

## WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES



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Before The  
State Of Wisconsin  
**DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES**

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In the Matter of the Disciplinary Proceedings  
Against **ROBERT T. RAFEL**, Respondent

FINAL DECISION AND ORDER

Order No. **0003419**

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**Division of Legal Services and Compliance Case No. 13 RHI 396**

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.

IT IS FURTHER ORDERED, that the Respondent's Request for Extension of Time to file Objections to the Proposed Decision is denied.

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 22nd day of September, 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**

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In the Matter of Disciplinary Proceedings Against  
**ROBERT T. RAFEL**, Respondent

DHA Case No. SPS-14-0021  
DLSC Case No. 13 RHI 396

**0003419**

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**PROPOSED DECISION AND ORDER**

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

Robert T. Rafel  
3305 South Monterey Drive  
New Berlin, WI 53151

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 Al Rohmeyer  
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P.O. Box 7190  
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**PROCEDURAL HISTORY**

These proceedings were initiated when the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division), filed and served a formal Complaint on Respondent Robert Rafel, alleging that Mr. Rafel failed to comply with his continuing education requirements, in violation of Wis. Stat. § 440.974(2) and Wis. Admin. Code § SPS 135.02(2), for the 2011-2012 biennium and that he violated Wis. Stat. § 440.978(2)(a) by making a material misstatement on his 2012 renewal application in representing that he had completed his continuing education requirements. The Division served Mr. Rafel on March 12, 2014 by sending a copy of the Notice of Hearing and Complaint to his

last known address on file with the Department, by regular and certified mail. Mr. Rafel filed an Answer to the Complaint on March 31, 2014.

A telephone prehearing conference was held on April 10, 2014, at which a hearing date was established. A Prehearing Conference Report and Scheduling Order was issued on April 10, 2014, setting the contested case hearing for June 5, 2014. The hearing was held on June 5, 2014, with Department employee Jill Remy testifying for the Division and Mr. Rafel testifying on his own behalf. The parties submitted post-hearing briefs, with the last submission received on June 30, 2014.

#### FINDINGS OF FACT

1. Respondent Robert Rafel is registered in the State of Wisconsin as a home inspector, having license number 128-106, first issued on October 1, 1998, and current through December 14, 2014. (Complaint, p. 1; Answer, p. 1)

2. On Mr. Rafel's 2012 home inspector renewal application, he 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. (Div. Ex. 11; Hrg. Tr., pp. 27-28)

3. In 2013, the Department conducted an audit of registered home inspector continuing education for the 2011-2012 biennium. (Hrg. Tr., pp. 19-20)

4. Mr. Rafel submitted the following courses for the 2011-2012 biennium, which he stated totaled 99.9 continuing education hours:

<u>Date</u>	<u>Sponsoring Organization</u>	<u>Course Title</u>	<u>CE Hours</u>
3/25/11	Wisconsin Park & Recreation Association	Security for Your Facility	2
3/25/11	Wisconsin Park & Recreation Association	ADA Requirements for Pools and Playgrounds	2.3
3/25/11	Wisconsin Park & Recreation Association	ADA Sports Fields	2.5
4/14/11	CVMIC (Cities and Villages Mutual Insurance Company)	Playground & Park Inspections	.6 <sup>1</sup>
7/20-21 2011	Wisconsin Park & Recreation Association	Inspect & Tour Washington County Parks & Facilities	8

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<sup>1</sup> At hearing, Mr. Rafel testified that .6 was in error and that he should have indicated 6 hours for this program. (Hrg. Tr., p. 67)

8/28-12/15 2011	Waukesha County Technical College	Instructor for 10-109-140	32 <sup>2</sup>
2/6/12	National Park & Recreation Association	Aquatic Facility Operator Test & Credential	17
3/22/12	Wisconsin Park & Recreation Association	ADA in Parks Buildings & Amenities	6
7/2012	Wisconsin Park & Recreation Association	Inspect & Tour of Oshkosh & Fondulac County Parks	8
11/7-9 2012	Wisconsin Park & Recreation Association	Annual Conference & Trade Show – Wis. Dells	11.5

(Div. Exs. 1, 3)

5. Pursuant to the Department audit, Mr. Rafel was found to be noncompliant with the continuing education requirements for registered home inspectors in the 2011-2012 biennium. The Department determined that Mr. Rafel only submitted documentation evidencing the completion of 10 hours of continuing education related to the general subject matter of home inspection during the 2011-2012 biennium. Those 10 hours were taken from the 32 hours that Mr. Rafel submitted for instructing a course entitled, “Facility Maintenance Management” at the Waukesha Technical College. (Div. Ex. 5; Hrg. Tr., pp. 34-35) Mr. Rafel now states that the course should have been submitted for 20 rather than 32 hours. (Hrg. Tr., p. 67)

6. The required text for the course was entitled, “Managing the Built Environment in Hospitality Facilities.” The Department viewed the course as generally about hotel management. However, the Department concluded that the following chapters discussed in the course, covering 5 of the 16 days, met the continuing education requirements because they addressed concepts that related to home inspection: Water Systems, Electric Systems, Heating Systems, Ventilation Systems and Cooling Systems. In determining that these chapters met the continuing education requirements, the Department went through the materials with a “fine-tooth comb” and “tr[ie]d to find any hours at all that [it] could grant to Mr. Rafel.” The Department felt it was being “generous” in granting the 10 hours. The remaining topics were not credited by the Department because they were not viewed as relating to the general topic of home inspection.<sup>3</sup> Topics which were not accepted included the hotel tour, the study of facility management, food service and laundry systems. (Div. Ex. 5, pp. 2, 8; Hrg. Tr., pp. 34-35, 51)

<sup>2</sup> At hearing, Mr. Rafel testified that 32 was in error and that he should have indicated 20 hours. (Hrg. Tr., p. 67)

<sup>3</sup> In testifying as to why the certain courses were not given credit, the Division’s witness often did not use the word “general.” However, it is clear that she knew and applied the correct standard of “relating to the general subject” of “home inspection,” and when questioned during cross-examination, she clarified that her failure to use the word “general” while testifying was not intentional, that she deals with over a hundred professions, and that she has not memorized the language of each provision. (Hrg. Tr., p. 51) As is discussed in more detail below, both the Department and this tribunal have applied the correct standard.

7. With regard to the courses Mr. Rafel listed for March 25-26, 2011 on security for facilities, Americans with Disabilities Act (ADA) requirements for pools and playgrounds, and ADA Sports Fields, sponsored by Wisconsin Park and Recreation Association, the Department found that the courses did not relate to the general topic of home inspection but related instead to parks and recreation. In addition, the certificate submitted by Mr. Rafel only indicates that he enrolled in the courses; it does not indicate that he actually completed them. (Div. Ex. 2; Hrg. Tr., pp. 29-30, 51)

8. The course held April 14, 2011, entitled Playground and Park Inspections, sponsored by Cities and Villages Mutual Insurance Company was likewise not accepted by the Department because the Department determined that the course related to playground and park inspections, not generally to home inspections. The program addressed issues such as layout and design of playgrounds; installation and maintenance of equipment; materials of manufacture and construction; platforms, guardrails and protective barriers; stairways, ladders and handrails; surfacing of playgrounds; and what constitutes an "alteration" of a playground. The program addressed structures such as slides (particularly tall slides), merry-go-rounds, spring rockers, balance beams, monkey bars, and swings. (Div. Ex. 3; Hrg. Tr., pp. 31, 51)

9. The Annual Conference and Trade Show held in Wisconsin Dells on November 2-4, 2011, sponsored by Wisconsin Parks and Recreation, was not given credit because Mr. Rafel only provided an invoice showing that he enrolled in the course which did not verify that he had actually attended the course. Moreover, Mr. Rafel did not provide an outline of any kind indicating what was covered; therefore, the Department could not determine what the topics were or whether they related in any way to home inspection. (Div. Ex. 6; Hrg. Tr., pp. 36-37)

10. The course held on February 6, 2012, sponsored by the National Park and Recreation Association, which granted Mr. Rafel certification as an Aquatic Facility Operator, was not given credit because the Department determined that the course related to aquatics and pools, which has to do with recreational facilities, and not to the general subject of home inspection. The course covered "aquatic facility operation and management," including these primary subjects: filtration controller operation, water testing, water treatment, design consideration, facility management, risk management, facility troubleshooting, and hot tub and spa operation. (Div. Ex. 7; Hrg. Tr., pp. 37-38, 51)

11. The course on March 22, 2012 on ADA in Parks Buildings and Amenities, sponsored by Wisconsin Parks and Recreation, was not given credit because the Department determined that it related to parks and recreation rather than to the general subject of home inspection, and because Mr. Rafel did not provide a certificate of completion showing that he actually completed the course. (Div. Ex. 8; Hrg. Tr., pp. 38-30, 51)

12. The Annual Conference and Trade Show held in Wisconsin Dells on November 7-9, 2012, was not given credit because the Department determined that it did not relate to the general subject of home inspection, and the documents Mr. Rafel submitted did not show who the sponsor of the program was, did not include a year and did not include any verification that Mr. Rafel actually attended the conference. (Div. Ex. 10; Hrg. Tr., pp. 40-41, 51)

13. Mr. Rafel conceded that the two parks tours in July of 2011 and July of 2012, for eight hours each (16 total), should not count as continuing education hours. (Hrg. Tr., p. 107; Resp. Closing Comments, p. 3)

14. Mr. Rafel conceded that he was “lax” on the paperwork he provided to the Department, particularly from the Wisconsin Park and Recreation Association, stating that “much of the documentation from WPRA I . . . provided did not fulfill all the requirements of SPS 135.02(6).” However, he testified that he did attend the courses, although he had no “solid proof” of his attendance. (Hrg. Tr., p. 106; Resp. Closing Comments, p. 3)

15. Mr. Rafel works only part-time as a home inspector. He is employed full-time with the City of Racine Parks Department as a Parks and Facilities Specialist, with full-time responsibilities including construction project design, and build and project management. He is also employed part-time as a mayoral appointee for the city of New Berlin, Wisconsin, on the Parks, Recreation and Forestry Commission and the Plan Commission. (Resp. Ex. 100; Resp. Ex. 107, p. J; Hrg. Tr., pp. 66-67)

16. As part of its audit, the Department gave credit to a different home inspector for an Energy Audit Inspection course sponsored by the American Home Inspectors Training Institute, Ltd. (Div. Ex. 13; Hrg. Tr., pp. 25-26)

## DISCUSSION

### Burden of Proof

The burden of proof in disciplinary proceedings is on the Division to show by a preponderance of the evidence that the events constituting the alleged violations occurred. Wis. Stat. § 440.20(3); *see also* Wis. Admin. Code § HA 1.17(2). To prove by a preponderance of the evidence means that it is “more likely than not” that the examined action occurred. *See State v. Rodriguez*, 2007 WI App. 252, ¶ 18, 306 Wis. 2d 129, 743 N.W.2d 460, citing *United States v. Saulter*, 60 F.3d 270, 280 (7th Cir. 1995).

### Violation of Wis. Stat. § 440.974(2) and Wis. Admin. Code § SPS 135.02

Wisconsin Stat. § 440.974(2) requires the Department to promulgate rules establishing continuing education requirements for registered home inspectors and states that such rules “shall require the completion of at least 40 hours of continuing education every 2 years.”

Consistent with this provision, Wis. Admin. Code § SPS 135.02(2) states: “A registered home inspector shall complete at least 20 hours of continuing education during each calendar year.” Section SPS 135.02(5) further provides, in relevant part: “A registered home inspector shall provide evidence satisfactory to the department that the applicant has met the educational requirements when applying for renewal of registration.”

In addition, Wis. Admin. Code § SPS 135.02(6) requires that home inspectors “obtain an individual certificate of completion from a program provider upon satisfactory completion of an

educational program,” that each certificate of completion “plainly state the title of the educational program, and the date, time and location on which the program was held,” and that “[r]egistered home inspectors shall retain evidence of completion for at least 5 years from the date of completion.” The provision further states that the Department “may require any registered home inspector to submit evidence of having completed the required hours of continuing education for the period specified. . .”

Moreover, “[a] registered home inspector who acts as an instructor of an educational program shall receive one hour of credit for each hour of teaching toward satisfaction of the educational requirement.” Wis. Admin. Code § SPS 135.02(3).

An “educational program” means “a program relating to the general subject matter of home inspection.” Wis. Admin. Code § SPS 135.02(1)(a). *See also* Wis. Admin. Code § SPS 135.02(7) (“Each educational program shall relate to the general subject of home inspection.”)

Pursuant to Wis. Admin. Code § SPS 134.02(1), “[a] home inspector shall perform a reasonably competent and diligent home inspection of the readily accessible installed systems and components required to be inspected under s. SPS 134.03 to detect observable conditions of an improvement to residential real property.”

The Department rejected the programs at issue because it determined that they did not relate to the general subject matter of home inspection and because, for several of the courses, Mr. Rafel did not submit certificates of completion containing the information required by Wis. Admin. Code § SPS 135.02(6). This conclusion was supported by the Division’s witness, Jill Remy, who is the Department’s Program Manager for the Office of Education and Examinations. Ms. Remy supervised the audit and personally reviewed Mr. Rafel’s continuing education submission twice during the course of the audit and a few times since. Among other things, Ms. Remy noted during her testimony that recreational facilities are not included on the list of required items for home inspections contained in § SPS 134.03, and are in fact specifically included on the list of items that are *not* required. *See* Wis. Admin. Code § SPS 134.03(1) and (5)(c)9. (Hrg. Tr., pp. 12, 18, 26-27, 52) The phrase “recreational facilities” means “spas, saunas, steam baths, swimming pools, tennis courts, playground equipment, and other exercise, entertainment, or athletic facilities.” Wis. Admin. Code § SPS 131.02(25).

Also not listed as required in a home inspection and specifically listed as not required are “out-buildings other than garages and carports” and “trees,<sup>4</sup> shrubs and other vegetation.” Wis. Admin. Code § SPS 134.03(5)(c)10. and 11.

Moreover, an overview of the provisions related to home inspections (Subchapter XI of Chapter 440 of the Wisconsin Statutes and Chapters SPS 131-135 of the administrative code) reveals that the subject matter of home inspection relates to the home itself and to the garage, not to matters outside these structures, such as playground equipment and pools.

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<sup>4</sup> With respect to trees, Mr. Rafel discusses problems associated with the emerald ash borer, arguing among other things, that a homeowner could face substantial financial consequences if the homeowner had to remove infected trees. (Resp. Closing Comments, pp. 3-4) However, there is no indication that this topic was covered in any of the programs which Mr. Rafel now argues should have been given credit.



Mr. Rafel concedes that the two park tours in 2011 and 2012 were properly not counted. He also concedes that he did not submit the required information with regard to various other courses. Without the two parks tours and the courses for which insufficient certificates were provided, the only remaining courses are the Waukesha Technical College course Mr. Rafel taught (20 hours for 2011), the Playground and Park Inspections course sponsored by the Cities and Villages Mutual Insurance Company (6 hours for 2011), and the aquatics facilities training sponsored by the National Park and Recreation Association, which granted Mr. Rafel certification as an Aquatic Facility Operator (17 hours for 2012). Mr. Rafel argues that he should have been given full credit for these remaining courses. (Resp. Closing Comments, p. 3) As a preliminary matter, I note that even if these hours were accepted, Mr. Rafel would evidently still not be in compliance with the continuing education requirements as he would not have the required 20 hours for 2012.<sup>5</sup> See Wis. Admin. Code § SPS 135.02(2) (“A registered home inspector shall complete at least 20 hours of continuing education *during each calendar year.*”) (Emphasis added.)

In addition, I conclude that the Department properly denied credit for these courses. With regard to the Aquatic Facility Operator course and certification, I note that the course is about operation and management of aquatic facilities. It was sponsored by the National Park and Recreation Association. The information Mr. Rafel submitted to the Department shows that the course covered “aquatic facility operation and management,” including these primary subjects: filtration controller operation, water testing, water treatment, design consideration, facility management, risk management, facility troubleshooting, and hot tub and spa operation. Mr. Rafel argues that the topic of pools should be credited because Wis. Stat. § 440.975(8)(a) and Wis. Admin. Code § SPS 134.02(3) state that a home inspector is not prohibited from “reporting observations or conditions in addition to those required” and because under Wis. Admin. Code § SPS 134.04 and consistent with Wis. Stat. § 440.975(3)(c), a home inspector’s report must “[l]ist[] any material adverse facts that a home inspector has knowledge of or has observed. A “material adverse fact” is defined as follows:

a condition or occurrence that is generally recognized by a competent home inspector as doing any of the following:

(a) Significantly reducing the functionality or structural integrity of components or systems of the improvements to the property being inspected.

(b) Posing a significant health or safety risk to occupants of the improvements.

Wis. Admin. Code § SPS 131.02(17). Mr. Rafel suggests that if he observes a defective pool during a home inspection, it should be reported as it would constitute a “material adverse fact” as that term is defined in § SPS 131.02(17). However, Mr. Rafel’s argument is undercut by § SPS 131.02(25), which specifically lists recreational facilities, including pools, as an item not required to be included in a home inspection. Moreover, even if Mr. Rafel is correct that the condition and safety of residential pools can be viewed as related to the general subject of home

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<sup>5</sup> It has not been brought to the ALJ’s attention that there is any carry-over provision which would allow any extra hours from 2011 to be counted in 2012.

inspection, in Mr. Rafel's case, the training he received addressed operation and management of an aquatic facility, versus general and observable issues related to private residential pools.

With respect to the Playground and Park Inspections program sponsored by the Cities and Villages Mutual Insurance Company (which Mr. Rafel states constituted 6 continuing education hours), a review of the materials provided shows that the program is geared toward issues related to larger scale playgrounds and playground equipment at parks versus the type of equipment typically associated with a private residence. The program addressed issues such as layout and design of playgrounds; installation and maintenance of equipment; materials of manufacture and construction; platforms, guardrails and protective barriers; stairways, ladders and handrails; surfacing of playgrounds; and what constitutes an "alteration" of a playground. The program addressed structures such as slides (particularly tall slides), merry-go-rounds, spring rockers, balance beams, monkey bars, and swings. The Department properly denied these hours as the topics did not relate to the general subject of home inspection.

Finally, with regard to the course Mr. Rafel taught at the Waukesha Technical College, "Facility Maintenance Management," I note that of the 20 hours Mr. Rafel is now claiming for that course, the Department granted 10, which covered 5 of the 16 days. Mr. Rafel was credited for the sections of the course related to water systems, electric systems, heating systems, ventilation systems and cooling systems. The remaining topics were not credited by the Department because they were not viewed as relating to the general subject of home inspection, but related instead to hotel management. Topics which were not accepted included the hotel tour, the study of facility management, food service and laundry systems.

Mr. Rafel argues that, in addition to the programs on aquatic facilities and playground equipment, the entire Technical College course should have been credited. In support of this argument, he asserts that a home inspection report under Wis. Admin. Code § SPS 131.02(13)(a) covers "residential real property that contains not more than 4 dwelling units." He next asserts that residential properties containing over 3 living units are multi-family residences and are also commercial properties under Wis. Stat. § 101.971(2). He states that there is an expectation that such properties will have items like laundry systems and common areas with recreation or pool equipment. He further states that the residential unit could be a bed and breakfast establishment that is subject to home inspections and that such establishments may have commercial kitchens and laundry facilities. (Resp. Closing Comments, p. 2)

Mr. Rafel's argument, which has not been addressed by the Division, is undeveloped and difficult to understand. I also note that the authority upon which Mr. Rafel relies does not support his argument that residential real property containing 4 dwelling units is a "commercial property." Nor has he presented any authority or evidence supporting his argument that there is an expectation that residential real property containing 4 units would have items such as pools, recreational equipment, laundry systems, commercial kitchens or other items which were the subject of the programs not credited by the Department. The course materials submitted by Mr. Rafel demonstrate that those portions of the course which were not given credit addressed facility maintenance and management in the hospitality industry. As such, the Department properly denied credit for these parts of the course.

Mr. Rafel also contends that the Department was inconsistent in granting credit for an Energy Audit Inspection course, Exhibit 13, while denying it for the programs he submitted. He argues that, like his programs that were not credited, energy efficiency is not one of the items listed in Wis. Admin. Code § SPS 134.03 as required in a home inspection, yet this program, unlike his, was given credit. However, the Energy Audit Inspection course is distinguishable. First, the Energy Audit Inspection course was sponsored by the American Home Inspectors Training Institute, and although not explicit in the record, it may reasonably be inferred that the course focused on how to assess the energy efficiency of a *home*. Also, unlike some of the topics covered in the programs Mr. Rafel submitted, energy efficiency is not one of the items specifically listed in Wis. Admin. Code § SPS 134.03 as *not* required as part of a home inspection.

Mr. Rafel also asserts that the Department applied an incorrect standard in not crediting the courses he submitted. His support for this argument is an email he received from Department Investigator Doug Austin dated October 17, 2013, in which Mr. Austin stated that, with the possible exception of the Waukesha Technical College course, none of the hours Mr. Rafel submitted for 2011 and 2012 could be accepted “as they don’t substantially relate to home inspection.” Mr. Rafel correctly argues that this standard is incorrect because it does not track the applicable legal standard as set forth in Wis. Admin. Code § SPS 135.02(1)(a) defining an education program as “a program relating to the general subject matter of home inspection.”

However, the record as a whole does not indicate that the Department rejected the courses submitted by Mr. Rafel based on an incorrect legal standard. The Complaint filed in this case stated that the Department was accepting 10 hours of the hours Mr. Rafel submitted because those 10 hours “relate[] to the general subject matter of home inspection.” In addition, in testifying why the Department rejected the courses it did, Ms. Remy applied the correct legal standard. (Hrg. Tr., pp. 21, 29-30, 32, 35, 37, 38) There was no indication that the Department applied a “substantially” related test. Further, in a previous email to Mr. Rafel from Department Continuing Education Auditor Daniel Marlin, dated July 11, 2013, Mr. Marlin informs Mr. Rafel that the courses he submitted would not be accepted because they did not comply with the requirement in Wis. Admin. Code § SPS 135.02(7) that the educational program “relate to the general subject of home inspection.” (Resp. Ex. 107, p. I)

In any event, applying the correct legal standard contained in Wis. Admin. Code § SPS 135.02(1)(a) and (7), I conclude that the Department properly rejected the courses at issue because none of those rejected were shown to be related to the general subject matter of home inspection and because several did not contain adequate certificates of completion indicating that Mr. Rafel actually completed the courses.

Based on the foregoing, the Department properly concluded that, with the exception of the 10 hours discussed above, the remainder of Mr. Rafel’s submitted programs did not relate to the subject matter of home inspection or Mr. Rafel did not provide an adequate certificate of completion for those programs. As a result, Mr. Rafel was not in compliance with his continuing education requirements.<sup>6</sup>

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<sup>6</sup> Mr. Rafel has asserted at various points in this proceeding that the rules promulgated by the Department exceed their statutory authority. This argument appears to be based in part on the specific arguments he made in this

### Violation of Wis. Stat. § 440.978(2)(a)

Wisconsin Stat. § 440.978(2)(a) states that a home inspector may be disciplined for making a “material misstatement in an application for a certificate or renewal of a certificate.” On Mr. Rafel’s 2012 home inspector renewal application, Mr. Rafel 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. He did not complete such hours. There is no indication that Mr. Rafel’s misrepresentation was intentional. Rather, it appears that he genuinely but mistakenly believed that he had sufficient continuing education hours meeting the legal requirements (his subsequent concessions notwithstanding). However, in certifying that he had completed 40 hours of continuing education, Mr. Rafel made a “material misstatement” on his renewal application and is therefore in violation of Wis. Stat. § 440.978(2)(a).

### Discipline

The Department has authority to discipline a home inspector for the violations alleged in these proceedings, pursuant to Wis. Stat. § 440.978(2)(a) and (m). 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 Mr. Rafel’s license<sup>7</sup> be suspended for an indefinite period of time and that the suspension be removed in one of two ways:

1. If, within 180 days of the date the Final Decision and Order is signed by the Department, Mr. Rafel submits proof of successful completion of 30 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 Mr. Rafel’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 Mr. Rafel fails to submit proof of successful completion of 30 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 Mr. Rafel’s license and his license will be revoked.

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proceeding which have been discussed and rejected in this decision. Mr. Rafel presents no cogent basis for his argument that the rules do not comply with the statute.

<sup>7</sup> I note that Wis. Stat. § 440.978 uses the term “certification” rather than “license.” However, because the Department uses the term “license” in this proceeding and in a prior final decision, *In the Matter of Disciplinary Proceedings Against Russell L. Fink*, Order No. 0003245 (June 2, 2014), it is likewise used in this decision.

This recommendation appropriately serves the purposes of discipline and is adopted in this case. Mr. Rafel not only failed to complete the continuing education hours required for license renewal, but also misrepresented to the Department the number of hours completed. Mr. Rafel 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. This Order also serves a rehabilitative function by allowing Mr. Rafel sufficient time to complete his outstanding education requirements whereupon the suspension will be removed. This discipline will also deter other home inspectors from engaging in similar conduct and is consistent with the Department's prior decision involving a home inspector's failure to comply with continuing education requirements. *See In the Matter of Disciplinary Proceedings Against Russell L. Fink*, Order No. 0003245 (June 2, 2014).

Finally, I note that Mr. Rafel was previously provided an opportunity to complete his continuing education hours without having his credential suspended; however, he declined to accept this offer. (Resp. Ex. 106, p. A)

### Costs

The Division has the authority to assess costs pursuant to Wis. Stat. § 440.22. With respect to imposition of costs, factors to consider include: (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 prosecutor; (4) the cooperation of the respondent; (5) any prior discipline; (6) the fact that the Department is a program revenue agency, funded by other licensees; and (7) any other relevant circumstances. *See In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz*, Order No. LS0802183CHI (Aug. 14, 2008).

The Division requests that full costs be imposed against Mr. Rafel. I disagree and award 60 percent of the costs. With respect to the first factor, the Division alleged and proved violations of two separate provisions; however, the two violations originated from the same conduct: not completing the required continuing education for 2011-2012. Regarding the second factor, I note that although continuing education is important for home inspectors to complete, it appears that Mr. Rafel's conduct stemmed from a mistaken belief that he had completed sufficient coursework to satisfy his continuing education requirements (even though he later conceded that some of the programs he originally submitted did not comply with the requirements). Moreover, the facts do not establish any concrete harm to the public occurred other than practicing for a relatively short period of time without having met his continuing education requirements.

Regarding the third factor, although the Division is seeking serious discipline, indefinite suspension of Mr. Rafel's credential, that suspension may be removed if Mr. Rafel completes 30 continuing education hours within a six-month period. Finally, in drastic contrast with *Fink* (in which full costs were awarded), where the home inspector did not cooperate in any way with this tribunal and likewise failed to cooperate with the Department, in this case, Mr. Rafel fully cooperated and participated in these proceedings.

Although it is true that the Division provided Mr. Rafel with the opportunity to satisfy his missing continuing education requirements prior to filing its Complaint and informed him that the potential costs would increase if the case went to hearing, I also note that Mr. Rafel was given a relatively short time period (approximately one month) in which to complete the 30 continuing education hours. (Resp. Ex. 106, p. A) Moreover, during the course of these disciplinary proceedings, Mr. Rafel offered some arguments which were not unreasonable, although they were ultimately unpersuasive, as to why programs which were not given credit by the Department should be credited.

The only factor that operates unequivocally in the Division's favor, which it always does, is the fact that any costs of these proceedings not borne by Mr. Rafel will be borne by other members of his profession.

However, in light of all of the factors set forth above, I conclude that it is appropriate to require Mr. Rafel to pay 60 percent of the costs of these proceedings.

### CONCLUSIONS OF LAW

1. The Department met its burden of establishing by a preponderance of the evidence that Mr. Rafel violated Wis. Stat. §§ 440.978(2)(a) and 440.974(2) and Wis. Admin. Code § SPS 135.02(2).

2. The Discipline set forth in the Order section below is warranted pursuant to the factors delineated in *Aldrich*.

3. Imposition of 60 percent of the costs of these proceedings on Mr. Rafel is warranted under the Department's prior decision in *Buenzli-Fritz*.

### ORDER

Accordingly, IT IS ORDERED that the license of Robert Rafel 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 Mr. Rafel'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, Rafel submits proof of successful completion of 30 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 his 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 Mr. Rafel fails to submit proof of successful completion of 30 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 Mr. Rafel's license and his license will be REVOKED.

IT IS FURTHER ORDERED that Mr. Rafel shall pay 60 percent of the 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

3. The terms of this Order are effective the date the Final Decision and Order is signed by the Department.

Dated at Madison, Wisconsin on July 31, 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