

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE BOARD OF REGISTRATION FOR ARCHITECTS, ENGINEERS AND
LAND SURVEYORS**

In the Matter of)
)
MICHAEL J. WARD) OAH No. 10-0455-AEL
) Agency No. 2010-0000836
_____)

DECISION

I. INTRODUCTION

Michael Ward applied for registration as an engineer in Alaska. He has several prior convictions for Driving Under the Influence (DUI), including one recent DUI. The Board of Registration for Architects, Engineers, and Land Surveyors decided that this criminal history showed a lack good character, and denied his application. Mr. Ward has appealed that denial.

The lack of good character is a basis for denying an application for registration, though the facts on which the Board evaluates the applicant's character must be related to the practice of engineering. Mr. Ward presented additional evidence concerning the relationship between his conduct and his work as an engineer. He also presented other evidence about his character. Based on this evidence, Mr. Ward has met his burden of demonstrating that the Board should exercise its discretion to approve his application for registration.

II. FACTS¹

On August 9, 2010, the Board denied Mr. Ward's application for registration as an engineer. The letter explaining the basis for the denial states:

Specifically, the board determined that your application does not meet the requirements of AS 08.48.171 because of excessive citations for driving under the influence (DUI). AS 08.48.171 states in part that "An applicant for registration as an architect, engineer, and surveyor, or landscape architect must be of good character and reputation."^[2]

Mr. Ward's application had disclosed five prior criminal offenses.³ He was arrested for Driving Under the Influence (DUI) in 1999.⁴ He had another DUI in 2001. Mr. Ward was also

¹ Unless otherwise stated, factual findings are based on Mr. Ward's testimony.

² Exhibit 4.

³ Exhibit 1, page 5.

⁴ This resulted in a guilty plea, but judgment was withheld. Exhibit 10.

arrested for breach of peace in 2001⁵ and for driving without privileges in 2002. In 2003 he was convicted of Delaying an Officer.⁶ In February of 2010, Mr. Ward was convicted of a third DUI.⁷ This offense was not listed on his application, but the application only asks about convictions and he had not been convicted as of the application date.⁸

Mr. Ward graduated in 1992 with a B.S. in Engineering. He served as an engineer in the Public Health Service for several years, and then practiced professionally in the private sector. He is currently licensed in nine states, and he has never been disciplined by any board or agency that exercises regulatory authority over engineers. Mr. Ward has submitted several affidavits that attest to his professional competence or his community involvement.⁹ One affidavit is from David Leslie, who has worked with Mr. Ward for 11 years and supervised him for five of those years. A second affidavit is from his alcohol counselor, and a third is from his probation officer. The other five affidavits are from people who know Mr. Ward from his various volunteer activities.

Mr. Ward has recently joined a committee working to create a Safe Rider Program in Hailey, Idaho, the community where Mr. Ward lives. That program is intended to provide safe rides home for people who might otherwise drive while intoxicated.

III. DISCUSSION

A. The Requirement of Good Character

As an applicant for registration as an engineer by comity, Mr. Ward “may, upon application, be registered in accordance with the regulations of the board” if “in the opinion of the board [he] meets the requirements of [AS 08.48], based on verified evidence ...”¹⁰ Use of the word “may” in the quoted statute, and in a related regulation,¹¹ indicates that the Board has discretion to approve an application for registration by comity if the applicant meets the statutory requirements, but may not approve such an application if the verified evidence reveals that the

⁵ According to Mr. Ward, his argument with a door man escalated to the point where he was charged with this offense. There was no resulting conviction. Record at 73.

⁶ Again according to Mr. Ward, he was riding his motorcycle with a friend. A police officer stopped the friend to warn him of elk in the road ahead, and expected Mr. Ward to stop as well. Mr. Ward did not see the officer and, therefore, did not stop. The officer pursued Mr. Ward and charged him with this offense. Record at 73.

⁷ Exhibit 2.

⁸ Mr. Ward did disclose this conviction prior to the Board’s consideration of his application. Exhibit 2.

⁹ Exhibits A – L.

¹⁰ AS 08.48.191(b).

¹¹ See 12 AAC 36.105(a). Like the quoted statute, this regulation uses the permissive word “may,” rather than a mandatory word such as “shall” or “must,” or a word such as “will” that can be viewed as mandatory, predictive or making a commitment.

applicant fails to meet a requirement of AS 08.48. By regulation, the Board has committed to approve an application if three criteria are met; the third one echoes the need for the applicant to meet the requirements of AS 08.48.¹² One such requirement is that an applicant “must be of good character and reputation”¹³

“Good character” is not defined in the applicable statutes or regulations. The term means different things to different people. Without some limitation, an applicant could be denied registration for being arrogant, inconsiderate, disrespectful, or immature, all of which could be considered bad character traits. In deciding where to place that limitation, the Board is free to apply a common sense interpretation of the statutory requirement that registered professionals be of good character.¹⁴ The interpretation adopted should be one that assists the Board in supervising the professions subject to its jurisdiction.

The exercise of the Board’s disciplinary powers is one way in which the Board supervises the professions under its jurisdiction. These disciplinary powers are aimed at three categories of registered professionals: Those who have obtained a certificate of registration wrongfully; those who have acted negligently or wrongfully in the practice of the profession; and those who have violated AS 08.48 or regulations adopted pursuant to that statute.¹⁵ Imposing various levels of discipline helps the Board protect the public from improper or dangerous conduct.

Another way in which the Board protects the public and supervises those subject to its jurisdiction is in deciding whether to grant a certificate of registration by comity. It does this, in part, by requiring that applicants be of good character.¹⁶ Character traits that the Board is concerned with – and thus should be within its definition of good character – are those that have some relationship to whether an applicant is likely to comply with the standards of practice applicable to the profession. In order to deny an application based on the lack of good character,

¹² 12 AAC 36.010(c).

¹³ AS 08.48.171.

¹⁴ *Squires v. Alaska Board of Architects, Engineers, & Land Surveyors*, 205 P.3d 326, 334 (Alaska 2009).

¹⁵ AS 08.48.111.

¹⁶ AS 08.48.171.

there must be some relationship or nexus between the act or acts used to show lack of good character and the practice of the applicant's profession.¹⁷

The Board found that Mr. Ward's DUI history demonstrated a lack of good character based on the information before it prior to the hearing. Because the Board denied Mr. Ward's application for registration, he has the burden of proving by a preponderance of the evidence that his DUI history does not undermine his good character for purposes of practicing as a registered engineer.¹⁸ Preponderance of the evidence means that something is more likely true than not true. Thus, he needed to show through the hearing process that, more likely than not, a nexus between his DUIs and the practice of engineering does not exist. Failing that, he needed to show that his character is sufficiently good that the Board should exercise its discretion to issue a certificate of registration notwithstanding his DUIs.

B. The Nexus between Mr. Ward's DUIs and Engineering

Mr. Ward argued that any acts thought to show a lack of good character must be related to the Code of Professional Conduct adopted by this Board. That code specifically relates to conduct occurring during the practice of the profession. For example, a registered engineer must act with complete integrity "in professional matters."¹⁹ A registrant must also recognize that his primary obligation is "to protect the safety, health, property, and welfare of the public in the performance of his or her professional duties."²⁰ The Code of Professional Conduct does not impose a duty of good conduct outside of the performance of a registrant's profession. Thus, it is plausible to argue that acts demonstrating a lack of "good character" that are not performed as part of the registrant's profession are simply outside the scope of the Board's concern and cannot be used as a basis for denying a license.

However, the Supreme Court has held that revocation of a professional license may be based on conduct that occurred outside of the scope of one's professional duties.²¹ It logically follows that, in deciding whether specific conduct justifies denial of a license or registration,

¹⁷ See *Kenai Peninsula Board of Education v. Brown*, 691 P.2d 1034, 1040 – 1041 (Alaska 1984). *Brown* held that proof of a nexus between the asserted immoral conduct and the profession at issue – teaching – was not necessary because the legislature had specifically defined "immorality" as it related to the teaching profession. The implication of the court's reasoning is that proof of the nexus is required when there is no statutory or regulatory definition. This issue was discussed in more detail in the Ruling in *Limine on Good Character Evidence*, entered on January 10, 2011. Attachment A.

¹⁸ AS 44.62.460(e)(2).

¹⁹ 12 AAC 36.200 (emphasis added).

²⁰ 12 AAC 36.210(a)(1) (emphasis added).

²¹ *Wendte v. State, Board of Real Estate Appraisers*, 70 P.3d 1089, 1092 (Alaska 2003).

boards may consider conduct that occurred outside the scope of the applicant's professional duties.²² In determining whether Mr. Ward is of good character, the Board may look at conduct that did not occur in the performance of his profession though, as discussed above, there must still be some nexus between the conduct and the practice of the profession.

The Division of Corporations, Business and Professional Licensing argued that Mr. Ward's DUI convictions were related to the practice of the profession as they show poor judgment, an inability to comply with rules of proper behavior, and a disregard for the safety and welfare of others. According to the Division, a registered engineer must exercise good judgment, must comply with the statutory and regulatory rules of the profession, and must be mindful of public safety and welfare.

The Division is correct; there is a nexus between Mr. Ward's acts and the practice of the profession. Based on Mr. Ward's descriptions of his three DUIs, there is a legitimate question as to whether he would comply with the rules of proper behavior. His explanations also show that he has exhibited poor judgment. He admitted to the first DUI in 1999 without any additional explanation.²³ He states that his 2001 conviction resulted from a plea that was against his wishes. Mr. Ward asserts that he was helping his friend put a bicycle in the back of his idling truck. Mr. Ward was not driving because he had had too much to drink. His friend was in fact driving but would not admit this because he did not have a valid license. According to Mr. Ward, he was arrested for DUI because it was his vehicle and neither person would tell the police officer who was driving.²⁴

An engineer must be willing to affirmatively report violations of AS 08.48 and applicable regulations.²⁵ Mr. Ward's refusal to inform a police officer that his friend was driving without a license calls into question whether he would report professional violations by colleagues or his employer.²⁶ There is a sufficient nexus between Mr. Ward's conduct related to this DUI and the obligations of a registered engineer for the Board to consider this conduct in deciding whether Mr. Ward has the required good character for registration.

²² *In re Deborah Lynn Wilson*, OAH No. 07-0199-DEN (Alaska Board of Dental Examiners 2007), at 7 n.53. (Behavior that justifies revocation of a license would also justify denial of a license.)

²³ Exhibit 1, page 7.

²⁴ *Id.*

²⁵ 12 AAC 36.210(a)(6). *See also* 12 AAC 36.210(a)(2), (a)(5), & (b).

²⁶ A registered engineer must be willing to "inform the board if he or she has knowledge or reason to believe that another person or firm might be in violation of AS 08.48 . . ." 12 AAC 36.210(a)(6).

Mr. Ward's explanation for his 2010 DUI conviction also shows poor judgment. He had two beers and three whiskeys within about one hour.²⁷ He then decided to drive the short distance home, thinking that the alcohol would not have entered his bloodstream yet.²⁸ He further explained that he did have an elevated blood alcohol level "when finally tested two hours after the stop."²⁹

Driving immediately after drinking involves risk. It is difficult to know precisely when one will become influenced by previously consumed alcohol. The willingness to engage in this type of behavior is related to the profession of engineering since people willing to take risks in their personal life might also be willing to take professional risks. There is a sufficient nexus between Mr. Ward's conduct related to this DUI and the obligations of a registered engineer for the Board to consider this conduct in deciding whether Mr. Ward has the required good character for registration.

Because there is a nexus between these two DUIs and the engineering profession, it was reasonable for the Board to deny Mr. Ward's application initially, before it had the benefit of additional evidence of good character brought out through the hearing process.

C. The Evidence of Mr. Ward's Good Character

As permitted by statute,³⁰ Mr. Ward presented the affidavits of several witnesses who attested to his good character and reputation.³¹ Exhibit B is a letter from Mr. David Leslie, P.E., who is a Regional Manager of POWER Engineers and who is also Mr. Ward's supervisor. Mr. Leslie's affidavit indicates at least some awareness of Mr. Ward's DUIs, though the extent of his knowledge was not established.³² Mr. Leslie states:

On a professional level, Mr. Ward is always aware of the responsibilities of a professional engineer in serving the public good as well as the project interests and his technical competence is quite high. I have worked with Mr. Ward in many capacities over the last eleven (11) years the past five (5) years as his supervisor, and have never experienced a situation where his focus and dedication to his work has not been of the highest quality. He has a solid reputation among his peers as a professional engineer.^[33]

²⁷ Exhibit 3.

²⁸ *Id.*

²⁹ *Id.*

³⁰ AS 44.62.470.

³¹ Exhibits B – H & J – L.

³² Neither party called Mr. Leslie as a witness during the hearing. Mr. Ward relied on the affidavit; the division did not ask to call Mr. Leslie for cross examination.

³³ Exhibit B, page 1.

Mr. Leslie goes on to discuss Mr. Ward's volunteer activities and concludes by suggesting that the information disclosed in the background check on Mr. Ward only tells part of the story. According to Mr. Leslie, Mr. Ward has a very good professional reputation and a history of service to others and is of good character.

Most of the other affidavits consist of glowing descriptions of Mr. Ward's volunteer activities within the community. It is not evident from these affidavits that the affiants are aware of Mr. Ward's DUIs, but it is clear that he has been an active community volunteer. It also appears that at least in terms of his volunteer activities, he has a reputation for good character.

Exhibit J is a sworn statement from Greg Greenfield.³⁴ Mr. Greenfield is an addiction counselor who founded and operates Renaissance Alliance, Inc., a non-profit mental health clinic. After his 2010 DUI, Mr. Ward was required to attend an alcohol awareness course taught by Mr. Greenfield. The course consisted of eight sessions, each of which was at least one hour long.³⁵ Mr. Greenfield stated that at first Mr. Ward seemed not to fully accept responsibility for his actions but by the end of the course had accepted responsibility. Mr. Greenfield's affidavit states, in part:

Mr. Ward participated in an educational class series in which substance abuse was the issue and was addressed in a physiological, psychological and sociological path. Mr. Ward was very honest and [sic] forthright in his participation demonstrating a high regard for the law and the seriousness of his oversight that led him to our classroom.

* * *

Mr. Ward does not fall under [accepted] criteria for substance dependence. Mr. Ward demonstrated no cognitive impairment, was compliant with all aspects of the program and prompt with the financial obligation to his classes. Mr. Ward was a model participant in our program and was a pleasure to work with.^[36]

Mr. Greenfield's affidavit and testimony establish that Mr. Ward does not have an undiagnosed addiction. This evidence also shows that Mr. Ward has learned to accept responsibility for his actions rather than attribute events to circumstances beyond his control.

Mr. Ward testified that he has been a professional engineer for nearly 20 years, and that he is licensed in nine different states. He has never been disciplined by any board or other licensing authority having jurisdiction over engineers. There is no indication in the record of any

³⁴ Mr. Greenfield was also called as a witness and was cross-examined by the Division's attorney.

³⁵ Testimony of Greg Greenfield.

³⁶ Exhibit J.

disciplinary action or prior license denial. Nor is there any evidence in the record that his drinking has interfered with his professional responsibilities.

Mr. Ward's testimony suggests that he now recognizes the serious impact his prior behavior has had on his professional life and how similar behavior in the future could be devastating to his career. Even if he did not view DUIs as serious offenses before, he does now. Between the education classes he took from Mr. Greenfield and the initial denial of his registration in Alaska, he has a new understanding that drinking and driving is unacceptable.

Mr. Ward has worked for nearly 20 years as a professional engineer without any indication that he has exercised poor judgment in his professional life. He has been able to separate the lapses in judgment in his personal life from his conduct in his professional and volunteer activities, and he likely will be able to continue to do so in the future.³⁷ This is especially true now because the repercussions of his most recent DUI appear to have changed his attitude towards drinking and driving. Based on the additional evidence presented at the hearing, it is unlikely that he will use poor judgment in his professional activities as an engineer. It is also unlikely that he would fail to comply with the rules and regulations applicable to a registered engineer. Mr. Ward has met his burden of proof to show that he has the necessary good character and reputation to be a registered engineer in Alaska.

IV. CONCLUSION

Mr. Ward had the burden of proving by a preponderance of the evidence that he is of good character and reputation to be a registered engineer in Alaska. He has met this burden despite the lapses in judgment shown through his prior DUIs. Because he proved through the hearing process that he has learned the seriousness of driving after drinking alcohol, does not appear to have an alcohol dependency problem, and has taken steps to reform his behavior, the Board should exercise its discretion to approve his application to be a registered civil engineer in Alaska.

DATED this 11th day of February, 2011.

By: Signed
Jeffrey A. Friedman
Administrative Law Judge

³⁷ This is not intended to suggest that Mr. Ward will in fact show poor judgment in his personal life in the future, but if that does happen, he will continue to be able to separate that area of his life from his professional life.

Non-Adoption Options

A. The Board of Registration for Architects, Engineers, and Land Surveyors, in accordance with AS 44.64.060, declines to adopt this decision, and instead orders under AS 44.64.060(e)(2) that the case be returned to the administrative law judge to

take additional evidence about _____;

make additional findings about _____;

conduct the following specific proceedings: _____.

DATED this _____ day of _____, 2011.

By: _____

Signature

Name

Title

B. The Board of Registration for Architects, Engineers, and Land Surveyors, in accordance with AS 44.64.060(e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as follows:

The Board rejects the proposed decision and denies Mr. Ward's application

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 5th day of May, 2011.

By: Signed _____

Signature

Richard C. Heieren _____

Name

Chair _____

Title

[This document has been modified to conform to the technical standards for publication.]

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In the Matter of)
)
 MICHAEL J. WARD) OAH No. 10-0455-AEL
) Agency No. 2010-0000836
_____)

RULING IN LIMINE ON GOOD CHARACTER EVIDENCE

The Board of Registration for Architects, Engineers, and Land Surveyors found that Mr. Ward lacked the required “good character” to be a registered engineer. This determination was based on Mr. Ward’s criminal history which allegedly includes three DWI convictions.

As part of its prehearing brief, the Division has asserted that the Board “may use Mr. Ward’s criminal history without first establishing a nexus behind his convictions and his ability to fulfill his duties as an engineer.”³⁸ Having reviewed the authority cited for the Division’s position, I have reached a different conclusion and believe that the Division must show a nexus between Mr. Ward’s criminal history and the practice of the profession of engineering.³⁹

Alaska’s professional licensing statutes treat criminal convictions in a variety of ways. Many statutes permit the denial of a license to an applicant for a criminal conviction only when that conviction is related in some way to the ability to practice the profession.⁴⁰ For other professions, the legislature has specifically said that a license can be denied based on a conviction for any felony,⁴¹ or for any crime of moral turpitude.⁴² In some cases, the legislature has created a more complex scheme by specifying that a license can be denied based on some felonies, while the commission of other felonies would result in a license denial only if the crime was related to the applicant’s ability to practice the profession.⁴³ None of these statutes require

³⁸ Prehearing brief at 4.

³⁹ This is a preliminary ruling which may be revised based on any additional argument or legal authority provided by the parties.

⁴⁰ E.g. AS 08.06.070(4) (Acupuncture); AS 08.11.080(4) (Audiologist); AS 08.20.170(a)(4) (Chiropractor); AS 08.45.060(4) (Naturopath); AS 08.68.270(2) (Nurse); AS 08.84.120(3) (Physical Therapist).

⁴¹ E.g. Licensed Professional Counselors, AS 08.29.400(2).

⁴² E.g. Morticians, AS 08.42.090(13).

⁴³ E.g. Doctors, AS 08.64.240(b), AS 08.64.326(a)(4).

ATTACHMENT A

that the crime be committed as part of the practice of the profession; at most, they only require some nexus between the criminal act or type of crime and the profession.

In *Kenai Peninsula Borough Board of Education v. Brown*,⁴⁴ the Alaska Supreme Court held that where the legislature has specifically stated that a license can be revoked for conviction of a class of crimes there is at least a presumption of a nexus between the crime and the person's fitness to practice that profession. Brown, a teacher, had been convicted of diverting electricity, which was considered to be theft. AS 14.20.170(2) allowed for the dismissal of a teacher for immorality, which is defined in AS 14.20.170(2) as any act that constitutes a crime of moral turpitude.⁴⁵ Brown argued that he could not be dismissed unless there was a nexus between his criminal conduct and his fitness, capacity or ability to be a teacher.⁴⁶ The Supreme Court disagreed. It held:

The determination of what constitutes immorality is not left to the Board's discretion. Immorality is defined in the statute as an act constituting a crime involving moral turpitude. By defining immorality in this manner the legislature obviated the need for a separate showing of nexus. The finding that a crime involving moral turpitude has been committed raises at least a presumption that there is a nexus between the teacher's act and the teacher's fitness to teach.^[47]

In reaching this holding, the court distinguished the Alaska statute from statutes in other jurisdictions which did not define "immorality."⁴⁸ In those other jurisdictions, courts had held that there must be a nexus between the crime and the applicant's fitness for the profession in order to avoid applying a broad interpretation that could result in discipline for laziness, vanity, avarice, or cowardice, any of which, according to at least one court, could be considered "immoral."⁴⁹

The Division relies on *Brown* and *Wendt* for the proposition that this Board can decide that a person who has been convicted of a crime of moral turpitude⁵⁰ does not have the requisite good character to be a licensed engineer without showing any nexus between the particular crime

⁴⁴ 691 P.2d 1034, 1041 (Alaska 1984).

⁴⁵ Theft is a crime of moral turpitude. *Brown*, 691 P.2d at 1039.

⁴⁶ *Brown*, 691 P.2d at 1040.

⁴⁷ *Id.* at 1040 – 1041. See also *Wendte v State, Board of Real Estate*, 70 P.3d 1089, 1091 – 1092 (Alaska 2003) (License revocation upheld without showing of nexus based on statute allowing revocation for crime of moral turpitude).

⁴⁸ *Id.* at 1040.

⁴⁹ *Id.* at 1040 (citing *Morrison v. State Board of Education*, 82 Cal.Rptr. 175 (1969)).

⁵⁰ For purposes of this order, it is assumed without deciding that DWI is a crime of moral turpitude.

and the practice of the profession. While the legislature has created a presumptive nexus in some licensing statutes, it has not done so for the statute applicable here.

AS 08.48.171 sets out the requirements for registration as an engineer. The relevant portion states: “An applicant for registration as an . . . engineer . . . must be of good character and reputation.”⁵¹ Unlike the statute relied on in *Brown* which specifically defined immorality, there is no statutory definition of “good character.” Nor has the legislature passed a statute that says conviction of a certain class of crimes is grounds for denying registration. Absent a legislative finding that all crimes or a class of crimes are related to the ability to practice the profession of engineering, or a regulation to that effect, there is no presumption of a nexus between Mr. Ward’s criminal history and his fitness for the profession of engineering.

Mr. Ward’s application for registration may be properly denied if he is not of good character. If it is found at the hearing that there is a nexus between DWI’s and the profession of engineering, then the existence of Mr. Ward’s criminal convictions could be relied on by the Board in denying his application without showing anything further about the specifics of those convictions or the underlying facts behind them. Otherwise, it would be necessary to determine whether the specific facts related to Mr. Ward’s criminal convictions demonstrate a lack of good character related to the practice of the profession.

If, at the hearing, the Division makes a *prima facie* showing of a nexus between driving while intoxicated and the practice of the profession of engineering, then Mr. Ward will have the burden of proving that nexus does not exist. If that nexus is found not to exist, Mr. Ward will still have the burden of proving that he is of good character as his character relates to the practice of the profession of engineering.⁵²

DATED this 10th day of January, 2011.

By: Signed
Jeffrey A. Friedman
Administrative Law Judge

⁵¹ AS 08.48.171.

⁵² Even if a nexus is found, Mr. Ward would have the opportunity to show why the Board should exercise its discretion and approve his registration despite his criminal history. *Brown* 691 P.2d at 1041.