

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION, BOARD)
OF PROFESSIONAL ENGINEERS,)
)
Petitioner,)
)
vs.) Case No. 98-1010
)
PAB CONSULTANTS, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, William J. Kendrick, held a formal hearing in the above-styled case on July 22, 1998, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Harold M. Knowles, Esquire
Knowles, Marks & Randolph, P.A.
215 South Monroe Street, Suite 130
Tallahassee, Florida 32301

For Respondent: Brant Hargrove, Esquire
1026 East Park Avenue
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

At issue in this proceeding is whether Respondent committed the offenses set forth in the Administrative Complaint and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated December 18, 1997,

Petitioner charged that Respondent, a corporation authorized (certified) to offer professional engineering services, violated the provisions of Section 471.033(1)(b), Florida Statutes, by obtaining or attempting to obtain, on one or more occasions, a certificate of authorization or amended certificate of authorization based on fraudulent representations.

Respondent filed an election of rights which disputed the factual allegations contained in the Administrative Complaint, and Petitioner referred the matter to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct a formal hearing pursuant to Sections 120.569, 120.51(1), and 120.60(5), Florida Statutes.

At hearing, Petitioner called Jerry Wilson, Mary Miller, and Dorothy Ann Barcia as witnesses, and Petitioner's Exhibits 1 through 9, 11, 15 through 18, and 20 through 25, were received into evidence.¹ Respondent's Exhibit 1 was offered and received into evidence; however, Respondent offered no additional proof.²

The hearing transcript was filed August 7, 1998, and the parties were accorded ten days from that date to file proposed recommended orders. Neither party elected to file such a proposal.

FINDINGS OF FACT

1. Pertinent to this case, Section 471.023, Florida Statutes, provides:

(1) The practice of, or the offer to practice, engineering by registrants through

a corporation . . . offering engineering services to the public or by a corporation . . . offering said services to the public through registrants under ss. 471.001-471.037 as agents, employees, [or] officers, . . . is permitted only if the firm possesses a certification issued by the [D]epartment [of Business and Professional Regulation] pursuant to qualification by the [B]oard [of Professional Engineers], subject to the provisions of ss. 471.001-471.037. One or more of the principal officers of the corporation . . . and all personnel of the corporation . . . who act in its behalf as engineers in this state shall be registered as provided by ss. 471.001-471.037. . . .

* * *

(4) . . . Each . . . corporation certified under this section shall notify the board within 1 month of any change in the information contained in the application upon which the certification is based.

2. On February 16, 1993, PAB Consultants, Inc. (PAB),³ filed an application (dated February 11, 1993) with the Department of Professional Regulation (now known as the Department of Business and Professional Regulation), Board of Professional Engineers (Department), for authorization to offer professional engineering services as a corporation.

3. Pertinent to this case, sections 9 and 10 of the application requested the name, address, and license number of Florida registered engineers employed by the corporation (one of which was required to be a principal officer of the corporation). PAB responded as follows:

<u>Irwin Schram</u>	<u>22779 Meridiana Drive, Boca Raton, FL 407118 (sic)</u>	<u>[40718]</u>
Name	Address	Lic. #
<u>Dana E. Smith</u>	<u>90 Isle of Venice, FT. Lauderdale, FL 0039633</u>	
Name	Address	Lic. #

Name	Address	Lic. #
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4. Dana Smith was, at the time, a principal officer ("Director of Engineering Services") of PAB; however, Irwin Schram was not, and never had been, employed by PAB, and the use of his name and registration by PAB was not known or authorized by him. In sum, the naming of Irwin Schram as an employee of PAB was an intentional and untruthful act.⁴

5. On February 17, 1993, PAB's application was approved and it was issued a certificate of authorization (certificate number EB-0006493) which permitted individually registered professional engineers to offer professional services to the public through PAB. More particularly, the certificate of authorization provided:

WHEREAS PAB CONSULTANTS, INC. HAS MET THE REQUIREMENT OF CHAPTER 471.023, FLORIDA STATUTES, FLORIDA STATE BOARD OF PROFESSIONAL ENGINEERS AUTHORIZES THE SAID CORPORATION TO OFFER TO THE PUBLIC PROFESSIONAL ENGINEERING SERVICES OF THE FOLLOWING LISTED INDIVIDUALS:

IRWIN SCHRAM	#PE0040718
DANA E. SMITH	#PE0039633

6. On April 6, 1995, PAB filed an application (dated April 3, 1995) with the Department for an amended certificate of authorization. Sections 9 and 10 of the application again required the name, address, and license number of Florida registered engineers employed by PAB (one of which was required to be a principal officer of the corporation). PAB responded as follows:

Irwin Schram	22779 Meridiana Drive, Boca Raton, FL 407118 (sic) [40718]	
Name	Address	Lic. #
Dana E. Smith	90 Isle of Venice, FT. Lauderdale, FL 0039633	
Name	Address	Lic. #
Javier Rodriquez	10870 SW 26th Ct, Davie, FL	0048264
Name	Address	Lic #

7. At the time, Javier Rodriquez was the principal officer ("Director of Engineering") of PAB, having replaced Dana Smith; however, as with the prior application, Irwin Schram was not, and never had been, employed by PAB and the use of his name and registration by PAB was not known or authorized by him.⁵ Again, the naming of Irwin Schram as an employee of PAB was an intentional and untruthful act.

8. On April 7, 1995, PAB's application was approved and it was issued an amended certificate of authorization (still certificate number EB-0006493). The amended certificate provided:

WHEREAS PAB CONSULTANTS, INC. HAS MET THE REQUIREMENT OF CHAPTER 471.023, FLORIDA STATUTES, FLORIDA STATE BOARD OF PROFESSIONAL ENGINEERS AUTHORIZES THE SAID CORPORATION TO OFFER TO THE PUBLIC PROFESSIONAL ENGINEERING SERVICES OF THE FOLLOWING LISTED INDIVIDUALS:

IRWIN SCHRAM	#PE0040718
DANA E. SMITH	#PE0039633
JAVIER RODRIGUEZ	#PE0048264

9. On September 11, 1995, PAB filed an application (dated September 6, 1995) with the Department for an amended certificate of authorization. Sections 9 and 10 of the application again required the name, address, and license number of Florida registered engineers employed by PAB (one of which was required

to be a principal officer of the corporation). PAB responded, as follows:

Irwin Schram	22779 Meridiana Drive, Boca Raton, FL 407118 (sic)	[40718]
Name	Address	Lic. #
Dana E. Smith	90 Isle of Venice, FT. Lauderdale, FL	0039633
Name	Address	Lic. #
David S. Rivera	11591 SW 9th Court, Pembroke Pines, FL	0033886
Name	Address	Lic. #

10. At the time, David S. Rivera was the principal officer (Senior Vice-President) of PAB, having replaced Javier Rodriguez; however, as with the prior application, Irwin Schram was not, and never had been, employed by PAB, and the use of his name and registration by PAB was not known or authorized by him.⁶ Again, the naming of Irwin Schram as an employee of PAB was an intentional and untruthful act.

11. On September 28, 1995, PAB's application was approved and it was issued an amended certificate of authorization (still certificate number EB-0006493). The amended certificate provided:

WHEREAS PAB CONSULTANTS, INC. HAS MET THE REQUIREMENT OF CHAPTER 471.023, FLORIDA STATUTES, FLORIDA STATE BOARD OF PROFESSIONAL ENGINEERS AUTHORIZES THE SAID CORPORATION TO OFFER TO THE PUBLIC PROFESSIONAL ENGINEERING SERVICES.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Sections 120.569, 120.57(1), and 120.60(5), Florida Statutes.

13. Where, as here, the Department proposes to take

punitive action against a licensee, it must establish grounds for disciplinary action by clear and convincing evidence. Section 120.57(1)(h), Florida Statutes (1997), and Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996). That standard requires that "the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

14. Regardless of the disciplinary action sought to be taken, it may be based only upon the offenses specifically alleged in the administrative complaint. See Kinney v. Department of State, 501 So. 2d 129 (Fla. 5th DCA 1987); Sternberg v. Department of Professional Regulation, Board of Medical Examiners, 465 So. 2d 1324 (Fla. 1st DCA 1985); and Hunter v. Department of Professional Regulation, 458 So. 2d 844 (Fla. 2d DCA 1984). Moreover, in determining whether Respondent violated the provisions of Section 471.033(1)(b), Florida Statutes, as alleged in the Administrative Complaint, one "must bear in mind that it is, in effect, a penal statute. . . . This being true, the statute must be strictly construed and no conduct

is to be regarded as included within it that is not reasonably proscribed by it." Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

15. Pertinent to this case, Section 471.023(5), Florida Statutes, provides that where, as here, a corporation has been issued a certificate of authorization to offer engineering services to the public, it is subject to "[d]isciplinary action . . . in the same manner and on the same grounds as disciplinary action against a registered engineer."

16. Disciplinary proceedings against registered engineers, and corporations such as Respondent, are governed by Section 471.033, Florida Statutes. Here, the Department contends PAB is guilty of "[a]ttempting to procure a license to practice engineering by . . . fraudulent misrepresentations," as proscribed by Section 471.033(1)(b), Florida Statutes, because it misrepresented, on its various applications for certification, that Irwin Schram was employed as a professional engineer by PAB.

17. To establish that a licensee committed a violation of Subsection 471.033(1)(b), Florida Statutes, the Department must show not only that the licensee provided false or misleading information on its application, but that it did so knowingly and intentionally. Munch v. Department of Professional Regulation, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992), ("[A]pplying to the words used [in Section 471.033(1)(b)] their usual and natural meaning, it is apparent that it is contemplated that an intentional act be proved before a violation may be found."). Accord, Walker v. Department of Business and Professional Regulation, 23 Fla. L. Weekly D292 (Fla. 5th DCA 1998), and Gentry v. Department of Professional and Occupational Regulations, 293 So. 2d 95 (Fla. 1st DCA 1974).

18. Here, as observed in the Findings of Fact, the Department has demonstrated that the misleading, deceptive and untrue representations contained in Respondent's application were made willfully (intentionally). See Ellis v. State, 425 So. 2d

201 (Fla. 5th DCA 1983), approved, 442 So. 2d 213 (Fla. 1983)
(Circumstantial evidence is sufficient to prove intent).

Consequently, it has been shown, as alleged in the Administrative Complaint, that Respondent violated the provisions of Section 471.033(1)(b), Florida Statutes.

19. Having reached the foregoing conclusion, it remains to resolve the appropriate penalty that should be imposed. Pertinent to this issue, Rule 61G15-19.004, Florida Administrative Code, provides the guidelines for the disposition of disciplinary cases, as well as aggravating and mitigating circumstances to consider. Where, as here, a license has been procured through fraudulent representations, the recommended penalty is revocation and a \$1,000 fine. Such penalty is appropriate under the facts of this case.

RECOMMENDATION

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

RECOMMENDED that a final order be entered which finds Respondent guilty of violating Section 471.033(1)(b), Florida Statutes, as alleged in the Administrative Complaint.

It is further RECOMMENDED that for such violation, the final order revoke Respondent's certificate of authorization and impose a \$1,000 fine.

DONE AND ENTERED this 17th day of September, 1998, in
Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of September, 1998.

ENDNOTES

1/ Objections were sustained to Petitioner's Exhibits 10, 13, 14, and 15. No document was marked as Petitioner's Exhibit 12.

2/ At hearing, the parties agreed that official recognition be taken of Petitioner's Request for Admissions and Respondent's response. The parties' request was granted, and those matters have been marked Joint Exhibit 1 and received into evidence.

3/ PAB Consultants, Inc. (PAB), is a family owned corporation engaged in highway (roadway) related work, principally through contracts with the Florida Department of Transportation. Paul Barcia, Sr., and his wife, Ann Barcia, are the principal owners of the corporation, although their son, Paul Barcia, Jr., apparently holds some interest. Mrs. Barcia is the president and secretary of PAB, Mr. Barcia its treasurer, and Paul, Jr., its senior vice-president.

PAB was founded in 1991 when Paul Barcia, Sr., retired following 31 years of employment with the Florida Department of Transportation (FDOT). Mr. Barcia's duties with FDOT, although vaguely expressed, were related to transportation and highway maintenance. (Petitioner's Exhibit 2, pages 9 and 10). Mr. Barcia does not, however, appear to have ever been a licensed engineer. Mrs. Barcia, a high school graduate without the benefit of further formal training, is likewise not a licensed engineer. According to the proof, although associated with PAB from its inception, Mrs. Barcia was employed full time by the Department of Veteran's Affairs (VA), West Palm Beach, Florida, until her

retirement in 1994. Mrs. Barcia's actual duties with the VA are not clearly expressed of record; however, it appears "[s]he worked for the engineering department, procurement, contracting." (Petitioner's Exhibit 2, page 10).

4/ That the various applications falsely named Irwin Schram as a professional engineer employed by PAB is not the subject of dispute. Moreover, given the proof, it should not be subject to serious debate that the inclusion of Mr. Schram's name as an employee on the various applications was an intentional act.

The conclusion that naming Mr. Schram as an employee of PAB was an intentional act, as opposed to mistake or neglect, is based in no small part on the observations which follow. First, it defies logic and common experience that a professional engineer would inadvertently be listed as an employee of PAB. Indeed, PAB is such a small company that it is inherently improbable that those in authority would not know the professional engineers employed by the company, or stated otherwise, that they would name a stranger as a professional employee by mistake.

Moreover, pointing with unwavering certainty toward the conclusion that PAB's act in naming Mr. Schram as an employee was intentional, as opposed to inadvertent, is evidence of similar unauthorized use of Mr. Schram's name and licensure status to advance PAB's applications with the Florida Department of Transportation (FDOT) for pre-qualification to work (bid) on certain discrete categories of transportation/highway projects. Such intention is evident from the magnitude of PAB's duplicity following the brief contact it had with Mr. Schram, as hereinafter discussed.

Mr. Schram retired to South Florida in 1991, following a 25-year career with Lockwood Greene Engineers, Inc., in New York State. During that period, Mr. Schram served as a structural engineer (11 years) and as a project manager (14 years), with responsibility for the design and construction of commercial and industrial buildings, schools, recreational, and research centers (vertical construction). Mr. Schram had no experience, and has never claimed to have any experience in transportation/traffic engineering, highway design or construction, bridge design or construction, or other matters related to transportation.

Following retirement, Mr. Schram elected to work part-time as a consultant, and in January 1993, observed an advertisement in the Sun Sentinel, a local newspaper, for a part-time professional engineer, with vertical construction experience. Mr. Schram responded to the telephone number listed, and reached the offices of PAB. As a consequence, Paul Barcia, Sr., made an appointment to meet with Mr. Schram in his (Mr. Schram's) home. In the

interim, Mr. Schram forwarded to Mr. Barcia a copy of his resume.

Mr. Barcia met with Mr. Schram on January 15, 1993. During the course of that meeting, Mr. Barcia suggested to Mr. Schram that he could make \$55,000 a year, sitting at home, by signing and sealing drawings. In response, Mr. Schram expressed interest, provided he could inspect the work prior to approving the drawings, as well as after the work was completed, to assure it complied with code and professional standards; however, Mr. Barcia was reluctant to allow Mr. Schram to inspect the projects.

About one week later, Mr. Barcia returned and asked Mr. Schram to review some specifications, which he did; however, because of Mr. Barcia's refusal to let him inspect the properties, Mr. Schram refused to do business with him. That was the last Mr. Schram heard or saw of Mr. Barcia (or PAB) until on or about July 22, 1997, when he received a letter from the Department regarding an audit of the records of PAB. That letter stated:

Our current records show that you are listed as one of the professional engineers for PAB Consultants, Inc. Please let me know if this is still your current status.

Mr. Schram responded that he was not, and never had been, associated with PAB. Thereafter, Mr. Schram also learned that PAB had (starting as early as February 17, 1993, and extending at least until April 28, 1995) listed him (without his knowledge or consent) as a professional engineer employed by the company when it had applied for pre-qualification with FDOT. PAB had also, in conjunction with those applications, submitted resumes bearing the PAB logo that purported to detail Mr. Schram's career and experience; however, PAB falsified his experience to include highway design and construction, bridge design and construction, and other transportation/traffic engineering experience which Mr. Schram did not possess. PAB even advised FDOT, in a letter dated April 27, 1995 and signed by Mrs. Barcia (Petitioner's Exhibit 20), that Irwin Schram was one of the company's design project managers with "extensive experience in major and complex highway design," and the resume it enclosed for Mr. Schram, bearing the PAB logo, stated he possessed the following "Relevant Experience":

Lockwood Greene Engineers, Inc. New York, NY 1965-1990 - Irwin is a diversified professional engineer with over twenty-five years experience with Lockwood Green Engineers. During his tenure he served as a Design Engineer, Design Program Manager, Structural Engineer and Transportation

Manager.

Design Engineer/Design Program Manager - Responsible for all phases of the original design of the Homestead extension of Florida's Turnpike. The subject design encompassed forty-six (46) miles of limited access facility with ten (10) interchanges, located in Dade and Broward counties.

Structural Engineer (11 years) -
Responsibilities include design of new bridge structures and rehabilitation design of existing structures. Additional structural design projects include design of commercial and industrial buildings, recreational and research centers.

Transportation/Traffic Engineering -
Responsible for supervision of Traffic Engineering Studies. Data gathered from local streets and intersecting highways generated the components needed to permit proposed commercial projects. In addition to the above, he provided Traffic/Transportation Design Services in signing, pavement markings and channelization plans. (Emphasis added.)

Those matters emphasized in the resume were false, as Mr. Schram had no such experience.

In reaching the conclusion that the use of Mr. Schram's name and registration on the various applications filed with the Department was willful (intentional), the exculpatory testimony offered by Mr. and Mrs. Barcia (that they were unaware that Mr. Schram's name and registration were used to advance PAB's applications with the Department or FDOT, or that fraudulent resumes had been submitted to advance PAB's interests with FDOT) has not been overlooked. However, such testimony has been rejected as unworthy of belief.

5/ At the time, Dana Smith was also not employed by PAB.

6/ Again, Dana Smith was no longer employed by PAB.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.