

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

In the matter of

Docket No. 2001-734

**Bureau of Commercial Services,
Petitioner**

Agency No. 21-99-4106-00

v

**Agency: Bureau of Commercial
Services**

**Leighton Bruce Rosenberger,
Respondent**

Case Type: Sanction

_____ /

**Issued and entered
this 14th day of August 2001
by Stephen B. Goldstein
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY:

This matter was properly noticed for a hearing to commence at 9:00 A.M. on July 10, 2001 in the hearing rooms of the Michigan Department of Consumer and Industry Services, Bureau of Hearings, 2942 Fuller Avenue, Grand Rapids, Michigan.

Stephen B. Goldstein presided as Administrative Law Judge.

Ms. D. Lynn Morison, Attorney at Law, appeared on behalf of the Bureau of Commercial Services (Petitioner).

Neither Leighton Bruce Rosenberger (Respondent), nor an attorney on Respondent's behalf appeared at the hearing.

This matter commenced with the filing by the Petitioner of a Formal Complaint dated July 28, 2000 (Complaint) alleging violations by Respondent of Michigan's Occupational Code, 1980 PA 299, as amended (Code).

The Notice of Hearing dated May 22, 2001 scheduled this matter for a contested case hearing to commence on July 10, 2001 at 9:00 A.M. Furthermore, the Notice informed Respondent that if Respondent failed to appear at the hearing as scheduled, a Default Judgment may be entered pursuant to Section 78 of the Administrative Procedures Act of 1969, as amended (APA), being MCL 24.201, et seq.; MSA 3.560 (101), et seq.

The July 20, 2001 hearing commenced as scheduled. Petitioner appeared, however, Respondent did not.

At the outset of the contested case hearing, Ms. Morison requested that Petitioner be allowed to proceed in the Respondent's absence pursuant to Section 72 of the APA. In addition, Ms. Morison requested that a Default be granted on behalf of Petitioner pursuant to Section 78 of the APA.

Section 72 of the APA states in pertinent part as follows:

“(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 Judge determined that Petitioner should be allowed to proceed in Respondent's absence, and therefore granted Petitioner's motion for a Default Judgment.

ISSUES AND APPLICABLE LAW:

The general issue in this matter is whether Respondent violated the Code.

The specific issues are whether Respondent violated MCL 339.2411(2)(a); MSA 18.425(2411)(2)(a); MCL 339.2411(2)(c); MSA 18.425(2411)(2)(c); MCL 339.2411(2)(m); MSA 18.425(2411)(2)(m); MCL 339.2411(2)(l); MSA 18.425(2411)(2)(l); 1979 AC R 338.1551(4), 1979 AC R 338.1551(5), and 1979 AC R 338.1521(3). Those Sections of the Code and Rules provides as follows:

“Sec. 2411. (1) * * *”

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

(a) Abandonment without legal excuse of a contract, construction project, or operation engaged in or undertaken by the licensee.”

“ * * *”

“(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 51. (1) “ * * *”

“ * * *”

“(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.”

Rule 21. (1) * * *”

“ * * *”

“(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.”

“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.”

SUMMARY OF EXHIBITS:

Petitioner Exhibit 1 is a copy of a database compiled by Victor Palenske, the homeowner with whom Respondent contracted to perform services regulated by the Code. The database lists all the receipts involved from a particular supplier, and represents expenditures incurred by Mr. Palenske in replacing and/or repairing work done by Respondent.

Petitioner Exhibit 2 is a copy of a receipt for siding.

Petitioner Exhibit 3 copy of O’Leary Paints receipt.

Petitioner Exhibit 4 copy of receipt from Jim’s Tile.

Petitioner Exhibit 5 copy of receipt from Scott’s Ceramic.

Petitioner Exhibit 6 Courtland Township permit receipt.

Petitioner Exhibit 7 receipts for work done by Rick Misner.

Petitioner Exhibit 8 also a receipt for work done by Laura Neab, an associate of

Rick Misner.

Petitioner Exhibit 9 receipt for work done by Dave Crum, who installed windows on Mr. Palenske's home.

Petitioner Exhibit 10 receipt from Greg DeHaan Masonry.

Petitioner Exhibit 11 receipt from Carter Lumber.

Petitioner Exhibit 12 receipt from Ackerman Electrical Supply Company.

Petitioner Exhibit 13 supplier expenditure spreadsheet similar to the one described under *Petitioner Exhibit 1*.

Petitioner Exhibit 14 receipts from the Home Depot totaling \$15,199.00.

Petitioner Exhibits 15 and 16 additional receipts from the Home Depot.

Petitioner Exhibit 17 receipts from Menards totaling \$1,317.09.

Petitioner Exhibit 18 receipts from Rockford Hardware totaling \$754.90.

Petitioner Exhibit 19 receipts from Rylee's Ace Hardware.

Petitioner Exhibit 20 receipt from Ikenhout, Inc.

Petitioner Exhibit 21 painting receipts.

Petitioner Exhibit 22 receipts from Beaver Distributors, Inc.

Petitioner Exhibit 23 receipts from Meijer, Inc.

Petitioner Exhibit 24 receipts from Quality Farm & Fleet.

Petitioner Exhibit 25 receipts from Plainfield Lumber and Hardware Company.

Petitioner Exhibit 26 receipts from Blakeslee & Son, Inc. (Plumbing, Heating and Air Conditioning).

Petitioner Exhibit 27 supplier expenditure spreadsheet similar to the one described under *Petitioner Exhibit 1*.

Petitioner Exhibit 28 copies of checks written to Leslie Sims, an electrician who performed work on Mr. Palenske's home.

Petitioner Exhibit 29 - packet of letters from Merrill Lynch to Victor and Ann Palenske, evidencing payment to Loomis Homefronts and others, totaling

\$25,333.25.

Petitioner Exhibit 30 receipt from Gem Construction, Inc.

Petitioner Exhibit 31 receipts from Wal Mart.

Petitioner Exhibit 32 certified copy of a lien placed on the home of Victor and Ann Palenske by Reames Drywall Company on February 11, 1999.

FINDINGS OF FACT:

Respondent was properly served with the Notice of Hearing but did not appear at the time and place scheduled for the hearing. As a result, Respondent was found in default under Section 78(2) of the APA.

Based upon the granting of the Default Judgment, the following facts are found:

1. That at all times relevant to this Complaint, Respondent maintained a place of business at 10888 Daggett Road, Howard City, Michigan.
2. That, on or about June 2, 1998, Respondent entered into a contract with Victor and Ann Palenske to perform services regulated by the Code.
3. That Respondent has, without legal excuse, failed to perform the terms of the contract, contrary to MCL 339.2411(2)(a); MSA 18.425(2411)(2)(a).
4. That Respondent has failed to perform the requirements of the contract in a workmanlike manner, contrary to MCL 339.2411(2)(m); MSA 18.425(2411)(2)(m).
5. That, during the course, and in performance of the contract, Respondent failed to comply with §308.4 #S of 1995 Council of American Building Officials Code, which was adopted by the Township of Courtland, via Ordinance #10, contrary to 1979 AC R 338.1551(5).
6. That Respondent failed to correct those items as justified by Exhibit 2 within a reasonable time, contrary to 1979 AC R 338.1551(4).
7. That Respondent failed to satisfy a lien filed on February 11, 1999 by Reames

- Drywall Company in the County of Kent, Michigan, on real property commonly known as 9029 Brower Lake Drive, contrary to MCL 339.2411(2)(l); MSA 18.425(2411)(2)(l).
8. That Respondent failed to satisfy a lien filed on February 11, 1999 by 5K Electric, Inc. in the County of Kent, Michigan, on real property commonly known as 9029 Brower Lake Drive, contrary to MCL 339.2411(2)(l); MSA 18.425(2411)(2)(l).
 9. That Respondent failed to pay money to subcontractors with whom Respondent has contracted to perform the services required by the contract, contrary to MCL 339.2411(2)(c); MSA 18.425(2411)(2)(c).
 10. That Respondent failed to file an assumed name or d/b/a certificate with the Commercial Licensing Division of the Department of Consumer and Industry Services or its predecessors before he commenced doing business as Bruce's Roofing & Siding & Construction, contrary to 1979 AC R 338.1521(3).
 11. That Respondent has violated a rule of conduct in practicing his occupation, contrary to MCL 339.604(c); MSA 18.425(604)(c).

CONCLUSIONS OF LAW:

The principles that govern judicial proceedings apply to administrative hearings. 8 Callaghan's Michigan Pleading and Practice, 2nd Ed, Section 60.48, p. 280. The burden of proof is upon the State to prove, by a preponderance of the evidence, that Respondent violated the Code. AmericanWay Service Corporation v Commissioner of Insurance, 113 Mich App 423 (1982). Under Section 72 of the APA, there is no requirement to provide a hearing when all alleged facts are taken as true. Smith v Lansing School District, 428 Mich 248 (1987).

Having granted a Default Judgment on behalf of Petitioner, it is concluded that the above acts establish that Respondent has violated MCL 339.2411(2)(a); MSA 18.425(2411)(2)(a); MCL 339.2411(2)(c); MSA 18.425(2411)(2)(c); MCL 339.2411(2)(m); MSA 18.425(2411)(2)(m); MCL 339.2411(2)(l); MSA 18.425(2411)(2)(l); 1979 AC R 338.1551(4), 1979 AC R 338.1551(5), and 1979 AC R 338.1521(3).

Accordingly, Petitioner has established, by a preponderance of the evidence, that Respondent has violated the above Sections of the Code and Rules as alleged.

RECOMMENDED SANCTIONS:

Based upon Respondent's violations of the Code and Rules, it is recommended that Respondent be assessed the following sanctions:

1. **Immediate suspension of any and all licenses currently held by Respondent in either an individual or corporate capacity.**
2. **Imposition of a Civil Fine in the amount of \$5,000.00**
3. **Respondent be ordered to pay restitution to Victor and Ann Palenske in the amount of \$57,283.95 in out of pocket costs, plus \$7,893.48, the amount of the unpaid lien presently filed against their home, for total restitution of \$65,177.43.**
4. **No new licenses should be issued in either an individual or corporate capacity until the civil fine and restitution is paid in full.**

STEPHEN B. GOLDSTEIN
ADMINISTRATIVE LAW JUDGE

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

In the matter of :

LEIGHTON BRUCE ROSENBERGER
Residential Builder
License No. 21-01-104124

Docket No. 2001-734
Complaint No. 21-99-4106-00

FINAL ORDER

WHEREAS, this matter having come before the Michigan Board of Residential Builders and Maintenance & Alteration Contractors, hereafter the "Board", on November 5, 2002; and

WHEREAS, the Board having considered the Hearing Report Clarification of Edward F. Rodgers, Administrative Law Judge, dated August 16, 2002, and the Findings of Fact and Conclusions of Law in the Hearing Report of Stephen B. Goldstein, Administrative Law Judge, dated August 14, 2001;

WHEREAS, the Board having received the Hearing Report under MCL 339.514, and Leighton Bruce Rosenberger, Licensed Residential Builder, License No. 21-01-118753, hereafter "Respondent", having been found in violation of Sections 604(c); 2411(2)(a); 2411(2)(c); 2411(2)(m) and 2411(2)(l) of the Michigan Occupational Code, 1980 P.A. 299, as amended, hereafter the "Code", MCL 339.604(c); MCL 339.2411(2)(a); MCL 339.2411(2)(c); MCL 339.2411(2)(m); and MCL 339.2411(2)(l) and Rules 21(3); 51(4); 51(5) of the State Board of Residential Builders and Maintenance & Alteration Contractors General Rules, promulgated hereunder, being 1979 AC, R 338.1521(3); 1979 AC, 338.1551(4); 1979 AC, 338.1551(5) 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 Five Thousand Dollars and 00/100 Cents (\$5,000.00), 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. 21-99-4106-00 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 Victor Palenske in the amount of Sixty Five Thousand One Hundred Seventy Seven Dollars and 43/100 Cents (\$65,177.43) by certified check made payable to Victor Palenske and mailed to 9029 Brower Lake Drive, Rockford, MI 49321. Restitution shall be paid not later than sixty (60) days from the date of mailing of this Final Order.
3. No application for licensure or relicensure shall be considered until fine and restitution are paid-in-full. Failure of Respondent to comply with any term of this Final Order shall suspend all current licenses or registration renewals of Respondent and result in denial of future applications for licensure or registration until such time as all of the terms of this Final Order have been complied with.