

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
REAL ESTATE AGENCY**

IN THE MATTER OF:) **FINAL ORDER BY DEFAULT**
)
PHILLIP LYELL) OAH Case No. 2020-ABC-03933
) Agency Case No. 2018-636
)
)

Upon request of the Real Estate Agency (REA), the Office of Administrative Hearings (OAH) assigned an Administrative Law Judge (ALJ) for the purpose of conducting a limited hearing on the issue of whether there was due cause for Respondent Phillip A. Lyell’s late hearing request submitted in regards to the above entitled matter. Following the limited hearing on the issue of due cause for the late hearing request, the ALJ issued a Proposed Order on December 3, 2020, recommending that the Agency find that: Respondent Phillip Lyell’s request for hearing on the Notice of Intent to Suspend License No. 810504147 and Notice of Opportunity for Hearing (Notice) issued June 25, 2020, is denied as untimely. As will be discussed herein, the Commissioner agrees with the ALJ’s recommendation and adopts it as his own, finding herein that Respondent Phillip Lyell’s request for hearing on the Notice is denied.

Given, the finding herein, that Respondent’s late hearing request was untimely and is denied, the Agency may now finds that Respondent is in default as to the entire matter at hand and the Agency may, therefore, issue a *Final Order By Default* in this matter.

For ease of reference, the Commissioner chooses to modify, through expansion, the ALJ’s Proposed Order adding in the information necessary to convert the proposed order into a final order on the matter of the limited hearing and also into a Final Order By Default for the entire proceeding. The addition/subtraction of language, noted herein, does not change the ALJ’s Proposed Order on the limited issue of whether Respondent had good cause for his failure to timely request a hearing in a “substantial manner”. ORS 183.650(2) and OAR 137-003-0665(3).

HISTORY OF THE CASE

On June 25, 2020, the Oregon Real Estate Agency (REA) issued a Notice of Intent to Suspend License No. 810504147 and Notice of Opportunity for Hearing, which proposed the suspension of Phillip Lyell’s real estate license for alleged violations of ORS696.301(3) as it incorporates OAR 863-015-0210(1)(1-1-2018 Edition), OAR 863-015-0250(1)(c)(6-16-2016 Edition), OAR 863-015-0250(2)(1-1-2018 Edition), ORS 696.805(2)(a)(2015 and 2017 Editions), (7), (12), (14) and (15); ORS 696.396(2)(c)(B), (C), and (D); and OAR 863-027-

0020(1) and (2).¹ On July 20, 2020, Mr. Lyell requested a hearing.

Included within the *Notice* at Section 9., pages 10-11, was a statement to the effect that should Respondent fail to request a hearing within 20 days from the mailing date of the notice that his right to a hearing would be considered waived and the Agency may issue a final order by default and impose the sanctions in the notice against him. It also stated that: “Lyell’s submissions to the Agency to date regarding the subject of this disciplinary case and all information in the Agency’s files relevant to the subject of this case automatically become part of the evidentiary record of this disciplinary action upon default for the purpose of proving a prima facie case. ORS 183.417(4).²

Respondent failed to submit a request for hearing within 20 days of the service of the *Notice* upon him.

On July 27, 2020, REA referred the matter to the Office of Administrative Hearings (OAH) for a limited hearing regarding the timeliness of Mr. Lyell’s hearing request. OAH assigned Administrative Law Judge (ALJ) Bradley A. Schmidt to preside over the matter.

On October 19, 2020, ALJ Schmidt convened a telephone hearing. Mr. Lyell appeared without counsel and testified. Senior Assistant Attorney General Catriona McCracken represented REA. Carolyn Kalb appeared for REA and testified on its behalf. The ALJ closed the record at the end of the hearing.

On December 3, 2020, ALJ Schmidt issued a Proposed Order recommending that the Commissioner find: Respondent Phillip Lyell’s request for hearing on the Notice of Intent to Suspend License No. 810504147 and Notice of Opportunity for Hearing (Notice) issued June 25, 2020, is denied as untimely.

Respondent Lyell did not file any *Exceptions* to the ALJ’s *Proposed Order*.

The Commissioner, pursuant to ORS 183.417(4) and OAR 137-003-0670, now issues a *Final Order By Default* in this matter. This *Final Order By Default* **suspends Respondent Phillip A. Lyell’s License No. 810504147 for six months commencing at 12:01 a.m. January 19, 2021 and ending at 11:59 pm July 18, 2021.**

ISSUES

Whether Mr. Lyell filed a timely request for hearing and, if not, whether he had good cause for failing to file his request within the time limit set forth in the Notice of Intent to Suspend License No. 810504147 and Notice of Opportunity for Hearing. ORS 183.415(3)(a); OAR 137-003-0501(7); OAR 137-003-0528(1)(b)(A).

Whether the Commissioner may issue a Final Order By Default in the above entitled matter subjecting Respondent to discipline pursuant to ORS 696.301(3),(7),(12),(14), and (15)

¹ Pleadings P1 to P5.

² Pleadings P2 pages 11 and 12.

for violations of ORS 696.301(3),(7),(12),(14), and (15); ORS 696.396(2)(c)(B), (C), and (D); and OAR 863-027-0020(1) and (2).

EVIDENTIARY RULINGS

Exhibits A1 through A11 and Pleadings P1 through P30, offered by REA, were admitted into the record without objection. Exhibits R1 and R2, submitted by Mr. Lyell, were also admitted into the record without objection.

Respondent Lyell's submissions to the Agency to date regarding the subject of this disciplinary case and all information in the Agency's files relevant to the subject of this case automatically become part of the evidentiary record of this disciplinary action upon default for the purpose of proving a prima facie case. ORS 183.417(4).³

STATEMENT OF THE LAW

1. ORS 696.301(3) which states a real estate licensee's real estate license may be disciplined if they have: ORS 696.301(3) which states a real estate licensee's real estate license may be disciplined if they have: (3) disregarded or violated any provision of ORS 659A.421, 696.010 to 696.495, 696.600 to 696.785, 696.800 to 696.870 and 696.890 or any rule of the Real Estate Agency
2. ORS 696.301(3) as it incorporates:
 - a. OAR 863-015-0210(1) (1-1-2018 Edition), which states: (1) disclosed limited agency agreements required by ORS 696.815 must be in writing, signed and dated by the parties to be bound or by their duly appointed real estate agents.
 - b. OAR 863-015-0250(1)(c) (6-16-2016, 11-15-2016 and 1-1-2018 Editions), which states (1) complete and adequate records of professional real estate activity include complete, legible, and permanent copies of all documents required by law or voluntarily generated during a real estate transaction, including all offers received by or through real estate brokers or principal brokers to the client, including, but not limited to, the following: (c) a copy of any written agreement for the listing, sale, purchase, rental, lease, lease option, or exchange of real property generated by a real estate broker or principal broker while engaging in professional real estate activity that must be signed by all parties to such an agreement.
 - c. OAR 863-015-0250(2) (1-1-2018 Edition), which states (2) When a real estate broker receives any document referred to in (1) of this rule, the real estate broker must transmit to the real estate broker's principal broker the document within 3 banking days of real estate broker's receipt of the document.

³ Pleadings P2 pages 11 and 12.

- d. ORS 696.805(2)(a) (2015 and 2017 Editions), which states: (2) a seller’s agent owes the seller, other principals and the principals’ agents involved in a real estate transaction the following affirmative duties: (a) to deal honestly and in good faith.
- e. ORS 696.810(2)(b) (2017 Edition), which states (2) a buyer’s agent owes the buyer, other principals and the principal’s agents involved in a real estate transaction the following affirmative duties: (b) to present all written offers, written notices and other written communications to and from the parties in a timely manner without regard to whether the property is subject to a contract for sale or the buyer is already a part to a contract to purchase.
3. ORS 696.301(7) (2017 Edition), which states licensee’s real estate license may be disciplined if they have: (7) intentionally interfered with the exclusive representation or exclusive brokerage relationship of another real estate licensee.
4. ORS 696.301(12) which states a licensee’s real estate license can be disciplined if they have demonstrated incompetence or untrustworthiness in performing any act for which the licensee is required to hold a license.
5. ORS 696.301(14), which states a licensee’s real estate license can be disciplined if they have: (14) committed an act of fraud or engaged in dishonest conduct substantially related to the fitness of the applicant or real estate licensee to conduct professional real estate activity, without regard to whether the act or conduct occurred in the course of professional real estate activity.
6. ORS 696.301(15) states a licensee’s real estate license can be disciplined if they have: (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.
7. OAR 137-003-0528(1) states, in relevant part:
 - (a) The agency must accept a properly addressed hearing request that was not timely filed if it was postmarked within the time specified for timely filing * * *.
 - (b) The agency may accept any other late hearing request only if:
 - (A) There was good cause for the failure to timely request the hearing[.]

OAR 137-003-0501(7) states:

For purposes of OAR 137-003-0501 to 137-003-0700, “good cause” exists when an action, delay, or failure to act arises from an excusable mistake,

surprise, excusable neglect, reasonable reliance on the statement of a party or agency relating to procedural requirements, or from fraud, misrepresentation, or other misconduct of a party or agency participating in the proceeding.

FINDINGS OF FACT

1. Mr. Lyell last renewed his real estate broker license, number 810504147, on December 27, 2018. (Ex. A11 at 3-4; test. of Kalb.) As required by REA, Mr. Lyell provided updated contact information, including his mailing address, 4718 SE 28th Place, Portland, Oregon, 97202; his phone number, (503) 577-4721; and his email address, phillyell@cbbain.com. (Ex. A11 at 3-4, 7; test. of Kalb.) After the renewal, Mr. Lyell's real estate broker license was not set to expire until December 31, 2020. (Ex. A11 at 3.)

2. Between December 27, 2018, and June 25, 2020, Mr. Lyell did not provide any new or updated contact information to REA. (Ex. A11 at 4; test. of Kalb.)

3. On June 25, 2020, staff at REA mailed two copies of a Notice to Suspend License No. 810504147 and Notice of Opportunity for Hearing (Notice) to Mr. Lyell at 4718 SE 28th Place, Portland, Oregon, 97202. REA mailed one copy of the Notice via certified mail and the other via regular U.S. mail. REA also emailed a copy of the Notice to Mr. Lyell at phillyell@cbbain.com. (Ex. A10 at 4; test. of Kalb.) The Notice included a cover letter and certificate of mailing that were both dated June 25, 2020. (Exs. A9 at 1, A10 at 4; test. of Kalb.) The Notice stated that Mr. Lyell had a right to request a hearing, but that the request must be in writing and must be filed within 20 days of the Notice's date of mailing. (Ex. A9 at 1; test. of Lyell, Kalb.)

4. Mr. Lyell received and read the Notice sent by regular U.S. mail on July 1, 2020.⁴ He called REA regarding the notice and left a voicemail message for REA commissioner Steve Strode. (Ex. A10 at 6; test. of Lyell.) REA compliance specialist Carolyn Kalb returned Mr. Lyell's call and left him a voicemail in response to his inquiries, but Mr. Lyell did not receive this voicemail message. (Test. of Lyell, Kalb.)

5. Between July 1, 2020 and approximately July 13, 2020, Mr. Lyell attempted to speak with an REA investigator about the Notice by calling REA. (Test. of Lyell.) However, he

⁴ Mr. Lyell initially testified that he received and read the Notice on July 6, 2020. As such, there is no dispute that Mr. Lyell received the Notice no later than July 6, 2020. However, Mr. Lyell also testified that he called REA commissioner Steve Strode on the day he received the notice, and according to the REA records submitted into evidence, Mr. Lyell made his initial call to Mr. Strode regarding the Notice on July 1, 2020. (Ex. A10 at 6.) Ms. Kalb testified that she added the record regarding the July 1, 2020, telephone call on the date the conversation occurred, not retrospectively on a later date. (Test. of Kalb.) When asked about the discrepancy between his testimony and the REA records, Mr. Lyell conceded that his receipt of the Notice and his conversation with Mr. Strode could well have occurred on July 1, 2020. Because of REA's contemporaneous record of the call and Mr. Lyell's concession, the preponderance of the evidence established that Mr. Lyell received the Notice on July 1, 2020.

was unable to reach an investigator, and REA did not receive any voicemail messages from him during this period. (Ex. A10 at 6; test. of Lyell, Kalb.)

6. On approximately July 14, 2020, Mr. Lyell left a voicemail message for Mr. Strode in which Mr. Lyell indicated that he was going to request a hearing on the proposed license suspension. (Ex. A10 at 6.) When Mr. Strode informed Ms. Kalb of this message on July 14, 2020, Ms. Kalb called Mr. Lyell that same day at (503) 577-4721 and left him a voicemail stating⁵ that the request must be in writing. (Exs. A10 at 6, A11 at 1; test. of Lyell, Kalb.) The same day, Ms. Kalb also sent the following email to Mr. Lyell at phillyell@cbbain.com:

This email is to follow-up the voicemail message I left you earlier today.

A request for hearing MUST be made in writing. Please review the Notice of Intent for instructions on how to submit a written hearing request.

The written hearing request must be made by close of business (5:00pm) tomorrow, July 15, 2020. If the Agency does not receive a written request for hearing, the Agency will proceed to issue a Final Order by Default.

(Ex. A7 at 1 (emphasis in original, highlighting omitted).)

7. Mr. Lyell received and listened to Ms. Kalb's voicemail, and received and read Ms. Kalb's email, prior to 5:00 p.m. on July 15, 2020. Because he still had questions about the Notice, he decided not to request a hearing at that time. (Test. of Lyell.)

8. On July 20, 2020, Mr. Lyell called REA and left a voicemail for Ms. Kalb. (Ex. A10 at 6; test. of Kalb.) On that same date, Mr. Lyell also called and spoke with REA investigator Liz Hayes and Mr. Strode regarding the Notice. (Exs. A9 at 1, A10 at 6; test. of Kalb.) In response to Mr. Lyell's voicemail, Ms. Kalb called Mr. Lyell the same day and left him a voicemail stating that the deadline for requesting a hearing on the Notice had already passed. (Ex. A10 at 6; test. of Kalb.)

9. Later on July 20, 2020, Mr. Lyell sent an email to Ms. Kalb requesting a hearing on the Notice. (Test. of Kalb.)⁶

10. On August 18, 2020, the U.S. Postal Service returned to REA the copy of the Notice sent via certified mail after unsuccessful delivery attempts on June 30, 2020 and July 22, 2020. (Test. of Kalb.)

⁵ Ms. Kalb advised upon reading the Proposed Order that her phone call of July 14, 2020 did not include the timeline and language "stating that he had until the following day to make a request for hearing and" but that the rest of this Finding of Fact is correct. Exhibit A10 page 6, first and third entries for 7-14-2020, provides clear and convincing evidence for Ms. Kalb's requested change to this finding of fact. ORS 183.650(3); OAR 137-003-0665(3), (4).

⁶ Mr. Lyell's July 20, 2020, email did not explicitly request a hearing; rather, it stated that Mr. Lyell would be making a separate written request for hearing. (See Pleading P7 at 1.) However, at hearing, REA conceded that Mr. Lyell's July 20, 2020, email amounted to a written hearing request.

11. The lapsing, expiration, revocation or suspension of a real estate license, whether by operation of law, order of the Real Estate Commissioner or decision of a court of law, or the inactive status of the license, or voluntary surrender of the license by the real estate licensee does not deprive the commissioner of jurisdiction to: (1) proceed with an investigation of the licensee; (2) conduct disciplinary proceedings relating to the licensee; (3) Take action against a licensee, including assessment of a civil penalty against the licensee for a violation of ORS 696.020(2); or (4) revise or render null and void an order suspending or revoking a license. ORS 696.775,

12. At all times mentioned herein, Lyell was licensed as a broker, doing professional real estate activity under the registered business name Coldwell Banker Bain. (Ex. A11)

13. On November 5, 2018, Christopher LaPointe (LaPoint) submitted a written complaint against Lyell and the Agency opened an investigation. (P2 and Agency Record)

14. On August 31, 2017, Lyell entered into a listing agreement with Kelly Sterns (Sterns), a court-appointed referee for the Eng Estate to assist in selling two lots in Rainer Oregon. One lot, was .89 acres, Tax ID 22102 (lot A), and the other was 1.39 acres. Tax ID 22105 (lot B). (P2 and Agency Record)

15. The agreed commission was 6% and the listing was to expire on November 30, 2017. (P2 and Agency Record)

16. The listing expired on December 1, 2017, and placed back on the market on December 5, 2017. Lyell provided a change order extending the expiration date, signed by Sterns on December 30, 2017, noting a new expiration date of December 30, 2017, the listing expired the same day. (P2 and Agency Record)

17. On February 13, 2018, the property was placed back on the market; however, a change order extending the listing was not signed by Sterns until March 16, 2018, noting a new expiration date of March 16, 2018; the listing expired the same day. (P2 and Agency Record)

18. On June 18, 2018, Lyell notified Sterns the property had been placed back on the market; however, RMLS records show the property was expired at the time and not put back on the market as active until July 19, 2018. There was no change order or addendum included in Lyell's file to extend the listing. (P2 and Agency Record)

19. Around or on August 15, 2018, LaPointe was brought on to co-list the lots and it was determined that Lyell would list Lot B and LaPoint would list Lot A. According to an "Agreement to List and Co-Share Commission between Offices," Coldwell Banker Bain and Lyell agreed to release their listing for Lot A and allow Pacific Pro Realty to list the lot beginning August 15, 2018. The commissions derived from the selling of either or both properties would be split equally between the two companies. The agreement was not dated or signed. (P2 and Agency Record)

20. On August 15, 2018, Sterns signed an exclusive right to sell listing agreement

with LaPointe for Lot A. On August 24, 2018, Sterns signed an addendum withdrawing the original listing with Lyell. (P2 and Agency Record)

21. On August 29, 2018, LaPointe prepared an offer on behalf of Gary and Mary Howell (Howells) for the purchase of Lot A, the lot listed by LaPointe. (P2 and Agency Record)

22. On September 2, 2018, Lyell removed Lot A from the original listing, lowered the price and placed the listing back on the market (this time for just lot B) Lyell did all of this without an addendum to the listing agreement. (P2 and Agency Record)

23. On September 3, 2018, Lyell wrote an offer on behalf of Margaret Eng (Eng) to purchase lots A and B on a single purchase agreement. On the final agency acknowledgement section of the sales agreement Lyell was named as the buyer's agent. The seller's agent section was blank and no agency relationship box was marked. The CB Bain file included a sign disclosed limited agency agreement for the sellers but none for the buyers. (P2 and Agency Record)

24. The September 3, 2018, sales agreement also failed to note that Christopher LaPointe (LaPointe), was a party to the contract as the listing agent for Lot A. (P2 and Agency Record)

25. On September 8, 2018, Clatsop County Circuit Court accepted M. Eng's offer and put Howells' offer in a back-up position. On September 14, 2018, Sterns signed the Eng offer. Sterns emailed Lyell a copy of the signed offer, but LaPointe was not included as a recipient. LaPointe asked Lyell for a copy of the sales agreement multiple times, however Lyell did not provide it. (P2 and Agency Record)

26. Since LaPointe was not noted on the sales agreement, escrow would not release any of the contract documents to him regarding the transaction. On October 4, 2018, Lyell sent LaPointe an email stating the easiest solution would be to pay LaPointe a referral fee. LaPointe agreed and signed the referral agreement on October 5, 2018, and he cancelled his listing for Lot A that same day in RMLS. (P2 and Agency Record)

27. The agreed referral prepared by Lyell was based on a total commission of 8%, 4.5% on the listing side, split 50/50 based on the sales price of \$285,000. (P2 and Agency Record)

28. On October 15, 2018, the transaction closed, and Coldwell Banker Bain received \$20,300 in commission. This amount was 7.12% of the sales price, \$3,200 more than the 6% commission noted on Lyell's listing agreement. (P2 and Agency Record)

29. As the Buyer's agent, Lyell received a 3.5% commission totaling \$9,975. However, Lyell's listing agreement stated a 2.5% commission paid to the Buyer's agent, a difference of \$2,850. There was no documentation in Lyell's file noting a change of commission. (P2 and Agency Record)

30. Lyell was late in transmitting the signed listing agreement and purchase agreement to his principal broker, Ward Spears (Spears) for review. The Listing Checklist for the transaction was noted that the listing was turned in late, and dated August 13, 2018, nearly a year after Lyell and Sterns entered into a listing contract. (P2 and Agency Record)

31. On October 5, Lyell and Spears received an email stating the documents had been uploaded into SkySlope to be reviewed by the principal broker. On October 11, 2018, Spears reviewed and approved the transaction file. (P2 and Agency Record)

32. All of the above violations demonstrate incompetence or untrustworthiness in performing acts for which Lyell is required to hold a license. Additionally, the above violations show Lyell engaged in dishonest conduct substantially related to the fitness of a real estate licensee to conduct professional real estate activity. Lastly the above violations show Lyell engaged in conduct below the standard of care for the practice of professional real estate activity in Oregon. (P2 and Agency Record)

33. In October 2013, Lyell's license was reprimanded and he was required to complete the 150 hour broker pre-license course and submit documentation showing completion within 6 months of the stipulated order. The stipulated order notes Lyell engaged in property management activity without the supervision of his principal broker and notes numerous violations relating to property management activity. As of April 18, 2014, Lyell failed to provide proof of completing the required education. As a result, the Agency issued a second stipulated order, resulting in an immediate suspension of 30 days at the minimum, with the length of the suspension based on how soon Lyell provided proof of the completed education. This stipulated order was signed by the Commissioner on April 21, 2014, with a date of service of April 22, 2014. On May 21, 2014, the suspension was lifted after Lyell provided proof the required education was complete. (P2 and Agency Record)

34. Lyell failed to obtain the seller's written instruction to change the listing information for Lots A and B in multiple occasions. (P2 and Agency Record)

35. Lyell failed to have Margaret Eng sign a disclosed limited agency agreement for the buyers. (P2 and Agency Record)

36. Lyell failed to include LaPointe as a listing agent on the sales agreement. (P2 and Agency Record)

37. Lyell failed to provide a copy of the sales agreement to LaPointe, a party to the transaction. (P2 and Agency Record)

38. Lyell failed to have any written documentation noting a change in commission from the listing agreement. (P2 and Agency Record)

39. Lyell failed to submit the signed listing agreement and purchase agreement to his principal broker for review within the required time frame. (P2 and Agency Record)

40. All of the above violations show Lyell demonstrated incompetence or untrustworthiness in performing acts for which Lyell is required to hold a license. Additionally, the above violations show Lyell engaged in dishonest conduct substantially related to the fitness of a real estate licensee to conduct professional real estate activity. Lastly the above violations show Lyell engaged in conduct below the standard of care for the practice of professional real estate activity in Oregon. (P2 and Agency Record)
41. In summary, the facts above establish grounds to suspend Lyell's broker license.

CONCLUSION OF LAW

1. Mr. Lyell did not file a timely request for hearing and did not have good cause for failing to file his request within the time limit set forth in the Notice of Intent to Suspend License No. 810504147 and Notice of Opportunity for Hearing.
2. Pursuant to ORS 183.417(4) and OAR 137-003-0670 Lyell is in default.
3. The material facts establish a violation of a ground for discipline under ORS 696.301 as set forth in the *Notice of Intent to Suspend*.
4. Based on these violations, the Agency may suspend Lyell's broker license.
5. Specifically, Lyell is subject to discipline pursuant to ORS 696.301(3),(7),(12),(14), and (15). A suspension of Lyell's broker license is appropriate for violations of ORS 696.301(3),(7),(12),(14), and (15), which states in part a licensee's real estate license may be disciplined if they have: (3) disregarded or violated any provision of ORS 659A.421, 696.010 to 696.495, 696.600 to 696.785, 696.800 to 696.870 and 696.890 or any rule of the Real Estate Agency; (7) intentionally interfered with the exclusive representation or exclusive brokerage relationship of another real estate licensee; (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 real estate licensee to conduct professional real estate activity, without regard to whether the act or conduct occurred in the course of professional real estate activity; and (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.
6. A suspension of Lyell's broker license is appropriate under ORS 696.396(2)(c)(B),(C), and (D). According to ORS 696.396(2)(c)(B),(C), and (D) the Agency may suspend a real estate license if the material facts establish a violation of a ground of discipline under ORS 696.301 that: (B) exhibits incompetence in the performance of professional real estate activity; (C) exhibits dishonesty or fraudulent

conduct; (D) repeats conduct or an act that is substantially similar to conduct or an act for which the real estate licensee was disciplined previously.

7. Based on the evidence in the record, the preponderance of the evidence weighs in favor of the suspension of Lyell's broker license.
8. The Agency may, therefore, suspend Lyell's broker license.

OPINION

The Late Request for Hearing

Mr. Lyell contests REA's determination that he did not file a timely request for hearing and did not have good cause to extend the filing deadline. As the proponent of the position that he filed a timely hearing request, or had good cause for failing to do so, Mr. Lyell bore the burden of proving these positions by a preponderance of the evidence. ORS 183.450(2), (5); *see also Dixon v. Board of Nursing*, 291 Or App 207, 213 (2018) (declaring that facts must be proven by a preponderance of the evidence in administrative actions). Proof by a preponderance of the evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987). For the reasons that follow, I conclude that Mr. Lyell failed to meet his burden of showing that he either filed a timely hearing request or had good cause to file a late request..

Timeliness of the Hearing Request

REA does not have a rule specifying the timeline for filing a request for hearing on a suspension notice such as that issued in the present matter. However, ORS 183.145 governs the notice that an administrative agency must provide when taking action such as a license suspension, and ORS 183.145(3)(a) specifies that the notice must contain a "statement of the party's right to hearing, with a description of the procedure and time to request a hearing." Additionally, OAR 137-003-0505(1)(f)(A)⁷ states that a notice issued under ORS 183.145 shall contain a "statement of the procedure and time to request a hearing." Under these provisions, REA was allowed to specify the deadline and procedure for requesting a hearing on the Notice itself.

Here, the Notice gave Mr. Lyell 20 days from the mailing date of the Notice to make his request and required that the request be made in writing. There is no dispute that REA mailed the

⁷ OAR chapter 137, division 3, contains the Model Rules of Procedure for Contested Cases. Under the REA procedural rules, OAR 863-001-0005, REA explicitly adopted "Model Rules OAR 137-001-0005 through 137-005-0070 bearing the effective date of January 1, 2008." In addition, under ORS 145.630(1), the Model Rules apply to "all contested case hearings conducted by administrative law judges assigned from the Office of Administrative Hearings." Under OAR 137-003-0000, "[w]hen an administrative law judge assigned from the Office of Administrative Hearings conducts a contested case hearing for the agency, the proceedings shall be conducted pursuant to OAR 137-003-0501 to 137-003-0700." Therefore, the notice provisions of OAR 137-003-0505 apply to the present proceeding.

Notice on June 25, 2020, via both regular and certified mail to Mr. Lyell’s address of record (and also emailed it to Mr. Lyell’s email address on file). Where an agency bases its deadline for filing a hearing request upon the mailing date, the filing deadline does not change based upon a delay in receipt of the notice. *El Rio Nilo LLC v. OLCC*, 240 Or App 362, 369 (2011). As such, Mr. Lyell had 20 days from June 25, 2020—until July 15, 2020—to file a timely request for hearing. He did not request a hearing until July 20, 2020. Therefore, his hearing request was not timely.

Good Cause for the Late Hearing Request

OAR 137-003-0528(1) states, in relevant part:

(a) The agency must accept a properly addressed hearing request that was not timely filed if it was postmarked within the time specified for timely filing * * *.

(b) The agency may accept any other late hearing request only if:

(A) There was good cause for the failure to timely request the hearing[.]

OAR 137-003-0501(7) states:

For purposes of OAR 137-003-0501 to 137-003-0700, “good cause” exists when an action, delay, or failure to act arises from an excusable mistake, surprise, excusable neglect, reasonable reliance on the statement of a party or agency relating to procedural requirements, or from fraud, misrepresentation, or other misconduct of a party or agency participating in the proceeding.

Here, the evidence does not persuasively establish that Mr. Lyell had good cause to file his hearing request after the July 15, 2020, deadline. Even if, as Mr. Lyell contends, he never received any postal service notification regarding the copy of the Notice sent to him via certified mail, more likely than not, he received the copy of the Notice sent via regular mail by July 1, 2020—two weeks before the deadline. He thus had ample time to review the Notice and file a written hearing request by the July 15, 2020 deadline. Moreover, even if he did not receive the Notice via regular mail until July 6, 2020 (the date to which he testified), the failure to receive the certified mail copy does not constitute good cause to justify a late hearing request. The evidence at hearing established that the Notice Mr. Lyell received in early July 2020 clearly set forth the deadline and method for requesting a hearing. In addition, Mr. Lyell received direct reminders of these particulars via voicemail and email on July 14, 2020, which he reviewed before the filing deadline passed on July 15, 2020. Despite having received this information, he did not file a written request a hearing on or before the July 15, 2020 deadline.

Given the clear information repeatedly communicated to Mr. Lyell regarding the timeline and procedure for filing a hearing request, there was no evidence to support a finding that Mr. Lyell’s late request resulted from “excusable mistake, surprise, [or] excusable neglect.” OAR 137-003-0501(7). Moreover, there was no evidence that anyone at REA communicated a different deadline or requirement for requesting a hearing than what was stated in the Notice. As

such, there is no basis to conclude that Mr. Lyell's late request was based upon "reasonable reliance on the statement of a party or agency relating to procedural requirements, or from fraud, misrepresentation, or other misconduct of a party or agency participating in the proceeding." *Id.*; see also *El Rio Nilo LLC*, 240 Or App at 370 (affirming a default judgment entered against a licensee company that contended its manager acted reasonably in not retrieving a license cancellation notice sent via certified mail until the day after the hearing request deadline, resulting in an untimely request for hearing).

Because Mr. Lyell did not file a timely hearing request and did not establish good cause for filing his request late, his July 20, 2020 request for hearing on the merits of the Notice must be denied.

Default Order

The Agency takes its consumer protection role very seriously. On multiple occasions, Lyell failed to obtain the seller's written approval to modify the listing agreement, including but not limited to increasing the total commission paid at closing. Additionally, Lyell failed to provide copies of the fully executed sales agreement to LaPointe, who was the listing agent for one of the two lots in the sale. Lastly, Lyell failed to submit the signed listing agreement and purchase agreement to his principal broker for review within the required timeframe, demonstrating similar conduct to Lyell's past actions of engaging in property management activity without the supervision of his principal broker (a violation noted in Lyell's stipulated order issuing a reprimand of his license in October 2013). Lyell's actions and violations establish a sufficient basis for the six-month suspension of his license.

The specific violations are repeated here below:

- (1) Violation: By failing to obtain the seller's written instruction to change the listing information for Lots A and B in multiple occasions Lyell violated ORS 696.301(3) as it incorporates OAR 863-015-0250(1)(c) (6-16-2016, 11-15-2016 and 1-1-2018 Editions), which states (1) complete and adequate records of professional real estate activity include complete, legible, and permanent copies of all documents required by law or voluntarily generated during a real estate transaction, including all offers received by or through real estate brokers or principal brokers to the client, including, but not limited to, the following: (c) a copy of any written agreement for the listing, sale, purchase, rental, lease, lease option, or exchange of real property generated by a real estate broker or principal broker while engaging in professional real estate activity that must be signed by all parties to such an agreement. Lyell also violated ORS 696.301(3) as it incorporates ORS 696.805(2)(a) (2015 and 2017 Editions), which states: (2) a seller's agent owes the seller, other principals and the principals' agents involved in a real estate transaction the following affirmative duties: (a) to deal honestly and in good faith.
- (2) Violation: By failing to have Margaret Eng sign a disclosed limited agency agreement for the buyers, Lyell violated ORS 696.301(3) as it incorporates OAR 863-015-0210(1) (1-1-2018 Edition), which states: (1) disclosed limited agency agreements

required by ORS 696.815 must be in writing, signed and dated by the parties to be bound or by their duly appointed real estate agents.

- (3) Violation: By failing to include LaPointe as a listing agent on the sales agreement Lyell violated ORS 696.301(7) (2017 Edition), which states: the real estate commissioner may sanction a licensee's real estate license if they intentionally interfered with the exclusive representation or exclusive brokerage relationship of another real estate licensee.
- (4) Violation: By failing to provide a copy of the sales agreement to LaPointe, a party to the transaction Lyell violated ORS 696.301(3) as it incorporates ORS 696.810(2)(b) (2017 Edition), which states (2) a buyer's agent owes the buyer, other principals and the principal's agents involved in a real estate transaction the following affirmative duties: (b) to present all written offers, written notices and other written communications to and from the parties in a timely manner without regard to whether the property is subject to a contract for sale or the buyer is already a part to a contract to purchase.
- (5) Violation: By failing to have any documentation noting a change in commission, Lyell violated ORS 696.301(3) which incorporates OAR 863-015-0250(1)(c) (1-1-2018 Edition), which states: (1) complete and adequate records of professional real estate activity include complete, legible, and permanent copies of all documents required by law or voluntarily generated during a real estate transaction, including all offers received by or through real estate brokers or principal brokers to the client, including, but not limited to, the following: (c) a copy of any written agreement for the listing, sale, purchase, rental, lease, lease option, or exchange of real property generated by a real estate broker or principal broker while engaging in professional real estate activity that must be signed by all parties to such an agreement.
- (6) Violation: By failing to submit the signed listing agreement and purchase agreement to his principal broker for review within the required time frame, Lyell violated ORS 696.301(3) as it incorporates OAR 863-015-0250(2) (1-1-2018 Edition), which states (2) When a real estate broker receives any document referred to in (1) of this rule, the real estate broker must transmit to the real estate broker's principal broker the document within 3 banking days of real estate broker's receipt of the document.
- (7) Violation: ORS 696.301(12),(14), and (15) which states a licensee's real estate license may be disciplined if they have: (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 real estate 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

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- (8) 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.

ORDER

IT IS HEREBY ORDERED that:

1. Respondent Phillip A. Lyell's request for hearing on the Notice of Intent to Suspend License No. 810504147 and Notice of Opportunity for Hearing issued June 25, 2020, is denied as untimely.
2. Phillip A. Lyell's License No. 810504147 is suspended for six months commencing at 12:01 a.m. January 19, 2021 and ending at 11:59 pm July 18, 2021.

Dated this 14th day of January, 2021.

OREGON REAL ESTATE AGENCY

DocuSigned by:

Steven Strode

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Steven Strode
Real Estate Commissioner

NOTICE OF RIGHT TO APPEAL: 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 to the Oregon Court of Appeals, pursuant to the provisions of ORS 183.482.

CERTIFICATE OF MAILING

On January 14, 2021, I mailed and emailed the foregoing FINAL ORDER BY DEFAULT issued on January 14, 2021 in OAH Case No. 2020-ABC-03933.

By: First Class and Electronic Mail

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