

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

ROBERT M. KIRBY,
RESPONDENT.

FINAL DECISION
AND ORDER
LS9410191REB

The State of Wisconsin, Real Estate Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Real Estate Board.

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

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

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

Dated this 26th day of Jan. 1995.

Beechie O. Brooks

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS AGAINST

LS9410191REB

ROBERT M. KIRBY,

Respondent

PROPOSED DECISION

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

Wisconsin Department of Regulation and Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708-8935

Robert M. Kirby
5304 South 14th Street
Milwaukee, WI 53221

State of Wisconsin Department of Regulation & Licensing
1400 East Washington Ave.
P.O. Box 8935
Madison, WI 53703

A hearing was conducted in the above-captioned matter on December 15, 1994. Complainant appeared by Attorney Gerald M. Scanlan. Respondent did not appear, nor did anyone appear to represent him. Based on the entire record in this matter, the administrative law judge recommends that the Real Estate Board adopt as its final decision in the matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Robert M. Kirby, 5304 South 14th Street, Milwaukee, WI 53221 (respondent), is licensed as a real estate broker in Wisconsin by license #36221, granted on December 12, 1985.
2. On or about January 27, 1993, in Circuit Court Branch #38CR for Milwaukee County, respondent was found guilty of two counts of burglary in violation of secs. 943.10(1)(a)

and 939.05, Stats. On or about May 11, 1993, respondent pleaded guilty to a third count of burglary in violation of secs. 943.10(1)(a) and 939.05, Stats.

3. On or about May 11, 1993, respondent was sentenced as follows: Count 1 -- 48 months in prison; Count 2 -- 48 months in prison concurrent with the sentence for Count 1; Count 3 -- 76 months in prison consecutive to the sentences for the first two counts. Respondent was also placed on probation for five years consecutive to the sentences imposed in Counts 1 and 2. The prison sentence was stayed and probation was ordered.

4. The circumstances of respondent's convictions substantially relate to the practices of a real estate broker.

CONCLUSIONS OF LAW

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

2. The circumstances of respondent's criminal convictions are substantially related to the circumstances of the practices of a real estate broker within the meaning of sec. 111.335(1)(c)1., Stats.

3. In having been convicted of crimes the circumstances of which substantially relate to the practices of a real estate broker, respondent has violated sec. RL 24.17(2), Code. Pursuant to sec. RL 24.01(3), Code, respondent has thereby violated sec. 452.14(3)(i), Stats.

ORDER

NOW, THEREFORE, IT IS ORDERED that the license of Robert M. Kirby to practice as a real estate broker in Wisconsin be, and hereby is, revoked.

IT IS FURTHER ORDERED that pursuant to sec. 440.22, Stats. the costs of this proceeding are assessed against the respondent.

OPINION

Inasmuch as respondent failed to appear or to contest the allegations of the Complaint in this matter, the only two questions to be resolved are first, whether the circumstances of his convictions substantially relate to the practices of a real estate broker and, if so, what discipline if any is appropriate. On the issue of whether the conviction is substantially related, the Wisconsin Supreme Court recently defined the criteria for establishing substantial relationship in *County of Milwaukee v. LIRC*, 139 Wis. 2d 805 (1987). Defendant in that case had been convicted of homicide by reckless conduct and of neglect of nursing home residents. The court found that in his capacity as nursing home administrator, the defendant had failed to provide for necessary staffing and supplies to avoid patient harm. At the time of conviction, defendant was employed by the County of Milwaukee as a Crisis Intervention Specialist, and he was discharged from employment as a result of the conviction. The Supreme Court overturned the decisions of the Milwaukee Circuit Court and the Court of Appeals by finding that the circumstances of the

conviction were substantially related to the circumstances of employment as a crisis intervention specialist.

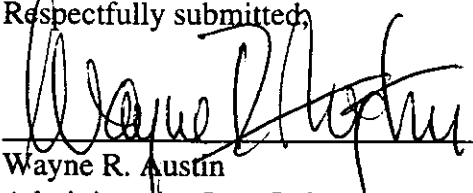
Assessing whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed, is the purpose of the test. What is important in this assessment is not the factual details It is the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person.
139 Wis. 2d at 824.

Conviction for the crime of burglary under sec. 943.10(1)(a), Stats., requires a finding that the respondent intentionally entered a building or dwelling without the consent of the person in lawful possession with intent to steal or commit a felony. Such intent evinces character traits clearly inconsistent with those required of a real estate broker. Persons engaged in real estate transactions with brokers have the right to expect those brokers to deal with them honestly and ethically. When a broker engages in criminal activity evidencing character traits diametrically opposed to those expected of a broker, it must be concluded that such activity and the criminal conviction arising therefrom are not merely substantially related, but are almost directly related to the circumstances of the practice of a real estate broker. If so, then the conclusion lies that respondent has violated sec. 24.17(1), Code, which establishes as a violation of the real estate law a violation of a law or conviction of a crime the circumstances of which substantially relate to the practice of a real estate broker; and that under sec. 24.01(3), Code, respondent has therefore also violated sec. 452.14(3)(i), Stats.

It is well established that the purposes of licensee discipline in Wisconsin are to protect the public, to deter other licensees from engaging in similar conduct, and to promote the rehabilitation of the licensee. *State v. Aldrich*, 71 Wis. 2d 206 (1976). Punishment of the licensee is not an appropriate consideration. *State v. McIntyre*, 41 Wis. 2d 481 (1969). Where, as here, the respondent has been convicted of three counts of criminal activity intended to deprive the lawful owners of their property, and where, as here, the circumstances of the conviction arising from that intentional criminal activity are substantially related to the practice of a broker, serious discipline is required. Because Mr. Kirby did not appear, there is no evidence in this record in mitigation or explanation of his actions. Accordingly, nothing less than revocation of the license is appropriate.

Dated this 28th day of December, 1994.

Respectfully submitted,



Wayne R. Austin
Administrative Law Judge

NOTICE OF APPEAL INFORMATION

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

Serve Petition for Rehearing or Judicial Review on:

THE STATE OF WISCONSIN REAL ESTATE BOARD.

1400 East Washington Avenue

P.O. Box 8935

Madison, WI 53708.

The Date of Mailing this Decision is:

JANUARY 27, 1995.

1. REHEARING

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

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

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

2. JUDICIAL REVIEW.

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

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

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

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

**IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST**

LS9410191REB

ROBERT M. KIRBY,

Respondent

**AFFIDAVIT OF COSTS
OFFICE OF BOARD LEGAL SERVICES
(SEC. 440.22, STATS.)**

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Wayne R. Austin, being first duly sworn on oath, deposes and states as follows:

1. Your affiant is an attorney licensed to practice law in the State of Wisconsin, and is employed by the Wisconsin Department of Regulation & Licensing, Office of Board Legal Services.
2. In the course of his employment, your affiant was assigned as administrative law judge in the above-captioned matter.
3. Set out below are the actual costs of the proceeding for the Office of Board Legal Services in this matter. Unless otherwise noted, all times commence at the start of the first five minute period following actual start of the activity, and terminate at the start of the first five minute period prior to the actual end of the activity.

ADMINISTRATIVE LAW JUDGE EXPENSE -- WAYNE R. AUSTIN

DATE &
TIME SPENT

12/15/94
31 minutes

ACTIVITY

Conduct Hearing

12/28/94

Prepare Proposed Decision

1 hour, 30 minutes

(one-half of the estimated actual time expended)

Total Time Spent.....2 hours, 1 minute

Total administrative law judge expense for Wayne R. Austin:

2 hours, 1 minute @ \$44.55, salary and benefits:.....\$89.84

REPORTER EXPENSE -- MAGNEScript

DATE &
TIME SPENT

ACTIVITY

12/15/94

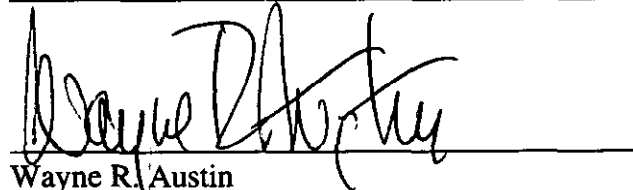
Record hearing

31 minutes

Total billing from Magne-Script reporting

service (Invoice #8442, dated 12/16/94):.....\$55.00

TOTAL ASSESSABLE COSTS FOR OFFICE OF BOARD LEGAL SERVICES: \$144.84



Wayne R. Austin

Administrative Law Judge

Sworn to and subscribed before me this 20th day of February, 1995.



Notary Public, State of Wisconsin

My commission is permanent

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF THE DISCIPLINARY
PROCEEDINGS AGAINST

ROBERT M. KIRBY,
RESPONDENT.

AFFIDAVIT OF COSTS
93 REB 067

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Gerald M. Scanlan, being duly sworn, deposes and states as follows:

1. That I am an attorney licensed in the state of Wisconsin and am 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.

PROSECUTING ATTORNEY EXPENSE

<u>Date</u>	<u>Activity</u>	<u>Time Spent</u>
10/3/94	Review file	1 hour
10/4/94	Draft complaint	2 hours
10/7/94	Finalize complaint	1 hour
10/18/94	File complaint	15 minutes
12/13/94	Prepare for hearing	1 hour
12/15/94	Prepare for and conduct hearing	1 ½ hours

TOTAL HOURS

6 Hours 45 Min.

Total attorney expense for 6 hours and 45 minutes at
\$41.00 per hour (based upon average salary and benefits
for Division of Enforcement attorneys) equals:

\$276.99

INVESTIGATOR EXPENSE FOR WILLIE E. GARRETTE

<u>Date</u>	<u>Activity</u>	<u>Time Spent</u>
4/23/93	Review file and draft letters	30 minutes
4/28/93	Proof letters, assemble and mail documents	10 minutes
9/27/93	Review file and draft letter	45 minutes
10/5/93	Proof and revise letter	5 minutes
11/11/93	Redraft new letter to court	20 minutes
4/4/94	Review file and draft PIC summary	45 minutes
4/8/94	Draft letter to Board Advisor	30 minutes
5/16/94	Draft letter to Clerk of Court	35 minutes
5/23/94	Proof and revise letter	10 minutes
6/17/94	Telephone call to clerk's office and draft letter	20 minutes

TOTAL HOURS


4 Hours 10 Min.

Total investigator expense for 3 hours and 10 minutes at
\$20.00 per hour (based upon average salary and benefits
for Division of Enforcement investigators) equals:

\$83.33

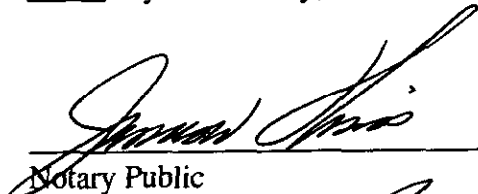
TOTAL ASSESSABLE COSTS


\$360.32



Gerald M. Scanlan, Attorney
Division of Enforcement

Subscribed and sworn to before me this
16TH day of February, 1995.


Notary Public

My Commission 

GMS:lmf
DOE-BLG1233