

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE BOARD OF ARCHITECTURE, ENGINEERING, LAND SURVEYING,
LANDSCAPE ARCHITECTURE, GEOSCIENCE, AND INTERIOR DESIGN

In the Matter of the Professional
Engineering License Application
of Michael P. Opela, Sr.

**RECOMMENDED ORDER ON
CROSS-MOTIONS FOR
SUMMARY DISPOSITION**

This matter is before Administrative Law Judge Steve M. Mihalchick on cross-motions for summary disposition. Respondent ¹ Michael P. Opela, Sr.'s Motion for Summary Disposition was received on March 16, 2011. The Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience, and Interior Design's (the Board's) Motion for Summary Disposition and Opposition to Respondent's Motion for Summary Disposition was received on April 11, 2011. On April 15, 2011, Respondent's Memorandum in Response to the Board's Motion for Summary Disposition and Supporting Arguments for Granting Mr. Opela's Motion for Summary Disposition were received. Oral Argument on the motions was held on April 18, 2011. The record on the motions was closed that day.

Christopher M. Kaisershot, Assistant Attorney General, appeared on behalf of the Board. Respondent appeared on his own behalf without counsel.

Based upon all of the files and records herein, and for the reasons set forth in the following Memorandum, the Administrative Law Judge makes the following:

RECOMMENDED ORDER

IT IS RESPECTFULLY RECOMMENDED that the Board **Grant in Part** Respondent's Motion for Summary Disposition and **Grant in Part** the Board's Motion for Summary Disposition and order as follows:

1. That the denial of Respondent's application for licensure as a professional engineer at this time be **AFFIRMED**.
2. That Respondent be allowed to retake the oral examination in accordance with Minn. Rule 1800.0900, subp. 4, on a date and at a place to be designated by the Board in accordance with Minn. Rule 1800.0900, subp. 5.

¹ Mr. Opela is denominated Respondent because this matter was initiated in part by an Order to Show Cause to him to show cause why his application for licensure as a professional engineer should not be denied.

On January 12, 2010, Respondent applied in Minnesota for licensure by comity, based upon his Arizona license. The Board denied the license because Respondent's education does not meet Minnesota's education requirements for a professional engineer, therefore finding that Respondent does not qualify for licensure by comity. The Board provided Respondent an oral examination to demonstrate his competence, but he failed the oral examination. The Board continues to deny him a license.

Respondent has asked that he be allowed to retake the oral examination in the near future. The Board has not agreed to his request.

Summary Disposition

Respondent disagreed with the denial of his license. Therefore, the Board ordered that this matter be referred to the Office of Administrative Hearings to conduct a contested case. Both parties have now moved for summary disposition.

Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.² The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.³ A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.⁴

In this case of cross-motions for summary disposition, there no dispute as to the material facts. The primary issue in this case is whether, as a matter of law, Respondent is entitled to be granted a professional engineering license by the Board. The law to be applied is found in the statutes and rules that govern the licensing of professional engineers in Minnesota.

Licensing Requirements in Minnesota

The Board is required and authorized to license or certify all qualified persons who wish to practice architecture, professional engineering, land surveying, landscape architecture, or professional geoscience, or who wish to use the title certified interior designer.⁵

The practice of professional engineering is defined as follows:

Any person shall be deemed to be practicing professional engineering within the meaning of sections 326.02 to 326.15 who holds out as being

² *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); Minn. R. 1400.5500K; Minn. R. Civ. P. 56.03.

³ See Minn. R. 1400.6600.

⁴ *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

⁵ Minn. Stat. §§ 326.01 – 326.15 (2009). Citations to statutes and rules are usually to the printed editions in effect when Respondent applied for a license in January, 2010. When necessary, citations are to statutes and rules in effect in June, 2004, when Respondent was licensed in Arizona.

able to perform or who does perform any technical professional service, such as planning, design or observation of construction for the purpose of assuring compliance with specifications and design, in connection with any public or private structures, buildings, utilities, machines, equipment, processes, works, or projects wherein the public welfare or the safeguarding of life, health, or property is concerned or involved, when such professional service requires the application of the principles of mathematics and the physical and applied engineering sciences, acquired by education or training, and by experience.⁶

This statute sets forth the definition of practicing professional engineering; it does not set forth the requirements for a professional engineering license.

The basic licensing requirements for all the occupations licensed or certified by the Board, including professional engineering, are set forth in Minn. Stat. § 326.10, subd. 1 (2009), as follows:

Subdivision 1. **Issuance.** (a) The board shall on application therefor on a prescribed form, and upon payment of a fee prescribed by rule of the board, issue a license or certificate as an architect, engineer, land surveyor, landscape architect, geoscientist, or certified interior designer. A separate fee shall be paid for each profession licensed.

(1) To any person over 25 years of age, who is of good moral character and repute, and who has the experience and educational qualifications which the board by rule may prescribe.

(2) To any person who holds an unexpired certificate of registration or license issued by proper authority in the District of Columbia, any state or territory of the United States, or any foreign country, in which the requirements for registration or licensure of architects, engineers, land surveyors, landscape architects, geoscientists, or certified interior designers, respectively, at the time of registration or licensure in the other jurisdiction, were equal, in the opinion of the board, to those fixed by the board and by the laws of this state, and in which similar privileges are extended to the holders of certificates of registration or licensure issued by this state. The board may require such person to submit a certificate of technical qualification from the National Council of Architectural Registration Boards in the case of an architect, from the National Council of Examiners for Engineering and Surveying in the case of an engineer, from the Council of Landscape Architectural Registration Boards in the case of a landscape architect, and from the National

⁶ Minn. Stat. § 326.02, subd. 3 (2009).

Council for Interior Design Qualification in the case of a certified interior designer.

...

Subd. 2. **Examination.** The board, or a committee of the board, may subject any applicant for licensure or certification to such examinations as may be deemed necessary to establish qualifications.

In determining the qualifications of applicants, at least one member determining the qualifications must be licensed or certified in the same profession as that being evaluated.

The Board has authority to adopt necessary rules.⁷ Among the rules that apply generally to all the occupations licensed by the Board is Minn. Rule 1800.0200, which identifies three classes of licenses as follows:

A. **Class 1:** those who were licensed without examination prior to July 1, 1933; by exemptions after 1933; or geoscientists who seek licensure within one year after August 4, 1997.

B. **Class 2:** those licensed by comity under the provisions of the law.

C. **Class 3:** those licensed after satisfying the applicable educational requirements, meeting the applicable experience requirements, and achieving successful passage of the applicable professional examination.

Minn. Rule 1800.0800 is a general rule that applies to all the Board's occupations, but contains specific provisions on specific occupations. It provides, in relevant part:

1800.0800 PROOF OF QUALIFICATION TO PRACTICE.

An applicant shall submit evidence to the board indicating that the applicant is qualified to practice in the profession or field of major practice in which the applicant seeks licensure or certification. The burden of proof is upon the applicant who should make every effort to present qualifications fully and clearly. Qualifications shall be established by one or more of the following methods:

A. by passing a written examination;

B. by successfully completing an oral examination;

⁷ See, e.g., Minn. Stat. §§ 362.04 (2009), 362.06 (2009), 262.10, subd. 1 (2009).

C. by submitting satisfactory exhibits of technical qualifications;

...

E. by submitting a council record prepared by the National Council of Examiners for Engineering and Surveying (NCEES) for engineer applicants only;

G. for licensure by comity as an architect, engineer, or landscape architect under Minnesota Statutes, section 326.10, subdivision 1, paragraph (a), clause (2), and experience as the board may require together with evidence of current licensure and proof of good standing; ...

Minn. Rule 1800.0900 is also a general rule that applies to all the Board's occupations, but contains specific provisions on specific occupations. It provides, in relevant part:

1800.0900 QUALIFICATION PROCEDURES.

Subp. 3. **Examination required.** An applicant for certification as an engineer-in-training, a land surveyor-in-training, a geologist-in-training, or a soil scientist-in-training must take all parts of the applicable fundamentals examination at one time. An applicant for licensure as a professional engineer, land surveyor, professional geologist, or professional soil scientist must pass the applicable fundamentals examination prior to taking the professional examination, except for the professional engineering applicant that meets the requirements outlined in part 1800.2800.

An applicant for licensure as a professional engineer, professional geologist, or professional soil scientist must take all parts of the professional examination at one time.

Subp. 4. **Reexamination.** An applicant who does not receive a passing grade in an examination may make application to retake that examination. The application shall be accompanied by a reexamination fee as required under part 1800.0500, subpart 7. The board may require an applicant failing an examination four or more times to submit evidence of improved qualifications before an additional retake examination is permitted.

Subp. 5. **Date and place of examination.** Oral examinations may be given each year at such times as may be designated by the board. A candidate who files an application for licensure by examination and is determined to be eligible for admission to the examination will be informed of the date and place of the examination in writing. Examinations shall be scheduled once the applicant's application is approved.

Minn. Rules 1800.2500 -1800.2900 apply specifically to the licensing of engineer applicants. The relevant portions of those rules state:

1800.2500 EDUCATION AND EXPERIENCE.

Subpart 1. **Written examination requirement.** An applicant for licensure as a professional engineer shall pass written examinations as provided in this subpart. Written examinations are required of all applicants except those licensed under part 1800.0800, items E and G, that apply to those professional engineers licensed in one or more states other than Minnesota. An applicant for licensure under part 1800.0800, items E and G, shall satisfy the Minnesota licensing requirements that were in effect at the time of the applicant's original licensure in the other state. The written Fundamentals of Engineering (FE) examination shall be waived by the board if the applicant meets the requirements in part 1800.2800.

Subp. 2. **Admission to written Fundamentals of Engineering (FE) examination.** To qualify for admission to the written examination, the applicant shall present evidence of one of the following:

A. graduation from an engineering curriculum accredited by the Engineering Accrediting Commission (EAC) of the Accreditation Board for Engineering and Technology (ABET) at the time of graduation or is within 32 semester or 48 quarter credits of obtaining an engineering degree meeting the requirements of this subpart;

B. graduation from an engineering curriculum that receives ABET accreditation within five years of the applicant's graduation;

C. graduation from a non-ABET-accredited or nonengineering degree curriculum with the minimum number of engineering science and design credits as required in an ABET-accredited degree (32 semester or 48 quarter credit hours of engineering science and 16 semester or 24 quarter credits of engineering design); or

D. has a graduate degree from an engineering program where the bachelor's degree is ABET-accredited, even though the applicant's bachelor's degree was earned in a nonengineering program, or is currently enrolled in a graduate program working toward a graduate degree and has completed a minimum of 36 quarter or 24 semester credit hours.

Subp. 2a. **Admission to written professional engineering examination.** To qualify for admission to the written examination, the applicant shall present evidence of meeting the educational and qualifying experience requirements in items A and B.

A. Education:

- (1) graduation from an ABET-accredited engineering curriculum;
- (2) graduation from an engineering curriculum that receives ABET accreditation within five years of the applicant's graduation;
- (3) has a non-ABET-accredited or nonengineering bachelor's degree with the minimum number of engineering science and design credits as required in an ABET-accredited degree (32 semester or 48 quarter credit hours of engineering science and 16 semester or 24 quarter credits of engineering design);
- (4) has a graduate degree from an engineering program where the bachelor's degree in that discipline of engineering is ABET-accredited, even though the applicant's bachelor's degree was earned in a nonengineering program; or
- (5) graduation from an engineering curriculum that has ABET accreditation and a graduate degree in engineering from an institution with an ABET-accredited bachelor's curriculum in that discipline of engineering.

B. Qualifying experience:

- (1) completion of a minimum of four years of qualifying engineering experience, if the applicant meets the educational requirements of item A, subitems (1) and (2);
- (2) completion of a minimum of six years of qualifying engineering experience, if the applicant meets the educational requirements of item A, subitem (3);
- (3) completion of a minimum of five years of qualifying engineering experience, if the applicant meets the educational requirements of item A, subitem (4); or
- (4) completion of a minimum of three years of qualifying engineering experience if the applicant meets the educational requirements of item A, subitem (5).

Not more than two years credit shall be allowed for qualifying engineering experience, gained before graduation from an accredited engineering curriculum. The two years experience before graduation must have been gained after completion of the second year of approved engineering education. The experience shall be credited at the rate of 50 percent up to the maximum allowable credit of two years.

1800.2600 ORAL EXAMINATION.

An applicant shall appear before the board for oral examination and shall submit two exhibits of engineering work the applicant has performed if:

A. the applicant's experience record, in the sole opinion of the board, does not clearly indicate the required qualifying engineering experience;

B. the applicant does not hold a degree from an approved engineering curriculum; or

C. the applicant qualifies for waiver of the fundamentals of engineering examination as provided in part 1800.2800.

...

Discussion

Respondent applied for a license by comity on January 12, 2010.⁸ His application and his transcript show that he has a Bachelor of Science degree from Mankato State University in 1991 with a major in Accounting and minors in Computer Science and in Business Administration.⁹ His transcript shows that he has no credits for engineering science or engineering design.¹⁰ Respondent's application states that he was licensed as an Engineer-in-Training in Arizona in January 2001 and as a Professional Engineer-Structural in Arizona in June 2004. It also states that his first employment related to engineering was from February 1995 to December 1995 at Component Manufacturing, Inc., where he was a truss design engineer designing pre-manufactured wood roof and floor trusses that were reviewed by licensed engineers in the states in which the trusses were used. He continued as a truss design engineer at various companies and eventually became a project manager at the Weintraub Organization in December 1997. He was a project designer in Tempe, Arizona, from February 2001 until he formed his own structural engineering firm in Phoenix, Arizona, in 2004. His company is now located in Stillwater, Minnesota.¹¹

By letter of March 2, 2010, the Board notified Respondent that his credentials did not qualify for Minnesota licensing by comity due to his education credentials not meeting the education requirements as found in Minn. Rule 1800.2500, subp. 2a, A(3).¹²

The Board was correct. In 2004, as today, Arizona's requirements for licensure were not equivalent to Minnesota's requirements. In Minn. Rule 1800.2500, subp. 2a (2003 and currently), Minnesota required applicants for admission to take the written examination to have graduated from an ABET-accredited engineering curriculum or

⁸ Affidavit of Doreen Frost (Frost Aff.) Ex. 1 (Also Respondent's Ex. 2).

⁹ Frost Aff. Ex. 2 (Also Respondent's Ex. 3).

¹⁰ Frost Aff. Ex. 2 (Also Respondent's Ex. 3).

¹¹ Frost Aff. Ex. 1 (Also Respondent's Ex. 2).

¹² Frost Aff. Ex. 3 (Also Respondent's Ex. 4).

have a bachelor's degree with the minimum number of credits as required in an ABET-accredited degree. Respondent does not have such a degree. The mere fact that Arizona granted him a license demonstrates that Arizona's requirements in 2004 were not equal to Minnesota's. Examination of the Arizona statutes confirms that Arizona allowed persons to qualify by experience only.¹³

Respondent argues that Arizona's standards are superior to Minnesota's because Minnesota's building code does not contain seismic or earthquake provisions while Arizona's does.¹⁴ This fact is not relevant to the requirement for an engineering education. If ABET-accreditation requires credits in earthquake protection, it is in the ABET-accredited curriculum for engineering required by Minnesota.

Respondent made telephone calls to and exchanged correspondence with the Board's staff and the Board's Chair. In a letter of March 7, 2010, to the Board, and an email of March 8, 2010, Respondent argued that he met all the applicable requirements of Minn. Rule 1800.0800 A (because he had passed the required national tests in Arizona), B (under Minn. Rule 1800.2600 B an oral examination must be allowed if the applicant does not have the required degree), C (submitted all required documents showing technical qualification) and G (for licensure by comity, has the required experience, a current license in Arizona, and proof of good standing.) Respondent requested that he be licensed as required by Minn. Rule 1800.0800.¹⁵

Respondent repeats those arguments here, but he misreads Minn. Rule 1800.0800. It lists the types of evidence that should be submitted by an applicant to prove that the applicant meets the requirements for licensure or certification that are set out elsewhere. It is not a list of the requirements for licensure or certification. In the case of professional engineering, those requirements are set out in Minn. Stat. § 326.10, subd. 1(a)(1) and (2), and Minn. Rules 1800.2500 – 1800.2900.

The Board's Executive Director responded in a letter of March 12, 2010, stating that the evidence showed that he possessed a non-engineering bachelor's degree and had not secured the minimum number of engineering science and design credits required for an EAC/ABET-accredited degree. The letter went on to state that his degree was apparently adequate to achieve licensure in Arizona, but at the time, the requirements for licensure in Arizona were not equal to the laws in effect in Minnesota, and cited Minn. Stat. § 326.10, subd. 1(a)(2) (2008). The letter went on to state:

Nevertheless, in order to further evaluate your competence and qualification, the Board is prepared to offer you an oral examination. See

¹³ Ariz. Stat. §§ 21-122, subd. A(2), and 32-122.02, subd. A(2), and Ariz. Admin. Code §§ R4-30-201, R4-30-202, subd. D.

¹⁴ Respondent's Memorandum at 8.

¹⁵ Frost Aff. Exs. 4 and 5 (Also Respondent's Exs. 5 and 6).

Minn. Rule 1800.0800B and 1800.2600B (2009). The exam will be held in the Board office on Tuesday, April 27th at 2:00 PM. ...¹⁶

After substantial correspondence, Respondent was given an oral examination on July 21, 2010. The oral examination was written, proctored, and graded by two professional engineers who are members of the Board. Respondent did not achieve a passing score of 70%. He answered only 26 of the 60 questions correctly for a failing score of 43%.¹⁷

On August 12, 2010, Respondent sent an email to the Board requesting an application to retake the oral examination "as outlined in board rule 1800.0600."¹⁸ Minn. Rule 1800.0600 contains no such provision. Respondent may have been referring to Minn. Rule 1800.0900, subp. 4. It states that an applicant who does not receive a passing grade in an examination may make application to retake that examination.

The Board's counsel wrote to Respondent on September 15, 2010, stating that the rules authorizing the oral examination do not provide for multiple oral examinations on the same license application and that, as such, the Board was declining his request to retake the oral examination.¹⁹

The rule allowing oral examination for applicants who do not hold an engineering degree is Minn. Rule 1800.2600. It does not contain a provision regarding retaking an oral examination. The rule allowing retests is Minn. Rule 1800.0900, a general rule applying to all the occupations regulated by the Board. In Subpart 3, it requires applicants for in-training certification to take the applicable fundamentals examination and applicants for professional licensure to take the applicable professional examination. In Subpart 4, it states:

Subp. 4. Reexamination. An applicant who does not receive a passing grade in an examination may make application to retake that examination. The application shall be accompanied by a reexamination fee as required under part 1800.0500, subpart 7. The board may require an applicant failing an examination four or more times to submit evidence of improved qualifications before an additional retake examination is permitted.

At oral argument, the Board argued that Subpart 4 applies only to Class 3 licensing by written examination and not to Class 2 licensing by comity. Similarly, it argued that the oral examinations allowed under Minn. Rule 1800.2600, apply only to Class 3 licensing by examination and not to Class 2 licensing by comity. That interpretation could be reasonable if there was anything unclear about these rules that required interpretation. But nothing in the language of Minn. Rules 1800.0900, subp. 4, or 1800.2600, restricts the opportunities for oral examinations to Class 3 licensing by

¹⁶ Frost Aff. Ex. 6 (Also Respondent's Ex. 7).

¹⁷ Frost Aff. Exs. 21, 22, 23.

¹⁸ Frost Aff. Ex. 24 (Also Respondent's Ex. 19).

¹⁹ Frost Aff. Ex. 26 (Also Respondent's Ex. 20).

written examination or to reexaminations only for written examinations. The language of the rules allows oral examinations for Class 2 licensing by comity and reexaminations on failed oral examinations.

Respondent was provided an oral examination. He failed that oral examination. He is not entitled to be licensed at this time. He is, however, entitled to be reexamined by oral examination in accordance with Minn. Rule 1800.0900, subp. 4, by applying to retake that examination and paying the required reexamination fee. Under Minn. Rule 1800.0900, subp. 5, oral examinations may be given each year at times designated by the board.

Respondent's Motion to Seal the Record.

Respondent has requested that the record in this matter and his application be forever sealed so as to protect his right to privacy and reputation.²⁰ As the Board points out, Respondent cites no authority for such a request.²¹

The Administrative Law Judge and the Board are bound by the requirements of the Minnesota Government Data Practices Act, Minn. Stat. Ch. 13. The record will be returned to the Board and must be maintained by the Board in accordance with the MGDPA. Those items already designated by the Board as not public under provisions of the MGDPA shall be maintained as such. The remainder of the record is public. Respondent's motion to seal the record is denied.

S.M.M.

²⁰ Respondent's Memorandum at 11.

²¹ Board's Memorandum at 17.