

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

In the matter of

Docket No. 2001-1784

**Bureau of Commercial Services,
Petitioner**

Agency No. 65-00-4854-00

**v
Kevin H. Elumbaugh,
Respondent**

**Agency: Bureau of Commercial
Services**

Case Type: Sanction

**Issued and entered
this 27th day of September, 2002
by Lauren G. Van Steel
Administrative Law Judge**

AMENDED HEARING REPORT

PROCEDURAL HISTORY

Appearances: Tracey L. Hampton, Attorney at Law, appeared on behalf of Petitioner Bureau of Commercial Services. Kevin H. Elumbaugh, Respondent, appeared on his own behalf.

This proceeding commenced with the filing of a Notice of Hearing dated October 16, 2001, scheduling hearing for November 26, 2001. The Notice of Hearing was issued pursuant to a Formal Complaint filed on August 9, 2001, which alleged noncompliance with the Michigan Occupational Code, 1980 PA 299, as amended, MCL 339.101 *et seq.* (Code), specifically Sections 604(b) & (c), as well as Rule 333(1) of the Board of Real Estate Brokers and Salespersons General Rules, being 1991 MR 4, R339.22333(1). [Note: The Formal Complaint cites Rule 333(1) as "1991 AACS R338.22333(1)" in error].

The hearing was held as scheduled on November 26, 2001. Reva J. Hurd, Complainant, testified for Petitioner, by means of telephone. The following exhibits were offered by Petitioner and accepted into the record as evidence:

Petitioner's Exhibit 1 Sales Contract, dated June 4 and 7, 1999

Petitioner's Exhibit 2 Seller's Disclosure Statement, dated July 12, 1999

Petitioner's Exhibit 3 Invoice from Crittenden Electric Inc., dated October 26, 2000, and copy of Check No. 1042; R.O. Quick Construction, Inc. proposal, dated August 17, 2001, for \$3,671.00, marked "paid in full 9-5-01"

Petitioner's Exhibit 4 Memorandum of Findings by Shannon E. Bush, dated June 29, 2001

Petitioner's Exhibit 5 Letter from Jeff Hugo to Mr. & Mrs. Hurd, dated April 25, 2000

Respondent testified on his own behalf and offered the following exhibit, which was accepted into the record as evidence:

Respondent's Exhibit A Inspection Notice

On December 3, 2001, Petitioner filed its Petitioner's Exhibit 5, along with the original Petitioner's Exhibit 3 (the admitted exhibit had been a poor photocopy). On January 14, 2002, the hearing transcript was received in the Bureau of Hearings. The record was closed after that date.

ISSUES AND APPLICABLE LAW

The issues in this matter are whether Respondent has violated Sections 604(b) & (c) of the Code, and/or Rule 333(1) of the Board of Real Estate Brokers and Salespersons General Rules, which provide in pertinent part as follows:

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 [MCL 339.604(b) & (c)].

Rule 333(1) A licensee shall not, directly or indirectly, misrepresent material facts [1991 MR 4, R339.22333(1)].

FINDINGS OF FACT

Based on the record, the undersigned makes the following findings of fact:

1. Respondent resides in Millington, Michigan and has been a licensed real estate salesperson since 1997. At times pertinent to this matter, Respondent was employed as a real estate salesperson with J. McLeod Realty in Millington. He is now self-employed through a Century 21 realty in Millington [Tr, 39-40].

2. On or about March 10, 1999, Respondent listed a property located at 4780 Caine Road in Vassar Michigan [Tr, 40-41].

3. Complainants Glen and Reva Hurd first came into contact with Respondent after seeing the listing. The property contained approximately 10 acres of land, with an older 1960's-era single-wide trailer or mobile home residence. The mobile home had an addition from about 1998. It was owned and lived in by Robert and Vicki Blogg [Tr, 9, 41; Pet. Exh. 1; Statement of Complaint].

4. The 1998 addition with upstairs loft was about 12 by 20 feet in size. It was built by Mr. Blogg himself to Respondent's knowledge. Mr. Blogg currently works as a contractor [Tr, 42].

5. Respondent admitted that the mobile home itself did not appear in good shape, but the addition did. The mobile home property was not unusual for the area. Respondent did not learn from Mr. Blogg that the property was not up to code, though. On March 2, 1999, Mr. Blogg completed and signed the Seller's Disclosure Statement. There was nothing on the completed Seller's Disclosure Statement that addressed possible code violations. Respondent could not readily see anything about the property not up to code [Tr, 43-44, 48; Pet. Exh. 2].

6. Respondent did not check with local building inspectors before listing the property. He "hardly ever" checks with such inspectors and explained as follows:

I guess you have a checklist of things that you go through and that's not a thing that's usually considered. If I was working, perhaps, as a buyer's agent and someone was paying me to find them a property, then most likely, yes, I would have, but I just listed the property and he filled out the seller's disclosure and it was sold.

* * *

[S]ince this stuff has happened I have asked many people, whether it be continuing education, whether it be other brokers of how I should deal with this, and they say that we have no responsibilities at all to check with the township when listing a property. That's why the seller fills out a seller's disclosure [Tr, 47].

7. To Respondent's knowledge, the Tuscola County building authority does not require that a property be brought up to code before being sold, or that a certificate of occupancy be issued before it is sold once occupied [Tr, 49].

8. Complainants tried to set up an appointment with Respondent to see the property. According to Mrs. Hurd, she spoke with Respondent about going out to see the property herself with the Bloggs [Tr, 9-10].

9. Mrs. Hurd set up an appointment to see the property with Respondent, but he failed to appear at the scheduled time. Another real estate salesperson from J. McLeod Realty, Lori Kilmer, showed Complainants the property [Tr, 11].

10. On June 7, 1999, Complainants fully executed a purchase agreement to buy the property for \$46,900.00 [Tr, 11-12; Pet. Exh. 1].

11. At some point, Complainants signed an "Inspection Notice," which states as follows:

We have been advised by Seller's agent, for J. McLeod Realty, Inc., to obtain an inspection of the premises to determine the condition of the premises and all articles of personal property included in the sale.

No representation or warranty of condition of the property or the contents therein has been made, other than specifically stated in the Purchase Agreement, either verbally or in any written form, by Seller or Seller's agent, J. McLeod Realty, Inc., REALTORS [Resp. Exh. A].

Mrs. Hurd acknowledged at the hearing having signed the Inspection Notice, but thought it had to do with the "land part" [Tr, 26].

12. The Complainants did not have an inspection done on the property, "because at the time we signed all this I didn't know something was wrong" [Tr, 31].

13. Respondent felt that the Complainants were in a hurry to close on the property, because of its low price for the area, and may have foregone the inspection for that

reason. He believes that the Complainants might have thought he was trying to get the property before them and so dealt with Ms. Kilmer [Tr, 49-50, 58].

14. On July 12, 1999, Complainants signed for receipt of a Seller's Disclosure Statement. The Seller's Disclosure Statement, signed by Robert Blogg and dated March 2, 1999, has "No" checked under "Other Items * * * 4. Structural modification, alterations or repairs made without necessary permits or licensed contractors?" Complainants closed on the property on July 12, 1999 [Tr, 12; Pet. Exh. 2].

15. Complainants purchased the property through Lori Kilmer of J. McLeod Realty. Ms. Kilmer was the "sales agent" listed on the purchase agreement; Respondent was the "listing agent" [Tr, 24; Pet. Exh. 1].

16. Subsequently, Complainants put up a pole barn on the property. They obtained a permit from Tuscola County. When Jeff Hugo, Assistant Director of Building Codes for Tuscola County, came out to inspect the pole barn on or about December 10, 1999, he informed the Complainants that the 1998 mobile home addition was not up to code [Tr, 15-16; 27-28, 33].

17. Mrs. Hurd also testified that Mr. Hugo told her that he had previously informed Respondent that the property was not up to code [Tr, 28-29]. Mrs. Hurd testified:

And he stated to us that he had told Mr. Elumbaugh on the phone that the place was not up to code. It should not be sold, but he couldn't tell him he couldn't sell it, but it should not be sold unless it was made aware to the buyer that it was not up to code. And he told me that he was going on the witness stand and raise his right hand and look Kevin in the eye and tell him that he did speak with him [Tr, 15].

18. Petitioner's Exhibit 5 is a photocopy of a letter, dated April 25, 2000, that Complainants received from Mr. Hugo [Tr, 32-33]. Petitioner did not call Mr. Hugo as a witness [Tr, 36]. The letter, which is not notarized, states in pertinent part:

My telephone records indicate that on March 23, 1999 I spoke to Mr. Kevin Elumbaugh * * *[and] informed him that the above referenced home, he had listed for sale, had an outstanding Field Correction Notice with several code violations that had not been corrected. Also, the addition that had been constructed had no building inspections requested or completed [Pet. Exh. 5].

19. Respondent testified at the hearing and specifically denied having the above-related telephone discussion of March 23, 1999, with Mr. Hugo. Respondent also denied knowing about any code violations or inspection "tickets" on the property before its sale. Respondent stated that the first he had heard about the alleged telephone call with Mr. Hugo was about June 2000, after Mrs. Hurd had contacted an attorney. The attorney faxed telephone records to him with a telephone number highlighted. The highlighted telephone number, however, "was an old pager that I had that he got off one of my name writers. It's just a numeric pager. You don't actually talk to nobody, you don't leave messages, it's just you punch in a number." Respondent did not think the pager number, which had been on a "name writer" attached to a yard sign, was even an active number at the time [Tr, 44-46, 51, 54-55].

20. Petitioner's Exhibit 4 is a Memorandum of Findings, which purports to be a summary of findings by Petitioner's investigator or "agent," Shannon E. Bush. It contains hearsay statements, purportedly relaying statements from Mr. Hugo that he had previously told Respondent that there were outstanding field correction notices on the property, to which Respondent allegedly replied, "what do you want me to do about it" [Pet. Exh. 4].

21. Mrs. Hurd has not filed a complaint against Ms. Kilmer's salesperson license or the McLeod realty license, because "Kevin was the one that was told, and I don't think he ever told her. I don't think he ever told McLeods" [Tr, 30].

22. Petitioner did not call Ms. Bush to testify as a witness at the hearing.

23. The Complainants sought to add on a double-wide to the mobile home addition. Mrs. Hurd related that when the contractor went to the Tuscola County building officials for a permit, "he came back about three weeks later and told us that this was not up to code and they could red tag it and leave us in the street if they wanted to * * * because it was not okay for permanent living" [Tr, 16].

24. Complainants made some repairs to the home themselves, including the foundation. They paid Crittenden Electric, Inc. to complete some electrical work at a cost of \$250.00. In addition, Complainants paid R.O. Quick Construction \$3,671.00 to make repairs, including ripping off a dormer that was not up to code. They also paid another contractor, CML, to do foundation work for \$101.63; and \$199.38 to Carter Lumber to rip out shingles. In total, Complainants spent \$4,222.01 to repair the home and bring it up to code [Tr, 17-20; Pet. Exh. 3].

25. On or about September 13, 2000, Complainants filed a statement of complaint with Petitioner Bureau, after first contacting an attorney and the Attorney General's office [Tr, 16, 34].

26. Respondent currently addresses possible code violations with the Director of the Tuscola County Inspection Department, if he becomes aware of them prior to a property's sale, because of possible "hard feelings between me and Mr. Hugo" [Tr, 51].

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.

Petitioner has alleged that Respondent's failure to disclose the existence and/or status of building code violations for the property in question constituted the direct or indirect misrepresentation of material facts, contrary to Rule 333(1) and Section 604(c) of the Code, and fraud, deceit or dishonesty in the practice of an occupation, contrary to Section 604(b) of the Code. The weight of the evidence in the record, however, does not support Petitioner's allegations. Respondent credibly testified at the hearing that he was unaware of any building code violations prior to the listing and sale of the property. He had the property owner complete and sign a Seller's Disclosure Statement, which indicated no code violation issues.

Mrs. Hurd's testimony about Mr. Hugo's prior statements to Respondent, along with statements contained in Petitioner's Exhibits 4 and 5, are entitled to little weight as they constitute hearsay evidence only, without an exception. Petitioner did not call Mr. Hugo as a witness to confirm that he sent the above-quoted letter, or to be further questioned and cross-examined by Respondent about his alleged prior statements. The reliability of the hearsay statements is further undercut by Respondent's uncontested testimony that the

telephone number that Mr. Hugo allegedly called was a pager number only, which could not even take voice messages.

In summary, Petitioner has not shown by a preponderance of the evidence that Respondent violated Sections 604(b) and (c) of the Code, and/or Rule 333(1) of the Board of Real Estate Brokers and Salespersons General Rules, being 1991 MR 4, R339.22333(1).

ORDER

Based upon the above findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that the Formal Complaint issued on August 9, 2001 in this matter is **DISMISSED with prejudice**.

Accordingly, this file shall be closed and returned to the Bureau of Commercial Services.

Lauren G. Van Steel
Administrative Law Judge