

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



Case No. 2013-32-B

IN THE MATTER OF:)

Mark Anderson Kay)



Respondent)

MODIFIED FINAL ORDER

On May 19, 2014 a hearing was convened concerning the allegations filed against Respondent, Mark Anderson Kay. The Board was represented by Mr. Benjamin Albritton, Board Counsel. Administrative Law Judge Dana A. Billingsley presided over the Hearing.

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 Findings of Fact, Conclusions of Law, a Conclusion and Recommendation. The Board accepted the Findings of Fact, Conclusions of Law, and Conclusion of the Administrative Law Judge, but modified the recommendation to be consistent with previous disciplinary actions of this type. The Board issued its Order regarding the matter on June 28, 2014.

On October 29, 2014 a re-hearing of the matter was convened at the request of Richard L. Patton, Attorney for that Respondent. Respondent, nor his counsel, attended the re-hearing. The Board re-considered the evidence previously presented, took into consideration events since the last Board meeting, and determined further action should be taken. The Board then issued the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Respondent Mark Anderson Kay is a licensed Professional Engineer ("PE"), license number 31096, and was so licensed at all times relevant to the matters stated herein. (Tr. 8); (BE #J-1).(1) Respondent was initially licensed on May 19, 2010; his license remained in active status until July 7, 2013, at which time it was suspended for failure to respond to the Board's request for documentation in support of the professional development hours listed on his 2013 license renewal. (Tr. 8); (BE #B-2). Respondent's license was returned to active status on July 30, 2013, but is currently in lapsed status as of December 31, 2013, due to failure to renew.

2. On December 3, 2012, Respondent submitted an on-line renewal of his PE license for the calendar year 2013. (Tr. 21); (BE #B-2). As a condition of licensure, licensees are required to take annually fifteen (15) hours of continuing education ("CE") or Professional Development Hours ("PDH"), which are to be reported on the renewal application form developed by the Board. ALA. ADMIN. CODE r. 330-X-13-.02(4)(a) (2013). Respondent's receipt for his online 2013 renewal shows that he selected the option certifying that he had met the continuing professional competency requirement of fifteen (15) hours of professional development. Respondent also marked the box for a retired status with an "N" for "No." (BE #B-2).

3. After completion of the renewal process, the Board randomly selects a certain percentage of its licensees to be audited in order to monitor their compliance with the PDH requirement. (Tr. 12-13). See ALA. ADMIN. CODE r. 330-X-13-.02(14) (2013).

4. On February 27, 2013, the Board notified Respondent via electronic mail to his last e-mail address of record with the Board that he had been randomly selected for an audit based on his 2013 license renewal and requested that he provide copies of the documents supporting the professional competency credits he earned in 2012 in support of that renewal. (Tr. 13); (BE #J-2). In said correspondence, the Board requested that Respondent provide a log showing a detailed list of the activities claimed and copies of attendance verification records, as required under ALA. ADMIN. CODE r. 330-X-13-.02(12) (2013), by April 1, 2013. (BE #J-2).

5. Respondent failed to respond to the Board's correspondence of February 27, 2013. (Tr. 14). The Board then forwarded a second notice of audit selection to Respondent via First Class and Certified Mail, dated April 29, 2013, to Recipient's address of record at [REDACTED], requesting that Respondent provide the requested documentation by June 1, 2013. (Tr. 14); (BE #J-3). Respondent's receipt of said letter was evidenced by a Certified Mail receipt bearing the signature of Edna C. Kay, dated May 2, 2013. (Tr. 14-15); (BE #J-4). The letter advised Respondent that failure to respond to the Board's request within sixty (60) days could result in the suspension of his PE license until such time as the requested documentation is provided. (Tr. 14); (BE #J-3).

6. Respondent did not respond to the Board's April 29, 2013 letter. (Tr. 14).

7. On July 9, 2013, the Board's Executive Director, Regina Dinger, initiated a Complaint against Respondent and sent a notification of the Complaint via First Class and Certified Mail to Respondent's address of record at 7 Spring Forest Road, Greenville, South Carolina. (BE #J-5). The letter requested that he provide a written response no later than July 25, 2013, concerning his failure to provide the requested

documentation in support of the continuing professional competency credits he obtained for his 2013 license renewal and to provide any additional information that could aid in the investigation of the Complaint. (Tr. 15-16); (BE #J-5). Respondent's receipt of said letter was evidenced by a Certified Mail receipt bearing the signature of Edna C. Kay, dated July 13, 2013. (Tr. 16-17); (BE #J-6).

8. Respondent telephoned the Board office and spoke to Investigator Robert Herbert on July 15, 2013, regarding the notice of Complaint and provided a Certificate of Attendance on July 24, 2013, from the Institute of Boiler Efficiency Improvement in Auburn, Alabama, verifying completion of 1.6 CEUs and 15 PDHs for June 21-22, 2012. (Tr. 19-21); (BE #1A, B-1).

9. By Notice dated March 31, 2014, sent to Respondent's address of record, Respondent was notified via Certified and First Class Mail of the date and time of a public hearing to be held on May 19, 2014, at 9:00 a.m. at the Board's office in Montgomery, Alabama, concerning his alleged violations of the Board's licensure act and administrative rules, which were specified in detail in the Board's Charges accompanying the Notice. (Tr. 9-11); (BE #1A). The Board's Charges were signed by the Executive Director on March 31, 2014, and contained a single charge of unethical conduct for failure to respond in a timely manner to the Board's audit of professional development requirements. (Tr. 10-11); (BE #1A).

10. The Board's Charges alleged that such acts constituted possible violations of ALA. CODE§ 34-11-11(a)(2) (1975 as amended) and ALA. ADMIN. CODE r. 330-X-14-.06(a)1. (2013), violation of the rules of professional conduct or misconduct in the practice of engineering; ALA. ADMIN. CODE r. 330-X-13-.02(12) (2013), governing the licensee's responsibility to maintain records that can be used to support claimed

CE credits; ALA. ADMIN. CODE r. 330-X-14-.06(a)15. and 330-X-13-.02(14)(a) and (b) (2013), governing the failure to respond to Board inquiries, including renewal audits, within sixty (60) days of receipt of such inquiry; and ALA. CODE § 34-11-11(a)(1) (1975 as amended), empowering the Board to impose disciplinary action for the practice of fraud or deceit in the renewal of a certificate of licensure. (BE #1A).

11. 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. (BE #1A). Service of the Notice and Board's Charges on Respondent to his address of record by Certified Mail was confirmed by a Certified Mail receipt signed by Edna C. Kay on April 2, 2014. (Tr. 11); (BE #1A).

12. The Board solicited testimony from the following individuals at the hearing: Executive Director Regina Dinger; William R. Huett, Assistant Executive Director and Chief Investigator; and Board Investigator Robert Herbert. Respondent did not appear. (Tr. 5). In accordance with ALA. CODE§ 41-22-12(d) (1975 as amended) and ALA. ADMIN. CODE r. 330-X-16-.05(3) (2013), having determined that Respondent received proper service of notice of the scheduled hearing, the undersigned proceeded with the hearing in Respondent's absence. (Tr. 5-6).

13. In addition to the testimony received as stated hereinabove, Investigator Herbert testified that Respondent stated in both a recorded interview on July 30, 2013, and in a previous call on July 15, 2013, that he is eighty (80) years old, in retired status, but has kept his PE licenses active. Respondent stated that he has been battling cancer, caring for his wife and dealing with the death of a grandchild during 2012 and 2013, and simply overlooked the Board's requests for documentation of his PDHs. He

provided documentation on July 24, 2013, that supported his renewal and satisfied the Board's audit request. (Tr. 21-22).

14. On August 19, 2013, Respondent provided a further written response to the Board, detailing his medical and family issues, and requested abatement of a proposed fine by the Board due to his circumstances. (Tr. 24); (BE #2). Respondent called again on April 14, 2014, and stated that he was aware of the time, date and place of the hearing, but would not be in attendance. Respondent said that he has spoken with the South Carolina licensing board and been assured that this matter would not affect his PE license in that state. (Tr. 25-26).

CONCLUSIONS OF LAW

1. The Alabama Legislature created the State of 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 within the state. ALA. CODE § 34-11-2(b) (1975 as amended). To ensure these mandates are met, the Board requires licensees to demonstrate continuing professional competency to maintain, improve or expand their skills and knowledge of the practice of professional engineering as a condition for license renewal. ALA. ADMIN. CODE r. 330-X-13-.02(1), (2) (2013).

2. ALA. ADMIN. CODE r. 330-X-13-.02(12) (2013) requires a licensee to maintain records supporting the CE credits claimed. Records required include, but are not limited to, information detailing the type of activity claimed, sponsoring organization, location, duration, speaker or instructor, credits earned and evidence of attendance. The rule provides that these records must be maintained for a period of four

(4) years and must be furnished by the licensee upon the Board's request for audit verification purposes. /d.

3. The Board is empowered to reprimand, censure, fine or place on probation any licensed professional engineer or to suspend, refuse to renew or revoke the certificate of any licensee for violation of any provision of Alabama law regulating the practice of engineering or for any violation of the administrative rules prescribed by the Board. ALA. CODE§ 34-11-11(a)(2) (1975 as amended). See also ALA. ADMIN. CODE r.330-X-14-.06(a)1. (2013).

4. Respondent's license remained in active status until December 31, 2013, and he remains answerable to the Board for the certifications he made on December 3, 2012, when renewing his Professional Engineer license.

5. The evidence of record supports a finding that Respondent failed to respond to the Board's requests for documentation in support of the professional development hours listed on his 2013 license renewal within sixty (60) days of receipt of such inquiry, in violation of ALA. ADMIN. CODE r. 330-X-13-.02(14)(b), 330-X-14-.06(a)1, and 330-X-14-.06(a)15. (2013), as specified in the Board's Charges of March 31, 2014. (BE #1A). The extenuating circumstances documented by Respondent, affecting his ability to timely comply with the Board's requests, and his subsequent cooperation with the Board's investigation, are noted by the undersigned.

CONCLUSION

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 engineering, including the licensee's responsibility to timely provide, upon request, records that can be used to support claimed Professional Development Hours. See ALA. ADMIN. CODE r. 330-X-14-.06(a)15, and 330-X-13-.02(14)(b) (2013).

2. As shown above, on the basis of the evidence of record and the testimony presented, it is hereby concluded that Respondent's failure to produce records in support of the Professional Development Hours for which he certified compliance with the Board's CE requirements on his 2013 license within sixty (60) days of receipt of such request constitutes violations of ALA. ADMIN. CODE r. 330-X-14-.06(a)1. (2013) (violation of the laws and rules and regulations of the Board) and 330-X-14-.06(a)15. and 330-X-13-.02(14)(b) (2013) (failure to respond to a Board inquiry within sixty (60) days of receipt of such inquiry).

DETERMINATION

The Board, after deliberation and review, agreed with its previous Findings of Facts, Conclusions of Law and Conclusion. The Board also determined to **MODIFY** its Order dated June 28, 2014 to again remain consistent with Board precedent in similar disciplinary matters.

ORDER

The Board hereby finds Respondent **GUILTY** of the allegations made against him and hereby **ORDERS** as follows:

1. Respondent's professional engineer license is **revoked** and he must submit a check or money order made payable to the PE & LS Fund for One Thousand dollars (\$1,000.00) within thirty (30) days of the date of the Final Order.

2. Respondent shall submit to the Board via a check or money order made payable to PE & LS Fund in the amount of \$751.25 (Seven Hundred & Fifty One dollars and Twenty-five cents) for the cost of hearing within thirty (30) days of date of Final Order.

ENTERED this the 29th day of October, 2014

DID NOT ATTEND

Earl R. Foust

Elizabeth Hyde
Liz Hyde

Marc S. Barter
Marc S. Barter

Richard Grace
Richard Grace

Frazier Christy
Frazier Christy
RECUSED

Nathan Johnson
Nathan Johnson

Charles P. Willis