



18

IN THE SUPREME COURT OF THE STATE OF OREGON

PAUL A. KERLEY,

Petitioner,  
Respondent on Review,

v.

REAL ESTATE AGENCY,

Respondent,  
Petitioner on Review.

Agency No. 200003-R-098C

Appellate Court No. A115200

Supreme Court No. S49995

PETITIONER'S BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals  
on Judicial Review of a  
Final Order of the Real Estate Agency

Opinion Filed: October 9, 2002  
Author of Opinion: BREWER, J.  
Concurring Judges: LANDAU, P.J., and WARREN, S.J.

ANDREW P. OSITIS #74245  
Attorney at Law  
388 State Street, Suite 565  
Salem, Oregon 97301  
Telephone: (503) 362-3249  
Attorney for Petitioner

HARDY MYERS #64077  
Attorney General  
MARY H. WILLIAMS #91124  
Solicitor General  
PHILIP SCHRADLE #81101  
Special Counsel to the Attorney General  
400 Justice Building  
Salem, Oregon 97301-4096  
Telephone: (503) 378-4402  
Attorneys for Respondent

337 OR 309

## TABLE OF CONTENTS

STATEMENT OF THE CASE .....	1
Legal Question Presented on Review.....	1
Proposed Rule of Law .....	1
Nature of the Proceeding .....	2
Summary of Facts.....	2
Summary of Argument.....	3
ARGUMENT.....	5
The Text of ORS 696.301(31) Supports the Real Estate Commissioner's Ruling .....	6
The Context of ORS 696.301(31) Supports the Real Estate Commissioner's Ruling.....	8
The Court of Appeals' Decision Misinterprets this Court's Decision in <i>Dearborn v Real Estate Agency</i> and Misinterprets the Terms of ORS 696.301(31).....	10
CONCLUSION .....	14

## TABLE OF AUTHORITIES

### Cases Cited

<i>Dearborn v. Real Estate Agency</i> , 334 Or 493, 53 P3d 436 (2002).....	2, 7, 10, 11, 12, 13
<i>Jefferson County School Dist. No. 509-J v. FDAB</i> , 311 Or 389, 812 P2d 1384 (1991).....	2
<i>Kerley v. Real Estate Agency</i> , 184 Or App 163, 55 P3d 549 (2002).....	3, 8, 10, 12, 14
<i>PGE v. Bureau of Labor and Industries</i> , 317 Or 606, 859 P2d 1143 (1993).....	5

### Constitutional and Statutory Provisions

ORS 183.482 .....	2
ORS 696.022(5).....	1
ORS 696.301 .....	1, 2, 4, 5, 8
ORS 696.301(1).....	4, 8, 9
ORS 696.301(10).....	8
ORS 696.301(11).....	8

ORS 696.301(12).....	8
ORS 696.301(15).....	8
ORS 696.301(17).....	8
ORS 696.301(18).....	8
ORS 696.301(2).....	8
ORS 696.301(20).....	8
ORS 696.301(23).....	8
ORS 696.301(24).....	8
ORS 696.301(28).....	4, 8, 9
ORS 696.301(29).....	8
ORS 696.301(31).....	1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14
ORS 696.301(32).....	8
ORS 696.301(6).....	8
ORS Ch 696.....	2

#### Other Authorities

<i>Webster's Third New Int'l Dictionary</i> (unabridged ed 1993) .....	6
--	---

## PETITIONER'S BRIEF ON THE MERITS

### STATEMENT OF THE CASE

The Oregon Real Estate Agency submits this brief on the merits of the question presented for review in this case.

#### **Legal Question Presented on Review**

Where a licensee's conduct demonstrates untrustworthiness and improper dealings and involves the misuse of funds in connection with real estate investments, is the Real Estate Commissioner nevertheless powerless to revoke that licensee's real estate broker's license because the improper dealings occurred before the date the licensee obtained his broker's license?

#### **Proposed Rule of Law**

ORS 696.022(5) charges the Real Estate Commissioner with the responsibility to license and regulate real estate brokers to ensure that individuals so licensed are "trustworthy and competent to conduct professional real estate activity in a manner that protects the public interest." In furtherance of that objective, ORS 696.301(31) empowers the Real Estate Commissioner to suspend or revoke a real estate license, or to deny issuance of a real estate license, for any act or conduct constituting or demonstrating bad faith, incompetency, or untrustworthiness, or dishonest, fraudulent or improper dealings. Under these statutory provisions, the authority of the Real Estate Commissioner to revoke a real estate broker's license can be based on improper conduct that occurred before the licensee received his real estate broker's license, where that improper conduct was directly related to the misuse of funds in

real estate investments, the improper conduct demonstrated the licensee's lack of trustworthiness in real estate dealings and the improper conduct was not known by the Real Estate Commissioner when the licensee was granted his real estate broker's license.

### **Nature of the Proceeding**

This case involves an administrative proceeding initiated by the Oregon Real Estate Agency pursuant to ORS Ch 696 which resulted in a Final Order of the Real Estate Commissioner revoking respondent Kerley's real estate broker's license. The agency's final order revoked respondent Kerley's license for engaging in conduct the Commissioner determined to be subject to discipline under ORS 696.301.

Respondent Kerley timely sought judicial review of the agency's order under ORS 183.482. Upon review, the Court of Appeals reversed the agency's order. The Real Estate Agency then sought review by this court.

### **Summary of Facts**

Respondent Kerley did not challenge the factual findings included in the Commissioner's Final Order; consequently, they are the facts for purposes of this judicial review proceeding. *Jefferson County School Dist. No. 509-J v. FDAB*, 311 Or 389, 393 n 7, 812 P2d 1384 (1991). The Court of Appeals opinion accurately summarizes those facts as follows:

In 1988, 1990, and 1992, [respondent], who was then a member of the Oregon State Bar (the Bar), entered into three real estate investment partnerships (the partnerships). In each case, [respondent] drafted the partnership agreement. A second partner, Rogovoy, was the managing partner of each partnership. In the partnerships formed in 1988 and 1990, all of the capital was provided by a third partner, King.

In the partnership formed in 1992, which also included King, a fourth partner, Kayser, provided all of the capital.

Sometime in 1993, [respondent] invested in the Dandelion Pub, a business venture that did not involve any of his partners in the partnerships. In October and November 1993, [respondent] wrote and negotiated three separate checks totaling \$50,000 from two of the partnership accounts to fund the Dandelion Pub venture. [Respondent] did not inform any of his partners that he had withdrawn partnership funds for that purpose. In April 1994, [respondent] realized that he could not replace the \$50,000, so he disclosed to Rogovoy his unauthorized withdrawal of the partnership funds. When King learned of [respondent's] conduct, he instituted partnership dissolution proceedings. On April 14, 1995, all three partnerships were dissolved pursuant to a settlement agreement.

On May 1, 1995, the Real Estate Agency (the agency) issued a real estate salesperson's license to [respondent]. In August 1995, King's attorney filed a Bar complaint against [respondent]. In June 1997, [respondent] applied for a real estate broker's license, which the agency issued in July 1997. In January 1999, the Bar commenced formal disciplinary proceedings against [respondent]. The Bar's complaint alleged that [respondent] had violated several disciplinary rules in connection with his real estate partnership activities, including the unauthorized withdrawal of partnership funds. In December 1999, [respondent] executed a Form B resignation from the Bar, which the Supreme Court accepted.

When the agency learned that disbarment proceedings had been instituted against [respondent], it commenced a separate disciplinary investigation of his activities. On June 20, 2000, the agency notified [respondent] that it intended to revoke both of his real estate licenses.

*Kerley v. Real Estate Agency*, 184 Or App 163, 165-166, 55 P3d 549 (2002).

### **Summary of Argument**

The text of ORS 696.301(31) unambiguously empowers the Real Estate Commissioner to sanction a licensee for any act or conduct constituting or demonstrating bad faith, incompetence, or untrustworthiness, or dishonest, fraudulent or improper dealings. The phrase "any act or conduct" demonstrates the legislature's

intent that the Commissioner have broad authority to revoke a license for all such conduct, without temporal limitation. In addition, this statute explicitly applies the same terms to applicants for licenses as well as to holders of licenses already issued. All conduct engaged in by an applicant for a license is by definition conduct that occurred before the applicant is licensed. Consequently, under the express terms of this statute the Commissioner is entitled to consider improper conduct of a licensee that occurred before the licensee received his license in determining whether a sanction is appropriate.

Furthermore, the context of ORS 696.301(31) further supports this conclusion. Several subsections of ORS 696.301 extend the Commissioner's disciplinary authority only to actions performed directly in the capacity of a licensee. No such limitation appears either in the introductory provisions of ORS 696.301 or in subsection (31) which governs this case. The absence of such a limitation in subsection (31), when it appears in a list of provisions where others do contain such a limitation, shows both that the legislature clearly knew how to impose such a limitation and that the legislature intentionally did not so limit the reach of subsection (31). In addition, if subsection (31) is interpreted to apply only to conduct that is undertaken directly in the course of licensed activity, then subsection (31) is made to become redundant with ORS 696.301(1) and (28) which already apply to misrepresentations made in the course of licensed activity and to negligence, incompetence or untrustworthiness in performing any act for which the licensee must hold a real estate license.

Consequently, ORS 696.301(31) should be determined to authorize the Real Estate Commissioner to revoke a real estate broker's license based upon improper conduct that occurred before the licensee received his real estate broker's license, where that improper conduct was directly related to the misuse of funds in real estate investments, the improper conduct demonstrated the licensee's lack of trustworthiness in real estate dealings and the improper conduct was not known by the Real Estate Commissioner when the licensee was granted his real estate broker's license.

### ARGUMENT

This case centrally involves a question of statutory construction. The fundamental issue on review concerns the meaning of ORS 696.301, which provides in pertinent part:

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:

\* \* \* \*

(31) Any act or conduct, whether of the same or of a different character specified in this section which constitutes or demonstrates bad faith, incompetency or untrustworthiness, or dishonest, fraudulent or improper dealings.

In *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), this court established the now familiar analytic framework for statutory construction whereby the reviewing court will look first to the text and context of the statutory provisions at issue. Both the text and context of ORS 696.301(31) show that the actions of respondent Kerley come well within the ambit of the statutory terms involved.



### The Text of ORS 696.301(31) Supports the Real Estate Commissioner's Ruling

At the outset, it should be noted that the statute contains no temporal limitation regarding when the act or conduct must have occurred. The statute rather is phrased in terms of "any act or conduct" which the licensee has done. The word "any" is an adjective denoting lack of restriction or limitation:

**1:** one indifferently out of more than two: one or some indiscriminately of whatever kind: **a :** one or another: this, that, or the other — used as a function word esp. in interrogative and conditional expressions to indicate one that is not a particular or definite individual of the given category but whichever one chance may select <did you experience ~ trouble> <if ~ defect appears> <ask ~ man you meet> **b :** one, no matter what one: EVERY — used as a function word esp. in assertions and denials to indicate one that is selected without restriction or limitation of choice <~ child would know that> <forbidden to enter ~ house> **c :** one or some of whatever kind or sort; *esp:* one or some however imperfect — used as a function word to indicate one that is selected with indifference to quality <~ plan is better than no plan>

*Webster's Third New Int'l Dictionary*, 97 (unabridged ed 1993). Thus, in empowering the commissioner to revoke a license for "any" dishonest conduct, the legislature exhibited its intent that the commissioner have broad authority to revoke a license for all such conduct, without temporal limitation. While it is true that the act or conduct at issue must already have occurred (*i.e.* the statute refers to any act or conduct that a licensee or applicant "has done"), the statute does not by its terms require that the act or conduct occur while the person involved is licensed.

To be sure, this statute does require that the acts or conduct at issue constitute or demonstrate bad faith, incompetency or untrustworthiness, or dishonest, fraudulent or improper dealings that have a nexus to the individual's fitness to engage in real estate activity. As this court has determined, the reference in ORS 696.301(31) "is a

reference to conduct that is substantially related to the [individual's] trustworthiness, competence, honesty, or good faith to engage in real estate activity." *Dearborn v. Real Estate Agency*, 334 Or 493, 500-501, 53 P3d 436 (2002). But that nexus can be established where, as here, the actions directly involved misrepresentations in real estate investments even though the actions occurred just prior to the individual obtaining a real estate license. As we stated in our petition for review in this case, it is hard to imagine activity that is more at the heart of the kind of conduct that the regulation of real estate professionals is intended to guard against.

This conclusion is also borne out completely as a matter of logic by the fact that the statutory terms apply to applicants for licensure as well as to licensees. By its terms, ORS 696.301(31) applies equally to licensees and to applicants for licensure. Obviously, when the Real Estate Commissioner is considering whether an applicant has engaged in conduct that "constitutes or demonstrates bad faith, incompetency or untrustworthiness, or dishonest, fraudulent or improper dealings," the conduct the Commissioner must consider is conduct that the applicant engaged in at a time when the applicant was not licensed. Here, too, of course the conduct must have enough of a nexus to the applicant's fitness to engage in real estate activity to support a conclusion that the conduct has demonstrated the applicant's untrustworthiness to be licensed to engage in real estate activity.

But it is virtually beyond question that, assuming respondent Kerley had engaged in precisely the same actions as those involved in this case, and those actions were known by the Real Estate Commissioner at the time he applied for a real estate

license, the Commissioner would have been completely justified in denying Kerley's application. Kerley's misrepresentations and fraudulent dealings with his real estate investment partners would be more than ample grounds for denying his *application* under ORS 696.301(31). It would be anomalous indeed for the very same activity to not provide sufficient support for *sanction* under the very same statutory provision when the activity becomes known by the Real Estate Commissioner only after Kerley has received a real estate license.<sup>1</sup>

#### **The Context of ORS 696.301(31) Supports the Real Estate Commissioner's Ruling**

The context of ORS 696.301(31) also supports the conclusion that actions not undertaken directly in the course of licensed activity can be considered under this subsection. As noted in the petition for review, numerous other subsections of ORS 696.301 explicitly restrict the Commissioner's disciplinary authority only to acts performed in the capacity of a real estate salesperson or broker. *See, e.g.,* ORS 696.301(1), (2), (6), (10), (11), (12), (15), (17), (18), (20), (23), (24), (28), (29), (32). In contrast, neither the introductory language of ORS 696.301, nor subsection (31) contains such a limitation. The legislature clearly could have included such a limitation in subsection (31), but did not do so. In light of the express inclusion of such limitations in other provisions, the absence of such a limitation in subsection

---

<sup>1</sup> The Court of Appeals' opinion in this case noted the anomaly that such a construction of the statute caused, but concluded rather cryptically "That construction need not – indeed, should not – be understood to extend to applicants to whom a license has not yet been issued." *Kerley*, 184 Or App at 168 n. 4. The Real Estate Agency does not perceive a principled basis for such a distinction when exactly the same terms apply to both circumstances.

(31) demonstrates the legislature's deliberate decision that no such limitation applies to the provisions of subsection (31). *See, e.g., Fisher Broadcasting, Inc. v Dept. of Rev.*, 321 Or 341, 353, 898 P2d 1333 (1995) (discussing principle of "express inclusion, implied exclusion").

Furthermore, if subsection (31) is interpreted to apply only to conduct that is undertaken directly in the course of licensed real estate activity, then subsection (31) is made to become redundant with subsections (1) and (28). ORS 696.301(1) applies to misrepresentations made in the course of licensed real estate activity.<sup>2</sup>

ORS 696.301(28) applies to "negligence, incompetence or untrustworthiness in performing any act for which the licensee is required to hold a license."<sup>3</sup>

Consequently, engrafting onto the terms of ORS 696.301(31) the requirement that the actions addressed there also must be undertaken directly in the course of licensed activity violates both of the rules of statutory construction set out in ORS 174.010.

First, to inject the requirement that the conduct addressed in ORS 696.301(31) must be undertaken in the course of licensed real estate activity inserts into that statute what has been omitted by the legislature. Second, to inject that requirement in subsection

---

<sup>2</sup> ORS 696.301(1) provides that the Real Estate Commissioner can impose a disciplinary sanction on a licensee who has: "Knowingly or negligently pursued a continued course of material misrepresentation in matters related to professional real estate activity, whether or not damage or injury resulted, or knowingly or negligently made any material misrepresentation or false promise in a matter related to professional real estate activity, if the material misrepresentation or material false promise created a reasonable probability of damage or injury, whether or not damage or injury actually resulted."

<sup>3</sup> ORS 696.301(28) provides that the Real Estate Commissioner can impose a disciplinary sanction on a licensee who has: "Demonstrated negligence, incompetence or untrustworthiness in performing any act for which the licensee is required to hold a license."

(31) renders it redundant with subsections (1) and (28) contrary to the requirement to give effect to all statutory provisions, if possible.

This discussion of text and context shows that ORS 696.301(31) should not be read to be addressed solely to action or conduct that occurs in the course of licensed activity. The following discussion shows that the Court of Appeals erred in concluding that it must be interpreted in such a limited fashion based upon this court's decision in *Dearborn*.

**The Court of Appeals' Decision Misinterprets this Court's Decision in *Dearborn v Real Estate Agency* and Misinterprets the Terms of ORS 696.301(31).**

The Court of Appeals' decision states: "In summary, even though petitioner's conduct demonstrated untrustworthiness and improper dealings, that conduct did not occur while he held a real estate license and therefore did not relate to professional real estate activities. Accordingly, the commissioner was not authorized, under ORS 696.301(31), to rely on that conduct as the ground for revocation of [Kerley's] broker's license." *Kerley*, 184 Or App at 169. As discussed above, this conclusion runs directly counter to the text and context of the provisions of ORS 696.301(31). Furthermore, the Court of Appeals' conclusion that such a reading of subsection (31) is compelled by this court's decision in *Dearborn* is also incorrect.

In *Dearborn*, this court was presented with a case in which the following two circumstances obtained. First, the actions of the individual at issue occurred at a time when the individual was licensed. Second, the actions of the individual were determined by this court not to be substantially related to the individual's trustworthiness, competence, honesty, or good faith to engage in real estate activity.

Those two circumstances are both critical in understanding the import of this court's statements in *Dearborn*.

In *Dearborn*, this court explicitly concluded from its own review of the text and context of ORS 696.301(31) "that the reference in subsection (31) to 'any act or conduct \* \* \* which constitutes or demonstrates bad faith, incompetence or untrustworthiness, or dishonest, fraudulent or improper dealing,' is a reference to conduct that is substantially related to the broker's trustworthiness, competence, honesty, or good faith to engage in real estate activity." 334 Or at 500-501. And later in the opinion, this court further stated that: "the range of acts to which subsection (31) applies is limited by the implicit requirement that the conduct in question relate substantially to the broker's fitness and ability to engage in real estate activity." 334 Or at 505. The Real Estate Agency agrees that these statements set out the proper scope of inquiry under ORS 696.301(31) – *i.e.* the test under ORS 696.301(31) is whether the conduct at issue is substantially related to the individual's trustworthiness, competence, honesty or good faith to engage in real estate activity. And that determination will necessarily be a case-by-case analysis of the different factual circumstances involved for each different individual.

In each such case, the particular factual circumstances involved will play a large part in framing the issues that must be decided. And that is true whether the decisionmaker involved is the Real Estate Commissioner or a reviewing court. In making the determination in *Dearborn* that Dearborn's actions did not come within the ambit of ORS 696.301(31), this court noted that Dearborn's actions "did not

involve real estate, clients or funds of clients. They were private acts, separate from broker's professional life. And, because they were, the Commissioner had no authority under them to discipline broker under ORS 696.301(31)." *Dearborn*, 334 Or at 505. That description is accurate based upon the factual circumstances of the case then before this court. But the elements of that description should not be transmogrified into dispositive requirements applicable to all other factual circumstances.

For example, assume the following hypothetical. Assume that an individual has a real estate broker's license and that the individual engages in precisely the same set of private real estate investment actions and misrepresentations that respondent Kerley engaged in as described above. According to the Court of Appeals' opinion in this case, the Real Estate Commissioner could not consider those actions under ORS 696.301(31) because this court purportedly construed the reach of this statute in *Dearborn* to apply only to *professional* real estate activity, not "private acts." *Kerley*, 184 Or App at 168.

But the fact that this court noted in *Dearborn* that Dearborn's acts were private acts, separate from his professional life, should not be imbued with the talismanic significance that the Court of Appeals' decision has given to it. Mr. Dearborn's actions were more separated from professional real estate activity than the private real estate investment actions and misrepresentations noted in the hypothetical above and that occurred in fact in this case. And this court's mere description of the fact that Mr. Dearborn's actions were separate from his professional life should not be

transformed into the categorical requirement that only actions undertaken directly in the course of professional real estate activity can be considered under ORS 696.301(31). In fact, for the reasons set out above, such private real estate activity comes well within the ambit of ORS 696.301(31) and the Real Estate Commissioner should be able to consider it under that statutory provision, if it has the required nexus to the individual's ability and fitness to engage in licensed real estate activity.

Here, there is no question but that respondent Kerley's actions involved fraudulent misrepresentations in financial transactions in real estate investments. In terms this court used in *Dearborn*, respondent Kerley's actions did involve real estate and they did involve misuse of funds of others (his investment partners). Such actions strike at the very heart of the concerns the Real Estate Commissioner must protect against in regulating the real estate profession. Such actions should not be beyond the scope of what the Real Estate Commissioner can consider in determining whether an individual has the trustworthiness to conduct professional real estate activity in a manner that protects the public interest. To hold otherwise both distorts the terms of ORS 696.301(31) and restricts the regulatory authority of the Real Estate Commissioner in an unwarranted manner.

On review, this court should reaffirm that conduct can be considered under ORS 696.301(31), if it is substantially related to the licensee's trustworthiness, competence, honesty or good faith (*i.e.* fitness and ability) to engage in professional real estate activity. *See Dearborn*, 334 Or at 500-501; *Dearborn*, 334 Or at 505. This



cudoo

court should further determine that such conduct need not be limited only to actions taken directly in the course of licensed real estate activity. And this court should determine that consideration can be given to improper conduct that occurred before the licensee received his real estate license where that improper conduct was directly related to the misuse of funds in real estate investments, the improper conduct clearly demonstrated the licensee's lack of trustworthiness in real estate dealings, *see Kerley*, 184 Or App at 169, and the improper conduct was not known by the Real Estate Commissioner when the licensee was granted his real estate license.

### CONCLUSION

For the reasons given above, this court should reverse the decision of the Court of Appeals and determine that the improper dealings engaged in by respondent Kerley demonstrate his lack of trustworthiness to engage in licensed real estate activity and justify the revocation of his real estate broker's license under the terms of ORS 696.301(31).

Respectfully submitted,

HARDY MYERS  
Attorney General  
MARY H. WILLIAMS  
Solicitor General

PHILIP SCHRADLE  
Special Counsel to the Attorney General

Attorneys for Respondent  
Real Estate Agency


**NOTICE OF FILING AND PROOF OF SERVICE**

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on June 26, 2003.

I further certify that I directed the Petitioner's Brief on the Merits to be served upon Andrew P. Ositis, attorney for petitioner; and Andrea L. Bushnell and Matt Farmer, amicus Curiae for the Oregon Association of REALTORS®, on June 26, 2003, by mailing two copies, with postage prepaid, in an envelope addressed to:

Andrew P. Ositis  
Attorney at Law  
388 State Street, Suite 565  
Salem, Oregon 97301

Andrea L. Bushnell  
Matt Farmer  
Oregon Association of REALTORS®  
693 Chemeketa Street NE  
PO Box 351  
Salem, Oregon 97308

 PHILIP SCHRADLE  
Special Counsel to the Attorney General

Attorneys for Respondent