

**STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
BUREAU OF HEARINGS**

In the matter of	Docket No.	2003-1571
Bureau of Commercial Services, Petitioner	Agency No.	11218
v	Agency:	Bureau of Commercial Services
Thomas Ray Twining, Respondent	Case Type:	Sanction

**Issued and entered
this 24th day of March 2004
by Robert H. Mourning
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY

This matter is commenced with the issuance of a Formal Complaint dated June 30, 2003, charging Thomas Ray Twining (Respondent) with one or more violations of the Occupational Code (Code), 1980 PA 299, as amended, MCL 339.101 *et seq.*

On December 22, 2003, a Notice of Hearing was mailed to the parties, scheduling a contested case hearing for February 9, 2004, at 9:00 a.m., in the hearing rooms of the Department of Labor & Economic Growth (Department), 2501 Woodlake Circle, 1st Floor, Okemos, Michigan.

On January 20, 2004, the Petitioner requested an adjournment of the hearing. The Respondent filed no objection. On January 26, 2004, the Administrative Law Judge issued and entered an Order Granting Adjournment, rescheduling the hearing for March 8, 2004.

On March 8, 2004, Attorney Tracey Yarborough appeared on behalf of the Petitioner. The Respondent appeared on his own behalf at the hearing.

The Petitioner and the Respondent offered the following exhibits, which were admitted into evidence:

Exhibit 1: Statement of Complaint, 5/15/02

Exhibit 2: Building Inspection Report, 3/19/03

Exhibit 3: Building Inspection Report, 5/17/02

Exhibit A: Licensee's Answer to Building Inspection Report

ISSUES AND APPLICABLE LAW

In a prehearing conference, the Petitioner and the Respondent settled the allegations in the Formal Complaint. The Respondent admitted to the allegations in paragraphs 5, 8, and 9 of the Formal Complaint. The Petitioner agreed to dismiss the allegations in paragraphs 6 and 7 of the Formal Complaint and to recommend a civil fine in the amount of \$500.00. There is no request for restitution for the homeowner.

The general issue is whether the Respondent violated the Code. The specific issues are whether the Respondent violated Sections 604(c) and (g) and 2411(2)(m) of the Code.

Section 604 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:

- (a) Practices fraud or deceit in obtaining a license or registration.
- (b) Practices fraud, deceit, or dishonesty in practicing an occupation.
- (c) Violates a rule of conduct of an occupation.

- (d) Demonstrates a lack of good moral character.
- (e) Commits an act of gross negligence in practicing an occupation.
- (f) Practices false advertising.
- (g) Commits an act which demonstrates incompetence.
- (h) Violates any other provision of this act or a rule promulgated under this act for which a penalty is not otherwise prescribed.
- (i) Fails to comply with a subpoena issued under this act.
- (j) Fails to respond to a citation as required by section 555.
- (k) Violates or fails to comply with a final order issued by a board, including a stipulation, settlement agreement, or a citation.

2411(2)(m) provides that:

(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.

(b) Diversion of funds or property received for prosecution or completion of a specific construction project or operation, or for a specified purpose in the prosecution or completion of a construction project or operation, and the funds or property application or use for any other construction project or operation, obligation, or purposes.

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

(d) A willful departure from or disregard of plans or specifications in a material respect and prejudicial to another, without consent of the owner or an authorized representative and without the consent of the person entitled to have the particular construction project or operation completed in accordance with the plans and specifications.

(e) A willful violation of the building laws of the state or of a political subdivision of the state.

(f) In a maintenance and alteration contract, failure to furnish to a lender the purchaser's signed completion certificate executed upon completion of the work to be performed under the contract.

(g) If a licensed residential builder or licensed residential maintenance and alteration contractor, failure to notify the department within 10 days of a change in the control or direction of the business of the licensee resulting from a change in the

licensee's partners, directors, officers, or trustees, or a change in the control or direction of the business of the licensee resulting from any other occurrence or event.

(h) Failure to deliver to the purchaser the entire agreement of the parties including finance and any other charge arising out of or incidental to the agreement when the agreement involves repair, alteration, or addition to, subtraction from, improvement of, wrecking of, or demolition of a residential structure or combination of residential and commercial structure, or building of a garage, or laying of concrete on residential property, or manufacture, assembly, construction, sale, or distribution of a residential or combination residential and commercial structure which is prefabricated, preassembled, precut, packaged, or shell housing.

(i) If a salesperson, failure to pay over immediately upon receipt money received by the salesperson, in connection with a transaction governed by this article to the residential builder or residential maintenance and alteration contractor under whom the salesperson is licensed.

(j) Aiding or abetting an unlicensed person to evade this article, or knowingly combining or conspiring with, or acting as agent, partner, or associate for an unlicensed person, or allowing one's license to be used by an unlicensed person, or acting as or being an ostensible licensed residential builder or licensed residential maintenance and alteration contractor for an undisclosed person who does or shall control or direct, or who may have the right to control or direct, directly or indirectly, the operations of a licensee.

(k) Acceptance of a commission, bonus, or other valuable consideration by a salesperson for the sale of goods or the performance of service specified in the article from a person other than the residential builder or residential maintenance and alteration contractor under whom the person is licensed.

(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.

R 338.1551 provides that:

(1) A complaint shall be in writing, signed by the party filing it and submitted to the bureau of regulation of the department. The department shall provide forms for submitting complaints.

(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 portion thereof is not acknowledged by the licensee as being justified, the department shall notify the complainant of the area of disagreement.

(3) If the complaint or the information submitted by the complaining party is incomplete or disputed by the licensee, the department may require the complaining party to furnish additional information. Such report shall indicate what steps, if any, have been taken by the complaining party before any other governmental agency or any other pertinent information regarding the subject matter of the complaint. Before the department takes any further action it shall obtain a report from local building officials or proper local authorities, and in the absence of such, a person authorized by the department shall make an inspection to determine if the complaint is justified.

(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 relevant times, the Respondent has been licensed as a residential builder under the Code.
2. On the record, the Respondent admitted to a violation of Section

604(c) and (g) and Section 2411(2)(m) of the Code, as alleged in paragraphs 5, 8, and 9 of the Formal Complaint.

CONCLUSIONS OF LAW

The principles that govern judicial proceedings also apply to administrative hearings. 8 Callaghan's Michigan Pleading and Practice, Sec. 60.48, at 230 (2d ed. 1994). The burden of proof is upon the Petitioner to prove, by a preponderance of the evidence that grounds exist for the imposition of sanctions upon the 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).

Accordingly, the Petitioner has proven, by a preponderance of the evidence, that the Respondent has violated Section 604(c) and (g) and Section 4211(2)(m) of the Code.

RECOMMENDATIONS

The Administrative Law Judge recommends that the Board impose the following sanctions on the Respondent:

1. A civil fine in the amount of \$500.00.
2. In the event that the civil fine is not paid within 60 days following the issuance of a final order by the Board, the Respondent's Article 24 licenses should be suspended. No Article 24 license should be renewed nor should any new Article 24 license be issued until the civil fine is paid in full.

Robert H. Mourning
Administrative Law Judge