

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

In the matter of

Docket No. 2000-1090

**Bureau of Commercial Services,
Petitioner**

Agency No. 21-99-5250-00

v

**Agency: Bureau of Commercial
Services**

**Kenneth Romain,
Respondent**

Case Type: Sanction

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**Issued and entered
this 1st day of February, 2001
by Stephen B. Goldstein
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY

This matter commenced with the issuance of a Notice of Hearing dated August 23, 2000, scheduling a contested case hearing for September 29, 2000. The Notice of Hearing was mailed to Respondent's last known address.

Appearances: Hal Ziegler, appeared on behalf of Petitioner, Bureau of Commercial Services. Neither Respondent, Kenneth Romain, nor an attorney on behalf of Respondent appeared at the hearing.

The Notice of Hearing was issued pursuant to allegations by the Bureau of Commercial Services (Petitioner) that Kenneth Romain, (Respondent) violated the Occupational Code, 1980 PA 299, as amended, being MCL 339.2401-2412; MSA 18.425(2401)-(2412) (Code).

On September 19, 2000, A Request for Adjournment was received on behalf of the Petitioner requesting a new hearing date. On October 19, 2000, an Order Granting Adjournment was issued and entered by this presiding Administrative Law Judge rescheduling this matter for December 11, 2000.

The hearing in this matter commenced as scheduled on December 11, 2000. At the hearing, Mr. Ziegler requested that the Petitioner be allowed to proceed in the Respondent's absence pursuant to Section 72 of the Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.272; MSA 3.560 (272) (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 Petitioner's motion for default was granted. As a result of the default, the factual allegations contained in the Petitioner's Formal Complaint were deemed true.

During the December 11, 2000, hearing, no exhibits were accepted into the record and no witnesses testified at the hearing.

ISSUES AND APPLICABLE LAW

The general issue in this matter is whether or not Respondent violated the Occupational Code, 1980 PA 299, as amended, being MCL 339.101 *et seq*; MSA 18.425(101) *et seq*. (Code).

The specific issues in this case are whether or not the Respondent violated the following Sections of the Code and Rules: Section 2411(2)(m); Section 604(c); Section 604(g) (Code); 1979 AC R 338.1521(3); 1979 AC R 338.1551(2); and 1979 AC R 338.1551(5) (Rule). Those Sections and Rules state in pertinent part:

Sec. 2411 Complaint; conduct subject to penalty; suspension or revocation of license; violation of §§ 338.3101 to 338.3319 or §§ 408.1057 to 408.1060f.

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

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

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.

(g) Commits an act which demonstrates incompetence.

R 338.1521(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 copartnership shall submit a certified copy of the certificate of copartnership. An applicant operating as a corporation shall submit a copy of the articles of certified copy of the assumed name certificate. An applicant operating as a copartnership shall submit a certified copy of the certificate of copartnership. 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.

R 338.1551(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 acknowledges as justified shall be corrected within a reasonable time. If a complaint or a portion thereof is not acknowledges by the licensee as being justified, the department shall notify the complainant of the area of disagreement.

R 338.1551(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

Based on the record, I make the following findings of fact:

1. On or about June 14, 1999, Respondent entered into a contract with Dana and Cindy Onuskanich to perform services which were regulated by the Code.
2. Respondent has failed to perform the requirements of the contract in a workmanlike manner.

3. Respondent, in performance of the contract, failed to comply with the 1995 Council of American Building Officials Code which was adopted by the Township of North Branch, effective September 21, 1996.

4. Respondent failed to meet minimal standards of acceptable practice for Respondent's occupation as a residential builder.

5. Respondent failed to file an assumed name or d/b/a certificate with the Commercial Licensing Division of the Department of Consumer & Industry Services or its predecessor before he commenced doing business as Ken Romain Contracting.

6. Respondent failed to respond to the Complaint in a timely manner.

7. 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 Rules and Sections of the Code:

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

2. Respondent, in performance of the contract, failed to comply with the 1995 Council of American Building Officials Code which was adopted by the Township of North Branch, effective September 21, 1996, violating Rule 1551(5).

3. Respondent failed to meet minimal standards of acceptable practice for Respondent's occupation as a residential builder, violating Section 604(g) of the Code.

4. Respondent failed to file an assumed name or d/b/a certificate with the Commercial Licensing Division of the Department of Consumer & Industry Services or its predecessor before he commenced doing business as Ken Romain Contracting, violating Rule 1521(3).

5. Respondent failed to respond to the Complaint in a timely manner, violating Rule 1551(2).

6. Respondent has violated a rule of conduct in practicing an occupation, violating 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 Administrative Law Judge to the Board:

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

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

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Stephen B. Goldstein
Administrative Law Judge