

SUPREME COURT OF NORTH DAKOTA

Berg, Apex, Olson, Miller, Welle, & Paustian v. North Dakota State Board of Registration for Professional Engineers and Land Surveyors

2018 ND 274 (2018) · No. Nos. 20170413-20170418 · Decided December 11, 2018

SUMMARY

The North Dakota Supreme Court reviewed disciplinary decisions by the North Dakota State Board of Registration for Professional Engineers and Land Surveyors concerning former Ulteig Engineers employees who formed a competing firm. The court held that the Board's findings regarding disclosure of confidential information, failure to disclose conflicts of interest, and improper solicitation of work were supported by a preponderance of the evidence, affirming in part and reversing in part the district court judgments.

CASE DETAILS

COURT	Supreme Court of North Dakota
WRITING FOR THE COURT	Jon J. Jensen, Justice; Jon J. Jensen; Gary H. Lee, District Judge, sitting in place of McEvers, J., disqualified; Gerald W. VandeWalle, Chief Justice; Jerod E. Tufte; Daniel J. Crothers
JURISDICTION	North Dakota
DECIDED	December 11, 2018
DOCKET	Nos. 20170413-20170418
DISPOSITION	other
PROCEDURAL POSTURE	The Board appealed district court judgments that affirmed in part, reversed in part, and remanded the Board's disciplinary decisions against the professional-engineer respondents. Berg, Miller, and Welle cross-appealed the determination that they had failed to disclose conflicts of interest.
STANDARD OF REVIEW	Under N.D.C.C. §§ 28-32-46 and 28-32-49, the Court reviews the administrative appeal in the same manner as the district court reviewed the agency decision. It does not make independent findings or substitute its judgment for the agency's; it asks whether a reasoning mind reasonably could have concluded the agency's findings were supported by the weight of the evidence from the entire record. The

	Court defers to the agency's credibility determinations and reviews the legal significance of established facts de novo.
PRECEDENTIAL VALUE	published and precedential
PARTIES	North Dakota State Board of Registration for Professional Engineers and Land Surveyors v. Michael Berg, Apex Engineering Group, Inc., Scott Olson, Dain L. Miller, Thomas Welle, Timothy Paustian

TOPICS

judicial review of agency action

agency adjudication

administrative law

standard of review

appellate procedure

PRACTICE AREAS

administrative law

professional licensing

employment law

appellate procedure

QUESTIONS PRESENTED

1. Whether the Board's findings that Welle, Miller, and Paustian disclosed Ulteig's confidential information were supported by a preponderance of the evidence.
2. Whether the Board's findings that Berg, Miller, and Welle failed to disclose known or potential conflicts of interest were supported by a preponderance of the evidence.
3. Whether the Board's findings that Berg, Olson, Welle, and Apex knowingly sought or accepted work for assignments for which Ulteig had been employed or contracted were supported by a preponderance of the evidence.
4. Whether the district court's attorney-fee awards to the respondents could stand after the Supreme Court affirmed the Board's disciplinary orders.

HOLDINGS

1. The Board's determination that Welle violated N.D. Admin. Code § 28-03.1-01-09 by disclosing Ulteig's confidential business and technical information, and by representing an adverse interest in the Fargo project, was supported by a preponderance of the evidence.
2. The Board's determination that Miller violated N.D. Admin. Code § 28-03.1-01-09 by disclosing confidential information relating to Ulteig's transportation sector was supported by a preponderance of the evidence.
3. The Board's determination that Paustian violated N.D. Admin. Code § 28-03.1-01-09 by transferring Ulteig computer files to an external drive and connecting that drive to an Apex computer was supported by a preponderance of the evidence.
4. The Board properly determined that Berg, Miller, and Welle violated N.D. Admin. Code § 28-03.1-01-10 by failing to disclose their participation in forming a competing firm while continuing to work for Ulteig and access its confidential information.

5. The Board properly determined that Berg, Olson, Welle, and Apex violated N.D. Admin. Code § 28-03.1-01-12(6) by knowingly seeking or accepting professional-services assignments for which Ulteig had been employed or contracted.
6. The district court's attorney-fee awards to the respondents were reversed because the awards were moot after the Supreme Court affirmed the Board's original disciplinary orders.

KEY QUOTATIONS

“In reviewing an agency’s findings of fact, we do not make independent findings of fact or substitute our judgment for that of the agency; rather, we determine only whether a reasoning mind reasonably could have concluded the agency’s findings were supported by the weight of the evidence from the entire record.” (¶ 12)

“Our role in reviewing the Board’s decision is not to act as a “super board.”” (¶ 13)

“The district court judgments against Berg, Apex, Olson, Miller, Welle, and Paustian are affirmed in part and reversed in part. The Board’s orders against Berg, Apex, Olson, Miller, Welle, and Paustian are affirmed.” (¶ 46)

FACTUAL BACKGROUND

Berg, Olson, Miller, Welle, and Paustian were employees of Ulteig Engineers, Inc.; Olson was terminated in 2009, and the others resigned in November 2010. Before leaving, the respondents planned and formed Apex Engineering Group, a competing firm, while some continued to hold positions involving Ulteig's clients, projects, and confidential information. The Board found that some respondents disclosed confidential Ulteig information, failed to disclose potential conflicts of interest, and knowingly sought work on projects for which Ulteig had been contracted.

PROCEDURAL HISTORY

After an administrative hearing, the Board found the respondents violated provisions of the professional engineers' code of ethics and imposed suspensions or reprimands. The district court affirmed the conflict-of-interest violations, reversed the confidentiality and improper-solicitation violations, remanded for reconsideration of discipline, and awarded attorney fees. The Supreme Court affirmed the conflict-of-interest determinations, reversed the district court's reversals of the other violations, reversed the attorney-fee awards, and affirmed the Board's orders.

DISPOSITION

other

CASES CITED

- Crawford v. Director, North Dakota Department of Transportation, 2017 ND 103, 893 N.W.2d 770
- Power Fuels, Inc. v. Elkin, 283 N.W.2d 214 (N.D. 1979)
- Koehly v. Levi, 2016 ND 202, 886 N.W.2d 689
- Bell v. North Dakota Department of Transportation, 2012 ND 102, 816 N.W.2d 786

- Sletten v. Briggs, 448 N.W.2d 607 (N.D. 1989)
- Singha v. North Dakota State Board of Medical Examiners, 1998 ND 42, 574 N.W.2d 838
- Skjefte v. Job Service North Dakota, 392 N.W.2d 815 (N.D. 1986)
- Landrum v. Workforce Safety and Insurance Fund, 2011 ND 108, 798 N.W.2d 669
- Johnson v. Elkin, 263 N.W.2d 123 (N.D. 1978)
- State v. Cromwell, 72 N.D. 565, 9 N.W.2d 914 (1943)
- Osborne v. Brown & Saenger, Inc., 2017 ND 288, 904 N.W.2d 34

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