

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ENGINEERS)
MANAGEMENT CORPORATION,)
)
Petitioner,)
)
vs.) Case No. 99-2297
)
ALLEN A. DAVIS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on September 9, 1999, in Daytona Beach, Florida.

APPEARANCES

For Petitioner: Natalie A. Lowe, Esquire
Florida Board of Professional Engineers
1208 Hays Street
Tallahassee, Florida 32301-0750

For Respondent: Dennis K. Bayer, Esquire
Post Office Box 1505
Flagler Beach, Florida 32136-1505

STATEMENT OF THE ISSUE

The issue is whether Respondent's license as a professional engineer should be disciplined for the reasons given in the Administrative Complaint filed on March 30, 1999.

PRELIMINARY STATEMENT

This matter began on March 30, 1999, when Petitioner, Florida Engineers Management Corporation, filed an Administrative Complaint against Respondent, Allen A. Davis, a licensed professional engineer, charging that he was negligent in the practice of engineering while performing engineering work on a project in June 1994. Respondent denied the allegation and requested a formal hearing to contest the preliminary action. The matter was referred by Petitioner to the Division of Administrative Hearings on May 24, 1999, with a request that an Administrative Law Judge be assigned to conduct a formal hearing.

By Notice of Hearing dated June 7, 1999, a final hearing was scheduled on August 12, 1999, in Daytona Beach, Florida. At Respondent's request, the matter was continued to September 9, 1999, at the same location.

At the final hearing, Petitioner presented the testimony of Carlos Garcia, a professional engineer, who was accepted as an expert in electrical engineering. Also, it offered Petitioner's Exhibits 1 and 2. Both exhibits were received in evidence. Respondent testified on his own behalf and offered Respondent's Exhibit 1, which was received in evidence.

The Transcript of the hearing was filed on September 13, 1999. Proposed Findings of Fact and Conclusions of Law were filed by Petitioner and Respondent on September 23 and 30, 1999,

respectively, and they have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. In this disciplinary action, Petitioner, Florida Engineers Management Corporation (FEMC), seeks to impose penal sanctions on the license of Respondent, Allen A. Davis, a professional engineer, on the ground that he committed negligence in the practice of engineering by signing and sealing the electrical portion of a set of plans when he had no expertise in that area of engineering. Respondent denies the allegation and contends that when he signed and sealed that part of the plans, he did not intend to hold himself out as an electrical engineer or for anyone to rely upon the plans in that respect.

2. Respondent is a long-time licensed professional having been issued Professional Engineer License No. 8986 on September 15, 1961, by the Florida Board of Professional Engineers. His current license is effective through February 28, 2001.

3. Respondent's specialty is as a structural engineer, and he holds himself out as having expertise in only that specialty. By experience gained over the years, however, he has a general familiarity with most aspects of engineering, including electrical engineering.

4. Upon graduation from college, Respondent worked for the Florida Department of Transportation (DOT). After leaving DOT some 20 years ago, he engaged in the engineering practice "in various forms of housing construction, including subdivisions, PUD's, house plans themselves, hydraulics and drainage projects involved in civil works throughout." For the last 15 years, he has also served as an engineering consultant for Volusia County. Most recently, he has operated a "one-man shop" in Deland, Florida, "checking, reviewing, and supervising production of plans for houses and other structures involving buildings, and [performing] some highway work [and] some traffic work."

5. Rule 61G15-23.002(2), Florida Administrative Code, provides that whenever an engineer places his signature and seal on a set of documents, the engineer is responsible for all work contained in the documents. However, engineers are only required to sign and seal that portion of a document for which they are proficient. Under informal agency policy, which the FEMC's expert says is based on a "common sense" interpretation of the cited rule, any other drawings which are signed and sealed should contain a disclaimer indicating that the engineer is not responsible for the content which lies outside of his expertise. Whether this policy was disseminated to engineers throughout the state in 1994 is unknown.

6. One of Respondent's projects involved a two-story residential home in Palm Harbor, Florida, being constructed by

Brattlof Construction Company, Inc. (Brattlof) in 1994. The third page of the plans described the electrical floor plan for the residence. In June 1994, Respondent signed and sealed that page, even though this discipline was outside his specialty area, and he failed to put a disclaimer on the sheet. As it turned out, the electrical plan contained numerous deficiencies as recited in paragraph 5 of the Administrative Complaint. Respondent says he signed all pages of the plans since this was a long-time practice of other professional engineers in the Volusia County area.

7. An electrical draftsman for Brattlof actually prepared the electrical plan. At that time, the Volusia County Building Department required that before it would accept any building plans, all pages had to be signed and sealed. Although the record is not altogether clear, it appears that if a project was "below 600 amp," a master electrician could sign that portion of the plans. In this case, the house apparently fell into this category. Even so, Respondent signed and sealed every page of the drawings in order to file them with the local agency. By doing so, Respondent unintentionally contravened the rule and informal policy. Respondent pointed out, however, that Brattlof later submitted a separate electrical plan prepared by the electrical subcontractor as a part of the permit process. The significance of this submission was not explained in the record.

8. According to Petitioner's expert, if an engineer is faced with a situation where a signature and seal is required on every page, he or she should engage the services of another professional (an architect or engineer) with expertise in electrical engineering, who could then review the plans and sign and seal them.

9. In terms of mitigation, there is no evidence that Respondent has ever been the subject of a disciplinary action during his lengthy 38-year career as a licensed professional engineer. In addition, there is no evidence that a third party was injured, misled, or adversely affected by relying on the plans. The project can be considered "minor", no restitution was required, and once this matter was brought to Respondent's attention, he began the practice of placing a disclaimer on all pages outside of his specialty. Finally, it can be inferred that Respondent has high professional standing among his peers, given the fact that he has testified as an expert around 500 times since gaining licensure.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

11. As the party seeking to impose penal sanctions on Respondent's professional license, Petitioner bears the burden of proving the allegations in the charging document by clear and

convincing evidence. See, e.g., Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

12. The Administrative Complaint charges that Respondent was "negligent" in the practice of engineering within the meaning of Section 471.033(1)(g), Florida Statutes. That statute makes it unlawful for a professional engineer to commit negligence in the practice of engineering.

13. Rule 61G15-23.002(2), Florida Administrative Code, provides in relevant part as follows:

(2) A professional engineer may only seal an engineering report, plan, print or specification if that professional engineer was in responsible charge of the preparation and production of the engineering document and the professional engineer has the expertise in the engineering discipline used in producing the engineering document in question.

15. By clear and convincing evidence, Petitioner has established that Respondent signed and sealed a portion of engineering plans for which he had no expertise. By doing so, Respondent unintentionally violated Rule 61G15-23.002(2), Florida Administrative Code, which in turn constitutes negligence within the meaning of Section 471.033(1)(g), Florida Statutes. Compare Bd. of Prof. Engrs. v. Whittum, Case No. 94-1600 (Bd. of Prof. Engrs., Aug. 28, 1995)(by signing and sealing plans without knowledge of site location, engineer committed negligence). Therefore, the charge in the Administrative Complaint has been sustained.

16. In its proposed order, FEMC does not suggest that a specific penalty be imposed on Respondent. Rule 61G15-19.004, Florida Administrative Code, however, sets forth the disciplinary guidelines and range of penalties for statutory violations. Among other things, where negligence has been proven, paragraph (1)(m) of the rule calls for a minimum penalty of a reprimand, two years' probation, and \$1,000.00 fine. The same paragraph also prescribes a maximum penalty of a reprimand, a \$1,000.00 fine, 5 years' suspension, and 10 years' probation. Under paragraph (3)(b) of the rule, a downward deviation from the minimum penalty is justified if mitigating circumstances are present.

17. Because a number of mitigating circumstances are present here, as recited in Finding of Fact 9, the violation was unintentional, and FEMC's informal policy was not widely disseminated in 1994, a reprimand is appropriate.

RECOMMENDATION

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

RECOMMENDED that the Board of Professional Engineers enter a final order finding Respondent guilty of violating Section 471.033(1)(g), Florida Statutes, and that he be given a reprimand.

DONE AND ENTERED this 12th day of October, 1999, in
Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of October, 1999.

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.