

# WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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Before The  
State Of Wisconsin  
DEPARTMENT OF REGULATION AND LICENSING

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In the Matter of the Denial of an Application for  
Registration as a Home Inspector Jeffrey J. Femal,  
Applicant

FINAL DECISION AND ORDER  
Order No. 0000798

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Division of Enforcement Case No. 10 RHI 011

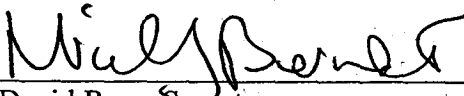
The State of Wisconsin, Department of Regulation and Licensing, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, make the following:

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 the 15<sup>th</sup> day of April, 2011.

  
David Ross, Secretary *for Dept. of Reg. & Lic.*  
Department of Regulation and Licensing



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

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In the Matter of the Denial of  
**AN APPLICATION FOR REGISTRATION AS  
A HOME INSPECTOR JEFFREY J. FEMAL,**  
Applicant

**PROPOSED DECISION AND ORDER**  
DHA Case No. DRL-10-0076

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Division of Enforcement Case No. 10 RHI 011

The parties to this proceeding for purposes of Wis. Stat §§ 227.47(1) and 227.53 are:

Jeffrey J. Femal, by

Attorney Brian Hamill  
Dempsey, Williamson, Kelly & Hertel LLP  
P.O. Box 886  
Oshkosh, WI 54903-0886

Department of Regulation and Licensing, Division of Enforcement, by

Attorney Lydia Thompson  
Department of Regulation and Licensing  
P. O. Box 8935  
Madison, WI 53708-8935

Secretary Dave Ross  
Department of Regulation and Licensing,  
P.O. Box 8935  
Madison, WI 53708-8935

**PROCEDURAL HISTORY**

The procedural matters leading up to this decision are as follows:

On or about June 11, 2010, the applicant, Jeffrey J. Femal, applied for a credential as a home inspector with the Department of Regulation and Licensing ("Department"). (DOE Exhibit 100, June 11, 2010 Application of Jeffrey J. Femal, p. 2).

The Department denied his application on or about July 13, 2010 for the following grounds:

1. Pursuant to Wis. Stat. § 440.972(1)(c), you failed to submit evidence satisfactory to the Department that you have not been convicted of a felony, misdemeanor, or other offense, when the circumstances of that conviction substantially relate to the practice of home inspection.
2. The Department has determined that the circumstances of the totality of your fourteen (14) criminal convictions substantially relate to the practice of home inspection.

(DOE Exhibit 109, July 13, 2010 Notice of Denial).

On or about August 25, 2010, Mr. Femal filed a timely request for an administrative hearing on the denial of his home inspector certification. (DOE Exhibit 102, August 25, 2010 letter from Jeffrey J. Femal to Department of Regulation and Licensing). Specifically, he challenged whether his violations of law were substantially related to the profession of home inspection. (*Id.*)

On or about October 8, 2010, the Department of Regulation and Licensing, Division of Enforcement ("Division") by Attorney Lydia Thompson, granted and provided appropriate notice of Mr. Femal's request for a hearing, consistent with Wis. Admin Code § RL 1.08. The notice identified the issues for consideration at the hearing on the denial of Mr. Femal's application as follows:

1. Whether the Department [of Regulation and Licensing] may register as a home inspector a person who has fourteen (14) criminal convictions when the circumstances of those convictions substantially relate to the practice of home inspection?<sup>1</sup>
2. Whether Jeffrey J. Femal made a material misstatement in his application for a certificate [for a home inspector license], such that the certificate may be denied pursuant to Wis. Stat. § 440.978(2)(a)?<sup>2</sup>

Pursuant to due notice, the contested case hearing in this matter was held at the Wisconsin Department of Regulation and Licensing, 1400 East Wisconsin Avenue, Madison, Wisconsin, on Wednesday, February 16, 2011.

### **FINDINGS OF FACT**

On the evidence presented, the undersigned ALJ makes the following findings of fact:

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<sup>1</sup> See Wis. Stat. § 440.972(1)(c).

<sup>2</sup> The Division did not pursue this claim at hearing. Transcript of Proceedings, February 16, 2011, Jeffrey J. Femal Application Denial, ("Tr."), p. 8. It will thus be considered dismissed.

1. Jeffrey J. Femal was born on April 7, 1974. Mr. Femal's latest address on file with the Department of Regulation and Licensing is: 1118 W. Packard St. #2, Appleton, WI 54914.

2. On June 11, 2010, Mr. Femal submitted an application for registration as a home inspector with the Department of Regulation and Licensing. On page two of the application, Mr. Femal was required to answer question A, which asked the following:

- A. Have you ever been convicted of a misdemeanor or felony, or driving while intoxicated, in this state or any other OR are criminal charges or driving while intoxicated charges currently pending against you? If YES, complete and attach Form #2252.

(DOE Exhibit 100, p. 2).

3. Mr. Femal answered "YES" to the afore-mentioned question, and submitted the required form #2252, the Convictions and Pending Charges form, which solicits detailed information about the applicant's conviction history and pending charges. He listed nine (9) convictions<sup>3</sup>, and further provided Wisconsin Circuit Court Access (WCCA) printouts (and other information) for an additional five (5) offenses<sup>4</sup>, four (4) of which he was convicted for. (See DOE Ex. 100).

4. On July 2, 2010, a U.S. Department of Justice, Crime Information Bureau Report acquired by the DOE demonstrated that Mr. Femal had fourteen (14) convictions. Specifically:

- a) On or about May 30, 1995, Mr. Femal was convicted of violating Wis. Stat. § 346.63(1)(a) [operating under influence];
- b) On or about April 2, 1998, Mr. Femal was convicted of violating Wis. Stat. § 9.44.010 [county disorderly contact];
- c) On or about April 2, 1998, Mr. Femal was convicted of violating Wis. Stat. § 346.63(1)(a) [operating while intoxicated (3<sup>rd</sup>)];
- d) On or about May 27, 1998, Mr. Femal was convicted of violating Wis. Stat. § 961.573(1) [possession of drug paraphernalia];
- e) On or about December 8, 1998, Mr. Femal was convicted of violating Wis. Stat. § 947.01 [disorderly conduct]
- f) On or about March 22, 1999, Mr. Femal was convicted of violating Wis. Stat. § 940.19(1) [battery];
- g) On or about August 17, 1999, Mr. Femal was convicted of violating Wis. Stat. § 947.01 [disorderly conduct];
- h) On or about February 14, 2000, Mr. Femal was convicted of violating Wis. Stat. § 940.19(1) [battery];

<sup>3</sup> Disorderly Conduct (11/11/2000); Battery (12/30/1999); Disorderly Conduct (7/4/1999); Battery (2/7/1999); Operating While Intoxicated (3<sup>rd</sup>) (2/1/1998); Disorderly Conduct (10/20/1998); Possession of Drug Paraphernalia (3/29/1998); Disorderly Conduct (1/9/1998); and Operating While Intoxicated (3/24/1995).

<sup>4</sup> Bail Jumping-Misdemeanor (6/11/2006); Possession of THC (dismissed) (4/15/2006); Operating While under Influence (4<sup>th</sup>) (11/11/2006); Battery (12/4/2008); Disorderly Conduct (12/4/2008).

- i) On or about January 25, 2001, Mr. Femal was convicted of violating Wis. Stat. § 947.01 [disorderly conduct];
- j) On or about June 22, 2006, Mr. Femal was convicted of violating Wis. Stat. § 9.47.010 [county-worthless checks];
- k) On or about August 15, 2006, Mr. Femal was convicted of violating Wis. Stat. § 946.49(a) [bail jumping-misdemeanor];
- l) On or about September 11, 2006, Mr. Femal was convicted of violating Wis. Stat. § 961.573(1) [possession of drug paraphernalia].
- m) On or about April 3, 2007, Mr. Femal was convicted of a violation of Wis. Stat. § 346.3(1)(a) [operating while under the influence (4<sup>th</sup>)], and
- n) On or about May 4, 2009, Mr. Femal was convicted of violating Wis. Stat. §§ 940.19(1) and 947.01 [battery and disorderly conduct].

None of these convictions were felonies. (DOE Ex. 103, Department of Justice Crime Information Bureau (CIB) Wisconsin Criminal History for Jeffrey J. Femal dated July 2, 2010; see also DOE Exhibit 109, July 13, 2010 Notice of Denial).

5. Mr. Femal was under the influence of alcohol or other drugs at the time he committed all the above-referenced offenses. (Tr. p. 27). He has struggled with substance abuse for at least ten (10) years. (Tr. p. 27).

6. Mr. Femal is still on probation for his last offense (n), and will be until approximately May of 2011. (Applicant Exhibit 1, Transcript Copy of *State of Wisconsin v. Jeffrey J. Femal Plea/Sentencing Hearing*, May 4, 2009, p. 19). This offense involved an altercation Mr. Femal had with his downstairs neighbor that escalated to the point where Mr. Femal injured his neighbor and later intimidated him with a pickaxe. (See DOE Ex. 100, pp. 44-46). Mr. Femal further resisted the officers who brought him into custody. (*Id.* At pp. 44-54).

7. It is unclear whether as a condition of Mr. Femal's probation, he is prohibited from entering residences where there is alcohol. (See Tr. p. 124, Applicant Ex. 1).

8. Mr. Femal has had no further arrests or convictions since December 5, 2008, the date of the above-referenced pickaxe incident. (See Tr. p. 33).

9. Mr. Femal has been sober since December 5, 2008. (Tr. p. 29). This is his longest period of sobriety since he began drinking. (Tr., p. 108).

10. Mr. Femal has received treatment for substance abuse over time and attended AA meetings, but does not attend AA anymore because of a "fall out" with the group. (Tr. pp. 27, 29, 109, see also Applicant Ex. 1).

11. The Department of Regulation and Licensing has received little to no evidence concerning Mr. Femal's AODA treatment and/or recovery. (Tr. pp. 29-31, 42-47, see also Division Exhibit 108).

12. Mr. Femal is currently educating himself as to what is required and what he would have to do as a home inspector. (Tr. pp. 33). His father is further a home inspector and has mentored him in the trade. (*Id.*) Mr. Femal currently has a home painting business (Tr. p. 36), and has a technical degree in automotive collision repair and refinishing (Tr. p. 28). He currently has a license as a DILHR<sup>5</sup>/rental weatherization inspector. (Tr. p. 38-39).

13. At Mr. Femal's last conviction hearing (May 4, 2009), the Court encouraged him to pursue a career in home inspection. (Tr. p. 34, *see also* Applicant Ex. 1, p. 19).

14. The main duties of a home inspector include evaluating the condition of the house, noting any defects, identifying the appropriate individuals to further explore the defect(s) and what must be done to rectify it, and relaying that information to the customer. (Tr., pp. 57, 78-79).

15. Home inspectors sometimes come across drugs and alcohol during their inspections. (Tr., pp. 60, 84).

16. On rare occasions, "people" may be unhappy with a home inspector's evaluation, and become "irate." (*See* Tr. pp. 81-82).

### CONCLUSIONS OF LAW

1. The Department's decision to grant or deny a license is discretionary. Wis. Stat. § 441.07(2). *See also* Wis. Stat. § 227.01(3)(a).

2. The administrative law judge's review of such a discretionary decision is limited to determining whether the Department's decision involved a mistake a fact or law. *See* RL 107.

3. Per Wis. Stat. § 440.972(1), **Registration of Home Inspectors**, "The department [of Regulation and Licensing] 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.*" (Emphasis added).

4. In determining whether a particular violation is "substantially related," to the duties of the credentialed activity, "... [i]t 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." *County of Milwaukee v. LIRC*, 139 Wis.2d 805, 821-24, 407 N.W.2d 908 (1987).

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<sup>5</sup> Department of Industry, Human Labor and Relations.

5. Per Wis. Admin. Code RL 1.08(4), “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.”

6. The burden of proof in disciplinary proceedings before the department or any examining board, affiliated credentialing board or board in the department is a preponderance of the evidence.<sup>6</sup> Wis. Stat. § 440.20(3). *See also*, Wis. Admin. Code 1.17(2), (“[u]nless the law provides for a different standard, the quantum of evidence for a hearing decision shall be by the preponderance of the evidence.”).

7. On the evidence presented, the Division’s denial of Mr. Femal’s application for registration as a home inspector was not an abuse of discretion under the facts and law of this case.

### DISCUSSION

The parties agree to the relevant facts.

Though they failed to specifically discuss it, they further appear to understand that standard of review to be applied to this case is “abuse of discretion.” (*See* Wis. Stat. § 441.07(2), Wis. Stat. § 227.01(3)(a) and RL 107). Under this standard, the administrative law judge is limited to determining whether the Secretary of the Department of Regulation and Licensing’s (“Secretary’s”) decision to deny Mr. Femal’s application for certification involved a mistake a fact or law. (*See* RL 107. *See also Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16 (1981) (a discretionary decision “must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law”); Wis. Stat. § 227.57(8) (“The court shall reverse or remand a case to the agency if it finds that the agency’s exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation there from is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision...”). She is not to substitute her judgment for that of the agency on an issue of discretion. (*Id.*).

The only issue that remains, then, is whether the Secretary properly employed her discretion in denying Mr. Femal’s application for certification as a home inspector.

Wis. Stat. § 111.335 prohibits employment discrimination, (defined in § 111.322 to include refusing to license an individual), on the basis of a conviction record. Indeed, “[i]t is highly desirable to reintegrate convicted criminals into the workforce, not only so they will not remain or become public charges, but to turn them away from criminal activity and hopefully to rehabilitate them.” (*Id.*).

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<sup>6</sup> “Preponderance of the evidence” is defined as the greater weight of the credible evidence. Wis. Admin. Code § HA 1.01(9).



An exception, however, exists in § 111.335, which says “notwithstanding § 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 circumstance of the particular job or licensed activity....” (See also Wis. Admin. Code § RL 161.03).

The parties’ interpretations of the above legal standard are, naturally, different. Mr. Femal takes a more narrow approach, arguing that while his past criminal convictions are admittedly numerous, they are not substantially related to the specific duties of a home inspector, (namely inspecting homes for defect, and relaying this information to customers), because they did not involve fraud and/or theft, and thus, do not demonstrate a propensity to falsify reports or steal from home owners.

The Division’s interpretation is somewhat broader, focusing not only on the specific elements of Mr. Femal’s criminal convictions and the practice of home inspection, but also on the inherent ones. In this vein, it argues that Mr. Femal’s numerous convictions for operating while intoxicated, disorderly conduct, and battery show not only his inability to control his alcohol intake, but also a pattern of unstable recovery and bad decision-making, a lack of respect for the law, and a propensity for violence – traits which are at odds with the level-headedness, attention to detail and trust required of home inspectors<sup>7</sup> as they relay critical information to individuals in one of the most important and personal transactions that exist – the purchases of a home. Because home inspectors are often unsupervised in homes where alcohol and drugs are present, and their evaluations are sometimes met with resistance, the Division argues that Mr. Femal’s risk of recidivism is too high to allow the public to bear.

In *County of Milwaukee v. LIRC*, the Court rejected a factually based determination of “substantially related circumstances” in favor of a test that involves “assessing whether the tendencies and inclinations to behave in a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed.... 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.” *Id.* at 139 Wis.2d 805, 824 (1987). In that case, the court found that the respondent’s past convictions for negligence in maintaining a nursing home were substantially related to his duties as a crisis intervention specialist for a mental health “hot line” because “[t]he responsibilities present in both jobs extended to a group of people similarly situated so that neglect or dereliction of duties in either job would likely have similar consequences.” *Id.* at 828. See also *Gibson v. Transportation Commission*, 106 Wis. 2d 22, 315 N.W. 2d 346 (1982), (finding applicant’s conviction for the offense of armed robbery constituted circumstances substantially related to school bus driver licensure, as conviction indicates a disregard for both the personal and property rights of other persons, and a propensity to use force or the threat of force to accomplish one’s purpose, which are contradictory to the extreme patience, level-headedness and avoidance of the use of force essential for a school bus driver).

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<sup>7</sup> See Tr. at pp. 61-62, 77-95.

Applying the above test to the present case, the undersigned administrative law judge does not find that the Department abused its discretion when it denied Mr. Femal's application for certification as a home inspector. It is undisputed that Mr. Femal has an extensive criminal history, including numerous convictions for operating while under the influence, disorderly conduct, and battery dating all the way up to December of 2008. Mr. Femal's repeated convictions demonstrate that he has a propensity to re-offend, and the nature of his convictions, most notably battery, are unacceptable in a profession dedicated to aiding the public in purchasing and/or selling homes.

The Secretary's decision will thus be affirmed.

That being said, the undersigned administrative law judge is convinced that the majority of Mr. Femal's convictions were related to his abuse of drugs and alcohol, and that the above-identified duties of home inspection, in and of themselves, will not lead Mr. Femal to reoffend, so long as he maintains sobriety. Upon the testimony he presented at hearing, Mr. Femal has demonstrated that he is on the road to recovery, and that he has many skills that would make him an asset to the practice of home inspection. (See Findings of Fact ## 9-10, 12). She therefore encourages the Department to reconsider Mr. Femal's application for credential as a home inspector if and when he can show that (1) he has completed his current probation, including any court-ordered treatment and/or counseling, and (2) he can demonstrate a sustained period of sobriety.<sup>8</sup>

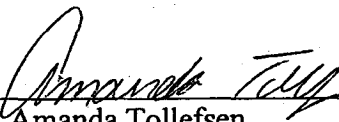
### ORDER

IT IS THUS ORDERED, effective the date of this Order, that the July 13, 2010, denial of the application of Jeffrey J. Femal for home inspection certification is **AFFIRMED**.

Dated at Madison, Wisconsin on March 21, 2011.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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By: \_\_\_\_\_

  
Amanda Tollefsen  
Administrative Law Judge

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<sup>8</sup> Of course, Mr. Femal must also meet all other requirements of certification, as identified in Wis. Stat. 440.972 and otherwise.