

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ENGINEERS MANAGEMENT)
CORPORATION,)
)
Petitioner,)
)
vs.) Case No. 05-4271PL
)
LESTER M. MAPLES, P.E.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This cause came on for formal hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on February 14, 2006, in Panama City, Florida.

APPEARANCES

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

For Respondent: Alvin L. Peters, Esquire
Peters & Scoon
25 East 8th Street
Panama City, Florida 32401

STATEMENT OF THE ISSUE

The issue is whether Respondent violated Sections 455.227(1)(a) and 471.033(1)(g), Florida Statutes.

PRELIMINARY STATEMENT

The genesis of this matter was the filing of an Administrative Complaint on September 19, 2005, by the Florida Engineers Management Corporation (FEMC), before the Board of Professional Engineers (Board). The gist of the complaint was that Respondent, Lester M. Maples (Mr. Maples), a professional engineer, engaged in misconduct in the practice of engineering by expressing an opinion publicly on an engineering subject without being informed as to the facts relating thereto; or that he was untruthful, deceptive, or misleading in testimony.

The dissembling charged was alleged to have occurred in Division of Administrative Hearing Case No. 05-2049PL, which was heard by Administrative Law Judge Stephen Dean on August 11, 2005. The Administrative Complaint did not cite with particularity to the transcript that was prepared in that case. The Administrative Complaint lacks specificity in that it does not reveal on what page or pages, or on what line or lines in the transcript the alleged offending language appears. It does not allege what specific words were spoken that gives rise to the charges against Mr. Maples in this case.

Mr. Maples disputed the facts contained in the Administrative Complaint in an Election of Rights filed with FEMC on October 18, 2005. In a letter dated October 20, 2005, FEMC informed counsel for Mr. Maples that his client had failed

to elucidate the facts disputed. This generated a Supplemental Statement of Disputed Issues of Material Fact in Accordance with Florida Administrative Code Rule 28-106.201, which was filed with FEMC on November 10, 2005.

Subsequently, Mr. Maples filed with FEMC a Motion to Dismiss Administrative Complaint. This Motion pointed out that the Complaint fails to identify with specificity any testimony of Mr. Maples that was "uninformed, or untruthful, deceptive, or misleading." Mr. Maples alleged, with good reason, that he was not adequately informed of the specific acts "for which the Petitioner is seeking punishment." FEMC did not respond to the Motion. On November 21, 2005, the Complaint and allied papers were filed with the Division of Administrative Hearings.

The hearing was set for February 13 and 14, 2006. It commenced on February 14, 2006, and was completed at the end of the day.

At the hearing, FEMC presented the testimony of two witnesses and offered Exhibit Nos. 1 through 5 that were accepted into evidence. Two of the five were group exhibits. Mr. Maples presented the testimony of Chris Thomas, and Mr. Maples testified on his own behalf. Mr. Maples offered Exhibit No. 1, and it was accepted into evidence.

A Transcript was filed on March 6, 2006. After the hearing, Petitioner and Respondent filed their Proposed Findings

of Fact and Conclusions of Law on March 14, and 16, 2006, respectively.

References to statutes are to Florida Statutes (2005) unless otherwise noted.

FINDINGS OF FACT

1. Mr. Maples is a licensed professional engineer in the State of Florida. He holds license no. PE 10214, and he practices engineering in the Panama City, Florida, area. During all times pertinent Mr. Maples held an active license and practiced pursuant to it.

2. FEMC is charged with providing administrative, investigative, and prosecutorial services to the Board pursuant to Section 471.038, Florida Statutes.

3. The Board exists pursuant to Section 471.007, Florida Statutes, and is authorized to discipline engineers under its authority by Section 455.225, Florida Statutes.

4. Mr. Maples signed and sealed three pages of sprinkler system plans for the Wellness Center at Gulf Coast Community College (Wellness Center), located in Panama City, Florida. These plans were admitted as Petitioner's Exhibit No. 2. No date can be observed on the seal on Petitioner's Exhibit No. 2. It either is illegible or a date was never placed upon it. Hydraulic calculations, which use drawings as a source document, and which appear to coincide with Petitioner's Exhibit No. 2,

were dated November 15, 2001. It is deduced, therefore, that Petitioner's Exhibit No. 2 was drawn on or about November 15, 2001.

5. Petitioner filed an Administrative Complaint against Respondent on April 1, 2005. The Administrative Complaint alleged that the plans and calculations for the Wellness Center demonstrated negligence in the practice of engineering. That charge resulted in an final hearing conducted by Administrative Law Judge Stephen Dean on August 11, 2005. That case number was DOAH Case No. 05-2049PL. On October 13, 2005, Judge Dean recommended that the Complaint be dismissed.

6. One of the allegations of negligence in 05-2049PL, related to a charge that inadequate water would be supplied to the hydraulically most demanding (HMD) area in the event of a fire. It was alleged, and proof was elicited, that a single 1 and 1/4-inch pipe traveling from a riser, across the men's shower area to the women's shower area, would be insufficient. This pipe is identified on Petitioner's Exhibit No. 2 as a line between Node 45 and Node 25. This pipe leads to a "T" intersection and further piping carries water, when activated, to the women's shower area.

7. The matter of whether adequate water would be supplied to the HMD devolved into whether the plans called for one 61-foot long, 1 and 1/4-inch diameter pipe, or two 61-foot long, 1

and 1/4-inch diameter pipes. Because there was no pump provided on the drawings, and in fact there was no plan to install a pump, two 61-foot long, 1 and 1/4-inch diameter pipes were necessary to provide sufficient water in case of fire.

8. As was illuminated in Case No. 05-2049PL, calculations were made, based on the drawings, in order to ensure that the HMD area will receive 1500 square feet of coverage per sprinkler head required by the contractor. The coverage required by the contractor exceeds that required by National Fire Protection Association-13 standards. HMD calculations are made at a point most remote from the source of water. The hydraulic calculations are produced through the use of a commercially produced computer program. Calculations from Case No. 05-2049PL became Petitioner's Exhibit No. 3 in this case.

9. At the hearing in Case No. 05-2049PL, the allegation that the fire sprinkler plans signed and sealed by Mr. Maples would not provide adequate water pressure to the HMD area was rejected by Judge Dean. This is because Mr. Maples claimed that the plans, when viewed in light of the calculations, actually depicted two 61-foot long pipes, 1 and 1/4-inch and Judge Dean, while determining that the depiction was inadequate for that purpose, found in essence that adequate water would be provided to the HMD.

10. Mr. Maples works closely with Chris Thomas, a sprinkler contractor whose license does not permit him to design a fire suppression system that consists of more than 49 heads. Their working arrangement is such that it would be expected that Mr. Thomas would understand Mr. Maples' drawings even if they were not as complete as they would be if the drawings were made for a contractor other than Mr. Thomas. In fact, Mr. Thomas participated in the production of the drawings signed and sealed by Mr. Maples.

11. More than one set of drawings were used for the Wellness Center project. The project came under the jurisdiction of the Florida Department of Education. That agency approved the plans and the Florida State Fire Marshal approved the plans, although it is not certain that the plans those agencies approved were Petitioner's Exhibit No. 2.

12. There were errors in the data entry on the hydraulic calculations.

13. The building was completed prior to the time Case No. 05-2049PL was heard on August 11, 2005.

14. Using the plans drawn by Mr. Maples, Mr. Thomas's foremen for the Wellness Center installed a single pipe between Node 45 and Node 25. On a weekend subsequent to the hearing in Case No. 05-2049PL, Mr. Thomas went to the Wellness Center and discovered that only one 61-foot long, 1 and 1/4-inch diameter

pipe had been installed in the area represented to be between Node 45 and Node 25. Mr. Thomas immediately installed a second 61-foot long, 1 and 1/4-inch diameter pipe.

15. Mr. Maples never went to the site and, accordingly, was unaware at the time he testified in Case No. 05-2049PL, that only one pipe had been installed.

16. The Administrative Complaint lists five statements made by Mr. Maples in Case No. 05-2049PL that are alleged to express "an opinion publicly on an engineering subject without being informed as to the facts relating thereto." The five statements are further alleged to describe testimony that was, "untruthful, deceptive, or misleading in any professional statement or testimony." As noted above, the statements do not cite with particularity to the Transcript in Case No. 05-2049PL. The five statements read as follows:

7. Respondent testified at the hearing that the line on the plans appearing as a single pipe, in fact, represented two pipes, 61 feet long with 1 1/4 inch diameters, running over the men's showers.

8. Respondent testified at the hearing that the intent to install the sprinkler system with two pipes over the men's showers was obvious to anyone with experience in fire sprinkler systems.

9. Respondent testified that he had signed and sealed revised plans showing a second parallel line over the men's showers.

10. Respondent testified that the second 61 foot long 1 1/4 inch diameter pipe was represented in his calculations by a 3 foot length of pipe.

11. Respondent testified that he used pipe lengths in the supporting calculations that match the pipe lengths shown in the plans.

17. The actual testimony of Mr. Maples that addresses the pipes follows below. The initial questions were posed by Mr. Maples' attorney, Mr. Peters at page 260, line 13, of the Transcript in Case No. 05-2049PL. .

Q. Okay. Now, the bulk of this allegation was that the hydraulically demanding design area did not have sufficient water pressure. Let's talk about that. Does the most hydraulically demanding area in this project show that it was receiving sufficient water pressure and distribution?

A. Yes, the calculations show that specifically.

Q. Do you have any concern that the most hydraulically demanding area is being under served?

A. I do not.

Q. Do the plans -- while they may not be perfect -- do they reasonably and competently show sufficient water pressure getting to the most hydraulically demanding area?

A. Yes.

(At this point there was a recess. Subsequently, the interrogation continued.)

* * *

Q. So do the plans and do the calculations show that there's sufficient water getting to the most challenging --

A. Yes, it does.

Q. Okay. And let's take a minute to just make sure we review our nodal system.

(At this point the Court interjected and moved the questioning away from the nodal system. The nodal system had been reviewed earlier in the hearing.)

* * *

Q. How is that? Okay.
There is a segment called 20 to 25, which is an inch-and-a-quarter, 61 feet long.

A. Correct.

Q. And is there a parallel pipe in the same plane that runs along that same segment?

A. Yes.

Q. How can you tell that from this drawing and this set of calculations?

A. I can tell on the calculations, because it tells me from 25 to 30, there's a connection. It tells me that 30 is connected to a three-inch main.

Q. All right. Can you show these calculations and -- go over them with us and show us how you see that from these documents?

A. Where is my set?

Q. Right there. That's yours.

THE COURT: Let me ask you this, sir. I see where it says that it's connected to that.

But by [sic] my question is, it says that it's only 3-feet long.

THE WITNESS: Three feet. Yes, sir. Let me -- can I address that?

THE COURT: Surely.

THE WITNESS: That is -- I will say an input error on it. But I want to tell you that it doesn't make any difference into the function of the system.

BY MR. PETERS:

Q. Tell us why not.

A. It says 25 to 30 tells me there's a line, a connection to a 3-inch -- to node 30. What that tells me is that 3-inch line is feeding this row of sprinklers right here. Even though it says 3 feet, what it does, it has a short segment of line that just gushes water through there and makes those sprinklers flow a whole lot more than it needed. All right. When you put the right length, you put 61 feet in there, it comes back to just about what this line does, and it cuts the sprinkler flow down in those three areas. But it doesn't effect [sic] the function of the system because it doesn't effect [sic] the head loss in the main system where the pressure goes in the 3-inch line.

Q. Head loss. Take a minute to try to explain that.

A. The water -- it doesn't effect [sic] the pressure that the sprinklers are getting. What it does, when you put 61 feet in there, those three sprinklers that where it shows a 3-feet [sic] connection, it cuts them down from sprinkling a whole lot more water that's needed back to what's required. But as you go along this -- as you go along this line, go along this line where the 3-inch

line is up here, at each place on the 3-inch line, there's a branch that goes towards the sprinklers. And each branch line is calculated separately. And the most demanding branch line is what puts the pressure that's required -- the flow -- required a 3-inch line. So what the 3-foot did, it made these three sprinklers right here flow considerably more, because it was just a little short piece of pipe and didn't have any friction loss going down through there. But it didn't effect [sic] -- it didn't effect [sic] the system head. Because that had less head loss than this one did. So when you put --

BY THE COURT:

Q. Head loss is effected [sic] by, what?

A. The length of pipe. Flow -- the length of pipe and size of pipe.

Q. So will a longer piece of pipe -- assuming all the pipes are the same diameter -- does the pipe -- does the head loss on a short piece, is it greater than a long piece?

A. Oh, no. Head loss on short pieces are considerably less than a long piece loss. The further it travels, the more pressure it loses.

Q. Okay. And the pressure loss is transmitted, if you will, back to the 3-inch main? It effects [sic] the --

A. It effects [sic] what the flow comes from a 3-inch main. The 3-inch main effects [sic] it, because the three-inch main has the water supply, and has the pressure that's pushing it.

Q. So the calculation for this system --

A. Yeah.

Q.-- even though there's an error, the error is not a critical error?

A. No, sir, it does not effect [sic] the function of the system.

Q. It doesn't effect [sic] the function of the system. Thank you.

A. What it does, it shows a little more water flow.

THE COURT: Okay.

DIRECT EXAMINATION (RESUMED)

BY MR. PETERS:

Q. So do the plans -- does it need a pump to get water to this area?

A. No, sir.

THE COURT: Now, let me ask you a follow up on that.

THE WITNESS: All right.

THE COURT: After Mr. Schmidt put his input in, and he was basically engaged to do exactly what he did, and that was, to go through the plans, catch any things that he was concerned about, and turn that back to the general contractor so the general contractor could go back to the people he needed to go back to?

THE WITNESS: Yes.

THE COURT: The general contractor came back to you, and you did whatever was necessary to generate the second set of plans that you-all put in, which is your Respondent's 1?

MR. PETERS: Well, although Respondent's -- can I ask him a couple of questions?

THE COURT: Sure.

BY MR. PETERS:

Q. Respondent's 1, this is the one that shows the second line, the parallel lines, right?

A. Yes, if this is the plan we're looking at, it shows the second -- physically shows -- separated it so anybody could see.

THE COURT: It also shows the point of service.

THE WITNESS: Yes, it also shows a different point of service. It shows --bring it back up to the 5.

BY MR. PETERS:

Q. But these don't bear your signature.

A. This particular set doesn't. We signed some, but I don't know where they are. That came from Gulf Coast College there.

Q. All right. All right. In terms of what this case is directly about, then, do the plans provide pipes with adequate diameters for water pressure to provide protection for the area most remote from the main riser?

A. Absolutely.

Q. Do the plans provide -- do the plans need to show a pump to increase water pressure for the pipe design use?

A. No.

Q. And did you use pipe lengths in the supporting calculations that match the pipe lengths shown in the plans?

A. Yes.

(At this point Mr. Peters addresses another matter. Thereafter, Mr. Campbell proceeded with his cross-examination on Page 268, line 25.)

* * *

BY MR. CAMPBELL

Q. Mr. Maples, there was no testimony about phantom pipes in that previous case, was there?

A. No.

Q. And you would admit that if there was no pipe underneath this Node 25 pipe, that this fork of six sprinkler heads would not adequately be served by 1-and-a-quarter inch diameter pipe; isn't that correct?

A. That's correct, with a caveat. The NFPA 13 has a section that says on the density .1 in a 1500 square feet [sic] area, if it is - - if it says ceiling heights less than 20 feet, and this is 10, that you can reduce the area of sprinkling by 40 percent. So that means, if we did that, we would do 900 square feet, and that would be adequate. Now, if you went strictly by NFPA 13 --

Q. But that's not what you drew here. You drew or attempted to draw 1500 square feet.

A. That's what we were told to do. But that's not in accordance with NFPA 13. NFPA 13 is less. And we agree NFPA 13 rules.

Q. Now, you initially said this was your initial set of plans before you got any input such as being told to do 1500 square feet; is that correct?

A. No, no, I was told to do that to start with.

Q. All right. Was that part of the specifications on this job?

A. I didn't see it. That was --according to the contractor, that was the specifications from Schmidt or whoever they were.

Q. All right. Now, looking at the Respondent's 1 you did not sign.

A. That one is not signed, but I know there were some that were signed.

Q. Doesn't it appear that in these entries for pressures and static pressures, at some point, there was a whiteout and a reentry on the first page of the sheet?

A. I can't tell you that. It may have been.

Q. All right. Now, in fact, you have got two separate entries of written information where some of those are different. For instance, the required pressure is different --

A. Yes, because it's a different system. This is one that's not in contention right here. This was the gym. It's got the same static pressures and flows, but this is a different set of calculations of the gym. This has not been -- that was for the gymnasium, just to see if there was enough water. They asked us to do that.

Q. Now, is the gymnasium a part of the Wellness Center? I thought that was what the Wellness Center was.

A. Well, it's part of the Wellness, yes. But it's a separate part. But this has never been in contention.

Q. Well, now, on the set of plans, your initial set of plans, there were no such double entries?

A. No, they didn't ask for it then.

Q. And this separate set of entries here for the gym -- well, this -- yeah -- is still used by the same riser and the same --

A. Yes, sir.

Q. -- point of service.

A. Yes, sir.

Q. So there would be a separate set of calculations somewhere for the gym; is that what you're saying?

A. My understanding, they asked Chris to do a set of calculations just so they would have plenty of water at the gym. That's never been in contention. Because one thing, it's located right at the riser.

Q. Now, isn't it a fact, if someone never looked at the calculations but only looked at page 2 of Exhibit P-1, that where the node 25 seems to go up to node 45, there is only one line indicating one pipe?

A. Depending on who looks at it. Anybody familiar with the calculations and sprinkler systems would know.

Q. If they saw no calculations whatsoever, they just looked at this sheet --

A. I would assume so. If it was Joe Blow out there that knew nothing, he would have probably been, you know --

Q. He would think there's one pipe there.

A. Who would do that?

Q. So the basis of your statement that anyone that knew that there had to be more than one pipe is -- anyone with experience in fire protection systems would know you could not feed --

A. That's correct.

Q. -- 6 heads 60 feet down from the 3-inch pipe on a one --

A. An inexperienced person, probably, correct.

Q. Well, now, an experienced person would know automatically you couldn't feed it that way, right? You would have to have a second pipe; that's what you're saying?

A. Well, you would have to go by the calculations. I didn't say that.

Q. But if you didn't go by the calculations, if you didn't know anything about the calculations, would it be obvious to anyone with experience in fire protection sprinkler systems that at the end of 60 feet of a one-and-a-quarter-inch pipe you could not support 50 pounds pressure -- support 6 heads on 1 inch pipe?

A. I wouldn't say that. Because if I was an experienced person in fire protection and installation, I would look at that, and I would look for something else to see if there was something else.

Q. So that sheet of plans by itself is insufficient even with someone with experience in fire protection?

A. No, I didn't say that. I said I would be looking for something else.

Q. You said you would be looking for something else.

A. He would know that there was something supporting it. And especially a licensed contractor that's licensed to design sprinklers, too. He would obviously know.

18. The statement set forth in paragraph 7, of the Administrative Complaint does not appear in the Transcript in Case No. 05-2049PL. Mr. Maples said nothing about showers. He did not say that the single pipe represented two pipes each of which was 61 feet long. What he said was that the calculations told him that there is a parallel pipe in the same plan as the pipe shown on the drawings. He said he could tell that because the calculations showed from Node 25 to 30 a connection to a 3-inch main. Mr. Maples' testimony in this regard was confusing and difficult to follow but not untruthful, deceptive, or misleading. He was not giving fact testimony but was expressing an opinion.

19. The statement set forth in paragraph 8, of the Administrative Complaint does not appear in the Transcript in Case No. 05-2049PL. Mr. Maples never said that the "intent to install the sprinkler system with two pipes over the men's showers was obvious to anyone with experience in fire sprinkler systems." What he said was, that, "Anybody familiar with the calculations and sprinkler systems would know." He further said that if someone familiar with sprinkler systems would know that two pipes were necessary looked at the plans without the

calculations that he "assumed" they would know there should be two pipes.

20. With regard to the statement set forth in paragraph 8, when offered to agree with the statement, ". . . an experienced person would know automatically you couldn't feed it that way, right? You would have to have a second pipe; that's what you are saying?" Mr. Maples declined. In response to the question he said, "Well, you would have to go by the calculations. I didn't say that." Mr. Maples' testimony in this regard was not untruthful, deceptive, or misleading. He was not giving fact testimony but was expressing an opinion.

21. The statement alleged as paragraph 9 does not appear in the Transcript. With regard to other plans, he said in response to a question about Respondent's Exhibit No. 1 that, ". . . it shows the second--physically shows--separated so any body could see." He noted that Respondent's Exhibit No. 1 did not bear his signature but said that he had signed some similar plans. There is no proof in the record that his testimony in this regard was untruthful, deceptive, or misleading.

22. The allegation in paragraph 10 of the Administrative Complaint was that Mr. Maples said that the second 61-foot long, 1 and 1/4-inch diameter pipe "was represented in his calculations by a 3 foot length of pipe." Mr. Maples never uttered that statement. In response to a question from Judge

Dean, with regard to the 3-foot long pipe, Mr. Maples said, "That is--I will say an input error on it." Mr. Maples' testimony in this regard was confusing and difficult to follow but not untruthful, deceptive, or misleading.

23. The allegation in paragraph 11 of the Administrative Complaint was that Mr. Maples said that, "he used pipe lengths in the supporting calculations that match the pipe lengths shown in the plans." This allegation approximates a verbatim statement made by Mr. Maples. However, he had earlier noted, and thus qualified the statement when he stated that there was input error. Mr. Maples' testimony in this regard was not untruthful, deceptive, or misleading.

24. The allegations contained in the Administrative Complaint at paragraphs 7 and 8, were fairly alleged as the opinions of Mr. Maples. The opinions alleged are in essence that a person with experience in the fire suppression business could determine from the plans and calculations that a second 61-foot long, 1 and 1/4-inch pipe would run parallel to the pipe shown from Node 25 to 45.

25. After an exhaustive study of the plans and calculations in this case, the Administrative Law Judge has not been able to conclude that the testimony as to the second pipe is borne out by Petitioner's Exhibit 2 or the calculations that are Petitioner's Exhibit 3. Moreover, Judge Dean found that the

intent to have two pipes, "was not adequately shown in the original drawings."

26. The foremen sent by Mr. Thomas to install the system did not conclude that two parallel pipes were required. They installed only one.

27. An expert called by FEMC, Larry Simmons, an expert in professional engineering, stated unequivocally in this case that using Mr. Maples' drawings and calculations, he could not determine that a second 61-foot long, 1 and 1/4-inch pipe was called for by the plans.

28. Judge Dean was not misled by Mr. Maples' testimony in Case No. 05-2049PL, with regard to the pipe. This was indicated by his acknowledgement in Finding of Fact 8 in his Recommended Order that the intent to have two pipes, "was not adequately shown in the original drawings." Judge Dean was not called as a witness so that he could reveal if he was misled based on the information that became available after the hearing in Case No. 05-2049PL.

29. It was not proven by clear and convincing evidence that Mr. Maples was "untruthful, deceptive, or misleading in any professional statement or testimony." As will be discussed in detail below, Mr. Maples engaged in misconduct in the practice of engineering by expressing an opinion publicly on an

engineering subject without being informed as to the facts relating thereto.

CONCLUSIONS OF LAW

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

31. Section 471.033(1)(a), Florida Statutes, authorizes the Board, on whose behalf the Corporation has prosecuted this matter pursuant to Section 471.038(3), Florida Statutes, to discipline an engineer proved guilty of misconduct in the practice of engineering, which is specifically addressed in Section 471.033(1)(g), Florida Statutes, or guilty of rendering an opinion publicly on an engineering subject without being informed as to the facts relating thereto" or being "untruthful, deceptive, or misleading in any professional statement or testimony," which is specifically addressed in Section 455.227(1)(a), Florida Statutes.

32. Section 471.033(1)(a), Florida Statutes, authorizes the Board, on whose behalf the Corporation has prosecuted this matter pursuant to Section 471.038(3), Florida Statutes, to discipline an engineer proved guilty of violating Sections 455.227(1)(a) and 471.033(1)(g), Florida Statutes.

33. The charge in this case is penal in nature and must be strictly construed, with ambiguities being resolved in favor of

the licensee. Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977) and Elmariah v. Department of Professional Regulation, 574 So. 2d 164 (Fla. 1st DCA 1990).

34. As the party asserting the affirmative of an issue, the Corporation has the burden of proof. Department of Transportation v. J.W.C Co., 396 So. 2d 778, 790 (Fla. 1st DCA 1981).

35. The grounds proven must be those specifically alleged in the Administrative Complaint. See Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1987).

36. The Florida Engineers Management Corporation must prove the allegations by clear and convincing evidence if it is to prevail. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

37. Clear and convincing evidence requires that, "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." Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

38. Section 455.227(1)(a), Florida Statutes, provides:

§ 455.227. Grounds for discipline;
penalties; enforcement

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

(a) Making misleading, deceptive, or fraudulent representations in or related to the practice of the licensee's profession.

* * *

39. Section 471.033(1)(g), Florida Statutes, provides:

§ 471.033. Disciplinary proceedings

(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.

* * *

40. Florida Administrative Code Rule 61G15-19.001(6) provides:

61G15-19.001 Grounds for Disciplinary Proceedings.

* * *

(6) A professional engineer shall not commit misconduct in the practice of engineering. Misconduct in the practice of engineering as set forth in Section 471.033(1)(g), F.S. shall include, but not be limited to:

(a) Expressing an opinion publicly on an engineering subject without being informed as to the facts relating thereto and being competent to form a sound opinion thereupon;

(b) Being untruthful, deceptive, or misleading in any professional report, statement, or testimony whether or not under

oath or omitting relevant and pertinent information from such report, statement or testimony when the result of such omission would or reasonably could lead to a fallacious conclusion on the part of the client, employer or the general public;

41. Only one case has been cited by Petitioner that illuminates the meaning of Sections 455.227(1)(a) and 471.033(1)(g), Florida Statutes. That case, Sheils v. Fla. Eng'rs. Mgmt. Corp., 886 So. 2d 426 (Fla. 4th DCA 2004), affirms an order of the Board that adopted a Recommended Order entered by Administrative Law Judge Robert Meale. See Florida Engineers Management Corporation v. John F. Sheils, Case No. 03-0204 (DOAH August 4, 2003).

42. In Sheils, Respondent issued a report stating that a roof would withstand 70 mile-per-hour winds and a major storm but omitted mention of a 100-mile-per-hour design storm. The report, done at the behest of a contractor, was internally inconsistent and a reading of the report without more, revealed a deliberate intent to mislead. The Court cited Florida Administrative Code Rule 61G15-19.001(6)(b) as supporting the conclusion that Sheils engaged in misconduct.

43. In Sheils the Court noted that the Board imposed high standards of professionalism upon engineers. This means in the current context that something less than prevarication or mendacity can be a basis for a finding of misconduct.

44. In this case, unlike the Sheils case, there is no evidence tending to prove that Mr. Maples was untruthful, deceptive, or misleading in the testimony he gave in Case No. 05-2049PL. It was proven, however, by clear and convincing evidence, that Mr. Maples provided, "an opinion publicly on an engineering subject without being informed as to the facts relating thereto." Thus he violated Section 471.033(1)(g), Florida Statutes, as further explicated by Florida Administrative Code Rule 61G15-19.001(6)(a).

45. Mr. Maples, relying on his own defective plans and calculations, provided opinions in Case No. 05-2049PL as to what others would deduce upon contemplating his plans and calculations. These types of opinions, which might be harmless if uttered by a lay person, have special status when uttered by a professional engineer, because they may result in someone suffering harm or even death. It is misconduct for a professional engineer to express opinions cavalierly or based on uncertain information.

46. Florida Administrative Code Rule 61G15-19.004(2)(m) provides that for a violation of Section 471.033(1)(g), Florida Statutes, the Board may impose discipline ranging from a reprimand and two years probation to a five-year suspension and ten years' probation; and an administrative fine from \$1,000 to \$5,000.

47. Florida Administrative Code Rule 61G15-19.004(3) provides that the Board shall be entitled to deviate from the above-mentioned guidelines upon a showing of aggravating or mitigating circumstances by clear and convincing evidence presented to the Board prior to the imposition of a final penalty. Florida Administrative Code Rule 61G15-19.004(3)(a) enumerates facts that might aggravate the offense, and Florida Administrative Code Rule 61G15-19.004(3)(b) enumerates facts that might mitigate the offense.

48. No facts were presented at the hearing which either aggravate or mitigate the offense committed.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Board find that Respondent Lester M. Maples did not violate Section 455.227(1)(a), Florida Statutes, but that he offered an opinion publicly on an engineering subject without being informed as to the facts relating thereto in violation of the prohibitions contained in Section 471.033(1)(g), Florida Statutes. It is further recommended that he be reprimanded, placed on two years' probation, and ordered to pay an administrative fine of \$1,000.

DONE AND ENTERED this 28th day of April, 2006, in
Tallahassee, Leon County, Florida.



HARRY L. HOOPER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.