

DECISION AND REASONS ON PENALTY

In the matter of a hearing under the *Professional Engineers Act*, R.S.O. 1990, c. P.28; and in the matter of a complaint regarding the conduct of ALI D. TAHA, P.ENG., a member of the Association of Professional Engineers of Ontario, and GAD TECHNOLOGY INC., a holder of a certificate of authorization.

This is the Decision and Reasons on Penalty further to this panel's Decision and Reasons on the merits of this matter issued May 2, 2019. In its decision on the merits, this panel found the member, Ali D. Taha, P.Eng., and the holder, GAD Technology Inc. (GTI), guilty of professional misconduct in relation to the design of an energy-generating solar tracking device prototype. Specifically, the panel found that Mr. Taha and GTI were guilty of professional misconduct under sections 72(2)(a) (negligence), (b) (failure to make reasonable provision for the safeguarding of life), (h) (undertaking work not competent to perform) and (j) (unprofessional conduct) of Ontario Regulation 941 of the *Professional Engineers Act* (the act).

With the parties' consent, the panel conducted the penalty phase of the hearing in writing. The Association of Professional Engineers of Ontario (the association) provided its written penalty submissions on May 10, 2019. Mr. Taha and GTI retained Mr. Mark Fahmy, who then provided written penalty submissions on June 21, 2019. The association also provided reply penalty submissions on July 5, 2019.

The panel convened an oral hearing on August 20, 2019, to issue its decision orally. Mr. Fahmy was not present, but he briefly participated in the hearing by teleconference. In its oral decision, the panel ordered that Mr. Taha be reprimanded and required him to complete the professional practice examination, that his licence be suspended for a month and permanently carry a term or condition that he practise only in the area of mechanical engineering, that he and GTI pay costs of \$2,000 and that the panel's order be published with the names of the defendants. The panel's reasons follow.

THE PENALTY SOUGHT BY THE ASSOCIATION

The association submitted that its requested penalty satisfies the five objectives of penalty: the protection

of the public, the maintenance of the reputation of the profession in the eyes of the public, general deterrence, specific deterrence and rehabilitation. The association sought:

- (a) that Mr. Taha be reprimanded, and the fact of the reprimand be recorded on the register permanently, pursuant to subsection 28(4)(f) of the act;
- (b) that Mr. Taha's licence be suspended for one month, pursuant to subsection 28(4)(b);
- (c) that it be a term, condition, limitation and restriction on Mr. Taha's licence that he engage in the practice of professional engineering only in the area of mechanical engineering, pursuant to subsections 28(4)(d) and 28(4)(e);
- (d) that it be a term or condition on Mr. Taha's licence that he shall, within fourteen months of the date of this penalty decision, successfully complete the association's professional practice examination (PPE), pursuant to subsection 28(4)(d);
- (e) that, if Mr. Taha does not successfully complete the PPE as ordered, his licence be suspended until he successfully completes the PPE or for 24 months (whichever comes first) pursuant to subsections 28(4)(b) and (k);
- (f) that this Decision and Reasons on Penalty be published, together with the names of the defendants, in the official publication of the association, pursuant to subsection 28(5);
- (g) that the defendants pay costs to the association of \$10,000 within three months of this decision, pursuant to subsection 28(4)(j), and that this be a joint and several obligation on them.

THE ASSOCIATION'S SUBMISSIONS ON PENALTY

The association argued that, in severely under designing structures that were installed on a residential property and largely failed, Mr. Taha's work imperiled the public. The association submitted that both the restriction on Mr. Taha's practice and the requirement to pass the PPE should assist in ensuring that Mr. Taha's conduct will not imperil the public in the future.

The association asserted that an aggravating factor was that Mr. Taha did not obtain assistance from a qualified structural engineer and took no responsibility for the problems at the time of their occurrence. Moreover, he denied liability and treated the matter as a civil monetary dispute, without considering his professional responsibilities. The association argued that a serious penalty is needed as specific deterrence to Mr. Taha to ensure that in the future, his work remains within his area of competence and that he meets his professional and ethical responsibilities; in this regard, the suspension and the requirement to pass the PPE will reinforce his responsibilities and, hopefully, deter him from reoffending. The association added that the requirement to pass the PPE will also assist in Mr. Taha's rehabilitation.

Regarding general deterrence and maintenance of the reputation of the profession in the eyes of the public, the association stressed that the profession must clearly be held to a high standard and that Mr. Taha's conduct must be dealt with seriously. It argued that, together, the suspension, the publication with names and the restriction on practice will show that the profession properly deals with its obligations under the act to regulate its members and to protect the public.

Finally, the association argued that Mr. Taha contested the matter, and it was required to summons two witnesses and have the expert testify, which resulted in \$11,101.98 in total costs. In the circumstances, the association submitted costs of \$10,000 were reasonable and appropriate. The association noted the Discipline Committee's penalty decision in the Sinha case, which it argued is similar to this matter, ordered \$10,000 in costs. The association concluded by noting that it seeks orders only on costs and publication against the holder, GTI, because while GTI remains an active corporation, it has not held a certificate of authorization since 2013.

MR. TAHA'S SUBMISSIONS ON PENALTY

In his submissions, Mr. Taha noted that he has been a licensed professional engineer since 2002 with no prior complaint or discipline history with the association. He also noted his lecturing at Seneca and Humber Colleges in the areas of electronics and mechanical engineering, and his 20 years of

volunteer work with the Tetra Society of North America, which is a not-for-profit organization that designs and constructs custom assistive devices for individuals with disabilities.

Mr. Taha stated that he agreed with the association that restricting his licence to the area of mechanical engineering as per item (c) of the association's penalty and ordering that he complete remedial technical courses were appropriate penalties that will protect the public, provide general and specific deterrence and maintain the reputation of the profession in the eyes of the public. He argued that the remaining penalties sought by the association were harsh, excessive, disproportionate and did not meet the objectives of penalty.

Mr. Taha argued that the requirement to complete the PPE was unnecessary. Instead, he submitted that he should be ordered to complete technical courses and examinations offered by the association that are relevant to the circumstances of this matter because this would address the objectives of protection of the public and rehabilitation. Mr. Taha also argued that given his agreement to have his licence restricted to mechanical engineering, the need for suspending his licence was negated.

Regarding the reprimand, Mr. Taha submitted that a private reprimand should be considered, and any reprimand should be recorded on the register for a maximum of 12 months rather than permanently. He also asked that the panel not order that his and GTI's names be published in the official publication of the association.

Mr. Taha denied the association's aggravating factor submission, arguing that it was not supported by the evidence or the panel's findings. Mr. Taha argued that he was entitled to deny liability and proceed with a hearing and that it can never be an aggravating factor to ask the association to prove its case and proceed with a hearing. He submitted that the association wrongly stated that he took no responsibility at all for the problems at the time of their occurrence, when the evidence was that he discussed the various defects with Mr. Pandya and the means for resolving them to avoid serious problems. Mr. Taha argued that these actions show that he was aware of his professional responsibilities and tried, without success, to correct the failings of the units; accordingly, the serious penalty sought by the association is not warranted. Mr. Taha also asserted that he and GTI did not dispute most of the allegations and made reasonable concessions and admissions of fact.

Regarding costs, Mr. Taha argued that no costs should be ordered. He stated that he was within his rights to contest the matter, and his decision to do so should not be the paramount consideration for costs as the association has argued. Mr. Taha also argued that the Sinha case put forward by the association was not similar, because the member in that matter did not attend the hearing and was found to have disregarded the Discipline Committee's processes, and even so, in the Sinha case, only one-third of the association's actual costs were ordered; applying that standard to this matter would result in costs of \$3,663, not \$10,000 which amounts to 90 percent of the association's actual costs.

THE ASSOCIATION'S REPLY SUBMISSIONS

The association stated that, in fact, Mr. Taha denied all of the allegations at the outset of the hearing, thus requiring it to call all of its witnesses and prove the ultimately uncontested events. It also asserted that, even at the hearing, Mr. Taha treated the matter as a civil dispute between himself and Mr. Pandya and sought to place all the blame on Mr. Pandya.

In reply to Mr. Taha's suggestion that he take technical courses and not the PPE, the association stated that the PPE focuses on law and ethics as applied to professional engineers. It submitted that this is one of the issues at the heart of the problem in this case and noted that Mr. Taha's belated grudging admission under cross-examination, that he should have discussed safety issues, is not sufficient to ensure that the public is protected in the future. The association submitted that the PPE would remind Mr. Taha of his professional obligations. As for technical courses, the association argued that it makes no sense to order Mr. Taha to complete technical courses and examinations in structural engineering since, as the defendants have agreed, he will be restricted to practising mechanical engineering. And courses in mechanical engineering, if that is what the defendants suggest, would not address the key issues in this matter: practising outside his area of competence and failing to recognize his professional responsibilities. Moreover, there is no evidence Mr. Taha lacks competence in mechanical engineering.

REASONS FOR PENALTY DECISION

The panel agrees with the association's submission that Mr. Taha's conduct warrants a serious penalty. The panel found that Mr. Taha negligently designed a solar tracking device prototype, failed to satisfy his professional responsibilities to safeguard life, health and property with respect to his design and failed to work within his area of competence. The panel also found that Mr. Taha was unprofessional in his and GTT's provision of engineering services to and dealings with Mr. Pandya, an individual motivated by profit whom Mr. Taha allowed to use his engineering work in a dangerous and opportunistic way. In these circumstances, the panel believes that most of the penalty provisions sought by the association are reasonable and appropriate.

The panel agrees with the parties that an oral reprimand and a condition on Mr. Taha's licence restricting him to practising only mechanical engineering are reasonable and appropriate penalties. The panel believes that Mr. Taha will benefit from an oral reprimand that will impress upon him the importance of always ensuring that he satisfies his professional obligations as a professional engineer. An oral reprimand and its permanent recording on the register will satisfy all five of the objectives of penalty. Placing a permanent condition on Mr. Taha's licence will protect the public and, importantly, maintain the reputation of the profession in the eyes of the public by making it clear that the panel does not condone the practice of professional engineering outside of a professional engineer's area of competence.

The panel also agrees with the association's submission that a suspension is warranted. A suspension satisfies the goals of general and specific deterrence. A suspension demonstrates that the panel takes Mr. Taha's and GTT's professional misconduct seriously and in doing so, it maintains the reputation of the profession in the eyes of the public. Publication of the panel's Decision and Reasons on Penalty with names will also maintain the reputation of the profession is upheld in the eyes of the public, while also protecting the public and ensuring specific and general deterrence.

Considering the nature of the professional misconduct in this matter, the penalty provision that will best serve the objective of rehabilitation is Mr. Taha's successful completion of the PPE. In his submissions on penalty, Mr. Taha appears to believe he does not need remediation in professional ethics and responsibility. He does. Technical courses and examinations as suggested by Mr. Taha are not an alternative to the completion of the PPE because there is no suggestion that he needs remediation in mechanical engineering; Mr. Taha appears to be competent in mechanical engineering and, going forward, he will be restricted to practising only mechanical engineering. The panel agrees with the association that the PPE's focus on law and ethics as applied to professional engineers, is at the heart of this matter and would assist in remediating Mr. Taha. The panel also believes that the requirement to complete the PPE would assist in deterring Mr. Taha in the future and protecting the public.

Regarding the requirement to successfully complete the PPE within 14 months, the panel declines, on jurisdictional grounds, to attach a further suspension under section 28(4)(k) for the potential failure to complete the PPE, as requested by the association. The panel does not believe it has the power under section 28(4)(k) to make the order sought by the association; to order the imposition of an additional penalty, in the form of an additional suspension, if an order provision is not satisfied in the future. The panel does not interpret section 28(4)(k) of the act as permitting this type of penalty. Section 28(4)(k)(i) states:

(4) Where the Discipline Committee finds a member of the association or a holder of a certificate of authorization, a temporary licence, a provisional licence or a limited licence guilty of profes-

sional misconduct or to be incompetent it may, by order,

- (k) direct that the imposition of a penalty be suspended or postponed for such period and upon such terms or for such purpose as the Discipline Committee may specify, including but not limited to,
- (i) the successful completion by the member or the holder of the temporary licence, provisional licence or limited licence of a particular course or courses of study[.]

The panel interprets this section as allowing for the suspension or postponement of an imposed penalty provision pending the future completion of a course. The words “direct that the imposition of a penalty shall be suspended” mean that a penalty must exist and must be ordered before the Discipline Committee can direct, under section 28(4) (k), that the imposition of that existing penalty shall be suspended. In the association’s submissions, it has already sought a one-month suspension as part of the penalty that addresses the panel’s findings of professional misconduct. The 24-month suspension that it seeks is not an existing penalty sought to address the panel’s findings. Rather, it is an additional penalty sought for a future failure. In the circumstances of this matter, section 28(4) (k)(i) could be relied on to suspend the one-month suspension for 14 months pending Mr. Taha’s completion of the PPE. However, section 28(4)(k) (i) does not give the panel the power to impose a 24-month suspension for a possible future failure of the member that is not based on the panel’s findings of professional misconduct. For these reasons, the panel does not rely on section 28(4)(k) for any of the penalty provisions in this Decision and Reasons on Penalty.

Finally, with respect to costs, the panel believes that an award of costs is warranted, but not in the amount sought by the association. It is true that Mr. Taha ultimately made a number of admissions that would have resulted in a shorter hearing, or a resolution without a hearing, if he had made them earlier. This resulted in the association incurring costs for the hearing that could have been avoided, at least in part. In these circumstances, and considering the other penalty provisions the panel is ordering

Mr. Taha to fulfill, costs in the amount of \$2,000 are reasonable and appropriate. The panel believes that these costs will satisfy the penalty objectives of deterrence and maintaining the reputation of the profession in the eyes of the public.

THE PENALTY

The panel orders that:

- a. Mr. Taha shall be reprimanded, and the fact of the reprimand shall be recorded on the association’s register permanently, pursuant to subsection 28(4)(f) of the act.
- b. Mr. Taha’s licence shall be suspended for one month, pursuant to subsection 28(4)(b) of the act.
- c. It shall be a term, condition, limitation and restriction on Mr. Taha’s licence that he shall engage in the practice of professional engineering only in the area of mechanical engineering, pursuant to subsections 28(4)(d) and 28(4)(e) of the act.
- d. It shall be a term or condition on Mr. Taha’s licence that he shall, within 12 months of the date of this Decision and Reasons on Penalty, successfully complete the association’s professional practice examination, pursuant to subsection 28(4)(d) of the act.
- e. This Decision and Reasons on Penalty shall be published, together with the names of the defendants, in the official publication of the association, pursuant to subsection 28(5) of the act.
- f. Mr. Taha and GTI shall pay costs to the association of \$2,000 within three months of the date of this Decision and Reasons on Penalty, pursuant to subsection 28(4)(j) of the act, and that this shall be a joint and several obligation on them.

Stella Ball, LLB, signed this Decision and Reasons on Penalty as chair of this discipline panel and on behalf of the members of the panel: James Amson, P.Eng., Paul Ballantyne, P.Eng., Michael Chan, P.Eng., and Robert Willson, P.Eng.