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Before The
State Of Wisconsin
Real Estate Appraisers Board

In the Matter of the Disciplinary Proceedings
Against **THOMAS P. PONIK**, Respondent

FINAL DECISION AND ORDER
Order No. 0000208

Division of Enforcement Case File # 09 APP 070

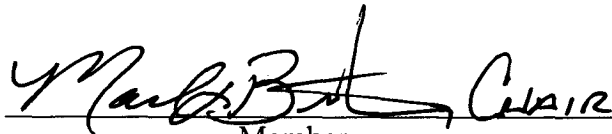
The State of Wisconsin, Real Estate Appraisers Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, make the following:

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 Appraisers Board.

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

Dated at Madison, Wisconsin on May 19, 2010.

A handwritten signature in black ink, appearing to read "Charles B. ...", followed by the word "CHAIR" in capital letters.

Member
Real Estate Appraisers Board



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Disciplinary Proceedings
Against **THOMAS P. PONIK**, Respondent

AMENDED PROPOSED DECISION
AND ORDER
DHA Case No. DRL-09-0125

Division of Enforcement Case File # 09 APP 070

The parties to this action for the purpose of Wis. Stat. § 227.53 are:

Thomas Ponik
P. O. Box 707
Mercer, WI 54547

Wisconsin Real Estate Appraisers Board
P.O. Box 8935
Madison, WI 53707-8935

Wisconsin Department of Regulation and Licensing
Division of Enforcement
PO Box 8935
Madison, WI 53708-8935

PROCEDURAL HISTORY

These proceedings were initiated when the Wisconsin Department of Regulation and Licensing, Division of Enforcement (the "Division") filed a formal Complaint against the Respondent, Thomas Ponik. The Division filed said Complaint with the Division of Hearings and Appeals on December 3, 2009. On that same date, the Division sent a copy the Complaint and a Notice of Hearing via certified and regular mail to Respondent Ponik at the address it believed to be his current address; 2379 West County Road J, Mercer, WI, 54547. The Division also mailed a copy of the above-referenced documents to Respondent Ponik at the most recent address on record with the Department of Regulation and Licensing; P.O. Box 707, Mercer, WI, 54547. The Notice of Hearing stated that the respondent was required to file a written Answer to the Complaint within 20 days, failing which "[he would] be found to be in default and a default judgment [could] be entered against [him] on the basis of the Complaint and other evidence and the [Wisconsin Real Estate Appraisers] Board [could] take disciplinary action against [him] and

impose the costs of the investigation, prosecution and decision of this matter upon [him] without further notice or hearing.”

Records of the United States Postal Service indicate that the Notice of Hearing and the Complaint were delivered to the P.O. Box address on December 8, 2009. To date, no Answer has been filed.

On January 5, 2010, the undersigned Administrative Law Judge (ALJ) of the Division of Hearings and Appeals issued a Notice of Telephone Prehearing Conference that set a telephone conference with Respondent Ponik and Attorney Angela Arrington¹ of the Division of Enforcement for January 20, 2010. This Notice instructed Respondent Ponik to contact the undersigned ALJ to provide the telephone number for which he could be reached for the January 20, 2010, telephone conference. It was sent to both addresses on file for Respondent Ponik, as provided above.

Respondent Ponik did not contact the undersigned ALJ with a telephone number that he could be reached at for the January 20, 2010 telephone conference, thus, the telephone conference that was conducted on that date was without his participation. At the conference, Attorney Arrington made a motion for default pursuant to Wis. Admin. Code § RL 2.14. The undersigned ALJ summarily accepted Attorney Arrington’s default motion and issued a Notice of Default instructing Respondent Ponik that he was in default and that findings would be made and an Order entered on the basis of the Complaint and other evidence. The Notice of Default further ordered Attorney Arrington to provide the undersigned ALJ with the Division’s written recommendations for discipline and the assessment of costs in this matter by January 27, 2010. Attorney Arrington provided the undersigned ALJ with its written recommendations as to discipline and costs on or about January 21, 2010. At the ALJ’s request, she additionally provided a basis for those recommendations on March 1, 2010 and March 8, 2010.

Respondent Ponik has failed to respond to either the Notice of Default issued against him, or the written recommendations provided by Attorney Arrington on January 21, 2010.

Accordingly, the Board in this matter makes the following:

FINDINGS OF FACT

1. Respondent Thomas P. Ponik was licensed in the State of Wisconsin as a Licensed Appraiser, license # 4-1085.
2. This license was first granted to Respondent Ponik on 12/19/1997 and expired as of 12/14/2009.

¹ Initially, this notice was sent to Attorney Mark A. Herman of the Department of Regulation and Licensing, who preceded Attorney Arrington as the attorney of record in this case.

3. The most recent address on file with the Wisconsin Department of Regulation and Licensing (Department) for Respondent Ponik is P.O. Box 707, Mercer, WI, 54547.

4. Respondent Ponik was required, pursuant to Wis. Admin. Code § RL 85.01, to obtain 28 hours of continuing education in each biennial period, which was to include the 7-hour national USPAP (Uniform Standards of Professional Appraisal Practice) update course or its equivalent.

5. During a routine audit, Respondent Ponik was randomly selected for audit of Real Estate Appraiser continuing education records.

6. The Department sent letters to Respondent Ponik on June 2, 2009 and June 26, 2009 requesting that Respondent Ponik provide verification of his completion of 28 hours of continuing education for the January 1, 2006 through December 14, 2007 biennium.

7. Respondent Ponik failed to respond to the Department's letters.

8. To date, Respondent Ponik has failed to provide the Department with verification of his completion of 28 hours of continuing education for the January 1, 2006 through December 14, 2007 biennium, as the Department requested.

9. Respondent Ponik's certificate as a licensed appraiser was renewed on December 18, 2007, and expired on December 14, 2009.²

10. As set out in the Procedural History above, a Complaint and Notice of Hearing were duly sent to Respondent Ponik at the address believed to be his current address (2379 West County Road J, Mercer, WI, 54547) on December 3, 2009.

11. A Complaint and Notice of Hearing were also sent to Respondent Ponik at the most recent address on record with the Department of Regulation and Licensing (P.O. Box 707, Mercer, WI, 54547).

12. On January 5, 2010, the undersigned ALJ sent a Notice of Telephone Prehearing Conference for January 20, 2010 to Respondent Ponik at both of the above addresses.

13. Respondent Ponik did not appear at this hearing, and the Division made a motion for default which was summarily accepted by the undersigned ALJ.

14. On or about January 20, 2010, the undersigned ALJ sent a Notice of Default to the respondent at his P.O. Box address.

² The passive voice of this statement, taken from the Division's proposed findings of fact, leads to some confusion as to whether the respondent was in fact involved in the renewal of his license for the above-stated biennium. Attorney Arrington has advised that the Department does not renew licenses without participation from the licensee. Thus, the respondent knowingly renewed his application without having completed the requisite continuing education.

15. Respondent Ponik has not responded to this Notice, or otherwise to the Complaint against him.

CONCLUSIONS OF LAW

1. The Wisconsin Real Estate Appraisers Board has jurisdiction to act in this matter pursuant to Wis. Stat. § 458.26 and Wis. Admin. Code § RL 2.

2. Wisconsin Administrative Code § RL 2.08(1) provides in relevant part that "[t]he complaint, notice of hearing, all orders and other papers required to be served on a respondent may be served by mailing a copy of the paper to the respondent at the last known address of the respondent," and that "[s]ervice by mail is complete upon mailing." Because the Complaint and Notice of Hearing, Notice of Telephone Prehearing Conference, and Notice of Default were mailed to Respondent Ponik at his last known addresses, he was served with these papers pursuant to Wis. Admin. Code § RL 2.08.

3. As the licensee, it was Respondent Ponik's responsibility to keep his address on record with the Department of Regulation and Licensing current.

4. Respondent Ponik has defaulted in this proceeding pursuant Wis. Admin. Code § RL 2.14 by failing to file and serve an Answer to the Complaint as required by Wis. Admin. Code § RL 2.09.

5. Allegations in a Complaint are deemed admitted when not denied in an Answer. Wis. Admin. Code § RL 2.09. Respondent Ponik has admitted the allegations of the Complaint by not filing an Answer.

6. Pursuant to Wis. Stat. § 458.26(3), "... the board may limit, suspend or revoke any certificate under this chapter or reprimand or impose additional continuing education requirements on the holder of a certificate under this chapter, if the department or board finds that the applicant for or holder of the certificate has done any of the following:... 458.26(3)(b) Engaged in unprofessional or unethical conduct in violation of rules promulgated under s. 458.24³."

7. Pursuant to Wis. Admin. Code § 85.01, "[e]very licensed appraiser shall complete 28 hours of continuing education in each biennial period which shall include successful completion of the 7-hour national USPAP update course or its equivalent that is approved by the appraiser qualifications board (AQB) of the appraisal foundation...."⁴

³ These rules are codified in Wis. Admin. Code chs. RL 80-86.

⁴ Wis. Stat. § 458.13 Continuing Education Requirements, additionally provides that "At the time of a renewal of a certificate issued under this chapter, each applicant shall submit proof that, within the 2 years immediately preceding the date on which the renewal application is submitted, he or she has satisfied the continuing education requirements

8. Respondent Ponik's failure to respond to the Department's requests that he verify that he completed 28 hours of continuing education during the January 1, 2006 through the December 14, 2007 biennium, as described in paragraphs 4-8 above, implicitly shows that he did not complete the requisite continuing education for this biennium.

9. By failing to complete 28 hours of continuing education during the January 1, 2006 through December 14, 2007 biennium, Respondent Ponik has violated Wis. Admin. Code § 85.01, thereby subjecting himself to discipline per Wis. Stat. § 458.26(3)(b).

DICUSSION

Violations of Wisconsin Statute and Administrative Code

By failing to provide an Answer to the Complaint filed against him, Respondent Ponik has admitted that all allegations contained within the Complaint are true. Wis. Admin. Code § RL 2.09. As such, the undisputed facts provide that: (1) Respondent Ponik was randomly selected for an audit of Real Estate Appraiser continuing education credits for the January 1, 2006 through December 14, 2007 biennium; (2) Respondent Ponik has failed to verify that he had completed the requisite 28 hours of continuing education for the January 1, 2006 through December 14, 2007 biennium; and (3) nevertheless, Respondent Ponik's license to practice as a Licensed Appraiser in Wisconsin had been renewed for the December 15, 2007 through December 14, 2009 biennium. Though the Complaint fails to allege that Respondent Ponik in fact failed to complete the requisite 28 hours of continuing education for the January 1, 2006 through the December 14, 2007 biennium, such is implicit in the above-stated facts. Ponik's conduct clearly violates Wis. Admin. Code § 85.01, requiring "[e]very licensed appraiser [to] complete at least 28 hours of continuing education in each biennial period..." and, thus, subjects him to discipline per Wis. Stat. § 458.26(3)(b).⁵ The only question that remains is what discipline is appropriate.

The Division, by Attorney Angela Arrington, recommends that Respondent Ponik's license to practice as a Licensed Appraiser be revoked, with no right to renew, request reinstatement, or re-apply for licensure for three (3) years. It further recommends that in the event that Respondent Ponik seeks to renew or reinstate his license to practice as a Licensed Appraiser, or obtain any other license from the Department of Regulation and Licensing, (1) he pay \$200.00 in costs⁶ to the Department of Regulation and Licensing, and (2) the Real Estate

specified in the rules promulgated under s. 458.08(3) [codified in Wis. Admin. Code ch. RL 85]. Unfortunately, the Department did not assert that Respondent Ponik violated this statute in its Complaint.

⁵ The Complaint initially asserted that Respondent Ponik's failure to respond to the Board's requests for verification also constituted a violation of Wis. Admin. Code § 86.01(10), (providing "[a]fter a request for information made by the board, a certified or licensed appraiser shall cooperate in a timely manner with the board's investigation of a complaint filed against the licensed or certified appraiser..."). As this claim was not made in the Division's Motion for Discipline and Costs, it will be considered abandoned.

⁶ Attorney Arrington has indicated said costs were based on the age of this case. However, Wis. Admin. Code § RL 2.18(4) provides that "When costs are imposed, the division and the administrative law judge shall file supporting

Appraisers Board have jurisdiction to determine whether and under what terms and conditions such request may be granted.

In support of these recommendations, Attorney Arrington advises that such discipline is standard in failure to complete continuing education cases. Unfortunately, Attorney Arrington could not cite any specific case law to support her claim.⁷ While the Division's above recommendation of discipline appears somewhat severe when one considers that Respondent Ponik's deficiency could be rectified by requiring him to satisfy his outstanding continuing education requirements, and suspending his license until that time, it is necessary to consider that no argument has been provided to contradict that the discipline recommended by the state is standard and/or necessary. Respondent Ponik has not participated in these proceedings in any way. Moreover, his violations involve his very credentials to practice as a Licensed Appraiser. Finally, the biennium in which Respondent Ponik was to complete his continuing education has long since passed, as has the biennium in which his license should not have been renewed. In light of these circumstances, the Division's request of a license revocation, with no right to renew for three (3) years is not unreasonable.

The purpose of discipline is: (1) to promote the rehabilitation of the licensee; (2) to protect the public from other instances of misconduct; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206 (1976). Respondent Ponik's failure to participate in these proceedings suggests that he cannot be reasonably relied upon to comply with any Board order. Additionally, the revocation of his license with no right of renewal for three (3) years will discourage other Licensed Appraisers from failing to complete their

affidavits showing costs incurred within 15 days of the date of the final decision and order. The respondent shall file any objection to the affidavits within 30 days of the date of the final decision and order. The disciplinary authority shall review any objections, along with the affidavits, and affirm or modify its order without a hearing." The costs of this case shall be so assessed.

⁷ To her credit, Attorney Arrington did provide three decisions showing a range of disciplines previously taken by the Real Estate Appraisers Board. See *In the Matter of Disciplinary Proceedings against Michael A. Schneider* (LS0090291APP) (Respondent's license and right to renew his license revoked); *In the matter of Disciplinary Proceedings against Kevin E. Wilder* (LS0808281APP) (Respondent's license revoked); *In the Matter of Disciplinary Proceedings against Robert E. Will* (LS0708152APP) (Respondent's license suspended for indefinite period of time, removal of suspension predicate upon successful completion of 45 hours of coursework). Because these decisions involved vastly different facts than the case at hand, they were of little help to the undersigned ALJ in determining the appropriate discipline in this case. Indeed, of the two cases in which the respondents' licenses were revoked, the first, *Michael A. Schneider*, involved a complicated scheme by the respondent to defraud mortgage brokers and lenders. To effectuate that scheme, the respondent misrepresented that he was a Licensed Appraiser in the State of Wisconsin when he was not, altering an expired license. He ultimately pled guilty to felony wire fraud, and was imprisoned for four months. The second case, *Kevin E. Wilder*, involved several omissions by the respondent in the performance of a property appraisal, causing certain aspects of that property to be undervalued. The respondent's license was subsequently suspended, nevertheless, the respondent agreed to and accepted payment for two additional appraisals, one of which he never performed, all the while holding himself out as a Licensed Appraiser. These fact patterns are simply not on par with the facts in the case at hand.

The *Robert E. Will* decision is not any more congruent. Though it involved similar, but somewhat less egregious facts than *Kevin E. Wilder*, (respondent made several errors in performing a property appraisal and failed to defend his work, resulting in overvalued property, as well as multiple USPAP violations), perhaps shedding light on why Respondent Will's license was suspended, and not revoked as with Respondent Wilder, the fact patterns and resulting disciplines in all the above cases are just too attenuated to apply to Respondent Ponik's conduct.

continuing education requirements, but having their licenses renewed. The relief requested by the Division is thus appropriate and necessary to protect the public from future instances of misconduct by the respondent and others.

Costs

The Division requests that the respondent be ordered to pay the full costs of its investigation and of these proceedings. In support of this recommendation, it cites Respondent Ponik's default.

In *In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz* (LS 0802183 CHI), the Chiropractic Examining Board found that:

The ALJ's recommendation and the ... Board's decision as to whether the full costs of the proceeding should be assessed against the credential holder..., is based on the consideration of several factors, including:

- 1) The number of counts charged, contested, and proven;*
- 2) The nature and seriousness of the misconduct;*
- 3) The level of discipline sought by the parties*
- 4) The respondents cooperation with the disciplinary process;*
- 5) Prior discipline, if any;*
- 6) The fact that the Department of Regulation and Licensing is a "program revenue" agency, whose operating costs are funded by the revenue received from licenses, and the fairness of imposing the costs of disciplining a few members of the profession on the vast majority of the licensees who have not engaged in misconduct;*
- 7) Any other relevant circumstances.*

The respondent, by nature of her being in default has not presented any evidence regarding any of the above factors that would mitigate the imposition of the full costs of this proceeding. To the contrary, her conduct is of a serious nature. The factual allegations were deemed admitted and proven and there is no argument to apportion any counts that were unproven (being none), or that certain factual findings were investigated and litigated that were unnecessary. Given the fact that the Department of Regulation and Licensing is "program revenue," agency, whose operating costs are funded by the revenue received for licensees, fairness here dictates imposing the costs of disciplining the respondent upon the

respondent and not fellow members of the chiropractic profession who have not engaged in such conduct."

Id.

For similar reasons, Respondent Ponik should be assessed the full amount of recoverable costs. His alleged conduct (practicing without the requisite credentials) is of a potentially serious nature, there is no argument that certain factual findings were investigated and litigated unnecessarily, and given the program revenue nature of the Department of Regulation and Licensing, fairness again dictates imposing the costs of disciplining Respondent Ponik on Respondent Ponik, and not fellow members of the real estate appraisal profession who have not engaged in such conduct. Payment of assessed costs will be necessary before the Respondent Ponik's license can be reinstated pursuant to Wis. Stat. § 441.07(2). If the Board assesses costs against the respondent, these amount of costs will be determined pursuant Wis. Admin. Code § RL 2.18.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. The REVOCATION AND RIGHT TO RENEW of the license of Thomas P. Ponik (# 4-1085) to practice as a licensed appraiser in the state of Wisconsin is hereby accepted.

IT IS FURTHER ORDERED that:

2. Mr. Ponik shall not seek to renew, or request reinstatement or re-apply for licensure to practice as a licensed appraiser in the State of Wisconsin for a minimum of three (3) years from the date of this Order.

3. In the event that Mr. Ponik seeks to renew or reinstate his license to practice as a licensed appraiser in the State of Wisconsin, he shall submit a new application for licensure and meet all then-existing requirements for licensure.

4. In the event that Mr. Ponik seeks to renew or reinstate his license to practice as an appraiser, or in the event that he seeks to obtain any other license administered by the Department, all recoverable costs shall be immediately due and owing.

5. In the event that Mr. Ponik seeks to renew or reinstate his license to practice as a licensed appraiser in the State of Wisconsin, the Wisconsin Real Estate Appraisers Board may determine whether and under what terms and conditions such request may be granted.

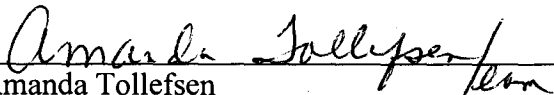
6. Mr. Ponik shall not practice as an appraiser or attempt to practice as one in the State of Wisconsin without being licensed in Wisconsin, whether by reciprocity, temporarily or otherwise.

7. Violation of any of the terms of this Order may be construed as conduct imperiling public health, safety and welfare. The Board may, in its discretion, impose additional conditions and limitations or other additional discipline for a violation of any of the terms of this Order.

IT IS FURTHER ORDERED that Division of Enforcement Case File Number 09 APP 70 be, and hereby is, closed.

Dated at Madison, Wisconsin on March 18, 2010.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: 
Amanda Tollefsen
Administrative Law Judge

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