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Thurston County Superior Court Case No. 18-2-04658-34

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

FISHERIES ENGINEERS, INC., a Washington corporation; and PAUL
TAPPEL, an individual and professional engineer,

Petitioners/Appellants,

v.

THE STATE OF WASHINGTON, GOVERNOR JAY INSLEE, in his
official capacity, ATTORNEY GENERAL BOB FERGUSON, in his
official capacity, and BOARD OF REGISTRATION FOR
PROFESSIONAL ENGINEERS & LAND SURVEYORS, an agency of
the State of Washington,

Respondents.

**OPENING BRIEF OF APPELLANTS
FISHERIES ENGINEERS, INC. AND PAUL TAPPEL**

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I. INTRODUCTION

This case involves the proper interpretation of Washington’s engineering licensing statute, RCW Chapter 18.43. For obvious public safety reasons, this Chapter regulates the licensing requirements for engineers. This State law dictates who can use the professional titles “Engineer” and “Professional Engineer.”

There are many other professional titles subject to this type of licensure requirement. For example, Physicians cannot use their professional title until they have completed and passed their medical board exams. A person cannot call himself an “Architect” unless he has satisfied all the licensure requirements under RCW Chapter 18.08. Law students and paralegals cannot call themselves “Attorneys” or “Lawyers,” unless and until they have passed the bar exam and have been duly admitted by the Washington State Bar Association. Cosmetologists, tattoo artists, auctioneers, chiropractors, dental hygienists, embalmers, escrow agents, pharmacists, radiologists, plumbers, social workers, home inspectors, and dieticians all must complete the statutory testing and licensure requirements before they can hold themselves out to the public as such. *See generally* RCW Title 18. These title protections exist so that the public can trust that the person performing these services has gone through the training and education necessary to utilize that professional title. And yet, the Respondents in this case—who represent the State entities primarily responsible for regulating the engineering profession—have

determined that the professional title “Engineer” deserves no such protection.

Appellant Paul Tappel is a licensed Professional Engineer. He filed his original Petition on behalf of himself and his business, Fisheries Engineers, Inc., because he, like so many other licensed engineers in this State, was frustrated by the Respondents’ refusal to enforce Washington’s engineering licensing statute. Respondents have embraced an enforcement policy that broadly allows individuals to hold themselves out as “Engineers” while providing services defined by the Act as engineering, regardless of whether they possess the qualifications necessary to obtain this distinguished title. Even worse, the State itself is one of the greatest violators of this statute. Hundreds, if not potentially thousands, of unlicensed, unqualified public employees utilize the title “Engineer,” regardless of whether they have been properly licensed.

According to Respondents, however, this presents no issue, because they interpret RCW Chapter 18.43 as protecting only a small and arbitrary subset of specific engineering titles—professional, structural, electrical, mechanical, and hydraulic engineers. All other engineering titles, such as Environmental Engineer, Civil Engineer, Bridge Engineer, Geotechnical Engineer, and Transportation Engineer, are unregulated. This enforcement policy is inconsistent with the statute, which itself is unambiguous: unlicensed individuals cannot use the title “Engineer” when the use of that title conveys the impression they are a duly licensed “Professional Engineer.” RCW 18.43.010. And the use of the title

“Engineer,” or any variation thereof, necessarily tends to convey the impression of licensure when it is used by someone who works within an agency, organization, or business that engages in or offers engineering services. Under those circumstances, there is no meaningful way for the general public to distinguish between the licensed engineers and the unlicensed individuals who work under them, if both are permitted to use the professional title “Engineer.” As discussed below, the text of the statute itself makes this clear, and it should be enforced as such. The trial court erred by rejecting the statute’s plain language and by embracing Respondents’ arbitrarily narrow view of the engineering licensing statute. Appellants respectfully request that this erroneous decision be reversed.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in denying Appellants’ Motion for Summary Judgment for injunctive and declaratory relief. Clerk’s Papers (“CP”) 507-509.

B. The trial court erred in granting summary judgment in favor of Respondents and in dismissing Appellants’ claims. *Id.*

III. ISSUE RELATED TO ASSIGNMENTS OF ERROR

A. Did the trial court err in holding, as a matter of law, that RCW Chapter 18.43 allows unlicensed, unqualified individuals to hold themselves out to the public as “Engineers,” even when they are offering or performing services defined by statute as professional engineering, so long as they do not use a certain arbitrary subset of engineering titles?

IV. STATEMENT OF THE CASE

A. History of the Engineer licensing statute.

The regulation of the engineering profession dates back to Babylonian times. The Hammurabi Code, circa 1800 BC, recognized the importance of holding engineers accountable, albeit through means no longer acceptable:

If a builder erect a house for a man and do not make its construction firm, and the house which he built collapse and cause the death of the owner of the house, that builder shall be put to death. If it cause the death of the son of the owner of the house, they shall put to death the son of the builder.

Doug McGuirt, *The Professional Engineering Century*, PE MAG., June 2007, at 25. It was not until 1907 that regulation of engineering came to this country. The need was first recognized by Wyoming’s state engineer responsible for state water use applications. Recognizing the problems caused by the inaccurate submissions being received from those untrained as engineers and surveyors, Wyoming enacted legislation in 1908 requiring registration for those who would represent themselves to the

public as an engineer or land surveyor and created a state board of examiners for these professions. *Id.* at 26. Other states soon followed, recognizing the wisdom in the need to protect the public. Sometimes laws were passed in response to engineering tragedies, such as California's law passed after a dam collapse killed 500, or Texas' law passed after a gas explosion at a school killed hundreds. *Id.* at 27-28. By 1950, all states had engineering licensure laws in effect. *Id.* at 28.

Washington State passed its licensure law for engineers and land surveyors in 1947, under Chapter 18.43 of the Revised Code of Washington. RCW Chapter 18.43 (the "Act") sets forth the law upon which the qualifications, testing, licensure, and regulation of engineers and land surveyors in the State is based. The Act provides for the creation of the Board of Registration for Professional Engineers and Land Surveyors (the "Board"): a seven-member board responsible for carrying out the powers and duties provided for in the chapter, including enforcement of the Act.

The stated mission of the Board is to safeguard life, health, and property, and to promote the public welfare in regards to engineering, land surveying and on-site wastewater system designs by ensuring that only qualified individuals are permitted to take licensure exams, only competent individuals are granted licensure to practice, only licensed individuals are permitted to offer and/or provide services, only registered businesses are authorized to provide services to the public, and all applicants, registrants, and licensees maintain a high standard of practice

and compliance with applicable statutes, rules, and regulations. *See Board of Registration for Professional Engineers and Land Surveyors, WASH.*

STATE DEP'T OF LICENSING,

<https://www.dol.wa.gov/business/engineerslandsurveyors/members.html>

(last visited Aug. 29, 2019). The Board is responsible for ensuring that only duly licensed individuals hold the titles of “Professional Engineer” or “Engineer.” *See* RCW 18.43.020(5) (prohibiting unlicensed individuals from using the title “Professional Engineer”) and RCW 18.43.020(1) (providing that “Engineer” and “Professional Engineer” are synonymous for purposes of the Act).¹

While there have been changes over the years, the key language at issue in this case remains unchanged over those 71 years:

In order to safeguard life, health, and property, and to promote the public welfare . . . **it shall be unlawful for any person . . . to use in connection with his or her name or otherwise assume, use, or advertise any title or description tending to convey the impression that he or she is a professional engineer** or a land surveyor, unless such person has been duly registered under the provisions of this act.

Sec. 2. Definitions. Engineer: The term “engineer” as used in this act shall mean a professional engineer as hereinafter defined.

Professional Engineer: The term “professional engineer” within the meaning and intent of this act,

¹ In fact, the term “Engineer” is defined as a registered “Professional Engineer” in three other statutory chapters as well. For example, RCW 18.210.010(5) (the chapter governing licensing for on-site water treatment systems designers) defines “Engineer” as a “professional engineer licensed under chapter 18.43 RCW.” Similarly, both RCW 18.08.320(9) and RCW 18.96.030(7) (the chapters governing licensure for architects and landscape architects) define “Engineer” as “an individual who is registered as an engineer under chapter 18.43 RCW.”

shall mean a person who, by reason of his special knowledge . . . acquired by professional education and practical experience, is qualified to practice engineering as hereinafter defined, as attested by his legal registration as a professional engineer.

A person shall be construed to practice or offer to practice engineering . . . who, by verbal claim, sign, advertisement, letterhead, card, or in any other way **represents himself to be a professional engineer, or through the use of some other title implies that he is a professional engineer . . .**

It shall be the duty of all officers of the state or any political subdivision thereof to enforce the provisions of this act.

Compare H.B. 42, 1947 Leg., 30th Reg. Sess. (Wash. 1947) (attached as Ex. A to the Declaration of Alan Schuchman in Support of Petitioners' Motion for Summary Judgment ("Schuchman Decl.)) CP 81-82, 91 *with* RCW 18.43.010 and .020.

However, the Board has taken a number of inconsistent positions regarding the Act's title requirements. In its first interpretation, under the now-repealed Policy No. 30, the Board applied the statute correctly. It determined that it was improper for "an individual [to use] either ["engineer/surveyor or other common derivatives thereof"] on letterhead or a business card that reflects an individuals [sic] job description within a business structure or government agency," and that the Board "may assign a case number and notify the business or agency to discontinue the use of the letterhead or business card." *See* CP 50 (Decl. Paul Tappel in Support of Pet'r Mot. for Summary Judgment ("Tappel Decl."), Ex. 2). And if the

entity was “engaged in an activity that, in all likelihood, could be considered an engineering or land surveying activity by the general public” then the Board “would assign a case number and issue a cease and desist letter that requires immediate corrective action.” CP 50-51.

Oddly, purportedly on the same day it adopted Policy No. 30, the Board also adopted Policy No. 32 to justify unlicensed engineers in professional title, practice, and presentation to the public. *See* CP 48 (Tappel Decl., Ex. 1). The Board adopted this policy in 1996, and in September 2008, it was revised to its present form without any explanation or proper rulemaking procedure. Policy No. 32 contained language exactly opposite of Policy No. 30 and was, on its face, inconsistent with the Act’s restrictions on the “Engineer” title, as it allowed for use of the title “Engineer” by non-licensed individuals under certain circumstances:

The use of “Engineer (or other common derivatives thereof)” is allowed **WHEN:**

- no representations or inferences are being made that they are Professional Engineers offering engineering services to the public, **OR;**
- the activities being performed **CANNOT** be construed as engineering or related to engineering practice as defined in chapter 18.43 RCW, **OR;**
- it is part of a description of an individual’s education credential, such as: “Graduate Civil Engineer,” or within the internal business identifications of exempt business entities.

Compare Board Policy No. 32, CP 48 (Declaration of Paul Tappel in Support of Petitioners’ Motion for Summary Judgment (“Tappel Decl.”)),

Ex. 1) *with* RCW 18.43.020(1) (defining “Engineer” to mean “Professional Engineer”).²

As a result of this Policy No. 32, many unqualified individuals in Washington State have used the title Engineer in contravention of the Act. In fact, among the greatest violators of this prohibition in the Act are Washington State agencies, who have significant numbers of employees who have official State-sanctioned titles that include “Engineer” despite the fact they are not licensed as such, do not have the qualifications of a Professional Engineer, and have not passed the exams to become a Professional Engineer. *See* CP 42 (Tappel Decl. at ¶ 8). Many of these employees interact with the public. *See id.* Because some State employees who practice engineering are required to hold a license for the position while others are not, this is misleading to the public and engineers dealing with these State employees.³ *See id.* at ¶ 9.

B. History of the Parties.

The Board and the Attorney General are the two public entities primarily charged with interpreting and enforcing the Act. *See* RCW 18.235.150(1) and (2) and .020(2)(b)(iii) (specifically identifying the

² Fortunately, subsequent to the filing of Appellants’ Petition, the Board repealed Policy No. 32, thus mooted the request in the Petition to declare the policy invalid. CP 44 (Tappel Decl. at ¶ 16).

³ For example, recent state agency positions for Transportation Engineer 3 requires the individual to be certified as an Engineer-in-Training, while Transportation Engineer 2 requires no special training or licensure; state agency positions for Environmental Engineer 3 through 5 include the legal requirement for the individual to be a registered professional engineer, while Environmental Engineer 1 and 2 do not. *See* CP 43, 53-55 (Tappel Decl. at ¶ 10, Ex. 3); CP 77, 97-116 (Schuchman Decl. at ¶ 3, Ex. B).

Board as the governmental body responsible for interpreting and enforcing the Act); and RCW 18.43.120 (the Attorney General shall act as legal adviser of the board and render assistance as necessary to carry out the Act). The Board specifically is charged with promulgating rules to aid in the Act's interpretation and enforcement. *See* RCW 18.42.035(5).

Appellant Paul Tappel is a licensed professional engineer, who has worked in Washington state as a licensed PE since 1987. *See* CP 41-42 (Tappel Decl.) at ¶ 2. As part of his licensing, Mr. Tappel was required to satisfy rigorous academic and experience requirements, pay registration fees, and undergo Board examinations. *See* RCW 18.43.040-.060. And like so many others, Mr. Tappel spent years as an "Engineer-in-Training" before earning the privilege of calling himself an Engineer. *See* CP 11-12 (Petition) at ¶ 10. And once licensed as an Engineer, the statute requires engineers, like Mr. Tappel, to continuously observe the profession's ethical code, and annually pay to renew their licenses. *See* RCW 18.43.080, .105.

Mr. Tappel is also the owner of Appellant Fisheries Engineers, Inc. CP 10. Over the past 30 years, he has successfully designed over 190 fisheries enhancement projects and he often works with various Washington State agencies for permitting purposes. CP 42.

In 2017, Mr. Tappel prepared a culvert design for one of his Fisheries Engineers' clients to be submitted to the Washington Department of Natural Resources ("WDNR") for the agency's approval and permitting. *See* CP 197 (Tappel Decl.) at ¶ 3. Given Mr. Tappel's

experience in the field, he knew his culvert design would be optimal for the conditions. It was a tried and true design. *Id.* However, WDNR handed off his design to an unlicensed WDNR “Forest Practices Engineer,” who reviewed the fish passage designs and rejected it without providing any valid technical comments. *Id.* Mr. Tappel’s client was understandably disappointed and confused as to why the design was rejected by this “Engineer.” *Id.* at ¶ 4. They mistakenly believed that the design was in fact flawed because an “Engineer” within WDNR had reviewed and rejected the design. Mr. Tappel was unable to convince his clients otherwise. As a result of false confidence due to an errant professional title, the clients terminated their \$12,000 contract with Fisheries Engineers, Inc. and Mr. Tappel. *See id.* at ¶¶ 4-5.

In 2017, Mr. Tappel filed a complaint with the Board regarding, in part, the unlicensed WDNR employee who used the title “Forest Practices Engineer.” CP 43 (Tappel Decl.) at ¶ 11. This individual was not duly licensed as an engineer, and should not have been professionally representing himself as a “Forest Practices Engineer” within WDNR. He even carried a business card that he passed out to the public that states he is a Forest Practices Engineer. *See id.* The Board closed its investigation into Mr. Tappel’s complaint without action, noting, irrelevantly, that “there is no clear, cogent, and convincing evidence that [the individual] violated any of the Board’s rules or regulations. [He] appears to have followed the supervisory structure of his organization which is outside the Board’s authority.” CP 43, 57 (Tappel Decl. at ¶ 12, Ex. 4). The Board went on to

note “it will not pursue investigations against the use of titles unless the titles used are professional engineer, structural engineer, or professional land surveyor. It will provide the same response to all future complaints on this issue.” *Id.* (emphasis added).

The Board provided no explanation as to why only these two specific engineering titles, “professional engineer” and “structural engineer,” warranted protection under the statute. *See* CP 57. In fact, this arbitrary subset captures only a fraction of the engineer licenses that actually exist; the Department of Licensing administers tests for Professional Engineers under 17 variations in title. These licensed titles range widely from chemical, environmental, industrial, to naval engineers. And there are 33 engineer title variations that exist for Professional Engineer licenses (including, *e.g.*, agricultural, electrical, mining, and petroleum). *See* CP 432-442, 444-445, 448 (Supp. Schuchman Decl., Exs. C-E). According to the Board’s interpretation, none of these licensed titles are protected. The Board’s letter further informed Mr. Tappel that its decision was “final and not subject to appeal to the Board.” *Id.* at ¶ 14.

Unfortunately, Senior Counsel from the Attorney General’s office reviewed Mr. Tappel’s complaint and essentially agreed with the Board’s conclusion that the Act contained no such restriction on the use of the “Engineer” title. CP 43-44, 60-65 (Tappel Decl. at ¶ 15, Ex. 5). Like the Board, the Senior Counsel relied on the exception in RCW 18.43.130(4), which allows unlicensed individuals to practice certain aspects of engineering work under the supervision of a licensed engineer. But this provision of the statute only provides an exception that allows unlicensed

individuals to do engineering work when appropriately supervised; it is unrelated to the title requirement itself and does not permit these same individuals to use the title “Engineer.”⁴ An analogous situation in the practice of law is that Rule 9 licensed legal interns can perform legal work with attorney oversight, but they cannot use the professional title Attorney. *See* APR 9.

Unfortunately, Mr. Tappel’s complaint and inexplicable result are not unique. The Board has kept its promise, using the same language in dismissing complaints against unlicensed individuals using the title “Engineer” and dealing directly with the general public. In 2017, the Acting Director of the Washington State Department of Transportation (“WSDOT”) Office of Human Resources & Safety responded to a complaint by another Professional Engineer about WSDOT’s pervasive use of the title “Engineer” for unlicensed employees. *See* CP 44 (Tappel Decl.) at ¶¶ 19-20. The Acting Director, responding “on behalf of WSDOT and on behalf of the Governor,” found there was no violation of the Act “when employees who are not registered under the provisions of RCW Chapter 18.43 hold positions with job titles like ‘Environmental Engineer,’ ‘Transportation Engineer,’ or ‘Marine Engineer’.” CP 44, 67 (Tappel Decl. at ¶ 20, Ex. 6). Similarly, in February 2018, the Deputy Secretary of WSDOT responded to complaints made by another Professional Engineer about use of the title Engineer by unlicensed

⁴ There is an exception to this statement in that the statute does allow engineers licensed in other states to use the title here in certain circumstances set forth.

WSDOT employees interacting with the public. CP 44, 69-71 (Tappel Decl. at ¶ 21, Ex. 7). Again, there was no acknowledgment that the statute prohibits this. Instead, the Deputy Secretary first argued that WSDOT does not use the titles “Professional Engineer,” “Registered Engineer,” or “Licensed Engineer” and asserted that employees do not identify themselves as such unless properly registered in accordance with RCW Chapter 18.43. *Id.* The Deputy Secretary went on to rely on the defense that, “WSDOT does not offer engineering services to the public.” *Id.*

Given the Respondents’ unequivocal position, and their exceedingly narrow and arbitrary interpretation of the title statute, Appellants sought relief by filing a petition in Thurston County Superior Court.

C. Appellants filed a Petition in Thurston County to enjoin public employees from unlawfully using the Engineer title and to compel Respondents to properly apply the law.

On September 21, 2018, Appellants filed and served their Petition against the State of Washington, Governor Jay Inslee, in his official capacity, Attorney General Bob Ferguson, in his official capacity, and the Board of Registration for Professional Engineers and Land Surveyors. Appellants’ Petition stated claims for declaratory judgment to invalidate Policy No. 32 and to clarify that the Act prohibits the use of the title “Engineer” by unlicensed individuals. The Petitioners also sought injunctive relief to (1) enjoin the Board from continuing to use Policy No. 32; (2) direct the Board to enforce the Act as written and specifically

preclude unlicensed individuals from utilizing the title “Engineer”; (3) direct the Attorney General to interpret and enforce the Act as written, again, specifically to preclude unlicensed individuals from utilizing the title “Engineer”; and (4) enjoin the State and any state agencies from allowing their unlicensed employees to use the title “Engineer.” *See* CP 26-28. Shortly after Appellants filed their Petition, the Board repealed its Policy No. 32. Appellants concede that specific claim for relief is now moot. However, even following the repeal of Policy No. 32, the Board maintained its position that the title “Engineer” was not protected under the Act and any individual, whether qualified or not, could hold themselves out as an “Engineer.”

Given that Appellants’ Petition turned almost entirely on proper statutory interpretation of the Act, Appellants filed a Motion for Summary Judgment, on January 24, 2019, requesting that the trial court grant its request for injunctive and declaratory relief as a matter of law pursuant to CR 56(c). *See* CP 156-176.

In response to Appellants’ Motion, the Respondents changed their interpretation of the title statute one more time. This time, instead of insisting that only “professional” and “structural” engineers were regulated, the Board explained that Chapter 18.43 RCW only prohibits the unlicensed use of “professional, civil, electrical, mechanical, structural, and hydraulic” engineer titles. *See* CP 308 (Gnanapragasam Decl.) at ¶ 11. How or why the Board decided to expand its list to include this subset of “Engineers” is unclear.

Regardless, Respondents' latest interpretation of the statute still leaves professional engineer titles such as Bridge Engineer, Geotechnical Engineer, Nuclear Engineer, Petroleum Engineer, and others, unregulated within the public domain. The inherent risks to public safety are obvious if these professional titles for "Engineer" are allowed for anyone without the proper qualifications called for in the Act.

On February 20, 2019, Respondents filed a cross-motion to dismiss, asserting several procedural challenges to Appellants' claim. *See* CP 177-195. The trial court decided to hear the Parties' cross-motions together on March 22, 2019. However, during oral argument, the trial court requested additional briefing to clarify whether Appellants' claim for injunctive relief would be more appropriately stated and analyzed as a claim for a writ of mandamus. The Parties each submitted supplemental briefing on that narrow issue and reconvened before the trial court on April 26, 2019. *See* CP 449-460 (Pet'r Supp. Br.); 461-473 (Resp't Supp. Br.); and 474-506 (Pet's Reply in Support of Supp. Br.).

At the outset of the hearing, the trial court opined that the most efficient means of resolving the cross-motions was to directly address the statutory interpretation issue and reach the merits of the claim. *See* Verbatim Report of the Proceedings ("VRP") (April 26, 2019 hearing) at 5:1-8. The trial court determined that whoever would prevail on the statutory interpretation argument would end up having summary judgment determined in their favor. *See id.* Thus, the court instructed that it was

“assuming without deciding” the threshold issues of standing and other procedural issues in favor of the Appellants. *Id.* at 24:17-23.

After argument on the statutory interpretation issue, the trial court judge held in favor of Respondents, explaining that he did not believe that the “Engineer” definition provided in subsection .020(1) of the Act “works in both directions” and that the statute’s equation of “Engineer” and “Professional Engineer” was useful only in understanding the text of the statute, but “it is not to be used in terms of assessing what conduct violates the law.” *See id.* at 24:6-23. The trial court requested that the Parties submit a proposed order consistent with its oral ruling. And on May 10, 2019, the trial court entered its Order granting Respondents’ summary judgment dismissal of Appellants’ claims. CP 507-509.

Appellants filed a timely notice of appeal of the trial court’s order on June 7, 2019. *See* RAP 5.2(a). *See* CP 510-515.

V. ARGUMENT

This Court should reverse the trial court’s decision to grant summary judgment in Respondents’ favor. Respondents’ interpretation of the statute is arbitrary and incompatible with the plain language of the statute. The trial court’s ruling, which appears to rest entirely on the reasoning that the statutory definitions for “Engineer” and “Professional Engineer” do not flow both ways, both misunderstands Petitioners’ statutory interpretation argument and contradicts other, persuasive authority on this precise issue. For the reasons below, the trial court’s erroneous interpretation of the statute should be reversed.

A. Standard of Review.

This Court reviews the trial court's summary judgment decision de novo and engages in the same inquiry as the trial court. *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 830, 92 P.3d 243 (2004) (citing *Benjamin v. Wash. State Bar Ass'n*, 138 Wn.2d 506, 515, 980 P.2d 742 (1999); *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993)). Summary judgment will be affirmed only if there are no genuine issues of fact and the moving party is entitled to judgment as a matter of law. *Id.* (citing *Clements*, 121 Wn.2d at 249). All reasonable inferences must be resolved against the moving party and the motion should only be granted if reasonable persons could reach but one conclusion. *Id.* (citing *Clements*, 121 Wn.2d at 249; *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000)).

B. Use of "Engineer" title by non-licensed individuals violates the Professional Engineers' Registration Act.

RCW Chapter 18.43 is known as the Professional Engineers' Registration Act. RCW 18.43.900. As stated above, it provides for the creation of the Board of Registration and governs licensure and other aspects of the practice of engineering and land surveying.

The first section of the Act establishes the reasons why laws governing engineers are important and very clearly limits use of titles:

In order to safeguard life, health, and property, and to promote the public welfare, any person in either public or private capacity practicing or offering to practice engineering or land surveying, shall hereafter be required to submit evidence that he or she is qualified so to practice and shall be

registered as hereinafter provided; and **it shall be unlawful for any person** to practice or to offer to practice in this state, engineering or land surveying, as defined in the provisions of this chapter, or **to use in connection with his or her name or otherwise assume, use, or advertise any title or description tending to convey the impression that he or she is a professional engineer** or a land surveyor, **unless such a person has been duly registered under the provisions of this chapter.**

RCW 18.43.010 (emphasis added).

The critical language governing titles plainly states that it is unlawful to use any title that tends to convey the impression one is a professional engineer unless the person is licensed under the Act. For more than 20 years the Board and the State have turned a blind eye toward this provision by allowing individuals to use the professional title “Engineer,” which is defined in the Act as meaning Professional Engineer, without being licensed professional engineers under the Act.

There can be no dispute that, generally speaking, a person who uses the title “Engineer,” while providing services defined as the practice of engineering, tends to convey the impression that he or she is in fact a licensed professional engineer. In the definitions of the Act, the first two definitions establish that “Engineer” means a person who has become a licensed professional engineer under the Act:

- (1) **“Engineer” means a professional engineer** as defined in this section.
- (2) “Professional engineer” means a person who, by reason of his or her special knowledge of the mathematical and physical sciences and the principles and methods of engineering analysis and design, acquired by professional education and practical experience, is qualified to practice

engineering as defined in this section, **as attested by his or her legal registration as a professional engineer.**

RCW 18.43.020 (emphasis added).

Similarly, the definition of “Practice of engineering” includes:

A person shall be construed to practice or offer to practice engineering, within the meaning and intent of this chapter, who practices any branch of the profession of engineering; or **who, by verbal claim, sign, advertisement, letterhead, card, or in any other way represents himself or herself to be a professional engineer, or through the use of some other title implies that he or she is a professional engineer;** or who holds himself or herself out as able to perform, or who does perform, any engineering service or work or any other professional service designated by the practitioner or recognized by educational authorities as engineering.”

RCW 18.43.020(5)(b) (emphasis added).

The plain language of the Act very clearly establishes that the title “Engineer” means a “Professional Engineer,” which means an individual who “is qualified to practice engineering as defined in this section” and as demonstrated by their “legal registration as a professional engineer.”⁵ It is, therefore, impossible to understand how one can use the title “Engineer” while providing services defined as engineering without tending to convey the impression or implying they are a duly licensed professional engineer.

The United States District Court for the District of Oregon employed the same analysis when it concluded that Oregon’s engineer

⁵ The Act contains limited exceptions for use of the title by individuals not licensed in Washington, such as engineers licensed in other states.

license statute also prohibited the use of the title “Engineer.” *See Jarlstrom v. Aldridge*, 366 F. Supp. 3d 1205, 1216 (D. Or. 2018). In that case, the Plaintiff stated a First Amendment challenge to Or. Rev. Stat. § 672.007(1)(a)-(b) and OAR 820-010-0730(3)(b). These provisions govern use of the title “Engineer” in Oregon.⁶ Or. Rev. Stat. § 672.007(1) applies if a person uses a title that suggests professional licensure.

To analyze whether the use of the title “Engineer” implied licensure, the District Court went directly to the statutory definitions provided, and held that *because* “engineer” and “professional engineer” were defined analogously under the law, using such a title presumptively conveyed the impression of licensure. The court explained: “Using the title ‘engineer’ suggests licensure because Or. Rev. Stat. § 672.002(2) defines ‘engineer’ to mean ‘an individual who is registered in [Oregon] and holds a valid certificate to practice engineering[.]’ This definition treats the word ‘engineer’ as synonymous with ‘professional engineer’ and ‘registered professional engineer.’” *Id.* The court went on, “In tandem with Or. Rev. Stat. § 672.045, which ‘prohibits a person from falsely

⁶ Oregon’s Title laws defined “engineer,” “professional engineer,” and “registered professional engineer” to mean “any individual who is registered in this state and holds a valid certificate to practice engineering in this state[.]” Or. Rev. Stat. § 672.002(2). The title laws provided that a person is practicing or offering to practice engineering if the person: “(a) By verbal claim, sign, advertisement, letterhead, card or in any other way implies that the person is or purports to be a registered professional engineer; (b) Through the use of some other title implies that the person is an engineer or a registered professional engineer; or (c) Purports to be able to perform, or who does perform, any service or work that is defined ... as the practice of engineering.” Or. Rev. Stat. § 672.007(1). The title laws prohibit any person from holding themselves out as an “engineer” unless registered as a professional engineer in Oregon. *See* Or. Rev. Stat. § 672.007(1); OAR 820-010-0730(3).

representing that the person is a registered engineer,' any person who refers to himself as an engineer without first acquiring a license violates Oregon law." *Id.* This court's rationale in this case is nearly indistinguishable from the case at bar.

However, other sections of Oregon's engineering statute go further than Washington's law to prohibit the use of the title "Engineer" in *any* context, even where the use of the title of "Engineer" is clearly not misleading.⁷ For that reason, ultimately, the District Court ruled that the Oregon statute unconstitutionally suppressed free speech. But the court's interpretation of Oregon's title statute is nonetheless illustrative for this case, and in fact stands in direct opposition to the trial court's analysis on Appellant's Motion for Summary Judgment: the use of the title "Engineer" suggests licensure because the statute treats the word "Engineer" as synonymous with "Professional Engineer" or "Registered Professional Engineer."

Further evidence supporting Appellants' interpretation is the Act's use of the title "Engineer-in-Training." Under the Act, the process for becoming a registered professional engineer in Washington includes a first step in which an individual becomes a registered "Engineer-in-Training"

⁷ On the other hand, Washington's law, while also defining engineer as a professional engineer, ties the definition of professional engineer to the offering of or providing services defined as the practice of engineering. This is the key distinction between the Washington and Oregon laws that saves Washington's law from First Amendment violation.

upon completion of appropriate education/work experience, an application and passing an examination:

(b)(i) As an engineer-in-training: An applicant for registration as a professional engineer shall take the prescribed examination in two stages. The first stage of the examination may be taken upon submission of his or her application for registration as an engineer-in-training and payment of the application fee prescribed in RCW 18.43.050 at any time after the applicant has completed four years of the required engineering experience, as defined in this section, or has achieved senior standing in a school or college approved by the board. The first stage of the examination shall test the applicant's knowledge of appropriate fundamentals of engineering subjects, including mathematics and the basic sciences.

(ii) At any time after the completion of the required eight years of engineering experience, as defined in this section, the applicant may take the second stage of the examination upon submission of an application for registration and payment of the application fee prescribed in RCW 18.43.050. This stage of the examination shall test the applicant's ability, upon the basis of his or her greater experience, to apply his or her knowledge and experience in the field of his or her specific training and qualifications.

RCW 18.43.040. To argue that an individual who has not even achieved the prerequisites to be an Engineer-in-Training can call themselves an Engineer is patently absurd.

In resisting summary judgment, Respondents relied on the same arguments as the *Jarlström* court did in concluding Oregon's statute was an unconstitutional restriction on speech. They argued that the word "Engineer" has a generic meaning, and that there are several contexts in which individuals may use the title "Engineer" without conveying the

impression of being duly licensed under the engineering statute. They have cited examples such as “Software Engineer” and “Locomotive Engineer.” CP 238. But these are not the examples complained of in Appellants’ Petition. Appellants agree, the use of “Engineer” in non-engineering contexts is not inherently misleading, since the circumstances make clear that they are not “Professional Engineers.” But as stated multiple times in Appellants’ briefing,⁸ Appellants specifically challenge the Board’s failure to enforce the statute against individuals—like the “Forest Practices Engineer” with WDNR—who actually engage in and offer engineering services, as defined under the statute, *and* use “Engineer” in their title.

If the individual calling themselves an “Engineer” is involved in a practice/profession/activity which could be considered the “Practice of Engineering,” it follows that the individual is conveying the impression that he or she is a licensed “Engineer.” The “Practice of Engineering” is defined as “any professional service or creative work requiring engineering education, training, and experience and the application of special knowledge of the mathematical, physical, and engineering sciences to such professional services or creative work as consultation,

⁸ See CP 325-326 (Petitioner’s summary judgment briefing, clarifying that the use of “Engineer” is inherently confusing *only* when used by individuals actually engaged in or offering engineering services, as defined by the statute); CP 450 (Petitioner’s supplemental briefing, specifying again that they seek to enjoin the use of “the professional title ‘Engineer’ for unlicensed state employees *who offer and perform engineering services*” (emphasis added)); and CP 475 (Petitioner’s supplemental briefing, again clarifying that the use of the title “Engineer” is inherently misleading when the “individual engages in the practice of engineering (as defined by the statute)...”).

investigation, evaluation, planning, design, and supervision of construction for the purpose of assuring compliance with specifications and design, in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works, or projects.” RCW 18.43.020(8)(a). If an individual engages in the “Practice of Engineering,” as defined above, they should not be permitted to use the title “Engineer” unless they have been duly licensed.

To illustrate: if one is offering design services in connection with a building or structure, it is difficult to understand how it would not be inherently misleading to identify as a “Building Engineer.” Such an unlicensed individual may be properly working underneath a licensed Engineer for training purposes, but he or she should not be able to hold themselves out to the public as an “Engineer.” The use of the title in that context inherently conveys the impression the individual is a licensed Professional Engineer. Similarly, Bridge Engineers, Transportation Engineers, and Marine Engineers who review and prepare plans related to structures and the environment should be regulated by the Act. Their title and occupation imply professional licensure, which in turns conveys the impression of technical capability commensurate with the respected professional title. By contrast, if an individual works as a handyman in a building and uses the title “Building Engineer,” it would be hard to conclude they were tending to convey or were implying they were a Professional Engineer since they perform no work that qualifies as the practice of engineering as defined in the Act. Similarly, titles frequently

cited to by Respondents—such as Locomotive Engineer or Software Engineer—are not inherently misleading because these individuals are not engaged in the practice of engineering, as it is defined by the statute. Such titles do not fall within the ambit of RCW 18.43.010’s protections because the title “Engineer” does not convey the impression that they are licensed Professional Engineers in those contexts.

C. The trial court erred by granting summary judgment in Respondents’ favor because Respondents’ interpretation of RCW Chapter 18.43 conflicts with the plain language of the statute.

The Board has systematically refused to properly enforce the Act. The Board issued Policy No. 32, which expressly permitted use of the title “Engineer” in certain circumstances by non-licensed engineers, and beyond the limited exemptions listed in statute. For example, Policy No. 32 allowed unlicensed individuals to use the title “Engineer” provided they did not represent that they were Professional Engineers offering engineering services to the public. This interpretation is inconsistent with the statute on two fronts. First, the licensing statute does not just protect the title “Professional Engineer.” The statute equates “Engineer” and “Professional Engineer,” and disallows any variation of the Engineer title when the use of that title conveys the impression of proper licensure. Second, nothing in the statute limits the statute’s title protections to Engineers who offer commercial engineering services to the public. Engineers who work with State agencies, like WSDOT and WDNR, frequently interface with the public. It is just as dangerous and misleading

for these individuals to convey the impression that they have been duly licensed when they are performing these public-facing engineering and design services.

The Board has also rejected complaints regarding use of the title “Engineer” by individuals who were offering engineering services, but were not registered as Professional Engineers. It even expressly stated “it will not pursue investigations against the use of titles unless the titles used are professional engineer, structural engineer, or professional land surveyor. It will provide the same response to all future complaints on this issue.” *See* CP 43, 57. As noted above, the Board is not alone in permitting violations of the Act but is joined by the State, which facilitates violations by its creation of positions using the title “Engineer” for state employees who are not professional engineers, and the Attorney General who legally advises the board, supports its position and refuses to enforce the law as written.

The law in Washington is clear: “Where the language of a statute is plain and unequivocal, courts must construe it according to its true intent, notwithstanding a contrary construction by an administrative agency.” *Wash. Fed’n of State Emps. v. State Pers. Bd.*, 54 Wn. App. 305, 309, 773 P.2d 421 (1989). Furthermore, if a term is defined in a statute, the Court must use that definition. *Blue Diamond Grp., Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 454, 266 P.3d 881 (2011). Here the statute clearly defines “Engineer” as “a professional engineer as defined in this section.” RCW 18.43.020(1). “Professional engineer” is then defined as an

individual meeting all the qualifications “as attested by his or her legal registration as a professional engineer” and who is therefore qualified to practice engineering as defined in the Act. The Court owes no deference to the Board or Attorney General’s construction of the Act. *See Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 184, 157 P.3d 847 (2007) (noting court’s ultimate authority to construe statutes and only give deference to administrative interpretation if statute is ambiguous). With no disputed material facts and the express language of the law clearly contradicting Respondents’ construction of the Act, the trial court should have adopted the proper interpretation that use of the title “Engineer,” alone or in conjunction with other descriptors such as Transportation Engineer, Marine Engineer, Forest Practices Engineer, etc. is a violation of the Act.

The Board’s systematic practice of only enforcing the licensing statute against a narrow and arbitrary subset of unlicensed “Engineers” is inconsistent with the statute and should be corrected.

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VI. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's decision to grant summary judgment in favor of Respondents and remand this matter to the trial court for further proceedings.

Dated this 21st day of October, 2019.

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I, Kelsey M. Doyle, certify under penalty of perjury of the laws of the State of Washington that on October 21, 2019, I caused a copy of the document to which this is attached to be served on the following individual(s) via email:

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