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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002555-MR

EARL F. MCKINNEY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 02-CI-00905

KENTUCKY STATE BOARD OF REGISTRATION
FOR PROFESSIONAL ENGINEERS
AND LAND SURVEYORS

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, KNOPF, AND TACKETT; JUDGES.

TACKETT, JUDGE: Earl McKinney (McKinney) appeals from a decision by the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors (Board) which revoked his engineering license in the Commonwealth. McKinney claims that the Board exceeded its authority in revoking his license for his alleged negligence in reviewing engineering projects

from other states in which he is also a licensed engineer. Since the actual review work took place in Kentucky, we agree with the Board that McKinney was negligently practicing engineering in the Commonwealth and uphold the Board's decision revoking his license.

McKinney has been a licensed professional engineer in the Commonwealth since 1964. Through reciprocity, he also holds engineering licenses in forty-eight other states. At the time the Board revoked his license, most of McKinney's work consisted of reviewing prototype plans for restaurant chains, hotels and retail stores. He was the president of A & E Designers, Inc. which had its main office in Lexington, Kentucky. Nevertheless, most of the plans which he reviewed were for projects located in other states, and McKinney would sign them under the seal for the state in which the projects were to be built.

The Board brought nine allegations of negligence against McKinney and the Hearing Officer found him guilty of five. The allegations were based on his habit of signing and sealing projects with inadequate review, unauthorized sealing of a land survey plat, and making false representations on his National Council of Examiners for Engineers & Surveyors (NCEES) license renewal forms. The Board accepted the Hearing Officer's findings and revoked McKinney's license. McKinney appealed the

decision to the Franklin Circuit Court which upheld the Board's decision. This appeal followed.

On appeal, McKinney argues that the Board improperly exercised extraterritorial authority in examining his work on projects located outside the Commonwealth and sealed with engineering licenses from other states. He also claims that the Board had insufficient evidence to determine that he was guilty of the charges of negligence against him. Specifically, McKinney brings up the Board's findings that he spent insufficient time reviewing plans, that he was untruthful on his NCEES forms, that he misrepresented the number of states in which he was a licensed electrical engineer, and that his statement regarding the number of engineers he employed was untrue. Finally, McKinney contends that revocation of his license was an excessive sanction as a matter of law.

In reviewing an appeal from an administrative agency, our function is to ensure that the agency did not act arbitrarily. We must review the Board's decision to determine whether it was supported by substantial evidence and whether the Board applied the correct rule of law. Kentucky Unemployment Insurance Comm'n v. King, 657 S.W.2d 250 (Ky.App. 1983). Substantial evidence is evidence that has "sufficient probative value to induce conviction in the minds of reasonable men." Kentucky Racing Comm'n v. Fuller, 481 S.W.2d 298, 308 (Ky.

1972). Even if the evidence would support differing conclusions, it may be sufficient to support an agency's decision.

McKinney's first argument is that Board lacked authority to regulate his practice of engineering related to projects outside the Commonwealth. In support of this argument, he cites a decision by the Kentucky Supreme Court, Union Underwear Company, Inc. v. Barnhart, 90 S.W.3d 188 (Ky. 2001), overturning our decision which would have allowed an employee to sue Union Underwear in Kentucky where the company is headquartered. The employee had no connection to Kentucky, and the alleged conduct occurred in either Alabama or South Carolina. Barnhart is easily distinguishable from the facts at hand. In this case, the Board is regulating the conduct of an engineer licensed in the Commonwealth. Moreover, McKinney's acts in the practice of engineering actually occurred in Kentucky. Consequently, the Board did not overstep its authority to regulate McKinney's conduct in reviewing plans for out-of-state projects.

McKinney next argues that the Hearing Officer engaged in speculation to reach a determination that he spent insufficient time reviewing engineering plans. The Hearing Officer made a finding that it would have been impossible for McKinney to review all of the plans that he signed and sealed.

McKinney testified that approximately 1,000 projects came into A & E's office each year. Of those, he stated that "in the neighborhood" of 60% to 70% were plans which he would sign. McKinney now claims that the Hearing Officer's finding that he could not adequately review all the plans he signed and sealed rests on speculation. However, this discounts additional evidence introduced by Bob Wooten, a former employee of A & E. Wooten testified that he had personal knowledge that McKinney would sign and seal plans the same day that he received them and without conducting a review. Moreover, there was evidence that McKinney accidentally signed and sealed a survey plat even though he was not a professional surveyor and, thus, not authorized to do so. We are unable to say that the Board had insufficient evidence upon which to base its finding that McKinney conducted insufficient reviews of engineering plans that he signed and sealed.

The remaining evidentiary issues deal with McKinney's alleged misrepresentations regarding the status of his license, the number of states in which he was licensed as an electrical engineer, and the number of engineers he employed. McKinney filled out NCEES renewal forms indicating that his license was not suspended in any state, nor was he under investigation by any state. There was evidence that McKinney had been suspended by a number of states and that, in Texas, he had formal

disciplinary charges pending. McKinney argues that, since some of the suspensions were probated, he could not have known that he needed to include that information on his NCEES forms. Moreover, the Texas disciplinary charges were filed at the conclusion of that state's investigation, so McKinney argues he was technically no longer under investigation. Despite these contentions, McKinney fails to persuade us that the Board had insufficient evidence to support its finding that he was untruthful in filling out his NCEES forms.

McKinney also claims that the Board erred in finding that he misrepresented the number of states in which he was an electrical engineer and the number of engineers he employed. He contends that statements regarding the number of states in which he was licensed as an electrical engineer were made in good faith. McKinney inflated the number of states in which he had such a licensed specialty in testimony to the Nevada Board of Professional Engineers and Land Surveyors and in his application to be licensed as an electrical engineer in California. Moreover, in his Nevada testimony, McKinney stated that he employed three engineers each in structural, electrical, and mechanical engineering. In truth, McKinney employed a total of three engineers, including himself. He now argues that his statements as to the number of engineers he employed was a matter of opinion rather than an untruthful statement. We

disagree. There was substantial evidence to support the Board's findings that McKinney made untruthful representations regarding his licensure as an electrical engineer and the number of engineers he employed.

Finally, McKinney argues that the penalty determined by the Board was excessive as a matter of law. He points out that there was no evidence that any of the plans he signed and sealed contained defects which might have posed a risk to the public health or safety. Kentucky Revised Statute 322.180 provides a wide range of penalties which the Board can impose on licensed engineers. We do not have the authority to change the penalty assessed by the Board unless it was arbitrary or capricious or constituted a clear abuse of discretion. City of Louisville v. Milligan, 798 S.W.2d 454 (Ky. 1990). The Board had the authority to revoke McKinney's license due to the numerous misrepresentations regarding his license and his practice of signing and sealing plans without an adequate review. The fact that McKinney's procedures for reviewing plans allowed him to inadvertently sign and seal a land survey plat is but one example of the lack of review he engaged in. The Board was not obligated to wade through the numerous plans certified by McKinney in an effort to point out hazards in the designs.

For the foregoing reason, the decision of the Kentucky State Board of Licensure for Professional Engineers and Land

Surveyors revoking McKinney's Kentucky license as an engineer is affirmed.

DYCHE, JUDGE, CONCURS.

KNOFF, JUDGE, CONCURS WITH SEPARATE OPINION.

KNOFF, JUDGE, CONCURRING: I concur in most of the reasoning and the result reached by the majority. However, with respect to the Board's sanctioning of McKinney for misconduct in reviewing engineering plans for out-of-state projects, I do so based primarily on the history of this case and these parties. In 1992, the Board brought an administrative action against McKinney alleging most of the same type of misconduct as it asserted in this action. McKinney argued then, as he argues now, that the Board lacked jurisdiction and statutory authority to initiate any discipline proceeding against him based upon conduct involving engineering projects outside of Kentucky.

In an unpublished opinion, this Court disagreed.¹ The prior panel of this Court noted that KRS 322.180 authorizes the Board to regulate the practice of engineering within Kentucky. After considering the definitions of "engineering" and "the practice of engineering" contained in KRS 322.010(3) & (4), this Court concluded that the Board is authorized to regulate all engineering work that takes place within Kentucky, even if it

¹ Earl F. McKinney v. Kentucky State Board of Registration for Professional Engineers and Land Surveyors, No. 93-CA-001561-MR (Not-to-be-Published Opinion rendered June 24, 1994).

involves projects outside of Kentucky and is under the authority of another state's professional license.

Were we considering this matter on a clean slate, I might reach a different conclusion. Nevertheless, the issue of the Board's jurisdiction was fully litigated in the prior action. Therefore, McKinney is precluded from re-litigating that matter.² Furthermore, as the majority correctly points out, Union Underwear Co. Inc. v. Barnhart,³ does not alter this result. In Union Underwear, the Kentucky Supreme Court held that the Kentucky Civil Rights Act cannot have extraterritorial application to conduct which occurred entirely outside of Kentucky. In this case, McKinney's acts in the practice of engineering actually occurred in Kentucky. As a practical matter I believe the Board should defer disciplinary action to the licensing bodies in the appropriate jurisdictions, but I agree with the majority that the Board had subject matter jurisdiction in this case.

BRIEF FOR APPELLANT:

Peter L. Ostermiller
Robert L. Abell
Louisville, Kentucky

BRIEF FOR APPELLEE:

B. R. Salyer
Frankfort, Kentucky

² See Sedley v. City of West Buechel, 461 S.W.2d 556 (Ky. 1970).

³ 50 S.W.3d 188 (Ky. 2001).