

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PETER J. SINGHOFEN, P.E. AND)	
STREAMLINE TECHNOLOGIES, INC.,)	
)	
Petitioners,)	
)	
vs.)	Case No. 05-3674RX
)	
BOARD OF PROFESSIONAL)	
ENGINEERS,)	
)	
Respondent.)	
_____)	

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case before the Division of Administrative Hearings, by its designated Administrative Law Judge Diane Cleavinger, on November 29, 2005, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Edwin A. Bayo, Esquire
Gray Robinson, P.A.
301 South Bronough Street, Suite 600
Tallahassee, Florida 32301

For Respondent: Lee Ann Gustafson, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue in this case is whether Florida Administrative Rule 61G15-22.011(2) is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

Petitioner Peter J. Singhofen, is the President and sole stockholder of Petitioner Streamline Technologies (Streamline). Streamline filed an application for approval as a Continuing Education (CE) provider with the Respondent, Board of Professional Engineers. Streamline's application was denied based on Florida Administrative Code Rule 61G15-22.011(2), providing that a continuing education provider shall have no financial or commercial interest, direct or indirect, in any technology that is the subject of the continuing education course. On October 6, 2005, based on the Board's denial, Petitioners filed a Petition for an Administrative Determination of the Invalidity of Florida Administrative Code Rule 61G15-22.011(2).

At the hearing, Petitioner Singhofen testified on his own behalf as well as on behalf of Streamline and offered the testimony of one witness. Petitioners also offered seven exhibits into evidence. Respondent did not present any witnesses or exhibits.

After the hearing, the Petitioners and Respondent filed Proposed Final Orders on January 9 and 10, 2006, respectively.

FINDINGS OF FACT

1. Petitioner Peter J. Singhofen is a licensed professional engineer in the State of Florida. He is the President and sole stockholder of Petitioner Streamline.

2. In the 1980's, Mr. Singhofen had a need for and developed engineering software that specialized in stormwater management for the terrain found in Florida. The software had to be specific to Florida because the terrain in the state is different from the terrain in many other parts of the country, and the Florida Statutes and rules governing stormwater management are some of the most stringent in the country.

3. The software that Mr. Singhofen developed uses the Interconnected Channel and Pond Routing model (ICPR). This system performs complex calculations utilized in stormwater management and planning. It was the first proprietary model to be formally reviewed and accepted as a nationally accepted hydraulic model.

4. ICPR is also extensively used by local and state government agencies throughout Florida, both to review stormwater permit applications as well as for the development of stormwater management master plans. Some of the users of Petitioners' software are the Southwest Florida Water Management District, Department of Environmental Protection, South Florida Water Management District, St. Johns Water Management District,

and Department of Transportation. Indeed, ICPR may be the most popular program of its type in the State of Florida.

5. Streamline sells the stormwater management software and offers training and technical support for the software it sells. Clearly Petitioners have a direct financial interest in the engineering software they developed and own.

6. As part of its business, Streamline conducts eight-to-ten workshops each year. Many of the state and local agencies that use ICPR send their engineers to these training programs.

7. These workshops take three days. The first two days consist of intense lectures supported by hands-on exercises on computers provided by Petitioners. On the third day participants perform a "real world" project, using aerial photographs and survey notes to work on the project. The evidence was clear that these workshops are not "shill" presentations that are tantamount to product promotions or advertisements.

8. Florida Statutes require licensed professional engineers to obtain a minimum of four professional development hours in the licensees' area of practice each biennium, or two hours per year. The Board approved Streamline as a CE provider during the 2001-2003 and 2003-2005 bienniums. However,

Streamline's application for approval for the 2005-2007 biennium was denied as a result of amendment to Florida Administrative Code Rule 61G15-22.011(2), effective August 8, 2005.

9. The amendment to the Rule in question reads as follows:

. . . The continuing education provider shall not have any financial or commercial interest, direct or indirect, in any technology that is the subject of the instruction.

10. The denial, and thus the Rule, has the potential to affect Petitioners' substantial interests in its product since their training can no longer qualify for CE credits for the engineers who need training and technical support in order to better use this complex software.

11. The Notice of Rulemaking published in the Florida Administrative Weekly listed the authority for the Rule as Section 471.017(3), Florida Statutes. Section 471.017(3), Florida Statutes, grants the Board rulemaking authority and requires that the CE rules be consistent with the guidelines of the National Council of Examiners for engineering and Surveying (NCEES) for multijurisdictional licensees.

12. The Notice of Rule Development published in the Florida Administrative Weekly, as well as the Notice of Rulemaking, stated the purpose and effect of the Rule was to include a prohibition of conflict of interest as an added requirement for Board approval of CE providers. The same reason

was provided in the Additional Statement to the Secretary of State under the Statement of Facts and Circumstances Justifying Proposed Rule. However, there was no discussion or finding by the Board prior to engaging in rulemaking that a CE provider who taught about technology over which he or she had a commercial interest would be engaging in a conflict of interest. In fact, the NCEES guidelines do not contain such a prohibition. According to the Board's Director, the statement that the purpose and effect of the Rule was to avoid a conflict of interest was "erroneous" and that "it was erroneous three times if it was published three times." Indeed, other than minor references in various minutes of Board meetings, there was very little official Board discussion about the Rule prior to its adoption. The evidence on the rationale behind the Rule showed that there was general concern by the Board over prohibiting "shill" CE courses that were nothing more than product promotions or advertisements. The fact that the published purpose of the Rule was erroneous is a material failure to follow the rulemaking process since notice to the public of the Rule's purpose is an important aspect of rulemaking.

13. Notably, the Board does not directly approve individual courses. It approves CE providers. Under the Rule the courses must be offered or sponsored by an approved CE provider. NCEES model rules do recognize that a governmental

authority may approve CE providers. In Appendix C, the guidelines indicate that provider approval be contingent upon the provider permitting a Board to attend courses and review course material to determine whether the course meets the standards of the Board.

14. In the process of applying for CE provider status, the Board requires the applicant to provide course descriptions, syllabuses, and a list of courses intended to be provided.

15. Section 456.025(7), Florida Statutes, mandates that:

[e]ach board . . . shall establish, by rule, a fee not to exceed \$250 for anyone seeking approval to provide continuing education courses or programs and shall establish by rule a biennial renewal fee not to exceed \$250 for the renewal of providership of such courses. The fees collected from continuing education providers shall be used for the purposes of reviewing course provider applications, monitoring the integrity of the courses provided, covering legal expenses incurred as a result of not granting or renewing a providership, and developing and maintaining an electronic continuing education tracking system.

16. Florida Administrative Code Rule 61G15-22.011 provides that:

- a. The Board retains the right to audit and/or monitor courses [61G15-22.011(7)], which the guidelines require the provider to permit;
- b. The Board retains the right to review course materials [61G15-22.011(7)], which the guidelines require the provider to supply;

- c. The provider must provide a description of the type of courses or seminars the provider expects to conduct [61G15-22.011(3)(a)] and a sample of intended course materials [61G15-22.011(3)(d) and the course curriculum [61G15-22.011(3)(f)], which the guidelines require a provider to supply;
- d. The provider must demonstrate the education and/or experience necessary to instruct engineers in the conduct of their practice [61G15-22.011(2)], which reflects the guideline requirement that providers ensure instructors are qualified;
- e. The provider must list anticipated locations to conduct the course [61G15-22.011(3)(3)], which the guidelines require the provider to supply after the course is presented.

Based upon information an applicant has provided, the Board has in the past denied applications for CE providers proposing to offer "shill" courses. Additionally, an existing rule of the Board, as well as NCEES guidelines, specifically provides that equipment demonstrations or trade show displays do not qualify as continuing education activities. See Fla. Admin. R. 61G15-22.005. The evidence was not clear on how denial of CE provider status, because the provider had a financial interest in the technology which is the subject of a CE course, would prohibit "shill" courses without limiting otherwise legitimate CE courses such as the one here. Indeed, the most logical person to present a course on the software at issue here would be Petitioners, since they are the developers of the software.

17. The NCEES guidelines at Section 2 set forth model rules for continuing professional competency.

18. NCEES guideline 2B4 defines course/activity as any qualifying course or activity with a clear purpose and objective that will maintain, improve, or expand the skills and knowledge relevant to the licensee's field of practice. Rule 61G15-22.002(5) defines course/activity as any qualifying course or activity with a clear purpose and objective that will maintain, improve or expand the skills and knowledge relevant to the licensee's area of practice. Clearly, Petitioners' workshops meet these definitions.

19. NCEES guideline 2C sets forth the ways licensees can earn the necessary CE credit through patenting inventions, active participation as an officer in professional or technical societies, authoring published papers, articles, books or accepted licensing exam items, teaching or instructing college courses or continuing education courses, completion of college courses, CE courses, correspondence, televised, videotaped and other short courses or tutorials, seminars, in-house courses, attendance at workshops, professional and technical presentations made at meetings, conventions or conferences. Similarly, Florida Administrative Code Rule 61G15-22.003, sets forth qualifying activities for the area of practice requirements and generally lists the same types of activities as

the NCEES guidelines. Petitioners' course specifically falls within both the NCEES guidelines and the Board's rules defining qualifying activities for CE credit. Thus, the Board's amendment to Florida Administrative Code Rule 61G15-22.011 results in a qualifying activity being excluded from such recognition, and thereby is inconsistent with NCEES guidelines. Such inconsistency is outside of the Board's rulemaking authority and the amendment to Florida Administrative Rule 61G15-22.011(2) is an invalid exercise of delegated legislative authority.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. § 120.56(3), Fla. Stat.

21. Section 120.52(8) defines "invalid exercise of delegated legislative authority" as follows:

- a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
- b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
- c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or

f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

22. Petitioners have challenged Rule 61G15-22.011 on the grounds that it was improperly promulgated; that it enlarges, modifies, or contravenes the specific provision of law implemented; that it is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; that it is arbitrary; and that it imposes regulatory costs on the regulated person which could be reduced by the adoption of a less costly alternative that substantially accomplishes the statutory objectives.

23. Petitioners have the burden of proof in this proceeding and must demonstrate by a preponderance of the evidence that the Rule is an invalid exercise of delegated legislative authority. § 120.56(3), Fla. Stat.

24. Section 471.017(3), Florida Statutes (2004), provides:

(3) The board shall require a demonstration of continuing professional competency of engineers as a condition of license renewal

or relicensure. Every licensee must complete 4 professional development hours, for each year of the license renewal period. For each renewal period for such continuing education, 4 hours shall relate to this chapter and the rules adopted under this chapter and the remaining 4 hours shall relate to the licensee's area of practice. The board shall adopt rules that are consistent with the guidelines of the National Council of Examiners for Engineering and Surveying for multijurisdictional licensees for the purpose of avoiding proprietary continuing professional competency requirements and shall allow nonclassroom hours to be credited. The board may, by rule, exempt from continuing professional competency requirements retired professional engineers who no longer sign and seal engineering documents and licensees in unique circumstances that severely limit opportunities to obtain the required professional development hours. (e.s.)

25. Section 120.58(8), Florida Statutes (2004), defines "invalid exercise of delegated legislative authority" as "action which goes beyond the power, functions, and duties delegated by the Legislature." See Pedersen v. Green, 105 So. 2d 1 (Fla. 1958); State, Department of Rehabilitative Services v. McTigue, 387 So. 2d 454 (Fla. 1st DCA 1980) ("it is axiomatic that an administrative rule cannot enlarge, modify, or contravene the provisions of a statute. A rule which purports to do so is an invalid exercise of delegated legislative authority"). State, Department of Business and Professional Regulation v. Salvation Limited, Inc., 452 So. 2d 65 (Fla. 1st DCA 1984).

26. In this case, Florida Administrative Code Rule 61G15-22.011(2), constitutes an invalid exercise of delegated legislative authority under Section 120.52(8)(c), Florida Statutes. It eliminates for consideration a category of continuing education that is a qualified activity under the NCEES guidelines and is therefore, inconsistent with those guidelines and contravenes the specific provisions of Section 417.017(3), Florida Statutes. The evidence also showed that the Rule was improperly promulgated since the Notice of Rulemaking published in the Florida Administrative Weekly listed an erroneous purpose for the Rule. The evidence did not demonstrate that the Rule was vague or vested unbridled discretion in the Board. The meanings of the terms, such as "indirect interest," in the Rule are sufficiently well known that any further application of them must be done on a case-by-case basis.

ORDER

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

ORDERED:

That the Petition for Administrative Determination of the Invalidity of Rule 61G15-22.011(2) is granted, and that said Rule constitutes an invalid exercise of delegated legislative authority.

DONE AND ORDERED this 2nd day of March, 2006, in Tallahassee, Leon County, Florida.



DIANE CLEAVINGER
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 2nd day of March, 2006.

COPIES FURNISHED:

Edwin A. Bayo, Esquire
Gray Robinson, P.A.
301 South Bronough Street, Suite 600
Tallahassee, Florida 32301

Lee Ann Gustafson, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

Simone Marstilller, Secretary
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Josefina Tamayo, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-2202

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

Doug Sunshine, Esquire
Vice President for Legal Affairs
Florida Engineers Management Corporation
2507 Callaway Road, Suite 200
Tallahassee, Florida 32303-5267

Scott Boyd, Executive Director
And General Counsel
Administrative Procedures Committee
Holland Building, Room 120
Tallahassee, Florida 32399-1300

Liz Cloud, Program Administrator
Administrative Code
Department of State
R. A. Gray Building, Suite 101
Tallahassee, Florida 32399

THE 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 the original Notice of Appeal with the agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.