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Before The
State Of Wisconsin
DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES

In the Matter of the Disciplinary Proceedings
Against **DANIEL SCHILLING**, Respondent

FINAL DECISION AND ORDER

Order No. **0003522**

Division of Legal Services and Compliance Case No. 13 RHI 406

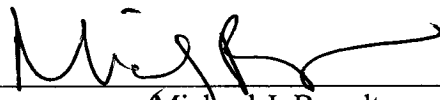
The State of Wisconsin, Department of Safety and Professional Services, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, make the following:

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 5th day of November, 2014.



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 Disciplinary Proceedings Against
DANIEL J. SCHILLING, Respondent

PROPOSED DECISION AND ORDER
DHA Case No. SPS-14-0023
0003522

Division of Legal Services and Compliance Case No. 13 RHI 406

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

Daniel J. Schilling
7125 Pagham Drive
Madison, WI 53719

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

On March 14, 2014, the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division), served a Complaint on Respondent Daniel J. Schilling, which alleged that he violated Wis. Admin. Code § SPS 135.02(2) by failing to complete at least 20 hours of continuing education during each calendar year of the 2011-2012 biennium. By Notice dated April 3, 2014, the undersigned administrative law judge (ALJ) set a telephone prehearing conference for April 24, 2014.

Prior to the April 24, 2014 prehearing conference, Mr. Schilling contacted the ALJ and Division counsel on several occasions, stating, among other things, that the case against him

should be dismissed and that he may or may not appear at the prehearing conference, depending on his schedule. The ALJ informed him in an April 23, 2014 email that the prehearing conference would be held as scheduled the following day and that failure to appear could result in default being entered against him.

On April 24, 2014, the telephone prehearing conference was held, at which the parties appeared. That same date, the ALJ issued a Prehearing Conference Report and Scheduling Order, which set a hearing date of August 19, 2014 and hearing-related deadlines, as well as deadlines for prehearing motions. On June 9, 2014, the Division filed a motion for summary judgment, and memorandum in support. On June 20, 2014, Mr. Schilling filed a response to the Division's motion, as well as a "Demand for Dismissal" of the Complaint. The Division filed a Reply on June 27, 2014. On July 1, 2014, Mr. Schilling filed another response, which, although outside of the April 24, 2014 Scheduling Order, was accepted as filed.

On July 25, 2014, the ALJ issued an order granting summary judgment to the Division, concluding that Mr. Schilling violated Wis. Admin. Code § SPS 135.02. The order denied the Division's motion for summary judgment on the issues of discipline and costs and also denied Mr. Schilling's request to dismiss the disciplinary action against him. The order scheduled a telephone status conference for August 5, 2014 to discuss whether the parties wished to submit written arguments on these remaining issues or address these issues at the hearing still scheduled for August 19, 2014. The July 25, 2014 Order Granting Partial Summary Judgment and Denying Motion to Dismiss is attached to this decision and incorporated by reference herein.

A telephone status conference was held on August 5, 2014, at which Mr. Schilling failed to appear. The Division moved for default, which the ALJ denied. The Division then indicated it would file written submissions on the issues of discipline and costs. Consistent with these discussions, on August 5, 2014, the ALJ issued an order cancelling the August 19, 2014 hearing, denying the Division's motion for default and setting deadlines for the parties' written submissions.

On the evening of the August 5, 2014 status conference, Mr. Schilling emailed the ALJ, stating that he was sorry to have missed the status conference that day but that he "had an important investigation that could not be interrupted with phone calls." He further stated that he did not know about the August 5 conference and that although he had received something regarding this matter in the mail, he did not have time to read it because of other matters. He again criticized Division counsel and stated he would meet with the Secretary of the Department to address counsel's conduct and help the Secretary and Department rework the language in the administrative rules.

Several other email exchanges occurred in which Mr. Schilling stated, among other things, that it was not his fault that other work kept him from attending the August 5 conference and that he intended to complain to the Department Secretary and "go public" regarding Division counsel's actions. When asked by the ALJ if he wished to go to hearing on the issues of discipline and costs on August 19, 2014, he responded, "If you are unwilling to allow me the opportunity to attend our meeting for its original purpose of fairness then there is no point in keeping the appointment on the 19th or rescheduling a new one. Besides, you told me the 19th

was now cancelled and that time slot has since been promised to clients with needs that are much more important than your lack of acknowledgement of my teaching hours.” He stated that he would file a written submission by the due date, August 19, 2014.

On August 12, 2014, the Division filed its written argument on discipline and costs. On August 19, 2014, Mr. Schilling emailed a response, which, although not in compliance with the filing requirements of Wis. Admin. Code § SPS 2.08, was accepted as filed.

FINDINGS OF FACT

Undisputed Material Facts 1-7, which form the basis for the determination that Mr. Schilling violated Wis. Admin. Code § SPS 135.02, are set forth in the attached July 25, 2014 Order Granting Partial Summary Judgment and Denying Motion to Dismiss and incorporated by reference herein.

DISCUSSION AND CONCLUSIONS OF LAW

Violation

The discussion and conclusions of law related to whether the Division proved its alleged violation are contained in the attached Order Granting Partial Summary Judgment and Denying Motion to Dismiss and incorporated by reference herein. As explained in that Order, Mr. Schilling failed to comply with the continuing education requirements of Wis. Admin. Code § SPS 135.02 in that he only completed eight hours of continuing education for the 2011-2012 biennium rather than the required 40 hours.

Discipline

Pursuant to Wis. Stat. § 440.978(2)(m), the Department has authority to discipline a home inspector for a violation of Wis. Admin. Code § 135.02. 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 requests that Mr. Schilling’s license be indefinitely suspended until he submits 32 hours of qualified continuing education credits, which must occur within 180 days. If Mr. Schilling fails to complete his education requirements within this time period, the Division requests that his license be revoked. Based on the factors articulated in *Aldrich*, the facts of this case and prior Department decisions involving similar facts, the Division’s request is warranted.

The proposed discipline appropriately serves the purposes of discipline set forth in *Aldrich*. Mr. Schilling failed to complete the required continuing education hours and should not be allowed to practice as a home inspector until he is in compliance with the rules governing his profession. The recommended discipline serves to protect the public from a home inspector who is not current in his professional education. At the same time, this discipline will serve a rehabilitative function by allowing Mr. Schilling sufficient time to complete his outstanding

education requirements, whereupon the suspension will be removed. Moreover, this discipline will put other home inspectors on notice that the type of on-line question and answer format and certificate of completion at issue here do not meet the requirements of Wis. Admin. Code § SPS 135.02.

I also note that the discipline imposed in this case is consistent with the Department's prior decisions 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) (Department imposes same discipline as that imposed here for home inspector's failure to comply with continuing education requirements); *In the Matter of Disciplinary Proceedings Against Robert T. Rafel*, Order No. 0003419 (Sept. 22, 2014) (same).

Costs

The Department 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; and (6) the fact that the Department is a program revenue agency, funded by other licensees. *See In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz*, Order No. LS0802183CHI (Aug. 14, 2008).

The Division requests, as it always does, that Mr. Schilling be assessed the full costs of this proceeding. Based on the factors set forth above, I disagree that full costs are appropriate and instead impose 75 percent of the costs on Mr. Schilling. With regard to the first factor, the Division originally alleged two violations originating from the same conduct but only pursued one of the violations, which it proved. Regarding the seriousness of the conduct, I note that this case involves a failure to complete continuing education hours for the 2011-2012 biennium. Of the 40 hours required for the two-year period, Mr. Schilling only completed eight, mistakenly believing that his on-line question and answer forum provided the remaining 32 hours. Although the Division argues that both the violation and discipline sought are "serious," neither the conduct nor the proposed discipline rise to the level of seriousness warranting full imposition of costs. That Mr. Schilling's conduct was on the lower end of seriousness is reflected in the discipline sought by the Division, which allows him the full rights of licensure upon completion of his remaining credits.

With respect to the fourth factor, respondent's cooperation in the proceedings, the Division concedes that Mr. Schilling has participated in most aspects of these proceedings but argues that he has not been cooperative in that he has consistently refused to treat the proceedings and the parties to the proceedings with an appropriate level of respect. Unquestioningly, Mr. Schilling has been condescending and disrespectful during these proceedings, as reflected by his failure to appear on one occasion and by his correspondence, some of which has been quoted above, but which also includes emails such as the following to Division counsel, sent on July 7, 2014:

Sarah,

I want you to know that I forgive you no matter how derailed your actions are in this instance. It would be wonderful to see you do your job by enforcing the regulations as intended. Letting bad Realtors and inspectors go without investigation after I brought them to you on a silver platter, and then putting so much of your effort into trying to pull my license, extort money from me, attempt to ruin my business reputation, and hurt the DSPS [Department] and so many other good inspectors and home buyers, especially after all I have done for the DSPS, creates the impression you either are in the pocket of the WRA or your ego is so out of control that it gets in the way of your professional judgment.

Another example includes his July 8, 2014 email to Division counsel, which began, "Sarah, I wish you would have simply apologized to me as a teacher of home inspectors and just asked me to help you to refine the regulations for greater clarification."

Mr. Schilling's disrespect for these proceedings and its participants also includes his failure to appear at the August 5, 2014 status conference; his nonchalance about that conference and other aspects of the proceedings, including not even bothering to look at correspondence related to the proceedings; and his repeated statements seeking to impugn Division counsel's character, his offers to educate her, and his threats to report her conduct to her boss and the media, despite the fact that her position was entirely reasonable in this case. Nevertheless, because Mr. Schilling has for the most part participated in these proceedings, I cannot conclude that his behavior constituted a complete failure to cooperate.

The final factor is the only one that operates unequivocally in the Division's favor, namely, that the Department is a program revenue agency and it would be unfair to impose the costs of disciplining Mr. Schilling on those members of his profession who have not engaged in misconduct.

Based on these factors, I conclude that imposition on Mr. Schilling of 75 percent of the costs is warranted.

ORDER

Accordingly, IT IS ORDERED that the license of Daniel Schilling 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. Schilling'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, Mr. Schilling 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

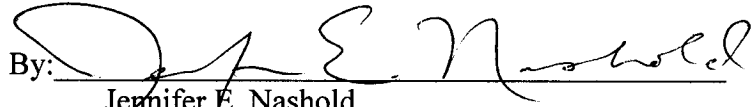
2. If Mr. Schilling fails to submit proof of successful completion of 30 hours of education in accordance with the continuing education requirements specified in Wis. Admin. Code § SPS 135.02 in the form of verification from the institution providing the education to the Department Monitor within 180 days of the date the Final Decision and Order is signed by the Department, the suspension shall be removed from Mr. Schilling's license and his license will be REVOKED.

IT IS FURTHER ORDERED that Mr. Schilling shall pay 75 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

Dated at Madison, Wisconsin on October 2, 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

Attachment: Order Granting Partial Summary Judgment and Denying Motion to Dismiss



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Disciplinary Proceedings
Against **DANIEL J. SCHILLING**, Respondent

ORDER GRANTING PARTIAL
SUMMARY JUDGMENT AND DENYING
MOTION TO DISMISS
DHA Case No. SPS-14-0023

Division of Legal Services and Compliance Case No. 13 RHI 406

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

Daniel J. Schilling
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Madison, WI 53719

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

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

PROCEDURAL HISTORY

The above-captioned matter is before this tribunal on a motion for summary judgment filed on June 9, 2014, by the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division). Respondent, Daniel J. Schilling, filed a response and Demand for Dismissal on June 20, 2014, and the Division filed a Reply on June 27, 2014. On July 1, 2014, Mr. Schilling filed another response, to which the Division objected in an email dated July 7, 2014, on grounds that the July 1, 2014 submission was outside of the April 24, 2014 Prehearing Conference Report and Scheduling Order.¹ Pursuant to the April 24, 2014 Scheduling Order, a hearing is scheduled in this matter for August 19, 2014.

¹ I accept Mr. Schilling's July 1, 2014 submission as filed.

UNDISPUTED MATERIAL FACTS

1. Respondent Daniel Schilling (DOB September 9, 1953) is registered in the State of Wisconsin as a Home Inspector, having license number 3-106, first issued on September 9, 1998, and current through December 14, 2014. (April 7, 2014 Letter from Schilling to Administrative Law Judge Nashold; Draeger Aff., ¶ 4)

2. On his 2012 application for registration renewal, Mr. Schilling certified that he had completed 20 hours of continuing education per calendar year within the 2011-12 biennium, for a total of 40 hours of continuing education. (Remy Aff., ¶ 4; Ex. A to Remy Aff.) The Department subsequently conducted an audit of Registered Home Inspector continuing education for the 2011-12 biennium. (Remy Aff., ¶ 5). In response to the audit, Mr. Schilling initially submitted a table indicating he completed 54 hours of continuing education during the biennium (Remy Aff., at ¶6; Ex. B to Remy Aff.), and two certificates which evidenced completion of two three-hour courses. (Remy Aff., ¶ 7; Ex. C to Remy Aff.) The table showed two entries, one for 2011 and another for 2012, listing “Wisconsin Home Inspectors Training” as the Course Title, and indicating nine hours of continuing education for each entry, with Mr. Schilling as the Sponsoring Organization. There are no other entries showing Mr. Schilling as the sponsoring organization. (Ex. B to Remy Aff.)

3. Mr. Schilling’s continuing education matter was referred to the Division for further investigation. Mr. Schilling stated that because his computer had crashed, he could not produce any other certificates of completion from the biennium at issue. (Draeger Aff., ¶ 5) During the course of the investigation, Mr. Schilling submitted a certificate of instruction as evidence of having provided 40 hours of training within the biennium. (*Id.* at ¶ 6) The certificate was signed by Mr. Schilling on December 31, 2012 on behalf of the Wisconsin Association of Home Inspectors Online Educational Forum. (Draeger Aff. ¶ 6; Ex. A to Draeger Aff.) The certificate did not include the title of the training or the date, time or location on which the training was held.

4. The Wisconsin Association of Home Inspectors Online Educational Forum is a Yahoo email group created by Mr. Schilling that involves the exchange of information in a question and answer format. (Draeger Aff., ¶ 7; Ex. B to Draeger Aff.) The forum is not associated with the Wisconsin Association of Home Inspectors. (Draeger Aff., ¶ 8) In a December 16, 2013 letter from Mr. Schilling to the Division, he states that in his online forum, he “answers the questions from inspectors through the forum, as well as through private emails and private phone calls.” He further states that the forum is “provided in real time, meaning that Wisconsin home inspectors can receive answers to urgent questions, even while actively performing a home inspection for a Wisconsin homebuyer.” (Ex. B to Draeger Aff., p. 3)

5. The Department’s investigator contacted the Wisconsin Association of Home Inspectors, Inc. to ascertain whether Mr. Schilling had attended any association meetings for which he might be awarded continuing education hours. (Draeger Aff., ¶ 9) The investigator obtained evidence of two hours of continuing education for Mr. Schilling’s attendance at the Association’s monthly meeting on February 16, 2012 in Waunakee, Wisconsin. (*Id.*)

6. On April 2, 2014, after the Division filed its Complaint against Mr. Schilling for noncompliance with continuing education requirements and during the course of these disciplinary proceedings, Mr. Schilling submitted revised certifications of instruction from the Wisconsin Association of Home Inspectors Online Educational Forum, dated December 31, 2011 and December 31, 2012, as verification of 40 hours of his training over the two-year audit period of 2011 and 2012. (April 2, 2014 Letter from Schilling to the Division of Hearings and Appeals) The certificates were again signed by Mr. Schilling on behalf of the Wisconsin Association of Home Inspectors Online Educational Forum but included a list of topics discussed and the location of the training, which was Mr. Schilling's home address. (*Id.*) The certificates listed the year in which the 20 hours were alleged to have been completed (2011 and 2012, respectively) but did not list specific dates or times for the online discussions, instead only indicating that they occurred in real time. (*Id.*)

7. On the same date, April 2, 2014, Mr. Schilling also provided a letter from Scott LeMarr, a board certified master inspector and president of InterNACHI, which, according to its website (of which I take official notice), is the International Association for Certified Home Inspectors. (*Id.*) The letter praises Mr. Schilling's online forum and states that Mr. LeMarr's employed inspectors are required to read the forum regularly for its educational content. The letter further states that Mr. Schilling "spends a significant amount of professional time preparing and delivering educational content through this forum as well as answering technical questions from inspectors." (*Id.*) The letter concludes: "Please allow this letter to verify that the hours Dan Schilling invests annually in the Wisconsin Association of Home Inspectors Educational Forum fulfills and exceeds his CE requirement every year." (*Id.*) The letter does not state the actual hours Mr. Schilling "invests" in the forum nor does it indicate a basis for Mr. LeMarr's conclusion that Mr. Schilling's investment of time exceeds the continuing education requirements. (*Id.*)

DISCUSSION AND CONCLUSIONS OF LAW

Standards Governing Summary Judgment

"The summary judgment procedure as provided in s. 802.08, Stats., shall be available to the parties upon approval by the division or the administrative law judge." Wis. Admin. Code § HA 1.10(2).

Pursuant to Wis. Stat. § 802.08, summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). "When a motion for summary judgment is made and supported as provided in this section [§ 802.08], an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial." Wis. Stat. § 802.08(3). "If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party." *Id.*

“A motion for summary judgment may be made on the basis of the pleadings or other portions of the record in the case or it may be supported by affidavits and a variety of outside material.” *Tews v. NHI, LLC*, 2010 WI 137, ¶ 49, 330 Wis. 2d 389, 793 N.W.2d 860 (citation omitted). On a motion for summary judgment, the facts are construed in favor of the non-moving party. *DeHart v. Wis. Mut. Ins. Co.*, 2007 WI 91, ¶ 7, 302 Wis. 2d 564, 734 N.W.2d 394.

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

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, § 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” and 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.” 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).

The following most significant facts are not in dispute:

- Other than the certificates of completion for his online question and answer forum, Mr. Schilling only submitted two certificates of completion for home inspector continuing education, one for a three-hour webinar on April 5, 2011, and another for a three-hour webinar on April 12, 2011.
- The Department was able to confirm that Mr. Schilling completed an additional two-hour continuing education program on February 16, 2012 in Waukesha, Wisconsin.
- Mr. Schilling seeks to fulfill the remaining 32 hours of his continuing education requirements for 2011 and 2012 by submitting certificates of instruction signed by Mr. Schilling himself on behalf of a Yahoo email group that he created which involves the exchange of information in a question and answer format.

² In its Complaint, the Division originally alleged that Mr. Schilling also violated Wis. Stat. § 440.978(2)(a) by making a material misstatement in an application for a certificate or renewal of a certificate. However, by failing to address this provision in its summary judgment submissions, the Division appears to have abandoned that allegation.

- The certificates submitted for the Yahoo email group do not contain the specific date or time on which the program was held, as required by Wis. Admin. Code § SPS 135.02(6).

As a matter of law, Mr. Schilling's certificates of instruction do not fulfill the continuing education requirements of Wis. Admin. Code § SPS 135.02 as they do not contain the specific date or time on which the "program" was held. Such information is critical as it assists in determining whether each continuing education hour is comprised of 50 minutes, as required by Wis. Code § SPS 135.02(1)(b) ("Hour" means 50 minutes of instruction.") Without such information in the certificates, neither the Department nor this tribunal may verify the actual hours of instruction. The absence of this required information is sufficient to find, as a matter of law, that Mr. Schilling failed to comply with the continuing education requirements.

However, I also note that Mr. Schilling has not presented any other evidence of the specific amount of time that he provided instruction on the online discussion group. Rather, he only presents his own statements and those from Mr. LeMarr representing that he met or exceeded the required continuing education hours each year. Moreover, Mr. Schilling's own stated total hours have been contradictory. The certificates state that he completed 20 hours of instruction in 2011 and 2012, respectively. However, in the attendance table he originally submitted to the Department, the only self-sponsored training listed showed nine hours for each of the two years at issue. Moreover, in his summary judgment submissions, Mr. Schilling indicates that the online question and answer hours for 2011 and 2012 were more than 40 hours. *See Respondent's June 20, 2014 "Stipulated Facts," at ¶ 17* ("Dan Schilling could have claimed more than the claimed 40 hours of instructional teaching through the Wisconsin Association of Home Inspectors Online Education Forum had he been required to.") Nor is Mr. Schilling assisted by Mr. LeMarr's representation that Mr. Schilling exceeded the required continuing education requirements, as Mr. LeMarr presented no basis for his belief or demonstrated that he was in any position to know how many hours Mr. Schilling actually spent on the online forum during the course of the two years at issue. Instead, Mr. LeMarr only indicates that Mr. Schilling "spends a significant amount of professional time" preparing and delivering educational content through the forum and answering questions.

In addition, the online question and answer forum at issue is not an educational "program," as contemplated by Wis. Admin. Code § SPS 135.02. An online question and answer session on any of the wide range of topics pertaining to home inspection which participants happen to want addressed, held at various and undisclosed times for various and undisclosed amounts of time over the course of a calendar year, does not constitute a "program" as that term is used in the rule. Rather, the term "program" contemplates a more structured forum, over a discrete period of time, with a specified topic. If the rule intended to cover an ongoing discussion group occurring over the course of a year on any topic which happens to arise, the rule would not require that the certificates of completion include such information as the title of the educational "program" and the date, time and location on which the "program" was held.

Because there is no genuine issue as to any material fact in this matter with regard to whether Mr. Schilling failed to comply with the continuing education requirements of Wis.

Admin. Code § SPS 135.02, and the Division has shown that it is entitled to a judgment on that issue as a matter of law, summary judgment is granted to the Division with respect to this issue.

For the same reasons, Mr. Schilling's motion to dismiss is denied, as it was based on grounds that his online forum complied with the continuing education requirements.³

Discipline and Costs

The Division requests that Mr. Schilling's home inspector license be suspended indefinitely, to be lifted only if he provides sufficient proof, within 180 days after the final decision and order in this matter, that he completed the remaining 32 hours of continuing education, and that if he fails to submit such proof, that his license be revoked. The Division also requests that Mr. Schilling be required to pay the full costs of these proceedings.

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).

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; and (6) the fact that the Department is a program revenue agency, funded by other licensees. See *In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz* (LS 0802183 CHI).

The Division has failed to apply the standards of summary judgment to the issues of discipline and costs and has not provided any authority suggesting that summary judgment is appropriate for such discretionary determinations.

In light of the discretionary nature of determining both discipline and costs, the exercise of which entails consideration of a wide variety of factors, and in view of the fact that these issues have not been briefed within the framework of summary judgment standards, I cannot conclude that imposition of a particular discipline or percentage of costs is required "as a matter of law" under Wis. Stat. § 802.08. Therefore, a telephone status conference will be held as set forth in the Order section below, at which the parties shall inform the undersigned administrative law judge whether they wish to submit written arguments on the issues of discipline and costs (or rest on those arguments presented in the submissions already filed) or whether a hearing on the issues of discipline and costs is required.

ORDER

For the reasons set forth above, IT IS ORDERED that:

³ The Division further argues that as a matter of policy, the Department does not accept self-authored certificates of continuing education as satisfactory evidence of course completion or instruction in any profession. However, because I conclude that the record does not show that Mr. Schilling's online forum complies with the rule governing continuing education requirements, I need not address this particular argument.

1. Summary judgment is granted in favor of the Division with respect to whether Mr. Schilling failed to comply with his continuing education requirements.
2. Summary judgment is denied with respect to the issues of discipline and costs.
3. Mr. Schilling's Demand for Dismissal is denied.
4. A telephone status conference will be held on **August 5, 2014, at 10:30 a.m.**, to establish whether the issues of discipline and costs may be determined on the basis of the parties' written submissions (either as previously filed or to be filed) or whether a hearing is required on these issues.
5. If a hearing on the issues of discipline and costs is to occur, it shall be held on August 19, 2014 at 10:30 a.m., the date and time originally scheduled for hearing.
6. The hearing-related deadlines set forth in the April 24, 2014 Prehearing Conference Report and Scheduling Order are cancelled.

Dated at Madison, Wisconsin on July 25, 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