RECEIVED
SEP 26 2005
WV REGISTRATION BOARD

BEFORE THE WEST VIRGINIA STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS

IN RE: GARY L. STEVENS CASE NO. 2004-6

FINAL ORDER

Pursuant to a hearing held before the West Virginia State Board of Registration for Professional Engineers, President Leonard J. Timms, Jr., presiding, on the 18th day of July, 2005, the Board hereby makes the following Findings of Fact and Conclusions of Law:

1. Respondent appeared and was represented by counsel, Jerry N. Linger.
2. Respondent did not respond to the Complaint prior to the hearing, except for the communication offered as Board Exhibit 2 which did not respond to the specific allegations of the Complaint [Exhibit 1] nor offer any defenses to the Complaint.
3. The response submitted at the time of the hearing has been considered in the rendering of this Final Order.
4. The complaint, issued by Mark A. Cooper of Chester, West Virginia, alleges that Mr. Stevens engaged in the unlicensed practice of engineering in connection with the construction of a commercial building.
5. Respondent admits he is not an engineer, nor does he have the education, training and experience to qualify as a registered professional engineer. Transcript at 58; Exhibit 9.

6. Mr. Cooper discussed the construction project with Respondent over several years, during which time Mr. Stevens worked with several different companies. Transcript at 23.
7. In his prior work experience, Mr. Stevens performed engineering work under the supervision of professional engineers. Transcript at 81.
8. At the time the services were performed, Respondent Stevens worked for Dynamic Structures, Inc., the party to the contract with Complainant Cooper. Exhibit 4.
9. The contract was signed on January 17, 2003 [Exhibit 4], and construction was on-going during the winter of 2003. Transcript at 33.
10. The contract's scope of work included "design and sketches" for "A. Earthwork / compaction / caissions [sic] / foundations / footers / block-work / floor." Transcript at 113-14; Exhibit 4.[1]
11. Dynamic Structures did not have an engineer on staff, and Respondent performed the engineering services required by the contract. Transcript at 59, 64-65.
12. During civil litigation between Complainant and Respondent, discovery responses identified Mr. Stevens as the "Engineer for Plaintiffs." Transcript at 64.
13. In a sworn statement connected with the civil litigation, Respondent stated it was his professional opinion that the building was "built according to acceptable construction and engineering practices of today." Exhibit 10.
14. Respondent believes his work experience and education qualifies him to render professional opinions regarding engineering practices. Transcript at 66, 70.

[1]While "caissons" is misspelled in the contract, and throughout the transcript of this hearing, the term has been spelled correctly in the remainder of this Order.

15. During the negotiation of the contract and the initial phase of construction, Mr. Cooper believed that. Respondent Stevens was an engineer based on his prior work and statements made by Mr. Stevens. Transcript at 23-24.

16. Complainant was familiar with Respondent's business card for Dynamic Structures which states he is a "Project Engineer." Transcript at 24; Exhibit 8.

17. Respondent admitted that he knows people in his community consider him an engineer. Transcript at 64.

18. Respondent never informed Mr. Cooper that he was not an engineer. Transcript at 64.

19. Mr. Cooper provided Respondent Stevens with a Geotechnical Engineering Services Report prepared by two engineers licensed in the State of West Virginia and then working for Professional Service Industries, Inc. (PSI). Transcript at 24-25, 60; Exhibit 3.

20. Mr. Cooper intended Dynamic Structures to follow the recommendations of the PSI report in the construction of his building. Transcript at 24-25, 43.

21. No changes were made to the design of the building or its situs between the time of the PSI report and the construction of the building. Transcript at 28, 38-39.

22. Respondent believed the PSI report to be wrong and that any lay person who understood rock and simple math would know that it was wrong. Transcript at 71, 86, 98.

23. Respondent Stevens did not agree with aspects of the PSI report and initiated conversations with the engineers who prepared it. Transcript at 87.

24. Respondent did not understand some aspects of his discussions with PSI engineer Elizabeth Dwyre, P.E., because he has "never had a soil mechanics course" regarding "sub-soils to be able to support a building." Transcript at 87 -88.
25. Soil mechanics is commonly referred to as geotechnical engineering. Transcript at 118.
26. Designing caissons is typically a part of geotechnical engineering. Transcript at 119.
27. Respondent admitted that in performing the calculations for the caissons, sizing them, and designing them, he practiced geotechnical engineering without being a geotechnical engineeer. Transcript at 119,.
28. Respondent "did not worry too much about PSI's report" and ignored it because of some fill material which was going to be brought in, which did not happen. Transcript at 89, 99.
29. Upon learning the fill material would not be brought in, Respondent discussed the matter with the other PSI Engineer, Randy Daub, P.E., who would not change his figure, but told Respondent it was "good rock." Transcript at 90, 96-97, 109.
30. Respondent had followed Engineer Daub's recommendations in the past, and this was the first time he did not follow the recommendations of the professional engineer. Transcript at 105.
31. Respondent did follow the PSI report "(o)n better than half of the building." Transcript at 101.
32. Respondent "never considered" following the PSI recommendation to set the building on 30" pipe pilings (Transcript at 102, 104) and decided to deviate from that portion of the PSI report. Transcript at 49, 62.

33. The Board is not making a finding on whether the sub-soil was suitable for the foundation designed by Respondent. Transcript at 97.

34. The Board is not making a finding on whether the site would allow the 30-inch pipe pilings.

35. The design for the foundation was set forth in design sketches which were submitted to the bank. Transcript at 31, Exhibit 6.

36. Respondent repeatedly referred to his work on Mr. Cooper's building to be "preliminary engineering work" and to the design sketches as "preliminary drawings." Transcript at 59, 63, 71.

37. Respondent's drawings were "done strictly as an estimate, a guideline for the engineers and architects to follow." Transcript at 84.

38. While Respondent testified that he knows his work must be reviewed by a registered engineer, he admitted that no engineer reviewed the work at issue in this complaint. Transcript at 63, 72, 84, 110.

39. Respondent failed to have his work reviewed by an engineer, knowing that "(m)ost of the time" the reviewing architect or engineer makes changes to his work. Transcript at 84-85.

40. These drawings were not preliminary in that they were done just prior to when construction commenced, were revised by him to keep up with the design as things changed (construction sketches), and were submitted to the bank. Transcript at 31-32, 60, 120-121; Exhibit 6.

41. Banks do not accept preliminary drawings. Judicially noticed by Board Member Plymale; Transcript at 122-23.

42. The building was constructed based on Respondent's design sketches. Transcript at 62-63, 71, 127.

43. In his verified Complaint, Mr. Cooper stated that Dynamic Structures made deviations from the PSI Report without his knowledge or consent (Exhibit 1), but the weight of the testimony indicates that Complainant knew about the deviation prior to construction. Transcript at 50.

44. Complainant refused to answer questions regarding an architect's involvement in the project (Transcript at 45-46), lending credibility to Respondent's contention that Complainant was unwilling to pay for architectural services. Transcript 72. However, the issue of architectural services is irrelevant to this proceeding.

45. The credibility of witnesses is always a factor to be considered, and both these witnesses may have been influenced by the civil litigation brought by Mr. Cooper against Mr. Stevens in connection with the building.

46. Although Respondent testified that Mr. Cooper directed that the building be set on 8" pilings (Transcript at 100), the weight of the testimony set forth in the above Findings of Fact is that Respondent made the decision to deviate from part of the PSI report.

47. When Complainant became aware of and/or consented to Respondent's deviation from the PSI report, he was still operating on the misunderstanding that Respondent was an engineer. Transcript at 26, 45.

48. Complainant discovered that Respondent Stevens was not a licensed engineer near the end of the construction project. Transcript at 23.

49. Had Mr. Cooper known Mr. Stevens was not a registered professional engineer, he would not have accepted Mr. Steven's revisions to PSI's design work. Transcript at 33.

50. Mr. Stevens deems his opinion to supercede that of registered professional engineers.

51. Mr. Stevens expressly and impliedly represents himself to be an engineer, and it is credible that Complainant deemed him to be an engineer.

52. In his proposed findings of fact and conclusions of law, which were reviewed and discussed by the Board, Respondent sets forth several matters for which no evidence was offered and raises issues of jurisdiction which were not raised prior to or at the hearing.

53. This Board is making no findings of fact on matters which were not made part of the hearing record.

54. Respondent's business cards, statements and the nature of the work performed were likely to and did deceive Mr. Cooper, a member of the public, into thinking Respondent was an engineer.

55. Based on the overall facts set forth above, and particularly the fact that Respondent Stevens disregarded the work and advice of professional engineers in deviating from PSI's geotechnical report, the Board finds that Respondent engaged in the practice of engineering in West Virginia in violation of W. Va. Code § 30-13-2.

56. The Board expended funds of almost one thousand dollars in out-of-pocket expenses in connection with the investigation and prosecution of this Complaint and in conducting the hearing, exclusive of attorney's fees and staff time.

57. Attorney's fees in this matter exceeded three thousand dollars ($3,000), and the Board's investigator spent considerable time preparing the prosecution of this complaint.

CONCLUSIONS OF LAW

58. The Board is a state entity created by West Virginia Code § 30-13-1 *et seq.* and is empowered to regulate the practice of professional engineering pursuant to West Virginia Code § 30-13-1 *et seq.*

59. West Virginia Code § 30-13-21 authorizes the Board to discipline any person practicing or offering to practice engineering in the State of West Virginia.

60. Engineering work performed for the West Virginia public must be performed by a licensed professional engineer, and it is not a defense to a charge of unlicensed practice that the customer did not want to fund the professional work if such work is required. W. Va. Code Engineering work performed for the West Virginia public must be performed by a licensed professional engineer, and it is not a defense to a charge of unlicensed practice that the customer did not want to fund the professional work. W. Va. Code §30-13-2.

61. "Design and sketches" were part of the contractual obligations of the contract. Exhibit 4.

62. Because design work on this construction project had been performed by professional engineers, any deviation from that design must be signed off on by the original engineer or revised and signed off on by another professional engineer

licensed to practice engineering in West Virginia. W. Va. Code §§30-13-2, 30-13-3(e).

63. A construction professional's decision to alter, ignore or otherwise not follow designs prepared by a licensed engineer constitutes the practice of engineering. W. Va. Code §§30-13-2, 30-13-3(e).

64. Complaints heard by this Board are not private causes of action, but administrative proceedings on matters within the jurisdiction of this licensing board. While Mr. Cooper was the complainant, he is not the Plaintiff, nor is this a private cause of action. Therefore, the case of *Hurley v. Allied Chemical Corporation*, 164 W. Va. 268, 262 S.E.2d 757 (1980), which is the focus of the Response submitted at the hearing, is not applicable..

65. Among its other powers, the Board has the power to levy fines and assess costs. W. Va. Code § 30-13-21(d)(4) and 7 CSR 1-15.

66. Practicing engineering without a license is an action that would subject a person to discipline by the Board, including a civil penalty up to $5,000.00. 7 CSR 1-15.1.

67. An action which is likely to deceive or defraud the public is an action which would subject a person to discipline by the Board, including a civil penalty up to $15,000. . 7 CSR 1-15.1.

68. While the Board did not amend the complaint to include Respondent's employer, Dynamic Structures, his employer may accept liability for Respondent's violation in accordance with the doctrine of *respondeat superior*.

69. Each day of continued violation constitutes a separate offense. 7 CSR 1-15.2.

70. Any civil penalty assessed as a result of a hearing must be paid within fifty (50) days of this Order. W. Va. Code § 30-13-22(f).

71. This Final Opinion is a matter of public record.

72. Orders of the Board may be enforced in the Circuit Court of Kanawha County. 7 C.S.R. 2-5.2.

73. This Final Order may be appealed to the Circuit Court of Kanawha County as prescribed by law.

ORDER

On the basis of the foregoing, the Board hereby **ORDERS** the following:

74. That Respondent is prohibited from practicing engineering in the State of West Virginia or from utilizing the term "engineer" or "engineering" in describing his areas of service and is required to correct any person or entity who he is aware believes him to be an engineer.

75. That Respondent Stevens pay a civil penalty in the amount of One Thousand Dollars ($1,000.00) for practicing engineering in West Virginia without a license.

76. That Respondent Stevens pay a civil penalty in the amount of One Thousand Dollars ($1,000.00) for deceiving and defrauding the public.

77. That Respondent Stevens pay administrative costs in the amount of One Thousand Five Hundred Dollars ($1,500.00).

78. That the required payments be made within fifty (50) days from the date of entry of this Order, with the civil penalties being made payable to the Treasurer, State of West Virginia, and the administrative costs payable to the W. Va. P.E. Board.

79. That a copy of this Final Opinion be served upon Respondent's attorney by certified mail within five days after entry by the presiding officer.

WEST VIRGINIA STATE BOARD OF
REGISTRATION FOR PROFESSIONAL ENGINEERS

By _____
LEONARD J. TIMMS, P.E.
Board President and Presiding Officer

Date: Sept 23, 2005