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

In the Matter of Disciplinary Proceedings Against
Timothy D. Russell, Respondent

FINAL DECISION AND ORDER

Order No. 0004883

Division of Legal Services and Compliance Case No. 14 REB 063


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 18th day of August, 2016.



Member
Real Estate Examining Board



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of Disciplinary Proceedings
Against Timothy D. Russell, Respondent

DHA Case No. SPS-16-0041
DLSC Case No. 14 REB 063

PROPOSED DECISION AND ORDER

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

Timothy D. Russell
6650 W. State Street, D312
Wauwatosa, WI 53213

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

PROCEDURAL HISTORY

These proceedings were initiated when the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division), filed a formal Notice of Hearing and Complaint against Respondent Timothy D. Russell (Respondent). The Complaint alleged that Respondent's right to renew his license was subject to disciplinary action pursuant to Wis. Stat. § 452.14(3)(L) and (p) and Wis. Admin. Code §§ REEB 24.17(2) and (2m) because Respondent: (1) violated Wis. Admin. Code § REEB 24.17(1) by violating any law the circumstances of which substantially relate to the practices of a real estate broker; and (2) violated Wis. Admin. Code § REEB 24.17(1) by failing to send to the Board within 48 hours after judgment of conviction a copy of the complaint or other information which describes the nature of the crime and judgment of conviction.

The Division served Respondent on April 26, 2016, by sending a copy of the Notice of Hearing and Complaint to his address on file with the Department by both certified and regular mail, consistent with Wis. Admin. Code § SPS 2.08. Respondent failed to file an Answer to the Complaint, as required by Wis. Admin. Code § SPS 2.09(4), and failed to appear at the telephone prehearing conference held before the Division of Hearings and Appeals on May 26, 2016.

The Division moved for default pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c). In light of Respondent's failure to file an Answer to the Complaint and failure to appear for the prehearing conference, the Administrative Law Judge (ALJ) found Respondent to be in default and issued a Notice of Default and Order on May 26, 2016. Consistent with the notice, the Division filed a recommended proposed decision and order.

FINDINGS OF FACT

Facts Related to the Alleged Violations

Findings of Facts 1-10 are set forth in the Division's Complaint against Respondent filed in this matter.

1. Respondent Timothy D. Russell is licensed by the State of Wisconsin as a real estate broker, having license number 43878-90, first issued on June 8, 1990, and expired on December 15, 2014.

2. Respondent's most recent address on file with the Department is 6650 W. State Street, D312, Wauwatosa, Wisconsin 53213.

3. On or about January 3, 2012, Respondent was charged with three counts of Theft-Business Setting (Embezzlement) in Milwaukee County Circuit Court, Case No. 2012CF000053.

4. The Criminal Complaint in Case No. 2012CF000053 alleged, among other things, the following:

- a. In 2009 and 2010, Respondent controlled and actively operated a corporation called Heritage Guard Preservation Society, Inc.
- b. Respondent actively operated Heritage Guard Preservation Society, Inc. for the purpose of raising funds for Operation Freedom, an event to honor military veterans.
- c. Respondent transferred, without consent, in excess of \$20,000 of funds from Heritage Guard Preservation Society, Inc. into his personal accounts.
- d. These funds were allegedly used by Respondent for personal trips to Hawaii, the Caribbean, and Atlanta.

5. On or about November 29, 2012, Respondent pled guilty to and was convicted of violating Wis. Stat. § 943.20(1)(b), Theft-Business Setting >\$10,000, a class G Felony.

6. In addition, the following charges were dismissed but read in: Theft-Business Setting >\$2,500-\$5,000, Wis. Stat. § 943.20(1)(b), a class I Felony and Theft-Business Setting <=\$2,500, Wis. Stat. § 943.20(1)(b), a class A Misdemeanor.

7. On January 22, 2013, Respondent was sentenced to, among other things, two years in prison and five years of extended supervision.

8. On May 9, 2013, the amended Judgment of Conviction for Case No. 2012CF000053 was filed with the Milwaukee County Clerk of Court.

9. Respondent did not report his conviction to the Department until May 19, 2014.

10. Pursuant to Wis. Stat. § 440.08(3), Respondent retains the right to automatically renew his real estate broker license (number 43878-90) through December 14, 2019.

Facts Related to Default

11. The Complaint and Notice of Hearing in this matter were served on Respondent on April 26, 2016, by both certified and regular mail, consistent with Wis. Admin. Code § SPS 2.08. The Notice of Hearing informed Respondent: “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 May 26, 2016. Notice of the prehearing conference was sent to both parties on May 16, 2016, with instructions that Respondent provide the ALJ with a telephone number at which Respondent could be reached for the conference no later than May 23, 2016. The Notice further informed Respondent: “The Respondent’s failure to appear at a scheduled conference or hearing may result in default judgment being entered against the Respondent.”

14. Respondent failed to provide a telephone number at which he could be reached for the conference. At the prehearing conference held on May 26, 2016, at 11:00 a.m., the Division provided a telephone number for Respondent, whereupon the ALJ left a voicemail for Respondent indicating that he should contact the ALJ at the telephone number provided by 11:10 a.m. Respondent failed to contact the ALJ at the telephone number provided.

15. The Division moved for default pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c).

16. On May 26, 2016, the ALJ issued a Notice of Default and Order which concluded that Respondent was in default and required the Division to serve no later than June 15, 2016, a recommended proposed decision and order.

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

18. Respondent did not file a response to either the Division's submission or to the ALJ's Notice of Default and Order.

DISCUSSION AND CONCLUSIONS OF LAW

Default

As stated in the May 26, 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 January 20, 2015. *See* Wis. Admin. Code §§ SPS § 2.09(4) and 2.14; Wis. Admin. Code § HA 1.07(3). Accordingly, an order may be entered against Respondent on the basis of the Complaint and other evidence. *See* Wis. Admin. Code § SPS 2.14; Wis. Admin. Code § HA 1.07(3).

Violations of Wis. Admin. Code § REEB 24.17(1)

The Division alleges that Respondent is subject to discipline pursuant to Wis. Stat. § 452.14(3)(L), which grants the Board the authority to discipline any license or license holder for violating any provision of Wis. Stat. ch. 452 or any rule promulgated under that chapter. The division also alleges that Respondent is subject to discipline under Wis. Admin. Code § REEB 24.17(2) for the conviction of a crime, the circumstances of which substantially relate to the practice of real estate, and under Wis. Stat. § 452.14(3)(p) and Wis. Admin. Code § REEB 24.17(2m) for being convicted of a felony that is a bar to licensure under Wis. Stat. § 452.25(1)(a).¹

Wisconsin. Admin. Code § REEB 24.17(1) states:

Licensees may not violate, or aid or abet the violation of, any law the circumstances of which substantially relate to the practices of a real estate broker or salesperson. A licensee who has been convicted of a crime shall send to the board within 48 hours after the judgment of conviction a copy of the complaint or other information which describes the nature of the crime and the judgment of conviction in order that the board may determine whether the circumstances of the crime of which the licensee was convicted are substantially related to the practice of a real estate broker or salesperson, pursuant to s. 111.335(1)(c), Stats.

¹ Wis. Stat. § 452.25(1)(a) provides: "Notwithstanding ss. 111.321, 111.322, and 111.335, and except as provided in pars. (b) to (e), no applicant who is an individual may be issued a broker's or salesperson's license if the applicant has been convicted of a felony."

The undisputed facts establish that on or about November 29, 2012, Respondent pled guilty to and was convicted of violating Wis. Stat. § 943.20(1)(b), Theft-Business Setting >\$10,000, a class G Felony, in Milwaukee County Circuit Court Case No. 2012CF000053. Respondent did not report this conviction to the Department until May 19, 2014. Moreover, the circumstances surrounding this violation substantially relate to Respondent's practice as a real estate broker.

The circumstances underlying Respondent's conviction are that in 2009 and 2010, Respondent controlled and actively operated a corporation called Heritage Guard Preservation Society, Inc (HGPS), a company whose purpose was to raise funds for an event honoring military veterans. Contrary to this purpose, Respondent transferred in excess of \$20,000 from HGPS into his personal accounts for personal use. The circumstances of a conviction substantially relate to the practice of a profession when "the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on traits revealed." *County of Milwaukee v. Labor & Industry Review Comm'n*, 139 Wis. 2d 805, 824, 407 N.W.2d 908 (1987). The practice of real estate can involve handling client funds, managing trust accounts and giving clients advice about real estate transactions, including the financial aspect of the transactions. Most importantly, Respondent would have access to client funds which he is legally obligated to safeguard. The practice of real estate will allow Respondent ample opportunity to engage in similar behavior to that of his conviction. Therefore, the circumstances of Respondent's conviction substantially relate to the practices of a real estate broker because Respondent's dishonest behavior and mismanagement of earmarked funds are likely to reappear in his practice as a real estate broker.

Based on the facts of this case and that Respondent has made no argument to the contrary, Respondent violated Wis. Admin. Code § REEB 24.17(1) and (2) by being convicted of a crime, the circumstances of which substantially relate to the practice of real estate, and by failing to send to the Board within 48 hours after the judgment of conviction a copy of the complaint or other information which describes the nature of the crime and the judgment of conviction. Furthermore, because Respondent's felony conviction would be a bar to licensure under Wis. Stat. § 452.25(1)(a), Respondent is subject to discipline, including the right to renew his license, pursuant to Wis. Stat. § 452.14(3)(p) and Wis. Admin. Code § 24.17(2m).

As a result of the above violations, Respondent is subject to discipline pursuant to Wis. Stat. § 452.14(3)(L) and (p) and Wis. Admin. Code §§ REEB 24.17(2) and (2m).

Appropriate Discipline

The three purposes of discipline are: (1) to promote the rehabilitation of the credential holder; (2) to protect the public from other instances of misconduct; and (3) to deter other credential holders 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 his real estate broker license be revoked. The recommended discipline is consistent with the purposes articulated in *Aldrich* and with case law. "Protection of the public is the purpose of requiring a license." *State ex rel. Green v. Clark*, 235 Wis. 628, 631, 294 N.W. 25 (1940). When a license is granted to an

individual, Wisconsin is assuring the public that the licensed individual is competent in his or her profession. *Stringez v. Dep't of Regulation & Licensing Dentistry Examining Bd.*, 103 Wis. 2d 281, 287, 307 N.W.2d 664 (1981). It follows that if the state cannot assure the public of the licensee's competence to practice the profession, then revocation is appropriate. *Gilbert v. State Medical Examining Bd.*, 119 Wis. 2d 168, 189–90, 349 N.W.2d 68 (1984).

Respondent has been convicted of a felony, the circumstances of which are substantially related to the practice of real estate and which would have been a bar to licensure. Thus, revocation is necessary to protect the public from other instances of misconduct by Respondent. As stated above, the purpose of the Board requiring real estate brokers to be licensed is to ensure the public that the licensees can be trusted to perform their responsibilities honestly and competently. Therefore, revocation of Respondent's right to renew his license is an appropriate response to his disrespect for the law, the public welfare, and the licensing authority governing his profession.

Promoting rehabilitation is one of the purposes of discipline; however, rehabilitation is unlikely in this case, as Respondent's felony conviction shows a disregard for the law and a lack of respect for the public and the profession. Notably, Respondent has failed to present any mitigating factors as to why he should be trusted to practice real estate. His lack of participation in these proceedings shows indifference toward his profession and toward any effort at rehabilitation. Moreover, revocation of Respondent's right to renew his broker license would send a strong message to all licensees that theft of others' property is a serious offense and refusing to cooperate with the Board is not tolerated.

In light of the facts of this case and the factors set forth in *Aldrich*, revocation of Respondent's right to renew his real estate broker license is warranted.

Costs

As a result of Respondent's right to renew his license being revoked by the Board, the Board is vested with discretion concerning whether to assess all or part of the costs of this proceeding against Respondent. *See* Wis. Stat. § 440.22(2). In exercising such discretion, the Department must look at aggravating and mitigating facts of the case; it may not assess costs against a licensee based solely on a "rigid rule or invocation of an omnipresent policy," such as preventing those costs from being passed on to others. *Noesen v. State Department of Regulation & Licensing, Pharmacy Examining Board*, 2008 WI App 52, ¶¶ 30-32, 311 Wis. 2d 237, 751 N.W.2d 385. The Board has, in previous orders, considered many factors when determining if all or part of the costs should be assessed against Respondent. *See e.g., In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz* (LS0802183 CHI) (Aug. 14, 2008). It is within the Board's discretion as to which, if any, of these factors to consider, whether other factors should be considered, and how much weight to give any factors considered.

Particularly relevant in the instant case are the following facts. First, the Division proved every count it alleged. This is not a case where the Division wasted resources or incurred additional costs by alleging multiple counts and then failing to prove those counts. Second,

Respondent's conduct and violations are serious. Respondent was convicted of a serious felony for which he served two years in prison, did not report the conviction to the Department as required by Wis. Admin. Code § REEB 24.17(1), and did not cooperate with these disciplinary proceedings. As a result of Respondent's conduct, the Division sought, and was granted, a revocation of Respondent's right to renew his license to practice real estate in Wisconsin, which, in addition to license revocation, is the most severe form of discipline. Moreover, Respondent made no argument concerning whether costs should be assessed against him. When Respondent fails to argue a position, the Division is not obligated to make the argument for him. Finally, the Department is a program revenue agency whose operating costs are funded by the revenue received from credential holders. As such, fairness weighs heavily in favor of requiring Respondent to pay the costs of this proceeding which resulted in significant discipline, rather than spreading the costs among all real estate licensees in Wisconsin.

In view of the foregoing, the full costs of this proceeding shall be assessed against Respondent in an amount to be determined pursuant to Wis. Admin. Code § SPS 2.18.

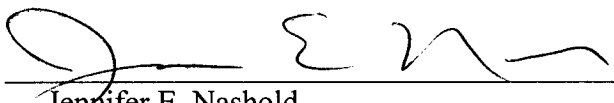
ORDER

Accordingly, it is hereby ORDERED that Respondent Timothy D. Russell's right to renew his real estate broker license (no. 43878-90) 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 Department in the future, Respondent shall pay all recoverable costs in this matter in an amount to 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 June 24, 2016.

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