WISCONSIN DEPARTMENT OF REGULATION & LICENSING

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FILE COPY

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST	:	FINAL DECISION AND ORDER
IRVING EDER, RESPONDENT.	:	(Case No. LS8911011REB)

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

Irving Eder
6208 North Berkeley Boulevard
Milwaukee, WI 53217

State of Wisconsin Real Estate Board
1400 East Washington Avenue, Room 281
P.O. Box 8935
Madison, WI 53708

Department of Regulation & Licensing
Division of Enforcement
1400 East Washington Avenue, Room 183
P.O. Box 8935
Madison, WI 53708

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

A disciplinary hearing was conducted in this matter before an administrative law judge on August 13, 1990. Complaint appeared by Attorney Richard Castelnuovo; respondent appeared in person and by Attorney Herbert L. Usow. The administrative law judge issued his Proposed Decision in the matter on November 9, 1990. Complainant's attorney filed objections thereto on November 20, 1990.

Based upon the record herein, the Real Estate Board adopts as its final decision in the matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Irving Eder (respondent), 6208 North Berkeley Boulevard, Milwaukee, Wisconsin 53217, was at all times material to this matter licensed as a real estate broker in the State of Wisconsin by license #12898, granted on September 1, 1976. Respondent is also licensed to practice law in the State of Wisconsin.

2. On or about April 20, 1985, Harold Winston, a licensed broker, and Winston's wife entered into a listing contract with respondent, in his capacity as broker for Execu-Systems Realtors, to sell their vacant land located at 5470 South 26th Street, Milwaukee, Wisconsin. The listing contract specified that the listing was exclusively for sale of the property to Christian Community Living Systems, Inc. The listing was to expire on or about May 20, 1985.

3. The Winstons caused to have inserted in the "Special Provisions" section of the listing contract at lines 53 through 55, the following provision:

> It is understood that the buyer is made aware of the fact that all of the land north of Grange for about 290' between So. 25th and So. 26th St. was filled in about 25 years ago and that four homes have been built on this filled land without any noticeable foundation problem of any consequence.

4. On or about June 29, 1985, following the failure to negotiate a sale pursuant to the April 20, 1985 listing contract, respondent submitted an all cash offer in the amount of $15,300 for the South 26th Street property.

5. On or about June 29, 1985, respondent's offer was accepted, and the property was transferred to him by warranty deed dated July 9, 1985.

6. By "Vacant Land Listing Contract - Exclusive Right to Sell" executed by respondent for himself and as broker for Execu-Systems Realtors on August 23, 1985, respondent granted Execu-Systems the exclusive right to sell respondent's South 26th Street property for the period between August 23, 1985 and February 28, 1986.

7. The listing contract provided at line 55 that "THE BROKER'S COMMISSION SHALL BE 10% . . . "; and provided at lines 43 and 44 that "MINIMUM EARNEST MONEY OF $ ..... WITHIN ..... DAYS OF ACCEPTANCE WHICH WILL BE RETAINED BY BROKER IN BROKER'S TRUST ACCOUNT, UNLESS OTHERWISE AGREED BY SELLER AND BUYER." The blanks were struck through.

8. The listing contract did not disclose the landfill condition affecting the South 26th Street property.

9. Under the name Execu-Systems, respondent posted a "for sale" sign at the South 26th Street property and listed the property through Multiple Listing Service as suitable for construction of "single or duplex. Possible 4 or 8 family."

10. On or about October 11, 1985, respondent drafted an offer to purchase for signature by Wladyslaw and Aleksandra Burzynski (Burzynskis) for purchase of the South 26th Street property at a price $16,000. The offer was made "subject to financing," but did not provide the terms and conditions governing the financing contingency.

11. On or about October 11, 1985, after consulting with an attorney, the Burzynskis submitted their own offer to purchase the South 26th Street property for $16,000. The offer was contingent upon obtaining financing for the lot and for construction of a house, execution of a construction contract satisfactory to the buyers, and obtaining a building permit through their contractor for construction of a home of not less than 2500 square feet. The offer provided for an earnest money deposit of $500 tendered with the offer, and established the closing date as December 9, 1985.

12. The offer was accepted by respondent on or about October 24, 1985. By the terms of the earnest money receipt section of the accepted offer, respondent acknowledged receipt of earnest money in the amount of $500, and agreed as follows:

> The undersigned hereby agrees to hold [the earnest money] in an authorized real estate account in Wisconsin, or transmit the same in accordance with the terms of the above offer.

13. Respondent failed to deposit the Burzynskis' earnest money in a real estate trust account maintained either by himself or by Execu-Systems, but rather deposited the earnest money into his business account, designated "Irving Eder, Attorney at Law," at the First National Bank of Glendale, Milwaukee, Wisconsin

14. The transaction closed on March 10, 1986. An amendment to the contract executed on December 9, 1985, had extended the closing date to January 6, 1986; however, no amendment was drafted or executed extending the date to March 10, 1986.

15. At all times material to this transaction, there was in effect an "Independent Contractor Agreement" between respondent and Execu-Systems by which Execu-Systems agreed to act as respondent's employing broker, and by which respondent agreed to pay Execu-Systems certain fees and charges for advertising, management and other services provided by Execu-Systems to Respondent. By the terms of the agreement, respondent was to pay Execu-Systems a transaction fee of $200 on the sale of each investment property owned and sold by respondent, where respondent's commission on such sale was waived.

16. With the exception of the listing contract, the documents relating to the transaction with the Burzynskis did not identify Execu-Systems as the broker, and respondent did not pay any transaction fee to Execu-Systems in connection with the Burzynski transaction.

17. The fact that the South 26th Street property had been filled was a material fact and an adverse factor which was required to be disclosed to the Burzynskis.

18. At no time prior to closing did Respondent disclose to the Burzynskis that the South 26th Street property had been filled.

19. Soil testing performed for the Burzynskis shortly after the closing disclosed subsoil conditions that precluded building without additional costs to them.

CONCLUSIONS OF LAW

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

2. The fact that the South 26th Street property had been filled was a material fact and adverse factor within the meaning of Wis. Adm. Code secs. RL 24.07(1) and (2).

3. In having failed to disclose to the Burzynskis the fact that the South 26th Street property had been landfilled, respondent has concealed a material fact, in violation of Wis. Adm. Code sec. RL 24.07(1), has failed to disclose an adverse factor, in violation of Wis. Adm. Code sec. RL 24.07(2)(d) and, pursuant to Wis. Adm. Code sec. RL 24.01(3), has therefore demonstrated incompetency to act as a broker in a manner which safeguards the interests of the public, in violation of Wis. Stats. sec. 452.14(3)(i).

4. In having failed to include in the offer to purchase drafted by him the exact terms and conditions of the financing contingency, respondent has violated Wis. Adm. Code sec. RL 24.08 and, pursuant to Wis.. Adm. Code sec. RL 24.01(3), he has therefore demonstrated incompetence to act as a broker in a manner which safeguards the interests of the public, in violation of Wis. Stats. sec. 452.14(3)(i).

5. In having failed to reduce to writing the change in the closing date of the transaction from January 6, 1985 to March 10, 1985, respondent has violated Wis. Adm. Code sec. RL 24.08.

6. In having failed to deposit the Burzynskis' earnest money payment into a real estate trust account, respondent has violated Wis. Adm. Code sec. RL 18.03 and, pursuant to Wis. Adm. Code sec. 18.14, respondent has thereby demonstrated incompetency to act as a real estate broker in a manner which safeguards the interests of the public, in violation of Wis. Stats. sec. 452.14(3)(i).

7. In having failed to act through Execu-Systems as employing broker, respondent has engaged in real estate practice in his own name without written approval from his broker-employer, in violation of Wis. Adm. Code sec. RL 17.03(1).

ORDER

NOW, THEREFORE, IT IS ORDERED that the license to practice as a real estate broker of Irving Eder be, and hereby is, suspended for period of twelve (12) months, to be stayed after nine (9) months if and only if the respondent successfully completes twelve (12) hours of real estate-related education covering: (a) applied aspects of listings and offers to purchase, (b) listing procedures, (c) financing, (d) providing property information and disclosure, (e) real estate trust funds, and (f) other related matters, and submits proof of completion with any request for a stay of the suspension; provided, that none of the education completed pursuant to this requirement may be used to satisfy any other continuing education requirements that are or may be required under the real estate law.

IT IS FURTHER ORDERED that this order is effective 30 days from the date of this decision. On or before the effective date of this decision, respondent shall return all license certificates issued to him by the department. Respondent's license certificates shall be returned to him at the time of expiration of the period of suspension.

EXPLANATION OF VARIANCE

The Real Estate Examining Board has accepted the Findings of Fact and Conclusions of Law set forth in the Proposed Decision of the administrative law judge. However, it has altered the recommended discipline of a three month suspension to provide for a twelve month suspension, the last three months of which will be stayed if the respondent successfully completes twelve hours in specified areas of real estate study.

The record in this case indicates that the respondent committed five violations of the real estate law. He failed to disclose that his lot had been landfilled to the purchasers, incompetently drafted a financing contingency, failed to reduce the change in closing date to writing, failed to deposit earnest money into a real estate trust account, and did not get written approval from his broker-employer to practice real estate in his own name.

Given the nature and number of violations found, as well as the defenses raised by the respondent, it is the opinion of the board that he should be required to undertake education in the relevant areas of concern in order to assure that he understands the requirements. Accordingly, the board has ordered that he complete 12 hours of education in specific subjects.

Of course, the most significant change in discipline from that recommended by the administrative law judge is that respondent be suspended for twelve months (to be reduced to nine if the education is completed within that time), rather than three. In making his recommendation, the administrative law judge indicated that the most serious violation--the failure to disclose the landfill condition of the property--was mitigated by respondent's candor at the hearing in which he admitted that he had not made such a disclosure and

inferred that this failure to disclose was due to respondent's conclusion that there was no problem with the lot. However, the board declines to agree that respondent's admission at hearing was sufficiently candid, when viewed in light of the record, to sufficiently mitigate in favor of a three month suspension.

As pointed out in complainant's objections, respondent's formal position until he personally testified at the hearing was that the disclosure had, in fact, been made to the purchasers. For example, when required to provide additional answers by the administrative law judge to previously evasive discovery responses submitted to complainant, it was stated flatly:

> He discussed on many occasions both at the restaurant and at other cites with the prospective buyers the fact that the land was filled.... The substance of the discussions was basically that the land was filled. This was mentioned on a number of occasions.

Furthermore, as stated within the proposed decision, at the hearing:

> Respondent produced two witnesses who had met with the respondent at the restaurant owned and operated by the Burzynskis and attempted to elicit testimony that they had witnessed respondent discussing with the Burzynskis the landfill condition of the lot. Those witnesses failed to establish that proposition.

Respondent firmly maintained that he had disclosed the landfill condition to the purchasers up until the 'eleventh hour'. It appears that only when confronted with the evidence at the hearing compelling a contrary conclusion, did he change his position and "admit" his failure to disclose. In the board's opinion, this approach speaks more of his character, candor and intentions in this case than his ultimate admission.

Based upon the foregoing discussion, as well as additional points made in complainant's objections, the board is of the opinion that the violations in this matter are of such serious nature under the circumstances of this case to require the imposition of a lengthy suspension of respondent's broker's license in order to adequately protect the public, promote respondent's rehabilitation, and deter other licensees from engaging in similar misconduct.

Dated: Jan. 24, 1991.

STATE OF WISCONSIN
REAL ESTATE BOARD

BDLS-1071

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be a prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3) (e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(2) The filing of a petition for rehearing shall not suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect unless the petition is granted or until the order is superseded, modified, or set aside as provided by law.

(3) Rehearing will be granted only on the basis of:

(a) Some material error of law.

(b) Some material error of fact.

(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

(4) Copies of petitions for rehearing shall be served on all parties of record. Parties may file replies to the petition.

(5) The agency may order a rehearing or enter an order with reference to the petition without a hearing, and shall dispose of the petition within 30 days after it is filed. If the agency does not enter an order disposing of the petition within the 30-day period, the petition shall be deemed to have been denied as of the expiration of the 30-day period.

(6) Upon granting a rehearing, the agency shall set the matter for further proceedings as soon as practicable. Proceedings upon rehearing shall conform as nearly may be to the proceedings in an original hearing except as the agency may otherwise direct. If in the agency's judgment, after such rehearing it appears that the original decision, order or determination is in any respect unlawful or unreasonable, the agency may reverse, change, modify or suspend the same accordingly. Any decision, order or determination made after such rehearing reversing, changing, modifying or suspending the original determination shall have the same force and effect as an original decision, order or determination.

227.52 Judicial review; decisions reviewable. Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter, except for the decisions of the department of revenue other than decisions relating to alcohol beverage permits issued under ch. 125, decisions of the department of employe trust funds, the commissioner of banking, the commissioner of credit unions, the commissioner of savings and loan, the board of state canvassers and those decisions of the department of industry, labor and human relations which are subject to review, prior to any judicial review, by the labor and industry review commission, and except as otherwise provided by law.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59 (6) (b), 182.70 (6) and 182.71 (5) (g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified. The petition may be amended, by leave of court, though the time for serving the same has expired. The petition shall be entitled in the name of the person serving it as petitioner and the name of the agency whose decision is sought to be reviewed as respondent, except that in petitions for review of decisions of the following agencies, the latter agency specified shall be the named respondent:

1. The tax appeals commission, the department of revenue.

2. The banking review board or the consumer credit review board, the commissioner of banking.

3. The credit union review board, the commissioner of credit unions.

4. The savings and loan review board, the commissioner of savings and loan, except if the petitioner is the commissioner of savings and loan, the prevailing parties before the savings and loan review board shall be the named respondents.

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

(d) The agency (except in the case of the tax appeals commission and the banking review board, the consumer credit review board, the credit union review board, and the savings and loan review board) and all parties to the proceeding before it, shall have the right to participate in the proceedings for review. The court may permit other interested persons to intervene. Any person petitioning the court to intervene shall serve a copy of the petition on each party who appeared before the agency and any additional parties to the judicial review at least 5 days prior to the date set for hearing on the petition.

(2) Every person served with the petition for review as provided in this section and who desires to participate in the proceedings for review thereby instituted shall serve upon the petitioner, within 20 days after service of the petition upon such person, a notice of appearance clearly stating the person's position with reference to each material allegation in the petition and to the affirmance, vacation or modification of the order or decision under review. Such notice, other than by the named respondent, shall also be served on the named respondent and the attorney general, and shall be filed, together with proof of required service thereof, with the clerk of the reviewing court within 10 days after such service. Service of all subsequent papers or notices in such proceeding need be made only upon the petitioner and such other persons as have served and filed the notice as provided in this subsection or have been permitted to intervene in said proceeding, as parties thereto, by order of the reviewing court.

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)

The following notice is served on you as part of the final decision:

1. Rehearing.

Any person aggrieved by this order may petition for a rehearing within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period commences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with the State of wisconsin Real Estate Board.

A petition for rehearing is not a prerequisite for appeal directly to circuit court through a petition for judicial review.

2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon the State of Wisconsin Real Estate Board.

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: the State of Wisconsin Real Estate Board.

The date of mailing of this decision is January 28, 1991

WLD:dms
886-490

BEFORE THE STATE OF WISCONSIN
REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST	:	
	:	NOTICE OF FILING PROPOSED DECISION
IRVING EDER RESPONDENT	:	

TO: Herbert Usow
Attorney at Law
633 W. Wisconsin Avenue
Suite 408
Milwaukee, WI 53203

Richard Castelnuovo
Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708

PLEASE TAKE NOTICE that a Proposed Decision in the above-captioned matter has been filed with the Real Estate Board by the Administrative Law Judge, Wayne R. Austin. A copy of the Proposed Decision is attached hereto.

If you have objections to the Proposed Decision, you may file your objections in writing, briefly stating the reasons, authorities, and supporting arguments for each objection. Your objections and argument must be received at the office of the Real Estate Board, Room 281, Department of Regulation and Licensing, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708, on or before November 26, 1990. You must also provide a copy of your objections and argument to all other parties by the same date.

You may also file a written response to any objections to the Proposed Decision. Your response must be received at the office of the Real Estate Board no later than seven (7) days after receipt of the objections. You must also provide a copy of your response to all other parties by the same date.

The attached Proposed Decision is the Administrative Law Judge's recommendation in this case and the Order included in the Proposed Decision is not binding upon you. After reviewing the Proposed Decision together, with any objections and arguments filed, the Real Estate Board will issue a binding Final Decision and Order.

Dated at Madison, Wisconsin this 9th day of November 1990.

Wayne R. Austin
Administrative Law Judge

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS AGAINST

LS8911011REB

IRVING EDER

Respondent

PROPOSED DECISION

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

Irving Eder
6208 North Berkely Boulevard
Milwaukee, WI 53217

State of Wisconsin Real Estate Board
1400 East Washington Avenue, Room 281
P.O. Box 8935
Madison, WI 53708

Department of Regulation & Licensing
Division of Enforcement
1400 East Washington Avenue, Room 183
P.O. Box 8935
Madison, WI 53708

A hearing was conducted in the above-captioned matter on August 13, 1990, at 1400 East Washington Avenue, Madison, Wisconsin. Complainant appeared by Attorney Richard Castelnuovo; respondent appeared in person and by Attorney Herbert L. Usow. Based on the entire record herein, the undersigned recommends that the Real Estate Board issue as its final decision and order in the matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Irving Eder (respondent), 6208 North Berkely Boulevard, Milwaukee, Wisconsin 53217, was at all times material to this matter licensed as a real estate broker

in the State of Wisconsin by license #12898, granted on September 1, 1976. Respondent is also licensed to practice law in the State of Wisconsin.

2. On or about April 20, 1985, Harold Winston, a licensed broker, and Winston's wife entered into a listing contract with respondent, in his capacity as broker for Execu-Systems Realtors, to sell their vacant land located at 5470 South 26th Street, Milwaukee, Wisconsin. The listing contract specified that the listing was exclusively for sale of the property to Christian Community Living Systems, Inc. The listing was to expire on or about May 20, 1985.

3. The Winstons caused to have inserted in the "Special Provisions" section of the listing contract at lines 53 through 55, the following provision:

> It is understood that the buyer is made aware of the fact that all of the land north of Grange for about 290' between So. 25th and So. 26th St. was filled in about 25 years ago and that four homes have been built on this filled land without any noticeable foundation problem of any consequence.

4. On or about June 29, 1985, following the failure to negotiate a sale pursuant to the April 20, 1985 listing contract, respondent submitted an all cash offer in the amount of $15,300 for the South 26th Street property.

5. On or about June 29, 1985, respondent's offer was accepted, and the property was transferred to him by warranty deed dated July 9, 1985.

6. By "Vacant Land Listing Contract - Exclusive Right to Sell" executed by respondent for himself and as broker for Execu-Systems Realtors on August 23, 1985, respondent granted Execu-Systems the exclusive right to sell respondent's South 26th Street property for the period between August 23, 1985 and February 28, 1986.

7. The listing contract provided at line 55 that "THE BROKER'S COMMISSION SHALL BE 10% . . . "; and provided at lines 43 and 44 that "MINIMUM EARNEST MONEY OF $ ..... WITHIN ..... DAYS OF ACCEPTANCE WHICH WILL BE RETAINED BY BROKER IN BROKER'S TRUST ACCOUNT, UNLESS OTHERWISE AGREED BY SELLER AND BUYER." The blanks were struck through.

8. The listing contract did not disclose the landfill condition affecting the South 26th Street property.

9. Under the name Execu-Systems, respondent posted a "for sale" sign at the South 26th Street property and listed the property through Multiple Listing Service as suitable for construction of "single or duplex. Possible 4 or 8 family."

10. On or about October 11, 1985, respondent drafted an offer to purchase for signature by Wladyslaw and Aleksandra Burzynski (Burzynskis) for purchase of the South 26th Street property at a price $16,000. The offer was made "subject to financing," but did not provide the terms and conditions governing the financing contingency.

11. On or about October 11, 1985, after consulting with an attorney, the Burzynskis submitted their own offer to purchase the South 26th Street property for $16,000. The offer was contingent upon obtaining financing for the lot and for construction of a house, execution of a construction contract satisfactory to the buyers, and obtaining a building permit through their contractor for construction of a home of not less than 2500 square feet. The offer provided for an earnest money deposit of $500 tendered with the offer, and established the closing date as December 9, 1985.

12. The offer was accepted by respondent on or about October 24, 1985. By the terms of the earnest money receipt section of the accepted offer, respondent acknowledged receipt of earnest money in the amount of $500, and agreed as follows:

> The undersigned hereby agrees to hold [the earnest money] in an authorized real estate account in Wisconsin, or transmit the same in accordance with the terms of the above offer.

13. Respondent failed to deposit the Burzynskis' earnest money in a real estate trust account maintained either by himself or by Execu-Systems, but rather deposited the earnest money into his business account, designated "Irving Eder, Attorney at Law," at the First National Bank of Glendale, Milwaukee, Wisconsin

14. The transaction closed on March 10, 1986. An amendment to the contract executed on December 9, 1985, had extended the closing date to January 6, 1986; however, no amendment was drafted or executed extending the date to March 10, 1986.

15. At all times material to this transaction, there was in effect an "Independent Contractor Agreement" between respondent and Execu-Systems by which Execu-Systems agreed to act as respondent's employing broker, and by which respondent agreed to pay Execu-Systems certain fees and charges for advertising, management and other services provided by Execu-Systems to Respondent. By the terms of the agreement, respondent was to pay Execu-Systems a transaction fee of $200 on the sale of each investment property owned and sold by respondent, where respondent's commission on such sale was waived.

16. With the exception of the listing contract, the documents relating to the transaction with the Burzynskis did not identify Execu-Systems as the broker, and respondent did not pay any transaction fee to Execu-Systems in connection with the Burzynski transaction.

17. The fact that the South 26th Street property had been filled was a material fact and an adverse factor which was required to be disclosed to the Burzynskis.

18. At no time prior to closing did Respondent disclose to the Burzynskis that the South 26th Street property had been filled.

19. Soil testing performed for the Burzynskis shortly after the closing disclosed subsoil conditions that precluded building without additional costs to them.

CONCLUSIONS OF LAW

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

2. The fact that the South 26th Street property had been filled was a material fact and adverse factor within the meaning of Wis. Adm. Code secs. RL 24.07(1) and (2).

3. In having failed to disclose to the Burzynskis the fact that the South 26th Street property had been landfilled, respondent has concealed a material fact, in violation of Wis. Adm. Code sec. RL 24.07(1), has failed to disclose an adverse factor, in violation of Wis. Adm. Code sec. RL 24.07(2)(d) and, pursuant to Wis. Adm. Code sec. RL 24.01(3), has therefore demonstrated incompetency to act as a broker in a manner which safeguards the interests of the public, in violation of Wis. Stats. sec. 452.14(3)(i).

4. In having failed to include in the offer to purchase drafted by him the exact terms and conditions of the financing contingency, respondent has violated Wis. Adm. Code sec. RL 24.08 and, pursuant to Wis.. Adm. Code sec. RL 24.01(3), he has therefore demonstrated incompetence to act as a broker in a manner which safeguards the interests of the public, in violation of Wis. Stats. sec. 452.14(3)(i).

5. In having failed to reduce to writing the change in the closing date of the transaction from January 6, 1985 to March 10, 1985, respondent has violated Wis. Adm. Code sec. RL 24.08.

6. In having failed to deposit the Burzynskis' earnest money payment into a real estate trust account, respondent has violated Wis. Adm. Code sec. RL 18.03 and, pursuant to Wis. Adm. Code sec. 18.14, respondent has thereby demonstrated incompetency to act as a real estate broker in a manner which safeguards the interests of the public, in violation of Wis. Stats. sec. 452.14(3)(i).

7. In having failed to act through Execu-Systems as employing broker, respondent has engaged in real estate practice in his own name without written approval from his broker-employer, in violation of Wis. Adm. Code sec. RL 17.03(1).

ORDER

NOW, THEREFORE, IT IS ORDERED that the license to practice as a real estate broker of Irving Eder be, and hereby is, suspended for period of three months, commencing 30 days from the date of the order of the Real Estate Board adopting the terms of this Proposed Decision. On or before the effective date of the board's order, respondent shall return all license certificates granted him by the board to the board office. Upon expiration of the period of suspension, such licensure certificates shall be returned to him.

IT IS FURTHER ORDERED that pursuant to Wis. Stats. sec. 440.20, respondent shall pay the costs of this proceeding.

OPINION

It is my opinion that by his conduct in the Burzynski transaction, Mr. Eder engaged in five violations of the real estate statute and code. First, respondent failed to disclose to the purchasers of his vacant lot the adverse factor that it had been landfilled a number of years before; second, in drafting the offer to purchase for the Burzynskis' signatures, respondent failed to include the terms and conditions governing the financing contingency; third, respondent failed to reduce a change in the closing date of his transaction with the Burzynskis to writing; fourth, respondent handled the transaction under his own name rather than the name of his employer-broker without the latter's written approval; and fifth, respondent failed to deposit the Burzynskis' earnest money payment into a real estate trust account.

Addressing the last of these, Mr. Eder does not deny that he deposited the earnest money into his business account, but argues that there was nothing wrong with that procedure because, as the owner of the property being sold, the money was his own. The problem with that defense is that Mr. Eder executed an earnest money receipt at

the time of his acceptance of the Burzynskis' offer agreeing that the earnest money would be held in a real estate trust account. The requirement that earnest money deposits be held in trust accounts is as much for the protection of the buyer as for the seller and, absent any specific agreement with the Burzynskis that the respondent could retain the money in his business account, to have done so is in my opinion a clear violation of Wis. Adm. Code sec. RL 18.03.

Mr. Eder does not contest his failure to reduce to writing the change in the closing date from January 6, 1985, to March 10, 1986, and it follows that he has therefore violated sec. RL 24.08, Code, requiring that "Licensees shall put in writing all . . . commitments regarding transactions, expressing the exact agreement of the parties."

Mr. Eder also does not deny that he failed to include in the offer to purchase drafted by him for the Burzynskis' signature the terms and conditions governing the financing contingency, but rather provided only that "This offer is subject to financing." In *Gerruth Realty Co. v. Pire,* 16 Wis. 2d 89, the offer to purchase specified that the offer was "contingent upon the purchaser obtaining the proper amount of financing." The court found that to the extent the cited clause permitted an interpretation which would have allowed the buyer to "determine without limitation and in a subjective manner the meaning of an ambiguous term," it would come "dangerously close to an illusory or aleatory contract . . . if it does not in fact reach it. *Gerruth, supra,* at 92. The court concluded that it was impossible to interpret the financing contingency and held the contract void for indefiniteness. Mr. Eder's financing contingency is equally ambiguous, and he has therefore violated Wis. Adm. Code sec. RL 24.08.

By Mr. Eder's independent contractor agreement with Execu-Systems, he was accepted as a salesperson under Execu-Systems' corporate license and he was provided by Execu-Systems with advertising and management services. Respondent was to receive the commission on properties sold by him upon payment of transaction and management fees to Execu-Systems. In the sale of investment properties owned by him where commission was waived, respondent was obligated to pay only a $200 transaction fee. While the listing contract lists Execu-Systems as the listing broker, Execu-systems dropped out of the picture in terms of the Burzynskis' offer to purchase and all subsequent transaction documents. Moreover, the uncontroverted evidence is that Mr. Eder never paid to Execu-Systems the $200 transaction fee provided by his contract with that corporation. I'm inclined to agree with respondent's contention that the question of the transaction fee constituted a private contractual matter between him and Execu-Systems, and that the board is not in a position to make findings related to a possible contractual dispute between the parties to the agreement in question. On the

other hand, there seems to be no question that respondent carried out this transaction in his own name rather that as an agent of Execu-Systems, and that he did not have Execu-Systems' written approval as employing broker to do so. Accordingly, I conclude that Mr. Eder has violated Wis. Adm. Code sec. RL 17.03(1).

Far more serious than any of the foregoing violations was respondent's failure to disclose to the Burzynskis the fact that the lot they were purchasing for construction of their residence had been landfilled. No disclosure was included on respondent's listing contract, and Mrs. Burzynski credibly testified that no such disclosure was made, either orally or in writing. Respondent produced two witnesses who had met with respondent at the restaurant owned and operated by the Burzynskis and attempted to elicit testimony that they had witnessed respondent discussing with the Burzynskis the landfill condition of the lot. Those witnesses failed to establish that proposition.

Kay Evanson, a former real estate broker, practiced at Execu-Systems at the time in question. She met With Eder at the Burzynski's restaurant, at a time when the transaction with the Burzynskis was pending, to discuss an unrelated transaction. Ms. Evanson testified that after speaking with respondent for a few minutes, he left the booth and went back toward the kitchen area. He returned in five or ten minutes, saying that he was there to talk to the Burzynskis about something. Ms. Evanson didn't know what. They then spoke about their unrelated transaction, and they then both left.

Harry Mechanic has been a broker with Execu-Systems since 1983, and periodically worked with respondent during the period in question. Mechanic at that time represented various builders in the sale of houses built by them and he met with respondent at the Burzynski's restaurant for dinner and to discuss the possibility of working with the Burzynskis in the construction of their home. Mr. Mechanic was present when respondent spoke to the Burzynskis; primarily to Mrs. Burzynski. When asked on direct examination whether in the course of the conversation, there was any mention of the possibility that the South 26th Street lot had been landfilled, Mr. Mechanic responded as follows:

> At that point in time, being a long time ago, I can't honestly say precisely, but Mr. Eder was very nonchalant, did not push them in any way, and told them they could ... ah, he had no knowledge of any type of fill at all, and he didn't know, actually, and that they were at liberty to take their, you know, [do] the bore test, whatever.

Mr. Mechanic's testimony and similar later testimony on cross examination is more damaging than exculpatory. Taken at face value, it would seem to establish that not only did respondent fail to disclose that the land had been filled, but that he was

actively concealing the fact. Mr. Mechanic's testimony is discounted, however, not only because he obviously had no clear recollection of the conversation, but because it is diametrically contrary to his representation to the department's investigator in a telephone interview on May 14, 1990, that he did not recall anything being discussed at the meeting in question pertaining to the condition of the lot and whether or not it had been filled (See Exhibit #9).[1]

The most damaging testimony, however, is respondent's own. His testimony on direct examination included the following:

> Q. (by Mr. Usow) Did you tell [Mrs. Burzynski] that at one time you had been told that there may have been fill added to that lot?
>
> A. (by respondent) I told her to have the lot inspected. And I said it's her privilege to have the lot checked out.
>
> Q. Did you talk about fill at all?
>
> A. No.

Respondent testified that he had spoken to the owners of properties adjoining the property in question to determine whether there had been any problems resulting from the landfill condition and was notified that there were not. Even if that testimony is accepted, however, respondent was not relieved of his duty to disclose the landfill condition of the lot. The Wisconsin Supreme Court defined "material fact," and described the elements necessary to establish a duty to disclose material facts in *Ollerman v. O'Rourke Co., Inc.*, 94 Wis. 2d 17.

> ...a fact is material if a reasonable purchaser would attach importance to its existence or non-existence in determining the choice of action in the transaction in question; or if the vendor knows or has reason to know that the purchaser regards or is likely to regard the matter is important in determining the choice of action, although a reasonable purchaser would not so regard it . . . ."

[1] *While Mr. Mechanic indicated that his memory of the conversation was better at the time of hearing than it had been at the time of his interview, it was, in some respects, much worse. The memorandum of the Mechanic interview found at Exhibit #9 indicates that respondent had told Mechanic that respondent's attorney had instructed him to tell Mechanic not to discuss this matter with anyone. When questioned on cross examination whether this exchange took place, Mr. Mechanic testified that he couldn't remember.*

Inasmuch as the Burzynskis were purchasing the lot for the purpose of constructing a home, it can hardly be denied that they would attach importance to the lot's subsoil condition and to its integrity as a building site, and it is concluded that the fact the lot had been previously filled was therefore a material fact. It is also concluded that it was a factor required to be disclosed to the Burzynskis. According to the *Ollerman* court, the elements establishing a requirement to disclose are first, that the condition is "latent", and not readily observable by the purchaser; second, that the purchaser acts upon the reasonable assumption that the condition does not exist; third, that the vendor has special knowledge or means of knowledge not available to the purchaser; and fourth, that the existence of the condition is material to the transaction; that is, that it influences whether the transaction is concluded at all or at the same price.

The elements enunciated by the *Ollerman* court are those governing the tort of intentional misrepresentation; but they are nonetheless instructive in terms of the board's prohibition against concealment or misrepresentation of material facts. It seems reasonable that a broker should not be found to have concealed a material fact if such fact is readily observable by the purchaser, if the buyer could not reasonably assume the non-existence of the fact, or if the broker had no knowledge of the fact. In this case, however, it is uncontroverted that the fill condition of the lot was not readily observable to the purchaser (see also in this regard, Exhibits 8A and 8B, respondent's photographs showing an apparently level and grassy plot); there is no reason to assume that the Burzynskis -- admitted neophytes in the area of residential construction -- could not have reasonably assumed the non-existence of land-fill at the site; and there is no question that respondent was made aware of the fact that the lot had been landfilled. It follows that he had an absolute duty to disclose that fact to the Burzynskis and, in failing to do so, he has violated Wis. Adm. Code sections RL 24.07(1) and RL 24.07(2)(d).

Before proceeding to a discussion of the what discipline is appropriate in these circumstances, it is perhaps necessary to briefly discuss an alleged violation set forth in the Complaint for which no finding has been made and which has not heretofore been addressed. Paragraphs 18. and 19. of the Complaint allege that at no time prior to Eder's October 24, 1985 acceptance of the Burzynskis' offer did he "disclose in writing or otherwise the purchase price of the vacant land owned by him" or "any commissions or fees payable directly or indirectly to him as a result of the sale of the vacant land to the Burzynskis." In having so failed, complainant alleges at paragraph 32.f. of the Complaint that respondent has violated Wis. Adm. Code sec. RL 24.05(3). That section was created in December, 1980, as Wis. Adm. Code sec. REB 15.05(3). The impetus for the rule was a *Petition for the Adoption of Rules* from the Attorney General dated October 19, 1979. That petition states in part as follows:

> The investigation into tie-in activities of real estate licensees in the Madison and Dane County area has revealed several types of conduct which we consider improper under . . . the antitrust statute and . . . the statute dealing with fraudulent advertising. The latter includes not only advertising in the usual sense but also includes "otherwise representing the sale or furnishing of any property or services combined with or conditioned on the purchase of any other property or services described in such advertisement or other representation."
>
> We propose that the board adopt the following rules so that the board can take proper disciplinary action against licensees who engage in the conduct of which we complain.
>
> * * *
>
> (2) The term "unprofessional conduct" . . . is defined to mean and include but not be limited to the following, or aiding and abetting the same:
>
> * * *
>
> (m) To knowingly fail to state the price which must be paid for real estate and services included in a sale along with any other requirement which is a condition to the receipt of such property or services prior to the submission of an offer to purchase to a buyer or seller.

As set forth in the department's October 28, 1989, analysis of the rules which were ultimately promulgated, the purpose of the rules was to govern "tie-in" practices of real estate licensees:

> This proposed revision to Chapter REB 15 is in response to the petition of Bronson C. LaFollette, Attorney General, for the adoption of rules relating to certain "tie-in" practices of real estate licensees, believed by the Attorney General to be in violation of s. 133.01 of the Wisconsin Statutes.
>
> * * *
>
> Section 15.05(3) prohibits a licensee from knowingly failing to state the price of property, and the cost of services included in a sale, or failing to disclose any unknown requirement which is a condition of the sale of property or receipt of services prior to submitting an offer to purchase to a buyer or seller.

I do not believe the cited section has any applicability to this transaction which, while complicated by the fact that the listing broker was Execu-Systems, was essentially nothing more than a simple sale by a broker-owner to a buyer.

It is established that the purposes for imposition of discipline include rehabilitation of the licensee, deterring other licensees from engaging in the same or similar conduct and, by deterrence and rehabilitation, to protect the health, safety and welfare of the public. *State v. Aldrich,* 71 Wis. 2d 206 (1976). Punishment of the licensee is not an appropriate consideration. *State v. McIntyre,* 41 Wis. 2d 481.

I conclude that there is clear and convincing evidence of the violations found herein, and I consider those violations -- particularly the failure to disclose the landfill condition -- to be serious in nature. In my opinion, however, there is mitigation here; and that mitigation consists primarily of my opinion that there is lacking in this case any real evidence of evil intent by Mr. Eder in his dealings with the Burzynskis. It is not unreasonable to infer that Mr. Eder's failure to disclose what he knew about the landfill condition of the lot was derived from his conclusion that there was no problem with the lot. That conclusion, in turn, could have been rationally based both on the fact that the disclosure to him indicated that the landfill condition had created no problem in terms of other properties in the neighborhood and on his confirmation of that fact from his own inquiries in the neighborhood. The reason I am able to accept the inference is that while the defense of this matter by Mr. Eder's attorney was, if nothing else, vigorous, Mr. Eder, when testifying under oath both on direct and cross examination, and when asked directly whether in his conversations with the Burzynskis he had specifically mentioned the landfill condition of the lot, he admitted candidly and unequivocally that he had not. That admission may not have done much for Mr. Eder's defense, but it does say something about his character. On balance, it is my opinion that a three month suspension of Mr. Eder's license adequately subserves the cited disciplinary objectives.

Dated at Madison, Wisconsin this 8th day of November, 1990.

Respectfully submitted,

Wayne R. Austin
Administrative Law Judge

WRA:BDLS:904