

# WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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STATE OF WISCONSIN  
BEFORE THE DEPARTMENT OF REGULATION AND LICENSING

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IN THE MATTER OF THE APPLICATION:

FOR A PRIVATE SECURITY PERMIT OF :	FINAL DECISION
:	AND ORDER
RICHARD A. REYNOLDS,	LS0811133RSG
APPLICANT.	:

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Division of Enforcement Case No. 08 RSG 039

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 24<sup>th</sup> day of March, 2009.

Celia M. Jackson, Secretary  
Department of Regulation and Licensing

STATE OF WISCONSIN  
BEFORE THE DEPARTMENT OF REGULATION AND LICENSING

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IN THE MATTER OF THE APPLICATION	:	
FOR A PRIVATE SECURITY PERMIT OF	:	
<b>RICHARD A. REYNOLDS,</b>	:	<b>PROPOSED DECISION</b>
APPLICANT.	:	Case No. LS-0811133-RSG

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**PARTIES**

The parties in this matter under section 227.44 of the Statutes and section RL 1.06 of the Wisconsin Administrative Code, and for purposes of review under sec. 227.53, Stats. are:

Credentialing Authority:

Department of Regulation and Licensing  
1400 East Washington Ave.  
Madison, WI 53708-8935  
represented by the Department's Division of Enforcement

Applicant:

Richard A. Reynolds  
3011 West Fardale Avenue #8  
Milwaukee, WI 53221

Represented by Attorney Sheila Sullivan  
Legal Action of Wisconsin  
230 West Wells Street, Room 800  
Milwaukee, WI 53203

**APPLICABLE STATUTES AND RULES**

**Statutes**

**111.335 Arrest or conviction record; exceptions and special cases.**

...  
(cg) 1. Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to deny or refuse to renew a license or permit under s. 440.26 to a person who has been convicted of a felony and has not been pardoned for that felony.  
...

**440.26 Private detectives, investigators and security personnel; licenses and permits.**

...  
(5m) Private security permit.  
(a) The department shall issue a private security permit to an individual if all of the following apply:

...  
2. The individual has not been convicted in this state or elsewhere of a felony, unless he or she has been pardoned for that felony.  
...

**Wisconsin Administrative Code**

**RL 35.01 Unprofessional conduct.**

The department may deny an application for renewal, limit, suspend or revoke a credential, or reprimand a credential holder upon proof that the credential holder or any owner of an agency has engaged in conduct reflecting adversely on professional qualification. Conduct reflecting adversely on professional qualification includes, but is not limited to, any of the following:

...  
(2) Violating, or aiding or abetting the violation of, any law the circumstances of which substantially relate to the practice of a private detective or private security person. ....

**PROCEDURAL HISTORY**

A. Mr. Reynolds applied for a Private Security permit on or about June 30, 2008.

- B. The Department denied Mr. Reynolds' application on August 8, 2008.[\[1\]](#)
- C. On September 19<sup>th</sup>, 2008, Mr. Reynolds requested a hearing on the denial.
- D. On November 13, 2008, a Notice of Hearing was filed by Attorney Angela Arrington for the Department, and mailed to Mr. Reynolds' Attorney, Sheila Sullivan. A hearing was scheduled for December 17, 2008.
- E. Ms. Sullivan filed a hearing brief on December 15, 2008.
- F. The hearing was held on December 17, 2008. Ms. Sullivan and Ms. Arrington appeared in person and Mr. Reynolds appeared by phone. The hearing was conducted by Administrative Law Judge Colleen Baird. The hearing was recorded, and a transcript of the hearing was prepared and delivered on December 22, 2008.
- G. A Brief and Closing Argument were filed by Ms. Arrington on December 22, 2008.
- H. A Supplemental Brief was filed by Ms. Sullivan on January 9, 2009.
- I. This Proposed Decision is based on the testimony and exhibits entered into evidence at the hearing and the briefs and legal argument filed by the attorneys for both parties.

### **FINDINGS OF FACT**

1. Richard A. Reynolds resides at 3011 West Fardale Avenue #8, Milwaukee, WI 53221.
2. Mr. Reynolds was convicted on September 25<sup>th</sup>, 1972 of one felony count of Operating Automobile Without Owner's Consent. He was sentenced to three years in prison. The court stayed the sentence and placed him on probation for three years but ordered him to serve six months in County Jail with work release privileges. Mr. Reynolds was ordered to pay \$35 monthly payments beginning November 1, 1972, and by the 1<sup>st</sup> of each month in succession until all costs, disbursements and restitution were paid. His driving privileges were suspended for the full term of probation.
3. On or about June 30, 2008, Richard A. Reynolds submitted an application to the Department of Regulation and Licensing for a Private Security Permit.
4. In his application, in response to a question about convictions, Mr. Reynolds disclosed that he had been convicted in 1972 of Operating a Motor Vehicle without the Owner's Consent. He stated that it was a misdemeanor conviction, but this was a mistake based on his being ordered to serve six months in jail, and he did not intentionally attempt to mislead the Department.
5. Mr. Reynolds has no other arrest record, and no other criminal convictions.
6. Given all the facts and circumstances, especially the passage of 36 years without another arrest or conviction, Mr. Reynolds' 1972 conviction for Operating Automobile Without Owner's Consent is not substantially related to the profession of private security.
7. By the effect of sec. 440.26 (5m) (a) 2., Wis. Stats., Mr. Reynolds may not be issued a Private Security Permit.

### **CONCLUSIONS OF LAW**

- I. The Department of Regulation and Licensing is the legal authority responsible for issuing and controlling Private Security Permits, under sec. 440.26, Stats., and it has jurisdiction over this hearing regarding the denial of an application for such a permit under sec. 440.03 (1), Stats., and ch. RL 31, Wis. Admin. Code.
- II. The Department of Regulation and Licensing has personal jurisdiction over the applicant, Richard A. Reynolds, based on submitting an application for a credential issued by the Department, and based on notice under sec. 801.04 (2), Stats.
- III. Mr. Reynolds has not shown satisfactory evidence that overcomes the effect of sec. 440.26 (5m) (a) 2., Wis. Stats. He has therefore not shown satisfactory evidence that he meets the eligibility requirements set by law for the credential, as required by sec. RL 1.08 (4), Wis. Admin. Code, and Mr. Reynolds may not be issued a Private Security Permit.

### **ORDER**

THEREFORE, IT IS ORDERED that the decision of the Department of Regulation and Licensing denying Richard A. Reynolds' application for a Private Security Permit is hereby affirmed.

## ANALYSIS

### Background.

This is a class 1 proceeding under the authority of ch. 227, Stats. and ch. RL 1, Wis. Admin. Code. The Division of Enforcement in the Department of Regulation and Licensing filed a Notice of Hearing stating that Mr. Reynolds' application for Private Security Permit was denied because he had been convicted of a felony. Section 440.26 (5m) (a) of the Wisconsin Statutes states, "The department shall issue a private security permit to an individual if all of the following apply: ... 2. The individual has been convicted in this state or elsewhere of a felony, unless he or she has been pardoned for that felony. ...." The burden of proof at a denial hearing is set in sec. RL 1.08 (4), Wis. Admin. Code, which states, "The applicant has the burden of proof to show by evidence satisfactory to the credentialing authority that the applicant meets the eligibility requirements set by law for the credential. Because Mr. Reynolds has been convicted of a felony for which he has not been pardoned, Mr. Reynolds is unable to show satisfactory evidence that he meets the eligibility requirements set by law for the credential.

### Constitutional Arguments.

Counsel for Mr. Reynolds argues that the provision in sec. 440.26 (5m) (a) 2., Stats. (and the parallel provision in sec. 111.335 (cg), Stats.) prohibiting the issuance of a private security permit to an unpardoned felon is unconstitutional. The bases for this argument include

- the law improperly discriminates against applicants for private security permits, as compared to current permit holders.
- the law improperly discriminates against applicants for private security permits, as compared to applicants for other licenses.
- the law improperly discriminates against applicants for private security permits, as compared to applicants for employment in law enforcement.
- there is no rational basis to deny applicants for private security permits the same legal protections granted to applicants for licenses in medicine, law, and other professional fields.
- the law violates due process by creating an irrebuttable presumption.

It is not necessary or appropriate to discuss or evaluate the constitutional arguments here, as this forum does not have the authority to decide constitutional issues<sup>[iii]</sup>, and the only authority granted to an administrative agency is to apply the law, which in this case is clear and unequivocal. Nevertheless, the constitutionality issue has been appropriately raised in this administrative hearing, as required<sup>[iii]</sup>, and it is preserved as an issue for appeal.

Counsel for Mr. Reynolds also urged the Department to consider the constitutionality of the statute "as applied", that is, to interpret the law so as to permit his application to be granted. The argument is that the law barring Private Security permits for felons contains one explicit exception -- a pardon -- and one implicit exception -- an amendment of the felony charge to a misdemeanor -- and that these exceptions exist to change the significance of the original conviction, specifically to acknowledge that the person has been rehabilitated. Ms. Sullivan argues that Mr. Reynolds' record since 1972 serves the same purpose and should similarly be an exception to the statutory prohibition. The argument is ingenious and it is reflected in the analysis of "substantially related" below, but it is not legally persuasive or acceptable. Ms. Sullivan also argues that the Metz case<sup>[iv]</sup> authorizes administrative tribunals to consider what she calls an "as applied" constitutional challenge. However, the language in the case she quotes to support her argument is hypothetical dicta unrelated to the actual ruling in the case, and therefore carries no real weight.

### Facts.

The hearing was held in Madison, and Mr. Reynolds appeared by phone from Milwaukee, due to physical limitations. Mr. Reynolds testified that for 30 years, essentially from the time of the conviction to 2001 when he suffered a stroke, he was gainfully employed as a tool and machinist [sic]. Since his stroke in 2001 he has received Social Security Disability assistance, but he wanted to supplement his SSDI income or get off SSDI completely. His left arm is "pretty well useless", and he limps. [hearing transcript, pp. 21-22] He has talked to a security guard company about a desk job checking people in and out, but that possibility is "in limbo" until and unless he can obtain a permit. [tr., pp. 29-31]

Even though Mr. Reynolds was not available for the Administrative Law Judge to see in person, the transcript reveals him to be very believable. Note, for example, his responses to this questioning from his own attorney:

Q: In the various jobs you've held, have there been opportunities to steal things or take advantage of your employer in any way?

A: All I ever did was --

Q: Not did you. Were there opportunities to do it in your position?

A: Well, yes, I suppose. On my lunch breaks, I would machine up parts for myself.

Q: Okay.

A: For my car or whatever. [tr., pp. 22-23]

His honesty is refreshing, and it both complements and lends credibility to his testimony about the 1972 arrest and conviction:

Q: So in September of 1972 you apparently, someplace in West Allis, stole a car; is that correct?

A: Yeah. Yeah. That's been -- would be me. Yeah.

Q: Do you want to say briefly what happened? Do you remember much about the circumstances?

A: Well, we happened to be -- me and a friend of mine just happened to see a car with keys in it, and we just decided to go joyriding, is all that happened.

Q: Was this --

A: And --

Q: Oh, sorry.

A: And the police ended up chasing us, and we ran, and my friend got caught. And he turned me in, and the next day the police were knocking on my door.

Q: So it looks to me like your arrest, apparently, was maybe the 17<sup>th</sup>, and you pled guilty on the 25<sup>th</sup> of September. It looks like it was very close together. Do you remember that?

A: Yeah. I always thought it was the 19<sup>th</sup>, but then that was so long ago, I really don't remember the dates.

Q: Did you have an attorney?

A: To tell you the truth, I don't even remember.

Q: Did you talk -- did you ever consider going to trial or making any kind of defense in this case?

A: No. They had me dead to rights. I was in the wrong, and I just owned up to it.

[tr., pp. 23-24]

Mr. Reynolds' testimony regarding the nature of the offense and his rehabilitation since 1972 is accepted as true.

### The "Substantial Relationship" Test

The "substantial relationship" test was mentioned frequently during the hearing and the written submissions in this case. The test derives from the Fair Employment Act, sections 111.31 *et seq.*, Wis. Stats. Section 111.321, Stats. generally prohibits employment discrimination (defined in sec. 111.322 to include refusing to license an individual) on the basis of conviction record. An exception exists, however, in sec. 111.335, which says "notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ or license, or to suspend 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 ...".

The substantial relationship test does not exist in the controlling statute here, sec. 440.26 (5m) (a) 2., Stats., or in the parallel provision in sec. 111.335 (cg), Stats. Thus, a licensing authority may consider an applicant's criminal history in deciding whether to license him/her but -- for most professions -- it may deny the application only if the crime was "substantially related" to the profession.

The major purpose of regulating any profession is to protect the public, and it is natural for a regulatory authority, on that basis, to wish to exclude from the profession any person who has committed a crime. On the other hand, the public interest is also served by rehabilitating criminals and assisting them to become productive members of society. Allowing a person to work in a profession for which he or she is qualified or has special skills furthers the goals of rehabilitation and contribution to society. The difficult balancing of interests underlying the issue of whether to allow a convicted criminal to practice a profession which is regulated for the protection of the public is described in the Fair Employment Act's "Declaration of Policy":

... It is the intent of the legislature to protect by law the rights of all individuals to obtain gainful employment and to enjoy privileges free from employment discrimination because of ... conviction record .... It is the intent of the legislature in promulgating this subchapter to encourage employers to evaluate an employee or applicant for employment based upon the employee's or applicant's individual qualifications rather than upon a particular class to which the individual may belong. In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of this state to encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of ... conviction record .... This subchapter shall be liberally construed for the accomplishment of this purpose.

A number of reported cases have dealt with the question of how to establish whether a particular offense is substantially related to the practice of a profession<sup>[iv]</sup>. The language in those cases turns "substantially related" from a common-sense term into a technical legal term, a "term of art". The analysis of whether a offense is "substantially related" to a profession must thus follow the analyses in the reported cases. The clearest guidance is provided in the County of Milwaukee v. LIRC case at page 824:

"Assessing whether the tendencies and inclinations to behave in a certain way in a particular context are likely to reappear in a related context, based on the traits revealed, is the purpose of the test. ... 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."

In Mr. Reynolds' case, his reaction to his 1972 felony conviction has been to become a perfectly law-abiding citizen.

Q: Now, over the last 36 years, what steps have you taken to avoid engaging in criminal behavior?

A: Oh, I just don't do it. I mean, it's -- I don't know what else to say. I have been just staying out of trouble. We got married and just stayed out of trouble.

[tr., p. 33]

Mr. Reynolds has now stayed out of trouble for 36 years, twice his age when he went joyriding.

I am convinced beyond a reasonable doubt that Mr. Reynolds presents no danger to the public, and that he could safely be entrusted with the responsibility of protecting property and people. I interpret the “substantially related” test in its legal sense as being for the protection of the public, and a Finding of Fact is made that Mr. Reynolds’ 1972 conviction is not substantially related to the practice of private security. This finding does not lead to a conclusion that Mr. Reynolds should be granted a Private Security permit, but it may be relevant if a reviewing court finds that the test should be applied.

### Conclusion.

Mr. Reynolds was convicted of one felony count of Operating an Auto Without the Owner’s Consent in September of 1972, for which he has not been pardoned. The burden of proof in this Class 1 hearing was on Mr. Reynolds to prove that he met the eligibility requirements set forth by law in order to be granted his private security permit. I conclude that under the controlling statute, although his conviction is not “substantially related” to the practice of Private Security, he is not eligible for a Private Security permit. He therefore failed to satisfy his burden, and the Department’s decision to deny his application must be affirmed.

Dated and signed: February 13, 2009

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Nick Schweitzer  
Administrative Law Judge  
Department of Regulation and Licensing

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[\[i\]](#) The notice of denial and the Notice of Hearing mistakenly stated that the controlling statutory section was sec. 440.26 (2) (c) 2., Stats., which (though misleadingly titled “Types of Licenses; Application; Approval”) applies only to applications for Private Detective licenses and Private Detective Agency licenses. However, as stated correctly in the Notice of Hearing, the issue is “whether a security permit may be granted in the State of Wisconsin to a person that has been convicted of a felony and that has not been pardoned for that felony”.

[\[ii\]](#) Wendlandt v. Industrial Comm. 256 Wis. 62, 39 N.W.2d 854 (1949); Kmiec v. Town of Spider Lake, 60 Wis.2d 640, 211 N.W.2d 471 (1973); Milwaukee v. Wroten, 160 Wis.2d 207, 466 N.W.2d 861 (1991).

[\[iii\]](#) Omernick v. Department of Natural Resources, 100 Wis.2d 234, 301 N.W.2d 437 (1981)

[\[iv\]](#) Metz v. Veterinary Examining Board, 2007 WI App 220, 305 Wis.2d 788, 741 N.W.2d 244.

[\[v\]](#) Law Enforce. Stds. Bd. v. Lyndon Station, 101 Wis.2d 472, 305 N.W.2d 89 (1981); Gibson v. Transp. Comm., 106 Wis.2d 22, 315 N.W.2d 346 (1982); County of Milwaukee v. LIRC, 139 Wis.2d 805, 407 N.W.2d 908 (1987).