



Oregon

STATE BOARD OF EXAMINERS
FOR ENGINEERING &
LAND SURVEYING

JOINT COMPLIANCE COMMITTEE
Summary of Meeting
October 2, 2014

670 Hawthorne Ave. SE, Suite 220
Salem, OR 97301
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OSBEELS members present:

Shelly Duquette
Jason Kent
John Seward

OSBGE members present:

Peter Stroud, OSBGE Chair
Kenneth Thiessen

OSBEELS Staff present:

Mari Lopez, Administrator
Jenn Gilbert, Executive Assistant
Adaira Floyd, Social and Communications Media Specialist
Jason Abrams, Investigator
Monika Peterson, Investigator
JR Wilkinson, Investigator

OSBGE Staff present:

Christine Valentine, Administrator

Others present:

Bernard Kleutsch, OSBGE JCC Alternate Member (observer)

Mari Lopez, Administrator for the Oregon State Board of Examiners for Engineering and Land Surveying (OSBEELS), called to order the meeting of the Joint Compliance Committee (JCC) at 1 p.m. in the OSBEELS Conference Room at 670 Hawthorne Avenue SE, Suite 220, Salem, OR 97301.

Review of Agenda

There were no additions, subtractions, or changes to the presented agenda.

Complaint Cases

Case # 13-01-005 – OSBGE

Mr. Stroud informed the Committee that OSBGE had reached a decision on the case, but had not yet notified the involved individual. On this case, there was no additional joint work to be done with OSBEELS.

Unfinished Business

Approval of the JCC Meeting Summary – May 1, 2014

Mr. Stroud noted minor revisions to the May 1, 2014 meeting summary; the members concurred. It was moved and seconded (Thiessen/Stroud) to accept the May 1, 2014, meeting summary as revised. The motion passed unanimously. There was no further discussion.

Joint Board Action Items (Updates)

MOU Revisions

As a result of the request made by past JCC member Carl Tappert during the last JCC meeting to revise the MOU, Ms. Lopez and Ms. Valentine worked together and prepared a completely redrafted MOU for Committee discussion. Ms. Valentine clarified that the Administrators purposely made the decision to not edit the original MOU since enough of its items needed to be changed. Ms. Lopez added that efforts were made to incorporate ideas discussed during previous Committee meetings. She also noted that the respective Boards' Assistant Attorney Generals (AAGs) may have additional edits.

The Committee discussed a section in the MOU regarding meeting minutes as opposed to meeting summaries. In the past, OSBGE requested that complainant and respondent names be left out of meeting minutes by preparing meeting summaries, consistent with OSBGE's practice to reference only case numbers; however, OSBEELS does not have similar practices for keeping complaints and investigations confidential. For these reasons, the Boards compromised and published meeting summaries and not meeting minutes. This presents a challenge because the state retention schedule requires meeting audio files to be maintained indefinitely unless the audio files are transcribed. If they are, then audio files can be destroyed after one year. As a result, the audio file for any given meeting has to be transferred to the other board. Both Boards must then ensure the audio files are retained. If either OSBGE or OSBEELS receives a public records request for the JCC minutes, the Boards would let the requestor(s) know there are no minutes of the meeting, but a recording can be made available. Ms. Valentine anticipates further discussion with OSBGE and counsel on the matter.

Mr. Stroud asked the Administrators to explain the sections pertaining to the lead board on investigating cases. Ms. Lopez responded that the details were agreed upon by past Committee members, but it was an item open for discussion by current members. She added that the draft MOU contains four questions for the JCC to consider during a preliminary review. They serve to identify the lead board, including:

- 1) Is the respondent practicing within their area of competence and the scope of their profession?
- 2) Is the quality of work up to accepted professional standards?
- 3) Does the practice of the respondent jeopardize the public?
- 4) Is additional information needed to answer these questions?

Ms. Valentine clarified that she believed the lead board has been the Board that holds the individual's registration; however, through challenges in investigations, she has learned differently, such as unlicensed work or when work is done by a registrant practicing outside their expertise. She explained that OSBGE has professional conduct rules which prohibit individuals

from engaging in practice outside their area of expertise; OSBEELS does not. Ms. Lopez concurred noting, for example, if an engineer was practicing geology then the case would be handled by OSBGE and not OSBEELS. The proposed definition of lead board clarifies the Board whose statutes or rules were violated and would have the authority to sanction. Ms. Duquette was pleased that the lead board distinctions will be clear and in writing – and that it either would be OSBEELS, OSBGE or both Boards making a decision on the cases. She thought this was a flexible approach. Mr. Seward offered that question #1 (above) was a two-part question, i.e., was the work within scope and also particularly in how it relates to competence.

The Committee expressed an interest in defining competence in the MOU. Ms. Valentine observed that OSBGE defines competence in rule while Ms. Lopez noted that OSBEELS has a rule requiring competency from their professionals. Ms. Lopez added that OSBEELS' AAG is currently updating their opinion regarding the definition of gross negligence, negligence and incompetence. Mr. Wilkinson explained that competence can be case-dependent. Although a broad definition may be helpful, it narrows in an individual case and involves the applicable professional standards. Mr. Stroud asked if OSBEELS would be sharing the opinion. Ms. Lopez replied that it's unclear whether the opinion by the Department of Justice (DOJ) would apply across the Boards. The opinion was requested and centered around OSBEELS statutes and rules and not necessarily to other agencies. Further, the OSBEELS Board would need to waive privilege on the opinion. Mr. Stroud thought it would be beneficial for OSBGE to review their definitions as well. Ms. Valentine offered that OSBGE's definitions were available for sharing with OSBEELS staff or the JCC.

Given the four questions, the Committee also discussed that cases may give rise to other factors, including ethics. Ms. Duquette noted that cases with ethical dilemmas may fall under two different MOU sections. Upon discussion about whether to expand the MOU to include more details, such as the definition of competence, the Committee believed the four questions are all-encompassing and that matters of ethics would fall under professional standards. To define particular standards in a MOU would distract from the intent of the MOU, which is to provide a broad framework for the Committee to work together in making a decision on a case-by-case basis.

Mr. Thiessen noted a spelling error on page 3, 7.d. and requested clarification on page 3, 10. Waiver. Mr. Stroud questioned if 11. Assignment/Subcontract/Successors, 12. Successors in Interest, and 13. No Third Party Beneficiaries would be relevant to this MOU. Ms. Lopez noted that the AAGs would be able to provide more details and revisions for upcoming drafts. Ms. Lopez asked the Committee, as a next step, if they would like to share the MOU draft with the Board Attorneys. After further discussion, they agreed to seek counsel review prior to the next JCC meeting to be held in February 2015. The JCC would then review prior to formal Board reviews and approvals.

1983 DOJ Opinion

The Committee reviewed a 1983 DOJ opinion regarding whether a professional engineer can engage in practices within the definition of geology and, if so, what were the limitations. Ms. Lopez explained that OSBEELS decided it was interested in pursuing an updated opinion and asked that the JCC work on developing the questions. Ms. Valentine explained that this idea was

shared with the OSBGE members and they came to a similar decision: the JCC would be a good place to develop the questions. However, the higher level of AAG review needed for the joint opinion necessitates that the right questions be asked, that there are not too many questions, and that the opinion applies to crucial needs. OSBGE agreed to have the JCC work on developing questions, but requested that OSBGE review the questions before submitting them to the DOJ.

Mr. Stroud added that an updated AAG opinion would be based on new analytical methods. He speculated the same questions might result in a different outcome. He also observed that the prior opinion was based primarily on case history outside of Oregon. Since 1983, there has been Oregon case law. Last mentioned was the incidental overlap of engineering and geology. He wondered if a new review by the AAG would change policy regarding the allowance of incidental overlap for engineers to provide a small amount of geologic services on a larger engineering project. He asked if the MOU needs to provide guidance on this or do the Boards already have the means to evaluate such cases. The questions and resulting legal opinion need to address the concerns facing the Boards today. He concluded that the questions posed in the past were simpler and feels that the JCC's questions could be more refined.

Ms. Valentine observed that the JCC reviewed the past questions and the DOJ opinions, especially regarding any overlap between engineering and geology. Mr. Seward stated that the opinion was an opportunity to share information with the regulated community. He believed practitioners were in need of guidance as opposed to the JCC. He asked what the JCC can produce that is a benefit to both Boards. He thought this might lead to different questions defining the overlap area. Mr. Seward also noted that the 1983 opinion was written before the recognition of Geotechnical engineering as a discipline. Mr. Stroud added that county regulators have also asked for guidance and thought this could serve that purpose as well. He liked the idea to provide more definition for local authorities. The JCC agreed to discuss questions with the Boards counsel at their next meeting.

New Business

Preliminary review of complaint submitted to JCC

OSBEELS Investigator Wilkinson presented a preliminary review memorandum regarding a complaint from a professional land surveyor (PLS). Mr. Wilkinson explained that the complainant submitted complaints against five individuals, three of whom are professional engineers, one professional land surveyor, and one registered geologist. Mr. Wilkinson noted that this was a preliminary review and was not an investigation or case summary. The JCC will need to determine next steps.

Mr. Wilkinson described the project of concern as a steep road built on a hillside behind the complainant's home. After seeing water and mud flow across a neighbor's property and highway, the complainant expressed concerns to the Jackson County Building Official. The complainant noted channelized water, a large fill on a hairpin curve in a draw, and drainage problems that may cause potential damage to his home. He further clarified that the initial road design was done by the property owner who lives in Florida and is a registered PE, especially qualified as a mechanical engineer. The owner also hired the contractor to grub the road. The events started after the initial permit submittal, which was for a non-engineered grading permit, and after construction had begun. Thereafter, a Building Official became involved and required a

qualified engineer to design the road. The property owner hired a civil engineer to complete the road design to Jackson County standards. The original permit was for road access to clean fire debris. The owner planned to later improve the road for residential access.

Mr. Wilkinson explained that the JCC was given a preliminary evaluation and it only presents what the complainant submitted. It is meant to expose the issues for JCC review and subsequent recommendation on whether or not to open cases. The same set of documents will be provided to the OSBEELS Law Enforcement Committee (LEC).

Ms. Lopez commented that in the past, OSBEELS investigators would investigate and provide case summaries; however, recent developments have modified the law enforcement process. Now, the LEC will review all complaints in a preliminary evaluation and then will guide staff on opening and conducting the investigation. This process is the same for the JCC. The LEC may want to revise the process, but for now the JCC is reviewing a preliminary evaluation. Ms. Lopez reiterated to the JCC that Mr. Wilkinson has not conducted an investigation.

Ms. Valentine observed that when the JCC last met interest was expressed in being engaged earlier in the process. This had not really happened for a number of reasons. The benefit of a preliminary evaluation is that the JCC is involved earlier, but the downside is the lack of investigation results. The question is what guidance the JCC will provide on the cases and taking that recommendation back to OSBGE.

After further discussion regarding changes in the OSBEELS law enforcement process, Ms. Valentine noted that OSBGE has not received a formal complaint that meets their statutory requirements. When a signed complaint is received meeting the statutory requirements, a case can be opened. In this instance, there is a lack of a formal filing with OSBGE that has been signed. Anything else would need to go to their Board for approval. She suggested the JCC can make a recommendation to the OSBGE and they will decide whether to open a case.

Ms. Lopez suggested the JCC review the factors listed in the draft MOU in light of the complaints to facilitate the discussion. The JCC agreed that it would be a great opportunity to test the factors.

Ms. Valentine asked for clarification regarding expectations. She inquired if Mr. Wilkinson wanted the JCC to consider only the RG, or were there other elements of the work on the project done by others that also should be reviewed. Ms. Lopez observed that the JCC can direct Mr. Wilkinson in the investigation once the case is opened. However, Mr. Wilkinson is not a geologist or engineer. Mr. Wilkinson added that JCC members are the experts and if they saw something or had comments regarding any of the allegations that their input would be a welcome aid to the investigation. Ultimately, there may be five potential cases.

Mr. Seward stated there was a lot of information supporting the allegations. He questioned whether their judgment would be based on what the complainant submitted or on other factors. Ms. Duquette replied that their judgment might be to get more information. The JCC could recommend opening a case for investigation.

A question of jurisdiction was asked. The point made was that the property owner was a private person working on his own property. He asked and received a non-engineered grading permit from the County. Was he required to be an engineer? Ms. Duquette countered that his work affected people off the property, so the exemption would not apply. It is about life, safety, and health of the neighbors and their properties. The Committee discussed that when a project affects life-safety, requiring a permit or not, particularly when construction is involved, it leads to the practice of engineering.

Mr. Thiessen observed that the original permit was for non-engineered grading. However, the project kept ratcheting up. It started as a narrow road with no erosion controls and evolved as the project became more sophisticated. He asked at what point was the project no longer about someone doing work on their private property and a formal engineering project. Ms. Duquette pointed out that the permit required that construction meet certain criteria. The individual failed to meet road slope criteria, for example. Once a building inspector walked the roadway, the County Building Official required detailed improvements to existing plans and a letter stating the engineer's stamp on the plans certified that the individual was practicing within the expertise necessary for the project. Ms. Duquette highlighted this as an example where an inspector reviewing the plans in the field caught problems that were corrected.

Mr. Seward asked about a design. Mr. Wilkinson briefly explained the series of events as outlined in the complaint. While the owner is an engineer, he is a mechanical engineer. When the county wanted sealed and signed plans, the owner subsequently retained a civil engineer and other parties, including a RG. The original intent of the road was for a fire break and debris removal, but evolved into something more.

The Committee reviewed a letter generated by the RG. With regard to overlapping practices, Ms. Lopez explained that since the RG is an OSBGE registrant, for OSBEELS to open a case there would need to be evidence that the RG violated statute or rule under the authority of OSBEELS (unlicensed engineering practice). At this time, the evidence is not clear. On the other hand, if JCC members saw evidence of the RG practicing inconsistently with the duties of a registered geologist, then a recommendation to investigate should be forwarded to OSBGE. Ms. Valentine noted the challenge as not enough information about the letter or its purpose, which would need to be gathered as part of an investigation.

Mr. Stroud noted that the geology statutes make a distinction between registered geologist and a certified engineering geologist (CEG). If a geologic evaluation involves civil structures, then it requires a CEG. Roadways are civil structures, which is different than assessing a landslide on a native slope. Mr. Thiessen remarked that the RG was brought in after construction and two substantial storm events to assess erosion associated with the new road. The RG apparently walked the road and issued a statement that "the road showed no obvious signs of differential settlement;" a quantitative statement; however, it was not a formal evaluation nor was it clear as to whether he was evaluating the road or the overall stability of the hillside slope. The JCC wanted more information before reaching any decisions, so an investigation was warranted. The question is whether he crossed the line between a RG and a CEG.

Ms. Duquette observed that the most of the case falls into OSBEELS jurisdiction; however, the question is the disposition of the allegation against the RG. Mr. Wilkinson clarified that the complainant cited the OSBEELS rule on geotechnical engineering, but the individual is a RG licensed by OSBGE placing the matter in the overlap. Ms. Valentine asked whether the RG was practicing as a CEG or as an engineer, and whether that was a matter for the JCC or OSBGE. The Committee agreed the issue was for OSBGE to resolve.

Mr. Stroud summarized that there does not seem to be enough information provided to determine whether the RG practiced engineering. He recommended an OSBGE discussion about the RG's work. If something was revealed during an OSBGE review, then it might change. He also recommended that OSBEELS take the lead on the other four cases. He also requested that OSBGE be notified if the LEC determined to open the case against the RG through the review of the other complaints. Ms. Duquette suggested both Boards to look into the RG. Ms. Gilbert pointed out that an OSBEELS investigation begins by citing a statute or rule under OSBEELS purview that was potentially violated. Ms. Duquette replied that it would be unlicensed practice of engineering, but more information should be obtained.

Ms. Lopez summarized the JCC as recommending that OSBEELS be the lead board on the investigations involving the three PEs and the PLS. For the RG, the OSBGE be the lead board. Mr. Stroud concurred.

It was moved and seconded (Stroud/Duquette) to refer the complaint against the RG to OSBGE to further investigate whether the RG practiced within the scope of a CEG. The motion passed unanimously. There was no further discussion.

Next Meeting

February 5, 2015 – OSBGE to host

Public Comment

There was no public comment.

The meeting was adjourned at 3:15 p.m.