

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

In the Matter of the Unlicensed
Residential Building Contractor
Activity of Joseph Penrose,
Individually and doing business as
Mainstreet Kitchen and Bath.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge (“ALJ”) Richard C. Luis on April 18, 2001 at the Office of Administrative Hearings, 100 Washington Square, Minneapolis, Minnesota. The hearing was held pursuant to an Amended Notice of and Order for Rehearing and Statement of Charges, dated February 16, 2001.

Sarah Walter, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2130, appeared on behalf of the Minnesota Department of Commerce (“Department”). Joseph A. Penrose, 8108 35th Avenue North, Crystal Minnesota 55427, appeared on his own behalf. The record closed on April 18, 2001, at the end of the hearing.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after reviewing the record and may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the Commissioner’s decision shall not be made until this Report has been 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 Division, Minnesota Department of Commerce, 85 East Seventh Place, St. Paul, MN 55101, telephone (651) 296-2594, to ascertain the procedure for filing exceptions or presenting argument to the Commissioner.

STATEMENT OF ISSUES

1. Did Mr. Penrose engage in the business of Residential Building Contractor or Residential Remodeler without a license? If so, was this a violation of Minn. Stat. § 326.84, subd. 1, and the Department’s Cease and Desist Order of May 18, 1998?

2. Did Mr. Penrose provide false information to the Department's investigator? If so, was this conduct a violation of Minn. Stat. § 45.027, subd. 3?

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

FINDINGS OF FACT

1. Joseph Penrose ("Mr. Penrose") is not licensed as a residential building contractor in the State of Minnesota pursuant to Minn. Stat. §326.84 (2000). On May 18, 1998, the Department issued a Cease and Desist Order ("the Order") that required Mr. Penrose, both individually and doing business as Mainstreet Kitchen & Bath, to "cease and desist from engaging in the work of a residential building contractor, remodeler, and/or roofer in the State of Minnesota until compliance with Minn. Stat. §§ 326.83-326.991 (1996) is achieved, including licensure pursuant to Minn. Stat. § 326.84 (1996)."^[1] Mr. Penrose did not appeal the Order of the Department.

2. On June 2, 1999, Kenneth Kolvig made an offer to purchase Mainstreet Kitchen and Bath from Mr. Penrose.^[2] Mr. Penrose suggested that Mr. Kolvig open accounts with suppliers in the name of a business begun by Mr. Kolvig, Kolvig Kitchen and Bath, that would then be used by Mr. Penrose and Mainstreet Kitchen and Bath. Mr. Penrose did not explicitly accept Mr. Kolvig's offer to purchase Mainstreet Kitchen and Bath, but implied that the offer would be accepted when some matters had been cleared up.^[3]

3. On June 29, 1999, Brad and Joanne Voves contracted with Mainstreet Kitchen and Bath for a kitchen remodeling project.^[4] Joseph Penrose signed the contract on behalf of Mainstreet Kitchen and Bath. He was the only person who spoke for the business in the negotiations for the contract. The work was to be begun and finished in August, 1999. The work did not begin until October, 1999. The kitchen was gutted and cabinets were installed in October. Additional work was done to the walls and floors, but the kitchen was not completed. Work items not completed were the installation and wiring of custom cabinetry, appliance installation, vent installation, and carpentry finishing work. Water was not restored to the kitchen until December 24, 1999. Joanne Voves took over as the general contractor in January, 2000 and arranged for the work to be completed on the remodeling job.

4. On July 22, 1999, Robert Koenig contracted with Mainstreet Kitchen and Bath for a kitchen remodeling project.^[5] Mr. Penrose signed the contract for Mainstreet Kitchen and Bath. Mr. Koenig discussed the project with Mr. Penrose and was given the impression that Mr. Penrose was the contractor for the remodeling project.^[6] The work was begun, but not completed by Mainstreet Kitchen and Bath.^[7]

5. On September 16, 1999, Mr. Kolvig made a second offer to purchase Mainstreet Kitchen and Bath. Mr. Penrose did not respond to the second offer. On October 17, 1999, Mr. Kolvig withdrew his offer to purchase the business and informed

Mr. Penrose that he no longer had access to supplier accounts on behalf of Mainstreet Kitchen and Bath.^[8]

6. During her remodeling job, Joanne Voves observed Mr. Kolvig working with Mr. Penrose. Mrs. Voves perceived Mr. Kolvig to be an employee of Mr. Penrose, based on their actions. In early November, 1999, Mr. Penrose told Mrs. Voves that Mr. Kolvig had taken substantial amounts of money from Mainstreet Kitchen and Bath.^[9] Based on what she had observed, Mrs. Voves believed that she could assist Mainstreet Kitchen and Bath in putting its books in order and gave Mr. Penrose a job application on November 8, 1999.^[10]

7. Mrs. Voves was hired by Mr. Penrose to begin work as an employee of Mainstreet Kitchen and Bath on November 17, 1999.^[11] On November 30, 1999, Mr. Penrose told Mrs. Voves not to refer to him as the owner of Mainstreet Kitchen and Bath when fielding calls from customers. Many of these calls were from customers who were irate over problems with their remodeling projects. In the course of her work, Mrs. Voves discovered the October 17, 1999 letter from Mr. Kolvig withdrawing his offer to purchase Mainstreet Kitchen and Bath.^[12]

8. On November 15, 1999, the Department received a complaint letter from Kenneth Kolvig asserting that Mr. Penrose was engaging in the work of a contractor without a license.^[13] The complaint was accompanied by an invoice, dated June 29, 1999, issued by Mainstreet Kitchen and Bath to Jane Rundquist.^[14] The invoice charged Ms. Rundquist \$6,814.60 for kitchen and bathroom remodeling work that involved the work of two or more of the specialized skills listed at Minn. Stat. § 326.83, subd. 19.

9. On November 19, 1999, David J. Letourneau, Investigator for the Department, mailed a letter to Mr. Penrose advising him that the Department had received information that he was unlicensed but engaging in residential building contractor work that requires a license. The letter was mailed to Mr. Penrose at 1419 Main Street, Hopkins, Minnesota and included a form to be returned to the Department investigator.^[15]

10. Mr. Penrose responded to the Department by letter dated November 24, 1999.^[16] He indicated that the Order was inappropriately issued to him. He also indicated that he had agreed to sell the business to Gary Knight in July, 1998. When that sale fell through on May 20, 1999, Mr. Penrose stated that he arranged to sell the business to Mr. Kolvig.^[17] Mr. Penrose indicated that Mr. Kolvig “abandoned the business” on October 17, 1999.^[18]

11. On three occasions in November, 1999 Mr. Penrose executed Affidavits of Forgery asserting that Mr. Kolvig had improperly cashed checks that were payable to Mainstreet Kitchen and Bath.^[19] Acting in reliance on those Affidavits, the bank debited the Mainstreet Kitchen and Bath account and credited Mr. Penrose’s personal account. Mr. Kolvig disputed Mr. Penrose’s version of events and the bank escrowed the amount in dispute pending resolution or settlement of the controversy.^[20]

12. Mrs. Voves was not regularly paid by Mainstreet Kitchen and Bath. On December 27, 1999, Mrs. Voves resigned from her job with Mainstreet Kitchen and Bath.^[21]

13. In April, 2000 the Department served a Notice and Order for Hearing on Mr. Penrose by mail. There was no response to the Notice, and on July 5, 2000, a default was entered against Mr. Penrose. On January 3, 2001, the Commissioner of Commerce issued Findings of Fact, Conclusions, and Order regarding the issues in this matter against Mr. Penrose. Subsequently, the Department discovered a different address for Mr. Penrose. The January 3, 2001 Order was vacated to allow Mr. Penrose to appeal.

14. The Department issued an amended Notice of Hearing on February 16, 2001, setting this matter on for hearing on April 18, 2001.

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

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Commerce are authorized to consider the charges against Mr. Penrose under Minn. Stat. §§ 14.50, 45.024, 45.027, subd. 1, and 326.91 (2000).

2. Mr. Penrose received due, proper and timely notice of the charges against him and this matter is properly before the Commissioner and the Administrative Law Judge.

3. The Department has complied with all relevant substantive and procedural legal requirements.

4. Mr. Penrose is a residential remodeler within the meaning of Minn. Stat. § 326.83, subd. 16, and required to be licensed by Minn. Stat. § 326.84, subd. 1.

5. Mr. Penrose was required to be licensed as a residential remodeler under terms of May 18, 1998 Cease and Desist Order issued by the Department before engaging in the work of a residential remodeler.

6. Mr. Penrose violated Minn. Stat. § 326.84, subd. 1, and the May 18, 1998 Cease and Desist Order by engaging in the business of residential remodeling from June, 1999 onward.

7. Minn. Stat. § 45.027, subd. 7(3), prohibits persons from providing false misleading or incomplete information to the Department. Mr. Penrose's claim that he had sold the business was false and known to be false by Mr. Penrose. This conduct is a violation of Minn. Stat. § 45.027, subd. 7(3).

8. Disciplinary action against Mr. Penrose is in the public interest.

9. Any Findings of Fact that are more appropriately described as Conclusions are adopted as Conclusions.

10. This report is subject to review by the Commissioner of Commerce, it is not the final disposition.

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

RECOMMENDATION

IT IS RECOMMENDED that the Commissioner of the Minnesota Department of Commerce take adverse action against Mr. Penrose and/or impose a civil penalty upon him.

Dated this 15th day of May 2001.

/s/ Richard C. Luis

RICHARD C. LUIS

Administrative Law Judge

Reported (three tapes; no transcript prepared).

NOTICE

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

MEMORANDUM

Residential Remodeler License Requirement

Any person must have a license to engage in the business of residential building contractor or residential remodeler.^[22] Minn. Stat. § 326.83, subd. 16, defines "residential remodeler" and states:

Subd. 16. Residential remodeler. "Residential remodeler" means a person in the business of contracting or offering to contract with an owner to improve existing residential real estate by providing two or more special skills as defined in this section.

“Special skills” are defined as excavation, masonry and concrete, carpentry, interior finishing, exterior finishing, drywall and plaster, roofing, and general installation specialties.^[23]

For the Voves, Koenig, and Rundquist projects, Mainstreet Kitchen and Bath contracted to perform carpentry, interior finishing, and drywall and plaster. In addition, plumbing and electrical work was to be performed on those jobs. Mainstreet Kitchen and Bath acted as a residential remodeler for all of these projects. Under Minn. Stat. § 326.84, subd. 1, Mainstreet Kitchen and Bath needed to be licensed to engage in the work that was contracted for and partly performed.

Ownership of Mainstreet Kitchen and Bath

Mr. Penrose does not dispute that Mainstreet Kitchen and Bath was in the residential remodeling business. He asserts that he is not responsible for what Mainstreet Kitchen and Bath was doing, since the business was either sold to another or in the process of being sold. The Department disputes his claims regarding the sale of the business.

There is no evidence in this record that Mr. Penrose actually sold Mainstreet Kitchen and Bath either in 1998 or in 1999. The evidence in the record does show that Mr. Penrose convinced Mr. Kolvig to open a bank account in the name of and to be used by Mainstreet Kitchen and Bath.^[24] The existence of a bank account does not change the actual ownership of a business. The fact that Mr. Penrose was asserting ownership of the funds in that account late in 1999 demonstrates that Mr. Penrose asserted an ownership interest in Mainstreet Kitchen and Bath.^[25]

Even if the efforts to sell Mainstreet Kitchen and Bath were made in good faith (and the evidence in this matter suggests that those efforts were not), there is no “sale pending” exemption to Minn. Stat. § 326.84, subd. 1. The requirement that a residential remodeler be licensed applies when the work is being performed. Similarly, the May 18, 1998 Cease and Desist Order requires licensure before conducting any further business as a residential remodeler. Mr. Penrose performed the work of a residential remodeler without a license and the status of any proposed sale of the business is irrelevant to the statutory licensure requirement.

Mr. Penrose informed the Department that Mainstreet Kitchen and Bath had been sold to Mr. Kolvig and that Mr. Kolvig “abandoned the business” on October 17, 1999. Mr. Penrose was in possession of Mr. Kolvig’s letter of that date withdrawing Mr. Kolvig’s offer to buy Mainstreet Kitchen and Bath. As discussed above, Mr. Penrose asserted that Mr. Kolvig wrongfully exercised control over payments to the business. Mr. Kolvig’s status as a potential purchaser is clear. Mr. Kolvig’s withdrawal of his offer to purchase is unambiguous. At all times relevant to this matter, Mr. Penrose exercised control over Mainstreet Kitchen and Bath. Mr. Penrose falsely told the Department that the business had been sold and he knew the statement to be false.

Performing the work of a residential remodeler without a license is a violation of Minn. Stat. § 326.84, subd. 1. Mr. Penrose violated that statute when he engaged in that work on three projects in 1999. Mr. Penrose provided false information regarding his ownership of the business to the Department and that is a violation of Minn. Stat. § 45.027, subd. 7(3). It is appropriate to sanction these violations.

R.C.L.

^[1] Ex. 4.

^[2] Kenneth Kolvig Testimony. There was additional testimony about a prior effort to sell Mainstreet Kitchen and Bath to another person. Since none of the allegations of unlicensed work relate to that period, there are no findings made concerning the earlier attempt to sell the business.

^[3] Kenneth Kolvig Testimony.

^[4] Joanne Voves Testimony ; Ex. 10 (Substitute copy).

^[5] Ex. 3.

^[6] *Id.*

^[7] Ex. 3.

^[8] Ex. 9.

^[9] Joanne Voves Testimony.

^[10] *Id.*

^[11] Ex. 11.

^[12] Ex. 9.

^[13] Ex. 1.

^[14] Ex. 2.

^[15] Ex. 5.

^[16] Ex. 6.

^[17] Ex. 6.

^[18] *Id.*

^[19] Ex. 12.

^[20] *Id.*

^[21] Voves Testimony.

^[22] Minn. Stat. § 326.84, subd. 1. That statute states:

Subdivision 1. Persons required to be licensed. A person who meets the definition of a residential remodeler as defined in section 326.83, subdivision 16, or a residential building contractor as defined in section 326.83, subdivision 15, must be licensed as a residential building contractor or residential remodeler.

^[23] Minn. Stat. § 326.83, subd. 19. "General installation specialties" are such items as garage door openers and fireplaces. Minn. Stat. § 326.83, subd. 19(h).

^[24] Exhibit 12.

^[25] Mr. Penrose asserted that Mr. Kolvig improperly exercised control over payments coming into the business. If Mr. Kolvig was the owner, Penrose would not have made an issue over what to do with payments made in the form of checks payable to Mainstreet Kitchen and Bath. See Finding 11.