

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN CHARLES COUNTS, JR.,)
)
 Petitioner,)
)
vs.) Case No. 07-5789
)
BOARD OF PROFESSIONAL)
SURVEYORS AND MAPPERS,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on June 19, 2008, in Ocala, Florida, before Barbara J. Staros, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Rex D. Ware, Esquire
Fowler White Boggs Banker, P.A.
101 N. Monroe Street, Suite 1090
Tallahassee, Florida 32301

For Respondent: Diane L. Guillemette, Esquire
Department of Legal Affairs
The Capitol, Plaza Level 01
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STATEMENT OF THE ISSUE

The issue is whether Petitioner's application for reinstatement of his licensure as a land surveyor should be granted or denied.

PRELIMINARY STATEMENT

On November 21, 2007, Respondent, Board of Professional Surveyors and Mappers (Board), issued a Notice of Intent to Deny Petitioner's application for reinstatement of his Florida professional surveyor's license. The reason for the denial as stated in the Notice of Intent, is that Petitioner "failed to present evidence of a good faith effort to comply with the license renewal statutes and rules and failed to present evidence that rises to the level of illness or unusual hardship that would justify the failure to renew the license."

Petitioner timely requested an Administrative Hearing to contest the Notice of Intent to Deny. The case was transmitted to the Division of Administrative Hearings on or about December 27, 2007. Three motions for continuance were granted, and the case was ultimately heard on June 19, 2008.

The parties filed a joint Pre-hearing Stipulation on June 12, 2008.

At hearing, Petitioner testified on his own behalf and presented the testimony of Connie Counts and Steven Counts. Petitioner offered Exhibits numbered 1 through 5 and 7 through 9, including the depositions of Dr. Hany Falestiny and Richard Morrison, which were admitted into evidence. Respondent presented the testimony of Richard Morrison. Respondent did not offer any exhibits.

A Transcript consisting of one volume was filed on July 3, 2008. The parties timely filed Proposed Recommended Orders, which were considered in the preparation of this Recommended Order. All references to the Florida Statutes are to 2007 unless otherwise indicated.

FINDINGS OF FACT

Stipulated Facts

1. From January 1988 through February 1993, Petitioner was licensed by the State of Florida as a land surveyor with license number LS4480.

2. On March 1, 1993, Petitioner's license was rendered delinquent, due to nonpayment and no proof of Continuing Education (CE) credits.

3. The next renewal period ended April 30, 1995. On March 8, 1995, Petitioner submitted a check in the amount of \$755.00 to the Board, to cover renewal and delinquent fees.

4. The bank failed to honor that check. Petitioner submitted payment of \$792.95 on June 1, 1995. That payment was accepted by the Board.

5. On September 16, 1998, the Department entered Petitioner's license as null and void in its computer.

6. After the time Petitioner's license became null and void, the educational requirements for licensure as a Florida surveyor changed and Petitioner would not have qualified if

applying for the first time based on those educational requirements.

7. Petitioner completed the following CE courses as follows:

February 12, 1993-6 hours

February 13, 1993-6 hours

April 22, 1994-6 hours

April 23, 1993-6 hours

April 27, 1994-6 hours

June 12, 1997-6 hours

8. In 2005, the Legislature amended Section 455.271, Florida Statutes, to allow a Board to reinstate the "null and void" license of an applicant.

9. In September 2007, Petitioner applied for reinstatement under the new provisions of law, paid the applicable fee and provided a packet of information to the Board.

10. On October 11, 2007, Petitioner appeared before the Board regarding his application for reinstatement and testified regarding why he believed he met the requirements of the statute to have his license reinstated. Petitioner provided the Board with a written time-line explaining when he was licensed, when his license became delinquent, and then null and void, and why he believed that his illness contributed directly to his inability to complete the continuing education requirements

earlier that would have prevented his license from becoming null and void.

11. After questioning Petitioner, the Board voted to deny him reinstatement and issued a Notice of Intent to Deny on November 19, 2007, which reads in pertinent part:

Petitioner, John C. Counts, Jr., has failed to present evidence of a good faith effort to comply with the license renewal statutes and rules, and failed to prevent evidence that rises to the level of illness or unusual hardship that would justify the failure to renew the license.

12. During the time period in question, Petitioner suffered from severe obstructive sleep apnea; however, Petitioner was not diagnosed with the disease until 1999.

13. During the period that his license was null and void, Petitioner has participated in activities related to mapping and surveying, but only within the parameters of Section 472.003, Florida Statutes, and with an associate licensed by the Board.

Facts based upon evidence of record

14. During the mid-1980's, Petitioner began to notice that he was suffering from sleepiness during the day and had difficulty staying awake during meetings and while driving. In 1985, Petitioner was dismissed from a job he had held for six years with a surveying/engineering firm for sleeping on the job.

15. After receiving his surveyor's license from the Board in 1988, he went to work as a surveyor with a company in Gainesville, Florida. He stayed with that company for a little over a year. He left that company because of concerns with his driving. That is, he felt he was losing focus while making the commute between his job in Gainesville and his home in Ocala, and felt he actually slept through parts of the drive. Additionally, the company was considering relocating to Orlando, which would have made his commute even longer and more of concern.

16. In 1989, Petitioner opened his own surveying business.

17. In the winter of 1993, Petitioner determined that he had not acquired the required number of CE credits to renew his license. Because of the demands of his small business, his concerns about his driving because of drowsiness, and difficulty paying attention in CE classes, he determined that he could not get all the credits he needed in a timely fashion.

18. Accordingly, Petitioner closed his surveying business and started working odd jobs. Petitioner hoped to attend classes over time to gain the necessary CE credits to get his license reactivated.

19. Petitioner attempted to acquire the necessary CE credits to get his license restored. He attended and obtained 12 CE hours in March 1993. In 1994, he attended and obtained

18 CE hours from classes given near his home. However, many courses were offered around the state and he did not feel safe driving to seminars or courses in cities that were farther away from home. He was having trouble staying awake during the courses and felt that he disturbed other persons around him with his snoring as well as not giving his instructors the respect they deserved.

20. During this time, Petitioner was experiencing other symptoms as well. After work, he would fall asleep if he sat down for any length of time. He was very irritable and short with his wife and children, and he was having more and more difficulty getting out of bed.

21. Connie Counts is Petitioner's wife. She recalls that during this period of time, her husband could not stay awake during the day and even fell asleep during meals. He gained weight and his snoring got worse; Mrs. Counts could hear his snoring even when she was outside the house. He had trouble driving and often would have others drive him home. She recalls driving in a car behind her husband's car and watching him swerve off the road and swerve towards the center line. Mrs. Counts' testimony in this regard is accepted as credible.

22. Petitioner did not go to the doctor for the symptoms he was experiencing. During this time, neither he nor Mrs. Counts understood that he might have a disease that would

cause these symptoms. Moreover, the Counts did not have health insurance and only went to the doctor for specific ailments.

23. Petitioner made more attempts to get CE credits in 1997 when he completed one course for six hours of CE credit. He slept through part of the course, disturbed other class members, and was embarrassed by his actions.

24. During this period of time, Petitioner was not aware of any correspondence or Internet courses available for purposes of obtaining the necessary CE credits. The courses were most often available in places requiring travel, which was problematic given his concerns about driving.

25. In the fall of 1998, Petitioner was hired by Marion County in a full-time position with health insurance benefits. He was required to locate and go to a primary care physician. Petitioner's primary care physician referred him to a pulmonary physician who is an expert in sleep disorders, Dr. Hany Falestiny.

26. Dr. Falestiny first saw Petitioner in June 1999. He ordered a sleep study for Petitioner; this entailed Petitioner's going to a local hospital for the night. During the study which took place in August 1999, Petitioner was "hooked up" to several monitors measuring his brain waves, oxygen levels, and heart.

27. Petitioner's condition was so severe that the sleep study was halted halfway through the first night and he was required to wear a continuous positive airway pressure (CPAP) device immediately.

28. The study revealed that Petitioner's blood oxygen level dropped to 65, which is considered to be quite severe desaturation, and potentially dangerous. He had an apnea hypopnea index (AHI) rating of 84 (he stopped breathing 84 times an hour). An AHI rating over 30 is considered severe.

29. As a result of the study, Dr. Falestiny diagnosed Petitioner with Severe Obstructive Sleep Apnea (severe sleep apnea).

30. Patients with severe sleep apnea, such as Petitioner's, often have excessive sleepiness during the day because of the frequency that their brain gets stimulated at night due to the patient's stopping breathing, resulting in the inability to experience deep sleep. There is also concern that patients with severe sleep apnea may develop other serious health conditions such as stroke, heart attacks, or related problems.

31. Severe sleep apnea can cause one to fall asleep while driving. After being diagnosed with severe sleep apnea, Dr. Falestiny informed Petitioner that if he ever ceased

treatment for the disease, Dr. Falestiny would report him to the driver's license agency.

32. Because of the nature and severity of his condition, Petitioner continues to use the CPAP device and continues to be a patient of Dr. Falestiny.

33. The preponderance of the evidence establishes that while Petitioner did not receive a diagnosis of severe sleep apnea until 1999, he experienced symptoms consistent with the disease as far back as the mid-1980's.

34. Petitioner made a good-faith effort to comply with the license renewal statutes and rules.

35. Petitioner's failure to comply with the license renewal statutes and rules was because of illness, i.e., severe sleep apnea.

36. Mr. Richard Morrison is Executive Director of the Board. Mr. Morrison acknowledged that Petitioner provided all information to the Board required by the applicable Board Rule. In Mr. Morrison's words, "He gave them all the information in the Rule. From that point on it was the Board's discretion as to whether he made a good-faith effort or not."

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this

proceeding in accordance with Sections 120.569 and 120.57(1), Florida Statutes.

38. The proceeding before the Division is de novo.
§ 120.57(1)(k), Fla. Stat.

39. In licensing cases, the burden is on the applicant to demonstrate entitlement to the requested license by a preponderance of the evidence. Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). In this instance, Petitioner, as an applicant for reinstatement, bears the burden of proof.

40. In the joint Pre-hearing Stipulation and in the Proposed Recommended Orders, the parties present argument as to whether the Board abused its discretion in its decision which resulted in its Intent to Deny letter. This argument is misplaced at this juncture. Because this is a de novo proceeding, it is intended to formulate final agency action, not to review action taken earlier and preliminarily. Haines v. Department of Children and Families, 983 So. 2d 602,606 (Fla. 5th DCA 2008) citing Department of Transportation v. J.W.C. Company, Inc., supra. Any review of the Board's discretion will be left to any appellate judicial review. See § 120.68(7)(e)1., Fla. Stat.

41. Section 455.271, Florida Statutes, reads in pertinent part as follows:

455.271(6)(b) Notwithstanding the provisions of the professional practice acts administered by the department, the board, or the department if there is no board, may, at its discretion, reinstate the license of an individual whose license has become void if the board or department, as applicable, determines that the individual has made a good faith effort to comply with this section but has failed to comply because of illness or unusual hardship. The individual must apply to the board, or the department if there is no board, for reinstatement in a manner prescribed by rules of the board or the department, as applicable, and shall pay an applicable fee in an amount determined by rule. The board, or the department if there is no board, shall require that such individual meet all continuing education requirements prescribed by law, pay appropriate licensing fees, and otherwise be eligible for renewal of licensure under this chapter.

42. Florida Administrative Code Rule 61G17-10.001 is entitled "Reinstatement of Null and Void License" and sets forth the information that a person seeking reinstatement must provide to the Board.

43. The Board's Executive Director acknowledged that Petitioner presented all the information required by the above Rule to the Board. The Notice of Intent to Deny was based on two things: that Petitioner failed to present evidence of a good faith effort to comply with the license renewal statutes and rules and that he failed to present evidence that rises to the level of illness that would justify the failure to renew the

license.^{1/}

44. The preponderance of the evidence established that Petitioner made a good-faith effort to comply with the license renewal statutes and rules, and that his failure to comply was due to an illness, i.e., severe obstructive sleep apnea, which justified his failure to renew.

RECOMMENDATION

Upon consideration of the facts found and the conclusions of law reached, it is

RECOMMENDED:

That a final order be entered granting Petitioner's application for reinstatement of his license as a land surveyor.

DONE AND ENTERED this 14th day of August, 2008, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of August, 2008.

ENDNOTE

1/ Other reasons for denial of Petitioner's application for reinstatement were suggested in Respondent's Proposed Recommended Order. However, only those reasons cited in the Notice of Intent to Deny will be addressed in this order.

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.