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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Michael Berg, Appellee, v. North Dakota State Board of Registration for Professional Engineers and Land Surveyors, Appellant.	Supreme Court No. 20170413 Civil No. 08-2015-CV-00200

An Appeal from a Judgment dated October 3, 2017 and two Orders dated February 6, 2017 and August 30, 2017 in regard thereto of the District Court, South Central Judicial District, Burleigh County, North Dakota, entered into an Administrative Appeal Proceeding

BRIEF OF APPELLANT NORTH DAKOTA STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS

ZUGER KIRMIS & SMITH

Dated: March 12, 2018.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1] This brief is filed on behalf of Appellant, North Dakota State Board of Registration for Professional Engineers and Land Surveyors, (the "Board") in connection with a judgment, and orders related thereto, entered in an administrative appeal before the district court, South Central Judicial District, Burleigh County, North Dakota. The issues raised by the Board are as follows:

[¶2] A. Whether the district court erred in its determination that neither relevant portion of Finding of Fact No. 5 of the Board's Order issued January 5, 2015 (the "Board's Berg Order") in connection with disciplinary complaints brought against the Appellee, Michael Berg ("Berg") that Berg violated N.D.A.C. § 28-03.1-01-12(6), was supported by a preponderance of the evidence.

[¶3] B. Whether the district court, after it affirmed Finding of Fact No. 6 of the Board's Berg Order that Berg had violated N.D.A.C. §28-03.1-01-10 erred in remanding the Board's Berg Order to the Board for reconsideration of the discipline imposed by the Board for the violation of this section, with a direction that the Board consider whether any discipline for the violation is appropriate.

[¶4] C. Whether, the district court erred in its determination that Berg is a prevailing party under the 2003 version of N.D.C.C. § 43-19.1-25.

[¶5] D. Whether the district court erred in determining that the 2003 version of N.D.C.C. § 43-19.1-25 applied to Berg's claim for attorney's fees, as opposed to the 2015 version of N.D.C.C. § 43-19.1-25.

[¶6] E. Whether, if Berg was a prevailing party under the 2003 version of N.D.C.C. § 43-19.1-25, the district court erred in awarding any attorney's fees incurred by Berg prior to the date of the issuance of the Board's Berg Order.

[¶7] F. Whether, if Berg is found to be a prevailing party under the 2003 version of N.D.C.C. § 43-19.1-25, the district court erred in determining that the amount of $103,627.30 awarded to Berg by the judgment for his attorney's fees were reasonable.

STATEMENT OF THE CASE

[¶8] This case arises because of a reversal by the district court of a portion of an order of the Board issued after a hearing held in accordance with the provisions of N.D.C.C. § 43-19.1-26, combined with a remand of another portion of the order directing the Board as to a consideration of discipline to be imposed. Berg is a registered professional engineer. Ulteig Engineers, Inc. ("Ulteig") filed charges pursuant to N.D.C.C. § 43-19.1-26 against Berg, alleging seven violations of the Code of Ethics by Berg.[1] The investigative panel of the Board reviewed the initial materials submitted by Ulteig, and the responses and materials submitted by Berg, and recommended that three of the seven alleged violations be dismissed because they were either unfounded or trivial. A hearing in front of the Board, as required by N.D.C.C. § 43-19.1-26, was held on the remaining four alleged violations the

[1] Ulteig also filed charges against four other engineers, (to-wit: Thomas Welle ("Welle"), Dain L. Miller ("Miller"), Scott Olson ("Olson"), Timothy Paustian ("Paustian"), and the company with which they were employed, and in which they were stockholders, Apex Engineering Group, Inc. ("Apex").

week of December 15, 2014.[2] Pursuant to this statute, the three members of the Board that were not involved in the investigation issued findings, conclusions, and an order. An Administrative Law Judge served as the hearing officer only. The Board subsequently entered the Board's Berg Order (Appendix ["App"] pp. 349-356). The Board found no disciplinary violation as to two of the remaining charges. The Board found a disciplinary violation as to two of the original seven alleged ethical violations and ordered a 60 day suspension of the practice of engineering.

[¶9] Berg filed an administrative appeal with the Burleigh County district court. Following briefing, the district court held a hearing on the administrative appeal on February 22, 2016. Approximately one year later, on February 6, 2017, the district court issued its Order reversing the finding of the Board in ¶5 of the Board's Berg Order by which the Board found Berg had violated N.D.A.C. § 28-03.1-01-12(6), and affirming the finding of the Board in ¶6 of the Board's Berg Order by which the Board found Berg had violated N.D.A,C. § 28-03.1-01-10, but remanding to the Board for a reconsideration of the discipline imposed with a specific direction that the Board reconsider if any discipline should be imposed.[3] (App. p. 400). Berg thereafter moved the district court for an award of attorney's fees pursuant to N.D.C.C. § 43-19.1-25, and the district court entered its Order awarding attorney's fees to Berg in the amount of $103,627.30.[4] (App. p. 473-484). A judgment was

[2] The hearing was a consolidated hearing held on all the charges of Ulteig filed against Apex and the five Apex engineers

[3] The district court issued one order covering all six administrative appeals involving Apex or Apex engineers.

[4] The district court, again, issued one order as to attorney fees for all six administrative appeals.

entered pursuant to these Orders of the district court on October 3, 2017 and this Appeal followed.

STATEMENT OF FACTS RELEVANT TO THE ISSUES

[¶10] The alleged Code of Ethics violations against Berg arose out of the formation and commencement of the business operations of Apex. Berg owns approximately fifteen percent of Apex (App. p. 286)[5]. Other owners included Welle, Miller, Olson, and Paustian. Olson, who had been terminated as an employee of Ulteig on September 29, 2009, thereafter contacted Welle about the possibility of forming a new engineering company that would compete with Ulteig (App. pp. 274-275). That new engineering firm ultimately became Apex. Welle was on the Board of Directors of Ulteig, ran the Water/Wastewater sector for Ulteig, and was also a Vice-President of Ulteig (App. pp 268-269). By no later than June 2010 Berg and Miller had been brought into the discussions (App. pp. 84). Miller was the Vice-President for transportation at Ulteig (App. p.330). Berg was a project manager on specified projects and reported to Welle (App. p. 286). Welle, Berg, and Miller continued working for Ulteig until November 2, 2010 (App. pp. 78-80).

[¶11] In a May 31, 2010 email from Olson to Welle and Berg, with a request that it be passed along to Miller, Olson reported on a meeting Olson had with two

[5] The official record of the oral testimony at the hearing was done by the use of an electronic recording devise pursuant to N.D.C.C. § 28-32-36. A disc of this recording has been filed with the district court and the Supreme Court. Subsequently, by stipulation, Apex had a written transcription of the electronic recording prepared, which had 5 volumes numbering 1329 pages, and this was also filed with the district court. References to the transcript are to this written transcription.

business advisers. The second sentence of the fourth bullet stated as follows: "I [Olson] told him [one of the advisors] that we need to take the key core groups [from Ulteig] so that there isn't the capability for Ulteig to continue in particular sectors." (App. p. 84).

[¶12] The May 31, 2010 email was followed by an email dated June 5, 2010 from Olson to Welle, Miller and Berg (App. pp.86-87). That email started out with the statement that Olson "wanted to give you a summary of the discussion that I had yesterday with my attorney regarding our plans." It further discussed why it was important for Olson, Welle, Berg, and Miller to take the key core groups from Ulteig so that there was not capability within Ulteig to continue in particular sectors. That email discussed a concept by which the new competing company would offer to complete ongoing projects for Ulteig as a sub-consultant. It discussed that this would require Ulteig to turn over information and work product, and then discussed what the new company would need to do if Ulteig refused stating:

> If Ulteig refuses to go along with an agreement to complete projects that are ongoing, we would then have to convince the clients to terminate Ulteig to allow us to complete the work.

(App. p. 87). The email went on to discuss how the engineers could, before resigning from Ulteig, get information and work product turned over to the client so the client would have it for the new company after Ulteig was terminated.

[¶13] On August 22, 2010 Olson sent another email to Welle, Miller and Berg that stated the subject was a business plan for a start-up business, with the proposed draft of the business plan attached (App. pp. 88-120).

[¶14] On September 3, 2010 Olson sent an email to Welle, Miller and Berg attaching a "Business Plan for a Startup Business 9-3-2010" (App. p. 121). This email noted that it included changes to the last draft of the business plan that needed to be reviewed by Welle, Miller and Berg. The email noted, in part, that certain financial data or other matters from Ulteig had been deleted because Berg was concerned with being sued by Ulteig if there was a continued use of marketing plans or data related back to Ulteig. The plan attached to the email included the following statement as part of the business plan.

> It is also our intention to offer to complete current contracts that Ulteig holds but will not be able to complete now that key individuals are no longer with the company.

(See last sentence of second paragraph at App. p. 173.) The business plan attached to the email also discussed that potential revenue for the new firm in the first year of operations included "[e]xisting projects under contract with core clients" with a statement that [m]uch of the potential revenue "depends on our client's wishes and their willingness to insist on keeping the existing work with the current project managers that will be leaving" (App. pp. 136-137).

[¶15] On October 8, 2010 Olson, Welle, Berg, and Miller hosted a meeting in Jamestown, North Dakota with additional Ulteig employees that they invited to become employees of Apex (App. pp. 181-184). Those employees included Paustian, who, along with seven other professionals, had been identified as potential hires from at least as early as August 22, 2010 (App. p. 89). In October, 2010 the Articles of Incorporation of Apex were filed with the North Dakota Secretary of State (App. pp. 232-233).

[¶16] Berg (along with Welle and Miller) continued to work for Ulteig without disclosing to Ulteig that they were developing plans for a competing company; had, or were intending to, solicit additional Ulteig engineers and staff to go to work for the new competing company; and expected to take work contracted to Ulteig (App. pp. 251-253). Part of Berg's duties at Ulteig was business development (App. p 294). The summary of Berg's time records from August, 2010 through November 2, 2010 shows 1 hour allocated to a business development meeting with the City of Mandan on September 13, 2010, and a 2 hour dinner with the City Engineer on September 20, 2013. It also shows 4 hours allocated to business development with the City of Jamestown on September 23, 2010; and 4 hours allocated to business development with the City of Dickinson on October 18, 2010 and October 19, 2010 (App. p. 185).

[¶17] On contracts for which Berg was the project superintendent, Berg was responsible for determining who would be assigned to perform the services on behalf of Ulteig, and tracking the resources on the project as the project was being done (App. p. 251).

[¶18] The final version of the Apex Business plan, submitted to Apex's bankers was significantly edited but included the statement that "[i]t is also our intention to offer to complete current contracts that Ulteig holds but will not be able to complete now that key individuals are no longer with the company" (App. p. 202, See last sentence of second paragraph).

[¶19] On November 2, 2010, twenty Ulteig employees resigned en masse at approximately 7:30 a.m., and began working for Apex (App. pp. 78-81 & 282). The

engineers who joined Apex immediately arranged meetings with Ulteig clients for whom those engineers worked while at Ulteig. An email dated October 30, 2010, entitled "Talking Points with Clients", with a document attached entitled Notes for Meetings with Clients was exchanged between Olson and Welle, copied to Berg and Miller (App. pp. 219-222) (the "Talking Points Memo"). Included is a section entitled "Discussion of Current or Pending Work" (i.e. work contracted to Ulteig). Paragraphs 1.a. and 1.b. of the Talking Points Memo stated as follows:

> Explain that we will be offering to work as a sub-contractor to Ulteig to complete pending projects. We will encourage the Client and Ulteig to meet and discuss options for projects that are under contract. Explain that we will gladly complete any project that is under contract, but that we will not try to influence the decision of whether we remain involved or not. If we are allowed to complete a project as a sub to Ulteig, we will assign the project manager and staff that were previously working on the project.

(App. p. 220).

[¶20] Notwithstanding the expectations of Apex, Ulteig was able to retain and complete the work on all projects without involving Apex, except for the Ulteig Water/Wastewater contract with the City of Jamestown, as to which Berg was the project manager. Following his Ulteig resignation, Berg on November 2, 2010 attempted to contact the Jamestown representative on the contract, Reid Schwarzkopf. Schwarzkopf did not take Berg's telephone call, and Berg left a phone message (App. p. 332). Before Schwarzkopf could talk to Berg, he was contacted by a Ulteig engineer, Steve Windish. Windish assured Schwarzkopf that the City of Jamestown's needs would be put first and Ulteig was going to proceed with whatever they needed to do to get the project finished; and Schwarzkopf accepted this statement as true (App. p. 332).

[¶21] Subsequent to Windish's call, Schwarzkopf returned Berg's call (App. p. 332). Schwarzkopf testified Berg did not make any adverse statements about Ulteig's ability to finish the work and Schwarzkopf did not feel coerced by Berg to hire Apex; however, Schwarzkopf was concerned that the work would not get done by Ulteig with Berg leaving Ulteig. This was not a concern expressed to Windish before Berg's call. (App. p. 332) After his call to Berg, Schwarzkopf requested a meeting between Ulteig, the City of Jamestown, and Apex (App. p. 334). Ulteig had determined that it did not want to use Apex as a sub-consultant on the Jamestown project. However, Schwarzkopf stated that Ulteig needed to hire Apex to finish the project (App. p. 255). The result was that Ulteig entered into a contract with Apex as a sub-consultant. (App. pp. 223-231).

ARGUMENT

A. Standard of Review

[¶22] This matter is an appeal pursuant to the Administrative Agencies Practice Act, N.D.C.C. Chapter 28-32; accordingly, the standard of review before the Supreme Court is the same standard of review applicable in district court under N.D.C.C. §§ 28-32-46 and 28-32-47 (See N.D.C.C. § 28-32-49). The Supreme Court looks to the record compiled before the administrative agency itself rather than to the findings of the district court. North Dakota Real Estate Commission v. Alan, 271 N.W.2d 593, 1978 N.D. Lexis 177 (N.D. 1978).

[¶23] The Court must affirm the order of the Board unless any of the following are present:

1. The order is not in accordance with the law.

2. The order is in violation of the constitutional rights of the appellant.

3. The provisions of N.D.C.C. Chapter 28-32 have not been complied with in the proceedings before the agency.

4. The rules or procedure of the agency have not afforded the appellant a fair hearing.

5. The findings of fact made by the agency are not supported by a preponderance of the evidence.

6. The conclusions of law and order of the agency are not supported by its findings of fact.

7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46.

[¶24] On appeal from an administrative agency decision a differential standard applies when reviewing an agency decision. WSI v. Auck, 2010 ND 126, 785 N.W.2d 186, ¶ 9. In reviewing an agency's factual findings, the Court does not make independent findings or substitute its judgment for the agency's judgment Montana-Dakota Utilities Co. v. Public Service Commission, 413 N.W.2d 308 (ND 1987). It is the province of the agency to resolve conflicts of evidence and weigh the credibility of witnesses. Landrum v. WSI, 2011 ND 108, ¶ 20, 798 N.W. 2d 669. The appellate court determines only "whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record". Id. As hereafter discussed,

applying this standard of review, the record in this case indicates that the Board's Berg Order should be affirmed in full.

B. Finding of Fact No. 5 of the Board's Berg Order, finding that Berg violated N.D.A.C. § 28-03.1-01-12(6), was supported by a preponderance of the evidence.

[¶25] N.D.A.C. § 28-03.1-01-12(6) provides as follows:

> 6. A registrant shall not knowingly seek or accept employment for professional services for an assignment for which another registrant is employed or contracted to perform. This prohibition shall not preclude a registrant from responding to a client-initiated or owner-initiated solicitation.

[¶26] Finding of Fact No. 5 of the Board's Berg Order found that Berg had knowingly participated in a plan to seek employment for Apex for assignments for which Ulteig had been contracted to perform in violation of N.D.A.C. § 28-03.1-01-12(6), and these contracts included a contract with the City of Jamestown as to which an Apex sub-contract was ultimately obtained (App. pp. 351-352).

[¶27] Berg (and others) denied the violation of this provision. But the evidence supporting the Board's findings and conclusions is found, not in this oral testimony, but in emails and documents. Olson has claimed his emails and business plans were simply his thoughts (App. p. 283); however, the emails and documents make it clear he was sending them to Welle, Berg, and Miller for review and comment, and that he received comments. Olson testified he does not recall any questions or objections to the proposed plan to convince clients to terminate Ulteig so Apex could complete the work (App. pp. 277); and that all four of them collectively expected to be in a position to complete ongoing projects. (App. p. 285).

[¶28] Berg claims to not remember whether he got the emails addressed to him, and claims he does not remember discussing any of them with anyone (App. pp. 287-288). Berg recalls reading at least one of the relevant business plans, but claims he cannot remember which one; and he does not remember commenting upon the plan (App. p. 291). Both Berg's and Olson's testimony, and lack of memory, has to be considered in light of Olson's September email in which Olson noted changes to the then version of the business plan due to comments and concerns of Berg; and in light of Olson's revisions to drafts of business plans after he had submitted them to Welle, Berg and Miller.

[¶29] In fact, the documentary evidence regarding a plan by Olson, Welle, Berg, and Miller to seek employment for Apex on all Ulteig contracts that had been assigned to engineers that left to go to Apex is clear. The plan was largely unsuccessful, and Apex was only able to accept employment on one such contract; but this does not change the fact that a preponderance of the evidence shows that Berg was seeking to obtain employment on all such contracts.

[¶30] Berg admitted at the hearing that this plan was a violation of the Code of Ethics, testifying as follows:

> Q. . . . [S]even lines down, there's a sentence that reads:
>
> > If Ulteig refuses to go along with an agreement to complete projects that are ongoing, we would then have to convince the clients to terminate Ulteig to allow us to complete the work.
>
> Do you see that sentence?

A. I do.

Q. Do you know today whether that would be a violation of the code of ethics?

A. Yeah, based on my understanding, it would be.

Q. Did you know on June 5, 2010, that that would be a violation of the code of ethics?

A. I can't say if I knew that summer of 2010 or not.

(App. p. 289, lines 2-17). Olson also admitted that this statement represents a violation of the Code of Ethics. (App. pp. 276-277, lines 19-24).

[¶31] Subsequent plans through the commencement of operations of Apex on November 2, 2010 document this plan continued to be the plan of Apex. Business plan drafts included a discussion that initial revenue estimates depended on clients, who were then Ulteig clients, being willing to insist on keeping the existing work with the current project managers that would be leaving to join Apex. Although Olson was asking for, and incorporating, comments and input to the business plans, there is no documentary evidence showing this business plan was ever abandoned or changed.

[¶32] Instead on November 2, 2010 the engineers who joined Apex immediately arranged meetings with Ulteig clients for whom those engineers worked while at Ulteig. The directions were to tell those clients that Apex would gladly complete contracts with Ulteig, if Ulteig would enter into a sub-contract with Apex; and Apex would assign the project manager and staff previously working on the project.

[¶33] If the intent of Berg, though Apex, was not to seek employment on these projects, the Apex engineers would have either not contacted the Ulteig clients at all, or they would have simply told the Ulteig clients that they were prohibited from seeking or accepting employment for work contracted to Ulteig. They would not have pointed out to the Ulteig clients that they would be offering to work on the pending projects, and that they would gladly complete any project with the same engineers and staff. They would not have "encouraged" the client to meet with Ulteig and discuss options for the project. The plan was for Apex employees to initiate the meetings as soon as they resigned from Ulteig, before Ulteig could even contact their own clients.

[¶34] It was the Board's province to assess the testimony of Olson, Berg, and other witnesses, in the face of documentary evidence. From the documentary evidence, the Board had ample factual basis to find that Berg, through Apex, was knowingly seeking employment for professional services for assignments for which Ulteig was contracted to perform.

[¶35] Finding 5 of the Board's Berg Order also includes a finding by the Board that Berg, through Apex, accepted employment on one such contract, to-wit, the Ulteig contract with the City of Jamestown. Berg disputes this Board finding, claiming that Apex's subcontract on the project was because Apex was responding to a client-initiated solicitation, which is an exception to the restrictions of N.D.A.C. § 28-03.1-01-12(6). Berg relies on Schwarzkopf's testimony that he was the one who wanted Berg and Apex to finish the work, and that he was not coerced by Berg.

[¶36] The Apex plan to knowingly seek Ulteig work did not include action to coerce a client to hire Apex. The statements in the emails, business plans, and Talking Points Memo make it clear that the approach was to get the client to insist on Apex being hired, because the client would feel it needed Apex to complete the work. This is exactly what occurred in Jamestown. The initial call from Berg to Schwarzkopf was part of the plan. While Schwarzkopf did not take this call, it was because of this call that Schwarzkopf made a subsequent call to Berg. Prior to returning Berg's call Schwarzkopf had accepted the assurance of Windish that Ulteig could complete the Jamestown contract. It was after Schwarzkopf returned Berg's call that Schwarzkopf requested a meeting with Ulteig and Apex, at which time he insisted Ulteig sub-contract with Apex. The Apex sub-contract on the Jamestown contract resulted from a contact initiated by Berg on behalf of Apex.

[¶37] The district court recognized that there was "evidence from the emails and business plan that Olson proposed a plan, which he shared with the other Apex principals including Berg, for obtaining business for Apex as a subcontractor on projects that Ulteig might not be able to complete without the engineers who resigned from Ulteig and went to work for Apex" (App. p. 385, ¶65). However, the district court reversed the Board's Berg Order because the district court held that "[t]here must be a 'seeking' or 'accepting' of employment in order for there to be a violation of N.D.Admin.C. § 28-03.1-01-12(6)" (App. p. 386, ¶66). The district court further held "there is no evidence of 'seeking' employment of specific projects under contract to Ulteig necessary to sustain a finding of a violation of N.D.Admin.C. § 28-03.1-01-12(6)" (App. p. 386, ¶66).

[¶38] The district court's interpretation of N.D.A.C. § 28-03.1-01-12(6) as requiring evidence of the seeking of employment on a specific project under contract, as opposed to seeking employment generally on all non-completed contracts on which Apex engineers had worked, adds a requirement that is not a part of N.D.A.C. § 28-03.1-01-12(6). It essentially would convert the word "or" between a prohibition of seeking or accepting employment on a project contracted to another engineer to an "and".

[¶39] "Seeking" means to try to get or achieve something. Berg, through Apex, were clearly trying to get, or achieve, employment for professional services contracted to Ulteig. The fact that Apex was largely unsuccessful does not change the fact that this is what they were seeking to do. Even if Apex had not gotten the work from the City of Jamestown, or even if the acceptance of the sub-contract with the City of Jamestown was because of a client-initiated contact, knowingly seeking the employment on this and other contracts through the business plan developed and implemented by Berg, through Apex, was a violation of N.D.A.C. § 28-03.1-01-12(6). The Jamestown Ulteig contract was one of many such contracts "targeted" by Berg and Apex.

[¶40] The district court's interpretation of the requirements of N.D.A.C. § 28-03.1-01-12(6) was not only contrary to the language of this section, it also gave no deference to the interpretation placed on this Code of Ethics provision by the Board, each of whom is also subject to this provision; and it ignored the fact that both Berg and Olson had admitted in their testimony that a plan that included, as part of the plan that "if Ulteig refuses to go along with an agreement to complete

projects that are ongoing, we would then have to convince the clients to terminate Ulteig to allow us to complete the work" was a violation of this Code of Ethics provision.

[¶41] The Board's Berg Order as to a violation of N.D.A.C. § 28-03.1-01-12(6) by Berg should be affirmed even if Apex had not also accepted a contract on the Jamestown. However, a preponderance of the evidence does also show that the acceptance of this sub-contract was a separate violation of N.D.A.C. § 28-03.1-01-12(6).

C. The district court erred, after it affirmed the Board's determination in the Board's Berg Order that Berg had violated N.D.A.C. § 28-03.1-01-10, in remanding the Board's Berg Order to the Board for reconsideration of the discipline imposed by the Board with a direction that the Board consider whether any discipline for the violation is appropriate.

[¶42] In Finding 6 of the Board's Berg Order, the Board found that Berg had violated N.D.A.C. § 28-03.1-01-10 which provides, in part, as follows:

> Registrants shall make full prior disclosure to their employers or clients of all known or potential conflicts of interest that could influence or appear to influence their judgment or the quality of their services.
>
> 1. If the employer or client objects to such an association or financial interest, the registrant shall either terminate the association or interest or offer to give up the employment.

[¶43] The Board found this "violation occurred by Berg failing to disclose his participation in the planning of the formation and the implementation of Apex, and by his failure to disclose after early October, 2010 that he had made a final decision to form Apex (with others) and join Apex as a competitor of Ulteig in November, 2010." The Board found "that during this time Berg's services to Ulteig included

meeting with actual or potential clients of Ulteig regarding existing or future potential water or wastewater projects, and participation in water/wastewater projects of Ulteig as to which the business plan of Apex was to complete the work contracted to Ulteig because Berg and others believed Ulteig would not be able to do so, including, without limitation being the project engineer of the Ulteig contract with the City of Jamestown". The Board found that "during this time Berg's judgment and services either were influenced, or could have been influenced, with regard to these matters." (App. pp. 352-353).

[¶44] Berg, as the project manager on the Jamestown contract, was responsible for determining who would be assigned to perform the services on behalf of Ulteig on this contract. His responsibilities included keeping track of the project schedule and project dates, and tracking the resources on the project as the project was being done. He was also responsible for determining how much of the Ulteig work in progress would be funneled to Jamestown, which would result in Ulteig no longer having control of it. He was doing this at the very time that Berg was a participant in a plan to get Apex hired as a subcontractor on this project (and others) to complete the project after Apex was formed because the client would be unable to complete the contract without the Apex engineers. Berg never disclosed this to Ulteig. This plan could have influenced Berg's decisions as to how he staffed this project while with Ulteig and/or how he sent work product to Jamestown. It also could have influenced his decision as to whether to include, as part of that staffing, an engineer who would not be offered a position at Apex, and who would therefore still be on the project.

[¶45] After, and while, he was planning to leave Ulteig, Berg's own time records document business development meetings with the cities of Mandan, Jamestown, and Dickinson on behalf of Ulteig. Berg planned to start a competing engineering firm, at which time he knew he would seek to obtain business for the competing firm from these same entities. It was certainly a reasonable conclusion that Berg's services for Ulteig, in these business development meetings, could have been influenced by his conflict of interest.

[¶46] Berg emphasized to the Board, and then to the district court, that there was no evidence his services were actually affected by his conflict of interest. The district court accepted that this was the case (App. p. 390, ¶74). Because the district court did so, it remanded this violation to the Board with a specific direction that the Board consider if any discipline is appropriate since the district court has not pointed to any evidence of actual effect (App. p. 390, ¶75). Having direct evidence that an engineer's judgment or services are affected by a conflict, if it was required, can be almost impossible, if the engineer denies it, because it requires proving the engineer's mental thought process with regard to discretionary decisions. Presumably that is a part of the reason there is no need to prove actual effect on the quality of services to prove a violation of N.D.A.C. § 28-03.1-01-10. Ultimately, the district court grudgingly acknowledged this to be the case (App. p. 390, ¶74).

[¶47] Unfortunately, the district court evidenced an obvious bias against allowing the Board to enforce this ethical provision. First, the district court cited to comments of a professional society of engineers (cited by Berg) as a basis for

saying the Board erred "as a matter of law" in its interpretation of N.D.A.C. § 28-03.1-01-10. (App. p. 389, ¶72). Statements of the National Society of Professional Engineers as to their position on what the law should be are not law in North Dakota. They have no relevance in interpreting N.D.A.C. § 28-03.1-01-10; and the district court's reliance upon them as support for a holding that the Board erred as a matter of law if it did not follow them is clear error.

[¶48] Then the district court repeatedly referred to Berg's violation of N.D.A.C. § 28-03.1-01-10 as a "technical violation" (App. p. 390, ¶¶74 & 75; App. p. 478, ¶¶14 & 15). It substituted its judgment for the Board's judgment, and directed the Board to consider no discipline for a violation. It then used this view as partial justification to award Berg over $100,000 in attorney fees.

[¶49] A violation of the code of ethics is a violation; the term "technical violation" is meaningless in the context of a code of ethics. Moreover, the district court's judgment that Berg's action does not merit any discipline strains logic. Berg wanted to take to Apex jobs on which he was a project superintendent because the client could not get the work done without Apex engineers; and he had been a part of formulating this plan for five months before he quit. To accept that his decision to not assign an engineer who Apex had not targeted as a potential hire was not affected by his desire to get the client to insist on hiring Apex is imperceptive. Berg met, as a representative of Ulteig, with three cities for the purpose developing business for Ulteig at a time he had decided to leave Ulteig without notice and then seek that same work for Apex. To accept that his efforts on behalf of Ulteig were not affected by his own interests is also imperceptive.

Notwithstanding the district court's direction, it can not be expected that the Board will find these "technical" matters for which no discipline should be imposed. After waiting two and half years for this matter to go through the administrative appeal process, the Board should not be under the cloud of another administrative appeal where the district court appears willing to substitute its judgment for the Board's judgment; particular when actual effect of the conflict of interest is not required.

[¶50] The requirement of disclosure if a conflict could influence an engineer's services is analogous to what is required of attorneys with regard to potential conflicts of interest as to clients (Rule 1.7 of the North Dakota Rules of Professional Conduct). If an attorney has a conflict that could appear to influence their judgment in representing a client, even if in the attorney's opinion it is not going to influence their judgment, the attorney must disclose that potential conflict to the potential clients, and they can only represent the client if the client consents after consultation. The only difference between this rule, and the engineers' code of ethics, is that the disclosure for engineers is required for clients and employers. If an attorney failed to disclose this conflict would it only be a "technical violation" for which no discipline should be imposed?

[¶51] The district court was in error in giving a direction to the Board to consider imposing no discipline after it affirmed the Board's finding. In doing so the district court went beyond the scope of review allowed by statute, and clearly was substituting its own judgment for that of the Board. The district court then compounded this error when it relied on its own opinions regarding the evidence in determining that Berg was the prevailing party.

D. The district court erred in its determination that Berg is a prevailing party under the 2003 version of N.D.C.C. § 43-19.1-25.

[¶52] Berg obtained a judgment against the Board in the amount of $103,627.30 for attorney's fees and costs as the prevailing party under the language of N.D.C.C. § 43-19.1-25 as it existed between August 1, 2003 and August 1, 2015. In particular, N.D.C.C. § 43-19.1-25 was amended in 2003 to add two sentences dealing with attorney's fees and costs (App. p. 401). The first sentence stated as follows:

> In an order or decision issued by the board in resolution of a disciplinary proceeding in which disciplinary action is imposed against a registrant, the board may direct a registrant to pay the board a sum not to exceed the reasonable and actual costs, including reasonable attorney's fees, incurred by the board and its investigative panels in the investigation and prosecution of the case.

The second sentence stated as follows:

> Notwithstanding section 28-32-50, if a registrant is the prevailing party in an administrative appeal of a disciplinary action taken by the board under this section, the board shall pay the registrant's reasonable and actual costs including reasonable attorney's fees.

[¶53] Berg is not a prevailing party under of N.D.C.C. § 43-19.1-25 (2003 version). Berg argued that he is the prevailing party under decisions of the North Dakota Supreme Court interpreting N.D.C.C. § 28-26-06 (dealing with the award of costs to the prevailing party); and this was the statute relied upon by the district court. But that statute, and those decisions, are not relevant in determining the prevailing party under N.D.C.C. § 43-19.1-25 (2003 version).

[¶54] The sentence relied upon by Berg that allows a prevailing party in an administrative appeal of a disciplinary action taken by the Board to recover

reasonable attorney's fees was adopted by the legislature at the same time that the legislature added the sentence allowing the Board to direct a registrant to pay a sum not to exceed reasonable and actual costs including attorney's fees in the investigation and prosecution of the case in any "disciplinary proceeding in which disciplinary action is imposed against a registrant". Statutes are construed as a whole, and are harmonized to give meaning to each provision. N.D.C.C. § 1-02-09.1. The language of a statute must be interpreted in context and according to the rules of grammar, giving meaning and effect to every word, phrase, and sentence. N.D.C.C. §§ 1-02-03; N.D.C.C. § 1-02-38(2). The only way to harmonize these two sentences which are both part of N.D.C.C. § 43-19.1-25 (2003 version), adopted at the same time, is to read the definition of a prevailing party under this statute to be a party as to whom no disciplinary action is imposed.

[¶55] Statutes are further construed to avoid absurd or illogical results. F/S Manufacturing v. Lensmoe, 2011 ND 113, ¶ 5, 798 N.W.2d 853. If disciplinary action is imposed against Berg by the Board, the Board is entitled to recover from Berg its reasonable and actual costs. If Berg's attorney's fees and costs under N.D.C.C. § 43-19.1-25 (2003 version) are assessed against the Board, they would be an actual cost of the Board. Therefore, the Board, in turn, could assess the amount it paid back against Berg as one of the actual costs of the Board. This is a circular situation which is completely illogical.

If the language of a statute is clear and unambiguous, the letter of the statute is not to be disregarded under the pretext of pursuing its spirit. N.D.C.C. § 1-02-05. However, if the legislative history of N.D.C.C. § 43-19.1-25 (2003

version) is reviewed, it shows that a registrant is only a prevailing party if there is no discipline (App. pp. 403-472). The language adding the right to recover by a registrant in an administrative appeal if they were the prevailing party came out of discussions by a conference committee that occurred on April 9, 2003 (App. pp. 426-427). The conference committee discussion resulted in a motion by Senator Forseth moving to amend the bill stating, "let's have Legislative Council put in something to the effect 'unless disciplinary action is found unproven, the board will assume legal costs, i.e. loser pay.'" (App. p 428) This discussion clearly shows that the term prevailing party was not to apply unless the entire disciplinary action was found in the administrative appeal to be unproven.

[¶56] The district court affirmed the Board's determination that Berg violated N.D.A.C. § 28-03.1-01-10. Therefore, even at the district court level, Berg is not a prevailing party under N.D.C.C. § 43-19.1-25 (2003 version).

[¶57] Moreover, Berg cannot be considered to be the "prevailing party" even under decisions dealing with the definition of the prevailing party under N.D.C.C. § 28-26-06. In a disciplinary action the main issue is whether there was a violation of the code of ethics. A registrant who is found to have violated the code of ethics cannot be considered as having prevailed on the "merits of the main issue" just because the Court found the registrant violated the code of ethics less times than the Board found. A professional is only a prevailing party in a disciplinary proceeding if there is no violation of the Code of Ethics.

[¶58] The fact that a registrant or licensee can only be a prevailing party in a disciplinary action if they are not disciplined is demonstrated by the ability of other

boards to assess attorney fees against a registrant or licensee with the respective board if a disciplinary violation is found. If those boards were no longer considered to be prevailing parties in an administrative appeal because part of their original order was reversed, and part affirmed, they would lose the ability to assess attorney fees in those situations.

E. The district court erred in determining that the 2003 version of N.D.C.C. §43-19.1-25 applied to Berg's claim for attorney's fees, as opposed to the 2015 version of N.D.C.C. § 43-19.1-25.

[¶59] The same above referenced two sentences were removed from the statute in 2015. N.D.C.C. § 43-19.1-25 (2003 version) was the effective statute in December, 2014 when the hearing occurred on the disciplinary complaints in this matter; however, by the time any of the parties submitted briefs or had oral argument with the district court, the applicable statute was N.D.C.C. § 43-19.1-25 (2015 version).

[¶60] Statutes are not generally applied retroactively unless there is an expressed declaration that they be applied retroactively. The effect of this rule is that statutes are applied to causes of action that arise after the effective date of the statute, Anderson v. North Dakota Worker's Compensation Bureau, 553 N.W.2d 496, 498 (N.D., 1996). The question, then, is whether the claims for attorney's fees of Berg arose before the effective date of N.D.C.C. § 43-19.1-25 (2015 version). If the "cause of action" for the recovery of attorney's fees by Berg, to the extent it exists, arose after the effective date of N.D.C.C. § 43-19.1-25 (2015 version) Berg has no right to the recovery of attorney's fees even if he were to be the prevailing party.

F. If Berg was a prevailing party under the 2003 version of N.D.C.C. § 43-19.1-25, the district court erred in awarding any attorney's fees incurred by Berg prior to the date of the issuance of the Board's Berg Order.

[¶61] If he were the prevailing party, the attorney's fees and costs recoverable by Berg under N.D.C.C. § 43-19.1-25 (2003 version) did not include attorney's fees and costs incurred in the underlying disciplinary investigation and hearing when the Board was not the charging party;

[¶62] Ulteig, not the Board, initiated the charges against Berg. Of the seven charges made against Berg, the Board only found a disciplinary violation as to two charges. The judgment Berg obtained would require the Board to reimburse Berg for his costs and attorney's fees incurred during the entire process, even though the Board dismissed, or did not pursue, five of seven charges, was affirmed as to one of its findings, and was fulfilling the duties imposed upon it by N.D.C.C. § 43-19.1-26.

[¶63] The Board was not a "party" to the administrative hearing; and the sentence of N.D.C.C. § 43-19.1-25 (2003 version) upon which Berg relies provides that the registrant must be the "prevailing party." In an administrative appeal, the Board is a party; but at the administrative hearing the Board was not a party, so it could not be a "losing party." The charging party was Ulteig.

[¶64] The rules of interpretation of North Dakota statutes lead to the same conclusion. Statutes are construed as a whole and are harmonized to give meaning to each provision. N.D.C.C. § 1-02-09.1. Statutes are interpreted to give meaning and effect to every word, phrase, and sentence, and a court does not

adopt a construction that would render part of the statute mere surplusage. Bruns v. North Dakota Worker's Comp. Bureau, 1999 N.D. 116, ¶ 16, 595 N.W.2d 298.

[¶65] The first sentence of the two sentences added by N.D.C.C. § 43-19.1-25 (2003 version) spells out that, if disciplinary action is imposed, the Board can recover its reasonable and actual costs "incurred by the board and its investigative panels in the investigation and prosecution of the case" (emphasis added). The second sentence, dealing with the registrant's rights if the registrant is the prevailing party in an administrative appeal, makes no reference to costs incurred in connection with the investigation and prosecution of the administrative case. If the legislature intended to give the registrant a right to recover these amounts it would have included the same language in the second sentence. To hold otherwise would assume the language included in the first added sentence, but not included in the second added sentence, was mere surplusage.

G. If Berg is found to be a prevailing party under the 2003 version of N.D.C.C. § 43-19.1-25, the district court erred in determining that the amount of $103,627.30 for his attorney's fees were reasonable.

[¶66] The factors considered when allowing attorney fees were first discussed by the Supreme Court in the case of Hughes v. North Dakota Crime Victim's Reparation Board, 246 N.W.2d 774, 777 (N.D. 1976). One of the factors is "the time and labor required on legal work …." (emphasis added).

[¶67] The Ulteig charges arose out of litigation between Ulteig and Berg, the other four Apex engineers against whom Ulteig filed ethical charges, and an additional approximate 15 to 20 other Apex employees. Berg's attorney, Robert Hoy, along with three other attorneys from two other law firms were all involved in this litigation.

[¶68] When Ulteig filed its charges all the same lawyers and firms were used in the disciplinary proceeding. This was not necessary or required as all the Apex engineers took the same positions in the disciplinary proceedings. It resulted in there being four separate lawyers, in three separate firms, plus support staff, involved in the disciplinary matter. This resulted in a very significant duplication of work. It resulted in the total amount of attorney's fees and costs requested by Apex engineers for an administrative proceeding being a total of $410,534.22. This is a cumulative unreasonable amount for handling one administrative hearing.

RELIEF SOUGHT

[¶69] For the reasons set out above the Board seeks an affirmation of the Board's Berg Order (App. pp. 349-356), with an affirmation that Findings of Fact Nos. 5 and 6 (App. pp. 351-353) of the Board's Berg Order that Berg violated N.D.A.C. § 28-03.1-01-12(6), and N.D.A.C. § 28-03.1-01-10 were supported by a preponderance of the evidence. The Board further seeks the vacation of the judgment dated October 3, 2017 in favor of Berg.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

[70] This Brief contains 7926 words, excluding the part of the brief exempted by N.D.R.App.P. 32(a)(8)(A). I certify that this Brief complies with N.D.R.App.P. 29(d) and the typeface requirements of N.D.R.App.P. 32 and the type style requirements of the rule, because it has been prepared in a proportionally-spaced typeface using a Microsoft Word, Arial, 12 point font.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Michael Berg, Appellee, v. North Dakota State Board of Registration for Professional Engineers and Land Surveyors, Appellant.	Supreme Court No.20170413 Civil No. 08-2015-CV-00200

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

The undersigned, being duly sworn and of legal age, deposes and says that she is of legal age and not a party to the above-entitled matter. On March 12, 2018, I filed with the North Dakota Supreme Court the following documents:

1. **Brief of Appellant**
2. **Appendix of Appellant**

and served a copy of the attached Brief of Appellant by electronic mail upon the person at the below e-mail addresses:

Robert G. Hoy
rhoy@ohnstadlaw.com

I further served a copy of the Appendix of Appellant by placing a true copy in a postage paid envelope or envelopes addressed to each person named below, at

the address stated below, which is the last known address of the addressee, and by depositing said envelope in the United States mail at Bismarck, North Dakota.

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Ellen Loraas

Subscribed and sworn to before me, today, March 12, 2018.

NOTARY PUBLIC
Burleigh County, North Dakota

BETTY H. MERTZ
Notary Public
State of North Dakota
My Commission Expires November 7, 2020

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