

WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

FILE COPY

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST

DALE F. HELLENGREEN,
RESPONDENT.

:
:
:
:
:

FINAL DECISION
AND ORDER
(Case No. LS9210162REB)

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

Dale F. Hellengreen
Rt #1, Box 13
Gordon, WI 54838

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

Department of Regulation and Licensing
Division of Enforcement
1400 East Washington Avenue
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 hearing was held in this matter before an Administrative Law Judge on January 19, 1993. Respondent Dale F. Hellengreen appeared personally, by telephone, without legal counsel. Complainant Division of Enforcement was represented by Attorney Charles J. Howden. The Administrative Law Judge issued a Proposed Decision on April 22, 1993. Complainant's attorney filed written objections to the decision, under date of May 4, 1993.

Based on the record of this proceeding, the Real Estate Board makes the following Findings of Fact, Conclusions of Law, and Order as its Final Decision in this matter

FINDINGS OF FACT

1. Respondent Dale F. Hellengreen is and was at the time of the facts set forth below a real estate broker licensed in the state of Wisconsin, under license number 36300, originally granted on December 19, 1985.

2. On September 21, 1992 in Winnebago County, Wisconsin, Mr. Hellengreen was convicted of one felony count of fraudulent practices/sales of securities under sec. 551.41(2), and sec. 551.58(1), Wis. Stats. in case # 92 CF 54; two misdemeanor counts of wilful failure to file corporate tax returns under sec. 71.83(2)(a), Wis. Stats. in case # 92 CF 89; and two misdemeanor counts of wilful failure to file tax returns under sec. 71.83(2)(a), Wis. Stats. in case # 92 CF 165.

CONCLUSIONS OF LAW

- I. The Real Estate Board has jurisdiction in this proceeding pursuant to sec. 452.14(3), Wis. Stats.
- II. The Real Estate Board has personal jurisdiction over Mr. Hellengreen. Mr. Hellengreen received timely notice of the hearing.
- III. The Real Estate Board has jurisdiction over the subject-matter of this complaint under sec. 452.14, Wis. Stats, and ch. RL 24, Wis. Admin. Code, based on the filing of a complaint alleging unprofessional conduct.
- IV. The circumstances of Mr. Hellengreen's convictions for fraudulent practices/sales of securities and wilful failure to file corporate tax returns are substantially related to the circumstances of the activities of a real estate broker under sec. 111.335(c), Wis. Stats., and they constitute incompetency to act as a real estate broker in such manner as to safeguard the interests of the public under sec. RL 24.01 (3)(i), and sec. RL 24.17 (2), Wis. Admin. Code, which is a basis for the imposition of discipline under sec. 452.14, Wis. Stats.

ORDER

NOW, THEREFORE, IT IS ORDERED that the license granted to Dale F. Hellengreen to practice as a real estate broker in the state of Wisconsin is hereby revoked.

FURTHERMORE, IT IS ORDERED that the assessable costs of this proceeding be imposed on Dale F. Hellengreen, pursuant to sec. 440.22, Wis. Stats. Pursuant to Wis. Adm. Code sec. RL 2.18(4), the attorney for the Division of Enforcement and the Administrative Law Judge shall file supporting affidavits showing costs incurred within 15 days of the date of this decision. Dale F Hellengreen shall file any objection to the affidavits within 30 days of the date of this decision.

EXPLANATION OF VARIANCE

FINDINGS OF FACT

The Findings of Fact are adopted from those recommended by the Administrative Law Judge (ALJ). They do not include a reference to the additional thirteen felonies and three misdemeanors which were "read-in" at the time of criminal sentencing, contrary to the request made by the complainant within his objections to the proposed decision.

The issue raised is the extent to which an administrative agency may utilize criminal read-ins as either: 1) proof of having violated a law substantially related to the licensed professional, such that discipline may be imposed, and, 2) an admission for the purpose of taking the conduct into consideration in assessing appropriate discipline.

Both the ALJ and complainant's attorney reference State v. Szarkowitz, 157 Wis 2d 740 (1990). There the court discussed the legal significance of "read-ins" as a part of the criminal proceeding, itself. The court stated, at p. 753:

"In Wisconsin, when a defendant agrees to crimes being read in at the time of sentencing, he makes an admission that he committed those crimes. The trial court considers these read-ins as part of the defendant's conduct for sentencing purposes, and the state is prohibited from later formally charging the defendant for these criminal offenses." (Emphasis, added).

The fact that read-ins are deemed admissions for criminal sentencing purposes, does not necessarily lead to the conclusion that a court would extend their scope as also establishing violations of law in a separate administrative disciplinary proceeding.

However, it would seem unnecessary to introduce the possibility of error into this proceeding by attempting to predict a court's ultimate determination of this issue here. The circumstances of the violations for which respondent was convicted are sufficient to support the determination made in this case.

CONCLUSIONS OF LAW

Changes have been made to Conclusions of Law I, II and III recommended by the ALJ for the purpose of legal precision and clarification. Conclusion of Law I has been revised to delete the reference to the board's jurisdiction as being based upon its authority to "issue and control credentials for real estate brokers". The authority to grant and issue a license to practice real estate does not reside in this board; but rather, the Department of Regulation and Licensing, pursuant to sec. 452.05(1)(a), Wis. Stats. The legal basis for the board's jurisdiction in this case rests in its statutory authority to take disciplinary action against holders of a real estate license, pursuant to sec. 452.14(3), Wis. Stats.

Similarly, Conclusion of Law II has been modified to eliminate the reference to personal jurisdiction as having been obtained over respondent through the board's authority to issue or control real estate credentials.

Conclusion of Law III, has been revised to delete the reference to the authority of examining boards under sec. 15.08(5)(c), Wis. Stats. That provision does not pertain to this board. See, sec. 15.07(1)(b)8., Wis. Stats.

Complainant's attorney has objected to the ALJ's proposed Conclusion of Law IV, which stated in material part that respondent's convictions:

"... constitute incompetency to act as a real estate broker in such manner as to safeguard the interest of the public under sec. RL 24.01(3), and sec. RL 24.17(2), Wis. Admin. Code, which is a basis for the imposition of discipline under sec. 452.14, Wis. Stats."

The argument presented is that the citation to sec. 452.14, Wis. Stats., without an accompanying subsection reference is not sufficiently explicit to be supported upon possible appeal. Sec 452.14, consists of 5 separate sections, section (3) of which is comprised of 15 subsections of separate forms of actionable misconduct. One of the Complaint's allegations is that respondent violated subsection (i) of sec. 452.14(3), Wis. Stats. This subsection authorizes discipline upon findings of:

"(i) Demonstrated incompetency to act as a broker . . . in a manner which safeguards the interests of the public"

An analysis of the conclusion at issue indicates that the ALJ determined respondent had violated RL 24.17(2), Wis. Adm. Code, which provides in material part, as follows:

"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. . . ."

Conjunctively, RL 24.01(3) acts as a legal conduit by which a criminal conviction can become incompetency for the purposes of discipline. This provision states in part:

"If a licensee violates rules in this chapter, the licensee has demonstrated incompetency to act as a broker . . . in such manner as to safeguard the interests of the public under s. 452.14(3)(i), Stats. . . ."

The final link in this chain is the statute itself, which provides:

"452.14 Investigation and discipline of licensees. . . . (3) Disciplinary proceedings shall be conducted by the board according to rules adopted under s. 440.03(1). The board may revoke, suspend or limit any broker's . . . license or registration, or reprimand the holder of the license or registration, if it finds that the holder of the license or registration has:

". . . (i) Demonstrated incompetency to act as a broker . . . in a manner which safeguards the interests of the public.

Recommended Conclusion of Law IV, specifically refers to "incompetency", and contains direct citations to ss. RL 24.17(2) and RL 24.01(3), quoted above. Inferentially, at least, the citation to "sec. 452.13" appears legally sufficient under these circumstances. There is no reason, however, for the board not to take this opportunity to assure precision, and it has made the appropriate change.

ASSESSMENT OF COSTS

Complainant's attorney has also requested that the costs of this proceeding be assessed against the respondent, contrary to the recommendation of the ALJ.

In his decision the ALJ expressed his preference to impose costs only in cases where the respondent has been recalcitrant or obstructionist. Complainant's attorney disagrees with that standard and expresses the opinion that costs are justified in this case due to the serious nature and impact upon the trusting public of respondent's criminal activities.

Sec. 440.22(2), Wis. Stats., authorizes the imposition of costs as follows:

"In any disciplinary proceeding against a holder of a license, certificate, permit or registration in which the department or an examining board attached to the department orders suspension, limitation or revocation of the license, certificate, permit or registration or reprimands the holder, the department or examining board may, in addition to this discipline, assess all or part of the costs of the proceeding against the holder. Costs are payable to the department."

The prerequisite for imposing costs against a licensee under the statute is being disciplined in the proceeding. The statute's language is identical in substance to that within the Wisconsin Supreme Court Rules pertaining to attorney disciplinary proceedings. See, SCR 22.20(1) Accordingly, resort to its decisions on this issue is not only appropriate, but instructive.

The customary practice of the Wisconsin Supreme Court appears to be to impose full costs against a disciplined attorney. C.f., In the Matter of the Disciplinary Proceedings Against Willis B. Swartwout, 116 Wis. 2d 380, 384-5 (1984); Disciplinary Proceedings Against Hur, 126 Wis. 2d 119, 122 (1985). The assessment of costs does not constitute discipline. Disciplinary Proceedings Against Nora, 173 Wis. 2d 660, 663 (1993). Accordingly, the determination as to whether costs are imposed need not be founded upon the factors required for assessing discipline--which are rehabilitation, public protection and deterrence. Indeed, it is appropriate that the offending licensee be required to pay for the actual cost of enforcement of a disciplinary action, rather than the remainder of the profession (and, ultimately, the consumer public) through licensing fees. In the Matter of the Disciplinary Proceedings Against Hur, supra.

Complainant argues that, in any event, the imposition of costs only upon a finding of recalcitrance or obstructionism should not be accepted as the standard by this board. He cites to the determination made by the Secretary of the Department of Regulation and License in a recent disciplinary case, where costs were ordered, and it was stated:

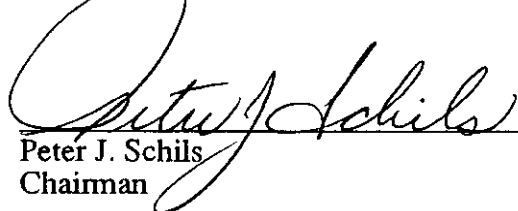
"Lack of cooperation of a Respondent should not be used as a basis for assessing a level of discipline. Costs are appropriate here based on the nature of the respondent's repeated misconduct: intentional violations of established regulatory standards for respondent's personal benefit and gratification." In the Matter of Disciplinary Proceedings Against Abdulah B. Zargar, (Case No. LS 9212021 RAL, Decided May 14, 1993).

The board agrees that the extent to which a respondent is deemed to have cooperated in a disciplinary proceeding should not be the primary factor in determining whether costs are imposed. Among other concerns, such a criterion could create the unreasonable risk of confusing or misinterpreting the respondent's vigorous exercise of the constitutional right to defend in the proceedings with a failure to cooperate with his or her licensing authority.

Under any theory, however, the fraud perpetrated upon the public in this case, for which the respondent was convicted, is of sufficient gravity and extent to warrant the board in recovering the costs incurred by the department in bringing the respondent to discipline. Respondent, and not other licensees nor the public, should be required to bear such costs.

Dated: June 5, 1993.

STATE OF WISCONSIN
REAL ESTATE BOARD



Peter J. Schils
Chairman

BDLS2-3002

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF	:	
DISCIPLINARY PROCEEDINGS AGAINST	:	AFFIDAVIT OF COSTS OF
	:	OFFICE OF BOARD LEGAL SERVICES
DALE F. HELLENGREEN,	:	Case No. LS-9210162-REB
RESPONDENT.	:	

John N. Schweitzer affirms the following before a notary public for use in this action, subject to the penalties for perjury in sec. 946.31, Wis. Stats.:

1. I am an attorney licensed to practice law in the State of Wisconsin, and am employed by the Wisconsin Department of Regulation and Licensing, Office of Board Legal Services.
2. In the course of my employment, I was assigned as the administrative law judge in the above-captioned matter.
3. The costs of the proceeding for the Office of Board Legal Services in this matter are set out below:


a. Administrative Law Judge Expense - John N. Schweitzer

Prehearing 1/19/93 (1/2 hour @ \$23.80/hour)	= <u>\$11.90</u>
Conduct hearing, 1/25/93 (1 1/4 hours)	= <u>\$29.75</u>
Read, research, and write proposed decision 2/8/93 to 4/21/93 (7 3/4 hours)	= <u>\$184.45</u>

b. Reporter Expense

Attend hearing, 1/25/93	= <u>\$75.00</u>
Transcribe 1/25/93 hearing, 32 pages	= <u>\$105.60</u>

Total costs for Office of Board Legal Services = **\$406.70**



John N. Schweitzer
Administrative Law Judge

Sworn to and signed before me this 28 day of May, 1993.

Lois Ann, Notary Public, State of Wisconsin.

My commission 11-6-94.

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF THE DISCIPLINARY
PROCEEDINGS AGAINST

DALE F. HELLENGREEN,
RESPONDENT.

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:

AFFIDAVIT OF COSTS
LS 9210162 REB

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Charles J. Howden, being duly sworn, deposes and states as follows:

1. That I am an attorney licensed in the state of Wisconsin and is employed by the Wisconsin Department of Regulation and Licensing, Division of Enforcement:

2. That in the course of those duties I was assigned as a prosecutor in the above-captioned matter; and

3. That set out below are the costs of the proceeding accrued to the Division of Enforcement in this matter, based upon Division of Enforcement records compiled in the regular course of agency business in the above-captioned matter.

PROSECUTING ATTORNEY EXPENSE

<u>Date</u>	<u>Activity</u>	<u>Time Spent</u>
10/1/92	Review conviction information	1.0 hour
10/5/92	Research and drafting of Summary Suspension documents and Motion	5.0 hour
10/9/92	Drafting	2.0 hour
10/12/92	Draft Complaint and Notice regarding formal disciplinary proceeding	6.0 hour
10/13/92	Completion of drafts of Summary Suspension matters	3.0 hour
10/16/92	Correspondence Waupun County	0.4 hour

10/23/92	Correspondence	0.2 hour
10/26/92	Preparation of Subpoena and related matters	0.5 hour
10/28/92	Receive and review correspondence and preparation and phone conferences	2.0 hour
10/29/92	Summary Suspension hearing; draft Order Conference with witnesses	2.5 hour
11/18/92	Amend Notice regarding Complaint; phone conference Mr. Copeland regarding service and arrange service	2.0 hour
1/5/93	Receive and review respondent's Answer; review file	1.0 hour
1/12/93	Receive and review ALJ correspondence	0.2 hour
1/14/93	Receive and review ALJ correspondence	0.3 hour
1/25/93	Preparation, conference witness, hearing	1.5 hour
1/28/93	Correspondence	0.5 hour
2/22/93	Correspondence	0.3 hour
5/4/93	Review file; review transcript; research and drafting of objections	5.0 hour
6/11/93	Drafting affidavit regarding costs	0.5 hour

TOTAL HOURS

33.90 hours

Total attorney expense for

33.90 hours at \$30.00 per hour equals:

\$ 1,017.00

MISCELLANEOUS DISBURSEMENTS

- | | | | | |
|----|----------|--------------------------------------|----|-------|
| 1. | 10/14/92 | Service of documents. | \$ | 12.50 |
| 2. | 11/3/92 | Service of order Summary Suspension. | \$ | 12.00 |

TOTAL

\$ 24.50

TOTAL ASSESSABLE COSTS

\$ 1,041.50

Charles J. Howden
Charles J. Howden, Attorney

Subscribed and sworn to before me this 14th day of June, 1993.

[Signature]
Notary Public
My Commission is permanent.

CJH:pw
ATTY-2570

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 June 16, 1993.

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST

DALE F. HELLENGREEN,
RESPONDENT.

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:

NOTICE OF FILING
PROPOSED DECISION
LS9210162REB

TO: Dale F. Hellengreen
ID 217077
Rt. #1, Box 13
Gordon, WI 54838
Certified P 992 818 941

Charles Howden, Attorney
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, John N. Schweitzer. 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, Department of Regulation and Licensing, Room 281, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708, on or before May 7, 1993. 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 22nd day of April, 1993.



John N. Schweitzer
Administrative Law Judge

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF	:	
DISCIPLINARY PROCEEDINGS AGAINST	:	PROPOSED DECISION
	:	Case No. LS-9210162-REB
DALE F. HELLENGREEN,	:	(DOE case number 92 REB 318)
RESPONDENT.	:	

PARTIES

The parties in this matter under sec. 227.44, Wis. Stats. and sec. RL 2.036, Wis. Adm. Code, and for purposes of review under sec. 227.53, Wis. Stats. are:

Dale F. Hellengreen
ID 217077
Rt. #1, Box 13
Gordon, WI 54838

Real Estate Board
1400 East Washington Ave.
Madison, WI 53708

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

PROCEDURAL HISTORY

A. This case was initiated by the filing of a complaint with the Real Estate Board on October 16, 1992. A disciplinary proceeding (hearing) was scheduled for December 2, 1992. Notice of Hearing was prepared by the Division of Enforcement of the Department of Regulation and Licensing and sent by certified mail on October 16, 1992 to Mr. Hellengreen at his home address in Weyauwega and also in care of the Waupaca County Jail.

B. On October 29, 1992, Mr. Hellengreen's license as a real estate broker was summarily suspended by the Real Estate Board.

C. A hearing was scheduled on November 18, 1992 in a similar disciplinary proceeding against Mr. Hellengreen's registration as a loan solicitor, LS-9210161-RLM. That hearing was rescheduled to January 25, 1993, and the hearing in this case was rescheduled to the same time. The two cases were heard together.

D. An amended notice of hearing was sent for service on Mr. Hellengreen at Dodge Reception Center in Waupun on December 3, 1992, and Mr. Hellengreen responded with a letter and answer to the complaint on December 22, 1992.

E. A prehearing conference was held on January 19, 1993 at which arrangements were made for Mr. Hellengreen to appear by phone at the hearing.

F. The hearing was held as scheduled on January 25, 1993. Mr. Hellengreen appeared personally, by telephone, without an attorney. Attorney Charles Howden of the Division of Enforcement appeared for the Department of Regulation and Licensing. The hearing was recorded. A transcript of the hearing was prepared and delivered on February 15, 1993. The testimony and exhibits entered into evidence at the hearing form the basis for this Proposed Decision.

APPLICABLE STATUTES AND RULES

Sec. 111.321, Wis. Stats. Prohibited bases of discrimination.

Subject to ss. 111.33 to 111.36, no employer, ... licensing agency or other person may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of ... arrest record (or) conviction record

Sec. 111.322, Wis. Stats. Discriminatory actions prohibited.

Subject to ss. 111.33 to 111.36, it is an act of employment discrimination to do any of the following:

- (1) To refuse to ... license any individual ... because of any basis enumerated in s. 111.321.

Sec. 111.325 Unlawful to discriminate.

It is unlawful for any employer, labor organization licensing agency or person to discriminate against any employee or any applicant for employment or training.

Sec. 111.335, Wis. Stats. Arrest or conviction record; exceptions and special cases.

- (1) ..

(c) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ or license, or to bar or terminate 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

Sec. 452.01, Wis. Stats. **Definitions.**

...

(2) "Broker" means any person ... who:

(a) For another, and for commission, money or other thing of value, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase or rental of an interest or estate in real estate;

(b) Is engaged wholly or in part in the business of selling real estate to the extent that a pattern of real estate sales is established, whether or not such real estate is owned by such person;

(d) For another and for commission, money or other thing of value, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase or rental of any business, its goodwill, inventory, fixtures or an interest therein; or

(e) Is engaged wholly or in part in the business of selling business opportunities or goodwill of an existing business or is engaged wholly or in part in the business of buying and selling, exchanging or renting of any business, its goodwill, inventory, fixtures or an interest therein.

(f) For another, and for commission, money or other thing of value, sells, exchanges or buys, or offers or attempts to negotiate a sale, exchange or purchase of a time share.

(g) Is engaged wholly or in part in the business of selling time shares to the extent that a pattern of sales is established, whether or not the time shares are owned by such person.

Sec. 452.14, Wis. Stats. **Investigation and discipline of licensees.**

...

(3) Disciplinary proceedings shall be conducted by the board according to rules adopted under s. 440.03(1). The board may revoke, suspend, or limit any broker's ... license ... if it finds that the holder of the license or registration has ...

(i) Demonstrated incompetency to act as a broker ... in a manner which safeguards the interests of the public

Sec. RL 24.01, Wis. Admin. Code. **Authority and intent.**

...

(3) If a licensee violates rules in this chapter, the licensee has demonstrated incompetency to act as a broker ... in such manner as to safeguard the interests of the public under s. 452.14 (3) (i), Stats.

Sec. RL 24.17, Wis. Admin. Code. **Miscellaneous requirements.**

(1) VIOLATIONS OF LAW. Licensees may not violate ... any law the circumstances of which substantially relate to the practices of a real estate broker or salesperson. ...

(2) CONVICTION. 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. ...

FINDINGS OF FACT

1. Respondent Dale F. Hellengreen is and was at the time of the facts set forth below a real estate broker licensed in the state of Wisconsin, under license number 36300, originally granted on December 19, 1985.
2. On September 21, 1992 in Winnebago County, Wisconsin, Mr. Hellengreen was convicted of:
 - one felony count of fraudulent practices/sales of securities under sec. 551.41(2) and sec. 551.58(1), Wis. Stats. in case # 92 CF 54;
 - two misdemeanor counts of wilful failure to file corporate tax returns under sec. 71.83(2)(a), Wis. Stats. in case # 92 CF 89; and
 - two misdemeanor counts of wilful failure to file tax returns under sec. 71.83(2)(a), Wis. Stats. in case # 92 CF 165.

CONCLUSIONS OF LAW

- I. The Real Estate Board is the legal authority for issuing and controlling credentials for real estate brokers, under chapter 452, Wis. Stats. and chapters RL 11 through RL 26, Wis. Admin. Code. The Board has jurisdiction over Mr. Hellengreen's license.
- II. The Real Estate Board has personal jurisdiction over Mr. Hellengreen, based on his holding a credential issued by the board. Mr. Hellengreen received timely notice of the hearing.
- III. The Real Estate Board has jurisdiction over the subject-matter of this complaint, under sec. 15.08(5)(c), Wis. Stats, sec. 452.14, Wis. Stats, and ch. RL 24, Wis. Admin. Code, based on the filing of a complaint alleging unprofessional conduct.
- IV. The circumstances of Mr. Hellengreen's convictions for fraudulent practices/sales of securities and wilful failure to file corporate tax returns are substantially related to the circumstances of the activities of a real estate broker under sec. 111.335(c), Wis. Stats., and they constitute incompetency to act as a real estate broker in such manner as to safeguard the interests of the public under sec. RL 24.01 (3), and sec. RL 24.17 (2), Wis. Admin. Code, which is a basis for the imposition of discipline under sec. 452.14, Wis. Stats.

ORDER

THEREFORE, IT IS ORDERED that the license granted to Dale F. Hellengreen to practice as a real estate broker in the state of Wisconsin is hereby revoked.

OPINION

Mr. Hellengreen has been convicted of one count of fraudulent practices/sales of securities (a felony) and four counts of wilful failure to file corporate tax returns (misdemeanors). At the time of his sentencing, various other charges against him were dismissed by the prosecution but "read in" for purposes of sentencing. The complainant Division of Enforcement seeks to revoke Mr. Hellengreen's broker's license because of the incompetency to practice evidenced in both the convictions and the read-in charges. Despite the authority cited for treating read-in charges as convictions¹, I decline to base this opinion on the read-in charges.² The crimes of which Mr. Hellengreen was convicted are sufficient for a finding that discipline is appropriate, and the potentially problematic issue of basing discipline on read-in charges need not be reached.

¹State v. Szarkowitz, 157 Wis.2d 740, 460 N.W.2d 819 (Ct. App., 1990).

²The issue in Szarkowitz arose from the following facts:

- Mr. Szarkowitz pled no contest to, and was convicted of, one count of burglary;
- as part of the plea bargain, the prosecutor dismissed and "read in" three other counts of burglary and two counts of theft;
- the court at sentencing ordered restitution to the victims in all the charges;
- Mr. Szarkowitz appealed, among other things, the restitution ordered on the read-in charges.

The Court of Appeals upheld the trial court's action, noting at p. 754 that it was "consonant with well-settled Wisconsin case law permitting the award of restitution under other statutory subsections to victims of crimes apart from the crime of conviction." The appellate court's focus in its analysis on this point was thus on the compensation of crime victims.

However, as part of its written decision the Court of Appeals said at p. 753 that "In Wisconsin when a defendant agrees to crimes being read in at the time of sentencing, he makes an admission that he committed those crimes." This is the statement relied on by the complainant here in arguing for discipline to be based on the read-in charges, but it is a very broad statement that goes beyond what is necessary for the actual ruling in the case regarding restitution, so it is "dicta" (defined in Black's Law Dictionary as "expressions in court's opinion which go beyond the facts before court and therefore are individual views of author of opinion and not binding in subsequent cases"). Thus, in the absence of a full discussion of the rights a person gives up when he or she agrees to having charges read in, and in the absence of a guarantee on the record that the defendant knowingly waived those rights, I am not convinced that a read-in charge may be treated as a conviction for all purposes. I also note that the test in sec. 111.335 is "has been convicted", and it would be an unwarranted extension even of the dicta in Szarkowitz to decide that making "an admission that he committed a crime" is identical to "has been convicted".

Sec. 111.321, Wis. Stats. generally prohibits employment discrimination (defined in sec. 111.322 to include refusing to license an individual) on the basis of conviction record, but sec. 111.335 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"

Wisconsin Supreme Court decisions establish 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.³ "Circumstances" has been interpreted to mean only "the elements of the offense",⁴ and the required inquiry has been stated as follows: "It is the circumstances which foster criminal activity that are important, e.g. the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person."⁵ The inquiry is thus into whether the elements of the offenses of fraudulent practices/sales of securities and wilful failure to file tax returns⁶ are substantially related to the practice of a real estate broker.

The responsibilities of a real estate broker are set forth in sec. 452.01, Wis. Stats. and reproduced above under "Applicable Statutes and Rules". These not only include offering to negotiate the sale or purchase of property for another, but they also extend to buying, selling, exchanging, or renting any interest in real property, a business, or a time-share on behalf of another. Clearly, not every real estate broker has occasion to perform all of these activities, but a real estate broker's license is exactly that, a license granted by the Real Estate Board to engage in any of the activities authorized by statute. Sec. 452.13, Wis. Stats. requires a real estate

³Law Enforce. Stds. Bd. v. Lyndon Station, 101 Wis.2d 472, 492, 305 N.W.2d 89 (1981).

⁴Gibson v. Transp. Comm., 106 Wis.2d 22, 24, 315 N.W.2d 346 (1982).

⁵County of Milwaukee v. LIRC, 139 Wis.2d 805, 824, 407 N.W.2d 908 (1987).

⁶The record is actually incomplete with regard to the two counts in 92 CF 89. The criminal complaint lists only three counts. The Judgment of Conviction shows that Mr. Hellengreen was convicted of counts 4 and 5, with counts 1, 2, 3 and 6 read-in and dismissed. I confirmed with the clerk of Branch 2 in Winnebago County that an Information was filed containing six counts, but I did not request a copy of it, as that would alter the evidence which was presented. Since the two counts in 92 CF 89 and the two counts in 92 CF 165 are all violations of the same statutory section, I am simply considering them all as "wilful failures to file tax returns".

broker to deposit in a trust account any downpayments, earnest money payments or other trust funds received, and additional requirements for trust accounts are spelled out in chapter RL 18, Wis. Admin. Code. The very nature of a real estate broker's work involves financial transactions, and the position of real estate broker is clearly one requiring probity in financial matters.

Mr. Hellengreen was convicted of count four in Winnebago County case number 92 CF 54, "fraudulent practices/sales, securities fraud". Fraudulent practices/sales, securities fraud is a violation of sec. 551.41(2), Wis. Stats. (Sec. 551.58(1) is the associated penalty section.) The text of 551.41(2) states "It is unlawful for any person, in connection with the offer, sale or purchase of any security in this state, directly or indirectly, to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading." From the conviction alone, it is established that Mr. Hellengreen made untrue or misleading statements in connection with an offer, sale, or purchase of one or more securities.

Mr. Hellengreen was convicted of counts four and five in Winnebago County case number 92 CF 89, "corporate tax return" and counts six and seven in Winnebago County case number 92 CF 165, "failure to file taxes". These are all violations of the same statute, sec. 71.83, Wis. Stats. As noted above, the language in 92 CF 89 is not in the record, but count six in 92 CF 165 states that Mr. Hellengreen "did willfully fail or refuse to make a corporate tax return for the year of 1989", and count seven states the same for 1990. From these convictions alone, it is established that Mr. Hellengreen consciously failed to make required financial reports to one or more government revenue offices.

Mr. Hellengreen argued that the sale of securities is not related to the functions of a real estate broker because the securities fraud charge related to property that he owned personally. He also argued that a real estate broker is not the ultimate decisionmaker in a transaction, whereas he was the decisionmaker in the transaction which led to his conviction. These distinctions are not important.

The necessary relationship for this analysis is not based on the decisionmaking status of the person, nor is it based on whether the person was dishonest with regard to his own or others' property. Rather it is based on the nature of the activities. The activities need not be identical, and the fit between the conviction and the duties of the regulated profession need not be perfect. As stated above, "it is the circumstances which foster criminal activity that are important, e.g. the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person." **Dishonesty in dealing with the public or with public agencies in financial matters is substantially related to the practice of a real estate broker.** Hence, these convictions demonstrate incompetency to act in such manner as to safeguard the interests of the public, and discipline is appropriate.

The purposes of professional discipline have been set forth in various attorney discipline cases, including Disciplinary Proc. Against Kelsay⁷. 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." That reasoning has been extended by regulatory agencies to disciplinary proceedings for other professions. The only discipline available to the Board which will adequately serve these three purposes is revocation of Mr. Hellengreen's license.

First, the discipline must be significant enough to deter other real estate brokers from dishonesty in their dealings with the public (although it should be unnecessary for most professionals). Because the immediate financial rewards of a dishonest or financially self-serving action may sound loud in the ears of the weak, the message of the discipline must be strident enough to drown out that siren song. A reprimand or a period of suspension would not be sufficiently audible, and only revocation is sufficient to indicate the seriousness with which financial dishonesty is viewed.

Second, in order to protect the public from further misconduct by Mr. Hellengreen, the discipline must essentially guarantee that he will not use his professional position as a real estate broker to prey on the public in the future. Given Mr. Hellengreen's record, which indicates that he is willing to defraud the public in a financial transaction, no such guarantee can be given, and the only alternative is to revoke his registration. If Mr. Hellengreen achieves rehabilitation, as discussed in the next paragraph, he would be eligible for licensure again, but without strong evidence of rehabilitation, the threat to the public is too great to allow him to retain his license.

Third and finally, discipline is to be imposed to foster the professional's rehabilitation. In my reading of the cases, the term "rehabilitation" covers both positive and negative reinforcement to deter the offender from similar behavior in the future⁸. 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. Here, Mr. Hellengreen may already have seen the light and been "rehabilitated" so that he will no longer take advantage of the public. On the other hand, he may still need some education. I cannot say and, in light of the need to protect the public, I conclude that at the very least it would be unsafe to assume rehabilitation prior to the completion of Mr. Hellengreen's sentence of imprisonment. On this

⁷155 Wis.2d 480, 455 N.W.2d 871 (1990).

⁸See, for example, State v. Corry, 51 Wis.2d 124, 186 N.W.2d 325 (1971) at 126.

issue, I note (in exhibit 4) that the sentencing judge -- who was in a better position than I to assess Mr. Hellengreen's danger -- ordered "If and when paroled defendant is to have no self-employment in the area of accounting or broker capacity." Significant disciplinary action against Mr. Hellengreen's professional credential may even assist his appreciation of the seriousness of his actions and thereby promote his rehabilitation.

For all three of the reasons commonly relied on in discipline cases, Mr. Hellengreen's license must be revoked.

The assessment of costs against a disciplined professional is authorized by sec. 440.22(2), Wis. Stats. and sec. RL 2.18, Wis. Admin. Code. However, there is no agreement on what circumstances lead to the imposition of costs in a disciplinary case. The approach I prefer is to impose costs only when a respondent has been recalcitrant or obstructionist. Throughout the process, Mr. Hellengreen cooperated with Mr. Howden and myself. Assuming that the Division of Enforcement's costs have been low, and not wishing to make these proceedings appear punitive, I have not included an order for costs.

Dated April 22, 1993.



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

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