



SERVING DESIGN AND CONSTRUCTION PROFESSIONALS

January 19, 2021

**VIA EMAIL: [doreen.johnson@state.mn.us](mailto:doreen.johnson@state.mn.us)**

Doreen Johnson  
MN Board of AELSLAGID  
85 East 7<sup>th</sup> Place  
Suite 160  
St. Paul, Minnesota 55101

Re: Charles Marohn; Board File No. 2020-0043

Dear Ms. Johnson:

This office represents Mr. Marohn on the above Board file. Mr. Marohn works in the realm of urban planning policy development and advocacy nationally. He has had a career beyond reproach and is a national leader in a dialogue on public policy about building strong communities. He has broad local and national support for his work. Importantly, although he holds a license, Mr. Marohn is not a practicing professional engineer. As such, his case is unique, and requires a fresh and unique analysis from the Board. I write to request, respectfully, that the Board re-think its position here.

As the Board is aware, it reinstated Mr. Marohn's license in June 2020 without objection. Only later did the Board commence this disciplinary action, based on a complaint it had received several months prior to issuing the reinstatement. That complaint was filed by someone who does not agree with Mr. Marohn's philosophies on urban planning. As the Board has heard directly from Mr. Marohn already, his lapsed license was not intentional; it was a mistake, an oversight. Significantly, since 2012 - *so before, during, and after the lapse and the reinstatement* - Mr. Marohn has not been practicing as a professional engineer. He does not use his credentials to practice engineering, gain employment as a practicing engineer, or hold himself out as a practicing engineer. He does not perform engineering work (calculations, plans, etc.) that would impact the health, safety, and welfare of the public. He included his P.E. credential on his website and biographical data as a matter of fact, not to pursue or practice engineering in any way.

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Therefore, from his perspective, when he completed the renewal form for reinstatement of his license, he was being 100% truthful when he said he had not held himself out or practiced as an engineer during the time his license had been expired. He was being 100% truthful. He did not appreciate that merely using the credentials would be a violation of the rules when he was not, himself, practicing engineering in any form. That was his mistake. My point here is just that: At worst, Mr. Marohn made an innocent mistake.

### **ALLEGATIONS**

Based on these facts, the Board alleges Mr. Marohn may be in violation of Minn. Stat. §§ 326.02, subd. 1 and 3; 326.03, subd. 1; and 326.111, subd. 4(a)(1); Minn. R. 1805.0200, subpts. 1(B), 2, and 4. Those statutes and rules provide as follows:

#### § 326.02 LICENSURE OR CERTIFICATION.

Subdivision 1. Licensure or certification mandatory.

In order to safeguard life, health, and property, and to promote the public welfare, any person in either public or private capacity practicing, or offering to practice, \*\*\* professional engineering, \*\*\* either as an individual, a copartner, or as agent of another, shall be licensed or certified as hereinafter provided. It shall be unlawful for any person to practice, or to offer to practice, in this state, \*\*\* professional engineering, \*\*\* or to solicit or to contract to furnish work within the terms of sections 326.02 to 326.15, or to use in connection with the person's name, or to otherwise assume, use or advertise any title or description tending to convey the impression that the person is a \*\*\* professional engineer (hereinafter called engineer), \*\*\* unless such person is qualified by licensure or certification under sections 326.02 to 326.15. This subdivision does not preclude an individual who retired from one of the professions listed in this subdivision from using the designation \*\*\* professional engineer \*\*\* as long as the designation is preceded by the word "retired" and the individual was licensed or certified in the designated profession in the state of Minnesota on the date the individual retired from the designated profession and the individual's license or certification was not subsequently revoked by the Board \*\*\*.

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Subd. 3. Practice of professional engineering.

(a) Any person shall be deemed to be practicing professional engineering within the meaning of sections 326.02 to 326.15 who holds out as being able to perform or who does perform any technical professional service, such as planning, design or observation of construction for the purpose of assuring compliance with specifications and design, in connection with any public or private structures, buildings, utilities, machines, equipment, processes, works, or projects wherein the public welfare or the safeguarding of life, health, or property is concerned or involved, when such professional service requires the application of the principles of mathematics and the physical and applied engineering sciences, acquired by education or training, and by experience.

(b) No person other than one licensed under sections 326.02 to 326.15 as a professional engineer may:

- (1) use the term "professional engineer";
- (2) use any other abbreviation or term, including the initials "P.E." or "PE" by signature, verbal claim, sign, advertisement, letterhead, card, or similar means that would lead the public to believe that the person was a professional engineer; or
- (3) use any means or in any other way make a representation that would lead the public to believe that the person was a professional engineer.

(c) A professional engineering license satisfies any requirements by the state or its political subdivisions to perform any actions authorized under the professional engineering license. A person licensed as a professional engineer under sections 326.02 to 326.15 shall only be required to obtain a license, certification, or other form of approval for a skill or service in addition to a professional engineering license if the state or political subdivision has made an affirmative written determination in statute, rule, or ordinance that such additional license or certification is necessary to safeguard life, health, or property, or promote the public welfare. This section does not preclude the state or a political subdivision from including additional requirements when soliciting public contracts for engineering services. This paragraph does not apply to practice areas where licenses or certifications are required prior to August 1, 2015.

#### § 326.03 LICENSE OR CERTIFICATE REQUIRED.

Subdivision 1. Plans; documents.

No person, except an \*\*\* engineer \*\*\* licensed \*\*\* as provided for in sections 326.02 to 326.15 shall practice \*\*\* professional engineering \*\*\* in the preparation of plans, specifications, reports, plats or other \*\*\* engineering \*\*\* documents, or in the observation of \*\*\* engineering \*\*\* projects. In preparation of such documents, reasonable care shall be given to compliance with applicable laws, ordinances, and building codes relating to design.

#### § 326.111 UNAUTHORIZED PRACTICE; DISCIPLINARY ACTION.

Subd. 4. Actions against applicants and licensees. (a) The board may, by order, deny, refuse to renew, suspend, temporarily suspend, or revoke the application, license, or certification of a person; censure or reprimand that person; condition or limit the person's practice; refuse to permit a person to sit for examination; or refuse to release the person's examination grades if the board finds that the order is in the public interest and the applicant, licensee, or certificate holder:

- (1) has violated a statute, rule, or order that the board has issued or is empowered to enforce.

#### Minn. R. 1805.0200 OBLIGATION TO PROVIDE FULL DISCLOSURE.

Subpart 1. Public statements.

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B. A licensee or certificate holder shall be objective and truthful in all professional documents, including but not limited to plans, reports, statements, or testimony. The licensee or certificate holder shall consider relevant and pertinent information in such documents or testimony and express professional opinions publicly only when they are founded upon an adequate knowledge of the facts and a competent evaluation of the subject matter.

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Subp. 2. False statements and nondisclosure. A licensee or certificate holder shall not make a false statement or fail to disclose a material fact requested in connection with an application for certification, licensure, or renewal in this state or any other state.

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Subp. 4. General prohibitions. A licensee or certificate holder shall not:

- A. circumvent a rule of professional conduct through actions of another;
- B. engage in illegal conduct involving moral turpitude;
- C. engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- D. engage in conduct that adversely reflects on the licensee's fitness to practice the profession; or
- E. permit the licensee's or certificate holder's name or seal to be affixed to plans, specifications, or other documents that were not prepared by or under the direct supervision of the licensee or certificate holder.

#### **ANALYSIS**

This case presents a situation where a licensee who has not practiced engineering since 2012 inadvertently failed to renew in 2018. In June 2020, a colleague alerted him of his expired license. That same day, Mr. Marohn completed and submitted his paperwork to reinstate his license. He had already completed all the necessary CE courses and was ready to be reinstated.

In preparing his application, he did not consider the use of his credentials in his biographical materials related to his speaking engagements or written articles to be “holding out” as a licensee or practicing engineering – again because he associated that phrase with working as a professional engineer, which he has not done since 2012. That interpretation may have been a mistake on his part, given that licensees have imputed knowledge of the rules, but it was an innocent mistake.

The Board reinstated Mr. Marohn’s license without objection.

And yet, in its December 17, 2020, proposed Order, the Board asks Mr. Marohn to admit that he made an “untruthful statement” on his license renewal because he stated that he had not held himself out as a professional engineer without proper licensure and that conduct constituted “engaging in conduct involving dishonesty and misrepresentation.” Further, the Board seeks to censure and reprimand Mr. Marohn and impose a \$1500 penalty upon him.

Under Minnesota law, any misrepresentation, whether negligent or fraudulent, constitutes fraud under Minnesota law. *Juster Steel v. Carlson Cos.*, 366 N.W.2d 616, 618 (Minn. Ct. App. 1985). Scienter (intent) is a required element of fraud. *Florenzano v. Olson*, 387 N.W.2d 168, 177 (Minn. 1986). The elements of common law fraud are: a false misrepresentation of a material fact; knowledge by the person making the misrepresentation of its falsity; an intention that another rely on the statement; reliance in fact; and damages. Negligent misrepresentation requires the same elements as fraudulent misrepresentation, minus the scienter element. *Florenzano*, 387 N.W.2d at 173.

The Board's use of the words "dishonesty" and "misrepresentation" implicate a scienter requirement here on Mr. Marohn's part. No such intention was present. Mr. Marohn mistakenly missed his renewal in 2018. He has not been a practicing engineer since 2012. He does not sign documents, practice engineering, oversee anyone who practices engineering, work on any engineering projects, apply for any work as an engineer, or represent himself as an engineer (except for the errant use of his PE in his bio while lapsed). He does not use his credentials to seek work as a professional engineer. Given that background, he honestly did not consider himself to be practicing engineering or in any way holding out as a licensee during his period of lapsed license.

In other cases, the Board has been able to appreciate a licensee's mistake and respond accordingly. In *Kriens* (2019-0104), a certified interior designer ("CID") came to realize that she had intentionally used the term CID after she passed her NCIDQ exam, but before she obtained her certificate from the MN State Board. In addition to improperly using the "CID" credentials, she had signed plans for three MN projects. Despite her intentional conduct, the Board understood that her conduct was based on a mistaken understanding of the rules, not on her bad or fraudulent intention. The Board's order makes no reference to *Kriens'* dishonesty, misrepresentation, fraud, or dishonorable conduct.

Even more impactful is the Board's order in *Sveum* (2020-0017). There, a PE inadvertently allowed his license to lapse, but admittedly continued working as an engineer and signed plans on 15 projects without a license. The Board was able to understand *Sveum's* mistake in failing to renew. The Board's order makes no reference to his dishonesty, misrepresentation, fraud, or dishonorable conduct.

Both cases involved critical mistakes by persons governed by the Board who were actively practicing in their particular areas, signing documents, and holding themselves out in their respective disciplines without appropriate credentials. Yet the Board made no mention of dishonesty, misrepresentation, fraud, or dishonorable conduct. Because it understood the conduct was based on an innocent and human mistake or misunderstanding.

By further way of contrast on the opposite end of intent, I call your attention to *In re Alvah Breitweiser*, OAH Dec. 2, 2007 (2007 WL 4522667). There, the Board found that a licensee had

engaged in acts that were fraudulent, deceptive or dishonest and that adversely affected his ability or fitness to engage in the practice of architecture. His actions included a conviction for bank fraud in Florida, a felony “an element of which is dishonesty or fraud.” The Florida Board of Architecture then disciplined him. But when he applied for renewal of his MN license, he answered “no” to the question of whether there were any disciplinary actions taken against him in other jurisdictions (failing to disclose the Florida discipline). Thus, Breitweiser engaged in fraud or deception in the process of renewing his license. Breitweiser’s conduct was radically worse and much different than the conduct of Mr. Marohn, and is indicative of what the legislature might have meant by “fraudulent, deceptive or dishonest acts.” That conduct is not present here in the least.

These cases demonstrate the span of licensee conduct. These cases also demonstrate how the Board can treat a licensee who has made an innocent mistake. Mr. Marohn’s inadvertent lapse of license and mistaken use of his credentials in the interim pale in comparison to the conduct of Kriens and Sveum, who were both active practitioners whose unlicensed conduct threatened the health, safety, and welfare of the public on the many projects they improperly signed. Yet, the Board did not require them to admit to fraud, misrepresentation or any other dishonorable terms as it seeks to impose on Mr. Marohn.

In addition, the Board’s imposition of a penalty does not meet the requirements of Minn. Stat. §14.045. That statute requires the Board to consider these factors prior to imposing a penalty:

- (1) the willfulness of the violation;
- (2) the gravity of the violation, including damage to humans, animals, and the natural resources of the state;
- (3) the history of past violations;
- (4) the number of violations;
- (5) the economic benefit gained by the person by allowing or committing the violation;
- and
- (6) other factors that justice may require.

Minn. Stat. 14.045, subd. 3.

Here, there is no evidence of “willfulness” by Mr. Marohn, but rather an innocent mistake that any licensee could make under these unique circumstances where one is not practicing in his or her discipline. There is no gravity to this situation when viewed in context and reality, as it must be. This licensee is not a practicing engineer – and has not been since 2012. As such, he has not created any threat to the health, safety, and welfare of the public, nor was he seeking work as a professional engineer. He has no prior violations. He received no economic benefit from the alleged violation.

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These cases and statute suggest that the Board's current handling of Mr. Marohn's case is arbitrary, capricious, and an abuse of process susceptible to legal challenge. Mr. Marohn will not accept or consent to an Order that accuses him of fraud, misrepresentation, and/or any form of dishonorable conduct, or imposes censures or sanctions upon him. He does not want to have to pursue further legal remedies, but he will if we are not able to resolve this matter amicably.

Ms. Johnson, you know from my many years of service on the Board that I respect the Board and its authority. I am also a strong believer in – and protector of – proper process. I again caution the Board not to allow its complaint process to be co-opted by complainants who have ulterior motives. Here, the complainant has made clear to Mr. Marohn personally that he does not agree with his philosophies about urban planning and is seeking to discredit him through this process. The Board's current position will assassinate Mr. Marohn's character for no reason and irreparably damage his reputation and career, essentially carrying out the work that the complainant could not do without facing personal liability for defamation and damages claims. Additionally, the Board's current position will chill other licensees' exercise of free speech in the public arena, where the unfettered and respectful exchange of ideas is crucial for problem-solving, which is what design professionals are so great at doing.

I plead with the Board to reconsider its evaluation and proposed order. In other cases involving honest mistakes, the Board has acknowledged that fact and reflected that in the outcome of the case. Mr. Marohn deserves at least that consideration here, if not more, given the fact that he is not a practicing engineer.

Mr. Marohn has certainly learned a lesson about tracking his renewal dates more closely. He has also learned a very hard lesson about the importance of the proper use of his credentials and the impact of the MN rules. Please allow those lessons to be sufficient and close this matter with no action taken.

I look forward to hearing from you to discuss this matter further. I thank you sincerely for your consideration.

Very truly yours,



Kristine A. Kubes

cc: Charles Marohn (email only)