

BEFORE THE IOWA REAL ESTATE COMMISSION
1918 S.E. Hulsizer Avenue
Ankeny, Iowa

IN RE:)	CASE NO. 91-023
)	DIA NO. 93DOCRE-8
MICHAEL LAMPHIER (S24836))	
2511 ELLIS VIEW COURT NW)	
CEDAR RAPIDS, IOWA 52404,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Respondent)	DECISION AND ORDER

On January 28, 1993, the Iowa Real Estate Commission (hereinafter Commission) filed a Complaint against Michael A. Lamphier, a licensed Iowa salesperson (hereinafter Respondent). The Complaint alleged specific acts or omissions and alleged these acts or omissions constituted violations of Iowa Code sections 117.29(2), (3), 117.34(1), (4), (7), and (8), 117.46(1), 117.55 and 193E IAC 1.27(1), 1.37, 1.37(1), (5)(a), 2.16, and 4.40(6)(i), (14).

On July 8, 1993, the Respondent filed his Answer. The hearing was continued at the request of the State.

On August 19, 1993, at 9:30 a.m. the Commission conducted the hearing to determine whether disciplinary action should be imposed against the Iowa salesperson's license of Respondent.

The following members of the Commission were present for the hearing and participated in making the decision: Jack Knapp, Jerry Duggan, Marlys Nielsen, and Theresa Loffredo. The State was represented by Sherie Barnett, Assistant Attorney General. The Respondent did not appear, nor was he represented by counsel. Margaret LaMarche, Administrative Law Judge from the Iowa Department of Inspections and Appeals, presided.

A court reporter was present and recorded the proceedings. The hearing was also tape recorded by the administrative law judge. The hearing was open to the public. The State's oral motion to amend the complaint was granted. The date in Count I was amended to read April 15, 1991. Count II was amended to include two Administrative Code sections: 193E IAC 2.16 and 4.40(14). The Commission convened in closed session, pursuant to Iowa Code sections 21.5(1)(f), to deliberate its decision.

On August 31, 1993, the Respondent filed Motions for Rehearing and to reopen the record. On September 8, 1993, the State filed its Responses. On October 22, 1993, the Commission issued an Order reopening the record for the limited purpose of accepting the affidavits of Gregory Gritton, Nadine Speer, and Michael Lamphier. On November 10, 1993, the State filed a Motion to Conform the Statement of Charges to the Evidence and submitted State's Exhibit 8, as rebuttal evidence.

The Commission met on December 16, 1993 to consider the additional evidence and instructed the Administrative Law Judge to prepare the Findings of Fact, Conclusions of Law, Decision and Order. The Commission granted the State's Motion to Conform the Statement of Charges to the Evidence.

FINDINGS OF FACT

The Iowa Real Estate Commission finds as follows:

1. The Commission has jurisdiction of this matter under Iowa Code Chapters 17A, 272C, and 543B (formerly 117B), as well as the administrative rules found in Chapter 193E of the Iowa Administrative Code.
2. The Respondent has been at all times relevant to the matters contained herein licensed as an Iowa real estate salesperson. His license number is S24836.
3. The Respondent was licensed with Ted G. Nelson, Broker, located at 1300 Memorial Drive, S.E., Cedar Rapids, Iowa, from March 7, 1991, to April 26, 1991. (testimony of Ted G. Nelson)
4. On April 15, 1991, Respondent listed the property located at 7525 Normandy Drive, N.E., Cedar Rapids, Iowa, for \$127,000.00, John and Nancy Baumhoefener, owners. (testimony of Roger Hansen, Nelson; State's Exhibit 1; Affidavit of Respondent)
5. Respondent did not submit the April 15, 1991 Baumhoefener listing to his broker, Ted G. Nelson. (testimony of Nelson)
6. On April 17, 1991, Respondent drafted an offer to purchase agreement with Gregory and Elizabeth Gritton, buyers, on the Baumhoefener property located at 7525 Normandy Drive, N.E., Cedar Rapids, Iowa, for \$80,000.00 with \$500.00 earnest money accompanying the signed offer. (State's Exhibit 2; Affidavits of Respondent, Gregory Gritton)
7. On April 17, 1991, John and Nancy Baumhoefener accepted the offer from Gregory and Nancy Gritton, subject to RTC Mortgage Company approval. (State's Exhibit 2)
8. Respondent failed to inform Broker Ted G. Nelson of the Offer to Purchase. (testimony of Nelson)
9. Respondent failed to turn the \$500.00 earnest money over to Broker Ted G. Nelson for deposit into the broker's trust account. (testimony of Nelson; State's Exhibits 4, 8; Affidavits of Respondent, Gritton)

10. Respondent failed to obtain an Agency Disclosure Statement signed by both parties involved in this transaction. The sellers did not sign the disclosure form. In their affidavits, both the Respondent and the buyer assert that the Respondent represented both the buyer and the seller in this transaction. However, the record contains no written consent to the dual representation. (testimony of Nelson; State's Exhibit 1, line 12-13; Affidavits of Respondent, Gritton)

11. On April 26, 1991, Broker Ted G. Nelson was contacted by Kislar/RTC Mortgage Servicing Center regarding the offer to purchase involving the property at 7525 Normandy Drive NE, Cedar Rapids, Iowa. Broker Nelson had no knowledge of a listing contract on this property or an offer to purchase this property. (testimony of Nelson)

12. On April 28, 1988, the Respondent and the Board entered into an informal settlement of another complaint. The Respondent admitted adding the language "as is condition" after the buyer signed the final Uniform Purchase Agreement, but failed to obtain the buyer's initials on the contract. The Respondent agreed to a \$200.00 civil penalty and to take twelve (12) hours of continuing education, in addition to the hours required by law for license renewal. (testimony of Hansen; State's Exhibit 4)

13. The Respondent did not appear for the hearing on August 19, 1993 at 9:30 a.m. The Notice of Hearing and Statement of Charges was sent to the Respondent by certified mail. The Order Granting Continuance, issued July 9, 1993, was also sent to the Respondent by certified mail, return receipt requested. The Respondent appeared for the hearing at 3:00 p.m. He and his attorney recorded the wrong time on their calendars. (testimony of Hansen; Exhibits 5, 6, 7; Affidavit of Respondent)

CONCLUSIONS OF LAW

1. 193E IAC 4.16 provides that a written notice of hearing, together with a statement of charges, shall be mailed to the licensee at least 20 days before the hearing by certified mail return receipt requested to the last known business address of the licensee or may be served in the manner of original notice. Delivery of personal notice to the licensee . . . may constitute commencement of the contested case proceedings.

193E IAC 4.25 provides that if a Respondent, upon whom a proper notice of hearing has been served, fails to appear in person at the hearing, the Commission may proceed to conduct the hearing and the Respondent shall be bound by the results of such hearing to the same extent as if the licensee were present.

The Respondent was served with notice of hearing and the complaint by certified mail, in accordance with 193E IAC 4.16, but failed to appear. The Commission has allowed him to submit three affidavits into the record, and has allowed the State to submit rebuttal evidence. He is bound by this decision of the Commission to the same extent as if he had appeared.

2. Iowa Code section 117.29 (1991) provides in relevant part:

A license to practice the profession of real estate broker and salesperson may be revoked or suspended when the licensee is guilty of the following acts or offenses:

• • •

2. Professional incompetency.

3. . . . or engaging in . . . practice harmful or detrimental to the public. Proof of actual injury need not be established.

3. Iowa Code section 117.34 (1991) provides in relevant part:

The real estate commission . . . may suspend or revoke a license issued under this chapter at any time . . . if the licensee is found to be guilty of any of the following:

4. Acting for more than one party in a transaction without the knowledge of all parties for whom the licensee acts.

• • •

7. Failing, within a reasonable time, to account for or to remit any moneys coming into the licensee's possession which belong to others.

8. Being unworthy or incompetent to act as a real estate . . . salesperson in such manner as to safeguard the interests of the public.

4. Iowa Code section 117.46(1) (1991) provides in relevant part:

1. Each real estate broker shall maintain a common trust account in a bank, a savings and loan association, savings bank, or credit union for the deposit of all down payments, earnest money deposits, . . .

193E IAC 1.27(1) provides in relevant part:

All money belonging to others received by the . . . salesperson on the . . . purchase . . . of real property located in Iowa are trust funds and must be deposited in a trust account; this shall include, . . . earnest money contracts; . . .

a. All trust funds must be deposited into the broker's trust account by no later than the next banking day after acceptance of the offer.

. . .

5. 193E IAC 2.16 provides in relevant part:

Supervision required. An employing broker is responsible for providing supervision of any salesperson or broker associate employed by or otherwise associated with the broker as a representative of the broker . . . Each salesperson and broker associate shall keep their broker fully informed of all activities being conducted on behalf of their broker and any other activities that might impact on their broker's responsibilities.

6. Iowa Code section 117.55 (1991) provides:

The real estate commission shall adopt rules requiring that each real estate broker or salesperson in a real estate transaction disclose in writing the broker's or salesperson's agency relationship with the buyer or seller in the transaction.

193E IAC 1.37 provides in relevant part:

Disclosure of agency. Enforcement of this rule and its subrules commenced January 1, 1990.

1.37(1) No person licensed pursuant to Iowa Code chapter 543B (formerly 117) shall represent any party or parties to a real estate transaction or otherwise act as a real estate broker or salesperson unless that person makes an affirmative written disclosure to all parties to the transaction identifying which party that person represents in the transaction. The disclosure shall be acknowledged by separate signatures of the buyer and seller.

. . .

1.37(4) A licensee may not be the agent for both the buyer and the seller without obtaining the written consent of both the buyer and the seller. The written consent shall state that the licensee made a full disclosure of the type of representation the licensee will provide and shall briefly describe the type of representation the licensee will provide to the buyer and to the seller. A general statement in the consent signed by the buyer and seller that the licensee represents both buyer and seller is not sufficient.

1.37(5) No particular disclosure language is required. To assist licensees, the commission approves

the following language when representing one party to the transaction:

• • •

a. Failure of a licensee to comply with this rule is prima facie evidence of a violation of Iowa Code subsection 543B.34(4) (formerly 117.34(4)).

7. 193E 4.40(6)(i) and (14) provide in relevant part:

4.40 Violations for which civil penalties may be imposed:

(6) Improper trust account and closing procedures:

(i) Failing as a salesperson or broker associate to immediately turn funds over to the broker.

• • •

(14) Failing by a broker associate or salesperson to keep the employing broker informed.

Count I

The preponderance of the evidence established that the Respondent failed to notify his employing broker of the listing he obtained on April 15, 1991, in violation of Iowa Code sections 117.29(2), (3), 117.34(8) and 193E IAC 2.16 and 4.40(14).

Count II

The preponderance of the evidence established that the Respondent failed to notify his employing broker of the offer to purchase, in violation of Iowa Code sections 117.29(2), (3), 117.34(1)(8), and 193E IAC 2.16 and 4.40(14).

Count III

The preponderance of the evidence established that the Respondent failed to turn over \$500.00 earnest money to his broker to deposit in the trust account, in violation of Iowa Code sections 117.29(2), (3), 117.34(7), (8), 117.46(1) and 193E IAC 1.27(1) and 4.40(6)(i).

Count IV

The preponderance of the evidence established that the Respondent failed to obtain an agency disclosure signed by both parties in the transaction, in violation of Iowa Code sections 117.34(4), 117.55(1991) and 193E IAC 1.37, 1.37(1) and (5)(a).

Count V

The preponderance of the evidence established that the Respondent violated Iowa Code section 117.55(1991) and 193E IAC 1.37(4) when he represented both the buyer and seller in a real estate transac-

tion without providing both parties with a written description of the services to be provided and obtaining the written consent of both parties to the dual representation.

DECISION AND ORDER

193E IAC 4.3 lists factors which may be considered by the Commission in determining the nature and severity of the disciplinary sanction to be imposed against a particular licensee or groups of licensees. These factors include the relative seriousness of the violation as it relates to assuring the citizens of this state professional competency and the number and seriousness of prior violations.

The broker's ability to supervise the salesperson is the linchpin of Iowa's Real Estate statute. When a broker is not kept informed of the activities of the salesperson, the broker is unable to supervise. Consequently, the public is placed at risk. The violations of the Respondent are serious and impact the public.

In addition, the Respondent has had a prior violation involving his failure to obtain the buyer's initials after adding a term to a signed uniform purchase agreement. This violation was similar to his failure to obtain the seller's signature on the disclosure form in the present case. It is evident that the disciplinary action in the prior case was insufficient to prevent future violations.

IT IS THEREFORE THE ORDER OF THE IOWA REAL ESTATE COMMISSION that the salesperson's license of Michael Lamphier, No. S24836, is hereby SUSPENDED for a period of six (6) months, effective upon service of this Decision and Order. Following the suspension the Respondent's license will be placed on probation for a period of three years.

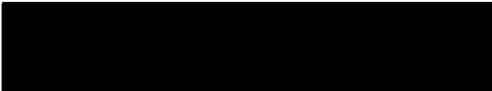
IT IS FURTHER ORDERED, pursuant to 193E IAC 4.40(6)(i) and (14), that the Respondent shall pay a civil penalty of \$1,000.00 within thirty (30) days of receipt of the date of this Order. The Respondent is warned that further violations may be cause for revocation of his license.

IT IS FURTHER ORDERED, pursuant to 193E IAC 4.41, that the Respondent shall pay \$75.00 for costs associated with conducting the disciplinary hearing, within thirty (30) days of the date of this Order. In addition, the Executive Secretary shall bill the Respondent for any transcript costs associated with this hearing, and the Respondent shall remit payment within thirty (30) days of receipt of the bill.

Issued this 4th day of January, 1994.



Jack Knapp
Vice Chairman
Iowa Real Estate Commission



Margaret LaMarche
Administrative Law Judge

ML/jmm

PROOF OF SERVICE
The undersigned certifies that the foregoing instrument was served upon all parties to the above cause by depositing a copy thereof in the U. S. Mail, postage paid, in envelopes addressed to each of the attorneys of record disclosed on the pleadings, on

January 4, 1994