

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

In the Matter of the Real Estate Broker
License of Daniel Rohricht, License No.
665005

FINDINGS OF FACT,

CONCLUSIONS AND RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde commencing at 9:30 a.m. on Friday, March 3, 1995 at the Office of Administrative Hearings in Minneapolis, Minnesota. The hearing was held pursuant to a Notice of and Order for Hearing and Order to Show Cause dated January 9, 1995.

Philip H. M. Grove, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Minnesota Department of Commerce (Department). Edward F. Kautzer, Ruvelson & Kautzer, Chtd., Attorneys at Law, Suite 510, Spruce Tree Centre, 1600 University Avenue West, St. Paul, Minnesota 55104-3829, appeared on behalf of the Respondent, Daniel Rohricht, who was present at the hearing. The record closed on April 3, 1995, when the last brief was filed.

NOTICE

Notice is hereby given that, 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, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with the James E. Ulland, Commissioner, Minnesota Department of Commerce, 133 East 7th Street, St. Paul, Minnesota 55101, telephone (612) 296-6694.

STATEMENT OF ISSUE

The issue in this case is whether the Respondent misrepresented to the United States Department of Housing and Urban Development (HUD) that he held earnest money in his trust account on behalf of a buyer for whom Respondent submitted a sales contract offering to purchase a HUD property; and if so, whether disciplinary action should be taken against him.

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

FINDINGS OF FACT

1. Respondent, Daniel M. Rohricht, has been licensed by the Department as a real estate broker since November 15, 1985. Respondent conducts his business at his home. He has no employees. Respondent, who generally operates as a buyer's broker, is not required to maintain a broker's trust account under Minn. Stat. § 82.24. He obtained a waiver of that requirement from the Department. Ex. 2. Due to the waiver, Respondent cannot hold client money in trust.

2. Clifford G. Lee is Respondent's personal friend. Late in 1993, Lee was looking for a home. He was interested in purchasing one from HUD. With Respondent's help, Lee found a HUD home he wanted to buy. It was located at 1041 Jessie Street in St. Paul.

3. The first sales contract Rohricht submitted to HUD offering to purchase the Jessie Street property was rejected by HUD as incomplete. On December 20, 1993 a second sales contract was completed. It was submitted to HUD in mid-January 1994 and was accepted by a HUD realty specialist on January 25, 1994. Ex. 1.

4. The second sales contract submitted to HUD stated that Lee had paid \$1,000 earnest money to Rohricht and that the earnest money would be held in Rohricht's trust account. Ex. 1. This information was untrue. Rohricht did not have a trust account and did not have Lee's \$1,000.00 earnest money in a trust account. In fact, Lee never paid any money to Rohricht to be held as earnest money for the purchase of the Jessie Street property.

5. The sales contract Respondent signed contained a "Certification of Broker" stating, among other things, that he was in compliance with HUD's earnest money policy as set forth in an Agreement to Abide executed on December 20, 1993. Id. On December 20, 1993, Respondent also signed a "Disclosure to Bidders on HUD properties (Addendum to HUD-9548)" wherein Respondent acknowledged that he would be representing HUD and the bidder (Lee) in the sales of the Jessie Street property. That document also contained the following provisions:

As HUD's representative the above-named Broker is responsible for adhering to HUD's policies throughout the sales process and after the closing has occurred. This includes following HUD's direction concerning disposition of earnest money and providing to HUD any information concerning non-compliance with HUD's policies by the bidder/purchaser.

* * *

The broker and its salespersons will disclose to both parties all information of which they are aware that either party will not perform in accordance with the terms of the purchase agreement or other HUD policies governing purchasing, closing, and occupancy.

Ex. 1, p. 3.

6. Under HUD's policies regarding the sale of property eligible for FHA insurance, all earnest money held by a broker, less a \$50.00 cancellation fee, is returnable to a buyer who is unable to obtain financing and who submits a timely cancellation agreement to HUD. A cancellation agreement is timely if it is received and approved by HUD before the HUD-established closing deadline. Ex. 5.

7. After Lee's sales contract was submitted to and approved by HUD, Lee sought financing from two mortgage bankers: CTX and Pacific Mortgage Co. Due to financing problems he encountered, Lee obtained five, 15-day extensions of HUD's initial closing deadline at a cost of \$150.00 each. In May, 1994, after his efforts to obtain financing proved unsuccessful, Lee backed out of the HUD purchase. He did not submit a cancellation agreement to HUD prior to or after the last closing deadline in May, 1994.

8. On May 17, 1994, HUD's closing agent, National Title Resources Corp., sent a letter demanding that Rohricht remit the \$1,000.00 ostensibly held in his trust account by May 27, 1994. Ex. 3. Rohricht did not respond to the letter or telephone messages from National Title. Consequently, a second demand letter was sent to

Rohricht on June 3, 1994. Rohricht did not respond to National Title and has not yet paid National Title the \$1,000.00 earnest money deposit demanded.

9. HUD would not have accepted Lee's sales contract if it had known that Rohricht did not have Lee's earnest money in his trust account.

10. The false and misleading information Rohricht gave to HUD regarding Lee's earnest money was not due to mistake or inadvertence but was knowingly done to enable Rohricht to represent Lee without establishing a trust account so that Lee would not have to pay any commissions. Rohricht had agreed not to keep any commissions on the sale and to give them to Lee.

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

CONCLUSIONS

1. The Commissioner of Commerce and the Administrative Law Judge have statutory authority to consider the charges against Respondent and the Commissioner is authorized to take disciplinary action for any statutory violations which occurred under Minn. Stat. § 14.50, 45.027, and 82.27 (1994).

2. Respondent received proper and timely notice of the hearing and the charges against him.

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

4. Under Minn. Rules Pt. 1400.7300, subp. 5 (1993), the Department has the burden of proof to establish by a preponderance of the evidence that Respondent committed the violations charged.

5. Under Minn. Stat. § 82.27, subd. 1(b), the Commissioner may take disciplinary action against a real estate broker who "has engaged in a fraudulent, deceptive or dishonest practice", if disciplinary action is in the public interest. Under Minn. Stat. § 45.027, subd. 6, the Commissioner also has authority to impose a civil penalty not to exceed \$2,000.00 per violation upon a broker who has violated Chapter 82.

6. Under Minn. Rules Pt. 2805.2000, subpt. 1I. (1993) it is a fraudulent, deceptive or dishonest practice to “make any material representation or permit or allow another to make any material representation.”

7. Under Minn. Rules Pt. 2805.2000, subpt. 1J. (1993), it is fraudulent, deceptive and dishonest practice “to make any false or misleading statements, or permit or allow another to make any false or misleading statements, of a character likely to influence, persuade, or induce the consummation of a transaction contemplated by Minnesota Statutes chapter 82.”

8. Under Minn. Stat. §§ 82.27, subd. 1 (e) and (f) the Commissioner may take adverse action against a real estate broker who violates any rule under chapter 82 or who is shown to be untrustworthy or financially irresponsible.

9. Respondent made material misrepresentations and false statements to HUD in violation of Minn. Rules Pt. 2805.2000, subpt. 1I. and J. (1993).

10. As a consequence of Conclusion No. 8, Respondent violated Minn. Stat. § 82.27, subd.1(b) (1993 Supp.) and (e) (1992).

11. Respondent’s statutory and rule violations, coupled with his failure to remit moneys owed to HUD, show that Respondent is untrustworthy and financially irresponsible for purposes of Minn. Stat. § 82.27, subd. 1(f) (1993 Supp.).

12. As a consequence of Conclusions 8, 9, 10 and 11, the Commissioner is authorized to take disciplinary action against the Respondent and impose a penalty not exceeding \$2,000.00 under Minn. Stat. §§45.027, subds. 6 and 7 and 82.27, subd. 1.

13. Disciplinary action is in the public interest.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner take disciplinary action against the Respondent consistent with the seriousness of his violations.

Dated this _____ day of April, 1995

JON L. LUNDE

Reported: Taped, 2 tapes

NOTICE

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

MEMORANDUM

The Department alleges that Respondent made material misrepresentations and false statements to HUD when he represented to HUD that he had received earnest money from a prospective purchaser and deposited that money in his broker's trust account. It is alleged that the Respondent's misrepresentations violated Minn. Rules Pts. 2805.2000, subpt. 1I. and J. (1993) and Minn. Stat. § 82.27, subd. 1(b) (e), and (f) :(1993 Supp).

Under Minn. Stat. §82.27, subd. 1, the Commissioner is authorized to take adverse action against real estate brokers for statutory violations. The statute states, in part:

The commissioner may by order deny, suspend or revoke any license or may censure a licensee if the commissioner finds (1) that the order is in the public interest, and (2) that the applicant or licensee or, in the case of a broker, any officer, director, partner, employee or agent or any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker or closing agent or controlled by the broker or closing agent:

* * * *

(b) has engaged in a fraudulent, deceptive, or dishonest practice;

* * * *

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

(f) has, in the conduct of the licensee's affairs under the license, been shown to be incompetent, untrustworthy, or financially irresponsible.

The statutory violations are based, for the most part, on violations of Minn. Rules Pt. 2805.2000. The Rule states, in pertinent part, as follows:

PROHIBITIONS. For the purposes of Minnesota Statutes, section 82.27, subdivision 1, clause (b), the following acts and practices constitute fraudulent, deceptive, or dishonest practices:

* * * *

I. make any material misrepresentation or permit or allow another to make any material misrepresentation;

J. make any false or misleading statements, or permit or allow another to make any false or misleading statements, of a character likely to influence, persuade, or induce the consummation of a transaction contemplated by Minnesota Statutes, chapter 82 * * *.

Under Minn. Stat. § 45.027, subd. 7, the Commissioner also has authority by order, to deny, suspend or revoke the authority or license of a real estate broker, or censure the broker if the Commissioner finds that such an order is in the public interest or the person has violated chapter 82. Furthermore, under Minn. Stat. § 45.027, subd. 6, the Commissioner may impose a civil penalty not exceeding \$2,000.00 per violation on a broker who violates any provision of Chapter 82.

Under Minn. Rules Pt. 2805.2000, subpt. 1 I and J, disciplinary action can be taken against a broker for misleading statements and material misrepresentations. Respondent argued that he made no misleading statements or material misrepresentations. He stated that he informed the mortgage companies -- CTX and Pacific -- that he had no trust account. It was stipulated that the two mortgage companies knew that Respondent did not have any earnest money in his trust account, required Lee to deposit his earnest money in a bank account, and verified that the deposit was made. Because the mortgage companies knew that there was no earnest money in Respondent's trust account, their willingness to proceed with the mortgage lending application process shows, in Respondent's view, that his statements to HUD were immaterial and not "misrepresentative." Those arguments lack merit.

In Matter of Sentry Ins. Payback P. Filing, 447 N.W.2d 454, 457 (Minn. Ct. App. 1989), the Minnesota Court of Appeals discussed the meaning of the word “misleading” as used in a statute relating to the disapproval of insurance policies. The Court stated in part:

Neither this court nor the Minnesota Supreme Court has interpreted the meaning of “misleading” as used in Minn. Stat. § 70A.06, subd. 2 (1988). The dictionary definition adopted by the ALJ is “to lead into a wrong direction or into a mistaken action or belief.” Webster’s Third New International Dictionary, 1444 (1971). Other jurisdictions have defined “misleading” in the regulatory context. Statements are misleading if they “tend to lead astray or into error, without any specific intent to deceive.” People v. Wahl, 39 Cal.App.2d Supp. 771, 773, 100 P. 2d 550, 551 (1940) (false advertising statute). The determination of whether a statement is misleading is based on the overall impression created by the statement. See American Home Products Corp. v. Johnson & Johnson, 654 F. Supp. 568, 590 (S.D.N.Y. 1987). The total impact may be deceptive or misleading even though the statement is technically not false. U.S. v. One Device, More or Less, Ellis Micro-Dynameter, 224 F. Supp. 265, 268 (E.D.PA. 1963).

In Matter of Insurance Agents’ Licenses of Kane, 473 N.W.2d 869, 877 (Minn. Ct. App. 1991), which involved misrepresentation and false statements, the court cited its discussion of the word “misleading” in Sentry with approval and stated further that:

While we conclude neither intent nor willfulness is an essential element of these statutes, we believe that some element of scienter is required. However, we conclude the extent of culpability is relevant only to the extent of sanctions to be considered by the Commissioner.

The fact that the two mortgage companies Lee contacted for financing apparently were aware that Respondent did not hold any earnest money of Lee’s in his trust account is not material. Respondent was charged for making misleading statements to HUD, not the two mortgage companies. Mortgage companies would not generally care whether a buyer’s earnest money deposit had been properly made because earnest money is required for the benefit of the seller. The record shows that HUD was interested in having each prospective buyers earnest money deposited in a broker’s trust account. This interest is reflected in documents HUD used and HUD’s policies. Under HUD’s policies, no sales contracts are approved unless the broker

certifies that the buyer's earnest money has been deposited in the broker's trust account. Respondent's statement to HUD that \$1,000.00 had been deposited in his trust account as earnest money for Lee's purchase of a HUD property was, therefore, false and misleading. Although the two lenders Lee consulted may have been aware that the sales contract submitted to HUD contained false information in that regard, HUD had already been misled and the mortgage companies were not its agents. Respondent never told HUD or any of its agents, such as National Title, that the representations made in the sales contract regarding the earnest money deposit were false.

Respondent also argued that the false information in the sales contract regarding the deposit of Lee's earnest money in Respondent's trust account was not a material misrepresentation for purposes of the Department's rule. That argument also lacks merit. In a civil fraud case, the Minnesota Court of Appeals held that a "statement of fact is material if it would naturally affect the conduct of the party addressed." Yost v. Millhouse, 373 N.W.2d 826, 830 (Minn. Ct. App. 1985), citing Griffin v. Farrier, 32 Minn. 474, 21 N.W. 533 (1884). The false information provided to HUD in the sales contract regarding the earnest money deposit to Respondent's trust account was a material misrepresentation because it affected HUD's conduct. Had HUD known that the information provided on the sales contract was false, the contract never would have been accepted.

Respondent argued that this matter is distinguishable from the situation in Matter of Perron, 437 N.W.2d 92 (Minn. Ct. App. 1989). In Perron, the court found that a real estate salesperson, in connection with the sale of her own home, engaged in fraudulent misrepresentations in connection with the sale when she withheld information regarding existing mortgages on her home and misrepresented that the purchaser's payments under their contract for deed would cover total monthly payments due on the mortgages when, in fact, the mortgage payments were substantially higher and the licensee did not have financial resources to cover them. In this case, Respondent argued that his conduct was a mere "miscommunication about a bookkeeping procedure." He argued that no substantial rights were affected and that the failure of

the parties to close HUD's sale of the home to Lee had nothing to do with the earnest money issue. In Respondent's view, the record contains no evidence showing that Respondent's misrepresentation detrimentally affected any of the parties. Those arguments must be rejected.

Respondent's statement that he had deposited Lee's earnest money in his broker's trust account was not a mere "miscommunication about a bookkeeping procedure" it was, on the contrary, a falsehood which was material to HUD. Furthermore, the false information detrimentally affected HUD because it prevented HUD from recovering the earnest money deposit it would otherwise have been entitled to receive. Although the mortgage companies were not induced to act based on Respondent's representations and did not rely on them and were not damaged because of them, the same cannot be said of HUD, and it is the misrepresentations made to HUD and not the mortgage companies which are at issue in this case. Respondent argued that his failure to have earnest money in a trust account for Lee does not affect any of the rights of the parties and can be remedied by giving a check to HUD for the forfeited earnest money. However, Respondent has never offered to pay HUD the sums it is entitled to receive from him.

Respondent also suggested that the Department failed to establish all the elements of fraud. It is highly questionable that the Department is required to establish the elements of fraud cited in Perron and in Davis v. Re-Trac Manufacturing Corp., 276 Minn. 116, 117, 149 N.W.2d 37, 38 - 39 (1967). In Perron the Court listed the following elements of fraud: (1) a representation; (2) that is false; (3) having to do with a past or present fact; (4) that is material; (5) and susceptible of knowledge; (6) known to be false or asserted as of his or [her] own knowledge without knowing its truth or falsity; (7) made with an intent to induce the other person to act; (8) actual inducement; (9) action in reliance on the representation; (10) damage; and (11) causation.

Assuming all 11 elements must be established, they were persuasively established by the Department in this case. Respondent made a false representation that he held \$1,000.00 of the prospective buyer's earnest money in his trust account. That was a material misstatement because HUD would not have accepted the contract if the money was not on deposit in his trust account and the representation was

susceptible of Respondent's knowledge and known to be false. Furthermore, the Administrative Law Judge is persuaded that the misrepresentation made to HUD was made to induce HUD's approval of the purchase agreement, that HUD was induced by the statement and approved the purchase agreement in reliance on the misrepresentation. Further, HUD was damaged by the misrepresentation when Lee was unable to obtain financing and Respondent was unable and unwilling to remit the deposit he should have had in his trust account to HUD. As a result, HUD lost the earnest money otherwise payable to it. All the elements of fraud were, therefore, persuasively established. The fact that Respondent had a waiver of the trust account requirements is immaterial. Although Respondent mentioned that fact several times, the fact that Respondent was unable to accept money for deposit in his trust account, because he was not required to have one, did not authorize him to represent to HUD that he had deposited Lee's money in his trust account.

Finally, Respondent argued that he was not required to deposit Lee's earnest money in a trust account before the sales contract was submitted to HUD for approval. He noted that the broker guide in effect in March, 1993, did not contain mandatory language requiring that earnest money be placed in HUD's trust fund account. That factor is immaterial for purposes of finding a violation. First, there is no evidence that Respondent looked at the broker's guide (§ 5) before the contract was submitted for approval or understood that he was not required to place funds in his trust account. In fact, Respondent testified that he understood that the sales contract was required to contain language stating that the earnest money deposit must be held in his trust account. He completed the sales contract accordingly to meet, what he thought, was a mandatory obligation. He misrepresented to HUD that Lee's earnest money had been deposited in his trust account. At the time he made that misrepresentation, he understood that the deposit to his trust account was a requirement. Therefore, the fact that the broker guide did not use mandatory language regarding Respondent's obligation to make the trust account deposit is irrelevant.

The courts have upheld disciplinary action for false statements about earnest money in purchase agreements. Grubaugh v. State ex rel. State Real Estate Commission, 202 Neb. 75, 273 N.W.2d 673 (1979) (preparing sales contracts showing

earnest money payments which had not been made or made by checks drawn on accounts having insufficient or no balances); Johnson v. State ex rel. State Real Estate Com'n., 202 Neb. 182, 274 N.W.2d 536 (1979) (false documents submitted to loan company showing that a \$2,000.00 earnest money deposit had been received). Similarly, disciplinary action has been upheld when real estate brokers fail to make required escrow deposits. Hughes v. White, 5 Mich. App. 666, 147 N.W.2d 710 (Mich. App. 1967). See generally, 12 C.J.S., Brokers, § 22 n. 52. Based on these holdings it is concluded that Respondent's violations were not de minimus and that some disciplinary action is in the public interest.