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STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

In the Matter of Disciplinary Proceedings Against THOMAS N. PETERSEN Respondent.	FINAL DECISION AND ORDER LS9903301REB
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The State of Wisconsin Real Estate Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is ordered that the Proposed Decision annexed hereto filed by the Administrative Law Judge shall be and hereby is made and ordered the Final Decision of the State of Wisconsin Real Estate Board.

IT IS FURTHER ORDERED that the assessable costs of this proceeding be imposed upon Thomas N. Petersen, pursuant to sec. 440.22, Stats.

Explanation of Variance.

The Administrative Law Judge recommended that costs not be assessed. The Board amends the order of the Administrative Law Judge to require that respondent pay costs as provided in sec. 440.22, Stats. because respondent should be held to bear the cost of the disciplinary investigation and proceeding caused by respondent's own actions. Respondent's actions had the potential to cause extremely serious damage to parties in the transactions.

In establishing the appropriate discipline in this proceeding it is recognized that the interrelated purposes for applying disciplinary measures are: 1) to promote the rehabilitation of the licensee, 2) to protect the public, and 3) to deter other licensees from engaging in similar misconduct. *State v. Aldrich*, 71 Wis. 2d 206, 209 (1976). Punishment of the licensee is not an appropriate consideration. *State v. MacIntyre*, 41 Wis. 2d 481, 485 (1969). In this matter, costs are required as a deterrent and to assure the public that licensees who cut corners in the preparation of documents and the processing of real estate transactions contrary to the requirements of law shall bear the expenses of investigating and proving their misconduct. The need for deterrence exists even in instances where a likelihood of harm is not immediately evident.

Affidavits of Costs

The Division of Enforcement and Administrative Law Judge are hereby directed to file affidavits of costs with the Department General Counsel within 15 days of this decision. The Department General Counsel shall mail a copy thereof to respondent or his or her representative.

Appeal Information

The rights of a party aggrieved by this decision to petition the department for rehearing and to petition for judicial review are set forth in the attached "Notice of Appeal Information."

Dated this 9th day of February 2000.

State of Wisconsin
Real Estate Board

by Cletus J. Hansen, Administrator,
Division of Business Licensure and Regulation

IN THE MATTER OF

DISCIPLINARY PROCEEDINGS AGAINST

THOMAS N. PETERSEN

LS9903301REB

Respondent

PROPOSED DECISION

The parties to this proceeding for the purposes of sec. 227.53, Stats., are:

*Thomas N. Petersen
P.O. Box 25
1067 Zechzer Road
Deerfield, WI 53531*

*Department of Regulation & Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708*

*State of Wisconsin Real Estate Board
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708*

A Class II hearing was held in the above-captioned matter on July 13, 1999, at 1400 East Washington Avenue, Madison, Wisconsin. Respondent Thomas N. Petersen appeared personally and by Attorney Michael D. Rumpf. The Division of Enforcement appeared by Attorney Gerald M. Scanlan.

Based upon the entire record in this case, the administrative law judge recommends that the Real Estate Board adopt as its final decision in the matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Thomas N. Petersen, 1067 Zechzer Road, Deerfield, Wisconsin (respondent), is licensed as a real estate broker in Wisconsin by license #6715, granted on June 22, 1973. Respondent is also President of Advanced Building Concepts, Inc., a construction firm.
2. On June 2, 1994, respondent, in his capacity as President of Advanced Building Concepts, closed on residential property located at 5317 Kingsbridge Road, Madison, Wisconsin, which he purchased from Harley and Linda Spilde. The purpose of the purchase was to facilitate the sale to the Spildes of new residential property constructed by respondent's corporation.
3. The Kingsbridge property was conveyed to Advanced Building Concepts by Warranty Deed dated June 2, 1994, which had been drafted by respondent, signed by the Spildes as grantors, and received by respondent as President of Advanced Building Concepts. Respondent did not file the deed, but rather personally retained it

pending a further sale of the property.

4. On or about June 13, 1994, respondent drafted a Residential Offer to Purchase on behalf of Donald and Mary Labno, by which the Labnos offered to purchase the Kingsbridge property from Advanced Building Concepts. Respondent accepted the offer as President of Advanced Building Concepts. The offer was contingent on the Labnos acquiring satisfactory financing.

5. Also on or about June 13, 1994, respondent entered into a Residential Listing Contract - Exclusive Right to Sell agreement with Donald and Mary Labno for the sale of their residential property located at 5314 Spicebush Lane, Madison, Wisconsin, for a price of \$116,500. The following day, respondent, as President of Advanced Building Concepts, submitted an Offer to Purchase the Spicebush property from the Labnos for a price of \$101,837. Respondent drafted an addendum to the Offer to Purchase, which states "This offer is contingent upon seller's (Don and Mary Labno) successful purchase of Buyer's (Advanced Building Concepts Inc.) property located at 5317 Kingsbridge Road, Madison, WI 53714." The Addendum was signed by Mary and Donald Labno as sellers, and respondent as President of Advanced Building Concepts, Inc. Respondent continued to market the Spicebush property.

6. On July 18, 1994, respondent, signing as "owner in Equity," accepted an Offer to Purchase the Spicebush property, submitted by Timothy and Cheryl Faust, for the sum of \$109,200. The Offer to Purchase was also executed by Donald and Mary Labno.

7. Either on June 28, 1994 or July 28, 1994, Mary and Donald Labno executed a document entitled "Letter of Direction" which had been prepared by respondent. By that document, the Labnos authorized respondent to act on their behalf concerning all matters relating to the closing of the Spicebush property, including authorizing him to give the Settlement Statement and the Proceeds of the Sale to respondent as President of Advanced Building Concepts, Inc. While the Letter of Direction identified respondent as the person authorized to act on behalf of the Labnos, his name was not imprinted on the document as the person who drafted it.

8. The closing of the Kingsbridge property occurred on July 28, 1999. Rather than preparing a new warranty deed, respondent utilized the warranty deed he had received from the Spildes when respondent acquired the property as President of Advanced Building Concepts. Respondent "whited out" the references to Advanced Building Concepts at the "conveys and warrants to" and the "Return to" sections of the form, and inserted the names of Mary and Donald Labno. He did not white out the date line for the Spildes' signatures, but rather left the date as June 2, 1994, the date of the previous closing.

9. Also on July 28, 1994, the Settlement Statement, Disclosure and Acknowledgment Regarding Real Estate Closing, and Owner's Affidavit as to Liens and Possession were each signed by respondent as agent for the Spildes. The Spildes had not authorized respondent to act as their agent, and were unaware of the July 28, 1994 closing on the Kingsbridge property.

CONCLUSIONS OF LAW

1. The Real Estate Board has jurisdiction in this matter pursuant to sec. 452.14, Stats.

2. In having prepared and used the "Letter of Direction" without imprinting the name of the drafter, respondent has violated sec. RL 16.04(2), Code and, pursuant to secs. RL 16.07, Code, respondent has thereby demonstrated incompetency to act as a real estate broker, in violation of sec. 452.14(3)(i), Stats.

3. By utilizing the warranty deed he had received from the Spildes when respondent acquired the property as President of Advanced Building Concepts, and "whiting out" the references to Advanced Building Concepts at the "conveys and warrants to" and the "Return to" sections of the form, and by inserting the names of Mary and Donald Labno, so as to make it appear that the Spildes rather than Advanced Building Concepts was the grantor, respondent has violated sec. RL 24.085, Code and, pursuant to secs. RL 24.01(3), Code, respondent has thereby demonstrated incompetency to act as a real estate broker, in violation of sec. 452.14(3)(i), Stats.

ORDER

NOW, THEREFORE, IT IS ORDERED that Thomas N. Petersen be, and hereby is, reprimanded.

OPINION

Attorney Pharis Horton testified for the respondent as an expert on real estate transactions. In his testimony regarding the "Letter of Direction, he opined that the document was not of a type described by sec. RL 16.04(2), Code, and therefore did not fall under the requirement that the name of the drafter be imprinted thereon.

Q. (by Mr. Scanlan) Are you familiar with letters of directions? Have you seen this type of document before?

A. I have seen this type of document in -- in a variety of forms. Not all of them are entitled letter of

direction. Not all of them show notarization. They come virtually everything from a formalized power of attorney to a -- directions written on the back of an envelope. And under -- under chapter 706. You can be an agent without even a writing.

Q. Correct. Is that -- you say this is a legal document?

A. A legal document?

Q. Yes. Akin to a power of attorney, would you say?

A. It -- it has certain of the same functions as a power of attorney, yes.

Q. You're I'm sure aware of *State ex rel Reynolds v. Dinger*, are you not?

A. Yes, sir. Yes, sir.

Q. That pretty well spells out what a broker can do with his license, does it not?

A. It speaks of what a broker can do in the practice of brokerage. This is not, in my estimation, within the practice of brokerage. This letter of direction could have as easily gone to the closing officer at the title company, or to a bank lending officer who happened to be there. So that this -- my view of real estate brokerage and the contracts that are related to it. There is a listing contract. There is an offer. There are the ancillary contracts that relate to those. Beyond that there are actions that are taken, services that are performed, that are not within the ambit of the license. And there I don't believe that the real estate licensee is bound to follow real estate law and license law in the various acts that are taken. I was talking with counsel and said, you know, there's a -- there's a rule that says all agreements must be in writing. And certainly any agreement within the context of the practice should be in writing. Must be in writing. But if I were a real estate broker, and I had a party coming in from out-of-state, and I said gee, I will agree to have you sit in my car and I will drive you around and show you homes. I don't have to have a written contract for chauffeuring services. And I view this certainly as something more substantial than chauffeuring. But it is not within the context of the listing contract or the offer to purchase. This is -- this is something outside of that, in my estimation.

Q. Now under the Dinger case, isn't it a fact that brokers are basically authorized to fill out approved forms in the course of transactions?

A. In the course of their practice as real estate licensees, they are limited to filling out approved forms, yes.

Q. And this is not a part of its transaction, is that your testimony.

A. It is not one of the contractual documents that are covered by that because this is an act, as I say, that could be directed to a bank official. It could be directed to a closing officer. Could be directed to somebody walking down the street. It's not this individual. It's not Tom Petersen, real estate licensee. It's Tom Petersen acting in a capacity related to a transaction, but not in his capacity as a real estate licensee. (tr. pp. 131-135)

The ALJ must disagree. The Letter of Direction was a legal document affecting the rights of the parties to the transaction and prepared in contemplation of the closing of the Spicebush property. Whether it constituted a contract is debatable, for the necessary elements of a contract are not stated therein. That doesn't mean, however, that those elements were not inherent in the Labnos' agreement to turn over the proceeds of the respondent, and it is concluded that the agreement falls well within the requirements of sec. RL1 6.04(2), Code, so as to require that respondent identify himself as the drafter of the agreement.

Respondent does not dispute that he whited out the reference to Advanced Building Systems at the "conveys and warrants to" and the "return to" portions of the warranty deed for the Spicebush property, and replaced it with a reference to the Labnos. This would appear to be a clear violation sec. RL 24.085, Code, which states that, "No licensee shall draft or use any document which the licensee knows falsely portrays an interest in real estate." Respondent argues, however, that his action was akin to the practice of relocation companies where the relocation company merely leaves these portions of the warranty deed blank until a buyer is found. While conceding that it might have been better if respondent had left the affected portions of the deed blank rather than inserting the reference to Advanced Building Concepts and then whitening it out, respondent points out that "The contractual intent was for the property to be owned by the Labnos. It was accomplished."

The problem with respondent's argument is that in the case of a relocation company, the seller is presumably aware that the ultimate buyer will not be identified until a buyer is found. In this case, the Spildes, who sold the property to Advanced Building Systems, not only had no interest in the property, they had no idea that they were being represented as the seller in the transaction with the Labnos. Ultimately, respondent's failure to correctly identify the actual seller on the deed caused no problem for either the Spildes or the Labnos, but that

is arguably only because no one who was in a position to object did so. And that problems did not occur does not change the fact that had circumstances been different, and had the Labnos not been aware that respondent was in fact the seller of the property, they would undoubtedly have directed their concerns over problems with the house they had purchased to the Spildes rather than to respondent. In fact, the Labnos were obviously quite aware who the seller was, notwithstanding Ms. Labno's representation to the contrary. The Offer to Purchase the Kingsbridge property signed by them listed Advanced Building Concepts as the seller, as did the addendum to the Offer to Purchase drafted by respondent and signed by the Labnos for the Spicebush property. That Addendum reads, "This offer is contingent upon seller's (Don and Mary Labno) successful purchase of Buyer's (Advanced Building Concepts Inc.) property located at 5317 Kingsbridge Road, Madison, WI 53714." The Labnos' knowledge of who sold them their house is also evidenced by their having addressed their concerns with various problems they had with the property to respondent (and the further evidence is that he promptly remedied those problems).

In the last analysis, there is no indication either that respondent was not well-intentioned in the transactions involved here, or that anyone was harmed by his actions. The violation related to respondent's failure to correctly identify the seller is nonetheless clear.

The last alleged violation is that in signing as agent for the Spildes various closing documents, including a notarized "Owner's Affidavit as to Liens and Possession," respondent violated sec. RL 24.17(1), Code. That provision states in part that, "Licensees may not violate, or aid or abet the violation of, any law the circumstances of which substantially relate to the practices of a real estate broker or salesperson." The problem is that the law alleged to be violated is sec. 946.32(2), Stats., which is a criminal statute. There is no evidence that respondent was criminally charged or convicted of violating this provision, which states that, "Whoever under oath or affirmation makes or subscribes a false statement which the person does not believe is true is guilty of a Class A misdemeanor." Accordingly, in order to find the alleged violation of the real estate code section, it would be necessary to find respondent guilty of a criminal misdemeanor. The ALJ does not have jurisdiction to make such a finding in a civil administrative proceeding.

It is well established that the objective of licensing discipline is the protection of the public by promoting the rehabilitation of the licensee and by deterring other licensees from engaging in similar misconduct. *State v. Aldrich*, 71 Wis. 2d 206 (1976). Punishment of the licensee is not an appropriate consideration. *State v. McIntyre*, 41 Wis. 2d 481 (1968). As stated above, there is satisfactory evidence that respondent's intentions throughout the course of the affected transactions were good, and that the violations were not committed either to profit respondent or disadvantage the other parties to those transactions. It is the ALJ's opinion that rehabilitation of this licensee is not a consideration or that the public needs protection in terms of the manner in which he practices. The only remaining disciplinary consideration is deterring other licensees from committing similar violations, and a reprimand is deemed to adequately satisfy that objective.

The ALJ recommends that costs not be assessed.

Dated at Madison, Wisconsin this 10th day of December, 1999

Respectfully submitted,

Wayne R. Austin

Administrative Law Judge