

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ENGINEERS)	
MANAGEMENT CORPORATION,)	
)	
Petitioner,)	
)	
vs.)	Case No. 04-3983PL
)	
JOSE G. PUIG, JR., P.E.,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on February 14, 2005, by video teleconference at sites in Miami and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Bruce A. Campbell, Esquire
Florida Engineers Management Corporation
2507 Calloway Road, Suite 200
Tallahassee, Florida 32303-5267

For Respondent: Samuel B. Reiner, II, Esquire
9100 South Dadeland Boulevard, Suite 1408
Miami, Florida 33156-7816

STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Administrative Complaint issued against him and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On September 30, 2004, Petitioner issued a four-count Administrative Complaint against Respondent, which read as follows:

1. Petitioner is charged with providing administrative, investigative, and prosecutorial services to the Board of Professional Engineers pursuant to Section 471.038, Florida Statutes. The Board of Professional Engineers is charged with regulating the practice of engineering pursuant to Chapter 455, Florida Statutes.
2. Respondent is and has been at all time material hereto a licensed professional engineer in the State of Florida, having been issued license number PE 49148. Respondent's last known address is 9300 N.W. 25th Street, Suite 210, Miami, Florida 33172.
3. The Respondent is the owner of JGP Engineering Group PA, a licensed engineering firm located two suites from N+A Naranjo+Associates Mechanical Electrical Engineers, located at 9300 N.W. 25th Street, #209, Miami, Florida.
4. On September 20, 2001, Mr. Naranjo's professional engineer's license was revoked.

COUNT ONE

5. Petitioner realleges and incorporates paragraphs one (1) through four (4) as if fully set forth in this Count One.
6. On or about February 25, 2003, Respondent signed and sealed calculations and 4 sheets of mechanical plans for a project known as Toras Emes Academy.

7. The contract for performance of mechanical engineering services for Toras Emes Academy had been entered into by Orlando Naranjo and all payments for the project were made payable to Naranjo and Associates.

8. The border of the mechanical plan sheets for Toras Emes Academy provides a record that the sheets were drawn by employees of Naranjo and Associates and checked by Orlando Naranjo.

9. All documentation of calculations, site visits, research and the like with respect to the Toras Emes project were maintained in the office of Naranjo and Associates, and not in Respondent's office.

10. Respondent did not receive compensation for his services with respect to Toras Emes Academy.

11. Respondent was not in responsible charge of the efforts of Orlando Naranjo with respect to the plans and calculations prepared for Toras Emes Academy.

12. Based on the foregoing, Respondent violated Section 471.033(1)(j), Florida Statutes, [by] affixing or permitting to be affixed his seal, name, or signature to final drawings that were not prepared by him or under his responsible supervision, direction, or control.

COUNT TWO

13. Petitioner realleges and incorporates paragraphs one (1) through four (4) as if fully set forth in this Count [Two].

14. Based on the foregoing, Respondent violated Section 471.033(1)(a), Florida Statutes, by violating Section 455.227(1)(j), Florida Statutes, by aiding

and assisting an unlicensed person to practice engineering.

COUNT THREE

15. Petitioner realleges and incorporates paragraphs one (1) through four (4) as if fully set forth in this Count Three

16. On or about October 1, 2003, Respondent signed and sealed mechanical plan sheets for a project known as Manatee Village at Ruskin, FL.

17. The contract for performance of mechanical engineering services for Manatee Village at Ruskin, FL, had been entered into by Orlando Naranjo and all payments for the project were made payable to Naranjo and Associates.

18. The cover of the plan sheets for Manatee Village at Ruskin, FL, lists Naranjo and Associates as the mechanical engineer.

19. All documentation of calculations, site visits, research and the like with respect to the Manatee Village at Ruskin project were maintained in the office of Naranjo and Associates and not in Respondent's office.

20. Respondent did not receive compensation for his services with respect to Manatee Village at Ruskin, FL.

21. Respondent was not in responsible charge of the efforts of Orlando Naranjo with respect to the plans and calculations prepared for Manatee Village at Ruskin, FL.

22. Based on the foregoing, Respondent violated Section 471.033(1)(j), Florida Statutes, [by] affixing or permitting to be affixed his seal, name, or signature to final drawings that were not prepared by him or under his responsible supervision, direction, or control.

COUNT FOUR

23. Petitioner realleges and incorporates paragraphs one (1) through four (4), and sixteen (16) through twenty-one (21), as if fully set forth in this Count Four.

24. Based on the foregoing Respondent violated Section 471.033(1)(a), Florida Statutes, by violating Section 455.227(1)(j), by aiding and assisting an unlicensed person to practice engineering.

WHEREFORE, the Petitioner respectfully requests the Board of Professional Engineers to enter an order imposing one or more of the following penalties: permanent revocation or suspension of the Respondent's license, restriction of the Respondent's practice, imposition of an administrative fine, issuance of a reprimand, placement of the Respondent on probation, the assessment of costs related to the investigation and prosecution of this case, other than costs associated with an attorney's time, as provided for in Section 455.227(3), Florida Statutes, and/or any other relief that the Board deems appropriate.

On November 1, 2004, Respondent "request[ed] a formal hearing [on the matter] be conducted pursuant to Sections 120.569 and 120.57(1), Florida Statutes." Along with his hearing request, he filed, through his attorney, an Answer to the Administrative Complaint, in which he stated, among other things, the following:

Respondent . . . states that he was in responsible charge and exercised responsible supervision over all plans for the projects referred to in Administrative Complaint for which Respondent sealed. More specifically, Respondent reviewed, revised, and approved

all plans for the projects referred to in the Administrative Complaint for which Respondent sealed. At no time did Respondent aid or assist in the unlicensed practice of Engineering, but merely succeeded to the responsible completion of projects for architects involved based upon Mr. Naranjo's inability to do so. Respondent completed the work with expectation [sic] of realizing compensation for the work performed. Further, the architects involved have, or will, corroborate Respondent's responsible supervision and charge over the completion of the projects involved.

WHEREFORE, Respondent requests a formal administrative hearing with respect to the disputed facts as set forth *infra*, an order dismissing the Administrative Complaint, and all other relief, including attorney's fees and costs for this defense pursuant to § 120.569[(2)](e) and any other applicable statute or code section, deemed just an[d] proper.

On November 3, 2004, the matter was referred to DOAH.

On February 7, 2005, the parties filed a Joint Prehearing Submission, which provided, in pertinent part, as follows:

A. STATEMENT OF THE CONTROVERSY

Whether Respondent committed the acts or omissions alleged in the Administrative Complaint and whether those acts and omissions constitute the violations alleged; and, if so, what penalty should be imposed.

B. BRIEF, GENERAL STATEMENT OF EACH PARTY'S POSITION

1. Petitioner's Position:

It is the Petitioner's position that Respondent's license as a Professional

Engineer should be subject to disciplinary action as a result of violations of Sections 471.033(1)(j), 471.033(1)(a), and 455.227(1)(j), Florida Statutes, as alleged in the complaint.

2. Respondent's Position:

It is Respondent's position that he did not violate the Florida Statutes. Respondent was in responsible charge and exercised responsible supervision over all plans referred to in the complaint and . . . Respondent did not aid or assist in the unlicensed practice of engineering all as alleged in the Answer. Respondent has claimed attorney's fees if he prevails.

* * *

E. STATEMENT OF THOSE FACTS WHICH ARE ADMITTED

1. At all times material to the allegations in the Administrative Complaint, Respondent was a licensed Professional Engineer.

2. Respondent is a licensed professional engineer in the State of Florida, having been issued license number PE 49148.

3. Respondent has maintained an engineering office at 9300 N.W. 25th Street, Suite 210, Miami, Florida at all times relevant to the Complaint.

4. Naranjo and Associates had an office at Suite 209 of the same address.

5. On or about February 25, 2003, Respondent signed and sealed calculations and 4 sheets of mechanical plans for a project known as Toras Emes Academy.

6. On or about October 1, 2003, Respondent signed and sealed mechanical plan sheets for

a project known as Manatee Village at Ruskin.

7. On the plans for . . . Toras Emes Academy, the initials "ON" refer to Orlando Naranjo.

8. On the plans for Toras Emes Academy, the initials "PV" refer to Pablo Viteri.

9. On the plans for Toras Emes Academy, the initials "AN" refer to Antia Rodriguez.

10. On the plans for Manatee Village at Ruskin, the initials "PV" refer to Pablo Viteri.

11. On the plans for Manatee Village at Ruskin, the initials "ON" refer to Orlando Naranjo.

12. On the plans for Manatee Village at Ruskin, the initials "AN" refer to Antia Rodriguez.

13. From September 2001, through January 2004, Orlando Naranjo was not an employee of Respondent or JGP Engineering Group.

14. Before August 2003, Pablo Viteri was not an employee of Respondent or JGP Engineering Group.

15. Before December 2003, Antia Rodriguez was not an employee of Respondent or JGP Engineering Group.

F. ISSUES OF LAW ON WHICH THERE IS AGREEMENT

1. Petitioner is the agent of the State of Florida charged with providing investigative and prosecutorial services to the Florida Board of Professional Engineers, pursuant to Section 471.039, Florida Statutes. The Florida Board of Professional Engineers is charged with regulating the practice of

engineering pursuant to Chapters 455 and 471, Florida Statutes.

2. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Section 120.57, Florida Statutes.

3. Petitioner must establish by clear and convincing evidence the violation of Chapter 471, Florida Statutes, alleged in the Administrative Complaint.

G. ISSUES OF FACT WHICH REMAIN TO BE LITIGATED

All facts in the Administrative Complaint not stipulated to above.

* * *

As noted above, the final hearing in this case was held on February 14, 2005.¹ Six witnesses testified at the hearing: Paul Siddal; Gustavo Ramos; Angela Jacobs; Orlando Naranjo; Pablo Viteri; Jose G. Puig, Sr.; and Respondent. In addition to these six witnesses' testimony, 11 exhibits (Joint Exhibits 1 and 2, Petitioner's Exhibits 1 through 4 and 6, and Respondent's Exhibits 1 through 4) were offered and received into evidence.

Following the close of the evidence, but before the conclusion of the hearing, the undersigned established a deadline (ten days from the date of the filing of the hearing transcript with DOAH) for the filing of proposed recommended orders.

The hearing transcript (consisting of one volume) was filed with DOAH on March 14, 2005.

On March 17, 2005, Respondent, on behalf of both parties, filed a motion requesting an extension of the deadline for the filing of proposed recommended orders. By order issued that same day, the motion was granted and the parties were given until March 28, 2005, to file their proposed recommended orders.

Petitioner and Respondent filed their Proposed Recommended Orders on March 29, 2005, and March 30, 2005, respectively.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made to supplement and clarify the factual stipulations set forth in the parties' February 7, 2005 Joint Prehearing Submission²:

1. Respondent and his father are the principal owners of J.G.P. Engineering Group P.A. (JGP), an engineering firm specializing in the design of mechanical, electrical, and plumbing systems.

2. JGP does mainly "high end projects."

3. It has offices in Miami, Florida, and San Juan, Puerto Rico.

4. Respondent is in charge of JGP's Miami office. The office is located at 9300 Northwest 25th Street, Suite 207.

Before moving to this location, JGP occupied Suite 210 in the same building.

5. In or around the mid-1990's, Orlando Naranjo was invited to work as an electrical engineer for JGP in its Miami office. Mr. Naranjo wanted to remain self-employed, so he turned down the offer; however, his firm and JGP subsequently worked collaboratively on "quite a few projects."

6. Mr. Naranjo's firm and JGP were "doing so much work [together] requiring significant coordination" that in or around 1998, Mr. Naranjo decided "to move [his office to 9300 Northwest 25th Street, Suite 209] next to [JGP's office]." Mr. Naranjo's office was at this location (9300 Northwest 25th Street, Suite 209) at all times material to the instant case.

7. On September 20, 2001, Mr. Naranjo's license to practice engineering in the State of Florida (which was then under suspension) was revoked by the Florida Board of Professional Engineers (Board). The suspension and revocation resulted from Mr. Naranjo's having failed to have taken the necessary steps to renew his license in a timely manner.

8. Mr. Naranjo did not become aware of the Board's revocation action until "some time later," around or before the Thanksgiving holiday (that same year).

9. Upon learning that his license had been revoked,

Mr. Naranjo began the process of attempting to become relicensed.

10. Mr. Naranjo's office (at 9300 Northwest 25th Street, Suite 209) remained open, and his firm continued to engage in business, following the revocation of his license and during the time that he was seeking relicensure.

11. Mr. Naranjo recognized that, until he got his license back, he would be unable to sign and seal documents and otherwise act as the "engineer of record" on projects.

12. Mr. Naranjo therefore asked Respondent to help him by assuming the role of "engineer of record" on projects that Mr. Naranjo had been working on but had not yet completed.

13. As a favor to Mr. Naranjo, Respondent agreed to do so without compensation.

14. Among the projects of Mr. Naranjo's that Respondent undertook responsibility for were (what the parties have referred to in their February 7, 2005, Joint Prehearing Submission as) the Toras Emes project (TE Project) and the Manatee Village at Ruskin project (MV Project).

15. "[C]ompared to the jobs that [JGP] had done with [Mr. Naranjo] in the past, these two jobs . . . [were] relatively straightforward."

16. The TE Project involved design work for a dormitory facility consisting of "individual dormitory rooms, a hallway

[connecting] them, and a common bathroom [with] showers and stalls for the people [living] in the dormitory."

17. The architectural firm that hired Mr. Naranjo to work on the TE Project was Gustavo J. Ramos and Associates, Inc. (Ramos).

18. Ramos had a contractual relationship with, and paid, Mr. Naranjo, not Respondent, for the work done on the TE Project.

19. The MV Project involved design work for a residential housing development consisting of four types of "small apartment units [having] one or two bedrooms."

20. The architectural firm that hired Mr. Naranjo to work on the MV Project was R.E. Chisholm Architects, Inc. (Chisholm).

21. Chisholm had a contractual relationship with, and paid, Mr. Naranjo, not Respondent, for the work done on the MV Project.

22. The MV Project required "relatively little" work since approximately "99% [of the plans that had been developed for use in a previous project] were reused" for this project.

23. Assisting in the preparation of the plans for the TE Project and the MV Project were Mr. Naranjo's employees, Pablo Viteri and Antia Rodriguez, who (unlike Respondent) were paid by Mr. Naranjo for their efforts in connection with the projects. Mr. Viteri and Ms. Rodriguez served as draftspeople on these

projects, drafting in accordance with the directions they received, as did Mr. Naranjo after he had relinquished his role as "engineer of record" on these projects (and Respondent had started "running the show"). In addition to the drafting work he did, Mr. Viteri was regularly "in touch" with the "people who were involved [o]n the architectural side" of the projects to "coordinate" with them.

24. Mr. Viteri became a Florida-licensed professional engineer in the "beginning of 2003." (He is currently employed by JGP as an electrical engineer and computer-aided design manager.)

25. Ms. Rodriguez was an engineer in her native country, but has not obtained a license to practice engineering in the State of Florida.

26. Mr. Viteri, Ms. Rodriguez, and Mr. Naranjo, at all times material to the instant case, worked (on the TE Project and the MV Project) out of Mr. Naranjo's office at 9300 Northwest 25th Street, Suite 209, which outside its front door had a sign which read:

N+A

NARANJO+ASSOCIATES

Mechanical·Electrical
Consulting Engineers

#209

27. The sign had been there since the time Mr. Naranjo had moved into the office. It remained on the door even though Mr. Naranjo's license had been revoked and he was no longer authorized to engage in the practice of engineering in the State of Florida.

28. The purpose of the sign was not to advertise, but to identify who occupied the office.

29. Following his agreement to help Mr. Naranjo, Respondent exercised complete supervision, direction, and control of all engineering aspects of the TE Project and the MV Project, including the preparation of the engineering plans for these projects (that he signed and sealed).

30. Upon assuming the role of "engineer of record" on these projects, Respondent first reviewed the design work that had been done prior to his involvement in the projects to determine if the "quality and validity" of the work met his satisfaction.

31. After completing this review, Respondent oversaw the completion of the design work, making all necessary engineering decisions.

32. Respondent had discussions with Mr. Viteri, Ms. Rodriguez, and Mr. Naranjo about the remaining work that

needed to done and gave them instructions and directions on the drafting they were to do.

33. Respondent reviewed their finished work product to make sure that it was consistent with the instructions and directions he had given them.

34. Only after he was satisfied that there was such consistency and that the drafting that had been done accurately reflected the engineering decisions he had made did Respondent sign and seal the plans for the projects.

35. The title block on these plans identifying Respondent as the projects' mechanical engineer listed his address as 9300 Northwest 25th Street, Suite 209, Miami, Florida (which was the address of Mr. Naranjo's office) and his telephone number and fax number as (305) 599-9447 and (305) 599-9427, respectively (which were the telephone number and the fax number for Mr. Naranjo's office).

36. All engineering documents related to the projects were kept, not in Respondent's office, but in Mr. Naranjo's office (where Mr. Naranjo, Mr. Viteri, and Ms. Rodriguez worked) so as to not inconvenience Mr. Viteri, who needed to have ready access to these documents on a regular basis given that he was the "person who had the direct day-to-day contact" with the project architects.

37. Likewise, the calculations done for the TE Project were on a computer in Mr. Naranjo's office.

38. Any documents or information that Respondent needed to fulfill his responsibilities as the "engineer of record" on the TE Project and the MV Project he could retrieve with relative ease from Mr. Naranjo's office, which was just a short distance from his office.

39. At no time did Respondent attempt to conceal from anyone the nature and extent of his involvement in the TE Project and the MV Project, nor did he have any intent to assist Mr. Naranjo in the unlicensed practice of engineering.

40. Respondent has never before been disciplined by the Board.

CONCLUSIONS OF LAW

41. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to Chapter 120, Florida Statutes.

42. In Florida, the practice of engineering is regulated by the provisions of Chapters 455 and 471, Florida Statutes.

43. "Engineering," as that term is used in Chapter 471, Florida Statutes, is defined in Section 471.005(7), Florida Statutes, as follows:

"Engineering" includes the term
"professional engineering" and means any
service or creative work, the adequate

performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning, and design of engineering works and systems, planning the use of land and water, teaching of the principles and methods of engineering design, engineering surveys, and the inspection of construction for the purpose of determining in general if the work is proceeding in compliance with drawings and specifications, any of which embraces such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects, and industrial or consumer products or equipment of a mechanical, electrical, hydraulic, pneumatic, or thermal nature, insofar as they involve safeguarding life, health, or property; and includes such other professional services as may be necessary to the planning, progress, and completion of any engineering services. A person who practices any branch of engineering; who, by verbal claim, sign, advertisement, letterhead, or card, or in any other way, represents himself or herself to be an engineer or, through the use of some other title, implies that he or she is an engineer or that he or she is licensed under this chapter; or who holds himself or herself out as able to perform, or does perform, any engineering service or work or any other service designated by the practitioner which is recognized as engineering shall be construed to practice or offer to practice engineering within the meaning and intent of this chapter.

44. Section 471.003(1), Florida Statutes, provides that "[n]o person other than a duly licensed engineer shall practice engineering or use the name or title of 'licensed engineer,'

'professional engineer,' or any other title, designation, words, letters, abbreviations, or device tending to indicate that such person holds an active license as an engineer in this state."

See also § 471.031(1)(a), Fla. Stat. ("A person may not: Practice engineering unless the person is licensed or exempt from licensure under this chapter.").

45. Section 471.003(2), Florida Statutes, enumerates those persons "not required to be licensed under the provisions of this chapter as a licensed engineer." These exempted persons include "[e]mployees of a firm, corporation, or partnership who are the subordinates of a person in responsible charge, licensed under this chapter." § 471.003(2)(e), Fla. Stat.

46. "Responsible charge, as that term is used in Chapter 471, Florida Statutes, and the rules promulgated thereunder, is defined in Florida Administrative Code Rule 61G15-18.011(1) as follows:

(1) "Responsible Charge" shall mean that degree of control an engineer is required to maintain over engineering decisions made personally or by others over which the engineer exercises supervisory direction and control authority. The engineer in responsible charge is the Engineer of Record as defined in subsection 61G15-30.002(1), F.A.C.

(a) The degree of control necessary for the Engineer of Record shall be such that the engineer:

1. Personally makes engineering decisions

or reviews and approves proposed decisions prior to their implementation, including the consideration of alternatives, whenever engineering decisions which could affect the health, safety and welfare of the public are made. In making said engineering decisions, the engineer shall be physically present or, if not physically present, be available in a reasonable period of time, through the use of electronic communication devices, such as electronic mail, videoconferencing, teleconferencing, computer networking, or via facsimile transmission.

2. Judges the validity and applicability of recommendations prior to their incorporation into the work, including the qualifications of those making the recommendations.

(b) Engineering decisions which must be made by and are the responsibility of the Engineer of Record are those decisions concerning permanent or temporary work which could create a danger to the health, safety, and welfare of the public, such as, but not limited to, the following:

1. The selection of engineering alternatives to be investigated and the comparison of alternatives for engineering works.

2. The selection or development of design standards or methods, and materials to be used.

3. The selection or development of techniques or methods of testing to be used in evaluating materials or completed works, either new or existing.

4. The development and control of operating and maintenance procedures.

(c) As a test to evaluate whether an engineer is the Engineer of Record, the following shall be considered:

1. The engineer shall be capable of answering questions relevant to the engineering decisions made during the engineer's work on the project, in sufficient detail as to leave little doubt as to the engineer's proficiency for the work performed and involvement in said work. It is not necessary to defend decisions as in an adversary situation, but only to demonstrate that the engineer in responsible charge made them and possessed sufficient knowledge of the project to make them. Examples of questions to be answered by the engineer could relate to criteria for design, applicable codes and standards, methods of analysis, selection of materials and systems, economics of alternate solutions, and environmental considerations. The individuals should be able to clearly define the span and degree of control and how it was exercised and to demonstrate that the engineer was answerable within said span and degree of control necessary for the engineering work done.

2. The engineer shall be completely in charge of, and satisfied with, the engineering aspects of the project.

3. The engineer shall have the ability to review design work at any time during the development of the project and shall be available to exercise judgment in reviewing these documents.

4. The engineer shall have personal knowledge of the technical abilities of the technical personnel doing the work and be satisfied that these capabilities are sufficient for the performance of the work.

(d) The term "responsible charge" relates to engineering decisions within the purview of the Professional Engineers Act and does not refer to management control in a hierarchy of professional engineers except

as each of the individuals in the hierarchy exercises independent engineering judgment and thus responsible charge. It does not refer to administrative and personnel management functions. While an engineer may also have such duties in this position, it should not enhance or decrease one's status of being in responsible charge of the work. The phrase does not refer to the concept of financial liability.

47. "Engineer of Record" is defined in Florida Administrative Code Rule 61G15-30.002(1), as follows:

Engineer of Record. A Florida professional engineer who is in responsible charge for the preparation, signing, dating, sealing and issuing of any engineering document(s) for any engineering service or creative work.

48. "Engineering documents," as that term is used in Florida Administrative Code Rule 61G15-30.002(1), is defined in Florida Administrative Code Rule 61G15-30.002(4) as follows:

Engineering Documents. Engineering documents are designs, plans, specifications, drawings, prints, reports, or similar instruments of service in connection with engineering services or creative work that have been prepared and issued by the professional engineer or under his responsible supervision, direction or control.

49. The "sealing" of "engineering documents" is addressed in Section 471.025, Florida Statutes, which provides as follows:

(1) The [B]oard [of Professional Engineers] shall prescribe, by rule, one or more forms of seal to be used by licensees. Each licensee shall obtain at least one seal in the form approved by rule of the board and

may, in addition, register his or her seal electronically in accordance with ss. 668.001-668.006. All final drawings, specifications, plans, reports, or documents prepared or issued by the licensee and being filed for public record and all final documents provided to the owner or the owner's representative shall be signed by the licensee, dated, and sealed with said seal. Such signature, date, and seal shall be evidence of the authenticity of that to which they are affixed. Drawings, specifications, plans, reports, final documents, or documents prepared or issued by a licensee may be transmitted electronically and may be signed by the licensee, dated, and sealed electronically with said seal in accordance with ss. 668.001-668.006.

(2) It is unlawful for any person to seal or digitally sign any document with a seal or digital signature after his or her license has expired or been revoked or suspended, unless such license has been reinstated or reissued. When an engineer's license has been revoked or suspended by the board, the licensee shall, within a period of 30 days after the revocation or suspension has become effective, surrender his or her seal to the executive director of the board and confirm to the executive director the cancellation of the licensee's digital signature in accordance with ss. 668.001-668.006. In the event the engineer's license has been suspended for a period of time, his or her seal shall be returned to him or her upon expiration of the suspension period.

(3) No licensee shall affix or permit to be affixed his or her seal, name, or digital signature to any plan, specification, drawing, final bid document, or other document that depicts work which he or she is not licensed to perform or which is

beyond his or her profession or specialty therein.

See also Fla. Admin. Code R. 61G15-23.002 ("(1) A professional engineer shall sign his name and affix his seal to all plans, specifications, reports, final bid documents provided to the owner or the owner's representative, or other documents prepared or issued by said registrant and being filed for public record. The date that the signature and seal is affixed as provided herein shall be entered on said plans, specifications, reports, or other documents immediately under the signature of the professional engineer. (2) Each sheet of plans and prints which must be sealed under the provisions of Chapter 471, F.S., shall be sealed, signed and dated by the professional engineer in responsible charge. Engineers shall legibly indicate their name, address, and license number on each sheet. If practicing through a duly authorized engineering business, engineers shall legibly indicate their name and license number, as well as, the name, address, and certificate of authorization number of the engineering business on each sheet. . . ."); and Fla. Admin. Code R. 61G15-29.001(3) ("Engineers who sign and/or seal certifications which: (a) relate to matters which are beyond the engineer's technical competence, or (b) involve matters which are beyond the engineer's scope of services actually provided, or (c) relate to matters which were not prepared under

engineer's responsible supervision, direction, or control; would be subject to discipline pursuant to Rule 61G15-19.001(6).").

50. "Engineering documents" that have been "sealed" by one licensed engineer may be "reuse[d]" by another licensed engineer, but only if the "procedures" set forth in Florida Administrative Code Rule 61G15-27.001, which provides as follows, are followed:

(1) A successor professional engineer seeking to reuse already sealed contract documents under the successor professional engineer's seal must be able to document and produce upon request evidence that he has in fact recreated all the work done by the original professional engineer. In other words, calculations, site visits, research and the like must be documented and produceable upon demand. Further, the successor professional engineer must take all professional and legal responsibility for the documents which he sealed and signed and can in no way exempt himself from such full responsibility. Plans need not be redrawn by the successor professional engineer; however, justification for such action must be available through well kept and complete documentation on the part of the successor professional engineer as to his having rethought and reworked the entire design process. A successor professional engineer must use his own title block, seal and signature and must remove the title block, seal and signature of the original professional engineer before reusing any sealed contract documents.

(2) Prior to sealing and signing work a successor professional engineer shall be required to notify the original professional engineer, his successors, or assigns by certified letter to the last known address

of the original professional engineer of the successor's intention to use or reuse the original professional engineer's work. The successor professional engineer will take full responsibility for the drawing as though they were the successor professional engineer's original product.

51. It is the responsibility of the Board to enforce the provisions of Chapter 471, Florida Statutes.

52. Petitioner was "created to provide administrative, investigative, and prosecutorial services to the [B]oard" § 471.038(3), Fla. Stat.

53. The Board is empowered to take disciplinary action against Florida-licensed professional engineers based upon any of the grounds enumerated in Section 471.033(1), Florida Statutes.

54. Such disciplinary action may include one or more of the following penalties: license revocation; license suspension; imposition of an administrative fine not to exceed \$5,000.00 for each count or separate offense; issuance of a reprimand; placement of the licensee on probation; restriction of the authorized scope of the licensee's practice; and requiring the licensee to pay restitution. § 471.033(3), Fla. Stat.

55. The Board may take such action against only after the licensee has been given reasonable written notice of the charges and an adequate opportunity to request a proceeding pursuant to

Sections 120.569 and 120.57, Florida Statutes. § 120.65(5), Fla. Stat.

56. An evidentiary hearing must be held if requested by the licensee when there are disputed issues of material fact. §§ 120.569(1) and 120.57(1), Fla. Stat.

57. At the hearing, Petitioner (prosecuting on behalf of the Board) bears the burden of proving that the licensee engaged in the conduct, and thereby committed the violations, alleged in the charging instrument.

58. Proof greater than a mere preponderance of the evidence must be presented by Petitioner to meet its burden of proof. Clear and convincing evidence of the licensee's guilt is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987); Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998); and § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute").

59. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696

So. 2d 744, 753 (Fla. 1997). It is an "intermediate standard." Id. For proof to be considered "'clear and convincing' . . . 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." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corporation, Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

60. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific allegations of wrongdoing made in the charging instrument. Due process prohibits the Board from taking penal action against a licensee based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Shore Village Property Owners' Association, Inc. v. Department of Environmental Protection, 824 So. 2d 208, 210 (Fla. 4th DCA

2002); Hamilton v. Department of Business and Professional Regulation, 764 So. 2d 778 (Fla. 1st DCA 2000); Luskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); and Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

61. In those cases where the proof is sufficient to establish that the licensee committed the violation(s) alleged in the charging instrument and that therefore disciplinary action is warranted, it is necessary, in determining what disciplinary action should be taken against the licensee, to consult the Board's "disciplinary guidelines," as they existed at the time of the violation(s). See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999)("An administrative agency is bound by its own rules . . . creat[ing] guidelines for disciplinary penalties."); and Orasan v. Agency for Health Care Administration, Board of Medicine, 668 So. 2d 1062, 1063 (Fla. 1st DCA 1996)("[T]he case was properly decided under the disciplinary guidelines in effect at the time of the alleged violations."); see also State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985)("[A]gency rules and regulations, duly promulgated under the authority of law, have the effect of law."); Buffa v.

Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995)("An agency must comply with its own rules."); and Williams v. Department of Transportation, 531 So. 2d 994, 996 (Fla. 1st DCA 1988)(agency is required to comply with its disciplinary guidelines in taking disciplinary action against its employees).

62. At all times material to the instant case, the Commission's "disciplinary guidelines" have been set forth in Florida Administrative Code Rule 61G15-19.004, and have provided, in pertinent part, as follows:

(1) The Board sets forth below a range of disciplinary guidelines from which disciplinary penalties will be imposed upon practitioners (including holders of certificate of authorization) guilty of violating Chapter 471, F.S. The purpose of the disciplinary guidelines is to give notice to licensees of the range of penalties which will normally be imposed upon violations of particular provisions of Chapter 471, F.S. The disciplinary guidelines are based upon a single count violation of each provision listed. Multiple counts of violations of the same provision of Chapter 471, F.S., or the rules promulgated thereto, or other unrelated violations contained in the same administrative complaint will be grounds for enhancement of penalties. All penalties at the upper range of the sanctions set forth in the guidelines, i.e., suspension, revocation, etc., include lesser penalties, i.e., fine, probation or reprimand which may be included in the final penalty at the Board's discretion. All impositions of probation as a penalty shall include successful completion of the Engineering Law and Rules Study Guide, completion of a Board-approved course in Engineering

Professionalism and Ethics, and an appearance before the Board at the option of the Board at the end of the probationary period. Other terms may be imposed by the Board at its discretion.

(2) The following disciplinary guidelines shall be followed by the Board in imposing disciplinary penalties upon licensees for violation of the below mentioned statutes and rules:

* * *

(c) Violation: "Plan stamping"
(471.033(1)(j), F.S.)
(paragraphs 61G15-19.001(6)(j), (q))[³]

Minimum: Reprimand, one (1) year probation and \$1,000 fine
Maximum: Reprimand, \$5,000 fine, one (1) year suspension, and two (2) year probation.

* * *

(s) Violation: Violation of any provision of Chapter 61G-15, F.A.C. or Chapter 471, F.S. (455.227, F.S.)(471.033(1)(a), F.S.)

Minimum: Reprimand, \$1,000 fine
Maximum: One (1) year suspension, two (2) year probation, and \$5,000 fine.

(3) The board shall be entitled to deviate from the above-mentioned guidelines upon a showing of aggravating or mitigating circumstances by clear and convincing evidence presented to the board prior to the imposition of a final penalty. The fact that a Hearing Officer [sic] of the Division of Administrative Hearings may or may not have been aware of the below mentioned aggravating or mitigating circumstances prior to a recommendation of penalty in a Recommended Order shall not obviate the duty of the board to consider aggravating and mitigating circumstances brought to its

attention prior to the issuance of a Final Order.

(a) Aggravating circumstances; circumstances which may justify deviating from the above set forth disciplinary guidelines and cause the enhancement of a penalty beyond the maximum level of discipline in the guidelines shall include but not be limited to the following:

1. History of previous violations of the practice act and the rules promulgated thereto.
2. In the case of negligence; of the magnitude and scope of the project and the damage inflicted upon the general public by the licensee's misfeasance.
3. Evidence of violation of professional practice acts in other jurisdictions wherein the licensee has been disciplined by the appropriate regulatory authority.
4. Violation of the provision of the practice act wherein a letter of guidance as provided in Section 455.225(3), F.S., has previously been issued to the licensee.

(b) Mitigating circumstances; circumstances which may justify deviating from the above set forth disciplinary guidelines and cause the lessening of a penalty beyond the minimum level of discipline in the guidelines shall include but not be limited to the following:

1. In cases of negligence, the minor nature of the project in question and lack of danger to the public health, safety and welfare resulting from the licensee's misfeasance.
2. Lack of previous disciplinary history in this or any other jurisdiction wherein the licensee practices his profession.

3. Restitution of any damages suffered by the licensee's client.

4. The licensee's professional standing among his peers including continuing education.

5. Steps taken by the licensee or his firm to insure the non-occurrence of similar violations in the future.

63. The charging instrument in the instant case, the Administrative Complaint issued September 30, 2004, alleges that Respondent twice violated Section 433.033(1)(j), Florida Statutes, by "affixing or permitting to be affixed his seal, name, or signature to final drawings that were not prepared by him or under his responsible supervision, direction, or control" (once in connection with the TE Project and again in connection with the MV Project) and that the also twice violated Section 477.033(1)(a), Florida Statutes, "by aiding and assisting an unlicensed person [Mr. Naranjo] to practice engineering," contrary to Section 455.227(1)(j), Florida Statutes (once in connection with the TE Project and again in connection with the MV Project).

64. At all times material to the instant case, Section 471.033(1)(j), Florida Statutes, has provided as follows:

The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:

* * *

Affixing or permitting to be affixed his or her seal, name, or digital signature to any final drawings, specifications, plans, reports, or documents that were not prepared by him or her or under his or her responsible supervision, direction, or control.

65. At all times material to the instant case, Section 471.033(1)(a), Florida Statutes, has provided as follows:

The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:

* * *

Violating any provision of s. 455.227(1), s. 471.025, or s. 471.031, or any other provision of this chapter or rule of the board or department.

66. At all times material to the instant case, Section 455.227(1)(j), Florida Statutes, has provided as follows:

The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

* * *

Aiding, assisting, procuring, employing, or advising any unlicensed person or entity to practice a profession contrary to this chapter, the chapter regulating the profession, or the rules of the department or the board.

67. Petitioner failed to meet its burden of proving that Respondent committed the violations alleged in the Administrative Complaint.

68. Although he was not required to do so to prevail in this matter, Respondent affirmatively established, through his own credible testimony, which was corroborated by the testimony of other witnesses, that the plans he signed and sealed for the TE Project and the MV Project were prepared under his responsible supervision, direction, and control and, further, that he was in "responsible charge" of the work done by Mr. Naranjo and Mr. Naranjo's employees, Mr. Viteri and Ms. Rodriguez, in connection with these projects and he did not do anything intended to aid or assist in the unlicensed practice of engineering.

69. Such being the case, the Administrative Complaint against Respondent should be dismissed in its entirety.

70. In his Answer to the Administrative Complaint, Respondent requested that, in addition to the dismissal of the Administrative Complaint, he be granted "all other relief, including attorney's fees and costs for this defense pursuant to § 120.569[(2)](e)⁴ and any other applicable statute or code section, deemed just an[d] proper." In his Proposed Recommended Order, however, he did not argue that he was entitled to any relief other than the issuance of "a final order in this case dismissing all charges against [him]." In any event, the record before the undersigned does not establish Respondent's entitlement to any such additional relief.

RECOMMENDATION

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

RECOMMENDED that the Board issue a final order dismissing all four counts of the Administrative Complaint issued against Respondent.

DONE AND ENTERED this 5th day of April, 2005, in Tallahassee, Leon County, Florida.



STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of April, 2005.

ENDNOTES

¹ The hearing was originally scheduled to commence on January 10, 2005, but was continued at the Respondent's request.

² These factual stipulations have been accepted. See Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative, 52 So. 2d 670, 673 (Fla. 1951) ("When a case is tried upon stipulated facts the stipulation is conclusive upon both the trial and appellate courts in respect to matters which may validly be made the subject of stipulation. Indeed, on appeal neither party will be heard to suggest that the facts were other than as stipulated or

that any material facts w[ere] omitted"); Schrimsher v. School Board of Palm Beach County, 694 So. 2d 856, 863 (Fla. 4th DCA 1997)("The hearing officer is bound by the parties' stipulations."); and Palm Beach Community College v. State, Department of Administration, Division of Retirement, 579 So. 2d 300, 302 (Fla. 4th DCA 1991)("When the parties agree that a case is to be tried upon stipulated facts, the stipulation is binding not only upon the parties but also upon the trial and reviewing courts. In addition, no other or different facts will be presumed to exist.").

³ "[P]aragraphs 61G15-19.001(6)(j) and (q)" of the Florida Administrative Code provide as follows:

A professional engineer shall not commit misconduct in the practice of engineering. Misconduct in the practice of engineering as set forth in Section 471.033(1)(g), F.S., shall include, but not be limited to:

* * *

(j) Affixing his seal and/or signature to plans, specifications, drawings, or other documents required to be sealed pursuant to Section 471.025(1), F.S., when such document has not been personally prepared by the engineer or prepared under his responsible supervision, direction and control;

* * *

(q) Sealing and signing all documents for an entire engineering project, unless each design segment is signed and sealed by the professional engineer in responsible charge of the preparation of that design segment;

* * *

⁴ Section 120.569(2)(e), Florida Statutes, provides as follows:

All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the party's qualified representative. The

signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

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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.