

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION, BOARD)
OF PROFESSIONAL ENGINEERS,)
)
Petitioner,)
)
vs.) CASE NO. 94-1600
)
JAMES B. WHITTUM,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A hearing was held in this case in Tampa, Florida on March 9, 1995, before Arnold H. Pollock, a Hearing Officer with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charles F. Tunnickliff, Esquire
Mary Ellen Clark, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

For Respondent: Charles S. Stephens, Esquire
1177 Park Avenue, Suite 5
Orange Park, Florida 32073

STATEMENT OF THE ISSUES

The issue for consideration in this hearing is whether Respondent's license as a professional engineer in Florida should be disciplined because of the matters alleged in the Administrative complaint filed herein.

PRELIMINARY MATTERS

By Administrative Complaint dated February 17, 1994, filed by Charles F. Tunnickliff, Chief Attorney for the Professions Section of the Department of Business and Professional Regulation, on behalf of the Board of Professional Engineers, the Department seeks to discipline the Respondent's license as a professional engineer in this state. The Complaint alleges that by signing and sealing plans for an aluminum frame structure without knowing where the structure was to be built, and by using building guidelines not appropriate to the actual site of the construction, Respondent was guilty of negligence, incompetence or misconduct, in violation of Section 471.033(1)(g), Florida Statutes.

Respondent thereafter filed a Petition For Administrative Hearings and this proceeding followed. At the hearing, Petitioner presented the testimony of James O. Power, a consulting structural engineer and expert in the practice of engineering, and introduced Petitioner's Exhibits 1, 2, 4, and 5. Petitioner's Exhibits 3 and 6 for Identification were offered but rejected on objection by Respondent. Respondent testified in his own behalf and, by deposition filed after the hearing, presented the testimony of Brian Sterling, a professional engineer. Respondent also introduced Respondent's Exhibits A, B, and D. Respondent's Exhibits C for Identification was offered but rejected on objection by Petitioner.

A transcript was provided and counsel for Petitioner submitted Proposed Findings of Fact which have been ruled upon in the Appendix to this Recommended Order. Respondent's counsel submitted a Proposed Recommended Order consisting of 46 numbered paragraphs which relate to both substantive and procedural matters. This Proposed Recommended Order was carefully considered by the undersigned in the preparation of this Recommended Order. Such paragraphs which can be considered as Proposed Findings of Fact have been ruled upon in the Appendix.

FINDINGS OF FACT

1. At all times pertinent to the issues herein, the Board of Professional Engineers was the state agency responsible for the licensing of professional engineers in this state. Respondent, James B. Whittum, was licensed as a professional engineer by the Board under License No. PE 0027689, dated March 9, 1979. He is a consulting engineer dealing primarily in aluminum structures - mostly pool enclosures.

2. Starting in 1990, Respondent did a number of designs, some thirty to fifty a year, for Paglino Aluminum, an aluminum contractor located in Tampa, which might also have had offices in Miami. The company is now out of business. Sometime in 1992 Respondent approved plans for Paglino for a residence for Mr. and Mrs. Marrero. These drawings were for an aluminum enclosure. He did not personally make the drawing which had been done by Mrs. Paglino. He did not know where the Marrero residence was but claims that at no time did he do or approve any drawings which he believed would be utilized for construction in Miami.

3. In order to save clients money, Respondent had established a practice with Paglino and with a number of other clients by which he would train them in how to design and draw the pool cages. Respondent would provide the clients with a design booklet and instruction on how to use it. The client would bring drawings to the Respondent who would check them over to make sure that everything was done according to the design basis. A copy of the design guide was furnished to Paglino.

4. Once Respondent received the drawings from the client, he would go through the whole design procedure himself to be sure that the drawings conformed to the code. In order to place his signature and seal on drawings, he had to have an identification of the site (either the name of the owner or the address of the site), the dimensions of the slab on which the structure is to be built, and the orientation of the structure with reference to the existing building to which it was to be attached.

5. With regard to the specific plans in issue, Mr. Whittum did not know the structure was to be built in Dade County. The plans he saw bore the

Marreros' name but not their address. He never spoke to the Marreros except for one call from Mrs. Marrerro, after the structure was built, complaining about it. Before signing the plans, Respondent checked in the Tampa phone book for listings for Marrero and found twenty-five or thirty listings for that name. He assumed the Marreros for which these plans were drafted were one of those families listed.

6. It is not Respondent's practice to know the street address for every design he signs and seals. He inquired of several other engineers designing aluminum structures to see if they did the same as he proposed before signing and sealing these plans. He found that they have either the name of the owner or the street address, but not necessarily both. Included in those with whom Respondent spoke concerning this issue were engineers in Sarasota and Cape Coral. This testimony by Mr. Whittum as to the practice of other engineers is hearsay, however.

7. Most counties in Florida, except Pinellas County, do not allow the use of standard plans as submittals for the purpose of permitting. However, an engineering firm has drawn a set of master drawings for the design of aluminum structures. These drawings were done for the Pinellas Chapter of the Aluminum Association of Florida, and each aluminum contractor in that county files them with the Pinellas Building Department. Thereafter, when plans are submitted, the Department official examines the plans with reference to the standard and decides whether or not to issue the permit. If the plans submitted by the contractor conform to the master design no engineer's signature or seal is required. This procedure has no bearing on any other county in Florida, however, and Respondent does not contend he believed at the time that the plans he signed would be used for construction in Pinellas County.

8. It was not Respondent's practice to require a street address for the plans he signed and sealed for Paglino Aluminum. It was his understanding, however, that the instant structure was to be built in Hillsborough County because all the other jobs he had done for that company were, without exception, built in Hillsborough County. At no time did Paglino ever seek Respondent's permission to transfer these drawings to Dade County. By the same token, nobody asked him if the design he drew would be appropriate for Dade County. Had they done so, he would have told them the drawings were not suitable to meet the South Florida Building Code where the structural design standards are, in many ways, more stringent than in the Standard Building Code.

9. As a result of this incident, Respondent has changed the procedure he follows. He now requires the drawings include a statement of who purchased the plans and who the proposed permitting authority is. This is not required by rule but is a precaution he takes. In his opinion, the drawings in issue were site specific. They showed the dimensions of the slab the structure was to be built on which determines the design for the size of the beams and their spacing. They also showed the orientation to the house where the structure would be connected. This was, he contends, all he needed to know to do the calculations for construction under the Standard Building Code. These calculations generally do not vary from county to county, with the exception of Dade and Broward County, where the South Florida Building Code is used.

10. The plans Respondent signed and sealed did not indicate where the structure was to be built at the time he signed and sealed them. The plans called for a structure that could be put up anywhere in the state, except for Dade and Broward Counties. The fact remains, however, that at the time he signed and sealed these plans, Respondent did not know where the structure was

to be built. His supposition that it would be built in Hillsborough County, while perhaps reasonable for a lay person, was not reasonable for a licensed professional engineer.

11. According to James O. Power, a consulting structural engineer and expert in the practice of engineering, a structural engineer, in signing and sealing plans, accepts responsibility for the integrity of the design, certifies that the plans are good for their intended purpose, and asserts that the structure will be safe. A sealed plan may be necessary, depending on the building code and enforcement agency. The code leaves it up to the building official to require what he feels is necessary. Depending on the agency, permits may be issued on the basis of non-sealed plans. The seal carries with it the added imprimatur of the engineer's expertise. Properly sealed plans should: (1) identify the project; (2) identify the drafter; (3) identify the Code used; and (4) indicate limitations on responsibility the engineer has taken.

12. Aluminum screen enclosures are generally similar and simple. Standard drawings can be developed for them. However, the standard plan, by itself, will not support a permit. To support the issuance of a permit, the plan must be site specific. This is a universal concept. For that purpose, additional drawings must be accomplished which consider and treat the specifics of that project.

13. Frequently, plans are issued with a statement by the engineer limiting the degree of his or her responsibility, such as "only treating one issue" or "plans are standard and not site specific." No such limiting language was placed on the drawing in issue except, "This design is specific to this job. It is not valid if filed as a standard."

14. In July, 1994, Mr. Power was contacted by the Department to evaluate the allegations against the Respondent in this case. In doing so, he reviewed the investigative report, portions of the transcript of the meeting of the Probable Cause Panel, the drawings in issue, and affidavits by Respondent and by the Dade County building official, but did not speak with any of them.

15. Respondent's plans in issue bear the notation that the design is "job specific" and not valid if filed as a standard. This means that the plan should identify the job for which the plans were drawn and bear details pertinent to it. Here, the Respondent's plans refer to the "Marrero" job, and who the contractor was. In Power's opinion, this is not complete and it is not enough for the engineer to say he had the specifics in his mind. The plans must be complete and stand by themselves.

16. Mr. Power admits he has not designed any pool enclosures. He also did not inquire whether Respondent had an office in Dade County or what the permit requirements of counties in the state are. However, in his opinion, it is universal that standard plans do not support the issuance of a permit.

17. Respondent's design includes connection details, slab details and wind load requirements. However, the name of the owner, alone, is not site specific information. While the exact street location is not required, an identification of the area in which the project is to be built, at the very least by county, is.

18. Respondent's expert, Mr. Sterling, is less critical of Mr. Whittum's performance. In his opinion, it is not common within the profession for signed

and sealed drawings to have an address or a name or contractor's name on them. Having reviewed Respondent's drawings, Mr. Sterling does not see anything else he would need to know to properly design the structure. He does not agree with Mr. Power with respect to having the address on each and every drawing. To him, what is important in looking at the drawing from a structural point of view are the design criteria that were applied to that particular structure. To his knowledge there is no professional requirement, statute or regulation that would oblige one to provide additional information. He admits, however, that there may be different practices or rules being applied in Dade and Broward Counties with respect to structure of this type.

19. By Final Order dated April 3, 1992, the Board disciplined Respondent's license for negligence in the practice of engineering by signing and sealing plans for an aluminum screened pool enclosure which the Hillsborough County Building Department found failed to meet acceptable engineering standards. The penalty imposed included an administrative fine of \$500, a reprimand, and probation for one year under conditions designed to insure technical and professional enhancement.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this case. Section 120.57(1), Florida Statutes.

21. Petitioner contends that by signing and sealing plans which were to be used for a structure in Dade County, without being aware of the location where the structure would be built and the specific job site information, and which plans did not comply with the requirements of the South Florida Building Code applicable where the structure was built, Respondent violated Section 471.033(1)(g), Florida Statutes, by being guilty of fraud, deceit, negligence, incompetence or misconduct in the practice of engineering.

22. The cited statutory provision authorizes the Board of Professional Engineers to discipline the license of a professional engineer when such misconduct is shown. In order to do so, the Board must establish the misconduct by clear and convincing evidence. *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987).

23. There is no issue concerning whether Respondent signed and sealed the plans in issue or what they contain. He did not draw the plans but, instead, received them in the condition shown, and thereafter placed his signature and seal thereon. The misconduct alleged is that when he did that, though he clearly defined them as site specific plans, he did not know where the structure was to be built.

24. The Department does not contest Mr. Whittum's contention that he believed the structure would be built in or around Hillsborough County. It does not contest that he looked in the phone book to determine that there were numerous Marreros listed therein. What the Department faults is the fact that he made no effort to determine from his client, Paglino Aluminum, or from anyone else, where the construction was to take place, assuming that it would be in or around Hillsborough County.

25. There is conflicting opinion whether Respondent's failure to determine the location of the construction before placing his signature and seal on the plans constitutes fraud, deceit, negligence, incompetence or misconduct. There

is no evidence of fraud or deceit, and any misconduct on the part of the Respondent was clearly unintentional. However, in light of the fact that the plans were specifically denoted to be site specific, the Respondent's failure to insure that the structure would be built in an area where the cited Building Code applied, clearly constitutes negligence.

26. Section 471.033 (3), Florida Statutes, outlines the penalties which the Board may impose in the event it finds a licensee guilty of any of the proscribed misconduct. Included are:

- a. Revocation or suspension of a license;
- b. Imposition of an administrative fine not to exceed \$1,000 for each count or separate offense.
- c. Issuance of a reprimand.
- d. Probation for such time and under such conditions as the Board may specify.

27. Clearly Respondent has been less than professional in his performance as indicated herein. The term "professional engineer" implies a certain degree of professionalism and expert performance which Respondent has not shown. When considered with the prior disciplinary action taken against him for negligence, it is clear that action must be taken to impress upon Respondent the need to meet professional standards.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is, therefore:

RECOMMENDED that a Final Order be issued finding Respondent guilty of negligence in the practice of engineering; imposing a fine of \$1,000.00 and revoking his license, but that so much of the penalty as provides for revocation be suspended for a period of two years.

RECOMMENDED this 31st day of May, 1995, in Tallahassee, Florida.

ARNOLD H. POLLOCK, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of May, 1995.

APPENDIX TO RECOMMENDED ORDER

The following constitutes my specific rulings pursuant to Section 120.59(2), Florida Statutes, on all of the Proposed Findings of Fact submitted by the parties to this case.

FOR THE PETITIONER:

- 1. Accepted and incorporated herein.
- 2 - 11. Accepted and incorporated herein.
- 12. Accepted and incorporated herein.
- 13. - 15. Accepted and incorporated herein.
- 16. Accepted, but primarily a restatement of testimony.
- 17. - 22. Accepted, but these are primarily restatements of witness testimony.

FOR THE RESPONDENT:

- 1. - 4. Not Findings of Fact but statements of procedure followed.
- 5. Unknown.
- 6. - 9. Not Findings of Fact but comments of the evidence.
- 10. Accepted and incorporated herein.
- 11. - 13. Accepted.
- 14. - 17. Accepted and incorporated herein.
- 18. - 21. Accepted and incorporated herein.
- 22. Rejected as surmise of witness, not knowledge.
- 23. - 25. Accepted.
- 26. - 28. Accepted.
- 29. Not a Finding of Fact but a restatement of the issue.
- 30. & 31. Not Findings of Fact but restatements of testimony.
- 32. Not a Finding of Fact but a comment on the evidence.
- 33. - 37. Accepted.
- 38. Not a Finding of Fact but a restatement of the evidence.
- 39. & 40. Not Findings of Fact but restatements of testimony.
- 41. - 44. Accepted.
- 45. Not a Finding of Fact but a restatement of testimony.
- 46. More a comment by one witness on the testimony of another witness.

COPIES FURNISHED:

Charles F. Tunnicliff, Esquire
Mary Ellen Clark, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Charles S. Stephens, Esquire
1177 Park Avenue, Suite 5
Orange Park, Florida 32073

Lynda Goodgame
General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Angel Gonzalez
Executive Director
Board of Professional Engineers
1940 North Monroe Street
Tallahassee, Florida 32399-0792

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should consult with the agency which will issue the Final Order in this case concerning its rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency which will issue the Final Order in this case.