

WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES



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Before The
State Of Wisconsin
DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES

In the Matter of the Disciplinary Proceedings
Against **EMANUEL L. CLAY**, Respondent

FINAL DECISION AND ORDER

Order No.

ORDER 0002104

Division of Legal Services and Compliance Case No. 11 RSG 022

The State of Wisconsin, Department of Safety and Professional Services, 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 Safety and Professional Services.

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 25th day of October, 2012.

Michael J. Berndt
Chief Legal Counsel

Department of Safety and Professional Services



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

In the Matter of the Disciplinary Proceedings
Against **EMANUEL L. CLAY**, Respondent

PROPOSED DECISION AND ORDER
DHA Case No. SPS-12-0043

Division of Legal Services and Compliance¹ Case No. 11 RSG 022

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

Emanuel L. Clay
1 North Wickham Ct. #2
Madison, WI 53711

Department of Safety and Professional Services, Division of Legal Services and
Compliance, by

Attorney Sarah Norberg
Department of Safety and Professional Services
Division of Legal Services and Compliance
P.O. Box 8935
Madison, WI 53708-8935

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PROCEDURAL HISTORY

These proceedings were initiated when the Department of Safety and Professional Services (Department), Division of Enforcement (Division), filed a formal Notice of Hearing and Complaint against Respondent Emanuel Clay (Respondent), alleging that Respondent's license

¹ The Division of Legal Services and Compliance was formerly known as the Division of Enforcement. "Division of Enforcement" is used in this decision when describing the procedural history as that was what the Division was called at the time of the actions described.

was subject to disciplinary action pursuant to Wis. Stat. § 440.26(6)(a) and Wis. Admin. Code §§ SPS (then RL)² 35.01(2), 35.01(8), 35.01(23), and 32.04.

Respondent failed to file an Answer to the Complaint, and, after appearing at a telephone prehearing conference on June 21, 2012, failed to make himself available for a subsequent status conference on July 10, 2012. As a result, the Division filed a Motion for Default Judgment and Supporting Memorandum, with attached exhibits, on July 23, 2012. Respondent did not file a response.

FINDINGS OF FACT

Facts Related to the Alleged Violation

Findings of fact 1-8 are taken from the Division's Complaint filed in this matter.

1. Respondent Emanuel L. Clay (dob 04/25/1988) is licensed in the State of Wisconsin as a Private Security Person, having license number 108-34482, first issued on October 18, 2007, and current through August 31, 2012.

2. Respondent's most recent address on file with the Department is 1809 Weber Drive, Madison, WI 53713.

3. On or about June 24, 2011, the Department received a complaint alleging that Respondent had been arrested for carrying a concealed weapon and for intentionally pointing a firearm at a person. Division of Enforcement case number 11 RSG 022 was subsequently opened for investigation.

4. On July 14, 2011, the Department sent Respondent a letter requesting additional information regarding his arrest. Respondent failed to respond to the letter. The letter was sent to 3158 Ridgeway Ave., Apt. 106, Madison, WI 53704, which was the most recent address on file with the Department at the time.

5. On August 9, 2011, the Department sent Respondent a second letter, via certified mail, requesting additional information regarding his arrest. The letter was returned to the Department by the U.S. Postal Service with an indication that Respondent had moved to 1809 Weber Drive, Madison, WI 53713.

6. On August 23, 2011, the Department sent Respondent a third request, via certified mail, for additional information regarding his arrest. This letter was sent to 1809 Weber Drive, Madison, WI 53713 and requested a response from Respondent by September 6, 2011. The certified mailing card was received by the Department on August 26, 2011 indicating that Respondent had signed for the letter on August 25, 2011. Respondent failed to respond to this request.

² For ease of reference, this decision will use the current "SPS" designation rather than the former "RL," although at the time of the alleged violations, the administrative code used the designation "RL."

7. Court records obtained during the course of the Department's investigation revealed that on or about December 29, 2010, Respondent was charged with Pointing a Firearm at Another and Carrying a Concealed Weapon (Dane County Case Number 2010CM003766).

8. On June 29, 2011, Respondent pled guilty to an amended charge of Disorderly Conduct – Use Dangerous Weapon and entered into a deferred prosecution agreement.

Facts Related to Default

9. The Complaint and Notice of Hearing in this matter were served on Respondent on May 17, 2012, by both certified and regular mail, consistent with Wis. Admin. Code § SPS 2.08. The Notice of Hearing notified Respondent as follows: "If you do not provide a proper Answer within 20 days, you will be found to be in default and a default judgment may be entered against you on the basis of the Complaint and other evidence. In addition, the Department may take disciplinary action against you and impose the costs of the investigation, prosecution and decision of this matter upon you without further notice or hearing."

10. Respondent failed to file an Answer as required by Wis. Admin. Code § SPS 2.09(4).

11. Following expiration of the 20-day time period to file an Answer, the administrative law judge (ALJ) scheduled a telephone prehearing conference for June 21, 2012. At the June 21, 2012 telephone conference, Respondent acknowledged receipt of the Notice of Hearing and Complaint and stated he was interested in settling the matter. The Division requested proof of financial hardship from Respondent. A status conference was set for July 10, 2012 and notice was sent to the parties of such on June 21, 2012.

12. On July 10, 2012, the ALJ contacted the parties for the scheduled status conference. Respondent indicated that he could not talk because he was at work and that he would surrender his license. The Division noted that the proof of financial hardship was supposed to have been received by the Department on June 21, 2012, by 3:30 p.m., but that the Department had not received anything from Respondent and had not been contacted by him. Counsel for the Division indicated she would file a motion for default by July 20, 2012 unless she was able to resolve the matter with Respondent before then.

13. Based on Respondent's failure to file an Answer to the Complaint and failure to make himself available for the July 10, 2012 status conference in this matter, the Division filed a Motion for Default Judgment and Supporting Memorandum, with attached exhibits, on June 23, 2012, pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c).

14. Respondent failed to file a response to the Division's motion.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter pursuant to Wis. Stat. § 440.26.

2. Wisconsin Stat. § 440.03(1) provides that the Department of Safety and Professional Services “may promulgate rules defining uniform procedures to be used by the department . . . for . . . conducting [disciplinary] hearings.” These rules are codified in Wis. Admin. Code Ch. SPS.

3. Respondent was duly served with the Notice of Hearing and Complaint pursuant to Wis. Admin. Code § SPS 2.08 and was also served with the Notice of Telephone Prehearing Conference.

4. When a Respondent fails to file an Answer as required by Wis. Admin. Code § SPS 2.09 or fails to appear at the hearing at the time fixed therefor, the Respondent is in default and findings may be made and an Order entered “on the basis of the complaint and other evidence.” Wis. Admin. Code § SPS 2.14.

5. Wisconsin Admin. Code § HA 1.07(3)(b) and (c) further provide: “(b) If a respondent fails to appear, the administrative law judge may . . . take the allegations in an appeal as true as may be appropriate . . .” and “(c) For a telephone or video hearing or prehearing the administrative law judge may find a failure to appear grounds for default if any of the following conditions exist for more than ten minutes after the scheduled time for hearing or prehearing conference: . . . (2) the failure to answer the telephone or videoconference line . . . (4) the failure to be ready to proceed with the hearing or prehearing conference as scheduled.”

6. Respondent has defaulted in this proceeding pursuant to Wis. Admin. Code § SPS 2.14 by failing to file and serve an Answer to the Complaint as required by Wis. Admin. Code § SPS 2.09.

7. Respondent has also defaulted in this proceeding by failing to be ready to proceed with the July 10, 2012 status conference as scheduled, pursuant to Wis. Admin. Code § HA 1.07(3) and Wis. Admin. Code § SPS 2.14.

8. Pursuant to Wis. Admin. Code §§ SPS 2.09(3) and 2.14, and Wis. Admin. Code § HA 1.07(3), Respondent has admitted to the allegations of the Complaint and other evidence by not filing an Answer and by failing to be ready to proceed with the status conference as scheduled.

9. Respondent engaged in conduct reflecting adversely on his professional qualification in violation of Wis. Stat. § 440.26(6)(a)(2) and Wis. Admin. Code § SPS 35.01(2) by violating a law, the circumstances of which substantially relate to the practice of a private security person.

10. Respondent engaged in conduct which reflects adversely on his professional qualification pursuant to Wis. Admin. Code § SPS 35.01(8) by violating a law relating to the care, handling or use of a firearm.

11. Respondent engaged in unprofessional conduct under Wis. Admin. Code § SPS 35.01(23) by failing to cooperate in a timely manner with the Department's investigation of a complaint filed against him after a request by the Department.

12. The facts do not establish that Respondent violated Wis. Admin. Code § SPS 32.04 by failing to notify the Department in writing within 30 days after a change of address.

13. As a result of the violations noted above, Respondent is subject to discipline pursuant to Wis. Stat. § 440.26(6)(a) and Wis. Admin. Code § SPS 35.01.

DISCUSSION

Violations of Wisconsin Statutes and Administrative Code

Because Respondent failed to provide an Answer to the Complaint filed against him and refused to make himself available for the July 10, 2012 status conference, findings may be made and an Order entered “on the basis of the complaint and other evidence,” Wis. Admin. Code § SPS 2.14, and the ALJ may “take the allegations in an appeal as true as may be appropriate.” Wis. Admin. Code § HA 1.07(3).

The undisputed facts establish the following violations. First, findings of fact 7 and 8 establish that Respondent was charged with Pointing a Firearm at Another and Carrying a Concealed Weapon in Dane County Case Number 2010CM003766 and that on June 29, 2011, he pled guilty to an amended charge of Disorderly Conduct – Use Dangerous Weapon and entered into a deferred prosecution agreement.

This conduct constitutes a violation of Wis. Stat. § 440.26(6)(a)(2) and Wis. Admin. Code § SPS 35.01(2). Wis. Stat. § 440.26(6)(a)2 provides, in relevant part that “the department may reprimand the holder of a license or permit issued under this section or revoke, suspend or limit the license or permit of any person who has . . . 2. Engaged in conduct reflecting adversely on his or her professional qualification.” Wisconsin Admin. Code § SPS 35.01 also states that “[t]he department may deny an application for renewal, limit, suspend or revoke a credential, or reprimand a credential holder upon proof that the credential holder . . . has engaged in conduct reflecting adversely on professional qualification.” That provision delineates certain activity which “constitutes conduct reflecting adversely on professional qualification,” and includes “[v]iolating, 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.” Wis. Admin. Code § SPS 35.01(2).

The Department has found convictions for disorderly conduct and engaging in violent behavior to be substantially related to the practice of private security person for the purpose of imposing discipline. *See In the Matter of Disciplinary Proceedings Against Jamil James Locker*, LS0001392RSG (February 27, 2012) (conviction for battery reduced from a charge of felony child abuse); *In the Matter of Disciplinary Proceedings Against Larry A. Russell*, LS0001469RSG (April 4, 2012) (conviction for disorderly conduct for impersonating a peace officer); *In the Matter of Disciplinary Proceedings Against Daniel J. Eichstaedt*, LS0001453RSG (March 30, 2012) (conviction for battery reduced from a charge of child abuse-intentionally cause harm).

The facts of this case and the Department’s prior decisions establish that the circumstances of Respondent’s convictions substantially relate to the practice of a private

security person and that therefore Respondent engaged in conduct reflecting adversely on his professional qualification and in unprofessional conduct in violation of Wis. Stat. § 440.26(6)(a)(2) and Wis. Admin. Code § SPS 35.01(2).

Findings of fact 7 and 8 also establish that Respondent engaged in conduct reflecting adversely on his professional qualification and therefore committed unprofessional conduct by “[v]iolating state or federal law rules or regulations related to the care, handling or use of firearms or other dangerous weapons,” in violation of Wis. Admin. Code § SPS 35.01(8).

Respondent also engaged in unprofessional conduct under Wis. Admin. Code § SPS 35.01(23) by “failing to cooperate in a timely manner with the department's investigation of a complaint filed against the credential holder” “after a request by the department.” Findings of fact 4-6 establish that on July 14, August 9 and August 23, 2011, the Department sent letters to Respondent requesting information related to his arrest and that Respondent failed to respond.

Relying on findings of fact 4-6, the Division also alleges that Respondent violated Wis. Admin. Code § SPS 32.04, which provides that “[a] credential holder shall notify the department in writing within 30 days after a change of name or address.” However, the facts (taken from the Complaint) do not establish a violation of this provision. The facts only establish that on July 14, 2011, the Department sent Respondent a letter at 3158 Ridgeway Ave., Apt. 106, Madison, WI 53704, the most recent address on file with the Department at that time; that on August 9, 2011, the Department sent Respondent a second letter, which was returned to the Department by the U.S. Postal Service with an indication that Respondent had moved to 1809 Weber Drive, Madison, WI 53713; and that on August 23, 2011, the Department sent Respondent a third letter to the Weber Drive address and that the certified mailing card was received by the Department on August 26, 2011 indicating that Respondent had signed for the letter on August 25, 2011. These facts are insufficient to establish that Respondent failed to notify the Department of his change of address within 30 days of that change.

Appropriate Discipline

The three purposes of discipline are: (1) to promote the rehabilitation of the licensee; (2) to protect the public from other instances of misconduct; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206, 237 N.W.2d 689 (1976).

The Division recommends that Respondent's license be suspended for a period of 15 days and that his license be limited to require: (1) that he successfully complete all the terms of his deferred prosecution agreement with the Dane County District Attorney's Office and (2) that he submit proof of completion of the deferred prosecution agreement in the form of verification from the Dane County District Attorney's Office to the Department Monitor.

This recommended discipline is consistent with the purposes of discipline articulated in *Aldrich* and also with the discipline imposed by the Department in similar cases. In *Locker*, involving a battery conviction, failure to report the conviction, and providing false information on an application for a credential, the Department ordered a 15-day suspension of a private security person's license and limited his license to require successful completion of probation. In *Eichstaedt*, involving a battery conviction, failure to report the conviction, and failure to

cooperate with the Department's investigation, the Department ordered a 30-day suspension of a private security person's license and limited his license to require successful completion of probation. In *Russell*, involving a disorderly conduct conviction, failure to report the conviction, and providing false information on an application for a credential, the Department ordered a 15-day suspension of a private security person's license. In light of the facts of this case and DHA's practice of complying with the prior decisions of the Department, the discipline recommended by the Division is warranted here.

Costs

The Division requests that Respondent be ordered to pay the full costs of its investigation and of these proceedings. In *In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz* (LS 0802183 CHI), the Chiropractic Examining Board stated:

The ALJ's recommendation and the ... Board's decision as to whether the full costs of the proceeding should be assessed against the credential holder..., is based on the consideration of several factors, including:

1. The number of counts charged, contested, and proven;
2. The nature and seriousness of the misconduct;
3. The level of discipline sought by the parties;
4. The respondent's cooperation with the disciplinary process;
5. Prior discipline, if any;
6. The fact that the Department of [Safety and Professional Services] is a "program revenue" agency, whose operating costs are funded by the revenue received from licenses, and the fairness of imposing the costs of disciplining a few members of the profession on the vast majority of the licensees who have not engaged in misconduct;
7. Any other relevant circumstances.

The respondent, by nature of her being in default has not presented any evidence regarding any of the above factors that would mitigate the imposition of the full costs of this proceeding. To the contrary, her conduct is of a serious nature. The factual allegations were deemed admitted and proven and there is no argument to apportion any counts that were unproven (being none), or that certain factual findings were investigated and litigated that were unnecessary. Given the fact that the Department of [Safety and Professional Services] is a "program revenue" agency, whose operating costs are funded by the revenue received for licensees, fairness here dictates imposing the costs of disciplining the respondent upon the

respondent and not fellow members of the chiropractic profession who have not engaged in such conduct.

For many of the same reasons delineated in the *Buenzli-Fritz* decision, Respondent should be assessed the full amount of recoverable costs. The alleged conduct, involving use of a dangerous weapon, is of a serious nature; Respondent refused to participate in these proceedings; and, given the program revenue nature of the Department of Safety and Professional Services, fairness dictates imposing the costs of these disciplinary proceedings on Respondent, and not on fellow members of his profession who have not engaged in such conduct.

If the Department assesses costs against Respondent, the amount of costs will be determined pursuant to Wis. Admin. Code § SPS 2.18.

ORDER

Accordingly, IT IS ORDERED that Respondent Emanuel Clay's license is hereby SUSPENDED for a period of 15 days, pursuant to § 440.26(6) and Wis. Admin. Code § SPS 35.01, effective the date the final decision is signed by the Department, and that Respondent's license is LIMITED as follows:

1. Respondent shall successfully complete all the terms of his deferred prosecution agreement with the Dane County District Attorney's Office in Dane County Case Number 2010CM003766.³
2. Respondent shall submit proof of completion of the terms of the deferred prosecution agreement in the form of verification from the Dane County District Attorney's Office to the Department Monitor at the address stated below.
3. This Limitation shall be removed from Respondent's license after he has satisfied the Department or its designee that he has successfully completed the deferred prosecution agreement.
4. In the event Respondent fails to successfully complete the terms of the deferred prosecution agreement, Respondent's license may, in the discretion of the Department or its designee, be REVOKED, without further notice or hearing.

IT IS FURTHER ORDERED that Respondent shall pay all recoverable costs in this matter in an amount to be established, pursuant to Wis. Admin. Code § SPS 2.18. After the amount is established, payment shall be made by certified check or money order payable to the Wisconsin Department of Safety and Professional Services and sent to:

³ According to the Division's Exhibit 2 attached to its Motion for Default and Supporting Memorandum, the deferred prosecution contract terminated on May 25, 2012. Therefore, Respondent may have already completed the terms of his deferred prosecution agreement and had his criminal case dismissed. If that is the situation, then the requirements of this paragraph have been completed and Respondent need only provide proof of completion as provided in the next paragraph.

**Department Monitor
Department of Safety and Professional Services
Division of Legal Services and Compliance
P.O. Box 8935
Madison, WI 53708-8935
Telephone: (608) 267-3817
Fax: (608) 266-2264**

IT IS FURTHER ORDERED that the above-captioned matter be and hereby is closed as to Respondent Emanuel Clay.

Dated at Madison, Wisconsin on October 1, 2012.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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Madison, Wisconsin 53705
Telephone: (608) 266-7709
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By: 

Jennifer E. Nashold
Administrative Law Judge

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