

## WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES



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**Before the  
State Of Wisconsin  
Auctioneer Board**

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In the Matter of the Disciplinary Proceedings  
Against Nicholas W. Cain, Respondent.

FINAL DECISION AND ORDER

Order **ORDER 0007766**

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**Division of Legal Services and Compliance Case No. 18 AUC 006**

The State of Wisconsin, Auctioneer 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, Auctioneer 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 11th day of January, 2022.

A handwritten signature in black ink, appearing to read "Jay L. Zehl".

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Member  
Auctioneer Board



Before The  
State of Wisconsin  
DIVISION OF HEARINGS AND APPEALS

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In the Matter of Disciplinary Proceedings  
Against Nicholas W. Cain, Respondent

DHA Case No. SPS-21-0074  
DLSC Case No. 18 AUC 006

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**PROPOSED DECISION AND ORDER**

The parties to this proceeding for purposes of Wis. Stat. §§ 227.44, 227.47(1) and 227.53 are:

Nicholas W. Cain  
1006 Day Lily Ct.  
Plymouth, WI 53073-5010

Wisconsin Auctioneer Board  
P.O. Box 8366  
Madison, WI 53707-8366

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

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

PROCEDURAL HISTORY

On September 23, 2021, the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division), served the Notice of Hearing and the Complaint in this matter on Nicholas W. Cain (Respondent) by certified and regular mail, consistent with Wis. Admin. Code § SPS 2.08. The Respondent failed to file an answer to the Complaint as required. Wis. Admin. Code § SPS 2.09(4).

Following the expiration of the 20-day period to file an answer, Administrative Law Judge (ALJ) Angela Chaput Foy scheduled a telephone prehearing conference for November 1, 2021, at 11:00 a.m. The Respondent did not appear.

On November 1, 2021, the Division moved for default based on the Respondent's failure to file an answer to the Complaint and failure to appear at the prehearing conference, pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c).

On November 2, 2021, the ALJ issued a Notice of Default and Order against the Respondent and ordered that the Division file a recommended proposed decision and order by December 2, 2021.

### FINDINGS OF FACT

#### Facts Related to the Alleged Violations

Findings of Fact 1-22 are taken from the Division's Complaint filed against the Respondent in this matter.

1. Respondent Nicholas W. Cain (Birth Year 1983) is licensed by the State of Wisconsin as an auctioneer, having license number 2143-52, first issued on November 22, 2002 and current through December 14, 2022.

2. Respondent's most recent address on file with the Wisconsin Department of Safety and Professional Services (Department) is in Plymouth, Wisconsin 53073-5010.

3. On May 29, 2018, the Department received a complaint alleging that Respondent had entered into a contract to auction items for E.R. but allegedly never auctioned the items. The Division of Legal Services and Compliance (DLSC) subsequently opened Case Number 18 AUC 006 for investigation.

4. On April 26, 2017, Respondent entered into a contract with E.R. to sell goods at auction.

5. On August 24, 2018, the Department mailed a letter to Respondent at his address of record to request a response to the complaint and copies of Respondent's continuing education (CE) certificates of completion for the 2014-2016 biennium. The Department did not receive a response.

6. On October 13, 2018, Respondent sold E.R.'s goods at auction.

7. On November 30, 2018, Respondent emailed the Department a response to the complaint, and one CE certificate for 6 hours of completed CE.

8. On December 4, 2018, Respondent emailed the Department a low-quality picture of a CE certificate, that the Department was unable to read.

9. On December 5, 2018, the Department emailed Respondent at his email address of record to request that Respondent resend the CE certificate in a more readable format.

10. On December 7, 2018, Respondent spoke with the Department regarding this case. The Department did not receive the paperwork requested in the December 5, 2018 email.

11. On December 27, 2018, Respondent sent paperwork regarding the inventory of what was sold at auction but did not provide the CE certificates requested on December 5, 2018.

12. On October 10, 2019, the Department emailed Respondent at his email address of record to again request the CE certificates in a more readable format, a readable copy of the contract, and a copy of the check sent to E.R.

13. On October 16, 2019, Respondent acknowledged the request but did not supply the paperwork.

14. On November 12, 2019, the Department emailed Respondent to reiterate the request made in the October 10, 2019 email.

15. On November 27, 2019, the Department sent a letter to Respondent at his address of record to reiterate the request made on October 10, 2019.

16. On November 27, 2019, Respondent acknowledged the request but did not supply the requested materials.

17. On December 16, 2019, the Department emailed Respondent at his email address of record to reiterate the request made on October 10, 2019.

18. On January 8, 2020, the Department emailed Respondent at his email address of record to reiterate the request made on October 10, 2019.

19. On January 21, 2020, Respondent acknowledged the request but did not supply the materials.

20. On February 10, 2020, the Department emailed Respondent at his email address of record to again request a readable copy of Respondent's CE certificates and the contract for the auction at issue.

21. On February 18, 2020, Respondent acknowledged the request but did not supply the materials.

22. A review of the auction contract between Respondent and E.R. reveals that the contract failed to specify or include the following items:

- a. A state registration number.
- b. A statement indicating whether the registrant is authorized to purchase at the auction.
- c. A statement regarding a buyer's fee.
- d. A statement by the seller that he or she has title and right to sell all property to be sold at auction free of encumbrances and liens.

#### Facts Related to Default

23. On September 23, 2021, the Division served the Notice of Hearing and the Complaint on the Respondent by both certified and regular mail, consistent with Wis. Admin. Code § SPS 2.08.

24. The Respondent failed to file an answer to the Complaint.

25. Following expiration of the 20-day period to file an answer, the ALJ scheduled a telephone prehearing conference for November 1, 2021. On October 13, 2021, the ALJ mailed notice of the prehearing conference to both parties by email and regular mail, using the Respondent's address on file with the Department, with instructions that the Respondent contact the ALJ with a telephone number at which he could be reached for the conference no later than October 29, 2021. The notice also stated that if the Respondent failed to appear at the scheduled conference, default judgment may be entered against him.

26. The Respondent did not contact the ALJ and did not provide a telephone number.

27. On November 1, 2021, the Respondent failed to appear at the prehearing conference. The ALJ attempted to reach the Respondent at two telephone numbers that the Respondent had on file with the Division. The ALJ called the Respondent at both numbers at approximately 10:03 a.m. and left a message, and called both numbers again at approximately 10:18 a.m. The ALJ also emailed the Respondent at the email address that the Respondent had on file with the Division at 11:07 a.m.

28. On November 1, 2021, the Division moved for default based on the Respondent's failure to file an answer to the Complaint and failure to appear at the prehearing conference, pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3).

29. On November 2, 2021, the ALJ issued a Notice of Default and Order against the Respondent and ordered that the Division file a recommended proposed decision and order by December 2, 2021. On November 2, 2021, the ALJ emailed and mailed the notice and order to the Respondent at his address on file with the Department.

30. On November 2 and 3, 2021, the Respondent emailed the ALJ, copying the Division, and said the email was in his spam folder and he wanted to know who to contact. The ALJ

responded on November 4, 2021, by email, explaining the status of the case and asked, "are you asking for an opportunity to show good cause to be relieved from the effect of the finding of default?" The Respondent did not respond or provide any further communication.

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

## DISCUSSION AND CONCLUSIONS OF LAW

### Jurisdictional Authority

The Wisconsin Auctioneer Board (Board) has jurisdiction over this matter pursuant to Wis. Stat. § 480.24(1). The Department of Safety and Professional Services "may promulgate rules defining uniform procedures to be used by the department . . . and all examining boards and affiliated credentialing boards attached to the department or an examining board, for . . . conducting [disciplinary] hearings." Wis. Stat. § 440.03(1). These rules are codified in Chapter SPS 2 of the Wisconsin Administrative Code.

The Division of Hearings and Appeals has authority to issue this proposed decision and order pursuant to Wis. Stat. § 227.43(1m) and Wis. Admin. Code § SPS 2.10(2).

### Default

The Division properly served the Notice of Hearing and the Complaint on the Respondent by mailing a copy to the address on file with the Department. Service by mail is complete upon mailing. Wis. Admin. Code § SPS 2.08(1).

The Division of Hearings and Appeals properly served the Respondent with its notices pursuant to Wis. Admin. Code § HA 1.03 (The division may serve decisions, orders, notices, and other documents by first class mail.).

An answer to a complaint shall be filed within 20 days from the date of service of the complaint. Wis. Admin. Code § 2.09(4). If a respondent "fails to answer as required by s. SPS 2.09 or fails to appear at the hearing at the time fixed therefor, the respondent is in default and the disciplinary authority may make findings and enter an order on the basis of the complaint and other evidence." Wis. Admin. Code § SPS 2.14.

For a telephone prehearing conference, the administrative law judge may find a failure to appear grounds for default if any of the following conditions exist for more than ten minutes after the scheduled time for prehearing conference: (1) the failure to provide a telephone number to the ALJ after it had been requested; (2) the failure to answer the telephone; (3) the failure to free the line for the proceeding; and (4) the failure to be ready to proceed with the prehearing conference as scheduled. Wis. Admin. Code § HA 1.07(3)(c).

Here, the Respondent failed to file an answer to the Complaint, failed to appear at the prehearing telephone conference on November 1, 2021, failed to provide a telephone number to

the ALJ after it had been requested, failed to answer the telephone when the ALJ called, and failed to be ready to proceed with the prehearing conference as scheduled. Therefore, the Respondent is in default, and findings and an order may be entered based on the Complaint.

### Violations

The Board has the authority to impose discipline against the Respondent pursuant to Wis. Stat. § 480.24. Following an investigation, if the Board determines that a that a credential holder has “engaged in conduct while practicing as an auctioneer or as an auction company which evidences a lack of knowledge or ability to apply professional principles or skill,” or “violated this chapter or any rule promulgated under this chapter” it may “reprimand a registrant or deny, limit, suspend, or revoke a certificate....” Wis. Stat. § 480.24(2)(b) and (j), respectively. The Board may also impose a forfeiture of not more than \$1,000 for each separate offense on a credential holder who violates Wis. Stat. § ch. 480 or any rule promulgated by the Board. Wis. Stat. § 480.26(2).

Conduct that is grounds for the Division to take disciplinary action includes, but is not limited to:

- a. Failing to include the specifications and terms required in a written contract with sellers of goods. Wis. Admin. Code § SPS 124.02.
- b. Failing to complete the required educational programs for licensure. Wis. Admin. Code § SPS 128.02(1).
- c. Failing to respond to a request for information to the Board or Department within 30 days. Wis. Stat. § 440.20(5)(a).

The Respondent’s violated Wis. Admin. Code § SPS 124.02 by failing to include the required specifications and terms in his auction contract with E.R.

No auctioneer may conduct an auction unless the auctioneer or the auction company that is managing the auction has entered into a prior written contract with each owner or consignor of goods or real estate that may be sold at the auction. The contract shall specify the terms and conditions upon which the auctioneer or auction company accepts the goods or real estate for sale and must contain:

- (1) The registrant’s name, trade or business name, state registration number, business address and business telephone number.  
...
- (3) A general description of the property to be sold at auction, any restrictions relating to conducting the auction and a statement indicating whether the registrant is authorized to purchase at the auction.  
...
- (5) A statement of whether a buyer’s fee or surcharge will be assessed and, if so, the percentage or other amount to be charged to the successful bidder.



- (6) The date, dates, or time period during which the items will be sold at auction.
- (7) A statement by the seller that he or she has title and right to sell all property to be sold at auction free of encumbrances and liens; or, if some or all of the property to be sold is subject to encumbrances or liens, a specific itemization of such property.

Wis. Admin. Code § SPS 124.02(1), (3), and (5-7). The Respondent's contract with E.R. failed to state a state registration number, a statement indicating whether the registrant is authorized to purchase at the auction, a statement regarding the buyer's fee, and a statement by the seller that the seller has the title and the right to sell all property at auction free of encumbrances and liens.

The Respondent violated Wis. Admin. Code § SPS 128.02(1) by failing to complete and report the required educational programs for licensure. "[E]very registered auctioneer applying to renew a registration shall complete at least 12 hours in an educational program." Wis. Admin. Code § SPS 128.02(1). Alternatively, a registered auctioneer may take and pass an education examination conducted by the Department. Wis. Admin. Code § SPS 128.06(1). Even after multiple requests, the Respondent did not provide proof of taking the examination or completion of the requisite number of credits. He only provided proof of completion for six credit hours.

Finally, the Respondent violated Wis. Stat. § 440.20(5)(a) by failing to respond to requests for information from the Board or Department within 30 days. On August 24, 2018, the Department requested a response to the initial allegations from the Respondent. The Respondent did not respond until November 30, 2018. On December 5, 2018, and December 16, 2019, the Department requested additional information from the Respondent. The Respondent did not provide the requested information. Additionally, the Respondent failed appear and participate in these proceedings.

By engaging in conduct qualifying as grounds for taking disciplinary action on his license, along with his failure to participate in these proceedings and make any argument to the contrary, the Respondent is subject to discipline pursuant to Wis. Stat. § 480.24(2)(b) and (j) and Wis. Stat. § 440.20(5)(a). Additionally, the Respondent is subject to a forfeiture pursuant to Wis. Stat. § 480.26(2).

### Discipline

The Division recommends that the Respondent's credential be suspended until he completes the educational requirements, provides a written statement to the Board, and pays the costs and forfeiture in the amount of \$1,000. Because the Respondent has been found in default for his failure to participate in any part of these proceedings, and because the recommended discipline is consistent with the purposes articulated in *Aldrich* and case law, I adopt the Division's recommendation.

The three purposes of discipline in a professional misconduct case 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, 209, 237 N.W.2d 689 (1976).

The recommended discipline is consistent with the purposes articulated in *Aldrich*. Although promoting rehabilitation is one of the purposes of discipline, rehabilitation is unknown in this case. The Respondent failed to respond to multiple requests for information from the Division, failed to provide an answer following the Notice of Hearing and Complaint, and failed to appear for the prehearing conference. Therefore, the Board cannot determine whether any rehabilitative measures would be effective, but the proposed discipline may encourage rehabilitation.

Suspending the Respondent's credential indefinitely protects the public from other potential instances of misconduct. "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 credential holder's competence to practice the profession, then suspension is appropriate. *Gilbert v. State Medical Examining Bd.*, 119 Wis. 2d 168, 189-90, 349 N.W.2d 68 (1984). In this case, the Respondent failed to meet the legal requirements governing his practice. The law is not ambiguous on the legal requirements of written contracts for auction. Wisconsin Admin. Code § SPS 124.02 lists seven elements that must be in the contract. The Respondent failed to include five of these seven required elements in his auction contract with E.R. These omissions call into question the Respondent's competency to perform his duties as an auctioneer. The Respondent also failed to complete the required continuing education for maintenance of his credential. Boards require such education to ensure that credential holders maintain competency in their profession.

Suspension and the forfeiture are also necessary to deter other credential holders from engaging in similar conduct. Failure to meet the minimum standards expected in the auctioneering profession and failing to cooperate with the Board that issued one's credential are serious instances of misconduct and cannot be tolerated. Suspension of the Respondent's credential will serve to deter others from committing similar violations, as the consequences are severe. Suspension is an appropriate response to the Respondent's disregard for the licensing authority governing his profession. Other credential holders must be put on notice that failing to cooperate with the Board is not an option. Credential holders must cooperate so that the Board can ascertain whether a violation was committed and determine the appropriate outcome to rehabilitate the credential holder while protecting the public. The Respondent has disregarded the Board's authority as well as the laws in place to protect the public. Therefore, the suspension of the Respondent's credential to practice as an auctioneer in Wisconsin is an appropriate response.

The proposed discipline is consistent with prior Board decisions. *See In the Matter of Disciplinary Proceedings Against William H. Betthausen*, Board Order No. LS0605151AUC (October 24, 2006) (Board suspended and limited respondent's credential after respondent failed

to respond to the Department, and failed to list a general description of property in a contract);<sup>1</sup> *See also In re the Matter of the Disciplinary Proceedings Against Steven J. Peterson*, Board Order No. LS0807223AUC (July 22, 2008) (Board reprimanded and assessed a forfeiture against respondent for practicing without being credentialed and failing to include certain required terms in the auction contract).<sup>2</sup>

Considering the facts of this case, the factors set forth in *Aldrich*, and prior Board decisions, the discipline recommended by the Department is reasonable and warranted.

### Costs

The Board is vested with discretion concerning whether to assess all or part of the costs of this proceeding against the Respondent. *See* Wis. Stat. § 440.22(2). In exercising such discretion, the Board 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. In previous orders, Boards have considered the following factors when determining if all or part of the costs should be assessed against a respondent: (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, funded by other licensees; and (7) any other relevant circumstances. *See In the Matter of Disciplinary Proceedings Against Elizabeth Buenzli-Fritz*, LS0802183CHI (Aug. 14, 2008). It is within the Board’s discretion as to which of these factors to consider, whether other factors should be considered, and how much weight to give any factors considered.

Considering the above factors, it is appropriate for the Respondent to pay the full costs of the investigation and these proceedings. The Respondent defaulted and the factual allegations identified in this decision were deemed admitted. The Respondent failed to follow essential laws governing his profession and failed to cooperate with the Board. Finally, the Respondent failed to appear at the prehearing conference, and failed to file an answer to the Complaint or otherwise provide any argument regarding the allegations. Such conduct demonstrates disregard for the authority of the board and disregard for the requirements of his profession.

The Department is a program revenue agency whose operating costs are funded by the revenue received from credential holders. It would be unfair to impose the costs of pursuing discipline in this matter on those licensees who have not engaged in misconduct. Therefore, it is appropriate for the Respondent to pay the full costs of the investigation and this proceeding, as determined pursuant to Wis. Admin. Code § SPS 2.18.

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<sup>1</sup> *In the Matter of Disciplinary Proceedings Against William H. Betthausen*, Board Order No. LS0605151AUC

<sup>2</sup> *In re the Matter of the Disciplinary Proceedings Against Steven J. Peterson*, Board Order No. LS0807223AUC

ORDER

For the reasons set forth above, IT IS ORDERED that the credential of the Respondent (license number 2143-52) is SUSPENDED indefinitely.

IT IS FURTHER ORDERED that the Respondent may petition for reinstatement of his license under the following conditions:

- a. Prior to submitting a petition for reinstatement, the Respondent shall, at his own expense, successfully complete six (6) hours of education on the topic of auction contracts and three (3) hours of education on the topic of auctioneer ethical and professional conduct offered by a provider pre-approved by the Board or its designee, including taking and passing any exam offered for the courses.
  - (1) The Respondent shall submit proof of successful completion of the education in the form of verification from the institution providing the education to the Department Monitor at the address stated below. None of the education completed pursuant to this requirement may be used to satisfy any continuing education requirements that have been or may be instituted by the Board or Department and may not be used in future attempts to upgrade a credential in Wisconsin.
- b. At the time of the petition, the Respondent must provide the Board a written statement explaining his failure to cooperate with the Board, the omissions committed in the auction contract, and his failure to complete his continuing education requirements.
- c. At the time of the petition, the Respondent must provide the Board with proof of completion of continuing education credit for the biennium preceding his 2020 license renewal.
- d. The Board, or its designee, may impose additional limitations upon the Respondent's license based on the written statement provided by the Respondent and his explanation for his failure to cooperate with the Board, omissions committed in the auction contract, and his failure to complete his continuing education requirements. The Board may also order additional education if the Respondent is unable to provide proof that he satisfactorily completed his continuing education requirements for the biennium preceding his 2020 renewal.
- e. Request for approval of courses, proof of successful course completion, petitions, and any other information required by this Order shall be submitted to the Department Monitor at the address below.

IT IS FURTHER ORDERED that, prior to petitioning the Board for reinstatement, the Respondent pay a FORFEITURE in the amount of \$1,000.

IT IS FURTHER ORDERED that the Respondent 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 the Department Monitor at:

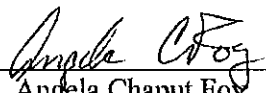
Department Monitor  
Division of Legal Services and Compliance  
Department of Safety and Professional Services  
P.O. Box 7190, Madison, WI 53707-7190  
Telephone (608) 266-2112; Fax (608) 266-2264  
DSPSMonitoring@wisconsin.gov

The Respondent may also submit this information online via DSPS' Monitoring Case Management System at: <https://dpsmonitoring.wi.gov/>

IT IS FURTHER ORDERED that the terms of the Order are effective the date the Final Decision and Order in this matter is signed by the Board.

Dated at Madison, Wisconsin, on December 15, 2021.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
4822 Madison Yards Way, 5th Floor North  
Madison, Wisconsin 53705  
Tel. (414) 227-4025  
Email: Angela.ChaputFoy@wisconsin.gov

By:   
Angela Chaput Foy  
Administrative Law Judge