

COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS

October 13, 2017

Suffolk, ss.

Docket No. PH-17-148

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DEPARTMENT OF PUBLIC HEALTH, Petitioner

v.

WUBISHET TILAHUN, Respondent

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RECOMMENDED DECISION

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**Appearance for Petitioner:**

James M. Strong, Esq.  
Deputy General Counsel  
Dep't of Public Health  
250 Washington St.  
Boston, MA 02108-4619

**Appearance for Respondent:**

Wubishet Tilahun, *pro se*  
TW Environmental Services, Inc.  
30 Ames St.  
Quincy, MA 02169

**Administrative Magistrate:**

Mark L. Silverstein, Esq.

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*Summary of Decision*

Respondent, a licensed lead inspector, appealed a notice of agency action issued by the Massachusetts Department of Public Health (DPH) proposing to refuse renewal of his lead inspector license, pursuant to M.G.L. c. 111, § 197(B) and 105 C.M.R. § 460.400(H). Following his expressed interest in resolving the matter by agreement and related discussions at two prehearing conference sessions, DPH sent respondent a proposed agreement describing what he would need to do to renew his lead inspector license, including purchasing or leasing a new x-ray fluorescence analyzer (portable equipment used by lead inspectors to determine the presence or absence of dangerous lead levels on surfaces in dwelling units or residential premises) and the completion of apprenticeship inspections with a licensed lead inspector. In his response, respondent asserted that compliance with the agreement's terms would be financially burdensome and that he was no longer interested in being a lead inspector or renewing his lead inspector license, but added that he was so stating with all his legal rights "reserved." The DALA Magistrate issued an order directing him to clarify whether he wished to pursue or withdraw his appeal. The order stated that failure to respond would result in the issuance of a decision dismissing the appeal for lack of prosecution. Because respondent did not respond to the order and the time for doing so has expired, it is recommended that the DPH Commissioner issue a final decision dismissing the appeal for lack of prosecution and making final the agency's proposed refusal to renew respondent's lead inspector license.

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*Background*

In this appeal, respondent Wubishet Tilahun challenged an undated notice of agency action issued by the Department of Public Health (DPH) proposing to refuse the renewal of his lead inspector license, pursuant to M.G.L. c. 111, § 197B and 105 C.M.R. § 460.400(H) (a subsection of the DPH lead poisoning prevention and control regulations), based upon alleged violations related to his lead inspection at several dwellings. The violations that DPH alleged included falsification of lead inspection test results, and failure to follow the procedures for initial lead inspection, *e.g.*, by repeatedly failing to identify and/or test surfaces in accordance with DPH Childhood Lead Poisoning Prevention Program ("CLPPP") policies and educational and training materials, and failing to appropriately operate and maintain his x-ray fluorescence analyzer in accordance with the

manufacturer's regulations and 105 C.M.R. § 460.740(A), specifically by using an x-ray fluorescence analyzer that was more than six years old but that had not been recently checked for functionality or re-sourced.<sup>1</sup> DPH also alleged in its notice that Mr. Tilahun failed to follow the procedures for initial inspection in accordance with 105 C.M.R. § 460.730, failed to record or report unauthorized de-leading in accordance with CLPPP policies and educational and training materials, and failed to file reports with CLPPP as required by 105 C.M.R. § 460.750. The notice identified surfaces or components at various residences that Mr. Tilahun failed to test or inspect, including windows, doors, closets and hallways and stairs, and/or entire rooms. DPH alleged that he reported negative lead readings for residential components or surfaces that did not exist, or reported the residences as having been negative for lead but that DPH inspectors later found to have dangerous lead levels on both interior and exterior surfaces. Other allegations included Mr. Tilahun's failure to report an

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<sup>1/</sup> An x-ray fluorescence analyzer is portable equipment used by lead inspectors to determine the presence or absence of dangerous lead levels on surfaces in dwelling units or residential premises. The DPH regulations define "lead inspection" as "the procedure used by lead inspectors for testing all applicable residential surfaces for dangerous levels of lead, using either an x-ray fluorescence analyzer and/or a 6% to 8% solution of sodium sulfide . . ." The regulations define "dangerous levels of lead" generally as "the level of lead in paint, other coating, plaster or putty which materially endangers the health of children or adults by producing a substantial and serious danger of lead poisoning." 105 C.M.R. § 460.020. Specifically, the level of lead detected "in a dried film, including but not limited to paint, glaze, stain, varnish or other substance on any toy, furniture or other articles, or when present in paint, other coating, plaster or putty on residential surfaces," is "deemed to be" dangerous if it is "equal to or more than 1.0 milligram of lead per square centimeter (mg/cm<sup>2</sup>) of surface as measured on site by a mobile x-ray fluorescence analyzer," if that equipment is used. *Id.* An applicant for a lead inspector license who uses an x-ray fluorescence analyzer must show, among other things, that he has completed training by the equipment's manufacturer, and that he holds the appropriate license from the Department of Public Health's Radiation Control Program *See* 105 C.M.R. §§ 460.400(D)(1) and (E)(3). A lead inspector who uses an x-ray fluorescence analyzer must verify the instrument's standardization "at least once a day when the instrument is being operated, or more often if so specified by the manufacturer, and a logbook must be maintained of all readings made during standardization verification." 105 C.M.R. § 460.740(A).

apparent prior, and unauthorized, de-leading at one dwelling unit that DPH later re-inspected. The notice stated that each of these grounds was a separate and independent basis for refusing to renew a lead inspector license, pursuant to M.G.L. c. 111, §97(B) and 105 C.M.R. § 460.400(H).

Mr. Tilahun appealed the notice, and the refusal to renew his lead inspector license that it proposed, by filing a hearing request with DPH on March 12, 2017.<sup>2</sup> DPH transferred the appeal to the Division of Administrative Law Appeals (DALA) on March 23, 2017, and DALA scheduled a prehearing conference for May 18, 2017.

I began the prehearing conference with both parties present. I did not conclude the conference or schedule a hearing, however, because Mr. Tilahun expressed a serious interest in attempting to resolve this matter by an agreement under which he could renew his lead inspector license, and the parties requested time to consider whether, and how, this matter might be resolved.

I held a further prehearing conference on June 8, 2017, at which DPH presented the outline of an agreement describing what Mr. Tilahun would need to do to renew his lead inspector license. Among other things, the proposed agreement would require a six-month “license non-renewal period,” during which time Mr. Tilahun would have to submit a list of inspections he performed (most likely over the past two years), purchase or lease a new x-ray fluorescence analyzer from a manufacturer of this equipment, and submit evidence of training he received from the manufacturer and the results of the manufacturer’s leak tests regarding the purchased or leased analyzer.

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<sup>2</sup>/ DPH did not challenge the appeal as untimely. This suggests that regardless of the date on which DPH issued its notice of agency action, Mr. Tilahun’s appeal was timely filed within 21 days after he received it, the appeal period prescribed by the DPH regulations. *See* 105 C.M.R. § 460.400(H), first unnumbered para., third sentence.

Following the six-month license non-renewal period, Mr. Tilahun would have to complete 15 apprenticeship inspections with a licensed lead inspector within a specified time.

The Department sent its proposed agreement to Mr. Tilahun for his consideration in late June 2017. In his response dated July 29, 2017, Mr. Tilahun stated that it would be extremely difficult and financially burdensome for him to comply with the agreement's terms, and that he was no longer interested in becoming a Massachusetts lead inspector or in renewing his license, but (per the letter's last phrase), he did so "with all my legal rights reserved."

The letter suggested that Mr. Tilahun did not wish to sign the proposed agreement, which was his right. However, the letter did not make clear whether he wished to pursue this appeal further or wished to withdraw it, particularly in view of its last phrase "with all my legal rights reserved." For this reason I issued, on August 11, 2017, an order directing that Mr. Tilahun clarify, by August 21, 2017, whether he wished to pursue this appeal or withdraw it. The order stated that if he withdrew the appeal, the proposed refusal to renew his lead inspector license would become final, but that if he preferred to pursue the appeal, I would issue an order scheduling a hearing. Finally, the order stated that if Mr. Tilahun did not respond to it, his appeal would be dismissed based upon lack of prosecution and/or the appeal's withdrawal, and as a result, DPH's proposed refusal to renew his lead inspector license would become final.

DALA sent a copy of the August 11, 2017 order to Mr. Tilahun by regular mail at the address he gave during the May 18, 2017 prehearing conference. The mailing was not returned to DALA by the United States Postal Service, and its receipt is therefore presumed.

Mr. Tilahun filed no response to the August 11, 2017 order, and the time for filing a response

has expired. Accordingly, I now recommend that the Commissioner of the Department of Public Health issue a final decision dismissing this appeal for lack of prosecution, pursuant to 801 C.M.R. § 1.01(7)(g)2, and making final the agency's proposed refusal to renew Mr. Tilahun's lead inspector license. Consistent with 105 C.M.R. § 406.400(L), this recommended decision reserves fully to the Commissioner of the Department of Public Health the decision of whether, and, if so, when, the renewal of Mr. Tilahun's lead inspector license will be denied.

SO ORDERED.

This is a recommended decision of the Division of Administrative Law Appeals. The parties are hereby notified that, pursuant to 801 C.M.R. § 1.01(11)(c)1, each of them has 30 days to file with the Commissioner of the Department of Public Health any written objections to this recommended decision, which may be accompanied by a supporting brief. A final agency decision in this matter will be issued by the Commissioner.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Mark L. Silverstein  
Administrative Magistrate

Dated: October 13, 2017