

**STATE OF ALABAMA BOARD OF LICENSURE
FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS**



Case No. 2014-21-B

IN THE MATTER OF:

Mr. Jerry Lee Dowdy, PLS
Dowdy Land Surveying
308 N Hood Ave
Gadsden, AL 35903

Respondent

HEARING ORDER

On October 31, 2014 a hearing was convened concerning the allegations filed against Respondent, Jerry L. Dowdy. The Board was represented by Mr. Benjamin Albritton, Board Counsel. Administrative Law Judge Dana A. Billingsley presided over the Hearing. Mr. Dowdy appeared at the hearing without legal Counsel.

After hearing the testimony of all the witnesses presented by the Board Investigative Committee and after considering all the evidence presented in the above-referenced case, Administrative Law Judge Dana H. Billingsley proposed the following Findings of Fact, Conclusions of Law, and Conclusion and Recommendation.

PROPOSED FINDINGS OF FACT

1. Respondent Jerry Lee Dowdy is a licensed Professional Land Surveyor ("PLS"), license number 18979, and was so licensed at all times relevant to the matters stated herein. (BE #2). Respondent's license was originally issued in June 1992, and is current through December 31, 2014. There have never been any actions taken against Respondent's PLS license in Alabama. (Tr. at 11-12).

2. On May 21, 2014, the Board received a Complaint against Respondent from Mr. Thomas Keith Battles, which alleged that Respondent used the "right of entry law" to wrongfully trespass on his property while performing land surveying services for the adjoining property owned by Mr. William Jones, 5455 County Road 48, Cedar Bluff, Alabama, in violation of ALA. CODE § 34-11-2(d)(3) (1975 as amended) and ALA. ADMIN. CODE r. 330-X-14-.06(a)1. and -.06(a)3. (2013). (BE #2). Mr. Battles was notified that the Board received his Complaint on May 27, 2014. (BE #3).

3. On May 27, 2014, the Board's Assistant Executive Director, William R. Huett, notified Respondent of the Complaint and requested that he provide copies of the documents used in the preparation of his survey of Section 19, Township 9 South, Range 9 East, Cherokee County, Alabama, for Mr. Jones before June 15, 2014. (Tr. at 27); (BE #4). Respondent provided his response on June 6, 2014. (Tr. at 28); (BE #5).

4. By Notice dated September 3, 2014, Respondent was notified via Certified and First Class Mail of the date and time of a public hearing to be held concerning his alleged violations of ALA. CODE § 34-11-2(d)(3) (1975 as amended) -requiring a PLS, his agents, employees and personnel under his supervision to make reasonable effort to notify adjoining landowners upon whose land it is necessary to enter; ALA. ADMIN. CODE r. 330-X-14-.06(a)3. - requiring the PLS to exercise reasonable care or diligence to prevent him or his partners, associates or employees from engaging in conduct which would violate the practice of land surveying; and ALA. ADMIN. CODE r. 330-X-14-.06(a)1. - violation of any statute or Board rule governing the practice of land surveying, which were specified in detail in the Board's Charges accompanying the Notice. (BE #1). The Board's Charges were signed by its Executive Director on September 3, 2014, and contained a single charge of failure to make a reasonable effort to notify adjoining landowners upon whose land it is necessary to enter. *Id.*

5. The Notice and Board's Charges complied in all respects with the requirements of ALA. CODE § 41-22-12 (1975 as amended) and ALA. ADMIN. CODE r. 330-X-16-.03 (2013) and sufficiently apprised Respondent of the nature of the charges against him and of the date, time and place of the hearing. *Id.*

6. The Board solicited testimony from the following individuals at the hearing: Executive Director Regina Dinger; Assistant Executive Director and Chief Investigator William R. Huett; Board Investigator Kevin Putnam; and Mr. Thomas Keith Battles.

7. Respondent appeared *pro se* at the hearing and testified on his own behalf. Mr. Rodney Blevins, Mr. Jeremy Dowdy and Mr. William Jones also offered testimony on behalf of Respondent.

8. Ms. Dinger testified regarding the Board's Charges and the September 3, 2014 Notice to Respondent informing him of the Charges and of the date, time and place for the hearing. (Tr. at 19); (BE #1). She stated further that, while the Complaint alleged that additional violations of the Board's rules and regulations had occurred, the Board found insufficient cause to proceed against Respondent for anything other than the alleged entry violation. (Tr. at 13). Ms. Dinger opined that the Board has interpreted the "reasonable effort" requirement under ALA. CODE § 34-11-2(d)(3) to mean physical contact with the landowner, such as calling by telephone or knocking on the landowner's door. She stated that the Alabama Society of Professional Land Surveyors ("ASPLS") has developed a doorhanger that is available for use by land surveyors that meets the Board's "reasonableness" requirement. The Board's rules do not further define what is intended by the term "reasonable effort." (Tr. at 17-18).

9. Mr. Huett testified that once a Complaint is opened by the Board's Executive Director, he is responsible to investigate the Complaint and to determine, as a part of the Board's Investigative Committee, whether the evidence established probable cause that a violation of the

Board's law or rules occurred. (Tr. at 29-32). Mr. Huett confirmed that the Investigative Committee found no probable cause to proceed against Respondent with regard to two of the issues raised in the Complaint, relating to standards of practice, ethics and competency. (Tr. at 32-33); (BE #2).

10. The Board called Respondent to testify regarding the matters at issue in the Complaint. Respondent stated that the three to four acres at issue are the subject of an adverse possession claim by Mr. Battles' adjoining landowner, Mr. Jones, who has been on the property since 1988. On the advice of his lawyer, Mr. Jones hired Respondent to locate all the corners of his property, as well as the property deeded to Mr. Battles that is the subject of Mr. Jones' adverse possession claim. (Tr. at 39-40). After his field crews located the corners of Mr. Jones' existing and "claimed" property, Respondent stated that he inputted the information into his computer and compared that property description with the results from a previous survey performed for Mr. Battles. The crew then returned to Mr. Jones' property to determine whether his property abutted Mr. Battles' or there was a gap between the two properties. (Tr. at 40, 43). When Mr. Blevins and Mr. Dowdy went to the section corner to make that determination, they passed Mr. Battles' house, but did not see anyone outside or any vehicles on the premises. The crew did not knock on Mr. Battles' door to see if he was home. (Tr. at 43-44).

11. Respondent stated that he was familiar with the doorhangers provided by ASPLS, but admitted that they were not used on this occasion. (Tr. at 44-45).

12. Mr. Battles testified that he first learned Respondent was surveying the property when he saw the crew on his land, some 3,000 feet below his house. He stated that he had been home an hour or more having breakfast when he saw a pickup truck and some men on his property, and he went to ask them what they were doing. According to Mr. Battles, the crew said that they were surveying for Mr. Jones and had seen the "No Trespassing" sign, but had the right of entry and

stated that they needed to go north to the point of beginning of Mr. Jones' property in order to complete the survey. Mr. Battles stated that no one knocked on his door to inform him that the survey crew would be entering onto his property; neither did the surveyors need to proceed north, since the property at issue was located south of the location where he approached them. (Tr. at 50-55).

13. Under cross-examination, Mr. Battles confirmed that the survey was conducted in January 2013, but he waited until May 18, 2014, to file the Complaint because his mother was experiencing some health issues and he did not know what he should do concerning the matter. (Tr. at 56). Mr. Battles stated that Mr. Jones never informed him of Jones' intent to survey the property. (Tr. at 57).

14. Mr. Blevins testified that he is the party chief for Respondent's survey crew, and he is supervised by Respondent. (Tr. at 59-60, 69). He stated it has been his policy that if he sees someone out on their property, he will notify them that the crew may be entering their property; if he doesn't see anyone, he doesn't walk around the home or attempt to make contact. He is aware of the ASPLS doorhangers and has seen them in Respondent's office, but does not generally keep them in the truck, and he did not leave one on Mr. Battles' door. (Tr. at 60-62). He stated that Mr. Battles approached him to ask what he was doing when he was in the right-of-way on Mr. Jones' property, but nothing hostile transpired during that conversation. Mr. Blevins said that Mr. Battles would have seen the crew on his property before they moved into the right-of-way. (Tr. at 62-67).

15. Mr. Jeremy Dowdy testified that he was a member of the crew that surveyed Mr. Jones' property. He stated that he did not knock on Mr. Battles' door to notify him on the date in question, but assumed that the party chief had done so. He was not aware of the doorhanger notices until recently. (Tr. at 73-75).

16. On cross-examination, Mr. Dowdy stated that on the date in question, Mr. Battles approached him to ask what they were surveying. He told Mr. Battles that he was working for Mr. Jones, but he needed to make sure that Mr. Battles had his distances and the property that his deed called for, since there was an apparent gap at the back of Mr. Jones' property that didn't fit the legal description. (Tr. at 75-77). Mr. Dowdy stated that the first person in the crew who enters the adjoining property normally tries to make contact with the landowner to notify him of the entry, and he presumed that Mr. Blevins, as the lead man, had notified Mr. Battles. (Tr. at 78-79). Mr. Dowdy also confirmed that the crew was in the right-of-way when Mr. Battles first approached them. (Tr. at 81-82).

17. Mr. Putnam testified that during the course of his investigation, he spoke with Respondent, Mr. Battles, Mr. Jeremy Dowdy and Mr. Blevins regarding the facts surrounding the "right of entry" onto Mr. Battles' property. (Tr. at 87-88). In particular, he stated that Mr. Jeremy Dowdy advised him that he had knocked on Mr. Battles' door, but Mr. Battles was not at home; Mr. Blevins indicated that they did not knock on the door. Mr. Putnam understood that the crew did not attempt to notify Mr. Battles by telephone, and Mr. Dowdy told him that he had the doorhanger notices in his possession, but did not leave one at Mr. Battles' residence. (Tr. at 88-89). As a general rule, if the crew did not see a vehicle at the house, they assumed the resident was not home and made no effort to get in contact with him any other way. (Tr. at 88).

18. Mr. Jones testified that he sought Respondent's services at the end of 2012, because he did not agree with the property boundaries established under Mr. Battles' survey. He stated that he told Mr. Battles in October 2012 that he intended to hire his own land surveyor. (Tr. at 98-102).

19. Respondent clarified further that Mr. Battles came to his office after making contact with the survey crew and asked Respondent what he had determined during the survey. Respondent stated that he explained that additional research was needed because there appeared to be a gap

between the two property descriptions, and he would have to run that down. Mr. Battles then came back in to Respondent's office after the corners had been set and the survey clearly established that a gap was present; he asked Respondent for a copy of the plat at that time. (Tr. at 107-08). Respondent stated that the crew did not know the situation was adversarial until they went out to survey Mr. Jones' property for the first time. (Tr. at 110-11).

20. Respondent contends that the rules do not require the surveyor to make contact with a landowner before exercising the right to entry - it is not an absolute requirement. He stated that crews need to exercise caution when approaching other people's homes, because most landowners do not want uninvited guests on their property. (Tr. at 115-16). Respondent stated that he has had to enter numerous other properties over the years to complete his work and is not always able to contact the landowners involved. To the extent the Board considers the notification requirement to be mandatory, Respondent contends that the rule should be revised. (Tr. at 116).

PROPOSED CONCLUSIONS OF LAW

1. The Alabama Legislature has created the Alabama Board of Licensure for Professional Engineers and Land Surveyors for the purpose of safeguarding life, health and property and promoting the public welfare with regard to the practice of engineering and land surveying within the state. ALA. ADMIN. CODE §§ 34-11-2(b) and (c) (1975 as amended).

2. The Board is empowered to reprimand, censure, fine or place on probation any licensed Professional Land Surveyor ("PLS") or to suspend, refuse to renew or revoke the certificate of any licensee for violation of the rules of professional conduct prescribed by the Board or misconduct in the practice of land surveying. ALA. ADMIN. CODE § 34-11-11(a)(2) (1975 as amended). See a/so ALA. ADMIN. CODE r. 330-X-14-.06(a)1.(2013).

3. It is a violation of the Board's licensure law for any PLS to fail to exercise reasonable care or diligence to prevent his or her partners, associates and employees from engaging in conduct which, if done by the licensee, would violate any provision of Alabama law governing the practice of land surveying. ALA. ADMIN. CODE r. 330-X-14-.06(a)3. (2013). In particular, ALA. CODE § 34-11-2(d)(3) provides that "A professional land surveyor shall make reasonable effort to notify adjoining landowners upon whose land it is necessary to enter." The term "professional land surveyor," as used in this section, includes the agents, employees and any personnel under the supervision of the PLS. ALA. CODE § 34-11 -2(d) (1975 as amended).

4. Respondent does not dispute that his employees failed to contact Mr. Battles directly before entering onto his property; however, he contends there is no "absolute" requirement under the Board's rule that an adjoining landowner be contacted, and there was no physical evidence that Mr. Battles was home at the time the survey crew proceeded onto his land. Respondent further contends that Mr. Battles was aware the property was being surveyed, and he thus did not require a separate notification of entry on the date in question.

5. Merriam Webster defines the term "reasonable" to mean "fair and sensible." MERRIAM-WEBSTER'S ONLINE DICTIONARY, www.merriam-webster.com/dictionary/reasonable. Black's Law Dictionary further defines "reasonable" to mean "fair, proper, or moderate under the circumstances;" "according to reason." BLACK'S LAW DICTIONARY (9th ed. 2009).

6. The Board has previously interpreted the "reasonable effort" requirement to mean physical contact with the landowner upon whose property the PLS or his agents or employees may be required to enter, such as calling the landowner by telephone or knocking on the landowner's door. An agency's interpretation of its own rules and regulations is to be given great weight and accorded the greatest deference upon review thereof. See *Employees Ret. Sys. v. Oden*, 369 So. 2d 4 (Ala. 1979); see also *Expedient Services, Inc. v. Weaver*, 614 F.2d 56, 57 n.1 (5th Cir. 1980)

(citing *Kinnett Dairies, Inc. v. Farrow*, 580 F.2d 1260, 1270 (5th Cir. 1978)). It is a "well-settled statement of law... that an agency's interpretation of its own regulation must stand if it is reasonable, even though it may not appear as reasonable as some other interpretation." *Ferlisi v. Alabama Medicaid Agency*, 481 So. 2d 400, 403 (Ala. Civ. App. 1985).

7. The undersigned notes that, while Mr. Battles was generally aware that Mr. Jones' property was being surveyed and had even visited Respondent's office to discuss the results of that survey, absent notification by the survey crew, Mr. Battles could not be expected to know of the crew's activities. The Board's rules clearly place the responsibility to notify an adjoining landowner of entry on the PLS - not on the landowner on whose behalf the survey activities are being undertaken. Notification efforts become even more critical to protect both the landowners and the PLS in situations involving possible adverse possession. A reasonable effort, as defined by the Board and evidenced by the ASPLS' development of the doorhanger notification - which the Board also considers to be an acceptable means of notification - requires at least some effort at notification. Even Mr. Jeremy Dowdy stated he presumed that the crew's party chief had attempted to notify Mr. Battles and that it was customary for the crew's advance man to assume that responsibility.

CONCLUSION AND RECOMMENDATION

1. It is incumbent upon a licensee to be familiar with the requirements under Alabama law and the Board's own rules and regulations governing the practice of the profession of land surveying. ALA. ADMIN. CODE § 34-11-1, *et seq.* (1975 as amended); ALA. ADMIN. CODE r. 330-X-1-.01, *etseq.* (2013). In particular, a professional land surveyor is responsible for the actions of his agents, employees and any personnel under his supervision with regard to the

exercise of the right of entry onto others' land in the course of the licensee's performance of land surveying activities. ALA. CODE § 34-11-2(d) (1975 as amended).

2. As shown above, on the basis of the evidence of record and the testimony presented, it is hereby concluded that the above-described conduct constitutes violations of ALA. CODE § 34-11-2(d)(3) (1975 as amended) and ALA. ADMIN. CODE r. 330-X-14-.06(a)1. and -.06(a)3. (2013).

3. Accordingly, it is hereby recommended that Respondent receive a written reprimand and pay a fine in the amount of \$2,500.00 for said violations, together with the cost to the Board of these proceedings, in accordance with ALA. CODE §§ 34-11-11(i) and 34-11-16(g) (1975 as amended) and ALA. ADMIN. CODE r. 330-X-16-.06(1) (2013), within thirty (30) days of the date of a Final Order issued by the Board.

ORDER

The Board, after deliberation and review, agrees with and adopts as final the Findings of Facts and Conclusion of Law proposed by Administrative Law Judge, Dana H. Billingsley. The Board finds the Respondent **GUILTY** of the allegations made against him, but modifies the disciplinary recommendation of the (ALJ) and hereby **ORDERS** the following:

1. Respondent is reprimanded for failing to insure that his agents, employees and any personnel under his supervision provide reasonable notice to a property owner when it becomes necessary to enter their property for the purpose of locating section corners, quarter corners, property corners, boundary lines, rights of way, or easements.

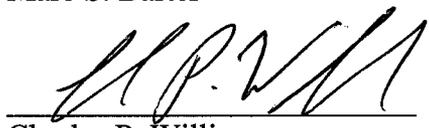
2. Respondent shall submit to the Board via a check or money order made payable to PE & LS Fund \$1,793.75 (One Thousand Seven Hundred & Ninety-Three dollars and Seventy-Five cents) for the cost of hearing within thirty (30) days of date of Final Order.

ENTERED this the 5th day of February, 2015


Earl R. Foust


Marc S. Barter


A. Frazier Christy


Charles P. Willis

RECUSED
M. Elisabeth Hyde


Richard G. Grace


Nathan G. Johnson