

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

In the Matter of the Residential Building  
Contractor's License of Capricorn  
Corporation, License No. 7987, James  
Edward Kollross, Qualified Person, and the  
Real Estate Broker's License of James  
Edward Kollross, License No. 450207, and  
James Edward Kollross, Individually, and  
as a Qualified Person

-  
FINDINGS OF FACT,  
CONCLUSIONS, AND  
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson commencing at 9:30 a.m. on June 10, 1997, at the offices of the Minnesota Department of Commerce, 133 East Seventh Street, in the City of St. Paul, Minnesota. The Department requested that a transcript of the hearing be prepared and thereafter filed its post-hearing brief. Mr. Kollross requested and received an extension of the time period for him to submit a brief, without objection by the Department. Several additional communications were received from the parties, the Department filed a post-hearing affidavit, and Mr. Kollross filed a post-hearing motion. The record with respect to this matter closed for all purposes on January 14, 1998, the date on which Mr. Kollross' final reply brief was due.

Michael A. Sindt, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Minnesota Department of Commerce ("the Department"). James E. Kollross, N-1504 Shore Drive, Marinette, Wisconsin 54143, appeared on behalf of Capricorn Corporation and himself, without benefit of counsel. The record remained open until January 14, 1998, for the receipt of a reply brief by the Respondent.

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department 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 contained herein. Pursuant to 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, Minnesota Department of Commerce, 133 E. 7th Street, St. Paul, Minnesota 55101, telephone (612) 297-3238, to ascertain the procedure for filing exceptions or presenting argument.

### STATEMENT OF ISSUE

The issues in this case are whether Respondent James E. Kollross provided the Commissioner with false information in September, 1996, when he supplied an address to the Department and told the Department that he had filed a police report with the Bloomington Police; whether Mr. Kollross failed to respond to requests made by the Department to provide his current address; whether Mr. Kollross failed to notify the Commissioner of a change of address for himself and for Capricorn Corporation; and whether Mr. Kollross directed his commission into the proceeds of the sale of a home, and thereby violated Minn. Stat. §§ 45.027, subds. 1(a) and 7(3), 82.20, subd. 11, and 326.875 (1997), and Minn. R. 2800.1600, subp. 2, 2805.1700, subp. 1, and 2891.0010 (1995); and, if so, whether the Respondents should be subject to discipline and/or civil penalties under Minn. Stat. §§ 45.027, subds. 6-7, 82.20, and 326.875 (1997), and Minn. R. 2800.1600, 2805.1700, and 2891.0010 (1995).

### FINDINGS OF FACT

1. James Kollross, the Respondent, was first licensed as a real estate salesperson (under license number 450207) on October 2, 1979. He was first licensed as a real estate broker (under license number 2000957) on February 23, 1994. T. 63, 64; Exs. 2, 19. The Respondent's real estate salesperson's license expired on October 9, 1996. Mr. Kollross notified the Department that he intended to remain on inactive status until further notice. Accordingly, the Respondent's real estate salesperson's license is deemed to be an inactive license which could be reactivated within two years. T. 176, 180-81; Exs. 2, 10. The Respondent's real estate broker's license expired on May 3, 1995. His renewal application is still pending due to lack of information regarding the Respondent's mental disorder. T. 176, 202, 206, 209; Ex. 2. While he was licensed as a broker, the Respondent did not have any sales people licensed to him. T. 65.

2. Respondent is also the president and qualifying person of Capricorn Corporation, a licensed residential building contractor (License No. 7981). T. 74, 76; Exs. 2, 19. The residential building contractor's license of Capricorn Corporation was first issued on October 6, 1992, and expired on March 31, 1997. T. 175-76; Ex. 2. The address that was on file with the Department for Capricorn Corporation as of October 28, 1996, was 7816 Bush Lake Drive in

Bloomington, Minnesota. The Department has not received any update of the address for Capricorn Corporation since that time. The Respondent has not lived at the Bush Lake Drive address since late April or early May of 1996. T. 109, 131, 177-78, Ex. 6.

3. Respondent suffers from depression. He served in Viet Nam and has received psychiatric care arising from his service in the military. His depression was diagnosed in 1992 in a VA hospital. He stopped seeing a doctor for this condition in March, 1997. T. 58-61, 182.

4. While licensed, Respondent sold real estate for the public and for himself. T. 102-03. He also built homes through Capricorn Corporation for the public and for himself. T. 78-80, 82-84. During the last five years of Capricorn's licensure, the corporation primarily engaged in residential construction. T. 77. It was common for Respondent to own and live in homes built by Capricorn Corporation after they were constructed and prior to their sale to the public. T. 82-83. It is also common for Respondent and his wife to move frequently. They have lived in approximately six residences during the last ten years. T. 83.

5. Respondent was born and raised in Marinette, Wisconsin. In 1990, he and his wife completed construction of a new home located at N1504 Shore Drive in Marinette. They have lived there off and on since that time. T. 130, 252-53. Respondent attempted on at least two occasions between early May, 1996, and October, 1996, to change the address set forth on his licenses to the Marinette address. Although one Departmental employee told him that the statutes gave him the freedom to have a license no matter where he resided, other Departmental employees told him that an out of state home address of a qualified person or a real estate agent could not be used unless the county in which he resided was adjacent to the Minnesota line. T. 129, 131, 135-36, 153.

6. On February 23, 1994, Respondent applied for a real estate broker license. His application listed his home address as 9900 Drew Avenue South, Bloomington, Minnesota. Ex. 2.

7. On June 8, 1994, Respondent applied to the Department for a real estate salesperson's license with Coldwell Banker Nationwide. On his application, he once again indicated that his home address was 9900 Drew Avenue South, Bloomington, Minnesota. Ex. 2

8. At some point prior to August of 1994 or August of 1995, Respondent did, in fact, live at 9900 Drew Avenue South in Bloomington, Minnesota. T. 82, 276. There is no evidence that the Drew Avenue address on Respondent's 1994 applications for real

estate broker and salesperson's licenses was inaccurate, and the Department does not so assert. T. 273; Ex. 1.

9. At some time during 1994, Respondent applied for a building permit to construct a home located at 7816 Bush Lake Drive, Bloomington, Minnesota. T. 82. Respondent and his wife thereafter moved into the home after construction was completed. T. 82.

10. On or about May 1, 1995, Respondent filed a form with the Department seeking to transfer his real estate salesperson's license to the Relocation Center, Inc. On the form, the Respondent listed his home address as 7816 Bush Lake Drive, Bloomington, Minnesota. T. 114, 166; Exs. 2, 11. At the hearing, Respondent was only able to recall that he moved into the Bush Lake Drive home either in August of 1994 or August 1995. T. 82. The precise date on which the Respondent moved into the Bush Lake Drive home thus is not clearly set forth in the record. The Administrative Law Judge finds that it is more likely than not that construction of the home was completed and Respondent and his wife moved into the home prior to May 1, 1995, in light of the fact that the Respondent was certain that he obtained the building permit for the home during 1994. The Department did not provide any evidence to the contrary. Therefore, it is likely that Respondent did, in fact, occupy the Bush Lake Drive house at the time he filed his application on May 1, 1995. T. 82, 115, 166.

11. On or about February 28, 1996, Respondent and his wife signed an Exclusive Right to Sell Listing Contract for the house at 7816 Bush Lake Drive with the Relocation Center, Inc. Respondent accepted the contract on behalf of The Relocation Center. T. 85-86; Ex. 7. In this listing contract, the Kollrosses agreed to pay Relocation Center, Inc., a commission of six percent on the selling price of \$288,000. *Id.* Six percent of \$288,000 is \$17,280. T. 98. If no reduction in commission is negotiated, a six percent commission would typically be split between the buying agent, who would receive 45 percent of the six percent, and the selling agent, who would receive 55 percent of the six percent. T. 103-04.

12. On approximately March 2, 1996, the Respondent and his wife entered into a purchase agreement with Paul Cameron to buy the house located at 7816 Bush Lake Drive. See Ex. 23B. The closing occurred on March 29, 1998. T. 82.

13. Prior to the closing, the Respondent sent Linda Hedberg of Equity Title a letter pertaining to the payment of real estate commissions. In the letter, Respondent informed Ms. Hedberg as follows:

Real Estate Commissions to be paid as follows

Seller will bring a check from earnest money held by  
Relocation Center in the amount of \$2624.00

Balance of earnest money retained by Relocation

Payment of \$7776.00 to be paid at closing to Edina Realty

Verification available Scot or Mary Jo 338-4577

Mary Jo Elliott was the broker for the agency with which Respondent worked, The Relocation Center, Inc. T. 104, 166. There were other notations on the letter, but there was no evidence who wrote them or when they were written. T. 169, 193; Ex. 13.

14. The Relocation Center, Inc., had a policy which was set forth in its handbook under which salespersons would be permitted to sell one property each year which they owned at no cost to them as far as the listing commission. Thus, the selling agent/owner of the property would not receive any commission on such a sale. The Relocation Center also covered the closing fees and title work. T. 98, 246-47. In accordance with this policy, the Respondent, as selling agent/owner of the property, did not expect to receive any commission payment in the Bush Lake Drive transaction. T. 85-87, 166.

15. Prior to the closing on the Bush Lake Drive property, the Respondent's commission was renegotiated to zero pursuant to the policy described in the previous Finding. The Respondent and his wife attempted to convince the Respondent's broker, Ms. Elliott, to abide by the handbook provision by also agreeing that there would be no commission to The Relocation Center, Inc. on the sale of the Bush Lake Drive property. They were unsuccessful in this attempt, however, and eventually agreed to provide Ms. Elliott with a commission payment of \$2,376. T. 246.

16. In the sale of 7816 Bush Lake Drive, Edina Realty was the buying agent's broker and The Relocation Center, Inc., was the selling agent's broker. T. 87, 98, 101; Exs. 15-17. At the closing, \$7,776 (45 percent of a six percent commission) was paid to Edina Realty as a commission on that property and \$2,376 was paid to The Relocation Center, Inc. T. 92; 95-96, 101; Ex. 17. The Relocation Center, Inc., received \$5,000 in earnest money from the buyer prior to closing. T. 92; Ex 15. The Relocation Center, Inc., wrote a check dated March 28, 1996, to Equity Title in the amount of \$2,624. T. 92, 95; Ex. 16. Equity Title is affiliated with Edina Realty. T. 96, 133. It appears that the remainder of the \$5,000 in earnest money was retained by The Relocation Center. This amounts to retention of \$2,376, which is 25 percent of 55 percent of the six percent commission. T. 97, 101. The HUD-1, the seller's

settlement statement, shows that the commission paid from the seller's funds at settlement was \$5,152. This amount, added to the check from The Relocation Center, Inc., of \$2,624 made payable to Equity Title, totals \$7,776, the total amount paid by Equity Title to Edina Realty as commission on the real estate. There is no evidence that the Respondent received any commission payment with respect to the transaction.

17. The fact that Ms. Elliott made out a check to Equity Title in the amount of \$2,624 (which, when deducted from the \$5,000 in earnest money, left a total commission of \$2,376) supports an inference that she agreed to the arrangement. T. 248; Ex. 16.

18. In April, 1996, Respondent applied for a building permit for a house to be located at 7860 West 96th Street in Bloomington. Due to a grading problem on the property, construction was delayed for 9 months. T. 132.

19. After the property at 7816 Bush Lake Drive was sold, Respondent continued to rent the house back from the owner until approximately late April or early May of 1996, at which time he moved to a rented house located at 9525 Rich Road, Bloomington, Minnesota. T. 109, 131; Ex. 23B.

20. In early May of 1996, Respondent and Phil Huston, a Burnet Realty agent, had a dispute over the occupancy of the Rich Road property and Mr. Huston's conduct. T. 235-37; Ex. 22. This dispute eventually resulted in the filing of a complaint with the Department against Respondent by Dr. Nizamaddih Maruf, the owner of the Rich Road property. T. 159. Mr. Huston apparently also filed a complaint regarding Respondent. T. 125.

21. Respondent and/or his wife attempted to file a complaint or report with the Bloomington Police concerning their dispute with Mr. Huston over the Rich Road property and asked for a restraining order. The Police Department told them that that was not a police department issue and directed them to the Bloomington City Attorney's Office. T. 126-27, 234. The Police Department apparently did not prepare a written report of a complaint by Respondent. T. 184, 212-13. On or about June 25, 1996, Vicki Kollross sent a letter to the Bloomington City Attorney's office requesting assistance with respect to the dispute with Mr. Huston. Respondent and/or his wife also visited the City Attorney's Office. T. 126-27, 234; Ex. 20. The City of Bloomington contacted Dr. Maruf regarding the matter. Ex. 21. The City Attorney's Office eventually told the Respondent and his wife that Hennepin County handled requests for restraining orders. They did not pursue the

matter with Hennepin County after they learned that there would be a six hour wait and a charge of approximately \$155. T. 126-27.

22. On July 23, 1996, Respondent moved from 9525 Rich Road to 11610 Normandale Boulevard, Bloomington, Minnesota, another rental property. T. 111, 131, 138.

23. The Department of Commerce opened an investigative file based on two letters of complaint regarding Respondent and the case was assigned to Margene Mayer, a Commerce Consumer Liaison for the Department who conducts investigations in the Enforcement Division. T. 159; Exs. 3,4. The Department opened two files, RE9603737 and RE960375, which were closed on September 3, 1996. T. 159-60; Ex. 4. Ms. Mayer noted when she began investigating the complaint that the address for Respondent that was given on the complaint(s) (the Rich Road address) was not the same as the address reflected in the Department's records for Respondent at that time (the Drew Avenue address). T. 107, 266-67. On August 20, 1996, Respondent met with Ms. Mayer and Ms. Stock at the Department of Commerce. Just after Respondent left the room after the end of the meeting, Ms. Mayer tore the pocket of her dress on the chair and made a comment about the chairs, and Ms. Mayer and Ms. Stock laughed. T. 146-47, 259-60. Their laughter was provoked by this incident, and was not directed at Respondent.

24. On September 3, 1996, after the completion of the investigation, Ms. Mayer sent Mr. Kollross a letter notifying him that the Department had determined that he had failed to notify the Commission within ten days of any change in the license application as required by Minn. Stat. § 82.20, subd. 11, and Minn. R. 2800.1600, subp. 2. The Department declined to initiate formal disciplinary proceedings against Mr. Kollross' real estate salesperson license but stated that the letter should be deemed a formal warning and would be made a permanent part of his enforcement record. Ex. 4; see also Ex. 6.

25. Ms. Mayer sent the September 3, 1996, letter dated notifying Respondent of the above to 7860 West 96th Street, Bloomington, Minnesota, which was the address on file with the Department at that time. T. 231-32; Exs. 4, 19. The letter was returned to Ms. Mayer with a notation from the post office indicating that the letter was not deliverable because there was no such address. Upon further investigation, the Department discovered that the home at that location was under construction and that the address was not yet assigned. T. 160-61, 163-64. Pictures taken by Departmental representatives on September 24, 1996, demonstrate that the house located at 7860 West 96th Street was under construction at the time and was not yet habitable. T. 163-

65; Ex. 5. Ms. Mayer opened a new enforcement file relating to the Respondent after this happened because, in her view, it raised an issue regarding whether the Respondent was providing the Department with false information. T. 161-63.

26. On September 24, 1996, Respondent provided the Department with a "verification of address," which included a copy of the 1996 Hennepin County Property Tax Statement sent to James and Vicki Kollross at N-1504 Shore Drive, Marinette, Wisconsin; a statement of real estate taxes issued in Wisconsin pertaining to the Marinette, Wisconsin, address; and a property tax refund form sent to James and Vicki Kollross at their Marinette, Wisconsin, address. Ex. 24 B-D. In the letter, Mr. Kollross stated that he "was not aware that Minnesota statutes require any person licensed to use only their home or residence address." Ex. 24B.

27. At some point during the Department's investigation, Respondent told Ms. Mayer that his wife had filed a report or complaint against Mr. Huston with the Bloomington Police Department. When Ms. Mayer later called the Bloomington Police Department, she was told that a police report had not been filed by either of the Kollrosses against Mr. Huston. T. 184, 212-13.

28. In October, 1996, Jay Wilson, the qualified person for Willis Builders, a licensed Minnesota building contractor, allowed Respondent to listen in on a telephone conversation between he and the Department. Mr. Wilson informed the Department during the telephone conversation that he had moved to a new address the prior June. The Departmental representative responded in a pleasant fashion. She did not criticize Mr. Wilson for waiting so long to notify the Department or request that Mr. Wilson put the information in writing. To Respondent's knowledge, no adverse action has been taken by the Department against Mr. Wilson or Willis Builders as a result of this late notification. T. 154-56, 251. The Department did not provide any evidence of adverse action against Willis Builders.

29. Respondent and his attorney held meetings with Department representatives prior to February 20, 1997, during which they attempted to have the Respondent's broker's license and Capricorn Corporation's building contractor license reinstated. T. 125. On or about February 20, 1997, Respondent submitted an application to reinstate his real estate broker's license. On the application, he gave N-1504 Shore Drive, Marinette, Wisconsin, as his home address, and identified 7860 West 96th Street in Bloomington, Minnesota, as his "broker certification" address. Although Respondent was not living at that location on February 20, 1997, he had received mail there since approximately September, 1996. T. 113-14, 121-24, 173-74; Ex. 18.

30. A certificate of occupancy was issued by the City of Bloomington with respect to the house located at 7860 West 96th Street, Bloomington, in early March, 1997, and the Respondent moved in shortly thereafter. T. 81-82, 112. The Respondent did not provide the Department with any notice of this change in address since he did not have a license at that time and he had already provided the Department with this address and his Marinette, Wisconsin, address at the time of his February 20, 1997, application to reinstate his real estate broker's license. T. 112-14. In addition, the Department's computerized records showed the West 96th Street address listed for the Respondent as early as September 3, 1996. T. 230-33; Ex. 4.

31. Respondent never notified the Department in writing that he had moved to the Rich Road and Normandale Boulevard locations. T. 110, 112.

32. In the Notice of and Order for Hearing and Order to Show Cause filed in this matter, the Commissioner alleged that Respondent's licenses were subject to discipline and/or that Respondent was responsible for the payment of civil penalties because he provided false information to the Commissioner when he submitted 7860 West 96th Street, Bloomington, Minnesota 55438, as his residence and told the Department that he had filed a police report with the Bloomington Police; failed to respond to requests made by the Department to provide his current address; failed to notify the Commissioner of a change of address for Capricorn Corporation within fifteen business days; and failed to notify the Commission in writing that Capricorn Corporation's address had changed. The Commissioner also alleged that Mr. Kollross' real estate license was subject to discipline and/or that Mr. Kollross was responsible for the payment of civil penalties because he directed his commission into the proceeds of the sale of a home located at 7816 Bush Lake Drive, Bloomington, Minnesota.

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

### CONCLUSIONS

1. The Minnesota Commissioner of Commerce and the Administrative Law Judge have subject matter jurisdiction herein pursuant to Minn. Stat. §§ 14.50, 45.027, 82.20, 82.27, and 326.91 (1997).
2. The Respondent received timely and proper notice of the hearing in this matter.

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

4. Pursuant to Minn. Rules, pt. 1400.7300, subp. 5 (1995), the Department has the burden of proof to show, by a preponderance of the evidence, that Respondent has committed the violations alleged.

5. Individuals licensed by the Department of Commerce are required to comply with requests from the Department for information or documents “within the time specified in the request or, if no time is specified, within 30 days of the mailing of the request . . .” Minn. Stat. § 45.027, subd. 1a (1997).

6. Minn. Stat. § 45.027, subd. 6 (1997), authorizes the Commissioner of Commerce to impose civil penalties not to exceed \$2,000 per violation upon persons who violate “any law, rule, or order related to the duties and responsibilities entrusted to the [C]ommissioner unless a different penalty is specified.”

7. Minn. Stat. § 45.027, subd. 7 (1997), provides in pertinent part as follows:

Subd. 7. **Actions against licensees.** In addition to any other actions authorized by this section, the commissioner may, by order, deny, suspend, or revoke the authority or license of a person subject to the duties and responsibilities entrusted to the commissioner, as described under section 45.011, subdivision 4, or censure that person if the commissioner finds that:

- (1) the order is in the public interest; and
- (2) the person has violated any law, rule, or order related to the duties and responsibilities entrusted to the commissioner; or
- (3) the person has provided false, misleading, or incomplete information to the commissioner or has refused to allow a reasonable inspection of records or premises; or
- (4) the person has engaged in an act or practice, whether or not the act or practice directly involves the business for which the person is licensed or authorized, which demonstrates that the applicant or licensee is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority or license granted by the commissioner.

8. Pursuant to Minn. Stat. § 82.27, the Commissioner is authorized to take adverse action against real estate licensees if the Commissioner finds:

- (1) that the order is in the public interest, and
- (2) that the applicant or licensee . . .

- (a) has filed an application for a license which is incomplete in any material respect or contains any statement which, in light of the circumstances under which it is made, is false or misleading with respect to any material fact;
- (b) has engaged in a fraudulent, deceptive, or dishonest practice;  
[or]

\* \* \*

- (e) has violated or failed to comply with any provision of this chapter or any rule or order under this chapter . . . .

9. Pursuant to Minn. Stat. § 326.91, the Commissioner of Commerce is authorized to take adverse action against building contractor licensees and impose a civil penalty if the Commissioner finds that the order is in the public interest and that the licensee or its qualifying person:

- (1) has filed an application for a license which is incomplete in any material respect or contains any statement which, in light of the circumstances under which it is made, is false or misleading with respect to any material fact;
- (2) has engaged in a fraudulent, deceptive, or dishonest practice; [or]

\* \* \*

- (5) has violated or failed to comply with any provision of sections 326.83 to 326.98 or any rule or order under sections 326.83 to 326.98;

10. Individuals holding real estate licenses must notify the Department in writing of a change of address or business location within ten days of the change. Minn. Stat. § 82.20 (1997); Minn. R. 2800.1600 (1995). Those holding building contractor licenses must notify the Commissioner in writing of a change of address or business location within fifteen business days after the change. Minn. Stat. § 326.875 (1997); Minn. R. 2891.0010 (1995).

11. Real estate salespersons are prohibited from “accept[ing] a commission or other valuable consideration for the performance of any acts requiring a real estate license from any person except the real estate broker to whom the licensee is licensed or to whom he or she was licensed at the time of the transaction.” Minn. R. 2805.1700, subd. 1 (1995).

12. The Department has not shown by a preponderance of the evidence that the Respondent provided information to the Commissioner that was false, misleading, or incomplete as to any material fact when he submitted 7860 West 96th Street, Bloomington, Minnesota 55438, as his home address at some point prior to September 3, 1996.

13. The Department has not shown by a preponderance of the evidence that the Respondent provided information to the Commissioner that was false, misleading, or incomplete with respect to any material fact when he told the

Department that he and/or his wife had filed a complaint or report with the Bloomington Police Department regarding the Rich Road rental dispute and Mr. Huston's conduct.

14. The Department has shown by a preponderance of the evidence that the Respondent failed to notify the Commissioner of a change of address for his real estate licenses within ten days, and failed to notify the Commission in writing within fifteen business days that Capricorn Corporation's address had changed. The Department has not shown by a preponderance of the evidence that the Respondent failed to respond to requests made by the Department to provide his current address.

15. The Department has not shown by a preponderance of the evidence that the Respondent accepted a commission or other valuable consideration for the performance of acts requiring a real estate license from a person other than the real estate broker to whom he was licensed at the time of the transaction in connection with the sale of a home located at 7816 Bush Lake Drive, Bloomington, Minnesota.

16. These Conclusions are made for the reasons discussed in the attached Memorandum, which is hereby incorporated herein by reference.

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

#### RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Commerce take appropriate action based upon the Findings of Fact, Conclusions, and Memorandum set forth herein.

Dated: February 17, 1998

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BARBARA L. NEILSON  
Administrative Law Judge

Reported: Tape-recording transcribed by Carol J. Peplinski, Reporters Diversified Services, Duluth Minnesota

#### MEMORANDUM

In the Notice of and Order for Hearing filed in this matter, the Department alleged that the Respondent's licenses are subject to discipline and/or civil penalties for several reasons. The Department's allegations fall into four main categories: (1) allegations that the Respondent directed his commission into the proceeds of the sale of the home located at 7816 Bush Lake Drive, Bloomington; (2) allegations that the Respondent failed to respond to requests made by the

Department to provide his current address and failed to notify the Commissioner of a change of address for himself and for Capricorn Corporation; (3) allegations that the Respondent provided the Commissioner with false information when he submitted 7860 West 96th Street, Bloomington, as his residence; and (4) allegations that the Respondent provided the Commissioner with false information when he told the Department that he had filed a police report with the Bloomington Police. Each of these assertions will be discussed below.

#### Alleged Mishandling of Commission

The Department alleges that the Respondent directed his portion of the commission on the sale of his Bush Lake Drive home into the proceeds of the sale, thereby violating Minn. R. 2805.1700, subp. 1 (1995), which forbids real estate salespersons from “accept[ing] a commission or other valuable consideration for the performance of any acts requiring a real estate license from any person except the real estate broker to whom the licensee is licensed . . . .” To support this allegation, the Department merely offered its investigator’s analysis of the closing documents and checks, coupled with hearsay reports of what the Respondent’s broker, Mary Jo Elliott, told the investigator. Because the closing documents or checks are open to interpretation and do not report any commission being paid to the Respondent, the Department in essence relied solely on hearsay evidence with respect to this alleged rule violation. The Department’s investigator testified that Ms. Elliott said that she had agreed that the Respondent was entitled to 75 percent of the 55 percent of the six percent commission (T. 170), the Respondent directed the closer to put his commission into the proceeds of the sale of the home so the Respondent received his commission directly at closing (T. 189, 191), and Ms. Elliott did not authorize the disbursement of the Respondent’s commission directly to him (T. 193). In considering this allegation as well as the other allegations made by the Department, the Administrative Law Judge is mindful that the Minnesota Supreme Court has admonished fact-finders in cases in which the State seeks to discipline the licenses of professionals to be persuaded only by “evidence with heft”:

[T]hese proceedings brought on behalf of the state, attacking a person’s professional and personal reputation and character and seeking to impose disciplinary sanctions, are no ordinary proceedings. We trust that in all professional disciplinary matters the finder of fact, bearing in mind the gravity of the decision to be made, will be persuaded only by evidence with heft.

In re Wang, 44 N.W.2d 488, 492 (Minn. 1989) (proposed revocation of license of dentist), cited with approval in In re the Insurance Agent’s License of Kane, 473 N.W.2d 869, 874 (Minn. App. 1990). It is appropriate to apply that standard in the present case.

Under the rules of the Office of Administrative Hearings governing contested case proceedings, hearsay is to be admitted only under circumstances indicating some reliability. See Minn. R. 1400.7300 (hearsay may be admitted “if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs”). Factors that have generally been used by the courts in assessing whether evidence offered in an administrative hearing is “reliable, trustworthy, and probative” have been summarized as follows:

In determining whether evidence is reliable, trustworthy, and probative for the purposes of an administrative hearing, other jurisdictions have enumerated several factors that provide helpful guidance . . . :

- (1) whether the statement was written and signed;
- (2) whether the statement was sworn to by the declarant;
- (3) whether the declarant was a disinterested witness or had a potential bias;
- (4) whether the hearsay evidence is denied or contradicted by other evidence;
- (5) whether the declarant is credible;
- (6) whether there is corroboration for the hearsay statement;
- (7) whether the case turns on the credibility of witnesses;
- (8) whether the party relying on the hearsay offers an adequate explanation for the failure to call the declarant to testify; and
- (9) whether the party against whom the hearsay is used has access to the statements prior to the hearing or the opportunity to subpoena the declarant.

Industrial Claims Appeals Office v. Flower Stop, 782 P.2d 13 (Colo. 1989).

Under all of the circumstances of the present case, the Administrative Law Judge concludes that the hearsay statements proffered by the Department cannot properly be relied upon as the sole basis for finding that the Respondent violated Minn. R. 2805.1700, subp. 1 (1995). Ms. Elliott did not provide any written or sworn statements. As the broker in the transaction at issue, she had a potential bias in that she might wish to disavow any knowledge of the manner in which commissions were handled in order to avoid being accused of any impropriety. The credibility of witnesses is critical in this case. As detailed in the Findings of Fact above, the Respondent credibly denied the hearsay statements of Ms. Elliott and explained that, pursuant to a provision in the handbook of The

Relocation Center, Inc., he did not, in fact, receive any commission on the sale of the Bush Lake Drive property. It is impossible to tell whether Ms. Elliott is credible since she did not appear at the hearing to give testimony under oath, she was not subject to cross-examination by the Respondent, and the Administrative Law Judge could not observe her demeanor. The Department did not offer any explanation for its failure to call Ms. Elliott to testify at the hearing. Although the Respondent was informed in the Notice of Hearing of his right to subpoena witnesses, he did not have the benefit of counsel at the hearing, and there is no evidence that he had knowledge of the hearsay statements prior to the hearing.

The evidence provided by the Department with respect to this allegation does not meet the standard imposed by the Minnesota Supreme Court in In re Wang. Due to her absence from the hearing, Ms. Elliott's motives, her memory of the transaction, the possible existence of other documents relating to the sale, and other matters cannot be evaluated. The Respondent was present at the hearing and denied, credibly, the hearsay allegations that were made by Ms. Elliott, as reported by the Department's investigator. The Administrative Law Judge must accept the Respondent's testimony over the unsupported allegations of an absent witness. Moreover, there was no reliable, non-hearsay evidence that the Respondent received a commission that was funneled into the proceeds of the sale. The letter the Respondent sent to Linda Hedberg of Equity Title (Ex. 13) does not say who directed the handling of the commission payments in the manner set forth in the letter--in fact, the letter invited Ms. Hedberg to seek verification from "Mary Jo" (presumably Mary Jo Elliott). In addition, the letter and the other documents and checks relating to the transaction say nothing about any commission to the Respondent.

The type of evidence relied upon by the Department simply cannot provide a proper basis for disciplining the real estate license of the Respondent and possibly removing his means of livelihood. Accordingly, the Judge has determined that the Department has not borne its burden with respect to this allegation.

#### Submission of 7860 West 96th Street Address and Handling of Other Address Changes

At some point prior to September 3, 1996, the Respondent told the Department to change his records to reflect an address of 7860 West 96th Street in Bloomington. Respondent was, in fact, building a house at that location. He moved into the house once the construction was complete and is still living there. When the Department sent the Respondent a letter on September 3, 1996, the letter was returned with a notation that the letter was undeliverable and the Department was told by the Postal Service that the address had not yet been assigned. However, Respondent testified that, although the house was not yet habitable, he did begin receiving mail at that address during September, 1996. In addition, by no later than September 24, 1996, Respondent also informed the

Department of the Marinette, Wisconsin address at which he also could be reached. Under these circumstances, there is no basis for a conclusion that the Respondent intended to provide or did provide the Commissioner with false, misleading, or incomplete information when he provided the West 96th Street address. It does not appear that there was any intent on the Respondent's part to mislead the Department in early September, 1996, about where he could be reached. To the contrary, he provided the Department with an accurate address at which he generally could receive mail and eventually resided. The Department's allegation that the phone number provided by the Respondent actually is forwarded to a telephone that is physically located at 11610 Normandale Boulevard (T. 178-79; Ex. 9) does not, in the view of the Administrative Law Judge, suggest bad faith or other ill motive, and simply appears to be irrelevant to the issues presented in this case.

Although it appears that the Respondent did not notify the Department of an address change during the summer of 1996 when he rented homes located on Rich Road and Normandale, he explained during the hearing that he viewed his stays at these locations as temporary in nature. It is clear that he merely rented these locations between the time that he sold his house on Bush Lake Drive and construction was completed on his new house on West 96th Street. He further testified that he never received any mail at the Rich Road house, where he did not even have access to a mailbox. Moreover, even if the Respondent could be faulted for failing to provide these rental addresses, the Department already determined in its September 3, 1996, letter that these earlier failures simply warranted issuance of a warning letter. See Ex. 4.

The Department has shown by a preponderance of the evidence that the Respondent technically violated statutory and rule provisions by failing to notify the Commissioner of a change of address for his real estate licenses within ten days, and failing to notify the Commission in writing within fifteen business days that Capricorn Corporation's address had changed. As the Department acknowledged at the hearing, the purpose of these provisions is simply to ensure that the Department is able to locate a licensee when necessary. (T. 182.) Business and home addresses suffice, and out-of-state addresses are fine. (T. 205, 277.) The statutes and rules requiring such notification obviously serve the legitimate and important purpose of making sure that the Department can reach its licensees if questions concerning the licensee arise, information must be requested from the licensee, complaints concerning the licensee are received and must be investigated, the Department must take adverse action with respect to the licensee, or other Department business must be conducted. The Respondent was negligent in not keeping the Department better informed of his whereabouts. Unfortunately, the Respondent was under the impression, based upon previous discussions with Departmental personnel, that his Wisconsin address would not be sufficient for licensing purposes. Despite this fact, the evidence shows that the Respondent repeatedly tried to provide his Wisconsin address to the Department. If the Department had accepted the Respondent's Wisconsin address, it would have had access to the most stable location at which

the Respondent could be reached, and perhaps this contested case proceeding could have been avoided. It is evident that the Respondent was able to be reached and respond in a fairly expeditious fashion to Departmental inquiries. The Administrative Law Judge finds that the Respondent did try to comply with Departmental requests to provide his current address to the best of his ability. For all of these reasons, it is concluded that the Department has not shown by a preponderance of the evidence that the Respondent failed to respond to requests made by the Department to provide his current address.

It is respectfully suggested that the Commissioner may wish to consider several factors when determining what, if any, discipline is appropriate with respect to these violations. At the hearing, the Respondent admitted that he did not follow the "notification of address change exactly per statute" but indicated that, due to his depression, he had problems dealing with such issues and tended to overlook the details. He asked for leniency in this regard. T. 250. Because the Respondent's depression may have played a part in his failure to report address changes more promptly, it may be appropriate to avoid a rigid application of the rules. Moreover, even though the Respondent neglected to update the Capricorn Construction prior to the expiration of that license in March, 1997, the Department as a practical matter could have located Respondent through the other license information maintained by the Department with respect to the Respondent. Finally, it is significant that the Respondent provided evidence that other licensees who violate the address change statute and rules have not been treated so harshly. Specifically, the Respondent asserted that another building contractor, Willis Builders, who called in with a belated change of address was treated differently in that it was not reprimanded or investigated for failing to update its address in writing at an earlier stage. All of these factors cause the Administrative Law Judge to respectfully recommend that the Commissioner consider imposing a less severe penalty for the Respondent's technical violations of the rules and statutes governing his licensures.

#### Allegation that Police Complaint or Report had been Filed

As a threshold matter, this Report must address the admissibility of Exhibits 14A and 14B and the accompanying affidavit submitted by Barbara Lessard, Commerce Enforcement Supervisor, which is labeled Ex. 14C. Exhibits 14A and B, which were offered into evidence at the hearing by the Department of Commerce and received at that time by the Administrative Law Judge, were identified as a tape recording of a portion of a telephone conversation between Barbara Lessard, Commerce Enforcement Supervisor, and Mr. Kollross on September 25, 1996, and a transcription of that recording. Ms. Lessard did not testify at the hearing. At the hearing, counsel for the Department indicated that these exhibits were being offered to rebut Exs. 20 and 21, which were offered by the Respondent. The Administrative Law Judge directed the Department to file an affidavit of Ms. Lessard following the hearing explaining the manner in which she tape-recorded the conversation in order to clarify whether she tape recorded all of the conversation or just a part of it, and the reason for any partial tape-recording. The affidavit was to be marked and received as Ex. 14C. T. 255-58.

Following the hearing, the Department filed an affidavit of Ms. Lessard in which she indicated that only a portion of the phone conversation was taped due to problems with the tape recorder that she was using at the time. See Ex. 14C. The Respondent objected to the receipt of these exhibits both at the hearing and in a motion filed after the hearing. The grounds for the Respondent's objections were that he was not informed at the time that the conversation was going to be tape-recorded and used against him; the tape recording and transcript did not reflect the entire conversation between the parties; and there was no information provided at the time of the hearing about the point at which Ms. Lessard started the tape recorder.

In a letter issued on December 23, 1997, the Administrative Law Judge directed the Department to submit argument addressing the relevance of Exs. 14A and 14B and their admissibility in view of the fact that they do not reflect the entire conversation held between Mr. Kollross and Ms. Lessard on the date in question. The Judge specifically indicated that, if the exhibits were being offered to rebut Exhibits 20 and 21, the Department should explain in what fashion they did so. The Department submitted a letter in which it argued that Exs. 14A and 14B "rebutted the Respondents' assertion of innocence" and, when viewed in conjunction with Exhibits 20 and 21, demonstrated that Respondents gave false information to the Commissioner of Commerce or at least information that was incomplete or misleading. Although the Department acknowledged that Exs. 14A and 14B are "linked only indirectly with the licensing information which is central to this case" and support only one specific instance of false information being provided, the Department urged that the information be found to be relevant and material and the type of evidence a reasonable person might rely upon. See Department's Jan. 6, 1998, letter.

Upon review of Exs. 14A-C and further consideration of the matter, the Administrative Law Judge has determined that these exhibits should not be received into evidence in this case. These exhibits do not, in fact, appear to rebut Exhibits 20 or 21 in any way. The Respondent apparently acknowledged during the telephone conversation with Commerce Department Supervisor Barbara Lessard on September 25, 1996, Ex. 14A, p. 10, that the information given to the Department regarding reports to the Bloomington Police Department was "true to his knowledge." That position is consistent with the position the Respondent has taken throughout this hearing. Moreover, it is troublesome that only a portion of the entire telephone conversation was tape-recorded, since that necessarily means that the conversation between the parties has not been placed in its proper context. Accordingly, the Judge has removed Exs. 14A-C from the exhibits admitted in this matter. They will be placed in a separate envelope marked "Offered but not Received" and included in the official record of this proceeding.

At the hearing in this matter, the parties did not offer much evidence relating to the circumstances under which the Respondent allegedly provided the "false" statement concerning police reports. In the Notice of and Order for

Hearing and Order to Show Cause, the Department asserted that, during a September 24, 1996, telephone call, the Respondent “indicated that he did not want to provide the Department with his address because he feared for his and his family’s personal safety” and that the Respondent “stated that a Burnet Realty agent had threatened him and that he had reported the threats to the Bloomington Police.” Ex. 1, ¶ 21. At the hearing, the Respondent explained the underlying circumstances, and the Department investigator testified regarding what she was told by the Bloomington Police.

Based upon consideration of the record, the Administrative Law Judge has determined that the Department has not shown by a preponderance of the evidence that the Respondent provided information to the Commissioner that was false, misleading, or incomplete with respect to any material fact when he told the Department that he and/or his wife had filed a complaint or report with the Bloomington Police Department regarding the Rich Road rental dispute and Mr. Huston’s conduct. The Respondent and/or his wife had, in fact, contacted the Bloomington Police Department to register a complaint, which; in lay terms, could reasonably be referred to as the filing of a police complaint or report. Although Respondent perhaps ideally would have further explained to the Department that he and his wife were subsequently referred to the Bloomington City Attorney’s Office and to Hennepin County and that they eventually decided not to attempt to get a restraining order, his failure to mention this to the Department at the time can not be viewed as a material omission.

B.L.N.