

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

In the matter of

Docket No. 2001-291

**Bureau of Commercial Services,
Petitioner**

Agency No. 21-99-4563-00

v

Agency: Bureau of Commercial Services

**Mark S. Kowalczyk,
Respondent**

Case Type: Sanction

**Issued and entered
this 3rd day of April, 2001
by Lauren G. Van Steel
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY

Appearances: Attorney Michael D. Homier appeared on behalf of Petitioner Bureau of Commercial Services. Neither Respondent Mark S. Kowalczyk, nor an attorney or representative on behalf of Respondent, appeared at the hearing.

This proceeding commenced with the filing of a Notice of Hearing dated February 20, 2001, scheduling a hearing for March 23, 2001. The Notice of Hearing was mailed to the parties' last known addresses. Further, the Notice of Hearing informed the parties that if either party failed to appear at the scheduled hearing, a default judgment might be entered pursuant to Sections 72 and 78 of the Michigan Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.* (APA).

The Notice of Hearing was issued pursuant to a Formal Complaint filed on September 26, 2000, which alleged noncompliance with the Michigan Occupational Code, 1980 PA 299, as amended, MCL 339.101 *et seq.*; MSA 18.425(101) *et seq.* (Code), specifically Sections 2411(2)(a); 2411(2)(c) and 604(c), and Rule 21(3), being 1979 AC, R 338.1521(3).

At the hearing held on March 23, 2001, Petitioner's representative requested to be allowed to proceed in Respondent's absence pursuant to Section 72 of the APA and that a default be granted for 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....

Petitioner's motion for default was granted. As a result of the default judgment, the factual allegations contained in Petitioner's Formal Complaint are deemed true.

During the hearing, the following exhibits were accepted into the record:

Petitioner's Exhibit 1 Copy of checks paid to Respondent, showing \$10,000.00 in total payments: \$6,000.00 and \$4,000.00, on 04/06/99 and 05/05/99, respectively.

Petitioner's Exhibit 2 Copy of first page of Complaint submitted to Department.

Petitioner's Exhibit 3 Construction Agreement, dated April 6, 1999

Petitioner's Exhibit 4 Proposal, dated February 13, 1999

Linda S. Hauler, Complainant in this matter, also testified at the hearing for Petitioner.

ISSUES AND APPLICABLE LAW

The issues in this matter are whether Respondent has violated the following Code sections: MCL 339.2411(2)(a); MCL 339.2411(2)(c), and MCL 339.604(c), along with Rule 21(3), which provide in pertinent part as follows:

Sec. 2411(2) A licensee or applicant who commits 1 or more of the following shall be subject to the penalties set forth in article 6:

(a) Abandonment without legal excuse of a contract, construction project, or operation engaged in or undertaken by the licensee.

* * *

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

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:

* * *

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

Rule 21(3) An applicant operating under an assumed name or d.b.a. shall submit a certified copy of the assumed name certificate. * * * An applicant operating as a corporation shall submit a copy of the articles of incorporation and the latest corporation annual report, if any, and be in good standing as a corporation.

FINDINGS OF FACT

Complainant Linda Hauler testified at the hearing that Respondent owed her and her husband a total of \$4,197.00. Mrs. Hauler arrived at this figure as follows: From the \$10,000.00 paid to Respondent [Petitioner's Exhibit 1], she deducted amounts for block (\$486.00), trusses (\$1,117.00), footings (\$400.00) and a septic system (\$3,800.00) that was delivered to the construction site by Respondent. Mr. and Mrs. Hauler paid another builder to complete their home. Mrs. Hauler testified that the \$4,197.00 figure is \$200.00 greater than the \$3,997.00 figure set forth on the Statement of Complaint [Petitioner's Exhibit 2], because she had originally credited Respondent with \$4,000.00 for the septic system based on their contract [Petitioner's Exhibit 3], rather than the actual \$3,800.00 value of the septic system that Respondent left at the site, but did not install.

Based on the record in this matter, including the testimony by Mrs. Hauler, and the default judgment granted for Petitioner, the undersigned makes the following findings of fact:

1. Respondent entered into a contract with Nick and Linda Hauler to perform services which were regulated by the Code.
2. Respondent has, without legal excuse, failed to complete the terms of the contract.
3. Respondent failed to account for monies received from Nick and Linda Hauler, totaling \$4,197.00
4. Respondent failed to file copies of the articles of incorporation and the latest annual report with the Commercial Licensing Division of the Department of Consumer

and Industry Services or its predecessor before he commenced doing business as Great Plains, Inc.

5. 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 in this matter is upon Petitioner to prove, by a preponderance of the evidence, that grounds exist for the imposition of sanctions upon 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 above findings of fact and the default judgment granted against Respondent, Petitioner has proven by a preponderance of the evidence that Respondent violated the Code as follows:

1. Respondent has, without legal excuse, failed to complete the terms of the contract, in violation of Section 2411(2)(a) of the Code.
2. Respondent failed to account for monies received from Nick and Linda Hauler, in violation of Section 2411(2)(c) of the Code.
3. Respondent failed to file copies of the articles of incorporation and the latest annual report with the Commercial Licensing Division of the Department of Consumer and Industry Services or its predecessor before he commenced doing business as Great Plains, Inc., in violation of Rule 21(3).

4. Respondent has violated a rule of conduct in practicing an occupation, in violation of Section 604(c) of the Code.

RECOMMENDATIONS

Based upon the above findings of fact and conclusions of law, the following recommendations are made by the undersigned to the Residential Builders and Maintenance and Alteration Contractors Board:

1. Restitution be ordered in the total amount of \$4,197.00, to be paid to Nick and Linda Hauler for the monies that have been tendered to Respondent.

2. Based upon the above violations of the Code and administrative rule, a civil fine in the amount of \$1,000.00 be assessed against Respondent.

3. Any and all licenses or registrations under the jurisdiction of the Code held by Respondent be suspended until such time as restitution has been paid in full.

Lauren G. Van Steel
Administrative Law Judge