

## WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES



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**Before the  
State Of Wisconsin  
Real Estate Examining Board**

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In the Matter of Disciplinary Proceedings Against  
Mark H. Pierce, Respondent

FINAL DECISION AND ORDER

Order No. 0004415

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**Division of Legal Services and Compliance Case No. 13 REB 042**

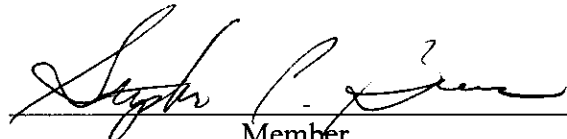
The State of Wisconsin, Real Estate Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, make the following:

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 Examining 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 the 3 day of DECEMBER, 2015.

  
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Member  
Real Estate Examining Board



Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS

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In the Matter of Disciplinary Proceedings Against  
Mark H. Pierce, Respondent

DHA Case No. SPS-15-0069  
DLSC Case No. 13 REB 042

0004415

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**PROPOSED DECISION AND ORDER**

The parties to this proceeding for purposes of Wis. Stat §§ 227.47(1) and 227.53 are:

Mark H. Pierce  
144 N. Water Street  
Sparta, WI 54656

Wisconsin Real Estate Examining Board  
P.O. Box 8366  
Madison, WI 53708-8366

Department of Safety and Professional Services, Division of Legal Services and  
Compliance, by

Attorney Andrea E. Brauer  
Department of Safety and Professional Services  
Division of Legal Services and Compliance  
P. O. Box 7190  
Madison, WI 53707-7190

PROCEDURAL HISTORY

This proceeding was initiated when the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division), filed a formal Complaint against Respondent Mark H. Pierce (Respondent), alleging that Respondent violated Wis. Admin. Code § REEB 24.17(5) by failing to respond to the Department and the Real Estate Examining Board (Board) regarding a request for information within 30 days of the date of the request and also violated Wis. Admin. Code § REEB 15.04 by failing to make trust account records available for inspection and copying by the Board. The Division served Respondent on July 27, 2015 by sending a copy of the Notice of Hearing and Complaint to his last known address on file with the Department. Respondent failed to file an Answer to the Complaint, as

required by Wis. Admin. Code § SPS 2.09, and failed to appear at the telephonic prehearing conference held before the Division of Hearings and Appeals on September 4, 2015.

At the prehearing conference, the Division moved for default pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c), respectively. In light of Respondent's failure to file an Answer to the Complaint and failure to appear at the prehearing conference, the undersigned Administrative Law Judge (ALJ) found Respondent to be in default. On September 4, 2015, the ALJ issued a Notice of Default and Order against Respondent. Consistent with the Notice of Default and Order issued by the ALJ, the Division filed a recommended proposed decision and order in this matter on September 25, 2015.

### FINDINGS OF FACT

#### Facts Related to the Alleged Violations

Findings of Fact 1-19 are taken from the Division's Complaint against Respondent filed in this matter.

1. Respondent Mark H. Pierce is licensed in the State of Wisconsin as a Real Estate Broker, having license number 50179-90, first issued on April 5, 2000, and current through December 14, 2016.

2. Respondent's most recent address on file with the Department is 144 N. Water Street, Sparta, Wisconsin 54656.

3. Respondent is identified in Department records as the responsible broker for Markim Realty, LLC, a Wisconsin licensed Real Estate Business Entity.

4. On or about February 7, 2005, Respondent registered with the Department IBRETA Trust Account – Real Estate Account United Country Markim Realty, held at State Bank of La Crosse, with account number ending in -747.

5. On February 26, 2013, the Department's auditor contacted Markim Realty, LLC to inform it that it had been chosen for a routine trust account audit and requesting Markim Realty, LLC complete a Pre-Audit Questionnaire.

6. On March 31, 2013, the Department's auditor emailed Respondent stating the audit had been scheduled for April 8, 2013.

7. On April 5, 2013, Respondent emailed the Department's auditor stating he would need to reschedule the audit. He also returned the Pre-Audit Questionnaire, on which he reported approximately 25 earnest or escrow transactions had been deposited into the trust account in the last 12 months.

8. On June 7, 2013, the Department's auditor emailed Respondent stating he would stop at the office in the next two weeks to review the trust account records. The email included a list of trust account records that should be available for review at that time.

9. On June 10, 13 and 14, 2013, Respondent and the Department's auditor corresponded by email to discuss when the requested trust account records would be prepared.

10. On July 28, 2013, the Department's auditor visited Respondent's office but was unable to meet with Respondent or obtain copies of the requested trust account records because Respondent was not present and had not prepared the requested trust account records.

11. Division case number 13 REB 042 was subsequently opened for investigation.

12. On August 6, 2013, the Division contacted Respondent on behalf of the Board requesting an explanation as to why he did not cooperate with the Department's auditor.

13. Respondent did not respond to the Division's August 6, 2013 request for information.

14. On October 27, 2014, the Division contacted Respondent on behalf of the Board to request that he mail the Division copies of trust account records.

15. Respondent did not respond to the Division's October 27, 2014 request for information.

16. On November 25, 2014, a Monroe County Deputy personally served Respondent with a subpoena on behalf of the Division.

17. The subpoena required Respondent to either attend an audit on December 8, 2014 or mail the Division copies of account records by at least December 8, 2014.

18. Respondent did not attend the December 8, 2014 audit.

19. Respondent did not mail copies of trust account records to the Division.

#### Facts Related to Default

20. The Complaint and Notice of Hearing in this matter were served on Respondent on July 27, 2015, by both certified and regular mail, consistent with Wis. Admin. Code § SPS 2.08. The Notice of Hearing stated that Respondent was required to file an Answer to the Complaint within 20 days. It further stated:

If you do not provide a proper Answer within 20 days, you will be found to be in default and a default judgment may be entered against you on the basis of the Complaint and other evidence. In addition, the Board may take disciplinary

action against you and impose the costs of the investigation, prosecution and decision of this matter upon you without further notice or hearing.

21. Respondent failed to file an Answer as required by Wis. Admin. Code § SPS 2.09(4).

22. Following expiration of the 20-day time period to file an Answer, the ALJ scheduled a telephone prehearing conference for September 4, 2015. Notice of this prehearing conference was sent to both parties, with instructions that Respondent provide the ALJ with a telephone number at which he could be reached for the conference no later than August 31, 2015. The notice instructed Respondent that “failure to appear . . . may result in default . . . .”

23. Respondent failed to provide a telephone number and could not be reached for the prehearing conference.

24. At the prehearing conference on September 4, 2015, the Division moved for default pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c).

25. On September 4, 2015, the ALJ issued a Notice of Default and Order, which ordered the Division to file and serve no later than September 25, 2015 a recommended proposed decision and order in this matter.

26. The Division timely filed its recommended proposed decision and order on September 25, 2015.

27. Respondent did not file a response to the Notice of Default and Order or to the Division’s recommended proposed decision and order.

### DISCUSSION AND CONCLUSIONS OF LAW

As stated in the September 4, 2015 Notice of Default and Order, Respondent is in default for failing to file an Answer to the Complaint and failing to appear at the prehearing conference held on September 4, 2015. As a result, an order may be entered against him on the basis of the Complaint and other evidence. *See* Wis. Admin. Code § SPS 2.14; *see also* Wis. Admin. Code § HA 1.07(3).

### Violations of Wis. Admin. Code §§ REEB 15.04 and 24.17(5)

Wisconsin Stat. § 452.14(3) states, in relevant part:

The board may revoke, suspend or limit any broker's, salesperson's, or time-share salesperson'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:

...

(L) Violated any provision of this chapter or any rule promulgated under this chapter.

Pursuant to Wis. Admin. Code § REEB 15.04, a broker must retain a copy of all trust account records for at least three years and must make these records available for copying and inspection by the Board. Wisconsin Admin. Code § REEB 24.17(5) requires licensees to "respond to the department and the board regarding any request for information within 30 days of the date of the request."

The undisputed facts establish that Respondent refused to allow the Department to audit his trust account despite continual requests by the Department on behalf of the Board. The Department's auditor began attempting to schedule an audit on March 31, 2013. After Respondent failed to agree to an audit time, the Department's auditor instead visited Respondent's office in person but was still unable to view trust account records. This disciplinary case was subsequently opened for investigation.

Respondent continued to ignore the Board's requests for information after this disciplinary case was opened for investigation. He failed to respond to the Division's August 6, 2013 request for an explanation as to why he did not cooperate with the Department's auditor and also failed to respond to the Division's October 27, 2014 request that he mail the Division copies of trust account records. Moreover, he failed to comply with a subpoena personally served on him on November 25, 2014, which required him to either attend an audit at the Department or mail the Division copies of trust account records. The Department has attempted to audit Respondent's trust account for over two years, and Respondent has consistently refused to make trust account records available for copying and inspection and has failed to respond to the Department's and Board's requests for information.

Based on the foregoing, I conclude that Respondent violated Wis. Admin. Code § REEB 15.04 by failing to make trust account records and other documents available for inspection and copying by the Board, and violated Wis. Admin. Code § REEB 24.17(5) by failing to respond to the Department within 30 days of a request for information. As a result of these violations, Respondent is subject to discipline pursuant to Wis. Stat. § 452.14(3)(L).

### Discipline

The three purposes of discipline are: (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, 237 N.W.2d 689 (1976).

The Division recommends that Respondent's Real Estate Broker license be revoked. The Board has previously revoked a Real Estate Broker's license for failing to make trust account records and other documents available for inspection and copying by the Board and failing to respond to the Department within 30 days of a request for information in violation of Wis. Admin. Code §§ REEB 15.04 and 24.17(5). *In the Matter of Disciplinary Proceedings Against Jason S. Schwittay and Apple Valley Realtors, LLC*, Order 0003776 (Mar. 3, 2015). It has also accepted the voluntary surrender of a Real Estate Broker's license for failing to make trust account records available for inspection and copying by the Board in violation of Wis. Admin. Code § REEB 15.04. *In the Matter of Disciplinary Proceedings Against Mark F. Moen and Veteran Realty Group, LLC*, Order 0003768 (Feb. 25, 2015).

Revocation of Respondent's license also appropriately serves the purposes of discipline as articulated in *Aldrich*. The purpose of licensing statutes is to protect the public by guaranteeing that the license holder possesses a minimal level of professional competence and will be held accountable for substandard practice or misdeeds. See *Stringez v. Dep't of Regulation & Licensing Dentistry Examining Bd.*, 103 Wis. 2d 281, 286-87, 307 N.W.2d 664, (1981). Accordingly, when the Board cannot assure the public of the licensee's competence to practice his profession, revocation is appropriate. See *Gilbert v. State Medical Examining Bd.*, 119 Wis. 2d 168, 189-90, 349 N.W.2d 68 (1984).

In particular, rules regulating use of client funds exist to protect the public by guaranteeing funds will be accounted for and clients will be reimbursed. Respondent's refusal to provide the Department with trust account records renders the Board unable to assure the public that Respondent is adequately safeguarding client funds. Therefore, revocation is necessary to protect the public from other instances of misconduct by Respondent.

Further, rehabilitation is not plausible, as Respondent refuses to submit to the authority of the Board which granted his license. The Division offered him repeated opportunities to comply with an audit. He was also personally served with a subpoena, which he ignored. Having obtained no information from Respondent, the Board cannot even determine what competency issues may exist and therefore cannot ascertain what rehabilitative measures might be effective.

Revocation in this case will also serve to deter other licensees from believing they might escape disciplinary action by merely ignoring the Board's attempts to investigate a complaint. To allow licensees to impede the Board's investigations by failing to respond would undermine the purpose of the licensing statutes.

In light of the facts of this case and the Division of Hearings and Appeals' practice of complying with the prior decisions of the Board, the discipline recommended by the Division is warranted here.

### Costs

The Department has the authority to assess costs pursuant to Wis. Stat. § 440.22. The Division requests that Respondent be ordered to pay the full costs of the Division's investigation and of these proceedings. The factors to be considered in assessing full costs are: (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 respondent's cooperation with the disciplinary process; (5) prior discipline, if any; (6) the fact that the department 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; and (7) any other relevant circumstances. See *In the Matter of Disciplinary Proceedings Against Elizabeth Buenzli-Fritz*, LS0802183CHI (Aug. 14, 2008).



Based on the factors delineated in the *Buenzli-Fritz* decision and the facts of this case, Respondent should be assessed the full amount of recoverable costs in this case. The Division has proven all counts charged. By refusing to cooperate with the Department's attempt to audit his trust account records, Respondent has committed serious violations which present troubling public safety concerns, and the Division is therefore seeking a license revocation. Respondent has also not cooperated with the investigation or participated in these proceedings. As a program revenue agency, the Department is funded entirely by the fees it collects. The expenses of responding to Respondent's violations should not be distributed among others in Respondent's profession. Instead, the costs should fall on Respondent.

ORDER

Accordingly, IT IS ORDERED that Respondent's Real Estate Broker license is hereby REVOKED, effective on the date the final decision is signed by the Board.

IT IS FURTHER ORDERED that, within 90 days after the date the final decision is signed by the Board, Respondent shall pay all recoverable costs in this matter in an amount to be established, pursuant to Wis. Admin. Code § SPS 2.18. After the amount is established, payment shall be made by certified check or money order payable to the Wisconsin Department of Safety and Professional Services and sent to:

Department Monitor  
Department of Safety and Professional Services  
Division of Legal Services and Compliance  
P.O. Box 7190  
Madison, WI 53707-7190

Dated at Madison, Wisconsin on September 30, 2015.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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By: Jennifer E Nashold msu  
Jennifer E Nashold  
Administrative Law Judge