

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ENGINEERS MANAGEMENT CORPORATION,)	
)	
Petitioner,)	
)	
vs.)	Case No. 05-0382
)	
THE POOL PEOPLE, INC.,)	
)	
Respondent.)	
)	
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FLORIDA ENGINEERS MANAGEMENT CORPORATION,)	
)	
Petitioner,)	
)	
vs.)	Case No. 06-1581PL
)	
MING ZEN HUANG, P.E.,)	
)	
Respondent.)	
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RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted pursuant to Sections 120.569 and 120.57(1), Florida Statutes,¹ in these consolidated cases on October 5, 2006, in 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 Respondents: William R. Clayton, Esquire
David O. Batista, Esquire
Greenberg Traurig, P. A.
East Las Olas Boulevard, Suite 2000
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUE

Whether Respondents committed the violations alleged in the Administrative Complaints filed against them and, if so, what penalties, if any, should be imposed.

PRELIMINARY STATEMENT

DOAH Case No. 05-0382

On December 20, 2004, Petitioner filed an Administrative Complaint charging The Pool People, Inc., with five counts of "violat[ing] Section 471.031(1)(a), Florida Statutes, by practicing engineering without a license." In Count One, Petitioner alleged that, "[o]n or about June 10, 2004, [The Pool People], through its qualifying individual contractor, filed an application for a permit to build a pool for an owner, Vista Builders, at 16326 78th Road North, in Palm Beach County, Florida" (hereinafter referred to as the "Vista Builders Project") and that the "application included 4 pages of engineering plans signed and sealed on June 9, 2004, by Ming Z. Huang, P. E.," whom the Pool People had "employed . . . to provide engineering services included in its contract with Vista Builders." In Count Two, Petitioner alleged that, "[o]n or

about July 7, 2004, [The Pool People], through its qualifying individual contractor, filed an application for a permit to build a pool for an owner, Toll Brothers, at 8108 Laurel Ridge Court, in Palm Beach County, Florida" (hereinafter referred to as the "Toll Brothers Project") and that the "application included 4 pages of engineering plans signed and sealed on June 23, 2004, by Ming Z. Huang, P. E.," whom The Pool People had "employed . . . to provide engineering services included in its contract with Toll Brothers." In Count Three, Petitioner alleged that, "[o]n or about July 22, 2004, [The Pool People], through its qualifying individual contractor, filed an application for a permit to build a pool for an owner, Jandjel, at 10265 Brookville Lane, Boca Raton, in Palm Beach County, Florida" (hereinafter referred to as the "Jandjel Project") and that the "application included 4 pages of engineering plans signed and sealed on July 20, 2004, by Ming Z. Huang, P. E.," whom the Pool People had "employed . . . to provide engineering services included in its contract with Jandjel." In Count Four, Petitioner alleged that, "[o]n or about July 26, 2004, [The Pool People], through its qualifying individual contractor, filed an application for a permit to build a pool for an owner, Shelby Homes, at 10681 Oak Meadow Lane, in Palm Beach County, Florida" (hereinafter referred to as the "Shelby Homes Project") and that the "application included 4 pages of engineering plans signed

and sealed on July 22, 2004, by Ming Z. Huang, P. E.," whom the Pool People had "employed . . . to provide engineering services included in its contract with Shelby Homes." In Count Five, Petitioner alleged that, "[o]n or about June 24, 2004, [The Pool People], through its qualifying individual contractor, filed an application for a permit to build a pool for an owner, Anthony Rycko, at 13761 76th Road North, in Palm Beach County, Florida" (hereinafter referred to as the "Rycko Project") and that the "application included 4 pages of engineering plans signed and sealed on June 23, 2004, by Ming Z. Huang, P. E.," whom the Pool People had "employed . . . to provide engineering services included in its contract with Anthony Rycko." With respect to all five counts, Petitioner alleged that:

Respondent engaged in the practice of engineering in one or more of the following ways:

- a. by filing engineering plans signed and sealed by a professional engineer employed by Respondent while Respondent did not have a Certificate of Authorization as required by Section 471.023, Florida Statutes;
- b. by providing engineering services directly to a customer while Respondent does not have a Certificate of Authorization as required by Section 471.023, Florida Statutes.

Pursuant to The Pool People's written request, the matter was referred to DOAH for the assignment of an administrative law judge to conduct a hearing pursuant to Section 120.57(1),

Florida Statutes. The case was docketed as DOAH Case No. 05-0382.

On February 25, 2005, The Pool People served its First Request for Admissions to Petitioner. In its response, served on The Pool People on March 2, 2005, Petitioner admitted the following:

1. The Board has no evidence that Ming Z. Huang, P.E. is an employee of Respondent.
2. The Board has not previously defined (through any final order, rule, statute or any other policy statement) the practice of professional engineering to include circumstances where a licensed contractor files a building permit application that includes engineering drawings signed and sealed by a licensed engineer who is not an employee of the contractor.

* * *

5. A licensed professional engineer may provide engineering services to a licensed contractor pursuant to a contract.
6. [W]ithout other facts, the fact that a contractor includes engineering drawings in a building permit application filed by the contractor, does not constitute the practice of engineering when the engineer is not the employee of the contractor.
7. Prior to filing the Administrative Complaint in this cause, no investigator, agent, or other representative of the Board of Professional Engineers interviewed Ming Z. Huang, P.E., regarding his business relationship or other activities with The Pool People, Inc.

8. Prior to filing the Administrative Complaint in this cause, no investigator, agent, or other representative of the Board of Professional Engineers interviewed Ming Z. Huang, P.E., regarding the engineering plans referred to in the Administrative Complaint.

9. Prior to filing the Administrative Complaint in this cause, no investigator, agent, or other representative of the Board of Professional Engineers interviewed any of the principals of The Pool People, Inc., regarding the respondent's relationship with Ming Z. Huang, P.E.

10. Prior to filing the Administrative Complaint in this cause, no investigator, agent, or other representative of the Board of Professional Engineers interviewed any of the principals of The Pool People, Inc., regarding the allegations in the administrative complaint.

11. Prior to filing the Administrative Complaint in this cause, no investigator, agent, or other representative of the Board of Professional Engineers interviewed any of the principals of The Pool People, Inc., regarding the issues raised in the administrative Complaint.

12. Prior to filing the Administrative Complaint in this cause, no investigator, agent, or other representative of the Board of Professional Engineers interviewed any employee, agent, or other representative of The Pool People, Inc., regarding the allegations in the Administrative Complaint.

13. Prior to filing the Administrative Complaint in this cause, no investigator, agent, or other representative of the Board of Professional Engineers interviewed any employee or other representative of The Pool People, Inc., regarding the issues raised in the Administrative Complaint.

The final hearing in DOAH Case No. 05-0382 was originally scheduled for April 7 and 8, 2005. At The Pool People's request, the hearing was continued and rescheduled for May 23 and 24, 2005. On May 12, 2005, The Pool People filed a second motion for continuance, requesting that the final hearing not be held until after the issuance of the final order in DOAH Case No. 05-1673RU, a case in which, according to its motion, it had alleged that "the underlying bases for the action initiated by [P]etitioner in [DOAH Case No. 05-0382] are unpromulgated rules." By order issued May 16, 2005, the motion was granted.

On December 14, 2005, the previously-assigned administrative law judge, Judge Michael M. Parrish, issued an Order Requiring Status Report, in which he observed:

This case has been in an inactive status pending the disposition of a related rule challenge case. A final order has been issued in the related rule challenge case. Accordingly, it would appear that this case should now be rescheduled for final hearing unless the parties have agreed to some other disposition of the case.

In the Status Report that it filed in response to this order, The Pool People advised that it had appealed the Final Order in DOAH Case No. 05-1637RU, and it requested that DOAH Case No. 05-0382 be held in abeyance pending the outcome of this appeal. By Order Placing Case in Abeyance issued January 30, 2006, the request was granted.

On May 4, 2006, having been informed that the appeal of the Final Order in DOAH Case No. 05-1637RU had been "disposed of," Judge Parrish "restored [DOAH Case No. 05-0382] to active status."

DOAH Case No. 06-1581PL

On February 22, 2006, Petitioner filed a two-count Administrative Complaint against Ming Zen Huang, P.E. In Count One, Petitioner alleged that Mr. Huang "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," to wit: the engineering plans referenced in Count Four of the Administrative Complaint filed in DOAH Case No. 05-0382. According to the Administrative Complaint filed against Mr. Huang, these plans "had been drawn by The Pool People," and they had been "signed and sealed [by Mr. Huang] pursuant to his employment by The Pool People." In Count Two, Petitioner alleged that Mr. Huang "violated Section 471.033[([1])](a), Florida Statutes, by violating Section 455.227(1)(j), Florida Statutes, by aiding and assisting an unlicensed entity, The Pool People, Inc., to practice engineering" in connection with the project referenced in Count Four of the Administrative Complaint filed in DOAH Case No. 05-0382.

Pursuant to Mr. Huang's written request, the matter was referred to DOAH for the assignment of an administrative law judge to conduct a hearing pursuant to Section 120.57(1), Florida Statutes. The case was docketed as DOAH Case No. 06-1518PL.

Consolidation of DOAH Case Nos. 05-0382 and 06-1518PL

In their Response to the Initial Order in DOAH Case No. 06-1518PL, the parties requested that the case be consolidated with DOAH Case No. 05-0382. On May 22, 2006, the undersigned issued an order granting the request and scheduling the final hearing in the consolidated cases for June 26, 2006.

Post-Consolidation Activity

The final hearing was twice continued at Respondents' request. It was ultimately scheduled to commence on October 5, 2006.

On October 4, 2006, the parties filed a Joint Stipulation of Facts, in which the parties stipulated to the following:

1. The Board of Professional Engineers is charged with deterring the unlicensed practice of engineering pursuant to Section 471.038(5) and Chapter 455, Florida Statutes.
2. In June and July 2004, Respondent, The Pool People ("Pool People"), was a Florida corporation with a principal office at 2150 SW 10th Street, Deerfield Beach, Florida 33442. During this time period, Pool People was qualified to construct swimming pools under Chapter 489, Florida Statutes, through

its qualifying agent Daniel M. Lowe, a Florida licensed swimming pool contractor. In June and July 2004, Pool People held certificate number QB 0002429 issued by the Construction Industry Licensing Board and in June and July 2004, Mr. Lowe held license number CPC 039909, issued by the same board.

3. Between June 9, 2004 through July 22, 2004, Ming Zen Huang, P.E., was a licensed professional engineer with Florida license number PE 53856. During this time period, Mr. Huang was employed full-time as a professor at Florida Atlantic University, Boca Raton, Florida.

4. On or about June 10, 2004, Daniel M. Lowe, as qualifier for The Pool People, Inc., filed an application for a permit to build a pool for an owner, Vista Builders, at 16326 78th Road North, in Palm Beach County, Florida.

5. On or about July 7, 2004, Daniel M. Lowe, as qualifier for The Pool People, Inc., filed an application for a permit to build a pool for an owner, Toll Brothers, [at] 8108 Laurel Ridge Court, in Palm Beach County, Florida.

6. On or about July 22, 2004, Daniel M. Lowe, as qualifier for The Pool People, Inc., filed an application for a permit to build a pool for an owner identified as Jandjel [at] 10265 Brookville Lane, in Palm Beach County, Florida.

7. On or about June 24, 2004, Daniel M. Lowe, as qualifier for The Pool People, Inc., filed an application for an owner identified as Anthony Rycko on the application form for 13761 76th Rd N., in Palm Beach County, Florida.

8. Respondent, The Pool People, Inc., has never been the subject of any administrative

complaint or disciplinary proceedings, except this one.

9. The Construction Industry Licensing Board, which authorizes Pool People to do business as a swimming pool construction company has never advised Pool People that it was operating outside the scope of its permitted authority.

10. Respondent, Ming Z. Huang, P.E., has never been the subject of any administrative complaint or disciplinary proceedings, except this one.

The final hearing in these consolidated cases was held on October 5, 2006. A total of 21 exhibits (Petitioner's Exhibits 1 through 7, and Respondents' Exhibits 1 through 3, 8 through 12, 14 through 17, 19, and 20) were offered and received into evidence. No live testimony was presented.²

Following the close of the evidence, but before the conclusion of the hearing, the undersigned established a deadline (30 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 October 18, 2006.

Petitioner and Respondents filed their Proposed Recommended Orders on November 1, 2006, and November 17, 2006, respectively. In its Proposed Recommended Order, Petitioner conceded that it "did not prove by clear and convincing evidence that Ming Z.

Huang, P.E., signed and sealed plans that were not prepared by him or under his responsible supervision, direction or control, because, although individual plans may not have been drafted by him, the only evidence was that he had approved the standard specifications before the plans were drawn."

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 extensive factual stipulations set forth in the parties' Joint Statement of Facts³:

1. Each of the five projects at issue in these consolidated cases (the Vista Builders Project, the Toll Brothers Project, the Jandjel Project, the Shelby Homes Project, and the Rycko Project, collectively referred to hereinafter as the "Five Pool Projects"⁴) involved the construction of a swimming pool by The Pool People for a customer, a task which, at all material times, The Pool People was authorized to undertake through its qualifying agent (Daniel Lowe) by virtue of its holding the certificate of authority from the Florida Construction Industry Licensing Board (certificate number QB 0002429) referenced in the parties' Stipulation of Fact 3.

2. The Pool People does not now have, nor has it ever had, a certificate of authorization (issued by the Florida Engineers Management Corporation pursuant to Section 471.023, Florida

Statutes) to engage in the practice of engineering in Florida as a business organization "through licensees under [Chapter 471, Florida Statutes] as agents, employees, officers, or partners."

3. At all material times, Mr. Huang was a "licensee under [Chapter 471, Florida Statutes]," that is, an individual authorized to engage in the practice of engineering in Florida.

4. Mr. Huang signed and sealed the engineering plans that The Pool People submitted in applying for the building permits required to complete the Five Pool Projects.

5. The written contracts The Pool People entered into with its customers for the Vista Builders, Toll Brothers, Shelby Homes, and Rycko Projects did not expressly mention anything about engineering services⁵; however, such services were performed in connection with each of these projects, as well as in connection with the Jandjel Project (those services being the work associated with the aforesaid engineering plans that accompanied the building permit applications The Pool People filed).

6. The only record evidence as to the arrangement Mr. Huang had with The Pool People and how he went about providing his services pursuant to that arrangement was the testimony given by The Pool People's senior vice president and chief operating officer, Walter Barrett, at the final hearing in DOAH Case No. 05-1637RU. This "former testimony" of

Mr. Barrett, who was not shown to be unavailable to testify about these matters at the final hearing in the instant cases, was offered by Petitioner (as Petitioner's Exhibit 6). It constituted hearsay evidence. To the extent that it was offered against Mr. Huang,⁶ this hearsay testimony is insufficient, standing alone as it does, to support any finding of fact because it would not be admissible over objection in a civil action in Florida.⁷ See Scott v. Department of Professional Regulation, 603 So. 2d 519, 520 (Fla. 1st DCA 1992)("The only evidence which the appellee presented at the hearing was a hearsay report which would not have been admissible over objection in a civil action. . . . [T]his evidence was not sufficient in itself to support the Board's findings."); Doran v. Department of Health and Rehabilitative Services, 558 So. 2d 87 (Fla. 1st DCA 1990)("The documents presented before the hearing officer were hearsay and did not come within any recognized exception which would have made them admissible in a civil action. . . . Because the only evidence presented by the department to show that Doran held assets in excess of the eligibility requirements for receiving ICP benefits consisted of uncorroborated hearsay evidence, we must reverse the hearing officer's final order."); and § 120.57(1)(c), Fla. Stat. ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in

itself to support a finding unless it would be admissible over objection in civil actions."). To the extent that it was offered against The Pool People, however, this hearsay testimony is sufficient to support factual findings based exclusively thereon because it is an "admission," within the meaning of Section 90.803(18), Florida Statutes, and therefore would be admissible over objection in a civil action in Florida. The following are such factual findings (based exclusively on Mr. Barrett's "former testimony"), which are made only with respect to DOAH Case No. 05-0382:

a. A little more than a year prior to the final hearing in DOAH Case No. 05-1637RU (which was held on July 21, 2005), The Pool People "retained [Mr. Huang as] an independent contractor" to provide it with engineering services on a continuing (as opposed to a per project) basis.

b. After being "retained," Mr. Huang worked on various projects, including the Five Pool Projects, for The Pool People.

c. The Pool People had Mr. Huang come to its office "on a regular schedule," three times a week, for generally two to four hours each visit, to review "construction drawings" (typically consisting of four pages) that had been prepared, in accordance with standard specifications that Mr. Huang had already approved, by personnel in its "drafting department" (none of whom were licensed engineers). Mr. Huang was expected to

conduct his review "using his professional judgment." The final products of the review process were engineering plans signed and sealed by Mr. Huang. These plans were submitted to The Pool People's "permitting department" for "inclusion] in [the appropriate] applications . . . for building permits." They did not "go to the customer at all."

d. For his services, The Pool People paid Mr. Huang based, not on the number of hours he actually worked nor on a per project basis, but on a "[p]rojected hourly rate per week."⁸

e. In May 2004, The Pool People received from the Florida Board of Professional Engineers a Notice to Cease and Desist from "hiring an engineer to . . . develop . . . plans for [building] permit[s]" without having a certificate of authorization from the Florida Engineers Management Corporation. The Pool People declined to comply with the directive set forth in the notice because it did not believe, after consulting with its counsel, that it was acting unlawfully.

CONCLUSIONS OF LAW

7. DOAH has jurisdiction over the subject matter of these proceedings and of the parties hereto pursuant to Chapter 120, Florida Statutes.

8. In Florida, the practice of construction contracting, including contracting involving the construction of residential swimming pools, is now, and has been at all material times,

regulated by the provisions of Chapter 455 and Chapter 489, Part I, Florida Statutes.

9. It is the responsibility of the Florida Construction Industry Licensing Board (CILB) to administer and enforce the provisions of Chapter 489, Part I, Florida Statutes. § 489.107, Fla. Stat.

10. A business organization, such as The Pool People, may engage in the practice of construction contracting as a residential pool contractor, through a qualifying agent, if it has a certificate of authority from the CILB to do so.

§ 489.119, Fla. Stat.

11. The practice of engineering in Florida is now, and has been at all material times, regulated by the provisions of Chapters 455 and 471, Florida Statutes.

12. "Engineering," as that term is used in Chapter 471, Florida Statutes, is now, and has been at all material times, 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.

13. It is the responsibility of the Florida Board of Professional Engineers (BPE) to administer and enforce the provisions of Chapter 471, Florida Statutes. In discharging this responsibility, the BPE is assisted by Florida Engineers Management Corporation (FEMC), which was "created to provide administrative, investigative, and prosecutorial services to the [BPE]." § 471.038(3), Fla. Stat.

14. In DOAH Case No. 05-0382, the BPE, through the FEMC, in its Administrative Complaint, has charged The Pool People with violating Section 471.031(1)(a), Florida Statutes, in connection with each of the Five Pool Projects,⁹ by "engag[ing] in the practice of engineering without having a certificate of authorization from the FEMC as required by Section 471.023, Florida Statutes."

15. At all material times, Section 471.031(1)(a), Florida Statutes, has provided as follows:

A person may not:

Practice engineering unless the person is licensed or exempt from licensure under this chapter.

16. At all material times, Section 471.023(1), Florida Statutes, has provided as follows:

The practice of, or the offer to practice, engineering by licensees or offering engineering services to the public through a business organization, including a partnership, corporation, business trust, or other legal entity or by a business organization, including a corporation, partnership, business trust, or other legal entity offering such services to the public through licensees under this chapter as agents, employees, officers, or partners is permitted only if the business organization possesses a certification issued by the management corporation pursuant to qualification by the board, subject to the provisions of this chapter. One or more of the principal officers of the business organization or one or more partners of the partnership and all personnel of the

business organization who act in its behalf as engineers in this state shall be licensed as provided by this chapter. All final drawings, specifications, plans, reports, or documents involving practices licensed under this chapter which are prepared or approved for the use of the business organization or for public record within the state shall be dated and shall bear the signature and seal of the licensee who prepared or approved them. Nothing in this section shall be construed to mean that a license to practice engineering shall be held by a business organization. Nothing herein prohibits business organizations from joining together to offer engineering services to the public, if each business organization otherwise meets the requirements of this section. No business organization shall be relieved of responsibility for the conduct or acts of its agents, employees, or officers by reason of its compliance with this section, nor shall any individual practicing engineering be relieved of responsibility for professional services performed by reason of his or her employment or relationship with a business organization.

Pertinent to DOAH Case No. 05-0382 is that portion of the statute that requires a business organization to obtain a certificate of authorization from the FEMC when it offers engineering services to the public through licensees "as agents, employees, officers, or partners."

17. A "certificate of authorization," as that term is used in Chapter 471, Florida Statutes, is a "license to practice engineering."

18. In DOAH Case No. 06-1581PL, the BPE, through the FEMC, in its Administrative Complaint, has charged Mr. Huang, in Count

One, with "violat[ing] 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," these "final drawings" being the engineering plans that accompanied the building permit applications The Pool People filed for the Shelby Homes Project; and, in Count Two, with "violat[ing] Section 471.033[([1])](a), Florida Statutes, by violating Section 455.227(1)(j), Florida Statutes, by aiding and assisting an unlicensed entity, The Pool People, Inc., to practice engineering" in connection with the preparation of the "final drawings" referenced in Count One.

19. At all material times, Section 471.033(1)(a) and (j), Florida Statutes, has provided as follows:

The following acts constitute grounds for which the disciplinary actions in subsection (3)^[10] may be taken:

(a) 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.

* * *

(j) 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.

20. At all material times, 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.

21. At the final hearing held in the instant cases, the FEMC (prosecuting on behalf of the BPE) bore the burden of proving that Respondents engaged in the conduct, and thereby committed the violations, alleged in the Administrative Complaints filed against them.

22. To meet its burden, the FEMC had to present proof greater than a mere preponderance of the evidence. Clear and convincing evidence was 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); Diaz de la Portilla v. Florida Elections Commission, 857 So. 2d 913, 917 (Fla. 3d DCA. 2003); and § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal . . . proceedings . . ."). 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).

23. In determining whether the FEMC met its burden of proof, it is necessary to evaluate its evidentiary presentation at the final hearing in light of the specific allegations of wrongdoing made in the Administrative Complaints. Due process prohibits the BPE from taking penal action against a charged party 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); and Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

24. The specific allegations of wrongdoing contained in the Administrative Complaint filed in DOAH Case No. 05-0382 are that The Pool People, in connection with each of the Five Pool Projects, practiced engineering without a certificate of authorization from the FEMC in violation of Section 471.031(1)(a), Florida Statutes, by engaging "in one or more" of the following activities:

a. by filing engineering plans signed and sealed by a professional engineer [Mr. Huang] employed by Respondent while [it] did not have a Certificate of Authorization as required by Section 471.023, Florida Statutes [hereinafter referred to as "Allegation a."];

b. by providing engineering services directly to a customer while [it did] not have a Certificate of Authorization as required by Section 471.023, Florida Statutes [hereinafter referred to as "Allegation b."].

25. It is asserted in Allegation a. that The Pool People was required by Section 471.023, Florida Statutes, to possess a certificate of authorization from the FEMC because it engaged in the practice of engineering through a licensed engineer,

Mr. Huang, who was acting as The Pool People's employee when he signed and sealed the engineering plans that were subsequently filed by the Pool People in connection with each of the Five Pool Projects. The FEMC, however, failed to present clear and convincing evidence at the final hearing establishing that there existed an employee-employer relationship between Mr. Huang and The Pool People. Indeed, the record affirmatively establishes that Mr. Huang was not an employee of The Pool People, but rather acted as an independent contractor, free to exercise his professional judgment in a manner that was not subject to the control of The Pool People. See Harper v. Toler, 884 So. 2d 1124, 1131 (Fla. 2d DCA 2004) ("The 'extent of control' . . . has been recognized as the 'most important factor in determining whether a person is an independent contractor or an employee.' Of course, employees and independent contractors both are subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on simply the 'result to be obtained' or extends to the 'means to be employed.' A control directed toward means is necessarily more extensive than a control directed toward results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship.") (citations omitted). A corporation, such as The Pool People,

that retains FEMC-licensed engineers to provide engineering services on an independent contractor basis is not obligated to obtain a certificate of authorization from the FEMC inasmuch as Section 471.023's certificate of authorization requirement is triggered only where the licensees are acting as "agents,^[11] employees, [or] officers" of the corporation. To construe Section 471.023 otherwise would add words to the statute not placed there by the Legislature. This neither the undersigned nor the BPE may do. See Hayes v. State, 750 So. 2d 1, 4 (Fla. 1999)("We are not at liberty to add words to statutes that were not placed there by the Legislature."); PW Ventures, Inc. v. Nichols, 533 So. 2d 281, 283 (Fla. 1988)("The express mention of one thing implies the exclusion of another."); Cook v. State, 381 So. 2d 1368, 1369 (Fla. 1980)("According to a longstanding principle of statutory construction, this list should be presumed to be exclusive and any omissions to be deliberate."); Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976)("[W]here a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned."); Chaffee v. Miami Transfer Company, Inc., 288 So. 2d 209, 215 (Fla. 1974)("To say, as the employer would have us do, that in merger cases the true meaning of s 440.15(3)(u) is that disability for purposes of that section is the greater of

physical impairment or loss of earning capacity only if there is a loss of earning capacity is to invoke a limitation or to add words to the statute not placed there by the Legislature. This we may not do."); Herrera-Lara v. State, 932 So. 2d 1138, 1141 (Fla. 2d DCA 2006)("Because the legislature did not include the terms 'temporary tags' or 'temporary license plates' in section 320.26, we must assume the legislature did not intend for section 320.26 to apply to those items."); and Childers v. Cape Canaveral Hosp., Inc., 898 So. 2d 973, 975 (Fla. 5th DCA 2005)("Courts must give statutory language its plain and ordinary meaning, and is not at liberty to add words that were not placed there by the legislature.").

26. The accusation made in Allegation b. that The Pool People "provid[ed] engineering services directly to a customer" in connection with each of the Five Pool Projects is likewise not supported by clear and convincing record evidence. The record reveals that The Pool People was a direct recipient, not a direct provider, of engineering services. What it contracted to provide "directly to a customer" in each instance was not any engineering service, but rather a newly-constructed residential swimming pool, a contractual obligation its certificate of authority from the CILB authorized it to assume. To fulfill this contractual obligation, it had to have engineering plans signed and sealed by a FEMC-licensed engineer. It needed these

plans to apply for the building permit required to commence construction of the pool. The Pool People obtained these engineering plans from a FEMC-licensed independent contractor, not from one of its "agents, employees, [or] officers," and it then used the plans to apply for the required building permit. In doing so, it did not run afoul of any requirement of Section 471.023, Florida Statutes.

27. Because the specific allegations of wrongdoing contained in the Administrative Complaint filed in DOAH Case No. 05-0382 are not supported by clear and convincing evidence, the Administrative Complaint should be dismissed in its entirety.

28. The specific allegations of wrongdoing contained in Count One of the Administrative Complaint filed in DOAH Case No. 06-1581PL are that Mr. Huang violated Section 471.033(1)(j), Florida Statutes, by signing and sealing engineering plans for the Shelby Homes Project that were "not prepared by him or under his responsible supervision, direction, or control."

29. There is no record evidence upon which a finding of fact in DOAH Case No. 06-1581PL may be based, much less clear and convincing evidence, that the Shelby Homes Project engineering plans were "not prepared by [Mr. Huang] or under his responsible supervision, direction, or control."

30. The specific allegations of wrongdoing contained in Count Two of the Administrative Complaint filed in DOAH Case No.

06-1581PL are that, in connection with the Shelby Homes Project, Mr. Huang violated Section 455.227(1)(j), Florida Statutes, and, thereby, also Section 471.033(1)(a), Florida Statutes, "by aiding and assisting an unlicensed entity, The Pool People, Inc., to practice engineering."

31. To prove that Mr. Huang committed such wrongdoing, the FEMC first had to establish by clear and convincing evidence that The Pool People, the "unlicensed entity" Mr. Huang allegedly "aided and assisted," engaged in the practice of engineering (for which it needed to have a certificate of authorization from the FEMC). As discussed above, the FEMC failed meet this threshold requirement (even if it were appropriate to take into consideration the findings of fact based on Mr. Barrett's "former testimony" (Findings of Fact 6a.-e.) in determining Mr. Huang's guilt).

32. Because the specific allegations of wrongdoing contained in both counts of the Administrative Complaint filed in DOAH Case No. 06-1581PL are not supported by clear and convincing evidence, the Administrative Complaint should be dismissed in its entirety.

RECOMMENDATION

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

RECOMMENDED that the BPE dismiss in their entirety the Administrative Complaints filed in these consolidated cases.

DONE AND ENTERED this 29th day of November, 2006, in Tallahassee, Leon County, Florida.



STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of November, 2006.

ENDNOTES

¹ All references to Florida Statutes are to the current version of Florida Statutes.

² Among the exhibits, however, were transcripts of two depositions taken of Paul Martin, Esquire, who serves as both the chief executive officer of the Florida Engineers Management Corporation and the executive director of the Florida Board of Professional Engineers, as well as the transcript of the testimony given by Walter Barrett, The Pool People's senior vice president and chief operating officer, at the final hearing in DOAH Case No. 05-1637RU.

³ The undersigned has accepted these factual stipulations. 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."); 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. 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.").

⁴ While all five projects are at issue in DOAH Case No. 05-0382, only the Shelby Homes Project is at issue in DOAH Case No. 06-1581PL.

⁵ The evidentiary record does not include a written contract for the Jandjel Project.

⁶ Mr. Huang was not a party in DOAH Case No. 05-1637RU.

⁷ Section 90.803(22), Florida Statutes, which provides for the admissibility of "former testimony," regardless of the declarant's availability to testify, under certain circumstances, including where "the party against whom the testimony is now offered . . . or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination," has been declared unconstitutional, and it therefore cannot be relied on by Petitioner in attempting to prove its case against Mr. Huang. See Grabau v. Department of Health, 816 So. 2d 701, 709 (Fla. 1st DCA 2002).

⁸ Contrary to the position taken by Respondents in their Proposed Recommended Order, the undersigned is of the view that, when Mr. Barrett's testimony is read in its entirety, it is clear, not uncertain, that The Pool People's routine practices regarding the "handl[ing] of engineering services" that Mr. Barrett described in his testimony had existed "for many years," including the entire period of its association with Mr. Huang. The undersigned has found that, with respect to the Five Pool Projects, The Pool People acted in accordance with these routine practices, there being no evidence of any deviation therefrom. See Florida East Coast Properties v. Coastal Construction Products, 553 So. 2d 705, 706 (Fla. 3d DCA 1989)("With regard to the materials which Coastal delivered to the work site, we conclude that there was sufficient evidence to support an award. Coastal's sales tickets, signed in each

instance by a Moore employee, indicated that these five orders were placed for delivery by Coastal to the Flamingo job site. Coastal's witness testified that the routine business practice in the execution of such an order was to deliver it to the address indicated. . . . FECP made no showing to the contrary, but simply contended that Coastal's proof was insufficient. An award was proper, therefore, for the five orders in the amount of \$ 6,024.20."); and § 90.406, Fla. Stat. ("Evidence of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is admissible to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice.").

⁹ The Administrative Complaint has five counts in toto, one related to each project.

¹⁰ At all material times, Subsection (3) of Section 471.033, Florida Statutes, has provided as follows:

When the board finds any person guilty of any of the grounds set forth in subsection (1), it may enter an order imposing one or more of the following penalties:

- (a) Denial of an application for licensure.
- (b) Revocation or suspension of a license.
- (c) Imposition of an administrative fine not to exceed \$5,000 for each count or separate offense.
- (d) Issuance of a reprimand.
- (e) Placement of the licensee on probation for a period of time and subject to such conditions as the board may specify.
- (f) Restriction of the authorized scope of practice by the licensee.
- (g) Restitution.

¹¹ "Whether one party is a mere agent rather than an independent contractor as to the other party is to be determined by measuring the right to control" Parker v. Domino's

Pizza, 629 So. 2d 1026, 1027 (Fla. 4th DCA 1993). "Generally, a contractor is not a true agent where the principal controls only the outcome of the relationship, not the means used to achieve that outcome." Theodore v. Graham, 733 So. 2d 538, 539 (Fla. 4th DCA 1999).

COPIES FURNISHED:

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

William R. Clayton, Esquire
David O. Batista, Esquire
Greenberg Traurig, P. A.
East Las Olas Boulevard, Suite 2000
Fort Lauderdale, Florida 33301

Paul J. Martin, Executive Director
Florida Board of Professional Engineers
2507 Calloway Road, Suite 200
Tallahassee, Florida 32303-5267

Josefina Tamayo, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Patrick Greehan, Esquire
Chief Prosecuting Attorney
Florida Engineers Management Corp.
2507 Calloway Road, Suite 200
Tallahassee, Florida 32303-5267

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 these cases.