

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

In the matter of

Docket No. 2000-147

Bureau of Commercial Services,
Petitioner

Agency No. 21-97-2862-00

v

Agency: Bureau of Commercial
Services

Manufacturers Discount Window &
Siding

Carol Jeanne Rothenberg, Q.O.,
Respondent

Case Type: Sanction

Issued and entered
this 13th day of November 2000
by Robert H. Mourning
Administrative Law Judge

REMAND HEARING REPORT

PROCEDURAL HISTORY

This matter was commenced with the issuance of a Notice of Hearing upon a Formal Complaint dated October 14, 1999, alleging violations by Respondent of the Occupational Code of 1980, 1980 PA 299, as amended, MCL 339.101 *et seq.*; MSA 18.425(101) *et seq.*(Code).

The Notice of Hearing scheduled the contested case hearing to commence at 9:00 a.m. on March 20, 2000, in the hearing rooms of the Department of Consumer and Industry Services, Bureau of Hearings, 2501 Woodlake Circle, Okemos, Michigan. The Notice also indicated that if a party failed to appear at the hearing as scheduled, a default may

be entered pursuant to Section 78 of the Administrative Procedures Act of 1969, as amended, MCL 24.271 *et seq.*; MSA 3.560(101) *et seq.* (APA).

Attorney Kimball Smith, III, appeared on behalf of the Bureau of Commercial Services (Petitioner). Neither Carol Jeanne Rothenberg, Q.O., (Respondent), nor an attorney on behalf of the Respondent, appeared for the hearing.

Attorney Smith requested that the Respondent be held in default pursuant to Section 78 of the APA, which provides that:

“(2) Except as otherwise provided by law, disposition may be made of a contested case by...default....”

The Administrative Law Judge granted the Petitioner’s motion for a default. As a result of the default, the factual allegations contained in the complaint were deemed true.

On April 21, 2000, the Administrative Law Judge issued and entered a Hearing Report in the above matter. On or about June 1, 2000, a Certification of Record was sent to the Residential Builders’ and Maintenance and Alteration Contractors’ Board (Board). Pursuant to a meeting on July 11, 2000, the Board issued an Order of Remand on September 1, 2000 for the purpose of obtaining an amended certified record containing all attachments.

The Notice of Remand Hearing scheduled the hearing to commence at 9:00 a.m. on October 30, 2000, in the hearing rooms of the Department of Consumer and Industry Services, Bureau of Hearings, 2501 Woodlake Circle, Okemos, Michigan.

Attorney Kimball Smith, III, appeared on behalf of the Bureau of Commercial Services (Petitioner). Neither Carol Jeanne Rothenberg, Q.O., (Respondent), nor an attorney on behalf of the Respondent, appeared for the hearing.

The Petitioner offered the following exhibits that were admitted into evidence:

Exhibit 1: Statement of Complaint, October 27, 1997.

Exhibit 2: Building Inspection Report, August 17, 1999.

ISSUES AND APPLICABLE LAW

The specific issues are whether the Respondent violated Sections 604(c) and 2411(2)(m) of the Code, MCL 339.604(c); MSA 18.425(604)(c), MCL 339.2411(2)(m); MSA 18.425(2411)(2)(m), and rule 51(2), (4) & (5) of the Board, promulgated thereunder, 1979 AC, R 338.1551(2), (4) & (5).

Section 604(c) of the Code 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.

Section 2411(2)(m) of the Code provides that:

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.

Rule 51(2), (4) & (5) provides that:

- (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.
- (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 proceeding, the Respondent has been licensed as a residential builder under the Code.
2. At all times relevant to this proceeding, the Respondent had a place of business at 8996 Middlebelt, Livonia, in the County of Wayne, Michigan (48150).
3. A complaint against the Respondent, conforming to the requirements of Section 2411 of the Code has been filed with the Department of Consumer and Industry Services.
4. An authority charged with the enforcement of the laws governing construction of residential or residential and commercial buildings in the political subdivision in which the building is located, has submitted an evaluation of the Complaint submitted.
5. Respondent entered into a contract to perform services regulated by the Code with Margaret Baskin on or about October 9, 1996.
6. Respondent has failed to perform the requirements of the contract in a

workmanlike manner, contrary to Section 2411(2)(m) of the Code.

7. Respondent, in performance of the contract, failed to comply with Section 1403.3 of 1993 Building Officials and Code Administrators Code, pursuant to the State Construction Code, 1972 PA 230, contrary to Rule 51(5).
8. Respondent failed to correct items within a reasonable time, contrary to Rule 51(4).
9. Respondent failed to respond to the Complaint in a timely manner, contrary to Rule 51(2).
10. Respondent has violated a rule of conduct in practicing an occupation, contrary to Section 604(c) of the Code.
11. The Respondent was properly served with notice of this proceeding but did not appear for the hearing.

CONCLUSIONS OF LAW

The principles that govern judicial proceedings also apply to administrative hearings. 8 Callaghan's Michigan & Practice (2d ed), § 60.48, p 230. The burden of proof is upon the Petitioner to prove, by a preponderance of the evidence, that the Respondent violated the Code. 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).

Having granted a default on behalf of the Petitioner, the Administrative Law Judge concludes that the Petitioner has established, by a preponderance of the evidence, that the Respondent has violated Sections 604(c) and 2411(2)(m) of the Code and Rule 51(2), (4) & (5).

RECOMMENDED SANCTIONS

The Administrative Law Judge recommends the following sanctions:

- 1) The Respondent be assessed a civil fine in the amount of \$750.00.
- 2) Restitution to Margaret Baskin in the amount of \$750.00.
- 3) In the event that the civil fine and restitution have not been paid within 60 days following the issuance of a final order, the Respondent's Article 24 licenses should be suspended. No new or renewal licenses shall be issued until the civil fine and restitution are paid in full.

Robert H. Mourning
Administrative Law Judge