Dep't of Buildings v. Velasquez

OATH Index No. 1557/10 (Nov. 24, 2010), *modified on penalty*, Comm'r Dec. (Dec. 2, 2010)

Respondent, a licensed engineer, submitted professionally certified applications that demonstrated negligence, incompetence, or a lack of knowledge of applicable laws. ALJ recommends two-year suspension of respondent's privilege to participate in the Department's limited supervisory review and professional certification programs, followed by three years' probation.

Commissioner revokes all professional certification privileges; after one year respondent may seek reinstatement of privileges.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF BUILDINGS
Petitioner
- against -
JOSE A. VELASQUEZ
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, the Department of Buildings brought this proceeding under its rules and the New York City Administrative Code. 1 RCNY § 21-02(b)(1); Admin. Code § 28-104.2.1.3.2 (Lexis 2009). The amended petition alleged that respondent, licensed engineer Jose A. Velasquez, filed five professionally certified applications in which he demonstrated negligence, incompetence, or lack of knowledge of applicable laws. Petitioner seeks to revoke respondent's privileges and exclude him from the Department's programs for limited supervisory review and professional certification of applications, plans, and removal of objections.

At a five-day hearing, which concluded on August 5, 2010, petitioner relied upon documentary evidence along with testimony from five witnesses. Respondent testified in his own behalf, presented testimony from three other witnesses, and offered documentary evidence. I closed the record on October 8, 2010, following receipt of the parties' written summations.

For the reasons below, I find that petitioner proved the charges and specifications for four of the five cited applications. I recommend a two-year suspension of respondent's privilege to participate in the Department's limited supervisory review and professional certification programs, followed by three years' probation.

ANALYSIS

Background

The Department's professional certification program allows design professionals to certify that applications and associated plans conform to the building code and zoning regulations. Professionally certified applications obtain expedited approval with limited review by the Department. *See* Admin. Code § 28-104.2.1. The Department's plan examiners pre-screen all professionally certified applications for completeness and major zoning issues (Tr. 56). In addition, the Department audits 20% of professionally certified applications for compliance with zoning, fire safety, and handicap access requirements (Tr. 59-60). All applications are subject to review at any time prior to issuance of a certificate of occupancy (Tr. 60, 1002).

If an application lacks clarity or contains errors, a plan examiner prepares an objection sheet that the Department sends to the owner and applicant (Tr. 45-46). The owner or applicant may meet with the plan examiner to resolve the objections (Tr. 46). If the objections are not resolved, further review within the Department is available (Tr. 48-49). For zoning issues, the owners or applicants can also seek relief from the Board of Standards and Appeals (BSA) or the City Planning Commission (CPC) (Tr. 52).

Under the Department's rules, an architect or engineer who submits plans, applications, or certifications that display "negligence or incompetence with regard to, or lack of knowledge of, the Building Code, the Zoning Resolution, the Department's regulations, or other applicable laws, rules or regulations" may be excluded or suspended from the Department's limited supervisory review and professional certification programs. 1 RCNY § 21-02(a)(1). The Administrative Code also mandates sanctions where an applicant: (1) "knowingly or negligently submits" a professionally certified application or construction documents that contain false information or do not comply with applicable laws; or (2) "submits two professionally certified applications for construction document approval within any 12-month period containing errors

that result in revocation of an associated permit or that otherwise demonstrate incompetence or a lack of knowledge of applicable laws." Admin. Code § 28-104.2.1.3.2.

Petitioner alleged that respondent submitted plans or applications on five occasions, from September 15, 2008 to April 23, 2009, that demonstrated negligence, incompetence, or lack of knowledge of applicable laws. In his defense, respondent insisted that he exercised a professional standard of care.

The charges and specifications concern objections to the following five jobs: new building applications for three-family homes at 103-10 Alstyne Avenue and 50-11 103rd Street (Job Nos. 410188639 and 410186294); alteration applications to convert two-family homes to three-family homes at 103-16 Alstyne Avenue and 50-15 103rd Street (Job Nos. 410204719 and 402299455); and a new one-family home at 244-16 85th Road (Job No. 410180548) (ALJ Ex. 1). Respondent was the original applicant on all of the jobs, except the 50-15 103rd Street alteration. Another professional certified that application in 2006 and respondent filed a post-approval amendment (PAA) on December 12, 2008, assuming responsibility for the job (Tr. 199).

General Challenges to the Charges

Besides offering defenses to specific objections, respondent challenged petitioner's entire case. Respondent protested that plan examiners went beyond the pre-screening process by objecting to matters other than major zoning issues (Tr. 587, 758). He also claimed that he could not resolve some of the objections, because he had not received objection sheets and folders were missing from the Department's record room (Tr. 666-67, 726, 740, 755). Respondent further maintained that petitioner violated due process by referring the matter to this tribunal (Resp. Memo at 28-29). He also argued that the evidence was insufficient because petitioner had failed to present expert testimony (Resp. Memo at 16-19). Each of these claims lacks merit.

The Department's plan examiners did not exceed their authority. Respondent's argument on this point rests, in large part, on a 2006 Department memorandum announcing a pilot program to perform initial review of professionally certified applications (Pet. Ex. 8). According to the one-page memorandum, the expected turnaround time for initial review would be five days and would "focus on compliance" with the Zoning Resolution, including checks on open space, floor area, density, lot area, and required yards (Pet. Ex. 8). The memorandum states that audits for

20% of professionally certified plans would take up to ten days (Pet. Ex. 8). Based on this memorandum, respondent said that plan examiners unfairly objected to non-zoning issues, such as potential violations of the Building Code or Multiple Dwelling Law (Tr. 586-88). Respondent is mistaken. Nothing in the 2006 memorandum bars plan examiners from flagging potential violations of the Building Code or other laws. If an application contains flaws, especially with respect to fire safety or safe egress, a plan examiner has an obligation to object (Tr. 997).

Respondent's claim regarding missing objection sheets and misplaced files is also unpersuasive. To begin with, I did not fully credit respondent's claims that he never received many of the objection sheets. For example, respondent filed a work application for 103-10 Alstyne Avenue on September 15, 2008 (Pet. Ex. 46; Velasquez: Tr. 740). The plan examiner filed an objection sheet on December 18, 2008, and respondent requested a meeting, which the Department initially scheduled for December 24, 2008 (Pet. Ex. 51, Velasquez: Tr. 741-42). That sequence of events suggests that he received notification of the objections. Similarly, respondent testified that he and his expediter could not obtain objection sheets because folders were missing from February to May 2009 (Tr. 664-65, 834). However, the property owner was able to obtain objections via fax after he spoke to someone at the Department of Buildings (Tr. 666-67). This undercuts the claim that the objection sheets were difficult to obtain. Moreover, respondent expected to obtain objection sheets within a few weeks. If he had not received them for months, he should have notified the Department. There is no evidence that respondent ever sent a letter, fax, or e-mail about any missing documents.

Even if Department personnel had failed to mail an objection sheet or misplaced a folder, it would not be a defense to the charges. The petition alleged that respondent filed applications that failed to meet professional standards of care. His errors, if any, occurred when he professionally certified and filed the applications. Later delays, even attributable to the Department, did not excuse respondent's conduct.

With respect to respondent's due process claim, the Department referred the matter to this tribunal under the Rules of the City of New York and the Administrative Code. 1 RCNY § 21-02(b)(1); Admin. Code § 28-104.2.1.3.2. This tribunal lacks the authority to address the constitutionality of those provisions. *See, e.g.*, *Dep't of Buildings v. 98 West 183rd Street, Bronx*, OATH Index No. 845/97 at 3 (Apr. 8, 1997), *aff'd sub nom. Deli Food Grocery Corp. v. Silva*, 259 A.D.2d 345 (1st Dep't 1999). In any event, respondent received a full opportunity to

defend against the charges. With the assistance of able counsel, respondent confronted petitioner's evidence and he offered evidence in his own defense.

As for expert witnesses, respondent relied upon testimony from Irving Minkin, an attorney and engineer who worked for the Department for more than 25 years, most recently as First Deputy borough Commissioner in Queens, from 1978 to 1985 (Tr. 906-12). Minkin, now associated with respondent's counsel's law firm, was qualified as an expert witness and he opined that respondent is a competent professional and petitioner's objections were, for the most part, "subjective," "frivolous," and "wrong" (Tr. 928, 931, 945, 947, 961, 977-79). To counter Minkin's testimony, petitioner relied on Brooklyn Deputy Borough Commissioner John Gallagher who opined that applications submitted by respondent failed to demonstrate a "professional standard of care" (Tr. 1008-09). In his post-hearing submission, respondent stressed that Gallagher was not formally qualified as an expert (Resp. Memo at 16-19).

Respondent's challenge to Gallagher's testimony is mistaken. Gallagher has 35 years' experience as a professional architect in the public and private sector (Tr. 40). Without question, he possesses the requisite skill, training, knowledge or expertise to offer an opinion concerning the adequacy of respondent's work. His opinion testimony, which respondent did not object to during the hearing, was competent and reliable. *See Matter of Shanta C.*, 47 A.D.3d 422, 423 (1st Dep't 2008) (termination of parental rights upheld based upon psychologist's testimony, even though witness not expressly qualified as an expert); *People v. Mack*, 301 A.D.2d 863, 864 (3d Dep't 2003) (though not formally qualified as an expert, physician had qualifications and experience to offer opinion testimony regarding physical injury); *see also* 48 RCNY § 1-46 (compliance with strict rules of evidence not required at OATH administrative hearings).

Allegations Regarding Applications at 103rd Street and Alstyne Avenue

Petitioner's most serious objections stemmed from professionally certified applications for four buildings on a single zoning lot at the intersection of 103rd Street and Alstyne Avenue (Job Nos. 410188639, 410186294, 410204719 and 402299455). Among other objections, petitioner alleged that respondent's plans failed to comply with zoning laws because they: did not satisfy rear-yard requirements; impermissibly increased existing non-compliance with zoning regulations; included unauthorized front-yard obstructions; and did not provide for sufficient off-

street parking (Pet. Exs. 30, 49, 57, 63). *See* ZR 23-532 (Apr. 30, 2008) (rear yard requirements); ZR 54-31 (Dec. 18, 1975) (restrictions against increasing non-compliance); ZR 23-44 (Apr. 30, 2008) (limits on front yard obstructions); ZR 25-23 (Oct. 29, 2007) (off-street parking limits).

Respondent did not seriously dispute these objections. Indeed, he testified that the errors were "obvious," he knew about them when he filed the applications, and he "fully expected" the Department's objections (Tr. 641, 649, 856). Prior to filing the applications, respondent inspected the lot with the property owner and saw four unfinished buildings (Tr. 633-34, 638-39, 641). It appeared that the construction work on the site had stopped years ago. Respondent noticed that some of the buildings were in the bed of a mapped street, an unused street that appeared on official city maps, in violation of the zoning laws (Tr. 641). Checking the Department's database, respondent discovered that only one of the four buildings had approved plans and permits had expired (Tr. 639-40, 693-94).

According to respondent, many of the obstacles to this project were due to the mapped street that went through the lot (Tr. 638, 680, 701). To obtain permission to build in the bed of a mapped street, respondent needed to apply to BSA after obtaining objections from the Department (Tr. 644-45, 708). *See* Gen. City Law § 35 ("no permit shall hereafter be issued for any building in the bed of any street" except for limited circumstances approved by BSA).

After receiving BSA approval, respondent planned to "cut" or partially demolish existing buildings on the lot (Tr. 645-56, 700). He anticipated that BSA approval and partial demolition would resolve most of the objections regarding rear and front yard requirements, open space, and off-street parking (Tr. 680-81, 698-700, 704). With professional certification, respondent expected prompt objections from the Department (Tr. 655, 657-59). He explained BSA approval to the property owner and included that requirement in a contract that they signed on July 17, 2008 (Velasquez: Tr. 651; Fernandez: 526, 529; Resp. Ex. QQQQ).

The main flaw in respondent's defense is that he never properly informed the Department that there was a mapped street or that he intended to seek BSA approval. A plot plan is prominently featured on the first page of each new building or alteration application that respondent professionally certified (Pet. Exs. 26, 45, 52, 59). None of those plot plans include the mapped street.

Compounding his error, respondent failed to notify the Department of the need for BSA approval. There is a standardized Department form (PC1) for disclosing the need for further approvals, entitled "Required Items Checklist for Professional Certification" (Pet. 68). In bold letters, near the top of the form, there is a column for "Items Required Prior to Approval" (Pet. Ex. 68). The first item on that list is "BSA/CPC Approval" (Pet. Ex. 68). If there is any doubt which box to check, there is also a space at the bottom of the list for "other" with room for further explanation. In fact, respondent knew that his predecessor had filed the checklist without reporting the need for BSA approval (Tr. 822-23; Pet. 68). Under these circumstances, respondent's omission of the mapped street from the plot plans and his failure to notify the Department of the need for BSA approval demonstrates a failure to exercise a professional standard of care.

In his post-hearing submission, respondent suggested that his failure to amend the PC1 checklist was a typographical error (Resp. Memo at 25). There was no credible evidence to support that claim. At the hearing, respondent conceded that he never amended the checklist and added, "I didn't consider that I had to do that" (Tr. 823).

He also attempted to shift blame by claiming that plan examiners should have reviewed related folders for jobs on the same zoning lot and should have checked the zoning map for the lot, which would have revealed the mapped street (Pet. Exs. 29; Velasquez: Tr. 696, 729-30, 841; Minkin: Tr. 936, 938, 948, 962). Respondent also noted that at least one of the job folders contained a document, prepared by the Topographical Bureau of the Borough President's Office, which revealed the mapped street (Velasquez: Tr. 764-65; Pet. Ex. TTTT).

Respondent's argument fundamentally misconstrues professional certification. By extending this privilege, the Department relies upon design professionals to submit clear, complete, and reliable applications (Tr. 895-96). *See* Building Code of 1968 § 27-157 (all applications shall be accompanied by plans "complete and of sufficient clarity to indicate entire nature of proposed work, and compliance with the provisions of code" (Pet. Ex. 74); *see also* Admin. Code § 28-104.7.1 ("construction documents shall be complete and of sufficient clarity to indicate the location and entire nature and extent of the work proposed, and shall show in detail that they conform" to applicable laws and rules; if there are "practical difficulties in the way of carrying the strict letter of the code, laws or rules, the applicant shall set forth the nature

of such difficulties) (Pet. Ex. 76). Petitioner presented credible evidence that plan examiners begin their review with the plot plan and it would be unusual for an examiner to look for other maps (Tr. 1006-07). If there is no mapped street on a professionally certified application, a plan examiner should be able to rely on that representation and need not hunt for conflicting information on other documents.

Petitioner also proved that respondent was unfamiliar with relevant laws concerning cellar water closets. On three of his professionally certified applications for this zoning lot, respondent included a water closet in the cellar (Pet. Exs. 49, 57, 63). Petitioner argued that respondent's plans violated the Multiple Dwelling Law. Mult. Dwell. Law § 76(1)(b) ("No water-closet shall be installed, kept or maintained in a cellar or basement unless it is provided for lawful cellar or basement living rooms, or is supplementary to the required water-closet accommodations"). The Department routinely questions and seeks more information when plans include a cellar water closet, because such an unusual situation could "easily lead" to an illegal apartment, which is "a very large problem" throughout the city (Tr. 998-99).

Respondent testified that the water closets were lawful because they were supplementary to first floor dwellings. Asked to explain his understanding of "supplementary," respondent testified, "it adds comfort" to owners who live on the first floor of a multiple dwelling and "almost everybody" has at least a half bathroom in a cellar, which the Department "accepts it all the time" (Tr. 844-45). Respondent's expert witness also insisted that it was "common practice" to include a water closet in the cellar (Tr. 961).

Petitioner's witnesses asserted that, even if respondent legitimately included a water closet in a cellar, he was obligated to make notations justifying the need for such a feature and he failed to do so (Tr. 493-94, 998).

In essence, respondent contends, "everybody does it." That is not a defense. For starters, every professional does not routinely include water closets in cellars. Petitioner presented credible testimony that a water closet in a cellar is an "unusual situation" (Tr. 998-99). That is consistent with the law. The Multiple Dwelling Law generally prohibits cellar water closets. Supplementary water closets are an exception to the rule. Respondent's testimony and his routine plans for cellar water closets demonstrate that he considers the exception to be the rule. Such a practice reflects a lack of understanding of the law.

On two of this lot's applications, 50-11 103rd Street and 103-10 Alstyne Avenue, petitioner also cited respondent for errors regarding major fire safety issues. On both jobs, respondent applied for review under the 2008 Building Code, which requires information regarding sprinklers and two means of egress of each dwelling unit (Tr. 407; Pet. Exs. 49, 57). Respondent's plans did not refer to sprinklers or the dual-egress requirements (Tr. 426-27).

Respondent blamed these errors on his secretary (Tr. 717, 838). He testified that he had the option of filing both applications under the 1968 Building Code or the 2008 Building Code (Tr. 717). Respondent claimed that he meant to file under the less stringent 1968 code but his secretary made typographical errors on both applications (Tr. 717, 838). On December 18, 2008, the same day that the examiner filed objections, respondent sought to file corrected applications for both jobs (Pet. Exs. 49, 56. 57). The Department accepted one correction but rejected the other (Pet. Ex. 57; Tr. 717-19, 740).

I did not credit respondent's explanation. Isolated, minor typographical errors are understandable. For example, on another plan, respondent referred to the wrong lot number, and one of petitioner's objection sheets had the wrong year (Pet. Ex. 16, 63). Those are not major errors. Here, however, respondent's errors concerned the critical issue of fire safety. His plans failed to comply with fire safety requirements and he tried to excuse his errors by claiming that he had intended to apply less stringent requirements but a subordinate had blundered. Respondent is the professional who certified the plans. He bore responsibility for carefully reviewing them prior to submission. Repeated, similar, and serious errors demonstrate neglect or lack of competence. *See Pettit*, OATH 190/02 at 9 (rejecting defense of "typographical error" where architect professionally certified alteration application that he knew was ineligible for limited review, even though most of the audit objections were later resolved); *see also Dep't of Buildings v. Fekete*, OATH Index Nos. 1118/07 & 1119/07 at 10-11 (Oct. 26, 2007), *modified on penalty*, Comm'r Dec. (Jan 15, 2008), *modified sub nom. St. Clair Nation v. City of New York*, 60 A.D.3d 468 (1st Dep't 2009), *rev'd* 14 N.Y.3d 452 (2010) (engineer failed to exercise professional standard of care by submitting suspicious photographs that had been altered by another party, without carefully reviewing the photographs and detecting flaws).

In his post-hearing submission, respondent also noted that most professionally-certified applications have objections (Resp. Memo at 6-10). As petitioner's witnesses conceded, during

pre-screening they approve, without any objections, 50% or less of the professionally certified applications (Tr. 79-80, 157). One of petitioner's witnesses estimated that he only approved 5% of applications during initial review (Tr. 520-21). Based upon this evidence, respondent argued, the evidence was insufficient to prove that he failed to "demonstrate a professional standard of care" (Resp. Memo at 6-10). The high objection rate confirms that zoning laws are complex, that reasonable professionals can disagree, and that the Department takes pre-screening seriously. But that does not mean that petitioner failed to prove its case.

Respondent's argument ignores the exceptional nature of his errors. He submitted or adopted four plans for buildings on the same zoning lot, even though he knew that the plans contained obvious errors. He also knew about a mapped street that went through the lot, but he did not include that information on four plot plans. And he knew that he needed BSA approval before going forward with work on this lot, but he never disclosed that information to the Department. Respondent also failed to recognize the legal limitations on cellar water closets and he made repeated errors regarding fire safety requirements. These errors were not isolated or inconsequential. The evidence, as a whole, proved that respondent repeatedly demonstrated incompetence or lack of knowledge of applicable laws or regulations.

Respondent's conduct was similar to the errors that contributed to the loss of privileges in *Department of Buildings v. Pettit*, OATH Index No. 190/02 (July 30, 2002). There, an architect professionally certified plans without obtaining required approval from the Landmarks Preservation Commission (Landmarks). *Id.* at 5. The architect testified that he was "fully aware" of the requirement to obtain prior approval but given what he "perceived as Landmark's unjustified recalcitrance," he felt compelled to go forward without that entity's "blessing." *Id.* This tribunal found that the architect's admission that he knowingly failed to obtain the requisite prior approval from Landmarks, "amounts to an admission of the charged misconduct." *Id.* at 6.

Here, too, respondent repeatedly certified that his applications were "complete and in accordance with all applicable laws, including the rules of the Department of Buildings" (Pet. Exs. 48, 55). Yet respondent knew that his plans included obvious errors. As in *Pettit*, that concession was tantamount to admission of the charges. Another similarity with *Pettit* is that respondent knew that he needed approval from another government entity and failed to disclose that information to the Department. In *Pettit*, there was additional misconduct, the architect falsely certified that he had obtained Landmark's approval, but that does not alter the analysis.

In sum, respondent knew, or should have known, that his professional certifications were inaccurate. Most notably, he filed applications with obvious errors, he did not clearly disclose the mapped street, and he did not disclose the need for BSA approval. Petitioner presented credible evidence that such conduct violates the Building Code and demonstrates a failure to exercise a professional standard of care (Tr. 1005-07, 1008, 1019-20). *See* Building Code 27-157; *see also* Admin. Code § 28-104.7.1. Thus, the charges and specifications pertaining to the four jobs on 103rd Street and Alstyne Avenue should be sustained.

Allegations Regarding 244 85th Road

Petitioner cited a number of objections on a fifth job professionally certified by respondent, but the evidence failed to prove that these errors were as serious or as glaring as the 103rd Street and Alstyne Avenue applications, discussed above. Plan examiner Fatima Murillo testified that respondent's application for a new one-family home at 244-85th Road failed to include gutter measurements and it appeared that the gutter extensions exceeded 16 inches, in violation of zoning laws (Tr. 112; Pet. Exs. 18) Zoning Res. § 23-12 (Apr. 30, 2008) (limits on open space obstructions). In addition, Murillo testified that respondent proposed a drywell that was too close to the building's foundation (Tr. 125-28; Pet. Ex. 18). *See* Reference Standard 16 (Pet. Ex. 22). Respondent also designated the building as Class II-B construction and the plan examiner objected that the plans failed to demonstrate that a column, the roof, and exterior walls had the proper fire rating (Pet. Exs. 10, 18; Tr. 142). Moreover, respondent's plans included different measurements for front steps and a porch that seemed to extend, impermissibly, into a required open space (Tr. 118-122; Pet. Exs. 9, 18). Zoning Res. § 23-44 (Apr. 30, 2008) (limit on obstructions in rear yard or rear-yard equivalents).

Respondent resolved the objection to the gutter extension and the drywell by amending his plans and providing clarification (Tr. 116, 124). He conceded that he made an error with the construction classification and amended it to resolve the issue with the fire ratings (Tr. 138, 143-44). As for the objection to the front steps and porch, respondent sought further review and a borough commissioner agreed with him (Tr. 163-64).

Respondent's submission for this job could have been clearer and he could have exercised more care. However, petitioner failed to prove that this application was so deficient that it demonstrated negligence, incompetence, or lack of knowledge of relevant laws.

Failure to Explain Contract to Building Owner

In its post-hearing memorandum, petitioner faulted respondent for failing to explain professional certification to one owner, Mr. Patel, and asking another owner, Mr. Fernandez, to sign a contract written in English after negotiating the agreement in Spanish (Pet. Memo at 29-30). These claims were not included in the petition and adding it at this late stage would be unduly prejudicial. Furthermore, Mr. Patel signed the certification stating that he was aware that the application would be professionally certified (Tr. 561-63; Pet. Ex. 12). Though he recalled dealing with the contractor rather than respondent, that evidence was too equivocal to prove that Mr. Patel was unaware of the professional certification process (Tr. 561-63). As for Mr. Fernandez, the evidence showed that respondent, who is bilingual, fully discussed the plans with him and orally translated the contract. Respondent specifically advised Mr. Fernandez of the scope of the work needed, the obstacles faced, and the need to go to BSA for further approval (Tr. QQQQ). In addition, respondent introduced Mr. Fernandez to an attorney to assist with the BSA application (Resp. Ex. SSSS). Petitioner failed to prove that respondent failed to inform or misled either property owner.

FINDINGS AND CONCLUSIONS

1. Respondent's submissions to the Department displayed negligence or incompetence with regard to, or lack of knowledge of, the Building Code, Zoning Resolution, or other applicable laws and regulations, in violation of RCNY § 21-02(a)(1), as alleged in Charge I, specifications 1, 4, 5, and 6.

2. Respondent submitted four professionally certified applications in 2008 containing errors that demonstrate incompetence or lack of knowledge of applicable laws, in violation of Admin. Code § 28-104.2.1.3.2(ii), as alleged in Charge II, specifications 1, 4, 5, and 6.

3. Petitioner failed to prove that respondent's application for new building construction at 244-16 85th Road, Queens, displayed negligence, incompetence, or lack of knowledge of relevant laws in violation of RCNY § 21-02(a)(1) and Admin. Code § 28-104.2.1.3.2(ii), as alleged in Charge I, specification 2 and Charge II, specification 2.

4. Petitioner did not plead or prove claims regarding respondent's dealings with building owners.

RECOMMENDATION

Based upon the proven charges, the Department seeks to revoke respondent's filing privileges and to exclude him from its programs for limited supervisory check and professional certification of applications, plans and removal of objections. That sanction is excessive.

The Administrative Code does not mandate revocation of privileges for every architect or engineer who fails to exercise a professional standard of care. Instead, the Code provides for an array of sanctions for the proven charges, ranging from attaching conditions to or suspending respondent's privileges to excluding him from participating in the Department's professional certification program. Admin. Code § 28-104.2.1.3.2.

Permanent exclusion from the Department's professional certification program, the most severe sanction available, should be reserved for the worst cases, where there is fraud or no mitigation. *See, e.g., Pettit*, OATH 190/02 at 16 (exclusion from professional certification recommended, where architect demonstrated lack of knowledge of relevant laws and knowingly or negligently made false statements and failing to file required reports); *Dep't of Buildings v. Scarano*, OATH Index No. 2571/08 at 65, 68 (Mar. 1, 2010) (exclusion from professional certification program recommended where architect knowingly made false statement in two filings); *Dep't of Buildings v. Fernando*, OATH Index No. 2423/10 (Sept. 9, 2010) (exclusion from professional certification recommended where undisputed evidence showed that engineer submitted five professionally certified applications which demonstrated negligence, incompetence, or lack of knowledge of applicable laws, and no mitigation shown). Where there is no willful intent to deceive, or where there is mitigation, a lesser penalty is appropriate. *See, e.g., Dep't of Buildings v. Fekete (St. Clair Nation)*, OATH Index Nos. 1118/07 & 1119/07 at 10-11 (Oct. 26, 2007), *modified on penalty*, Comm'r Dec. (Jan 15, 2008), *modified sub nom. St. Clair Nation v. City of New York*, 60 A.D.3d 468 (1st Dep't 2009), *rev'd* 14 N.Y.3d 452 (2010) (where engineer negligently submitted doctored photographs, recommendation of revocation of privileges modified to two-year suspension and three years' probation); *Dep't of Buildings v. Nagan*, OATH Index No. 614/09 (Feb. 4, 2009), *modified on penalty*, Comm'r Dec. (Mar. 16, 2009) (where architect submitted two professionally certified applications, within 12 months, containing errors that resulted in permit revocations, recommended penalty of attaching

conditions to privileges rejected in favor of exclusion with right to seek reinstatement within one year, with other conditions).

Of those relevant precedents, respondent's case is most similar to *St. Clair Nation*. There, an engineer certified digitally altered photographs submitted in connection with a pavement plan, attested to the accuracy of a falsified photograph for another pavement plan, and offered a false application for alterations to a nonexistent second floor of another property. *Fekete (St. Clair Nation)*, OATH 1118/07 & 1119/07 at 21-22. Though the Department failed to prove intentional deception, the evidence showed that he negligently submitted false documents, and the Commissioner exercised discretion by imposing a penalty less than permanent exclusion.

Here, as in *St. Clair Nation*, the Department proved negligence on multiple filings. Unlike the respondents in *Pettit* and *Scarano*, respondent did not engage in intentional misconduct. As petitioner conceded, it did not accuse respondent of "deceit or duplicity" (Pet. Memo. at 18). That does not excuse his conduct, but it supports a lesser penalty.

It appears that respondent is a hard-working professional. He is an active member, and treasurer, of his local chapter the Society of National Professional Engineers (Tr. 650). He has filed more than 1200 applications in his 23 years of professional practice (Tr. 578-81). During the hearing, respondent defended his actions but he also credibly testified that, with the benefit of hindsight, he would be more explicit in his future filings with the Department (Tr. 902-03).

The Department and the public have a compelling interest in ensuring that engineers exercise an appropriate level of care when they professionally certify work. Respondent repeatedly failed to provide the expected level of care. Thus, a stern sanction is justified. However, respondent's lack of willful intent and the aberrational nature of his most serious errors favor a lesser penalty.

Accordingly, I recommend a two-year suspension of respondent's privilege to participate in the Department's limited supervisor review and professional certification program, followed by three years' probation. Prior to restoration of any privileges, the Department may also set appropriate conditions.

Kevin F. Casey
Administrative Law Judge

November 24, 2010

SUBMITTED TO:

ROBERT LIMANDRI
Commissioner

APPEARANCES:

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Commissioner's Decision (December 2, 2010)

I have completed my review of the Report and Recommendation in OATH Case Index No. 10-1557, dated November 24, 2010, of Administrative Law Judge Kevin F. Casey, who was designated to conduct a hearing on charges and specifications that were served upon respondent on December 18, 2009 [*see* attached December 18, 2009 *OATH Petition*]. I have further reviewed transcripts of the 5-day hearing, which concluded on August 5, 2010, at OATH before Judge Casey.

In his November 24, 2010 Report and Recommendation, Judge Casey found that multiple submissions by respondent to the NYC Department of Buildings [NYC-DOB] displayed negligence or incompetence with regard to, or lack of knowledge of, the Building Code, Zoning Resolution, or other applicable laws and regulations, in violation of RCNY § 21-01(a)(1), and that respondent repeatedly failed to provide the expected level of care in such professionally-certified applications.

Judge Casey recommended a two-year suspension of respondent's privilege to participate in DOB's limited supervisory review and professional certification program, followed by three years' probation.

A copy of Judge Casey's Report and Recommendation is attached.

I hereby adopt Judge Casey's findings of fact and find respondent in violation of the provisions of law cited in the OATH Petition. Accordingly, I hereby revoke respondent's privilege to file applications and plans with NYC-DOB pursuant to NYC Administrative Code § 28-104.2.1 and in accordance with the "Directive 14 of 1975" process and the "Professional Certification of Applications and Plans" process [Operation Policy and Procedure Notice 2/95], and any other professional certification procedures currently in effect or which may be instituted in the future.

Effective immediately, NYC-DOB will not accept any professionally certified application submitted by respondent pursuant to or in satisfaction of a requirement of the Construction Codes or of a rule of any agency.

After one (1) year from the date of this Order, respondent may seek reinstatement of the privileges recited above by submitting a written request to me. A decision to grant reinstatement

is at my sole discretion. In the event such privileges are restored, respondent shall be placed on probation in accordance with Administrative Code Section 28-104.2.1.3.2.1.

Additionally, respondent shall be required during the one-year period commencing as of the date of this Order to take a minimum of twenty-four (24) credit hours in classes relating to NYC Building Codes and Zoning (which credit hours shall not be applicable to any continuing education requirement imposed upon respondent as a Professional Engineer by NYS Office of the Professions).

Approval for any course respondent wishes to take toward fulfillment of credit hours required under this Order must be obtained from James Colgate, NYC-DOB Assistant Commissioner of Technical Affairs and Code Development, before taking such course. Proof of satisfactory completion of each course taken and credit hours obtained (which shall include, but not be limited to, course materials and respondent's handwritten course notes) shall be submitted to Assistant Commissioner Colgate for review and approval within five (5) business days after completion of the course.

Robert D. LiMandri
Commissioner