

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA BOARD OF PROFESSIONAL
ENGINEERS,

Petitioner,

vs.

Case No. 13-1842PL

JOSEPH POTTS, P.E.,

Respondent.

_____ /

RECOMMENDED ORDER

A final hearing was held in this matter before David M. Maloney, Administrative Law Judge with the Division of Administrative Hearings, on July 11, 2013. The hearing was conducted by video teleconferencing at sites located in Tallahassee and Lauderdale Lakes.

APPEARANCES

For Petitioner: John Jefferson Rimes, III, Esquire
Florida Engineers Management Corporation
2639 North Monroe Street, Suite B-112
Tallahassee, Florida 32303

For Respondent: Joseph Potts, P.E., pro se
4440 Northeast 13th Avenue
Fort Lauderdale, Florida 33334

STATEMENT OF THE ISSUE

Whether Joseph Potts violated statutes and rules governing the practice of engineering as charged in the Amended

Administrative Complaint filed with the Clerk of the Florida Board of Professional Engineers (the "Board") on April 24, 2013.

PRELIMINARY STATEMENT

At the final hearing, the Board presented the testimony of Robert Monsour, P.E.; Wendy Anderson, investigator and public records clerk for Florida Engineers Management Corporation; and, Roger Jeffery, P.E., accepted as an expert in structural engineering. The Board offered nine exhibits, labeled Petitioner's Exhibits 1-9. All were admitted into evidence. Respondent presented his own testimony and offered seven exhibits labeled Respondent's Exhibits 1-7. Respondent's Exhibits 1, 3, 5, 6, and 7 were admitted. Respondent's Exhibits 2 and 4 were ruled inadmissible in light of objections by the Board.

A Transcript was filed on July 22, 2013. After the hearing, Petitioner and Respondent filed their proposed findings of fact and conclusions of law in a timely manner. Their proposed orders have been given due consideration.

FINDINGS OF FACT

Stipulated Facts

1. A Joint Pre-hearing Stipulation (the "Stipulation") was filed by the parties on July 9, 2013.

2. The Stipulation contains a section denominated "Admitted facts" (the "Admitted Facts").

3. The Admitted Facts are contained in seven paragraphs of the Stipulation as follows:

1. Petitioner, Florida Board of Professional Engineers, is charged with regulating the practice of engineering pursuant to Chapter 455, Florida Statutes. This complaint is filed by the Florida Engineers Management Corporation (FEMC) on behalf of Petitioner. FEMC is charged with providing administrative, investigative, and prosecutorial services to the Florida Board of Professional Engineers pursuant to Section 471.038, Florida Statutes (1997).

2. Respondent is, and has been at all times material hereto, a licensed professional engineer in the State of Florida, having been issued license number PE 22656. Respondent's last known address is 4440 NE 13th Ave., Ft. Lauderdale, FL 33334.

3. On November 23, 2011 Respondent sealed, signed and dated engineering documents for an aluminum canopy and screen enclosure for a Residence located at 7603 NW 167 Street, Miami (the Project). The documents consisted of two (2) pages of engineering design documents (Drawings) and five (5) pages of engineering calculations (Calculations). The Calculations provided the engineering basis for the structural design assumptions contained in the Drawings.

4. The Calculations were identical copies of calculations that were originally prepared and signed and sealed on May 23, 2011 by another Professional Engineer, Robert Mansour [sic], for another aluminum canopy and screen enclosure which was located at 15265 SW 36 Terrace, Miami, Fl.[sic] Respondent simply reproduced and then sealed the Mansour [sic] calculations for the Project.

5. To meet acceptable engineering standards the Calculations must have met the following requirements:

A. They must be susceptible to rational analysis in accordance with well-established principles of mechanics and sound engineering practice.

B. They must be mathematically correct.

C. They must clearly state any material assumptions, if those assumptions are not obvious.

D. They must accurately model the actual physical conditions in the area which they profess to address - in this case the Drawings.

E. They must recognize and deal with all critical structural conditions in the area they profess to address - in this case the Drawings.

6. Section 471.033(1)(j), Florida Statutes, provides that a Professional Engineer's license is subject to disciplinary action by the Board for ". . . affixing or permitting to be affixed his or her seal, name, or digital signature to any final drawings, specifications, plans, reports, or document that were not prepared by him or her or under his or her responsible supervision, direction, or control." Rule 61G15-19.001(6)(j), Florida Administrative Code, provides that it is misconduct in the practice of engineering for a Professional Engineer to affix his seal and/or signature to plans, specifications, drawings or other documents required to be sealed pursuant to 471.024(1), Florida statutes, when such documents have not been personally prepared by the engineer or prepared under his responsible supervision, direction and control.

7. Section 471.033(1)(g), Florida Statutes, provides that an engineer is subject to discipline for engaging in negligence in the practice of engineering. Rule 61G15-19.001(4), Fla. Admin Code, provides that negligence constitutes "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."

Joint Pre-Hearing Stipulation, filed July 9, 2013.

The Stipulation's Contested Facts

4. The Stipulation also contains a section denominated "Contested issues of fact." See Joint Pre-Hearing Stipulation, section g., at 5-6. Among them are those under the heading, "Respondent's Statement":

Respondent states he took no actions in this Project.

Respondent states he had no involvement in the final engineering documents for this project.

* * *

Respondent states he had not [sic] involvement in this project.

Id. at 6.

5. The Respondent's Statement in section g. of the Stipulation contravenes matters contained in the Stipulation's Admitted Facts. (See "Disavowed Admitted Facts," below.)

6. Mr. Potts bolstered his written statements that he had taken no actions in the Project and was not involved in it,

when, under oath at the hearing, he averred that he had not been involved in the Project (a disavowal of the Stipulation's Admitted Facts crucial to the outcome of the case).

Disavowed Admitted Facts

7. At the final hearing, Mr. Potts under oath disavowed the first sentence of Stipulated Fact No. 3 (that he "signed, sealed and dated engineering documents for an aluminum canopy and screen enclosure for a Residence located at 7603 NW 167 Street, Miami (the Project)").

8. In sworn testimony, Mr. Potts also disavowed the second sentence of Admitted Fact No. 4 (that he "simply reproduced and then sealed the Mansour [sic] calculations for the Project").

9. With regard to these matters, Mr. Potts, after having been placed under oath, testified:

My whole case is based on the fact that I had nothing to do with this -- with this job, and then someone else placed a seal on the work and ID stamp on the work, and they did it incorrectly

I have nothing at all to do with these jobs. Someone else was involved that -- besides Monsour, someone also was involved with placing these seals.

Hr'g Tr. 51-52.

10. When asked who "someone else" might be, Mr. Potts stated under oath, "Well, I don't want to implicate anybody, but perhaps the contractor." Hr'g Tr. 52.

11. On cross-examination, Mr. Potts, still under oath, reiterated that he had nothing to do with the Project when he testified that his work was primarily in Palm Beach and Broward counties and that "in the last year or two, I haven't signed any in Miami that I can recall." Hr'g Tr. 54.

Facts Adduced at Hearing

a. Complaint filed by Mr. Monsour

12. In May 2011, Robert Monsour, a professional engineer who designs aluminum structures, produced a set of engineering documents for an aluminum screened enclosure to be located at 15265 Southwest 36th Terrace, Miami, Florida (the "SW 36th Terrace Documents"). The documents included design drawings and six pages of hand-written calculations (the "SW 36th Terrace Calculations").

13. In March of 2012, Mr. Monsour received a telephone call from a Miami building official, June Willcott. Ms. Willcott told Mr. Monsour that a permit applicant had filed a set of engineering calculations as part of a permit application with the building department. The permit application was for a pool screen enclosure to be located at 7603 Northwest 167th Street, Miami (the "167th Street Property"). Ms. Willcott, in her capacity as a building official, is familiar with Mr. Monsour's work product. Her familiarity with his work led her to note that the calculations

for the 167th Street Property appeared to be identical to Mr. Monsour's work yet contained the seal and signature of another professional engineer. The seal and signature appeared to be that of Mr. Potts.

14. Approximately three weeks later, the owners of the 167th Street Property paid a visit to Mr. Monsour. They presented the 167th Street Property documents related to their property that purported to be signed and sealed by Mr. Potts. Mr. Monsour reviewed the documents. He noted that the calculations (the "167th Street Calculations") appeared to be copies of the SW 36th Terrace Calculations made by Mr. Monsour in May 2011, with a few modifications.

15. Mr. Monsour explained the modifications in the second set of calculations in his testimony:

[T]he calcs were intact for columns that are spaced on seven-foot centers, but the sketch that was submitted . . . had calcs spaced on nine-foot centers. So that didn't correspond. And also, the footing was changed from a 16-by-22 to 16-by-12

Hr'g Tr. 21. Otherwise, the six pages of the hand-written 167th Street Calculations appeared to be identical to the six pages of the SW 36th Terrace Calculations. Furthermore, but for the modifications detailed by Mr. Monsour, the two sets of calculations appeared to be in Mr. Monsour's writing, that is, the 167th Street Calculations appeared to be photocopies of the

SW 36th Terrace Calculations hand-written by Mr. Monsour with the few modifications detailed above.

16. The only other differences between the two sets of calculations related to identification information. The initial page of the SW 36th Terrace Calculations show that they were produced by Ramms Engineering, Inc., Mr. Monsour's Structural Design company located in Hialeah, Florida. The initial page of the 167th Street Calculations indicates they were produced by Mr. Potts as follows:

Joseph Potts, P.E.
4440 NE 13th Ave
Ft. Lauderdale Fl. 33334
954-772-1713

Petitioner's Ex. 4 at 000016.

17. Mr. Monsour observed that his seal and signature had been removed or covered over in the 167th Street Calculations. In place of Mr. Monsour's seal and signature, the initial page of the 167th Street Calculations now contained what purported to be the embossed seal and signature of Mr. Potts. See Petitioner's Ex. 4, baste-stamped 000016. Two additional pages of 167th Street Property documents also purported to be sealed and signed by Mr. Potts: Design Drawings of a "PROPOSED 3" INSULATED ROOF." See Petitioner's Ex. 3 and 4 at 000014 and 000015.

18. Mr. Monsour filed a complaint with the Florida Board of Professional Engineers against Respondent since the identification information (including the seals and signatures) appeared to be attributable to Mr. Potts, and Mr. Potts had neither obtained permission from Mr. Monsour nor notified him of intent to use the SW 36th Terrace Calculations.

b. Use of the Work of Another Engineer

19. Protocols must be followed for an engineer to properly utilize and incorporate original work of another engineer into a new project. The incorporating engineer must notify the original engineer. The incorporating engineer must review and analyze the original engineer's work to determine if it is applicable to the incorporating engineer's project before sealing and signing it.

20. Mr. Monsour was not notified that his work on the SW 36th Terrace project would be used for the 167th Street Property project.

21. The calculations in the 167th Street Property documents, furthermore, were not appropriate for the 167th Street Property Project. The inappropriateness was significant as explained by Mr. Jeffery in expert testimony at hearing. See Hr'g Tr. 38-43. Among the problems created by the inappropriateness of using the SW 36th Terrace Calculations (even in consideration of the two modifications) is that "the

beam is inadequate to resist the loads shown in the calculations." Hr'g Tr. 42. Simply put, the assumptions and analysis in the SW 36th Terrace Calculations were for an enclosure that was of a different size and scope than the enclosure at the 167th Street Property.

22. The 167th Street Calculations were materially deficient, moreover, because of inconsistency with the drawings in the 167th Street Property documents in the following ways:

(a) The drawings indicated a column spacing of nine feet. The calculations used a column spacing of seven feet. The incorrect length used in the calculations results in an overstress of the 2-by-5 beam that spans the nine feet between the columns. This error also results in a deflection in excess of the allowable deflection.

(b) The footing size required to resist the uplift is correctly calculated in the SW 36th Terrace Calculations. In contrast, the footing indicated on the corresponding page of the 167th Street Calculations is undersized and will not resist the calculated uplift forces.

A More Detailed Defense: Seal and Other Discrepancies

23. In addition to disclaiming involvement in the 167th Street Property Project, Mr. Potts offered details of the seal he claims to use currently as proof that he did not sign or seal the 167th Street Calculations.

24. The impression on the seal Mr. Potts claims to use currently contains the term "certificate" in its center. It is the term that identifies his engineering license along with a number uniquely assigned to him. In contrast, the impression on the 167th Street Property documents contains the word "license."

25. The abbreviation for "number" on the impression of the seal he uses currently is "NO" with both the "N" and the "O" in upper case. The abbreviation for "number" on the impression of the seal affixed to the 167th Street Property documents is "No" with only the "N" in upper case and the "o" in lower case.

26. The term "license," unlike the term in the seal Mr. Potts claims he uses currently, is the required term for seals of professional engineers in Florida. The use of the term "certificate" has been invalid for some 16 years.

27. Mr. Potts offered no documents that confirmed his use of the invalid seal he claims he now uses. But, it is not unusual for an engineer to possess several seals. And, it is certainly possible that Mr. Potts might possess a seal that is not up-to-date, however unlikely it would be that an engineer who strives to comply with the Board's rules might use a seal that has been outdated for such a length of time.

28. Mr. Potts pointed out another discrepancy in the 167th Street Property documents. The telephone number listed in the information in the heading of the initial page of the

calculations that identifies Mr. Potts as the Project's engineer transposes two of the numbers. The telephone number is shown as 954-772-1713 when, in fact, Mr. Potts' business telephone number is 954-772-1731.

Signature Evidence

29. Petitioner's Exhibit 6 contains six pages of documents retrieved from the records of the Florida Engineers Management Corporation, the custodian of disciplinary records for the Board of Professional Engineers. See Petitioner's Ex. 6 at 000029-000035. The documents had been submitted by Mr. Potts to the Board's custodian of records in "two separate disciplinary cases during his probationary period." Hr'g Tr. 33.

30. Each of the six pages contains Mr. Potts' signature. To the eye untrained in hand-writing analysis, the six signatures are similar to the signature that appears on the initial page of the 167th Street Calculations. See Petitioner's Ex. 4 at 000016.

31. There are some unusual characteristics that the signatures in Petitioner's Exhibit 6 have in common with the signatures on the 167th Street Calculations. For example, the signature over the seal on the initial page of the 167th Street Calculations is slanted upward much the same as the signature that appears in Petitioner's Exhibit 6 at 000033 (a page that contains a boxed-in heading, "FRAME CALCS"). In essence, the

signature and date on date-stamped page 000033 in Petitioner's Exhibit 6 (a page of frame calculations) is in a somewhat unusual manner similar to the signature over the seal on the initial page of the 167th Street Calculations.

CONCLUSIONS OF LAW

a. Jurisdiction

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

b. Clear and Convincing Evidence

33. Petitioner must prove the allegations of its administrative complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern and Co., Inc., 670 So. 2d 932 (Fla. 1996), Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

34. The "clear and convincing" standard requires:

[T]hat the evidence found must be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must 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.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

c. Strict Construction of Penal Statutes

35. "Statutes providing for the revocation or suspension of a license to practice are deemed penal in nature and must be strictly construed, with any ambiguity interpreted in favor of the licensee." Elmariah v. Dep't of Bus. & Prof'l Reg., 574 So. 2d 164, 165 (Fla. 1st DCA 1990).

d. Application of the Charges to the Facts

36. If Mr. Potts, contrary to his denials under oath, signed and sealed the 167th Street Documents, he is in violation of: section 471.033(1)(g),^{1/} as charged in Count I of the Administrative Complaint; and sections 471.003(1)(j) and 471.033(1)(a) [by violating rules 61G15-19.001(6)(j) and 61G15-29.001(3)], as charged in Count II.

37. The issue is whether Mr. Potts did, indeed, sign and seal the 167th Street Property documents. Other than making documents that purport to be signed, sealed and dated by Mr. Potts part of the evidentiary record, and providing documents in other projects that appear to match the signatures on the Project's documents, the Board did not prove a nexus between Mr. Potts and the 167th Street Property Project. It did not present the testimony of the owner or the contractor who might have hired Mr. Potts; nor did it offer documentary evidence, such as a written contract, an invoice or other billing record or a copy of a check paid to Mr. Potts for work on the project, which

might have demonstrated Mr. Potts' involvement in the Project. In contrast, Mr. Potts under oath denied involvement in the Project.

38. Ordinarily, parties are bound by facts admitted in a stipulation or are confined to the scope of issues they stipulate to be the issues in a case. See, e.g., Gandy v. Dep't of Offender Rehab., 351 So. 2d 1133 (Fla. 1st DCA 1977). The Stipulation in Mr. Potts' case, however, contains an internal conflict. The "Respondent's Statement" that Mr. Potts took no action with regard to the Project and had no involvement in it contravenes the Admitted Facts: 1) that Mr. Potts sealed, signed and dated the 167th Street Property Project's engineering documents; and 2) that Mr. Potts reproduced and then sealed Mr. Monsour's SW 36th Terrace Calculations. In sum, the Stipulation does not clearly and convincingly establish facts necessary to sustain the charges against Mr. Potts.

39. Without regard to whether the Admitted Facts stand or are nullified by the Stipulation's internal conflicts (or by Mr. Potts' subsequent sworn testimony), the Board argues that it proved the violations through the evidence presented in its case-in-chief: the 167th Street Property documents and the SW 36th Terrace Calculations; the testimony of Messrs. Monsour and Jeffery and Ms. Anderson; and the documentary evidence introduced through them, in particular, the signature evidence. In the wake

of the Board's evidence, however, the Board views Mr. Potts' defense to be that the 167th Street Property documents were forged. Forgery is a defense that the Board asserts is "in the nature of an avoidance or affirmative defense." Petitioner's PRO at 11.

40. The Board also sees Silverstone v. Bd. of Opticianry, Case No. 96-5772 (DOAH June 13, 1997) as instructive of which party bears the burden of proving the facts with regard to the alleged forgery. The case involved an application for licensure that on its face showed the standards for licensure had been met. The agency asserted that a document filed by the applicant was forged, and the administrative law judge determined that, even though the applicant had the burden of proof (as does the Board in this case) to establish entitlement to the license, the agency there -- by asserting the documents were forged (as Mr. Potts does) -- assumed the burden of persuasion in proving the forgery.

41. Mr. Potts did not prove the documents were forged by some other party. But, Mr. Potts' defense was not limited to a claim of forgery. His primary defense was utter lack of involvement in the Project. Mr. Potts' lack of proof with regard to forgery does not cure the Board's failure to prove an essential element of its case clearly and convincingly: that Mr. Potts was the engineer for the Project.

42. The signature evidence produced by the Board lends credence to its decision to take action against Mr. Potts' license. But, standing alone, it is not of sufficient quality and weight to show that Mr. Potts was the Project's engineer.

43. The Board's suspicions, without doubt, were rightly raised by the documentary evidence it produced. And Mr. Potts did much less than he could have done (assuming his testimony were truthful) to aid his denial of involvement in the 167th Street Property Project. Testimony from the owner of the property or the contractor that Mr. Potts was not involved, for example, would have eased any doubt about Mr. Potts' veracity or the quality of his testimony. Were there a competent witness who testified that Mr. Potts was involved in the 167th Street Property Project and were Mr. Potts still to testify under oath that he was not, then an exercise in determining which witness was the more credible could have been undertaken. Had documentary evidence been admitted that showed involvement in the Project, such as a contract or an invoice, it could have been weighed against Mr. Potts' testimony. As the record stands, however, there is no evidence of involvement in the Project against which to judge Mr. Potts' sworn testimony.

44. Without proof that Mr. Potts was the Project's engineer that meets the "clear and convincing" standard, the Board did not prove that Mr. Potts committed the violations with which he is

charged in the Amended Administrative Complaint. The case against Mr. Potts should be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Florida Board of Professional Engineers enter a Final Order that dismisses the Amended Administrative Complaint filed on April 24, 2013, with the Florida Engineers Management Corporation on behalf of the Board against Joseph Potts, P.E., license number PE 22656.

DONE AND ENTERED this 27th day of August, 2013, in Tallahassee, Leon County, Florida.



DAVID M. MALONEY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of August, 2013.

ENDNOTE

^{1/} References to statutes are to Florida Statutes (2012) unless otherwise noted.

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.