

**FILED**  
**Florida Engineers**  
**Management Corporation**  
**09/26/2017 Clerk: Rebecca Valentine**

STATE OF FLORIDA  
BOARD OF PROFESSIONAL ENGINEERS

<b>FILED</b>	
Department of Business and Professional Regulation	
Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	<b>9/26/2017</b>
File #	<b>2017-07568</b>

FLORIDA BOARD OF PROFESSIONAL  
ENGINEERS,

Petitioner,

vs.

FEMC CASE NO.: 2016000255  
DOAH CASE NO.: 16-6395PL  
LICENSE NO.: 64064

MALCOLM T. WATKINS, P.E.,

Respondent.

FINAL ORDER

THIS CAUSE came before the BOARD OF PROFESSIONAL ENGINEERS (Board) pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on August 10, 2017, in Orlando, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order, Exceptions to the Recommended Order, and Response to Exceptions to the Recommended Order (copies of which are attached hereto as Exhibits A, B, and C, respectively) in the above-styled cause. Petitioner was represented by John J. Rimes, III, Chief Prosecuting Attorney. Respondent was not present and was not represented by counsel.

Upon review of the Recommended Order, the written and oral argument of the parties, the written Exceptions and responses thereto, and after a review of the complete record in this case, the Board makes the following findings and conclusions.

## RULING ON EXCEPTIONS

1. Respondent filed exceptions to paragraphs 4, 5, 6, 12, 13, 27, 34, 35, 36, and 47. Petitioner filed responses to the Respondent's exceptions. The Board reviewed and considered the Respondent's Exceptions to the Recommended Order and ruled as follows:

2. Respondent's Exception to Paragraph 4 is denied as there is competent substantial evidence in the record to support the ALJ's findings.

3. Respondent's Exception to Paragraph 5 is denied as there is competent substantial evidence in the record to support the ALJ's findings.

4. Respondent's Exception to Paragraph 6 is denied as there is competent substantial evidence in the record to support the ALJ's findings.

5. Respondent's Exception to Paragraph 12 is denied as there is competent substantial evidence in the record to support the ALJ's findings.

6. Respondent's Exception to Paragraph 13 is denied as there is competent substantial evidence in the record to support the ALJ's findings.

7. Respondent's Exception to Paragraph 27 is denied because Respondent challenges the ALJ's ruling regarding the date

Respondent was convicted. The term "conviction" is defined Title 47, relating to criminal procedure and corrections, section 921.0021, Florida Statutes. The Board has no substantive jurisdiction over Title 47 or section 921.0021, Florida Statutes, and therefore, lacks the authority to grant the exception and overturn the ALJ's determination.

8. Respondent's Exception to the statutory citation in Paragraph 34 of the Recommended Order is granted, and the citation is corrected from 471.031, F.S. to section 471.013, F.S.

9. Respondent's Exception to the statutory citation in Paragraph 35 of the Recommended Order is granted, and the citation is corrected from 471.031, F.S. to section 471.013, F.S.

10. Respondent's Exception to the refence in the second sentence of Paragraph 36 to "Petitioner" is granted, and the reference is corrected to "Respondent."

11. Respondent's Exception to Paragraph 47 is rejected, in that the Board finds no error with the ALJ's Conclusion of Law.

12. Petitioner's Exception to the Conclusions of Law set forth in Paragraphs 33 - 43 of the Recommended Order are accepted in their entirety, and the Board adopts and incorporates the conclusions of law as follows:

13. Paragraphs 33 - 43 of the Recommended Order address the question as to whether Respondent's conviction falls within the

ambit of Section 471.033(1)(d), Florida Statutes, which permits the Board to impose discipline upon a Professional Engineer who has been "...convicted or found guilty of, or ..., a crime in any jurisdiction which directly relates to the practice of engineering or the ability to practice engineering." The ALJ found that the crime for which Respondent was convicted did not violate Section 471.033(1)(d) as a matter of law.

14. As the ALJ found, (COL #29) Florida courts have held that statutes like Section 471.033(1)(d) apply to criminal convictions, though not directly involving the technical practice of a profession, which directly relate to the licensee's ability to practice the profession. See Ashe v. Department of Professional Regulation Board of Accountancy, 467 So.2d 814 (Fla. 5th DCA 1985) and Rush v. Department of Professional Regulation. Board of Podiatry, 448 So.2d 26 (Fla. 1st DCA 1984).

15. The Florida Supreme Court has defined a crime of moral turpitude as a crime that is evidenced by an act of "inherent baseness or depravity in the private social relations or duties owed by man to man or by man to society. The act itself and not its prohibition by statute fixes the moral turpitude." See State ex rel. Tullidge v. Hollingsworth, 108 Fla. 607, 611, 146 So. 660, 661 (Fla. 1933). "[C]rimes constituting violations of one's duties in dealings with members of society may be classified as crimes

involving moral turpitude." Pearl v. Fla. Bd. of Real Estate, 394 So.2d 189, 191(Fla. 3d DCA 1981), Cambas v. Department of Business and Professional Regulation, 6 So.3d 668(Fla. 5th DCA 2009). Professional licensure disciplinary cases addressing convictions of licensees for similar acts directed against minors have unequivocally held that such a conviction evidences a lack of good moral character, see DBPR, Division Of Real Estate v. William Thomas, DOAH Case #06-0150PL March 21, 2008, 2008 WL 786511, (Final Order October 14, 2008), DBPR. Division Of Real Estate. v. Thomas Taylor, DOAH Case # 06-1544PL October 5, 2006, 2006 WL 2859307, (Final Order January 23,2007), affirmed in material part, reversed on other grounds, Taylor v. Division of Real Estate,975 So.2d 626 (Fla.4th DCA 2008). Again, as the ALJ found (COL#36, First Sentence), the criminal acts for which Respondent was convicted show that Respondent lacks good moral character.

16. The only question is whether Respondent's crime falls within the ambit of Section 471.033(1)(d). That is, does the crime ". . .directly relate[s] to the practice of engineering or the ability to practice engineering." To answer this question both the ALJ and Petitioner looked to the same case - Department of Health, Board of Medicine. v. Brian Lee, DOAH Case #15-486PL2015 WL 8680324, (Recommended Order December 2, 2015, Final Order adopting Recommended Order, February 17, 2016). That case involved a finding

that a medical doctor's conviction violated the Medical Practice Act and resulted in the revocation of the doctor's license. Just as in this case, the issue in Lee was whether the crime "directly ...relates to the practice...or the ability to practice" the profession.

17. The Medical Practice Act and its related umbrella act for the Department of Health (Chapters 456 and 458), just as Chapters 455 and 471, do not contain stand-alone statutory disciplinary provisions that permit discipline based upon an act showing a lack of "Good Moral Character" on the part of a licensee. Chapters 456 and 458, just like Chapter 471, address criminal convictions by providing for disciplinary action by the Board using identical language to that contained in Section 471.033(1)(d)-see Sections 456.072(1)(c) and 458.331(1)(c), Florida Statutes. Moreover, the Board of Medicine produced nothing at hearing to show that Dr. Lee's conviction in any way arose out of Dr. Lee's medical practice or involved the use of Dr. Lee's medical skills. As noted above, the criminal acts underlying the conviction in Lee are remarkably similar to those in the instant case. Thus, from the texts of the applicable statutes, the factors utilized by Judge Nelson in Lee to find a violation were identical to those that should have been utilized by the ALJ in this case.

18. In Lee, the Board of Medicine met its burden of showing that the conviction related to the practice of medicine by simply presenting the facts underlying the conviction itself—just as the Petitioner did herein. Those facts proved that, "... [Dr. Lee's] actions represent[ed] a violation of the trust placed in physicians, on whom patients rely to make life-changing decisions. His actions demonstrate such impaired judgment, that they reflect the antithesis of what is expected of a physician licensed in this state." (Lee Recommended Order COL #27 at Page 15) The ALJ found as much in this case (COL #36).

19. Then, in this case, the ALJ erred as matter of law. The ALJ noted (COL #41) that Judge Nelson in Lee discussed the effects that the criminal penalty imposed on Dr. Lee would likely have on Dr. Lee's practice of medicine. The ALJ stated (COL #42) that Petitioner presented none of this type of evidence in the instant case and, as a result, concluded that Petitioner had not met its burden to show that Respondent's conviction related to the practice of engineering. Thus, the ALJ, by necessity, had to have concluded that the criminal penalty imposed on a respondent can move a crime into the "related to" the profession category and thus justify discipline of the licensee. Moreover, given the virtual identity of the criminal convictions and the underlying licensure disciplinary law in both Lee and this case, the ALJ must have

concluded that the Board of Medicine in Lee carried its burden only by showing the effect of the criminal penalty upon Dr. Lee.

20. But a PE (and a Medical Doctor) cannot be disciplined based upon the penalty imposed by the courts upon the conviction of a crime. The statutes at issue do not address the criminal penalty imposed for committing a crime but rather the criminal conviction itself. The Board must prove that the conviction, standing alone, relates to the profession. The criminal penalty imposed upon a licensee, while it might buttress the independently reached conclusion that the crime "relates to" the profession cannot be used to meet the standard for discipline. For the ALJ to hold to the contrary in this case was error.

21. Thus, when the actual basis for Judge Nelson's ruling in Lee is applied to this case, it is plain that Petitioner carried its burden and that Respondent violated Section 471.033(1)(d). Judge Nelson found the following when holding that Dr. Lee's license was subject to discipline: "... [Dr. Lee's] actions represent[ed] a violation of the trust placed in physicians, on whom patients rely to make lifechanging decisions. His actions demonstrate such impaired judgment, that they reflect the antithesis of what is expected of a physician licensed in this state."



22. As did Dr. Lee, Respondent showed the same lack of maturity and respect for others by the conduct underlying Respondent's conviction. Criminal acts like Respondent's represent a violation of the trust that the state and the public places upon the judgment of all professionals - including engineers. And the Legislature has made it clear that the people of Florida are just as entitled to the sound and unimpaired judgment of PEs as they are of physicians, see Section 471.005(7), Florida Statutes, the regulated practice of engineering involves the provision of many services that "involve safeguarding life, health, or property." The Board has included similar language in its Rules addressing the importance of sound judgment to the provision of engineering services, see Rule 61G15-18.011(1) (definition of "Responsible Charge").

23. It is precisely because of this inescapable fact that the Legislature mandated that the possession of "good moral character" is a prerequisite for obtaining a professional license, Section 471.013(2). Contrary to the ALJ's discussion (COL#31-35), Petitioner did not assert that the "good moral character" requirement in Section 471.013(2) translates directly into Section 471.033(1)(d).

24. Rather, Petitioner cited that prerequisite to licensure in support of the Legislature's obvious conclusion that the public

is entitled to rely on an engineer's sound judgment-both at the inception of a PE's licensure and during the course of a PE's professional life.

25. In short, Respondent was convicted of a crime that shows a lack of good moral character and which demonstrated impaired judgment and a lack of respect for others. Since the public is entitled to rely on a PE's judgment and Respondent's conviction shows such a lack of judgment and respect, it is plain that the conviction directly relates to Respondent's ability to practice engineering. Because the factual evidence is undisputed only the ALJ's error of law precludes the Board finding that Respondent violated Section 471.033(1)(d). Once that error is corrected the Board must find that Respondent violated the law. The Board also finds that its conclusion of law is a more reasonable conclusion than that of the ALJ set forth in paragraphs 33 - 43 of the Recommended Order.

#### FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference.
2. There is competent substantial evidence to support the findings of fact.

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to

Section 120.57(1), Florida Statutes, and Chapter 458, Florida Statutes.

2. The conclusions of law set forth in the Recommended Order are approved and adopted and incorporated herein by reference with the modifications set forth above to paragraphs 33 - 43 of the Recommended Order.

#### PENALTY

1. Upon a complete review of the record in this case, the Board determines that the penalty recommended by the Administrative Law Judge shall be modified. The ALJ's recommended penalty was based upon the ALJ's determination that Respondent violated sections 455.227(1)(t) and 471.033(1)(a), F.S., but finding no violation of section 471.033(1)(d), F.S. The Board has modified the ALJ's Conclusions of Law in Paragraphs 33 - 43 of the Recommended Order, and determined that Respondent did violate section 471.033(1)(d), F.S. Accordingly, the Board MODIFIES the recommended penalty to include the additional violation, as follows:

2. Respondent's license to practice engineering shall be **SUSPENDED** until Respondent is released from incarceration and requests the suspension be lifted and makes a personal appearance before the Board. The Board reserves jurisdiction to determine the conditions for reinstatement, and to impose additional

penalties at the time of appearance consistent with the Board's disciplinary guidelines.

RULING ON MOTION TO TAX COSTS

1. The Board reviewed the Petitioner's Motion to Tax Costs in the amount of nine hundred thirty-three dollars and thirty-five cents (\$933.35) and GRANTED the Petitioner's motion, with the costs to be paid within thirty (30) days of Respondent's release from incarceration, unless a request for extension of time is granted.

RULING ON MOTION TO RELINQUISH JURISDICTION

1. On May 23, 2017, Respondent filed a Motion to Relinquish Jurisdiction with the Board. On June 5, 2017, Petitioner filed a Response, opposing Respondent's Motion.

2. In the Motion, Respondent asserts that Respondent timely filed a Proposed Recommended Order ("PRO") with the Division of Administrative Hearings ("DOAH"), which the Administrative Law Judge ("ALJ") failed to consider prior to issuing the Recommended Order. Respondent requests the Board "relinquish jurisdiction back to the DOAH top allow the ALJ to review his Proposed Recommended Order and allow the ALJ to issue a new or modified Recommended Order that takes into consideration his Proposed Recommended Order."

3. Uniform Rule 28-106.215, Florida Administrative Code, mandates that "all parties may submit proposed findings of fact,

conclusions of law, orders, and memoranda on the issues within a time designated by the presiding officer." In this case, the ALJ set the deadline for receipt of Respondent's PRO as April 27, 2017.

4. Respondent's PRO was not filed until May 3, 2017. Accordingly, filing of the PRO does not comply with Uniform Rule 28-106.215, F.A.C., and was therefore untimely.

5. Accordingly, Respondent's Motion to Relinquish Jurisdiction is DENIED.

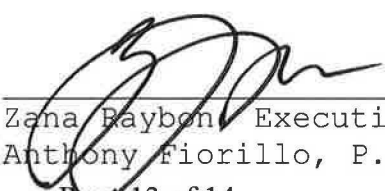
RULING ON RESPONDENT'S OBJECTION TO PETITIONER'S NOTICE OF FILING SUPPLEMENTAL AUTHORITY

1. On July 27, 2017, Petitioner filed a Notice of Supplemental Authority, directing the Board's attention to the DOAH Recommended Order, issued July 26, 2017, in the matter of Rothaar v. Florida Real Estate Commission, DOAH Case No. 17-1855. On August 7, 2017, Respondent filed an Objection to Petitioner's Notice of Supplemental Authority.

2. The Board acknowledges the supplemental authority over the objection of Respondent.

DONE AND ORDERED this 26 day of September, 2017.

BOARD OF PROFESSIONAL ENGINEERS

  
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Zana Baybon Executive Director, for  
Anthony Fiorillo, P.E., S.I., Chair

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 APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF HEALTH 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 APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by **Certified Mail** to Malcolm T. Watkins, P.E, DC #H46813, Walton Correctional Institution (Male), 691 Institution Road, DeFuniak Springs, Florida 32433; to Suzanne Van Wyk, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; by interoffice mail to John J. Rimes, III, ESQ., Prosecuting Attorney, Florida Engineers Management Corporation; and by email to Lawrence D. Harris, Assistant Attorney General, at Lawrence.Harris@myfloridalegal.com this 26 day of September, 2017.

  
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