

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
BOARD OF EXAMINERS FOR ENGINEERING AND LAND SURVEYING**

IN THE MATTER OF:)	FINAL ORDER
)	
HERBERT FARBER)	OAH Case No. 2019-ABC-02558
)	Agency Case No. 3133
)	
)	

The Oregon State Board of Examiners for Engineering and Land Surveying, having considered this matter and the Proposed Order issued on January 2, 2020, makes the following findings of fact, conclusions of law, and opinion, and issues the following ORDER:

HISTORY OF THE CASE

On December 5, 2017, the Board of Examiners for Engineering and Land Surveying (the Board) issued a Notice of Intent to Assess Civil Penalty (the December 5, 2017 Notice) to Herbert Farber (Respondent), alleging eight violations of statute and/or administrative rule and proposing a \$5,000 civil penalty and 90-day license suspension. On May 14, 2018, the Board issued a Final Order that incorporated a settlement agreement between the parties. In exchange for Respondent’s compliance with the terms of the settlement agreement (including payment of a \$1,000 civil penalty), the Board agreed to dismiss the violations alleged in the December 5, 2017 Notice, as well as the remaining civil penalties. The Board subsequently determined that Respondent violated one or more terms of the settlement agreement.

On December 3, 2018, the Board issued a Notice of Intent to Assess Civil Penalty (the December 2, 2018 Notice) to Respondent. The December 3, 2018 Notice reinstated alleged violations from the December 5, 2017 Notice which had been dismissed as part of the settlement agreement, alleged an additional violation pertaining to the breach of the settlement agreement, and proposed a \$4,000 civil penalty. On December 15, 2018, Respondent requested a hearing.

On March 5, 2019, the Board referred the matter to the Office of Administrative Hearings (OAH). OAH assigned Senior Administrative Law Judge (ALJ) Joe L. Allen to preside at hearing. Senior ALJ Allen convened a prehearing conference on May 15, 2019. Assistant Attorney General (AAG) Katharine DiSalle appeared on behalf of the Board. Daren Cone, Board President, and Rob Sobotka, Investigator for the Board, also appeared on the Board’s behalf. Respondent appeared at the conference *pro se*. The conference was continued to allow Respondent an opportunity to seek legal representation.

On June 21, 2019, Senior ALJ Allen reconvened the prehearing conference. Respondent had not retained counsel and again appeared *pro se*. AAG DiSalle, Mr. Sobotka, and Mr. Cone all appeared on behalf of the Board. A hearing was scheduled for October 24 and 25, 2019.

On June 25, 2019, the Board issued an Amended Notice of Intent to Assess Civil Penalty (the Amended Notice) to Respondent. The Amended Notice included the alleged violations from the December 5, 2017 Notice, the additional violation pertaining to the alleged breach of the settlement agreement, and the proposed assessment of a \$4,000 civil penalty.

On August 1, 2019, Respondent filed a Motion for Summary Determination (MSD), pursuant to OAR 137-003-0580, seeking a ruling as a matter of law regarding the seven alleged violations from the December 5, 2017 Notice. In response, on August 12, 2019, the Board filed written notice of its intent to withdraw those seven allegations.

On August 15, 2019, the Board issued a Second Amended Notice of Intent to Assess Civil Penalty (the Second Amended Notice) to Respondent. The Second Amended Notice did not contain the seven alleged violations from the December 5, 2017 Notice. The Second Amended Notice alleged breach of the settlement agreement (*i.e.* failure to cooperate with the Board) and proposed assessment of a \$1,000 civil penalty.

On September 24, 2019, the Board requested postponement of the scheduled hearing due to witness unavailability. On October 4, 2019, Senior ALJ Allen granted the Board's motion. The hearing was rescheduled for October 30 and 31, 2019.

On October 10, 2019, Senior ALJ Allen issued a letter opinion concluding that because the Board had withdrawn the allegations from the December 5, 2017 Notice, Respondent's MSD was moot.

On October 15, 2019, the OAH assigned ALJ Micah S. Moskowitz to preside at hearing. Also on October 15, 2019, the Board issued a Third Amended Notice of Intent to Assess Civil Penalty (the Third Amended Notice) to Respondent. The Third Amended Notice corrected a scrivener's error in the Second Amended Notice and did not contain any substantive changes. The matter proceeded to hearing on the Third Amended Notice.

The hearing was held on October 30, 2019, in Salem, Oregon. AAG DiSalle represented the Board, and Mr. Cone also appeared on the Board's behalf. Investigator Sobotka and Jason Martin, Professional Land Surveyor, testified on behalf of the Board. Respondent appeared personally, without counsel, and testified on his own behalf. The record closed on October 30, 2019, at the conclusion of the hearing.

On January 2, 2020, ALJ Moskowitz issued a proposed order recommending the Board find Respondent had committed the violations alleged in its Third Amended Notice and assess a civil penalty of \$1,000 against Respondent. Respondent filed no exceptions to the proposed order.

The Board now issues its final order adopting ALJ Moskowitz's proposed order recommending we assess a civil penalty against Respondent in the amount of \$1,000, for

violations of ORS 672.200(5) and OAR 820-020-0015(8). The Board made no changes to the proposed order's facts or reasoning, and only minor changes to the language of proposed order's opinion, explained in footnotes except for corrections of syntax, formatting, or the like.

ISSUES

1. Whether Respondent violated the terms of a final order of the Board by submitting a survey to the Jackson County Surveyor's Office before it was peer reviewed. ORS 672.200(5).
2. Whether Respondent failed to cooperate with the Board on a matter subject to its jurisdiction. OAR 820-020-0015(8).
3. If so, whether the Board may assess a civil penalty of \$1000 against Respondent. ORS 672.325(1).

EVIDENTIARY RULINGS

Exhibits A1 through A6, offered by the Board, were admitted into the record without objection.

Exhibits R2 through R5 and R7, offered by Respondent, were admitted into the record without objection.

The Board objected to Respondent's Exhibit R1 as unduly repetitious (duplicative). In response, Respondent agreed that Exhibit R1 was duplicative. Exhibit R1 was excluded from the record on that basis.

The Board objected to Respondent's Exhibit R6 as immaterial. Exhibit R6 was admitted into the record over the Board's objection.

The Board objected to Respondent's Exhibit R8, pages 2 and 5, as unduly repetitious (duplicative). Exhibit R8 pages 2 and 5 were excluded from the record on that basis. The remainder of Exhibit R8 was admitted without objection.

The Board objected to Respondent's Exhibit R9 as immaterial. Exhibit R9 was admitted into the record over the Board's objection.

The Board objected to Respondent's Exhibit R10 as immaterial. Exhibit R10 was admitted into the record over the Board's objection.

FINDINGS OF FACT

1. On July 26, 1985, the Board issued a professional land surveyor certificate to Respondent under license #02189PLS. Respondent maintained his land surveyor license until his formal retirement on September 19, 2018. (Ex. A1.) During his period of licensure, Respondent served as a professional land surveyor for many clients particularly in the area of Jackson County, Oregon. (Test. of Respondent.)

2. On December 5, 2017, the Board issued the December 5, 2017 Notice to Respondent. (Ex. A2.) The December 5, 2017 Notice alleged that Respondent had committed multiple violations of the laws and rules regulating the practices of professional land surveyors, including:

- Respondent failed to timely file surveys with the Jackson County Surveyor's Office within 45 days after setting the first monument on two occasions: exceeding the deadline by 93 days in one case and 95 days in the other. (*Id.* at 3 and 6.)
- Respondent failed to cite bearings and distances as required for a survey filed with the Jackson County Surveyor's Office. (*Id.*)
- Respondent failed to properly seal the description for two projects submitted to the Medford Planning Commission. (*Id.* at 3 and 7.)
- Respondent failed to properly seal, sign, and mark a preliminary survey before submitting it to the Jackson County Surveyor's Office. (*Id.*)
- Respondent failed to properly note and identify the prior surveys he used to establish boundary lines for a subsequent survey, and thereby failed to act in the manner of a reasonably prudent and skillful land surveyor. (*Id.* at 3-4 and 7.)
- Respondent failed to properly document how boundaries were determined for a survey done for Eric and Lisa Artner, and thereby failed to act in the manner of a reasonably prudent and skillful land surveyor. (*Id.* at 4 and 7.)

For the above violations, the Board proposed to assess a \$5,000 civil penalty and suspend Respondent's professional land surveyor license for 90 days. (*Id.* at 8.)

3. Respondent engaged with the Board regarding the matters alleged in the December 5, 2017 Notice and ultimately worked toward settlement. (Test. of Respondent and Sobotka.) By May 2018, Respondent and the Board had reached an agreement (the Settlement Agreement). (Ex. A3 at 2-4.) As part of the agreement, on April 27, 2019, Respondent admitted to a single act of gross negligence in violation of ORS 672.200(2), as follows:

Because Farber included in his survey for Eric and Lisa Artner a narrative which cites utilizing GPS control, tying the recovered monuments "as shown," and locating the right-of-way "per plat records," but fails to show found monuments or record data, Farber demonstrated a willful indifference to prescribed standards and practices, legal duties, probable consequences, and/or the rights of others. Thus, Farber demonstrated gross negligence in his survey for Eric and Lisa Artner.

(*Id.* at 3.) For that violation, Respondent agreed to pay a civil penalty of \$1,000, to stop taking new land surveying work as of April 12, 2018, and to retire his license by August 31, 2018, without opportunity for reinstatement. (*Id.*) Respondent also agreed to abide by several conditions for the remainder of his time working as a professional land surveyor, including the following:

Farber agrees to provide the name of an Oregon-licensed professional land surveyor who will peer review all of his current land surveying projects to the Board for approval by April 30, 2018. This Oregon-licensed professional land surveyor will be paid by Farber for any and all peer review work he or she provides. The peer reviewer must be approved by the Board before this term of the settlement agreements [*sic*] is considered fulfilled. The peer reviewer must agree to review and, if necessary, assist Farber in correcting any and all work before Farber submits it to a County Surveyor or City Surveyor.

(*Id.* at 3-4.) For its part of the Settlement Agreement, the Board agreed to dismiss the remaining charges in the December 5, 2017 Notice and “not to take action against Farber for any and all other land surveying work he performed prior to April 12, 2018.” (*Id.* at 4.)

4. On May 14, 2018, the Board issued a Final Order Incorporating Settlement Agreement, which incorporated the Settlement Agreement, assessed a \$1,000 civil penalty against Respondent, and accepted Respondent’s permanent retirement effective August 31, 2018. (Ex. A3 at 1.)

5. After entering into the Settlement Agreement, Respondent performed most of his obligations to the satisfaction of the Board. (Test. of Sobotka.)

6. Respondent asked Jason Martin, a Professional Land Surveyor serving the Jackson County area, to act as his peer reviewer as required by the Settlement Agreement. Martin agreed to act in that capacity and began submitting monthly peer review reports to Investigator Sobotka detailing his activities as Respondent’s peer reviewer. (Test. of Martin.) The Board received and accepted Martin’s peer review reports. (Test. of Sobotka.)

7. Shortly after May 14, 2018, Respondent submitted a property line adjustment map he prepared for Artnr Investment Properties to the Jackson County Surveyor’s Office. (Test. of Respondent.) Respondent did not submit the property line adjustment map to Martin for peer review before submitting it to the county surveyor. (Test. of Respondent and Martin.) Jackson County Surveyor Scott Fein reviewed the map, noted errors, and returned the map to Respondent for correction. (Ex. A6 at 1.)

8. On June 6, 2018, Respondent submitted a second map of a survey for the Artnr property line adjustment. (Ex. A6 at 1.) Respondent did not submit the second property line adjustment map to Martin for peer review before submitting it to the county surveyor. (Test. of Respondent and Martin.) Fein reviewed the second map, noted several errors and deficiencies, and again returned the map to Respondent for correction. (Ex. A6 at 1.) Fein also sent an email to Respondent, Martin, and Sobotka detailing his dissatisfaction with the property line adjustment map and suggesting that Respondent work with his peer reviewer. (Ex. A4 at 1.) In the email, Fein noted that Respondent had used the allowed number of reviews for the property line adjustment map and that new fees would be required for resubmission. (*Id.*)

9. On July 6, 2018, Martin submitted a peer review report to Sobotka detailing projects he had reviewed for Respondent in the month of June. (Ex. A5.) In the report, Martin disclosed that

Respondent had not submitted the Artner property line adjustment map for peer review before submitting it to the Jackson County Surveyor's Office. (*Id.* at 1.)

10. Respondent knew that he had agreed to have all his projects peer-reviewed before submission to a County Surveyor as part of the Settlement Agreement. (Test. of Respondent.) Other than the Artner property line adjustment, Respondent sent every other pending work project to Martin for peer review before submission, as required. (Test. of Martin.) With respect to the Artner property line adjustment, Respondent was under time pressure because he was aware that his client wanted the matter completed quickly to facilitate a pending real estate transaction. Respondent initially submitted the Artner property line adjustment to the Jackson County Surveyor on May 15, 2018, one day after the Final Order Incorporating Settlement Agreement was issued. When he resubmitted the Artner property line adjustment on June 6, 2018, Respondent knew the Final Order Incorporating Settlement Agreement was in effect and that – under the terms of the agreement – the map was required to be peer reviewed by Martin before submission. (Test. of Respondent.)

CONCLUSIONS OF LAW

1. Respondent violated the terms of a final order of the Board by submitting a survey to the Jackson County Surveyor's Office before it was peer reviewed.
2. Respondent failed to cooperate with the Board on a matter subject to its jurisdiction.
3. The Board may assess a civil penalty of \$1000 against Respondent.

OPINION

The Board proposed to assess a civil penalty of \$1,000 against Respondent on the grounds that he violated the terms of a final order of the Board by submitting a survey to a county surveyor's office without first submitting that survey for peer review. The Board contends that the same conduct also constituted a failure to cooperate with the Board on a matter subject to its jurisdiction, but the Board chose not to assess any additional civil penalty for that alleged violation. The Board had the burden to establish, by a preponderance of the evidence, that Respondent engaged in the alleged conduct and that the proposed civil penalty is legally authorized. *See* ORS 183.450(2) (“The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position”); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Dixon v. Board of Nursing*, 291 Or App 207, 213 (2018) (in administrative actions, burden of proof is by a preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

1. Violating the terms of a Final Order of the Board

ORS 672.200(5) states, in relevant part:

The State Board of Examiners for Engineering and Land Surveying may * * * reprimand an individual enrolled as an intern or holding a certificate or permit:

* * * * *

(5) For failing to pay a civil penalty or fee in the manner prescribed by a final order of the board, or for failing to meet any other term of a final order of the board.

To resolve disciplinary matters not at issue in this hearing, Respondent entered into the Settlement Agreement with the Board in May 2018. The terms of the agreement required Respondent to stop taking new projects and find an Oregon-licensed professional land surveyor “who will peer review all of his current land surveying projects” and “review and, if necessary, assist Farber in correcting any and all work before Farber submits it to a County Surveyor or City Surveyor.” Exhibit A3 at 3-4. Those terms of the Settlement Agreement were incorporated in the Board’s Final Order dated May 14, 2018. *See* Exhibit A3.

Respondent complied with the peer review terms of the Final Order Incorporating Settlement Agreement by working with Martin on nearly every one of his pending work projects before submitting them to a County Surveyor or City Surveyor. While Respondent testified that he believed the Board should have provided some kind of formal documentation that Martin had been accepted as his peer reviewer, Respondent’s behavior demonstrates that he understood his obligation under the Settlement Agreement to send projects to Martin for peer review. Respondent knew what was required of him.

However, Respondent acknowledged at hearing that he submitted the Artner property line adjustment to the Jackson County Surveyor’s Office on June 6, 2018, without first seeking peer review and assistance on that project from Martin.¹ That conduct constitutes a failure to meet a term of the Settlement Agreement incorporated in the May 14, 2018, Final Order Incorporating Settlement Agreement, and is grounds for license discipline² by the Board under the authority of ORS 672.200(5).

2. Failing to cooperate with the Board

The Board also alleged that Respondent committed a violation subject to a civil penalty by failing to cooperate with the Board on a matter subject to its jurisdiction, although the Board chose not to impose a sanction with respect to that violation. ORS 672.225(1)(c) requires the Board to adopt rules “[p]rescribing standards of professional conduct for professional engineers, professional land surveyors, photogrammetrists, engineering interns and land surveying interns.”

¹ The Board does not find the reason for violating the order that Respondent provided at hearing relevant.

² The ALJ listed reprimand, but license suspension, refusal to renew licensure, and license revocation are also authorized.

Pursuant to that mandate, the Board has adopted professional conduct rules under OAR 820-020-0005 through 0055. The professional conduct rules apply to any individual holding a certificate issued by the Board. OAR 820-020-0005(1).

OAR 820-020-0015(8) provides:

Registrants³ or applicants for registration or certification shall cooperate with the Board on all matter subject to the Board's jurisdiction.

A final order issued by the Board which incorporates a settlement agreement with a licensee is plainly a matter subject to the Board's jurisdiction. Respondent signed an agreement with the Board in April 2018, wherein he committed to have all his remaining projects peer reviewed before submittal to a County Surveyor. That agreement had been fully executed and incorporated in a final order of the board when Respondent submitted the Artnr property line adjustment on June 6, 2018. At that time, Respondent still held an active professional land surveyor certificate. As discussed above, Respondent understood his obligations regarding the peer review process and largely abided by them, but he failed to do so with respect to the Artnr property line adjustment. By deviating from his agreement with the Board, Respondent failed to cooperate on a matter subject to the Board's jurisdiction in violation of the professional conduct rules for land surveyors.

3. The civil penalty

ORS 672.325(1) provides:

In addition to any other penalty provided by law, any person who violates any provision of ORS 672.002 to 672.325 or any rule adopted thereunder shall forfeit and pay to the State Board of Examiners for Engineering and Land Surveying a civil penalty in an amount determined by the board of not more than \$1,000 for each offense.

Here, Respondent committed two distinct violations under ORS 672.002 to 672.325 and the associated administrative rules: Respondent violated ORS 672.200(5) by failing to comply with the terms of a final order of the Board, and Respondent violated OAR 820-020-0015(8) by failing to cooperate with the Board on a matter subject to its jurisdiction.⁴ The law explicitly authorizes the Board to determine the amount of the penalty, not to exceed \$1000 for each offense. The Board determined that a \$1,000 penalty for violating ORS 672.200(5) is appropriate, this penalty is within the Board's discretion, and the circumstances of this case support a penalty in that amount.

Pursuant to ORS 183.745(6) a civil penalty must be paid within 10 days after the order imposing it becomes final.

³ OAR 820-020-0005(3) provides: "In these Rules of Professional Conduct, the word 'registrant' means any person holding a license or certificate issued by this Board."

⁴ The Board removed the proposed order's reference to ORS 672.335, as no such statutory provision exists and was not included in the Board's Third Amended Notice.

ORDER

For all the foregoing reasons, the Oregon State Board of Examiners for Engineering and Land Surveying hereby ORDERS that Herbert Farber is assessed a \$1,000 civil penalty for violating the terms of a final order of the Board.



Daren Cone, PE, PLS

President

Oregon State Board of Examiners for
Engineering and Land Surveying

Date: 3/31/2020

APPEAL NOTICE

You are entitled to judicial review of this order in accordance with ORS Chapter 183.482. You may request judicial review by filing a petition with the Court of Appeals in Salem, Oregon within 60 days from the date of service of this order.