

BOARD FOR PROFESSIONAL ENGINEERS,
LAND SURVEYORS, AND GEOLOGISTS
Department of Consumer Affairs
State of California

BEFORE THE
BOARD FOR PROFESSIONAL ENGINEERS,
LAND SURVEYORS AND GEOLOGISTS
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: TERRY EDWIN SMITH Yreka, California 96067 Civil Engineer License No. C25056 Respondent.	Case No. 955-A OAH No. 2011030169
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PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter in Redding, California on September 27 and 28, 2011.

Leslie A. Burgermyer, Deputy Attorney General, represented Richard B. Moore, PLS, Executive Officer of the Board for Professional Engineers and Land Surveyors ("Board"), Department of Consumer Affairs ("Department").

Respondent Terry Edwin Smith represented himself. Edward A. Pearson, respondent's business partner, was present throughout the hearing and assisted respondent at different times during the hearing.

Evidence was received and the record was left open for the parties to submit simultaneous written closing arguments. On October 28, 2011, complainant filed Complainant's Closing Arguments, which was marked as Exhibit 21, and respondent filed his written closing argument, which was marked as Exhibit A. The record was closed, and the matter was submitted for decision.

On October 31, 2011, complainant filed Complainant's Motion to Strike, which was marked as Exhibit 22. The Motion seeks to strike portions of respondent's closing argument as constituting an improper attempt to introduce new evidence.¹

¹ At the hearing, respondent declined to call any witnesses, including himself, or introduce any documentary evidence. Ms. Burgermyer called respondent as a

For the reasons discussed in the Motion, the following portions of respondent's closing argument are stricken and were not considered:

1. Paragraph 3, the second, third, and fourth sentences.
2. Paragraph 4, the second sentencing beginning with "the referenced letter" through the end of that sentence.
3. Paragraph 6, everything after the first sentence.
4. Paragraph 8, the second sentence.
5. Paragraph 9, everything after the first sentence.
6. Paragraph 10, the first sentence beginning with "yet" through the end of the sentence, and the second sentence.
7. Paragraphs 11 through 19, each paragraph.

SUMMARY

Complainant seeks to discipline respondent's civil engineer license on the grounds that respondent provided professional engineering services without obtaining a written contract signed by his clients and that he provided such services in a negligent and incompetent manner. Complainant also alleged that respondent practiced outside his area of competence. Cause exists to discipline respondent's license based on the lack of a written contract only. After considering evidence of the rehabilitation criteria adopted by the Board, the appropriate discipline is to place respondent's license on probation for two years, subject to the conditions specified in the Order below.

FACTUAL FINDINGS

1. On February 12, 1975, the Board issued respondent License Number C25056 as a civil engineer (license). At all times relevant herein, the license was in full force and effect and will expire on December 31, 2011, unless renewed or revoked. On February 26, 2010, the Board issued Citation Order 5346-L to respondent for violating Business and Professions Code section 8762, subdivision (c), by performing a field survey and not timely filing a Record of Survey with the

witness pursuant to Government Code section 11513, subdivision (b). Even then, respondent's testimony was limited to answering Ms. Burgermyer's questions.

County Surveyor's Office. He paid an administrative fine in the amount of \$500 on March 25, 2010. There is no other history of prior discipline of the license.

2. On November 24, 2010, complainant's predecessor, David E. Brown, acting solely in his official capacity as the Executive Director of the Board, filed an accusation seeking to discipline respondent's license on the grounds that he: 1) performed professional engineering services for Colin and Sophia Swarthout in a negligent manner; 2) performed such services in an incompetent manner; 3) practiced outside the area of his competence when performing such services; and 4) performed such services without first having received a written contract signed by the Swarthouts.

The Swarthouts Hiring of Noble Engle and EDS Engineering and Land Surveying

3. In May 2005, the Swarthouts purchased slightly more than four acres of undeveloped land in Red Bluff, California (Swarthout property). Their intention was to subdivide the land into four parcels, each consisting of just over one acre, for future residential development. On May 15, 2005, they hired Noble Engle of the engineering firm EDS Engineering and Land Surveying (EDS) to perform the work necessary to obtain the appropriate permits from Tehama County Public Works (TCPW) for subdividing the land. Mr. Engle used to be licensed by the Board as a civil engineer. His license was revoked for reasons which were not disclosed at the hearing. He was an employee of EDS at the time the Swarthouts hired him. EDS is a partnership which consists of respondent and Edward Pearson, a non-engineer. As a licensed civil engineer and owner of EDS, respondent was responsible for all engineering services provided by anyone acting on behalf of EDS who was not licensed him or herself. (Bus. & Prof. Code, § 6738, subd. (a)(2).)

4. Shortly before the Swarthouts hired Mr. Engle, Mr. Engle approached respondent and Edward Pearson and advised both of them that he had a potential project for EDS. Respondent directed Mr. Pearson to prepare a written proposal and a contract for services, signed the contract, and authorized Mr. Engle to present both documents to the Swarthouts for approval and signature. While there was no evidence that Mr. Engle actually presented the written proposal and contract to the Swarthouts – Mrs. Swarthout testified that he did not – respondent conceded that he never received a signed written contract back from them.

5. Complainant introduced a copy of an unsigned contract that respondent described as "an office copy of the draft contract and proposal" that he signed and authorized Mr. Engle to provide to the Swarthouts. The proposed contract was introduced, without objection, for all purposes and said the following regarding the scope of EDS' proposed work:

Consultant agrees to perform the services set forth on Exhibit "A" attached hereto and incorporated herein by this reference ("services").

"& A-1" was handwritten onto the contract after the reference to "Exhibit 'A'".

Exhibit A provided:

SERVICES

E.D.S. WILL PROVIDE LAND SURVEYING SERVICES FOR A 4 LOT TENTATIVE & FINAL MAP IN THE UNINCORPORATED TERRITORY OF TEHAMA COUNTY AS REQUIRED BY THE TEHAMA COUNTY PLANNING DEPARTMENT AND PUBLIC WORKS DEPARTMENT AND THE CONDITIONS OF APPROVAL LISTED AS FOLLOWS:

1. EDS WILL TIE EXISTING IMPROVEMENTS TO INCORPORATE THEM INTO THE REQUIRED FORM OF TENTATIVE MAP.
2. EDS WILL PREPARE AND PROCESS A TENTATIVE PARCEL MAP WITH THE COUNTY OF TEHAMA AND INCOPRORATE EXISTING DATA FOR THE APPLICATION.
3. EDS WILL COORDINATE WITH OUTSIDE CONSULTANTS FOR TENTATIVE PROCESSING WITH ALL AGENTS AS NEEDED.
4. EDS WILL PREPARE A FINAL MAP AND SUBMIT TO COUNTY OF TEHAMA DEPARTMENT OF PUBLIC WORKS AND PLANNING FOR REVIEW AND COMMENTS.
5. EDS WILL MAKE ANY NECESSARY CORRECTIONS TO FINAL MAP FOR FINAL RECORDATION.
6. EDS WILL SET ALL PROPERTY CORNERS AS SHOWN ON FINAL MAP.
7. EDS WILL PREPARE IMPROVEMENT PLANS FOR ROAD CONSTRUCTION.

8. EDS WILL NOTIFY CLIENT OF ALL ITEMS TO BE TAKEN CARE OF BY OTHERS [sic] IT IS THE RESPONSIBILITY OF THE CLIENT TO HANDLE THESE MATTERS AS THEY ARISE.

9. ALL ITEMS TO BE PAID AS CHARGED PER EXHIBIT B & C ATTACHED [sic] ESTIMATED COST \$12,000.00 TO \$16,000.00.

10. CLIENT IS RESPONSIBLE FOR PAYING ALL FEES.

ESTIMATE OF AGENCY FEES

TENTATIVE MAP	\$2000+/-
RECORDING	\$100+/-
TITLE WORK	\$300+/-
FINAL MAP REVIEW (DPW)	\$820+/-
PROPERTY TAXES	\$2,500+/-
IMPROVEMENT PLAN CHECK	\$1,500+/-

Exhibit A-1 provided:

"SERVICES"

APPLICATION PROCESSING/MAPPING

(STAGE 1)

SURVEY CONTROL EDS ENG. (DEPOSIT)
\$2,350

(STAGE 2)

TENTATIVE MAP APPLICATION & PROCESSING
\$2,500

(STAGE 3)

ATTENDANCE AT PUBLIC HEARING
\$200

(STAGE 4)

FINAL MAP
\$1,500

(STAGE 5)

IMPROVEMENT PLANS
\$8,000

(STAGE 6)
SURVEYING FINAL MONUMENTS

\$1,450

TOTAL **\$16,000.00**

6. In addition to the specific dollar amounts provided in Exhibits A and A-1, the contract contained the following language regarding the basis of compensation applicable to the contract and the method of payment:

Client agrees to compensate Consultant for its services according to the schedule of payments attached hereto as Exhibit "B" and incorporated herein by this reference ("schedule").²

[¶] ... [¶]

Billing. All fees and other charges attributable to this agreement will be billed by Consultant monthly and shall be due and payable by Client at the time of billing unless otherwise specified in this agreement. Client agrees that all billings from Consultant to Client are correct, conclusive, and binding on Client unless Client, within ten (10) days from the date of such billing, notifies Consultant in writing of the objection stating the alleged inaccuracies, discrepancies, or errors in the billing. In the event Client so notifies Consultant of such objection, Client shall nevertheless pay the billed amount and address such objection thereafter.

[¶] ... [¶]

Payment of Costs. Client shall pay the costs of checking and inspection fees, zoning and annexation application fees, assessment fees, soils engineering fees, soils testing fees, aerial topography fees, and all other fees, permits, bond premiums, title company charges, blueprints and reproductions, and all other charges not specifically covered by the terms of this agreement. In the event all or any portion of the work prepared or partially prepared by Consultant be suspended, and restarts, Client agrees to pay Consultant on demand as extra work for any

² "& 'C'" was handwritten onto the contract at the end of the sentence.

additional expenses or services required by Consultant as a result of suspension of the work.

Exhibit B provided:

"SCHEDULE OF PAYMENTS"

(STAGE 1)	
CONTROL SURVEY DEPOSIT FOR PROJECT	\$2,350.00
(STAGE 2)	
TENTATIVE MAP	
WHEN APPLICATION IS SUBMITTED	\$2,500.00
(STAGE 3)	
AFTER PUBLIC HEARING	\$200.00
(STAGE 4)	
FINAL MAP	
WHEN SUBMITTED	\$1,500.00
(STAGE 5)	
IMPROVEMENT PLANS	
WHEN SUBMITTED FOR REVIEW	\$8,000.00
(STAGE 6)	
WHEN FINAL PINS ARE SET	\$1,450.00
<u>TOTAL</u>	<u>\$16,150.00 [sic]³</u>

And Exhibit C provided:

E.D.S. FEE SCHEDULE

<u>FEE SCHEDULE: (EFFECTIVE JANUARY 1, 2001)</u>	<u>PER HOUR RATE</u>
ENGINEER/SURVEYOR-----	\$75.00
THREE MAN SURVEY CREW & EQUIPMENT-----	\$165.00
TWO MAN SURVEY CREW & EQUIPMENT-----	\$125.00

³ The total should have been \$16,000.00.

ONE MAN SURVEY CREW & EQUIPMENT-----\$85.00

ENGINEERING TECHNICIAN-----\$55.00

CAD DRAFTSMAN-----\$65.00

PLOTTING-----\$10.00

WORD PROCESSING-----\$25.00

REBILLING FEE-----\$5.00

REPRODUCTIONS

24" X 36"-----\$2.00

18" X 26"-----\$1.50

7. The contract contained EDS's name and address, as well as respondent's license number. It identified Mrs. Swarthout as the client and contained her address.

8. The contract contained the following provision regarding additional services:

Additional Services. Client agrees that if services not specified in this agreement are provided or if Client requests services not specified herein, Client agrees to timely pay for all such services as extra work at the rates set forth in Exhibit "C" attached hereto and by this reference incorporated herein.

9. The contract provided the following about termination services:

Suspension of Termination of Performance. In addition to any other rights Consultant may have for default of Client, if Client fails to pay Consultant within thirty (30) days after invoices are rendered, Client agrees Consultant shall have the right to consider such default in payment a material breach of this agreement, and, upon written notice, the duties, obligations, and responsibilities of Consultant under this agreement may be suspended or terminated at Consultant's sole option.

Early Termination Release. Consultant has a right to complete all services agreed to be rendered pursuant to this contract. In the event this agreement is terminated before the completion of all services, unless Consultant is responsible for such early termination, Client agrees to pay Consultant the full contract price and that any such termination shall automatically release Consultant from any liability for any work performed.

Exhibit A-1 provided the following:

IN THE EVENT THE CLIENT WISHES NOT TO PROCEED WITH ANY STAGE OF THIS PROPOSAL, THEY MUST NOTIFY EDS ENGINEERING & LAND SURVEYING PRIOR TO COMMENCING WITH THAT STAGE OF WORK AS LISTED ABOVE. EDS WILL RELEASE THE CLIENT FROM FUTHER OBLIGATION OF THIS CONTRACT.

NOTIFICATION SHALL BE WRITTEN AND SIGNED BY ALL PARTIES.

IN THE EVENT THE CLIENT DOES NOT WISH TO CONTINUE WITH ANY PORTION OF A STAGE OF THIS PROPOSAL [sic] EDS WILL TAKE A PORTION OF PAYMENT FOR STAGES THAT HAVE BEEN EXECUTED BY THIS CONTRACT FOR A PERCENTAGE OF WORK PERFORMED.

The Swarthouts' Dissatisfaction with EDS's Services

10. Not long after Mr. Engle began work on the project, the Swarthouts became dissatisfied with his services. He missed the initial deadline for submitting documents to TCPW he had promised to meet. After he submitted the documents, he and Mrs. Swarthout met with staff from TCPW at the property to discuss a drainage problem. Staff informed them that the property sat lower than an adjoining road, thereby causing runoff from the road and surrounding properties to pool on the Swarthout property. Staff required a solution to this drainage problem as a condition to any development of the Swarthout property. The original suggestion was to devise an on-site retention basin or to install a culvert which would drain to a nearby slough. Further investigation revealed that the culvert option required the Swarthouts to acquire an easement across property located between theirs and the slough, which the property owner was unwilling to grant. Therefore, the Swarthouts felt that construction of an on-site retention basin was their only reasonable solution.

11. Mr. Engle told the Swarthouts that the retention basin would be designed by Mr. Pearson. As time went by, the Swarthouts continued to contact Mr. Engle for the status of the design of the retention basin. Mr. Engle kept explaining that he was waiting for Mr. Pearson and at some point said that Mr. Pearson was no longer returning his phone calls. The Swarthouts eventually received a telephone call from Mr. Pearson explaining that he was taking over the project because Mr. Engle no longer worked for EDS.

12. The Swarthouts' satisfaction with the engineering services being provided by EDS did not improve with Mr. Pearson in charge of the project. He continuously failed to return phone calls and repeatedly missed promised deadlines for submitting improvement plans to TCPW. He eventually submitted the plans only after demanding that the Swarthouts pay their invoice in full, but settling for payment of one half of the amount due. He did not return Mrs. Swarthout's repeated phone calls checking on the status of TCPW's approval of the improvement plans submitted. She eventually learned from TCPW staff that the plans had been returned to Mr. Pearson with requested corrections two weeks prior.

13. Mrs. Swarthout left a message for Mr. Pearson suggesting that they meet with TCPW staff to discuss the requested changes to the improvement plans. Mr. Pearson never returned her phone call. Mrs. Swarthout eventually left a message for respondent stating that she would file a complaint with the Board if he did not return her phone call within 48 hours. Respondent returned the call and promised to meet with Mrs. Swarthout and TCPW staff to discuss the requested corrections to the improvement plans in two weeks. Three weeks later, Mrs. Swarthout confirmed with TCPW staff that respondent never called to schedule a meeting with them. She terminated EDS's services.

14. The Swarthouts eventually hired Steven Nelson of S2-J2 Engineering, Inc., to finish the project Mr. Engle and EDS were originally hired to complete. Mr. Nelson successfully obtained TCPW's approval of the subdivision of the Swarthout property, and a final parcel map showing the four separate parcels was recorded with the Tehama County Clerk/Recorder on August 27, 2009.

Expert Testimony

15. Complainant alleged that respondent was negligent and incompetent in his work for the Swarthouts because he: 1) overlooked the topographic and hydrologic setting of the Swarthout property, critical design information that was required before commencing the design phase; 2) was unaware of the need for an onsite facility to handle water runoff; 3) prepared a set of undated calculations for a runoff facility, but provided no evidence that those calculations were considered or

used;⁴ and 4) agreed with TCPW that a retention basin on the property was a reasonable solution after learning that an onsite facility was necessary. Complainant relied upon the expert testimony of Nejde "Jack" Yaghoubian to establish respondent's purported negligence and incompetence.

16. In his written report, Mr. Yaghoubian opined:

The subject as the principal of EDS and the engineer of the record failed to exercise due diligence to investigate and correctly characterize the geologic and hydrologic setting of the property before commencing the design activities. It was imperative for the subject to obtain or prepare a topographic map of the property to determine the hydrologic parameters and site characteristics that governed the design. None of the plans prepared by or under the Subject's supervision in the case file include contour lines of the property and its immediate vicinity.

(Bolding and emphasis omitted.)

However, Mr. Yaghoubian failed to follow the Board's specific instructions that his report include: 1) a factual basis explaining how respondent's conduct breached his duty of care; 2) the factual basis for his opinion that respondent breached his duty of care and the identification of supporting evidence or documentation; 3) an explanation of what respondent should have done to meet the standard of care; 4) the factual basis for his opinion that respondent was incompetent and the identification of support evidence or documentation; and 5) an explanation of what a competent engineer would have done under the relevant circumstances.

⁴ Complainant waived this alleged act of negligence and incompetence at the hearing when his attorney objected to respondent's attempt to question Mr. Yaghoubian (complainant's expert witness) about those calculations, arguing:

But the fact is Mr. Nelson could have been asked about it, his own document, and wasn't this morning, and now Mr. Smith's asking Mr. Yaghoubian to interpret Mr. Nelson's document which this is the first time Mr. Yaghoubian has read this, and being an engineer he probably does understand this, but what's the relevance to our charges? Our charges aren't about the calculations, correct? Our charges are the incompetence and the negligence and failing to do the soil analysis and different things like that, not about the calculations.

At the hearing, Mr. Yaghoubian explained that the same acts which rendered respondent negligent, also demonstrated his incompetence. Mr. Yaghoubian opined that respondent was negligent and incompetent because he (respondent) was unaware of the fact that the Swarthout property was situated about two feet lower than an adjacent road and water flowed from that road onto the property during heavy rains. Mr. Yaghoubian also explained that without knowing the volume of runoff that normally flows from the adjacent road onto the property, respondent had no factual basis for determining whether the property could naturally absorb such runoff or if an onsite facility to handle the runoff was necessary.

17. For the reasons explained further in Legal Conclusion 1, complainant failed to establish, by clear and convincing evidence, that respondent's alleged conduct rose to the level of negligence. Mr. Yaghoubian provided no testimony regarding the appropriate standard of care against which respondent's conduct is to be measured to determine if he acted negligently. While he opined that respondent should have surveyed the Swarthout property and determined the amount of water that flowed onto the property from adjacent properties before doing anything else, he provided no foundation for such opinion. In other words, there was no testimony from which it could be determined that Mr. Yaghoubian was stating what he believed a duly licensed engineer in good standing and exercising ordinary care would have done, as opposed to merely stating what he personally would have done under the circumstances. (See, *Huang v. Garner* (1984) 157 Cal.App.3d 404, 413 [expert's testimony that the failure to include engineering calculations on the plans would constitute a departure from common practice did not constitute testimony as to the standard of care]; disapproved on different ground in *Aas v. Superior Court* (2000) 24 Cal.4th 627, 648-649.) Furthermore, his opinions that respondent's actions constituted negligence were "unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion" (*Jennings v. Palomar Pomerado Health Systems* (2004) 114 Cal.App.4th 1108, 1117 [explaining that such expert testimony is conclusory and inadmissible].) Therefore, there is insufficient evidence to support a factual finding that respondent was negligent in providing engineering services to the Swarthouts.

18. Complainant also did not establish respondent's incompetence by clear and convincing evidence as discussed further in Legal Conclusion 2. (See, *Pollak v. Kinder* (1978) 85 Cal.App.3d 833, 838 ["... the terms negligence and incompetency are not synonymous; a licensee may be competent or capable of performing a given duty but negligent in performing that duty."]) Again, Mr. Yaghoubian provided no testimony regarding what a competent engineer would have done differently than respondent. Nor did he testify to a sufficient factual basis for his conclusions that respondent was incompetent.

Factors in Aggravation, Mitigation, and Rehabilitation

19. Respondent has been a licensed civil engineer for the past 36 years. Because he obtained licensure prior to 1982, his civil engineer license allows him to practice land surveying under the Professional Land Surveyor's Act without additional licensure. (Bus. & Prof. Code, § 6731, subd. (g).) Other than the administrative citation issued February 26, 2010, there is no history of prior discipline of his license. (Factual Finding 1.)

20. Respondent declined to testify on his own behalf, and complainant questioned respondent pursuant to Government Code section 11513, subdivision (b). Even then, respondent did not offer any testimony other than his responses to complainant's questions. He candidly admitted that he never received a signed written contract back from the Swarthouts. He did not call any witnesses, even though he initially said his partner, Mr. Pearson, would testify and was present throughout the hearing. Respondent offered no documentary evidence.

21. The Board has adopted criteria for determining a licensee's rehabilitation since committing the acts for which discipline is sought and his present ability to retain his license. (Cal. Code Regs., tit. 16, § 418, subd. (b).) The criteria which are relevant here include: 1) the nature and severity of the acts for which discipline is sought; 2) evidence of the commission of other acts, either before or after the underlying conduct, which would constitute grounds for discipline; 3) the time that has elapsed since the commission of the underlying acts and any other acts which would constitute grounds for discipline; and 4) any evidence of rehabilitation presented by the licensee. (Cal. Code Regs., tit. 16, § 418, subds. (b)(1)-(b)(3) and (b)(5).)⁵

22. As discussed below, cause exists to discipline respondent's license as a civil engineer solely on the grounds that he failed to have the Swarthouts sign a written contract prior to the commencement of work. Such an obligation is one which is imposed by statute. (Bus. & Prof. Code, § 6749, subd. (a).) Respondent conceded that he never received the Swarthouts' signatures on the contract he had signed and authorized Mr. Engle to present to them. (Factual Findings 4 and 20.)

To respondent's credit, he did not completely ignore his statutory obligation to obtain a signed contract from the Swarthouts. While there was no evidence that whether Mr. Engle actually presented the contract to the Swarthouts, respondent's

⁵ The other criteria specified in the regulation apply only when criminal conduct is the basis for discipline. (Cal. Code Regs., tit. 16, § 418, subds. (b)(4) [the extent of any compliance with the terms of probation, parole, or restitution], (b)(6) [total criminal record], and (b)(7) [any proceedings to expunge prior criminal convictions].)

testimony that he signed a contract and authorized Mr. Engle to present that contract to the Swarthouts was uncontradicted and therefore believed. (Factual Finding 4.) The contract sent to the Swarthouts contained each of the elements specified in Business and Professions Code section 6749, subdivision (a), which is quoted in Legal Conclusion 4. (Factual Findings 5-9.)

Mr. Yaghoubian's testimony that the proposed contract did not include the statutory elements was not credible. His demeanor while testifying made it clear that he was unable to separate the issue of respondent not obtaining a signed contract from the issue of whether the contract that was sent to the Swarthouts contained all of the statutory elements. Also, his testimony made it clear that he was not going to deviate from his opinion that the proposed contract did not comport with the statute, regardless of any evidence to the contrary shown to him. For instance, he testified that the proposed contract did not adequately describe the proposed scope of work. But when referred to Exhibit A to the contract (see, Factual Finding 5) and asked whether it specified the scope of work, Mr. Yaghoubian answered: "No. This just says the services that you are going to provide." He criticized the signature block for not containing the client's preprinted name, instead identifying the client as "Property Owner." But "Property Owner" identified the title of the person who was supposed to sign as the client. And he admitted that the first page of the proposed contract adequately identified Mrs. Swarthout as the client such that it could easily be understood that she was the "client" referred to in the signature block.

23. Respondent's license was disciplined on one prior occasion when he failed to file a Record of Survey with the County Surveyor's Office within the time period required by Business and Professions Code section 8762, subdivision (c). (Factual Finding 1.) He was issued an administrative citation and paid a fine in the amount of \$500. There has been no other discipline.

24. Respondent presented no evidence of his rehabilitation. (Factual Finding 20.)

25. After considering each of the criteria for evaluating respondent's rehabilitation and fitness to maintain licensure specified above, it is clear that the appropriate discipline for respondent's failure to obtain a written contract prior to commencing work on the project is to place his license on probation as specified in the Order below. While he did violate a statutory requirement, there was no evidence that such violation was intentional. In fact, the above evidence suggests that it was not. Furthermore, he has been licensed for the past 36 years and has had only one prior incident of discipline.

Costs of Enforcement

26. Complainant requested costs of enforcement and prosecution in the total amount of \$14,172.50 pursuant to Business and Professions Code section 125.3. This amount consists, in part, of charges incurred by the Attorney General's Office and billed to the Board. A Certification of Prosecution Costs: Declaration of Leslie A. Burgermyer was introduced at the hearing. Attached as Exhibit A to that Certification is a document entitled Matter Time Activity by Professional Type, which shows that the Board has incurred costs in the amount of \$13,047.50 for work performed, or expected to be performed, by the Attorney General's Office in this matter.

The amount requested also consists of expert witness fees for Mr. Yaghoubian's services (\$1,125), which the Board incurred directly. Attached as Exhibit B to the Certification of Prosecution Costs is the Board's Certification of Costs. Included with that Certification is a Technical Expert Statement of Services showing that Mr. Yaghoubian charged the Board \$1,125 for the 15 hours he purportedly spent on September 14, 2009, reviewing the case and preparing a report.

Respondent did not object to the requested costs as being unreasonable at the hearing.

Costs in the amount of \$14,172.50 are unreasonable in light of the issues involved in this matter as discussed in Legal Conclusion 7 below. However, costs in the amount of \$4,250 are reasonable and should be awarded for the reasons explained in Legal Conclusion 7.

LEGAL CONCLUSIONS

1. A civil engineer license may be disciplined when the Board has found the licensee guilty of negligence in his practice. (Bus. & Prof. Code, § 6775, subd. (c).) A person is guilty of negligence when his conduct falls below the standard established by law for the protection of others against an unreasonable risk of harm. (See, *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997.) The general rule is that one is required to exercise the care that a reasonable prudent person would exercise under similar circumstances. (*Ibid.*) "With respect to professionals, their specialized education and training do not serve to impose an increased duty of care but rather are considered additional 'circumstances' relevant to an overall assessment of what constitutes 'ordinary prudence' in a particular situation." (*Id.*, at pp. 997-998.)

The applicable standard of care by which respondent's conduct is to be measured is the duty "to use the care ordinarily exercised in like cases by duly licensed professional engineers and land surveyors in good standing." (Cal. Code Regs., tit. 16, § 404, subd. (dd).) And the care a duly licensed professional engineer in good standing would have ordinarily exercised in providing engineering services to the Swarthouts must be established by expert testimony. (*Flowers v. Torrance Memorial Hospital Medical Center*, *supra*, 8 Cal.4th 992, 1001.)⁶ While case law provides that such testimony is conclusive and cannot be disregarded (*Ibid*), such case law has been interpreted to mean only that expert testimony cannot be rebutted by, or disregarded in favor of, lay testimony. "The weight to be given to expert testimony is within the sound discretion of the fact finding tribunal." (*Maryland Casualty Company v. Industrial Accident Commission* (1944) 64 Cal.App.2d 162, 166; *Pacific Employers Insurance Co. v. Industrial Accident Commission* (1941) 47 Cal.App.2d 494, 501 [affirming the Commission's right to disregard uncontradicted expert testimony regarding causation as not persuasive].)

Here, Mr. Yaghoubian failed to offer any testimony about the applicable standard of care by which respondent's conduct is to be measured. He said nothing about what a duly licensed engineer in good standing and exercising ordinary care would have done that respondent did not. (Factual Finding 17; see, *Huang v. Garner*, *supra*, 157 Cal.App.3d 404, 413 [proof of professional negligence requires evidence of the standard of care in the relevant community].) Nor did he provide any factual basis for his opinions that respondent's conduct amounted to negligence. (Factual Finding 17.) "An expert's conclusory opinion that something did occur, when unaccompanied by a reasoned explanation illuminating how the expert employed his or her superior knowledge and training to connect the facts with the ultimate conclusion, does not assist the jury." (*Jennings v. Palomar Pomerado Health Systems*, *supra*, 114 Cal.App.4th 1108, 1118 [affirming trial court's exclusion of the testimony of plaintiff's expert witness]; see, Evid. Code, § 801, subd. (a) [expert witness may offer an opinion if the subject matter of that opinion "is sufficiently beyond common experience that the opinion of [the] expert would assist the trier of fact."]) Therefore, there is no factual basis to support a factual finding that respondent provided engineering services to the Swarthouts in a negligent manner, and no cause exists to discipline respondent's license pursuant to Business and Professions Code section 6775, subdivision (c), based on his alleged negligence.

2. A civil engineer license may be disciplined when the Board has found the licensee guilty of incompetence in his practice. (Bus. & Prof. Code, § 6775, subd. (c).) The Board has defined incompetence as "the lack of knowledge or ability in

⁶ An exception exists in those circumstances, which did not exist here, in which the particular conduct required is with the "common knowledge" of the layman, and such "common knowledge" exception is generally limited to those circumstances under which the doctrine of *res ipsa loquitur* applies. (*Ibid*.)

discharging professional obligations as a professional engineer or land surveyor.” (Cal. Code Regs., tit. 16, § 404, subd. (u).) As with the standard for determining whether one’s conduct amounted to negligence, the standard for determining whether one acted competently is generally established through expert testimony about “the generally accepted practices and procedures within the professional community.” (*Milligan v. Hearing Aid Dispensers Examining Committee* (1983) 142 Cal.App.3d 1002, 1006 [substantial evidence supported the conclusion that respondent was incompetent for not performing two tests which were essential to an adequate determination of possible medical pathology and the extent of the patients’ hearing loss] .)

As with the allegation of negligence, complainant failed to offer any testimony about the applicable standard by which respondent’s conduct is to be measured in determining whether he performed engineering services for the Swarthouts competently. Mr. Yaghoubian said nothing about what a knowledgeable and capable engineer would have done differently than respondent. (Factual Finding 18.) Nor did he provide any factual basis for his conclusions that respondent was incompetent. Therefore, there is no factual basis to support a factual finding that respondent provided engineering services to the Swarthouts in an incompetent manner, and no cause exists to discipline respondent’s license pursuant to Business and Professions Code section 6775, subdivision (c), based on his alleged incompetence.

3. A civil engineer license may be disciplined if the licensee violates the Professional Engineers Act, the Professional Land Surveyors’ Act, or any rule or regulation adopted pursuant to either of those Acts. (Bus. & Prof. Code, §§ 6775, subd. (h), and 8780, subd. (d).) California Code of Regulations, title 16, section 415, requires licensed engineers and surveyors to practice in only those areas in which they are fully proficient and competent based on their education and experience. Since the record is factually devoid of clear and convincing evidence establishing that respondent performed engineering services for the Swarthouts in an incompetent manner (Factual Finding 18), there is a similar void in the evidence that he practiced outside his area of competence by providing such services. Therefore, there is no cause to discipline his license pursuant to Business and Professions Code sections 6774, subdivision (h), or 8780, subdivision (d), as either of those statutes relate to California Code of Regulations, title 16, section 415.

4. A civil engineer license may be disciplined if the licensee violates the Professional Engineers Act, the Professional Land Surveyors’ Act, or any rule or regulation adopted pursuant to either of those Acts. (Bus. & Prof. Code, §§ 6775, subd. (h), and 8780, subd. (d).) Business and Professions Code section 6749 requires professional engineers to obtain their client’s signature on a written contract before providing engineering services.

A professional engineer shall use a written contract when contracting to provide professional engineering services to a client pursuant to this chapter. The written contract shall be executed by the professional engineer and the client, or his or her representative, prior to the professional engineer commencing work, unless the client knowingly states in writing that work may be commenced before the contract is executed. The written contract shall include, but not be limited to, all of the following:

- (1) A description of the services to be provided to the client by the professional engineer.
- (2) A description of any basis of compensation applicable to the contract, and the method of payment agreed upon by the parties.
- (3) The name, address, and license or certificate number of the professional engineer, and the name and address of the client.
- (4) A description of the procedure that the professional engineer and the client will use to accommodate additional services.
- (5) A description of the procedure to be used by any party to terminate the contract.

(Bus. & Prof. Code, § 6749, subd. (a).)⁷

It is undisputed that respondent never received a written contract signed by the Swarthouts before beginning work on their property. (Factual Findings 4 and 20.) Therefore, cause exists to discipline respondent's license pursuant to Business and Professions Code sections 6775, subdivision (h), and 8780, subdivision (d), jointly and severally, as those statutes relate to Business and Professions Code sections 6749, subdivision (a), and 8759, subdivision (a), respectively.

⁷ Business and Professions Code section 8759, subdivision (a), provides the same with regard to licensed surveyors and registered civil engineers authorized to practice land surveying.

5. Cause exists to discipline respondent's civil engineer license for the reasons discussed in Legal Conclusion 4. When the evidence of the Board's criteria for evaluating his rehabilitation discussed in Factual Findings 21 through 25 is considered, the appropriate discipline is to place respondent's license on probation on the conditions specified in the Order below.

Cost Recovery

6. Business and Professions Code section 125.3, subdivision (a), states:

Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before any board within the department or before the Osteopathic Medical Board, upon request of the entity bringing the proceeding, the administrative law judge may direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

California Code of Regulations, title 1, section 1042, subdivision (b), states the following about cost recovery:

Except as otherwise provided by law, proof of costs at the Hearing may be made by Declarations that contain specific and sufficient facts to support findings regarding actual costs incurred and the reasonableness of the costs, which shall be presented as follows:

[¶] . . . [¶]

(2) For services provided by persons who are not agency employees, the Declaration shall be executed by the person providing the service and describe the general tasks performed, the time spent on each task and the hourly rate or other compensation for the service. In lieu of this Declaration, the agency may attach to its Declaration copies of the time and billing records submitted by the service provider.

In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 125.3. These factors include: 1) the licensee's success in getting the charges dismissed or reduced; 2) the licensee's subjective good faith

belief in the merits of his or her position; 3) whether the licentiate raised a colorable challenge to the proposed discipline; 4) the licentiate's financial ability to pay; and 5) whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Id.*, at p. 45.)

7. Ms. Burgermyer, a person not employed by the Board, signed a declaration in which she described the general tasks performed, the time spent on each task, and the hourly rate or other compensation for service. (Factual Finding 26.) With regard to Mr. Yaghoubian's services, the Board submitted a Certification of Costs and included a copy of the Technical Expert State of Services he submitted for payment. (Factual Finding 26.) Such evidence constitutes prima facie evidence of the reasonableness of the costs requested. (Bus. & Prof., § 125.3, subd. (c).)

However, such prima facie evidence is rebutted by consideration of the *Zuckerman* factors. Complainant alleged four separate grounds for discipline, but prevailed on only one of them. (Factual Finding 2; Legal Conclusions 1-4.) The relevance of Mr. Yaghoubian's expert testimony was limited to those grounds which complainant did not prove, and those grounds were not proved because of shortcomings in Mr. Yaghoubian's testimony. (Legal Conclusions 1, 2, and 3.) Additionally, Mr. Yaghoubian failed to follow the Board's specific instructions that his report include: 1) a factual basis explaining how respondent's conduct breached his duty of care; 2) the factual basis for his opinion that respondent breached his duty of care and the identification of supporting evidence or documentation; 3) an explanation of what respondent should have done to meet the standard of care; 4) the factual basis for his opinion that respondent was incompetent and the identification of support evidence or documentation; and 5) an explanation of what a competent engineer would have done under the same circumstances. (Factual Finding 16.)

After considering the relevant evidence and the pertinent *Zuckerman* factors, it is clear that it was unreasonable for the Board to have incurred prosecution and investigation costs based on 76.75 hours of attorney time billed by the Attorney General's Office. However, it would have been reasonable for the Attorney General's Office to have spent 25 hours of attorney time investigating and prosecuting this matter prior to hearing. Based on an hourly rate of \$170 charged by the Attorney General's Office as reflected in the billing statement, which is reasonable, costs in the amount of \$4,250 are reasonable and are awarded as set forth in the Order below.

For the reasons previously discussed, no costs are awarded for the expert fees incurred for Mr. Yaghoubian's services. Additionally, it is not believable that he purportedly spent 15 hours in one day reviewing the case and preparing a report. (Factual Finding 26.)

ORDER


IT IS HEREBY ORDERED that Civil Engineer License Number C25056 issued to respondent Terry Edwin Smith is REVOKED. However, the revocation is STAYED and respondent is placed on PROBATION for a period of two years on the following conditions:

1. Respondent shall obey all laws and regulations related to the practices of professional engineering and professional land surveying.
2. Respondent shall submit such special reports as the Board may require.
3. The period of probation shall be tolled during the time respondent is practicing exclusively outside the state of California. If, during the period of probation, respondent practices exclusively outside the State of California, he shall immediately notify the Board in writing.
4. Within 60 days of the effective date of this Decision, respondent shall successfully complete and pass the California Laws and Board Rules examination, as administered by the Board.
5. No later than 60 days prior to the end of the period of probation, respondent shall successfully complete and pass a course in professional ethics, approved in advance by the Board or its designee.
6. Within 30 days of the effective date of this Decision, respondent shall provide the Board with evidence that he has provided all persons or entities with whom he has a contractual or employment relationship for the provision of professional engineering and/or professional land surveying services a copy of the Decision and Order of the Board. Such evidence shall include, but not be limited to, the name and business address of each person or entity required to be so notified. During the period of probation, respondent may be required to provide the same notification to each new person or entity with whom he has such contractual or employment relationship and shall report to the Board the name and address of each person or entity so notified.
7. Respondent shall pay the Board's costs associated with its investigation and prosecution pursuant to Business and Professions Code section 125.3 in the amount of \$4,250. Respondent shall be permitted to pay these costs in a payment plan approved by the Board, with payments to be completed no later than 90 days prior to the end of the period of probation.

8. If respondent violates the probationary conditions in any respect, the Board, after giving respondent notice and the opportunity to be heard, may vacate the stay and reinstate the disciplinary order which was stayed. If, during the period of probation, an accusation or petition to vacate stay is filed against respondent, or if the matter has been submitted to the Office of the Attorney General for the filing of such, the Board shall have continuing jurisdiction until all matters are final, and the period of probation shall be extended until all matters are final.

9. Upon successful completion of all of the probationary conditions and the expiration of the period of probation, respondent's license shall be unconditionally restored.

DATED: November 15, 2011

Original Signed

COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings

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8 **BEFORE THE**
BOARD FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS
9 **DEPARTMENT OF CONSUMER AFFAIRS**
10 **STATE OF CALIFORNIA**

11 In the Matter of the Accusation Against:

Case No. 955-A

12 **TERRY EDWIN SMITH**
2409 Oberlin Road
13 Yreka, California 96067

A C C U S A T I O N

14 Civil Engineer License No. C25056

15 Respondent.

16
17 Complainant alleges:

18 **PARTIES**

19 1. David E. Brown (Complainant) brings this Accusation solely in his official capacity
20 as the Executive Officer of the Board for Professional Engineers and Land Surveyors,
21 Department of Consumer Affairs.

22 2. On or about February 12, 1975, the Board for Professional Engineers and Land
23 Surveyors issued Civil Engineer License Number C 25056 to Terry Edwin Smith (Respondent).
24 The Civil Engineer License was in full force and effect at all times relevant to the charges brought
25 herein and will expire on December 31, 2011, unless renewed.

26 3. Pursuant to Business and Professions Code section 6731, Respondent is authorized to
27 practice all land surveying within the meaning of the Professional Land Surveyors' Act, Code
28 section 8700 et seq. in that he was registered as a Civil Engineer prior to January 1, 1982.

JURISDICTION

4. This Accusation is brought before the Board for Professional Engineers and Land Surveyors (Board), Department of Consumer Affairs, under the authority of the following laws. All section references are to the Business and Professions Code (Code) unless otherwise indicated.

5. Section 118, subdivision (b), of the Code provides that the suspension, expiration, surrender, or cancellation of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated.

6. Section 6775 of the Code [Professional Engineers Act] states, in pertinent part, that

[T]he board may reprove, suspend for a period not to exceed two years, or revoke the certificate of any professional engineer registered under this chapter:

(c) Who has been found guilty by the board of negligence or incompetence in his or her practice.

(h) Who violates any provision of this chapter [Professional Engineers Act].

7. Section 8780 of the Code [Professional Land Surveyors' Act] states, in pertinent part:

[T]he board may reprove, suspend for a period not to exceed two years, or revoke the license or certificate of any licensed land surveyor or registered civil engineer, respectively, licensed under this chapter or registered under the provisions of [Professional Engineers Act] , whom it finds to be guilty of:

(d) Any violation of any provision of this chapter [Professional Land Surveyors' Act] or of any other law relating to or involving the practice of land surveying.

STATUTORY PROVISIONS

8. Section 6749 of the Code [Professional Engineers Act] provides, in pertinent part:

(a) A professional engineer shall use a written contract when contracting to provide professional engineering services to a client pursuant to this chapter. The written contract shall be executed by the professional engineer and the client, or his or her representative, prior to the professional engineer commencing work, unless the client knowingly states in writing that work may be commenced before the contract is executed. The written contract shall include, but not be limited to, all of the following:

1 (1) A description of the services to be provided to the client by the
professional engineer.

2 (2) A description of any basis of compensation applicable to the contract, and
3 the method of payment agreed upon by the parties.

4 (3) The name, address, and license or certificate number of the professional
engineer, and the name and address of the client.

5 (4) A description of the procedures that the professional engineer and the
6 client will use to accommodate additional services.

7 (5) A description of the procedure to be used by any party to terminate the
contract.

8 (b) This section shall not apply to any of the following:

9 (1) Professional engineering services rendered by a professional engineer for
10 which the client will not pay compensation.

11 (2) A professional engineer who has a current or prior contractual
relationship with the client to provide engineering services, and that client has paid
12 the professional engineer all of the fees that are due under the contract.

13 (3) If the client knowingly states in writing after full disclosure of this section
that a contract which complies with the requirements of this section is not required.

14 (4) Professional engineering services rendered by a professional engineer to
15 any of the following:

16 (A) A professional engineer licensed or registered under this chapter.

17 (B) A land surveyor licensed under Chapter 15 (commencing with Section
8700).

18 (C) An architect licensed under Chapter 3 (commencing with Section
19 5500).

20 (D) A contractor licensed under Chapter 9 (commencing with Section
7000).

21 (E) A geologist or a geophysicist licensed under Chapter 12.5
22 (commencing with Section 7800).

23 (F) A manufacturing, mining, public utility, research and development, or
other industrial corporation, if the services are provided in connection with or
24 incidental to the products, systems, or services of that corporation or its affiliates.

25 (G) A public agency.

26 (c) "Written contract" as used in this section includes a contract that is in
electronic form.

27 ///

28 ///

1 9. Section 8759 of the Code [Professional Land Surveyors' Act] states:

2 (a) A licensed land surveyor or registered civil engineer authorized to
3 practice land surveying shall use a written contract when contracting to provide
4 professional services to a client pursuant to this chapter. The written contract shall
5 be executed by the licensed land surveyor or registered civil engineer and the
6 client, or his or her representative, prior to the licensed land surveyor or registered
7 civil engineer commencing work, unless the client knowingly states in writing that
8 work may be commenced before the contract is executed. The written contract
9 shall include, but not be limited to, all of the following:

10 (1) A description of the services to be provided to the client by the licensed
11 land surveyor or registered civil engineer.

12 (2) A description of any basis of compensation applicable to the contract, and
13 the method of payment agreed upon by the parties.

14 (3) The name, address, and license or certificate number of the licensed land
15 surveyor or registered civil engineer, and the name and address of the client.

16 (4) A description of the procedure that the licensed land surveyor or
17 registered civil engineer and the client will use to accommodate additional
18 services.

19 (5) A description of the procedure to be used by any party to terminate the
20 contract.

21 (b) This section shall not apply to any of the following:

22 (1) Professional land surveying services rendered by a licensed land surveyor
23 or registered civil engineer for which the client will not pay compensation.

24 (2) A licensed land surveyor or registered civil engineer who has a current or
25 prior contractual relationship with the client to provide professional services
26 pursuant to this chapter, and that client has paid the surveyor or engineer all of the
27 fees that are due under the contract.

28 (3) If the client knowingly states in writing after full disclosure of this section
that a contract which complies with the requirements of this section is not required.

(4) Professional services rendered by a licensed land surveyor or a registered
civil engineer to any of the following:

 (A) A professional engineer licensed or registered under [Professional
Engineers Act].

 (B) A land surveyor licensed under this chapter.

 (C) An architect licensed under Chapter 3 (commencing with Section
5500).

 (D) A contractor licensed under Chapter 9 (commencing with Section
7000).

1 (E) A geologist or a geophysicist licensed under Chapter 12.5
(commencing with Section 7800).

2 (F) A manufacturing, mining, public utility, research and development, or
3 other industrial corporation, if the services are provided in connection with or
incidental to the products, systems, or services of that corporation or its affiliates.

4 (G) A public agency.

5 (c) "Written contract" as used in this section includes a contract that is in
6 electronic form.

7 **REGULATORY PROVISIONS**

8 10. California Code of Regulations (CCR), title 16, section 415, states:

9 A professional engineer or land surveyor licensed under the Code shall
10 practice and perform engineering or land surveying work only in the field or fields
in which he/she is by education and/or experience fully competent and proficient

11 Nothing in this regulation shall be construed: (1) to prohibit a professional
12 engineer from signing plans which include engineering work in areas other than
that in which he/she is fully competent and proficient, if such work was performed
13 by other engineers who were fully competent and proficient in such work; (2) to
prohibit a professional engineer from performing engineering work or a land
14 surveyor from performing land surveying work in areas which involve the
application of new principles, techniques, ideas or technology; (3) to prohibit a
15 professional engineer from supervising other engineers or a land surveyor from
supervising other land surveyors who may respectively be performing engineering
16 work or land surveying work in areas other than those in which the supervising
professional engineer or supervising land surveyor is fully competent and
17 proficient; and (4) to prohibit a professional engineer from signing plans which
include engineering work, portions of which were designed or required by any
18 governmental agency.

19 **COST RECOVERY**

20 11. Section 125.3 of the Code provides, in pertinent part, that the Board may request the
21 administrative law judge to direct a licentiate found to have committed a violation or violations of
22 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
23 enforcement of the case.

24 **RED BLUFF PROJECT**

25 12. On or about May 2005, C.S. and S.S., husband and wife, purchased four acres of land
26 in an unincorporated area of Tehama County, APN 039-370-05, near Red Bluff, California, and
27 intended for the parcel to be subdivided into four lots, each measuring 1.08 acres, for future
28

1 residential homes (Red Bluff Project). The Project required obtaining necessary permits from
2 Tehama County Public Works (TCPW).

3 13. At all times relevant to this matter, Respondent was the principal engineer, a partner
4 and owner of Engineering and Land Surveying Services (EDS). Edward A. Pearson is also an
5 owner and partner of EDS. Respondent hired Noble Engle (Engle), an unlicensed individual, and
6 assigned him to work on the Red Bluff Project.

7 14. C.S. and S.S. contacted EDS for the purposes of managing and preparing the
8 necessary plans and drawings for the Red Bluff Project as required by TCPW.

9 15. On or about May 8, 2005, EDS submitted a proposed written Agreement for
10 Professional Services Between Client and Consultant (Agreement) to C.S. and S.S. for the Red
11 Bluff Project. The Agreement proposed by Respondent to C.S. and S.S. did not include provision
12 for a drainage design system. Respondent admits that C.S. and S. S. never executed the
13 Agreement.

14 16. The unexecuted written Agreement appeared to include tasks related to the needed
15 scope of work to obtain the necessary permits. However, Respondent overlooked critical, yet
16 basic, design information required before commencing the design phase including topographic
17 and hydrologic setting of the Red Bluff Project property and its vicinity to quantify runoff water
18 significant to the site. The Agreement did not include provision for the design of a drainage
19 system to accommodate the runoff water in an environmentally acceptable manner.

20 17. On or about May 15, 2005, EDS employed and assigned Engle to complete the
21 subdivision project for the Red Bluff Project. Respondent admits that Engle provided services
22 under Respondent's direction and supervision. Respondent also admits that he had poor
23 judgment in employing Engle and assigning him to the Red Bluff Project.

24 18. On or about August 25, 2005, Respondent, unaware of the necessity for runoff water
25 handling facility at the Red Bluff Project site, wrote a letter to the Tehama County Planning
26 Department in which he, among other things, pointed to the need of soil information for the
27 assimilation of the wastewater only. The soil information for the assimilation of waste water has
28 no relevancy to the drainage design system required for the Red Bluff Project.

1 19. On or about October 5, 2005, Engle, as Respondent's representative, appeared at a
2 public hearing before the Tehama County Technical Advisory Committee (TAC), Tehama
3 County Planning Department. A result of the public hearing, among other things, was Condition
4 18 requiring a drainage design for the Red Bluff Project.

5 a. The drainage design plan was required to be prepared by a registered civil
6 engineer which certifies proposed improvements and appurtenant drainage facilities will not
7 adversely impact adjacent lands and to meet certain requirements of the Tehama County Land
8 Division Standards. The drainage design plan was required to be submitted to the Tehama
9 County Public Works Department (TCPWD) for review and comments prior to the approval of
10 improvement plans and commencement of construction. The drainage plan was required to
11 include all pertinent calculations and studies for approval. The TCPWD shall be reimbursed via a
12 Service Agreement for all costs incurred in the review and processing of drainage design,
13 improvement plans, and construction inspection. All drainage channels and pipes were required
14 to be constructed within private drainage easements and to comply with the minimum easements
15 widths determined by the drainage design in accordance with the TILDES and to be delineated on
16 the Final Map.

17 20. Before June 15, 2006, Respondent submitted improvement plans for the Red Bluff
18 Project to the TCPWD for review.

19 21. On or about June 15, 2006, TCPWD returned the plans to Respondent with numerous
20 requests for corrections and a sample cover sheet illustrating the requested information and
21 format for the drainage design system. Respondent's submittal had failed to include required
22 information. As to the drainage plans, TCPWD requested additional information, including but
23 not limited to: site all references and/or show all determination calculations; incremental analysis
24 for the volume calculation of the basin is not a constant and varies on the depth of water and
25 incremental analysis was requested to include that consideration and to include the accumulative
26 effect that the rainfall has on the basin in the Red Bluff Project property; to provide an overflow
27 with a drainage path because the time of infiltration for the basin is too long to allow the basin to
28 empty before the next rain event.

22. Before July 27, 2006, Respondent submitted improvement plans for the Red Bluff Project to the TCPWD for first check.

23. On or about July 27, 2006, TCPWD returned Respondent's first check improvement plans for the Red Bluff Project as incomplete and stated the first check will not be considered a complete check. TCPWD noted that the project improvement plans should include, at a minimum, cover sheet, general plan, plan and profile, and details sheet. TCPWD requested Respondent to provide a complete drainage study that includes the new roadway and the runoff that will be generated and possibly redirected by the new development.

24. Throughout the Red Bluff Project, Respondent failed to communicate with C.S. and S.S. regarding the status of that Project and provided untimely, negligent, and incompetent professional services.

25. On or about September 7, 2006, C.S. and S.S. sent a "cease and desist" letter to Respondent requiring him to immediately stop performing all professional services on the Red Bluff Project.

26. Subsequently, C.S. and S.S. hired a different licensed engineer to provide professional services to complete the Red Bluff Project, at additional expense to them.

FIRST CAUSE FOR DISCIPLINE

(Negligence)

27. Respondent is subject to discipline under Code section 6775, subdivision (c), in that he is guilty of negligence in his professional engineering practice for the Red Bluff Project from approximately May 8, 2005, through September 7, 2006, as set forth in paragraphs 12 through 26, above, incorporated herein by this reference, and as more particularly described below:

a. Respondent overlooked critical, yet basic, design information required before commencing the design phase.

b. The design information Respondent overlooked was the topographic and hydrologic setting of the Red Bluff Project property and its vicinity to quantify runoff water significant to the site.

1 c. Respondent, unaware of the necessity for runoff water handling facility at the Red
2 Bluff Project property stated in his August 25, 2005 letter to TCPD the need of soil information
3 for the assimilation of the wastewater only.

4 d. On a currently unknown date, Respondent prepared a set of undated calculations for a
5 runoff facility at the Red Bluff Project property but there is no information that his calculations
6 were considered or used by Respondent because they are not mentioned in the scope of work in
7 the unexecuted written Agreement and are not required thereunder.

8 e. After Respondent became aware of the necessity for runoff water handling facility at
9 the Red Bluff Project property, he agreed with TCPW that a retention basin at the property, where
10 the runoff water could be detained to gradually infiltrate into the subsurface formation, would be
11 a reasonable solution.

12 **SECOND CAUSE FOR DISCIPLINE**

13 **(Incompetence)**

14 28. Respondent is subject to discipline under Code section 6775, subdivision (c), in that
15 he is guilty of incompetence in his professional engineering and land surveying practice for the
16 Red Bluff Project from approximately May 8, 2005, through September 7, 2006, as set forth in
17 paragraphs 12 through 26, above, incorporated herein by this reference, and as more particularly
18 described below:

19 a. Respondent overlooked critical, yet basic, design information required before
20 commencing the design phase.

21 b. The design information Respondent overlooked was the topographic and hydrologic
22 setting of the Red Bluff Project property and its vicinity to quantify runoff water significant to the
23 site.

24 c. Respondent, unaware of the necessity for runoff water handling facility at the Red
25 Bluff Project property stated in his August 25, 2005 letter to TCPD the need of soil information
26 for the assimilation of the wastewater only.

27 d. On a currently unknown date, Respondent prepared a set of undated calculations for a
28 runoff facility at the Red Bluff Project property but there is no information that his calculations

1 were considered or used by Respondent because they are not mentioned in the scope of work in
2 the unexecuted written Agreement and are not required thereunder.

3 e. After Respondent became aware of the necessity for runoff water handling facility at
4 the Red Bluff Project property, he agreed with TCPW that a retention basin at the property, where
5 the runoff water could be detained to gradually infiltrate into the subsurface formation, would be
6 a reasonable solution.

7 **THIRD CAUSE FOR DISCIPLINE**

8 **(Practiced Outside Area of Competence)**

9 29. Respondent is subject to discipline under Code sections 6775, subdivision (h), and
10 8780, subdivision (d), in that in performing the professional engineering and land surveyor
11 services provided to C.S. and S.S. for the Red Bluff Project, as described in paragraphs 12
12 through 26, above, incorporated herein by this reference, he practiced outside his area of
13 competence in violation of CCR, title 16, section 415.

14 **FOURTH CAUSE FOR DISCIPLINE**

15 **(Failure to Enter into Written Contract for Services)**

16 30. Respondent is subject to discipline under Code sections 6775, subdivision (h), and
17 8780, subdivision (d), in that he failed to enter into a written contract in violation of Code
18 sections 6749 and 8759 for his professional engineering and land surveyor services provided to
19 C.S. and S.S. for the Red Bluff Project, as described in paragraph 12 through 26, above,
20 incorporated herein by this reference.

21 **OTHER DISCIPLINARY CONSIDERATIONS**

22 31. On or about February 26, 2010, the Board issued Citation Order 5346-L to
23 Respondent, in Board Case No. 2007-02-080, ordering Respondent to immediately cease and
24 desist from violating Business and Professions Code section 8762, subdivision (c) [shall file
25 record of survey within 90 days after setting boundary monuments during performance of a filed
26 survey or within 90 days after completion of a field survey, whichever occurs first]. Respondent
27 timely paid an administrative fine of \$500.00 and the matter is closed.

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PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Board for Professional Engineers and Land Surveyors issue a decision:

1. Revoking or suspending Civil Engineer License Number C 25056 issued to Terry Edwin Smith;
2. Ordering Terry Edwin Smith to pay the Board for Professional Engineers and Land Surveyors the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3; and
3. 4. Taking such other and further action as deemed necessary and proper.

DATED: _____

3/24/10

Original Signed

DAVID E. BROWN
Executive Officer
Board for Professional Engineers and Land Surveyors
Department of Consumer Affairs
State of California
Complainant

SA2010102257 / 10632616