

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
)
Petitioner,)
)
vs.) Case No. 05-3232PL
)
CHARLES EDWARD MARTIN,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, this cause was heard by Linda M. Rigot, the assigned Administrative Law Judge of the Division of Administrative Hearings, on November 1, 2005, by video teleconference with sites in Pensacola and in Tallahassee, Florida.

APPEARANCES

For Petitioner: Brian A. Higgins, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Wilson Jerry Foster, Esquire
Law Offices of Wilson Jerry Foster
1342 Timberlane Road, Suite 102-A
Tallahassee, Florida 32312-1775

STATEMENT OF THE ISSUE

The issue presented is whether Petitioner proved the allegations contained in the Administrative Complaint filed

against Respondent, and, if so, what disciplinary action should be taken against him, if any.

PRELIMINARY STATEMENT

On May 2, 2002, Petitioner Department of Business and Professional Regulation (Department) issued an Administrative Complaint against Respondent Charles Edward Martin alleging that he had violated the statutes regulating his conduct as a licensed professional surveyor and mapper, and Respondent timely requested an administrative hearing regarding the allegations in that Administrative Complaint. On September 6, 2005, over three years later, this cause was transferred to the Division of Administrative Hearings to conduct the evidentiary proceeding.

The Department presented the testimony of Tom Bishop and Colleen C. Presnell. The Respondent testified on his own behalf. Additionally, the Department's Exhibits numbered 1-4 and the Respondent's Exhibits numbered A-C were admitted in evidence.

Both parties submitted proposed recommended orders after the final hearing in this cause. Those documents have been considered in the entry of this Recommended Order.

FINDINGS OF FACT

1. At all times material hereto and since 1979, Respondent has been licensed by the State of Florida as a professional surveyor and mapper, having been issued license number LS 3463.

He and his wife have owned Southern Surveying since June 1990, and he is and has been actively performing surveying work.

2. Respondent has been married to his present wife since 1985. He and his wife have five children between them: two from her previous marriage, two from his previous marriage, and one from their marriage.

3. In Spring 1989, Respondent was arrested and charged with sexual battery on a person 12 years of age or older but less than 18 years of age. The victim was his wife's daughter. Respondent was immediately separated from his family, with his wife and two stepdaughters moving to a nearby town.

4. Respondent entered a plea of nolo contendere to sexual battery on November 9, 1989, and was incarcerated in the county jail for eight months. He was only permitted to leave the jail when his wife picked him up and took him to family counseling on Tuesday nights.

5. After his release from the county jail, he was under community control for one year as part of his probation. Pursuant thereto, he reported when he left his home, where he was going, and when he returned. He was subject to drug testing and checked in with his probation officer every Wednesday.

6. Thereafter, he was subject to regular probation conditions, which included checking in with his probation officer once a month and obeying the law. His total period of

probation, including the community control portion, was for 12 years. He successfully completed his probation on November 8, 2001, 12 years from the date he entered his plea. During those years, he was never charged with probation violation.

7. An Order of Modification of Probation was entered on February 12, 1993, nunc pro tunc November 24, 1992. The Order modified one of the Respondent's conditions of probation which had forbidden contact with the victim so that Respondent could have supervised contact with the victim who could reside in Respondent's home. In other words, the Order allowed the family to be re-united.

8. Some months before he was incarcerated, Respondent became involved with the Impact Program relating to the family counseling he and his family underwent. While in the Impact Program he learned the importance of being a protector to his daughters, who are now grown and on their own. He wrote a letter to his victim apologizing. He took responsibility for his actions. He was in the Program for a total of four years.

9. Also in 1989, just before his arrest, he "accepted Jesus." He subsequently began biblical studies, receiving certificates of completion of courses of study. He is a deacon in his church.

10. He is actively involved in prison ministries, such as Interfaith Jail Ministries, Inc., an organization for which he

is also on the Board of Directors. He is a member of the Christian Motorcyclists Association and, with other members, travels to prisons and jails around the nation, showing the inmates their motorcycles and then talking to the inmates about Jesus Christ.

11. There is no factual relationship per se, direct or otherwise, between the practice of surveying and sexual battery. Similarly, there is no factual relationship, direct or otherwise, between Respondent's crime and his practice of surveying or his ability to practice surveying.

12. Respondent has shown remorse for his conduct and has tried to make amends. The extensive 12-year probation which he successfully completed is evidence of his successful rehabilitation.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter hereof and the parties hereto. §§ 120.569 and 120.57(1), Fla. Stat.

14. The Administrative Complaint filed in this cause alleges that Respondent has violated Sections 455.227(1)(c) and 472.033(1)(d), Florida Statutes, in that sexual battery relates to the practice of land surveying due to the special trust placed in land surveyors by virtue of their exemption from

trespass laws to the extent set forth in Section 472.029, Florida Statutes.

15. In this revocation of licensure proceeding the Department bears the burden of proving its allegations by clear and convincing evidence. Dept. of Banking & Finance, Div. of Securities & Investor Protection v. Osborne, Stern & Co., 670 So. 2d 932 (Fla. 1996). The Department has failed to do so.

16. In 1989 when Respondent entered his plea of nolo contendere, Section 455.227(1)(c), Florida Statutes, which applies to all professions and occupations licensed by the Department, authorized the Department to take disciplinary action against a licensee convicted of a felony which relates to the practice of his profession. The test of "relates" existed prior to 1989 and still exists although the surrounding language has been expanded.

17. However, in 1989, Chapter 472, Florida Statutes, under which Respondent is regulated in his practice of surveying and mapping, was revived and re-adopted after review pursuant to the Regulatory Sunset Act. As re-adopted and as in effect when Respondent entered his plea of nolo contendere, Section 472.033(1)(d), Florida Statutes, authorizes disciplinary action against a licensee for entering a plea of nolo contendere to a crime which directly relates to the practice of surveying or mapping or the ability to practice surveying or mapping.

Respondent, therefore, is subject to the higher standard of directly related to his profession rather than the lower standard of simply related which applies, in general, to many professions and occupations. Moreover, that a crime must be directly related to surveying and mapping to warrant disciplinary action, rather than be just related, is the latest expression of legislative will as to the standard applicable to surveyors and mappers.

18. Whether a crime directly relates to a regulated practice or the ability to practice raises questions of law and fact. See Michael Spuza, M.D. v. Dept. of Health, 838 So. 2d 676 (Fla. 2d DCA 2003). As set forth above, there is no factual relationship between Respondent's crime of sexual battery and the practice of surveying and mapping or his ability to practice surveying and mapping.

19. In considering whether a legal relationship exists between the crime of sexual battery and the practice of surveying, the definition of surveying and mapping offers no connection. Section 472.005(4), Florida Statutes, includes the following descriptions of surveying and mapping: the application of special knowledge of the principles of mathematics, the act of measuring and locating lines and elevations, interpreting the facts of size and shape and topography, the monumentation of property boundaries, the

preparation of plans showing existing improvements after construction, and the preparation of subdivision planning maps and record plats. None of these activities involves unacceptable sexual activity. Accordingly, as to a legal relationship, direct or indirect, no statute establishes such a relationship, and no case law has been cited or found.

20. The Department argues that the relationship arises by virtue of Section 472.029(1), Florida Statutes, which authorizes surveyors and mappers to go on, over, and upon the lands of others in conjunction with making surveys or maps or locating or setting monuments. The statute specifically provides that such entry onto land does not constitute trespass. The Department argues that sexual battery is directly related to surveying due to the exemption from trespass provided by this statutory provision. In furtherance of its argument, the Department suggests that the exemption covers trespass into dwellings rather than simply onto land. Such an interpretation is contrary to the plain wording of the statute which authorizes a licensee to go upon another's land when necessary to perform surveying work and does not authorize entering buildings, dwellings, or structures.

21. Thus, Respondent's sexual battery is not related or, a fortiori, directly related factually or legally to the practice of surveying or mapping or to his ability to practice surveying

or mapping. Even if it were directly related, Respondent has clearly demonstrated that he is entitled to remain licensed by both the passage of time and his rehabilitation and that no disciplinary action is needed to protect the public from harm.

22. As to the passage of time, it has been 16 years since Respondent entered his plea, and there is no suggestion in this record that he has repeated his criminal conduct. He successfully completed his 12-year period of probation four years ago. Further, the record reveals that, except during the time that he was in jail, Respondent has been actively engaged in surveying and mapping activities without incident, a conclusion supported by the Administrative Complaint in this cause which charged Respondent with statutory violations based only upon his 1989 plea and contained no subsequent or additional allegations of wrongful conduct.

23. As to Respondent's rehabilitation, the testimony is uncontroverted that Respondent accepted responsibility for his crime, attended family counseling for four years, wrote a formal letter of apology to his victim, was re-united with his family pursuant to judicial approval, began extended religious studies, became a deacon in his church, and participates in a prison ministry nation-wide. Respondent has clearly and convincingly demonstrated rehabilitation.

24. The seriousness of the crime of sexual battery is not overlooked in this Recommended Order. Nor is the possibility that the factual circumstances surrounding the crime of sexual battery could not only relate but directly relate to the practice of surveying and mapping and/or the ability to practice surveying and mapping. However, the facts in this case do not establish such a relationship.

25. Section 472.033, Florida Statutes, which sets forth the grounds for disciplinary action against surveyors and mappers, provides that disciplinary action against a licensee found guilty of any of the enumerated statutory provisions, including the one at issue in this proceeding, is discretionary with the Board of Professional Surveyors and Mappers and not mandatory. § 472.033(2), Fla. Stat. Hence, even if the Board were to determine that Respondent's crime directly related to his practice, the Board is authorized to determine that no disciplinary action should be taken against him based upon the passage of time and his rehabilitation.

26. Even if the Board were to determine that a direct relationship, factual or legal, exists between sexual battery and surveying, the disciplinary recommendation contained in the Department's proposed recommended order filed in this cause is contrary to the Board's disciplinary guidelines. The Department

has recommended that Respondent's license be revoked, that he be fined \$1,000, and that he pay \$1,382.04 in costs.

27. However, the Board's disciplinary guidelines found in Florida Administrative Code Rule 61G17-2.0015(2)(d) provides that for a violation of Section 472.033(1)(d), Florida Statutes, a licensee shall be penalized for the first offense with a fine of \$250, as a minimum penalty, and a fine of \$500 and suspension to be followed by a term of probation, as a maximum penalty. Although Section (4) of that Rule authorizes the Board to deviate from the guidelines based upon aggravating or mitigating evidence, none of the enumerated items of aggravating evidence was offered at the final hearing in this cause, but one enumerated item of mitigating evidence was, i.e., the Respondent's efforts at rehabilitation, and those efforts are set forth in this Recommended Order.

28. Accordingly, if the Board should find a factual or legal direct relationship between sexual battery and the practice of surveying and mapping, the minimum fine of \$250 for Respondent's first offense should be mitigated by the passage of time and his rehabilitation, and the Board should exercise its discretionary authority to impose no discipline against Respondent under the facts of this case.

RECOMMENDATION

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

RECOMMENDED that a final order be entered dismissing the Administrative Complaint filed against Respondent in this cause.

DONE AND ENTERED this 21st day of December, 2005, in Tallahassee, Leon County, Florida.

Linda M. Rigot

LINDA M. RIGOT
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 21st day of December, 2005.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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