

## WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES



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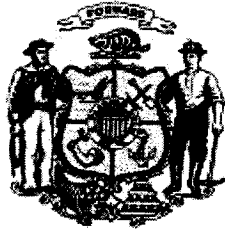
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**Before the  
State of Wisconsin  
Real Estate Appraisers Board**

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In the Matter of Disciplinary Proceedings Against  
Kelly M. McNamara, Respondent

FINAL DECISION AND ORDER

Order No. 0004703

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**Division of Legal Services and Compliance Case No. 15 APP 037**

On May 5, 2016, the State of Wisconsin, Real Estate Appraisers Board, delegated authority to Department of Safety and Professional Services Chief Legal Counsel Michael Berndt to review and decide this matter. Chief Legal Counsel Berndt, 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 Appraisers Board.

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

Dated at Madison, Wisconsin on the 5<sup>th</sup> day of May, 2016.

A handwritten signature in black ink, appearing to read "Michael Berndt".

Michael Berndt, Chief Legal Counsel  
Department of Safety and Professional  
Services for the Real Estate Appraisers  
Board



Before The  
State Of Wisconsin  
**DIVISION OF HEARINGS AND APPEALS**

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In the Matter of Disciplinary Proceedings Against  
Kelly M. McNamara, Respondent

DHA Case No. SPS-16-0010  
DLSC Case No. 15 APP 037

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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:

Kelly M. McNamara  
11071 47<sup>th</sup> Avenue  
Chippewa Falls, WI 548729

Wisconsin Real Estate Appraisers 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 Kelly M. McNamara (Respondent), alleging that Respondent violated Wis. Admin. Code § SPS 86.01(10) by, after a request for information made by the Board, failing to cooperate in a timely manner with the Board's investigation of a complaint filed against Respondent. The Division served Respondent on January 22, 2016 by sending a copy of the Notice of Hearing and Complaint to her 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 telephone prehearing conference held before the Division of Hearings and Appeals on February 22, 2016.

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 Administrative Law Judge (ALJ) found Respondent to be in default. On February 22, 2016, 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 timely filed a recommended proposed decision and order in this matter.

## FINDINGS OF FACT

### Facts Related to the Alleged Violations

Findings of Fact 1-10 are taken from the Division's Complaint against Respondent filed in this matter.

1. Respondent Kelly M. McNamara is certified in the State of Wisconsin as a Licensed Appraiser, having certificate of licensure number 2030-4, first issued on May 25, 2007, and expired on December 15, 2015.

2. Respondent retains a five year right to renew her Licensed Appraiser certificate of licensure pursuant to Wis. Stat. § 440.08(3).

3. Respondent's most recent address on file with the Department is 11071 47th Avenue, Chippewa Falls, Wisconsin 54729.

4. On or about July 16, 2015, the Department received a complaint from a consumer who alleged that he hired Respondent to prepare appraisals for multiple properties and paid Respondent a total of \$800 for her services but Respondent did not prepare the appraisals or refund the \$800 payment.

5. On August 11, 2015, Division of Legal Services and Compliance Case Number 15 APP 037 was opened for investigation.

6. On August 12, 2015, an investigator for the Department sent, on behalf of the Real Estate Appraisers Board (Board), an email to Respondent at her email address on file with the Department requesting that Respondent provide a response to the complaint.

7. On August 24, 2015, the Department investigator sent, on behalf of the Board, a follow-up email to Respondent at her email address on file with the Department renewing his request that Respondent provide a response to the complaint.

8. On August 31, 2015, the Department investigator sent, on behalf of the Board, a letter to Respondent at Respondent's most recent address on file with the Department renewing his request that Respondent provide a response to the complaint.

9. On September 30, 2015, a different investigator for the Department sent, on behalf of the Board, a letter to Respondent at Respondent's most recent address on file with the Department requesting that Respondent provide a response to the complaint.

10. Respondent has not responded to any of the Department's requests for information.

#### Facts Related to Default

11. The Complaint and Notice of Hearing in this matter were served on Respondent on January 22, 2016, 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."

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

13. Following expiration of the 20-day time period to file an Answer, the ALJ scheduled a telephone prehearing conference for February 22, 2016. Notice of this prehearing conference was sent to both parties, with instructions that Respondent provide the ALJ with a telephone number at which she could be reached for the conference no later than February 17, 2016. The notice stated: "The Respondent's failure to appear at a scheduled conference . . . may result in default being entered against the Respondent."

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

15. At the prehearing conference on February 22, 2016, the Division moved for default pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c).

16. On February 22, 2016, the ALJ issued a Notice of Default and Order, which ordered the Division to file and serve no later than March 14, 2016 a recommended proposed decision and order in this matter.

17. The Division timely filed its recommended proposed decision and order.

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

## DISCUSSION AND CONCLUSIONS OF LAW

### Default

As stated in the February 22, 2016 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 February 22, 2016. As a result, an order may be entered against her 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)(b)-(c).

### Violation of Wis. Admin. Code § SPS 86.01(10)

Wisconsin Stat. § 458.26(3) states, in relevant part:

Disciplinary proceedings shall be conducted by the board according to the rules promulgated under s. 440.03(1). The department may deny any certificate under this chapter, and 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:

...

(b) Engaged in unprofessional or unethical conduct in violation of rules promulgated under s. 458.24.

...

(i) Violated this chapter or any rule promulgated under this chapter.

Wisconsin Admin. Code § SPS 86.01(10) states:

After 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 or of a complaint filed against an individual who practiced real estate appraising under the supervision of the licensed or certified appraiser. There is a rebuttable presumption that a licensed or certified appraiser who takes longer than 10 business days to respond to a request for information by the board has not acted in a timely manner under this subsection.

The undisputed facts establish that on or about July 16, 2015, the Department received a complaint from a consumer who alleged that he hired Respondent to prepare appraisals for multiple properties and paid Respondent a total of \$800 for her services but Respondent did not prepare the appraisals or refund the \$800 payment. The Department contacted Respondent multiple times on behalf of the Board requesting a response to the complaint. Emails were sent to Respondent's email address on file with the Department on August 12 and August 24, 2015, and letters were sent to Respondent's mailing address on file with the Department on August 31 and September 30, 2015. Respondent failed to respond to all of the Board's requests for information.

Based on the foregoing, Respondent violated Wis. Admin. Code § SPS 86.01(10) by, after a request for information made by the Board, failing to cooperate in a timely manner with the Board's investigation of a complaint filed against Respondent. As a result of this violation, Respondent is subject to discipline pursuant to Wis. Stat. § 458.26(3)(b) and (i).

### Appropriate 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 right to renew her Licensed Appraiser certificate of licensure be revoked. This recommendation appropriately serves the purposes of discipline and is adopted in this case.

It is well-established that the purpose of licensing statutes is to protect the public by ensuring licensees possess a minimal level of professional competence. *Stringez v. Dep't of Regulation & Licensing Dentistry Examining Bd.*, 103 Wis. 2d 286–87, 307 N.W.2d 664, 667 (1981). The license allows the public to trust that the individual is subject to rules and requirements that guarantee competence and accountability for substandard practice or misdeeds. *Id.* As such, when the Board cannot assure the public of the licensee's competence to practice her profession, revocation is appropriate. *Gilbert v. State Medical Examining Bd.*, 119 Wis. 2d 168, 189–90, 349 N.W.2d 68 (1984).

Even though Respondent's certificate of licensure is currently expired, it is appropriate and necessary to impose discipline. Wisconsin Stat. § 440.08(3)(a) allows the holder of a credential to restore the credential even after expiration by simply paying the applicable renewal fee plus a late renewal fee of \$25. Under Wis. Stat. § 440.08(3)(b), the Department or Board, as appropriate, may promulgate rules requiring credential holders who have failed to renew the credential for five years to complete additional requirements to restore the credential. The Department and Board correctly interpret these provisions to mean that credential holders retain a right to automatically renew their credentials within five years of expiration by simply paying the required fees. Thus, Respondent has an automatic right to renew her certificate of licensure until December 15, 2020 by merely paying the applicable renewal fees. The purposes of discipline as articulated in *Aldrich* apply to this case because Respondent may renew her certificate of licensure at any time.

The conduct alleged in the consumer complaint in this case is very serious. Respondent's client alleged he paid Respondent \$800 to prepare appraisals for multiple properties. Respondent allegedly accepted the payment but failed to perform the appraisals or refund the payment. If the allegations are true, Respondent engaged in severely unethical conduct in her appraisal practice. Respondent's refusal to respond to the Board's request for information renders the Board unable to adequately investigate the complaint and consequently strips the Board of its ability to assure the public that Respondent is practicing ethically and competently. Therefore, revocation of

Respondent's right to renew is necessary to protect the public from other instances of misconduct by Respondent.

Further, rehabilitation is not likely, as Respondent refuses to submit to the authority of the Board which granted her license. The Division offered her repeated opportunities to comply with its investigation on behalf of the Board. Having obtained no information from Respondent, the Board cannot even determine what competency issues may exist and therefore cannot ascertain what other rehabilitative measures might be effective.

Revocation of Respondent's right to renew her license 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, the discipline recommended by the Division is warranted.

### Costs

The Division has the authority to assess costs pursuant to Wis. Stat. § 440.22. Factors which may be considered in assessing 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 prosecutor; (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, D.C.*, LS0802183CHI (Aug. 14, 2008).

In the instant case, the Division has proven all counts charged. By refusing to cooperate with the Board's attempt to investigate a complaint against her, Respondent has committed a serious violation which presents a troubling public safety concern, and the Division is therefore seeking a revocation of Respondent's right to renew her credential. Respondent has also not cooperated with the investigation or participated in these proceedings. As such, fairness weighs heavily in requiring Respondent to pay the costs of this proceeding which resulted in significant discipline, rather than spreading the costs among all appraiser licensees in Wisconsin. Finally, Respondent made no argument concerning whether costs should be assessed against her. When Respondent fails to argue a position, the Division is not obliged to make the argument for her.

Based on the foregoing, I conclude that should Respondent ever apply for a credential with the Board in the future, the full costs of this proceeding shall be assessed against Respondent in an amount to be determined under Wis. Admin. Code § SPS 2.18.



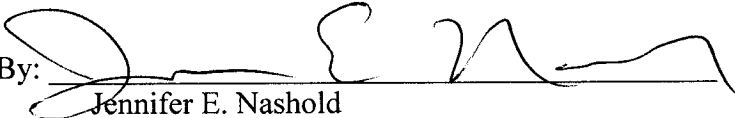
ORDER

Accordingly, it is hereby ORDERED that Kelly M. McNamara's right to renew her Licensed Appraiser certificate of licensure (number 2030-4) pursuant to Wis. Stat. § 452.26(3)(b) and (i) is REVOKED, effective on the date the final decision is signed by the Board.

IT IS FURTHER ORDERED that should Respondent ever apply for a credential with the Board in the future, Respondent shall pay all recoverable costs in this matter in an amount be established, pursuant to Wis. Admin. Code § SPS 2.18, prior to the Department's consideration of any such application.

Dated at Madison, Wisconsin on March 15, 2016.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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By:   
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Administrative Law Judge