

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ENGINEERS MANAGEMENT )  
CORPORATION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 07-0377  
 )  
FRESNEL E. HERNANDEZ AND G. F. )  
CONSULTING ENGINEERS, INC., )  
 )  
Respondents. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on March 29, 2007, by video teleconference, with the Petitioner appearing in Tallahassee, Florida, and the Respondent appearing in Miami, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: John J. Rimes, III, Esquire  
Florida Engineers Management Corporation  
2507 Callaway Road, Suite 200  
Tallahassee, Florida 32303

For Respondent: Samuel B. Reiner, II, Esquire  
Reiner & Reiner, P.A.  
9100 South Dadeland Boulevard, Suite 1002  
Miami, Florida 33156-7866

STATEMENT OF THE ISSUE

Whether the Respondents committed the violations alleged in the Administrative Complaint dated April 18, 2006, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

In an Administrative Complaint dated April 18, 2006, the Florida Engineers Management Corporation ("FEMC") charged Fresnel E. Hernandez, P.E., and G.F. Consulting Engineers, Inc.,<sup>1</sup> with a single count of negligent practice of engineering, in violation of Section 471.033(1)(g), Florida Statutes (2005),<sup>2</sup> and Florida Administrative Code Rule 61G15-19.001(4). The charge was based on allegations in paragraph 5 of the Administrative Complaint that Mr. Hernandez had signed and sealed plans and calculations

that failed to conform to acceptable standards of engineering principles in one or more of the following ways:

- a. The plans and calculations do not consider the load path for concentrated wind loads into the roof deck at tie columns;
  
- b. New footing extensions are connected to the ends of existing wall footings without consideration for the bending moments required to be developed between the end of the existing wall footings and the new extensions.

Mr. Hernandez timely requested a formal administrative hearing, and FEMC transmitted the matter to the Division of

Administrative Hearings for assignment of an Administrative Law Judge. Pursuant to notice, the final hearing was held on March 29, 2007.

At the hearing, FEMC dismissed the allegation in paragraph 5a. of the Administrative Complaint and proceeded solely on the allegation in paragraph 5b. FEMC offered the transcript of the deposition of James E. Towbridge, P.E., its expert witness, in lieu of his live testimony, and the deposition transcript was received into evidence as Petitioner's Exhibit 10. Petitioner's Exhibits 1 through 9 were also offered and received into evidence. Mr. Hernandez testified in his own behalf and offered the testimony of Evidell Gauthier, P.E., and Samuel De Leon, P.E.; Respondent's Exhibits 1 through 5 were offered and received into evidence. Respondent's Exhibit 4 is the transcript of the deposition of John R. Abbott, and Respondent's Exhibit 5 is the transcript of the deposition of Dariusz Reczek, P.E. The parties also submitted a Joint Pre-Hearing Stipulation which included several stipulations of fact that, to the extent that they are material to resolution of the issue presented herein, are incorporated in the Findings of Fact below.

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings on April 5, 2007, and the parties timely filed proposed findings of fact and

conclusions of law, which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

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

1. FEMC is the entity responsible for providing administrative, investigative, and prosecutorial services to the Florida Board of Professional Engineers ("Board").

§ 471.038(4), Fla. Stat. The Board is responsible for regulating the practice of engineering pursuant to Chapters 455 and 471, Florida Statutes.

2. At all times material to this proceeding, Mr. Hernandez has been a licensed professional engineer in the State of Florida, having been issued license number P.E. 46618.

G.F. Consulting Engineers, Inc., is a licensed engineering firm holding Certificate of Authorization # 9129.

3. In late 2004, architect Carlos Lozano was commissioned to design plans for the renovation of a structure that was to become the Moon Thai Restaurant in Coral Gables, Florida.

4. G.F. Consulting Engineers, Inc., was retained to provide structural engineering services for the Moon Thai Restaurant Renovation Project ("Project").

5. Mr. Hernandez was the professional engineer in charge of producing the plans and calculations for the structural portions of the Project.

6. On February 8, 2005, Mr. Hernandez sealed, signed, and dated a set of structural plans, which were submitted to the Coral Gables Building Department.

7. Dariusz Reczek, P.E., a structural plans examiner employed by the Coral Gables Building Department, reviewed the plans and issued a set of Structural Review Comments dated April 12, 2005. Among other comments, Mr. Reczek directed Mr. Hernandez to "[r]eview 50% rule per FBC [Florida Building Code] (3401.8)" and to provide a set of structural calculations.<sup>3</sup>

8. Mr. Hernandez received Mr. Reczek's comments in April 2005, and, on or about April 26, 2005, Mr. Hernandez sealed, signed, and dated structural calculations and revised structural plans for the Project.

9. Mr. Reczek prepared another set of Structural Review Comments dated May 23, 2005, which included the comments made on April 12, 2005, and added three comments related to the new structural drawings submitted April 26, 2005.

10. On June 1, 2005, Mr. Hernandez sealed, signed, and dated additional structural plans and, on June 2, 2005, Mr. Hernandez sealed, signed, and dated additional structural calculations.

11. The comment that Mr. Hernandez "review the 50% rule" was ambiguous with regard to Mr. Reczek's opinion as to whether the rule did or did not apply. Mr. Hernandez was, however, advised that Mr. Reczek was of the opinion that the 50 percent rule did apply to the Project. Mr. Hernandez believed that the 50 percent rule did not apply.<sup>4</sup>

12. Although Mr. Hernandez disagreed with Mr. Reczek's assessment that the 50 percent rule applied to the Project, he nonetheless modified the structural calculations and plans to address Mr. Reczek's primary concern, the danger that the building would overturn as a result of being subject to high velocity winds. In the June 1 and 2, 2005, plans and calculations, Mr. Hernandez addressed Mr. Reczek's concern that the building might overturn by designing 8' x 8' concrete dead weight anchors that were to be attached to the existing footings on the building. The dead weight anchors were designed to prevent the building from overturning by adding additional weight to the building to counteract the overturning effect. Mr. Hernandez's intent in the June 1 and 2, 2005, structural plans and calculation was not to redesign the footings of the building.<sup>5</sup>

13. Mr. Hernandez's design of the dead weight anchors was appropriate to address the concern of the Coral Gables Building Department plans examiners regarding the lateral stability of

the building and the possibility of overturning, even though he disagreed with the plan examiner's concern, and Mr. Hernandez used due care and had due regard for acceptable standards of engineering principles in formulating the design.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2006).

15. In its Administrative Complaint, FEMC seeks to impose penalties against Mr. Hernandez that include suspension or revocation of his professional engineer's license. The Department, therefore, has the burden of proving by clear and convincing evidence that Mr. Hernandez committed the violations alleged in the Administrative Complaint. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

16. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the court defined clear and convincing evidence as follows:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the

witnesses testify must be distinctly remembered; the evidence 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 the firm belief of 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).

17. Judge Sharp, in her dissenting opinion in Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998)(Sharp, J., dissenting), reviewed pronouncements on clear and convincing evidence and observed:

Clear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997). It is an intermediate level of proof that entails both qualitative and quantitative [sic] elements. In re Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995), cert. denied, 516 U.S. 1051, 116 S. Ct. 719, 133 L. Ed. 2d 672 (1996). The sum total of the evidence must be sufficient to convince the trier of fact without any hesitancy. Id. It must produce in the mind of the fact finder a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davie, 645 So. 2d 398, 404 (Fla. 1994).

18. Section 471.033(1)(g), Florida Statutes, provides that the act of engaging in negligence in the practice of engineering is a basis on which disciplinary action may be taken. Florida



Administrative Code Rule 61G15-19.001(4) provides in pertinent part:

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. . . .

19. Based on the findings of fact herein, FEMC has failed to meet its burden of proving the factual allegations of misconduct in paragraph 5b. of the Administrative Complaint, and it has, therefore, failed to prove by clear and convincing evidence that Mr. Hernandez committed negligence in the practice of engineering, in violation of Section 471.033(1)(g), Florida Statutes, and Florida Administrative Code Rule 61G15-19.001(4).<sup>6</sup>

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Board of Engineers enter a final order dismissing the Administrative Complaint against Fresnel E. Hernandez, P.E., and G.F. Consulting Engineers, Inc.

DONE AND ENTERED this 12th day of June, 2007, in  
Tallahassee, Leon County, Florida.



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PATRICIA M. HART  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 12th day of June, 2007.

ENDNOTES

<sup>1/</sup> Because G.F. Consulting Engineers, Inc., can only operate through a qualifying professional engineer, the Respondents are referred to herein collectively as "Mr. Hernandez."

<sup>2/</sup> All references to the Florida Statutes herein are to the 2005 edition unless otherwise noted.

<sup>3/</sup> The "50 percent rule" requires that, if the cost of renovations exceeds 50 percent of the replacement cost of the building, the entire structure must be altered to conform to the requirements of the current building code.

<sup>4/</sup> Although a great deal of testimony during the hearing was addressed to the issue of whether the 50 percent rule applied to the Project, this issue is not material to a determination of whether Mr. Hernandez committed negligence in the practice of engineering, as charged in the Administrative Complaint.

<sup>5/</sup> In formulating his opinion that Mr. Hernandez's calculations and plans failed to comply with accepted engineering standards, FEMC's expert, James E. Towbridge, P.E., assumed that Mr. Hernandez's "design assumed that the footing was extended in

length and made integral or continuous to act as one long rigid member." Working from his assumption regarding Mr. Hernandez's design intent, Mr. Towbridge concluded that the structural calculations were deficient in that "the detail for connecting the added footings did not correspond with the assumptions used in calculating the resistance to the overturning that was provided by those additional footings." Mr. Towbridge noted that Mr. Hernandez's calculations "for the detail of the connection of the new footing to the existing shows calculations for shear transfer only." Mr. Towbridge's erroneous assumptions provided the basis for his opinion that Mr. Hernandez's design failed to include "consideration for the bending moments required to be developed between the end of the existing wall footing and the new extension." Because Mr. Towbridge's assumptions about Mr. Hernandez's design intent were not supported by the record, his opinion must be discounted.

<sup>6/</sup> Mr. Hernandez's expert witness testified that Mr. Hernandez's calculations of the moment arm of force for the dead-weight-anchor design contained a mistake that resulted in the anchors being smaller than required under Mr. Hernandez's design approach. It does not appear from the record, however, that this miscalculation relates to the factual allegation in paragraph 5b. of the Administrative Complaint upon which the charges against Mr. Hernandez are based.

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.