



Oregon

**State Board of Examiners for
Engineering & Land Surveying**

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LAW ENFORCEMENT COMMITTEE

Meeting Summary

October 11, 2012

Members Present:

Carl Tappert, Chair

Ken Hoffine

Sue Newstetter

Staff Present:

Mari Lopez

Jenn Gilbert

James R. (JR) Wilkinson

Allen McCartt

Others Present:

Katharine Lozano, AAG

Timothy Wolden, PE

Margaret Stevenson

Sandra Johnston, City of Eugene Deputy Fire Marshal

A meeting of the Law Enforcement Committee (LEC) was called to order at 10:00 a.m. in the conference room of the Oregon State Board of Examiners for Engineering and Land Surveying (OSBEELS) office at 670 Hawthorne Avenue SE, Suite 220, Salem, OR, 97301.

Since no informal conferences were scheduled, LEC Chair Tappert briefly reviewed the agenda. Wilkinson informed the LEC that the respondent in case #2781, a PE, the complainant, and Sandra Johnston, City of Eugene Deputy Fire Marshal were in attendance to discuss law enforcement case #2781. Johnston is the Deputy Fire Marshal in charge of the City of Eugene's Fire Escape Testing and Maintenance Policy 08-08. Wilkinson explained that the respondent wanted to attend in order to address any questions the LEC might have about his efforts to comply with Policy 08-08. Johnston attended to respond to any questions regarding the Policy and compliance issues. The complainant is the Facilities Manager for Pi Beta Phi Sorority and she wanted to communicate the impact from their failure to comply with Policy 08-08.

Committee Meeting

2670

The LEC discussed that the Board received an anonymous complaint against the respondent, an LLC, alleging they engaged in the unlicensed practice of engineering by advertising in the *East Oregonian* newspaper an offering to perform engineering services without employing a registered professional engineer, or without identifying the PE that will perform the services constituting the practice of engineering. The advertisement identified the respondent as General Contractors offering "In-House Engineering" and "On-site Staking." The investigation found

that the respondent is a licensed general contractor and is allowed to offer engineering services consistent with Oregon Administrative Rule (OAR) 820-010-0715.¹ However, they did not comply when advertising their services. Newstetter observed they did employ an engineer, but when he left they did not correct the advertisement. She added they changed the advertisement once notified of the violation. **The LEC recommended the Board close the case as compliance met.**

2678

The LEC discussed that complainants, both PE's, alleged that the respondent, a PE, committed "ongoing misconduct and conflict of interest" violations, including alleged engineering deficiencies, when acting as the City Engineer for the City of Independence, Oregon. The complainants were hired by attorney Mark Hoyt of Sherman, Sherman, Johnnie, & Hoyt, (SSJH) LLP, to evaluate plans and specifications prepared by the respondent's company, involved in a lawsuit against the respondent who, at various times, was an employee and owner of the company while also acting allegedly as the City Engineer.

Newstetter stated this case is primarily a contractual employment matter outside the purview of the Board. Furthermore, no evidence supported the allegation of engineering deficiencies. She questioned whether the Board should go further into the allegations.

McCartt replied to a question about the status of a partition application by noting the project was still under development. He added that when he contacted the complainants, they did not have any information regarding the alleged deficiencies. McCartt stated there was no evidence to support that allegation. Newstetter concluded that if there was no evidence of deficiencies then there was no violation.

¹ OAR 820-010-0715, Construction Contractors Offering Engineering,

(1) For the purpose of this rule, the following definitions apply:

(a) "Offering services" means manifesting a willingness to provide services, either orally or in writing, such that another person may reasonably believe that their assent to the services is invited and will establish an agreement.

(b) "Appurtenant" services are those services that relate to the construction trade, which include constructing, altering, repairing, or improving real estate.

(2) The engineer registration requirements of ORS 672.002 to 672.325 do not prevent a construction contractor from offering services constituting the practice of engineering when all of the following conditions are met:

(a) The construction contractor holds an active license under ORS 701;

(b) The services offered by the construction contractor, constituting the practice of engineering, are appurtenant to construction services to be provided by the contractor;

(c) The services constituting the practice of engineering are performed by an engineer or engineers registered under ORS 672.002 to 672.325; and

(d) The offer by the construction contractor discloses in writing that the contractor is not an engineer and identifies the registered engineer or engineers that will perform the services constituting the practice of engineering.

(3) An engineer performing or identified as an engineer that will perform the services constituting the practice of engineering as provided in subsection (2) of this rule must notify the Board in writing, within thirty (30) days if, after the contractor is retained by the owner, the engineer ceases to provide engineering services identified in the offer by the construction contractor.

(4) Construction contractors who violate any provision of this rule may be practicing engineering or using an engineer title in violation of ORS 672.020 and 672.045. As such, the contractor may be subject, under 672.325, to sanctions and civil penalties of up to \$1,000 per violation.

Tappert wondered if there was a conflict of interest, as per the allegation. It was alleged in the complaint that the respondent was under contract with the City while also working on a private project for Danko, the City's Community Development Director. Newstetter noted that there was no documentation of a contract between the City and the respondent. Tappert clarified that the respondent should disclose if he is making engineering recommendations regarding storm water development plans at the same time he was working for developer Danko who might benefit from those recommendations.

Newstetter stated the City Engineer is hired by the City Council, and observed that there should be evidence of his hiring. If he was so hired, Newstetter suggested reviewing City Council minutes to learn if it was disclosed or discussed. This would continue the investigation. McCartt informed that the new city manager found no written contract with the respondent and broke all contact with him. No documentation was provided about the events, but Danko was still working for the City. Tappert observed that the respondent worked for the City, for a City administrator in a private capacity, and for a private developer. Were these conflicts disclosed? McCartt pointed out that the minutes are not on line. Newstetter suggested requesting city council minutes to determine if the conflict of interest was disclosed.

Lozano emphasized the need to find the former City manager. McCartt also identified that the timing on the projects were not matching. Lozano agreed noting that it was not clear if the timelines match for a conflict of interest to exist. In addition, many allegations were not substantiated with evidence. Upon further discussion, the LEC determined further investigation. Tappert then remarked that Danko appears to be at the center of the situation. He inquired if this is something that could be referred to the Ethics Commission. Lozano counseled that the investigation should resolve outstanding questions so findings are based on evidence. After that, if the Board decides to refer the matter to the Commission then they can decide based on the evidence if the allegations fit within their authority and whether to pursue the matter.

2684

The LEC discussed that the respondent, a PLS, was requested to participate in the audit of documentation to support the professional development hour (PDH) units he claimed as a condition of the last biennial renewal period. The respondent responded with a Continuing Professional Development (CPD) Organizational Form listing three courses, yet he included documentation for only one course of 8 PDH units. The respondent explained he had completed the required 30 PDH units; however, his CPD records were left with his last employer in 2008. He would contact the sponsors in an effort to reconstruct his CPD records, but he also understood there would be consequences. Subsequently, the respondent submitted a revised CPD Organizational Form showing documentation of 26 PDH units. The Examinations & Qualifications Committee granted him an extension to complete the remaining 4 PDH units.

McCartt informed that the respondent did not submit the documentation and was referred to the Regulation Department. Once notified of the open investigation, the respondent was able to submit compliant documentation for 31 PDH units. Newstetter pointed out that the respondent complied, but he did not do so during the audit. He responded only when contacted by investigators. Lozano asked if the LEC typically sanctions someone who has submitted compliant documents. Tappert responded "yes" if they did not comply with the audit until the

investigation commenced. If an individual had complied while in an audit then there would be no need for an investigation. The LEC determined to issue a NOI to assess the respondent a \$1,000 civil penalty for failure to maintain records violating Oregon Administrative Rule (OAR) 820-010-0635(5).

2690

Tappert recused himself because he knows the respondent, an EI. Lozano observed a quorum was still present. Thereafter, the LEC discussed that the Board received an anonymous complaint that the respondent was engaged in the unlicensed practice of engineering by use of a business card listing himself as an “engineer.” When the respondent responded to the allegation, he noted he was unaware he could not use the title after graduating from an accredited college with a bachelor’s degree in Mechanical Engineering as well as successfully passing the Fundamentals of Engineering examination. Nevertheless, he committed to immediately cease using business cards with the “engineer” title. The respondent subsequently submitted one of his revised business cards showing the title had been removed. Newstetter noted the respondent had “engineer” on his card when he was only an intern, but he immediately took it off when notified, which was verified. **The LEC recommended that the Board close the case with a letter of concern.**

2781

Tappert started the LEC discussion by noting it was an unusual situation in that respondent, complainant, and an interested third-party attended the LEC meeting to discuss a case. He explained that an investigator typically presents their case summary to the LEC for determining whether the evidence supports issuing a Notice of Intent (NOI). Once the NOI has been issued, the respondent has the opportunity to meet with the LEC in an informal conference to discuss the case, or they can request a hearing. The process is not in order because the LEC has not decided whether the allegations and evidence support violations within the authority of the Board. After further exchange, Tappert summarized the issue as the City requires certification for fire escapes under Policy 08-08. To date, the respondent, an SE, has not complied with the policy in eight instances where he was hired to certify fire escapes, and the question is whether failing to complete the requirements is negligent or incompetent. Tappert asked if the City has taken action regarding occupancy.

City of Eugene Deputy Fire Marshal Sandra Johnston replied that Policy 08-08 is meant to ensure safe exiting for occupants from the upper floors of buildings, but due to questions regarding the respondent’s work the City cannot guarantee those escapes as structurally sound. Because the integrity of the fire escape is uncertain, the Fire Marshal has restricted occupancy load and removed occupants from the upper floors of Pi Beta Phi.

Newstetter asked whether the sororities and fraternities hire their own engineer. Johnston replied that it is the house owner’s responsibility to provide a complete report complying with Policy 08-08. She has ongoing conversations with owners during inspections and they are free to hire any engineer they choose. Policy 08-08 sets the expected standard.

The committee discussed the Eugene fire escape certification process and history with Johnson.

Hoffine asked if an engineer was involved in developing the Policy. Johnston stated that after a round of inspections in 2008, that former City of Eugene Fire Marshal MC Thrapp adopted a fire escape policy for Eugene similar to those used by the City of Portland. She added the City of Portland has structural engineers on staff.

Hoffine expressed additional questions about the creation of Eugene's fire inspection certification policy, and Newstetter commented it does not matter because it is what the City of Eugene adopted as the standard they want met for their structures. The Policy sets the expected standard. Johnston added that she has Uniform Building Codes going back to 1982 that show fire escapes needing to meet the 100 lbs/ft² load test and that the codes are not necessarily aimed at the building itself, even on a small scale, but are aimed at occupancy load safely exiting to the ground floor.

Lozano interrupted to observe that if the Board decides to agree or disagree with a municipal or state standard, or how it was developed, the Board would need to do that for every case. At this point, the question is how an engineer did his work to meet the standard he certified he had met.

Tappert asked if the respondent was hired to provide certifications on the eight houses. The respondent described how he had done the certification historically, since 2002. In May 2008, the required certification process changed. The respondent admitted he was unaware of the change. He used forms given to him by house managers, and in a number of instances he used forms superseded without his knowledge, and suggested it was the Fire Department's responsibility to keep him current. The respondent then described his load test as shaking fire escapes with his hands and finding weak spots that way. He also described his engineering reports as being sealed and signed with calculations to back up his load testing procedure. In March 2012 he was notified that the houses were being shut down because they could not demonstrate that load testing was done, but believed he had been doing load testing. The respondent reported that he contacted the City and learned there were approved forms with examples from Portland, and that that was the first time he had seen the new requirements. He subsequently developed a water load test and has done two load tests this year, and another house did it on their own. He has not been contacted to complete reports for the other houses.

Tappert noted this was October and that was in March, and the City is now restricting occupancy. He asked the respondent what was happening. The respondent replied that Sigma Pi was finished a few months ago, and claimed that another house turned in his testing procedures and report. Tappert also asked about the horizontal load on the rails. The respondent stated he pushed on the railings with his weight and used a scale to calibrate. He added that once he was notified he took the matter seriously and has been trying to correct the problems.

Tappert then asked about the status of Pi Beta Phi. The complainant informed the LEC that she began discussions with Johnston in February and looked at different companies. She was able to get the house open around the first of September. The sorority paid to reinforce the fire escape. They also worked with a different engineering firm to do testing and protocols. She also noted that the policy and correct forms are available online.

Tappert asked if the deficiencies found were from the outdated forms or inadequate load testing. Johnston explained that the respondent signed and sealed cover letters and forms that were unsubstantiated by meeting the load testing requirements of Policy 08-08. Once the reports for each house were examined, she found no engineering work complying with Policy 08-08 to support the sealed and signed letters and checklists. Wilkinson clarified it was a difference between performing static calculations and load testing.

The respondent stated he physically looked at the escapes and he could tell when there is a weak spot. The calculations show that the connections work, the welds work, and when he would go test them he found good quality with no broken members. He further asserted that the calculations were accurate because escapes are made of steel and his calculations are repeatable. Tappert noted that the Policy requires an actual load test every three years. The respondent asserted that fire escapes are 10% of the work and stated that he did not check on the latest code or policy requirements, but would have followed them if someone had informed him of them.

Tappert observed it is prudent to check on the current standards, especially after three years. Newstetter emphasized that it's the professional's responsibility to be informed on what the standard is in the preparation of a professional report.

There was then discussion between Newstetter, Hoffine, and Tappert, with input from the respondent, Johnston and Wilkinson regarding which elements of the respondent's conduct related to engineering issues versus form completion, versus truthful or untruthful representations, versus adhering or failing to adhere to the accepted standards of practice for the job and the area, and what harm was done to the public.

Hoffine expressed interest in having a structural engineer analyze the city's Policy. Newstetter stated it does not matter because the City adopted the requirement, which made it the standard for fire escape certifications in Eugene, and that if Policy requirements truly cannot be met, then the professional should explain why they cannot be met and offer an alternative, but not to simply ignore them.

Lozano asked if the LEC would like to view a compliant report. The complainant replied they hired a contractor to come in and reinforce the fire escape rather than trying to get it passed. Johnston volunteered that she has a copy of an engineering report that was used as an example in the Policy. However, there are two houses that the respondent has gone forward with on testing. She also noted the City hired an independent structural engineer to review the respondent's work, which review she claimed found deficiencies in the respondent's report. Another peer review also allegedly found deficiencies in the respondent's reports.

Tappert refocused the LEC on deciding whether there is sufficient evidence to move the case forward to a NOI and noting additional information will come forth. The LEC determined to recommend issuing the respondent a NOI to revoke registration and assess an \$11,000 civil penalty. Tappert also informed the respondent there were issues with the way he was sealing and signing documents, which will be included in the NOI.

However, there was one remaining question regarding auditing for continuing professional development (CPD). Wilkinson explained that during the investigation a question emerged about what the respondent was taking as professional development hour (PDH) units, as it related to maintaining competence, but the rule that specifically references supporting PDH documentation relates to continuing professional development audits, not investigations. He asked if CPD records can be requested during an investigation. Lozano replied that a review of CPD documents during an investigation is not an audit function, but that under ORS 672.300 the Board has broad investigative authority to gather information, and that if getting the CPD records is important to investigate competence then the agency can request them, but the agency cannot request them outside of audit merely because of curiosity.

Tappert stated it was not relevant given the clear circumstances of not meeting the Policy. Lozano noted there were conduct questions regarding forms, not sealing documents, and not completing load tests in compliance with accepted standards, and that if the committee is considering alleging either negligence or incompetence, it will be important to determine whether the respondent's conduct is attributable to either or both, and that of the respondent's continuing professional development history may be helpful in making that determination. Hoffine commented that the CPD records are needed because of a larger question about competence, which Newstetter agreed. Wilkinson will send a letter to the respondent requesting his CPD records and a list of recent projects.

New Business

Review example of Notice of Intent cover letter for compliance with Notice of Contested Case Right and Procedures; Memorandum regarding Streamlining the Law Enforcement Process; Revisions to Law Enforcement Flow Chart, and LEC Policies and Procedures: authorize staff negotiated settlement agreements

Lozano began the discussion by noting that delegating discretionary authority to investigators to negotiate settlement agreements is unlawful. The delegated authority might expose investigators to civil litigation because that exercise of discretion is Board's responsibility. Wilkinson provided an example of the breadth of details that might be present in a case and might impact which settlement terms would be appropriate. Lozano stressed it could be done by developing a sanction and settlement matrix, which would give investigators specific parameters set by the Board, rather than impermissibly delegating their discretionary and quasi-judicial acts to the investigators to exercise the Board's own discretion. She distributed a penalty matrix used by the Building Codes Division (BCD) to illustrate sanction parameters and gave illustrative examples of the types of parameters and factors that could be set the OSBEELS.

Tappert and Lozano continued to discuss issues and details of a penalty and settlement matrix. Lozano explained that the Board could then approve draft settlement agreements, created in line with the matrix, by consent agenda where the settlements are listed and approved. Newstetter added that a settlement could also always be removed from the consent agenda for further consideration or negotiation, if the Board desired.

Also discussed were revisions to the NOI cover letter, a Notice of Contested Case Rights and Procedures, and a proposed checklist that respondents could use in response to the NOI. Lopez asked should the Board renew registrations while registrants are under investigation. She noted

the Board will hold renewal payments in those instances. Lozano, Lopez, and Newstetter further discussed the issue, and Lozano stated this topic would be discussed further during an upcoming staff training session. Wilkinson stated the proposed policy was aimed at negotiating settlement agreements at the response to allegations stage, which is prior to issuing a NOI. Lozano stated settlements can be done that way too if it is within the parameters that have been established by the Board.

Tappert provided additional examples of ways the matrix could be structured and used in practice. Lozano also suggested a pilot project by starting with the simpler CPD cases and working towards more complex cases from there.

Tappert concluded by noting the redrafted board policy should be put on hold while the matrix issues are decided. Lozano added that if the LEC decides to recommend a matrix then the policies should be changed. Newstetter suggested that, regardless of what happens with the matrix, the Board should begin to use the NOI checklist whereon respondents can indicate their response by: 1) not contesting the NOI; 2) requesting a hearing; or 3) requesting an informal settlement while also reserving their right to a hearing. Lozano stated it would clear confusion about their response. The LEC agreed to begin using the checklist.

Attorney General Updates

2662: Notice of Intent (NOI)

Lozano informed that a NOI for the respondent, a PE, would be completed shortly. McCartt stated that the respondent was disciplined by other states and failed to report the actions to the Board. Upon further investigation, it was found that more states had issued disciplinary actions against the respondent for other issues as well, including revocations. Lozano concurred that it began as a failure to report, but the problem has grown due to other states taking additional actions. McCartt also stated that the respondent has not been responsive to letters and telephone calls.

2618: OAH referral

Lozano informed that a prehearing conference has been set for the respondent for an unlicensed practice hearing with the Office of Administrative Hearings (OAH).

2778: OAH referral

Lozano noted the respondent, a PE, submitted a request for a hearing and has been referred to OAH. She has not requested a prehearing conference. Tappert asked about his hearing date. She responded his hearing likely would be in June 2013.

2601: OAH referral

Lozano informed that a prehearing conference has been set for the respondent with a hearing with OAH to follow. McCartt explained that the respondent is a contractor who offered engineering without listing their engineer per the requirements of OAR 820-010-0715. The respondent requested a hearing and refused an informal conference. McCartt, Lozano and Tappert discussed what had happened, procedurally, in the case up to that point.

Tappert asked about scheduling the case #2778 hearing prior to the other referrals. Lozano replied that she would check into adjusting the schedule, but could not commit. On another matter regarding case #2572, the Appellate Court has yet to issue their decision.

Settlement Agreements

The LEC offered no comments on Settlement Agreements, on Cases subject to Collections (9), or on Cases subject to Monitoring (12).

Case Status Report, total cases open: 109

Wilkinson reported that he has recently entered additional CPD cases into the Board's database. This brings the total cases to 118. Lopez also informed that a new investigator will be joining staff, Monika Peterson, and she will help reduce the case load. She is coming over from the Architect Board.

The meeting adjourned at 11:55 a.m.