

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

In the Matter of the William Bernier

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

The above matter came on for hearing before Administrative Law Judge Manuel J. Cervantes on December 4, 2009, commencing at 9:30 a.m. at the Office of Administrative Hearings, 600 Robert Street North, St Paul, MN 55164-0620.

Michael J. Tostengard, Assistant Attorney General, appeared on behalf on the Department of Commerce (Department). Respondent did not appear. The hearing record closed when the hearing ended on December 4, 2009.

STATEMENT OF THE ISSUES

Whether the conduct alleged below constitutes one or more of the following grounds for disciplinary action:

1. Engaging in a fraudulent, deceptive or dishonest practice in violation of Minn. Stat. § 82.35, subd. 1(b) (2008);
2. Demonstrating incompetence and untrustworthiness in violation of Minn. Stat. § 82.35, subd. 1(f) (2008);
3. Failing to return \$1,000 earnest money funds after the real estate transaction was cancelled in violation of Minn. Stat. § 82.50, subd. 5(d) (2008);
4. Back-dating the beginning date of a listing agreement in violation of Minn. Stat. § 82.35, subd. 1(b) and (e) (2008);
5. Altering the dates on purchase agreements and listing agreements in violation of Minn. Stat. § 82.35, subd. 1(b) and (e) (2008); and
6. Failing to respond to the Department's investigation in violation of Minn. Stat. § 82.35, subd. 1(e) (2008).

FINDINGS OF FACT

1. Respondent is currently licensed as a real estate broker. In June 2008, the Respondent pled guilty to a misdemeanor offense in Ramsey County District Court for failing to provide a Truth-in-Sale of Housing evaluation report to a residential real estate purchaser. He was sentenced to a \$50 fine and placed on probation for one year.

2. Nine months later, in March 2009, Respondent again pled guilty to failing to have a Truth-in-Sale of Housing evaluation completed within three days of offering a residential property for sale. Because he was still on probation for the prior offense, a \$500 fine was imposed.

3. The Department has also received a complaint from a St. Paul resident, R.U., concerning Respondent's activities as a real estate broker.

4. The Department's investigation revealed that in June 2009, R.U. sold his home to M.K. A \$1,000 earnest money check was tendered by the prospective purchasers to Respondent. The sale, however, did not close and the purchase agreement was cancelled on July 28, 2009. A copy of the cancellation was sent by mail to Respondent with a directive to return the \$1,000 earnest money payment. Respondent, however, failed to return the earnest money.

5. The Department further received a complaint from St. Paul resident O.D. The Department's investigation revealed that O.D.'s home is currently in the redemption period of the foreclosure process. O.D.'s neighbor, A.N., expressed an interest in purchasing O.D.'s home.

6. In June 2009, A.N., represented by Respondent, came to O.D.'s home to enter into a purchase agreement. A.N. made a verbal offer of \$70,000. O.D., however, indicated that he needed \$80,000 to enter into the transaction. Respondent prepared numerous documents and induced O.D. to sign them despite the fact that most of the documents were blank. In particular, the purchase agreement and listing agreement had no sales price entered. O.D. requested copies and, although Respondent said he would send them, he did not. After O.D. repeatedly requested copies of the documents, Respondent provided them and O.D. noticed the \$70,000 sales listing and price in the documents. O.D. also noted that the dates on many of the documents were inconsistent or appeared to have been altered. Additionally, the listing agreement was back-dated to May 2, 2009. O.D. told Respondent that the \$70,000 sales price was insufficient and that he wanted to cancel the transaction. No cancellation agreement was ever executed.

7. Respondent subsequently sued O.D. in conciliation court for the commission, but Respondent failed to appear at the court hearing.

8. On October 15, 2009, the Department ordered Respondent to provide the R.U. and O.D. files, and his trust account records. Respondent failed to produce the documents as ordered.

9. The Department served Respondent with the Notice of and Order for Hearing, Order for Prehearing Conference, and Order to Show Cause on July 30, 2009. Respondent appeared at the prehearing conference through his counsel, Michael C. Black, on September 22, 2009.¹

10. This Order is in the public interest.

CONCLUSIONS

1. The Administrative Law Judge and the Department have jurisdiction pursuant to Minn.Stat. §§ 14.55, 45.027, subd. 7 and 326.91, subd. 1 (2008).

2. Respondent was given notice of the Hearing in this matter and the Department has complied with all relevant procedural requirements.

3. Under Minn. R. 1400.6000, the Respondent is in default as a result of his unexcused failure to appear at the scheduled Hearing.

4. Under Minn. R. 1400.6000, when a party defaults, the allegations and issues set out in the Notice of and Order for Hearing may be taken as true and deemed proven. In this matter, the Administrative Law Judge accepts the allegations and issues as true and are deemed proven without further evidence.

5. Respondent's conduct constitutes grounds for the Department to take disciplinary action against Respondent's license.

Based on the Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED that the Department of Commerce take adverse action against Respondent's license as deemed appropriate.

Dated: December 16, 2009

s/Manuel J. Cervantes

MANUEL J. CERVANTES
Administrative Law Judge

¹ See, ALJ Scheduling Order, dated September 30, 2009. Counsel subsequently withdrew from representation on November 3, 2009.

NOTICES

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 the office of Glenn Wilson, Commissioner, Minnesota Department of Commerce, 85 Seventh Place E., Suite 500, St. Paul, MN 55101, telephone (651) 296-3528, to ascertain the procedure for filing exceptions or presenting argument to the Commissioner.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the negative licensing action, if any, to be imposed. The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Pursuant to Minn. Stat. § 14.62, subd. 1 (2006), the Commissioner is required to serve his final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

Respondent failed to appear at the scheduled Hearing without justification or prior approval. The facts alleged in the underlying pleading are taken as true and are deemed proven without further evidence. The uncontroverted facts reasonably support discipline against Respondent's real estate broker license.

M. J. C.