

No. 41614-0-II

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

REPLY BRIEF OF APPELLANT

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Rules

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The Board of Engineers denied due process to Garry Fourre in a licensure disciplinary hearing when it charged him with unprofessional conduct for violating four laws of the State concerning his practice of wastewater system design, exonerated him of those charges, and then sanctioned him for an uncharged, fifth violation. Moreover, the alleged misconduct for which he was sanctioned did not constitute unprofessional conduct under the laws of the State of Washington. Thus, the Original Order of sanctions was unconstitutional as was the Final Order that emanated from the Original Order. The Final Order was also arbitrary and capricious because it had no nexus to the charged misconduct and was not supported by clear and convincing evidence.

I. ARGUMENT

A. The Board Of Engineers Failed To Provide Mr. Fourre Due Process Required By Any Licensure Disciplinary Hearing.

Courts review all constitutional challenges *de novo*, *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875(2004), and an Agency's interpretation and application of the law is also 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). The Board's invitation to this Court to give deference to its determination that Mr.

Fourre's behavior falls below the standard of care, because it is in the best position to determine what conduct fell below the standard of care should be declined. Resp. Br. at 12. The purpose of the statutes is to define what constitutes unprofessional conduct and this Court does not defer to an Agency when interpreting an unambiguous statute's plain meaning even if the agency disagrees with the Court's interpretation.. *Cascade Floral Products Inc. v Dep't of L&I*, 142 Wn. App. 613, 617, 177 P.3d 124 (2008).

1. The Board Violated Mr. Fourre's Due Process Rights when It Failed To Inform Him That He Was Being Charged With Unprofessional Conduct Based On His Initial Wastewater System Designs.

Originally, in charging Mr. Fourre with unprofessional conduct, the Board alleged fourteen facts concerning four initial wastewater system designs. CP 95-97. The Board said that if the facts were proved, Mr. Fourre would be guilty of unprofessional conduct, incompetence and/or gross negligence in the practice of on-site wastewater system designs as defined in WAC 196-33-200(1)(b), (2), and RCW 18.235.130(4), and (11).¹ CP 97-98. In short, all of the facts alleged were directed at proving violations of the four regulations charged. None of the charges

¹ Although the Board charged Mr. Fourre of violating all four statutes or regulations, RCW 18.235.130 (4), (11), and WAC 196-33-200(2), are not at issue in this appeal because Mr. Fourre was found not to have violated any of those statutes, nor any portion of those statutes.

had any relevance to initial designs; the only charge referencing designs referenced final designs. WAC 196-33-200(1)(b).

The Board then acquitted Mr. Fourre of violating all of the charged statutes, but added that he did violate a fragment of one of the charged statutes, WAC 196-33-200(1), and sanctioned him for that alleged violation. CP 30-31.

A defendant must be informed of the charges against him in order to defend against them. *State v. Rhinehart*, 92 Wn.2d 923, 602 P.2d 1188 (1979). In *Rhinehart*, the defendant was in possession of a stolen car part. The State originally thought he was in possession of a stolen car and charged him accordingly. The State argued that by charging a defendant with possession of a stolen car, it could convict him of possession of a stolen car part. The court disagreed, noting that the State could have charged the defendant with possession of stolen car parts, initially or by amendment after it became clear that there was insufficient proof that petitioner ever possessed the entire stolen vehicle. “The information put petitioner on notice that he must answer the charge as to a stolen Ford Bronco, not one part thereof. This was the charge his defense prepared to meet.” *Rhinehart*, 92 Wn. 2d at 928.

Similarly here, the Board charged Mr. Fourre with a violation of WAC 196-33-200(1)(b), which specifically concerns final plans of

wastewater system designs. The Board maintains that Mr. Fourre should have known he was being charged with issues regarding his initial designs because that was “the heart of [its] case.” Resp. Br. at 12. But, if that was the heart of its case, just as in *Rhinehart*, the Board should have charged him with conduct related to his initial designs.

Merely listing a statute the licensee is accused of violating does not constitute notice required by due process. The rule is that all essential elements of an alleged crime must be included in the charging document that must contain a “written statement of the essential facts constituting the offense charged.” *State v. Naillieux*, 158 Wn.App 630, 645, 241 P.3d 1280 (2010). A conviction based on notice that does not contain all the essential facts constituting the offense charged violates due process and requires reversal. *Id.*

In *Naillieux*, the State maintained that it cited the correct statute in charging the defendant, so it didn’t matter if it had listed all the elements. *Id.* The court disagreed. “It is not enough to cite the correct statute—defendants should not have to search for the rules or regulations they are accused of violating.” *Id.* Here, not only did the Board fail to provide a written statement of the essential facts constituting professional misconduct related to initial designs, the Board did not even cite to any

statute related to initial designs because no statutes include initial designs when defining professional conduct.

Had the Board given Mr. Fourre notice that he could be sanctioned for disputes over his initial designs, he could have then defended himself against that charge as ably as he defended himself against the four charges actually leveled at him, and presumably would have been successful and avoided the years of financial embarrassment and professional humiliation caused by the Board's actions.

2. The Board's Assertion That It Can Charge Mr. Fourre With A Portion Of A Statute In Isolation From The Rest Is Untenable.

The Board charged Mr. Fourre with violating WAC 196-33-200(1)(b). CP 97-98. It now maintains that it actually charged Mr. Fourre with WAC 196-33-200(1), on a stand-alone basis; and not even the entire provision of WAC 196-33-200(1)—only the first clause of the statute, “failure to apply the skills [sic] diligence and judgment required by the professional standard of care.” CP 30, Resp. Br. at 11. This fractional application of a statute defies all principles of statutory reading and should be disregarded.

Statutory provisions must be read in their entirety and construed together, not by piecemeal. *ITT Rayonier, Inc., v. Dalma*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993). The meaning of a statute is discerned from the

context of the statute in which it is found, related provisions, and the statutory scheme as a whole. *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002). Statutory provisions and rules should be harmonized whenever possible, and an interpretation that gives effect to all provisions is the preferred interpretation.. *Emwright v. King County*, 96 Wn.2d 38, 543, 637 P.2d 656 (1981).

The Board charged Mr. Fourre with violating WAC 196-33-200(1)(b). CP 97-98. In reading the statute as a harmonious unit, one would assume the Board was advising Mr. Fourre that if the alleged facts were proved, he would be guilty of failing to be able to demonstrate that his final products and work plans adequately considered the primary importance of protecting the safety, health, property and welfare of the general public and that such a failure constituted unprofessional conduct for which he could be sanctioned, because that's what the statute says.

This interpretation gives accord to all the provisions and harmonizes the statute with the rest of the chapter, which states WAC 196-33's purpose is to give particular guidance as to what constitutes professional conduct of system designers. WAC 196-33-100(1)(emphasis added).

Arguing that charging Mr. Fourre with violating WAC 196-33-200(1)(b) gave him notice that he could be sanctioned because his initial

designs failed to “provide adequate information to support the designs,” Resp. Br. at 12, requires an incongruent reading of the statute. Nothing in the statute addresses or even alludes to initial designs, adequate or otherwise. Nor does the statute inform a licensee that disputes over initial plans could violate the standard of care and subject the violator to sanctions.

In arguing that standing alone, the vague, boilerplate phrase exhorting licensees to “apply the skill, diligence and judgment required by the standard of care” can be the basis for a finding of unprofessional conduct, the Board completely ignores the context of the chapter whose purpose is to give particular guidelines of what constitutes professional conduct and to delineate standards to measure the performance of system designers. WAC 196-33-100(1). Indeed, under this very statute, the Board listed thirty-six particular acts that constitute either professional or unprofessional conduct. WAC 196-33-200(1-27). No system designer could read the fragment of WAC 196-33-200(1) the Board relies on and have notice that he or she could be charged with unprofessional conduct for disputes over initial designs.

Moreover, with the thirty-six ways to commit unprofessional conduct as a systems designer clearly enunciated in the statute, one could assume that if the drafters meant to include disputes over initial designs in

this section, it surely would have. There are obvious reasons why disputes over initial designs are not the subject matter of the professional conduct regulations: this is apparently a contentious arena in wastewater system design. As the Board acknowledged, fully 80-90% of all initial designs are not approved as submitted. CP 26. Clearly there are differences of opinion about the appropriateness of initial designs. And, as it turned out, all of Mr. Fourre's designs in the four cases at issue in his hearing were approved as submitted.

Just as Idaho in *H & V Engineering, Ind., v. Idaho State Board of Professional Engineers*, 747 P.2d 55 (1988), this court should find that it is a violation of due process to sanction a wastewater system designer for unwritten standards that was unknown to the licensee.

B. An Order Based On A Due Process Violation May Be Attacked In Any Further Proceeding At Any Time.

The Board is simply incorrect in asserting that the 2009 Original Order may not be challenged at this time. Resp. Br. at 14. The law is clear that Mr. Fourre can challenge the constitutionality of the Board's Order at anytime, either directly or collaterally. *Levinson v. Washington Horse Racing Commission*, 48 Wn.App. 822, 828, 740 P.2d 898 (1987); RAP 2.5(a)(3); 15 Karl B. Tegland, WASHINGTON PRACTICE 39.17 (1st ed. 2003). And, because Mr. Fourre failed to receive due process in the

original hearing, the original Order is void and all orders emanating from that original Order and hearing are also void, and can be attacked for the first time on appeal. *Esmieu v Schrag*, 88 Wn.2d 490, 497, 563 P.2d 203 (1977); *Marriage of Ebbighausen*, 42 Wn.App. 99, 102, 708 P.2d 1220 (1985). This issue is properly before this Court at this time.

C. The Board's 2010 Revocation Order, Based On 2009 Original Order Had No Connection To The Alleged Misconduct And Was Thus Arbitrary And Capricious.

Revocation of a professional license is the harshest penalty an agency can impose on a licensee. In order to protect against an arbitrary and capricious order in revoking a professional license, an agency must demonstrate a rational connection between the sanction issued and the conduct charged. An agency action is arbitrary and capricious if it is made without consideration of all the facts and circumstance. *Seymour v. Washington Department of Health*, 152 Wn.App. 156, 172 216 P.3d 1039 (2009).

Because the primary purpose of sanctions against the license of a wastewater system designer in Washington is to promote the protection of public health, safety, and welfare, RCW 18.235.110(3), it follows that the severity of the sanctions must have some nexus to public health, safety, and welfare. Here, the Board may have been frustrated with Mr. Fourre's

pro se defense of the charges against him, but there was no reason or need to revoke his license.

The Board has made no connection between Mr. Fourre's alleged misconduct and protection of public health, safety, and welfare. Even in arguing that Mr. Fourre did not cooperate with the Board during the hearings, there is no reference to an impact on public health, safety, and welfare. Resp. Br. at 15-16. In neither the Original Order, nor the Final Order, did the Board relate Mr. Fourre's alleged actions to public health, safety, and welfare. Indeed, the Board made a finding that Mr. Fourre's work specifically did not constitute a threat to public health, safety, or welfare. CP 0030, ¶3.4. The revocation order lacked a rational connection between Mr. Fourre's alleged misconduct and an order to revoke his license and should be revoked.

D. The Final Order Revoking Mr. Fourre's License Was Not Based On Substantial Evidence.

The Board's contention that Mr. Fourre proposes a "hybrid" standard of review for a licensure disciplinary case is misplaced. Resp. Br. at 19. Indeed, the case on which the Board relies in making that assertion, *Ancier v. Dep't of Health*, 140 Wn.App. 564 fn.12, 166 P.3d 829 (2007), proclaims the very standard on which Mr. Fourre relies. *Ancier* notes that the appellate court's function in reviewing licensure disciplinary

cases is to assess whether the evidence presented below “was adequate to satisfy the applicable burden of proof below.” That is precisely the level of review Mr. Fourre stated in his opening brief: whether the evidence below was adequate to satisfy the burden of clear and convincing evidence, which is the applicable burden of proof. *Nims v. WA Bd. of Registration*, 113 Wn.App. 499, 505, 53 P.3d 52 (2002).²

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

A court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorney fees, unless the court finds that the agency actions was substantially justified or that circumstances make an award unjust. RCW 4.84.350(1). RCW 4.84.350(2); *Eidson v. State*, 108 Wn.App. 712, 731 (2001). An agency’s position may be substantially justified only if it has a reasonable basis in law and fact.

The Board relies on *Silverstreak, Inc. v. Dep’t of L&I*, 159 Wn.2d 868, 154 P.3d 891 (2007) to deny Mr. Fourre fees if he prevails. Resp. Br. at 21. But *Silverstreak* is inapposite. There, the Court found that

² Mr. Fourre notes that on July 14, 2011, the Supreme Court issued an opinion, *Hardee v. DSHS*, No. 83728-7, in which it held that constitutional due process requires no more than a preponderance of the evidence to justify the revocation of a home child care license. Because the issues in *Hardee* concerned a non-professional license, it has no application in a professional licensure action against Mr. Fourre, a professional engineer, as defined under RCW 18.43.020(2) and WAC 196-12-010.

although the plaintiff/respondent prevailed in its case, it was because the State was equitably estopped from enforcing its lawful order and thus its actions against *Silverstreak* were substantially justified. *Id.* at 892-93.

Here, there is no such complicated issue as equitable estoppel, nor is there any other justification of the Board's action in law or fact and Mr. Fourre is entitled to his fees and costs.

II. 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 8th day of August, 2011.

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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 first class mail, postage prepaid, to the following:

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DATED this 8th day of August 2011.

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