

Final Order No. BPR-2006-06656 Date: 9-12-06

FILED

Department of Business and Professional Regulation
AGENCY CLERK

Sarah Wachman, Agency Clerk

By: Brandi M. Nish

STATE OF FLORIDA
BOARD OF PROFESSIONAL ENGINEERS

FLORIDA ENGINEERS MANAGEMENT
CORPORATION,

Petitioner,

vs.

FEMC CASES: 03-0036 and 03-0046
DOAH CASES: 05-3215PL and 05-3216PL
LICENSE NO.: PE 54476

FRED C. JONES, P.E.,

Respondent.

FILED
2006 SEP 15 P 1:10
DIVISION OF
ADMINISTRATIVE
HEARINGS

FINAL ORDER

THIS CAUSE came before the BOARD OF PROFESSIONAL ENGINEERS (Board) pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on July 27, 2006, in Palm Beach, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order and Petitioner's Exceptions to the Recommended Order (copies of which are attached hereto as Exhibits A and B, respectively) in the above-styled cause. Petitioner was represented by Bruce A. Campbell. Respondent was represented by Dominic C. MacKenzie, Esquire.

Upon review of the Recommended Order, the argument of the parties, and after a review of the complete record in this case, the Board makes the following findings and conclusions.

FILED
Florida Engineers Management Corporation
Clerk

CLERK Jessie Butler
DATE 9/12/06

RULINGS ON EXCEPTIONS

1. Petitioner's exception to paragraph 45 of the recommended order is granted, and paragraph 45 of the recommended order is deleted. Acceptance by a building official of design plans is not a determination that the plans have been designed in conformance with proper engineering standards. Such a conclusion divests the Board of jurisdiction to regulate and discipline professional engineers for misconduct or negligence in the practice of engineering.

2. Petitioner's exception to paragraph 49 of the recommended order is denied. Paragraph 49 addresses the quantum of proof, which is an issue to be determined by the trier of fact.

FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference.

2. There is competent substantial evidence to support the findings of fact.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 471, Florida Statutes.

2. The conclusions of law set forth in the Recommended Order, as amended herein, are approved and adopted and incorporated herein by reference.


DISPOSITION

Upon a complete review of the record in this case, the Board determines that the disposition recommended by the Administrative Law Judge be ACCEPTED. WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the Administrative Complaint is dismissed.

This Final Order shall take effect upon being filed with the Clerk of the Department of Business and Professional Regulation.

DONE AND ORDERED this 3rd day of September, 2006.

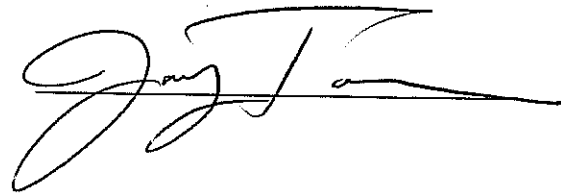
BOARD OF PROFESSIONAL ENGINEERS



Paul J. Martin, Executive Director
for Henn Rebane, P.E., Chair

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to FRED C. JONES, P.E., 239 UW Highway Blvd. East, Suite B. Bradenton FL 34208 and Dominic C. MacKenzie, Esquire, 50 N. Laura Street, Suite 3900, Jacksonville FL 32202; to Daniel Manry, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and by interoffice delivery to Bruce A. Campbell, Florida Engineers Management Corporation, 2507 Callaway Road, Suite 200, Tallahassee FL 32303 and Lee Ann Gustafson, Department of Legal Affairs, PL-01 The Capitol, Tallahassee FL 32399-1050 this 13th day of SEPT, 2006.



NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE FLORIDA ENGINEERS MANAGEMENT CORPORATION AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CLERK Jana Sator
DATE 03-20-06

STATE OF FLORIDA
FLORIDA BOARD OF PROFESSIONAL ENGINEERS

FLORIDA ENGINEERS
MANAGEMENT CORPORATION,

Petitioner,

v.

DOAH CASE NOS. 05-3215PL
05-3216PL

FRED C. JONES, P.E.,

FEMC CASE NOS. 03-0036
03-0046

Respondent.

PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

COMES NOW the Petitioner, the Florida Engineers Management Corporation, by and through its undersigned counsel, and hereby files its exceptions to the Administrative Law Judge's May 2, 2006 Recommended Order.

Conclusions of Law

1. Petitioner takes exception to paragraph 45 of the Recommended Order, to the extent the Administrative Law Judge concluded that Respondent's use of his professional opinion to design the plans, coupled with his reliance upon a building permit issued by the local authority charged with interpreting the applicable building code, prevents the conclusion that Respondent could be "professionally negligent" in such circumstances. The ALJ specifically indicated on the record that he did not know what counsel for Respondent meant by the term "professional" negligence (T. 161, l. 13-14) and the term was never clarified elsewhere in the record.

The ALJ, relying upon Seibert v. Bayport Beach and Tennis Club Association, Inc., 573 So.2d 889, 892 (Fla. 2d DCA 1990), has apparently concluded that professional

engineers licensed in Florida cannot be found negligent by the Board if a permit is issued by a Building Official for the design plans because the Building Official interprets the applicable building code. Such a conclusion is without merit and essentially divests this Board of the ability to discipline engineers for engaging in negligence in the practice of engineering if the plans are submitted to a Building Official and a permit is issued. Mr. Devenport, the Manatee County Building Official testified that the Building Department's review of the plans at issue did not encompass a determination as to acceptable standards of engineering principles, as none of his staff are licensed professional engineers (T. 161-162).

The ALJ's reliance upon the holding in Seibert is misplaced. Seibert involved the determination of an architect's civil liability, if any, for a failure to design a structure in a manner that complied with the Standard Building Code. The Court concluded that since the City of Longboat Key, through its chief building inspector, interpreted the plans as complying with the code and issued a permit, and such interpretation was not shown to be clearly erroneous, the trial court should have accepted the city's interpretation and directed a verdict for the architect. This conclusion is distinguishable from the circumstances of this case to the extent that Manatee County's review of the plans for compliance with the code did not encompass a determination as to acceptable standards of engineering principles, which is under the sole province of this Board. Consequently, Manatee County's interpretation is not entitled to the deference accorded to it by the ALJ. To conclude otherwise would divest this Board of its authority conferred to it by the Legislature in Chapter 471, Florida Statutes.

Paragraph 45 of the Recommended Order should be deleted in its entirety.

2. Petitioner takes exception to paragraph 49 of the Recommended Order, to the extent the Administrative Law Judge concluded that it is less than clear and convincing that Respondent provided building code inspection services for the Coker and Yonkers projects, the weight of the evidence showing that Manatee County Building Department employees performed the required inspections. It is submitted that the ALJ's conclusion is based upon the incorrect premise that "building code inspection services," as defined in Section 553.791(1)(c), Florida Statutes, must be read to mean that a professional engineer licensed in Florida must both review building plans to determine compliance with applicable codes and conduct those inspections required by law of each phase of construction for which permitting by a local enforcement agency is required to determine compliance with applicable codes (emphasis added).

Such an interpretation is unwarranted and creates ambiguity that is not otherwise present; particularly when read *in para materia* with Section 553.791(3), Florida Statutes, which provides, in pertinent part:

(3) A private provider...may only perform building code inspection services that are within the disciplines covered by that person's licensure or certification under...chapter 471.... A private provider may not provide building code inspection services pursuant to this section upon any building designed or constructed by the private provider or the private provider's firm. (Emphasis added)

Subsection (3) clearly and unambiguously indicates that a private provider is prohibited from providing "building code inspection services" upon any building designed by the private provider, regardless of whether the private provider did not construct the building. To interpret otherwise leads to an unreasonable result; that being a professional engineer would be able to provide plan review in lieu of a local building official upon a building

designed by said professional engineer, so long as the building is not also constructed by the professional engineer or his firm.

Construction of a statute which would lead to an absurd or unreasonable result or would render a statute purposeless should be avoided. State v. Webb, 398 So.2d 820, 824 (Fla. 1981). Such an interpretation as the ALJ's is clearly unreasonable and untenable, there being a clear conflict of interest in such a scenario, as well as a concern for the health, safety and welfare of the public.

Respondent was not charged with having performed the required inspections, as articulated by the ALJ; rather, Respondent was charged with having performed plan review pursuant to the Plan Compliance Affidavits submitted for the projects. Respondent stipulated that he submitted a plan compliance affidavit for the Coker Gully Road project (Petitioner's Exhibit 5) and the plan compliance affidavit for the Yonker project was admitted into evidence as Petitioner's Exhibit 3 (T. 123-125). Both affidavits certify that Respondent reviewed the submitted plans submitted for compliance and that they were in compliance with the Florida Building Code and that he is duly authorized to perform plans review pursuant to Section 553.791, Florida Statutes. Such private provider review and certification of plans is strictly and clearly prohibited by Section 553.791(3), Florida Statutes, when performed by the design engineer of the plans being certified. Consequently, Petitioner submits that, once the Board determines that its substituted conclusion is more reasonable than that of the ALJ, it state with particularity its reasons for substituting Conclusion of Law paragraph 49 with the following conclusion:

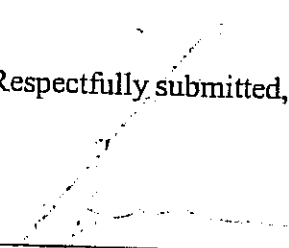
49. Petitioner proved by clear and convincing evidence that Respondent provided "building code inspection services" for the Coker

and Yonker projects by executing the Plan Compliance Affidavits, which certified that he was duly authorized to perform plans review pursuant to Section 553.791, Florida Statutes; that he had reviewed the plans; and that he had determined they were in compliance with the Florida Building Code. Such acts constitute a violation of Section 553.791(3), Florida Statutes, which is a violation of Section 471.033(1)(g), Florida Statutes, by violating Rule 61G15-19.001(6)(n), Florida Administrative Code, which provides that misconduct in the practice of engineering shall include a violation of any law of the State of Florida directly regulating the practice of engineering.

3. The Board must be cognizant of Section 120.57(1)(l), Florida Statutes, which provides, in pertinent part:

“[t]he agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact....”

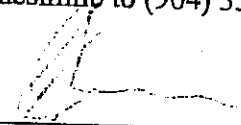
Respectfully submitted,



Douglas D. Sunshine, Esquire
Chief Prosecuting Attorney
Florida Engineers Management
Corporation
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Tallahassee, Florida 32303
(850) 521-0500
Florida Bar Number 935263

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Exceptions to Recommended Order has been furnished by United States Mail this 17th day of May, 2006 to Dominic C. MacKenzie, Esquire, Holland & Knight, LLP, 50 North Laura Street, Suite 3900, Jacksonville, Florida 32202 and via facsimile to (904) 358-1872.



Douglas D. Sunshine, Esquire
Chief Prosecuting Attorney