

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

In the Matter of:

Docket No. 2000-1522

**Bureau of Commercial Services,
Petitioner**

Agency No. 21-99-3052-00

v

**Agency: Bureau of Commercial
Services**

**Timothy H. Koczara,
dba Homeowners Modernization
Company
Respondent**

Case Type: Sanction

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**Issued and entered
this 8th day of June, 2001
by Gregory Holiday
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY

This proceeding was commenced with the issuance of a Notice of Hearing upon a Formal Complaint dated May 19, 2000, charging Respondent with violations of the Occupational Code, 1980 PA 299, as amended (Code), MCL 339.101 *et seq.*; MSA 18.425(101) *et seq.* Pursuant to Section 92 of the Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.201 *et seq.*; MSA 3.560(101) *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 hearing as described above. A hearing was scheduled to be held on September 19, 2000 at the Bureau of Hearings of the Department of Consumer and Industry

Services, 1200 Sixth Street, Eighth Floor, Detroit, Michigan. At Respondent's request filed on August 31, 2000, and with no objection by Petitioner, the September 19, 2000 hearing was postponed to November 7, 2000 at 9:30 a.m. At that hearing, Administrative Law Judge Erick Williams agreed to dismiss the proceedings because the parties entered into an agreement to resolve the matter. On March 5, 2001, Petitioner filed a Request for Hearing because the Department rejected the proposed settlement of the parties. On March 7, 2001, a Notice of Remand Hearing was issued which scheduled a remand hearing for Friday, April 13, 2001 at 9:30 a.m. On April 4, 2001, Respondent's counsel filed a Request for Adjournment and, with no objection by Petitioner, the hearing was postponed to Monday, May 7, 2001 at 9:30 a.m., which hearing was held as scheduled. Gregory Holiday presided as Administrative Law Judge. Tracey Hampton, Esq., appeared on behalf of the Bureau of Commercial Services' Enforcement Division of the Department of Consumer and Industry Services (Petitioner). Dennis Cairns, Olga Panagos, Christine Panagos and Chris Panagos testified for Petitioner. Donn Fresard, Esq. appeared on behalf of Timothy H. Koczara dba Homeowners Modernization Company (Respondent), who testified on his own behalf.

ISSUES AND APPLICABLE LAW

The general issue presented is whether or not Respondent violated the Code with respect to the practice of a residential builder. The specific issues are whether or not Respondent violated Rules 1979 AC, R 338.1521(3), 1979 AC, R 338.1533(3), 1979 AC, R 338.1551(4) and 1979 AC, R 338.1551(5) and Sections 601(1), 604(c), 604(g) , 2411(2)(c), 2411(2)(l) and 2411(2)(m) of the Code, which provide, in pertinent part:

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.

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

(g) Commits an act which demonstrates incompetence.

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:

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

(l) Becoming insolvent, filing a bankruptcy action, becoming subject to a receivership, assigning for the benefit of creditors, failing to satisfy judgments or liens, or failing to pay an obligation as it becomes due in the ordinary course of business.

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

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 co-partnership shall submit a certified copy of the certificate of co-partnership. 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.

Rule 33...(3) Changes in the agreement shall be in writing, dated and initialed by the parties to be bound.

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	Not offered
2	5/28/99 Building Inspection Report of Dennis S. Cairns

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- 3 Copy of 10/14/97 Contract Proposal between Homeowners Modernization & Construction Co. and Olga Panagos
- 4a Photo showing missing trim
- 4b Photo showing trim/soffit falling onto downspout
- 5a Copy of 2/9/98 Change Order revising the contract from \$104,000.00 to \$117,494.00
- 5b Copy of Undated Change Order revising the contract from \$117,494.00 to \$126,191.00
- 5c Copy of April 6, 1998 Change Order revising the contract from \$126,191 to \$153,034.00
- 6 Copy of 2/25/98 Claim of Lien of Precision Temp Heating & Cooling, Inc. in the amount of \$3,107.00
- 7 Copy of 11/19/97 Claim of Lien of Rea 7 Son Construction in the amount of \$4,017.30
- 8 Estimate from Sears Siding - (Rejected and Withdrawn)
- 9 Copy of 6/18/99 Notice to Respondent from the Department with Certificate of Mailing
- 10 Copy of 7/19/99 Repair/Correction Notice to Respondent
- 11 Copy of Settlement Letter from Respondent to the Department (Rejected and Withdrawn)

Respondent offered the following exhibits for consideration at the hearing:

Exhibit **Description**

- 1a Photo showing rear elevation of home before construction
- 1b Photo showing rear elevation of home after construction

- 2a Photo showing front elevation of home before construction
- 2b Photo showing front elevation of home after construction
- 3 Copy of 6/30/98 Financial Summary and Recap submitted to Panagos by Respondent
- 4a Copy of Complete Home Improvement Payment Schedule - Page 1
- 4b Copy of Complete Home Improvement Payment Schedule - Page 2
- 5 Copy of 2/22/99 Partial Unconditional Waiver of Precision Temp Heating
- 6 Copy of Cabinetry Layout from Home Depot

FINDINGS OF FACT

On October 14, 1997, a contract (Petitioner Exhibit 3) was executed between Respondent and Olga Panagos to essentially rebuild a “cottage” located at 28918 Jefferson, St. Clair Shores. At the time Respondent entered into the contract, and performed services under the contract, Respondent was not licensed under Article 24 of the Code as required. Ms. Panagos’ son, Chris Panagos, was actively involved with Respondent in generating the terms of the contract. Daughter Christine Panagos was also involved on behalf of her mother. The handwritten language was added to the contract at that time and agreed upon by the parties. Construction under the contract commenced in late 1997 and was 90% completed by June 1998. While the parties anticipated completion by May 1, 1998, that provision was negated when the parties agreed to contract changes (Petitioner Exhibits 5a, 5b and 5c) which increased the project cost by nearly 50%. The final agreed contract price was \$153,034.00 (though the contract change orders were not initialed by the homeowner or

anyone on her behalf) of which Respondent was paid about \$151,000. Ms. Panagos was entitled to a credit of up to \$4,500.00 for cabinets, flooring and replumbing. In addition, there was a period of time when Respondent had to wait for Detroit Edison to install a drop.

Respondent continued to do work sporadically from June 1998 until about June 1999, when he was fired from the project. Prior to that, as construction was proceeding, Chris Panagos would point out construction problems to Respondent who would assure Chris Panagos that the problems would be corrected. As uncorrected problems mounted, the Panagos' became increasingly concerned and a meeting was held at which they showed Respondent each of the problems they complained about. Inspector Cairns was also present at the meeting and walk-through. The Panagos left the meeting believing that Respondent agreed to correct the problems. Immediately after the meeting, Christine Panagos, who had been handling much of the transaction for her mother, took some photos (Petitioner Exhibits 4a and 4b) showing problems with the trim. Then, Respondent notified them by letter that, in his opinion, the siding did not require any repairs. Christine Panagos considered that to be the last straw and assisted her mother in filing a Statement of Complaint with the Department and contacting the building inspector to come out and inspect the home. As a result of the apparent impasse, the Panagos family terminated Respondent's services on the project orally and by letter dated May 5, 1999. Respondent Exhibits 1a and 1b are before and after views of the rear elevation of the home. Respondent Exhibits 2a and 2b are before and after views of the front elevation of the home.

While the Panagos family believes that Respondent charged them for priming and painting, the record does not support that claim, even where Respondent tendered a request for payment citing that as work that was done. Respondent was entitled to the full contract price (less allowances) when the contract was completed. There is no evidence that the Ms. Panagos paid in excess of the contract price. The only issues are whether the work was completed and whether it was done correctly.

Dennis Cairns started as a Building Inspector for St. Clair Shores in about 1996. He became a Building Official in about 1998. Inspector Cairns has been a licensed builder since about 1967 and retired from active construction in about 1999. Inspector Cairns is considered an expert in the building trades. Inspector. Cairns performed a complaint inspection of the Panagos home on May 21, 1999 and completed his Building Inspection Report (Petitioner Exhibit 2) noting the following eight items:

1. Siding/Trim was coming off and not secured properly - he felt that the siding could be repaired, except for one piece of trim near an electrical meter, that needed to be replaced - a 2-day job.
2. We couldn't find an access door to the crawl space. Code requires it. To correct this problem, it would require cutting a hole for access.
3. Inadequate venting of crawl space - Building Code requires 1 sq. ft. venting per 100 feet of crawl space area. This space needed at least two vents. To correct this problem, it would require removing a couple blocks and installing a vent in each of two locations.

4. Missing door and window hardware.
5. Nail pops in 2nd fl hall & bedroom.
6. Missing ceramic tile 2nd fl. bathroom - To correct this problem, it would require replacing the missing tile and properly grouting it.
7. Missing front step - required because of the height from the foundation to the porch - easily correctable by installing a front step.
8. Kitchen cabinet trim incorrectly installed - some ends were not mired properly and one piece of crown molding was being held with a temporary nail.

Inspector Cairns is not aware whether Respondent corrected the items of complaint that he justified in his Building Inspection Report. According to Christine Panagos, inspection items 1, 2, 3, and 7 are still outstanding while inspection items 4, 5, 6 and 8 have been corrected at their expense. According to Chris Panagos, the house is reasonably complete but the siding is still an issue.

A civil suit was filed against Respondent on behalf of Ms. Panagos as a result of the defects in the construction project.

Respondent insists that the contract did not include priming or painting (See Petitioner Exhibit 3, paragraph19), that he did not charge the Panagos for priming or painting and that the draw schedule (Resp Exhibit 4b) erroneously talks about painting. Respondent notes that under the contract, he was to install the kitchen cabinets provided by the homeowners and it wasn't until October, 1998 when the cabinets were provided following the September 1998 Home Depot designs (See Respondent Exhibit 6).

According to Respondent, he was in a position to repair all of the items set forth by the Building inspector in May 1999 and received the termination letter after having completed 95% of the items. Respondent acknowledged receiving the Notice To Respondent (Petitioner Exhibit 9) and the Repair/Correction Letter (Petitioner Exhibit 10)

Respondent failed to file an assumed name or d/b/a certificate or articles of incorporation with the Department before he commenced doing business as Homeowners Modernization & Construction Co.

Respondent acknowledged that in another unrelated proceeding, he was fined by the Department. Subsequent to being fined, he filed bankruptcy and believed that the civil fine would be discharged. When he learned that the civil fine had not been discharged and that his license had been suspended for failure to pay the civil fine, he paid the fine.

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 Respondent violated the Code. 1990 AACRS, R 339.1763.

Violation of Section 601(1) of the Code

By this charge, Petitioner asserts that Respondent was not licensed as a residential builder at the time he entered into the Panagos contract and when he performed services under the Panagos contract. Respondent essentially admitted to this charge, offering, in mitigation, the fact that he had recently filed bankruptcy but had not paid a civil fine that he

thought might have been discharged in bankruptcy; and that when he learned that the civil fine had not been discharged, he paid the civil fine to obtain the return of his residential builder's license.

Accordingly, Petitioner has proven, by a preponderance of the evidence, that Respondent violated Section 601(1) of the Code.

Violation of Section 604(c) of the Code

By this charge, Petitioner asserts that Respondent violated Builder Rules 338.1521(3), 338.1533(3), 338.1551(4) and 338.1551(5), thereby violating Section 604(c) of the Code.

Builder Rule 338.1521(3) sanctions a builder or contractor who fails to submit to the Department a certified copy of the assumed name certificate before operating under the assumed name. Respondent essentially admitted to this violation, suggesting that it was an oversight.

Builder Rule 338.1533(3) sanctions a builder or contractor who fails to have changes to an agreement placed in writing dated and initialed by the parties to be bound. In this case, while Respondent prepared and went over change orders with Dr. Panagos (for his mother), Respondent failed to obtain initials or a signature in violation of Builder Rule 338.1533(3).

Builder Rule 338.1551(4) sanctions a builder or contractor who fails to correct justified items of complaint within a reasonable time. Because Respondent was made aware of Inspector Cairns' verification of the defects in late July 1999 and because Respondent was

“fired” from the job around that same time with no opportunity to correct, the evidence is insufficient to establish that Respondent failed to correct justified items of complaint within a reasonable time.

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).

Respondent's violation of Builder Rules 338.1521(3) and 338.1533(3) constitute violation of Section 604(c) of the Code.

Accordingly, Petitioner has proven, by a preponderance of the evidence, that Respondent violated Section 604(c) of the Code.

Violation of Section 604(g) of the Code

By this charge, Petitioner asserts that Respondent engaged in incompetence within the meaning of the Code. The Code defines incompetence at Section 104(8) as meaning, "...a departure from, or a failure to conform to, minimal standards of acceptable practice for the occupation."

In this case, while Inspector Cairns identified a number of defects with the work, he did not offer any opinion on whether Respondent's work constituted a departure from, or a failure to conform to, minimal standards for a residential builder. The items identified by Inspector Cairns were not items that would obviously depart from or fail to conform to, minimal standards.

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

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

By this charge, Petitioner asserts that Respondent failed to account for or remit monies coming into his possession but belonging to others.

In support of this charge, Petitioner points to the November 19, 1997 Claim of Lien filed by Rea & Son Construction and the February 25, 1998 Claim of Lien filed by Precision Temp Heating & Cooling, Inc. Under the circumstances of this case, the claims of liens, in and of themselves, are insufficient to establish that there are or were amounts due to the lien claimants for which Respondent had received payment.

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

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

By this charge, Petitioner asserts that Respondent failed to satisfy one or more liens in violation of Section 2411(2)(l) of the Code.

Again, under the circumstances of this case, the claims of liens, in and of themselves, are insufficient to establish that there are or were amounts due to the lien claimants for which Respondent had received payment.

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

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

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

Inspector Cairns' Inspection Report and testimony adequately establish that there were six separate items of poor workmanship on the project. Respondent's testimony did not refute the findings of Inspector Cairns. Respondent's inability to return to the project to correct the defects is immaterial to this charge. A builder or contractor is required to do the job right the first time. *Arndtv Dept Licensing & Regulation*, 47 Mich App 97; 383 NW2d 136 (1985).

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 Builder Rules 338.1521(3) and 338.1533(3) and Sections 601(1), 604(c) and 2411(2)(m) of the Code, as described in this Hearing Report. Petitioner recommended that sanctions include revocation of license and a \$10,000.00 civil fine. Petitioner is not seeking restitution because of the pendency of a civil matter between Respondent and the homeowner. Respondent suggested that the sanctions should be commensurate with the violations found.

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

1. Payment of a civil fine in the amount of \$3,500.00
2. In the event the civil fine has 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 has been paid.

Gregory Holiday
ADMINISTRATIVE LAW JUDGE