

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT WOOD, P.E.,)
)
 Petitioner,)
)
 vs.) Case No. 12-2900RU
)
 THE FLORIDA BOARD OF)
 PROFESSIONAL ENGINEERS AND THE)
 FLORIDA DEPARTMENT OF BUSINESS)
 AND PROFESSIONAL REGULATION,)
)
 Respondents.)
 _____)

FINAL ORDER

A final hearing was conducted in this case on November 29, 2012, in Tallahassee, Florida, before E. Gary Early, an administrative law judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Michael John McCabe, Esquire
Nicholas Martino, Esquire
McCabe Law Group, P.A.
1400 Prudential Drive, Suite 5
Jacksonville, Florida 32207

For Respondent Florida Board of Professional Engineers:

Michael T. Flury, Esquire
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399

For Respondent Department of Business
and Professional Regulation:

Garnett Chisenhall, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

The issue for disposition in this case is whether Respondents have implemented agency statements that meet the definition of a rule, but which have not been adopted pursuant to section 120.54.

PRELIMINARY STATEMENT

Petitioner, Robert Wood, P.E. (Petitioner), filed his Unadopted Rule Challenge (Petition) on September 4, 2012. The Petition alleged that the procedures by which disciplinary actions against professional engineers are assigned, investigated, and resolved contained the following "unadopted rules:"

1. the annual term of the contract between the Department of Business and Professional Regulation (DBPR) and the Florida Engineers Management Corporation (FEMC) by which FEMC performs certain administrative, investigative, and prosecutorial services, as "set forth in Sec. 1 of the 2001 FEMC Contract;"

2. that the determination of whether a complaint against a professional engineer is "legally sufficient" to begin an

investigation is made by the FEMC as described in section IV.F.1. of the Agreement between FEMC and DBPR, and section D.2. of the FBPE Board Training Manual; and

3. the imposition of "project review" as a condition of probation in disciplinary proceedings "[a]s shown by the published disciplinary records on the Board's website."

Petitioner asserted that the "statements" amount to rules under section 120.52(16), Florida Statutes, which must be adopted pursuant to section 120.54.

The case was scheduled for hearing to commence on September 27, 2012. On September 21, 2012, the parties filed a Joint Motion for Continuance, which was granted. On September 28, 2012, Petitioner filed a Motion to Set Final Hearing, which proposed a number of dates that were acceptable to the parties. Thereupon, the final hearing was scheduled for November 29, 2012.

The parties filed a Joint Prehearing Stipulation. The stipulation identified the "nature of the controversy" as "[w]hether Respondents' policies and procedures related to processing complaints against engineers, determining legal sufficiency of complaints, determining probable cause for prosecution of disciplinary actions and enforcing final disciplinary orders constitute unlawful un-adopted rules." The identification of the "controversy" differs in some degree from

the unadopted rules challenged in the Petition, particularly as to the determination of probable cause. The Transcript, including Petitioner's opening argument, recognized the focus of the case was as pled and described above, and the record is otherwise devoid of evidence regarding any unadopted rule governing the action of the FBPE probable cause panel. Based thereon, it is found that there are no issues beyond those pled in the Petition that have been tried by consent, and the issues for final consideration in this proceeding shall be those raised in the Petition.

The stipulation contained a number of contested issues of fact, some of which correspond neatly to the alleged agency statements challenged in the Petition, and some of which do not. The stipulated facts have been accepted and given the weight deemed appropriate to address the issues for consideration, and the stipulation has been otherwise considered in the preparation of this Final Order.

The final hearing was held as scheduled on November 29, 2012. At the hearing, Petitioner presented the testimony of Wendy Anderson, an investigator and public records clerk for the FEMC, and John Rimes, vice president and chief prosecuting attorney for the FEMC. Petitioner's Exhibits A-D, G, I, K-L, and R-V were received in evidence. Respondents presented no witness testimony or exhibits.

A one-volume Transcript of the final hearing was filed on December 14, 2012. By agreement of the parties, the date for filing proposed orders was set for January 30, 2013. The parties timely filed their Proposed Final Orders which have been considered in the preparation of this Final Order.

References to statutes are to Florida Statutes (2012) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner, Robert Wood, P.E., is a Florida-licensed professional engineer, holding license No. PE 31542. A large part of Petitioner's work involves the design of aluminum-framed structures.

2. Respondents, DBPR and FBPE, are charged with regulating the practice of professional engineering in the State of Florida, pursuant to chapters 455 and 471, Florida Statutes, and the rules promulgated thereunder, Florida Administrative Code Chapter 61G15.

3. The FEMC is a public-private partnership established by the legislature to provide administrative, investigative, and prosecutorial services to the FBPE. By statute, the FEMC operates under a written contract (Contract) with the DBPR, which Contract is approved by the FBPE.

Term of the Contract

4. From the creation of FEMC in 1997 until 2000, the legislature provided that the required written contract was to be "renewed annually."

5. In 2000, the legislature amended section 471.38 to require that the written contract be an "annual contract."

6. In 2003, the legislature again amended section 471.38 to repeal the requirement that the contract be an annual contract.

7. There is currently no specified term or time for renewal for the required written contract. The DBPR and the FEMC have elected to continue to enter written contracts with a term of one year.

Determination of Legal Sufficiency

8. Since its creation in 1997, section 471.038 has provided that "[t]he corporation may not exercise any authority specifically assigned to the board under chapter 455 or this chapter, including determining probable cause to pursue disciplinary action against a licensee, taking final action on license applications or in disciplinary cases, or adopting administrative rules under chapter 120." The only change to that restriction was made in 2000, when the term "corporation" was changed to "management corporation."

9. In 2000, the legislature also enacted the Management Privatization Act, section 455.32, Florida Statutes. That Act was intended to establish a model for the creation of non-profit corporations with which the DBPR could contract for "administrative, examination, licensing, investigative and prosecutorial services to any board created within the department." The similarities between section 471.38 and section 455.32 make it obvious that the latter was largely patterned after the former.

10. Among the duties to be performed by a "corporation" under section 455.32(10) is to:

. . . make a determination of legal sufficiency to begin the investigative process as provided in s. 455.225. However, the department or the board may not delegate to the corporation, by contract or otherwise, the authority for determining probable cause to pursue disciplinary action against a licensee, taking final action on license actions or on disciplinary cases, or adopting administrative rules under chapter 120.

11. In previous years, at least through 2001, the written contract between the DBPR and the FEMC provided that "FEMC shall not exercise the police powers inherent in the Department and the FBPE including a determination of legal sufficiency or insufficiency of a disciplinary complaint."

12. At some time after the passage of the Management Privatization Act, the contractual "police powers" restriction

was changed, and now reads, as reflected in the current Contract, as follows:

Except when providing those prosecutorial and investigative services set forth in this Agreement, FEMC shall not exercise the police powers inherent in the Department and the FBPE under Chapters 455 or 471, Florida Statutes, including determining probable cause to pursue disciplinary action against a licensee, other than failure to comply with final orders of the Board as set forth in Rule 61015-18.005(2), Florida Administrative Code, taking final action on license applications or in disciplinary cases, or adopting administrative rules under Chapter 120, Florida Statutes. Prosecutorial servicing shall only be executed in the name of FBPE.

That contractual restriction is consistent with the statutory limitation on the powers of the FEMC set forth in section 471.38.

13. In its current form, the Contract establishes the services that are to be provided by FEMC to the DBPR and the FBPE. The list of prosecutorial services to be provided by FEMC include coordinating with investigators, reviewing and taking "appropriate action" on complaints, and preparing cases for presentation to the FBPE probable cause panel. The list of investigative services to be provided by FEMC include receiving complaints, interviewing complainants, witnesses, and subjects of complaints, issuing subpoenas, preparing investigative

reports, and taking other actions leading to the prosecution of a case.

14. The Contract does not specifically address the issue of determining legal sufficiency.

15. The typical procedures of the FEMC in performing its investigatory functions are initiated when the FEMC receives a complaint by various means, including telephone, e-mail, or submission of a written complaint. Written complaints are normally directed to the FEMC chief prosecutor, who assigns them to an investigator for initial review. If the complaint is verbal, the investigator fielding the call will ask the complainant to file a written complaint.

16. If a complaint is unaccompanied by information to substantiate the claims, the investigator typically requests supporting documentation, which may be a set of engineering plans, a report, or similar evidence of the facts underlying the complaint.

17. In a procedure implemented by the FEMC in 2012, after receipt of the complaint and supporting documentation, the investigator forwards the complaint to an engineering expert retained by FEMC for a pre-review. The expert prepares a preliminary report which is then considered in the determination of legal sufficiency. Prior to implementation of the 2012 pre-review procedure, the determination of legal sufficiency was

made without the benefit of a pre-review report in the manner otherwise described below.

18. After receipt of the complaint, the supporting documentation, and, since 2012, the pre-review report, the investigator presents the complaint to the FEMC chief prosecutor.

19. If the chief prosecutor determines that the complaint is not legally sufficient, the investigator is instructed to draft a memorandum for the chief prosecutor to review, which is in turn submitted to the FBPE Executive Director for signature.

20. If the chief prosecutor determines that the complaint is legally sufficient, he or she verbally authorizes the investigator to place the engineer on notice of the investigation. At that point, the complaint is investigated using the investigative tools available to FEMC as set forth in the Contract.

21. If sufficient evidence that a violation has occurred is found, the investigation culminates in a recommendation to the FBPE probable cause panel for a decision as to whether the panel believes there to be probable cause to proceed with disciplinary action. The decision to proceed with a disciplinary proceeding requiring a point of entry to challenge the action is entirely that of the FBPE probable cause panel.

Probationary Project Review

22. On November 4, 2009, FBPE entered a disciplinary final order regarding Petitioner that incorporated a stipulated settlement agreement, and imposed sanctions on Petitioner, including probation. By his entry of the settlement stipulation, Petitioner agreed to a "project review" at six and eighteen-month intervals.

23. The project review consisted of the submission by Petitioner of a list of all completed projects. That list was provided to an engineering expert, who then selected two of the projects for a more comprehensive review. The steps to be performed by Petitioner and the FBPE are generally described in Project Review Process Guidelines that were provided to Petitioner by FBPE as an attachment to the notice of the two projects selected for comprehensive review.

24. As a result of the project review, the two projects were determined to violate engineering standards, which resulted in the FEMC making a recommendation of probable cause to the FBPE probable cause panel. The probable cause panel found probable cause, leading to the issuance of an Administrative Complaint against Petitioner.

25. Petitioner introduced evidence of one other case in which a project review was required as a condition of probation. In that case, an administrative law judge, after having

determined that the professional engineer committed violations of section 471.033 and Florida Administrative Code Rule 61G15-19.001, recommended imposition of "probation for two years with appropriate conditions for this case." The Final Order, entered on March 12, 2008, imposed the recommended probation "with a plans review at 6 months and 18 months from the date of this Order." The basis for the imposition of that sanction was not explained. There was no evidence introduced at the final hearing as to any other specific case in which a project review was required, other than the case involving Petitioner.

26. The 2012 FEMC Annual Report, which is a business record of the FEMC, indicated that between July 1, 2011 and June 30, 2012, the FEMC was involved in the investigation and/or prosecution of 32 cases in which Administrative Complaints were filed against engineers. Disciplinary sanctions imposed against engineers during that one-year period included, among others, twenty-five reprimands, six license suspensions, eight probations, seven license restrictions, two voluntary license relinquishments, and four license revocations. Also included among the sanctions imposed during that period were three project reviews.

27. The sanction of project review is one that is, statistically, used sparingly by the FBPE. There was no evidence introduced to establish the criteria, if any, for the

imposition of a project review as a condition of probation, or to demonstrate that it was generally applied in any specific circumstances.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

29. Section 120.54(1)(a) provides, in pertinent part, that “[r]ulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.”

30. Section 120.52(16) defines a rule, in pertinent part, as:

. . . each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

31. An agency statement is “generally applicable” if it is intended by its own effect to create rights, or to require compliance, or otherwise have the direct and consistent effect of law. Coventry First, LLC v. Ofc. of Ins. Reg., 38 So. 3d 200

(Fla. 1st DCA 2010) (quoting McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 581 (Fla. 1st DCA 1977)). Furthermore:

"An agency statement that either requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law is a rule." Vanjaria, 675 So. 2d at 255. When deciding whether a challenged action constitutes a rule, a court analyzes the action's general applicability, requirement of compliance, or direct and consistent effect of law. Volusia Cnty. Sch. Bd. v. Volusia Home Builders Ass'n, Inc., 946 So. 2d 1084, 1089 (Fla. 5th DCA 2006).

Fla. Dep't of Fin. Servs. v. Cap. Collateral Reg'l Counsel-Middle Region, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

32. Section 120.56(4)(a) provides, in pertinent part, that "[a]ny person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a)."

33. Petitioner has the burden of establishing by a preponderance of the evidence that the challenged agency statements constitute unadopted rules. Dravo Basic Material Co. v. Dep't of Transp., 602 So. 2d 632 (Fla. 2d DCA 1992); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

34. Petitioner alleges that the following agency statements are rules, as defined by section 120.52(16): (1) the provision of the Contract establishing a contractual term of one

year; (2) section IV.F.1. of the Contract and Section D.2. of the FBPE Board Training Manual that describe the process by which the FEMC makes the initial determination of legal sufficiency of a complaint against an engineer; and (3) the imposition of "project review" as a condition of probation in disciplinary proceedings.

Standing

35. In order to demonstrate standing to challenge the Respondents' alleged agency statements as unadopted rules, Petitioner must meet the two-pronged test for standing in formal administrative proceedings established in the seminal case of Agrico Chemical Corp. v. Dep't of Env'tl. Reg., 406 So. 2d 478 (Fla. 2d DCA 1981). In that case, the Court held that:

We believe that before one can be considered to have a substantial interest in the outcome of the proceeding, he must show 1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Id. at 482. The standing requirements described in Agrico are applicable to rule challenges, including unadopted rule challenges, brought pursuant to section 120.56. Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st DCA 2005).

36. The injury necessary to support standing cannot be speculative, nonspecific, hypothetical, or lacking in immediacy or reality. All Risk Corp. of Fla. v. State Dep't of Labor & Emp. Sec., Div. of Workers' Comp., 413 So. 2d 1200, 1202 (Fla. 1st DCA 1982); Fla. Dep't of Offender Rehab. v. Jerry, 353 So. 2d 1230, 1235 (Fla. 1st DCA 1978).

37. The standing requirement established by Agrico has been refined, and now stands for the proposition that standing to initiate an administrative proceeding is not dependent on the ultimate success of the challenge to a governmental action. Instead, standing requires proof that Petitioner has a substantial interest and that the interest reasonably could be affected by the proposed agency action. Whether the effect would constitute a violation of applicable law is a separate question.

Standing is "a forward-looking concept" and "cannot 'disappear' based on the ultimate outcome of the proceeding." . . . When standing is challenged during an administrative hearing, the petitioner must offer proof of the elements of standing, and it is sufficient that the petitioner demonstrate by such proof that his substantial interests "could reasonably be affected by . . . [the] proposed activities." (emphasis in original)

Palm Beach Cnty. Env'tl. Coal. v. Fla. Dep't of Env'tl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009) (citing Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.,

18 So. 3d 1079, 1083 (Fla.2nd DCA 2009)) and Hamilton Cnty. Bd. of Cnty. Comm'rs v. State Dep't of Env'tl. Reg., 587 So. 2d 1378 (Fla. 1st DCA 1991)).

38. Except as it pertains to the issue regarding the term of the contract, which is addressed below, Petitioner has standing to challenge the agency statements at issue as unpromulgated rules. Petitioner has made sufficient allegations that he has been adversely affected by Respondent's agency statements regarding professional discipline, and as a licensed professional engineer remains subject to those agency statements. Thus, Petitioner meets the immediate injury prong. Petitioner also meets the second prong of the Agrico test, as he is within the zone of interest to be protected or regulated by the disciplinary rules and policies applicable to professional engineers. Jacoby v. Fla. Bd. of Med., 917 So. 2d at 360.

Term of the Contract

39. Petitioner has failed to demonstrate that the term of the Contract between DBPR and the FEMC requires compliance, creates rights while adversely affecting others, or otherwise has the direct and consistent effect of law.

40. For the reasons set forth herein, the provision of the Contract that establishes an annual term is not a "rule" as defined in section 120.52(16), subject to challenge under section 120.56(4).

41. Petitioner has failed to demonstrate that the term of the Contract could result an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing. The argument that a contract "fixed in perpetuity" is necessary to prevent the regulated community from being "left to guessing as to what might be in a future contract" is not sufficient to show any injury or any immediacy that would establish standing.

42. For the reasons set forth herein, Petitioner does not have standing to challenge the provision of the Contract that establishes its term.

Determination of Legal Sufficiency

43. Section 455.225 provides, in pertinent part, that:

Disciplinary proceedings for each board shall be within the jurisdiction of the department.

(1)(a) The department, for the boards under its jurisdiction, shall cause to be investigated any complaint that is filed before it if the complaint is in writing, signed by the complainant, and legally sufficient. A complaint is legally sufficient if it contains ultimate facts that show that a violation of this chapter, of any of the practice acts relating to the professions regulated by the department, or of any rule adopted by the department or a regulatory board in the department has occurred. In order to determine legal sufficiency, the department may require supporting information or documentation. The department may investigate, and the department or the appropriate board may take appropriate final action on, a complaint even though the original complainant

withdraws it or otherwise indicates a desire not to cause the complaint to be investigated or prosecuted to completion. The department may investigate an anonymous complaint if the complaint is in writing and is legally sufficient, if the alleged violation of law or rules is substantial, and if the department has reason to believe, after preliminary inquiry, that the violations alleged in the complaint are true. The department may investigate a complaint made by a confidential informant if the complaint is legally sufficient, if the alleged violation of law or rule is substantial, and if the department has reason to believe, after preliminary inquiry, that the allegations of the complainant are true. The department may initiate an investigation if it has reasonable cause to believe that a licensee or a group of licensees has violated a Florida statute, a rule of the department, or a rule of a board.

* * *

(2) The department shall allocate sufficient and adequately trained staff to expeditiously and thoroughly determine legal sufficiency and investigate all legally sufficient complaints. When its investigation is complete and legally sufficient, the department shall prepare and submit to the probable cause panel of the appropriate regulatory board the investigative report of the department. The report shall contain the investigative findings and the recommendations of the department concerning the existence of probable cause

44. Section 455.32, the Management Privatization Act, was created to establish a model for DBPR to contract "with nonprofit corporations to provide administrative, examination,

licensing, investigative, and prosecutorial services to any board created within the department pursuant to chapter 20 in accordance with the provisions of this chapter and the applicable practice act.”

45. Section 455.32(10), Florida Statutes, provides that:

The corporation may exercise the authority assigned to the department or board under this section or the practice act of the relevant profession, pursuant to the contract, including but not limited to initiating disciplinary investigations for unlicensed practice of the relevant profession. The corporation may make a determination of legal sufficiency to begin the investigative process as provided in s. 455.225. However, the department or the board may not delegate to the corporation, by contract or otherwise, the authority for determining probable cause to pursue disciplinary action against a licensee, taking final action on license actions or on disciplinary cases, or adopting administrative rules under chapter 120.

46. An investigation is a process, and not a discrete act. The language in section 455.32(10), even though not directly applicable to the FEMC because of its later enactment, leads the undersigned to conclude that the determination of legal sufficiency is within the continuum of an “investigation,” and is therefore within the FEMC’s legislatively delegated powers and duties “to provide administrative, investigative, and prosecutorial services” to the FBPE, subject to the entry of a written contract with the DBPR.

47. The decision to proceed with an investigation has no direct effect on Petitioner's substantial interests. At most, the investigation can result in a recommendation to a panel of the FBPE which has authority to make the decision to proceed with enforcement. It is that act, rather than the preliminary investigatory step of determining the legal sufficiency of a complaint filed by a third party, that may affect Petitioner's substantial interests.

48. It is well established that "[a] recommendation which, standing alone, does not 'require compliance, create certain rights while adversely affecting others, or otherwise have the direct and consistent effect of law,' does not constitute a rule." Fla. Dep't of Fin. Servs. v. Capital Collateral Reg'l Counsel-Middle Region, 969 So. 2d at 530 (citing Volusia Co. Sch. Bd. v. Volusia Home Builders Ass'n, Inc., 946 So. 2d 1084, 1090 (Fla. 5th DCA 2006)). Furthermore, "merely conducting and reporting on an investigation does not amount to promulgating a rule which can be preemptively challenged prior to any attempt by an agency at enforcement." Id. at 531.

49. Petitioner failed to prove that the DBPR's contractual assignment of the preliminary investigative step of determining legal sufficiency to the FEMC, an act required as part of the investigatory process under section 455.225, in and of itself

creates rights in Petitioner while adversely affecting others, or otherwise has the direct and consistent effect of law.

50. For the reasons set forth herein, the terms of the Contract and the FBPE Board Training Manual that describes the process by which investigations are to occur, including the initial determination of legal sufficiency, are not "rules" as defined in section 120.52(16), subject to challenge under section 120.56(4).

Probationary Project Review

51. Section 455.227(2) establishes the penalties that may be imposed for a violation of that section or the applicable professional practices act, including that for the practice of engineering under chapter 471, and provides, in pertinent part, that:

When the board, or the department when there is no board, finds any person guilty of the grounds set forth in subsection (1) or of any grounds set forth in the applicable practice act, including conduct constituting a substantial violation of subsection (1) or a violation of the applicable practice act which occurred prior to obtaining a license, it may enter an order imposing one or more of the following penalties:

* * *

(f) Placement of the licensee on probation for a period of time and subject to such conditions as the board, or the department when there is no board, may specify. Those conditions may include, but are not limited to, requiring the licensee to undergo

treatment, attend continuing education courses, submit to be reexamined, work under the supervision of another licensee, or satisfy any terms which are reasonably tailored to the violations found.

52. Section 471.033(3) establishes the penalties that may be imposed for a violation of chapter 471, and provides, in pertinent part, that:

When the board finds any person guilty of any of the grounds set forth in subsection (1), it may enter an order imposing one or more of the following penalties:

* * *

(e) Placement of the licensee on probation for a period of time and subject to such conditions as the board may specify.

53. Section 455.2273(1), Florida Statutes, provides that:

Each board, or the department when there is no board, shall adopt, by rule, and periodically review the disciplinary guidelines applicable to each ground for disciplinary action which may be imposed by the board, or the department when there is no board, pursuant to this chapter, the respective practice acts, and any rule of the board or department.

54. Florida Administrative Code Rule 61G15-19.004(1), which establishes the guidelines for FBPE disciplinary matters, provides that:

The Board sets forth below a range of disciplinary guidelines from which disciplinary penalties will be imposed upon practitioners (including holders of certificate of authorization) guilty of violating Chapter 471, F.S. The purpose of

the disciplinary guidelines is to give notice to licensees of the range of penalties which will normally be imposed upon violations of particular provisions of Chapter 471, F.S. . . . All impositions of probation as a penalty shall include successful completion of the Engineering Law and Rules Study Guide, completion of a Board-approved course in Engineering Professionalism and Ethics, and an appearance before the Board at the option of the Board at the end of the probationary period. Other terms may be imposed by the Board at its discretion.

55. Petitioner has raised a legitimate question regarding the imposition of a "project review" as described herein as a condition of probation under the imprecise and discretionary "catch-all" provisions contained in the cited statutes and rules. However, whether there may be authority for the imposition of a project review on a case-by-case basis is not the question at issue here.

56. The evidence in this case demonstrates that project review is a sanction that is imposed sparingly, and for which no evidence of the grounds for its imposition was offered. Petitioner failed to prove that the imposition of a project review as a condition of probation was a statement of general applicability, or that it creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law.

57. For the reasons set forth herein, the imposition of a project review as a sanction in a disciplinary case is not a "rule" as defined in section 120.52(16), subject to challenge under section 120.56(4).

Constitutional Issues

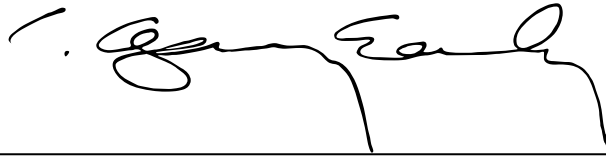
58. Interspersed throughout Petitioner's Proposed Final Order is the argument that the FEMC's initial determinations of legal sufficiency of complaints, whether made pursuant to section 471.38 or pursuant to the agency statements described herein, are the result of an unconstitutional delegation of the state's police powers to a private entity. An argument of this nature is not within the authority of the undersigned to decide in a section 120.56 rule challenge proceeding, even though exhaustion of administrative remedies may be required before proceeding with a constitutional challenge in an Article V court. Key Haven Associated Enter., Inc. v. Bd. of Trs. of the Int. Imp. Trust Fund, 427 So. 2d 153, 157 (Fla. 1982); Sarnoff v. Fla. Dep't of High. Saf. & Motor Veh., 825 So. 2d 351 (Fla. 2002); Fla. Fish & Wildlife Conser. Comm'n v. Pringle, 838 So. 2d 648 (Fla. 1st DCA 2003). Therefore, no ruling is made as to the facial constitutionality of section 471.38, or of the application of that section by Respondents as alleged in this proceeding.

ORDER

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

ORDERED that the Unadopted Rule Challenge is dismissed.

DONE AND ORDERED this 20th day of February, 2013, in Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of February, 2013.

COPIES FURNISHED:

Michael John McCabe, Esquire
McCabe Law Group, P.A.
Suite 5
1400 Prudential Drive
Jacksonville, Florida 32207

Philip J. Stoddard
North Star Associates, LLC
320 High Tide Drive
St. Augustine, Florida 32080

Michael Todd Flury, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

John Jefferson Rimes, III, Esquire
Board of Professional Engineers
Florida Engineers Management Corp.
Suite B-112
2639 North Monroe Street
Tallahassee, Florida 32303

Garnett Wayne Chisenhall, Esquire
Department of Business and
Professional Regulation
Suite 42
1940 North Monroe Street
Tallahassee, Florida 32399

Ken Lawson, Secretary
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399

Zana Raybon, Executive Director
Department of Business and
Professional Regulation
Board of Professional Engineers
Suite B-112
2639 North Monroe Street
Tallahassee, Florida 32303-5268
(e-served)

J. Layne Smith, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399
(e-served)

Liz Cloud, Program Administrator
Administrative Code
Department of State
R.A. Gray Building, Ste. 101
Tallahassee, Florida 32399
(e-served)

Mr. Ken Plante, Coordinator
Joint Admin Procedural Committee
Room 680, Pepper Building
111 West Madison Street
Tallahassee, Florida 32399
(e-served)

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 one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second 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 Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.