

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

In the matter of

Docket No. 2001-89

**Bureau of Commercial Services,
Petitioner**

Agency No. 89-00-6354-00

v

Agency: Bureau of Commercial Services

**Daniel F. Naimowicz,
Respondent**

Case Type: Sanction

**Issued and entered
this 9th day of March, 2001
by Lauren G. Van Steel
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY

Appearances: Attorney Kimbal R. Smith appeared on behalf of Respondent Bureau of Commercial Services. Neither Respondent Daniel F. Naimowicz, nor an attorney or representative on behalf of Respondent, appeared at the hearing.

This proceeding commenced with the filing of a Notice of Hearing dated January 16, 2001, scheduling a hearing for February 9, 2001. The Notice of Hearing was mailed to the parties' last known addresses. Further, the Notice of Hearing informed the parties that if either party failed to appear at the scheduled hearing, a default judgment might be entered pursuant to Sections 72 and 78 of the Michigan Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.* (APA).

The Notice of Hearing was issued pursuant to a Formal Complaint filed on December 21, 2000, which alleged noncompliance with the Michigan Occupational Code, 1980 PA 299, as amended, MCL 339.101 *et seq.*; MSA 18.425(101) *et seq.* (Code), specifically Sections 2411(2)(c) and 2411(3).

At the hearing held on February 9, 2001, Petitioner's representative requested to be allowed to proceed in Respondent's absence pursuant to Section 72 of the APA and that a default be granted for 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....

Petitioner's motion for default was granted. As a result of the default judgment, the factual allegations contained in Petitioner's Formal Complaint are deemed true.

During the hearing, the following exhibits were accepted into the record:

Petitioner's Exhibit 1 Copy of State of Michigan warrant (check) to A & J Gering Builders, Inc. for \$500.00, dated October 4, 2000

Petitioner's Exhibit 2 Litigation Cost Report, showing legal costs/fees of \$2,100.00

No further evidence was offered for the record by Petitioner at the hearing, other than the exhibits.

ISSUES AND APPLICABLE LAW

The issues in this matter are whether Respondent has violated the following Code sections: MCL 339.2411(2)(c); MSA 18.425(2411)(2)(c); and MCL 339.2411(3); MSA 18.425(2411)(3) which provide in pertinent part as follows:

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.

Sec. 2411 (3) The department shall suspend or revoke the license of a person licensed under this article whose failure to pay a lien claimant results in a payment being made from the homeowner construction lien recovery fund pursuant to the construction lien act, Act No. 497 of the Public Acts of 1980, being sections 570.1101 to 570.1305 of the Michigan Compiled Laws * * * The license shall not be renewed nor shall a new license be issued until the licensee has repaid in full to the fund the amount paid out plus the costs of litigation and interest at the rate set by section 6013 of the revised judicature act of 1961, Act No. 236 of the Public Acts of 1961, as amended, being section 600.6013 of the Michigan Compiled Laws.

FINDINGS OF FACT

Based on the record and the default judgment granted for Petitioner, the undersigned makes the following findings of fact:

1. On or about October 4, 2000, as a result of Respondent's failure to pay one or more lien claimants, payment was made by the Homeowner Construction Lien Recovery Fund in the amount of \$500.00 to A & J Gering Builders, Inc.

2. The facts underlying said payment arose out of and in connection with the performance of Respondent's duties as a licensed residential builder and/or residential maintenance and alteration contractor.

3. Respondent failed to remit money which belonged to Frank Jacoboni to A & J Gering Builders, Inc.

4. Respondent failed to account for money which belonged to Frank Jacoboni.

5. Total litigation costs in this matter for the Homeowner Construction Lien Recovery Fund are \$2,100.00.

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. 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 above findings of facts and the default judgment granted against Respondent, Petitioner has proven by a preponderance of the evidence that Respondent violated the Code as follows:

1. On or about October 4, 2000, as a result of Respondent's failure to pay one or more lien claimants, payment was made by the Homeowner Construction Lien

Recovery Fund in the amount of \$500.00 to A & J Gering Builders, Inc., invoking the provisions of Section 2411(3) of the Code.

2. The facts underlying said payment arose out of and in connection with the performance of Respondent's duties as a licensed residential builder and/or residential maintenance and alteration contractor, invoking the provisions of Section 2411(3) of the Code.

3. Respondent failed to remit money which belonged to Frank Jacoboni to A & J Gering Builders, Inc., in violation of Section 2411(2)(c) of the Code.

4. Respondent failed to account for money which belonged to Frank Jacoboni, in violation of Section 2411(2)(c) of the Code.

5. Total litigation costs in this matter for the Homeowner Construction Lien Recovery Fund are \$2,100.00, invoking the provision of Section 2411(3) of the Code.

RECOMMENDATIONS

Based upon the above findings of fact and conclusions of law, the following recommendations are made by the undersigned to the Residential Builders and Maintenance and Alteration Contractors Board:

1. Restitution be ordered in the total amount of \$2,600.00, plus statutory interest as required by Section 2411(3) of the Code, to be paid to the Homeowner Construction Lien Recovery Fund for the monies that have been tendered to A & J Gering Builders, Inc., and for litigation costs.

2. Any and all licenses or registrations under the jurisdiction of the Code held by Respondent be suspended until such time as restitution, plus statutory interest, has been paid in full.

Lauren G. Van Steel
Administrative Law Judge