



# Oregon

**State Board of Examiners for  
Engineering & Land Surveying**

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**LAW ENFORCEMENT COMMITTEE**

**Meeting Summary**

**April 9, 2009**

Members Present:

Dan Linscheid, Chair

Ed Butts (excused 1:15 p.m.)

Grant Davis

Ken Hoffine

Staff Present:

Mari Lopez

James R. (JR) Wilkinson

Allen McCartt

Others Present:

Katharine Lozano, AAG

The meeting was called to order at 1:00 p.m. in the conference room of the Oregon State Board of Examiners for Engineering and Land Surveying (OSBEELS) office at 670 Hawthorne Ave. SE, Suite 220, Salem, OR 97301. However, Chair Linscheid observed that no public members were in attendance and, therefore, recessed proceedings in order to complete negotiations on a settlement agreement.

Chair Linscheid reconvened the meeting at 1:35 p.m. and announced that three informal conferences were scheduled prior to the meeting of the Law Enforcement Committee (LEC).

**Informal Conferences**

2479

The LEC met in an informal conference with the respondent and his attorney to discuss a Notice of Intent (NOI) to Assess a Civil Penalty of \$1,000 for violating Oregon Revised Statute (ORS) 672.007(1)(a),(c) and ORS 672.045(2). The OSBEELS received an anonymous complaint alleging that the respondent engaged in the unlicensed practice of engineering when he signed a report as "Supervising Engineer" to the Oregon Department of Environmental Quality (DEQ). His employer's Web site also identified him as a Supervising Engineer. The respondent is not a registrant.

The respondent's attorney began by noting that he provided the LEC a DEQ email to evidence that the report that the respondent signed did not require an engineer, but required a registered geologist (RG). The report was dual signed by the respondent and a RG. He continued that in this situation the respondent as a "supervising engineer" meant he would supervise a professional

engineer if one was needed. When engineering services are needed, they contract with a PE. However, an engineer was not required for this report. Furthermore, the respondent and his employer at the time stopped using supervising engineer immediately upon receiving notification from the Board. He is now project manager. Lastly, the allegations surfaced at a time when the respondent's employer was concluding eight months of negotiations to close its sale to a Utah-based company.

In response, a LEC member observed that because a PE is not required to prepare a report does not excuse the fact that the respondent used the title of engineer without registration. Whether or not the report required a PE is not germane to the issue regarding the use of the title. The respondent's attorney replied that ORS 672.045(2) requires a representation that a person is authorized to practice engineering. He persisted that the respondent "supervised engineers" when it was required. Another LEC member stated the title "Supervising Engineer" gave him the impression that the respondent was an engineer. The respondent spoke that it was not his intent to represent himself as an engineer. He was given the title by previous California employers where it was appropriate to use supervising engineer without registration since he did not use the terms "civil," "mechanical," or "chemical" along with engineer. When he started with the Oregon firm, they continued to use Supervising Engineer.

The respondent's attorney described the importance of the context of the DEQ communication. Within this context, it was understood by everyone involved that the respondent was not purporting himself as a PE. The LEC observed this was not true since the Board received an anonymous allegation of unlicensed practice. The respondent's attorney replied that without knowing who the complaint came from, or any context of the complaint, it was not evidence to contravene the otherwise undisputed fact that the DEQ to whom the respondent addressed the report absolutely understood there's nothing to suggest in the context of actual communications that he was holding himself out as a PE. He pointed to the DEQ email as evidence that they understood the respondent was not a PE. A LEC member remarked that DEQ wrote they did not require a PE to prepare the report. He could not reach the context understanding the respondent's attorney was inferring. In reply, the respondent's attorney voiced that his understanding of the Committee's interpretation of these rules was obviously in error because he thought the LEC view was consistent with his own in that a communication needs to be interpreted within the context of the person making the communication and the person receiving the communication. After further discussion regarding context, the LEC received the DEQ email, but dismissed its importance given that the respondent also used the title of Supervising Engineer on the company's Web site.

Upon conferring, the LEC offered to reduce the civil penalty to \$500 because of the respondent's mitigation efforts to comply. The respondent's attorney replied that the respondent was concerned about his professional standing with a record of a violation because he wanted to sit for the exam. The respondent then described his immediate corrective actions and his regrets about the violations. The LEC recessed and returned with a counter offer. As long as the respondent admitted using the title of Supervising Engineer, the LEC will accept a settlement agreement without civil penalty. The LEC also agreed to include settlement language stating the use of the title was unintentional. However, the LEC remained concerned that the respondent's employer was offering engineering services at Oregon offices without registrants in charge

violating Oregon Administrative Rule (OAR) 820-010-0720. A separate law enforcement case #2555 was opened against the company. **The LEC recommended that the Board approve the settlement agreement.**

2472

The LEC met in an informal conference with respondent, a PE, and his attorney to discuss a Notice of Intent to Revoke Registration and Assess a \$7,000 Civil Penalty for negligence or incompetence in the practice of engineering violating ORS 672.020(2), ORS 672.200(2),(4), OAR 820-010-0622, OAR 820-020-0015(2), and OAR 820-020-0025(1). On October 19, 2005, the respondent sealed and signed a certificate of completion for the Curry County Building Department stating he had observed construction of a retaining wall and it was constructed as per design. He recommended approval. The wall failed in December 2005 causing property damage. The respondent wrote a subsequent letter to the owner/contractor stating the wall had not been built to his design.

The respondent's attorney began by stating the letter the respondent sent to the County was a problem. The respondent designed the wall, which was all he was hired to provide. To respond to County and owner/contractor requests, the respondent went to the site to observe wall construction. At the time, only one lift of the stepped wall design was complete and it was being constructed according to plans, so the respondent prepared the County letter. The respondent's attorney continued that the respondent documented on the plans that an engineer was to observe construction – the respondent assumed it would be done by another engineer since he was hired only to provide the wall design. The respondent's attorney concluded that as part of a civil case they had an engineer review the wall design and that engineer determined the wall would not have failed except for the improper backfill material and drain sizes in a flooding event. He asserted the wall would have withstood the flooding if it had been constructed to specifications.

A LEC member stated the Board's duty is to safeguard life, health, and property. The respondent failed his professional duty by writing the initial letter. The respondent replied that his stepped-wall design was totally free-draining using a rocky backfill with fabric. He expressed surprise that it failed until he discovered that debris and silty sand was used as backfill material without capturing the off-slope water. Furthermore, the contractor built a vertical wall that failed global stability because the backfill became saturated. The respondent then described his efforts to remedy the matter by meeting with a geotechnical engineering firm to arrange for core drilling. A slip plane was found at the site. He observed reconstruction and the geotechnical firm signed off on the project.

The respondent also described his experience doing civil engineering work for the Forest Service (FS) for 20 years and for the Bureau of Land Management (BLM) for 15 years. He worked in design, supervision, and contract administration. A LEC member added that it is common for a FS or BLM design engineer to not be the construction or project engineer.

The LEC next discussed five standard drawings that the respondent sealed for the permit application to Curry County. The designs were done by Retaining Wall Systems (RWS) of Minnetonka, MN, and it appeared the designs were not prepared under his supervision and control. He responded that the City required him to stamp all documents he was submitting.

RWS issued ten standard design sheets and he examined each one. As a result, he became familiar with their proprietary details, design manual, and software. He spoke to the company about several issues including the variations in connection strengths. Of the ten standard design sheets he examined, he only stamped five sheets because he accepted responsibility for those designs. The LEC accepted that the respondent properly examined, sealed, and signed those five standard sheets. The LEC determined to remove these specific allegations from the Notice of Intent.

Upon conferring, the LEC stressed the seriousness of the case. The LEC offered a 180-day suspension effective June 1, 2009, through November 28, 2009, and a \$2,000 civil penalty. The civil penalty was reduced because of the five drawings. The LEC acknowledged that the respondent can continue engineering work as long as it is done under the supervision of another engineer. He also can continue professional land surveying. Before the settlement can be approved, however, the respondent will need to submit by May 12, 2009, a list of his current engineering projects and identify the engineer who will take responsible charge of those projects during the suspension period. The LEC accepted a request by the respondent to make four payments towards the civil penalty. **The LEC recommended that the Board approve the settlement agreement.**

#### 2443

The LEC met in an informal conference with the respondent, a PE, to discuss a Notice of Intent to Revoke Registration for negligence or incompetence in the practice of engineering violating ORS 672.200(2),(4), OAR 820-020-0015(2), and OAR 820-020-0020(2). The respondent sealed and signed sets of plans and calculations for a winery, but plans reviewers discovered design problems. The client hired another engineer to complete the project. The designs were reviewed by LEC member Grant Davis, SE, and he identified five deficiencies to support the NOI.

The respondent began by reading his letter of March 16, 2009, which was his response to the NOI. He addressed each specific issue, but had difficulty understanding the overall problem. He discussed calculations that were dated July 15, 2005, and done in response to the issues raised by the last plans reviewer. However, the calculations were not analyzed as part of the complaint packet because the respondent had not submitted the stamped drawings and calculations for review or submitted them before being removed from the project.

To initiate a dialogue about the issues raised in the NOI, Davis presented the respondent the plans he sealed for permit review. Davis noted that there were three separate reviews. The responses he provided the reviewers did not address the identified technical issues. Rather, it appeared the respondent did not understand what the reviewers were looking for because of a potential lack of code knowledge and/or engineering skills. Davis noted the NOI allegations were not based on plans reviewers' issues with code compliance, but on Davis' engineering concerns that may affect life, health, and property. While the respondent readily accepted responsibility for the plans and calculations, Davis reminded him that when sealed he is ensuring the plans are buildable and safe.

The first issue Davis discussed was about the storage load in a mechanical room. On some plan sheets it was identified as a storage room while on other sheets and plans it was a mechanical

room. The structural loads are different for these two room uses. His calculations and drawings were not clear.

The second issue was more serious and it involved the design of main floor glu-lam beams. In the basement there are two columns, but there are several short walls and columns at the first floor that supported the roof away from the column locations below. The respondent's calculations showed no concentrated roof loads on the first floor beams. In fact, the original calculations used a uniform load from the floor only and the shear was at the maximum. This was not proper. Davis reminded the respondent that his seal certified the building was safe for construction and use.

The third issue Davis emphasized was the respondent designed a roof that called for three diaphragms in a step pattern. The in-plane loads and reactions were not addressed in either the calculations or the drawings. The respondent stated that the interior walls at the step would transfer the shears at the step. Davis questioned whether the shear walls the respondent designed as double-sided gypsum could handle the shear or the overturning. Davis noted the discontinuous diaphragms the respondent had designed and the lack of showing a concentrated load applied to tall walls. The discussion ended on the lack of details the respondent provided regarding the walls and the type of nailing and hold downs.

The fourth issue arose regarding the 16-foot high basement retaining wall. There was some confusion about whether this was the north or south wall due to a 180 degree shift in the plans from the site plans to the building plans. Davis stated that the design of the wall was the concern, not whether it was north or south. Davis asked whether this wall was a cantilever wall or a top supported wall. There appeared to be confusion about the type of wall the respondent used to support the earth. The respondent replied that the design went through three configurations while he attempted to appease the client. The client wanted earth up against the full height of the wall. The respondent stated the plans in question were done about the time he was relieved as project engineer. Davis remarked that for a wall to work as a pure cantilever wall, the shear and overturning need to be reacted at the footing, but he didn't see the calculations. Further, there would need to be movement at the top of the wall. This assumption was not justified in his calculations.

Davis noted that his last concern was the wall was not properly detailed. Davis expressed concern about rebar tearing out of footings because the respondent had a simple hook in the rebar that goes into the top of the footing. The respondent acknowledged that the design might be in error, but replied that the rebar goes into the middle of the footing. The respondent believed he had addressed the issue, but the plans appear to have not changed. Davis also indicated that the footing did not appear to be properly designed for the base wall moment.

Upon conferring, the LEC recognized that the respondent had prepared revised calculations to address the concerns raised by the last plan review. However, the revised calculations were not reviewed as part of the investigation. The LEC determined to postpone deliberation to allow the respondent the opportunity to submit revised calculations and a detailed response to the NOI by April 30, 2009. The LEC will meet with the respondent in an informal conference at its meeting in June.

## Cases Reviewed

### 2476

The LEC recommended on March 10, 2009, that the Board issue the respondent, a PE and PLS, a letter of concern regarding his failure to maintain right of entry documentation. However, the Board rejected the recommendation because the respondent did not cooperate with investigators when he was asked to provide the evidence during the investigation. The LEC reevaluated the case and took notice of the lack of communication. At the beginning of the investigation, Board investigators wrote the respondent to request that he submit any documents relevant to explaining his position. The email was not received into evidence. Furthermore, the respondent made note of the email in an interview to a Board investigator on July 22, 2008, but he failed to submit a copy when requested. The LEC determined to issue the respondent a Notice of Intent to Assess a \$1,000 Civil Penalty for failing to cooperate with the Board violating OAR 820-020-0015(8).

### 2480

The complainant claimed that the respondent, a PLS, was incompetent in his means for determining a common property boundary. The respondent was hired by an adjoining neighbor of the complainant to perform a corner search to verify if the fence the complainant was reconstructing was in the correct location. The respondent conducted the survey and set a stake to mark the approximate location of the northeast property line because the front corner monument was no longer recoverable. In a report to his client, the respondent recommended a high precision survey prior to any investment that would require an exact property corner location. The respondent informed his client that the stake set at the approximate northeast lot corner is likely within +/- 0.5 feet of where a high precision survey would determine the true corner to fall.

After a lengthy discussion regarding whether wooden stakes used as monuments are permanent and durable, the LEC focused on whether the respondent met his professional duties as a professional land surveyor when he conducted a “low precision survey.” The LEC noted that the respondent placed a margin of error on a survey point to authoritatively define that point as near the property corner. The respondent appeared to have used proper surveying techniques to set the point, but ultimately failed to monument the intersection of two property lines, which defines a property corner. In this case, the respondent set an approximate property line between two neighbors in conflict. The complainant reconstructed the fence at the approximate location the respondent indicated with the stake. However, “low precision surveys” are improper since the standard of practice is to monument property corners. The LEC determined to issue the respondent a Notice of Intent to Assess a \$1,000 civil penalty for incompetence or negligence in the practice of surveying violating ORS 209.250(1), ORS 672.200(2), and OAR 820-020-0015(1),(2).

### 2546

The complainant, a PLS and former County Surveyor alleged that the respondent, another PLS, completed nine surveys and set property monuments, but failed to file maps of survey. The respondent responded to a Board inquiry that the discovered and unrecorded monuments were set prior to March 9, 2004, which was when the respondent and the Board signed a settlement agreement for a past law enforcement case. The respondent asserted that if the Board notified

him that surveys or maps needed to be completed, the Board would allow him 45 days to complete or file maps of survey. The respondent submitted subsequent documentation showing that he either filed maps of survey or recorded affidavits of correction within 45 days. By completing documentation on the discovered and unrecorded monuments, the respondent contended he had complied with statute and rule by meeting the past settlement agreement.

The LEC discussed the past settlement agreement and the interpretation the respondent offered. In review, the past settlement agreement included a \$43,000 civil penalty. Of that amount, \$21,500 would be abated if the respondent complied with the terms of the settlement agreement. The LEC determined that the respondent complied with the past settlement agreement by filing the required documents and that the abated amount would not come due. However, the violations occurred and the LEC determined to issue the respondent a Notice of Intent to Assess a Civil Penalty of \$9,000 for violating ORS 209.250(1).

### **New Business**

#### *Investigator memorandum regarding CWRE activities:*

The Board received a communication from the Oregon Water Resources Department (WRD) regarding an individual who holds a PLS, PE, and CWRE. Upon application to OSBEELS, a PE, PLS, or registered geologist will be examined and a certificate issued to be qualified as a Certified Water Right Examiner (CWRE). A CWRE is authorized to prepare and submit documents to the WRD. The WRD manages all waters of the State of Oregon through a permit process that includes the following general steps. An application to use water is submitted to the WRD. The application is reviewed and, if accepted, a final order and permit is issued to allow development of the water based on time limits and conditions of use (e.g., install water meters, fish screens, etc.). After a water system is complete, a CWRE is hired to prepare a Claim of Beneficial Use (COBU). The COBU includes a map and a report detailing how and where water is being applied. If water has been used according to the provisions of the permit, a water right certificate is issued based upon the report findings. The respondent prepared a COBU for a client and submitted it to the WRD. However, he used the incorrect form. The WRD returned the COBU to the respondent for correction, but it was not resubmitted and his client communicated with WRD about its fate.

Board Investigator Wilkinson informed the LEC that the respondent contacted him just days before the LEC. The respondent claimed he revised the COBU using the corrected form and gave it to his clients to sign and submit. However, Wilkinson noted the history of communications between the respondent's client and WRD regarding the status of the application. If the client had received the revised paperwork and it had not been forgotten, it would not make sense that they repeatedly contacted the WRD. Compounding the problem, the respondent appeared to not respond to WRD inquiries. The LEC would need to provide guidance on whether or not to open a law enforcement investigation against the respondent because he failed his professional duty as a registrant.

Setting aside what action the respondent did not take in response to WRD inquiries, the LEC next was informed of the statutes and rules that govern the application, examination, investigation, and sanctioning of a CWRE. The WRD alleged the respondent used an incorrect form in violation of OAR 690-014-0100(1), Minimum Requirements for Claims of Beneficial

Use for Permits and Transfer Final Orders. The WRD also alleged the respondent failed to resubmit the correct COBU within the designated time in violation of OAR 690-014-0220, Time Limit to Cure Defects in a Claim of Beneficial Use. The WRD empowered OSBEELS with CWRE certification by OAR 690-014-0050, which also states “OSBEELS rules found in OAR chapter 820 apply.” Lastly, OAR 690-014-0080 allows OSBEELS to decertify a CWRE certificate “for violation of OAR chapter 690, division 14 rules or violation of OAR chapter 820 rules.”

After reviewing statutes and rules regulating CWREs, the LEC observed that some adjustments may be necessary to statutes and rules to clarify agency roles and responsibilities. However, those clarifications should not forego an investigation and sanction if violations are found regarding enforcement of OSBEELS and WRD rules. The LEC has a responsibility to take action if violations occurred. The LEC declared that registrants must fulfill their professional code of conduct under OAR 820, Division 20 to work closely with the OSBEELS and the WRD to complete the process. It appeared that the respondent failed his registrations’ standard of care duty as a CWRE. The LEC determined to open a law enforcement case against the respondent.

*Investigator memorandum regarding disciplinary action:*

An Oregon registrant from Eau Claire, WI, notified the Board that the West Virginia Board of Registration for Professional Engineers investigated the adequacy of a roofing system and contacted him regarding his design calculations. While he was able to demonstrate a safe design, the WV Board found that the registrant “took longer than they expected” to compile and submit his records and he was issued a disciplinary fine. The boards of Wisconsin, Oklahoma, and Ohio took action against him for failing to notify them of the WV action. The LEC found that the registrant notified the Board as required. In addition, OAR 820-020-0015(6) requires the revocation or suspension of the license of a registrant in another jurisdiction. In this case, the registrant paid a fine to WV, which does not rise to a level required by OAR 820-020-0015(6). The LEC determined not to open a law enforcement case.

*Linscheid email March 26, 2009:*

The LEC briefly reviewed an email regarding a firm that was advertising surveying services on the Web. After a preliminary investigation, it was revealed that the firm limited their services to within the State of Colorado. The LEC determined there were no violations.

*Linscheid email March 27, 2009: Right of Entry and Romey Ware article*

Douglas County Surveyor Romey Ware wrote an article entitled “Right of Entry, Or Not?” for *The Oregon Surveyor* published by the Professional Land Surveyors of Oregon (PLSO). Ware noted in the article that the LEC has issued civil penalties against land surveyors for violating right of entry ORS 672.047. He continued that professional engineers, photogrammetrists, and geologists are not subjected to ORS 672.047. Ware asserted “it would be preferable that OSBEELS not get involved in right of entry issues with land surveyors, so why do they?” He argued that right of entry is misdemeanor trespass and within the jurisdiction of the courts. Once a court determined trespass occurred, Ware reasoned, the Board could then take action for an ORS 672.047 violation and issue the violator a suspension, revocation, or reprimand and penalty under ORS 672.200. Ware did not contend that ORS 672.047 should be eliminated, changed, or

altered. However, he believed OSBEELS should “stop making strict interpretation of statute” regarding right of entry.

The LEC discussed a response submitted to PLSO by Linscheid. The response was not reviewed by OSBEELS, but was prepared based on his LEC experiences. Linscheid began by noting that ORS 672.047 provides a land surveyor lawful right of entry to conduct surveying activities. He observed that the Legislature mandated by statute that notice is given prior to entry and that if not done correctly then a violation of ORS 672.047 occurred, not trespass. Furthermore, right of entry was legislated under ORS 672 and thus placed within the purview of OSBEELS and not the courts. Linscheid commented that to limit sanctions to ORS 672.200 would result in the Board being powerless over unlicensed professional practices since ORS 672.200 only addresses registrants. After reviewing the article, the LEC acknowledged the difficulty individuals may have in understanding how the LEC interprets and applies statutes and rules to any particular case including right of entry. The LEC determined to invite Ware to the next LEC meeting.

### 2513

The LEC met by teleconference on April 23, 2009, to discuss a proposed Notice of Intent to Refuse Restoration of Registration (NOI). The LEC observed that the respondent volunteered that he had been practicing engineering and making offers to practice engineering while in retirement status. The LEC also noted that the respondent has not sealed and signed documents based on advice given by his insurance broker. The Board issued a Final Order by Default against the respondent because he agreed to the violations, paid a \$1,000 civil penalty, and waived his right to a hearing. With the law enforcement violations settled, the LEC discussed whether or not to restore his professional engineer registration. The LEC discussed the uniqueness of the situation since the respondent did not request an informal conference where questions could have been resolved. Regardless, the members inquired of the Continuing Professional Development hours (CPD) the respondent submitted, which lacked proper documentation. After further review of options, the LEC determined to not issue the NOI and would require rather that the respondent submit qualified CPD hours and successfully pass the take-home examination on the laws and rules in Oregon. Upon receipt of proper payment and paperwork, the LEC would recommend restoration of his registration.

## **Unfinished Business**

### Update on 2332

Board Investigator Wilkinson informed the LEC that the respondent, a PE and PLS, was sent a letter on March 5, 2009, requesting that he list his engineering activities for the LEC. On March 19, 2009, the respondent was given an additional week to respond to the inquiry. His response was received on March 26, 2009, but his letter identified the last three years of clients rather than specifying his engineering work. A second letter asking him to update the Board on his engineering work was sent on March 31, 2009. His deadline to respond is April 14, 2009.

## **Expert Witness Applicants**

### Paul Eckley, PE

The LEC discussed the professional reviewer application of Paul Eckley, PE, and found that his qualifications and application met the requirements of the professional reviewer program. **The LEC recommended approving Eckley as an expert reviewer.**

John Shaw, PE

The LEC discussed the professional reviewer application of John Shaw, PE, and found that his qualifications and application met the requirements of the professional reviewer program. A LEC member noted that Shaw's *curriculum vitae* listed his Oregon registration as inactive. However, Shaw is current through June 30, 2010. **The LEC recommended approving Shaw as an expert reviewer.**

**Settlement Agreement Monitoring**

LEC Cases Subject to Monitoring and LEC Cases Subject to Collections:

The LEC reviewed the LEC Cases Subject to Monitoring and the LEC Cases Subject to Collections and offered no comments.

**Case Status Report**

The Committee briefly reviewed the case status list. Board Investigator Wilkinson noted that 13 - 14 complaints were received in March and await processing, which is more than what is typically received in a month (6 - 8).

The meeting adjourned at approximately 3:09 p.m.