

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

MATTHIS B. SZAYNA, P.E.,)
)
 Appellant,)
)
 v.) C.A. No.: N15A-10-005 ALR
)
DELAWARE ASSOCIATION OF)
PROFESSIONAL ENGINEERS,)
)
 Appellee.)

MEMORANDUM OPINION

Submitted: February 4, 2016
Decided: March 21, 2016

*On Appeal from the Final Order of the Council of
the Delaware Association of Professional Engineers*
AFFIRMED

Matthias B. Szayna, P.E., Appellant, *pro se*

Carla A.K. Jarosz, Esquire, Deputy Attorney General, Delaware Department of
Justice, Attorney for Appellee, Delaware Association of Professional Engineers

ROCANELLI, J.

This is an appeal from a final order of the Council of the Delaware Association of Professional Engineers (“Council”) affirming a Cease and Desist Order against Appellant Matthias B. Szayna, P.E., for the unlicensed practice of engineering in Delaware (“Final Order”). Appellant appeals the Final Order. For the reasons set forth below, the Council’s Final Order is hereby **AFFIRMED**.

Facts and Procedural History

Appellant is a professional engineer licensed to practice in Pennsylvania and New Jersey. Appellant is not licensed to practice in Delaware. Chubb Group Insurance Companies (“Chubb”) is a Delaware entity engaged in the insurance business and does not offer professional engineering services to the public. Chubb engaged Appellant—doing business as Szayna & Associates—to perform engineering services. Specifically, on July 26, 2012, Appellant conducted an inspection and evaluation of an insurance claim for damaged property in Delaware. Appellant subsequently prepared a written report for Chubb, rendering opinions regarding the proximate cause of the damage to the property.

Following an investigation by the Law Enforcement and Ethics Committee of the Council, the Committee found Appellant to be engaged in the unlicensed practice of engineering in violation of 24 *Del. C.* § 2825(a).¹ Consequently, the

¹ See 24 *Del. C.* § 2825(a) (“Persons or engineering corporations or partnerships not licensed, not authorized by Council, or not holding a permit or certificate of authorization may not: (1) Practice engineering as defined in this chapter. . . .”).

Council entered a Cease and Desist Order on July 16, 2014, restricting Appellant's ability to further practice in Delaware without a license.² Appellant challenged the Cease and Desist Order and requested a hearing on the matter. The parties later stipulated that, in lieu of a formal evidentiary hearing, they would submit written submissions to the Disciplinary Hearing Committee of the Council ("Committee"). Appellant raised several arguments in favor of withdrawing the Cease and Desist Order. First, Appellant argued that because he was employed by Chubb at the time he rendered his services and because Chubb does not offer professional engineering services to the public, his services did not constitute the practice of engineering under the Delaware Professional Engineers Act ("Act").³ Second, Appellant argued that Appellant's services to Chubb were intended to be used as

² As a normal part of the Cease and Desist Order, the matter is thereafter reported to the National Council of Examiners for Engineering and Surveying for entry into its Enforcement Exchange Database.

³ See 24 Del. C. § 2803(25) (emphasis added) (defining the "practice of engineering" as:

any professional service performed for the general public such as consultation, investigation, evaluation, planning, design, or responsible supervision of construction or operation in connection with any public or private buildings, structures, utilities, machines, equipment, processes, works, or projects wherein the public welfare or the safeguarding of life, health or property is concerned or involved when such professional service requires the application of engineering principles and data, but it does not include the work ordinarily performed by persons who operate or maintain machinery or equipment, *neither does it include engineering services performed by an employee of a firm or corporation that does not offer professional engineering services to the general public.*).

expert testimony in a Delaware judicial proceeding and, therefore, Appellant was exempted from licensure under the Act.⁴

On August 10, 2015, the Committee issued its decision and proposed order (“Committee Decision”) finding that Appellant was engaged in the unlicensed practice of engineering in Delaware and, therefore, recommended that the Cease and Desist Order be issued to Appellant. Appellant filed timely exceptions and arguments to the Council. On September 9, 2015, the Council issued its Final Order, adopting the Committee Decision, concluding that Appellant engaged in the unlicensed practice of engineering in Delaware, and affirming the Cease and Desist Order. Appellant now appeals the Final Order.

Standard of Review

The Court’s appellate review of the Council’s Final Order is limited. On appeal from a decision of an administrative agency, this Court must determine whether the agency ruling is supported by substantial evidence and free from legal error.⁵ Substantial evidence is relevant evidence that a reasonable person could

⁴ See 24 Del. C. § 2802A (“Nothing in § 2802 of this title shall be construed as prohibiting an otherwise qualified engineer, duly licensed under the laws of a state other than Delaware, from offering expert testimony in any action or proceeding in the courts of this State, consistent with the requirements of Delaware Uniform Rule of Evidence 702.”).

⁵ *Stoltz Mgmt. Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992); see also 24 Del. C. § 2823(f) (“The Court’s review, in the absence of actual fraud, shall be limited to determination of whether the Council’s decision was supported by substantial evidence on the record before it.”).

accept as adequate to support a conclusion.⁶ Absent an abuse of discretion, the decision of the agency must be affirmed.⁷ Moreover, when factual determinations are at issue, this Court must “take due account of the experience and specialized competence of the Council and of the purposes of the [Act].”⁸

Discussion

This Court must decide if there is substantial evidence in the record to support the Council’s Final Order. Under the Act, it is unlawful to perform engineering services in Delaware without being licensed, authorized, or otherwise exempted.⁹ The Act provides for several exemptions from licensure, including where the engineer is an employee of an organization that does not offer engineering services to the public,¹⁰ where the purpose of the engineer’s services is to offer expert testimony in a judicial action or proceeding in Delaware,¹¹ or where the engineer acquires a permit by applying to the Council for approval.¹²

⁶ *Lehto v. Bd. of Educ. of Caesar Rodney Sch. Dist.*, 962 A.2d 222, 226 (Del. 2008) (internal citations omitted); *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *PAL of Wilmington v. Graham*, 2008 WL 2582986, at *3 (Del. Super. June 18, 2008).

⁷ *Stoltz Mgmt. Co.*, 616 A.2d at 1208.

⁸ 24 *Del. C.* § 2823(f).

⁹ See 24 *Del. C.* § 2825(a).

¹⁰ See 24 *Del. C.* § 2803(25) (“ . . . neither does it include engineering services performed by an employee of a firm or corporation that does not offer professional engineering services to the general public.”).

¹¹ 24 *Del. C.* § 2802A.

¹² 24 *Del. C.* § 2820(a).

It is undisputed that Appellant is not licensed as a professional engineer in Delaware.¹³ It is also undisputed that the services that Appellant rendered to Chubb constituted professional engineering services. The record lacks any indication that Appellant either applied for or received a temporary permit with the Council. Accordingly, Appellant has engaged in the unlicensed practice of engineering in Delaware unless one of the Act's exemptions applies.

A. The conclusion that Appellant was an independent contractor of Chubb is supported by substantial evidence.

The Act explicitly excludes from its definition of the practice of engineering any “engineering services performed by an employee of a firm or corporation that does not offer professional engineering services to the general public.”¹⁴ Appellant argues that he is exempt from Delaware’s license requirement because the services he performed for Chubb are excluded from the statutory definition of engineering. Particularly, Appellant argues that he was an employee of Chubb and Chubb does not offer professional engineering services to the public.

The Committee concluded, and the Council approved in its Final Order, that Appellant was an independent contractor—not an employee—of Chubb. There is substantial evidence to support this conclusion. Most importantly, although Appellant argues that he was “employed” by Chubb, he nevertheless concedes that

¹³ It is undisputed that Appellant is only licensed as a professional engineer in Pennsylvania and New Jersey.

¹⁴ 24 *Del. C.* § 2803(25).

he was an independent contractor. Moreover, in determining whether Appellant was an employee of Chubb, the Committee considered various factors as laid out by the Delaware Supreme Court in *Fisher v. Townsends, Inc.*¹⁵ The Committee determined that: Appellant has his own engineering consulting business, which is distinct from Chubb's insurance business; Appellant utilized his engineering skills in performing the services, which requires specialized training, education and experience; and Chubb is an insurance company, an entity which is a member of the general public under the Act. Further, the Committee determined that there was no evidence that addressed the length of time of Appellant's "employment" with Chubb or any evidence of the method of payment which would support a conclusion that Appellant was an employee. Accordingly, the conclusion that Appellant was merely an independent contractor of Chubb is supported by substantial evidence and, therefore, Appellant is not exempt from the license requirement under 24 *Del. C.* § 2803(25).

¹⁵ 695 A.2d 53, 59 (Del. 1997) (providing that, in determining whether an individual is an employee or an independent contract, a court should consider various factors, including: (1) the extent of control the employer may exercise over the details of the work; (2) whether the employed is engaged in a distinct occupation or business; (3) whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required; (5) who supplies the instrumentalities, tools, and the place of work for the employed; (6) the length of time for which the person is employed; (7) the method of payment, whether by the time or by the job; (8) whether the work is a part of the regular business of the employer).

B. The conclusion that Appellant was not offering expert testimony in a Delaware court is supported by substantial evidence.

Section 2802A of the Act (“Section 2802A”) provides an exemption for the license requirement for individuals licensed in another state who offer expert testimony in an action or proceeding in a Delaware court so long as the testimony is consistent with the Delaware Rules of Evidence.¹⁶ Appellant argues that he is exempt from the license requirement because his services to Chubb were intended to be used as expert testimony in a Delaware court. Appellant also argues that Section 2802A is ambiguous, and that engineers need to inspect property before litigation commences, such that it would be illogical not to exempt Appellant from the licensing requirement simply because litigation has not begun.

Appellant’s arguments are without merit. First, Section 2802A is unambiguous. A statute is ambiguous if it is susceptible to multiple reasonable interpretations.¹⁷ If a statute is unambiguous, then this Court must give the words in the statute their plain meaning.¹⁸ If the statute is ambiguous, then this Court must consider the statute as a whole and read each section “in light of all others to produce a harmonious whole.”¹⁹ Section 2802A provides: “Nothing in § 2802 of this title shall be construed as prohibiting an otherwise qualified engineer, duly

¹⁶ 24 *Del. C.* § 2802A.

¹⁷ *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011).

¹⁸ *Id.*

¹⁹ *Id.*

licensed under the laws of a state other than Delaware, from offering expert testimony in any action or proceeding in the courts of this State”²⁰ Section 2802A is clear; the exemption is for expert testimony in a Delaware court.

Second, although Appellant is accurate that experts may need to inspect property before the commencement of litigation, Appellant fails to consider the purpose of the Act. Even assuming *arguendo* that Section 2802A is ambiguous, a reading of the Act as a whole leads to a reasonable conclusion that the Act intends engineers to be licensed in the State before rendering their services or otherwise request a permit from the Council if they are licensed in another jurisdiction. Importantly, in its *declaration of purpose*, the Act notes the intent to deter the unlawful practice of engineering.²¹ In pertinent part, the Act provides:

In order to safeguard life, health, and property and to promote the public welfare, the practice of engineering in this State is hereby declared to be subject to regulation in the public interest. It shall be *unlawful* for any person to practice or to offer to practice engineering in this State . . . *unless such person has been duly licensed, authorized or exempted under this chapter.*²²

Accordingly, the Act intends to deter the precise type of conduct that Appellant engaged in. Appellant could have applied for a permit with the Council,²³ however, Appellant did not do so.

²⁰ 24 Del. C. § 2802A.

²¹ 24 Del. C. § 2802.

²² *Id.* (emphasis added).

²³ See 24 Del. C. § 2820(a) (“Individuals not residing in this State, not having full-time employment in this State, and not having established a place of business for the practice of

Moreover, there was substantial evidence that Appellant was not offering expert testimony in a Delaware court. The record does not contain any evidence that the services Appellant provided were intended as expert testimony for an action or proceeding in the courts of Delaware. Although the Committee conceded that there could be a situation where the services rendered by Appellant might have a sufficient nexus to a current, on-going, or contemplated litigation, those facts were not provided. Accordingly, Appellant's engineering services were not intended as expert testimony in Delaware, and are not eligible for the exemption.

Conclusion

The Court has examined the record below and determined that substantial evidence supports the Council's Final Order and the decision is free from legal error. Accordingly, the Final Order must be and is hereby **AFFIRMED**.

IT IS SO ORDERED.

Andrea L. Rocanelli

The Honorable Andrea L. Rocanelli

professional engineering within this State, who are legally qualified by licensure to practice engineering as defined within the chapter in the state, territory or possession of the United States, the District of Columbia, or province or territory of Canada where they reside or are in business, may make application to the Council in writing for a permit to practice professional engineering in this State.”).