

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

In the matter of

Docket No. 2001-1288

**Bureau of Commercial Services,
Petitioner**

Agency No. 21-00-5593-00

v

Agency: Bureau of Commercial Services

**Wayne J. Howard,
Respondent**

Case Type: Sanction

**Issued and entered
this 20th day of September, 2001
by James L. Karpen
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY

Appearances: Michael Homier, Attorney at Law, appeared on behalf of the Petitioner, Bureau of Commercial Services. Neither Respondent, Wayne Howard, nor an attorney on behalf of Respondent, appeared at the hearing.

This proceeding was commenced with the filing of a Notice of Hearing upon a Formal Complaint, dated April 26, 2001. The Notice of Hearing was mailed to Respondent's last known address on July 31, 2001. The Notice informed Respondent that failure to appear at a scheduled hearing may result in a default being entered pursuant to Sections 72 and 78 of the Administrative Procedures Act of 1969, 1969 PA 306, as amended, MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.* (APA). The hearing in this matter was held on September 17, 2001. Mr. Homier requested that the Petitioner be allowed to proceed in the Respondent's

absence pursuant to Section 72 of the APA, and that a default be granted on behalf of the Petitioner pursuant to Section 78 of the APA.

Section 72 of the APA states, in pertinent part:

(1) If a party fails to appear in a contested case, after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.

Further, Section 78 of the APA states, in pertinent part:

(2) Except as otherwise provided by law, disposition may be made of a contested case by... default... .

The Judge granted the Petitioner's motion for default. As a result of the default, the factual allegations contained in the Petitioner's Formal Complaint were deemed true.

ISSUES AND APPLICABLE LAW

The Formal Complaint discloses that Respondent was licensed as a residential builder under the Occupational Code, 1980 PA 299, as amended; MCL 339.101 *et seq.*; MSA 18.425(101) *et seq.* (the Code).

The Complaint further discloses that Respondent entered into a contract with Lawrence and Ruth Quigley on November 8, 1999 and November 30, 1999, to perform residential builder's services. The Complaint alleges that Respondent failed to perform the requirements of the contract in a workmanlike manner, contrary to Section 2411(2)(m) of the Code. The Complaint further alleges that Respondent's performance under the contract, Respondent failed to comply with the local building code, contrary to 1979 AC, R 338.1551(5). The Complaint asserts that Respondent failed to correct his defective

workmanship, contrary to 1979 AC, R 338.1551(4). The Complaint also asserts that Respondent, without legal excuse, failed to perform all the terms of the contract, contrary to Section 2411(2)(a) of the Code. The Complaint avers that Respondent failed to file an assumed name certificate with Petitioner prior to commencing business, contrary to 1979 AC, R 338.1521(3). The complaint also avers that Respondent failed to respond to the complaint in a timely manner, contrary to 1979 AC, R 338.1551(2). The last substantive allegation in the Complaint asserts that Respondent violated a rule of conduct in practicing his occupation, contrary to Section 604(c) of the Code.

FINDINGS OF FACT

Based upon the foregoing, I make the following findings of fact.

- (1) Respondent is licensed as a residential builder under the Code.
- (2) On November 8 and November 30, 1999, Respondent entered into a contract to perform residential builder's services.
- (3) Respondent failed to perform the requirements of the contract in a workmanlike manner.
- (4) In performing under the contract, Respondent failed to comply with the local building code.
- (5) Respondent failed to correct his defective workmanship within a reasonable

time.

- (6) Respondent, without legal excuse, failed to perform all the terms of the contract.
- (7) Respondent failed to file an assumed name certificate with Petitioner prior to commencing business.
- (8) Respondent failed to respond to the complaint in a timely manner.
- (9) Respondent violated a rule of conduct in practicing his occupation.

CONCLUSIONS OF LAW

The principles that govern judicial proceedings also apply to administrative hearings 8 Callaghan's Michigan Pleading and Practice (2d ed) Section 60.48, page 230. The burden of proof is upon the Petitioner to prove, by a preponderance of the evidence, that grounds exist for the imposition of sanctions upon the Respondent. Under Section 72 of the APA, there is no requirement to provide a full evidentiary hearing when all alleged facts are taken as true. Smith v Lansing School District, 428 Mich 248; 406 NW2d 825 (1987). Based upon the facts described herein, the Petitioner has proven, by a preponderance of the evidence, that the Respondent violated Sections 604(c), 2411(2)(a), (m) of the Code and Rules 338.1521(3), 338.1551(2), (3) and (4).

RECOMMENDED SANCTION

At the hearing Petitioner introduced Exhibit 1, an estimate of the cost to complete the work Respondent had agreed to do in the amount of \$19,600.00. I recommend that Respondent make restitution to the complainant in the amount of \$19,600.00 and a \$5,000.00 civil fine be imposed.

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James L. Karpen
Administrative Law Judge

**STATE OF MICHIGAN
DEPARTMENT OF CONSUMER & INDUSTRY SERVICES
BOARD OF RESIDENTIAL BUILDERS AND
MAINTENANCE & ALTERATION CONTRACTORS**

In the matter of :

**WAYNE J. HOWARD
Residential Builder
License No. 21-01-118753**

**Docket No. 2001-1288
Complaint No. 21-00-5593-00**

FINAL ORDER

WHEREAS, this matter having come before the Michigan Board of Residential Builders and Maintenance & Alteration Contractors, hereafter the “Board”, on November 5, 2002; and

WHEREAS, the Board having considered the Hearing Report Clarification of Edward F. Rodgers, Chief Administrative Law Judge, dated August 16, 2002, and the Findings of Fact and Conclusions of Law in the Hearing Report of James L. Karpen, Administrative Law Judge, dated September 20, 2001;

WHEREAS, the Board having received the Hearing Report under MCL 339.514, and Wayne J. Howard, Licensed Residential Builder, License No. 21-01-118753, hereafter “Respondent”, having been found in violation of Sections 604(c); 2411(2)(a); 2411(2)(m) of the Michigan Occupational Code, 1980 P.A. 299, *as amended*, hereafter the “Code”, MCL 339.604(c); MCL 339.2411(2)(a); MCL 339.2411(2)(m), and Rules 21(3); 51(2); 51(3); 51(4) of the State Board of Residential Builders and Maintenance & Alteration Contractors General Rules, *promulgated hereunder*, being 1979 AC, R 338.1521(3); 1979 AC, R 338.1551(2); 1979 AC, R 338.1551(3); 1979 AC, 338.1551(4) and

WHEREAS, the hearing report being hereby incorporated by reference; now, therefore,

IT IS HEREBY ORDERED, that the following penalties authorized by Section 602 of the Code are hereby imposed:

- 1. Respondent shall pay a FINE in the amount of Five Thousand Dollars and 00/100 Cents (\$5,000.00), said fine to be paid to the Department of Consumer & Industry Services within sixty (60) days from the date of mailing of this Final Order. Said fine shall be paid by cashier’s check or money order, with Complaint No. 21-01-5593-00 clearly indicated on the check or money order, made**

payable to the State of Michigan, and sent to the Department of Consumer & Industry Services, Bureau of Commercial Services, Enforcement Division, P.O. Box 30185, Lansing, Michigan 48909.

- 2. Respondent shall make RESTITUTION to Lawrence W. & Ruth Quigley in the amount of Nineteen Thousand Six Hundred Dollars and 00/100 Cents (\$19,600.00) by certified check made payable to Lawrence W. & Ruth Quigley and mailed to 304 N. O'Keefe Street, Cassopolis, MI 49031. Restitution shall be paid not later than sixty (60) days from the date of mailing of this Final Order.**
- 3. No application for licensure, relicensure or reinstatement shall be considered until fine and restitution are paid-in-full. Failure of Respondent to comply with any term of this Final Order shall suspend all current licenses or registration renewals of Respondent and result in denial of future applications for licensure or registration until such time as all of the terms of this Final Order have been complied with.**