

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

In the Matter of Kristin Wagner

**ORDER
DENYING MOTION TO DISMISS**

This case is pending before Administrative Law Judge Jeanne M. Cochran pursuant to a Notice and Order for Prehearing Conference and Hearing dated June 26, 2015. On November 9, 2015, Respondent Kristin Wagner filed a Motion to Dismiss and to Vacate Order to Show Cause (Motion to Dismiss) in this matter. The Department of Commerce filed its Memorandum Opposing Motion to Dismiss on November 25, 2015. The record on the Motion closed on that day.

Evan Weiner, Neve Webb, PLLC, appeared on behalf of Kristin Wagner (Respondent). Michael J. Tostengard, Assistant Attorney General, appeared on behalf of the Department of Commerce (Department).

Based upon all of the filings by the parties, and for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY ORDERED THAT:

1. Respondent's Motion to Dismiss is **DENIED**.
2. The evidentiary hearing will proceed beginning on **February 1, 2016**, as scheduled in the First Prehearing Order.

Dated: December 9, 2015

s/Jeanne M. Cochran

JEANNE M. COCHRAN
Administrative Law Judge

MEMORANDUM

I. Procedural Background

On April 29, 2015, the Department issued an Order to Show Cause to Respondent. The Order to Show Cause alleges that Respondent was a mortgage loan originator between December 2010 and January 2014, and that Respondent “had been employed as a mortgage professional since February 2003, including a period of one year and three months during which she owned and operated Wagner Lending Incorporated.”¹ The Order to Show Cause further alleges that Respondent violated Minn. Stat. § 58.13, subd. 1(9) (2014) when she made false and deceptive representations in connections with residential loan transactions for five residential properties that she purchased between 2007 and 2008.² In addition, the Order to Show Cause alleges that Respondent engaged in fraudulent practices in connection with these same loans in violation of Minn. Stat. § 58.12, subd. 1(b) (2014) when she received monetary kickbacks from the loan transactions.³ The Order to Show Cause imposed a number of sanctions on Respondent including: retroactive revocation of Respondent’s mortgage originator’s license; imposition of a \$130,000,000 civil penalty; a permanent bar to Respondent engaging in residential mortgage origination or servicing; and imposition of all investigative costs.⁴

Respondent filed a timely appeal of the Order to Show Cause. On June 26, 2015, the Department issued the Notice and Order for Prehearing Conference and Hearing in this matter, initiating a contested case proceeding.

II. Motion to Dismiss

In support of her Motion to Dismiss, Respondent argues that the Department does not have jurisdiction to discipline Respondent for violations of Minn. Stat. § 58.13 (2014) because that statute only applies to persons acting as a residential mortgage originator or servicer.⁵ Respondent maintains that the alleged unlawful conduct occurred before Respondent became a mortgage originator, and solely in her capacity as a mortgage loan customer.⁶ Respondent argues that the Department does not have retroactive jurisdiction over prior conduct that occurred solely when Respondent was a mortgage loan customer.⁷

In response, the Department notes that Respondent has been employed in the mortgage origination industry since February 2003, and was licensed as a mortgage

¹ Order to Show Cause at 2, ¶ 1 (April 29, 2015).

² Order to Show Cause at 2-15.

³ *Id.*

⁴ *Id.* at 1.

⁵ Respondent’s Memorandum of Law in Support of Motion to Dismiss and to Vacate Order to Show Cause at 1-2 (dated November 5, 2015).

⁶ *Id.*

⁷ *Id.* at 3.

originator from 2010 until January 2014.⁸ The Department argues that Minn. Stat. § 45.027, subd. 11 (2014) gives it authority to take action against a former licensee as long as the action is commenced within two years after the license expired. The Department states that it issued its Order to Show Cause within two years of when Respondent's license expired in January 2014. The Department also argues that it has authority to take enforcement action against any person working in the mortgage origination industry, regardless of whether that person is licensed. In support of its position, the Department cites Minn. Stat. §§ 45.027, subd. 6; 58.12-.13 (2014).

III. Legal Analysis

Respondent's Motion to Dismiss is based on her assertion that Respondent was acting solely as a loan customer at the time of the alleged fraudulent conduct. The Order to Show Cause, however, alleges that Respondent was more than just a mortgage loan customer at the time of the alleged fraudulent conduct. The Order to Show Cause alleges that Respondent was employed as a mortgage professional at the time of the alleged fraudulent conduct.⁹

These allegations are sufficient for the Department to claim jurisdiction over Respondent under Minn. Stat. §§ 58.12-.13. The plain language of Minn. Stat. § 58.12 provides that the Department of Commerce may take disciplinary action against a "residential mortgage originator, servicer, applicant, or *other person*, an officer, director, partner, employee, or agent..." for fraudulent conduct.¹⁰ Likewise, the standards of conduct set forth in Minn. Stat. § 58.13 are not limited to licensees. By its terms, Minn. Stat. § 58.13 also applies to any person acting as a mortgage originator or servicer who is "exempt from the licensing requirements of this chapter...."¹¹ Persons exempt from licensing include employees of a mortgage originator and employees of a mortgage servicer.¹² In addition, Minn. Stat. § 45.027 (2014) gives the Department the authority to impose a civil penalty against "any person who violates any law, rule, or order relating to the duties and responsibilities of the commissioner."¹³

The Court of Appeals has addressed the scope of the Department's jurisdiction under chapter 58 and Minn. Stat. § 45.027 in *Pomrenke v. Comm'n of Commerce*.¹⁴ In *Pomrenke*, the Court of Appeals held that the language of chapter 58 and Minn. Stat. § 45.027 is broad enough to give the Department jurisdiction to take disciplinary action against an employee working in the mortgage industry for fraudulent conduct even though the employee was not licensed at the time.¹⁵ The Court of Appeals held that the Department of Commerce had the authority to discipline the employee because the Department's authority under chapter 58 (the Minnesota Residential Originator and

⁸ Memorandum Opposing Motion to Dismiss at 1 (dated November 23, 2015).

⁹ Order to Show Cause at 2, ¶1.

¹⁰ Minn. Stat. § 58.12, subd. 1(a) and (b)(2) (emphasis added).

¹¹ Minn. Stat. § 58.13, subd. 1(a).

¹² Minn. Stat. § 58.04, subds. 1-2 (2014).

¹³ Minn. Stat. § 45.027, subd. 6.

¹⁴ 677 N.W.2d 85, 90 (Minn. Ct. App. 2004).

¹⁵ *Id.* at 90.

Servicer Licensing Act) is not restricted to licensees and includes employees who are exempt from licensing requirements under Minn. Stat. § 58.04. The Court of Appeals also held that Minn. Stat. § 45.027 grants the Department jurisdiction over individuals who are subject to the requirements of chapter 58.¹⁶ Notably, the individual who was disciplined by the Department in *Pomrenke* was disciplined for fraudulent activity involving his own loan application (and one other application) while he working as an employee for a mortgage origination company.¹⁷

Therefore, by alleging that Respondent engaged in fraudulent conduct within the scope of Minn. Stat. §§ 58.12-.13 while she was working as a mortgage professional, the Department has alleged sufficient facts to survive a motion to dismiss for lack of jurisdiction.

J. M. C.

¹⁶ *Id.* at 91. The case of *Frost-Benco Assoc. v. Minn. Pub. Utilities Comm.*, 358 N.W.2d 639 (Minn. 1984), relied upon Respondent in her brief is inapposite because it does not address the scope of Minn. Stat. §§ 58.12-.13 or 45.027. Rather, *Frost-Benco* addresses the scope of the Minnesota Public Utilities Commission's jurisdiction under chapter 216B over the rates of an electric cooperative that were in effect before the cooperative elected to be subject to rate regulation by the Commission. *Id.* at 640-44.

¹⁷ *Pomrenke* at 88-89.