

BEFORE THE STATE ELECTRICAL BOARD
STATE OF MONTANA

IN THE MATTER OF CASE NO. 2015-ELE-NR-643 REGARDING:

THE PROPOSED DENIAL OF THE)	Case No. 253-2016
APPLICATION FOR JOURNEYMAN)	
ELECTRICIAN LICENSE OF)	
JUSTIN R. FISCHER.)	
)	

ORDER RECOMMENDING SUMMARY JUDGMENT

I. INTRODUCTION

The Business Standards Division of the Department of Labor and Industry has moved for summary judgment on the basis that there is no genuine issue of material fact and that on the basis of the undisputed facts, Fischer should be issued a probationary license provided that he sits for and passes the electrician's examination. After considering the department's motion, the supporting affidavits, and the licensee's failure to respond to the motion, the motion is granted for the reasons stated below.

II. PROCEDURAL FACTS

1. The Business Standards Division (BSD) of the Department of Labor and Industry served Fischer with its Notice of Proposed Board Action and Opportunity for Hearing on July 17, 2015. The licensee opposed the proposed action and the matter was transferred to the Office of Administrative Hearings for contested case hearing on August 5, 2015.

2. On August 17, 2015, the hearing officer held a telephone scheduling conference with counsel for BSD and Fischer in attendance. At that time, BSD counsel and the licensee agreed to a pre-hearing and hearing schedule.

3. On October 9, 2015, the department filed a motion for summary judgment arguing that in light of the undisputed facts, the Board was entitled under the law to issue Fischer a probationary license if and when he passes the journeyman electrician's test.

4. At the time of the pre-hearing conference in this matter, Fischer had not responded to the department's motion although he acknowledged receiving it in a timely manner. Fischer had also failed to provide his list of witnesses, list of exhibits, final contentions, and proposed stipulated facts. At the time of the telephone hearing, the hearing officer informed Fischer that he would be vacating the hearing and issuing summary judgment in the department's favor because he had failed to respond and based on the undisputed facts the department was entitled to judgment as a matter of law.

III. UNDISPUTED FACTS

1. From May through early July 2015, Justin Fischer submitted a complete application for journeyman's license (Dept's Ex. 1), including documents to indicate he has received eight convictions since 2006 for (Dept's Ex. 2):

- a. August 6, 2006 – Disorderly conduct for arguing with police after being asked to leave a party.
- b. October 14, 2007 – Reckless Driving for rolling his vehicle.
- c. July 31, 2008 – Contempt for missing his court date.
- d. September 15, 2008 – Operating a motor vehicle with a blood alcohol content (BAC) of .08 percent or more.
- e. February 16, 2010 – Negligent endangerment reduced from driving under the influence (DUI).
- f. March 7, 2010 – DUI after officers found him passed out behind the wheel of his running vehicle with a blood alcohol content of .336.
- g. January 27, 2012 – DUI, driving without a valid license and no proof of insurance.
- h. April 21, 2013 – DUI – felony – fourth offense, driving on a suspended license and without proof of insurance after crashing his car.

2. On February 12, 2014, the Honorable Judge Todd Baugh issued written Judgment requiring Fischer to serve 13 months with the Montana Department of Corrections followed by a three-year suspended sentence, recommending Fischer serve nine months at the Montana Warm Springs Addiction Treatment and Change Program (WATCh) and if successful, serve the remainder of the 13 months plus an additional three years on supervised community release, on the condition he comply with the terms of probation. (Dept's Ex. 3.)

3. On August 11, 2014, Fischer was discharged from WATCh and began serving his probationary sentence. His treatment overview included (Dept's Ex. 4):

During the course of treatment, Justin participated in groups and meetings. He completed written assignments in a timely and thorough manner. Through his time at WATCh, Justin grew in confidence and became more willing and able to start and carry on conversations with others. Justin's feedback, although sometimes limited, was direct and to the point. He was always willing to help others with their work, showing a solid understanding of treatment concepts. He completed his therapeutic tasks with diligence and without complaint. His prognosis is guarded due to numerous DUI offenses, a lack of sober living experience and his ongoing desire to belong and feel needed even though it means sacrificing his values and beliefs.

It is recommended Justin complete an aftercare program, follow all the standard rules of probation of Montana Probation and Parole, Court ordered conditions of release and follow through with his Continued Care Plan. It is further recommended that he seek out and attend a recovery-based support group to assist in dealing with his addiction.

4. Fischer's response included a July 7, 2015 email from his probation officer to say although he has otherwise been compliant, he should be attending three social support meetings each week. However, he has not provided proof of attendance. (Dept's Ex. 5.)

5. On July 9, 2015, the Board approved a motion to allow him to sit for the journeyman's exam, and if he passes, issue him a probationary license for one year under the condition he completes his court-ordered rehabilitation. (Dept's Ex. 6.)

6. On August 5, 2015, Fischer requested a hearing to challenge the restriction. (Dept's Ex. 7.)

7. On August 17, 2015, the hearing officer scheduled the hearing and associated dates, including the close of discovery on October 2, 2015. (Dept's Ex. 8.)

8. On September 3, 2015, the Board served Fischer with its First Set of Combined Discovery Requests. (Dept's Ex. 9.)

9. As of today's date, the Board has not received a response to its discovery requests nor any corresponding requests from Fischer.

10. Fischer's criminal sentence is scheduled to end February 9, 2018.

IV. SUMMARY JUDGMENT SHOULD BE GRANTED

A. Summary Judgment Is Appropriate In Administrative Cases Where There Are No Contested Issues Of Fact.

Summary judgment is proper to resolve disputes in contested administrative licensing proceedings when the requisites for the summary judgment sought are met. *Matter of Peila* (1991), 249 Mont. 272, 815 P.2d 139. Summary judgment should be granted if “the pleadings . . . and admissions on file, together with the affidavits, . . . 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.” Rule 56(c), Mont. R. Civ. P.

The party seeking summary judgment has the initial burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. Once the moving party meets this burden, the burden then shifts to the party opposing the motion to establish otherwise by more than mere denial or speculation. *Ravalli County Bank v. Gasvoda* (1992), 253 Mont. 399, 883 P.2d 1042.

B. The Department’s Motion For Summary Judgment Should Be Granted Because Fischer Failed To Respond.

Fischer was properly served with the department’s Motion for Summary Judgment at the address OAH has used in these proceedings. Fischer had previously acknowledged receiving the Notice of Hearing sent to his address in Laurel.

Fischer did not file a response to the motion and was thus not in compliance with the scheduling order in this matter and is therefore subject to sanction. Additionally, M. R. Civ. P. 56(e)(2) provides:

(2) Opposing Party’s Obligation to Respond. When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must -- by affidavits or as otherwise provided in this rule -- set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

Thus, under the rules governing motions for summary judgment, Fischer’s failure to respond forms one basis for granting the department’s motion.

C. Discussion

Under M. R. Civ. Pro. 36 (a)(3), requests for admissions are deemed admitted if a party fails to timely respond. The department submitted the following requests for admission to Fischer:

REQUEST FOR ADMISSION NO. 1: Please admit the truth and accuracy of the “Fact Assertions,” set forth in paragraphs 1 through 7, inclusive, of the Notice [of Proposed Board Action]. If you admit part of a fact assertion but deny another part of the same assertion, please describe in detail those portions you admit and those portions you deny.

REQUEST FOR ADMISSION NO. 3: Please admit occupational licensing is a police power of the state to protect public health, safety, and welfare authorizing the State Electrical Board (Board) to use its discretion to grant or revoke an occupational license as stated in Mont. Code Ann. § 37-1-202. A copy of Mont. Code Ann. § 37-1-202 is attached.

REQUEST FOR ADMISSION NO. 6: Please admit you paid a fine to resolve an August 16, 2006 citation for arguing with a police officer.

REQUEST FOR ADMISSION NO. 7: Please admit you paid a fine to resolve a October 14, 2007 citation for reckless driving after rolling your vehicle.

REQUEST FOR ADMISSION NO. 8: Please admit you paid a fine to resolve a July 31, 2008 citation for contempt, because you missed a court date.

REQUEST FOR ADMISSION NO. 9: Please admit you paid a fine to resolve a September 15, 2008 citation for operating a motor vehicle with a blood alcohol content (BAC) greater than the legal limit of .08 percent (first alcohol/driving related offense).

REQUEST FOR ADMISSION NO. 10: Please admit you paid a fine to resolve a February 16, 2010 citation for negligent driving, reduced from driving under the influence of alcohol (DUI) (second).

REQUEST FOR ADMISSION NO. 11: Please admit you pled guilty to resolve a March 7, 2010 citation for driving under the influence (third), because although not moving, you were unconscious in the driver’s seat of your vehicle with a BAC of .337 percent when the police tested you.

REQUEST FOR ADMISSION NO. 12: Please admit you pled guilty to resolve citations dated January 27, 2012, for driving under the influence (fourth), driving without a valid license, and driving without proof of liability insurance.

REQUEST FOR ADMISSION NO. 13: Please admit you pled guilty to resolve citations dated April 21, 2013, for felony driving under the influence of alcohol (fifth), driving on a suspended license, and driving without proof of liability insurance.

REQUEST FOR ADMISSION NO. 14: Please admit as of July 9, 2015, you are not compliant with the requirement to attend three social support/self-help meetings per week as directed by your probation and parole officer.

Pursuant to Uniform District Court Rule 2(b), the failure to respond to a motion within ten days shall be deemed an admission that the motion is well taken. However, summary judgment cannot be granted on that basis alone. *Cole v. Flathead County*, (1989) 236 Mont. 412, 417, 771 P.2d 97, 100. In this case, pursuant to M. R. Civ. P. Rule 36 (a)(3), the above requests are deemed admitted because Fischer failed to respond. Based on those admitted facts, summary judgment is proper.

While a conviction may not serve as the sole basis for a license denial or restriction, the facts identified above fail to show that Fischer has been sufficiently rehabilitated as to warrant the public trust. Mont. Code Ann. § 37-1-203. Here, denial is not recommended but rather a period of probation. Allowing Fischer to sit for the journeyman exam and subject to a one-year probation is a reasonable measure to ensure rehabilitation and the public's health, safety, and welfare.

D. Conclusions Of Law

1. Fischer seeks licensure as a journeyman electrician in Montana. As such, he bears the burden of proof to demonstrate that he is qualified for the license. See generally, 2 Am. Jur. 2d Administrative Law §251.

2. Mont. Code Ann. § 37-1-307(1)(e) provides that a professional licensing board may grant or deny a license.

3. No licensing authority shall refuse to license a person solely on the basis of a previous criminal conviction; provided, however, where a license applicant has been convicted of a criminal offense and such criminal offense relates to the public health, welfare, and safety as it applies to the occupation for which the license is sought, the licensing agency may, after investigation, find that the applicant so convicted has not

been sufficiently rehabilitated as to warrant the public trust and deny the issuance of a license. Mont. Code Ann. § 37-1-203.

V. RECOMMENDED ORDER

Based on the foregoing, it is recommended that the State Electrical Board:

1. Grant the department's motion for summary judgment;
2. Enter its order allowing Justin Fischer to sit for the journeyman license exam and, if he passes, issue him a probationary license for one year with the condition he complete his court-ordered rehabilitation within that year.

DATED this 16th day of December, 2015.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
Hearing Officer