



PAUL A. KERLEY,

Agency No. 200003-R-098C

Appellate Court No. A115200

V.

Supreme Court No. S49995

REAL ESTATE AGENCY,

**Respondent,
Petitioner on Review.**

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

Opinion Filed: October 9, 2002

Author of Opinion: BREWER, J.

Concurring Judges: LANDAU, P.J., and WARREN, S.J.

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STATEMENT OF THE CASE

1. Legal Question Presented on Review

Paul A. Kerley, Respondent on Review, submits that the Legal Question Presented on Review asserted by the Petitioner on Review is inaccurate and misleading as it misstates the underlying facts, i.e. it asserts that the prelicensure misconduct of the Respondent Kerley, which was the basis for the Real Estate Agency licensing action, was "professional real estate activity." It was not. "Professional real estate activity" requires a real estate license. No license is required to own rental property, either individually or in partnership with others. It is undisputed that Respondent Kerley was not charged with engaging in unlawful unlicensed real estate activity.

Respondent Kerley submits that instead, the actual question before this court is: Absent fraud in the application, does ORS Chapter 696 authorize the Real Estate Commissioner to revoke a broker's license for misconduct not involving professional real estate activities, occurring prior to the broker applying for or being issued a real estate license?

2. Proposed Rule of Law

Respondent Kerley submits the following proposed rule of law: Absent fraud in the application, ORS chapter 696 does not authorize the Real Estate Commissioner to revoke a real estate license for prelicensure misconduct.

3. Summary of the Facts

While the Oregon Court of Appeals opinion accurately summarizes the facts in the case it is important to bear in mind that there was no finding by either the Administrative Law Judge, the Real Estate Commissioner, or the Oregon Court of Appeals that the formation and operation of the three real estate investment partnerships constituted "professional real estate activity" for which a license would be required under ORS Chapter 696. If the acts of Respondent Kerley prior to applying for a real estate license had been "professional real estate activity," it would have violated ORS 696.020(1), which provides that:

No person shall engage in, carry on, advertise or purport to engage in or carry on professional real estate activity, or act in the capacity of, a real estate licensee within this state without first obtaining a license as provided for in this chapter.

There was no charge of violation of ORS 696.020(1). The Oregon Court of Appeals correctly determined that the wrongdoing constituted "private acts" by the Respondent Kerley that "did not relate to professional real estate activities."

4. Summary of Argument

The statute, ORS Chapter 696, only confers limited power on the Real Estate Commissioner. It does not allow the Real Estate Commissioner to suspend or revoke a real estate license for conduct outside of the professional real estate activity for which the license was issued. As the misconduct in the case took place (a) before Respondent Kerley applied for or received a real

estate license and (b) did not involve professional real estate activity, the Real Estate Commissioner may not revoke his license for those acts.

ARGUMENT

ORS 696.020(2) provides that:

A real estate *licensee* shall be bound by and subject to the requirements of ORS 696.010 to 696.490, 696.600 to 696.730, 696.800 to 696.855 and 696.995 in engaging in any professional real estate activity or while acting in the licensee's own behalf in the offer to, negotiations for, or sale, exchange, lease option or purchase of real estate. (Emphasis added).

So while all *licensees* are bound by the referenced statutes, in particular ORS 696.301, nothing in ORS 696.020(2) makes *non-licensees* bound by those statutes. Only a limited portion of ORS Chapter 696 applies to license applicants.

The administrative rules of the Oregon Real Estate Agency confirm that limited applicability of the statutes:

Any *real estate licensee* who does not comply with any provision of OAR 863-010-0010 to 863-010-0120 and OAR 863-010-0207 to 863-010-0225 shall be deemed, prima facie, to be guilty of improper dealings under subsection (31) of ORS 696.301, and may be subject to appropriate disciplinary action by the Commissioner. (Emphasis added).

OAR 863-010-095. The administrative rules of the Real Estate Agency do not apply to non-licensees who are not applicants.

The exclusion of non-licensees from the statute and the administrative rules call for application in this analysis of the fundamental "rule of statutory construction that the inclusion of one is the exclusion of the other (*inclusio unis*

est exclusio alterius) ..." *Fisher Broadcasting, Inc. v. Department of Revenue*, 321 Or 341, 351, 898 P. 2d 1333 (1995).

To date, the Oregon appellate cases have only addressed the question of whether the licensee's conduct *as a licensee* was within the prohibitions of ORS 696.301; *not* as to conduct which occurred before the license was issued. Some guidance as to the scope and applicability of the statute can be found in case law. "The purpose of ORS ch. 696 is to protect the public against improper conduct described in that chapter." *Blank v. Black*, 14 Or App 470, 477, 512 P. 2d 1016 (1970). What is described "in that chapter" is improper conduct in professional real estate activity. "Although ORS 696.300(1)(q) [since re-numbered ORS 696.301(31)] is not expressly limited to conduct in the capacity of a broker or salesman, when this subsection is considered in context with the language of the entire section, applying the familiar rule of statutory construction *Noscitur a sociis* (associated words), it is our conclusion that the conduct referred to is limited to acts by the licensee in his capacity as a broker or salesman, excepting where the licensee is action for himself in a private capacity as in *Blank v. Black*, 14 Or App 470, 512 P. 2d 1016 (1973). [Further cites omitted]." *Klein v. Real Estate Commissioner*, 19 Or App 646, 653, 301 P. 2d 1355 (1974).

The applicable statute has undergone several changes, but the earlier ORS 696.300(1)(q) and the later ORS 696.301(31) are considered as

“materially similar.” *Garton v. Real Estate Commissioner*, 127 Or App 340, 340, 873 P. 2d 359 (1994). “To protect the public interest the legislature imposed sanctions for ‘untrustworthiness’ *of a licensee* (ORS 696.300(1)(q) (1973), now ORS 696.301(32) [ORS 696.301(31) since 1983].” (Emphasis added). *Todd v. Real Estate Division*, 25 Or App 433, 440, 552 P. 2d 1328 (1976).

From the foregoing it can be seen that the courts have limited the Real Estate Commissioner to disciplining real estate licensees only for wrongdoing in professional real estate activity. The Oregon courts are not alone in that regard: “It seems clear that under section 10176 the misconduct referred to therein must arise in connection with the licensee’s ‘performing or attempting to perform any of the acts within the scope of ...’ chapter 3 of the Real Estate Act. In other words, the misconduct of the person involved must be connected with his activity as a broker.” *Buckley v. Savage*, 184 Cal. App. 2d 18, 7 Cal. Rptr. 328, 334 (1960).

This court decided in *Dearborn v. Real Estate Agency*, 334 Or 493, 53 P. 3d 436 (2002) that the Real Estate Commissioner had no authority to discipline a licensee for his “private acts, separate from broker’s professional life.” 334 Or at 505. The fact that Respondent Kerley’s acts were “private acts” should, under this court’s analysis in *Dearborn*, be dispositive.

Unlike the fact situation in *Dearborn*, this case adds the additional fact that the acts for which the Real Estate Commissioner seeks to discipline the Respondent Kerley occurred years before he was licensed as a salesman or as a broker. There is no Oregon case authority on point to assist the court on this question prelicensure misconduct. The Real Estate Commissioner repeatedly asserts the mantra of "no temporal limitation" on the Commissioner's right to discipline a licensee. By that reasoning the Commissioner could revoke the license of a licensee for "improper dealings," however generously that term may be defined by the Commissioner, committed at any time in the licensee's lifetime. The courts have made it clear that the Commissioner's authority is not without limits. The statute does not authorize the Commissioner to consider any and all acts of a licensee before and after issuance of a license. He is limited to considering only the "professional real estate activity" of a licensee.

In a similar vein, in a licensing action against a doctor, the Florida Court of Appeals stated that "We discern no clear statement of legislative intent to provide for discipline of a physician for prelicensure misconduct where he has not falsified his application and is adjudged presently fit to practice. We therefore hold that the Board was without jurisdiction to discipline appellant." *Taylor v. Department of Professional Regulation, Board of Medical Examiners*, 534 So. 2d 782; 1988 Fla. App. LEXIS 5090; 13 Fla. L. Weekly 2539. This court faces the same thing here; no clear statement exists of legislative intent to

authorize the Real Estate commissioner to discipline a licensee for prelicensure acts.

In support of the "no temporal limitations" argument the Real Estate Agency contends that since ORS 686.301 applies to licensees and to *applicants*, and, since *applicants* are not licensees, then ORS 696.301 must apply to all other non-licensees. This syllogism does not stand up to closer scrutiny.

As ORS 696.301 is limited to professional real estate activity, and non-licensees may not lawfully engage in professional real estate activity, any professional real estate activity by a non-licensee is illegal and thus is on that basis alone appropriate grounds for denial of a license and imposition of other sanctions. ORS 696.120(2) grants the Commissioner broad powers when it comes to license *applicants*:

The commissioner expressly is vested with the power and authority to make and enforce any and all such reasonable rules connected with the application for any license as shall be deemed necessary to administer and enforce the provisions of ORS 696.010 to 696.490, 696.200 to 696.730, 696.800 to 696.855 and 696.995.

ORS 696.100 through 696.180 deals with the specifics of licensing and the steps required to obtain a license. It involves an application, fingerprints, an examination, and a criminal records check. But if there is no "temporal limitation" to the Commissioner's power to discipline licensees, there really is no need for the license application, criminal background check, fingerprinting,

or examination. The Commissioner could, by that analysis, revoke the license of any licensee determined by the Commissioner to have been unfit *ab initio*.

CONCLUSION

The Real Estate Commissioner has been given the statutory authority to determine who shall or shall not be issued a real estate license. The statutes do not authorize the Real Estate Commissioner to do so after the fact when a licensee has a vested interest in having that license and engaging in that profession. The Real Estate commissioner has been given the statutory authority to suspend or revoke the licenses issued for specific reasons set out in the statute. This court has stated that the acts or omissions for which the Commissioner may take action against licensees are confined to acts and omissions involved in the licensee's professional real estate activity. The acts of the respondent Kerley took place before he was licensed and did not involve professional real estate activity, and for those reasons the Commissioner is not authorized by the statute to revoke his license and this court should affirm the decision of the Oregon Court of Appeals.

Respectfully submitted this August 21, 2003.


Andrew P. Ositis

Attorney for the Respondent on Appeal