

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

In the matter of:

**HAROLD G. TACKETT
D/B/A METRO CONSTRUCTION COMPANY
License No. 21-01-078721**

**Docket No. 2002-1228
Complaint No. 21-01-2879-00**

FINAL ORDER

WHEREAS, this matter having come before the Michigan Board of Residential Builders and Maintenance & Alteration Contractors, hereafter the “Board”, on March 4, 2003 and

WHEREAS, the Board having considered the Findings of Fact and Conclusions of Law in the Hearing Report of Gregory Holiday, Administrative Law Judge, dated January 7, 2003,

WHEREAS, the Board having received the Hearing Report under MCL 339.514 and Harold G. Tackett d/b/a/ Metro Construction Company, Licensed Residential Builder, License No. 21-01-078721, hereafter “Respondent”, having been found in violation of Sections 2411(2)(m) of the Michigan Occupational Code, 1980 P.A. 299, *as amended*, hereafter the “Code”, MCL 339.2411(2)(m) 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 One Thousand Dollars and 00/100 Cents (\$1,000.00), 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. 21-01-2879-00 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 Mrs. Shirley Tomlin in the amount of Two Thousand Dollars and 00/100 Cents (\$2,000.00) by certified check made payable to Mrs. Shirley Tomlin and mailed to 18110 Muirland St., Detroit, MI 48221. Restitution shall be paid not later than sixty (60) days from the date of mailing of this Final Order.**
- 3. Respondent's failure to comply with each and every condition of this Final Order shall result in suspension of any and all licenses held by Respondent, MCL 339.2405(3), including Harold G. Tackett d/b/a/ Metro Construction Company, License No. 21-01-078721. No application for licensure, relicensure or reinstatement shall be considered by the Department until both fine and restitution are paid-in-full.**
- 4. Respondent shall submit in writing to the Michigan Department of Consumer and Industry Services, Bureau of Commercial Services, Audit Unit, P.O. Box 30018, Lansing, Michigan 48909, proof in a form acceptable to the Department of compliance with each and every requirement of this Final Order.**

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

In the matter of

Docket No. 2002-1228

**Bureau of Commercial Services,
Petitioner**

Agency No. 21-01-2879-00

v

**Agency: Bureau of Commercial
Services**

**Harold G. Tackett,
Respondent**

Case Type: Sanction

_____ /

**Issued and entered
this 7th day of January, 2003
by Gregory Holiday
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY

This proceeding was commenced with the filing of a Notice of Hearing upon a Formal Complaint dated May 6, 2002, charging Respondent with one or more violations of the Occupational Code, 1980 PA 299, as amended (Code), MCL 339.101 *et seq.* Pursuant to Section 92 of the Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.201 *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 a formal hearing.

The hearing was scheduled to be held on Friday, October 11, 2002 at 9:00 a.m., at the Bureau of Hearings of the Department of Consumer and Industry Services, Cadillac

Place, 2nd Floor Annex, Room 2-700, 3026 West Grand Boulevard, Detroit, Michigan, and the same proceeded as scheduled. Gregory Holiday presided as Administrative Law Judge. Scott Lovernick, Esq., appeared on behalf of the Bureau of Commercial Services' Enforcement Division of the Department of Consumer and Industry Services (Petitioner). Shirley Tomlin and Inspector John Treanor testified as witnesses for Petitioner. Harold Tackett d/b/a Metro Construction Company (Respondent) appeared and testified on his own behalf.

ISSUES AND APPLICABLE LAW

The general issue presented is whether Respondent violated the Code, with respect to the practice of a residential builder. The specific issues are whether Respondent violated Builder Rules 1979 AC, R 338.1551(4) and (5) and Sections 604(b) and (c) and 2411(2)(e) and (m) 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. 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:

(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.

Rule 51...(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.

Rule 51...(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.

EXHIBITS

Petitioner offered the following exhibits for consideration at the hearing:

<u>Exhibit</u>	<u>Description</u>
1	Copy of 3 Contracts with Shirley Tomlindated 12/15/99, 12/15/99 and 11/03/99
2	Copy of 6/26/01 Estimate from Bruno Building Corporation and 6/26/00 faxed Estimate from Sunnyside Construction, Inc.
3	Certificate of Licensure History of Metro Construction & Building, Inc.

Respondent offered no exhibits for consideration at the hearing.

FINDINGS OF FACT

Respondent has been licensed as a residential builder since about 1987 and is currently licensed. Respondent incorporated his business as Metro Construction & Building, Inc., but has never arranged for the corporation to obtain a residential builder's license.

On about November 3, 1999, Respondent entered into a contract with Shirley Tomlin, who resides on Muirland Street in Detroit, to perform roofing work at her other home located at 4721 Trumbull in Detroit. Before work started on the roof, Respondent halted the project because of problems with the chimney. As a result, Respondent and Ms. Tomlin entered into a 2nd contract dated 12/15/99 to remove and rebuild the chimney. In addition, they entered into a 3rd contract to replace the porch and steps. The total amount of the contracts (See Petitioner Exhibit 1) was \$19,857.80. Ms. Tomlin paid Respondent in full on the contracts.

As work progressed, Ms. Tomlin expressed dissatisfaction with the job. She felt that every time he sent someone out to do work, it was terrible. At one point, following a lengthy conversation/argument, Respondent walked off the job. When it became clear to her that she would not receive satisfaction, Ms. Tomlin complained first to the Better Business Bureau and then to the Department of Consumer and Industry Services. As a result of her complaint, the City of Detroit Department of Buildings and Safety Engineering was asked to conduct a complaint inspection. The matter was assigned to Inspector John Treanor, a

licensed building Inspector with some 25 years of both licensed and unlicensed building experience.

From the complaint inspection , Inspector Treanor issued his May 2, 2001 Building Inspection Report. Of 8 separate items of complaint verified by Inspector Treanor, he found that the gutters and roof finial cone and front porch ceiling and flooring involved poor workmanship. He considered several complaint items as violations of the 1996 BOCA Building Code and several other complaint items as violations of the 1995 CABO Building Code. Inspector Treanor identified no wilful building code violations and none of the evidence established that any building code violations were wilful. On inspection item seven, the footing test holes for front porch steps, Inspector Treanor noted that even though the contract between Respondent and Ms. Tomlin didn't include any footings and was simply to replace existing precast steps with new ones, the City would require that footing test holes be made (and if deficient, footings would have to be corrected). Inspector Treanor conducted a routine re-inspection the day before the hearing in this matter and found that inspection items four and five (front porch guardrails) had been taken care of and that portions of inspection items three (roof finial cone) and eight (front porch ceiling and flooring) had been taken care of.

Ms. Tomlin secured estimates from two contractors to correct defects on the project: one from Bruno Building Corporation in the amount of \$9,400.00 and the other from Sunnyside Construction, Inc., in the amount of \$8,750.00. Neither estimate is a fair estimate of the cost to correct the remaining defects attributable to Respondent. Both estimates include substantial work not required to correct the remaining defects. Petitioner suggested

that \$4,000.00 would be adequate to cover the cost of needed repairs. Respondent felt that the cost to correct the remaining defects is about \$400.00.

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 grounds exist for the imposition of sanctions upon Respondent. 1990 AACSR, R 339.1763.

Violation of Section 604(b) of the Code

By this charge, Petitioner asserts that Respondent practiced fraud, deceit or dishonesty in practicing as a residential builder.

The thrust of Petitioner's claim is that Respondent was doing business as Metro Construction and Building, Inc., a corporate entity and pretending to have a corporate builder license when the corporation was unlicensed. In fact, there was no evidence presented to establish that Respondent engaged in any fraudulent, deceitful or dishonest conduct. While Respondent should have taken steps to have the corporate entity licensed as a residential builder or residential maintenance and alteration contractor, his lack of knowledge in that regard does not amount to fraud, deceit or dishonesty.

Accordingly, Petitioner has not proven any violation of Section 604(b) of the Code.

Violation of Section 604(c) of the Code

By this charge, Petitioner asserts that Respondent violated Builder Rules 338.1551(4) and 338.1551(5), thereby violating Section 604(c) of the Code.

Rule 338.1551(4) sanctions a builder or contractor who fails to correct justified items of complaint within a reasonable time.

Because Respondent was prevented from correcting the remaining justified items of complaint through a lack of cooperation in obtaining a building permit, Petitioner is unable to establish that Respondent violated this rule.

Builder Rule 338.1551(5) requires that the standards of construction be in accordance with the local building code. A violation of, or failure to comply with, the building code does not constitute a violation of Builder Rule 338.1551(5). Building Code violations are addressed under Section 2411(2)(e) of the Code and are required to be willful in order to constitute a violation. As with any administrative rule, Builder Rule 338.1551(5) must be construed in light of the statute it is based upon, in this case, the Code. Construing Builder Rule 338.1551(5) in the manner sought would conflict with Section 2411(2)(e) of the Code. The Michigan legislature determined that as to building code violations, in order to constitute a misconduct under Section 2411(2)(e) of the Code, the violation must be willful. Where there is conflict between a rule and a statute, the statute controls. *Michigan Sportservice, Inc. v Commission of Department of Revenue*, 319 Mich 561; 30 NW2d 281 (1948). Builder Rule 338.1551(5) can be construed to avoid a conflict with Section 2411(2)(e) of the Code. In construing Builder Rule 338.1551(5) in light of Section 2411(2)(e) of the Code, Builder Rule 338.1551(5) governs the standards that are used by a builder or contractor. Where the builder

or contractor knows what the applicable building code requires and, despite that knowledge, elects to use and follow other standards, then a violation of Builder Rule 338.1551(5) is established. For example, where the contractor and the homeowner agree privately that the contractor need not replace rotted roof boards before re-roofing, despite the contractor's knowledge that the applicable building code requires their replacement, the contractor would be in violation of Builder Rule 338.1551(5). That willful violation may also constitute a violation of Section 2411(2)(e) of the Code. If, on the other hand, the contractor simply failed to replace some of the rotted roof boards without any decision to use other standards in place of the applicable building code, there would be no violation of Builder Rule 338.1551(5). There is no violation of Builder Rule 338.1551(5).

Accordingly, Petitioner has not proven any violation of Section 604(c) of the Code.

Violation of Section 2411(2)(e) of the Code

Section 2411(2)(e) of the Code requires proof that a Respondent willfully violated building laws. In this case, the Formal Complaint cites building code violations but does not allege that the violations were willful. None of the evidence in the record establishes that any building code violations were willful. Without some proof that the violations of building laws were willful, there can be no finding of a violation of Section 2411(2)(e) of the Code.

Accordingly, Petitioner has not proven any violation of Section 2411(2)(e) of the Code.

Violation of Section 2411(2)(m) of the Code

By this charge, Petitioner asserts that on the Tomlin project, Respondent practiced poor workmanship, or workmanship not meeting the standards of the custom or trade, verified by a building code enforcement official.

A builder or contractor is required to do the job right the first time. *Arndt v Dept Licensing and Regulation*, 147 Mich App 97; 383 NW2d 136 (1985). Inspector Treanor's verification of three items of poor workmanship after Respondent presented the job to Ms. Tomlin as complete, establishes that Respondent practiced poor workmanship on the Tomlin project.

Accordingly, Petitioner has proven, by a preponderance of the evidence, that Respondent violated Section 2411(2)(m) of the Code.

DECISION AND RECOMMENDED SANCTIONS

It is the decision of this Administrative Law Judge that Respondent violated Section 2411(2)(m) of the Code as described in this Hearing Report. Petitioner recommended that sanctions include restitution of \$4,000.00 to Shirley Tomlin and payment of a civil fine in the amount of \$2,000.00.

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

1. Payment of a civil fine in the amount of \$1,000.00.
2. Payment of restitution to Shirley Tomlin in the amount of \$2,000.00.
3. In the event the civil fine and restitution have 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 and restitution have been paid.

Gregory Holiday
Administrative Law Judge