

STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH¹
BOARD OF RESIDENTIAL BUILDERS AND
MAINTENANCE & ALTERATION CONTRACTORS

DEPARTMENT OF ENERGY, LABOR &
ECONOMIC GROWTH,
BUREAU OF COMMERCIAL SERVICES *ex rel*
CARL SIMPSON

Docket No. 2008-810
Complaint No. 308411

Complainant,

v

TIM E. HEALY
D/B/A TIM E. HEALY CONSTRUCTION
License No. 21-01-089815

Respondent.

FINAL ORDER

WHEREAS, this matter having come before the Michigan State Board of Residential Builders and Maintenance & Alteration Contractors, hereafter the "Board", on May 5, 2009;

WHEREAS, the Board having received a Hearing Report under MCL 339.514 for this case and the Board having considered the Findings of Fact and Conclusions of Law in the Hearing Report of Edward F. Rodgers II, Administrative Law Judge, dated February 11, 2009;

WHEREAS, the hearing report is hereby incorporated by reference;

WHEREAS, the Respondent having been found in violation of the Michigan Occupational Code, PA 299 of 1980, hereafter the "Code," or rules promulgated there under, now, therefore,

IT IS ORDERED, that the following penalties authorized by Section 602 of the Code are imposed:

1. Respondent shall pay a FINE in the amount of \$7,000.00. The fine is payable to the State of Michigan within 60 days from the mailing date of this Final Order. Complaint No. 308411 must be clearly indicated on the check or money order, and the payment sent to the Department of Energy, Labor & Economic Growth, Bureau of Commercial Services, Final Order Monitoring, P.O. Box 30018, Lansing, Michigan 48909.

¹ Effective December 28, 2008, by Executive Order 2008-20, the Department of Labor & Economic Growth (DLEG) was reorganized and renamed as the Department of Energy, Labor & Economic Growth (DELEG).

2. Respondent shall make RESTITUTION to Carl Simpson by paying \$16,510.94, by certified check made payable to Carl Simpson and mailed to Carl Simpson, 107 Spring St., PO Box 102, Bloomington, MI 49026 within 60 days from the mailing date of the Final Order.

3. Respondent's failure to comply with each and every condition of this Final Order shall result in REVOCATION of any and all Article 24 licenses held by Respondent. Respondent may not serve as the Qualifying Officer of any licensed entity while any other Article 24 license held by Respondent is in suspended or revoked status. No application for licensure, relicensure, reinstatement or renewal shall be considered or granted by the Department until all Final Orders of the Board have been fully complied with.

4. Respondent shall submit in writing to the Michigan Department of Energy, Labor & Economic Growth, Bureau of Commercial Services, Final Order Monitoring, P.O. Box 30018, Lansing, Michigan 48909, proof of compliance with each and every requirement of this Final Order, in a form acceptable to the Department.

This Final Order shall not be construed as limiting the Department of Energy, Labor & Economic Growth, any other agency of the State of Michigan, or any individual as to the use of a lawful method of collection of the payment imposed by this Final Order.

Failure to comply with the provisions of this Final Order is considered a violation of the Code pursuant to Section 604(k) and may result in further disciplinary action.

This Final Order is effective immediately upon its mailing.

Given under my hand at Okemos, Michigan, this 22 day of July, 2009.

BY: 
Mark T. Glynn, Chairperson

Date mailed: July 22, 2009

Proof of Compliance should be filed with:

Department of Energy, Labor & Economic Growth, Bureau of Commercial Services
Final Order Monitoring
P.O. Box 30018
Lansing, MI 48909 .

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

In the matter of	Docket No.	2008-810
Bureau of Commercial Services, Petitioner	Agency No.	308411
v	Agency:	Bureau of Commercial Services
Tim E. Healy d/b/a Tim E. Healy Construction, Respondent	Case Type:	Sanction

Issued and entered
this 11th day of February, 2009
by Edward F. Rodgers II
Administrative Law Judge

HEARING REPORT

PROCEDURAL ORDER

This matter commenced with a filing of a Request for Hearing on June 19, 2008. Following the receipt of the Request for Hearing, the State Office of Administrative Hearings and Rules (SOAHR) issued a Notice of Hearing on June 24, 2008. The Notice of Hearing issued by SOAHR scheduled a contested case hearing for August 11, 2008.

The Notice of Hearing was issued pursuant to allegations set forth in a Formal Complaint (Complaint) issued on April 4, 2008. The Complaint alleged that the Respondent violated the Occupational Code of 1980, 1980 PA 299, as amended (Code), being MCL 339.101 *et seq.* and the Administrative Rules promulgated thereunder.

On July 2, 2008, Mr. William D. Wilhelm Jr., filed an appearance on behalf of the Petitioner.

On August 8, 2008, the Respondent requested an adjournment of the hearing scheduled for August 11, 2008. This request was granted by the Judge and an Order Granting Adjournment was issued on August 22, 2008. The Order Granting Adjournment rescheduled the matter to commence on December 8, 2008.

The hearing in the above entitled matter commenced as scheduled on December 8, 2008. Mr. Wilhelm appeared on behalf of the Petitioner and Neither the Respondent nor an attorney on behalf of the Respondent appeared at the hearing.

At the outset of the hearing on December 8, 2008, Mr. Wilhelm, on behalf of Petitioner, requested that the Petitioner be allowed to proceed in the Respondent's absence pursuant to Section 72(1) of the Administrative Procedure Act of 1969, 1969 PA 306, as amended (APA), being MCL 24.272(1) and that a default be granted on behalf of Petitioner pursuant to Section 78(2) of the APA, being MCL 24.278(2).

Section 72(1) of the APA provides in pertinent part:

If a party fails to appear in a contested case after proper services of notice the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party

§78(2) of the APA provides, in pertinent part:

Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default or other method agreed upon by the parties.

At the hearing the Judge granted Petitioner's Motion for Default. As a result of the default, allegations contained in the Petitioner's Formal Complaint were deemed proven.

During the contested case hearing on December 8, 2008, the following exhibits from Petitioner were admitted into the record:

1. Petitioner's Exhibit 1 is a copy of Respondent's licensing history.
2. Petitioner's Exhibit 2 is a copy of the estimate for the cost of the total project in the amount of \$13,700. This exhibit also includes copies of payment checks.
3. Petitioner's Exhibit 3 contains estimates and an accounting of the detail of cost related to the abandonment of the project by the Respondent. This documentation indicates that it is necessary to award \$16,510.94 in restitution to the consumers.
4. Petitioner's Exhibit 4 is a copy of the building inspectors report issued on July 5, 2008.

ISSUES AND APPLICABLE LAW

The general issue in this matter is whether or not the Respondent violated the Code or the Administrative Rules promulgated thereunder.

The specific issues in this case is whether or not the Respondent violated Sections 604(c) and 2411(2)(a) & (e) of the Code being MCL 339.604(c) and MCL 339.2411(2)(a) & (e). Further, Rules 33(1) and 51(2), (4), & (5) being, 2006 AACRS R 338.1533(1) and R 338.1551(2), (4) & (5).

Those Sections and Rules state in pertinent part:

Sec. 604.

A person who violated 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 penalties prescribed in section 602:

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

Sec. 2411.

- (1) A complaint filed under this section or article 5, or both, shall be made within 18 months after completion, occupancy, or purchase, whichever occurs later, of a residential structure or a combination of residential and commercial structure.
- (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.
 - (e) A willful violation of the building laws of the state or of a political subdivision of the state.

R 338.1533 Purchase and sales agreements.

(1) All agreements and changes to the agreements between a builder, or contractor, and the customer shall be in writing and signed by the parties. Copies of all agreements and changes to agreements shall be in writing, and provided to the customer.

R 338.1551 Complaints; filing.

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

(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

Based upon the record, including the default, the pleadings, and the exhibits accepted into the record, the following Findings of Fact are established:

1. Tim E. Healy d/b/a Tim E. Healy Construction (Respondent), has, at all times relevant to this complaint, been licensed as a residential builder under the Code.
2. Respondent, entered into a contract to perform services regulated by the Code, with Carl Simpson on or about May 29, 2007.
3. Respondent failed to ensure the contract with in writing signed by the parties.
4. Respondent, in performance of the contract, willfully failed to comply with Section R 109.1.1 of the 2003 Michigan Residential Code, which was adopted pursuant to the Stille-DeRossett-Hale single state construction code act, effective February 29, 2004.
5. Respondent, in performance of the contract, failed to comply with Sections R 401.3, R 404.1.6 and R 703.1 of the 2003 Michigan Residential ode.
6. Respondent failed to correct items which needed correction within a reasonable time.
7. Respondent has, without legal excuse, failed to perform the terms of the contract.
8. Respondent failed to respond to the Complaint in a timely manner.
9. Respondent has violated a rule of conduct in practicing an occupation.
10. The record establishes that the Respondent should pay Mr. Carl Simpson \$16,510.94 as restitution to complete the project that he did not complete successfully.

CONCLUSIONS OF LAW

The principles that govern judicial proceedings also apply to administrative hearings. 8 Callaghan's Michigan Pleading and Practice (2d. Ed.) Section 60.48, page 230. The burden of proof is upon Petitioner to prove, by a preponderance of the evidence, that grounds exist for the imposition of sanctions under 1990 AACRS, R 339.1763. Under §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 (1987). Based upon the record as a whole in this matter, including the exhibits and the fact that a default has been granted, the Petitioner has proven by a preponderance of the evidence that the Respondent committed the following violations:

The Respondent failed to ensure the contract was in writing by the parties in violation of R 338.1533(1).

Respondent in performance of the Contract willfully failed to comply the 2003 Michigan Residential Builders Code in violation of MCL 339.2411(2)(e).

Respondent in performance of the contract, failed to comply with multiple sections of the 2003 Michigan Residential Builders Code in violation of R 338.1551(5).

Respondent failed to correct those items which should have been corrected within a reasonable time in violation of R 338.1551(4).

Respondent has, without legal excuse, failed to perform the terms of the contract in violation of MCL 339.2411(2)(a).

Respondent failed to respond to the Complaint in a timely manner in violation of R 338.1551(2).

Respondent has violated a rule of conduct in practicing an occupation in violation of MCL 339.604(c).

The Petitioner recommends a civil fine in the amount of \$2,000 to be paid within 60 days of the issuance of the Board's Penalty Order. The recommendation is being increased by the Presiding Judge pursuant to the record in this matter. Based on the seven violations of the Code and Rules the Judge recommends that a penalty be assessed in the amount of \$7,000 for the seven violations.

The Petitioner recommends that restitution be paid to Mr. Carl Simpson in the amount of \$16,510.94. The record as established on the whole by a preponderance of the evidence justifies this recommendation.

The Petitioner recommends that the Respondent's licenses be suspended for 60 days if the civil fine and restitution are paid timely. The Petitioner recommends that the Board order that the civil fine and restitution be paid within 60 days of the date that the Board issues its penalty order. This is a reasonable recommendation. In addition, the Petitioner recommends and the Presiding Judge concurs that if the civil fines and restitution are not paid within 60 days of the time the Board issues its penalty order then the Respondent's license should be revoked.

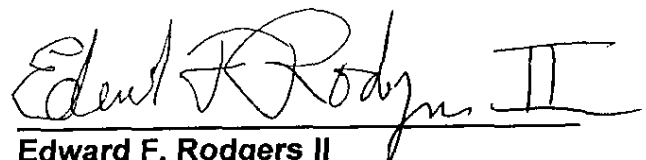
DESICION

Based upon the Findings of Fact and Conclusions of Law, the Administrative Law Judge finds that the Respondent violated Section 604(c) and 2411(a) & (e) of the Code. Further, the Respondent violated Rules 33(1) and 51(2), (4), & (5).

PENALTY RECOMMENDATIONS

Based upon the Findings of Fact, Conclusions of Law, and the recommendations of the Petitioner, the Administrative Law Judge makes the following penalty recommendations to the Board to be included in the Board's Penalty Order:

1. The Respondent pays a civil fine in the amount of \$7,000 for the seven violations of the Code and/or the Rules.
2. The Respondent's licenses, under jurisdiction of the Code, be suspended for a minimum of 60 days after the issuance of the Board's Penalty Order.
3. The Respondent pay restitution to Mr. Carl Simpson in the amount of \$16,510.94.
4. If the Respondent does not pay the civil fine of \$7,000 and the restitution in the amount of \$16,510.94 within 60 days of the Board's Penalty Order, the Respondent's licenses should be revoked. If the fines and restitution are paid timely, Respondent's license should be suspended for 60 days from the date that the Board issues its Penalty Order.


Edward F. Rodgers II
Administrative Law Judge

PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed by the file on the 11th day of February, 2009.



Christy L. Livingston
State Office of Administrative Hearings and Rules

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