

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF COMMERCE

In the Matter of the Resident  
Insurance Producer License of  
Herson Wilberto Villacorta

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

The above-entitled matter came before Administrative Law Judge Barbara L. Neilson for a hearing on October 29, 2014. The Office of Administrative Hearings' record closed on that date.

Christopher Kaisershot, Assistant Attorney General, appeared on behalf of the Minnesota Department of Commerce (Department). Herson Wilberto Villacorta (Licensee) appeared on his own behalf.

**STATEMENT OF THE ISSUES**

1. Did Licensee hold himself out as a real estate salesperson without being properly licensed, in violation of Minn. Stat. §§ 45.027, subd. 7(a)(2); 60K.43, subd. 1(2); 82.81, subd. 1 (2012)?<sup>1</sup>
2. Did Licensee fail to appear and allow a reasonable inspection of his records as ordered by the Department under Minn. Stat. §§ 45.027, subd. 7(a)(2); 60K.43, subd. 1(2); 82.81, subd. 1?
3. If either or both violations occurred, what, if any, sanction should be imposed?

**SUMMARY OF RECOMMENDATION**

Licensee's license as a real estate salesperson automatically became inactive on June 30, 2013, due to the suspension of the license of his supervising broker for failure to comply with continuing education requirements. Licensee continued to hold himself out as a real estate salesperson on September 6, 2013, when he sent an e-mail message seeking to show a client a home listed by another agency. Licensee also failed to appear for a reasonable inspection of his records as ordered by the Department.

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<sup>1</sup> The Amended Notice and Order for Hearing filed by the Department in this matter alleged violations of the 2012 version of these statutes.

The Department has demonstrated grounds for the imposition of discipline against Licensee. Under all of the circumstances, the Administrative Law Judge recommends that any discipline imposed be relatively minor in nature.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

### FINDINGS OF FACT

1. Licensee has been licensed as a Resident Insurance Producer since 2010. His current license expires on February 28, 2015.<sup>2</sup>

2. Licensee previously also held a Real Estate Salesperson License with the Department. He was originally licensed in 2005. However, Licensee's license automatically became inactive on June 30, 2013, because the license of the person who served as Licensee's primary broker was suspended for failing to comply with education requirements.<sup>3</sup>

3. On September 6, 2013, Licensee sent an e-mail to real estate agent Steve Neuman, inquiring about a particular listing.<sup>4</sup> The property in question was not listed for sale until July 25, 2013, after Licensee's real estate license became inactive. The property was removed from the market on August 22, 2013, and the sale closed on September 20, 2013.<sup>5</sup>

4. In his September 6, 2013, e-mail to Mr. Neuman, Licensee stated:

Good morning [S]teve, is there a chance that the homeowner will let myself and my client in tomorrow for the showing[?] I have a discrepancy with my e-key providers and they have suspended my service and my clients really wanna [sic] see that property[.] thanks for help and have a good day[.] my id is 506096241.<sup>6</sup>

Although Licensee does not recall sending this e-mail, he acknowledged that the e-mail was sent from his e-mail account.<sup>7</sup>

5. Mr. Neuman e-mailed a response to Licensee's message later on September 6, 2013. Mr. Neuman informed Licensee that the property was sold and asked, "Who are you?"<sup>8</sup> There is no evidence that Licensee ever responded to Mr. Neuman's e-mail message.

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<sup>2</sup> Exhibits 1 and 11.

<sup>3</sup> Ex. 2; Testimony of Timothy Knautz; see *also* Minn. Stat. § 82.63, subd. 4 (2012) (stating that "[a] salesperson must be licensed to act on behalf of a licensed broker").

<sup>4</sup> Ex. 3.

<sup>5</sup> Ex. 4; Test. of T. Knautz.

<sup>6</sup> Ex. 3; Test. of T. Knautz.

<sup>7</sup> Test. of Herson Villacorta.

<sup>8</sup> Ex. 3.

6. On December 6, 2013, Mr. Neuman received an e-mail from Licensee that was identical to the one he had received on September 6, 2013.<sup>9</sup> Apparently, a technological malfunction of some sort caused numerous stored e-mails to be resent from Licensee's cell phone.<sup>10</sup>

7. After receiving the second e-mail from Licensee, Mr. Neuman filed a complaint with the Department via e-mail on December 6, 2013. Mr. Neuman noted that the number provided by Licensee in his e-mail did not show up in the Multiple Listing Service system and the Department's website identified Licensee's real estate license as "inactive." Mr. Neuman stated that Licensee appears to be an insurance agent who "seems to want to be acting as a real estate agent."<sup>11</sup>

8. Timothy Knautz, a senior investigator with the Department, initiated an investigation into Mr. Neuman's complaint.<sup>12</sup> Mr. Knautz and Licensee spoke on the telephone, and Mr. Knautz informed Licensee that they needed to meet in person to discuss Licensee's real estate activities.<sup>13</sup> Licensee stated that he was unsure of his schedule but that he would call back with that information.<sup>14</sup>

9. On December 23, 2013, Mr. Knautz e-mailed Licensee.<sup>15</sup> Licensee acknowledged that the e-mail was sent to his e-mail account.<sup>16</sup> The e-mail's subject was "Review of your real estate files."<sup>17</sup> The e-mail message informed Licensee that the "Department of Commerce needs to review your real estate activity for the year 2013" and directed Licensee to respond by December 26, 2013, with a time during the week of December 30, 2013, through January 3, 2014, when he could "come into our offices with all of your real estate files, regardless of closing status, and review those files with us."

10. Licensee never called back to schedule the appointment with Mr. Knautz.<sup>18</sup>

11. On January 29, 2014, Mr. Knautz sent an "Order to Appear" to the business address on file for Licensee by both first class and certified mail.<sup>19</sup> The envelopes containing both letters were marked "Refused—no one here that name" and were returned to the Department as undeliverable.<sup>20</sup>

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<sup>9</sup> Ex. 5.

<sup>10</sup> Test. of H. Villacorta.

<sup>11</sup> Ex. 5; Test. of T. Knautz.

<sup>12</sup> *Id.*

<sup>13</sup> Test. of T. Knautz.

<sup>14</sup> *Id.*

<sup>15</sup> Ex. 6.

<sup>16</sup> Test. of H. Villacorta.

<sup>17</sup> Ex. 6.

<sup>18</sup> Test. of T. Knautz.

<sup>19</sup> Exs. 7, 8; Test. of T. Knautz.

<sup>20</sup> Ex. 7, 8.

12. Thereafter, Mr. Knautz conducted research using public property tax records to find Licensee's home address. During the hearing, Licensee verified that the address located by Mr. Knautz was, in fact, his home address.<sup>21</sup>

13. On February 12, 2014, Mr. Knautz sent a revised "Order to Appear" to Licensee's home address by both first class and certified mail.<sup>22</sup> The letter informed Licensee that he was a subject of an investigation currently being conducted by the Department, and ordered Licensee to appear before Mr. Knautz on February 25, 2014, to provide a statement under oath. The letter directed Licensee to bring with him "all your original real estate files in their entirety regardless of successful consummation which occurred during the calendar year 2013 to include but not limited to all contracts, agreements, disclosures, amendments, addenda, notes, correspondence (written and electronic) and all other related documents."<sup>23</sup>

14. The letter sent via certified mail was returned to the Department marked "unclaimed."<sup>24</sup> However, the letter sent via first class mail was not returned to the Department.<sup>25</sup>

15. Licensee did not appear before Mr. Knautz as ordered, nor did he contact the Department.<sup>26</sup>

16. On June 17, 2014, the Department filed a Notice and Order for Prehearing Conference with the Office of Administrative Hearings.<sup>27</sup> The Department included three counts:

(1) Licensee acted or held himself out as a real estate salesperson without an appropriate license, in violation of Minn. Stat. §§ 45.027, subd. 7(a)(2), 60K.43, subd. 1(2), and 82.81, subd. 1;

(2) Licensee violated the Order to Appear and refused to allow a reasonable inspection of records, in violation of Minn. Stat. §§ 45.027, subd. 7(a)(2)-(3) and 60K.43, subd. 1(2); and

(3) Licensee failed to notify the Commissioner within ten business days of the change of his business address, in violation of Minn. Stat. §§ 45.0112, 45.027, subd. 7(a)(2), 60K.38, subd. 6, and 60K.43, subd. 1(2).<sup>28</sup>

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<sup>21</sup> Ex. 9; Test. of H. Villacorta. Licensee's correct home address also appears in the Department's database relating to his Resident Insurance Producer License. See Ex. 11.

<sup>22</sup> Ex. 10; Test. of T. Knautz.

<sup>23</sup> Ex. 10.

<sup>24</sup> *Id.*

<sup>25</sup> Test. of T. Knautz.

<sup>26</sup> *Id.*

<sup>27</sup> Notice and Order for Prehearing Conference (June 17, 2014).

<sup>28</sup> *Id.*

17. The contested case hearing proceeded as scheduled on October 29, 2014. The Department called two witnesses, and Licensee testified on his own behalf. During the hearing, the Department withdrew its allegation that Licensee failed to notify the Commissioner of the Department of Commerce (Commissioner) of a change in his business address.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS OF LAW**

1. The Administrative Law Judge and the Commissioner of Commerce have jurisdiction in this matter.<sup>29</sup>

2. Licensee received due, proper, and timely notice of the time and place of the hearing. Therefore, this matter is properly before the Commissioner and the Administrative Law Judge.

3. The Department has complied with all relevant procedural requirements of law and rule.

4. The Department bears the burden to establish by a preponderance of the evidence that Licensee committed the violations alleged in the Notice and Order for Prehearing Conference in this matter.<sup>30</sup>

5. Minnesota law specifies that “[n]o person shall act as a real estate broker or real estate salesperson unless licensed as provided in [Minn. Stat. § 82.81].”<sup>31</sup>

6. The Commissioner of Commerce is authorized to “conduct investigations . . . for the purpose of compiling information related to the duties and responsibilities entrusted to the commissioner” and “examine the books, accounts, records, and files of every licensee.”<sup>32</sup>

7. Those licensed by the Commissioner “shall comply with requests for information, documents, or other requests from the department within the time specified in the request, or, if no time is specified, within 30 days of the mailing of the request by the department.”<sup>33</sup> In addition, licensees “shall appear before the commissioner or the commissioner's representative when requested to do so and shall bring all documents

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<sup>29</sup> Minn. Stat. §§ 14.50; 45.027, subd. 7, 60K.43; 82.81 (2014).

<sup>30</sup> See Minn. R. 1400.7300, subp. 5 (2013) (“The party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard.”).

<sup>31</sup> Minn. Stat. § 82.81, subd. 1.

<sup>32</sup> Minn. Stat. § 45.027, subd. 1(4), (5) (2014).

<sup>33</sup> Minn. Stat. § 45.027, subd. 1a (2014).

or materials that the commissioner or the commissioner's representative has requested.”<sup>34</sup>

8. The Commissioner is also empowered to “deny, suspend, or revoke the authority or license of a person subject to the duties and responsibilities entrusted to the [C]ommissioner . . . or censure that person” if the Commissioner finds that the person has “violated any law, rule, or order related to the duties and responsibilities entrusted to the [C]ommissioner” or has “refused to allow a reasonable inspection of records or premises. . . .”<sup>35</sup>

9. More specifically, the Commissioner may “restrict, censure, suspend, revoke, or refuse to issue or renew” an insurance producer’s license or “levy a civil penalty” if a person violates “any insurance laws, including chapter 45 or chapters 60A to 72A” of the Minnesota Statutes, or violates “any regulation, subpoena, or order” issued by the Commissioner.<sup>36</sup>

10. The Commissioner’s service of orders or other papers may be made by personal service, “first class United States mail, including certified United States mail, postage prepaid and addressed to the party at the party's last known address,” or “any other method of service provided under the laws relating to duties and responsibilities entrusted to the commissioner.”<sup>37</sup>

11. The Department met its burden of demonstrating, by a preponderance of the evidence, that Licensee did not have an active real estate license on September 6, 2013, when he sent an e-mail to a real estate salesperson requesting that a homeowner show Licensee and Licensee’s “client” a house that had been listed for sale. The Department thereby demonstrated that Licensee acted as a real estate salesperson on that date without an active license, in violation of Minn. Stat. § 82.81(1).

12. Because Licensee acted as a real estate salesperson without an active license in violation of chapter 45 of the Minnesota Statutes and in violation of a law related to the duties and responsibilities entrusted to the Commissioner, the Department has shown that it has grounds to impose discipline or a civil penalty on Licensee under Minn. Stat. §§ 45.027, subd. 7(a)(2); 60K.43, subd. 1(2).

13. The Department also met its burden of demonstrating, by a preponderance of the evidence, that Licensee failed to appear before the Department’s investigator or provide his real estate files for inspection on February 25, 2014, and thereby failed to comply with the Order to Appear issued by the Department on February 11, 2014.

14. Because Licensee failed to comply with the Department’s Order to Appear before the Commissioner’s representative with requested materials, and refused to

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<sup>34</sup> *Id.*

<sup>35</sup> Minn. Stat. § 45.027, subd. 7(a)(2),(3) (2014).

<sup>36</sup> Minn. Stat. § 60K.43, subd. 1(2).

<sup>37</sup> Minn. Stat. § 45.016 (2012).

allow a reasonable inspection of records, the Department has shown that it has grounds to impose discipline or a civil penalty on Licensee under Minn. Stat. §§ 45.027, subd. 7(a)(2),(3); 60K.43, subd. 1(2).

15. An order imposing an appropriate penalty against Licensee is in the public interest.

16. The attached Memorandum provides a further explanation of the basis for the Recommendation of the Administrative Law Judge and is incorporated in these conclusions.

Based upon these Conclusions of Law, and for the reasons set forth in the attached Memorandum, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

IT IS HEREBY RECOMMENDED that the Commissioner impose appropriate discipline against the Licensee Herson Wilberto Villacorta.

Dated: December 2, 2014

s/Barbara L. Neilson

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BARBARA L. NEILSON  
Administrative Law Judge

Reported: Digitally recorded; no transcript prepared.

### **NOTICE**

This Report is a recommendation, not a final decision. The Commissioner of Commerce (Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2014), the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Michael Rothman, Commissioner, Department of Commerce, Attn: Heidi Retterath, Suite 500, 85 Seventh Place East, St. Paul, MN 55101, (651) 539-1445, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2014). In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1 (2014), the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## MEMORANDUM

The Department argues that Licensee improperly “acted or held himself out as a real estate sales person . . . without an appropriate license.” Minnesota Statutes, section 82.81, subdivision 1, states that “[n]o person shall act as a real estate broker or real estate salesperson unless licensed as provided in this section.”

In this case, the Department seeks to discipline Licensee, who is currently licensed as a Resident Insurance Producer. Licensee was previously licensed by the Department to act as a real estate salesperson, but his license automatically became inactive on June 30, 2013, when the license of the individual who served as his primary broker was suspended.<sup>38</sup> Nonetheless, on September 6, 2013, Licensee sent an e-mail to a real estate agent asking to see a house for sale.<sup>39</sup> In the e-mail, Licensee indicated that his e-key service had been suspended due to some “discrepancy” with his e-key providers, stated that he wanted the homeowners to let his “client” into a house, and provided his inactive real estate license number.<sup>40</sup> During the hearing, Licensee admitted that he made a mistake when he sent the September e-mail, but testified that he did not know that his broker’s license had been suspended.<sup>41</sup>

The Administrative Law Judge concludes that the Department has met its burden of demonstrating that Licensee violated Minn. Stat. § 82.81 in September of 2013. The e-mail was sent more than two months after Licensee’s license became inactive. The language used in the e-mail implied that Licensee was a properly-licensed real estate salesperson at that time. It is also evident that Licensee was on notice of a possible issue with his own licensure or that of the broker at the time he sent the e-mail, since he knew at that point that his e-key service had been suspended. Those licensed by the Department have the responsibility to ensure that they are properly licensed and are acting within the scope of their licensure. Moreover, because real estate salespersons must be licensed to act on behalf of a licensed broker,<sup>42</sup> it is appropriate to hold them responsible for knowing that their broker is currently licensed. Based on this violation, the Department has shown that there are grounds under Minn. Stat. §§ 45.027, subd. 7(a)(2); 60K.43, subd. 1(2), to impose sanctions against Licensee’s insurance producer’s license and/or levy a civil penalty against him.

The Department further argues that Licensee failed to appear and allow a reasonable inspection of his records. It is not disputed that the Department’s investigator, Mr. Knautz, spoke to Licensee on the telephone after the complaint against Licensee was filed on December 6, 2013. Mr. Knautz informed Licensee during that

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<sup>38</sup> Ex. 2.

<sup>39</sup> Ex. 3.

<sup>40</sup> *Id.*

<sup>41</sup> Test. of H. Villacorta.

<sup>42</sup> See Minn. Stat. § 82.63, subd. 4.

conversation that he would like to meet with him.<sup>43</sup> Licensee promised to call back Mr. Knautz with scheduling information, but failed to do so.<sup>44</sup> Mr. Knautz sent a follow-up e-mail to Licensee on December 23, 2013, but Licensee did not respond.<sup>45</sup> On January 29, 2014, Mr. Knautz sent an Order to Appear to the business address on file for Licensee via first class and certified mail, but both letters were returned as undeliverable.<sup>46</sup> Finally, on February 12, 2014, Mr. Knautz sent an Order to Appear to Licensee's home address via first class and certified mail.<sup>47</sup> Although the certified mail letter was returned as unclaimed, the first class letter was not returned.<sup>48</sup>

The Department served the Order to Appear in a manner that was consistent with statutory requirements.<sup>49</sup> And Licensee verified during the hearing that the address ultimately used by the Department to serve the Order to Appear was, in fact, correct.<sup>50</sup> Yet, Licensee did not appear as ordered, nor did he contact the Department.<sup>51</sup>

In testimony at the hearing, Licensee denied receiving the December 23, 2013, e-mail from Mr. Knautz or the Order to Appear that was sent to his home address. He also contended that he had no records to disclose or report because he had no income from real estate transactions during 2013. He asserted that he told Mr. Knautz during their telephone conversation that he had no records to provide, and argued that this should have satisfied the Department's inquiry. During the hearing, Licensee alleged that he had only shown properties to one client during 2013, and that that client decided not to purchase anything.<sup>52</sup>

The Administrative Law Judge concludes that the Department has demonstrated by a preponderance of the evidence that Licensee violated the Order to Appear and refused to allow a reasonable inspection of his records. As noted in the Conclusions of Law above, the Commissioner of Commerce has the power under applicable statutes to "conduct investigations" and "examine the books, accounts, records, and files of every licensee."<sup>53</sup> Those licensed by the Department are required to appear before the Commissioner's representative "when requested to do so and . . . bring all documents or materials that the commissioner or the commissioner's representative has requested."<sup>54</sup>

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<sup>43</sup> Test. of T. Knautz.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*; Ex. 6.

<sup>46</sup> Exs. 7, 8; Test. of T. Knautz.

<sup>47</sup> Ex. 10; Test. of T. Knautz

<sup>48</sup> *Id.*

<sup>49</sup> See Minn. Stat. § 45.016 (the Commissioner's service of orders or other papers may be made by personal service, "first class United States mail, including certified United States mail, . . . to the party at the party's last known address," or "any other method of service provided under the laws relating to duties and responsibilities entrusted to the commissioner.").

<sup>50</sup> Test. of H. Villacorta.

<sup>51</sup> Test. of T. Knautz.

<sup>52</sup> See Ex. 17 (copy of Agency Relationship in Real Estate Transactions disclosure form signed by the client on February 15, 2013).

<sup>53</sup> Minn. Stat. § 45.027, subd. 1(4), (5).

<sup>54</sup> *Id.*, subd. 1a.

Licensee was notified on multiple occasions that the Department wished to speak with him about the complaint and inspect his records. He admitted that he engaged in the initial telephone conversation with Mr. Knautz, but denied receiving any of the later communications from the Department. The Administrative Law Judge finds that it is more likely than not that Licensee received the December 23, 2013, message from Mr. Knautz that was sent to his correct e-mail address, as well as the Order to Appear that was sent to his correct home address by U.S. mail and was not returned to the Department. The Order to Appear made it clear that Licensee was being ordered to come to Mr. Knautz's office and provide records for inspection, and also that he would be asked to give a statement under oath. The Department has ample statutory authority to investigate complaints relating to its licensees and to order that licensees' records be produced for inspection. It is not required to discontinue further inquiry if a licensee denies allegations during an initial telephone conversation or represents that there are no relevant records. Under the circumstances, there was no proper basis for Licensee's failure to comply with the Order to Appear.

Relevant statutes clearly give the Commissioner authority to suspend or revoke a person's license or censure that person if the person "has refused to allow a reasonable inspection of records or premises."<sup>55</sup> And the Commissioner "may restrict, censure, suspend, revoke, or refuse to issue or renew an insurance producer's license or may levy a civil penalty" for "violating any insurance laws, including chapter 45 or chapters 60A to 72A, or violating any regulation, subpoena, or order" issued by the Commissioner.<sup>56</sup> In addition to licensing sanctions, the Commissioner is authorized to impose a civil penalty of up to \$10,000 per violation.<sup>57</sup>

Because Licensee acted as a real estate salesperson at a time when his license was inactive and then failed to appear for a reasonable inspection of his records as ordered by the Department, the Administrative Law Judge concludes that the Department has demonstrated that it has grounds to impose a licensing sanction and/or a civil penalty.<sup>58</sup> Because it appears that Licensee's violation of Minn. Stat. § 82.81 was inadvertent and limited in scope, the Administrative Law Judge recommends that any licensing sanction or civil penalty imposed be relatively minor in nature.

**B. L. N.**

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<sup>55</sup> *Id.*, subd. 7(a)(2)-(3).

<sup>56</sup> Minn. Stat. § 60K.43, subd. 1(2).

<sup>57</sup> Minn. Stat. § 45.027, subd. 6 (2014); Minn. Stat. § 60K.43, subd. 4.

<sup>58</sup> See Minn. Stat. §§ 45.027, subds. 6, 7(a)(2),(3); 60K.43, subds. 1(2), 4.