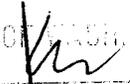


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STATE OF WASHINGTON
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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GARRY FOURRE,

Appellant,

vs.

BOARD OF ENGINEERS AND LAND SURVEYORS OF THE

WASHINGTON STATE BOARD OF LICENSING,

Respondent.

Appeal from Administrative Agency Order

BRIEF OF APPELLANT

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Pursuant to RCW 34.05.570, appellant Garry Fourre requests reversal of the Board of Engineers' Order to revoke his on-site wastewater treatment system design license in the State of Washington.

I. ASSIGNMENTS OF ERROR

- A. The Board of Engineers erred by sanctioning Mr. Fourre in 2009 for uncharged conduct that did not constitute unprofessional conduct.
- B. The Board of Engineers erred by revoking Mr. Fourre's on-site wastewater treatment system design license in 2010 based on a void 2009 order.
- C. The Board of Engineers erred by issuing a 2010 Order that was arbitrary and capricious when the sanction issued had no connection to the alleged acts or the purpose of the sanctions.
- D. The Board of Engineers erred when its 2010 Order was not supported by clear and convincing evidence.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Licensure disciplinary hearings that fail to give notice of the charges against the licensee violate due process requirements and are void. Mr. Fourre was disciplined in 2009 for uncharged and unwritten alleged unprofessional conduct. Is the 2009 order void?
- B. A court order based on a void order is also void. The 2010 order revoking Mr. Fourre's license was based on the void 2009 order. Should both orders be reversed?
- C. Disciplinary orders that have no rational connection between conduct charged and discipline ordered are arbitrary and capricious. The purpose of sanctions in wastewater system designers is to protect the public health, safety and welfare. Can the Board sanction Mr. Fourre after finding that his acts did not endanger public health, safety or welfare?

D. Due Process requires clear and convincing evidence to support licensure discipline. The evidence as to Mr. Fourre's attempts to comply with the Board's 2009 Order is conflicting. When evidence is conflicting, must this court find that such evidence cannot be clear and convincing?

III. STATEMENT OF THE CASE

A. Background Facts

In 1991, Garry Fourre obtained his on-site wastewater system treatment design ("system design") license in Pierce and Thurston counties. In 2000, following a statewide licensure test, Mr. Fourre designed in Thurston, Grays Harbor, Mason, Pacific, and Lewis counties. Before June 16, 2005, there were no complaints on his license. During that time, he designed between 30 and 50 treatment systems per year. After June 16, 2005, there have been no complaints on his license.

B. The Original Complaint—2005

On June 16, 2005, John Ward, a Thurston County Environmental Health Specialist submitted a complaint to the Board of Registration for Professional Engineers and Land Surveyors ("Board") alleging various deficiencies, issues, and problems with Mr. Fourre's 2004 and 2005 design work on four single family residences in Thurston County. CP 0090-93.¹

¹ The Clerk's Papers (CP) consist of 195 pages of documents that were part of the record before the Board and/or the Thurston County superior court

C. The Original Statement of Charges—2007

Two years later, on May 7, 2007, the Board issued a Statement of Charges accusing Mr. Fourre of unprofessional conduct as defined in WAC 196-33-200(1)(b)², (2)³ and RCW 18.235.130(4)⁴ and (11)⁵. CP 0030, ¶¶3.2, 3.3, 3.4, 3.5. The gist of the charges was that Mr. Fourre engaged in unprofessional conduct because of inadequate final designs that did not adequately consider the primary purpose of protecting the safety, health, property, and welfare of the general public; incompetence in technology and lack of knowledge of the codes and regulations governing wastewater treatment systems; incompetence, negligence, or malpractice that caused harm or damage or created an unreasonable risk of harm or damage; and misrepresentation in the conduct of his profession.⁶

relating to this matter. Pages 110-164 have been removed because they are duplicative of pages 67-115.

² WAC 196-33-200 (1)(b) Be able to demonstrate that their final products and work plans adequately consider the primary importance of protecting the safety, health, property, and welfare of the general public.

³ AC 196-33-200 (2) Licensees shall be competent in the technology, and knowledgeable of the codes, regulations, and guidelines applicable to the services they perform.

⁴ RCW 18.235.130(4) Incompetence, negligence, or malpractice that results in harm or damage to another or that creates an unreasonable risk of harm or damage to another;

⁵ RCW 18.235.130(11) Misrepresentation in any aspect of the conduct of the business or profession;

⁶ The Statement of Charges also alleged that the facts recited demonstrated inability to meet the expected standard of care by ignoring or

The Board alleged that if proven, the charges constituted grounds for suspension or revocation of Mr. Foure's license and/or other sanctions, as provided in RCW 18.210.020 and RCW 18.235.110. CP 0098 ¶3. The Board proposed that Mr. Foure stipulate to the charges and sign an agreed order of reprimand and a sanction of taking two courses. CP 0104-109. Mr. Foure denied the charges and requested a hearing.

D. The Original Hearing—2008

One and one-half years later, on October 28, 2008, a hearing was conducted before the Board. Two Assistant Attorney Generals represented the Board; Mr. Foure appeared *pro se*. CP 0022.

E. The Original Order—2009

Four months later, on February 13, 2009, Mr. Foure was vindicated. The Board issued Findings of Fact and Conclusions of Law and found that Mr. Foure did not engage in "misrepresentation in any aspect of the conduct of his business or profession," as charged; CP 0030, ¶3.2; did not engage in "incompetence, negligence, or malpractice that results in harm or damage to a consumer or that creates an unreasonable

failing to follow the requirements of local codes, regulation, and/or guidelines as defined in Thurston County Sanitary Code, Thurston County Critical Areas Ordinance, and State Board of Health administrative rule, WAC 246-272-09501. CP 0098, ¶2.5. The Statement of Charges omits, however, the precise codes, regulations, and/or guidelines Mr. Foure allegedly violated, and WAC 246-272-09501 was repealed on July 18, 2005. None of these local codes, regulations, and/or guidelines was mentioned or apparently considered in the 2009 order. CP 0022-33.

risk that a consumer may be harmed or damaged,” as charged; CP 0030, ¶3.3; did not fail “to be able to demonstrate that [his] final products and work plans adequately consider the primary importance of protecting the safety, health, property and welfare of the general public,” as charged; CP 0030, ¶3.4; and did not violate the mandate that he “shall be competent in the technology, and knowledgeable of the codes, regulations, and guidelines applicable to the services [he] perform[s],” as charged. CP 0030, ¶3.5.

Indeed, after almost four years of investigation and litigation, the Board seemingly dismissed all charges against Mr. Fourre, but then determined that he “failed to meet the expectation of his profession” by “failing at the outset to provide adequate information to support his designs.” CP 0030, ¶3.6.

Having failed to prove that Mr. Fourre violated any of the regulations with which he was charged, the Board nevertheless levied an extreme and financially burdensome sanction on Mr. Fourre: the Board ordered Mr. Fourre to hire a licensed on-site wastewater treatment system designer practicing in Thurston County to act as a peer reviewer on five future designs; to submit to the Board, within 30 days, the names of three Thurston County licensed designers willing to serve as his peer reviewer; and to submit the peer reviewed designs to the Board prior to submitting

On May 22, 2009, Mr. Fourre again wrote to the Board stating that he had been unable to locate any designer who was willing to take on the role of peer reviewer. CR 0039-40. Mr. Fourre proposed that instead, he be allowed to complete two to three classes that addressed the Board's concerns, as per the original proposed sanction. CR 0040. In the alternative, he asked that the Board provide him with the name of a person who would be willing to act as a peer reviewer as well as more time to fulfill this condition. CR 0039-40. Again the Board failed to approve or disapprove Mr. Fourre's request for accommodation and notify him in writing of such.

Instead, without addressing the issues Mr. Fourre raised, the Board's Deputy Director wrote Mr. Fourre a letter dated June 1, 2009, asking Mr. Fourre to contact him at his earliest convenience. AR 6.⁸ Mr. Fuller wrote another letter on July 22, 2009, entitled "Re: Request to modify Final Order" in which he stated, without explanation, "[y]our request for modification of the Order was denied in March 2009." AR 5.

date stamp, and considered by the Board. CR 0035. This court can review evidence in addition to that contained in the Agency Record if it is needed to decide disputed issues regarding brief adjudications, or if the Agency improperly excluded or omitted evidence from the record. *See* RCW 34.05.562(1)(c), (2)(c).

⁸ Included in the CP is a copy of the Agency Record (AR), which consists of 75 pages and which was forwarded to the Court with the Clerk's Papers.

Mr. Fourre did contact Mr. Fuller at his earliest convenience, which was in late August or early September. AR 51. At that time, he again explained the difficulty of finding anyone who would serve as his peer reviewer and asked for Mr. Fuller's assistance. AR 51. Mr. Fuller suggested that although Mr. Fourre would still be responsible for the financial end, the Board could help Mr. Fourre identify a willing peer reviewer. AR 51. Mr. Fourre never heard back from Mr. Fuller on this issue, never received notification that the Board had considered his request, never received notification that the Board approved his request, and never received notification that the Board denied his request. AR 51. What he did receive on December 30, 2009, was a Statement of Charges alleging that he failed to comply with the Board's February 13, 2009 Order and his license could be suspended or revoked. CP 0047.

G. The Final Order—2010

Mr. Fourre requested a Brief Administrative Proceeding (BAP) on the December 30, 2009 Statement of Charges. CP 0054, ¶2.2. The BAP took place on March 8, 2010, and on March 25, 2010, the Board issued an Initial Order that Mr. Fourre was not in compliance with the 2009 Order and subject to discipline by the Board. CP 0055, ¶3.1-2. Mr. Fourre appealed the Initial Order, again *pro se*, again explaining why he could not comply with the 2009 Order. AR 58-60. A Final Order was issued on

June 4, 2010, revoking Mr. Fourre's on-site wastewater treatment system designer license for failure to comply with the 2009 Order. CP 19, ¶1.1.

H. Superior Court Appeal—2010

Mr. Fourre filed a Petition for Review of the Board's revocation order to Thurston County Superior Court. CP 0006-0013. On November 30, 2010, Judge Carol Murphy denied the Petition for Review. CP 188-89. On December 28, 2011, Mr. Fourre appealed to the Court of Appeals. CP 190.

IV. ARGUMENT

Failure to put a defendant on notice of the charges he must face so he can answer the charge and prepare his defense violates due process, voids the order, and requires dismissal. All orders flowing from a void hearing or order are also void. Because the 2009 order was void for violating Mr. Fourre's due process rights, the 2010 order revoking his license for failing to comply with the 2009 order is also void and must be reversed. An order based on a due process violation may be attacked at any time in any proceeding.

A. Courts Review All Constitutional Challenges To An Agency Action De Novo And At Any Time.

Constitutional challenges are questions of law subject to de novo review by this Court. *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91

P.3d 875 (2004). An Agency's interpretation and application of the law is subject to de novo review. *Keene v. Board of Accountancy*, 77 Wn. App. 849, 894 P.2d 582, review denied, 127 Wn.2d 1020, 904 P.2d 300 (1995). Courts shall grant relief from an agency order if it determines that "[t]he order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied," or, "the order, is outside the statutory authority of the agency conferred by any provision of law[.]" RCW 34.05.570(3)(a), (b).

A party may raise a constitutional issue at any time. *Levinson v. Washington Horse Racing Commission*, 48 Wn.App. 822, 829, 740 P.2d 898 (1987)(constitutional issues may be raised for the first time in the reply brief). Courts review constitutional errors, even if raised for the first time on appeal, if they are manifest errors. RAP 2.5(a)(3). An error is manifest if it results in actual prejudice to the defendant. *State v. WWJ Corp.*, 138 Wn.2d 595, 602-03, 980 P.2d 1257 (1999)(internal citations omitted). This "error of law" standard permits a reviewing court to substitute its judgment for that of the agency. *Haley v. Medical Disciplinary Board*, 117 Wn.2d 720, 728, 818 P.2d 1062 (1991).

An order based on a due process violation may be attacked collaterally in any further proceeding at any time. 15 KARL B. TEGLAND, WASHINGTON PRACTICE § 39.17 (1st ed. 2003).

B. The Board Violated Mr. Fourre's Due Process Rights By Disciplining Him For Uncharged Behavior That Did Not Constitute Unprofessional Conduct.

The Washington Constitution guarantees that the government will not deprive an individual of "life, liberty, or property, without due process of law." WA. CONST. art. I, §3. When a state seeks to deprive a person of a protected interest, procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivations. *Mathews v. Eldridge*, 242 U.S. 319, 348, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976). The right to practice a chosen profession is a valuable property right that cannot be deprived absent the safeguards of due process. *Nguyen v. Dept. of Health*, 144 Wn.2d 516, 527, 29 P.3d 689 (2001).

Licensure disciplinary hearings in Washington invoke due process protections because they are concerned with a constitutionally protected property right and because they are quasi-criminal proceedings. *Nguyen*, 144 Wn.2d at 523; *Washington State Med. Disciplinary Bd. v. Johnston*, 99 Wn. 2d 466, 474, 663 P.2d 457 (1983). Professional engineers are provided the same due process protections afforded other professional licensees at disciplinary hearings. *Nims v. WA Bd. of Registration*, 113 Wn.App. 499, 505, 53 P.3d 52 (2002). Judgments entered in a proceeding

that fails to comply with due process requirements are void. *In Re Marriage of Ebbighausen*, 42 Wn.App. 99, 102, 708 P.2d 1220 (1985).

1. Mr. Fourre Had No Notice Of The Charges For Which The Board Levied Sanctions Against Him In 2009.

The core of due process is the opportunity to be heard and the right to adequately represent one's interests. *Ebbighausen*, 42 Wn.App. at 102(reversing custody order for due process violation of the right to be heard when the judge did not allow father to present testimony in a custody hearing). Failure to put a defendant on notice of the charges he must face so he can answer the charge and prepare his defense, violates the accused's due process rights and requires dismissal of the charge. *State v. Rhinehart*, 92 Wn.2d 923, 928, 602 P.2d 1188 (1979).

In order to put an accused on notice, an information must contain a plain, concise, and definite statement of the essential facts that constitute the offense charged. CrR 2.1(A)(1); *McDaniel v. DSHS*, 51 Wn.App. 893, 897, 756 P.2d 143(1988). An information is subject to attack if it is too indefinite or uncertain to enable the accused to prepare his defense. *State v. Dixon*, 78 Wn.2d 796, 802, 479 P.2d 931 (1971).

In *Rhinehart*, the court dismissed a conviction when the defendant was charged with possession of a stolen car, when he had possession only of a stolen car part, because the information put the defendant on notice

that he must answer the charges as to a stolen car, not one part thereof, which is what the proof established. “[I]t is fundamental that an accused must be informed of the charge he is to meet at trial and that he cannot be tried for an offense not charged.” 92 Wn.2d at 928 (internal citations omitted).

Here, Mr. Fourre was given no notice that he was being charged with unprofessional conduct for failing to meet the expectation of his profession by failing “at the outset to provide adequate information to support [one’s] designs.” The charges against him concerning his designs alleged that his final products and work plans were inadequate. CP 0097-98, ¶¶2.5-3. Of that charge, he was acquitted. CP 0030, ¶3.3.

2. No Relevant Statute Or Code Defines Mr. Fourre’s Alleged Acts As Unprofessional Conduct.

Even if it could be argued that Mr. Fourre was given notice that he was charged with failing to meet the “expectation of his profession to apply the skills diligence and judgment required by the professional standard of care” by failing “at the outset to provide adequate information to support his designs,” there is simply no evidence that committing such acts constitutes unprofessional conduct under the regulations. Indeed, all evidence is against such a assumption.

Failure to give notice to a licensee that certain acts are grounds for sanctions violates the licensee's due process rights. *H&V Engineering, Inc., v. Idaho State Board of Professional Engineers and Land Surveyors*, 747 P.2d 55, (ID. 1988) is a case strikingly similar to this case. In *H&V Engineering*, the issue was revocation or suspension of wastewater treatment system designers who were charged with misconduct and gross negligence in their practice. *H&V Engineering*, 147 P.2d at 56. The Idaho court noted it was obligated to "reverse a decision if substantial rights of an individual have been prejudiced because the administrative findings, inferences, conclusions, or decisions are 'in violation of constitutional or statutory provisions.'" *H&V Engineering*, 147 P.2d at 58 (internal citation omitted). Finding that charges of "poor judgment" and "misconduct" were not defined in the Idaho laws establishing grounds for professional discipline, the court reversed the order of sanctions as a violation of due process because the engineers were sanctioned for unwritten standards that were unknown to the licensees when there was "nothing in the statutory definitions—nor Board rules and regulations—which warned the engineers that their acts would subject them to discipline." *H&V Engineering*, 147 P.2d at 59, 61.

In Washington, the Legislature and Administrative Agency have taken great pains to spell out multiple, specific acts and omissions that

constitute professional and unprofessional conduct as related to wastewater system designers. RCW 18.210.020, 18.235.110; WAC 196-33-200. The purpose of the regulations is to promote health, safety, environment, property, and welfare of the public. WAC 296-33-100. A secondary purpose is to give licensees notice of expectations of conduct. WAC 196-33-100. But nothing in any of the regulations governing professional conduct of system designers gives notice that “failing at the outset to provide adequate information to support designs” constitutes unprofessional conduct or that such failure compromises the health, safety, environment, property, and welfare of the public.

a. Title 18 Of The RCW Does Not Include Failure At The Outset To Provide Adequate Information To Support One’s Designs In Its Definitions Of Unprofessional Conduct.

Washington State employs a uniform disciplinary act (“UDA”) to consolidate disciplinary procedures for businesses and professions licensed under the department of licensing. It follows standardized procedures for the regulation of business and professions and the enforcement of laws, the purpose of which is to assure the public of the adequacy of business and professional competence and conduct. RCW 18.235.005. On-site wastewater treatment systems designers are licensed under RCW 18.210 and thereby subject to all the rules and regulations of the UDA under RCW 18.235.110. Licensure disciplinary authorities are

authorized to issue disciplinary orders only upon a finding of unprofessional conduct. RCW 18.235.110.

Under the UDA, 15 specific offenses constitute unprofessional conduct of those professionals licensed under Title 18, which includes on-site wastewater treatment system designers. The specific acts of unprofessional conduct include:

- (1) the commission of any act involving moral turpitude, dishonesty, or corruption;
- (2) misrepresentation or concealment;
- (3) false advertising;
- (4) incompetence, negligence or malpractice that results in harm;
- (5) suspension of a license by another authority;
- (6) failure to cooperate with the disciplinary authority in the course of an investigation;
- (7) failure to comply with an order issued by the disciplinary authority;
- (8) violating provisions of this chapter or chapter RCW 18.235.020(2);
- (9) aiding or abetting an unlicensed person to practice when a license is required;
- (10) practice of profession beyond the scope of practice;
- (11) misrepresentation in any aspect of the conduct of the business;
- (12) failure to adequately supervise or oversee auxiliary personnel;
- (13) conviction of any gross misdemeanor or felony related to the practice;
- (14) interference with an investigation or disciplinary action; and
- (15) engaging in unlicensed practice.

RCW 18.235.130(a)(1-15)

RCW 18.210.020 adds three additional acts that constitute unprofessional conduct specifically related to wastewater system designers, including:

- (1) practicing with an expired, suspended, or revoked permit or license;
- (2) being willfully untruthful or deceptive in any documents, report, statement, testimony, or plan that pertains to the

- design or construction of an on-site wastewater treatment system; and
- (3) submission of a design or as-built record to a local health jurisdiction, to the department of health, or to the department of ecology, that is knowingly based upon false, incorrect, misleading, or fabricated information.

Mr. Fourre was not charged with any violations of RCW 18.210.020.

b. WAC 196-33 Does Not Include Failure At The Outset To Provide Adequate Information To Support One's Designs In Its Definitions Of Unprofessional Conduct.

In addition to governance by the UDA, wastewater system designers are also regulated under WAC 196-33, which defines rules of professional practice specific to wastewater system designers. The purpose of these regulations is to provide additional guidance with respect to "accepted professional conduct and standard of practice" as iterated in RCW 18.210 (and 18.235.130 by inference). The intent of these guidelines is "to establish standards with which to measure the performance of practitioners." WAC 196-33-100(1).

Under WAC 196-33, all licensees are broadly charged to "exercise a standard of care that holds paramount the protection of the health, safety, environment, property, and welfare of the public." WAC 196-33-200. Like RCW 18.235.130, WAC 196-33-200 specifies multiple distinct actions that constitute professional practice and conduct of wastewater system designers. They are measurable because they are specific.

In the preamble to the first of these guidelines, licensees are again broadly exhorted to apply the skill diligence and judgment required by the professional standard of care, to achieve the goals and objectives agreed with the client or employer, and to promptly inform the client or employer of progress and changes in conditions that may affect the appropriateness or achievability of some of all of the goals and objectives of the client or employer. WAC 196-33-200(1). The broad language of this preamble does not give guidance to the accepted professional conduct and standard of practice—only through the specific examples that follow is a licensee informed of what acts satisfy the broad exhortation, including:

(a) be honest and fair and conform to the relevant laws and codes of the jurisdiction;

(b) be able to demonstrate that final products and work plans adequately consider the primary importance of protecting the safety, health, property, and welfare of the public;

(c) approve only documents prepared by them or under their direct supervision;

(d) inform clients or employers of the possible consequences, when an overruling or disregarding of the licensee's professional judgment may threaten the safety or health of the public. If in the judgment of the licensee and imminently dangerous situation persists, they shall promptly inform appropriate authorities; and

(e) inform the board in writing, citing specific facts to which the licensee has direct knowledge, if they have knowledge or reason to believe that another person or firm may be in violation of any of the provisions of chapter 18.210 RCW or these rules of professional conduct,

and cooperate with the board in furnishing such further information or assistance as may be required.

WAC 196-33-200(1)(a-e).

The next 25 items denominate additional, specific acts that constitute measurable professional conduct of on-site wastewater system designers. WAC 196-33-200(2-26). The final provision itemizes the only acts in this chapter specifically constituting unprofessional conduct, including:

- (a) some types of duplicating;
- (b) failure to notify client that project could not be completed;
- (c) failure to respond to client inquiries that endanger health, safety or welfare of public or client;
- (d) failure to respond to inquiries from other practitioners or agencies regarding differences in respective work products;
- (e) harassing, intimidating or retaliating against one who had provided information to the Board; and
- (f) disorderly, discriminatory or abusive behavior.

WAC 196-33-200(27)(a-f). In this way, the definitions of professional and unprofessional conduct under the regulatory scheme define specific actions that are measurable and provide guidance to the licensee as to what constitutes professional as well as unprofessional conduct in a systems designer.

3. Mr. Fourre Had No Notice That The Charges For Which He Was Sanctioned Constitute Unprofessional Conduct.

After acquitting Mr. Fourre of all the charges actually levied against him in the 2007 Statement of Charges, the Board did not dismiss the complaint. Instead, it created a new charge out of the preamble at WAC 296-33-200(1)—failure to meet the expectation of his profession “to apply the skills, diligence and judgment required by the professional standard of care.” CP 0030, ¶3.6.

This vague, uninformative, and circular argument begs the question—essentially saying that Mr. Fourre violated the standard of care because he did not meet the standard of care, without iterating a single provision of professional conduct he violated. The charge is contrary to the agency purpose of providing system designers with guidelines against which to measure performance and determine whether or not they are meeting the standard of care. WAC 196-33-100(1)(“it is the intent of the board to introduce guidance and direction through these rules, together with recommended standards and guidance documents.”)

Ironically, while alleging that Mr. Fourre failed to meet the expectation of the profession because at the outset his plans were not adequately supported, the Board made a finding that there is, in fact, no expectation in Thurston County that wastewater system designs are ever

approved “at the outset.” To the contrary, the Board found that 80-90% of all design engineers in Thurston County fail at the outset to have their designs approved as originally submitted. CP 0026, ¶2.11.

Like the engineers in *H&V Engineering*, Mr. Fourre was disciplined based on unwritten standards unknown and unknowable to him and for which Mr. Fourre did not have notice and/or opportunity to be heard and/or to defend against.

Moreover, the Board didn’t even make a finding of unprofessional conduct; it found instead that he failed to meet the expectation of his profession by failing at the outset to provide adequate information so support his designs. CP 0030 at ¶3.6. The Board acted outside its statutory authority by issuing sanctions absent a finding of unprofessional conduct, RCW 18.235.110, and this Court must grant relief from an order that is outside the statutory authority of the agency. RCW 18.235.110, RCW 34.05.570(3)(b).

For all these reasons, Mr. Fourre’s due process right to notice in the Original hearing was violated and the 2009 Order was void.

C. Because the 2010 Order Was Based On The Void 2009 Order, The 2010 Order Is Also Void And Must Be Stricken.

An order based on a hearing in which there was not adequate notice or opportunity to be heard is void. *Esmieu v Schrag*, 88 Wn.2d

490, 497, 563 P.2d 203 (1977); *Marriage of Ebbighausen*, 42 Wn.App. at 102. A void order is, in legal effect, no order, and a court may relieve a party from an order that is void. CR 60(B)(5). Being worthless in itself, all subsequent orders based on the faulty order are equally worthless and also void. *See Esmieu*, 88 Wn.2d at 497.

In *Esmieu*, a trial court issued an order approving a trust to exchange land for an apartment complex based on evidence taken at an *ex parte* hearing for which the defendants did not receive notice and were not present. 88 Wn.2d at 493-495. Four months later, based on the order approving the exchange, the court ordered defendants to execute quitclaim deeds for their interest in the land to be exchanged. *Id.* at 495. The defendants appealed and the appellate court granted their motion to dismiss and vacated the trial court's order because failure to notify defendants of the *ex parte* hearing violated their due process rights to notice. The Supreme Court affirmed, holding that an order based on a hearing in which there is not adequate notice or opportunity to be heard is void. *Id.* at 497. "The violation of defendants' constitutional rights alone is sufficient to require the orders to be voided and the case remanded." *Id.* at 498. Moreover, the court held that "all subsequent orders based on the faulty hearing are void." *Id.* at 497.

On February 13, 2009, the Board issued an Order requiring Mr. Fourre, within 30 days, to submit the names of three persons who would be willing to act as his peer reviewer, knowing only five persons in the universe were eligible for the post. CP 0031, ¶4.1, CP 0026. ¶2.10.

Mr. Fourre was unable to comply with the request. He spoke to several people, but no one wanted to serve as peer reviewer because it was deemed a conflict of interest and because there were no guidelines. CP 0040. Mr. Fourre informed the Board of his difficulty in a Letter for Reconsideration written on February 24, and another written on May 22, 2009. CP 0114, 0039-40. The Board recognized this letter for Reconsideration as a request for accommodation. AR 5. The Board did not respond to his concerns, despite stating in the Order it would do so in writing. CP 32-33, ¶4.11.

On December 30, 2009, Mr. Fourre received notice that because he was not in compliance with the 2009 order, the Board could revoke his license. CP 0048. After a Brief Adjudicative Proceeding, (“BAP”) the Board found Mr. Fourre was non-compliant with the 2009 Order. CP 0055, ¶3.2. An appeal of that finding was unsuccessful. On June 4, 2010, the Board issued a Final Order based on the finding of non-compliance with the 2009 order and ordered Mr. Fourre’s license revoked. CP 0019, ¶1.1. The 2010 revocation order flows directly from the void 2009 order

and is thus also void. *Esmieu*, 88 Wn.2d at 497. It should be dismissed and Mr. Fourre's license restored.⁹

D. The Board's Action Was Arbitrary and Capricious When It Issued Sanctions Absent Any Objective Analysis, Made No Connection Between The Findings And The Sanction, Ignored Mr. Fourre's Good Faith Attempts To Work With The Board, And Ignored The Untenable Order.

Even if this Court does not reverse on Constitutional grounds, it must do so because the agency action in ordering revocation of Mr. Fourre's license was arbitrary and capricious. RCW 34.05.570(i).

An agency action is arbitrary and capricious if it lacks a rational connection between facts found and the choice made. *Seymour v. Washington Department of Health*, 152 Wn.App. 156, 216 P.3d 1039 (2009). Arbitrary and capricious actions are those that disregard the facts and circumstances, are unreasoned and without consideration. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 609, 903 P.2d 433, 909 P.2d 1294 (1995), *cert. denied*, 518 U.S. 1006 (1996).

The primary purpose and consideration in determining appropriate sanctions for unprofessional conduct of wastewater designers in the State of Washington is to promote the protection of public health, safety, and

⁹ Mr. Fourre is asking for dismissal of the orders and the charges against him, not remand, believing that because licensure hearings are quasi-criminal, he should be protected from being twice placed in jeopardy for the same offense. *United States v. Scott*, 437 U.S. 82, 91, 98 S.Ct. 2187, 57 L.Ed. 2d 65 (1978).

welfare. RCW 18.235.110(3). Mr. Fourre's work was specifically found not to constitute a threat to public health, safety, or welfare. CP 0030, ¶3.2.

The Board failed to make any attempt to connect, rationally or otherwise, the purpose of its sanctions and Mr. Fourre's alleged misconduct. Indeed, there is a vast chasm between the sanctions issued and Mr. Fourre's conduct. These sanctions do not consider the Board's mandate to consider public safety, health, and welfare in applying sanctions, and totally fail to consider the facts and circumstances of this case, i.e., that there were no peer reviewers available to Mr. Fourre in all of Thurston County and he tried to work with the Board to find a solution.

E. The Board's 2010 Revocation Order Was Not Based On Clear And Convincing Evidence.

Clear and convincing evidence is required to support a finding of unprofessional conduct in a professional license disciplinary hearing. *Ongom v. Department of Health*, 159 Wn.2d 132, 148 P.3d 1029 (2006). To be clear and convincing, evidence must "instantly tilt" the evidentiary scales to the side of the party producing such evidence. *Colorado v. New Mexico*, 467 U.S. 310, 316, 104 S. Ct. 2433, 81 L.Ed.2d 247 (1984). Such evidence must therefore be unequivocal. *Nguyen*, 144 Wn.2d at 524.

On reviewing a licensure action, the Court must determine whether the action is supported by evidence that is substantial when viewed in light of the whole record before the court. *Honesty in Environmental Analysis and Legislation (HEAL) v. Central Puget Sound Growth Management Hearings Bd.*, 96 Wn. App. 522, 979 P.2d 864, amended on reconsideration in part (1999). Substantial evidence is “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *Tassoni v. Dep’t of Retirement Systems*, 108 Wn.App. 77, 84, 29 P.3d 63 (2001)(reversing agency findings for lack of substantial evidence).

Thus, the test on appeal of a licensure hearing is whether there is a sufficient amount of unequivocal evidence to persuade a fair-minded person of the correctness of the Order. In this case, the question is, was there sufficient evidence that would instantly tilt the scales of justice toward the correctness of the Board’s 2010 Order revoking Mr. Foure’s license? The answer is no.

The Board revoked Mr. Foure’s license because it found he failed to work with the Program to identify, by March 27, 2009, three peer reviewers or work with the Board to do so. CP ¶2.6. These findings are directly contradicted by the evidence, blatantly disregard the facts and

circumstances, and are not remotely supported by evidence that is unequivocal.

First of all, the evidence is clear that Mr. Fourre did notify and attempt to work with the Board on February 27, 2009. CP 114. Mr. Fourre's Letter for Reconsideration and discussion of the difficulties he was experiencing with the Order was received and date stamped by the Board on February 27, 2009. The Board regarded this letter as a request for modification pursuant to the Board's order that Mr. Fourre let the Board know in writing if he was having trouble complying with the order. AR 5, CP 0032, ¶4.11. The Board simply ignored it.

Having received no response in writing to his February 26 letter to the Board, Mr. Fourre believed that the Board was working on helping him find a solution as required by the Order. Clearly, the Board had imparted no sense of urgency in any of its previous dealings with Mr. Fourre—letting two years elapse from the complaint to the Statement of Charges, another year and a half between the Statement of Charges and the hearing, and another four months between the hearing and the February 2009 Order. So, he wrote again on May 22, 2009 expressing more urgently the impossibility of the proposed sanction. CP 0039-41. He again noted the conflict of interest for a peer reviewer, and more potently, his inability to locate any person willing to take on the role of a

peer reviewer, despite his good faith efforts to do so. CP 0040. He asked, pursuant to the Order, that the Board assist him by providing him the name of a person willing to act as his peer reviewer, as well as more time to fulfill this condition. CP 0040. Mr. Fourre also spoke with the Board's deputy director in August or early September, and was told that the Board would attempt to find a peer reviewer. AR 50-51. Again the Board did not respond to Mr. Fourre's request for assistance.

The facts of Mr. Fourre's attempts to work with the Board are alone sufficient to show that the Order revoking Mr. Fourre's license for failure to comply with the Order was not based on clear and convincing evidence. *Ongom*, 159 Wn.2d at 149, n.1 (the presence of directly conflicting testimony in a hearing does not give rise to clear and convincing evidence).

F. Mr. Fourre Is Entitled To Attorney Fees And Costs

A qualified party that prevails in a judicial review of an agency action is entitled to an award of reasonable attorney fees and other expenses pursuant to RCW 4.84.350(1) up to the limit of twenty-five thousand dollars. RCW 4.84.350(2); *Eidson v. State*, 108 Wn.App. 712, 731 (2001). Garry Fourre is a qualified party; his license to practice as an on-site wastewater system designer, his livelihood, was revoked. His reputation has been tarnished and his ability to obtain suitable employment

has been compromised. This Court should reverse and award Mr. Fourre his fees.

V. CONCLUSION

Mr. Fourre requests that the Court reverse the Agency decision and vacate the order revoking Mr. Fourre's license to practice his profession. Mr. Fourre further requests that the Court award him the reasonable costs of this action, including attorney fees, and all other relief this Court deems equitable or just in the circumstances.

DATED this 12th day of May, 2011

LAW OFFICE OF EVY MCELMEEL



EVY MCELMEEL WSBA NO. 30866
ATTORNEY FOR APPELLANT

WAC 196-33-100

Purpose and definitions.

(1) The purpose of chapter 196-33 WAC is to provide further guidance to licensees with respect to the accepted professional conduct and standard of practice, as indicated in chapter 18.210 RCW, and generally expected of those practicing professional on-site wastewater treatment system designing. These standards shall apply to all persons authorized to practice on-site wastewater treatment system design services, whether licensed professional designers under chapter 18.210 RCW, or licensed professional engineers under chapter 18.43 RCW. The board recognizes the need to establish standards with which to measure the performance of practitioners. The board further recognizes, as a minimum standard, those standards for the design of on-site wastewater treatment systems required by chapter 246-272 WAC, promulgated by the state board of health in accordance with their authority granted in RCW 43.20.050. It is the intent of the board to introduce guidance and direction through these rules, together with recommended standards and guidance documents.

(2) The word "licensee" in these rules of professional practice shall mean any person holding a license issued in accordance with chapter 18.210RCW, or chapter 18.43 RCW, issued by this board.

(3) All licensees are charged with having knowledge of and practicing in accordance with the provisions of these rules of professional practice.

(4) Should there be any conflict in the guidance provided in this chapter and the intent of the language of chapter 18.210 RCW, the intent of the language in chapter 18.210 RCW prevails.

(5) Terms used in this chapter shall have the same definition as provided in chapter 18.210 RCW.

WAC 196-33-200

Fundamental[s] canons and guidelines for professional practice and conduct.

The specialized and complex knowledge required for on-site wastewater treatment system design makes it imperative that licensees exercise a standard of care that holds paramount the protection of the health, safety, environment, property, and welfare of the public.

(1) Licensees are expected to apply the skill, diligence and judgment required by the professional standard of care, to achieve the goals and objectives agreed with the client or employer, and are expected to promptly inform the client or employer of progress and changes in conditions that may affect the appropriateness or achievability of some or all of the goals and objectives of the client or employer. Licensees are obliged to:

(a) Be honest and fair in their dealings, and to conform to the relevant laws and codes of the jurisdiction in which they practice.

(b) Be able to demonstrate that their final products and work plans adequately consider the primary importance of protecting the safety, health, property, and welfare of the general public.

(c) Approve or seal only documents prepared by them or under their direct supervision.

(d) Inform their clients or employers of the possible consequences, when an overruling or disregarding of the licensee's professional judgment may threaten the safety or health of the public. If in the judgment of the licensee an imminently dangerous situation persists, they shall promptly inform appropriate authorities.

(e) Inform the board in writing, citing specific facts to which the licensee has direct knowledge, if they have knowledge or reason to believe that another person or firm may be in violation of any of the provisions of chapter 18.210 RCW or these rules of professional conduct, and cooperate with the board in furnishing such further information or assistance as may be required.

(2) Licensees shall be competent in the technology, and knowledgeable of the codes, regulations, and guidelines applicable to the services they perform.

RCW 18.235.130

Unprofessional conduct — Acts or conditions that constitute.

The following conduct, acts, or conditions constitute unprofessional conduct for any license holder or applicant under the jurisdiction of this chapter:

4) Incompetence, negligence, or malpractice that results in harm or damage to another or that creates an unreasonable risk of harm or damage to another;

(11) Misrepresentation in any aspect of the conduct of the business or profession

RCW 34.05.570

Judicial review.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of

constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington a true and correct copy of this document was sent by legal messenger or first class mail, postage prepaid, to the following:

Susan Pierini AAG
Attorney General's Office
1125 Washington St.
P.O. Box 40100
Olympia, WA 98504-0100

DATED this 12th day of May 2011.

[Signature]
Evvy McElmeel