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Before The
State Of Wisconsin
DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES

In the Matter of the Disciplinary Proceedings
Against **RUSSELL L. FINK**, Respondent

FINAL DECISION AND ORDER

Order No. **0003245**

Division of Legal Services and Compliance Case No. 13 RHI 266

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 2nd day of June, 2014.

A handwritten signature in black ink, appearing to read "Michael J. Berndt", written over a horizontal line.

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 **RUSSELL L. FINK**, Respondent

DHA Case No. SPS-14-0005
DLSC Case No. 13 RHI 266

PROPOSED DECISION AND ORDER

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

Russell L. Fink
3611 South 18th Street
Milwaukee, WI 53221

Michael J. Berndt
Chief Legal Counsel
Department of Safety and Professional Services
P.O. Box 8368
Madison, WI 53708-8368

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

Attorney Sarah E. Norberg
Department of Safety and Professional Services
Division of Legal Services and Compliance
P.O. Box 7190
Madison, WI 53707-7190

PROCEDURAL HISTORY

These proceedings were initiated when the Department of Safety and Professional Services, Division of Legal Services and Compliance (Division), filed a formal Notice of Hearing and Complaint against Respondent Russell L. Fink (Respondent). The Complaint alleged that Respondent's license was subject to disciplinary action pursuant to Wis. Stat. § 440.978(2)(m) for failing to complete at least 20 hours of continuing education during each calendar year for the 2011-2012 biennium, in violation of Wis. Admin. Code § SPS 135.02(2), and pursuant to Wis. Stat. § 440.978(2)(a) for making a material misstatement in an application

for a certificate or renewal of a certificate. The Division served Respondent on January 21, 2014 by sending a copy of the Notice of Hearing and Complaint to his address on file with the Department of Safety and Professional Services (Department). Respondent failed to file an Answer to the Complaint as required by Wis. Admin. Code § SPS 2.09 and failed to appear at the telephonic prehearing conference held before the Division of Hearings and Appeals on February 26, 2014.

At the prehearing conference, the Division moved for default pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c). In light of Respondent's failure to file an Answer to the Complaint and failure to appear for the conference, the undersigned administrative law judge (ALJ) found Respondent to be in default. On February 28, 2014, the ALJ issued a Notice of Default against Respondent and ordered that the Division file a recommended proposed decision by April 1, 2014. The Division timely filed its recommended proposed decision.

FINDINGS OF FACT

Facts Related to the Alleged Violations

Findings of Fact 1–6 are taken from the Division's Complaint against Respondent filed in this matter.

1. Respondent Russell L. Fink is licensed in the State of Wisconsin as a registered Home Inspector, license number 2494-106. This license was first granted to Respondent on July 14, 2011 and expires on December 14, 2014.

2. The most recent address on file with the Department for Respondent is 3611 S. 18th St., Milwaukee, WI 53221.

3. On Respondent's 2012 renewal application, Respondent certified that he had completed 20 hours of continuing education per calendar year, for a total of 40 hours of continuing education, within the 2011-2012 biennium.

4. In 2013, the Department conducted an audit of registered Home Inspector continuing education for the 2011-2012 biennium.

5. Pursuant to the Department audit, Respondent was found to be noncompliant with the continuing education requirements for registered home inspectors in the 2011-2012 biennium as Respondent only submitted documentation evidencing the completion of 24 hours of continuing education during 2011.

6. The Department attempted to contact Respondent by telephone and e-mail on five occasions between November 12, 2013 and January 6, 2014. Respondent failed to respond to the Department's telephone calls and e-mails.

Facts Related to Default

7. The Complaint and Notice of Hearing in this matter were served on Respondent on January 21, 2014 by both certified and regular mail consistent with Wis. Admin. Code § SPS 2.08. The Notice of Hearing advised Respondent: "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."

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

9. Following expiration of the 20-day time period to file an Answer, the ALJ scheduled a telephone prehearing conference for February 26, 2014. Notice of this prehearing conference was sent to both parties, with instructions that Respondent provide the ALJ with the telephone number at which he could be reached for the conference no later than February 21, 2014. The Notice instructed Respondent: "A respondent's failure to appear at a scheduled conference or hearing may result in default judgment being entered against the respondent."

10. Respondent failed to provide a telephone number and could not be reached for the prehearing conference.

11. At the prehearing conference, the Division moved for default pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c).

12. On February 28, 2014, the ALJ issued a Notice of Default and Order, requiring the Division to serve no later than April 1, 2014 a recommended proposed decision.

13. The Division timely filed its recommended proposed decision.

14. Respondent did not file a response to either the Notice of Default or to the Division's subsequent submission.

DISCUSSION AND CONCLUSIONS OF LAW

Default

As stated in the February 28, 2014 Notice of Default and Order, Respondent is in default for failing to file an Answer to the Complaint and failing to appear at the prehearing conference held on February 26, 2014. Wisconsin Admin. Code § SPS 2.14 provides: "If the respondent fails to answer as required by s. SPS 2.09 or fails to appear at the hearing at the time fixed therefor, the respondent is in default and the disciplinary authority may make findings and enter an order on the basis of the complaint and other evidence." Wisconsin Admin. Code § HA 1.07(3) states, in relevant part:

(3) FAILURE TO APPEAR.

...

(b) If a respondent fails to appear, the administrative law judge may . . . take the allegations in an appeal as true as may be appropriate. . .

(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: (1) The failure to provide a telephone number to the division after it had been requested; (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.

An Answer to a Complaint must be filed within 20 days of service of the Complaint. Wis. Admin. Code § SPS 2.09(4). Service of the Complaint may be made by mailing a copy of the Complaint to the respondent at the respondent's last known address. Wis. Stat. § 440.11(2); Wis. Admin. Code § SPS 2.08(1). "Service by mail is complete upon mailing." Wis. Admin. Code § SPS 2.08(1). On January 21, 2014, the Division served Respondent with the Complaint by mailing a copy of the Notice of Hearing and Complaint by both regular and certified mail to his most recent address on file with the Department. Pursuant to Wis. Admin. Code §§ SPS 2.08(1) and 2.09(4), Respondent was required to file an Answer within 20 days but failed to do so.

Because Respondent is in default for his failure to file an Answer and to appear at the prehearing conference, an order may be entered against him on the basis of the Complaint and other evidence. *See* Wis. Admin. Code § 2.14; Wis. Admin. Code § HA 1.07(3)(b) and (c).

Violation of Wis. Stat. § 440.978(2) and Wis. Admin. Code § SPS 135.02(2)

Wisconsin Stat. § 440.978(2) states, in relevant part:

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

...

(a) Made a material misstatement in an application for a certificate or renewal of a certificate.

...

(m) Violated this subchapter or any rule promulgated under this subchapter.

A registered home inspector is required "to complete at least 20 hours of continuing education during each calendar year." Wisconsin Admin. Code § SPS 135.02(2). "The department may require any registered home inspector to submit evidence of having completed the required hours of continuing education for the period specified in sub. (2)." Wis. Admin. Code § SPS 135.02(6).

The undisputed facts establish that Respondent only submitted documentation evidencing the completion of 24 hours of continuing education for the 2011-12 biennium. In addition, Respondent certified that he had completed 20 hours of continuing education per calendar year, for a total of 40 hours of continuing education, within the 2011-12 biennium on his 2012 renewal application.

Based on the foregoing, Respondent violated Wis. Admin. Code § SPS 135.02(2) by failing to complete at least 20 hours of continuing education during each calendar year for the 2011-2012 biennium. Respondent also made a material misstatement in his application for the renewal of his home inspector certificate. As a result, Respondent is subject to discipline pursuant to Wis. Stat. § 440.978(2)(a) and (m).

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 to practice as a home inspector in Wisconsin be suspended for an indefinite period of time. The Division proposes that the suspension be removed from Respondent's license in one of two ways:

1. If, within 180 days of the date the Final Decision and Order is signed by the Department, Respondent submits proof of successful completion of 16 hours of education in accordance with the continuing education requirements specified in Wis. Admin. Code § SPS 135.02 in the form of verification from the institution providing the education to the Department Monitor, the suspension shall be removed from Respondent's license. The education completed pursuant to this requirement may not be used to satisfy any other registered home inspector continuing education requirements with the Department, or
2. If Respondent fails to submit proof of successful completion of 16 hours of education in accordance with the continuing education requirements specified in Wis. Admin. Code § SPS 135.02 in the form of verification from the institution providing the education to the Department Monitor within 180 days of the date the Final Decision and Order is signed by the Department, the suspension shall be removed from Respondent's license and Respondent's license will be revoked.

This recommendation appropriately serves the purposes of discipline and is adopted in this case. Respondent not only failed to complete the continuing education hours required for license renewal, but also misrepresented to the Department the number of hours completed. Respondent should not be allowed to practice as a home inspector until he is in compliance with the rules governing his profession. This discipline will serve to protect the public from a home inspector who is not current in his professional education. However, this Order allows Respondent sufficient time to complete his outstanding education requirements and, hopefully,

will serve to rehabilitate him. Finally, this discipline will also deter others in Respondent's profession from engaging in similar conduct.

Costs

The Department has the authority to assess costs pursuant to Wis. Stat. § 440.22. The Division requests that Respondent be ordered to pay the full costs of its investigation and of these proceedings. The factors to be considered in assessing costs are: (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 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; and (7) any other relevant circumstances. *See In the Matter of Disciplinary Proceedings Against Elizabeth Buenzli-Fritz*, LS0802183CHI (Aug. 14, 2008).

Based on the factors delineated in the *Buenzli-Fritz* decision and the facts of this case, Respondent should be assessed the full amount of recoverable costs in this case.

ORDER

Accordingly, IT IS ORDERED that the license of Russell L. Fink to practice as a home inspector in the State of Wisconsin is SUSPENDED for an indefinite period from the date the Final Decision and Order is signed by the Department. This suspension shall be removed from Respondent's license in one of the following two ways:

1. If, within 180 days of the date the Final Decision and Order is signed by the Department, Respondent submits proof of successful completion of 16 hours of education in accordance with the continuing education requirements specified in Wis. Admin. Code § SPS 135.02 in the form of verification from the institution providing the education to the Department Monitor, the suspension shall be removed from Respondent's license. The education completed pursuant to this requirement may not be used to satisfy any other registered home inspector continuing education requirements with the Department, or
2. If Respondent fails to submit proof of successful completion of 16 hours of education in accordance with the continuing education requirements specified in Wis. Admin. Code § SPS 135.02 in the form of verification from the institution providing the education to the Department Monitor within 180 days of the date the Final Decision and Order is signed by the Department, the suspension shall be removed from Respondent's license and Respondent's license will be REVOKED.

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:

**Department Monitor
Department of Safety and Professional Services
Division of Legal Services and Compliance
P.O. Box 7190
Madison, WI 53707-7190**

IT IS FURTHER ORDERED that the above-captioned matter be and hereby is closed as to Respondent Russell L. Fink.

Dated at Madison, Wisconsin on May 7, 2014.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: _____

Jennifer E. Nashold
Administrative Law Judge