

ORDER ON MOTIONS 05C-07

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
BOARD OF REGISTRATION OF
HAZARDOUS WASTE SITE CLEANUP PROFESSIONALS

In the Matter of:)	
)	
James J. Decoulos)	LSP Board Complaint No. 05C-07
Respondent)	OADR Docket No. 10AP-01
)	

**POST HEARING ORDER ON MOTIONS TO EXTEND
EFFECTIVE DATE OF FINAL ORDER
AND NOTICE OF APPEAL AND
MOTION TO DELAY ANNOUNCEMENT OF FINAL ORDER**

INTRODUCTION¹

This disciplinary action is the result of an investigation and determination by the Board that the respondent violated the following Rules of Professional Conduct while providing Professional Services as a LSP: 309 CMR 4.02(1) which requires a LSP to act with reasonable care and dilligence, and to apply the knowledge and skill ordinarily exercised by LSPs in good standing, practicing in the Commonwealth, when performing hazardous waste site cleanup activities; and 309 CMR 4.03(3)(b) which requires a LSP to follow the requirements and procedures set forth in the applicable provisions of G.L. c. 21E and 310 CMR 40.0000 *et seq.*

PROCEDURAL HISTORY

On December 15, 2005, the Board received a complaint from Najib Badaoui regarding 131 Main Street, Carver, Massachusetts ("Site A"). On January 20, 2006; August 31, 2007 and

¹ The Board herein repeats the chronology contained in its Final Order.
In the Matter of James J. Decoulos
LSP Board Complaint No. 05C-07
Order on Respondent's February 12, 2019 Motions
Page 1 of 10

ORDER ON MOTIONS 05C-07

January 30, 2008, the respondent filed responses to the complaint. A Complaint Review Team ("CRT") was formed to investigate the matter. As part of its investigation, the CRT retested the audit history of the respondent which revealed potential violations with 633 North Main Street, Randolph, Massachusetts ("Site B"). *See* CRT Report, July 15, 1999 at p. 2. The CRT held informal conferences with the respondent on December 12, 2007 and May 12, 2008. CRT Report, July 15, 1999 at p. 2; *see also* 309 CMR 7.05. Two members of the CRT visited the Carver site on June 26, 2008. *See* Luhrs Pre-filed Testimony ("PFT") at pp. 3-4. The CRT concluded that sufficient facts existed to warrant discipline against the respondent. *See* CRT Report at p. 41. Finding that aggravating circumstances justified the penalty, the CRT recommended that the respondent's license be suspended for one year on July 21, 2009. *See* CRT Recommendation of Discipline at pp. 1-4.

On January 8, 2010, the Board issued an Order to Show Cause and Proposed Order Finding Sufficient Grounds for Discipline and Notice of Noncompliance ("Order") to the respondent, which outlined two specific findings of noncompliance. *See* Order at p. 14. As an initial matter, the Order alleged that the respondent violated 309 CMR 4.02(1), failing to act with reasonable care and diligence. *Id.* Next, the Order indicated that he failed to meet the requirements of 310 CMR 40.000, in violation of 309 CMR 4.03(3)(b). *Id.* The Board contended that the respondent failed to both perform adequate assessments, and collect sufficient data to support his opinions. *Id.*; Luhrs Rebuttal Pre-filed Testimony ("PFT") at pp. 7-8; RFD at p. 11. The Order likewise outlined the facts on which it relied for its decision that his work at two hazardous waste disposal sites violated the Board's regulations, all pursuant to 309 CMR 7.07. *See* Order at p. 14. On February 2, 2010, the respondent filed Objections and Answer to

ORDER ON MOTIONS 05C-07

Order to Show Cause, appealing the Order. He requested an adjudicatory hearing on the findings that he violated the Rules of Professional Conduct. *See generally*, Respondent's Objections and Answer to Order to Show Cause. Pursuant to 309 CMR 7.07 and adjudicatory hearing rules 309 CMR 7.07, the hearing officer scheduled the matter for a Pre-Hearing Conference on April 13, 2010. *See* Scheduling Order, March 25, 2010 at p. 1.

On or about October 27, 2010 the hearing officer conducted an adjudicatory hearing. Cynthia Baran ("Baran"); Robert Luhrs ("Luhrs"); Ian Phillips ("Phillips"); and John Fitzgerald ("Fitzgerald") testified on behalf of the Board. The respondent testified and offered testimony from Theodore Bosen ("Bosen"); Paul Wright ("Wright"); and Richard Doherty ("Doherty"). The witnesses offered by the prosecuting attorney were present at the hearing to authenticate their pre-filed direct testimony and for cross-examination by the respondent's counsel. The respondent as well as his witnesses were similarly present at the hearing to authenticate their pre-filed direct testimony and to be cross-examined by the Board's prosecuting attorney.

On April 1, 2011 and April 29, 2011 respectively, the prosecuting attorney and the respondent filed post-hearing briefs, and on May 13, 2011, the prosecuting attorney filed a brief in rebuttal to the post-hearing brief of the respondent. On September 7, 2012, the hearing officer issued a Recommended Final Decision ("RFD"). Jones found "persuasive evidence that the Board proved all of the violations by an overwhelming preponderance of the evidence." RFD at p. 43; *Craven v. State Ethics Comm'n*, 390 Mass 191, 196 (1983). The substantial and uncontroverted testimony at trial demonstrated that the respondent violated both the Board's Rules of Professional Conduct 309 CMR 4.00 *et seq.*, as well as the Massachusetts Contingency Plan by a preponderance of the evidence. *See generally*, Recommended Final Decision

ORDER ON MOTIONS 05C-07

("RFD"); Prosecuting Attorney's Memorandum Recommending A Disciplinary Sanction; Prosecuting Attorney's Reply to Respondent's Oppositions to the Board's Final Findings of Fact and Rulings of Law and Recommendation for Disciplinary Sanctions; *Sch. Comm. of Brookline v. Bureau of Special Educ. Appeals et al.*, 389 Mass. 705, 716 (1983)(Massachusetts standard is more probably true than not).

The non-recused Board members voted to wholly affirm and adopt the RFD pursuant to 801 CMR 1.01(11)(b)-(d) on March 20, 2014. The respondent timely objected to the RFD and moved to enlarge time to file objections/responses on November 2, 2012. That motion was allowed in a quasi-judicial session on November 16, 2012. Another extension was requested on December 4, 2012, which the Board granted in a December 6, 2012 quasi-judicial session. Subsequently, the Board convened Quasi-Judicial Sessions on June 20, 2013, August 20, August 29, 2013, September 18, 2013, October 7, 2013, October 21, 2013, November 12, 2013, November 21, 2013, and March 20, 2014 to rule on post-hearing motions.

In accordance with 801 CMR 1.01(11)(c) the Board decided as follows: The Respondent's Objections to the Decision were denied; the Prosecuting Counsel's Response to the Respondent's Objections to the Decision was rendered moot; the Respondent's Request for Oral Argument on his objection to the RFD was denied; the Prosecuting Counsel's Opposition to his Request for Oral Argument and Motion to Strike Late-Filed Exhibits moot. The Respondent's Motion to Allow Additional Exhibits to the Record was likewise denied. The Respondent's Opposition to Board's Motion to Strike Late-Filed Exhibits was also moot as was the Prosecuting Counsel's Opposition to Motion to Allow Additional Exhibits to the Record and Reply to Opposition to Motion to Strike.

ORDER ON MOTIONS 05C-07

On or about October 10, 2014, the respondent's attorney-initiated settlement discussions. He indicated that the respondent might accept a limited suspension and payment of fine, or a fine and additional Continuing Education requirements. However, if asked to surrender his license for any substantial period of time, he would appeal the matter to the Massachusetts Superior Court Department pursuant to G.L. c. 30A, § 18. On October 22, 2014, the prosecuting attorney informed the respondent's legal counsel that she would recommend that the Board enter into an agreement for a suspension of 15 months plus 32 additional continuing education credits to settle both complaints against the respondent.² On October 29, 2014, the respondent through his legal counsel responded to the offer asserting that the comparable cases cited by the Board's prosecuting attorney were dissimilar to the present case; they were more egregious. Specifically, *In the Matter of Jaffe* 06C-08, the LSP failed to conduct an Imminent Hazard Evaluation, thereby creating a risk that people would inhale contaminant vapors. Conversely, the respondent here did not put anyone in imminent peril. A 15-month suspension is not appropriate, but the respondent would accept a fine of \$5,000, 40 hours of additional Continuing Education credits, and a Private Censure, which he would have accepted before the hearing.

Again, in early 2015, the Board decided to attempt to resolve the matter through settlement. Based on disciplinary precedent, the Board offered the respondent a fifteen-month suspension of his license to practice and an additional thirty-two hours of continuing education.³ The respondent made a counter offer of forty-five additional continuing education credits and

² There is another matter pending against the respondent. In lieu of prosecution, the offer included settlement of both the instant case as well as the second proceeding.

³ Pursuant to the Board's regulations, LSPs are required to earn forty-eight hours of continuing education credits every three years. *See* 309 CMR 309(3).

ORDER ON MOTIONS 05C-07

payment of a monetary penalty in the amount of \$7,500 on January 14, 2015 which the Board rejected at its January 15, 2015 meeting. The offer was made a second time on January 22, 2015. On May 19, 2015, the respondent again rejected the offer.

In June 2016, the Board issued its Final Findings of Fact and Rulings of Law. On July 6, 2016, the Prosecuting Attorney filed A Memorandum Recommending a Disciplinary Sanction, which was served on the respondent's attorney. The respondent's attorney requested an extension of time to file a response until "August 15, 2016 or later," which was granted. The respondent's attorney served a Notice of Withdrawal of Appearance on August 19, 2016. The non-recused Board members granted the respondent a one-time extension until October 21, 2016 to file his opposition memoranda.

The respondent, pro se, filed his Opposition to the Board's Final Findings, and Opposition to Recommendation for Disciplinary Sanctions on October 21, 2016. The respondent was notified on November 14, 2016, that the non-recused members of the Board voted to permit him to argue the Prosecuting Attorney's disciplinary recommendation orally pursuant to 309 CMR 7.10(3). Additionally, the Board voted to limit oral argument to the issue of the imposition of disciplinary sanctions. The Prosecuting Attorney filed a reply to the respondent's Opposition to the Board's Final Findings, and Opposition to Recommendation for Disciplinary Sanctions on March 15, 2018.

Pursuant to 309 CMR 7.10(3), the Board issued an Order on May 7, 2018 that scheduled oral argument before its Professional Conduct Committee meeting on May 16, 2018. The order set out rules that governed the procedure in oral arguments: The Co-chairperson of the Professional Conduct Committee will conduct the proceedings; the proceedings would be audio-

ORDER ON MOTIONS 05C-07

recorded⁴; oral arguments were limited to twenty minutes on each side; the party that requested oral argument argued first; oral arguments were not permitted to go beyond the scope of the recommended disciplinary sanctions; physical exhibits or documents to be used at the oral argument had to be placed in the LSP Board meeting room before the meeting began on the date of the argument; no party was permitted to adduce testimony or call witnesses to take part in the oral argument; the Board did not entertain questions from the parties. The order also indicated that if in the progress of oral argument, it becomes necessary that a pleading be filed, or other step be taken so that the case may proceed, and the issue is not covered by any provision of statute, regulation, or rule, the Board could make any appropriate order. At oral argument, the respondent requested and was granted an additional two minutes for rebuttal. He also offered six exhibits into the record. *See* Professional Conduct Committee Hearing Transcript at p. 3. Legal counsel for the Board waived oral argument and rested on the papers filed with the Board. *See* Professional Conduct Committee Hearing Transcript at p. 32.

On June 19, 2018, the respondent filed a Motion to Supplement Oral Argument.⁵ The non-recused members of the Board deliberated in Quasi-Judicial session on May 16, 2018, and June 20, 2018. On June 20, 2018, the non-recused members of the Board confirmed the vote taken on April 26, 2018 to impose discipline as originally set and approved which was a one (1)

⁴ The respondent engaged a stenographer to transcribe the proceedings.

⁵ “Ordinarily, litigation is considered moot when the party who claimed to be aggrieved ceases to have a personal stake in its outcome.” *Commonwealth v. Puleio*, 433 Mass. 39, 40 (2000) (quoting *Blake v. Massachusetts Parole Bd.*, 369, Mass. 701, 703 (1976)). The mootness doctrine applies with force here where this matter has been fully litigated. As pertains to discipline, the Board found that the respondent violated the Rules of Professional Conduct. Further, the nonrecused members voted to impose discipline. Therefore, there is no live case or controversy before it. *Acting Supt. Of Bournewood Hosp. v. Baker*, 431 Mass. 101, 103 (2000)(quoting *Attorney Gen. v. Comm’r of Ins.*, 403 Mass. 370, 380 (1988)). On that basis, it found that the respondent’s Motion to Supplement Oral Argument was moot.

ORDER ON MOTIONS 05C-07

year suspension and completion of thirty-two hours of continuing education credit in the areas of hydrogeology, conceptual site modeling, remediation of non-aqueous phase liquid, and risk characterization, in addition to what is required to renew his license pursuant to 309 CMR 3.09.

The Board issued Final Findings of Fact and Rulings of Law on June 16, 2016, that are attached to this Final Order. The Findings of Fact and Rulings of Law are incorporated herein by reference. The Board has determined that the respondent failed to comply with the Rules of Professional Conduct 309 CMR 4.02(1) and 4.03(3)(b), by failing to act with reasonable care and diligence or apply the knowledge and skill ordinarily exercised by licensed site professionals at the time the services were performed and failing to follow the requirements and procedures set forth in applicable provisions of G.L. c. 21E and 310 CMR 40.0000.

For the reasons stated in the Final Findings of Fact and Rulings of Law incorporated into the Final Order by reference, the Board concluded that the record of the adjudicatory hearing established that the respondent violated the Board's Rules of Professional Conduct and that discipline is warranted. The Board ordered that the respondent's license to practice as a Hazardous Waste Site Cleanup Professional, License No. 9360, be suspended for one (1) year and that he complete thirty-two hours of continuing education credit in the areas of hydrogeology, conceptual site modeling, remediation of non-aqueous phase liquid, and risk characterization, in addition to what is required to renew his license, beginning thirty (30) days on February 8, 2019. The Board's Final Order was served on all parties on February 8, 2019.

On February 12, 2019, the respondent pro se, filed a Motion to Extend the Effective Date of the Final Order and a Notice of Appeal and Motion to Delay Announcement of Final Order.

As grounds therefore, the respondent indicated that he was "recovering from [a] medical

ORDER ON MOTIONS 05C-07

procedure and [was] unable to work at his office.” The motions were accompanied by an unsigned copy of a note regarding “Left Arthroplasty Total Knee With Custom Implant,” dated February 5, 2019. The motions requested an additional fifteen (15) days from the effective date of the Order, from March 10, 2019 until March 25, 2019. On February 27, 2019, the nonrecused Board members by a majority roll call vote issued the order below.

ORDER

It is hereby **ORDERED** that

1. Respondent’s Motion to Extend the Effective Date of Final Order is **DENIED**; and
2. Respondent’s Notice of Appeal and Motion to Delay Announcement of Final Order is **DENIED**.

Issued this 1st day of March 2019

The Board of Registration of Hazardous Waste Site Cleanup Professionals

By:

James N. Smith, Date

Kathleen Campbell Date

David Austin Date

Marc J. Richards Date

Farooq Siddique Date

Dr. Gail L. Batchelder Date

ORDER ON MOTIONS 05C-07

Gregg McBride

Date