

WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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STATE OF WISCONSIN
BEFORE THE DEPARTMENT OF REGULATION AND LICENSING

IN THE MATTER OF THE APPLICATION FOR	:	
A REAL ESTATE APPRAISERS LICENSE OF	:	FINAL DECISION
	:	AND ORDER
JOSEPH COGNAC,	:	LS0405211APP
APPLICANT.	:	

The State of Wisconsin, Department of Regulation and Licensing, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Department of Regulation and Licensing.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 13th day of August, 2004.

Donsia Strong Hill, Department Secretary
Department of Regulation and Licensing

STATE OF WISCONSIN
BEFORE THE DEPARTMENT OF REGULATION & LICENSING

IN THE MATTER OF
THE APPLICATION FOR A
REAL ESTATE APPRAISERS LICENSE OF

JOSEPH E. COGNAC,	LS0405211APP
Applicant	

PROPOSED DECISION

The parties to this proceeding, for the purposes of sec. 227.53, Stats., are:

Joseph E. Cognac
529 Carignan Court
Baraboo, WI 53913

Mark A. Herman
Prosecuting Attorney

Department of Regulation & Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

Secretary of the Department of Regulation & Licensing
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

A Class I hearing was conducted in the above-captioned matter on June 7, 2004, at 1400 East Washington Avenue, Madison, Wisconsin. Applicant Joseph E. Cognac appeared without legal counsel. The Division of Enforcement appeared by Attorney Mark A. Herman.

Based upon the entire record in this case, the administrative law judge recommends that the Department of Regulation & Licensing adopt as its final decision in the matter the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Joseph E. Cognac, the applicant herein, submitted his application for a license to practice as a real estate appraiser on December 5, 2003.
2. In an application for a real estate appraiser license, the applicant is required to answer the following question:

“Have you ever been convicted of a misdemeanor or felony or driving while intoxicated (DWI) in this or any other state, or are criminal charges currently pending against you? If yes, complete and attach Form #2252.
3. Mr. Cognac’s response to the question was to check the box marked “Yes.”
4. Mr. Cognac forwarded Form #2252 and other information that indicated he had a federal felony conviction for Mail Fraud.
5. Information received from the Clerk’s Office for the United States District Court, for the Western District of Wisconsin, indicated that Mr. Cognac was convicted of the following:
 - a. December 2, 2002 – Felony – Mail Fraud, Class D Felony, 18 U.S.C. sec. 1341 (United States District Court, Western District of Wisconsin Case # 02-CR-94-C-01)
6. On March 12, 2004, the Department issued its Notice of Denial of Mr. Cognac’s application. The basis for the denial was stated as follows:

You have submitted evidence to the department on the Convictions and Pending Charges (form #2252) that you were convicted on December 3, 2002-Felony-Mail Fraud. Documentation on files establishes that you have been convicted of a felony crime, the circumstances of which substantially relate to the practice of real estate appraisal. The legal basis for this decision is Chap. 458.08 of the Wisconsin Statutes.
7. Mr. Cognac was sentenced to imprisonment for a period of five (5) months and upon release from imprisonment, to supervised release for a term of 36 months. Mr. Cognac was also ordered to pay criminal monetary penalties in the amount of \$100.00 and restitution in the amount of \$47,331.62.
8. Mr. Cognac served his period of imprisonment and is currently under supervised probation until May 23, 2006.
9. Mr. Cognac is making monthly restitution payments and still owes approximately \$46,000.00.

10. Through January 2004, Mr. Cognac had been receiving one hour of AODA counseling on a monthly basis per court order. Mr. Cognac was released from this requirement by his probation officer.
11. Mr. Cognac claims that he attends AA meetings regularly and meets with patients who are in the counseling program at St. Claire Hospital. Mr. Cognac did not submit any documentation or evidence from his sponsor verifying his attendance at AA or the counseling program at the hospital.
12. Prior to the hearing in this matter, the Department requested that Mr. Cognac provide a letter from his treatment provider regarding his recovery status. Mr. Cognac responded to the Department request that the information was privileged and information and could not be released.
13. There is no documentation from Mr. Cognac's AODA treatment provider indicating the status of his recovery.
14. Mr. Cognac was convicted for Mail Fraud as a result of his misuse of the company credit cards of his employer, St. Claire Hospital. Mr. Cognac claims that he was under the influence of alcohol and used the credit cards at various gentlemen's clubs, buying alcohol for himself and others, for prostitution services and to withdraw funds from ATM machines.
15. Mr. Cognac's pattern of embezzlement occurred over a seven to eight year period while he was employed at St. Claire Hospital as the Finance Director for approximately 15 years.
16. Mr. Cognac was able to conceal his theft by using his position as Finance Director to request payments to vendors and payments for his personal credit cards because he was not supervised.
17. Mr. Cognac was a "practicing alcoholic" at time of the embezzlements and under the influence of alcohol when he misused the company credit cards. Mr. Cognac was in a "black-out" state and could not remember what he done when woke up. Mr. Cognac performed many of his job duties under the influence of alcohol.
18. Mr. Cognac knew what was right and what was wrong, but his inhibitions were lowered while he was under the influence of alcohol so he did not care.
19. Mr. Cognac did not self-report his theft to his employer. He was caught by his employer, possibly as a result of report by another employee who worked in the same area.
20. Mr. Cognac entered a guilty plea to the criminal felony charges.
21. Mr. Cognac has been offered a job as real estate appraiser by his current employer, Mr. Glaser, the owner of Wisconsin Home Mortgage Company. Mr. Glaser has owned the mortgage company for approximately four or five years. Mr. Glaser also owns a real estate appraisal company, Allstate Appraisal.
22. Mr. Cognac has worked for Wisconsin Home Mortgage Company since August 2003. Mr. Cognac indicated that in his present position he processes loan applications. Mr. Cognac does not have a mortgage broker's license.
23. There is currently only one licensed real estate appraiser working for Mr. Glaser's company, Allstate Appraisal. The company has unlicensed agents in other communities, such as Portage, Baraboo and Deerfield, Wisconsin.
24. According to Mr. Cognac, the agents typically pick up an order from the Wisconsin Home Mortgage office, go into the field, inspect the property, perform their appraisal and submit their finished product to the licensed appraiser. Each agent has computer software which they use on their home computers to generate their appraisal reports.
25. Mr. Cognac indicated that he would be supervised by the licensed appraiser who works out of the main company office in Deerfield. Mr. Cognac indicated that he would not actually work in the Deerfield office.
26. Mr. Cognac maintained that his conviction was not substantially related to the practice of real estate appraiser and that

since his will not be handling any funds; he should receive a real estate appraiser license.

CONCLUSIONS OF LAW

1. The Department of Regulation and Licensing has jurisdiction in this matter under § 458.03, Stats.
2. The circumstances of the convictions detailed above substantially relate to the circumstances of the practice of a real estate appraiser within the meaning of § 111.335, Stats.

ORDER

NOW, THEREFORE, IT IS ORDERED that Joseph M. Cognac's application for a real estate appraiser is DENIED.

OPINION

The circumstances of Mr. Cognac's conviction, which involves a lengthy pattern of embezzlement and theft from his employer, leaves little doubt that it is substantially related to the practice of a real estate appraiser. The Wisconsin Supreme Court, in *County of Milwaukee v. LIRC*, 139 Wis.2d 805 (1987), 407 N.W.2d 908, set forth its definitive explanation of the concept.

The basic question is: What is the nature of the inquiry required by sec. 111.32(5)(h)2b?^[1] Answering this question requires that this court determine what the legislature intended when it chose to phrase the exception in terms of the "circumstances" of the offense and "circumstances" of the particular job. Depending on what meaning is ascribed to the term "circumstances," the question remains: What procedure is required in order that courts may assess the "circumstances" in the particular case?

* * * *

We reject an interpretation of this test which would require, in all cases, a detailed inquiry into the facts of the offense and the job. For these reasons, the department was fully justified in initially denying the application. What is important in this assessment is not the factual details related to such things as the hour of the day the offense was committed, the clothes worn during the crime, whether a knife or a gun was used, whether there was one victim or a dozen or whether the robber wanted money to buy drugs or to raise bail money for a friend. All of these could fit a broad interpretation of "circumstances." However, they are entirely irrelevant to the proper "circumstances" inquiry required under the statute. It is the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person.

The full assessment of what may be termed the "fostering" circumstances may, at times, require some factual exposition. For instance, in "disorderly conduct" cases the type of offensive circumstances is not as explicit as it is in sexual assault, armed robbery, theft or embezzlement convictions for example. However, such factual inquiry would have as its purpose ascertaining relevant, general, character-related circumstances of the offense or job. 824 Wis. 2d at 824-825

Contrary to Mr. Cognac's argument, the determination of whether the circumstances of his conviction is substantially related to the practice of a real estate appraiser does not depend on whether or not he will have direct access to the funds of another. Rather, the question is whether the circumstances which fostered Mr. Cognac's criminal activity in the first place, would be available to him in the licensed occupation. As the courts have stated, these circumstances are: 1) the opportunity for criminal behavior; 2) the reaction to responsibility; and 3) the character traits of the person. By his own admission, Mr. Cognac engaged in an on-going pattern of theft from his employer for a period of seven to eight years. Mr. Cognac was the Finance Director of St. Clare Hospital for approximately 15 years. The circumstances of Mr. Cognac's criminal activity demonstrates how he reacted to opportunity and responsibility; he misused his employers' corporate credit cards for his own personal gain. The circumstances also indicate that Mr. Cognac would have continued to engage in this conduct had it not been for the watchful eye of another employee who reported his misconduct. Finally, although Mr. Cognac is an educated and intelligent individual, he has exhibited by his own conduct, very troubling character traits of dishonesty and untrustworthiness that substantially relate to the practice of a real estate appraiser.

It is interesting that Mr. Cognac by his own admission claims that he committed much of his embezzlement while under the influence of alcohol, and that he was so debilitated by alcohol that he could not remember what he had done and that he often drank at work. Yet, Mr. Cognac was still able to perform his day-to-day duties as the finance director and carry out and conceal his embezzlement scheme for seven to eight years. It seems doubtful that if Mr. Cognac's alcohol abuse was as bad as he claims, that he would not have been discovered and terminated from employment or required to obtain treatment. Clearly, Mr. Cognac was able to function sufficiently to conceal his embezzlement by arranging for invoices or payments to vendors, which occurred presumably after-the-fact of his alcohol induced "black-outs." The prosecutor aptly noted in his closing argument that while "all alcoholics drink, not all alcoholics steal from their employers." Therefore, regardless of whether or not Mr. Cognac had an alcohol abuse problem, the circumstances of his criminal conviction show his ability to carry out and conceal a criminal scheme over an extended period of time. For these reasons, the circumstances of Mr. Cognac's criminal conduct are substantially related to the practice of a real estate appraiser; as his criminal convictions demonstrated a lack of honesty, trustworthiness and responsibility, character traits that are integral to the ethical practice of a real estate appraiser.

While employment and re-entry into the workforce are important considerations in the rehabilitation process, the convicted person's interest must be weighed against the interests of society. The concern is that society should not have to bear an unreasonable risk that a convicted person, being placed in an employment situation offering temptations or opportunities for criminal activity similar to those present in the crimes for which he had been previously convicted, will commit another similar crime. This concern is legitimate, since it is based on the well-documented phenomenon of recidivism. If Mr. Cognac were granted a license as a real estate appraiser, he would be involved in significant financial transactions wherein he would be entrusted with significant responsibility as well as ample opportunity for misconduct, such as self-dealing, "kick-backs" and other fraudulent schemes. The occurrences of such criminal activity in the real estate appraisal industry are documented and well known. One example is the "property flipping" scheme, which involves inflated appraisals and the short term purchase and re-sale of the property. This scheme creates problems for sellers, buyers, lenders and impacts the surrounding property values.

Prior to the granting of license, the licensing authority must have reliable proof that the person with a conviction record has been successfully rehabilitated. There are several indicators of rehabilitation. One of the indicators is the passage of time since the date of the conviction; how long has it been since the criminal activity occurred? Another indicator is the payment of restitution; has the convicted person paid restitution to the victim? Another indicator is the successful completion of probation; has the convicted person completed their probation? Finally, if substance abuse was a factor in the commission of the crime, has the convicted person received appropriate treatment and achieved remission or recovery?

Unfortunately, when measured against these indicators, there is insufficient evidence in the record to determine if Mr. Cognac has been successfully rehabilitated. For example, with respect to the passage of time, Mr. Cognac's conviction was in December 2002, less than two years from the present date and one year before his application for a license in December 2003. Also, with respect to the payment of restitution, Mr. Cognac owes approximately \$46,000.00, nearly the full sum of the restitution assessed by the court. Mr. Cognac remains under supervised probation until May 2006. Lastly, Mr. Cognac does not receive formal AODA treatment, despite having been a "practicing alcoholic," for many years. Instead, Mr. Cognac's support and recovery system consists of a voluntary compliance in AA and speaking to a hospital counseling program, although no documentation was submitted to substantiate the frequency and results of his participation. The evidence of record also shows that Mr. Cognac failed to provide his AODA assessment reports to the Division as requested so that his diagnosis and prognosis for recovery are unknown.^[2]

In summary, it is simply too early to determine, based on the limited evidence submitted in support of his application, that Mr. Cognac has been successfully rehabilitated and should receive a license as a real estate appraiser. It is simply too early, based on the evidence of record, to reliably know whether Mr. Cognac would abide by the laws governing the privilege and responsibility that such a license would afford him. His record of rehabilitation is too short and uncertain at this point.

For all of these reasons discussed herein, the Department was fully justified in initially denying Mr. Cognac's application for licensure.

Dated this 26th day of July, 2004.

Respectfully submitted,

Colleen M. Baird
Administrative Law Judge

[\[1\]](#) Now sec. 111.335(1)(c)1., Stats., which states as follows:

111.335 Arrest or conviction record; exceptions and special Cases. (1)

* * * *

(c) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ or license, or to bar or terminate from employment or licensing, any individual who:

1. Has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity;

[\[2\]](#) It is has been established by AODA treatment specialists that a minimum period of five (5) years is necessary to demonstrate complete substance abuse recovery. Disciplinary authorities have, therefore, routinely imposed 5 year treatment and monitoring orders upon licensees to protect the public.