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STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST	:	FINAL DECISION AND ORDER
DAVID V. JENNINGS, III, RESPONDENT.	:	LS9408121REB

The State of Wisconsin, Real Estate Board, having considered the bove-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 FEBRUARY 1995.

Peter J. Schiller

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST DAVID V. JENNINGS, III, RESPONDENT.	:	**PROPOSED DECISION** Case No. LS-9408121-REB (93 REB 123)

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:
David V. Jennings, III
c/o Comcor, Inc.
5250 North Nevada Ave.
Colorado Springs, CO 80919

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 August 12, 1994. A disciplinary proceeding (hearing) was scheduled for September 20, 1994 . Notice of Hearing was prepared by the Division of Enforcement of the Department of Regulation and Licensing and sent by certified mail on August 12, 1994 to the respondent, David V. Jennings, III, who received it on August 15, 1994 .

B. Mr. Jennings filed an answer to the complaint on September 10, 1994.

C. All time limits and notice and service requirements having been met, the disciplinary proceeding was held as scheduled on September 20, 1994. Mr. Jennings appeared by telephone without representation. The Board was represented by Attorney Roger R. Hall of the Department's Division of Enforcement. The hearing was recorded, and a transcript of the hearing was prepared and delivered on October 25, 1994. The testimony and exhibits entered into evidence at the hearing form the basis for this Proposed Decision.

FINDINGS OF FACT

1. The respondent, David V. Jennings, III, practiced law in Wisconsin from 1975 through 1993. In December, 1992 Mr. Jennings filed a petition for voluntary revocation of his attorney's license. On January 12, 1993 the Wisconsin Supreme Court entered an order revoking his license.

2. On November 3, 1992 Mr. Jennings applied to be licensed as a real estate broker. His application was granted on November 6, 1992 and he is now licensed as a real estate broker in the state of Wisconsin, under license number 46545.

3. By a letter which is undated but which was received on June 21, 1993, Mr. Jennings informed the Board that he had entered into an agreement with the U.S. Attorney's Office to plead guilty to criminal charges.

4. On August 10, 1993 Mr. Jennings was found guilty in U.S. District Court of four criminal violations committed in July 1992, two counts of embezzlement from bankruptcy estates (one amounting to $553,150 and the other amounting to $79,000) and two counts of making false entries in bankruptcy estates. Mr. Jennings was sentenced to 27 months in prison and at the time of the hearing he was incarcerated and assigned to an urban work cadre program in Colorado until February 25, 1995. He is scheduled to return to Wisconsin on February 25, 1995 to continue under supervision until August 25, 1995. Following that he will be on supervised release for up to three years. One condition of his supervised release will be to notify any prospective employer of his convictions.

CONCLUSIONS OF LAW

I. The Real Estate Board has jurisdiction over the subject-matter of a complaint alleging unprofessional conduct, under sec. 452.14 (3), Stats.

II. The Real Estate Board has personal jurisdiction over Mr. Jennings under sec. 801.04 (2), Stats., based on his receiving notice of the proceeding, and his holding a credential issued by the board, which is a substantial contact with the state of Wisconsin, regardless of whether he is physically present in the state.

III. Mr. Jennings' convictions are substantially related to the practice of real estate, and discipline is appropriate, under sec. RL 24.17 (2), Wis. Admin. Code and sec. 452.14 (3), Stats.

ORDER

THEREFORE, IT IS ORDERED that the license to practice as a real estate broker issued to David V. Jennings, III be revoked.

OPINION

This is a disciplinary proceeding conducted under the authority of ch. 227, Stats. and ch. RL 2, Wis. Admin. Code. The Division of Enforcement in the Department of Regulation and Licensing filed two essentially similar complaints naming Mr. Jennings as respondent. Case number LS-9408121-REB is an action conducted under the authority of the Real Estate Board alleging unprofessional conduct as a real estate broker. Case number LS-9408122-RLM is an action conducted under the authority of the Department of Regulation and Licensing alleging unprofessional conduct as a loan solicitor. Both the board and the department conduct disciplinary hearings under RL 2, Wis. Admin. Code, and both complaints were assigned to the undersigned administrative law judge for hearing. Because the factual allegations and the legal standards are identical, a single hearing was held, and this opinion serves both cases.

The complaints allege that the respondent, David V. Jennings, III, was convicted in U.S. District Court of four criminal violations committed in July 1992, two counts of embezzlement from bankruptcy estates and two counts of making false entries in bankruptcy estates. The complaint further alleges that the convictions are substantially related to the practice of real estate as practiced by both real estate brokers and loan solicitors, and because of that substantial relationship, Mr. Jennings is subject to disciplinary action against those licenses. I conclude that such a substantial relationship does exist, and that some discipline is appropriate.

The Substantial Relationship.

Sec. 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". This section applies to Mr. Jennings' real estate broker's license. Sec. RL 43.04 (8), Wis. Admin. Code defines "incompetency to act as a loan solicitor" as including "being convicted of a crime, the circumstances of which substantially relate to the practice of ... a loan solicitor", and "a lack of competency" is a ground for discipline under sec. 440.77 (1) (i), Stats. Mr. Jennings does not dispute the convictions. The question is whether the circumstances of those offenses substantially relate to the practice of a real estate broker or a loan solicitor. The testimony of Mr. Cletus Hansen in the hearing considered in the light of applicable statutory and case law establish that Mr. Jennings' convictions are substantially related to the practice of real estate and that they may form the basis for disciplinary action.

Section 111.321, Stats. generally prohibits employment discrimination 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." In Law Enforce. Stds. Bd. v. Lyndon Station, 101 Wis.2d 472, 305 N.W.2d 89 (1981), the Wisconsin Supreme Court upheld a decision that convictions for misconduct in public office were substantially related to employment as a law enforcement officer. More importantly, the case 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).

Mr. Jennings' offenses involve misappropriation of funds entrusted to him as an attorney and making false bookkeeping entries. Mr. Hansen testified convincingly [transcript, pp. 16-23] that few offenses could be more closely linked to the practice of real estate, because both brokers and loan solicitors typically handle trust funds and must conscientiously complete applications and other forms relating to financial transactions. I conclude that the circumstances of Mr. Jennings' convictions are substantially related to the practice of real estate, as practiced by both loan solicitors and real estate brokers. The imposition of discipline against the licenses held by Mr. Jennings is appropriate.

Discipline.

The purposes of professional discipline have been set forth in Wisconsin Supreme Court Rule SCR 21.03(5) and in various attorney discipline cases, including Disciplinary Proc. Against Kelsay, 155 Wis.2d 480, 455 N.W.2d 871 (1990). In that case the Wisconsin Supreme Court stated "discipline for lawyer misconduct is not intended as punishment for wrongdoing; it is for the protection of the public, the courts and the legal profession from further misconduct by the offending attorney, to deter other attorneys from engaging in similar misconduct and to foster the attorney's rehabilitation." However, in my reading of the cases, I see that the term "rehabilitation" means what is necessary to make a person conform his or her behavior to the requirements of the profession, and it covers both positive and negative reinforcement to deter the offender from similar behavior in the future. See, for example, State v. Corry, 51 Wis.2d 124, 186 N.W.2d 325 (1971) at 126, or State v. Postorino, 53 Wis.2d 412, 193 N.W.2d 1 at 4 (1972). Thus, even though the purpose of discipline is not to impose punishment per se, appreciating the unpleasant consequences of unprofessional behavior is part of rehabilitation. That reasoning has been extended by regulatory agencies to disciplinary proceedings for other professions.

Another way of stating the purpose of professional discipline is as the single goal of protecting the public, as individuals and as collective members of society. Discipline seeks to protect both the individuals who directly use the services of the professional, and the institutions of society with which the professional interacts. To accomplish this, the disciplining authority must ensure, to the extent possible, that neither this individual nor any other member of the profession will repeat the behavior for which this professional is being disciplined.

Mr. Jennings has been convicted of serious crimes. He has been sentenced to federal prison and prison work programs. He will complete his incarceration soon and return to society ready to be gainfully employed. The issue is whether he can safely be allowed to practice in the field of real estate. The interests which must be considered in deciding the issue of discipline were stated 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.

The attorney for the Division of Enforcement, Mr. Hall, requested revocation of Mr. Jennings' licenses with a provision that he not be allowed to reapply for such licenses until he is released from all supervision, which may be as late as 1998. Mr. Jennings acknowledged that some discipline would be appropriate, especially as notice to others of the seriousness of his actions, and he implicitly suggested a retroactive suspension [transcript, p. 52]. Mr. Jennings also pointed out two other recent disciplinary actions taken by the Real Estate Board in which six month periods of suspension were imposed for fairly serious violations.

The factors in this record which support Mr. Hall's argument that more severe discipline is appropriate are that

1. the amount of money embezzled by Mr. Jennings was significant ($632,150 in two counts);
2. the offenses are relatively recent (only 2 1/2 years ago); and
3. Mr. Jennings has not completed the sentence imposed on him, and therefore he has presumably not completed the process of rehabilitation.

The factors in the record which support Mr. Jennings' argument that severe discipline is not necessary are that

1. Mr. Jennings seems to be responding well to his sentence, and he is in the process of rehabilitation;
2. he will be under close supervision for up to three years after August, 1995, and he faces the prospect of immediate re-incarceration during that period should he commit any violation; and
3. he will already be under an obligation to disclose his convictions fully to prospective employers.

I unfortunately conclude that the first three factors outweigh the latter three, and that, at least until the sentence imposed by the federal court has been served, Mr. Jennings cannot be trusted in a position of fiduciary responsibility. He has forfeited that trust, and the responsibility of the board and the department to safeguard the public requires revocation of his licenses. I have not included an order for costs because the costs of an action such as this are relatively low, such an order would appear punitive, and Mr. Jennings did not impede or delay this proceeding in any way.

Dated and signed: January 18, 1995

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:

FEBRUARY 24, 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.)