

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA BOARD OF PROFESSIONAL
ENGINEERS,

Petitioner,

vs.

Case No. 16-6395PL

MALCOLM T. WATKINS, P.E.,

Respondent.

_____ /

RECOMMENDED ORDER

A final hearing was held in this case on February 10, 2017, in Tallahassee, Florida (with Respondent appearing by phone from Defuniak Springs), before Suzanne Van Wyk, Administrative Law Judge for the Division of Administrative Hearings.

APPEARANCES

For Petitioner: John Jefferson Rimes III, Esquire
Florida Engineers Management Corporation
2639 North Monroe Street, Suite B-112
Tallahassee, Florida 32303-5268

For Respondent: Malcolm T. Watkins, pro se
DC No. H46813
Walton Correctional Institution (Male)
691 Institution Road
DeFuniak Springs, Florida 32433

STATEMENT OF THE ISSUES

Whether Respondent, Malcolm T. Watkins, violated sections 455.227(1)(t) and 471.033(1)(a) and (d), Florida Statutes

(2015),^{1/} as alleged in the Administrative Complaint; and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On September 23, 2016, Petitioner served an Administrative Complaint upon Respondent alleging that Respondent had violated statutory provisions regulating the practice of engineering. Respondent timely requested a formal hearing to dispute the allegations. Petitioner forwarded the Answer and Administrative Complaint to the Division of Administrative Hearings (Division) on October 28, 2016, for assignment of an Administrative Law Judge (ALJ). The case was originally assigned to ALJ Gary Early and set for hearing on December 12, 2016, but was later continued to February 10, 2017. The case was transferred to the undersigned on January 18, 2017.

The final hearing was held as rescheduled in Tallahassee, Florida, with Respondent appearing by telephone from DeFuniak Springs, Florida. Petitioner offered no witnesses and the Respondent testified on his own behalf. Petitioner's Exhibits 1 and 5 through 11 were admitted in evidence. Respondent's late-filed Exhibits 1 and 2 were admitted in evidence.

The one-volume Transcript of the proceedings was filed on March 7, 2017. Petitioner timely filed a Proposed Recommended Order on March 17, 2017. Respondent requested a first extension until April 17, 2017, and a second extension until April 27,

2017, to make his post-hearing filing, both of which were granted. To date, Respondent has not filed a proposed recommended order.

FINDINGS OF FACT

1. Petitioner, Florida Board of Professional Engineers (the Board), is charged with regulating the practice of engineering pursuant to chapter 455, Florida Statutes (2016).

2. The Florida Engineers Management Corporation (the Corporation) is charged with providing administrative, investigative, and prosecutorial services to the Board pursuant to section 471.038, Florida Statutes. The Complaint at issue was filed by the Corporation on behalf of the Board.

3. At all times material hereto, Respondent has been a Florida licensed professional engineer, having been issued license number 64064.

4. On July 17, 2015, Respondent was found guilty on the following criminal counts by the Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida, in Case 2011-CF-002890-01: (1) Traveling to meet a Minor for Unlawful Sexual Conduct; (2) Use of Computer for Child Exploitation; (3) Attempted Lewd or Lascivious Battery; and (4) Unlawful Use of a Two-Way Communications Device.

5. Respondent was sentenced to 10 years' incarceration followed by five years' probation. On Count 2, Respondent was sentenced as a Sex Offender.

6. The sworn assertions in the April 25, 2011, Polk County Sheriff's Affidavit (the Affidavit), and the allegations in the 4th and 6th Amended Information (the Informations) filed by the State Attorney in Case 2011-CF-002890-01, set out the facts supporting Respondent's conviction. The allegations were grounded in Respondent's having contacted, via the internet, a fictitious 24-year-old person posing as the custodian of a 13-year-old girl. Respondent arranged a meeting with the supposed 13-year-old, through her "custodian," at which Respondent would have sexual relations with the 13-year-old.

7. Respondent was arrested on April 25, 2011, at a location in Polk County where he had arranged to meet the "custodian" along with the female minor.

8. On December 21, 2015, five months after Respondent's conviction, Petitioner's Investigator, Wendy Anderson, received a written complaint from Kyle Cartier, P.E., notifying Petitioner of the fact of Respondent's conviction. Upon receipt, Petitioner opened Corporation Case Number 2016000255 (the Complaint).

9. On January 4, 2016, Ms. Anderson notified Respondent via U.S. Mail of the opening of the Complaint. On January 21,

2016, Respondent replied to the Complaint and directed Petitioner to Respondent's counsel.

10. Respondent subsequently sent two letters to Petitioner, both dated March 11, 2016. The letters were provided to Walton Correctional Institution for mailing on March 18, 2016, and were received by Petitioner on March 23, 2016.

11. The first letter notified Petitioner of Respondent's conviction, and alleged that the conviction was not final because it had been appealed. The second letter claimed that the conviction did not relate to the practice of engineering and reiterated that Respondent's conviction was not final because it had been appealed.

12. Respondent's March 11, 2016, letter notifying Petitioner of the conviction was received 238 days after Respondent's conviction.

13. Following her investigation of the Complaint, which commenced on December 21, 2015, and concluded on July 28, 2016, Ms. Anderson presented her investigative report to the Board.

14. The Board filed the instant two-count Administrative Complaint against Respondent on September 23, 2016.

15. Count I alleges that Respondent violated section 471.033(1)(d), which includes as grounds for disciplinary action, being convicted or found guilty of a crime "which

directly relates to the practice of engineering or the ability to practice engineering.”

16. Count II alleges that Respondent violated section 471.033(1)(a), which includes as grounds for disciplinary action, failing to report in writing to the Board within 30 days after the licensee is convicted or found guilty of a crime in any jurisdiction.

17. Pursuant to section 455.227(2), the Board may impose any one in a range of penalties against Respondent for violating the cited provisions, including license suspension or revocation, practice restrictions, administrative fines, reprimand, and probation.

CONCLUSIONS OF LAW

18. The Division has jurisdiction over both the subject matter of, and the parties to, this proceeding under the provisions of sections 120.569 and 120.57(1), Florida Statutes.

19. This is a proceeding in which Petitioner seeks to revoke Respondent’s license as a professional engineer. Because disciplinary proceedings are considered to be penal in nature, Petitioner is required to prove the allegations in the Administrative Complaint by clear and convincing evidence.

Dep’t of Banking & Fin. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

20. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). The clear and convincing evidence level of proof

entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact 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, with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005). "Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

21. Section 471.033 is penal in nature, and must be strictly construed, with any ambiguity construed against Petitioner. Penal statutes must be construed in terms of their literal meaning, and words used by the Legislature may not be expanded to broaden the application of such statutes. Elmariah v. Dep't of Bus. & Prof'l Reg., 574 So. 2d 164, 165 (Fla. 1st DCA 1990); see also Beckett v. Dep't of Fin. Servs., 982 So. 2d 94, 100 (Fla. 1st DCA 2008); Whitaker v. Dep't of Ins., 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Dyer v. Dep't of Ins. & Treas., 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991).

22. Moreover, the allegations against Respondent must be measured against the law in effect at the time of the commission of the acts alleged to warrant imposition of discipline. McCloskey v. Dep't of Fin. Servs., 115 So. 3d 441 (Fla. 5th DCA 2013).^{2/}

COUNT I

23. Petitioner first seeks to discipline Respondent based upon his 2015 criminal convictions, pursuant to section 471.033.

24. Section 471.033, Florida Statutes reads, in pertinent part, as follows:

471.033 Disciplinary proceedings.—

(1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:

* * *

(d) Being convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of engineering or the ability to practice engineering.

Conviction

25. Respondent asserts that because his conviction is under appeal, Respondent has not been "convicted" for purposes of section 471.033(1)(d). Respondent's assertion is not well taken.

26. It is axiomatic that, for purposes of applying statutes of this nature, a person is convicted when adjudicated guilty by a court of competent jurisdiction. Delta Truck Brokers, Inc. v. King, 142 So. 2d 273, 275 (Fla. 1962). This precedent has been consistently applied at the Division. See Dep't of Bus. and Prof'l Reg. v. Nowell, Case No. 08-4836 (Fla. DOAH Jan. 27, 2009); Dep't of Bus. and Prof'l. Reg. v. Mese, Case No. 00-3234 (Fla. DOAH Dec. 28, 2000; DBPR Mar. 14, 2001); and Dep't of Prof'l Reg. v. Azima, Case No. 84-2536 (Fla. DOAH Apr. 25, 1985; Fla. DBPR June 21, 1985).

27. Respondent has been "convicted" of crimes, for purposes of applying section 471.033, by virtue of having been found guilty by a jury and adjudicated as such by a circuit court, notwithstanding his pending appeal of the conviction.

Relationship Between Conviction and Practice of Engineering

28. Respondent next argues that, assuming he has been convicted of a crime, he cannot be found to have violated section 471.033(1)(d) because the crimes for which he was adjudicated guilty do not relate to either the practice of engineering or the ability to practice engineering. At final hearing, Respondent urged that his conviction bears no relation to engineering as that term is statutorily defined.

29. A number of Florida cases demonstrate that, although the statutory definition of a particular profession does not specifically refer to acts involved in the crime committed, the crime may nevertheless relate to the profession. See Ashe v. Dep't of Prof'l Reg., Bd. of Accountancy, 467 So. 2d 814, 815 (Fla. 5th DCA 1985) (finding that accountant's fraudulent acts involving gambling, although not directly related to his technical ability to practice public accounting, related to the practice of accounting); Rush v. Dep't of Prof'l Reg., Bd. of Podiatry, 448 So. 2d 26, 28 (Fla. 1st DCA 1984) (finding podiatrist's conviction for conspiracy to possess and import marijuana is within the scope of crimes directly related to the practice of or ability to practice podiatry); and Doll v. Dep't of Health, 969 So. 2d 1103, 1106 (Fla. 1st DCA 2007) (finding chiropractor's conviction for conspiracy to defraud Medicare

"related to" the practice of chiropractic medicine although not related to his technical ability to practice as a chiropractor).

30. As explained by the court in Rush,

By confining the convictions upon which disciplinary action may be based to those directly related to the practice of podiatry, the Legislature has not limited the grounds for disciplinary action to only those crimes which related to the technical ability to practice podiatry or to those which arise out of misconduct in the office setting.

448 So. 2d at 27.

31. In the case at hand, Petitioner relies upon the language of section 471.013, which requires applicants for an engineering license to demonstrate good moral character, to draw the legal conclusion that Respondent's conviction relates to the practice of engineering or his ability to practice engineering.

32. Section 471.013, Florida Statutes (2015) reads, in pertinent part, as follows:

471.013 Examinations; prerequisites.-

(1)(a) A person shall be entitled to take an examination for the purpose of determining whether she or he is qualified to practice in this state as an engineer if the person is of good moral character and:

* * *

(2)(a) The board may refuse to certify an applicant for failure to satisfy the requirement of good moral character only if:

1. There is a substantial connection between the lack of good moral character of

the applicant and the professional responsibilities of a licensed engineer; and

2. The finding by the board of lack of good moral character is supported by clear and convincing evidence.

(b) When an applicant is found to be unqualified for a license because of a lack of good moral character, the board shall furnish the applicant a statement containing the findings of the board, a complete record of the evidence upon which the determination was based, and a notice of the rights of the applicant to a rehearing and appeal.

33. Following a mere passing reference to the statute, Petitioner, in its Proposed Recommended Order, summarily concludes, as follows:

Since the Legislature has mandated that the possession of 'good moral character' is a prerequisite for obtaining a professional [engineering] license . . . then possession of 'good moral character' is directly related to the practice and ability to practice the profession. Therefore a conviction of a crime showing a lack of good moral character by definition relates to the practice and ability to practice engineering.

Petitioner cites no case law construing section 471.013 to support the conclusion that the prerequisite of good moral character to sit for the engineering licensing exam is, ipse dixit, required to maintain one's duly-issued license.^{3/}

34. Surprisingly, Petitioner cites ALJ Lisa Shearer Nelson's Recommended Order in Department of Business and Professional Regulation, Board of Accountancy v. Larry Beard,

Case No. 15-3940 (Fla. DOAH Oct. 13, 2015; Fla. Bd. of Acct. Feb. 11, 2016), in support of its argument. That case directly contradicts Petitioner's conclusion that the good moral character requirement in section 471.031 applies to a license disciplinary proceeding pursuant to section 471.033:

[T]he provision upon which Respondent relies specifically indicates that it applies to those instances where the failure to maintain good moral character as a basis for denying initial licensure to an applicant, as opposed to those instances, as this one, where the definition is applied to a person who is subject to discipline based on conduct evidencing a lack of good moral character after the license has been obtained.

35. By its plain language, section 471.031 defines prerequisites to sit for initial license examination. In contrast, section 471.033 specifically defines the grounds for which disciplinary action may be taken. The undersigned cannot read into the license disciplinary section a "good moral character" requirement which does not exist. "When the legislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, [the court] will not imply it where it has been excluded." Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911, 914 (Fla. 1995); see also J.S. v. C.M., 135 So. 3d 312, 317 (Fla. 1st DCA 2012); Beshore v. Dep't of Fin. Servs., 928 So. 2d 411, 412 (Fla. 1st DCA 2006).

36. The undersigned does not dispute Petitioner's conclusion that the crimes for which Respondent was convicted reflect a lack of good moral character. However, the undersigned is not free to recommend discipline against a licensee based upon her finding that Petitioner's behavior was repugnant. The undersigned must follow the law. The Legislature could include a lack of good moral character as a basis for disciplinary action, but has not done so.

37. As such, many of the cases relied upon by Petitioner to support its argument are wholly inapplicable. In Beard, supra, the licensee was disciplined under a statute which included "failing to maintain a good moral character" as grounds for disciplinary action. § 473.323(1)(1), Fla. Stat. (1996). In both Thomas and Taylor, supra, the licensees were disciplined under a licensing statute which includes conviction of "a crime . . . which . . . involves moral turpitude" as grounds for disciplinary action. § 475.25(1)(f), Fla. Stat. (2005). The license disciplinary statute in the case at hand includes no similar language.

38. In this case, it is Petitioner's burden to prove, by clear and convincing evidence, that the crimes for which Respondent was convicted "directly relate to the practice of engineering or the ability to practice engineering." § 471.033, Fla. Stat. Unfortunately, Petitioner did not carry its burden.

Each of the cases cited by Petitioner to support imposing discipline against professional licensees for criminal conviction is distinguishable from the facts sub judice.

39. In Ashe, 467 So. 2d at 815, the accountant was disciplined under a statute which included, as grounds for disciplinary action, “[p]erformance of any fraudulent act while holding a license to practice public accounting.”

§ 473.323(1)(k), Fla. Stat. The Board of Accountancy demonstrated by clear and convincing evidence that the licensee’s conviction for wire fraud clearly fell within the stated grounds for disciplinary action.

40. In Rush, 448 So. 2d at 28, in determining the licensee’s conviction for conspiracy to import marijuana was “within the scope of ‘those crimes which directly relate to the practice or ability to practice podiatry,’” the court considered, among other factors, that the podiatrist was one of six categories of licensed professionals allowed to prescribe, administer, and dispense controlled substances, that the Florida Supreme Court had described marijuana as “a harmful mind-altering drug which endangers the health of the user and which is highly detrimental to the public welfare,” and that the licensee’s conduct “shows a lack of honesty, integrity, and judgment, and an unwillingness to abide by the Laws of the State

of Florida which cannot be tolerated of a professional licensed to dispense dangerous drugs.” Id. at 27.

41. In Department of Health, Board of Medicine v. Brian Lee, Case No. 15-4486PL (Fla. DOAH Dec. 2, 2015; Fla. DOH Feb. 17, 2016), the licensee was convicted of charges similar to the charges with which Petitioner was convicted, including conviction as a sex offender. In prosecuting its case against the physician, the Board of Medicine introduced the terms of the physician’s community control, which included prohibiting him from caring for or treating minors without notifying the minor’s parents of his sex offender status, and having another staff person present; prohibiting him from having any other contact with minors; and prohibiting him from using a computer unless required for treatment of patients. The Board of Medicine carried its burden to prove, by clear and convincing evidence, that the physician’s crimes were related to his ability to practice medicine. Id.

42. In the case at hand, the Board introduced no evidence to tie Respondent’s convictions to the practice of engineering, although it was not required to prove the conviction related to Respondent’s technical ability to practice engineering. In fact, Petitioner introduced no testimony whatsoever. The only documentary evidence introduced was of Petitioner’s arrest, conviction, sentence (including probation), and Ms. Anderson’s

investigative report. Petitioner's case relies solely on its flawed legal theory that Respondent's conviction demonstrates a lack of good moral character, which it argues is sufficient grounds for discipline.

43. Petitioner failed to carry its burden to prove the allegations of Count I by clear and convincing evidence.

COUNT II

44. In Count II of the Administrative Complaint, Petitioner charges Respondent with violating section 471.033(1)(a) by violating the provisions of section 455.227(1)(t).

45. Section 471.033(1)(a), Florida Statutes, provides that "violating any provision of s. 455.227(1)" constitutes grounds for disciplinary action.

46. Section 455.227(1)(t), Florida Statutes, includes the following as grounds for disciplinary action:

(t) Failing to report in writing to the board or, if there is no board, to the department within 30 days after the licensee is convicted or found guilty of, or entered a plea of nolo contendere or guilty to, regardless of adjudication, a crime in any jurisdiction.

47. It is undisputed that Respondent failed to notify the Board of his conviction within 30 days of the conviction as required by 455.227(1)(t). Respondent therefore did not comply with the plain language of the statute.

48. Petitioner carried its burden to prove the allegations of Count II by clear and convincing evidence.

Penalty

49. Florida Administrative Code Rule 61G15-19.004 sets out penalty guidelines for violations of the engineering licensing statutes. For a first-time failure to report conviction of a crime in any jurisdiction, the penalty range is a reprimand up to a \$5,000 fine. Based upon the length of time that had passed (238 days) before Respondent reported his conviction, his attempt to comply with the reporting statute only after having been informed that an investigation had been opened, and the utter lack of remorse demonstrated by Respondent during the final hearing, the undersigned recommends the highest penalty in the range--a \$5,000 fine--be imposed.^{4/}

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Professional Engineers enter a final order finding that Malcolm Watkins violated sections 455.227(1)(t) and 471.033(1)(a), Florida Statutes, and imposing a fine of \$5,000.

DONE AND ENTERED this 2nd day of May, 2017, in Tallahassee,
Leon County, Florida.



SUZANNE VAN WYK
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of May, 2017.

ENDNOTES

^{1/} Except as otherwise provided herein, all references to the Florida Statutes are to the 2015 version.

^{2/} The Administrative Complaint does not cite a date of the Florida Statutes which is being applied. Petitioner was convicted on July 17, 2015, thus the 2015 version of the statutes must be applied.

^{3/} Nor did Petitioner cite any case interpreting the statutory phrase "a substantial connection between the lack of good moral character of the applicant and the professional responsibilities of a licensed engineer," which would be particularly relevant to the question at hand.

^{4/} Petitioner offered no evidence of any aggravating factors which may be considered in departing from the penalty guidelines. See Fla. Admin. Code R. 61G15-19.004(3)(a).

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.