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**Before The
State Of Wisconsin
DEPARTMENT OF REGULATION AND LICENSING**

In the Matter of the Application for Certification as
a Massage Therapist or Bodyworker of
GREGORY LOGAN, Applicant

Case No. LS 0907031 MTB

Division of Enforcement Case No. 09 MTB 003

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, make 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 at Madison, Wisconsin on

1/6/10

A handwritten signature in cursive script, appearing to read "Celia M. Jackson".

Celia M. Jackson, Secretary
Department of Regulation and Licensing



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Application for
Certification as a Massage Therapist or
Bodyworker of **GREGORY LOGAN**,
Applicant

PROPOSED DECISION AND ORDER
Case No. LS 0907031 MTB

Division of Enforcement Case No. 09 MTB 003

The PARTIES to this proceeding for purposes of Wis. Stat. § 227.53 and Wis. Admin. Code § RL 1.06 are:

Gregory Logan
N3252 Asje Road
Cambridge, WI 53523

Department of Regulation and Licensing, by
Attorney John Zwieg
Division of Enforcement
Department of Regulation and Licensing
P.O. Box 8935
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On March 2, 2009, Gregory J. Logan submitted to the Department of Regulation and Licensing ("Department") an application for a certificate as a massage therapist or bodyworker. The Department denied the application by notice of denial dated May 21, 2009, and Logan thereafter timely requested a contested case hearing on the Department's denial. The undersigned conducted the contested case hearing in Madison on November 12, 2009, and the record in the matter was closed at the conclusion of the hearing.

The Department's denial of the application is sustained, for the reasons set forth below.

FINDINGS OF FACT

1. In his application for a certificate as a massage therapist or bodyworker, Logan truthfully disclosed that he had been convicted of the following crimes: second offense operating a motor vehicle while intoxicated ("OWI") on April 9, 1999; third offense OWI on August 28, 2000; fourth offense OWI on September 10, 2002; fifth offense OWI on April 14, 2004; and sixth offense OWI on February 19, 2009. The OWI-fifth and OWI-

sixth offenses were felony convictions. Logan also disclosed that he had been convicted of disorderly conduct on November 14, 2005.

2. The Department denied Logan's application by notice of denial dated May 21, 2009. The notice of denial cited the convictions for OWI-fifth, OWI-sixth and disorderly conduct, concluding that Logan had been "convicted of a felony crime, the circumstances of which substantially relate to the practice of a massage therapist or bodyworker."¹

3. The criminal complaint for Logan's OWI-fifth conviction (Dane County case 2004CF000842) alleged that on March 22, 2004, Logan was arrested after a police officer observed him slumped over the steering wheel of a parked vehicle at 1:42 a.m., and that the officer had to awaken Logan by grabbing and shaking him. Logan's blood-alcohol concentration was measured at 0.251 g/mL from an analysis of his blood. (Ex. 1, pp. 14-18). The sentencing court withheld the sentence and placed Logan on probation for five years commencing on November 4, 2004. (Ex. 1, p. 19).

4. The criminal complaint for Logan's OWI-sixth conviction (Dane County case 2007CF002456) alleged that on December 26, 2007, Logan was arrested at about 1:55 a.m. after police stopped the vehicle he was driving because its headlights were not on. Logan was on probation for the OWI-fifth conviction at the time, and as a condition of that probation he was prohibited from consuming alcohol. (T. p. 19). The sentencing court withheld the sentence and placed Logan on probation for five years, commencing on February 19, 2009. As a condition of probation, the court ordered Logan to serve twelve months of "condition time," the first six months of which could be served at a residential treatment facility in Milwaukee known as Manitoba House. Logan completed the treatment program at Manitoba House, and he has continued serving his twelve months of condition time at the Dane County Jail with Huber privileges. (Tr. pp. 34-35).

5. Logan has been compliant with the conditions of his probation since his arrest on December 26, 2007, abstaining from alcohol use since that time. In the approximate 13 months prior to the contested case hearing, he had participated in approximately 518 hours of individual or group treatment sessions. (Ex. 100). His AODA counselor at Cedar Creek Family Counseling, where he successfully completed AODA treatment on August 25, 2009, recently described his prognosis to be "excellent." (Ex. 101.)

6. The circumstances of Logan's convictions for OWI-fifth and OWI-sixth substantially relate to the practice of massage therapy or bodywork.

¹ At the outset of the contested case hearing, the Department withdrew the disorderly conduct offense as a basis for the denial on the ground the application materials had required Logan to report only state or federal convictions, and the disorderly conduct offense had been a county ordinance violation and thus was outside the scope of the disclosure requested by the application materials. (Tr. pp. 6-7).

DISCUSSION

Chapter 460, Stats., titled "Massage Therapy and Bodywork," allows for the voluntary certification of persons as massage therapists or bodyworkers. Chapter 460 is a "title protection act" (in contrast to a "practice protection act") because it does not require a person to hold a certificate as a massage therapist or bodyworker in order to engage in the practice of massage therapy or bodywork. Rather, Chapter 460 simply restricts the use of the titles "massage therapist" or "bodyworker" to persons who hold a certificate for the same issued by the Department. Wis. Stat. § 460.02. "Massage therapy or bodywork" is defined in Wis. Stat. § 460.01(4) as follows:

"Massage therapy or bodywork" means the science and healing art that uses manual actions to palpate and manipulate the soft tissue of the human body, in order to improve circulation, reduce tension, relieve soft tissue pain, or increase flexibility, and includes determining whether massage therapy or bodywork is appropriate or contraindicated, or whether a referral to another health care practitioner is appropriate. "Massage therapy or bodywork" does not include making a medical or chiropractic diagnosis.

Persons who are certified massage therapists or bodyworkers are required to comply with chapter 460 and rules promulgated pursuant to that statute. A violation of the statute or rules subjects the certificate holder to discipline and a penalty of up to \$1,000 per violation. Wis. Stat. § 460.15(1). For example, a certified massage therapist or bodyworker is subject to discipline by the Department for practicing while his or her ability to practice is impaired by alcohol or other drugs. Wis. Stat. § 460.14(2)(e). Similarly, certificate holders are subject to discipline by the Department for violating any of the 32 enumerated standards of professional conduct specified by Wis. Admin. Code Chapter RL 94, "Unprofessional Conduct." Wis. Stat. § 460.14(2)(g). In contrast, persons who practice massage therapy or bodywork but who are not certified are not required to comply with chapter 460 (except as regards the "title use" restriction) or the administrative rules promulgated pursuant to chapter 460, nor are such uncertified practitioners subject to the oversight, investigation, consumer complaint process, or discipline by the Department.

Wisconsin Stat. § 460.14(2)(b) empowers the Department to deny a certificate to an applicant who has been convicted of certain unspecified offenses. It provides in pertinent part as follows:

(2) Subject to the rules promulgated under s. 440.03(1), the department may ... deny, limit, suspend, or revoke a certificate under this chapter if it finds that the applicant or certificate holder has done any of the following:...

(b) Subject to ss. 111.321, 111.322, and 111.335, been convicted of an offense the circumstances of which substantially relate to the practice of massage therapy or bodywork.

The issue for determination is thus whether the circumstances of Logan's felony convictions for OWI-fifth and OWI-sixth substantially relate to the practice of massage therapy or bodywork within the meaning of section 460.14(2)(b).

Section 460.14(2)(b) references provisions of the Wisconsin Fair Employment Act, codified at subchapter II, chapter 111, Stats. The Fair Employment Act generally prohibits employment discrimination on the basis of "conviction record," but excepts from that general prohibition a conviction "of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity." Wis. Stat. § 111.335(1)(c)1.

The statutory construction doctrine of *in pari materia* requires that statutes relating to the same subject matter be read, applied and construed together. See *Perra v. Menomonee Mut. Ins. Co.*, 2000 WI App 215 ¶ 9, 239 Wis.2d 26, 619 N.W.2d 123. *In pari materia* refers to statutes and regulations relating to the same subject matter or having a common purpose. The "substantially relate" standard for certification of massage therapists or bodyworkers contained in section 460.14(2)(b) is clearly derived from the "substantially relate" exception in section 111.335 of the Fair Employment Act, which it specifically references. The "substantially relate" standard of section 460.14(2)(b) is *in pari materia* with the "substantially relate" standard of section 111.335(1)(c)1 and consequently should be construed and applied in a manner consistent with the section 111.335 standard.

Our supreme court in *County of Milwaukee v. LIRC*, 139 Wis.2d 805, 407 N.W.2d 908 (1987), discussed the application of the section 111.335(1)(c)1 exception in detail. Under the doctrine of *in pari materia*, the court's decision on the scope and effect of the "substantially relate" standard of section 111.335(1)(c)1 is likewise applicable to the "substantially relate" standard of section 460.14(2)(b).

In *County of Milwaukee v. LIRC*, the court ruled that the circumstances of a person's convictions for homicide by reckless conduct and for twelve counts of patient neglect, all of which arose out of his former employment as the administrator of a nursing home, substantially related to the circumstances of the job of crisis intervention worker at a mental health complex. Salient excerpts from the court's analysis regarding the legislature's intent in devising the "substantially relate" standard follow:

It is evident that the legislature sought to balance at least two interests. On the one hand, 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. There is a 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. This concern is legitimate since it is necessarily based on the well-documented phenomenon of recidivism.

It is highly desirable to reintegrate convicted criminals into the work force, not only so they will not remain or become public charges but to turn them away from criminal activity and hopefully to rehabilitate them. This is a worthy goal and one that society has shown a willingness to assume, as evidenced by the large sums of money expended in various rehabilitative programs. However, the legislature has clearly chosen to not force such attempts at rehabilitation in employment settings where experience has demonstrated the likelihood of repetitive criminal behavior.

This law should be liberally construed to effect its purpose of providing jobs for those who have been convicted of crime and at the same time not forcing employers to assume risks of repeat conduct by those whose conviction records show them to have the "propensity" to commit similar crimes long recognized by courts, legislatures and social experience.

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.

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. Assessing whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later 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.

139 Wis.2d at 821-24 (footnotes omitted).

Logan acknowledges that he is an alcoholic. He has seriously endangered others and himself by driving while under the influence of alcohol on at least six occasions. He has now abstained from alcohol for nearly two years now, and his primary AODA treatment counselor has described his prognosis as "excellent." He remains on probation for both the OWI-fifth and OWI-sixth convictions, and he has more incentive than ever to maintain sobriety and to desist from ever again operating a motor vehicle while under the influence of an intoxicant.

Despite the positive changes and progress that Logan has made since his last incident of OWI in December 2007, the risk that he may again relapse will always exist, particularly during the first five years of his sobriety. (Graeber testimony). From a purely statistical perspective, the risk that an alcoholic in Logan's present circumstances may relapse before completing five years of sobriety is significant. (Graeber testimony).

Less than two years ago, Logan went to a tavern and consumed alcohol, even though both of those acts were in violation of the conditions of probation for the crime of OWI-fifth. (Tr. pp. 19-20). He then compounded these probation violations by

reoffending by driving while under the influence of intoxicants, which resulted in his conviction for OWI-sixth on February 19, 2009.

Logan argues that his felony OWI convictions are not related to his qualifications and competence to practice massage therapy or bodywork, but the legislature has indicated otherwise by enacting section 460.14(2)(e), which empowers the Department to discipline a certificate holder who has “practiced massage therapy or bodywork while his or her ability to practice was impaired by alcohol or other drugs.” This fact that the legislature saw fit to specifically address the matter of substance abuse on the practice of massage therapy or bodywork indicates a heightened concern on this issue.

Alcohol abuse adversely affects the community in many ways, and impaired drivers constitute one of the leading negative impacts on public safety and welfare. The legislature’s determination in section 460.14(2)(e) that a certificate holder who practices massage therapy or bodywork while under the influence of an intoxicant may be disciplined for that misconduct is an indicator that an alcohol-related crime may properly be viewed to “substantially relate” to the practice of massage therapy or bodywork. In Logan’s circumstances, in his most recent felony offense he not only reoffended but he also violated the conditions of his probation by going to a tavern and consuming alcohol. Even though there is no evidence that Logan has any record of alcohol abuse in an employment context, his failure in December 2007 to refrain from alcohol use and then to drive a motor vehicle while under the influence of alcohol demonstrates a “tendency or inclination” to consume alcohol at a time when he is forbidden to do so, and to violate the law by engaging in an otherwise lawful activity while under the influence of alcohol. See Milwaukee County v. LIRC. It is reasonable to conclude that this demonstrated tendency or inclination could reappear in the practice of massage therapy or bodywork. The Department correctly concluded that Logan’s two felony OWI convictions substantially relate to the practice of massage therapy or bodywork, and it thus acted within its authority to deny the application for certification.²

² Section 460.14(2), Wis. Stats., appears to empower the Department to issue a limited certification for a person who has been convicted of a crime the circumstances of which substantially relate to the practice of massage or bodywork. Moreover, the Department appears recently to have exercised this authority with respect to another applicant for certification, as reflected in an order that is posted on the Department’s website at the following URL: <http://drl.wi.gov/dept/decisions/docs/20070521Seiser.htm>

In the course of the initial prehearing telephone conference, the undersigned ALJ became aware that the Department had previously submitted a proposal to Logan with a view to resolving this matter by agreement, and that Logan had rejected the proposal. (The undersigned quite properly was not privy to the substance of the Department’s proposal.) Regardless of the substance of the Department’s proposal, Logan should be encouraged to apply to the Department for a limited certification, and the Department should seriously consider any such application in recognition of and in furtherance of Logan’s rehabilitation and apparent sincere (and thus far successful) efforts to abstain from alcohol and to desist from any further incidents of OWI.

CONCLUSIONS OF LAW

1. The Department has authority pursuant to Wis. Stat. § 460.14(2)(b) to deny an application for a certificate as a massage therapist or bodyworker from an applicant who has "been convicted of an offense the circumstances of which substantially relate to the practice of massage therapy or bodywork."

2. The circumstances of Logan's convictions for OWI-fifth and OWI-sixth substantially relate to the practice of massage therapy or bodywork. The Department was empowered pursuant to Wis. Stat. 460.14(2)(b) to deny Logan's application for certification on the basis of these two convictions.

PROPOSED ORDER

IT IS ORDERED that the denial of the application of Gregory J. Logan for a certificate for the practice of massage therapy or bodywork is sustained.

IT IS FURTHER ORDERED that Division of Enforcement File 09 MTB 003 be, and the same hereby is, closed.

Dated at Milwaukee, Wisconsin on December 15, 2009.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
819 N. 6th Street, Room 92
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By: William S. Coleman, Jr.
William S. Coleman, Jr.
Administrative Law Judge