

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 REGISTRATION AS A
HOME INSPECTOR OF

BRIAN E. HEMPLEMAN,
APPLICANT.

FINAL DECISION
AND ORDER
LS0705032RHI

Division of Enforcement Case No. 07RHI004

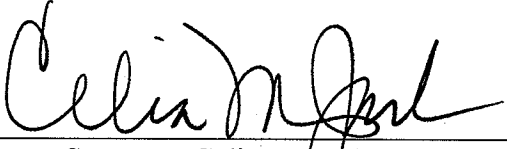
The State of Wisconsin, Department of Regulation and Licensing, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

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 3rd day of August, 2007.


Secretary Celia M. Jackson
Department of Regulation and Licensing

STATE OF WISCONSIN
BEFORE THE DEPARTMENT OF REGULATION & LICENSING

IN THE MATTER OF THE APPLICATION	:	
FOR REGISTRATION AS	:	PROPOSED DECISION
HOME INSPECTOR	:	
OF	:	AND ORDER
BRIAN E. HEMPLEMAN,	:	(Class One Hearing)
APPLICANT	:	
	:	Case No. LS 0705032-RHI

(Division of Enforcement Case File # 07 RHI 004)

To: Brian E. Hempleman
W10141 Eddy Road
Thorp, WI 54771

John Nicholas Schweitzer
Division of Enforcement
P.O. Box 8935
Madison, WI 53708-8935

PROCEDURAL HISTORY

On June 26, 2007, a Class One hearing pursuant to Wis. Admin. Code Chapter RL 1, was held in the matter of the application for registration as a home inspector of Brian E. Hempleman. The notice of hearing identified two issues to be adjudicated:

Whether Mr. Hempleman's felony conviction record constitutes convictions substantially related to the practice of a home inspector within the meaning of Wisconsin Statutes sec. 111.335(1) (c) 1. and whether a full and unrestricted registration should be issued to Mr. Hempleman.

FINDINGS OF FACT

1. Brian E. Hempleman was born in 1970.
2. Mr. Hempleman's latest address on file with the Department of Regulation and Licensing is W10141 Eddy Road, Thorp, WI 54771.
3. Mr. Hempleman submitted an application for registration as a home inspector on or about December 16, 2006.
4. On March 21, 2007, the Department of Regulation and Licensing denied Mr. Hempleman's application for a full and unrestricted registration as a home inspector on the following grounds: documentation on file that establishes that the applicant had been

convicted of felony crimes, the circumstances of which substantially relate to the practice as a home inspector.

5. On April 10, 2007, Mr. Hempleman sent a letter to the Department of Regulation and Licensing requesting a hearing on the Department of Regulation and Licensing's decision to deny an unrestricted registration as a home inspector. Mr. Hempleman timely requested a hearing on the denial of his application within 45 days of receiving the denial.

6. Brian E. Hempleman has been convicted of felony offenses in Chippewa County, Wisconsin Circuit Court Case # 89 CF 175. On October 24, 1989, Mr. Hempleman was convicted of three counts of Party to the Crime of Burglary, all Class F felonies contrary to Wis. Stats., §§ 943.10 (1) and 939.05. On March 23, 1990, on one count sentence was imposed and stayed, and on all counts, Mr. Hempleman was placed on probation for ten years with conditions. The offense dates were September 17, 18 and 22, 1989.

7. Brian E. Hempleman has been convicted of a felony offense in Clark County Wisconsin Circuit Court Case # 89 CF 62. On February 27, 1990, Mr. Hempleman was convicted of one count of Party to the Crime of Burglary, a Class F felony contrary to Wis. Stats., §§ 943.10 (1) and 939.05. Sentence was withheld and Mr. Hempleman was placed on probation for three years with conditions. Two counts of theft, one Class C felony and one Class A misdemeanor, were read-in and dismissed. The offense date was September 18, 1989.

8. Brian E. Hempleman has one other criminal conviction for a misdemeanor offense the circumstances of which are not substantially related to the practice of home inspection. The offense date was October 28, 1989 and the offense was criminal damage to property.

9. Mr. Hempleman successfully completed the probationary period for the Clark County case and was discharged from probation on September 10, 1996.

10. Sometime in the year 2000, Mr. Hempleman applied for registration as a home inspector. In July 2000, by agreement, Mr. Hempleman was issued a limited registration as a home inspector. Among the limitations were:

- Quarterly reports to the Department Monitor from both Mr. Hempleman and from his probation agent showing continuing lawful conduct and compliance with the terms of his limited registration.
- Immediate notification to the department of any violation of probation conditions.
- Renewal in a timely fashion.

11. On April 30, 2002, the Department of Regulation and Licensing revoked Mr. Hempleman's limited home inspector registration granted by the July 13, 2000, Order Adopting Stipulation. The reason for the revocation was failure to file reports as required by the July 13, 2000, Order Adopting Stipulation.

12. The probationary period for the Chippewa County case was extended for three years because Mr. Hempleman had not fully paid restitution during the original period. Mr.

Hempleman completed all the conditions of the Chippewa County probationary period and was discharged March 23, 2003.

CONCLUSIONS OF LAW

1. The Wisconsin Department of Regulation and Licensing has jurisdiction of this matter pursuant to Wis. Stats. §440.972.
2. The convictions described in Findings of Fact paragraphs 6 and 7 are felony offenses the circumstances of which are substantially related to the practice of home inspection.
3. Brian E. Hempleman has met the burden of proof to show rehabilitation such that the credential sought should issue. Wis. Admin. Code § RL 1.08(4)

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that Brian E. Hempleman be **GRANTED** his application for registration as a home inspector.

OPINION

Wis. Stat. § 440.972 Registration of home inspectors.

- (1) The department shall register an individual under this subchapter if the individual does all of the following:
- (a) Submits an application for registration to the department on a form provided by the department.
 - (b) Pays the fee specified in s. 440.05 (1).
 - (c) Submits evidence satisfactory to the department that he or she is not subject to a pending criminal charge, or has not been convicted of a felony, misdemeanor or other offense, the circumstances of which substantially relate to the practice of home inspection.
 - (d) Passes an examination under s. 440.973 (1).

This case presents a situation that invokes the provisions of the Wisconsin Fair Employment Act which is codified in subchapter II of Chapter 111 of Wisconsin Statutes. The general principle of the fair employment act is set forth in § 111.321 Wis. Stats., which states:

Subject to ss. 111.33 to 111.36, no ... licensing agency or other person may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of ... arrest record, conviction record, ... or use or nonuse of lawful products off the employer's premises during nonworking hours.

Wis. Stat., § 111.321 Prohibited bases of discrimination.

Statutory provisions that are closely related and applicable to this situation include:

It is unlawful for any employer, labor organization, licensing agency or person to discriminate against any employee or any applicant for employment or licensing.

Wis. Stat., § 111.325 Unlawful to discriminate.

It is the public policy of the State of Wisconsin to encourage rehabilitation of persons who have violated the law. Wisconsin recognizes that society has an interest in rehabilitating one who has been convicted of crime and protecting him or her from being discriminated against in the area of employment. Employment is an integral part of the rehabilitation process.

On the other hand, society has an interest in protecting its citizens. Both the reality and the public perception of recidivism, the tendency to relapse into a previous undesirable type of behavior, especially crime; require the creation of exceptions to the protection afforded convicted criminals. Our Supreme Court recognizes that there is concern that individuals, and the community at large, not 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.¹

These exceptions are set forth in § 111.335 (1), Wis. Stats., which provides in relevant part:

...

(b) Notwithstanding s. 111.322, it is not employment discrimination because of arrest record to refuse to employ or license, or to suspend from employment or licensing, any individual who is subject to a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the particular job or licensed activity.

(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 relates to the circumstances of the particular job or licensed activity; ...

The analysis does not end there, however, as the "Declaration of Policy" of the Fair Employment Act embodied in § 111.31 requires an evaluation of an applicant based upon the applicant's individual qualifications with an eye to employment of all properly qualified individuals. A fair reading of section 111.31 suggests a balancing of the interests between public protection on the one hand and the public interest in rehabilitating criminals. This

¹ *County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 407 N.W.2d 908 (1987).

balancing test was recognized and approved by the Wisconsin Supreme Court in *County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 407 N.W.2d 908 (1987).

In balancing the competing interests, and structuring the exception, the legislature has had to determine how to assess when the risk of recidivism becomes too great to ask the citizenry to bear. The test is when the circumstances, of the offense and the particular job, are substantially related.

COUNTY OF MILWAUKEE v. LIRC, 139 Wis.2d 805,
407 N.W.2d 908, (1987)

The assessment of the risk of recidivism once an offense has been determined to be substantially related to the profession entails an analysis of several factors such as the time elapsed since the conviction and other indicia of rehabilitation of the applicant.

It is generally accepted that the risk of recidivism decreases as the amount of time that a person remains crime free increases. Closely related factors are whether the applicant is no longer incarcerated, no longer on parole or probation and whether all conditions of the sentence have been completed.

Evidence of rehabilitation can take many forms and is inherently individualistic. That is, that which may be a strong indication of rehabilitation for one may have little value for others. Some such factors include;

- Signs of remorse,
- Acceptance of responsibility,
- Acknowledgement of wrongdoing,
- Payment of full restitution,
- Participation in and successful completion of counseling, if appropriate,
- Successful and substantial periods of employment,
- Substantial periods of crime free behavior while not incarcerated or under supervision, and
- Involvement in the community.

In the present case, Hempleman concedes that the offenses for which he was convicted are substantially related to the profession of home inspector. This concession is correct. Mr. Hempleman is convicted on four counts of party to the crime of burglary, one count of felony theft, one count of misdemeanor theft and one count of misdemeanor criminal damage to property. Two of the burglary convictions are based upon entry into residences without consent with the intent to steal. The other two burglary convictions are based upon entry into a machine shed and a business establishment. The relationship to the profession of home inspector is readily apparent.

The true issue presented in this matter is whether and to what degree Mr. Hempleman has been rehabilitated. If there are signs of rehabilitation but legitimate public protections concerns remain, it may be possible to fashion credential limitations that address those concerns while allowing the applicant into the workforce. At one point in the proceedings, the

department suggested that one such limitation should be requiring Mr. Hempleman to work under the supervision of a registered home inspector.

In support of its denial the department notes that the offenses for which Mr. Hempleman was convicted were serious, that in recent correspondence with the department, Mr. Hempleman minimized his culpability and he failed to appropriately communicate with the department regarding the lapse/revocation proceedings in 2002.

Mr. Hempleman requests an unlimited registration. He argues that because he is situated in rural Wisconsin, requiring him to have a registered home inspector supervise him is unrealistic and impractical. Hempleman points out that the only supervisors available are actually competitors in the market place and unlikely to welcome him into the field. Hempleman notes that all of his convictions stem from events committed in a relatively short timeframe in the fall of 1989. He notes no prior or subsequent criminal activity. Hempleman reports that he is now married with two children and that he has a long history of employment.

The determination whether Hempleman may be eligible for a credential and, if so, whether limitations should be imposed, relies on a determination whether he has presented evidence of his rehabilitation sufficient to warrant grant of the credential.

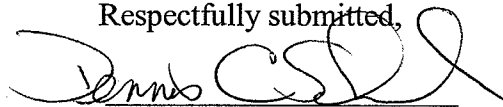
The balance of rehabilitation, personal accountability and community protection in the circumstances presented here tilts in Hempleman's favor. He has remained free of criminal activity for almost 18 years. While he was technically under probationary supervision for 13 years of that, there is no record of any violation of the terms of that supervision during that period. He accepted responsibility and assumed personal accountability by entering pleas to the charges rather than forcing the State to prove his guilt at trial. He has made restitution in the amount determined by the courts, thus making the victims whole. He has been employed and is proving himself as a participating member of society. He is further showing involvement in other community based activities such as Boy Scouts.

The risk that Mr. Hempleman would upset the life he has built by reverting to criminal behavior that he engaged in as a teenager after 18 years and thereby risk loss of family, friends, and reputation is minimal. Allowing him to enter homes as necessary to perform the functions of home inspector is not likely to be a temptation to criminal activity that could not or would not be overcome by personal integrity that Mr. Hempleman has developed in the many years since his transgressions.

The recommendation of a limited credential for one year does not substantially increase the public protection beyond that which is evidenced by Mr. Hempleman's own personal ethics that he demonstrated and were testified to by two community members. Therefore, an unlimited registration as a home inspector should be awarded to the applicant.

Dated this 5th day of July, 2007.

Respectfully submitted,



Dennis C. Schuh
Administrative Law Judge

NOTICE OF RIGHTS OF APPEAL

TO: Brian Hempleman

You have been issued a Final Decision and Order. For purposes of service the date of mailing of this Final Decision and Order is 8-9-07. Your rights to request a rehearing and/or judicial review are summarized below and set forth fully in the statutes reprinted on the reverse side.

A. REHEARING.

Any person aggrieved by this order may file a written petition for rehearing within 20 days after service of this order, as provided in section 227.49 of the Wisconsin Statutes. The 20 day period commences on the day of personal service or the date of mailing of this decision. The date of mailing of this Final Decision is shown above.

A petition for rehearing should name as respondent and be filed with the party identified below.

A petition for rehearing shall specify in detail the grounds for relief sought and supporting authorities. Rehearing will be granted only on the basis of some material error of law, material error of fact, or new evidence sufficiently strong to reverse or modify the Order which could not have been previously discovered by due diligence. The agency may order a rehearing or enter an order disposing of the petition without a hearing. If the agency does not enter an order disposing of the petition within 30 days of the filing of the petition, the petition shall be deemed to have been denied at the end of the 30 day period.

A petition for rehearing is not a prerequisite for judicial review.

B. JUDICIAL REVIEW.

Any person aggrieved by this decision may petition for judicial review as specified in section 227.53, Wisconsin Statutes (copy on reverse side). The petition for judicial review must be filed in circuit court where the petitioner resides, except if the petitioner is a non-resident, the proceedings shall be in the county where the dispute arose. The petition should name as the respondent the Department, Board, Examining Board, or Affiliated Credentialing Board which issued the Final Decision and Order. A copy of the petition for judicial review must also be served upon the respondent at the address listed below.

A petition for judicial review must be served personally or by certified mail on the respondent and filed with the court within 30 days after service of the Final Decision and Order if there is no petition for rehearing, or within 30 days after service of the order finally disposing of a petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing. Courts have held that the right to judicial review of administrative agency decisions is dependent upon strict compliance with the requirements of sec. 227.53 (1) (a), Stats. This statute requires, among other things, that a petition for review be served upon the agency and be filed with the clerk of the circuit court within the applicable thirty day period.

The 30 day period for serving and filing a petition for judicial review commences on the day after personal service or mailing of the Final Decision and Order by the agency, or, if a petition for rehearing has been timely filed, the day after personal service or mailing of a final decision or disposition by the agency of the petition for rehearing, or the day after the final disposition by operation of the law of a petition for rehearing. The date of mailing of this Final Decision and Order is shown above.

The petition shall state the nature of the petitioner's interest, the facts showing that the petitioner is a person aggrieved by the decision, and the grounds specified in section 227.57, Wisconsin Statutes, upon which the petitioner contends that the decision should be reversed or modified. The petition shall be entitled in the name of the person serving it as Petitioner and the Respondent as described below.

SERVE PETITION FOR REHEARING OR JUDICIAL REVIEW ON:

Dept of Regulation & Licensing

1400 East Washington Avenue

P.O. Box 8935

Madison WI 53708-8935