IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GARRY FOURRE, LICENSED ON-SITE TREATMENT DESIGNER, Appellant, v. BOARD OF ENGINEERS AND LAND SURVEYORS OF THE WASHINGTON STATE BOARD OF LICENSING, Respondent.	No. 41614-0-II UNPUBLISHED OPINION

Johanson, J. — Garry Fourre appeals from a final administrative order revoking his professional license. Fourre argues that the Board of Registration for Professional Engineers and Land Surveyors (Board) (1) failed to give adequate notice of the charges against him, thereby violating his due process rights; (2) based its final order on a void original order; (3) arbitrarily and capriciously revoked his license; and (4) failed to support its findings with substantial evidence. We hold that the Board gave Fourre both adequate notice and hearing, the original order was valid, the Board acted honestly on due consideration, and that substantial evidence supports the Board's findings of fact. Accordingly, we affirm the Board's license revocation order.

FACTS

Gary Fourre was a licensed on-site wastewater treatment designer residing and practicing in Thurston County. The Board regulates licensed on-site treatment designers in the State of

Washington. In June 2005, the Thurston County Department of Environmental Health (Health Department) filed a formal complaint letter with the Board, sending a copy of the complaint letter to Fourre. The Health Department informed the Board that it was filing the complaint after three attempts to resolve issues with Fourre. The complaint letter stated that in his proposals, Fourre consistently failed to provide adequate and accurate information regarding a variety of significant facts such as soil type, existing sewer lines, and compliance with local codes. The complaint letter detailed specific problems on four different proposed building sites. The complaint letter emphasized:

> The issues identified are not "minor" professional disagreements. They are related to incomplete and inaccurate *proposals* that do not provide the necessary information needed to review *proposals* in a timely manner.

Clerk's Papers (CP) at 93 (emphasis added).

In response to the Health Department's complaint letter, the Board served Fourre with a statement of charges in May 2007, informing Fourre that if proven, the charges constituted professional misconduct contrary to WAC 196-33-200(1)(b), (2) and to RCW 18.235.130(4) and (11). The statement of charges included the text of the applicable statutes and regulation, and it also informed Fourre that he could request a formal hearing on the allegations. Fourre timely requested a hearing.

At an October 2008 hearing, the Board admitted several exhibits and heard testimony from four witnesses, including Fourre, who appeared pro se. On February 13, 2009, the Board issued an order with findings of fact and conclusions of law (February 13 order). The Board found in favor of Fourre on several of the charges. But the Board also found that:

> Clear cogent and convincing evidence on Cases Nos. 1, 2 and 3 establishes

> Respondent consistently failed at the outset to provide adequate information to support his designs and, as such, failed to meet the expectation of his profession contained in WAC 196-33-200(1) "to apply the skills diligence and judgment required by the professional standard of care."

CP at 30.

The February 13 order stated that (1) Fourre must submit a list of proposed peer reviewers to the Board within 30 days; and (2) after approval of peer reviewer(s), he must submit five peer-approved future designs to the Board, with three of the future designs to be located in Thurston County; and (3) in the event that Fourre could not satisfy the above terms within the time frames ordered, he should write Deputy Executive Director Robert Fuller and he would receive a written response accepting or denying his request for accommodation. This order also provided that, should Fourre disagree with the written response, the Board's presiding officer would review his request and the staff member's decision. Further, the order stated that under RCW 34.05.470, Fourre may request reconsideration in writing, provided that the Board actually receives it within 10 days, and that the Board "is deemed to have denied" the reconsideration petition if, within 20 days, it neither disposes of the petition nor serves written notice specifying when it will act. Administrative Record (AR) at 22.

On February 26, Fourre requested the Board to reconsider[1] the February 13 order. The

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[1] The February 13 order separately provided for "accommodation" and "reconsideration" requests. *See* AR at 20 (§ 4.11), 21-22. This is significant because the order stated that the Board must respond, in writing, to accommodation requests and made no corresponding provision for reconsideration requests. Fourre characterizes this letter as an "attempt[] to work with the Board" implying that it was an accommodation request. Br. of Appellant at 6. But we reject this characterization because the subject heading of Fourre's letter states, "Reconsideration of Final Order-Board" and the letter begins by expressly stating, "I request reconsideration of the final order." CP at 35.

Board denied Fourre's reconsideration request.[2] Fourre did not submit a list of peer reviewers to the Board within the order's 30-day time frame.

On May 22, Fourre submitted a letter to the Board with the subject heading "Motion for Modification of imposed conditions based upon Conflict of Interests and Failure to identify a willing peer reviewer."[3] CP at 39. In it, he told the Board that the order's requirement created a "conflict of interest" because any professional qualified to be his peer reviewer would also be his competitor and that he was unable to find a willing qualified peer reviewer. CP at 39.

On June 1, Deputy Executive Director Fuller responded to Fourre by letter with the subject line "Request to modify Final Order," stating that Fuller had attempted to reach Fourre, without success, and requested Fourre to contact him. AR at 6. Receiving no response, Fuller again wrote to Fourre on July 21, expressly informing Fourre that the Board had denied his reconsideration motion in March, and requesting that Fourre contact him. Fourre telephoned Fuller in late August or early September.[4]

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[2] The record merely states that the Board denied his request; it does not indicate that the Board responded to Fourre's letter. But the order informed Fourre that if the Board did not act on his reconsideration motion within 20 days, the Board was "deemed" to have denied his reconsideration motion. AR at 22; RCW 34.05.470(3); *see* n.1 supra.

[3] Fourre also characterizes this letter as a "request for accommodation." Br. of Appellant at 7. The Board characterizes this letter as an untimely reconsideration motion. Even if we consider a request for "modification" to be equivalent to a request for "accommodation," Fourre's May 22, 2009 request was untimely as of March 17, 2009.

[4] Fourre states that he and Fuller discussed the possibility of Fourre engaging a peer reviewer employed by Thurston County or practicing outside of Fourre's range of practice. The Board claims that during this phone call, Fuller asked Fourre to "follow up with the call" and Fourre did nothing. Br. of Resp't at 6. But the information in the record cannot verify these claims and we do not consider them.

On December 30, the Board sent Fourre a second statement of charges, informing him that he had failed to comply with the February 13 order and that the Board could sanction him by revoking his license. Fourre requested a Brief Adjudicative Proceeding (BAP) to dispute the Board's decision. The Board scheduled the BAP for March 8, 2010, and informed Fourre that the proceeding was a record review without oral testimony and that he could submit additional materials for review. On March 25, 2010, after the BAP, the Board's presiding officer issued an order (BAP order), finding that (1) Fourre's objections to the February 13 order were untimely, (2) Fourre did not comply with the February 13 order to identify three peer reviewers, (3) Fourre's objections did not excuse his failure to comply, (4) the Board denied Fourre's reconsideration request, (5) the February 13 order "stands," and (6) the Board established by clear and convincing evidence that Fourre violated at least one time-defined term of the original order and had yet to comply with the other terms. AR at 35.

Fourre requested administrative review of the BAP order. Fourre argued that the findings of fact and conclusions of law, issued as part of the February 13 order, cleared him of all of the charges contained in the May 7, 2007 statement of charges. Fourre further argued that because the Board cleared him of those charges, the February 13 order lacked clear, cogent, and convincing evidence. After reviewing Fourre's request, the Board adopted the findings of fact[5] and conclusions of law from the BAP order and issued the June 4, 2010 BAP compliance order (compliance order). This compliance order revoked Fourre's on-site wastewater treatment

[5] Fourre failed to assign error to these findings of fact; thus, we limit our review "to whether they support the conclusions of law and judgment." *In re Discipline of Brown*, 94 Wn. App. 7, 13, 972 P.2d 10, *review denied*, 138 Wn.2d 1010 (1999).

designer license and informed Fourre of the requirements to reapply for that license.

Fourre petitioned for review of the compliance order. The superior court affirmed. Fourre appeals.

ANALYSIS

I. Standard of Review

"In reviewing a superior court's final order on review of a Board decision, an appellate court applies the standards of the Administrative Procedures Act directly to the record before the agency, sitting in the same position as the superior court." *Honesty in Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 526, 979 P.2d 864 (1999). We review the Board's legal determinations using the APA's "error of law" standard, which allows us to substitute our view of the law for that of the Board. *Verizon Nw., Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008); *see* RCW 34.05.570(3)(d). We review an agency's interpretation or application of the law de novo. *HEAL*, 96 Wn. App. at 526. We give substantial weight to an agency's interpretation of the law within its expertise, such as regulations the agency administers. *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 885, 154 P.3d 891 (2007); *Dep't of Labor & Indus. v. Granger*, 159 Wn.2d 752, 764, 153 P.3d 839 (2007).

II. Due Process

Fourre first argues that the Board violated his due process rights by disciplining him for uncharged behavior that did not constitute unprofessional conduct. Specifically, Fourre argues that (1) he lacked proper notice of the charges for which he received sanctions; and (2) because no statute or code defines the charges for which he received sanctions, he lacked notice that his actions constituted unprofessional conduct. We conclude the Board did not violate Fourre's due process rights because (1) it charged him with failing to act within his profession's standard of

care, in violation of WAC 196-33-200(1); (2) it provided him with notice and a full evidentiary hearing; and (3) it found him in violation of the profession's standard of care as charged.

Article 1, section 3 of the Washington Constitution provides that no person shall be deprived of life, liberty or property without due process of law. Wash. Const. art. I, § 3. Procedural elements of this constitutional guarantee are notice, the opportunity to appear and to defend, before a competent tribunal in an orderly proceeding, adapted to the nature of the case. *State v. Dolson*, 138 Wn.2d 773, 776-77, 982 P.2d 100 (1999). An agency may not revoke a license without due process of law. *Dolson*, 138 Wn.2d at 776-77. Due process requires that the agency give the license holder notice of an opportunity to appear and to defend before the revocation. *Dolson*, 138 Wn.2d at 777. The notice must be "reasonably calculated to inform the affected party of the pending action and of the opportunity to object." *Dolson*, 138 Wn.2d at 777.

A. Ample Actual Notice

Fourre first argues that the Board failed to give him notice that the charge of unprofessional conduct included failure to provide adequate information to support designs "at the outset." Br. of Appellant at 13. The record shows, however that both the Health Department and the Board provided Fourre with ample notice that professional misconduct involved not only finalized designs but also proposed designs.

Initially, working directly with Fourre, the Health Department made three attempts to resolve issues involving his proposed designs, giving him preliminary notice of potential professional misconduct applying to design proposals. Then, the Health Department sent a formal

complaint letter both to the Board and to Fourre, informing Fourre that his proposed designs did not meet professional standards. The formal complaint letter emphasized that Fourre's proposals were "incomplete and inaccurate" and "[did] not provide the necessary information needed to review proposals in a timely manner." CP at 93. Further, the complaint letter informed the Board and Fourre:

> The time spent in writing revision letters, discussing the requirements with Mr. Fourre, and discussing the cases with applicants that contact our department, is costly to all involved.

CP at 93. Next, the Board gave Fourre formal notice by providing a statement of charges, which included detailed information and identified the alleged professional misconduct as occurring in his design proposals. Furthermore, the statement of charges informed Fourre that, if proven, the deficiencies outlined in the statement of charges constituted professional misconduct contrary to WAC 196-33-200(1)(b)(2) and RCW 18.235.130(4) and (11), and included the text of the applicable statutes and regulation. The record contradicts Fourre's argument that he lacked proper notice that unprofessional conduct included failure to provide adequate information to support his proposed designs; thus, his contention fails.

Fourre also argues that the Board acquitted him of all the charges and then, without notice, created a new charge out of the preamble of WAC 196-33-200(1).[6] But the Board never acquitted Fourre of his unprofessional conduct charge. Instead, after looking at four separate design proposals, the Board found in Fourre's favor concerning several specific charges (i.e.,

[6] In his brief, Fourre sometimes references "WAC 296-33-200(1)" but this is not an actual section of the WAC. Presumably, these are typographical errors and Fourre intended to reference WAC 196-33-100(1) consistently.

finding that Fourre did not engage in misrepresentation, incompetence, negligence, or malpractice) but nevertheless found that in three of the proposed designs, Fourre consistently failed to meet the expectation of his profession. Quoting the regulation on which it relied, the Board found that

> Clear cogent and convincing evidence on Cases Nos. 1, 2 and 3 establishes Respondent consistently failed at the outset to provide adequate information to support his designs and, as such, failed to meet the expectation of his profession contained in WAC 196-33-200(1) "to apply the skills diligence and judgment required by the professional standard of care."

CP at 30. The Board did not acquit Fourre of all of the charges just because the Board made some favorable findings. Accordingly we reject this argument.

B. Board's Application of Regulation

Next, Fourre argues that the Board's broad application of WAC 196-33-200 did not provide him with notice that unprofessional conduct included "failing at the outset to provide adequate information to support designs." Br. of Appellant at 13. Fourre does not explain why he believes the Board's oversight of wastewater designers does not include submitted design proposals. We hold that the Board is uniquely suited to determine how best to apply the regulation and that it provided Fourre with due process.

In analyzing Fourre's challenge to the Board's application of the regulation, we look to the regulatory language in WAC 196-33-200 and the rules of statutory construction. *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 51-52, 239 P.3d 1095 (2010). WAC 196-33-200 provides:

> 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.
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> (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:
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> . . . .
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> (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.
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> (c) Approve or seal only documents prepared by them or under their direct supervision.
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> . . . .
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> (2) Licensees shall be competent in the technology, and knowledgeable of the codes, regulations, and guidelines applicable to the services they perform.
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> (7) Licensees shall be objective and truthful in professional documents, reports, statements, or testimony. They shall include all relevant and pertinent information in such reports, statements or testimony. They shall not knowingly falsify, misrepresent or conceal a material fact in offering or providing services to a client or employer.
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> . . . .
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> (22) Professional reports, statements, or testimony made to the public or public entities shall include all relevant and pertinent information to support conclusions or opinions expressed.

Regarding *when* professional wastewater designers must support their designs, the regulation is ambiguous.[7] Because the regulation is ambiguous, the question is whether the Board's interpretation is consistent with the underlying legislative policy. *See Overlake Hosp. Ass'n*, 170 Wn.2d at 55. The legislative policy underlying WAC 196-33-200 is "that licensees 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; RCW 43.20.050(2).

[7] Neither the Board nor Fourre specifically argues that the regulation is ambiguous. The Board argues that it is in the best position to interpret the regulation. Fourre argues the regulation specifies many acts of professional misconduct and does not include his behavior.

We give the Board's interpretation of ambiguous regulatory language great deference as the agency has expertise and insight gained from administering the regulation that we do not possess. *Overlake Hosp. Ass'n*, 170 Wn.2d at 56. Additionally, because this matter involves factual matters that are "complex, technical, and close to the heart of the agency's expertise," it is appropriate to give "substantial judicial deference" to the Board's view. *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997). Noting that the Board is in the best position to determine the appropriate professional standard for wastewater designers, we conclude that the regulation sufficiently supports the Board's interpretation that regulation includes submitted design proposals. Thus, the pertinent regulations gave Fourre adequate notice that unprofessional conduct included failure "at the outset to provide adequate information to support his designs." CP at 30.

C. Valid Order

Fourre next argues that the compliance order is void because the Board based it on the February 13 order, which he argues is void for violating due process. As we discussed above, the Board did not violate Fourre's due process rights; thus Fourre's argument fails on the merits. Additionally, Fourre did not timely appeal the Board's February 13 order, which found he failed "to apply the skills[,] diligence and judgment required by the professional standard of care." CP at 30.

Fourre appeals the compliance order; he may not relitigate the February 13 order now. RAP 5.2(a); *Buckner, Inc. v. Berkey Irrigation Supply*, 89 Wn. App. 906, 911, 951 P.2d 338, *review denied*, 136 Wn.2d 1020 (1998). Here, the Board gave Fourre ample notice that the

regulation governing unprofessional conduct included the failure to provide adequate information supporting proposed designs. Further, nothing about the Board's interpretation of its regulation deprived Fourre of notice "reasonably calculated to inform the affected party of the pending action and of the opportunity to object." *Dolson*, 138 Wn.2d at 777.

In addition to ample notice, the Board provided Fourre a full evidentiary hearing, which despite making some favorable findings, did not acquit him of all of the charges. *Dolson*, 138 Wn.2d at 776-77. Finally, the Board did not base the compliance order on a void order. We hold that the Board did not violate Fourre's due process rights.

III. No Arbitrary Or Capricious Action

Fourre next argues that the Board arbitrarily and capriciously revoked his license because the revocation sanction lacked a rational connection to his alleged misconduct. We hold that the Board did not arbitrarily and capriciously revoke Fourre's license.

An agency's action is arbitrary and capricious when it is "'willful and unreasoning and taken without regard to the attending facts or circumstances.'" *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 589, 90 P.3d 659 (2004) (quoting *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 149 Wn.2d 17, 26, 65 P.3d 319 (2003)). But an agency's action is not arbitrary and capricious if the agency acted honestly and with due consideration. *Port of Seattle*, 151 Wn.2d at 589.

Fourre argues that the Board's sanctions are arbitrary and capricious because the Board revoked his license despite having dismissed the charge that his work constituted a threat to public health, safety, or welfare. But Fourre's argument overlooks that the February 13 order did

not revoke his license. Instead, the February 13 order, which he did not appeal, merely required Fourre to identify three peer reviewers, obtain the Board's approval of one peer reviewer, and submit five peer-reviewed designs to the Board. Fourre overlooks that the Board revoked his license in June 2010, only after his ongoing noncompliance with the February 13 order.

Here, the Board revoked Fourre's license following a BAP, which allowed Fourre to submit additional materials for review. Additionally, before issuing the compliance order, the Board performed an administrative review of the all materials. Thus, the Board took action after giving Fourre "due consideration." *In re Discipline of Brown*, 94 Wn. App. 7, 17, 972 P.2d 10, *review denied*, 138 Wn.2d 1010 (1999).

We defer to the Board's determination of Fourre's professional misconduct and also to its determination of his sanction because both of these determinations involve administrative competence peculiar to the Board. *Brown*, 94 Wn. App. at 16. Fourre does not meet the "heavy burden" to show that the Board revoked his license as the result of willful or unreasoning action and we reject his argument. *Brown*, 94 Wn. App. at 16.

IV. Clear and Convincing Evidence

Fourre finally argues that clear and convincing evidence does not support the Board's license revocation.[8] The Board responds that although substantial evidence supports its compliance order revoking Fourre's license, Fourre does not challenge the compliance order's findings of fact. We agree with the Board.

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[8] Fourre confuses the burden of proof, which is clear and convincing evidence, with the standard of review, which is substantial evidence. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433, 909 P.2d 1293, *cert. denied*, 518 U.S. 1006 (1996). But the standard is not at issue here because Fourre did not assign error to the findings of fact.

When the appellant does not assign error to findings of fact, "'the findings become the established facts and our review must be limited to whether they support the conclusions of law and judgment.'" *Brown*, 94 Wn. App. at 13 (quoting *In re Infant Child Perry*, 31 Wn. App. 268, 269, 641 P.2d 178 (1982)). Fourre argues that insufficient evidence supports the compliance order revoking his license because he attempted to work with the Board. But this argument directly conflicts with the unchallenged findings of fact adopted in the June 4, 2010 compliance order. Those findings include that (1) Fourre's objections to the February 13 order were untimely, (2) Fourre did not comply with the February 13 order to identify three peer reviewers, and (3) Fourre's objections did not excuse his failure to comply. We conclude that Fourre's insufficient evidence argument fails.

Accordingly, we affirm the superior court and the Board's order revoking Fourre's license and we deny an award of attorney fees to Fourre because he is not a prevailing party.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Hunt, J.

Penoyar, C.J.