

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

In the Matter of United Continental
Industries, Inc.; Quality Placements,
Inc.; Lonnie R. Lewis; William B. Kiper;
James Martin; John Taylor; and
Patrick A. Radzikowski

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for a prehearing conference before Administrative Law Judge Barbara L. Neilson at 2:30 p.m. on November 5, 1996, in Minneapolis, Minnesota. The record closed on November 22, 1996, upon receipt of the Complainant's post-hearing submission. Philip H.M. Grove, Assistant Attorney General, Suite 1200, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Complainant, the Minnesota Department of Commerce. There was no appearance by or on behalf of the Respondents, United Continental Industries, Inc., Quality Placements, Inc., Lonnie R. Lewis, William B. Kiper, James Martin, John Taylor, or Patrick A. Radzikowski.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact David B. Gruenes, Commissioner of Commerce, 133 East Seventh Street, St. Paul, Minnesota 55101, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue in this case is whether the Cease and Desist Order issued by the Commissioner of Commerce on May 10, 1996, with respect to the Respondents should be vacated or made permanent as provided by Minn. Stat. §§ 80C.12, subd. 2, and 45.027, subd. 5 (1994).

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On May 10, 1996, the Commissioner of Commerce issued a Cease and Desist Order and Notice of Right to Hearing with respect to the Respondents. The Commissioner alleged that Respondents United Continental Industries, Inc., Quality Placements, Inc., Lonnie R. Lewis, William B. Kiper, James Martin, John Taylor, and Patrick A. Radzikowski had offered or sold unregistered franchises in the State of Minnesota in violation of Chapter 80C of the Minnesota Statutes.

2. Specifically, the Commissioner alleged in the Cease and Desist Order and Notice of Right to Hearing that Respondent Quality Placements, Inc., advertised a "business opportunity" in Minnesota consisting of a local vending route with over 20 prime locations. The Commissioner alleged that people who called the 800 number listed in the advertisement were informed by Respondent Quality Placements that they could not obtain the list of locations unless they purchased Lite-N-Rite vending machines from Respondent United Continental, Inc. The Commissioner further alleged that Respondents Quality Placements and John Taylor represented to at least one Minnesota resident that there were a minimum of 24 locations available for Lite-N-Rite vending machines in a certain area in Minnesota. The Commissioner contended that the resident, relying on the representation, purchased 26 Lite-N-Rite vending machines from Respondent United Continental, Inc., for \$32,375.00 and later learned that the representation of Respondents Quality Placements and Taylor that 24 locations existed for the vending machines was false. The Commissioner alleged that this business venture constituted a franchise and that Respondents had not filed an effective registration statement for the franchises with the Commissioner at the time they offered or sold these franchises in Minnesota, as required by Minn. Stat. § 80C.02 (1994).

3. The Cease and Desist Order and Notice of Right to Hearing informed the Respondents that they had the right to request a hearing in this matter and included the following language:

Such request shall be made in writing and served upon the Commissioner If no hearing is requested by Respondents within thirty (30) days of service of this Order and none is ordered by the Commissioner, this Order will become permanent and will remain in effect until it is modified or vacated by the Commissioner. . . . The administrative proceeding provided by Minn. Stat. § 45.027, subd. 5a (1994), as amended, and subsequent appellate judicial review of that administrative proceeding, constitutes the exclusive remedy for determining whether the Commissioner properly issued this Order and whether this Order should be made permanent. . . . Failure to attend a hearing in this matter may result in the allegations of this Order being taken as true.

4. The Cease and Desist Order and Notice of Right to Hearing was served upon the Respondents by certified mail at their last known addresses, and a copy of the Cease and Desist Order and Notice of Right to Hearing was left in the office of the

Commissioner of Commerce in accordance with the requirements of Minn. Stat. § 45.028 (1994).

5. Respondents United Continental Industries, Inc., and Quality Placements, Inc., made timely hearing requests through their respective presidents, Lonnie Lewis and Patrick Radzikowski. Both Respondents agreed with the Department of Commerce that the hearing could take place after the seven-day time period set forth in Minn. Stat. § 45.027, subd. 5 (1994).

6. The remainder of the Respondents, Lonnie R. Lewis, Patrick A. Radzikowski, William B. Kiper, James Martin, and John Taylor, did not request hearings in this matter in their individual capacities.

7. A Notice of and Order for Prehearing Conference was issued in this matter by the Commissioner on October 14, 1996. The Notice of and Order for Prehearing Conference indicated that hearing requests had only been received on behalf of United Continental Industries, Inc., and Quality Placements, Inc., and that the May 10, 1996, Cease and Desist Order had been made permanent as to the individual Respondents (Mssrs. Lewis, Radzikowski, Kiper, Martin, and Taylor). The Notice of and Order for Prehearing Conference scheduled a prehearing conference to be held on November 5, 1996, at 2:30 p.m. at the Office of Administrative Hearings in Minneapolis, Minnesota.

8. The Notice of and Order for Prehearing Conference contained the following language:

If Respondents United Continental Industries, Inc., or Quality Placements, Inc., without the prior consent of the judge, fail to attend or otherwise appear at the hearing or at any prehearing conference or settlement conference in this matter or fail to comply with any interlocutory orders of the judge, Respondents shall be deemed in default and the allegations or issues set forth herein may be deemed proved and the May 10, 1996, Cease and Desist Order against Respondents may be made permanent without further proceedings.

9. The Notice of and Order for Prehearing Conference was served by both certified and first-class mail upon United Continental Industries, Inc., Lonnie Lewis, William B. Kiper, and James Martin, in care of Richard W. Davis, Attorney at Law, Pioneer Building, Suite 1616, St. Paul, Minnesota 55101. The Notice of and Order for Prehearing Conference was also served by certified and first class mail upon Quality Placements, Inc., John Taylor, and Patrick A. Radzikowski at 2247 Palm Beach Lakes Boulevard, Suite 220, West Palm Beach, Florida 33409.

10. By letter dated November 1, 1996, sent by Federal Express and first-class mail, counsel for the Department reminded Patrick A. Radzikowski, the president of Quality Placements, Inc., of the November 5, 1996, prehearing conference, requested that Mr. Radzikowski contact counsel for the Department immediately if Quality

Placements, Inc., planned to appear at the prehearing conference, and informed him that the Department intended to move for default if Quality Placements, Inc. did not appear at the prehearing conference, at which time the May 10, 1996, Cease and Desist Order would be made permanent without further proceedings. Counsel for the Department did not receive any response from Mr. Radzikowski or anyone else representing Quality Placements, Inc.

11. Richard Davis, an attorney representing United Continental Industries, Inc., and Messrs. Lewis, Kiper, and Martin, contacted counsel for the Department prior to the prehearing conference and left a phone message that he had been instructed by his clients not to proceed in opposition to the Cease and Desist Order and that, accordingly, he would not be appearing at the November 5, 1996, prehearing conference.

12. The Respondents failed to file a Notice of Appearance with the Office of Administrative Hearings, failed to appear at the scheduled prehearing conference, and did not make a request prior to the prehearing conference for a continuance or any other relief. The Respondents are, therefore, in default.

13. Pursuant to Minn. Rules 1400.6000 (1995), the allegations contained in the Cease and Desist Order issued on May 10, 1996, and the Notice of and Order for Prehearing Conference issued on October 14, 1996, are hereby taken as true and deemed proved without further evidence and are hereby incorporated herein as facts.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Commerce and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50, 45.027, and 80C.12 (1994).

2. Minn. Stat. § 45.027, subd. 5 (1994), authorizes the Commissioner to issue and cause to be served orders requiring persons to cease and desist from violations of chapter 80C or any rule or order adopted or issued under that chapter. This statutory provision requires that cease and desist orders "must be calculated to give reasonable notice of the rights of the person to request a hearing and must state the reasons for the entry of the order," and provides that all hearings conducted with respect to a cease and desist order "must be conducted in accordance with chapter 14" unless specified otherwise by statute. Minn. Stat. § 45.028 (1994) provides, *inter alia*, that, when a nonresident engages in conduct that is prohibited or made actionable by chapters 45 to 83, that conduct is equivalent to an appointment of the Commissioner as the person's attorney to receive service of process, and permits service of process to be made by leaving a copy of the process in the office of the commissioner, with a copy sent by certified mail to the respondent's last known address. Minn. Stat. § 14.58 (1994), requires that, "in any contested case all parties shall be afforded an opportunity for hearing after reasonable notice." Chapter 14 does not specify the manner in which such notice must be served. However, the rules promulgated under chapter 14 indicate

that "[s]ervice by mail or licensed overnight express mail service is complete upon placing the item to be served in the mail or delivering it to the authorized agent of the express mail service," and that "[m]ail to a person other than a state agency shall be addressed to the last known address of the person." Minn. Rules 1400.5100, subp. 9 (1995).

3. Service of the Cease and Desist Order and Notice of Right to Hearing by certified mail addressed to the Respondents' last known addresses and by leaving a copy in the office of the Commissioner of Commerce, and service of the Notice of and Order for Prehearing Conference by certified and first-class mail addressed to the Respondents' last known addresses constitutes proper service in this case. The steps taken by the Department of Commerce to serve these Orders were calculated to give reasonable notice of the Respondents' opportunities for hearing. The Department thus gave reasonable and proper notice of the hearing in this matter pursuant to Minn. Stat. §§ 45.027, subd. 5, 45.028, and 80C.12, subd. 3 (1994).

4. Minn. Stat. § 45.027, subd. 5 (1994), provides that, "[i]f the person to whom the cease and desist order is issued fails to appear at the hearing after being duly notified, the person is in default, and the proceeding may be determined against that person upon consideration of the cease and desist order, the allegations of which may be considered to be true."

5. The Respondents, having made no appearance at the prehearing conference and not requesting any continuance or other relief, are in default.

6. The Cease and Desist Order and Notice of Right to Hearing and the Notice of and Order for Prehearing Conference are in all respects proper with regard to form, content, execution, and filing.

7. The Department of Commerce gave proper notice of the prehearing conference in this matter and has fulfilled all relevant, substantive and procedural requirements of law and rule.

8. Pursuant to Minn. Stat. §§ 45.027, subd. 5 (1994), and Minn. Rules 1400.6000 (1995), the allegations contained in the Cease and Desist Order and Notice of and Order for Prehearing Conference are hereby taken as true.

9. Respondents have violated Minn. Stat. § 80C.02 (1994).

10. A cease and desist order is necessary and appropriate in the public interest and is consistent with the purposes fairly intended by the policy and provisions of Chapter 80C of the Minnesota Statutes.

11. Due to the violations described above, grounds exist for making permanent the Cease and Desist Order of May 10, 1996.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Cease and Desist Order of May 10, 1996, should be made permanent and affirmed as provided by Minn. Stat. §§ 45.027, subd. 5, and 80C.12, subd. 2 (1994).

Dated this _____ day of November, 1996.

BARBARA L. NEILSON
Administrative Law Judge

Reported: Tape Recorded (one tape).

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail.