

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Administrative Order
Issued to Collin Myrlie, Individually, and
d/b/a M3 Construction and M3 Roofs

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

The above-entitled matter came before Administrative Law Judge Jeanne M. Cochran for an evidentiary hearing on April 24, 2014 at the Office of Administrative Hearings. The record closed on that day at the conclusion of the hearing.

Christopher M. Kaisershot, Assistant Attorney General, appeared on behalf of the Minnesota Department of Labor and Industry (Department). There was no appearance by, or on behalf of, Collin Myrlie, individually and d/b/a as M3 Construction and M3 Roofs (Respondent).

STATEMENT OF THE ISSUES

1. Whether the Respondent acted or held himself out as a residential building contractor, residential remodeler, or residential roofer without having a license issued by the Department in violation of Minn. Stat. § 326B.805, subs. 1 and 3?
2. Whether the Respondent engaged in fraudulent, deceptive, or dishonest practices by waiving the insurance deductible for roofing work performed for a Rosemount homeowner in violation of Minn. Stat. § 325E.66?
3. Whether the Administrative Order with Penalty should be affirmed?

SUMMARY OF RECOMMENDATION

Based on the evidence in the hearing record, the Administrative Law Judge concludes that the Respondent failed to comply with the applicable legal requirements and recommends that the Administrative Order with Penalty be **AFFIRMED**.

FINDINGS OF FACT

1. The Respondent is not now, and never has been, licensed by the Department as a residential building contractor, residential remodeler, or residential roofer.¹

2. On August 15, 2013, the Minnesota Department of Labor and Industry opened an investigation of the Respondent based on questions posed by a representative of the Minnesota Better Business Bureau concerning the residential building contractor, remodeler, or roofer license status of the Respondent.²

3. The Investigation included a review of the Respondent's website (www.m3roofs.com).³ The website states that the Respondent will do free inspections of residential and commercial property, and will provide instruction on filing and managing of insurance claims. The website also states that the Respondent works "with all insurance companies, so there is little to no out-of-pocket expense to you. In fact, you may end up with extra money left over after the work is completed." The website includes a testimonial from a homeowner in Rosemount, Minnesota, stating that his entire roof was replaced by M3 Construction and that his deductible was covered by the warranty claim.⁴

4. Dan Cunningham, a Senior Investigator with the Department, was able to identify the location of the Rosemount home where the Respondent had done work based on information on the website.⁵ Mr. Cunningham also determined that Krech Exteriors had obtained a building permit for roofing work performed on the home.⁶

5. Greg Wallace, co-owner of Krech Exteriors, informed Mr. Cunningham that Krech Exteriors had performed roofing work on the Rosemount home as a subcontractor for the Respondent.⁷ Krech Exteriors is a licensed Minnesota residential building contractor. Krech Exteriors did not have a contract with the Rosemount homeowner. Krech Exteriors pulled the building permit as a subcontractor at the request of M3 Construction.⁸

6. Krech Exteriors also performed roofing work and obtained permits for the Respondent on five other residential roofing jobs in 2012.⁹

7. On August 19, 2013, the Department sent a letter to the Respondent notifying him that the Department had opened an investigation of his business based on

¹ Testimony (Test.) of Dan Cunningham, Senior Investigator, Department of Labor and Industry.

² *Id.*; Exhibit (Ex.) 1.

³ Test. of D. Cunningham.

⁴ Ex. 2. Test. of D. Cunningham.

⁵ Test. of D. Cunningham.

⁶ *Id.*; see also, Ex. 4.

⁷ Test. of Greg Wallace; Exs.4- 6.

⁸ *Id.*; Ex. 6.

⁹ *Id.*; Ex. 7.

information contained on the Respondent's website offering to perform work for which a residential building contractor, remodeler, or roofer license is required. The letter asked the Respondent to: 1) provide his license number as a residential building contractor, remodeler, or roofer in Minnesota; 2) explain his connection to Krech Exteriors; 3) provide a copy of his contract to perform work at the Rosemount home featured on his website; 4) explain whether he is currently pursuing licensure in Minnesota as a residential building contractor, remodeler, or roofer; and 5) provide other related information.¹⁰ The letter requested a written response by September 3, 2013, and advised the Respondent that a failure to respond within the time specified constitutes a violation of Minn. Stat. § 326B.082, subd. 2(b).¹¹

8. The Respondent did not provide a written response to the Department's letter of August 19, 2013. Investigator Cunningham did speak with the Respondent on the telephone about the letter. The Respondent told Mr. Cunningham that he did not believe he needed a license from the Department because he subcontracted out the work on the Rosemount home to a licensed contractor, Krech Exteriors. Mr. Cunningham informed the Respondent that he needed a license even if he hired a subcontractor with a license because he was acting as a residential building contractor, remodeler, or roofer when he contracted with the homeowner for the roofing work. The Respondent then told Mr. Cunningham that he would apply for a license with the Department. As of the date of the hearing, the Respondent had not done so.¹²

9. Mr. Cunningham spoke with the Respondent approximately two to three times on the telephone over the course of his investigation. During those conversations, the Respondent never denied that the unlicensed activity occurred. In fact, he admitted that it occurred.¹³

Procedural History

10. On November 18, 2013, the Department issued an Administrative Order with Penalty (Order) to the Respondent based on the results of its investigation. The Order concludes that the Respondent violated Minnesota law when he acted or held himself out as a residential building contractor, residential remodeler, or residential roofer without having a license. The Order also concludes that the Respondent engaged in fraudulent, deceptive, or dishonest practices by waiving the insurance deductible for roofing work performed for a Rosemount homeowner in violation of Minn. Stat. § 325E.66.

11. The Order imposed a penalty of \$11,000 and ordered the Respondent to "cease and desist" from violating the laws cited in the Order.¹⁴ The penalty amount in the Order was calculated in accordance with the Department's penalty guidelines.¹⁵

¹⁰ Ex. 3; Test. of D. Cunningham.

¹¹ *Id.*

¹² Test. of D. Cunningham.

¹³ *Id.*

¹⁴ Ex. 8.

¹⁵ Test. of D. Cunningham.

12. On December 16, 2013, the Respondent sent an e-mail to Mr. Cunningham stating that he had received Mr. Cunningham's letter that day and stating that he wished to contest the Order.¹⁶ The Department considered the Respondent's e-mail to constitute a request for a contested case hearing pursuant to Minn. Stat. § 326B.082, subd. 8.¹⁷

13. On January 29, 2014, the Department issued its Notice and Order for Prehearing Conference (Notice and Order) in this matter setting a prehearing conference for March 3, 2014, at 3:30 p.m., at the Office of Administrative Hearings. The Notice and Order provides, in part, that:

Respondent's failure to appear at the prehearing conference, settlement conference, or *hearing* may result in a finding that the Respondent is in default, that the allegations contained in this Notice and Order for Prehearing Conference and Hearing may be accepted as true, and its proposed action may be upheld.¹⁸

14. In addition, the Notice and Order states:

If the Administrative Law Judge makes a finding that the hearing was requested solely for purposes of delay or that the hearing request was frivolous, the Commissioner may add to the amount of the penalty the costs charged to the Department by the Office of Administrative Hearings for the hearing.¹⁹

15. The Notice and Order was served on Collin Myrlie on January 30, 2014.²⁰

16. In accordance with the Notice and Order, a prehearing hearing conference was held on March 3, 2014. Collin Myrlie attended the prehearing conference for the Respondent. Christopher Kaisershot, Assistant Attorney General, attended the prehearing conference for the Department.

17. At the prehearing conference, the parties agreed to hold the evidentiary hearing on April 24, 2014, at the Office of Administrative Hearings. The parties also agreed to start the hearing at 9:00 a.m. to accommodate Mr. Myrlie's schedule.²¹

¹⁶ Ex. 9; Test. of D. Cunningham.

¹⁷ Test. of D. Cunningham; Ex. 9.

¹⁸ Notice and Order for Prehearing Conference at 3 (January 29, 2014) (emphasis added).

¹⁹ *Id.* at 5.

²⁰ Affidavit (Aff.) of Ann Kirilin (January 30, 2014) (attached to the Notice and Order for Prehearing Conference).

²¹ Recording of March 3, 2014 Prehearing Conference.

18. A prehearing order was served on the parties, which specified that the evidentiary hearing would take place on April 24, 2014, beginning at 9:00 a.m., at the Office of Administrative Hearings.²²

19. An evidentiary hearing was held as scheduled on April 24, 2014. The Respondent was given sufficient time to appear, but there was no appearance by the Respondent. The Respondent did not contact the Administrative Law Judge or the Office of Administrative Hearings prior to the hearing to request a continuance or to state that he was unavailable.

20. At the hearing, counsel for the Department requested that the Administrative Law Judge allow the Department's witnesses to testify, even though the Respondent failed to appear, in order to make a record of the facts in the case. The Department's witnesses were allowed to testify.

21. Counsel for the Department also requested that the Administrative Law Judge make a finding that the Respondent requested the hearing solely for purposes of delay or that the hearing request was frivolous. The Administrative Law Judge took the request under advisement.

22. Because Respondent failed to appear at the hearing or to contact the Administrative Law Judge prior to the hearing, the Respondent is in default.

23. Pursuant to Minn. R. 1400.6000, the allegations contained in the Notice and Order for Prehearing Conference are taken as true and incorporated by reference in these Findings of Fact.

Based on these Findings of Fact, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Labor and Industry are authorized to consider the charges against the Respondent under Minn. Stat. § 14.50, and Minn. Stat. §§ 326B.082, 326B.84.

2. The Department has complied with all applicable procedural requirements.

3. The Respondent received timely and proper notice of the April 24, 2014 hearing in this matter.

4. Minn. Stat. § 326B.802, subd. 11, defines "Residential building contractor" as "a person in the business of building residential real estate, or of contracting or offering to contract with an owner to build residential real estate, by providing two or more special skills as defined in this section. A residential building contractor may also contract or offer to contract with an owner to improve existing residential real estate."

²² First Prehearing Order (March 4, 2014).

5. Minn. Stat. § 326B.802, subd. 12, defines “Residential remodeler” as “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.”

6. Minn. Stat. § 326B.802, subd. 14, defines “Residential roofer” as “a person in the business of contracting, or offering to contract with an owner, to complete work on residential real estate in roof coverings, roof sheathing, roof weatherproofing and insulation, and repair of roof systems, but not construction of new roof systems.”

7. Minn. Stat. § 326B.805, subd. 1 provides, in relevant part, that:

A person who meets the definition of a residential building contractor as defined in section 326B.802, subdivision 11, must be licensed as a residential building contractor by the commissioner. A person who meets the definition of a residential remodeler as defined in section 326B.802, subdivision 12, must be licensed by the commissioner as a residential remodeler or residential building contractor. A person who meets the definition of a residential roofer as defined in section 326B.802, subdivision 14, must be licensed by the commissioner as a residential roofer, residential building contractor, or residential remodeler.

8. Minn. Stat. § 326B.805, subd. 3, provides, in relevant part, that no person “required to be licensed by subdivision 1 may act or hold themselves out as a residential building contractor, residential remodeler, [or] residential roofer, ... for compensation without a license issued by the commissioner.”

9. The Respondent violated Minn. Stat. § 326B.805, subds. 1 and 3 when he acted or held himself out as a residential building contractor, residential remodeler, or residential roofer without having a license issued by the Department.

10. Minn. Stat. § 325E.66, subd. 1, provides that:

A residential contractor providing home repair or improvement services to be paid by an insured from the proceeds of a property or casualty insurance policy shall not, as an inducement to the sale or provision of goods or services to an insured, advertise or promise to pay, directly or indirectly, all or part of any applicable insurance deductible or offer to compensate an insured for providing any service to the insured. If a residential contractor violates this section, the insurer to whom the insured tendered the claim shall not be obligated to consider the estimate prepared by the residential contractor.

For purposes of this section, "residential contractor" means a residential roofer, as defined in section 326B.802, subdivision 14; a residential building contractor, as defined in section 326B.802, subdivision 11; and a residential remodeler, as defined in section 326B.802, subdivision 12.

11. Minn. Stat. § 326B.082, subd. 1, provides in relevant part:

The commissioner may enforce all applicable law under this section. The commissioner may use any enforcement provision in this section, including the assessment of monetary penalties, against a person required to have a license, registration, certificate, or permit under the applicable law based on conduct that would provide grounds for action against a licensee, registrant, certificate holder, or permit holder under the applicable law.

12. The Respondent violated Minn. Stat. §§ 325E.66 and 326B.082, subd. 1, when he engaged in fraudulent, deceptive, or dishonest practices by waiving the insurance deductible for roofing work performed for a Rosemount homeowner.

13. Minn. Stat. § 326B.082, subd. 7, provides that the Commissioner may issue an administrative order to any person who the Commissioner determines has committed a violation of the applicable law.

14. An order by the Department taking disciplinary action against the Respondent's license is in the public interest.

15. It is appropriate to affirm the Administrative Order with Penalty issued November 18, 2013, to Respondent.

16. The Respondent's request for a hearing was frivolous because the request was not well grounded in fact or supported by existing law or a good faith extension of existing law.

Based upon these Conclusions of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge recommends that the Administrative Order with Penalty issued on November 18, 2013 be **AFFIRMED**, and the Commissioner consider adding the costs charged to the Department by the Office of Administrative Hearings for the hearing to the amount of the penalty.

Dated: May 8, 2014

s/Jeanne M. Cochran
JEANNE M. COCHRAN
Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared

NOTICE

Pursuant to Minn. Stat. § 326B.082, subd. 8(c), this report is a recommendation, not a final decision. The Commissioner will make a final decision after a review of the record and may adopt, reject, or modify these Findings of Fact, Conclusions, and Recommendation. The Commissioner shall not issue a final order until at least five days after the date of this report. Any person aggrieved by this report may, within those five days, serve written comments on the report. Parties should contact Commissioner Ken Peterson, Attention: Wendy Willson Legge, Director of Legal Services, Minnesota Department of Labor & Industry, 443 Lafayette Road, St. Paul, MN 55155; telephone number: 651-284-5126, 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. 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.

Under 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 or as otherwise provided by law. If the Commissioner fails to issue a final decision within 90 days of the close of the record under Minn. Stat. § 14.61, this Report becomes a final decision.

MEMORANDUM

The Department has requested that the Administrative Law Judge make a finding that the hearing was requested by the Respondent solely for purposes of delay or that the hearing request was frivolous. The Department seeks such a finding to allow the Commissioner to add the costs charged to the Department by the Office of Administrative Hearings for the hearing to the amount of the penalty.²³

The Administrative Law Judge concludes that there is not adequate information in the record to show that the Respondent requested the hearing for purposes of delay. The record, however, demonstrates that the Respondent's request for a hearing was frivolous.

A frivolous claim is one that is without any reasonable basis in law or equity and could not be supported by a good faith argument for a modification or reversal of existing law.²⁴ Minnesota Rules of General Practice 9.06(b)(3) defines "frivolous litigant" to include:

²³ *Id.* at 5 (citing Minn. Stat. § 326B.082, subd. 8(d)).

²⁴ *Maddox v. Department of Human Services*, 400 N.W.2d 136, 139 (Minn. Ct. App. 1987).

A person who institutes and maintains a claim that is not well grounded in fact and not warranted by existing law ... or that is interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigating the claim.

In this case, the law is clear and the facts are not in dispute. Pursuant to Minn. Stat. § 326B.082, subd. 1, a person who contracts or offers to contract with a homeowner to provide roofing work on an existing home must be licensed by the Department as a residential roofer, residential building contractor, or residential remodeler.²⁵ Similarly, Minn. Stat. § 326.082, subd. 3, provides that no person “required to be licensed by subdivision 1 may act or hold themselves out as a residential building contractor, residential remodeler, [or] residential roofer, ... for compensation without a license issued by the commissioner.” The facts in this case clearly establish that the Respondent violated Minn. Stat. § 326.082, subs. 1 and 3, when he contracted with homeowners to provide roofing work on existing homes without a residential roofer, residential building contractor, or residential remodeler license.²⁶

Prior to the Department issuing the Administrative Order with Penalty, the Respondent told Investigator Cunningham that he did not think he needed a license because he hired a licensed subcontractor to do the work. Mr. Cunningham told the Respondent that he misunderstood the law and that a license was required by Minn. Stat. § 326B.805. The Respondent then said he would seek a license. Rather than applying for a license, the Respondent requested a hearing. The Respondent’s request for a hearing, however, was not well grounded in fact, nor warranted by a good faith legal argument. The Respondent’s unlicensed activities clearly violate Minn. Stat. § 326B.805, and the Respondent has presented no argument in this proceeding to the contrary. For these reasons, the Administrative Law Judge concludes that the Respondent’s administrative challenge to violation of Minn. Stat. § 326B.082 is frivolous.

Similarly, the Administrative Law Judge concludes that the Respondent’s challenge to the violation of Minn. Stat. § 325E.66, subd. 1, is frivolous. That statute provides that:

A residential contractor providing home repair or improvement services to be paid by an insured from the proceeds of a property or casualty insurance policy shall not, as an inducement to the sale or provision of goods or services to an insured, advertise or promise to pay, directly or indirectly, all or part of any applicable insurance deductible or offer to compensate an insured for providing any service to the insured. If a residential contractor violates this section, the insurer to whom the insured tendered the claim shall not be obligated to consider the estimate prepared by the residential contractor.

²⁵ Minn. Stat. § 326B.805, subd. 1.

²⁶ Exs. 5-7; Test. of G. Wallace; Test. of D. Cunningham.

For purposes of this section, "residential contractor" means a residential roofer, as defined in section 326B.802, subdivision 14; a residential building contractor, as defined in section 326B.802, subdivision 11; and a residential remodeler, as defined in section 326B.802, subdivision 12.

It is undisputed that the Respondent waived the insurance deductible for roofing work performed for a Rosemount homeowner in violation of this statute.²⁷ Moreover, the Respondent's website advertises that "[w]e work with all insurance companies, so there is little or no out-of-pocket expense to you." This statement, on its face, violates Minn. Stat. § 325E.66, subd. 1, because it is an inducement to the homeowner to contract for roofing services by offering to cover all or part of the insurance deductible. The Respondent has not provided any facts or good faith legal arguments to demonstrate that his position is warranted by existing law or a reasonable extension of existing law.

For these reasons, the Administrative Law Judge concludes that the Administrative Order with Penalty was properly issued and the Respondent's request for a hearing was frivolous.

J. M. C.

²⁷ Ex. 2.