

FILED December 22, 2015 (Date)

BEFORE THE REAL ESTATE COMMISSION
OF THE STATE OF IOWA

REC
Board / Commission
[Signature]
Signature Executive Officer

IN THE MATTER OF:)	CASE NOS. 15-009, 15-022
)	DIA NO. 15REC004
Rhonda Jo Herr)	
Broker (B56936000))	
)	FINDINGS OF FACT,
Herr Real Estate & Auction)	CONCLUSIONS OF LAW,
209 East Locust)	DECISION AND ORDER
Sigourney, IA 52591)	

On September 30, 2015, the Iowa Real Estate Commission (Commission) found probable cause to file a Notice of Hearing and Statement of Charges against Rhonda Jo Herr (Respondent). The Statement of Charges alleged that Respondent:

- As the designated broker, failed to comply with the mandatory errors and omissions insurance requirement for her licensed real estate firm in violation of Iowa Code sections 543B.29(1)(c), 543B.29(1)(d), 543B.29(1)(j), 543B.34, 543B.47(1) and (6) and 193E IAC 18.2(5), 8.14(5)(s), and 19.6(5) & (6); and,
- Failed to comply with the mandatory errors and omissions insurance requirement for her Iowa real estate broker license in violation of Iowa Code sections 543B.29(1)(c), 543B.29(1)(d), 543B.29(1)(j), 543B.34, 543B.47(1) & (6) and 193E IAC 18.2(5), 18.14(5)(s), 19.6(5) & (6).

A telephonic prehearing conference was held on October 29, 2015. The hearing was held at the Commission's offices on November 5, 2015. Assistant Attorney General John Lundquist represented the state of Iowa. Respondent Rhonda Jo Herr appeared and was self-represented. The following Commission members presided at the hearing: Terry Duggan, Chairperson and Broker member, Helen Kimes, Broker member, John Goede, Broker member, and Janet DeMott, Salesperson member. Administrative Law Judge Kerry Anderson assisted the Commission in conducting the hearing. A certified court reporter recorded the proceedings. The hearing was open to the public. After hearing the testimony and examining the exhibits, the Commission convened in closed executive session, pursuant to Iowa Code section 21.5(1)(f)(2015), to deliberate its

decision. The Commission instructed the administrative law judge to draft Findings of Fact, Conclusions of Law, Decision and Order, in conformance with their deliberations.

THE RECORD

The record includes the state's Prehearing Conference Report; testimony of Sandy Malek and Respondent Rhonda Jo Herr; and State Exhibits 1-13 (See Exhibit Index for description).

FINDINGS OF FACT

The facts of this case are not in dispute.

Respondent Rhonda Jo Herr was originally license by the Commission as a salesperson in 2005. On December 3, 2013, the Commission issued Herr Iowa real estate broker license number B56936000, which is in full force and effect until December 31, 2015. Respondent is a licensed real estate broker officer, assigned to Herr Real Estate & Auction, license number F05653000, located in Sigourney, Iowa. At all times relevant to this decision and order, both Respondent Herr's broker license and Herr Real Estate & Auction's license were on active status. (State's Pre-hearing Conference Report; State Exhibit 1-3; Herr testimony; Malek testimony)

Herr Real Estate & Auction was selected for a random audit to verify the firm's compliance with the mandatory errors and omissions insurance requirement. On October 22, 2014, the Commission sent the firm a letter requesting that the broker in charge or a broker officer provide verification of the firm's 2014 Real Estate Errors and Omissions insurance coverage within twenty (20) days. (Exh. 7-1; Malek testimony)

Having received no response to its request within the allotted time, the Commission sent Herr Real Estate & Auction a second letter dated December 11, 2014, again requesting verification of the firm's 2014 Real Estate Errors and Omissions Insurance coverage within twenty (20) days. This notice was sent by certified mail and was signed for by Respondent Rhonda Jo Herr on December 22, 2014. Again, no response was received within the time allowed. (Exhs. 5-1, 8-1 – 8-3; Malek testimony).

Subsequently, in January 2015, Respondent Herr was also selected for a random audit to verify whether she had maintained the mandatory errors and omissions insurance coverage as a licensed broker. The commission sent a letter to Herr on January 9, 2015, requesting verification of her 2015 Real Estate Errors and Omissions Insurance Coverage within twenty (20) calendar days. (Exhs. 5-2, 6-2, 9-1; Malek testimony)

On January 16, 2015, Investigator Sandy Malek telephoned Respondent Herr and inquired about the lack of response to the Commission's audit letters to the firm. Respondent stated she had not replied because she had been uncertain whether she was going to continue operating Herr Real Estate & Auction. Respondent explained she had only recently decided to carry on business through the firm. Herr also told Malek she had just obtained errors and omissions coverage for herself and would supply the same. Malek asked about coverage for the firm and Respondent Herr explained she did not have errors and omissions coverage for the firm but would obtain it.¹ Ms. Malek asked Herr to provide a written explanation as to the lack of coverage. (Exhs. 5-2; Malek testimony)

On January 22, 2015, Respondent Herr faxed her written explanation along with Certificates of Coverage from Rice Insurance Services Company for Herr Real Estate & Auction and for herself. (Exh. 10-3 – 10-4) Both certificates show errors and omissions insurance coverage in effect for the period from January 1, 2015 through January 1, 2016. The certificate for the firm's coverage indicates the policy was purchased on January 21, 2015 while the certificate relating to Ms. Herr states she obtained the policy on January 14, 2015. Both certificates include the following statement:

THIS POLICY IS A CLAIMS-MADE-AND-REPORTED POLICY. It only applies to Claims that are made and reported during the individual Policy Period or any applicable Extended Reporting Period. To protect the insured's interest and preserve any available coverage, it is essential to report claims timely in accordance with policy provisions.

(Exh. 5-2, 10-3 – 10-4; Malek testimony; Herr testimony)

Herr confirmed in writing her explanation that she delayed obtaining insurance because she was indecisive about the firm's future. Ms. Herr noted; however,

¹ The record contains evidence that Herr Real Estate & Auction had errors and omissions coverage through Navigator's Insurance Group from September 15, 2013 through September 15, 2014. (Exh. 4)

that she had determined the firm would be joining the Southeast Iowa Regional Board of Realtors and would be continuing in business. (Exh. 10-1)

After reviewing the certificates supplied by Respondent, Investigator Malek sought an explanation from Rice Insurance Services Company regarding the practice of backdating policies. Rice Insurance responded on January 26, 2015, stating there was a risk that the public would not be compensated if any claim was filed against Respondent or her firm for any period in which either did not have errors or omissions insurance in force. For the firm, that period was from September 16, 2014 through January 21, 2015; for Respondent individually, the period without coverage was from January 1, 2015 through January 14, 2015. (Exhibit 12; Malek testimony)

At hearing, Ms. Herr admitted she did not have errors and omissions coverage in place for herself from January 1, 2015 through January 14, 2015. Additionally she admitted there was no such coverage for Herr Real Estate & Auction from September 16, 2014 through January 21, 2015. (Herr testimony)

Respondent testified that throughout her tenure as a licensed salesperson her broker handled insurance on her behalf and she was not required to know the details of obtaining and maintaining coverage. Her first exposure to the issue came when she was preparing to become a broker and go out on her own. Ms. Herr explained she obtained errors and omissions coverage for the firm in September 2013 but did not become licensed until December of that year. Respondent noted she did not realize the firm's coverage expired the following September; she was operating under the assumption both the firm's policy and her own expired on January 1, 2015. This misperception, along with her indecision about continuing the business resulted in the lapse of coverage. (Herr testimony)

Respondent testified she knew she needed to decide the future of Herr Real Estate & Auction in January 2015. It was at that time she decided to continue the business and she therefore secured errors and omissions coverage for both herself and the firm. Herr stated that the terms of both policies obtained are for the calendar year so this confusion should not reoccur. She has taken other steps to ensure there are no future problems including hiring an office assistant. (Herr testimony)

Ms. Herr admitted that she did not seek to have her license placed on inactive status while she sorted out the future of her business. She emphasized;

however, that no business was conducted during the lapse in insurance coverage for herself and Herr Real Estate & Auction. Herr argued that this is the first time in ten years of licensure that she has run afoul of the rules. She contended she should not be subject to any monetary penalties for this incident. (Herr testimony)

CONCLUSIONS OF LAW

The legislature has directed the Commission to adopt rules requiring all real estate licensees, except those who hold inactive licenses, to carry errors and omissions insurance coverage for all activities contemplated by Iowa Code chapter 543B. The law also requires that the Commission's rules contain mandatory provisions for licensees to submit evidence of compliance with that insurance requirement within twenty calendar days of the Commission's request.² Failure of a licensee to carry the errors and omissions insurance required by Iowa Code section 543B.47, or to timely submit proof of coverage upon Commission request, is grounds for the denial of an application to renew a license or for the suspension or revocation of a license.³

By rule, the Commission has clarified that the requirement of errors and omissions coverage applies to all firms and sole proprietorships as well as individual licensees.⁴ It is the responsibility of the firm's designated broker to provide proof of the firm's coverage when requested by the Commission.⁵

The Commission is authorized to initiate disciplinary action against an active licensee for failure to maintain adequate insurance coverage or for failure to submit proof of insurance to the Commission within twenty days of their request.⁶ A licensee is required to carry insurance on an *uninterrupted* basis and may not avoid discipline simply by acquiring insurance after receipt of an audit notice.⁷

The undisputed evidence established that Rhonda Jo Herr failed to maintain uninterrupted errors and omissions insurance coverage for herself during the period from January 1, 2015 through January 14, 2015 and for Herr Real Estate & Auction, for which she is the designated broker, during the period beginning

² Iowa Code section 543B.47(1)(2015).

³ Iowa Code sections 543B.29(1)(j), 543B.47(6)(2015).

⁴ 193E IAC 19.2(1), 19.3(3), 19(3)(3).

⁵ 193E IAC 19.3(2)(a).

⁶ 193E IAC 18.2(5), 19.6(6).

⁷ 193E IAC 19.6(5).

September 16, 2014 through January 21, 2015, all in violation of Iowa Code sections 543B.47(1), 543B.47(6) and 193E IAC 18.2(5), 19.6(5) and 19.6(6). This failure created a very real risk to the public because the insurance company likely would have refused to pay any claims filed against Respondent or her firm during any period in which no coverage was in place. While Ms. Herr argues that she conducted no business during the period of time in which there was no coverage that does not excuse the lapse. Respondent did not seek to have her license placed on inactive status and nothing would have prohibited her from transacting business had the opportunity presented itself.

The Commission has the authority to impose any or all of an array of sanctions including, but not limited to, the revocation or suspension of a license, imposition of civil penalties, and issuance of a reprimand.⁸ The Commission's rules allow consideration of various factors in determining discipline including:

- The relative seriousness of the violation as it relates to assuring the citizens of this state professional competency.
- The facts of the violation.
- Prior violations, if any.
- Whether remedial action has been taken.
- The impact of the particular activity on the public.
- Other factors that may reflect upon the competency, ethical standards and professional conduct of the licensee.⁹

Absent compelling mitigating circumstances, the Commission has traditionally imposed a \$1000 civil penalty for a first violation of the errors and omissions insurance requirement. Such penalty is appropriate due to the seriousness of the potential impact on the public. The Commission's consistent imposition of civil penalties on licensees who fail to maintain uninterrupted insurance also serves as an important deterrent.

Because Ms. Herr failed to maintain continuous errors and omissions coverage for both herself and her firm she has been charged with two, first-time violations and she has failed to present any compelling personal reasons to mitigate her lack of action. As such, she should be subject a civil penalty in the amount of \$1,000 for each count. However, the Commission was persuaded that, because both infractions arose from the same set of circumstances, for the purposes of

⁸ 193E IAC 18.14(1)(a)-(l).

⁹ 193E IAC 18.14(2)(a)-(g).

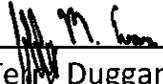
Iowa Code section 543B.29(4), they shall be considered as a single prior violation.¹⁰

ORDER

IT IS THEREFORE ORDERED, that for each count of failure to maintain uninterrupted errors and omissions insurance, Respondent Herr shall pay a civil penalty in the amount of one thousand dollars (\$1,000) for a total penalty of two thousand dollars (\$2,000). Payment must be made within six (6) months of the issuance of this Decision and Order.

IT IS FURTHER ORDERED, pursuant to Iowa Code section 272C.6 and 193 IAC 7.41, that Respondent shall pay \$75.00 for fees associated with conducting the disciplinary hearing, within thirty (30) days of receipt of this decision.

Dated this 22nd day of December, 2015.

 FOR CHAIR
Terry Duggan, Chairperson
Iowa Real Estate Commission

cc: John Lundquist, Assistant Attorney General (LOCAL)

Judicial review of the commission's action may be sought in accordance with the Iowa administrative procedure act, from and after the date of the commission's order. If a party does not file a timely application for rehearing, a judicial review petition must be filed with the district court within 30 days after the issuance of the commission's final decision. 193 IAC 7.37.

¹⁰ Iowa Code section 543B.29(4) provides for the mandatory revocation of a real estate broker's or salespersons's license following three violations of the section or Iowa Code section 543B.34 within a five-year period.