

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

In the matter of

Docket No. 2001-945

**Bureau of Commercial Services,
Petitioner**

Agency No. 21-00-1010-00

v

Agency: Bureau of Commercial Services

**Timothy Claude Phillips,
Respondent**

Case Type: Sanction

**Issued and entered
this 25th day of September, 2001
by Lauren G. Van Steel
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY

Appearances: Attorney Michael Homier appeared on behalf of Respondent Bureau of Commercial Services. Neither Respondent Timothy Claude Phillips, 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 June 13, 2001, scheduling a hearing for July 31, 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 April 13, 2001, 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), (b), (c) and (h); 601(1); 604(b), (c) and (d), and Administrative Rules 33(1) and 51(2) of the Residential Builders and Maintenance and Alteration Contractor Board Rules, being 1979 AC, R 338.1533(1) and R 338.1551(2).

At the hearing held on July 31, 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 taken as true.

During the hearing, the following exhibit was accepted into the record:

Petitioner's Exhibit 1 90th District Court, Charlevoix County, Judgment and sentencing documents - Case No. 00-825-FY, showing restitution ordered in the amount of \$600.00, dated 12/5/00

In addition, complaining witnesses Mr. and Mrs. Elmer Crain testified for Petitioner.

ISSUES AND APPLICABLE LAW

The issues in this matter are whether Respondent has violated the following Code sections: 2411(2)(a), (b), (c) and (h); 601(1); 604(b), (c) and (d), and Administrative Rules 33(1) and 51(2) , 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.

(b) Diversion of funds or property received for prosecution or completion of a specific construction project or operation, or for a specified purpose in the prosecution or completion of a construction project or operation, and the funds or property application or use for any other construction project or operation, obligation, or purposes.

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

(h) Failure to deliver to the purchaser the entire agreement of the parties including finance and any other charge arising out of or incidental to the agreement when the agreement involves repair, alteration, or addition to, subtraction from, improvement of, wrecking of, or demolition of a residential structure or combination of residential and commercial structure, or building of a garage, or laying of concrete on residential property, or manufacture, assembly, construction, sale, or distribution of a residential or combination residential and commercial structure which is prefabricated, preassembled, precut, packaged, or shell housing.

Sec. 601(1) A person shall not engage in or attempt to engage in the practice of an occupation regulated under this act or use a title designated in this act unless the person possesses a license or registration issued by the department for the occupation.

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.

(d) Demonstrates a lack of good moral character.

Rule 33(1) A builder or contractor shall deliver to his customer fully executed copies of all agreements between them, including specifications, and when construction is involved, both plans and specifications. He shall make certain that all such writings are definite in their terms and sufficient to express the intent of the parties with regard to the transaction, the type and amount of work to be done, and the type and quality of materials to be used, and the parties shall adhere to applicable building, housing, and zoning regulations.

Rule 51(2) Upon receipt of a valid and written complaint, the department shall assign a complaint number, acknowledge the complaint and forward a copy of the complaint to the licensee. He shall reply to the department within 15 days from receipt of the complaint and shall confirm or deny the justification of the complaint. A complaint acknowledged as justified shall be corrected within a reasonable time. If a complaint or a portion thereof is not acknowledged by the licensee as being justified, the department shall notify the complainant of the area of disagreement.

FINDINGS OF FACT

Based on the record and the default judgment granted for Petitioner, the undersigned makes the following findings of fact:

1. On or about June 18, 1999 and July 30, 1999, Respondent entered into oral contracts with Complainant Elmer Crain to perform services regulated by the Code.

2. At the time Respondent entered into the contracts, Respondent was not licensed.

3. Between June 18, 1999 and July 30, 1999, Respondent performed some of the work which was the subject of the contracts. He did not meet any exceptions from licensure at the time.

4. On July 30, 1999, Complainant Elmer Crain did pay Respondent the amount of \$1,787.00 in cash, check or money order, of which \$600.00 was paid for services to be performed in the future.

5. Respondent accepted and/or negotiated the check or money order, but has not performed the services for which payment was accepted.

6. Respondent has failed and refused to perform the service and failed and refused to return said monies, thereby engaging in conduct which is fraudulent, deceitful, and dishonest within the meaning of the Code.

7. Respondent has, without legal excuse, failed to perform the terms of the contract.

8. Respondent has failed to provide a copy of the entire agreement reached by Respondent and Elmer Crain.

9. Respondent failed to remit money to Elmer Crain.

10. Respondent has utilized funds provided for the completion of the work called for in the contract entered into July 30, 1999, for other purposes.

11. On or about December 5, 2000, Respondent was convicted in 90th District court of “Embezzlement.” His conviction derived from conduct while performing activities regulated under the Code.

12. Respondent’s conduct in engaging in embezzlement demonstrates his inability to serve the public in a fair, open and honest manner and his lack of good moral character.

13. Respondent failed to respond to the Complaint (Exhibit 1 to the Formal Complaint) in a timely manner.

14. 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 Sections 2411(2)(a), (b), (c) and (h); 601(1); 604(b), (c) and (d) of the Code, as well as Rules 33(1) and 51(2), as follows:

1. At the time Respondent entered into the contract, Respondent was not licensed, in violation of Section 601(1) of the Code.

2. Respondent has failed and refused to perform the service and failed and refused to return said monies, thereby engaging in conduct which is fraudulent, deceitful, and dishonest, in violation of Section 604(b) of the Code.

3. Respondent has, without legal excuse, failed to perform the terms of the contract, in violation of Section 2411(2)(a) of the Code.

4. Respondent has failed to provide a copy of the entire agreement reached by Respondent and Elmer Crain, in violation of Section 2411(2)(h) and Rule 33(1).

5. Respondent failed to remit money to Elmer Crain, in violation of Section 2411(2)(c) of the Code.

6. Respondent has utilized funds provided for the completion of the work called for in the contract entered into July 30, 1999, for other purposes, in violation of Section 2411(2)(b) of the Code.

7. On or about December 5, 2000, Respondent was convicted in 90th District court of "Embezzlement," in violation of MCL 750.174(3)(a). Respondent's conduct in engaging in embezzlement demonstrates his inability to serve the public in a fair, open and honest manner and his lack of good moral character, in violation of Section 604(d) of the Code.

8. Respondent failed to respond to the Complaint (Exhibit 1 to the Formal Complaint) in a timely manner, in violation of Rule 51(2).

9. 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. A civil fine of at least \$4,000.00 be assessed against Respondent.
2. Restitution be ordered in the total amount of \$600.00, to be paid to Elmer Crain based on Petitioner's Exhibit 1.
3. Any and all licenses or registrations under the jurisdiction of the Code held by Respondent be revoked if the fine and restitution amounts are not paid within the time frame set forth in the Final Order in this matter.

Lauren G. Van Steel
Administrative Law Judge