

May 31, 2022

VIA EFILING ONLY

Doreen B. Johnson
Executive Director
Minnesota Board of Architecture,
Engineering, Land Surveying, Landscape
Architecture, Geoscience and Interior
Design
85 East Seventh Place Ste 160
Saint Paul, MN 55101
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Re: *In the Matter of the Professional Engineer License of Charles Marohn*
OAH 60-1006-37594

Dear Executive Director Johnson:

Enclosed and served upon you is the Administrative Law Judge's **RECOMMENDED ORDER ON CROSS-MOTIONS FOR SUMMARY DISPOSITION** in the above-entitled matter. The official record, along with a copy of the recording of the oral argument, is also enclosed. The Office of Administrative Hearings' file in this matter is now closed.

If you have any questions, please contact me at (651) 361-7874, michelle.severson@state.mn.us, or via facsimile at (651) 539-0310.

Sincerely,


MICHELLE SEVERSON
Legal Assistant

Enclosure

cc: Docket Coordinator
Allen C. Barr
James R. Magnuson

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF ARCHITECTURE, ENGINEERING, LAND SURVEYING,
LANDSCAPE ARCHITECTURE, GEOSCIENCE AND INTERIOR DESIGN

In the Matter of the Professional Engineer
License of Charles Marohn

**RECOMMENDED ORDER ON CROSS-
MOTIONS FOR SUMMARY
DISPOSITION**

This matter is pending before Administrative Law Judge James E. LaFave.

Allan Cook Barr, Assistant Attorney General, represents the Minnesota Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience and Interior Design (Board) Complaint Committee (Complaint Committee). William F. Mohrman, Mohrman, Kaardal & Erickson, P.A., represents Charles Marohn (Respondent).

On January 21, 2022, each party filed a Motion for Summary Disposition (Motions). The parties responded to the Motions on February 4, 2022, and both parties submitted reply memoranda on February 25, 2022.

A hearing on the Motions was held on March 2, 2022, via Microsoft Teams, and the record closed that day at the conclusion of the hearing.

Based on the submissions of counsel and the hearing record,

IT IS HEREBY RECOMMENDED THAT:

1. Respondent's Motion for Summary Disposition be **DENIED**.
2. The Complaint Committee's Motion for Summary disposition be **GRANTED**.

Dated: May 31, 2022


JAMES E. LAFAVE
Administrative Law Judge

NOTICE

This Report is a recommendation, **not** a final decision. The Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience and Interior Design (Board) will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2020), the Board shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Board must consider the exceptions in making a final decision. Parties should contact the Executive Director of the Minnesota Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience and Interior Design, Suite 160, 85 East Seventh Place, St. Paul, MN 55101, telephone (651) 296-2388, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Board, or upon the expiration of the deadline for doing so. The Board must notify the parties and Administrative Law Judge of the date the record closes. If the Board fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2020). In order to comply with this statute, the Board must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline to be imposed.

Under Minn. Stat. § 14.62, subd. 1 (2020), the Board is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The facts in this case are largely undisputed. The Board licensed Respondent as a professional engineer (PE). In 2012, Respondent ceased practicing as an engineer and dedicated himself to assisting the public to better understand public infrastructure projects in their communities via his nonprofit. This advocacy is related to engineering but does not involve the practice of engineering. A few years later, he allowed his license to expire. While unlicensed, Respondent called himself a “professional engineer” and “PE” on the internet and while giving book talks related to his nonprofit work. In 2020, in an application to renew his engineering license, Respondent affirmed to the Board that he had not represented himself as a professional engineer without proper licensure.

The Board maintains that, by these actions, Respondent violated Minnesota’s engineer licensure statutes and regulations. Respondent argues that these actions are protected under the First Amendment to the United States Constitution and Article I, section 3, of the Minnesota Constitution.

I. The Factual Background

A. Respondent's Licensure Status

In 2000, the Board licensed Respondent as a professional engineer.¹ Professional engineering licenses must be renewed every two years, and Respondent duly renewed his license for each two-year period through 2016 to 2018.²

But, on July 1, 2018, Respondent's license expired because he had failed to renew it.³ Respondent acknowledges that he forgot to renew his license for the period beginning in 2018, in part because he did not receive the Board's renewal notice. It is likely Respondent did not receive the renewal notice because he failed to update his address with the Board as required by rule.⁴

Respondent learned his license expired on June 9, 2020.⁵ He then submitted material both to reinstate his expired license and to renew his license for the upcoming 2020 to 2022 licensure period.⁶

On June 17, 2020, the Board received Respondent's renewal applications for both the 2018 to 2020, and 2020 to 2022 periods.⁷ On June 23, 2020, the Board renewed Respondent's license.⁸

It is undisputed that Respondent was not licensed as a professional engineer from July 1, 2018, through June 22, 2020.

B. Respondent's Work History

Respondent worked as a professional engineer at his own firm from 2000 to 2012.⁹ In 2009, while Respondent was still practicing as a professional engineer, he founded the nonprofit Strong Towns.

In Respondent's words, Strong Towns "advocates an approach to urbanism that avoids the construction of unnecessary infrastructure and hence the costs of building and maintaining unnecessary infrastructure."¹⁰ Moreover, Strong Towns "provides education and information to the public, both in and out of Minnesota, in an effort to assist the public in being better advocates for appropriate infrastructure projects in their localities," and "maintains a website that provides news and commentary related to

¹ Declaration (Decl.) of Dillon Lang ¶ 2.

² Decl. of Charles Marohn ¶ 16.

³ Lang Decl. ¶ 5.

⁴ Minn. R. 1800.0120, subp. 1(A) (2021) ("Each ... licensee ... must notify the board in writing of any change of address within 30 days of the change.").

⁵ Marohn Decl. ¶ 18.

⁶ *Id.* at ¶ 20.

⁷ Lang Decl. ¶ 2.

⁸ *Id.* The renewal meant that Respondent's license became reactivated before the July 1, 2020, biannual changeover date, but the renewal was not retroactive to the entire 2018 to 2020 period.

⁹ Marohn Decl. ¶¶ 6-7.

¹⁰ *Id.* at ¶¶ 8-10.

urbanism, urban planning, land-use planning, and infrastructure projects.”¹¹ Respondent and Strong Towns are influential and respected contributors in the field of urban planning.¹²

In 2012, Respondent closed his professional engineer firm and stopped practicing as an engineer; he has since focused solely on his advocacy work.¹³ He has not “signed any engineering documents, prepared any plans or specifications requiring licensure, overseen anyone who practices engineering, worked on any engineering projects, or undertaken any professional action that created any threat to the health, safety, and welfare of the public” since 2012.¹⁴ Further, Respondent affirms that, since 2012, he has not “applied for any work as an engineer nor used [his] credentials to seek work as a professional engineer,” and that the work he engages in “does not require any type of licensure including a professional engineering license.”¹⁵

C. Respondent’s Representations During His Unlicensed Period

It is undisputed that, during the period in which he was not licensed, Respondent used the terms “professional engineer” and “PE” to describe his credentials. During this period:

- Respondent’s LinkedIn profile stated that Respondent was a “Professional Engineer (PE) licensed in the State of Minnesota.”¹⁶
- In separate places, the Strong Towns website described Respondent as a “Professional Engineer (PE) licensed in the State of Minnesota” and as a “professional engineer.”¹⁷
- Respondent’s 2019 book *Strong Towns*, published during the period when he was unlicensed, states that Respondent is a “certified Professional Engineer (PE)” in the dust jacket author profile, and states that Respondent is a “professional engineer licensed in the State of Minnesota” in its “about the author” section.¹⁸
- In spring 2020, Respondent gave at least three presentations in which he stated that he was a “PE.”¹⁹
- When Respondent renewed his license in 2020, on both submissions, he checked “Yes” on the “Affidavit” portion to the statement: “I have not represented myself as . . . [a] professional engineer . . . without proper licensure or certification, either

¹¹ Marohn Decl. ¶¶ 8-10.

¹² See *Id.* at ¶ 13.

¹³ *Id.* at ¶¶ 7, 14.

¹⁴ *Id.* at ¶ 14.

¹⁵ *Id.*

¹⁶ Lang Decl. Ex. 1A at 1.

¹⁷ *Id.* at Ex. 1B at 1, 7.

¹⁸ *Id.* at Ex. 1C at 2-3.

¹⁹ *Id.* at Exs. 2B, 2C, 2E.

verbally or on any printed matter, in the State of Minnesota, nor will I do so until such time as my license or certificate has been issued by the Minnesota Board of . . . Engineering.”²⁰

D. The Board’s Investigation and this Contested Case Proceeding

On March 5, 2020, the Board received a complaint from an engineer in South Dakota alleging that Respondent had represented himself as a professional engineer without holding the requisite licensure.²¹ On July 24, 2020, the Board sent a letter to Respondent informing him of the complaint and the Board’s investigation via a duly impaneled Complaint Committee.²² Although the South Dakota engineer’s complaint was filed before Respondent sent his renewal papers to the Board, Respondent did not learn of the complaint until after filing those papers.²³

Respondent replied to the Board’s letter, stating that he did not engage in any professional engineer work during the period in which he was unlicensed.²⁴ In his letter, Respondent stated: “When I represented myself as being licensed in the state of Minnesota, I believed I was.”²⁵

On November 3, 2020, the Complaint Committee sent Respondent a letter and proposed stipulation and order.²⁶ The letter informed Respondent that the Complaint Committee had determined him to be in violation of Minn. Stat. § 326.02, subds. 1 and 3 (2020), and Minn. R. 1805.0020, subps. 1(B), 2, and 4(C) (2021), and that the Complaint Committee would recommend that the Board impose disciplinary action.²⁷ The stipulated order would have required Respondent to acknowledge violating those measures and making a false statement on his renewal papers, and would have imposed a \$1,500 civil penalty, in addition to a requirement to take two hours of ethics classes.²⁸

On November 17, 2020, Respondent replied to the Complaint Committee’s letter and proposed stipulation.²⁹ Between that date and April 20, 2021, Respondent and the Board exchanged several proposals to resolve this matter, but the parties could not agree on stipulated language,³⁰ and the Board initiated this contested case proceeding.³¹

²⁰ *Id.* at Exs. 3A, 3B.

²¹ Marohn Decl. Ex. 2.

²² *Id.*

²³ *Id.* at ¶¶ 22-23.

²⁴ *Id.* at ¶¶ 27-28, Ex. 3.

²⁵ *Id.* at Ex. 3.

²⁶ *Id.* at ¶ 29, Ex. 4.

²⁷ *Id.* at Ex. 4.

²⁸ *Id.*

²⁹ *Id.* at Ex. 5.

³⁰ See *Id.* at Exs. 5-11.

³¹ See Notice and Order for Prehearing Conference (June 3, 2021).

II. Summary Disposition Standard

Summary disposition is the administrative law equivalent of summary judgment.³² A motion for summary disposition shall be granted when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law.³³ The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition in contested case matters.

The function of the Administrative Law Judge on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but to determine whether genuine, material factual issues exist.³⁴ The Administrative Law Judge does not weigh the evidence; instead, the judge views the facts and evidence in a light most favorable to the non-moving party.³⁵

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.³⁶ A fact is material if its resolution will affect the outcome of the case.³⁷ If the moving party meets the initial burden, the burden shifts to the non-moving party to prove the existence of any genuine issue of any material fact.³⁸ A genuine issue is not a "sham or frivolous" one, and it cannot rely on mere allegations or denials.³⁹ Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.⁴⁰

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.⁴¹ Thus, summary disposition is only proper when no fact issues need to be resolved.⁴²

III. Legal Analysis

A. The Use of Terms "Professional Engineer" and "PE"

The Complaint Committee alleges that Respondent violated Minn. Stat. § 326.02, subds. 1 and 3, by representing himself as a professional engineer during the time his license was expired.⁴³

³² *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); see also Minn. R. 1400.5500(K) (2021).

³³ *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985).

³⁴ *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

³⁵ *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

³⁶ *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

³⁷ *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996) (citing *Zappa v. Fahey*, 245 N.W.2d 258, 259-260 (Minn. 1976)).

³⁸ *Thiele*, 425 N.W.2d at 583.

³⁹ *Highland Chateau, Inc. v. Minnesota Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984) (citing *A & J Builders, Inc. v. Harms*, 179 N.W.2d 98, 103 (Minn. 1970)).

⁴⁰ See Minn. R. Civ. P. 56.05.

⁴¹ *Sauter*, 70 N.W.2d at 353.

⁴² See *id.*

Minn. Stat. § 326.02, subd. 1 provides:

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 a person's name, ***or to otherwise assume, use or advertise any title description tending to convey the impression that the person is [a] . . . professional engineer*** (hereinafter called engineer) . . . unless such person is qualified by licensure or certification under sections 325.02 to 326.15.⁴⁴

Minn. Stat. § 326.02, subd. 3(a) states:

Any person shall be deemed to be practicing professional engineering within the meaning of sections 326.02 to 326.15 ***who holds out as being able to perform*** or who does perform any technical professional service, such as planning, design or observation of construction for the purpose of assuring compliance with specifications and design, in connection with any public or private structures, buildings, utilities, machines, equipment, processes, works, or projects wherein the public welfare or the safeguarding of life, health, or property is concerned or involved, when such professional service requires the application of the principles of mathematics and the physical and applied engineering sciences, acquired by education or training, and by experience.⁴⁵

Under Minn. Stat. § 326.02, subd. 3(b), no one other than a licensed professional engineer may “use the term ‘professional engineer’,” use any abbreviation of “professional engineer” in a way “that would lead the public to believe that the person was a professional engineer,” or “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.”

In social media posts, in a book, and in multiple public presentations Respondent stated he was a professional engineer. It is undisputed that Respondent repeatedly held himself out as a professional engineer during the time his license had lapsed in violation of the statute.

B. False Information on the License Renewal

Respondent affirmed on his reapplication papers that he had “not represented [him]self as . . . [a] professional engineer . . . without proper licensure or certification, either verbally or on any printed matter, in the State of Minnesota.”⁴⁶ As detailed above,

⁴³ Notice and Order for Prehearing Conference (Notice) (Jun. 3, 2021).

⁴⁴ (Emphasis added.)

⁴⁵ *Id.*

⁴⁶ Lang Decl. Exs. 3A, 3B.

Respondent, on numerous occasions, represented himself to be a professional engineer.

The Complaint Committee asserts that, in so doing, Respondent violated three state regulations:

1. Minn. R. 1805.0020, subp. 1(B), “[a] licensee or certificate holder shall be objective and truthful in all professional documents, including but not limited to plans, reports, statements, or testimony.”
2. Minn. R. 1805.0020, subp. 2, “[a] licensee or certificate holder shall not make 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.”
3. Minn. R. 1805.0020, subp. 4(C), a licensee may not “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”

C. Respondent’s Arguments

Respondent asserts the Complaint Committee is mistaken in its reading of the cited statutes and rules. Respondent reasons that because he was engaged in public advocacy and was not providing professional engineering services, he did not improperly hold himself out as a professional engineer. Moreover, during the period Respondent’s license was expired, he was unaware of that fact, so when he represented himself as a professional engineer, he believed that to be true. For all these reasons, Respondent feels he did not provide false information on his license renewal. Respondent further moves for summary disposition in his favor on the grounds that his statements are protected by the First Amendment. These arguments will be addressed below.

i. Respondent violated the statutes and rules

Respondent’s argument, that because he was engaged in public advocacy and was not providing actual professional engineering services, he did not improperly hold himself out as a professional engineer, ignores the plain language of the law. Minn. Stat. § 326.02, subd. 1, prohibits the use of a description that would “convey” the impression a person is a professional engineer. Minn. Stat. § 326.02, subd. 3(a), defines a professional engineer, not only as one who performs engineering services but also one “who holds out being able to perform” engineering services.

It does not matter that Respondent was engaged in public advocacy or that he had stopped providing engineering services in 2012. By stating he was a professional engineer and using the initials “PE”, Respondent was holding himself out as one who could perform engineering services. And therefore, because his license had expired and because he was not a licensed engineer, Respondent violated the statute.

A similar analysis applies to the Complaint Committee’s claim that Respondent provided false information on his license renewal. Respondent states he answered

truthfully in the license renewal, because he interpreted the certification to mean he had not represented himself as a professional engineer in connection with providing or offering to provide professional engineering services in Minnesota as opposed to engaging in public advocacy. Respondent's interpretation is unreasonable under the plain language of the renewal.

There is a difference between providing or offering to provide professional engineering services and holding oneself out as a professional engineer. There is no dispute that Respondent, on multiple occasions while he was unlicensed, claimed he was a professional engineer. The facts conclusively prove, contrary to his representations to the Board, that Respondent held himself out as professional engineer without proper licensure in the State of Minnesota in violation of the rules.

ii. The Constitutional Claims

Respondent moves to dismiss the Complaint Committee's claims on the grounds they violate his rights under the First Amendment to the United States Constitution and Article I, § 3 of the Minnesota Constitution.⁴⁷ Specifically, Respondent argues Minn. Stat. § 326.02, subd. 3(b), is facially overbroad and patently unconstitutional.⁴⁸

Respondent seeks to have statutes declared unconstitutional. Administrative law judges, unlike Article VI judges in the state court system, have no power to declare a statute unconstitutional. These are powers accorded to judges in the judicial branch alone.⁴⁹ The Administrative Law Judge, therefore declines to address Respondent's constitutional claims.⁵⁰

IV. Conclusion

Based on a careful review of the record, the Administrative Law Judge concludes the Complaint Committee established it is entitled to summary disposition as a matter of law because Respondent violated Minn. Stat. § 326.02, subd. 1 and 3 by representing himself as a professional engineer while his license was expired. And that Respondent violated:

- Minn. R. 1805.0200, subp. 1(B), by failing to be truthful in all professional documents.
- Minn. R. 1805.0200, subp. 2, by making a false statement on an application for renewal; and

⁴⁷ Respondent Charles Marohn's Motion for Summary Judgement at 3 (Jan. 21, 2022).

⁴⁸ *Id.* at 23.

⁴⁹ See, e.g., *In re Rochester Ambulance Service*, 500 N.W.2d 495, 499-500 (Minn. Ct. App. 1993); *Neeland v. Clearwater Mem'l Hosp.*, 257 N.W.2d 366, 368 (Minn. 1977).

⁵⁰ Respondent will have the opportunity to raise the constitutional issues on an appeal from an administrative tribunal at the first opportunity in a forum possessing subject matter jurisdiction. (See *Neeland*, 257 N.W.2d at 68).

- Minn. R. 1805.0200, subp. 4(C), by engaging in conduct involving misrepresentation.

Consequently, the Administrative Law Judge respectfully recommends that Respondent's Motion for Summary Disposition be denied, and the Board's Motion for Summary Disposition be granted.

J. E. L.