

**STATE OF MICHIGAN
DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES
BUREAU OF HEARINGS**

In the matter of

Docket No. 2000-192

**Bureau of Commercial Services,
Petitioner**

Agency No. 65-97-0442-00

v

**Agency: Bureau of Commercial
Services**

**Eugene Rupert, Jr.,
Respondent**

Case Type: Sanction

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**Issued and entered
this 21st day of November, 2000
Gregory Holiday
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY:

This proceeding was commenced with the issuance of a Notice of Hearing upon a Formal Complaint dated August 12, 1999, charging Respondent with violations of the Occupational Code, 1980 PA 299, as amended (Code), MCL 339.101 *et seq.*; MSA 18.425(101) *et seq.* Pursuant to Section 92 of the Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.*, Respondent was afforded an opportunity to demonstrate compliance prior to the commencement of formal proceedings. Respondent failed to satisfactorily demonstrate compliance and, as a result, the matter was set and noticed for hearing as described above. A hearing was scheduled to be held on Monday, April 17, 2000 at 1:30 p.m. at the Bureau of Hearings of the Department of

Consumer and Industry Services, 1200 Sixth Street, Eighth Floor, Detroit, Michigan, and the same proceeded at about 2:35 p.m. Gregory Holiday presided as Administrative Law Judge.

Kimbal R. Smith, III, Esq., appeared on behalf of the Bureau of Commercial Services Enforcement Division of the Department of Consumer and Industry Services (Petitioner). Robert Okurowski, Jr. and Timothy Lee Teague testified as witnesses for Petitioner. Eugene Rupert, Jr. (Respondent) appeared and testified on his own behalf.

ISSUES AND APPLICABLE LAW:

The general issue presented is whether or not Respondent violated the Code with respect to the practice of real estate. The specific issues are whether or not Respondent violated Administrative Rule 1991 AACCS, R 339.22301(1) and Sections 604(b), 604(c), and 2512(d), (j)(i) and (j)(iv) of the Code, which provide, in pertinent part:

Sec. 604. A person who violates 1 or more of the provisions of an article which regulates an occupation or who commits 1 or more of the following shall be subject to the penalties prescribed in section 602:

(b) Practices fraud, deceit, or dishonesty in practicing an occupation.

(c) Violates a rule of conduct of an occupation.

Sec. 2512. A licensee shall be subject to the penalties set forth in article 6 who commits 1 of the following:

(d) Failure to account for or to remit money coming into the licensee's possession which belongs to others.

(j) Except in the case of property management accounts, failure to deposit in a custodial trust or escrow account money belonging to others coming into the hands of the licensee in compliance with the following:

(i) A deposit or other money accepted by a person, partnership, corporation, or association holding a real estate broker's license under this article shall be retained by a real estate broker pending consummation or termination of the transaction involved, and shall be accounted for in the full amount of the money at the time of the consummation or termination.

(iv) A real estate broker shall deposit within 2 banking days after the signing of a purchase agreement by all parties, but not later than 5 days after receipt, money belonging to others in a separate custodial trust or escrow account maintained by the real estate broker with a bank, savings and loan association, credit union, or recognized depository until the transaction involved is consummated or terminated, at which time the real estate broker shall account for the full amount received.

Rule 301. (1) A broker shall not conduct business or advertise under a name other than that in which the license is issued.

Petitioner offered the following exhibits for consideration at the hearing:

<u>Exhibit</u>	<u>Description</u>
1	2/24/97 Offer to Purchase 1720 Ackley with 2/28/97 Acceptance
2	Undated Mutual Release of Purchase Agreement
3	Copies of 5 Money Orders totaling \$2,800.00 to Global Real Estate and 4 Money Order Receipts totaling \$450.00
4	Copy of 3/5/97 Letter to Eugene Rupert from Nancy E. Stoddart (Rejected)

Respondent offered the following exhibits for consideration at the hearing:

<u>Exhibit</u>	<u>Description</u>
1	Undated "To Whom It May Concern letter from Eugene Rupert Jr.

FINDINGS OF FACT:

Sometime before February 24, 1997, Robert Okurowski became interested in purchasing a home located at 1720 Ackley in Westland. He contacted the office of the listing broker and was shown the property by one of the listing broker's sales agents. Having had a prior transaction through Respondent, in which, according to Mr. Okurowski, he was entitled to a partial commission credit, Mr. Okurowski decided to purchase the Ackley home through Respondent. On about February 24, 1997, Mr. Okurowski executed an Offer to Purchase Real Estate (Petitioner Exhibit 1) through Respondent as real estate broker. While the Offer To Purchase references an earnest money deposit of \$3,250.00, Mr. Okurowski never made a payment to Respondent of an earnest money deposit. Instead, Mr. Okurowski expected to apply his credit owed by Respondent from the prior transaction to the earnest money deposit. According to Respondent's Undated Statement (Respondent Exhibit 1), Mr. Okurowski was entitled to a credit of "3/5% of the sales price of the 28070 Rose property...payable upon the close of the above referenced property".

Respondent tendered the Offer to Purchase to Listing Real Estate Broker Nancy E. Stoddart without earnest deposit funds. The Offer To Purchase was accepted by the Sellers on about February 28, 1997, but the Sellers required a copy of the earnest money deposit check for verification. When Respondent contacted Mr. Okurowski to advised him that the Sellers were requiring a check for the earnest money deposit, Mr. Okurowski replied that he was in the process of leaving town and could not accommodate the request. Respondent, on his own, then directed his receptionist to provided copies of money orders (See Petitioner Exhibit 3, pages 2-4) from other business dealings to serve as the verifications on this transaction, which she did. The money orders falsely indicated that they were executed by Robert Okurowski and were tendered as verifications in an effort to save the transaction. Mr. Okurowski had no part in providing the money orders to the Listing Real Estate Broker.

Under the terms of the Offer to Purchase, the sale was subject to Mr. Okurowski obtaining a mortgage approval within 30 days. Mr. Okurowski applied for a mortgage through PLG Funding Corporation. His mortgage application was denied (see Respondent Exhibit 2) by a notice mailed March 6, 1997. The transaction under the Offer to Purchase never closed and at some point, Robert Okurowski executed a Mutual Release of Purchase Agreement (Petitioner Exhibit 2) with the Sellers. Respondent was not a participant in the Mutual Release of Purchase Agreement. Mr. Okurowski never received a return of any of the claimed \$3,250.00 earnest money deposit from the Offer to Purchase.

In a separate transaction, Mr. Okurowski executed another agreement to purchase the same property providing an earnest money deposit directly to the Listing Real Estate Broker. That transaction eventually closed without incident.

Timothy Lee Teague is an auditor for the Department of Consumer and Industry Services, Bureau of Commercial Services, Enforcement Division. Mr. Teague conducted an investigation of the circumstances surrounding this transaction. Upon his investigation, which included an interview with Respondent and a review of Respondent's trust account records, Mr. Teague concluded that no deposit for \$3,250.00 was placed in Respondent's trust account during the relevant time period. During the interview, Respondent admitted to Mr. Teague that "I am guilty on this deal, I was just starting out and I didn't do what was right, I want to just get things right and make sure they stay that way".

CONCLUSIONS OF LAW:

The principles that govern judicial proceedings also apply to administrative hearings. 8 Callaghan's Michigan Pleading & Practice (2d ed) § 60.48, page 230. The burden of proof is upon Petitioner to prove, by a preponderance of the evidence, that Respondent violated the Code. 1990 AACCS, R 339.1763.

Violation of Section 604(b) of the Code

By this charge, Petitioner asserts that Respondent practiced fraud, deceit or dishonesty in connection with his dealings concerning 1720 Ackley, Westland, Michigan.

Respondent's solution to the problem he faced in the Okurowski transaction involved deceit and dishonesty. The verifications of earnest money deposit he provided to listing broker Nancy Stoddart were false and Respondent knew that they were false. Using the false verifications to show the existence of an earnest money deposit constitutes deceit and dishonesty within the meaning of Section 604(b) of the Code. Respondent's defenses that (1) the money order verifications were meant to be a temporary solution until he was able to secure proper funds and (2) he didn't know the receptionist was going to falsely affix Mr. Okurowski's signature to the money orders, are of no consequence. Respondent's intent at the time the money orders were faxed to the listing broker as verifications of an earnest money deposit was deceitful and dishonest.

Accordingly, Petitioner has proven, by a preponderance of the evidence, that Respondent violated Section 604(b) of the Code as alleged in the Formal Complaint.

Violation of Section 604(c) of the Code

By this charge, Petitioner asserts that Respondent violated Real Estate Rule 339.22301(1), thereby violating Section 604(c) of the Code.

Rule 22301(1) sanctions a real estate licensee who conducts business under a name other than the name under which the real estate license is issued. Petitioner presented no evidence in support of this charge.

Accordingly, Petitioner has not proven any violation of Real Estate Rule 22301(1), or Section 604(c) of the Code, as alleged in the Formal Complaint.

Violation of Section 2512(d) of the Code

By this charge, Petitioner asserts that Respondent failed to account for or to remit monies coming into his possession that belonged to Mr. Okurowski.

In this case, no money came into Respondent's possession that belonged to Mr. Okurowski. Mr. Okurowski claims a debt owed to him by Respondent from a prior transaction. This record does not contain sufficient information to determine the amount of the debt or the specific terms of repayment. In any case, Section 2512(d) relates to monies actually coming into a Respondent's possession, not to debts that arise by virtue of business dealings.

Accordingly, Petitioner has not proven any violation of Section 2512(d) of the Code, as alleged in the Formal Complaint.

Violation of Section 2512(j)(i) of the Code

By this charge, Petitioner asserts that Respondent failed to retain a deposit accepted from Mr. Okurowski, failed to place the deposit into a custodial or trust account, and failed to account for the deposit upon termination of the transaction.

In this case, there was no deposit to retain or to place into a custodial or escrow account and, therefore, no deposit to account for upon termination of the transaction. The debt allegedly owed Mr. Okurowski by Respondent on an unrelated transaction can't be considered a deposit that Respondent maintained on the subject transaction.

Accordingly, Petitioner has not proven any violation of Section 2512(j)(i) of the Code, as alleged in the Formal Complaint.

Violation of Section 2512(j)(iv) of the Code

By this charge, Petitioner asserts that Respondent failed to place the earnest money deposit of Mr. Okurowski into a custodial or trust account of an appropriate financial institution within 2 banking days or within 5 business days after receipt.

Since there was no earnest money deposit made by Mr. Okurowski, the obligations

imposed by Section 2512(j)(iv) do not come into play in this transaction.

Accordingly, Petitioner has not proven any violation of Section 2512(j)(iv) of the Code, as alleged in the Formal Complaint.

DECISION AND RECOMMENDED SANCTIONS:

It is the decision of this Administrative Law Judge that Respondent violated Section 604(b) of the Code, as described in this Hearing Report. Petitioner recommended that sanctions include an appropriate civil fine and restitution of \$3,250.00.

It is recommended that the Board include the following as sanctions in this matter:

1. Payment of a civil fine in the amount of \$1,500.00.
2. Restitution is inappropriate in this matter.
3. In the event the civil fine has not been paid within 60 days following the issuance of a final order, then all Article 24 licenses should be suspended and no new or renewal licenses should be issued until the civil fine has been paid.

Gregory Holiday
Administrative Law Judge