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STATE OF WISCONSIN
REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST HARLAND J. KLEIBER RESPONDENT.	:	FINAL DECISION AND ORDER LS9402032REB

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 hereby 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.

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

Dated this 23RD day of JUNE, 1994.

Peter J Achilles

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST HARLAND J. KLEIBER, RESPONDENT.	:	**PROPOSED DECISION** Case No. LS-9402032-REB (91 REB 052)

PARTIES

The parties in this matter under § 227.44, Stats. and § RL 2.037, Wis. Admin. Code, and for purposes of review under § 227.53, Stats. are:

Complainant:
Division of Enforcement
Department of Regulation and Licensing
Madison, WI 53708-8935

Respondent:
Harlan J. Kleiber
2515 North Fifth Street
Wausau, WI 54403

Disciplinary Authority
Real Estate Board
1400 East Washington Ave.
Madison, WI 53703

PROCEDURAL HISTORY

A. This case was initiated by the filing of a complaint with the Real Estate Board on February 3, 1994. A disciplinary proceeding (hearing) was scheduled for March 8, 1994.

B. Mr. Kleiber filed an answer on February 23, 1994. As an affirmative defense, Mr. Kleiber alleged that the action against him was barred by laches.

C. The hearing was postponed at Mr. Kleiber's request and rescheduled to April 6, 1994.

D. The hearing was held as rescheduled. Mr. Kleiber appeared in person and represented by Attorney Mark T. Scheffer of Collins, Beatty & Krekeler, S.C., 15 N. Pinckney St., Suite 200, Madison, WI 53701-0828. The Real Estate Board was represented by Attorney Roger Hall of the Department's Division of Enforcement. The hearing was recorded, but no transcript has been prepared. The testimony and exhibits entered into evidence at the hearing form the basis for this Proposed Decision.

FINDINGS OF FACT

1. The respondent, Harlan J. Kleiber, is a real estate broker licensed in the state of Wisconsin, under license number 30527, and he has held that license continuously since it was originally granted on December 21, 1983.

2. On February 14, 1991, in Marathon County, Wisconsin, Mr. Kleiber entered pleas of no contest to two misdemeanors, one of intentionally pointing a firearm at or toward another person, contrary to § 941.20(c), Stats. and one of intentionally causing damage to physical property of another, contrary to § 943.01(1), Stats.

3. On February 20, 1991 Mr. Kleiber notified the Real Estate Board in writing of the pleas.

4. On April 15, 1991 sentence was withheld and Mr. Kleiber was placed on probation for eighteen months with the following conditions: he was to pay costs of $80 and restitution of $545.49, he was to forfeit the firearm used in the offense, and he was to spend 30 days in jail with work-release privileges. Mr. Kleiber complied with all the conditions, and has been released from probation.

4. The circumstances of Mr. Kleiber's offenses are as follow:

- Mr. Kleiber is married, with two children, aged 23 and 25.
- Prior to November 2, 1990 Mr. Kleiber's son Joel told him that he was receiving threatening phone calls at the Kleiber residence.
- At approximately 4:00 or 4:30 in the morning on November 2, 1990, seven windows were broken in Mr. Kleiber's home and his telephone line was cut.
- From November 2nd through November 18th, Mr. Kleiber slept in his clothes to be prepared for another incident.
- At approximately 10:25 P.M. on November 18, 1990, Joel Kleiber received a phone call and informed his father that he had been threatened again and been told to "be prepared to die".
- Shortly after the call, a car pulled up alongside Mr. Kleiber's house.
- Mr. Kleiber went outside with a loaded shotgun and shot once in the air.
- The car drove toward Mr. Kleiber, at which time he shot at the car, aiming and striking it in a lower rear panel, following which the car left.

5. Mr. Kleiber is an owner of ERA Metro Valley Realty and president of Harlan Homes, Inc., both in Wausau. He has been a director of the Wausau Board of Realtors, president of the Wausau Area Builders Association, and state director of the National Association of Home Builders.

6. Besides his activities as a real estate professional, Mr. Kleiber has been active in his community. Through the Wausau Noon Optimist Club he has chaired the "Children's Festival" and acted as secretary of the "Just Say No To Drugs" program. He has been active in promoting the "Jerry's Kids" program to raise money for the muscular dystrophy association. He has worked with Crossroads Mental Health Services to provide job opportunities for chronically mentally ill persons.

CONCLUSIONS OF LAW

I. The Real Estate Board is the legal authority responsible for controlling credentials for real estate brokers, under ch. 452, Stats. The Real Estate Board has jurisdiction over Mr. Kleiber's brokers license.

II. The Real Estate Board has personal jurisdiction over Mr. Kleiber under § 801.04 (2), Stats., based on his receiving notice of the proceeding, and his holding a credential issued by the board.

III. The Real Estate Board has jurisdiction over the subject-matter of a complaint alleging unprofessional conduct, under § 452.14(3), Stats. and ch. RL 24, Wis. Admin. Code.

IV. The offenses of criminal damage to property and reckless use of a weapon can be substantially related to the practice of a real estate broker under certain circumstances.

V. The circumstances of Mr. Kleiber's offenses are not substantially related to the practice of a real estate broker.

ORDER

THEREFORE, IT IS ORDERED that this action be dismissed.

OPINION

The Affirmative Defense of Laches.

Mr. Kleiber raised an affirmative defense of laches in his answer. The leading case on this issue is State v. Josefsburg, 275 Wis. 142, 81 N.W.2d 735 (1957) in which the Wisconsin Supreme Court said at 153 that a defense of laches cannot be raised against the state in its capacity of protecting the public. That ruling was repeated in State v. Chippewa Cable Co., 21 Wis.2d 598, 608 (1963). The Supreme Court has also stated that laches is not a bar to an attorney disciplinary proceeding, although the passage of time may be considered in imposing discipline. Disciplinary Proc. Against Eisenberg, 144 Wis.2d 284, 294, 424 N.W.2d 867 (1988). These cases have been relied on repeatedly within this department to defeat affirmative defenses based on the passage of time.

The U.S. District Court took a less absolute view of the equitable doctrine in Petition of Charlton, 834 F.Supp. 1089 (E.D.Wis. 1993), another attorney discipline case. The court said at 1093 that equity "depends on all the circumstances; this includes an examination of such factors as the existence of prejudice to the attorney, the complexity of the proceedings and the reasons for the delays." Nevertheless, even this case provides little support for the affirmative defense here, for the court in Charlton found that a 13-year delay between the underlying events and the complaint did not in itself violate due process and allow a defense of laches. Even if there is some point or some set of circumstances which permit the defense to be raised successfully in a disciplinary proceeding, it is fairly clear that the passage of three years, as in this case, does not in itself violate due process.

Whether Mr. Kleiber's Convictions are Substantially Related to the Practice of Real Estate.

Section RL 24.17(2), Wis. Admin. Code states "the Board may discipline a licensee on the basis of a conviction of any crime, the circumstances of which substantially relate to the practice of real estate". Mr. Kleiber does not dispute his convictions for criminal damage to property and reckless use of a weapon. The question is whether the circumstances of those offenses substantially relate to the practice of real estate. Based on statutory and case law, Mr. Kleiber's offenses cannot form the basis for a disciplinary action.

Section 111.321, Stats. generally prohibits employment discrimination (defined in § 111.322 to include refusing to license an individual) on the basis of conviction record. An exception exists, however, in § 111.335, which says "notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ or license, or to suspend from employment or licensing, any individual who: 1. has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity ...."

A number of reported cases have dealt with the question of how to establish whether the "circumstances" of a particular offense are "substantially related." Law Enforcement Stds. Bd. v. Lyndon Station, 101 Wis. 2d 472, 305 N.W.2d 89 (1981), held that employers or licensing authorities, in making an employment or licensing decision, are required only to consider the "circumstances" of the conviction rather than to investigate all the facts of a conviction. Gibson v. Transp. Comm., 106 Wis.2d 22, 315 N.W.2d 346 (1982), elaborated by saying that in an employment decision, an agency need not inquire into the specific facts of a conviction where the "circumstances" of the crime itself are substantially related to the type of employment, and "circumstances" was interpreted to mean only "the elements of the offense." This distinction between "facts" and "circumstances" was restated in County of Milwaukee v. LIRC, 139 Wis.2d 805, 407 N.W.2d 908 (1987). In essence, all of these cases seek to avoid placing an excessive burden on employers when making employment decisions regarding people convicted of crimes. The decision in County of Milwaukee states at 823-4, "We reject an interpretation of this test which would require, in all cases, a detailed inquiry into the facts of the offense and the job", and at 826, "A full-blown factual hearing is not only unnecessary, it is impractical".

Mr. Kleiber's offenses involve damage to property and the threat of injury to persons, and if the inquiry went no further than the elements of the offenses (which is all that is required under case law), I would find that they are sufficiently related to the practice of real estate to justify discipline. However, in a disciplinary proceeding before this or any other board, a "full-blown factual hearing" is already required by ch. 227, Wis. Stats. In this situation I conclude that it is not inappropriate during a disciplinary hearing to conduct a limited inquiry into the facts underlying a conviction, since little if any additional burden will be placed on the board. The inquiry must be carefully limited, and it would be improper to allow a respondent to present a collateral attack on the conviction itself, but within reason the respondent may be given an opportunity to explain the facts of his/her offense and conviction.

Such an inquiry is intended to facilitate the difficult balancing of interests which is explained in County of Milwaukee at 821-823:

> It is evident that the legislature sought to balance at least two interests. On the one hand, society has an interest in rehabilitating one who has been convicted of crime and protecting him or her from being discriminated against in the area of employment. Employment is an integral part of the rehabilitation process. On the other hand, society has an interest in protecting its citizens. There is a concern that individuals, and the community at large, not bear an unreasonable risk that a convicted person, being placed in an employment situation offering temptations or opportunities for criminal activity similar to those present in the crimes for which he had been previously convicted, will commit another similar crime. This concern is legitimate since it is necessarily based on the well-documented phenomenon of recidivism.
>
> It is highly desirable to re-integrate convicted criminals into the work force, not only so they will not remain or become public charges but to turn them away from criminal activity and hopefully to rehabilitate them. This is a worthy goal and one that society has shown a willingness to assume, as evidenced by the large sums of money expended in various rehabilitation programs. However, the legislature has clearly chosen not to force such attempts at rehabilitation in employment settings where experience has demonstrated the likelihood of repetitive criminal behavior.
>
> This law should be liberally construed to effect its purpose of providing jobs for those who have been convicted of crime and at the same time not forcing employers to assume risks of repeat conduct by those whose conviction records show them to have the "propensity" to commit similar crimes long recognized by courts, legislatures and social experience.
>
> In balancing the competing interests, and structuring the exception, the legislature has had to determine how to assess when the risk of recidivism becomes too great to ask the citizenry to bear. The test is when the circumstances, of the offense and the particular job, are substantially related.
>
> We reject an interpretation of this test which would require, in all cases, a detailed inquiry into the facts of the offense and the job. Assessing whether the tendencies and inclinations to behave in a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed, is the purpose of the test. What is important in this assessment is not the factual details related to such things as the hour of the day the offense was committed, the clothes worn during the crime, whether a knife or a gun was used, whether there was one victim or a dozen or whether the robber wanted money to buy drugs or to raise bail money for a friend. All of these could fit a broad interpretation of "circumstances." However, they are entirely irrelevant to the proper "circumstances" inquiry required under the statute. It is the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person.

Such an inquiry is also appropriate to satisfy the spirit of the Fair Employment Act, which is subchapter II of ch. 111, Stats. Section 111.31 states

> ... It is the intent of the legislature to protect by law the rights of all individuals to obtain gainful employment and to enjoy privileges free from employment discrimination because of ... conviction record .... It is the intent of the legislature in promulgating this subchapter to encourage employers to evaluate an employee or applicant for employment based upon the employee's or applicant's individual qualifications rather than upon a particular class to which the individual may belong. In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of this state to encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of ... conviction record .... This subchapter shall be liberally construed for the accomplishment of this purpose.

The circumstances of Mr. Kleiber's offenses as related in the findings of fact above do not show that he has a propensity for such crimes but that, on the contrary, he was driven to commit the crimes by extraordinary circumstances. The test is whether the tendencies and inclinations to behave in a certain way in a particular context (in this case in the defense of his family), are likely to reappear in a related context (i.e. in the practice of real estate). I find that the risk of Mr. Kleiber's repeating his actions is negligible, especially in the context of his real estate practice. All the evidence of Mr. Kleiber's character traits is favorable, and aside from the convictions themselves, nothing was presented which would lead a person to believe that the public requires protection from a repetition of his criminal acts. The prohibition in § 111.321, Stats. against discrimination on the basis of criminal conviction prohibits the imposition of discipline against Mr. Kleiber unless the circumstances of his offenses are substantially related to the practice of real estate. The burden of proof is on the board to show that a substantial relationship exists, and such a relationship does not exist here.

Dated and signed: April 19, 1994

John N. Schweitzer
Administrative Law Judge
Department of Regulation and Licensing

NOTICE OF APPEAL INFORMATION

Notice Of Rights For Rehearing Or Judicial Review, The Times Allowed For Each, And The Identification Of The Party To Be Named As Respondent.

Serve Petition for Rehearing or Judicial Review on:

THE STATE OF WISCONSIN REAL ESTATE BOARD.

1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708.

The Date of Mailing this Decision is:

JUNE 24, 1994.

1. REHEARING

Any person aggrieved by this order may file a written petition for rehearing within 20 days after service of this order, as provided in sec. 227.49 of the *Wisconsin Statutes*, a copy of which is reprinted on side two of this sheet. The 20 day period commences the day of personal service or mailing of this decision. (The date of mailing this decision is shown above.)

A petition for rehearing should name as respondent and be filed with the party identified in the box above.

A petition for rehearing is not a prerequisite for appeal or review.

2. JUDICIAL REVIEW.

Any person aggrieved by this decision may petition for judicial review as specified in sec. 227.53, *Wisconsin Statutes* a copy of which is reprinted on side two of this sheet. By law, a petition for review must be filed in circuit court and should name as the respondent the party listed in the box above. A copy of the petition for judicial review should be served upon the party listed in the box above.

A petition must be filed within 30 days after service of this decision if there is no petition for rehearing, or within 30 days after service of the order finally disposing of a petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30-day period for serving and filing a petition commences on the day after personal service or mailing of the decision by the agency, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing this decision is shown above.)