

of signing or sealing a final drawing, specification, plan, report or other document not actually prepared or checked by the practitioner;

Section 72(2)(j): In light of the above reasons, the panel finds there is insufficient evidence to conclude the conduct or an act relevant to the practice of professional engineering that, having regard to all the circumstances, would reasonably be regarded by the engineering profession as disgraceful, dishonourable or unprofessional.

PEO provided very little submissions in its closing argument in support of the allegation that Mr. Balbaa breached the Code of Ethics. In the view of the panel, there is no merit to this allegation.

If Ralph Balbaa or HITE would like the panel's determination in this matter published in the official publication of the association, then they are directed to make this request to independent legal counsel (ILC) within two weeks of the date of this decision.

Ravi Gupta, P.Eng., signed this Decision and Reasons for the decision as chair of this discipline panel and on behalf of the members of the discipline panel: Santosh Gupta, P.Eng., Colin Cantlie, P.Eng., Daniela Iliescu, P.Eng., and David Spacek, P.Eng.

SUMMARY OF DECISION AND REASONS

In the matter of a hearing under the *Professional Engineers Act* and in the matter of a complaint regarding the conduct of a member of the Association of Professional Engineers of Ontario and a holder of a certificate of authorization. This decision and its reasons are published without names.

AGREED STATEMENT OF FACTS

The parties introduced an Agreed Statement of Facts that included the following:

1. At all material times, the member was a licensed professional engineer and held a certificate of authorization pursuant to the *Professional Engineers Act*.
2. At all material times, the member operated as an unincorporated sole proprietorship and provided structural engineering services for commercial and residential applications.
3. On or about September 1, 2014, a construction company retained the holder "to design concrete columns to support the new steel columns and reinforce the existing concrete wall" for the new waste storage building (the project).
4. On or about September 22, 2014, the member signed and sealed a drawing, without a title block, that appeared to provide wall modifications and column design details for the project.
5. On or about October 16, 2014, the municipality issued a building permit for the building relying in part on the member's September 22 drawing.
6. On or about November 24, 2014, the member signed and sealed a letter to the municipality's senior building inspector affirming that the project had been "built in substantial conformance with the approved construction drawing for their intended use."
7. On or about May 2015, the project was substantially destroyed by fire.

THE ALLEGATIONS

Counsel for the Association of Professional Engineers Ontario (the association) introduced a statement of allegations against the member and the holder that included the information in Agreed Statement of Facts above and the following:

1. The member's September 22, 2014 drawing was deficient in several ways, including without limitation:
 - a. That it proposed a design that was not compliant with applicable standards, codes and regulations;

- b. That it proposed a design that failed to properly account for the dimensions or strength of the foundation to which it would be attached;
 - c. That it failed to properly account for load requirements of various elements of the proposed structure;
 - d. That it failed to properly account for horizontal shear forces of the structure; and
 - e. That it omitted or failed to reference required notes, details, dimensions and/or applicable codes.
2. The complainant, whose engineering firm had been retained by the project's owner to design and construct a replacement structure, discovered several of the deficiencies in the member's design.
 3. Based upon these facts, it is alleged that the member is guilty of professional misconduct as follows:
 - a. Sealing and signing a drawing that fell below the expected standards of a reasonable and prudent practitioner, amounting to professional misconduct as defined by section 72(2)(a) [of Ontario Regulation 941];
 - b. Sealing and signing a drawing that proposed a design for a commercial structure that failed to make reasonable provision for the safeguarding of life, health or property of a person may be affected by the work, amounting to professional misconduct defined by section 72(2)(b);
 - c. Sealing and signing a drawing that failed to make reasonable provision for complying with applicable codes, regulations and/or standards, amounting to professional misconduct as defined by section 72(2)(d); and
 - d. Sealing and signing a drawing that, in all of the circumstances, would reasonably be regarded by the engineering profession as unprofessional, amounting to professional misconduct defined by section 72(2)(j).

PLEA BY THE MEMBER

The member denied the allegations in his personal capacity and on behalf of the holder.

THE EVIDENCE

The association called a witness who testified that she attended the site to prepare an estimate for a replacement building after the steel building burned down. She testified that three concrete columns along the west side were damaged, but that she did not see any evidence of any reinforcing. She subsequently received a copy of the member's September 22, 2014 drawing, did some quick calculations, and concluded that the columns were grossly undersized in accordance with the requirements of the Ontario Building Code. She brought her concerns to another professional engineer, who was the complainant in this matter.

The association called an expert witness. He testified that the member's design of the three concrete columns were 570 per cent overstressed, that they did not have the minimum amount of reinforcing steel, and that they did not provide enough resistance to shear forces from wind loading as required under ASTM A23.3 Concrete Design Code and the 2012 Ontario Building Code. In addition, he testified that the member's September 22 drawing did not include the elements required for final plans by the association's 1995 *Guideline on Professional Engineers Providing Structural Engineering Services in Buildings* (the guideline).

Counsel for the member called an owner of the construction company, who is a professional engineer, as a witness. The owner testified that the member's work was limited to providing a drawing to support a building permit application and that he, the owner, was responsible for the design of the columns that were built. He testified that the columns included reinforcing steel as shown in the photograph that was taken before the concrete was poured. He expressed frustration that the discipline process needed his testimony in this matter.

The member testified that the scope of his work was to provide a design for three columns along the west wall to support a building permit application. He produced the drawing after meeting with a representative of the construction company, who is also a professional engineer, and discussing what was required. The member's testimony included an explanation of the measurements for the reinforcing steel in the column. He agreed that his drawing required additional details.

Under cross-examination, the member admitted that he thought his design would be used for construction. He admitted that the design was for a footing on bedrock, though no bedrock is shown on his drawing. He confirmed that his drawing dated September 22, 2014 contained errors.

The member also admitted that there is no limitation on the scope of his work on the signed Commitment to General Reviews by Architect and Engineers that was submitted to

the municipality and includes a certification that “the construction is in general conformance with the plans and other documents that form the basis for issuances of a building permit in accordance with the performance standards of the [association]” (the certificate).

CLOSING STATEMENTS

Counsel for the association summarized that the evidence supported the allegations as follows:

1. That the member admitted his retainer was to provide a structural drawing to be submitted to the municipality,
2. That the expert witness determined that the columns fell short of the requirements under ASTM A23.3 Concrete Design and the Ontario Building Code,
3. That a professional engineer identified significant difficulties with the columns, including that she did not see any reinforcing steel in them,
4. That the member’s stamp on the certificate shows that he took responsibility for the design, including the west wall with the expanded columns,
5. That the member had an overriding standard of care that included that his drawing must comply with the guideline as set out in *Skyway Equipment Co. Limited et. al. v. Guardian Insurance Company of Canada et. al.* and that the expert witness said that the member’s work fell below that expected of a reasonable and prudent practitioner.

Counsel for the association added that the allegation under section 72(2)(j) of Regulation 941, the association was alleging that the member’s conduct would be regarded by the profession as unprofessional and that, in the association’s submission, the member’s actions would not be regarded as disgraceful or dishonourable.

Counsel summarized that the member’s work was unprofessional, not just that it lacked information, since it was not fit for purpose, and that it was unclear and contained errors.

Counsel for the member summarized that the evidence did not support a finding of guilt as follows:

1. That the complaint was not made by the professional engineer, whose observations were made after the fire and the columns were damaged,
2. That the building is unoccupied,
3. That the expert witness assumed that the member was retained to design the complete foundation,
4. That the expert witness indicated that the column loading the member’s design was appropriate for axial loading,
5. That the expert witness did not take into account that the owner was a knowledgeable client,
6. That the guideline and the same standard of care may not apply when the client is a professional engineer,
7. That the owner took responsibility for the design of the columns, and testified that they included reinforcing steel,
8. That it does not make sense that the member would take responsibility for the entire design of the foundation based only upon his signature on the certificate provided to the municipality,
9. That the member believed that he and the representative of the construction company understood that the columns were sitting on bedrock,
10. That the member confirmed that his drawing contained errors.

Counsel for the member asserted that the association had not proven all its allegations in that:

1. With regard to 72(2)(a) and (j), that the context is lacking and that his design did not include general notes etc., but that he would have provided different information for a less knowledgeable client,
2. With regard to 72(2)(b), that the expert witness found that the design was sufficient to support the axial loading, and that his calculations did not take into account the actual height of the wall and was based upon information that was unavailable to the member,
3. With regard to 72(2)(d), that the codes do not apply in this context as the on-site supervisor took responsibility for the design.

Independent legal counsel provided advice to the panel that included that the applicable standard to apply is on the balance of probabilities, considering all the evidence, whether it is more likely than not that the member committed the actions.

DECISION

The association bears the onus of proving the allegations in accordance with the standard of proof. The standard of proof applied by the panel was a balance of probabilities. The proof must be clear and convincing and based upon cogent evidence accepted by the panel.

Having considered the evidence, the onus and standard of proof, the panel finds:

1. That the member did not commit an act of professional misconduct as alleged in subparagraphs 3.a. or b. of the statement of allegations.
2. That the member did commit an act of professional misconduct as alleged in subparagraphs 3.c. and d. of the statement of allegations.

As the member was acting on behalf of the holder at all times, these findings of professional misconduct apply both to the member, in his personal capacity, and to the holder.

REASONS FOR DECISION

Negligence

The panel accepted the expert witness' testimony that the member should have applied the guideline when preparing his drawing. The panel accepted the member's testimony and concluded that the member was not trying to shirk his responsibility but instead was doing what was expected by his client, the construction company. The panel decided that the evidence showed that while the member's work was sloppy, his actions did not reach the level of negligence.

The panel found the testimony by the owner very credible. He was clear and his evidence was uncontroverted. He testified that the scope of the member's services were limited, that the

owner took responsibility for the design, and that the columns had the proper reinforcing.

Based upon these findings, the panel found that the member was not guilty of the allegation of professional misconduct as defined by section 72(2)(a) of Ontario Regulation 941.

Making reasonable provision for safeguarding property

The panel relied on the testimony by the owner, supported by the testimony by the member, that the scope of the member's work was limited to providing a drawing for the purpose of securing a building permit from the municipality. In addition, as referred to above, the panel accepted the owner's testimony that he took responsibility for the design and the construction on site. The panel accepted the owner's testimony that the only reason for the larger columns was to provide a landing for the base plate of the building. The panel also accepted the owner's and the member's testimony that the construction company is a knowledgeable client with regard to structural engineering services.

Based upon these findings, the panel found that the member was not guilty of the allegation of failing to make reasonable provision for safeguarding property as defined by section 72(2)(b).

Complying with applicable codes

The panel accepted the expert witness testimony and the member's admission that the member was required to apply the ASTM 23.3 Concrete Design, the Ontario Building Code and the guideline when preparing his drawing.

Based upon these findings, the panel found that the member was guilty of the allegation of failing to make reasonable provision for complying with the applicable codes and standards as defined by section 72(2)(d) of Ontario Regulation 941.

Unprofessional

The panel noted errors in the member's drawing dated November 22, 2014 including the different dimensions for the reinforcement and the size of the column. These errors made the drawing unclear, despite the fact that the drawing was accepted by the municipality and despite the fact that the columns did not fail during their short service life. The panel found that such a relatively simple drawing should not have contained such errors.

Based upon these findings, the panel found that the member was guilty of the allegation of failing to make reasonable provision for complying with the applicable codes and standards as defined by section 72(2)(d) of Ontario Regulation 941.

PENALTY

Counsel for the association requested the following penalty:

1. A reprimand that remains on the association's register permanently,
2. Publication of the Discipline Committee's decision with names,

3. That the member complete, within 14 months, the following exams set by the association: Advanced Structural Analysis and Advanced Structural Design,
4. That, in the event the member does not pass both exams, suspension of his licence to the maximum permitted under the *Professional Engineers Act*,
5. That costs be awarded to the association in the amount of \$10,000.

Counsel for the association submitted that the proposed penalty was fair and appropriate, and noted that no suspension was requested due to the fact that the panel found the member not guilty of professional misconduct in relation to section 72(2) (a) or (b) of Regulation 941.

She submitted that the costs requested were only to pay for out of pocket expenses, including for the expert witness, travelling expenses and summons. Counsel for the association pointed out that they were higher than the penalty sought in other matters, but that they were proportional to the nature and complexity in this matter.

Counsel for the association set out the application of the principles of penalty as follows:

1. The public interest will be protected by ensuring that by completing the two exams, the member will understand and properly apply the applicable codes,
2. Remediation will be achieved also with the exams by educating the member on how to prepare drawings with accuracy and precision,
3. The maintenance of the reputation of the profession in the eyes of the public will be achieved by publicly naming the member and by placing a reprimand on the register permanently,
4. General deterrence will be achieved by publishing the matter with names and by setting difficult examinations for the member's actions,

5. Specific deterrence will be achieved since the member will have to pass two difficult exams and therefore is unlikely to reoffend.

Counsel for the association cited two previous decisions of the Discipline Committee, *Abraham Bueckert, P.Eng., et al v. Professional Engineers Ontario*, and *George Mikhael, P.Eng., et al. v. Professional Engineers Ontario*. These matters include findings under sections 72(2) (c) and 72(2)(j) that she said demonstrated that the proposed penalty was within the range of acceptable penalties for similar actions.

Counsel for the association noted the criticism of the association in the *Report of the Elliot Lake Commission of Inquiry* dated October 15, 2015 about the length of time a members' reprimands are reflected on the association's register, and the Discipline Committee's comment in the matter of the *Association of Professional Engineers of Ontario v. Van Iterson* that the default for reprimands is that they be on the register forever. She submitted that publication without names should only occur in rare cases since it is important to maintain the reputation of the profession in the eyes of the public and to provide general deterrence.

Counsel for the association noted that the member did not plead guilty, that he did not show that he admitted his errors, and that he did not come to grips with the inadequacy of his drawings.

Counsel for the member submitted that the facts in this matter are unique and that she tried unsuccessfully to find similar cases. Counsel noted that this matter is the first offence for the member, that he learned from this experience, that he acknowledged his errors, and that he recognized the possible confusion that his action created. She pointed out the member was not responsible for the design of the complete building foundation, and that he said that he would not have done what he did for another client. Counsel pointed out that the member paid the expense of a lawyer, and that he has learned from the experience.

Counsel for the member requested the following penalty: a reprimand on the association's register for one year and publication of the matter without names. She cited two previous decisions of the Discipline Committee: the *Association of Professional Engineers of Ontario v. the member and the Certificate of Authorization holder and a complaint regarding the conduct of a member of the Association of Professional Engineers of Ontario* that include findings under sections 72(2)(c) and 72(2)(j). Counsel for the member said that the proposed penalty was proportional to the facts of this matter and that a permanent reprimand would be out of proportion.

The independent legal counsel provided advice to the panel on the application of the principles of penalty including costs. The independent legal counsel advised the panel that it has broad discretion under section 28 (4) of the *Professional Engineers Act*.

PENALTY DECISION

The panel makes the following orders as to penalty:

1. Pursuant to section 28(4)(f) of the *Professional Engineers Act*, the member shall be reprimanded verbally, and the fact of the reprimand shall be recorded on the register for a period of one year.
2. Pursuant to section 28(4)(d) of the *Professional Engineers Act*, the member shall successfully complete the Professional Practice Examination (PPE) within one year, commencing November 1, 2017.
3. Pursuant to section 28(4)(b) and (k) of the *Professional Engineers Act*, in the event that the member does not successfully complete the PPE within the time set out above, his licence shall be suspended for a period of twelve (12) months thereafter or until he successfully completes the examination, whichever comes first; and
4. The findings and order of the Discipline Committee shall be published in summary form under section 28(4)(i) of the *Professional Engineers Act*, without reference to names.

There shall be no order with respect to costs.

REASONS FOR PENALTY

The panel concluded that the proposed penalty is reasonable and in the public interest.

The penalty will:

- a) Provide protection to the public by ensuring that the member will complete the Professional Practice Exam;
- b) Maintain the reputation of the profession by publishing this decision with reasons;
- c) Provide general deterrence to others in the profession to be thorough in all of their dealings;
- d) Provide specific deterrence to the member to be thorough with all future work to ensure that his work does not lead to a complaint;

- e) Rehabilitate the member by administering an oral reprimand and by ordering him to complete the Professional Practice Exam.

The panel considered the previous decisions raised by the parties in making its decision regarding the issue of publication without names and decided that the current matter more closely resembled the facts in the ones identified by the member. In addition, the panel believed the member would have provided a more detailed work product to a client who was not a professional engineer, so there is little danger to the public posed by publishing the panel's decision without names.

In making its decision regarding costs, the panel decided that the association should pay its own costs since the member co-operated with the investigation into this relatively straightforward matter.

REPRIMAND

The member waived his right to appeal and the member was reprimanded verbally following the conclusion of the hearing.

Patrick Quinn, P.Eng., signed the decision on January 16, 2018 as chair of this discipline panel and on behalf of the members of the discipline panel: Rishi Kumar, P.Eng., Glenn Richardson, P.Eng., Nadine Rush, C.E.T., and Warren Turnbull, P.Eng.