

JUN 28 2019

BEFORE THE WEST VIRGINIA STATE BOARD OF
REGISTRATION FOR PROFESSIONAL ENGINEERS WV PE BOARD

IN RE: BENJAMIN L. SMITH, JR.

C2019-19

CONSENT ORDER

Comes now the West Virginia State Board of Registration for Professional Engineers by Bhajan S. Saluja, P.E., its President, (hereinafter "the Board") for the purpose of agreeing to resolve a Complaint seeking disciplinary action against Benjamin L. Smith, Jr. (hereinafter "Respondent"). As reflected in this document, the parties have reached an agreement concerning the proper disposition of this matter, and the Board, upon approval of this agreement, does hereby **FIND** the following:

1. The matters set forth herein are within the jurisdiction of the Board, which is the state entity with the power and duty to regulate the practice of engineering in the State of West Virginia.
2. Respondent is a licensed professional engineer in the State of West Virginia holding license number 10710.
3. On or about November 11, 2018, Respondent caused to be submitted an "*Elevation Certificate*," FEMA Form 086-0-33 (7/15), to the Putnam County Planning Commission, Winfield, Putnam County, West Virginia regarding a certain trailer located in Poca, Putnam County, West Virginia.
4. On November 11, 2018, Respondent did not hold a Certificate of Authorization ("COA").
5. This complaint relates to Respondent's "*Elevation Certificate*," and revisions of same which were submitted to the county planning commission, but were later determined by the county planning director to be incomplete, or otherwise inadequate.
6. The Board became aware of the Respondent's aforesaid submission.
7. This resulted in a Board-initiated investigation which revealed that Respondent had prepared and submitted an "*Elevation Certificate*," and said action allegedly constituted

violations of engineering law as follows: 1) practicing engineering in West Virginia without a COA; and 2) Violating the Rules of Professional Responsibility which prohibit registrants from affixing their signatures or seals to any plans or documents except in accordance with W. Va. Code §30-13-1 *et. seq.*, and the Board's rules. W. Va. Code R. §7-1-12.4(a) and (b).

8. The Board initiated Complaint Number C2019-19 at its regular meeting on January 30, 2019, which was filed and served on or about February 7, 2019.
9. Respondent filed a timely response to the complaint stating his position on or about February 28, 2019.
10. Thereafter, the Respondent and the Board agreed to settle this matter in lieu of the Respondent going forward to a formal hearing before the Board.
11. The Board has considered the following factors in reaching this settlement: Respondent was a professional engineer licensed in West Virginia at the time the engineering work was done; Respondent cooperated in the resolution of this Complaint, and there was no risk of harm to the public.
12. The Board, in its discretion, will not assess administrative costs although it is within its power to assess such costs and administrative costs were incurred in the investigation, initiation and resolution of this complaint.

CONCLUSIONS OF LAW

13. The Board is the state entity with the power and duty to regulate the practice of engineering in the State of West Virginia, and matters related to such practice are within the jurisdiction of the Board. W. Va. Code §30-13-1 *et seq.*
14. Benjamin L. Smith, Jr., Respondent, has the power and authority to make admissions, and otherwise act on his own behalf.
15. At all times material hereto, Respondent admits he was acting in his individual capacity, did not have any employees, and was not acting as a separate corporate or partnership

- entity. Therefore, Respondent was acting as a sole proprietorship when he provided engineering services relating to the “*Elevation Certificate*.” W. Va. Code R. §7-1-11.2(a).
16. Sole proprietorships are required to have a COA to offer engineering services or practice engineering in West Virginia. W. Va. Code §30-13-17.
 17. Respondent admits that he did not have a COA at the time he provided the aforesaid engineering services.
 18. Based on the findings of fact set forth above, and the legal citations set forth herein, Respondent admits that it violated W. Va. Code §30-13-17 when Respondent provided engineering services without the required COA.
 19. Practicing engineering, and/or offering to practice engineering as defined by W. Va. Code §30-13-3(e), without an active Certificate of Authorization is an action that may subject a person or firm to discipline by the Board, including a civil penalty up to Five Thousand Dollars (\$5,000.00) for each offense. W. Va. Code R. §7-1-15.1.
 20. The rules promulgated under W. Va. Code §30-13-1 et seq. include the Rules of Professional Responsibility, which are binding on every professional engineer, which each professional engineer must be familiar with, and which delineate specific obligations each professional engineer must meet. W. Va. Code R §§7-1-12.2 and 7-1-12.2(a).
 21. The Rules of Professional Responsibility require that a professional engineer exercise the privilege of performing engineering services “only in the areas of their competence according to current standards of technical competence.” W. Va. Code R §7-1-12.2(b).
 22. A professional engineer’s obligation to society requires the professional engineer to approve and seal only those designs, plans, or other documents that conform to accepted engineering standards, and safeguard the life, health, property and welfare of the public. W. Va. Code R §7-1-12.3(b).
 23. A professional engineer’s obligation to society requires the professional engineer to include all relevant and pertinent information in reports. W. Va. Code R §7-1-12.3(a).

24. Respondent admits that the submission of the “*Elevation Certificate*” was incomplete and not accurate.
25. A violation of the Rules of Professional Responsibility, including the misuse of a seal, which would include affixing a seal to an engineering document at the time when the registrant did not possess the necessary education, training and/or experience to provide an engineering opinion on said subject matter, is an action that could subject Respondent to discipline by the Board, including a civil penalty up to \$5,000.00 for each offense. W. Va. Code R. §7-1-15.1; see also W. Va. Code R §7-1-12.
26. The Board may suspend or revoke or refuse to issue, restore or renew a certificate of registration, or place on probation, impose a civil penalty or reprimand any professional engineer who has failed to comply with any of the provisions of this article or any of the rules promulgated under it. W. Va. Code §30-13-21(a)(4).
27. The provisions of W. Va. Code §30-13-21(a) are applicable as appropriate to unlicensed persons and firms. W. Va. Code §30-13-21(b) and (d).
28. The Board is authorized to assess civil penalties against any person who violates any provisions of this article or any rule promulgated by this Board for each offense in an amount determined by the Board. W. Va. Code §30-13-21(b); see also W. Va. Code §30-13-21(d)(4).
29. In determining the amount of a civil penalty to be assessed, the Board may consider such factors as the circumstances leading to the violation; the nature and severity of the violation and the risk of harm to the public; the extent to which the cited person or firm has cooperated with the Board and the Board’s investigation; and other matters as may be appropriate. W. Va. Code R. §7-1-15.4.
30. The assessment of administrative costs is within the Board’s sole discretion. W. Va. Code §30-13-21(d)(4) and W. Va. Code R. §7-1-14.4.

CONSENT OF RESPONDENT

Mr. Benjamin L. Smith, Jr., Respondent, by affixing his signature hereon, agrees to the following:

31. Respondent is aware of his rights to be represented by counsel in this matter and to pursue this matter through appropriate administrative and/or court procedures, including his right to a formal hearing before the Board, and Respondent intelligently and voluntarily waives these rights provided the Board accepts the terms and conditions set forth in this Consent Order.
32. Respondent admits he did not have an active Certificate of Authorization at the time Respondent provided engineering services in West Virginia, in violation of West Virginia engineering law.
33. Respondent admits that he did not did not possess the necessary education, training and/or experience to seal the aforesaid "*Elevation Certificate*," FEMA Form 086-0-33 (7/15), an engineering document.
34. Respondent accepts the findings set forth above and consents to the entry of this Consent Order freely and voluntarily and not under duress, restraint or compulsion.
35. Respondent acknowledges that this Consent Order is being executed for the purpose of avoiding further administrative action with respect to the above-styled matter. In this regard, Respondent authorizes the Board to review and examine all investigative file materials concerning Respondent's activities in West Virginia in consideration of this Consent Order.
36. Should the Board not approve this Consent Order, Respondent waives any objections to the Board or any of its members participating in the adjudication of this matter. This paragraph is binding on Respondent even if the Board does not approve this Consent Order.
37. Respondent acknowledges that the Board may reject this proposal, notice and hold a hearing, and, upon adjudication, impose such sanctions of a disciplinary nature as it deems appropriate.

38. Respondent understands that this Consent Order constitutes a full and final settlement of this matter, and nothing in this Consent Order or the circumstances giving rise to the same may be the subject of any appeal or other civil or administrative actions except an action by the Board to enforce the terms of this Consent Order, but that nothing in this Consent Order prohibits the Board from considering this disciplinary action or the circumstances giving rise to same with regard to any future disciplinary matter involving Respondent which may be before this Board.
39. Respondent understands that the Complaint and this Consent Order are public records which, together with other public documents in the file, must be made available upon legal request in accordance with the State's Freedom of Information Act.
40. Respondent agrees that the sum and substance of the Complaint and this agreement in part or in their entirety will be set forth in Board publications and on the Board's website, as well as other appropriate placements, including the non-public enforcement exchange database administered by the National Council of Examiners for Engineering and Surveying (NCEES).
41. Respondent acknowledges that non-compliance with this Consent Order may result in the rescission of this agreement, the reinstatement of the Complaint, the summary revocation, non-renewal or non-reinstatement of any license or Certificate of Authorization issued to Respondent by the Board, the addition of any other charges which may arise or ensue from Respondent's non-compliance with this Consent Order.
42. Respondent acknowledges that proof of any material misstatement or misrepresentation made in connection with this matter will result in the rescission of this agreement, the reinstatement of the Complaint, the summary revocation, non-renewal or non-reinstatement of any license or Certificate of Authorization issued to Respondent by the Board, and the addition of any other charges which may arise or ensue from providing false information to the Board in violation of West Virginia engineering law.

ORDER

1. On the basis of the foregoing, and upon entry of this Consent Order, the Board hereby **ORDERS** that this Consent Order shall serve as settlement of Complaint Number C2019-19 pursuant to West Virginia Code §30-13-22(b).
2. The Board **ORDERS** Respondent to pay a civil penalty in the amount of Two Hundred Fifty Dollars (\$250.00) for practicing engineering without a Certificate of Authorization.
3. The Board **ORDERS** Respondent to pay a civil penalty in the amount of Five Hundred Dollars (\$500.00) for misuse of his seal.
4. The Board **ORDERS** Respondent not to perform or submit any FEMA Elevation Certificates, including, but not limited to, building elevation calculations, or such other services related to the National Flood Insurance Program as specified in OMB No. 1660-0008 until such time as he successfully demonstrates to the Board that such services are within his area of competence, and can be performed in conformity with the current standards of technical competence. Respondent's ability to resume performing or submitting FEMA Elevation Certificates, building elevation calculations, or other services related to the National Flood Insurance Program as specified in OMB No. 1660-0008 must be set forth in writing by the Board, and the Board will not issue written approval until the civil penalties agreed to herein are paid in full.
5. The civil penalty imposed herein totaling Seven Hundred and Fifty Dollars (\$750.00) must be paid within thirty (30) days of the date of entry set forth below, such amount to be made payable to the "**W. Va. P.E. Board**" for transfer to the general fund of the State of West Virginia upon receipt.
6. The sum and substance of the Complaint and this agreement in part or in their entirety shall be set forth in Board publications and on the Board's website, as well as other appropriate placements, including the non-public enforcement exchange database administered by the National Council of Examiners for Engineering and Surveying (NCEES).

7. Any violation of the terms of this Consent Order shall be immediate cause for further disciplinary action by the Board.
8. If the civil penalty imposed herein is not paid within thirty (30) days of the date of entry set forth below, then the Respondent's license or COA, if any, is hereby **ORDERED REVOKED**. Said revoked license or COA may be restored once the civil penalty is paid, and the Respondent pays the appropriate fees, and is otherwise in good standing with the Board. West Virginia Code §30-13-21(d)(1).
9. This Consent Order may be summarily enforced in the Circuit Court of Kanawha County, West Virginia, without further notice to Respondent upon application by the Board for the entry of a Judgment Order for the total amount of payment agreed to herein of Seven Hundred and Fifty Dollars (\$750.00), together with pre-judgment interest from the date of the Board President's signature hereon, post-judgment interest from the date of entry of the Judgment Order, and all costs of any enforcement action(s), which judgment shall be fully executable in accordance with applicable law.
10. This matter shall be closed upon execution of this Consent Order by both parties and the full payment of the civil penalty agreed to herein, except as to the provisions set forth in paragraph 8, above, regarding revocation of the Respondent's COA, and its affects shall survive the closure of this Consent Order.
11. This Consent Order constitutes a full and final settlement of this matter, and nothing in this Consent Order or the circumstances giving rise to the same may be the subject of any appeal or other civil or administrative actions except an action by the Board to enforce the terms of this Consent Order. This shall not prohibit the Board from considering this disciplinary action or the circumstances giving rise to the same with regard to any future disciplinary matter involving Respondent which may come before this Board.
12. This Consent Order relates solely to matters set forth in West Virginia engineering law and does not evidence compliance with any other laws of the State of West Virginia or its political subdivisions, nor should any such compliance be implied.

AGREED TO BY:


BENJAMIN L. SMITH, JR.

6/27/19
DATE

ENTERED into the records of the West Virginia State Board of Registration for Professional Engineers this 19 day of July, 2019.

**WEST VIRGINIA STATE BOARD OF REGISTRATION
FOR PROFESSIONAL ENGINEERS**

By: 
BHAJAN S. SALUJA, P.E.
BOARD PRESIDENT