altered Cook's report by using an inexpensive software program that allowed her to alter a PDF document. (Aff. of Hlawatsch).

CONCLUSIONS OF LAW

1. There are no genuine issues as to any material facts raised in this motion and the Agency is entitled to a favorable ruling as a matter of law on those issues. OAR 137-003-0580.
2. Licensee demonstrated untrustworthiness in the practice of the real estate profession, violating ORS 696.301(12).
3. Licensee committed an act of fraud or engaged in dishonest conduct in her real estate practice, violating ORS 696.301(14).
4. Licensee engaged in conduct below the standard of care in her practice of the real estate profession, violating ORS 696.301(15).
5. Licensee created a reasonable probability of damage or injury to a person by making misrepresentations or false promises, violating ORS 696.301(1).
6. Licensee failed in her affirmative duty to deal honestly and in good faith with others in the real estate transactions at issue, thereby violating ORS 696.301(3), as it incorporates ORS 696.810(2)(a) and (c).

OPINION

The Agency has the burden of proof to establish that Licensee has violated the standards alleged in this case. *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 burden of proof encompasses two burdens, the burden of production of evidence in support of an assertion, and the burden to persuade the fact-finder that the facts asserted are true. *Marvin Wood Products v. Callow*, 171 Or App 175 (2000). Because there are no remaining questions of fact to be decided as to these issues, and the Agency is entitled to a ruling in its favor on these issues, the Agency has established the matters it has asserted in this motion.

ORS 696.301 states in part:

696.301 Grounds for discipline. 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:

- (1) *Created a reasonable probability of damage or injury to a person by making one or more material misrepresentations or false promises* in a matter related to

professional real estate activity.

* * * * *

(3) Disregarded or violated any provision of ORS 659A.421, 696.010 to 696.495, 696.600 to 696.785 and 696.800 to 696.870 or any rule of the Real Estate Agency.

* * * * *

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

* * * * *

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

(15) *Engaged in any conduct that is below the standard of care* for the practice of professional real estate activity in Oregon as established by the community of individuals engaged in the practice of professional real estate activity in Oregon.

(Emphasis added).

Violations of ORS 696.301(12) (14), and (15)

The Agency alleges that Licensee's altering of Cook's report violated subsections (12), (14) and (15) of the statute quoted above. That is, the Agency contends that Licensee's actions: 1) demonstrated incompetence or untrustworthiness; 2) were an act of fraud associated with professional real estate activity; and 3) were below the standard of care for real estate professionals.

The material facts in this case are undisputed and quite straightforward, and the analysis is equally so. Licensee intentionally altered the letter of engineer Cook in order to help a client obtain financing on a manufactured home in Mulino. Licensee knew that the information she was placing in the Mulino property report—taken from the Molalla property report—drastically altered Cook's opinion and covered up the dangerous foundation issues on the Mulino property. Licensee had the presence of mind, when altering the document, to avoid actually forging Cook's name and also to transpose the numbers in his phone number so that no one would be able to contact Cook about his actual opinion. Licensee then presented the altered report to the loan processor as if it was the original report.

In her response, Licensee argues that her use of opioid pain medications contributed to her poor decision-making. Other than her unsworn statement, there is no evidence that she had an opioid addiction, or that it affected her decision-making. Importantly, Licensee admits in her Response that she altered the Cook report. She clearly recalls making the decision to alter the report, and she remembers how she altered it. She recalls her decision not to falsify Cook's

signature (as she explained to Hlawatsch), and her intentional decision to alter Cook's phone number so that no one could contact him about the altered report.

Licensee was untrustworthy. Subsection (12) of the statute indicates that the Agency may discipline one who "[d]emonstrated incompetence or untrustworthiness" in real estate activity. Given Licensee's willingness to actually alter the report of another professional in order to complete a sale, she is untrustworthy in the practice of real estate.

Licensee's clients, whether they recognized it or not, were victims of that untrustworthiness. If Licensee's falsified version of Cook's report had been undiscovered and led to financing of the Mulino property, her clients would have had potential liability for obtaining financing under false pretenses and would certainly have had a home that was dangerous to live in. Other real estate agents could not trust that Licensee was honest, and engineers such as Cook would probably refuse to perform any more work for Licensee, her company, or her clients. The Agency has established that Licensee is not trustworthy.³

Licensee has committed dishonest acts in this case. Licensee altered Cook's report and submitted the document to the loan processor as the original. Licensee acted dishonestly and, given the amount of time necessary to obtain the software program and change the letter, as well as to submit it to the processor, the dishonest acts were premeditated. The Agency has established that Licensee acted dishonestly in these circumstances.

Licensee's actions were below the standard of care. ORS 696.022 sets forth some of the characteristics the legislature expects of a real estate professional, and states in part:

(5)(a) A license for a real estate broker, principal real estate broker or real estate property manager may be granted only to an individual who is trustworthy and competent to conduct professional real estate activity in a manner that protects the public interest. As a condition of licensing, the commissioner may require proof of competence and trustworthiness that the commissioner deems necessary to protect the public interest.

Although no witness testified as to the standard of care, it is a reasonable inference that Licensee's dishonest actions in this case violate the quoted statute and fall far below the standard of care of a real estate professional. The Agency has established that Licensee violated the standard of care.

Violation of ORS 696.301(1)

Licensee created a reasonable probability of damage to persons by making material misrepresentations. Licensee's alteration of Cook's report on the Mulino property had the reasonable probability of damaging the parties to the transaction on the Mulino property, as well as Cook's reputation as an engineer. The parties would have believed (and the lender would have financed on its belief) that there was no problem with the foundation on the Mulino

³ The statute refers to "incompetence or untrustworthiness" and, having found that Licensee was untrustworthy, I need not address whether she was incompetent.

property, when it was actually in serious disrepair.

As noted above, the misrepresentations in the report carried the probability of damage to the parties to the sales transaction, to Cook, and to the lender. Litigation over the matter would have been likely, leading to financial damage even if the facts of the case were ultimately determined correctly. Licensee violated this portion of the statute.

Violation of ORS 696.301(3)

Subsection (3) of the statute prohibits the violation of any other provision of the statutes. The Agency contends that Licensee violated subsection (3) as it incorporates ORS 696.810(2), which states in part:

696.810 Real estate licensee as buyer's agent; obligations. * * *

(2) A buyer's agent owes the buyer, other principals and the principals' agents involved in a real estate transaction the following affirmative duties:

(a) To deal honestly and in good faith;

* * * * *

(c) To disclose material facts known by the buyer's agent and not apparent or readily ascertainable to a party.

The original report that Cook drafted concerning the Mulino property identified several problems with the foundation of the property. Licensee altered that report to remove that information, thereby withholding material facts that should have been disclosed to the other parties to the transaction. Licensee violated this section of the statute as well.

Sanction

The Agency seeks to revoke Licensee's broker license based upon her actions in this case. Based upon ORS 696.396, the violations established by the Agency justify revocation of her license.

ORDER

The Commissioner adopts the ALJ's Modified Ruling on the Motion for Partial Summary Determination.

For the foregoing reasons, Licensee's Real Estate Broker License is hereby revoked.

IT IS SO ORDERED THIS

11th

DAY OF August

2017.

OREGON REAL ESTATE AGENCY



GENE BENTLEY

Real Estate Commissioner

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.

CERTIFICATE OF MAILING

On August 11, 2017, I mailed the foregoing Final Order Incorporating Modified Ruling on Motion for Partial Summary Determination and Proposed Order issued on this date in OAH Case No. 2017-ABC-00405 and Agency Case No. 2016-219 & 2016-258.

By: First Class Mail

AMBER M WOLF
9735 SW McDonald Street
Tigard, OR 98642-8208

Office of Administrative Hearings
ALJ Rick Barber
PO Box 14020
Salem OR 97309-4020

Raul Ramirez
Senior Assistant Attorney General
Department of Justice
1162 Court St NE
Salem OR 97301-4096

Carolyn Kalb
Compliance Specialist