

N.D.A.G. Letter to Bard (Sep. 23, 1986)

September 23, 1986

Mr. Dean F. Bard
Special Assistant Attorney General
North Dakota Real Estate Commission
1101 East Interstate Avenue, #2
Bismarck, ND 58501

Dear Mr. Bard:

We are responding to your request for an opinion of the Attorney General regarding the extent of jurisdiction that the North Dakota Real Estate Commission may exert over companies operating in North Dakota that engage in the business of real property management. As you observed in your correspondence of May 17, 1986, there are a number of firms that show real property belonging to others for the purpose of obtaining a lease for the owner. Many of these firms are not licensed by the Commission as a real estate broker pursuant to N.D.C.C. Ch. 43-23 which establishes the authority of the Commission with regard to the licensing of persons that engage in activities for which licensure as a real estate broker or salesman is required.

Your letter asks the following questions:

1. If the sales company owns the property itself, must it be licensed as a real estate broker? And, must it employ only licensed real estate salesmen to sell leasehold interests to others?
2. If the sales company does not own the property, but holds itself out as accepting and marketing leasehold interests for others for a fee or commission or other consideration, must it be licensed as a real estate broker? And, must it employ only licensed real estate salesmen to market these leasehold interests?
3. If the sales company is licensed as a real estate broker, may it employ nonlicensees as salesmen, or must these individuals be licensed?
4. If a person is employed as a resident manager or caretaker of an apartment house for the owner, must that person be licensed as either a real estate broker or salesman? And in cases where the resident manager works for more than one apartment owner, and shows apartments, collects rent, etc., at several locations, must that person then be licensed as either a real estate broker or salesman?

Our inquiry must commence with the relevant statutory language. N.D.C.C. § 43-23-05 says that no person shall act as a real estate broker or real estate salesman unless they are licensed by the Commission. The term "real estate broker" is defined in N.D.C.C.

§ 43-23-06.1(5) as one who, for another and for a fee, commission, salary or other consideration, engages in, offers or attempts to engage in any of the following activities:

- a. Lists, offers, attempts or agrees to list real estate or any interest therein. . .for sale, exchange, or lease.
- b. Sells, exchanges, purchases, or leases real estate or any interest therein. . . .
- c. Offers to sell, exchange, purchase, or lease real estate or any interest therein.
- d. Negotiates, or offers, attempts, or agrees to negotiate the sale, exchange, purchase, or leasing of real estate. . . .

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- g. Advertises or holds himself out as being engaged in the business of buying, selling, exchanging, or leasing of real estate. . .
- h. Assists or directs in the procuring of prospects, calculated to result in the sale, exchange, or leasing of real estate. . . .(Emphasis supplied)

A "real estate salesman" is defined in N.D.C.C. 43-2306.1(6) as any person who, for a fee, compensation, salary or other consideration or in the expectation thereof, is employed by a real estate broker to do any of the above acts.

The term "real estate" is defined in N.D.C.C. § 43-2306.1(4) as any ". . .interest or estate in land, including leaseholds. . . ." (emphasis supplied). The term "leasehold" is not defined in N.D.C.C. Ch. 43-23, but there are a multitude of cases which define it as an incorporeal interest in land or the renting thereof, usually for a term of years, and requiring payment of a certain sum as rent during the term of the lease. It is the right to use property and is entirely separate and distinct from the estate that the landlord retained. See 24A Words and Phrases 280-84 (1966).

From the above definitions, it is quite clear that the North Dakota Real Estate Licensing Act, N.D.C.C. Ch. 43-23, includes all types of activity whereby an individual lists, sells, exchanges, or purchases a leasehold interest for a consideration, or attempts to do the same, for another. It is further the case that anyone who advertises as being engaged in that business or assists or directs in the procuring of prospects is also subject to the licensing requirement.

There is, however, an exception provided in N.D.C.C. Ch. 43-23 for persons who own property themselves. N.D.C.C. § 43-23-07(1), relieves from the licensing requirement owners of property and their "regular employees" in the following terms:

43-23-07. REAL ESTATE BROKERS, SALESMEN, OR MORTGAGE BROKERS -- EXCEPTIONS.--The term "real estate broker", "real estate salesman", or "mortgage broker" shall not be held to include:

1. Any person, partnership, association, or corporation who as a bona fide owner or lessor shall perform any of the aforesaid acts with reference to property owned or leased by them, nor shall it apply to regular employees thereof, where such acts are performed in the regular course of or as an incident to the management of such property and the investment therein. (Emphasis supplied).

The question we are left with is to what degree does this exception serve to limit the all-inclusive licensing requirement as applied to those persons who are in the business of selling their own leasehold and rental interests in property when this activity is performed through their "regular employees"? This question has come before the courts on several occasions through the construction of licensing acts which are strikingly similar to ours, and the distinction has usually revolved around the definition of the term "regular employees."

Probably the leading case in this field is Strumpf v. State, 18 S.2d 104 (Ala. 1944). Here, a corporation that owned property subdivided it and employed several individuals to sell lots. One P. S. Strumpf was convicted of the criminal offense of selling real property without being licensed and, on appeal, the court reversed his conviction. There was an exception in the Alabama licensing law which for all intents and purposes is identical to ours, and the court determined that Strumpf was a "regular employee" as he devoted his entire time to this corporate employer, and he was paid only on a commission basis for those lots that he sold. The court pointed out that a broker could be distinguished from an agent who was regularly employed by one principal and devoted his entire time to that employment. A broker holds himself out for employment by others and acts as an intermediate negotiator between the parties to a transaction, making him an agent of both parties.

Edmonds v. Fehler and Feinauer Const. Co., 252 F.2d 639 (6th Cir. 1958), was a case where a corporation was engaged in the development of a real estate subdivision in the state of Kentucky. Edmonds was engaged in the corporation as its sales manager to sell residential housing built by the corporation for a fee of 2 1/2% of the sales price. He was employed under a written contract for a period of five years. The contract provided that Edmonds would devote his entire time, skill, and attention to the promotion and development of the subdivision, and engage in no other employment during the term of the contract. When the corporation refused to pay the agreed upon compensation, Edmonds sued. The suit was dismissed by the Federal District Court for the reason that Edmonds had not established that he was a licensed real estate broker and was therefore not entitled to collect under the contract. Edmonds' argument that he was a "regular employee" under the licensing statute, and thereby exempt from licensure, was disregarded.

On appeal, the 6th Circuit Court of Appeals reversed, finding that Edmonds was a "regular employee" of the corporation and exempt from licensing. It was pointed out that a corporation of necessity must act through an agent. The contract between the parties set out Edmonds' obligations and he was required to perform "such services a corporation and its officers might require of him," including seeking out prospective purchasers for the housing development, arranging the financing of sales, displaying model housing plans, securing contracts of purchase, etc. He was required to devote his entire time, skills, and attention to his duties, to engage in no other form of employment, nor do anything contrary to the best interests of the corporation. He was required to furnish all transportation at his own cost. The court found he was clearly a "regular employee" of the corporation.

A review of the cases in this area, of which the two referred to above are representative, leaves us with the firm conclusion that one who is employed full-time to sell real property for an owner and does not undertake any similar employment for another, can come under the classification of "regular employee" and thus need not be licensed. If the property owner happens to be a corporation, this result would apply with more vigor since a corporation, as the owner of property, must necessarily employ others to perform its services. It seems to make little difference as to whether the employee is paid a salary or a commission based on the selling price of the property, although it would seem that a salaried employee would have a better opportunity to show that his employer was commanding his full time and attention.

It naturally follows that anyone who advertises or holds themselves out as available for employment by others in the listing, selling, or purchasing of leasehold interests or in rental or property management must be required to be licensed as a North Dakota real estate broker or salesman.

It also seems to follow that one engaged in the business of renting leasehold interests in real property, such as apartment dwellings, who lives in the apartment building and shows apartments to prospective tenants, collects rent, etc., and receives either a reduction in their own rent, or a fee for their services, would be exempt as a "regular employee" of the owner, even if the services performed were less than full-time. However, if such persons were employed or held themselves out as available for employment by more than one apartment owner, they would have to be licensed. In other words, one could not claim the exemption as a "regular employee" if they were employed by more than one owner of leasehold interests.

Finally, if the owner of the property has contracted with a licensed real estate brokerage for the marketing of a leasehold interest, any person who is employed by that brokerage to show the property to prospective lessees must be licensed as a real estate salesman or broker for the reason that while they might qualify as the "regular employees" of the license, the real estate brokerage could not qualify as the "owner or lessor." Of course, if the real estate brokerage in fact owned the property, the exemption would apply and the result would be otherwise.

We trust that the above commentary will serve to satisfactorily answer the questions you raised. If you need any further information, please contact me.

Sincerely,

Nicholas J. Spaeth

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