

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DAVID F. JOHNS,	:	
	:	C.A. No. 03A-07-001 WLW
Appellant,	:	
	:	
v.	:	
	:	
COUNCIL OF THE DELAWARE	:	
ASSOCIATION OF PROFESSIONAL	:	
ENGINEERS,	:	
	:	
Appellee.	:	

Submitted: October 9, 2003

Decided: January 29, 2004

**OPINION AND ORDER**

Upon an Appeal of the Decision of the Council  
of the Delaware Association of Professional Engineers.  
*Reversed and Remanded.*

Scott E. Chambers, Esquire of Schmittinger and Rodriguez, P.A., Dover, Delaware;  
attorneys for the Appellant.

James J. Hanley, Esquire, Deputy Attorney General, Department of Justice,  
Wilmington, Delaware; attorneys for the Appellee.

WITHAM, J.

### **Introduction**

Before this Court is David Johns' ("Appellant" or "Johns") appeal of a decision by the Council of the Delaware Association of Professional Engineers ("Appellee" or "Council") revoking his Delaware Professional Engineer's license. Based upon the Council's failure to provide Johns with sufficient notice of the disciplinary hearing, the decision of the Council is *reversed* and *remanded* for a new hearing consistent with this opinion.

### **Background**

#### ***Facts***

On June 11, 2003, the Council conducted a disciplinary hearing regarding David Johns, a licensed professional engineer. Notice of the hearing and a copy of the Complaint were sent to Johns via certified mail on May 15, 2003, and received on May 16, 2003. The notice informed Johns of the date and time of the hearing and stated that he should contact Peggy Abshagen ("Abshagen"), the Executive Director of the Delaware Association of Professional Engineers ("DAPE"), if he had any questions or concerns. On May 19, 2003, Johns telephoned DAPE after receiving the Complaint and notice of the hearing and spoke with Terry Fluke ("Fluke"), an administrative assistant. An affidavit signed by Fluke indicates that she informed Johns that he could fax information to her to forward to Abshagen, but that she did not have the authority to postpone the hearing or intervene in the matter in any way. Johns did not contact DAPE again and did not appear at the hearing, which proceeded in his absence. After speaking with Fluke, Johns was under the impression that the hearing would be postponed as he had requested.

***David F. Johns v. Council of DAPE***  
**C.A. No. 03A-07-001 WLW**  
January 29, 2004

At the hearing, the Council heard testimony from Jim Cassidy and Dave Shepens, managers at the Department of Natural Resources Environmental Control (“DNREC”), regarding Manager’s Warning letters sent to Johns regarding deficiencies in permits submitted in 2001 and 2002. David Kelley, a senior environmental compliance specialist with DNREC, also testified regarding a notice of violation issued to Johns on May 14, 2002. The DNREC employees answered additional questions from the Council, indicating that manager’s warning letters are infrequently given, and even less so to professional engineers. The Council further questioned the DNREC employees about the number of permits submitted by Johns as compared with other sole proprietor operations, learning that Johns submitted 163 more permits than his nearest competitor. The Council even questioned whether the number of permits could be the reason for the manager’s warnings, but the other competitors had not received any warnings regarding their permits.

Finally, the Council heard the testimony of Brian Carbaugh, a professional engineer providing expert testimony for the State. Mr. Carbaugh testified that certain aspects of the manager’s warnings did demonstrate an extreme departure from the standard of care, particularly the systems which were designed outside of the approved disposal area. In addition, Mr. Carbaugh stated that Mr. John’s failure to properly and accurately complete the construction review documentation submitted to DNREC was “probably both an extreme departure from the standard of care as well as a violation of the code of ethics.”<sup>1</sup> Mr. Carbaugh answered additional questions from Council

---

<sup>1</sup> Transcript of June 11, 2003, hearing conducted by the Delaware Association of Professional Engineers regarding David Johns, p.25.

members, including the following exchange:

Q. Mr. Carbaugh, on reviewing all these complaints and violations, is it your opinion, professional opinion, that in some cases there may be demonstration of negligence here?

A. I have to refer back to the - - because my laymen's terminology of negligence and the legal definition of negligence as it's been explained to me, as I remember any deviation from the standard of care is negligence, but the negligence alone was not in violation of the professional engineers act. A gross deviation from the standard of care or a significant - - extreme deviation from the standard of care, that denoted gross negligence, and it was gross negligence which was the issue with regards to the Professional Engineers Act. In my review in taking all of the - - everything in composite together may be an extreme deviation from the standard of care and gross negligence.

Q. In your professional opinion?

A. In my professional opinion. But I felt that the failure to again coordinate between said evaluation and the placement design of the system, and not just once, but on multiple occasions clearly was an extreme deviation from the standard of care and representing gross negligence. So in my review that's where I had directed my professional opinion.<sup>2</sup>

### ***Decision of the Council***

After a discussion off the record, the Council found Johns guilty of gross

---

<sup>2</sup> Transcript, pp.35-36.

negligence<sup>3</sup> and violations of the Code of Ethics.<sup>4</sup> The Council then heard about Johns' previous conduct. In 1991, Virginia issued a written reprimand to Johns for certifying inspection reports which were not in compliance. In December 2000, Johns was found guilty of violating Canons 1.B and 2.B of the Code of Ethics and censured by the DAPE. Following a period of discussion, the Council voted to revoke Johns' professional engineering license.

In August 2003, this Court denied Johns' Motion for a Stay of the Council's Order, concluding that Johns failed to demonstrate that the revocation of his license resulted in irreparable harm.

***Appellant's Contentions***

Johns filed this appeal contending that he received inadequate notice of the hearing, that the Council erred in relying on the testimony of Mr. Carbaugh as an expert, and that the Council's revocation of his license was excessive punishment.

**Discussion**

Title 24, section 2823 of the Delaware Code provides for an appeal of a disciplinary decision by the Council to the Superior Court. When factual determinations are in issue, the Court "shall take due account of the experience and specialized competence of the Council and of the purposes of the Delaware Professional Engineers' Act under which Council has acted."<sup>5</sup> In the absence of actual fraud, the

---

<sup>3</sup> 24 DEL. C. § 2823(a)(2) (2003).

<sup>4</sup> 24 DEL. C. § 2823(a)(3) (2003).

<sup>5</sup> 24 DEL. C. § 2823(c) (2003).

Court's review "shall be limited to a determination of whether the Council's decision was supported by substantial evidence on the record before it."<sup>6</sup> *Notice*

The Delaware Professional Engineers' Act provides the procedure for a disciplinary hearing, stating:

The time and place for such hearing shall be fixed by the Council or the committee appointed by the Council, and a copy of the charges, together with a notice of the time and place of hearing, shall be personally served on the accused or sent by **registered** mail to the last known address of such individual . . . at least 30 days before the date fixed for the hearing.<sup>7</sup>

Johns contends that the Council failed to provide **30 days** notice of the hearing and that the notice was sent via certified mail, rather than registered mail. Based upon this, Johns contends that the Council lacked the authority to convene the hearing and, thus, the Council's decision should be voided. In addition, Johns maintains that the Council, after rendering its decision, did not hand deliver or send via registered mail a copy of its decision.<sup>8</sup> Johns relies upon a decision rendered by the Delaware Supreme Court, in which the Court states that if an administrative agency adopts regulations, it has a duty to obey them. And when the "rule is designed 'to afford . . . due process of law by providing safeguards against essentially unfair procedures,'" any action which

---

<sup>6</sup> *Id.*

<sup>7</sup> 24 DEL. C. § 2824(c) (2003) (emphasis added).

<sup>8</sup> 24 DEL. C. § 2824(d) (2003).

results from a violation of that rule is invalid.<sup>9</sup>

The State argues that even though the notice was received only 26 days before the hearing and was sent via certified mail, Johns still received adequate notice of the hearing. Relying upon *Kreshtool v. Delmarva Power & Light Co.*,<sup>10</sup> the State asserts that “substantial compliance” with the statute is all that is required as long as there is also “no prejudice” claimed by the party. However, the Court’s statement in *Kreshtool* dealt with rules that were technical in nature, not matters of substance. Requiring notice to be given 30 days before the hearing is not merely technical in nature, but is designed to give the accused a reasonable period of time in which to prepare a defense. Thus, it confers an additional right on the accused with which the Council must strictly comply.

A professional license is property within the Fourteenth Amendment to the United States Constitution and thus is afforded due process protection.<sup>11</sup> Due process before an administrative agency requires that the party receive notice which provides the time, date, place, and subject matter of the proceeding.<sup>12</sup> The statute which governs the disciplinary hearing requires the Council to provide the practitioner with 30 days

---

<sup>9</sup> *Dugan v. Delaware Harness Racing Commission*, 752 A.2d 529, 531 (Del. 2000) (citing *United States v. Caceres*, 440 U.S. 741, 749 (1979)).

<sup>10</sup> 310 A.2d 649, 654 (Del. Super. Ct. 1973) (citing *Witmer v. United States*, 348 U.S. 375, 384 (1955)).

<sup>11</sup> *Cain v. Delaware State Board of Accountancy*, 1989 Del. Super. LEXIS 427 at \*5.

<sup>12</sup> *Id.* at \*6.

notice of the hearing.<sup>13</sup> In this case, Johns received 26 days notice. In addition, the statute requires that notice must be provided by personal service or by registered mail.<sup>14</sup> The Council sent the notice by certified mail on May 15, 2003. The notice, received by Johns on May 16, 2003, did inform him that the hearing would be conducted at the Sheraton Hotel in Dover on June 11, 2003, at 12:30 p.m. In addition, the notice stated that “[v]iolations of § 2823(a) of the Delaware Professional Engineers Act and Canons 1.B, 2.A, and 3.A of the Code of Ethics are alleged,” and included a copy of the Complaint prepared by the Attorney General’s office. Therefore, the information contained *within* the notice was adequate. However, this Court cannot ignore the fact that the Council disregarded the statute governing disciplinary hearings by failing to provide Johns with adequate notice. Mr. Johns received only 26 days notice, although the statute required 30 days, and the notice was sent by certified mail.

The Delaware Administrative Procedures Act requires 20 days notice of hearings held by administrative agencies.<sup>15</sup> However, the General Assembly apparently concluded that the loss of a professional engineering license was serious enough to require additional notice to the accused, specifically 30 days notice. When interpreting a statute, the Court must give full effect to all of the pertinent statutory language,<sup>16</sup> and the Court must presume that the General Assembly “inserted every provision into a

---

<sup>13</sup> 24 DEL. C. § 2823(b) (2003).

<sup>14</sup> *Id.*

<sup>15</sup> 29 Del. C. § 10131 (2003).

<sup>16</sup> *Williams v. State*, 818 A.2d 906 (Del. 2002).



legislative enactment for some useful purpose.”<sup>17</sup> By analogy, it is reasonable for this Court to conclude that the General Assembly enacted each statute for some useful purpose. Although the notice requirement existed in the Administrative Procedures Act, the General Assembly established the additional notice requirement for disciplinary hearings conducted by the Council. For this Court to allow less than 30 days notice in this case would be to disregard an enactment by the General Assembly which should be given full effect. This Court will not do that.<sup>18</sup>

Due to the nature of the proceedings, the relevant statute, and prior case law, this Court concludes that the notice Johns received regarding the disciplinary hearing was insufficient. Because the notice was inadequate, “the action which results from the violation of [the statute] is invalid.”<sup>19</sup> Therefore, the decision of the Council should be reversed. The additional issues raised in Johns’ appeal<sup>20</sup> are now rendered moot by the decision of this Court, and do not need to be discussed.

### **Conclusion**

In conclusion, based upon the Council’s failure to comply with title 24, section 2823 of the Delaware Code, this Court finds that the decision of the Council at the

---

<sup>17</sup> *Colonial Insurance Co. v. Ayers*, 772 A.2d 177, 181 (Del. 2001) (citing *General Motors Corp. v. Burgess*, 545 A.2d 1186, 1191 (Del. 1988)).

<sup>18</sup> Given the serious penalty imposed on Johns in his absence, it is especially important for the Council to fully comply with the Delaware Professional Engineer’s Act in giving proper notice.

<sup>19</sup> *Dugan*, 752 A.2d at 531.

<sup>20</sup> Johns also contended that the Council erred in relying upon the expert testimony of Brian Carbaugh and that the Council’s punishment was excessive.

***David F. Johns v. Council of DAPE***  
**C.A. No. 03A-07-001 WLW**  
January 29, 2004

disciplinary hearing on June 11, 2003, is invalid. Therefore, the Council's conclusion that Johns violated title 24, section 2823(a)(2) and (3) and revocation his professional engineering license is hereby *reversed* and *remanded* for a new disciplinary hearing consistent with this opinion.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution

File