

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

In the Matter of the Residential  
Building Contractor License of  
Jeffrey P. Wacker, individually and  
d/b/a Dynamic Builders or  
d/b/a Home Masters Construction,  
License No. 7528.

**RECOMMENDATION ON MOTION  
FOR SUMMARY DISPOSITION**

The above-entitled matter is before Administrative Law Judge (ALJ) George A. Beck on the Department of Commerce's (Department) Motion for Summary Disposition. The Department filed its motion with the Office of Administrative Hearings on March 17, 1999. By and through his attorney, the Respondent, Jeffrey Wacker, filed a Memorandum in Opposition to Summary Disposition on April 5, 1999. On April 7, 1999, the Department filed an Amended Notice of and Order for Hearing and a Reply Memorandum in Support of Summary Disposition. Respondent filed a Formal Objection to Reply Memorandum and Amended Notice of and Order for Hearing on April 9, 1999. For purposes of this motion, the record closed on April 9, 1999, when the last memorandum was received.

Philip H.M. Grove, Assistant Attorney General, NCL Tower, Suite 1200, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, represents the Department of Commerce on this motion. Arne D. Anderson, Esq., 308 Board of Trade Building, 301 West First Street, Duluth, Minnesota 55802, represents the Respondent on this motion.

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

**IT IS RECOMMENDED:**

- (1) That the Commissioner of Commerce GRANT the Department's Motion for Summary Disposition;
- (2) That the hearing scheduled for May 14, 1999 be canceled.

Dated this \_\_\_\_\_ day of April, 1999.

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GEORGE A. BECK  
Administrative Law Judge

## 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 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 (10) 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 Gary A. LaVasseur, Deputy Commissioner, Enforcement and Licensing Division, 133 East Seventh Street, St. Paul, Minnesota 55101, (651) 296-2594, to ascertain the procedure for filing exceptions or presenting argument.

## MEMORANDUM

### **Background Facts**

Respondent was first licensed as a residential building contractor on October 29, 1992, license number 7528.<sup>[1]</sup> Although his license expired on three different occasions, Respondent renewed it and currently holds a valid contractor license.<sup>[2]</sup> Respondent changed the name of his business from "Home Masters Construction" to "Dynamic Builders" effective August 12, 1998.<sup>[3]</sup>

In August 1993, Respondent entered into a contract with Arlene Salisbury of Duluth, Minnesota, to install a new roof on her home.<sup>[4]</sup> The total contract price was \$1,800. Ms. Salisbury made her final payment on October 19, 1993, when Respondent completed the work.<sup>[5]</sup> Respondent did not obtain a building permit from the City of Duluth for the roofing work done on Ms. Salisbury's home until July 7, 1994, almost a year after he contracted to do the work.<sup>[6]</sup> The City of Duluth requires that building permits be obtained prior to commencement of the work.<sup>[7]</sup> The new roof leaked and Respondent's attempts at repairing the roof failed. In the spring of 1997, Ms. Salisbury had a new roof installed by a contractor other than Respondent. Ms. Salisbury filed suit against Respondent and on September 18, 1997, judgment was entered in her favor for \$3,869, the price of the new roof.<sup>[8]</sup> This judgment remains outstanding.<sup>[9]</sup>

Respondent also had judgment entered against him in 1995. Duluth Ready Mix Concrete, Inc. brought suit against Respondent and judgment was entered in its favor in the amount of \$1,443.66. This amount represented the cost of the materials Respondent ordered from Duluth Ready Mix and supplied to a building project. Respondent failed to pay for the materials.<sup>[10]</sup> This judgment remains outstanding.<sup>[11]</sup>

### **Analysis**

Summary disposition is the administrative equivalent to summary judgment.<sup>[12]</sup> Summary disposition is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law.<sup>[13]</sup> A genuine issue is one that is not a sham or frivolous, and a material fact is one which will affect the outcome of the case.<sup>[14]</sup> The moving party must demonstrate that no genuine issues of material fact

exist.<sup>[15]</sup> If the moving party is successful, the non-moving party then has the burden of proof to show specific facts are in dispute which have an affect on the outcome of the case.<sup>[16]</sup> It is not sufficient for the non-moving party to rest upon mere averments or denials; it must present specific facts demonstrating a genuine issue for trial.<sup>[17]</sup>

Minnesota law provides that the Commissioner of Commerce may suspend, deny, or revoke a license if he finds that the licensee has engaged in unlawful activity.<sup>[18]</sup> Examples of unlawful activity include the following: fraudulent, deceptive, or dishonest practice;<sup>[19]</sup> financial irresponsibility,<sup>[20]</sup> or judgment has been entered against a licensee for failure to make payments to employees or subcontractors and the time to appeal the judgment has expired or has been exhausted.<sup>[21]</sup> The commissioner may also take disciplinary action if the licensee violates or fails to comply with specific statutory provisions, or violates or fails to comply with any rule or order under those provisions.<sup>[22]</sup> Additionally, the commissioner may take disciplinary action against a license holder if the licensee violates “any law, rule, or order related to the duties and responsibilities entrusted to the commissioner.”<sup>[23]</sup> The Department alleges that Respondent violated Minnesota law when he failed to obtain a building permit for the Salisbury work and failed to satisfy the judgments entered against him.

In his Formal Objection to the Department’s amended Notice, Respondent contends that the amended Notice is procedurally inappropriate. He claims the Department has cited no authority to amend its Notice, and that it only creates “procedural confusion.” Respondent also argues that the Administrative Law Judge should disregard the Department’s reply memorandum submitted in conjunction with its amended Notice. In support of this position, Respondent states that the Department may not submit a reply memorandum because Respondent’s responsive memorandum did not raise new legal or factual matters as required by Rule 115.03 of the General Rules of Practice.<sup>[24]</sup>

Minnesota law allows the Department to amend its Notice in this case. In addition, the Department’s Reply Memorandum in Support of Motion for Summary Disposition is appropriate. Before a case has gone to hearing, an agency may serve an amended notice of and order of hearing as the Department did in this case.<sup>[25]</sup> If an amended notice raises new legal issues or allegations, the parties will be afforded reasonable time to prepare to address these new issues.<sup>[26]</sup> In its amended Notice, the Department dropped the allegation that Respondent was in breach of contract<sup>[27]</sup> and included an allegation that Respondent violated or failed to comply with a rule under certain statutory provisions.<sup>[28]</sup> It is appropriate for the ALJ to consider the Department’s Reply Memorandum in Support of Motion for Summary Disposition because it addresses the new charge added in the amended Notice. Respondent subsequently had an opportunity to respond to and address the Department’s amended Notice and its legal arguments supporting the new charge.

The Department alleges that Respondent violated Minnesota law in his transactions with Ms. Salisbury and Duluth Ready-Mix Concrete. With regard to the Salisbury contract, Respondent failed to obtain a building permit<sup>[29]</sup> and failed to satisfy

a judgment. The Department contends that by failing to satisfy the Salisbury judgment against him, Respondent has demonstrated that he is incompetent, untrustworthy, or financially irresponsible.<sup>[30]</sup> With regard to Duluth Ready-Mix Concrete, Respondent failed to satisfy a judgment.<sup>[31]</sup> The Department contends that this also demonstrates incompetence, untrustworthiness, or financial irresponsibility. Based on these allegations, the Department argues that Respondent's violations of Minnesota laws are grounds for suspension or revocation of Respondent's license, censure of Respondent, or imposition of a civil penalty of up to \$2,000 per violation.<sup>[32]</sup>

1. Allegations of violations with regard to the Salisbury contract

A. Failure to obtain a building permit.

The Department alleges that Respondent's failure to obtain a building permit prior to commencing the work on Ms. Salisbury's home violated Minn. R. 2891.0040, subp. 1(H), three different subsections of Minn. Stat. § 326.91, subd. 1, and Minn. Stat. § 45.027, subd. 7(2). Minn. Stat. § 326.91, subd. 1(2) allows the commissioner to take disciplinary action if a licensee engages in "fraudulent, deceptive, or dishonest practice." Minn. R. 2891.0040, subp. 1(H) states that "acts and practices" considered fraudulent, deceptive, or dishonest practices include "performing any construction without obtaining applicable local building permits and inspections."

Respondent admits that he failed to obtain the appropriate building permit before he commenced the work on Ms. Salisbury's home.<sup>[33]</sup> Respondent also admits that the City of Duluth requires that building permits be obtained prior to commencement of the work performed in this case.<sup>[34]</sup> No specific material facts are in dispute. Respondent contends, however, that he has performed over 500 contracts and the work he did on Ms. Salisbury's home is the only job in which he neglected to obtain a permit prior to commencing the work.<sup>[35]</sup> Also, Respondent provides that when this oversight came to his attention, he immediately obtained the necessary permit.<sup>[36]</sup> Respondent's appeals, however, do not negate the fact that he failed to obtain a building permit prior to commencing the work he contracted to do on Ms. Salisbury's roof in violation of Minnesota laws.

In his Memorandum in Opposition to Summary Disposition, Respondent contends that this single occurrence of neglecting to obtain a building permit prior to commencement of the work does not, and cannot, constitute a "practice" as the term is used in the applicable Minnesota statute.<sup>[37]</sup> Respondent argues that a "practice" is defined as a "repeated or customary action"<sup>[38]</sup> and that under the terms of statutory construction, it must be assumed that this is what the legislature intended as the definition of "practice." Finally, Respondent argues that when an enforcement rule is inconsistent with the clear meaning of the underlying statute, the rule is void to the extent that it is inconsistent with the statute. The Administrative Law Judge, however, is not persuaded by Respondent's arguments.

The Administrative Law Judge finds that the enforcement rule is not inconsistent with the statute. Minn. R. 2891.0040, subp. 1(H) states that for purposes of Minn. Stat.

§ 326.91, subd. 1(2), “the following acts and practices are considered fraudulent, deceptive, or dishonest practices: . . . performing any construction without obtaining applicable local building permits and inspections.” Under the statute, any construction performed without obtaining the applicable building permit is a fraudulent, deceptive, or dishonest practice. Respondent quotes a dictionary definition of “practice” to suggest that the word, as it is used in Minn. Stat. § 326.91, subd. 1(2), must mean a repeated action that is customary or even habitual. A different dictionary, however, defines “practice” as “[t]he act or process of doing something; performance or action.”<sup>[39]</sup> This definition suggests that a practice need not mean a repeated action, but can be one act or process. Notwithstanding dictionary definitions, however, the language of the statute and its enforcing rule are not confusing, unclear, or inconsistent. In this case, the applicable rule provides clarity to the definition of “practice” in a fashion that is not inconsistent with the statute.<sup>[40]</sup>

Minn. Stat. § 326.91, subd. 1(5) allows for disciplinary action if a licensee violates or fails to comply with any rule or order under Minn. Stat. §§ 326.83 to 326.98. The Department notes that Minn. R. 2891.0040 was promulgated pursuant to Minn. Stat. § 45.023, 326.87, and 326.98. Minn. Stat. § 45.027, subd. 7(2) allows the commissioner to take disciplinary action if the licensee violates “any law, rule, or order related to the duties and responsibilities entrusted to the commissioner.”<sup>[41]</sup> As noted above, Respondent admits that he performed construction on Ms. Salisbury’s home without obtaining the necessary building permit. Consequently, Respondent violated Minn. R. 2891.0040, subp. 1(H). Because he violated this rule, Respondent is also found to have violated Minn. Stat. § 326.91, subd. 1(5), and § 45.027, subd. 7(2).

**B. Failure to satisfy judgment against Respondent in favor of Salisbury**

The Department alleges that Respondent violated Minn. Stat. § 326.91, subd. 1(6) because he failed to satisfy the judgment entered against him in Ms. Salisbury favor. Minn. Stat. § 326.91, subd. 1(6) allows disciplinary action if it is demonstrated that a licensee is incompetent, untrustworthy, or financially irresponsible. The Department contends that Respondent’s failure to satisfy Ms. Salisbury’s judgment demonstrates that he is financially irresponsible.

The Department argues that Respondent’s failure to pay the Salisbury judgment demonstrates financial irresponsibility because, in certain situations, Minnesota law allows the commissioner to take disciplinary action against a licensee’s license if he fails to pay a judgment. No rule or statute specifically declares that failure to satisfy a judgment is financial irresponsibility. If judgment is entered against a contractor in favor of a homeowner, however, the aggrieved homeowner may apply to receive payment for the amount of the unpaid judgment out of the contractor’s recovery fund.<sup>[42]</sup> If payment is made out of the contractor’s recovery fund, the commissioner must automatically suspend the licensee’s license. The licensee’s license is suspended until he has paid twice the amount paid from the recovery fund, plus interest at the rate of twelve percent a year, and has obtained a surety bond of at least \$40,000.<sup>[43]</sup> The Department

contends that this action allowed by the commissioner is evidence that a contractor's failure to pay a judgment to a homeowner constitutes financial irresponsibility.

Respondent argues that the Department has cited no persuasive authority in this matter. Specifically, Respondent states that because case law is void of any standard defining financial irresponsibility, no mandatory authority exists entitling the Department to summary disposition. Respondent contends that a failure to satisfy two judgments in a seven-year period does not necessarily demonstrate that he violated the law.

The facts in this case convince the Administrative Law Judge that Respondent's failure to satisfy the judgment entered against him in favor of Ms. Salisbury was financially irresponsible and a violation of Minn. Stat. § 326.91, subd. 1(6). Respondent admits that Ms. Salisbury sued him for the cost of installing a new roof and judgment was entered against him on September 18, 1997 in the amount of \$3,876.50.<sup>[44]</sup> A failure to pay business-related debts due to customers or suppliers is financially irresponsible within the common sense meaning of the term. Additionally, as noted by the Department, an aggrieved homeowner – such as Ms. Salisbury – may apply for payment from the contractor's recovery fund after she has obtained a court judgment. If payment is made from the fund, the commissioner shall suspend the licensee's license until the licensee has paid the appropriate amount back to the fund. This method of financial recovery is intended to protect the public from contractors/licensees who fail to satisfy their debts. The law supports the notion that failing to pay judgments is a serious matter. The law also supports the notion that a licensee's failure to satisfy his judgment may constitute financial irresponsibility.<sup>[45]</sup>

2. Allegations of violations with regard to Duluth Ready Mix Concrete

Respondent admits that summary disposition is appropriate on the Department's allegation that he violated Minnesota law<sup>[46]</sup> by failing to satisfy the judgment entered against him in favor of Duluth Ready Mix Concrete. Consequently, the Administrative Law Judge finds that Respondent violated Minn. Stat. § 326.91, subd. 1(12) for failing to satisfy this judgment against him and all appeals of the judgment have been exhausted or the appeals period has expired.

**G.A.B.**

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<sup>[1]</sup> Affidavit of Philip H.M. Grove, dated March 15, 1999, Ex. A (Contractors Response to Requests for Admissions), No. 1.

<sup>[2]</sup> Id., Nos. 2 and 3.

<sup>[3]</sup> Id., Nos. 4 and 5.

<sup>[4]</sup> Id., No. 6.

<sup>[5]</sup> Id., No. 7.

<sup>[6]</sup> Id., No. 8.

[7] Id., No. 9.

[8] Id., No. 18, and Ex. B (Judgment Certificate).

[9] Id., No. 19.

[10] Id., No. 20, and Ex. B (Judgment Certificate).

[11] Id., No. 22.

[12] Minn. R. 1400.5500 (K).

[13] Id.; Minn. R. Civ. P. 56.03.

[14] Highland Chateau v. Minnesota Dep't of Pub. Welfare, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984) rev. denied, Feb. 6, 1985.

[15] Theile v. Stich, 425 N.W.2d 580, 582 (Minn. 1988).

[16] Highland Chateau v. Minnesota Dep't of Pub. Welfare, 356 N.W.2d at 808.

[17] Minn. R. Civ. P. 56.05.

[18] Minn. Stat. § 326.91, subd. 1.

[19] Minn. Stat. § 326.91, subd. 1(2).

[20] Minn. Stat. § 326.91, subd. 1(6).

[21] Minn. Stat. § 326.91, subd. 1(12).

[22] Minn. Stat. § 326.91, subd. 1(5). The applicable statutory provisions referenced in subdivision 1(5) are Minn. Stat. §§ 326.83 to 326.98.

[23] Minn. Stat. § 45.027, subd. 7(2) (1998).

[24] Minn. R. Civ. P. 56.03 states, in part, that “[s]ervice and filing of the [summary judgment] motion shall comply with the requirements of Rule 115.03 of the General Rules of Practice for the District Courts.” Rule 115.03 (c) of the General Rules of Practice for the District Courts permits the moving party to file a responsive memorandum “limited to new legal or factual matters raised by an opposing party’s response to a motion.”

[25] Minn. R. 1400.5600, subp. 5.

[26] Id.

[27] In its initial Notice of and Order for Hearing, the Department alleged that Respondent violated Minn. Stat. § 326.91, subd. 1(4), which allows disciplinary action to be taken if the licensee performs negligently or is in breach of contract, “so as to cause injury or harm to the public.”

[28] Minn. Stat. § 326.91, subd. 1(6). This statute provides for disciplinary action if the licensee “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.”

[29] Failing to obtain a building permit violates Minn. R. 2891.0040, subp. 1(H). The Department claims that Respondent’s failure to obtain a building permit also violated Minn. Stat. § 326.91, subd. 1(2) and (5) (1998), and Minn. Stat. § 45.027, subd. 7(2).

[30] Demonstrated incompetence, untrustworthiness, or financial irresponsibility is a violation of Minn. Stat. § 326.91, subd. 1(6) (1998).

[31] Failing to make payments owed to a subcontractor, for which all appeals of the judgment have been exhausted or the appeals period has expired violates Minn. Stat. § 326.91, subd. 1(12) (1998).

[32] Grounds for discipline arise under the provisions of Minn. Stat. § 326.91, subd. 1 (1998), and Minn. Stat. § 45.027, subs. 6 and 7 (1998).

[33] Grove Aff. Ex. A, No. 8.

[34] Id., No. 9.

[35] Id., No. 8.

[36] Id., No. 9.

[37] Minn. Stat. § 326.91, subd. 1(2).

[38] Black’s Law Dictionary 1172 (6<sup>th</sup> ed. 1990).

[39] American Heritage College Dictionary 1073 (3<sup>rd</sup> ed. 1997).

[40] The ALJ finds that the language of the statute is clear and that a single act may constitute a practice. In further support of this, the Department cited a few cases in its reply memorandum. In In the Matter of Perron, 437 N.W.2d 92 (Minn. Ct. App. 1989), the court affirmed the commissioner’s decision to discipline the holder of real estate license. The facts in Perron involved a real estate agent who was dishonest to her clients about previous mortgages on a home, the monthly mortgage payments, and the status of her real estate business. In State v. Blackwell, 13 S.E.2d 443 (So. Car. 1941), the court held that a single act of embalming is a practice within the meaning of the applicable statute requiring licensure for the practice of embalming. The third case cited by the Department, State v. Randall, 248 S.W.2d 860 (Mo. 1952),

held that a single act of child molestation may be considered a practice. These three cases cited by the Department may support the notion that a single act may constitute a practice. It is noted, however, that the facts in these cases are more egregious than the case at hand. While Respondent in this case admits that he failed to obtain a building permit prior to commencing the work on Ms. Salisbury's home, he did, eventually, get a permit. Also, there is no indication, nor is there any contention made, that Respondent lied about getting the building permit. These facts may be considered if or when the Department determines the level of discipline to take against Respondent's contractor license.

<sup>[41]</sup> The duties and responsibilities of the commissioner are set forth in Minn. Stat. § 45.011, subds. 1 and 4, and include the provisions listed in Minn. Stat. §§ 326.83 to 326.98. As mentioned above, these statutes allowed for the promulgation of Minn. R. 2891.0040.

<sup>[42]</sup> Minn. Stat. § 326.975, subd. 2(a).

<sup>[43]</sup> Minn. Stat. § 326.975, subd. 1(b).

<sup>[44]</sup> Grove Aff. Ex. A, Nos. 18 and 19.

<sup>[45]</sup> The ALJ notes that Respondent did not claim or contend that his failure to pay this judgment was due to any compelling hardship.

<sup>[46]</sup> The Department alleged that Respondent violated Minn. Stat. § 326.91, subd. 1(12).