

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR BOARD OF ARCHITECTURE, ENGINEERING, LAND SURVEYING,
LANDSCAPE ARCHITECTURE, GEOSCIENCE, AND INTERIOR DESIGN**

In the Matter of Professional Engineer License
of Charles Marohn

**RESPONDENT'S MEMORANDUM IN
OPPOSITION TO THE BOARD'S MOTION
FOR SUMMARY DISPOSITION**

INTRODUCTION

The Complaint Board of the Minnesota Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience, and Interior Design (the "Board") moved for Summary Disposition arguing there are no material facts in dispute because (i) Charles L. Marohn ("Marohn") violated Minn. Stat. §326.02 subd. 3 (b) when he identified himself solely in conjunction with his political work as a "professional engineer" while unlicensed and (ii) Marohn violated Minn. Rule §1800.0200 subps. 1(B), 2, and 4(C) when he certified in his reinstatement application that he had not referred to himself as a professional engineer while unlicensed. Minn. Rule §1800.0200 subps. 1(B), 2, and 4(C) prohibits licensees from being "[un]truthful in all professional documents;" making "a false statement ... in connection with an application for ... renewal;" or "engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation."

The Board's motion completely ignores the two central facts in this case: (i) Marohn has not worked as a professional engineer in any capacity since 2012 (which the Board admits) and (ii) the Board's application of the Minn. Stat. 326.02 subd. 3 (b) and Minn. Rule §1800.0200 subps. 1(B), 2, and 4(C) either do not apply to licensee activities outside the practice of

professional engineering or, if applied outside the practice of professional engineering, their application violates the First Amendment of the U.S. Constitution.

With respect to the constitutional argument, Mr. Marohn has set forth facts in his declaration in support of his motion for summary disposition demonstrating that the Board was motivated in seeking to discipline Mr. Marohn based on his political activities. In addition, Mr. Marohn is filing a second declaration in response to the Board's motion which set forth additional facts supporting Mr. Marohn's argument that the Board's claims are unconstitutional. Based on these disputed facts, the Board's Motion must be denied.

FACTS

A. Marohn Relies on his Declaration and the Factual Arguments Made in Support of his Motion for Summary Disposition.

Rather than reiterate the facts set forth in his Motion for Summary Disposition, Marohn incorporates those facts by reference including the facts set forth in the Declaration Marohn filed in support of his motion for summary disposition ("Marohn First Declaration"). More specifically, Marohn's First Declaration states, in detail, that (i) Marohn was not engaged in either practicing or offering to practice engineering services during the period he was unlicensed (which the Board admits) and (ii) Board members relied on Marohn's political activities in pursuing the complaint in the above captioned proceeding. This memorandum and Marohn's Second Declaration will set forth additional facts in response to the Board's motion. More specifically, Marohn testifies in Marohn's Second Declaration that (i) that he did not make a false certification in reinstatement application based on the language of the certification and Minnesota statutes and (ii) that even if this tribunal finds that the certification was false, Marohn did not intend to make a false certification because of his understanding of the certification.

B. The Board Admits (i) that Marohn Has Not Worked as Professional Engineer While Unlicensed and (ii) Marohn Had No Knowledge of the Complaint Filed Against Him at the Time Marohn Signed his Reinstatement Certification.

Marohn does not dispute (i) that he failed to renew his professional engineering license for the period of July 1, 2018 to June 30, 2020 and (ii) that in conjunction with renewing his lapsed license, he signed the certification stating that he had not “represented [himself] as a professional engineer” while unlicensed. What the Board fails to state in its memorandum is that the Board admitted in response to discovery requests that the Board had no evidence (i) that Marohn had performed any work as a professional engineer while his license had lapsed and (ii) that Marohn had any knowledge of the claim against him when Marohn signed the certification that he had not represented himself as a professional engineer while unlicensed when he submitted his reinstatement application on June 9, 2020. *Board’s Discovery Responses attached to the James R. Magnuson Declaration as Exhibit 1 at page 17; Marohn First Declaration at ¶¶16-21.*

C. Additional Facts Disputing the Board’s Factual Allegations.

As set forth in Marohn’s memorandum in support of his motion for summary disposition and Marohn’s First Declaration, Marohn has not practiced professional engineering since 2012. Moreover, as the Board admits, Marohn did not practice professional engineering while he was unlicensed and, in fact, has not practiced as an engineer since at least 2012.

More importantly, as set forth in Marohn’s First Declaration, the Board received the Dixon Complaint on March 5, 2020 (“Dixon Complaint”). *Marohn Declaration at ¶22.* The Board had this Complaint for 96 days prior to Marohn submitting his reinstatement application on June 9, 2020. However, the Board failed to notify Marohn that the Complaint had been made until July 24, 2020. While the Board’s file for Marohn shows the Board mailed Marohn notices

on March 5, 2020 and April 29, 2020 to Marohn’s prior address, Dixon’s Complaint provided Marohn’s business address at Strong Towns in the Dixon Complaint as well as Strong Town’s website address which contained Strong Town’s address and phone number. *Marohn First Declaration, Exhibit 2 and the Board’s March 5, 2020 and April 29, 2020 letters attached as Exhibits 2 and 3 to the Magnuson Declaration.* As Marohn testifies, if the Board had notified Marohn of the Dixon Complaint prior to Marohn filing his reinstatement application on June 9, 2020, Marohn would have still signed the certification that he had not represented himself as a professional engineer while unlicensed because of his understanding that the certification was asking if Marohn had made such representations while engaged in providing engineering services. *Marohn Second Declaration at ¶¶3, 4.* However, Marohn also testifies that he would have provided an explanation to the Board that he was signing the certification based on his understanding that the certification only applies to individuals who represent themselves as professional engineers *while engaged in the practice of engineering.* *Marohn Second Declaration at ¶3 and Exhibit 1 to the Marohn First Declaration.*

The Board’s initial July 24, 2020 letter requested information from Marohn on all engineering work performed by Marohn while his license was expired and steps he took to “rectify the matter.” *Marohn First Declaration, ¶26.* The Board’s request was thus properly focused on the only relevant question – whether Marohn held himself out as being licensed as a professional engineer in connection with offering or providing engineering services in Minnesota. *Marohn First Declaration, ¶27 and Marohn’s July 28, 2020 letter attached as Exhibit 3.* When the Board was made aware Marohn had not practiced professional engineering during the time period that his license had lapsed, the Board only then charged that Marohn had identified himself as a professional engineer during the period when his licensure had

inadvertently lapsed. *Marohn Dec.*, ¶30. In settlement negotiations, the Board repeatedly insisted that Marohn admit that he was “dishonest” and “untruthful” in order for the Board accept any settlement. Not surprisingly, Marohn would not admit in a public document to engaging in “dishonesty” in conjunction with his profession – because Marohn had not engaged in any dishonesty.

LEGAL ARGUMENT

A. Minn. Stat. §326.02 subd. 3(b)’s Prohibition on Unlicensed Persons Representing Themselves as Professional Engineers Only Applies to Representations Made While Practicing, Or Offering to Practice, Professional Engineering.

Marohn argues the Board’s legal claims against have no merit based on two legal arguments: (i) statutory interpretation and (ii) constitutional violation. Before addressing Marohn’s constitutional arguments, a statutory analysis of Minn. Stat. §326.02 subd. 3(b)’s prohibition on using the term “professional engineer” demonstrates that subdivision only applies when the person is engaged in, or offers to engage in, the practice of professional engineering.

Minn. Stat. §326.02, subd. 3, which was amended in 2014 to add subd. 3(b), and is entitled “Practice of Professional Engineering,” states:

(b) No person other than one licensed under sections 326.02 to 326.15 as a professional engineer may:

- (1) use the term “professional engineer”;
- (2) use any other abbreviation or term, including the initials “P.E.” or “PE” by signature, verbal claim, sign, advertisement, letterhead, card, or similar means that would lead the public to believe that the person was a professional engineer;
or
- (3) use any means or in any other way make a representation that would lead the public to believe that the person was a professional engineer.

Minn. Stat. §326.02 subd. 3(b) is contained in Chapter 326 of the Minnesota Statutes entitled “Employments Licensed by State.” Chapter 326 is part of Chapters 324-341 entitled

“Trade Regulations; Consumer Protection.” The titles of these chapters and sections demonstrate that these statutes govern business conduct – “employments” – and do not extend beyond business conduct and certainly do not extend to political conduct.

Moreover, Minn. Stat. §362.02 subd. 1 states, in relevant part:

In order to safeguard life, health, and property, and to promote the public welfare, any person in either public or private capacity *practicing, or offering to practice, ... professional engineering*, ... either as an individual, a copartner, or as agent of another, shall be licensed or certified as hereinafter provided. It shall be unlawful for any person to practice, or to offer to practice, in this state, ... professional engineering, ... or to solicit or to contract to furnish work within the terms of sections 326.02 to 326.15, or to use in connection with the person's name, or to otherwise assume, use or advertise any title or description tending to convey the impression that the person is an architect, professional engineer (hereinafter called engineer), land surveyor, landscape architect, professional geoscientist (hereinafter called geoscientist), or certified interior designer, unless such person is qualified by licensure or certification under sections 326.02 to 326.15. (emphasis added).

The focus in subdivision 1 is on the practice, or offer to practice, of professional engineering without a license. Subdivision 1 also bars soliciting or contracting to work as an engineer, or advertising one’s services as an engineer without a license. In context, the focus is on unlicensed persons providing professional engineer services, or offering to do so through solicitation or advertising.

Minnesota statutes Chapter 646 governs the interpretation of statutes. Minn. Stat. §645.16, entitled “Legislative Intent Controls,” provides the following rules for interpreting Minnesota statutes:

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.

When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:

- (1) the occasion and necessity for the law;
- (2) the circumstances under which it was enacted;
- (3) the mischief to be remedied;
- (4) the object to be attained;
- (5) the former law, if any, including other laws upon the same or similar subjects;
- (6) the consequences of a particular interpretation;
- (7) the contemporaneous legislative history; and
- (8) legislative and administrative interpretations of the statute.

More importantly, Minn. Stat. §646.17, entitled “Presumptions in Ascertaining Legislative Intent,” provides:

In ascertaining the intention of the legislature the courts may be guided by the following presumptions:

- (1) the legislature does not intend a result that is absurd, impossible of execution, or unreasonable;
- (2) the legislature intends the entire statute to be effective and certain;
- (3) the legislature does not intend to violate the Constitution of the United States or of this state;
- (4) when a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language; and
- (5) the legislature intends to favor the public interest as against any private interest.

Under these canons of statutory construction, the legislature enacted Minn. Stat. §326.02 subd. 3(b) to prohibit individuals from identifying themselves as a professional engineer only when engaged in the practice of professional engineering. In fact, the Board, in testifying before the legislature in seeking the 2014 amendment to Minn. Stat. §326.02 subd. 3(b), told the legislature the reason they were seeking the amendment was to:

Next the legislation (i.e., proposed Minn. Stat. §326.02 subd. 3(b)) strengthens and clarifies the practice act by limiting the use of the designation ‘P.E.’ only by professional engineers. This is the standard designation and use of ‘P.E.’ across the country. This rule will serve the public welfare by eliminating confusion that can arise by those that use ‘P.E.’ to mean project engineer or principal engineer.”

Magnuson Declaration at ¶ 5, Exhibit 4.

Thus, the Board sought the amendment to “strengthen the *practice act*” to only allow licensed engineers to use the label “professional engineer” or “P.E.” while practicing engineering because individuals who were not licensed professional engineers were calling themselves “project engineers” and using the initials “P.E.” to describe themselves. Because licensed professional engineers use the initials “P.E.” to describe themselves, unlicensed “project engineers” were seeking to confuse clients and potential clients that these project engineers were actually licensed “professional engineers.” Nothing in the legislative history suggests that the Board or the legislature sought to extend the reach of the statute beyond the practicing, or offering to practice, of professional engineering.

Finally, a 1960 Minnesota Supreme Court decision interpreting Minn. Stat. §326.02 specifically held that licensing statutes should not be interpreted in a literal or arbitrary manner which would extend the statute beyond the statute’s purpose of protecting against the unlicensed practice of engineering. In *Dick Weatherston's Associated Mech. Servs., Inc. v. Minnesota Mut. Life Ins. Co.*, 100 N.W.2d 819 (Minn. 1960), the Court analyzed whether a contractor who was assisting engineers licensed under Minn. Stat. §326.02 was also required to be licensed. In interpreting §326.02, the Court first noted that “[j]ustice and sound public policy do not always require the literal and arbitrary enforcement of a licensing statute.” *Dick Weatherston's* then held that the purpose of Minn. Stat. §326.02 was to ensure that engineering projects protected the “life, health, property, or public welfare” and were “free from any element of fraud, incompetence, or misrepresentation.” *Id.* As a result, *Dick Weatherston's* held in interpreting Minn. Stat. §326.02:

it is our view that it comes within those numerous exceptions which hold generally that the prohibitions of the statute involved are no broader than its purpose in protecting the

public from misrepresentation and deceit. The scope of the statute coincides with the reasons for its existence. Since those reasons have no bearing upon the transaction involved herein, the statute is without application.”

Id at 192 (citations omitted).

Under *Dick Weatherston's*, the OAH is bound to interpret Minn. Stat. §326.02 consistent with the reasons for its existence – i.e., ensuring that engineering projects were “free from any element of fraud, incompetence, or misrepresentation.”

Minn. Stat. §326.02 states that the purpose of the licensing scheme is to “safeguard” the “public welfare” and “its life, health and property.” The “public welfare” and “its life, health and property” only needs to be “safeguarded” from unlicensed persons practicing, or offering to practice, engineering. In order to ensure this interest is protected, the legislature further “safeguards” the public by prohibiting persons from saying they are professional engineers when engaged in, or offering to engage in, the practice of professional engineering if those persons are not licensed.

More importantly, Minn. Stat. §646.17 specifically provides that the legislature never intends for a statute to have an unconstitutional or absurd result. In fact, the Supreme Court requires that statutes be construed to avoid constitutional problems. *Matter of Welfare of A. J. B.*, 929 N.W.2d 840, 848 (Minn. 2019). If Minn. Stat. §326.02 subd. 3(b) is interpreted to extend beyond prohibiting persons from identifying themselves as professional engineers when not engaged in the practice of engineering, such an interpretation will begin to intrude into constitutionally protected speech and lead to absurd results. More importantly here, if the interpretation is applied, as the Board seeks to apply it, to core political speech, the statute is unequivocally unconstitutional under *Nat’l Inst. of Family Life Advocates v. Becerra* (“*NIFLA*”), 138 S.Ct. 2361, 2371 (2018).

Thus, under the rules of statutory construction, Minn. Stat. §326.02 3(b) does not apply to Marohn’s identifying himself as a professional engineer when engaged in political speech – period – full stop. Based on the case law, and a proper reading of the statutes, persons may not use the term professional engineer to describe themselves *in connection with professional engineering services*.

The Board’s interpretation, which is inconsistent with the statutory canons the legislature adopted set forth above, leads to absurd results. According to the Board, subd. 3. prohibits anyone in Minnesota from ever using the term “professional engineer” or “P.E.” to describe themselves anytime and anywhere. For instance, an actor calling him or herself a “professional engineer” in a play would violate the statute. A gym teacher stating on the gym teacher’s resume that the gym teacher is a “P.E.” would violate the statute.

Finally, Minn. Stat. §326.02 subd. 3(b) bars affirmative use of terminology. In its motion, the Board did not present evidence in its motion that Marohn reviewed his credentials on his website, nor his LinkedIn profile, nor even the biography on his book jacket during the time period his licensure was expired. In other words, there is no evidence to suggest that Marohn did not make these statements when they were accurate and truthful. If Marohn’s license were to lapse again in the future, and he were not to immediately hunt down every reference to himself in books he authored and published, online, from youtube videos, to social media posts, to websites, that used the term “professional engineer” or “P.E.” would subject Marohn to discipline under the statute. This absurd result in no way furthers the stated aims of the legislature.

B. As Marohn Has Previously Argued, the Board’s Application of Minn. Stat. §326.02 subd. 3(b) to Marohn When Marohn Was Not Engaged in the Practice of Professional Engineering Violates the Free Speech Guarantee of the First Amendment.

Marohn filed a Motion for Summary Judgment that extensively evaluates Minn. Stat. §326.02 subd. 3(b) and demonstrates that its application to Marohn based on these facts violates the First Amendment to the United States Constitution. Marohn will not exhaustively recite that analysis here, but incorporates the arguments in Marohn’s Memorandum of Law in Support of Summary Judgment by reference. This memorandum will highlight a few points.

The State of Minnesota’s interest is ensuring that those who are performing engineering services are licensed have met certain qualifications for competence and ethics. The State of Minnesota could not possibly demonstrate that it has a compelling state interest in whether a person uses the term “P.E.” or “professional engineer” when describing themselves on social media, in political advocacy or in conversation. Further, even knowingly false speech is generally protected and subject to strict scrutiny outside of narrow exceptions. *United States v. Alvarez*, 567 U.S. 709 (2012). In this case, the Board has no important or compelling state interest in whether Marohn’s website had identified him as a professional engineer when he was not licensed, so long as Marohn was not engaging, or offering to engage, in the practice of professional engineering. Therefore, the Minn. Stat. §326.02 subd. 3(b) is unconstitutional and the Board’s motion for summary disposition should be denied. More importantly, because of the statements Board members made at the March 10, 2021 conference demonstrating the motivation to discipline Marohn because of Marohn’s political advocacy, at a minimum, there must be a hearing on the Board’s allegations. *Marohn First Declaration*, ¶38 and the Board’s February 17, 2021 Notice of Conference attached as Exhibit 8.

C. The Board Cannot Establish That Marohn Made an Intentional Misrepresentation.

Minnesota Rule 1800.0200 subps. 1(B), 2, and 4(C) prohibit licensees from being “[un]truthful in all professional documents;” making “a false statement or fail to disclose a material fact requested in connection with an application for certification, licensure, or renewal in this state or any other state;” or “engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation.” The Board argues that Marohn violated these Rules when he certified in his reinstatement application that he had not referred to himself as a professional engineer while unlicensed when in fact Marohn had identified himself as a professional engineer solely while engaged in political advocacy.

To begin, the certification states that Marohn did not represent himself as a professional engineer “without proper licensure and certification.” Marohn accurately interpreted this to mean what it says – he did not make the representation in circumstances where he needed “proper licensure and certification.” The only circumstances in which one needs proper licensure and certification is when someone is practicing, or offering to practice, engineering. *Marohn Second Declaration*, ¶4.

Moreover, if the Board’s only concern were whether Marohn had made a technical and inadvertent oversight, in failing to realize that his licensure had lapsed, this matter would have been settled long ago. Instead, the Board, after the initial complaint was conveyed to Marohn, amended the allegations to include that Marohn was “dishonest,” and engaged in conduct “involving dishonesty or misrepresentation” in conjunction with the certification. Both dishonesty and misrepresentation involve knowingly statements, and are distinct from negligence. The Board has provided absolutely no evidence that Marohn knew that his statements in his reinstatement application were false. All the Board has demonstrated is that

Marohn made statements on his reinstatement application, and that thereafter, upon hearing the Board's interpretation of said language, Marohn has consistently testified that he interpreted the reinstatement application as asking whether he had represented himself as a professional engineer while providing engineering services. As Marohn has set forth herein, the case law and legislative history both establish that the purpose of Minn. Stat. §326.02 is to protect the public from unlicensed persons representing themselves as professional engineers in connection with the practice or offering of engineering services, in order to protect the health and welfare of the public, and protect them from incompetence and fraud. *See, e.g., Dick Weatherston's Associated Mech. Servs., Inc. v. Minnesota Mut. Life Ins. Co.*, 257 Minn. 184, 189–90 (1960). There is no evidence that Marohn intentionally attempted to mislead the Board, nor that he would have any motive to do so. Because the facts on summary disposition must be interpreted in Marohn's favor, at the bare minimum there is a material factual dispute as to whether Marohn was intentionally dishonest or untruthful to the Board.

CONCLUSION

The Board's Motion for Summary Disposition should be denied.

DATED: February 4, 2022

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