COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. **Division of Administrative Law Appeals**

Department of Public Health,
Petitioner,

v.

Timothy Foley,
Respondent.

No. PHLP-24-0560

Dated: May 10, 2025

MEMORANDUM AND ORDER ON MOTION FOR SUMMARY DECISION

Petitioner the Department of Public Health (department) seeks to suspend respondent Timothy Foley's lead inspection license. The department has filed a motion for summary decision, which Mr. Foley has opposed.

I

The undisputed background runs as follows. The department commenced an investigation of a home in Webster (Webster home) upon learning that a child living there had tested positive for lead poisoning. In January 2024, department investigator Eric Fortier inspected the Webster home, identified more than forty lead hazards, and filed an assessment report. In February 2024, the department produced the report to the homeowner and ordered him to remedy the hazards.

In March 2024, investigator Fortier and a colleague reinspected the Webster home. They found additional lead hazards, as well as evidence of unauthorized "deleading." In April 2024, the department issued an updated report to the homeowner, reordered him to remedy the hazards, and required him and his family to vacate the premises.

Mr. Foley is a licensed lead inspector. In May 2024, the homeowner engaged Mr. Foley to conduct his own inspection of the Webster home. Mr. Foley issued a report identifying no

lead hazards and no evidence of unauthorized deleading. In accord with the report, Mr. Foley furnished the homeowner with "letter of compliance."

The applicable statute and regulations authorize the department to revoke or suspend the license of a lead inspector who has violated any applicable regulations. *See* G.L. c. 111, § 197B(f)(1); 105 C.M.R. § 460.400(H). Acting on those authorities, the department in August 2024 issued a notice suspending Mr. Foley's license for sixty days. After Mr. Foley requested a hearing, the department referred the matter to this tribunal. *See id.* § 460.400(L).

II

Summary decision is warranted where "there is no genuine issue of fact . . . and [the moving party] is entitled to prevail as a matter of law." 801 C.M.R. § 1.01(7)(h). An issue is "genuine" if both parties possess "reasonable expectations" of prevailing on it. *Goudreau v. Nikas*, 98 Mass. App. Ct. 266, 269-70 (2020). The record in this context must be assessed in the light most favorable to the non-moving party, *Caitlin v. Bd. of Reg. of Architects*, 414 Mass. 1 (1992), recognizing that the governing rules do not enable that party to depose the movant's affiants, *Murphy v. State Bd. of Ret.*, No. CR-23-0302, 2024 WL 664423, at *2 (Div. Admin. Law App. Feb. 9, 2024).

The department's motion alleges four regulatory violations by Mr. Foley as bases for suspending him. The discussion that follows reorders them for convenience.

A

The department's first two theories may be grouped together. They both tackle the substantive quality of Mr. Foley's May 2024 inspection and report. In essence, the department says that Mr. Foley should have found and reported both lead hazards and unauthorized deleading.

The department identifies two regulations in connection with these theories. One requires a lead inspector who has found "no lead hazards, and . . . no evidence of unauthorized deleading" to prepare a report so stating. 105 C.M.R. § 460.750(A)(1). The other provides that a lead inspector who *has* discovered evidence of deleading must prepare an appropriate report, "refuse to issue any letter of compliance," and take other related steps. *Id.* § 460.730(E).

The application of these regulations here is not necessarily straightforward. Both of them refer to the actions that an inspector is expected to take after an inspection is complete. A potential violation of them would appear to arise only if an inspector *did* find evidence of lead hazards or unauthorized deleading yet failed to respond accordingly. Arguably, even the most egregiously lax inspection would not in itself implicate these particular regulations.

It may be that the department *does* mean to accuse Mr. Foley of seeing and ignoring deficiencies at the Webster home. Alternatively, it may be the department's view that Mr. Foley would not have missed any deficiencies at the Webster home if he had "follow[ed] [the] procedures outlined in inspector training," as a separate regulation requires. *See* 105 C.M.R. § 460.730. Either way, Mr. Foley does not deny that some regulation or another requires lead inspectors to catch and report lead hazards and unauthorized deleading. At least for present purposes, I accept the parties' agreement on this point.

The dispute as framed by the parties concentrates on whether the Webster home in fact displayed lead hazards and evidence of unauthorized deleading at the time of Mr. Foley's inspection. The board says yes primarily on the basis of investigator Fortier's reports, his affidavit, and laboratory testing of samples taken during one of his visits. Mr. Foley responds with his own affidavit and his own detailed, standard-form report.

The likelihood that Mr. Foley will prevail at an evidentiary hearing may not appear to be high. The lab test results and the presence of lead poisoning in one or more residents of the Webster home would appear to offer powerful indications that lead levels in the home were irregularly high. And it may be the case that detectible evidence would have been more easily overlooked (by Mr. Foley) than imagined (by investigator Fortier).

On the other hand, the evidence at this point is thin. The affiants do not speak in detail about the tests and procedures that yielded their respective reports. There is no record evidence about the likelihood of a competent lead inspection producing false positives or false negatives. Mr. Foley has not had an opportunity to probe investigator Fortier's methods and conclusions through cross-examination. On balance, even if the question is close, the current record does not establish the punishable inadequacy of Mr. Foley's inspection beyond genuine dispute.

B

The department's next asserted basis for disciplining Mr. Foley arises from a regulation specifically about homes in which lead-poisoned children reside. With respect to such homes, the regulation requires inspections and re-inspections to be performed only by "employees of the [department]," or by the department's "designated representatives," or by certain local bodies. *See* 105 C.M.R. § 460.400(M). The department asserts that Mr. Foley violated this provision by inspecting the Webster home when he did.

In his affidavit, Mr. Foley says: "I have been approved by [the department] to conduct re-inspections on its behalf." This averment is too "vague, non-specific and general" to defeat the department's motion. *See Benson v. Massachusetts Gen. Hosp.*, 49 Mass. App. Ct. 530, 533 n.3 (2000). Mr. Foley does not specifically claim that he was a department "employee" or "representative." He does not say whether the re-inspections he was "approved" to conduct

included re-inspections at the homes of lead-poisoned children. He produces no supportive documentation that might have cleared up these uncertainties.

Perhaps in light of the foregoing issues, Mr. Foley's memorandum of law offers no defense against the allegation that the Webster home was off-limits to private inspectors at the time of his inspection. The department is entitled to summary decision on this point.

C

The department's final theory relates to a department-operated database named "Lead Safe Homes 2.0" (lead database). Department supervisor Alicia Bessette avers that "[l]ead inspectors are required to review the [database] prior to inspection." She adds that "[t]his requirement is reviewed during lead inspector training." The department alleges that Mr. Foley failed to consult the lead database in advance of his inspection of the Webster home. The department explains that a review of the database would have alerted Mr. Foley to investigator Fortier's reports, including their implication that the Webster home was no longer eligible to be inspected by private inspectors.

The department identifies the regulation pertinent to this theory as 105 C.M.R. § 460.400(B)(1), which requires lead inspectors to "comply with . . . policies established by the [department]." Mr. Foley does not dispute this provision's applicability. In principle, the term "policies" might tend to evoke enactments more formal than requirements discussed orally in training sessions.[1] But even if that is the case, the regulation stating that lead inspectors must "follow procedures outlined in inspector training" is again squarely on point. *See* 105 C.M.R. § 460.730.

[1] A written policy document cited by supervisor Bessette appears to discuss the rule against private inspectors inspecting homes of lead-poisoned children but not the corollary that they must consult the lead database before each inspection.

Mr. Foley's brief does not counter this theory either. But in his affidavit, Mr. Foley says: "[P]rior to commencing [the] inspection, [I] checked . . . Lead Safe Homes 2.0." This averment is not vague or evasive. It confronts the department's allegation head-on.

Mr. Foley nevertheless possesses no reasonable expectation of prevailing on this issue of fact. In a record email dated in June 2024, Mr. Foley wrote to supervisor Bessette, "Yes, I missed a look up." Supervisor Bessette avers that Mr. Foley made that statement to her "on numerous occasions." Also, in an emotional June 2024 email to the homeowner, Mr. Foley said: "[Y]ou should have told me that the state was involved in this case." In context, this statement suggested that Mr. Foley's assumption that the state was *not* involved rested specifically on the homeowner's reticence, not on a clean database search.

Mr. Foley does not deny in his affidavit that he made the foregoing statements in real time. He offers no explanation for them. The only one that the record offers is that Mr. Foley was being less defensive before discipline was being pursued against him. Where one party seeks summary decision on the basis of probative "documentary evidence . . . [t]he bare assertion to the contrary in the [non-moving party's] affidavits raises no genuine issue of material fact." *Ng Bros. Const., Inc. v. Cranney*, 436 Mass. 638, 648 (2002). The department is entitled to summary decision on this issue too.

D

Mr. Foley states in his brief that some of his conduct amounted to "de minimis" violations only. It appears that this argument is directed at the allegations that I have found to be proven beyond genuine dispute, namely that Mr. Foley inspected the Webster home without consulting the lead database and even though the home was then off limits to private inspectors.

This argument offers no basis for denying summary decision to the department. Discussing the permissible predicates for both revocations and suspensions, an applicable

regulation states that "[a]ny one [reason] shall be sufficient cause." 105 C.M.R. § 460.400(H). And Mr. Foley identifies no precedent, other authority, or logical rationale in support of a conclusion that his missteps were a less-than-adequate basis for the sixty-day suspension that the department proposes.

III

In view of the foregoing, it is hereby ORDERED that the department's motion for summary decision is ALLOWED in part, namely as to the following allegations: that Mr. Foley failed to consult Lead Safe Homes 2.0 before performing an inspection; and that he impermissibly inspected a home in which one of the residents was a lead-poisoned child. The department's motion is otherwise DENIED. The evidentiary hearing will proceed on schedule as to the unresolved factual issues unless the department timely withdraws its remaining allegations and moves for a case-closing recommended decision limited to the allegations on which it has prevailed in the current order.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate