

BC FINANCIAL SERVICES AUTHORITY

IN THE MATTER OF THE *REAL ESTATE SERVICES ACT*
SBC 2004, c 42 as amended

AND

IN THE MATTER OF

[Applicant 6]
([Licence Number Redacted])

**REASONS FOR DECISION REGARDING
ADMINISTRATIVE PENALTY RECONSIDERATION REQUEST**

[These Reasons have been redacted before publication.]

DATE AND PLACE OF HEARING: Via Written Submissions

HEARING OFFICER: Gareth Reeves

Introduction

1. On April 29, 2024, the BC Financial Services Authority (“**BCFSA**”) issued a Notice of Administrative Penalty (the “**NOAP**”) in the amount of \$1,000 to [Applicant 6] (“**[Applicant 6]**”) pursuant to section 57(1) and 57(3) of the *Real Estate Services Act*, RSBC 2004, c 42 (“**RESA**”).
2. In the NOAP, BCFSA determined that [Applicant 6] had contravened section 75 of the *Real Estate Services Rules*, BC Reg 209/2021 (the “**Rules**”) by failing to file its required Accountant’s Report, Brokerage Activity Report, and financial statements within 120 days of its fiscal year end for the year ending December 31, 2022. The filing was due on April 30, 2023 but was not received until May 10, 2023.
3. [Applicant 6] applied for a reconsideration of the NOAP under section 57(4) of RESA. That application was submitted 16 days after the deadline set out in RESA for a reconsideration request. The application proceeded by written submissions.

Issues

4. The first issue in this matter is whether [Applicant 6] should be granted an extension to file its reconsideration request.
5. If the extension is granted, the next issue is whether the April 29, 2024 NOAP should be cancelled or confirmed.

Jurisdiction and Standard of Proof

6. This application for reconsideration is brought pursuant to section 57(4) of RESA, which requires the Superintendent of Real Estate (the “**superintendent**”) to provide a person who receives an administrative penalty with an opportunity to be heard upon request.
7. Section 57(4) of RESA permits the superintendent to cancel the administrative penalty, confirm the administrative penalty, or, if the superintendent is satisfied that a discipline hearing under section 40 of RESA would be more appropriate, cancel the administrative penalty and issue a notice of discipline hearing.
8. The superintendent has delegated the statutory powers and duties set out in section 57 to Hearing Officers.
9. The standard of proof is the balance of probabilities.

Background

10. [Applicant 6] has a December 31 fiscal year end. As a result, it is required to file its annual Accountant’s Report, Brokerage Activity Report, and financial statements by April 30 each year.
11. On February 3, 2023, BCFSA sent [Managing Broker 1], the managing broker for [Applicant 6], two emails advising him that service requests on its online system, IRIS, were available for his completion. The first service request was named “Accountant’s Report Filing”. The second was named Brokerage Financial Information Filing. I note that the name of the Brokerage Activity Report required by section 75 of the Rules is the “Brokerage Financial Information Filing” pursuant to a Regulatory Statement issued by the superintendent: RESA 23-004, Brokerage Reporting Requirements (BCSRE), Part 3. I will refer to that portion of the filing as the Brokerage Financial Information Filing throughout this decision. The emails noted the deadline for completion and submission was April 30, 2023.
12. On April 24, 2023, BCFSA sent [Managing Broker 1] an email reminding him that the Accountant’s Report Filing remained outstanding, and the submission deadline was April 30, 2024.
13. On May 10, 2023, [Applicant 6] uploaded its Accountant’s Report and financial statements to IRIS, but not the Brokerage Activity Report. BCFSA sent [Managing Broker 1] an email to confirm this submission had occurred.
14. Later that same day, BCFSA Audit emailed [Managing Broker 1] to confirm receipt of the Accountant’s Report and financial statements and to advise that the Brokerage Activity Report, called a Brokerage Financial Information Filing, remained outstanding.
15. On May 10, 2023 and following BCFSA’s reminder email, [Applicant 6] uploaded the Brokerage Financial Information Filing but did not click “Submit” until May 29, 2024. [Managing Broker 1] explains that the delay between uploading and submission was an error and arose from his misunderstanding of the system.
16. In the circumstances, BCFSA considered the filing complete on May 10, 2023, using the upload date and disregarding the delay in submission.
17. As indicated above, the NOAP was issued on April 29, 2024. It was delivered by email and sent by registered mail on that same date. Section 19 of the Rules permits service on licensees by mail. Section 4.1 of the *Real Estate Services Regulation*, BC Reg 506/2004 (the “**Regulations**”), provides that service effected in accordance with the Rules is deemed effective seven days after it was mailed. The NOAP was therefore served on May 6, 2023.

18. Pursuant to section 57(2) of RESA, a licensee has 30 days from the date of service to request a reconsideration of an administrative penalty. [Applicant 6] therefore had until June 6, 2024 to submit a reconsideration request.
19. BCFSA received the reconsideration request on June 21, 2024.
20. On June 24, 2024, BCFSA Hearings Division wrote to [Managing Broker 1] to provide BCFSA's Reconsideration Request form and to request that he provide reasons why the 30-day deadline should be extended to permit his application. That evening, [Managing Broker 1] submitted the Reconsideration Request form attaching his June 21, 2024 email on behalf of [Applicant 6] and made no submissions regarding the extension.

Submissions

21. [Applicant 6] submitted that the filing was not made on time because [Managing Broker 1] did not understand how to use the new online filing system implemented by BCFSA, IRIS, prior to his attempt to file the December 31, 2022 year end materials. He says the materials were uploaded by the required date but had not been submitted. In effect, he says he missed a step in the submission process.
22. [Managing Broker 1] also submitted that this was his first instance of non-compliance in his more than 35 years as a real estate licensee.
23. [Managing Broker 1] made no submission explaining his late filing of the reconsideration request in this matter.

Reasons and Findings

Applicable Legislation

24. Section 56 of RESA provides that BCFSA may designate specific provisions of RESA, the Regulations, or the Rules as being subject to administrative penalties, and may establish the amounts or range of amounts of administrative penalty that may be imposed in respect of each contravention of a specified provision. Pursuant to section 56(2), the maximum amount of an administrative penalty is \$100,000.
25. Section 26(1) of the Rules indicates that for the purposes of section 56(1) of RESA, contraventions of the Rules listed in section 26(2) of the Rules are designated contraventions to which Division 5 (Administrative Penalties) of Part 4 of RESA applies.
26. Section 26(2) of the Rules at the relevant time identified four categories, Category A, B, C, and D, for designated contraventions for the purpose of determining the amount of an administrative penalty. Section 75 of the Rules was placed in Category A. Section 27(1) of the Rules provided that the amount of an administrative penalty for a Category A contravention was \$1,000 for a first contravention and \$2,000 for a subsequent contravention.
27. Section 57(1) of RESA sets out that if the superintendent is satisfied that a person has contravened a provision of RESA, the Regulations, or the Rules designated under section 56(1)(a) of RESA, the superintendent may issue a notice imposing an administrative penalty on the person. Section 57(2) requires that a notice of administrative penalty indicate the rule that has been contravened, indicate the administrative penalty that is imposed, and advise the person of the person's right to be heard respecting the matter along with the time limit of "30 days or a longer period allowed by the superintendent" to request a reconsideration. If the person does not apply for reconsideration within the indicated timeline, including any extensions, the person is deemed to admit the contraventions and the penalty becomes due.

The Extension of Time

28. Sections 57(2) and 57(4) of RESA provide that the superintendent must provide an opportunity to be heard if requested and must confirm the penalty, cancel the penalty, or cancel the penalty and issue a notice of discipline hearing or notice of hearing. Although it could have been more clearly drafted, the intention of the legislation is to provide a deadline of 30 days from the date of service for the recipient of an administrative penalty to apply for an opportunity to be heard which may be extended by the superintendent. This is confirmed by guidance published by BCFSA online entitled “Administrative Penalty Process”. Although I am not bound by that guidance, I am guided by it with regard to the process to be followed here and I take it as representing the regulator’s interpretation of its home statute and persuasive in that regard.
29. Many courts and regulators have addressed the question of late filing and have considered a variety of factors in regard to those filings in the circumstances of their processes. The BC Court of Appeal has a long-standing test expressed in *Davies v CIBC*, 1987 CanLII 2608 (BC CA) at para 20. This case has been relied on by other regulators in deciding whether to permit time extensions for appeals and reconsiderations: *Applicant v College of Physicians and Surgeons of British Columbia*, 2019 BCHPRB 13 (CanLII) at paras 33-37.
30. In my view, the decision to extend the deadline is discretionary and should be decided on the whole of the context. The applicant has the burden of demonstrating that the extension should be granted. The following, non-exhaustive factors are relevant to the exercise of the discretion to grant or refuse the extension:
 - a. The date(s) of the alleged contravention(s);
 - b. The amount at issue;
 - c. The complexity of the alleged contravention(s);
 - d. The length of the delay between the deadline and the reconsideration request;
 - e. The explanation offered for the delay;
 - f. If any special or extenuating circumstances impacted the applicant’s ability to apply within the timeline;
 - g. Whether the application, on the merits, is bound to fail;
 - h. Any prejudice to the applicant in denying or the superintendent in permitting the extension; and
 - i. Whether an extension would advance or stymie the interests of justice or the purposes of RESA as a whole and the administrative penalty provisions in particular, being, efficient regulation of the real estate industry and the protection of the public.
31. Two comments on the above list are appropriate. First, the final factor is the primary factor and, to some extent, encompasses the preceding ones. Second, the question of merit, at the extension stage, is restricted to the question of whether the application is “doomed to fail” or has no merit such that it cannot succeed: see *Clock Holdings Ltd v Braich*, 2009 BCCA 269.
32. In this matter, the date of the contravention is fairly dated in relation to the nature of the contravention. The NOAP was issued almost a year after [Applicant 6] made the late filing. In my view, this weighs in favour of granting the extension.
33. The amount at issue is low. This factor weighs against granting the extension. The low amount indicates that this matter should be resolved efficiently and expediently: requiring compliance with statutory timelines encourages that efficiency.

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34. The simplicity of the contravention in this case also weighs against granting the extension as does the lack of any explanation for or special or extenuating circumstances justifying the delay in application. [Applicant 6] should have been able to turn its mind to reason for its late filing and submit the reconsideration request within the 30-day timeline. The lack of explanation from [Applicant 6], despite being explicitly prompted to explain the delay, supports the inference that the was no pressing reason for the delay and [Applicant 6] could have made the request on a timelier basis.
35. The length of the delay is a relatively short 16 days. This weighs in favour of granting the extension.
36. Regarding the merits, the application is not doomed to fail. [Applicant 6] raises an argument that requires at least some consideration; therefore, on at least a preliminary basis, the application is not entirely frivolous on its face.
37. There is some prejudice to [Applicant 6] in refusing the reconsideration request: it will be liable to pay the \$1,000 administrative penalty and be deprived of an opportunity to be heard. There is little prejudice to the superintendent in this case. Although the matter will take slightly longer than originally contemplated, the NOAP was not issued for nearly a year after the events underlying the contravention had occurred and were within the superintendent's knowledge. I find there is unlikely to be any loss of evidence in this matter and that the prejudice to the superintendent is limited to a small delay in circumstances where the superintendent did not indicate a need to proceed immediately.
38. Regarding the final factor, I am of the view that the interests of justice favour allowing the extension a primary consideration in this matter is the relatively short extension compared the time between the alleged singular failure to file and the date of the NOAP. I am given some significant pause by [Applicant 6]'s failure to provide any explanation at all for its tardiness in making the request, despite being asked to do so; however, the extension is short and the conduct is dated and was known to the superintendent.

The Section 75 Contravention

39. The imposition of an administrative penalty under section 57 of RESA is a discretionary decision. A request to reconsider the imposition of an administrative penalty requires a Hearing Officer to consider not only whether a contravention of RESA, the Regulations, or the Rules has occurred, but also whether a licensee exercised due diligence, that is: took reasonable steps or precautions, to prevent the contravention of the designated sections identified in the notice of administrative penalty. A Hearing Officer may also consider information on any extenuating circumstances that prevented compliance, or any other information the licensee believes a Hearing Officer should consider.
40. Section 75(1) of the Rules, provides as follows:
- 75 (1) A brokerage must, within 120 days after the end of each fiscal year of the brokerage, file with the superintendent
- (a) financial statements for that fiscal year,
- (b) an accountant's report respecting that fiscal year, completed in accordance with any requirements specified by the superintendent, and
- (c) a brokerage activity report respecting that fiscal year, completed in accordance with any requirements specified by the superintendent.
41. The form and content of the Accountant's Report and the Brokerage Activity Report required by subsections 75(1)(b) and (c) of the Rules is set by Regulatory Statement under RESA 23-004,

Brokerage Reporting Requirements. Part 3 of that Regulatory Statement indicates that the Brokerage Activity Report is named a "Brokerage Financial Information Filing".

Contravention

42. I find that [Applicant 6] contravened section 75 of the Rules by filing the materials required under that section until May 10, 2023, ten days after the April 30, 2023 statutory deadline. [Applicant 6] does not deny this fact.
43. The question therefore is whether [Applicant 6] exercised due diligence in this matter.

Due Diligence

44. [Applicant 6]'s submission is that the contravention occurred in this case because BCFSA changed the method by which brokerages submitted their section 75 filing from a mail-in method to an online method and that this caused them some confusion in making the filing. Before that change, accountants could mail in the required filings. After the change, the brokerage's managing broker had to upload the documents to IRIS and click "Submit".
45. [Applicant 6] submits that [Managing Broker 1] uploaded the documents to BCFSA's online system on time but then failed to notice that he had not taken the further step of submitting the filings after they were uploaded. I accept that [Managing Broker 1] did miss the "Submit" button and only clicked it weeks after uploading the required documents. I do not accept that the documents were uploaded on time. The evidence before me indicates that the documents were not uploaded until May 10, 2024, which is contrary to [Managing Broker 1]'s recollection of when the documents were uploaded.
46. There is no explanation for the delay in uploading the materials until May 10, 2024. [Managing Broker 1] is an experienced managing broker and would have been aware of the filing deadline. He was also reminded at least twice of the filing deadline by BCFSA. He failed to make the filing on time, despite these notices.
47. Had the late filing been the result of [Managing Broker 1]'s inadvertence arising from his lack of familiarity with the new system, that may have been determinative, depending on the information available to [Managing Broker 1] about the way to make the filing. That said, BCFSA already accounted for this fact in its assessment, as indicated in the NOAP by the statement that the filing was completed on May 10, 2024. I therefore do not need to decide whether [Applicant 6] exercised due diligence in that regard.
48. I therefore find that [Applicant 6] did not exercise due diligence in making its filings under section 75 of the Rules by April 30, 2023 for its fiscal year ending December 31, 2022.

Penalty Amount

49. The set penalty amount for a contravention of section 75 of the Rules at the time of the contravention was \$1,000 for a first contravention. That is the amount imposed by the NOAP. I find that amount is appropriate.

Conclusion

50. I grant [Applicant 6] a 16-day extension to file its reconsideration request.
51. I find that [Applicant 6] contravened section 75 of the Rules by failing to file its December 31, 2022 year end filings by April 30, 2023 and filing them late on May 10, 2023.

52. I confirm the \$1,000 administrative penalty issued on April 29, 2024.

53. The administrative penalty is now due and payable to BCFSA.

DATED at North Vancouver, BRITISH COLUMBIA, this 21 day of November, 2024.

“Original signed by Gareth Reeves”

Gareth Reeves
Hearing Officer

