FILE COPY

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST	:	FINAL DECISION AND ORDER
DELMAR C. MESKE, RESPONDENT.	:	LS9406171REB

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 Division of Enforcement and Administrative Law Judge are hereby directed to file their affidavits of costs, and mail a copy thereof to respondent or his or her representative, within 15 days of this decision.

Respondent or his or her representative shall mail any objections to the affidavit of costs filed pursuant to the foregoing paragraph within 30 days of this decision, and mail a copy thereof to the Division of Enforcement and Administrative Law Judge.

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 25 day of May 1995.

Kathryn M. Nutter

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS AGAINST

DELMAR C. MESKE LS9406171REB

Respondent

PROPOSED DECISION

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

Delmar C. Meske
R.R. 2, Box 498
Argonne, WI 54511

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

State of Wisconsin Department of Regulation & Licensing
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

A hearing in this matter was conducted on November 7 and 8, 1994, at 1400 East Washington Avenue, Madison, Wisconsin. Delmar C. Meske, respondent herein, appeared in person and by Attorney Lloyd J. Blaney. Complainant appeared by Attorney Henry E. Sanders. The transcript was received on January 16, 1995.

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

FINDINGS OF FACT

1. Delmar C. Meske (Meske), R.R. 2, Box 498, Argonne, Wisconsin 54511, was at all times relevant to the matters herein, licensed as a real estate broker in this state by

license #1842, granted on June 30, 1976. Meske has at various times done business as ERA-State Wide Realty, as State Wide Realty of Wisconsin, and as Stilson Division.

2. At all times relevant hereto, Meske did business as ERA-State Wide Realty, but failed to register that trade name with the department.

3. In November, 1982, Meske was the listing broker for residential property with the address of Route 2, Box 248A, Columbus, Wisconsin (Columbus property), owned by Jack W. and Penny McElroy (McElroys). On or about November 23, 1982, Meske and Attorney Timothy J. Lesperance (Lesperance) executed an Offer to Purchase the Columbus property for $50,000. The transaction closed on March 3, 1983.

4. On or about February 18, 1983, Meske and Lesperance were granted a mortgage loan in the amount of $50,000 on the Columbus property from Eldorado State Bank, Eldorado, Wisconsin. By the terms of the mortgage agreement, any outstanding balance of indebtedness was to be due and payable on October 18, 1983. The agreement also provided at paragraph 17 that the lender's written consent was required prior to sale or transfer of title to the property.

5. Prior to October, 1983, Meske was the listing broker for a residential property with the address of Route 1, Box 16, Randolph, Wisconsin (Randolph property), owned by Larry and Janis Bilke (Bilkes). The Bilkes' mortgage loan was with Mutual Savings and Loan Association of Wisconsin (Mutual Savings and Loan).

6. Prior to October, 1983, Meske negotiated with the Bilkes to exchange the Randolph property for the Columbus property owned by Meske and Lesperance. However, on or about October 5, 1983, Meske and Lesperance executed an Offer to Purchase the Randolph property as tenants in common for $45,100. The offer provided the buyers would assume the sellers' mortgage loan at Mutual Savings and Loan or would secure separate financing. All costs of the sale were to be absorbed by the buyers, and the tax escrow was to be transferred to the buyers. The offer also provided that the sellers could keep horses on the premises for up to one year, and that sellers were responsible for removal of fencing, hay and bedding within one year of closing. The offer was to be accepted on or before October 5, 1983, and the transaction was to close on or before November 30, 1983. Meske may or may not have disclosed to the Bilkes his intent to resell the property at a substantially higher price than he was paying them.

7. The Bilkes accepted the Offer to Purchase on October 5, 1983, and the transaction closed on or about March 8, 1984.

8. Also on October 5, 1983, Meske and Lesperance executed an exclusive residential listing contract as sellers of the Randolph property, with Meske as the listing

broker, for a listed price of $56,500. The term of the listing was from October 5, 1983, to October 31, 1983.

9. Prior to acceptance of the Offer to Purchase the Randolph property, Meske had entered into negotiations with Dean and Karen Sommers (Sommerses) for the sale to them of the Randolph property. On October 8, 1983, the Sommerses executed an offer to purchase the Randolph property for $57,300, to be accepted on or before the date of the offer. Closing was to be on or before November 30, 1983. Financing was to be by land contract providing for negative amortization, with interest at 12.75% per annum and a balloon payment of $59,700 at the end of two years. The transaction between Meske and the Sommerses on the Randolph property closed as scheduled on November 30, 1983. Meske did not disclose to the Sommerses that his purchase of the Randolph property from the Bilkes was still pending or that the price of the property was substantially higher than Meske's accepted offer for the property.

10. At some point prior to closing of the sales transaction with the Sommerses, but after accepting their offer to purchase the Randolph property, Meske informed the Sommerses that the fence was not included with the sale, notwithstanding that Meske had provided the Sommerses with the sales information sheet on the property which indicated that it was, and notwithstanding that the Offer to Purchase prepared by Meske and executed by the Sommerses stated that only "personalties" were not included in the sale. The Sommerses subsequently negotiated with the Bilkes for purchase of the fencing, and paid for the fence by check in the amount of $2700.00 dated November 5, 1983.

11. On the date of closing on November 30, 1983, the Sommerses, Meske and Lesperance executed a land contract for the Randolph property in the amount of $57,300, with payments of $540 per month, and a balloon payment of $59,169.48 payable on December 1, 1985. The land contract was never recorded.

12. There is insufficient evidence to establish whether Meske did or did not represent to the Sommerses that he would renew the land contract after its expiration.

13. The transaction between Meske/Lesperance and the Sommerses, for purchase of the Randolph property by the Sommerses from Meske/Lesperance, closed on November 30, 1983. The transaction between Meske/Lesperance and the Bilkes, for purchase of the Randolph property by Meske/Lesperance from the Bilkes, closed on or about March 8, 1994, some three months after the closing on the sale to the Sommerses.

14. On or about October 5, 1993, Meske and Lesperance accepted the Bilkes' offer to purchase the Columbus property on land contract for $62,500. On November 30, 1983 the Bilkes, Meske and Lesperance executed a land contract for purchase of the Columbus property, providing for payment of $7200.00 at the execution of the contract, which was specified as the Bilkes' equity on the Randolph property; $20,300.00 payable

at the execution of the contract, specified as a note secured by a mortgage on the property; and with the balance of $35,000 payable through payments of $380.00 per month, with a balloon payment for any balance due and owing on December 1, 1985.

15. On or about December 19, 1983, Meske sent a letter to Larry Bilke, stating as follows:

> I am applying for a mortgage loan on your living quarters. Please confirm the information below by signing this letter and returning it to me in the enclosed envelope.

Monthly rental	$485
Lease term	month-to-month
Type of lease	verbal

On the same date as the Meske letter to Bilke, Meske and Lesperance filed their loan application to Western Federal Savings and Loan (Western Federal) for a mortgage loan in the amount of $52,000.00 to refinance the Columbus property. Meske and Lesperance were listed as co-borrowers and as the title holders. Meske and Lesperance each answered "NO" to the question whether he was a co-maker or endorser of a note.

16. Also On December 19, 1983, Meske and Lesperance filed their loan application to Western Federal for a mortgage loan in the amount of $45,000.00 to refinance the Randolph property. The purpose of the refinance is listed as "Pay out land contract." Meske, his wife, and Lesperance were listed as title holders; Meske and Lesperance were listed as co-borrowers. Again, Meske and Lesperance each answered "NO" to the question whether he was a co-maker or endorser of a note.

17. By notices dated February 1, 1984, Eldorado State Bank, which held the February 16, 1983 Meske/Lesperance mortgage on their purchase of the Columbus property from the McElroy's, filed their Notice of Right to Cure Default, by which Meske and Lesperance were notified that they could cure the default on the property by paying the full amount of the balance, including interest owed, in the total amount of $56,000.00 by February 16, 1984.

18. Seven days later, by letter dated February 23, 1984, Meske notified Western Federal Savings and Loan of their wish to sell the Columbus and Randolph properties on land contract. On or about May 6, 1984, Western Federal returned a copy of the Meske letter to Meske with the following notation:

> 3/06/84 - Approved subject to approval of P.M.I., payment of a 1% fee. This is approval only for a one-time transfer and we must be furnished names of purchasers so consent may be specific.

The note was initialed by Timothy J. Masters, of Western Federal's corporate office in Sparta.

19. On February 23, 1984, Lawyers Title Insurance Corporation issued its title insurance binder for the Randolph property. As of the effective date of the commitment on February 20, 1984, fee simple title to the property is listed as being vested in the Bilkes, with Western Federal, Meske and Lesperance listed as the proposed insured.

20 Also on February 23. 1984, Lawyers Title Insurance Corporation issued its title insurance binder for the Columbus property. As of the effective date of the commitment on February 20, 1984, fee simple title to the property is listed as being vested in Meske and Lesperance. Proposed insured is listed as "None."

21. By letter to Meske dated February 27, 1984, Attorney James J. Yanikowski, who had been retained by the Sommerses to assist in the matter of refinancing the Randolph property, inquired as to possible lenders for the Sommerses following the termination of the land contract covering the property. The letter also requests a copy of the land contract as recorded and inquires as to the apparent lack of a title opinion or title insurance on the property. Meske's response to this letter, if any, is not in evidence.

22. On or about February 27, 1984, Western Federal notified Meske and Lesperance that their loan on the Randolph property had been approved.

23. In response to Meske's inquiry as to the payoff on the mortgage loan held by Eldorado State Bank on the Columbus property, the bank notified Meske by letter dated March 5, 1984 that the payoff was $56,325.71, as of March 9, 1984.

24. The sale of the Randolph property by the Bilkes to Meske/Lesperance closed on March 8, 1984. Included among the documents executed at the closing was the title insurance company's "Owners Affidavit as to Liens and Adverse Matters," by which Meske certified that he had "no knowledge of any conveyance delivered to anyone (other than the proposed insured) nor of any action having been commenced subsequent to said effective date, nor of any matters (other than those set forth in said commitment) adversely affecting title to said real estate." Meske also represented on the affidavit that the real estate had been in the exclusive and undisputed possession of the vestee of title thereto since acquisition thereof and that no other leasehold rights in the property existed. Meske and Lesperance also executed a document at the March 8, 1984, closing captioned "Assignment of Rents and Agreement Not to Sell or Encumber Real Property," agreeing in part as follows:

> 3. Borrower will not create or permit any lien or any encumbrance (other than those presently existing) to exist on said real property and will not

sell, assign or in any manner dispose of said real property or any interest therein without the prior written consent of Lender.

25. At the closing on March 8, Meske provided Western Federal with an insurance binder prepared by him and dated March 5, 1984, for hazard insurance on the Randolph property. By letter dated July 6, 1984, Western Federal, indicating that it had made "numerous phone calls" to Meske to obtain proof of hazard insurance for the Columbus and Randolph properties, and noting that its inquiry to the insurer resulted in a finding that insurance had never been issued, demanded either that Meske have the insurer verify coverage by July 10, 1984, or that Western Federal would bind the coverage itself.

26. By letter dated March 17, 1984, signed by Jeffrey Steel, Western Federal approved Meske's request to sell the Columbus and Randolph properties on land contract subject to the following conditions:

(1) Private mortgage insurance must approve the sale.
(2) Payment of 1% fee based on the original loan amounts.
(3) This approval is for a one-time transfer.
(4) We must be furnished with the names of the purchasers so our consent may be specific.

27. Following the July 6, 1984 letter to Meske demanding that Meske verify insurance coverage on the Columbus and Randolph properties, and upon discovering that the Sommerses were the named insured for the Randolph property, Western Federal also discovered for the first time that the Columbus and Randolph properties had both been previously sold on land contract without notification to Western Federal.

28. By letter dated July 11, 1984, First Federal notified Meske that they were invoking the 1% service charge on the loans for both properties based upon previous sale of the properties to the Sommerses and the Bilkes.

29. On July 31, 1984, a closing was held on the sale of the Columbus property to the Bilkes, following the grant of a mortgage loan to the Bilkes by Provident Savings and Loan Corporation. The Bilkes voluntarily conveyed the property to the lender in December, 1985, following their having defaulted on the mortgage.

30. On January 17, 1985, Ray Petkovsek, who was employed by Meske as a broker and accountant from May, 1983, sent a handwritten letter to the Sommerses on the subject of refinancing the Randolph property. In addressing the possibility of a loan application, Mr. Petkovsek stated as follows:

> In order to get this loan through, we have to adjust the amount of the land contract so you can qualify for an 80% loan-to-value ratio. Therefore, we said the original land contract was $49,000, not $57,300. Balance due yet is shown as

$48,731. See redone amortization schedule attached. If anyone calls you to verify the land contract, the attached schedule is the information you should give them over the phone.

31. In response to the Petkovsek letter, the Sommerses consulted Attorney Martin J. Greenberg, Milwaukee. On December 20, 1985, Greenberg wrote to Meske and Lesperance concerning the Sommerses' land contract, referencing an earlier telephone conversation between Greenberg and Meske wherein they had discussed extending the land contract in consideration of the payment of an additional $5000.00 in reduction of the principal amount. The letter requests copies of various relevant documents. After further negotiation, on April 28, 1986, the Sommerses executed a quit claim deed in favor of Meske and Lesperance, and an Estoppel Affidavit canceling all debts and obligations between the parties.

32. On April 25, 1986, Western Federal notified Meske and Lesperance that the acceleration clause of the real estate mortgage contract on the Randolph property was invoked, and that the entire principal, interest and late charges were due and payable. Meske and Lesperance defaulted, foreclosure proceedings were initiated, judgments were obtained against Meske, and, on January 21, 1988, Western Federal, Mortgage Guarantee Insurance Corporation, and Meske entered into a settlement agreement and general release finally resolving the matter.

33. Meske acted as Lesperance's agent in executing various documents related to the transactions set forth herein. There was no written agency agreement, however, establishing Meske's authority to act as Lesperance's agent in that regard.

CONCLUSIONS OF LAW

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

2. There is insufficient evidence to establish that in having failed to notify the department in writing of the trade name ERA-State Wide Realty, Meske violated sec. RL 23.04(2), Code.

3. In having executed various documents utilized in the transactions set forth herein as Lesperance's agent without specific written authority by Lesperance to do so, Meske has failed to put in writing commitments regarding the transactions in violation of sec. RL 24.08, Code (1983).

4. There is insufficient evidence to determine whether Meske did or did not disclose to the Bilkes his intent to sell the Randolph property at a price substantially higher than offered to the Bilkes.

5. Failure to disclose to the Sommerses at the time of his acceptance of their offer to purchase the Randolph property that the transaction between Meske/Lesperance and the Bilkes had not closed, that his sale to the Sommerses was contingent upon closing of the transaction between the Bilkes and Meske/Lesperance, and that the pending purchase of the Randolph property was at a price substantially lower than that offered to the Sommerses constitutes misrepresentation or concealment of material facts, in violation of sec. RL 24.07(1), Code (1983), and, pursuant to sec. RL 24.01(3), Code (1983), Meske has thereby demonstrated untrustworthiness or incompetency to act as a broker in such manner as to safeguard the interests of the public, in violation of sec. 452.14(3)(i), Stats.

6. In having executed the title insurance company's "Owners Affidavit as to Liens and Adverse Matters," at the closing of the sale of the Randolph property by the Bilkes to Meske/Lesperance, by which Meske certified that he had "no knowledge of any conveyance delivered to anyone (other than the proposed insured) nor of any action having been commenced subsequent to said effective date, nor of any matters (other than those set forth in said commitment) adversely affecting title to said real estate," and by having represented on the affidavit that the real estate had been in the exclusive and undisputed possession of the vestee of title thereto since acquisition thereof and that no other leasehold rights in the property existed, Meske has engaged in misrepresentation or concealment of material facts, in violation of sec. RL 24.07(1), Code (1983), and, pursuant to sec. RL 24.01(3), Code (1983), Meske has thereby demonstrated untrustworthiness or incompetency to act as a broker in such manner as to safeguard the interests of the public, in violation of sec. 452.14(3)(i), Stats.

7. In having provided the Sommerses with a sales information sheet indicating that the white oak fencing on the Randolph property was included in the price of the property, and in preparing and accepting an offer to purchase by which the fencing was included in the sale, and in having later notified the Sommerses that it was not in fact included in the price, Meske has engaged in misrepresentation or concealment of material facts, in violation of sec. RL 24.07(1), Code (1983), and, pursuant to sec. RL 24.01(3), Code (1983), Meske has thereby demonstrated untrustworthiness or incompetency to act as a broker in such manner as to safeguard the interests of the public, in violation of sec. 452.14(3)(i), Stats.

8. In having filed loan applications with Western Federal Savings and Loan on December 19, 1993, for mortgage loans covering the Columbus property and the Randolph property without disclosing that both properties had previously been sold by him on land contract to the Bilkes and to the Sommerses, respectively, and in having subsequently falsely notified Western Federal Savings and Loan of his future intent to sell the properties on land contract, Meske has engaged in misrepresentation or concealment of material facts, in violation of sec. RL 24.07(1), Code (1983), and, pursuant to sec. RL 24.01(3), Code (1983), Meske has thereby demonstrated

untrustworthiness or incompetency to act as a broker in such manner as to safeguard the interests of the public, in violation of sec. 452.14(3)(i), Stats.

9. In having suggested to the Sommerses that they participate in making false representations to a mortgage lender by understating the amount of the land contract in order to achieve an 80% loan-to-value ratio, Meske has engaged in misrepresentation or concealment of material facts, in violation of sec. RL 24.07(1), Code (1983), and, pursuant to sec. RL 24.01(3), Code (1983), Meske has thereby demonstrated untrustworthiness or incompetency to act as a broker in such manner as to safeguard the interests of the public, in violation of sec. 452.14(3)(i), Stats.

10. There is insufficient evidence to establish whether Meske did or did not represent to the Sommerses that he would renew their land contract following its expiration.

ORDER

NOW, THEREFORE, IT IS ORDERED that the license of Delmar C. Meske be, and hereby is, suspended for a period of 60 days, commencing 30 days from the date of the final decision and order of the Real Estate Board adopting the terms of this proposed Decision.

IT IS FURTHER ORDERED that pursuant to sec. 440.22, Stats., the partial costs of this proceeding, in the amount of $1500.00, are assessed against Delmar C. Meske.

OPINION

The principal events in this case took place in late 1982, 1983 and early 1984. The investigation was commenced in 1986, and the Complaint in the matter was filed in 1994. The hearing took place over a period of two days, and consisted primarily of the introduction of hundreds of pages of documentary exhibits covering real estate transactions involving Mr. Meske and various clients. Some of these are relevant to the issues raised by the case; many of them are not. Testimonial evidence was marked by an inability of various witnesses to recall the facts of the case or an inability to testify as to the significance of the many documents introduced. Mr. Sanders comment at the close of the hearing probably correctly characterizes the record in the matter.

> LAW JUDGE: Okay. You mentioned the subject of closings Mr. Sanders. I am almost inclined to ask for written closings so that we can make some sense out of the various --
>
> MR. SANDERS: Well, I don't intend to give one. I would just like to make one small statement.
>
> LAW JUDGE: All right.

> MR. SANDERS: Just saying due to the nature of all the documents, all of the occurrences, I just would respectfully request the judge to read the complaint, the answers to the complaint, all of the documents. Some of the documents are duplicates, but they came from different sources. And for convenience to the judge's discretion they can -- he can discard duplicate documents. Attorney Blaney didn't object to their admission. I don't object to his documents. It's going to be a difficult decision, but if the documents' trail are followed and the witnesses' testimony, in the end the truth will come forward.

The ALJ obviously hasn't discarded documents admitted into evidence. The liberty has been taken, however, to assemble a file of admitted documents which are central to the relevant transactions in this matter and which constitute the basis for and proof of the principal findings herein. These have been marked as "ALJ Exhibit A", and consist of 41 numbered documents related to the two principal transactions involved in this case. A list of those documents is appended hereto.

The chronology of events occurring in transactions involving what are referred to as the Columbus property and the Randolph property is set forth as clearly as the undersigned is able to reconstruct them in the Findings of Fact, and no narrative reconstruction of those events is therefore attempted. Instead, what follows is an explanation of the basis for the various Conclusions of Law recommended for adoption by the board.

2. ***There is insufficient evidence to establish that in having failed to notify the department in writing of the trade name ERA-State Wide Realty, Meske violated sec. RL 23.04(2), Code.***

Respondent does not deny that he did business as ERA-State Wide Realty, and does not deny that he failed to notify the department in writing of his use of that trade name. Nonetheless, it would appear that the failure was probably the result of an honest misunderstanding between Meske and the department on the issue. The testimony in the record on the question was as follows:

> Q. (by Mr. Blaney) There was an issue regarding your -- whether or not you've ever been licensed under the ERA State Wide Realty trade name. Is it your position that you were registered with the Department of Regulation & Licensing under the ERA name?
>
> * * * *
>
> A. (by Mr. Meske) When I started in real estate, it was just State Wide Realty of Wisconsin. When I took out the ERA franchise, I asked about it and they said have you changed your name? And I said no, it's still State Wide Realty of Wisconsin, only now it's ERA. And they said you don't have to do anything. That was basically it. (tr., pp. 426, 428)

An examination of Mr. Meske's letterhead in use at the time in question confirms that while the ERA logo appears to the left of the company letterhead, the actual letterhead reads only "STATE WIDE REALTY."

3. ***In having executed various documents utilized in the transactions set forth herein as Lesperance's agent, without specific written authority by Lesperance to do so, Meske has failed to put into writing commitments regarding the transactions, expressing the exact agreements of the parties, in violation of sec. RL 24.08, Code (1983).***

Mr. Lesperance's testimony was that while he had not given Mr. Meske written authority to execute written documents on his behalf, he did not have any particular objection to his having done so. Nonetheless, the violation here is obvious.

4. ***There is insufficient evidence to determine whether Meske did or did not disclose to the Bilkes his intent to sell the Randolph property at a price substantially higher than offered to the Bilkes.***

As stated in *Sphatt v. Roth*, 253 Wis. 339 (1948) at page 346:

> It is the rule in this state that where a broker is authorized to sell his principal's property that for him to purchase it himself, he is bound, due to the relationship of principal and agent, by additional and greater obligations and duties than are required in ordinary business transactions between buyer and seller, and that a broker can neither purchase from, nor sell to, his principal unless the latter expressly assents thereto or, with full knowledge of all the facts acquiesces in such a course.

It was quite apparent at hearing that Mr. Bilke and his (former) wife were entirely unsophisticated in terms of real estate transactions, property values and other factors relevant to their selling their house to Mr. Meske and purchasing another property owned by him. Mr. Meske clearly had a duty to disclose to them the purpose of his purchase of the property and his anticipated resale of the property at a substantial profit. The evidence in the record, however, fails to satisfactorily establish whether he did or did not make that disclosure. Mr. Bilke's testimony did not directly address the issue, and Mrs. Bilke's testimony addressed it only obliquely. See, *inter alia*, the testimony of Janice Bilke Hirsig at page 122 of the transcript. Mr. Meske's testimony on the other hand, which may be found at page 203, was unequivocal and internally consistent.

5. ***In having failed to disclose to the Sommerses at the time of his acceptance of their offer to purchase the Randolph property that the transaction between Meske/Lesperance and the Bilkes had not closed, that his sale to the Sommerses was contingent upon closing of the transaction between the Bilkes and Meske/Lesperance,***

and that the pending purchase of the Randolph property was at a price substantially lower than that offered to the Sommerses, Meske has engaged in misrepresentation or concealment of material facts, in violation of sec. RL 24.07(1), Code (1983), and, pursuant to sec. RL 24.01(3), Code (1983), Meske has thereby demonstrated untrustworthiness or incompetency to act as a broker in such manner as to safeguard the interests of the public, in violation of sec. 452.14(3)(i), Stats.

There is satisfactory evidence in this record that the Sommers were not notified that they were to pay 25 percent more for the Randolph property than Mr. Meske had offered the Bilkes in his pending purchase of the property, and that they also were unaware, and insufficiently knowledgeable to make themselves aware, that they were purchasing a house from a putative owner who had no more than equitable title to the property. The residential offer to purchase fails to reference any contingency relating to the pending purchase of the property by Meske/Lesperance, and the allegations of failure to provide notice were ever denied and were tacitly admitted in respondent's trial brief:[1]

> The department alleges that Meske avoided and failed to show Sommers that he had title to the property. First, the contract was written so as to allow Sommers to force him to do so. It says so. Secondly, Meske specifically promised to pay for final abstracting at final closure of the land contract. What more can one do? (Respondent's Brief, pp. 7-8).

These were material facts that Mr. Meske had a duty to disclose to the Sommerses under sec. RL 24.07(1), Code (1983), for "a fact is material if a reasonable purchaser would attach importance to its existence or nonexistence in determining the course of action in the transaction in question." *Ollerman v. O'Rourk Company, Inc.*, 94 Wis. 2d 17 (1980).

6. ***In having executed the title insurance company's "Owners Affidavit as to Liens and Adverse Matters," at the closing of the sale of the Randolph property by the Bilkes to Meske/Lesperance, by which Meske certified that he had "no knowledge of any conveyance delivered to anyone (other than the proposed insured) nor of any action having been commenced subsequent to said effective date, nor of any matters (other than those set forth in said commitment) adversely affecting title to said real estate," and by having represented on the affidavit that the real estate had been in the exclusive and undisputed possession of the vestee of title thereto since acquisition thereof and that no other leasehold rights in the property existed, Meske has engaged in misrepresentation or concealment of material facts, in violation of sec. RL 24.07(1), Code (1983), and, pursuant to sec. RL 24.01(3), Code (1983), Meske has thereby demonstrated untrustworthiness or incompetency to act as a broker in such manner as to safeguard the interests of the public, in violation of sec. 452.14(3)(i), Stats.***

[1]Respondent's Answer avers lack of information sufficient to form a belief as to the allegation, a technical denial.

It is undisputed that at the closing of the sale of the Randolph property to Meske/Lesperance on March 8, 1984, the Sommerses were in possession of the property pursuant to its sale to them on land contract on November 30, 1983. Probably nothing more need be said.

7. In having provided the Sommerses with a sales information sheet indicating that the white oak fencing on the Randolph property was included in the price of the property, and in preparing and accepting an offer to purchase by which the fencing was included in the sale, and in having later notified the Sommerses that it was not in fact included in the price, Meske has engaged in misrepresentation or concealment of material facts, in violation of sec. RL 24.07(1), Code (1983), and, pursuant to sec. RL 24.01(3), Code (1983), Meske has thereby demonstrated untrustworthiness or incompetency to act as a broker in such manner as to safeguard the interests of the public, in violation of sec. 452.14(3)(i), Stats.

It was respondent's position at hearing that he could not have provided the sales brochure to the Sommerses because it was not prepared until after he had drafted the Sommerses' Offer to Purchase. (tr., p.408) The brochure is undated, and there is no evidence as to exactly when it was prepared. Mrs. Sommers credibly testified, however, that the Sommerses had been given the document at the time they contemplated purchase of the property. She testified that she knew the document in evidence had in fact come from her file because at some point during the process of buying and then losing the property, she had highlighted the phrase "white oak fencing." That phrase is indeed highlighted in the document in evidence. Moreover, examination of the offer to purchase prepared by Mr. Meske and executed by the Sommerses on March 8, 1983 specifies that only "personalties" are not included in the sale. The Sommerses thus had every reason to believe that the fence was included in the sale, and Mr. Meske did not notify them to the contrary until after they were committed to the transaction.

8. In having filed loan applications with Western Federal Savings and Loan on December 19, 1993, for mortgage loans covering the Columbus property and the Randolph property without disclosing that both properties had previously been sold by him on land contract to the Bilkes and to the Sommerses, respectively, and in having subsequently falsely notified Western Federal Savings and Loan of his future intent to sell the properties on land contract, Meske has engaged in misrepresentation or concealment of material facts, in violation of sec. RL 24.07(1), Code (1983), and, pursuant to sec. RL 24.01(3), Code (1983), Meske has thereby demonstrated untrustworthiness or incompetency to act as a broker in such manner as to safeguard the interests of the public, in violation of sec. 452.14(3)(i), Stats.

The question in this instance is whether the fact that Meske held land contracts covering the two affected properties at the time of his applications to Western Federal for mortgage loans covering the properties, and the fact that he failed to disclose that fact to

Western Federal, may be deemed to constitute concealment of a material fact. It would undoubtedly have been a material fact if it would have been important to Western Federal in determining their course of action in considering the loan applications.

At the time in question, Jeffery Steel was Vice President and Manager of the Reedsburg office of Western Federal Savings and Loan. He confirmed in his testimony at hearing that Western Federal was unaware at the time of the loan applications that the two properties in question had been previously sold by Meske on land contract. His further testimony was that before approving the sale on land contract of any property on which they held a mortgage, the financial status of the land contract buyer would have to be established, and the approval of the mortgage insurance company would have to be obtained (tr., p.224). At the very least, Mr. Meske's failure to notify the mortgage lender of the existing land contracts deprived the lender of the opportunity to make the inquiry regarding the buyers ability to make the land contract payments, and it cannot be gainsaid that such failure constitutes concealment of a material fact.

9. ***In having suggested to the Sommerses that they participate in making false representations to a mortgage lender by understating the amount of the land contract in order to achieve an 80% loan-to-value ratio, Meske has engaged in misrepresentation or concealment of material facts, in violation of sec. RL 24.07(1), Code (1983), and, pursuant to sec. RL 24.01(3), Code (1983), Meske has thereby demonstrated untrustworthiness or incompetency to act as a broker in such manner as to safeguard the interests of the public, in violation of sec. 452.14(3)(i), Stats.***

In his trial brief, respondent characterized the effect of the proposed falsification of the mortgage application as follows:

> The land contract was not recorded, so if Sommers got a mortgage to pay it down, that mortgage, if recorded, would be senior to the land contract unless the lender knew of it <u>and</u> that it would not be satisfied. If the representation was to be that the land contract would be satisfied, then the seller's lien for the $10,654.00 could only be junior to the mortgage. Pretty clearly, all Petkovsek offered on behalf of his employer was to make either an unsecured or second mortgage loan for the balance. The licensee posits that he did everything he could to help the Sommers refinance the property, but they simply failed to follow through.

It may well be that the mortgage lender's interest would have been protected had the Sommerses gone along with the scheme and had the loan been granted. It may even be true that there was some measure of altruistic motive involved in Mr. Meske's attempt to assist the Sommerses in getting a mortgage loan. But there was undoubtedly at least an equal measure of self-interest involved. If the Sommerses didn't get financing, Meske and Lesperance were either going to have to continue to carry the land contract or they were going to have to take the property back. In the latter eventuality, what

would happen is exactly what ultimately did happen: they would lose the property to foreclosure.

In the last analysis, respondent's attempt to explain away the scheme to falsify the loan application does nothing to obscure the fact that Meske knew that if the application was not falsified, the loan would probably not be granted. Because whether the $16,000 lien held by Meske would have been junior to the mortgage lien does not alter the fact that the Sommerses would have had a $16,000 debt owed to Meske and Lesperance, and that would have been a material fact in Western Federal's consideration of the application. Had the Sommerses gone along with the scheme, of course, that $16,000 debt would have been undisclosed.

10. There is insufficient evidence to establish whether Meske did or did not represent to the Sommerses that he would renew their land contract following its expiration.

Apparently the original complaint filed by the Sommerses was that Mr. Meske had reneged on his promise to renew the land contract. Karen Sommers credibly testified that he did; Mr. Meske credibly testified that he didn't; and there's nothing in writing.

It is possible that expenditure of additional hours poring over the many documents admitted in this matter could and probably would reveal a preponderance of evidence supporting more of the 43 separate allegations of violation set forth in the Complaint. For example, in the sale by land contract of the Columbus property to the Bilkes, we find Meske sending Larry Bilke a letter asking that Mr. Bilke confirm a month-to-month "verbal" lease with monthly rental of $485.00 per month. When one considers this letter along with other facts of record, including that Meske had sold the property to the Bilkes a month before, that Meske and Lesperance were applying for a loan from Western Federal in their own names, and that their existing mortgage from Eldorado State Bank required the bank's consent prior to transferring title, there are some obvious inferences possible. In the last analysis, however, the violations which have been found probably suffice to establish the seriousness and pervasiveness of respondent's misconduct in the course these transactions. In fact, the degree of seriousness of the misconduct found would, under the disciplinary objectives cited by the Wisconsin Supreme Court, normally militate for a long period of suspension or even revocation of Mr. Meske's license. Those objectives are to protect the public, to rehabilitate the licensee, and to deter other licensees from similar misconduct. *State v. Aldrich*, 71 Wis. 2d 206, 208 (1976). These are not your ordinary circumstances, however.

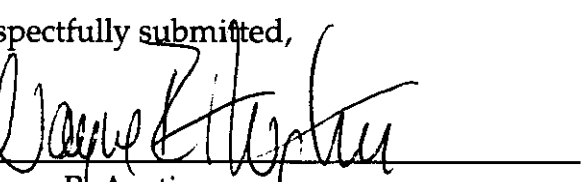
As stated above, most of the events relevant to this matter occurred in 1983. That is the first instance of misconduct by Mr. Meske on record with the board, and Mr. Meske has

not been charged with any misconduct in the 12 years since that time.[2] That is relatively solid evidence that there is no pattern of misconduct in his practice, and substantial evidence of rehabilitation. It could be speculated that the fact that he's had this matter hanging over his head since 1986 (when the investigation was initiated) may have motivated him to exercise care in his practice. On the other hand, it could be speculated that the inordinate time it took to bring this matter to hearing could have motivated him to disregard any possible consequences of future misconduct. On balance, it seems inequitable to impose substantial discipline for misconduct occurring 12 years ago when there is no evidence that such conduct has continued or recurred in the intervening period. Discipline so long delayed, where there has been no such recurrence, does nothing to protect the public, for it appears that the public no longer needs protection from Mr. Meske. It will not serve to rehabilitate Mr. Meske, because it appears that to the extent rehabilitation was required, it has occurred. Whether the deterrence objective would be better served by substantial discipline is debatable, but that objective, standing alone and in the total circumstances of this case, seems a somewhat trivial reason to deprive Mr. Meske of his livelihood.

The same factors which have led to the conclusion that substantial discipline is inappropriate in this case also lead to the conclusion that less than the total costs of the proceeding should be assessed. The record does not reflect how many hundreds of hours have been expended in the investigation and prosecution of this matter over the period of nine years, but there is also nothing in this record which would lead to the conclusion that fault for the delay rests with Mr. Meske. Assessment of $1500 should cover the costs of the hearing itself, and that should be deemed sufficient.

Dated this 10th day of April, 1995.

Respectfully submitted,



Wayne R. Austin
Administrative Law Judge

WRA:9411011.doc

[2]The Real Estate Board closed investigations involving Mr. Meske in 1987 and 1988 without formal action.

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS AGAINST

DELMAR C. MESKE LS9406171REB

Respondent

PROPOSED DECISION - ERRATA

The last sentence of the first full paragraph at page 12 of the Proposed Decision in this matter reads as follows:

The residential offer to purchase fails to reference any contingency relating to the pending purchase of the property by Meske/Lesperance, and the allegations of failure to provide notice were ***ever*** denied and were tacitly admitted in respondent's trial brief. (emphasis provided)

That sentence should read as follows:

The residential offer to purchase fails to reference any contingency relating to the pending purchase of the property by Meske/Lesperance, and the allegations of failure to provide notice were never denied and were tacitly admitted in respondent's trial brief.

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:

MAY 26, 1995.

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.)