

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

In the matter of

Docket No. 2001-1354

**Bureau of Commercial Services,
Petitioner**

Agency No. 21-00-3713-00

v

Agency: Bureau of Commercial Services

**Katherine M. Ellsworth
dba Ellsworth Builders,
Respondent**

Case Type: Sanction

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**Issued and entered
this 28th day of December, 2001
by Robert H. Mourning
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY

This matter commenced with the issuance of a Notice of Remand Hearing dated November 6, 2001, scheduling a contested case hearing for December 10, 2001. The Notice of Remand Hearing was mailed to the Respondent's last known address.

Tracey Hampton appeared on behalf of the Petitioner, Bureau of Commercial Services. Neither the Respondent, Katherine M. Ellsworth nor an attorney on behalf of the Respondent appeared at the hearing. The Notice of Remand Hearing was issued pursuant to allegations by the Petitioner that the Respondent violated the Occupational Code (Code), 1980 PA 299, as amended, MCL 339.2401-2412; MSA 18.425(2401)-(2412).

The hearing in this matter was held on December 10, 2001. At the hearing, Attorney Hampton requested that the Petitioner be allowed to proceed in the Respondent's

absence pursuant to Section 72 of the Administrative Procedures Act (APA), 1969 PA 306, as amended, MCL 24.272; MSA 3.560 (172), and that a default be granted on behalf of the Petitioner pursuant to Section 78 of the APA.

Section 72(1) 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(2) 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 Petitioner's motion for default was granted. As a result of the default, the factual allegations contained in the Petitioner's Formal Complaint are deemed true.

No witnesses testified at the hearing. The Petitioner offered the following exhibits which were admitted into evidence:

Exhibit 1: Order and Notice of Stay from the United States Bankruptcy Court, February 13, 2001

Exhibit 2: Building Inspection Report, August 30, 2000

ISSUES AND APPLICABLE LAW

The general issue in this matter is whether the Respondent violated the Code.

The specific issues in this case are whether or not the Respondent violated the following Sections of the Code and Rule: Section 604(c), Section 2411(2)(e) and (m), and 1979 AC R 338.1551(4) and (5). Those Sections and Rule state in pertinent part:

Section 2411(2)(e) and (m) provides that:

(2) A licensee or applicant who commits 1 or more of the following shall be subject to the penalties set forth in article 6:

* * *

(e) A willful violation of the building laws of the state or of a political subdivision of the state.

* * *

(m) Poor workmanship or workmanship not meeting the standards of the custom or trade verified by a building code enforcement official.

Section 604 (c) provides that :

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:

* * *

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

Rule 51(4) and (5) provides that:

(4) If a complaint is justified by the local building inspector or by a person authorized by the department to make inspections, the builder or contractor shall correct the complaint within a reasonable time. Failure or refusal by the licensee to correct a structural matter that is materially deficient, dangerous or hazardous to the owners shall be presumed to be dishonest or unfair dealing.

(5) Standards of construction shall be in accordance with the local building code, or in the absence of a code in accordance with the building code of the nearest political subdivision having a building code.

FINDINGS OF FACT

1. At all times relevant to this Formal Complaint, the Respondent has been licensed as a residential builder under the Code.

2. On or about September 14, 1998, the Respondent entered into a contract with David and Katherine Kasbohm to perform services which are regulated by the Code.

3. The Respondent failed to perform the requirements of the contract in a workmanlike manner.

4. The Respondent, in performance of the contract, failed to comply with certain provisions of the 1993 State Code, which was adopted by Washtenaw County.

5. The Respondent failed to correct certain items within a reasonable time.

6. The Respondent has violated a rule of conduct in practicing an occupation.

CONCLUSIONS OF LAW

The principles that govern judicial proceedings also apply to administrative hearings. 8 Callaghan's Michigan Pleading and Practice, §60.48, at 230 (2d ed. 1994). 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 Dist, 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 the following Rule and Sections of the Code:

1. The Respondent failed to perform the requirements of the contract in a workmanlike manner, violating Section 2411(2)(m) of the Code.

2. The Respondent failed to comply with certain provisions of the 1993 State Code, which was adopted by the Washtenaw County, violating Section 2411(2)(e) of the Code and R 338.1551(5).

3. The Respondent failed to correct certain items within a reasonable time, violating R 338.1551(4).

4. The Respondent has violated a rule of conduct of an occupation, violating Section 604(c) of the Code.

RECOMMENDATIONS

The Administrative Law Judge recommends the following sanctions:

1. The Respondent be assessed a civil fine in the amount of \$500.00.

2. In the event that the civil fine has not been paid within 60 days following the issuance of a final order by the Board, the Respondent's Article 24 licenses

should be suspended. No Article 24 license shall be renewed nor shall any new Article 24 license be issued until the civil fine is paid in full.

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