

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ENGINEERS MANAGEMENT)
CORPORATION,)
)
Petitioner,)
)
vs.) Case No. 05-3340PL
)
ROBERT C. KANY, P.E.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Jeff B. Clark, held a final administrative hearing in this case on January 13, 2006, in Orlando, Florida.

APPEARANCES

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

For Respondent: Daniel M. Greene, Esquire
Kirwin & Morris
338 West Morse Boulevard, Suite 150
Winter Park, Florida 32789

STATEMENT OF THE ISSUES

Whether Respondent, Robert C. Kany, P.E., committed the acts or omissions alleged in the Administrative Complaint; whether those acts or omissions constitute the violations

alleged; and, if so, what penalty should be imposed (as submitted in the parties' Joint Pre-hearing Submission).

PRELIMINARY STATEMENT

On March 29, 2005, Petitioner, Florida Engineers Management Corporation, filed an Administrative Complaint alleging that Respondent, Robert C. Kany, P.E., had violated Florida law and had been negligent in the practice of engineering. In essence the Administrative Complaint alleged that Respondent had signed plans drafted by a unlicensed person over whom Respondent was "not in responsible charge," "had aided and assisted an unlicensed person to practice engineering," and that the particular plans did "not comply with acceptable standards of engineering principles," and, therefore, Respondent was negligent in the practice of engineering.

On September 1, 2005, Respondent's attorney requested an administrative hearing. Petitioner forwarded the case to the Division of Administrative Hearings on September 14, 2005. On that same day, an Initial Order was sent to both parties. Based on the parties' response to the Initial Order, on September 29, 2005, the case was scheduled for final hearing in Orlando, Florida, on November 8, 2005.

On October 27, 2005, in response to a Joint Motion for Continuance, the final hearing was cancelled. In response to a

request of the parties, the case was rescheduled for January 13, 2006.

The case was presented as rescheduled on January 13, 2006. Petitioner presented four witnesses: Nereida Laureano; Alejandro Perez; Homer Ooten, who was accepted as an expert witness in electrical engineering; and Syed Mehdi Ashraf, who was accepted as an expert witness in the field of structural engineering. Three joint exhibits were submitted by the parties and marked Joint Exhibits 1 through 3. Petitioner presented two additional exhibits, which were admitted into evidence and marked Petitioner's Exhibits 1 and 2.

Respondent presented four witnesses: Thomas Love, who was accepted as an expert witness in mechanical, electrical, and plumbing engineering; Frank Griffo; Darius Adams; and Frank Kany. Messrs. Griffo and Adams were accepted as expert witnesses in structural engineering and general engineering practice in the community, respectively.

The Transcript of Proceedings was filed with the Clerk of the Division of Administrative Hearings, on January 27, 2006. The parties had agreed to 25 days from filing to submit proposed recommended orders. Both parties timely filed Proposed Recommended Orders.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, the following findings of fact are made:

1. At all times material to the allegations in the Administrative Complaint, Respondent was a licensed Professional Engineer with license PE 16739.

2. On or about February 12, 2004, Respondent signed and sealed two pages of plans for a project described as "Renovations to Existing Facilities 8245 Curryford Road, Orlando."

3. Respondent did not have a contract with or any communication with the Curryford Road owner.

4. Between April 26, 2002, and on or about July 8, 2003, Respondent signed and sealed five pages of plans for a project identified a "2008 Corena Drive."

5. Respondent did not have a contract with or any communication with the Corena Drive owner.

6. Petitioner is the State of Florida agent that provides investigative and prosecutorial services for the Florida Board of Professional Engineers. The Florida Board of Professional Engineers regulates the practice of engineering pursuant to Chapters 455 and 471, Florida Statutes (2001).

7. Joint Exhibit 1, "Renovations to Existing Facilities 8245 Curryford Road, Orlando," and Joint Exhibit 2, "2008 Corena

Drive," contain deficiencies regarding mechanical, electrical, and plumbing design. Some deficiencies can be cured by the plans examiner's refusing to approve the plans and requesting clarifying information regarding the noted deficiency.

8. In Florida, an electrical contractor can assume responsibility for electrical design requirements for residential properties that require less than 600 amps systems. However, when an engineer seals the plans, the engineer assumes that responsibility.

9. The initial step in plans approval in Orange County, Florida, is submission of the plans to the Orange County Zoning Department. Both sets of plans in question were initially reviewed by the zoning department. The "Curryford" plans were submitted to the Orange County Building Department for review and were not approved. While the "Corena" plans were retained by Orange County, there is no evidence that these plans were submitted for building department review.

10. It is not atypical for plans to be rejected by the Orange County Building Department and returned to the engineer for additions or corrections.

11. While one small deficiency exists to the structural design of Joint Exhibit 1, "Renovations to Existing Facilities 8245 Curryford Road, Orlando," there was no threat to public safety.

12. There are myriad structural engineering deficiencies in Joint Exhibit 2, "2008 Corena Drive," which are the sealed plans for the residence at that address. The deficiencies may be a result of the fact that the plans were incomplete due to the owners' failure to decide on a cathedral or closed ceiling. If the plans were preliminary, Respondent should not have sealed them.

13. The plans depicted in Joint Exhibit 2, "2008 Corena Drive," do not meet minimum engineering standards; the engineer of record, Respondent, was negligent in sealing these plans.

14. It is acceptable practice in the engineering community for an engineer to work with a designer who drafts design documents and is independently employed. It is also acceptable practice in the engineering community for an engineer working with a designing draftsman not to visit a particular project site if sufficient detail of the project is related to the engineer by the draftsman.

15. It is acceptable practice in the engineering community for a draftsman to design complete drawings and then present the drawings to an engineer for engineering review and approval as long as the draftsman is known to the engineer and the engineer is aware of the draftsman's skill and expertise.

16. Respondent has practiced his profession for 65 years, the last 25 in Florida. He has known Robert Thomas, the

individual who drafted both sets of plans in question, for seven or eight years. Respondent considers Mr. Thomas to be a "darn good" draftsman with considerable knowledge of the building industry. When Mr. Thomas brings plans to Respondent for review, they discuss the project and the plans; Respondent then makes appropriate changes to assure that the plans comply with or exceed code. This process meets the "responsible charge" standard.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. § 120.57(1), Fla. Stat. (2005).

18. Subsection 471.038(3), Florida Statutes (2001), authorizes Petitioner to provide administrative, investigative, and prosecutorial services to the Board of Professional Engineers.

19. Petitioner must prove the allegations of its Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

20. The "clear and convincing" standard requires:

[T]hat 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 Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

21. Statutes that authorize the imposition of penal sanctions must be strictly construed, and any ambiguity must be construed in favor of Respondent. Elmariah v. Department of Business and Professional Regulation, 574 So. 2d 164, 165 (Fla. 1st DCA 1990). The Florida lenity statute, Subsection 775.021(1), Florida Statutes (2001), provides that: "offenses" defined by any Florida Statutes must be construed most favorably to the offender if the language is susceptible to different meanings. Pasquale v. Florida Elections Commission, 759 So. 2d 23, 26 (Fla. 4th DCA 2000).

22. Subsection 471.033(1)(g), Florida Statutes (2001), reads as follows:

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

* * *

(g) Engaging in fraud or deceit, negligence, incompetence, or misconduct, in the practice of engineering.

23. Florida Administrative Code Rule 61G15-19.001(4) reads as follows:

(4) A professional engineer shall not be negligent in the practice of engineering. The term negligence set forth in Section 471.033(1)(g), F.S., is herein defined as the failure by a professional engineer to utilize due care in performing in an engineering capacity or failing to have due regard for acceptable standards of engineering principles. Professional engineers shall approve and seal only those documents that conform to acceptable engineering standards and safeguard the life, health, property and welfare of the public. Failure to comply with the procedures set forth in the Responsibility Rules as adopted by the Board of Professional Engineers shall be considered as non-compliance with this section unless the deviation or departures therefrom are justified by the specific circumstances of the project in question and the sound professional judgment of the professional engineer.

24. Subsection 455.227(1)(j), Florida Statutes (2001), reads as follows:

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

* * *

(j) 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.

25. Subsection 471.033(1)(j), Florida Statutes (2001), reads as follows:

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

* * *

(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.

26. Florida Administrative Code Rule 61G15-18.011(1) reads as follows:

As used in Chapter 471, F.S., and in these rules where the context will permit the following terms have the following meanings:

(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.

27. Petitioner has proved clearly and convincingly Count Six of the Administrative Complaint. By sealing the plans identified as Joint Exhibit 2, "2008 Corena Drive," plans which do not meet minimum engineering standards, Respondent was negligent.

28. Petitioner has failed to prove by clear and convincing evidence the remaining counts of the Administrative Complaint. The evidence presented indicates that Respondent exercised "responsible charge" over Robert Thomas; although Mr. Thomas actually met with his clients and drafted the plans, Respondent had ultimate control over engineering decisions after discussion of the particular project and consideration of plan alternatives. Respondent was familiar with Mr. Thomas' qualifications.

29. There is no evidence that supports the allegation that Respondent aided or assisted Mr. Thomas in the unlicensed practice of engineering.

30. There is little evidence that the plans identified as Joint Exhibit 1, "Renovations to Existing Facilities 8245 Curryford Road, Orlando," did not conform to acceptable engineering standards and safeguard the life, health, property and welfare of the public. Admittedly, the plans were flawed and contained errors and omissions, not an uncommon occurrence, but that fact alone does not evidence negligence as defined in paragraph 22, supra.

31. The disciplinary guidelines, found in Florida Administrative Code Rule 61G15-19.004(2)(m), allow the imposition of discipline for negligence in the practice of engineering to range from a minimum of a reprimand, two years' probation, and a \$1,000 fine to a maximum of a reprimand, \$5,000 fine, five years' suspension, and ten years' probation.

32. No aggravating circumstances have been presented, although the undersigned is aware that aggravation and mitigation are to be considered by the Board of Professional Engineers. The undersigned has considered Petitioner's demeanor at the final hearing and his 65 years of professional service in mitigation.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Board of Professional Engineers reprimand Respondent, Robert C. Kany, P.E., for his negligence in sealing incomplete plans.

DONE AND ENTERED this 14th day of March, 2006, in Tallahassee, Leon County, Florida.



JEFF B. CLARK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of March, 2006.

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.