

STATE OF FLORIDA
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES
BOARD OF PROFESSIONAL SURVEYORS AND MAPPERS

DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES,

Petitioner,

DOAH Case No.: 15-0087PL
Case No. 1402-04768
Agency Clerk No. A92640

v.

WESLEY BRIAN HAAS (LS3708),

Respondent.

FILED
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DIVISION OF
ADMINISTRATIVE
HEARINGS

FINAL ORDER

THIS CAUSE came before the Board of Professional Surveyors and Mappers (Board) at a duly noticed public meeting held on May 6, 2015 in Tallahassee, Florida for consideration and final action following receipt of a Recommended Order by an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings. The Respondent was present and represented Mr. Torben S. Madson, Esq. The Petitioner was represented by Ms. Courtney Frazier, Esq.

PRELIMINARY STATEMENT

On August 24, 2014, the Petitioner filed an Administrative Complaint, Case No. 1402-04768, against Mr. Wesley Brian Haas (Respondent Haas) alleging he had not complied with several Minimum Technical Standards applicable to the practice of surveying and mapping. On August 26, 2014, the Petitioner filed an Administrative Complaint, Case No. 1401-03768, against Exacta Land Surveyors, Inc., Respondent Haas' employer, alleging identical violations. Respondents disputed the allegations and requested a hearing pursuant to section 120.57(1),

Florida Statutes. On January 8, 2015, the cases were referred to the Division of Administrative Hearings for assignment of an administrative law judge (ALJ). The cases were consolidated on January 16, 2015, and set for final hearing on February 20, 2015.¹

On January 8, 2015, the Respondents jointly filed a “Motion to Dismiss with Prejudice.” The motion sought the dismissal of the Administrative Complaint based on various grounds such as the Respondents were not afforded more rights during the probable cause proceeding, Respondent Haas wished to assert a right to remain silent, and the so-called “double jeopardy” clause of the Fifth Amendment to the United States Constitution protected the Respondents. On January 26, 2015, the ALJ entered an “Order Denying Motion to Dismiss.”

On February 20, 2015, the final hearing was held by video teleconference at locations in West Palm Beach and Tallahassee, Florida before ALJ F. Scott Boyd. Mr. Patrick Creehan, Esq. appeared on behalf of the Petitioner. Mr. Torben S. Madson, Esq. appeared on behalf of the Respondents.

At the hearing, the Petitioner presented the testimony of Mr. Alvin T. Gloer, who was accepted, without objection, as an expert in surveying and mapping. Petitioner’s Exhibits P1 through P3 were admitted into evidence. Respondent Haas asserted his right to remain silent and was not present at the hearing. Respondent offered exhibit R-1, which was admitted with the caveat that it contained hearsay.

The transcript of the hearing was filed on March 12, 2015. Both parties timely filed proposed recommended orders. The ALJ’s recommended order was entered on April 14, 2015. On April 20 and 27, 2015, the Respondents filed exceptions to the Recommended Order. On April 23, 2015, the Petitioner filed its exceptions to the Recommended Order. By agreement, the

¹ Where appropriate and due to joint filings by the Respondent Haas and Exacta Land Surveyors, Inc., this Final Order may refer to the “Respondents.”

Petitioner filed its responses to the Respondent's exceptions on May 4, 2015. The Respondents filed their response to the Petitioner's exceptions on April 27, 2015.

STATEMENT OF THE ISSUE

Whether the Respondent Haas failed to comply with various Minimal Technical Standards, in violation of Rules 5J-17.051 and 5J-17.052, Florida Administrative Code (F.A.C.), or was guilty of negligence in the practice of surveying and mapping, all in violation of section 472.0351, Florida Statutes (2012), and if so, what is the appropriate penalty.

STANDARD OF REVIEW OF RECOMMENDED ORDER

The Administrative Procedure Act grants the Board limited authority to reject or modify findings of fact in a Recommended Order. See Section 120.57(1)(l), Florida Statutes ("The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.").

In determining whether challenged findings of facts are supported by the record evidence in accord with this standard, the Board may not reweigh the evidence or judge the credibility of witnesses. *See Rogers v. Dep't of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005).

The Administrative Procedure Act also addresses the manner that the Board must address conclusions of law in a Recommended Order. Section 120.57(1)(l), Florida Statutes provides:

The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted

conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

RULING ON EXCEPTIONS

Respondent's "Exceptions to Recommended Order" filed on April 20, 2015

The Respondent's first four exceptions listed under the heading "Exceptions" do not identify any disputed portion of the Recommended Order, do not identify a legal basis, and do not include any appropriate citations to the record, as required by Rule 28-106.217, F.A.C. The four exceptions appear to be general opinions and/or citations of law. In accordance with section 120.57(1)(k), Florida Statutes, the Board makes no ruling on the first four exceptions listed under the heading "Exceptions."

The Respondent's next exception, labeled "Count I and II Exceptions to Recommended Order," is generally directed to the findings of fact and conclusions of law relating to Counts I and II of the Recommended Order.

As to Count II, the Respondent argues the ALJ "incorrectly concluded that: "since the field notes that are dated show a date of 9/24/12, while the survey drawing shows a field work date of 9/25/12. The parties stipulated as to the different dates shown on these documents. The dated filed notes show that filed work was performed on September 24, 2012. The clear and convincing evidence is that the date of data acquisition was September 24, 2012, while the date on the survey drawing is September 25, 2012." The Respondent does not identify the portion of the Recommended Order by page number or paragraph; however, the above quote appears to be paragraphs 9 and 10 in the Recommended Order.

This general exception fails to comply with Rule 28-106.217, F.A.C. in that the Respondent did not identify the portion of the Recommended Order by page number or paragraph.

Notwithstanding this failure to comply with section Rule 28-106.217, F.A.C, a review of the record establishes competent substantial evidence supports paragraphs 9 and 10 in the Recommended Order. The parties stipulated to these facts and Mr. Gloer's testimony supports these findings (Tr. p. 12 and pp. 47-48).

As to Count I, there is competent substantial evidence to support the findings of fact and conclusions of law related to Count I. Mr. Gloer testified that page 12, a computation note, was not dated (Tr. p. 44).

The Respondent also argues "That Petitioner failed to prove by clear and convincing evidence that no field work was performed on this survey on September 25, 2012, and therefore Count I and II must be dismissed." The Petitioner's burden is to show by clear and convincing evidence that the date of data acquisition was not the date on the survey drawing. The ALJ found that the Petitioner proved by clear and convincing evidence that the date of data acquisition was September 24, 2012 and the date on the survey drawing was September 25, 2012, and therefore the Respondent violated Rule 5J-17.051(2)(b)3 and 5J-17.051(3)(b)3, F.A.C. The ALJ's findings are based upon competent substantial evidence and should not be disturbed (Tr. p. 12, p. 44, and pp. 47-48). The Board may not reweigh the evidence or resolve conflicts therein. *See Rogers v. Dep't of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005).

The Respondent's "Count I and II Exceptions to Recommended Order" are denied.

The Respondent's next exception, labeled "Count V Exceptions to Recommended Order" is generally directed at the findings of fact and conclusions of law relating to Count V of the Recommended Order. The Respondent does not identify the portion of the Recommended Order by page number or paragraph. At the Board meeting held on May 6, 2015, the Respondent clarified the exception to be the Respondent could not have violated Rule 5J-17.051(3)(b)15.b.ii,

F.A.C. as a matter of law because the term “redundant measurement” is not defined. The Respondent therefore argues that each licensed person or entity should be entitled to make up its own interpretation of the rule. However, Mr. Gloer testified that redundancy and redundant measurements are common principles and terms used in the industry (Tr. pp. 112-116). The ALJ’s interpretation of Rule 5J-17.051(3)(b)15.b.ii, F.A.C. is a reasonable interpretation of the rule and is more reasonable than that advanced by the Respondent. The ALJ’s findings of fact in paragraph 15 in the Recommended Order are based on competent substantial evidence and should not be disturbed.

The Respondent’s “Count V Exceptions to Recommended Order” is denied.

The Respondent’s next exception, labeled “Count VII Exceptions to Recommended Order” is generally directed at the findings of fact and conclusions of law relating to Count VII of the Recommended Order. Essentially, the Respondent argues the survey is not part of a metes and bounds survey, therefore he could not have been found in violation of Rule 5J-17.052(2)(a)8., F.A.C. The Respondent does not identify the portion of the Recommended Order; however, the exception appears to be directed at paragraph 19 in the Recommended Order.

This general exception fails to comply with section Rule 28-106.217, F.A.C. in that the Respondent did not identify the portion of the Recommended Order by page number or paragraph.

Notwithstanding this failure to comply with section Rule 28-106.217, F.A.C, a review of the record establishes competent substantial evidence supports paragraph 19 in the Recommended Order. Mr. Gloer testified the parcel being surveyed was described by metes and bounds (Tr. p. 61).

The Respondent’s “Count VII Exceptions to Recommended Order” is denied.

The Respondent withdrew his "Count VIII Exceptions to Recommended Order" at the Board meeting held May 6, 2015. Thus, no explicit ruling is required.

The Respondent's next exception, labeled "Count X Exceptions to Recommended Order" is a general exception to the findings of fact and conclusions of law relating to Count X of the Recommended Order. The Respondent does not identify the portion of the Recommended Order by page number or paragraph. At the Board meeting held on May 6, 2015, the Respondent clarified that his argument was identical to his argument regarding Count V in that he could not have violated Rule 5J-17.052(2)(b)7, F.A.C. as a matter of law because the term "redundancy of measurements" is not defined. As explained above, Mr. Gloer testified that redundancy is a common term and principle used in the industry, and the ALJ's interpretation of Rule 5J-17.052(2)(b)7, F.A.C. is a reasonable interpretation of the rule and is more reasonable than that advanced by the Respondent. The ALJ's findings of fact in paragraph 25 in the Recommended Order are based on competent substantial evidence and should not be disturbed.

The Respondent withdrew his "Count XI Exceptions to Recommended Order" at the Board meeting held May 6, 2015. Thus, no explicit ruling is required.

"Respondent's Additional Exceptions and Response to Petitioner's Proposed Exceptions to Recommended Order"

At the Board meeting held May 6, 2015, the Respondent explained that his additional exceptions, filed on April 27, 2015 were merely filed in support of, and to summarize, his initial exceptions filed on April 20, 2015. As such, the additional exceptions addressing Counts I, II, V, VIII, and V are rejected for the reasons stated above.

Finally, at the Board meeting held May 6, 2015, the Respondent raised, for the first time, an objection to the ALJ's recommendation of a total administrative fine, as opposed to a separate fine for each proven violation. The Respondent's written exceptions do not raise this issue.

The total administrative fine of \$1,500.00 for 5 proven violations is clearly and undisputedly within the range of fines established in the Board's disciplinary guidelines found in Rule 5J-17.011(2) and (4), F.A.C.

"Petitioner's Proposed Exceptions"

The Petitioner's first exception is directed at the ALJ's finding in paragraph 1 in the Recommended Order that the Department of Agriculture and Consumer Services (Department) is the state entity charged with regulating the practice of land surveying and mapping. While the Department has jurisdiction over disciplinary proceedings under section 742.033, Florida Statutes, the Board has the sole authority to impose disciplinary action against licensees. See section 472.0355, Florida Statutes. The Board also has sole authority for final agency action. See section 472.033(6), Florida Statutes. Lastly, the Board has sole authority to establish Standards of Practice (formerly Minimum Technical Standards). See section 472.027, Florida Statutes.

The Petitioner correctly points out that the Department and the Board are charged with regulating the practice of land surveying and mapping. Paragraph 1 in the Recommended Order is not supported by competent, substantial evidence and should be modified to include a reference to the Board.

The Petitioner's first exception is accepted and paragraph 1 in the Recommended Order is hereby modified as follows: "The Department and the Board of Professional Surveyors and Mappers are charged with regulating the practice of land surveying and mapping, pursuant to chapter 472, Florida Statutes."

The Petitioner's second exception is directed at the ALJ's finding of fact in paragraph 5 in the Recommended Order. At the beginning of the hearing, the parties stipulated to several findings of fact proposed in the Respondent's Unilateral Prehearing Admission to the Facts and Law. However, this finding of fact was not part of the stipulation. See Tr. p. 11 and Respondent's Unilateral Prehearing Admission to the Facts and Law, page 3, stipulated fact number 7. A review of the record does not reveal any competent substantial evidence supporting this finding of fact.

The Petitioner's second exception is accepted and the finding of fact in paragraph 5 in the Recommended Order is rejected.

The Petitioner's third exception is directed at the ALJ's recommended penalty for Respondent Haas. The Petitioner recites those portions of the Recommended Order that discuss Rule 5J-17.011(2), F.A.C. establishes a minimum penalty for a first time offender of section 472.0351(1)(h), Florida Statutes to include a fine of \$250, probation, and compliance with legal obligation. The Petitioner correctly points out that the ALJ stated "none of the aggravating or mitigating circumstances are present here to the extent necessary to warrant deviation from the range of penalties already permitted within the guidelines with respect to Respondent Haas." Thus, the Petitioner argues the ALJ's failure to include probation in his recommended penalty for Respondent Haas is not supported by competent substantial evidence and is impermissibly excludes an important discipline the Board imposes on all first time offenders.

Because Rule 5J-17.011(2), F.A.C. establishes a minimum penalty for a first time offender of section 472.0351(1)(h), Florida Statutes to include a fine of \$250, probation, and compliance with legal obligation, and the Board routinely imposes probation consistent with this rule, the Petitioner's third exception is accepted. The record contains competent substantial

evidence; and provides a basis to conclude that Respondent Haas, a first time offender found in violation of section 472.0351(1)(h), Florida Statutes, shall at a minimum be placed on probation.

FINDINGS OF FACT

1. The Department and the Board of Professional Surveyors and Mappers are charged with regulating the practice of land surveying and mapping, pursuant to chapter 472, Florida Statutes.

2. After review of the record, it is determined that the Findings of Fact set forth in paragraphs 2 through 4 and 6 through 28 of the Recommended Order are supported by competent, substantial evidence and the Board adopts and incorporates them as if fully set forth herein.

CONCLUSIONS OF LAW

3. The Board has jurisdiction over the subject matter and parties to this proceeding pursuant to Chapters 120 and 472, Florida Statutes.

4. The Conclusions of Law set forth in paragraphs 29 through 84 of the Recommended Order are supported by law and the Board adopts and incorporates them as if fully set forth herein.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, and being otherwise fully advised in the premises it is hereby ORDERED that:

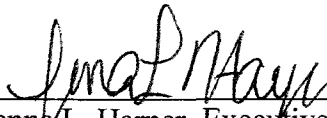
The ALJ's Recommended Order is adopted in its entirety as herein modified;

In accordance with Rule 5J-17.011(2)(h), F.A.C., Respondent Wesley Brian Haas is hereby placed on probation pursuant to Rules 5J-17.016, 5J-17.083, and 5J-17.085, F.A.C.;

In accordance with Rule 5J-17.011, F.A.C., Respondent Wesley Brian Haas shall pay an administrative fine of \$1,500.00 within 90 days of the date this Final Order is filed with the Agency Clerk of the Department of Agriculture and Consumer Services, and;

This Final Order shall be placed in and become a part of the Respondent's official records and shall take become effective on the date of filing with the Agency Clerk of the Department of Agriculture and Consumer Services.

DONE and ORDERED at Tallahassee, Florida, this 9th day of July, 2015

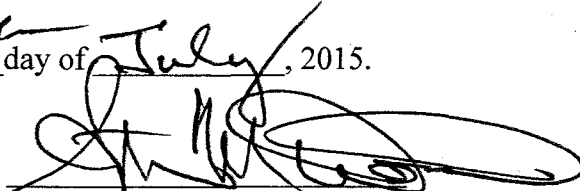


Jenny L. Harper, Executive Director
Florida Board of Professional Surveyors
and Mappers
For Nicholas Fusco, Chair

NOTICE OF RIGHT TO APPEAL

Any party to these proceedings adversely affected by this Final Order is entitled to seek judicial review of this Final Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure. Judicial review proceedings must be instituted by filing a Notice of Appeal with the Department's Agency Clerk, 407 South Calhoun Street, Suite 509, Tallahassee, Florida, 32399-0800, within thirty (30) days of rendition of this order. A copy of the Notice of Appeal must be filed with the Clerk of the appropriate District Court of Appeal accompanied by any filing fees prescribed by law.

Rendered this 13th day of July, 2015.


Agency Clerk

Copies furnished to:

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