Iowa Department of Inspections and Appeals Division of Administrative Hearings Wallace State Office Building Des Moines, Iowa 50319

IN THE MATTER OF:) DIA NO. 10DPH002
) CASE NO. 2010-01-01
Jeffrey Wolff Jr.) ·
Brothers Construction) PROPOSED DECISION
3045 East Quarry Rd.)
LaPorte City, IA 50651)

On January 20, 2010, the Department of Public Health-Bureau of Lead Poisoning Prevention (Department) issued a Notice of Proposed Denial of Application for Certification to Jeffrey Wolff Jr.(Appellant). The Appellant filed a timely Notice of Appeal and a Notice of Telephone Hearing was issued. The telephone hearing was held before Administrative Law Judge Margaret LaMarche on March 17, 2010 at 2:00 p.m. Assistant Attorney General Heather Adams represented the Department. The Appellant was self-represented.

THE RECORD

The record includes the Notice of Telephone Hearing, testimony of the witnesses, Department Exhibits 1-13 (See Exhibit Index for description), and Appellant Exhibits A-D.

FINDINGS OF FACT

1. The Appellant was originally certified by the department as a lead abatement contractor in 2004. The certification must be renewed every year. When the Appellant submitted his renewal application on June 17, 2007, he disclosed that he had engaged in the illegal/improper use of drugs within the past five years and that he had a criminal conviction. The department renewed the Appellant's certification (Appellant Exhibit D) but it also asked him to provide additional information concerning his use of drugs and convictions. The Appellant provided some additional information but did not provide the additional substance abuse evaluation requested by the department. The Appellant's father later notified the department that the reason Appellant did not

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provide the additional evaluation was that he was incarcerated. (Testimony of Kane Young; Department Exhibits 3-5)

- 2. On May 2, 2008, the department sent the Appellant a reminder notice that his certification as a lead abatement contractor would expire on June 22, 2008. (Department Exhibit 6) The Appellant did not renew his certification and it expired on June 22, 2008. (Department Exhibit 7)
- 3. On November 2, 2009, the Appellant submitted his Information Verification for Certification as a Lead Abatement Contractor to the department with a \$50.00 certification fee. In response to the required certification questions, the Appellant checked the "yes" box, thereby indicating that he had answered the questions before and nothing had changed since his previous certification in 2007. The Appellant signed the Information Verification on October 28, 2009, and his signature appears below the following statement:

I hereby certify that the information I have provided in this document, including any attachments, is true and correct. I understand that providing false or misleading information in or concerning my application may be cause for denial or revocation of certification and criminal prosecution. I agree to comply with the certification requirements, work practice standards, and all other provisions of Iowa Administrative Code 641-Chapter 70.

(Department Exhibit 8; Testimony of Kane Young)

- 4. Kane Young is an Executive Officer 2 with the Bureau of Lead Poisoning Prevention and is assigned to oversee the department's certification program. Based on information previously received from the Appellant's father, Mr. Young believed that the Appellant's circumstances had changed since he last submitted information to the department. On November 5, 2009, Mr. Kane sent Appellant a letter asking him to respond to the two questions on the application concerning illegal drug use and convictions. (Testimony of Kane Young; Department Exhibit 9)
- 5. Appellant responded by providing copies of his Plea of Guilty and Sentence for 1st Degree Theft/Possession of Marijuana 3rd filed in Black Hawk County on March 26, 2008. Appellant also provided his Certificate of Completion of 160 hours of Primary

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Chemical Dependency at the Correctional Release Center. Appellant also submitted his "yes" answers to the questions asking about illegal drug use and criminal convictions and a copy of the criminal Complaint charging him with 1st Degree Theft, a class C felony. According to the Complaint, Appellant was charged with the theft of a construction trailer containing tools and supplies worth \$8,947.02 on or about August 3, 2007. (Testimony of Kane Young; Department Exhibits 10, 11)

- 6. The Appellant's complete criminal history record includes the following convictions:
 - a. Two convictions for Possession of Controlled Substance (felony) and one conviction for Possession of Controlled Substance-Marijuana (serious misdemeanor) on May 5, 2003. Appellant was sentenced to five years probation and one year in a residential facility. Appellant reports that he served 7 months in a halfway house.
 - b. One felony controlled substances conviction on November 16, 2006, for which Appellant received a ten year suspended prison sentence and was placed on probation for five years.
 - c. One Probation Violation Conviction on March 24, 2008 and felony convictions for Possession of Controlled Substance-3rd or Subsequent Offense and First Degree Theft on March 24, 2008.

(Testimony of Kane Young; Appellant; Department Exhibit 12)

7. Lead abatement involves construction work to remove lead based paint in residential housing. In a typical project the homeowner is relocated while the lead abatement activities are conducted. The lead abatement workers are afforded access to homes and residents' belongings without homeowners being present. A certified lead abatement contractor or worker may work alone in a home without any supervision. For these reasons, the department has determined that it is essential that persons certified as meeting minimum standards to provide lead abatement activities must be reliable and trustworthy. Illegal drug use and addiction presents potential safety issues for the individual lead abatement worker, his or her co-workers, and the residents in the home. When reviewing the Appellant's application for certification, the department reviewed the totality of the circumstances and determined that the application should

be denied based on the Appellant's drug abuse and conviction history. The denial was consistent with actions the department has taken in three similar cases involving drug addiction and convictions. (Testimony of Kane Young)

- 8. Appellant served 21 months in prison on his most recent convictions and was released on parole in late October 2009. Appellant completed 160 hours of chemical dependency treatment while in prison and reports that he has been drug free for over two years. Appellant will be discharged from parole in 2014. His terms of parole include obtaining gainful full-time employment, random drug testing, and regular meetings with his parole officer. (Testimony of Appellant; Appellant Exhibit A)
- 9. Appellant completed an 8 hour lead abatement refresher course and scored 100%. Appellant's father, Jeffrey Wolff, Sr., owns a construction company that performs lead abatement activities. Jeffrey Wolff, Sr. wants to provide a full-time job for Appellant, but Appellant must be certified to perform the work. Jeffrey Wolff, Sr. believes that all of his son's convictions, including the theft conviction, were drug related. Appellant is currently living with his father and in his father's opinion, Appellant is now drug-free and is a completely different person than he was before he went to prison. (Testimony of Jeffrey Wolff, Sr.)

CONCLUSIONS OF LAW

The legislature has designated the Department of Public Health (department) as the agency responsible for establishing a program for the training and certification of lead inspectors and lead abaters. Iowa Code section 135.105A(1).

Iowa Code section 135.105A(5) provides that the department shall adopt rules requiring minimum requirements for training programs, certification, work practice standards, and suspension and revocation requirements, and shall implement the training and certification programs. The department has promulgated rules governing Lead-Based Paint Activities at 641 IAC chapter 70.

"Lead abatement" means any measure or set of measures designed to permanently eliminate lead-based paint hazards in a residential dwelling or child-occupied facility. It includes but is not limited to: removal of lead-based paint and dust-lead hazards, all preparation, cleanup, disposal, repainting or refinishing, and postabatement clearance testing activities associated with such measures. Lead abatement specifically includes

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projects for which there is a written contract or other documentation, which provides that an individual will be conducting lead abatement in or around a residential dwelling or child-occupied facility. Certified lead abatement workers must work under a certified contractor. 641 IAC 70.2.

The requirements for certification as a certified lead professional are found at 641 IAC 70.5. The department may deny an application for certification for any of the reasons set out in 641 IAC 70.10(1). In this case the department has cited to the following subsections of 641 IAC 70.10(1) as a basis for its denial:

- y. Engaged in any conduct that subverts or attempts to subvert a department investigation.
- ab. Been convicted of a felony or misdemeanor related to lead professional activities or the conviction of any felony or misdemeanor that would affect the ability of the firm or individual to perform lead professional activities. A copy of the record of conviction or plea of guilty shall be conclusive evidence.
- *ac.* Unethical conduct. This includes, but is not limited to, the following: ...(6) Habitual intoxication or addiction to the use of drugs.

Subversion of or attempt to subvert a department investigation

The department asserts that Appellant attempted to subvert its investigation when he submitted his certification application on October 28, 2009 and claimed that there was no new information since his prior certification application on June 17, 2007. It is clear that Appellant should have provided new answers on the October 2009 application disclosing his three convictions in March 2008. However, Appellant denies that he attempted to subvert the investigation and maintains it was his belief that his father had already provided this new information to the department. Appellant's arguments were not persuasive. It was Appellant's responsibility to truthfully and fully respond to the questions on the application by disclosing his recent convictions, and he failed to do so. Appellant did violate 641 IAC 70.10(1)"y."

Illegal Drug Use and Prior Convictions

The preponderance of the evidence established that the Appellant had five felony convictions between 2003 and 2008, including multiple convictions for drug possession and one felony theft conviction. Appellant argues that the convictions do not affect his ability to perform lead abatement activities because they were related to his drug use, he has not used drugs in over two years, and he is in successful recovery from his drug addiction. Appellant asserts that he is able to safely and responsibly perform his duties as a lead abatement contractor at this time.

Even assuming that Appellant has been drug free for over two years, the preponderance of the evidence in this record supports the department's decision to deny his certification application. Appellant's convictions adversely affect his ability to perform lead abatement activities for the reasons outlined by the department's witness. By certifying an individual as a lead abatement worker, the department represents to the public that the person meets all minimum qualifications to provide lead abatement activities. Because this work takes place in residences and may be unsupervised, certification means more than just the ability to perform the work in a competent manner. Certified lead abatement workers are also expected to be honest and trustworthy so as not to endanger the persons living in the residences where work is performed or their possessions. A record of drug addiction and felony convictions clearly diminishes the department's confidence that the person is honest, reliable, and trustworthy.

Appellant's father, who is currently living with Appellant and undoubtedly knows him well, believes that Appellant has been drug free for more than two years and has fully rehabilitated himself. He is confident that his son will perform his work duties in a responsible manner but points out that his business has insurance to cover property losses, should any occur. However, insurance payments cannot compensate residents for a lost sense of security if a person working in their home commits a crime. Although it does appear that Appellant is on the right track to remain law abiding and drug free, the fact remains that he was incarcerated for most of the last two years. Appellant has been out of prison for less than six months and remains on parole until 2014. It is not unreasonable for the department to expect the Appellant to demonstrate a significantly longer period of time remaining drug and conviction free prior to granting him certification as a lead abatement worker.

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Finally, the department should be encouraged to take a consistent approach in making decisions on certification applications, absent compelling aggravating or mitigating circumstances. The department has previously denied applications presenting a similar record of drug abuse and convictions.

ORDER

IT IS THEREFORE ORDERED that the Notice of Proposed Denial of Application for Certification, issued by the department to Jeffrey Wolff, Jr. on January 20, 2010, is hereby AFFIRMED.

Dated this 14th day of April, 2010...

Mayaret La Marche

Margaret LaMarche
Administrative Law Judge
Iowa Department of Inspections and Appeals
Division of Administrative Hearings
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This proposed decision and order becomes the department's final agency action without further proceedings ten days after it is received by the aggrieved party unless an appeal to the director of the Department of Public Health is taken as provided in subrule 70.10(6)"f." Any appeal to the director for review of this proposed decision and order shall be filed in writing and mailed to the director of the Department of Public Health by certified mail, return receipt requested, or delivered by personal service within ten days after the receipt of the administrative law judge's proposed decision and order by the aggrieved party. A copy of the appeal shall also be sent to the administrative law judge. Any request for appeal shall state the reason for the appeal.