

BEFORE THE WYOMING STATE BOARD OF EXAMINING WATER WELL DRILLING
CONTRACTORS AND WATER WELL PUMP INSTALLATION CONTRACTORS

STATE OF WYOMING

IN THE DISCIPLINARY MATTER OF)	
BRANDON DREILING)	OAH DOCKET NO. 19-012-037
d/b/a JOHN'S PUMP SERVICE, INC.)	AGENCY DOCKET NO. 16-004
LICENSE NO. 01-WD 099)	

DISCIPLINARY ORDER

This matter comes before the Wyoming State Board of Examining Water Well Drilling Contractors and Water Well Pump Installation Contractors ("Board") as a contested case, pursuant to the Wyoming Administrative Procedures Act ("WAPA"), Wyoming Statutes, Ch. 16-3. Petitioner, Investigating Board Member Lisa Lindemann ("IBM"), by and through counsel, Eric A. Easton, Senior Assistant Attorney General, asks that the Board discipline the water well drilling contractor and water well pump installation contractor licenses held by Respondent, Brandon Dreiling ("Dreiling"), for alleged violations of the Water Well Minimum Construction Standards ("WWMCS"), Regulations and Instructions, Part III, Wyoming State Engineer's Rules, and other rules governing water well drillers and pump installers, as described herein.

An evidentiary hearing was held in this case in two sessions, the first occurring on April 10, 2019, the second occurring on May 29, 2019, and the record was closed at the conclusion of the hearing. The Board, therefore, having considered and weighed all of the evidence presented in this case, and being duly advised in the premises, now hereby determines as follows:

Course of Proceedings

1. The IBM initiated this case through a "Petition and Complaint," dated October 30, 2018, and an initial hearing was scheduled for 1:00 pm on April 10, 2019. Hearing Examiner Tania S. Hytrek ("HE Hytrek") was assigned to the case by the Wyoming Office of Administrative Hearings, and in an "Order Setting Prehearing Conference and Requiring Disclosure," dated February 4, 2019, HE Hytrek set a deadline of March 22, 2019, for the parties to file disclosure statements and scheduled a prehearing conference for 10:00 am on March 28, 2019.

2. The IBM, through counsel, timely filed her disclosure statement. Dreiling did not file a disclosure statement.

3. The telephonic prehearing conference was held as scheduled. As indicated by advisory counsel for the Board, Sean Towles, Assistant Attorney General, who was in attendance at the prehearing conference, Dreiling was advised of his right to counsel and consented to the telephonic appearance of Board members and witnesses at the hearing.

4. The Board convened the public hearing at approximately 1:00 pm on April 10, 2019. HE Hytrek conducted the hearing, and all current Board members were in attendance, with Board

members Jerry Hunt, James O'Connor, and Michelle Christopher attending telephonically. The IBM appeared in person and by counsel, and Dreiling appeared in person *pro se*.

5. At approximately 5:20 pm on April 10, 2019, it was determined that another hearing session would be required to complete the case, and the hearing was recessed until another session could be convened. HE Hytrek advised the parties that they would be given an opportunity to file supplementary disclosure statements prior to the next session of the hearing.

6. A telephonic scheduling conference for the second hearing session was held on May 2, 2019. As indicated by Mr. Towles, who was in attendance at the scheduling conference, the date of May 29, 2019, was proposed for the second hearing session. Dreiling expressed a general concern over his ability to make any hearing date within the next several months, stating that this was his busiest time of year, but did not disclose any specific conflict on the proposed date. Mr. Towles stated that the expressed preference of the Board was to finish the hearing as soon as possible.

7. Following the scheduling conference, in an "Order Setting Prehearing Conference, Reconvening Hearing and Requiring Disclosure" dated May 8, 2019, HE Hytrek scheduled the second session of the hearing for 9:30 am on May 29, 2019. This same order also set a deadline of May 17, 2019, for any supplementary disclosure statements and scheduled a prehearing conference for the second session of the hearing for 9:00 am on May 22, 2019.

8. The IBM, through counsel, timely filed a supplementary disclosure statement. Dreiling did not file a supplementary disclosure statement.

9. At 8:45 pm on May 21, 2019, Dreiling submitted an email which HE Hytrek construed as a motion to continue the second session of the hearing for 90 days.

10. Dreiling did not appear at the telephonic prehearing conference on May 22, 2019. As indicated by Mr. Towles, who was in attendance at the prehearing conference, Mr. Towles stated that he had not had the opportunity to poll the Board with regard to Dreiling's motion to continue the hearing, but that the Board had previously expressed a desire to finish the hearing as soon as possible. HE Hytrek provisionally denied Dreiling's motion, indicating that the motion would be placed before the Board at the outset of the second session of the hearing for final determination.

11. On May 23, 2019, Dreiling communicated *ex parte* with the Board, via email, to advocate for the granting of his motion to continue the second session of the hearing. This communication was disclosed by multiple Board members to Mr. Towles, who disclosed it to Mr. Easton and HE Hytrek on May 23, 2019.

12. The Board convened the second session of the public hearing at approximately 9:45 am on May 29, 2019. HE Hytrek conducted the hearing, and all current Board members were in attendance, with Board member James O'Connor attending telephonically. The IBM appeared in person and by counsel, and Dreiling appeared in person *pro se*. Members of the public, some of whom had previously testified at the first hearing session in this case, were allowed to remain in the audience over Dreiling's objection.

13. After hearing argument concerning Dreiling's motion to continue, the Board recessed to executive session to receive legal advice concerning the motion. The IBM took no part in the executive session or in the decision on Dreiling's motion. Upon returning from executive session, the Board denied Dreiling's motion.

14. Mr. Easton indicated that he had no concerns that Dreiling's *ex parte* communication had prejudiced the Board as it did not pertain to the merits of the case.

15. The hearing proceeded in an orderly fashion, and the presentation of the case concluded at approximately 4:00 pm on May 29, 2019, at which time the record was closed and the hearing adjourned. The parties were dismissed, and the Board recessed to executive session to deliberate on the case. The IBM took no part in the deliberations or decision in this case.

16. Upon returning from executive session, at approximately 7:20 pm on May 29, 2019, the Board issued its oral findings in this case, which are made final by issuance of this Order.

Allegations

1. This case concerns many alleged violations of the WWMCS and the rules governing water well drillers and pump installers. The allegations are grouped into six substantive categories, each of which contains a varying number of alleged instances. The allegations are set out in most detail in the IBM's Investigative Report, dated August 1, 2018, attached as Exhibit F of the IBM's initial disclosure statement.

2. First, the IBM alleges that Dreiling failed "to use appropriate filter (gravel) pack in well construction" in violation of the WWMCS, Ch. 3, § 2(g), which reads, in relevant part: "Filter pack (or gravel pack) material shall consist of clean, well-rounded, chemically stable grains that are smooth and uniform." IBM's Exhibit F at F.15.

3. The first allegation concerns Dreiling's use of a particular gravel product, referred to most often in the record, and herein, as "B12," alternately referred to in the record as "47B." The IBM alleges that Dreiling used this product, in violation of the WWMCS, in sixteen (16) wells. *See* IBM's Exhibit F at F.2-F.8.

4. Second, the IBM alleges that Dreiling failed "to provide requested information to the State Engineer's Office [SEO] describing the 'B12' used," in violation of the Board's Rules and Regulations, Ch. 5, § 1(a)(i), which reads, in relevant part: "A license holder shall not ... fail to disclose any material facts requested ... in connection with a board investigation[.]" IBM's Exhibit F at F.15.

5. The IBM alleges that Dreiling committed this violation on two (2) occasions during the IBM's investigation into whether B12 complies with the WWMCS. *See* IBM's Exhibit F at F.2.

6. Third, the IBM alleges that Dreiling failed to "[i]ninstall an appropriate surface seal in the annular space between casing and borehole wall," in violation of the WWMCS, Ch. 3, § 2(h)(i),

which reads, in relevant part: “Well casing shall be sealed to prevent vertical movement or leakage of fluid in the annular space between casing and borehole wall.” IBM’s Exhibit F at F.15.

7. The IBM alleges that Dreiling improperly sealed two (2) wells, referred to in the record as the “Ruiz #1 Well” and the “Ackerman South Stock Well.” *See* IBM’s Exhibit F at F.1-F.7.

8. Fourth, the IBM alleges that Dreiling failed “to perform pump/electrical installations in accordance with existing electrical codes,” in violation of: 1) the WWMCS, Ch. 3, § 3(h), which reads, in relevant part: “All electrical installations shall be performed and maintained in accordance with existing electrical codes”; and 2) the Board’s Rules and Regulations, Ch. 5, § 1(a)(v), which reads, in relevant part: “All license holders shall comply with ... all federal, state, and local building, fire, safety, and real estate and any other laws, codes, ordinances, or regulations[.]” IBM’s Exhibit F at F.16.

9. The IBM alleges that Dreiling committed seven (7) violations of the applicable electrical code on the Ruiz #1 Well. IBM’s Exhibit F at F.5.

10. Fifth, the IBM alleges that Dreiling failed “to submit notices of intent [NOIs] to the Board’s Executive Director,” in violation of the Board’s Rules and Regulations, Ch. 5, § 1(a)(ix), which reads, in relevant part: “All license holders ... shall notify the Board, on forms established by the Board, of any intent to drill a well or install a pump in a newly constructed well or well repair requiring the withdrawal of the casing, five business days prior to commencement.” IBM’s Exhibit F at F.16.

11. The IBM alleges that Dreiling failed to submit NOIs on thirteen (13) wells. *See* IBM’s Exhibit F at F.8.

12. Sixth, the IBM alleges that Dreiling failed “to comply with a previous Settlement Agreement, Stipulation and Order,” by violating the settlement agreement attached to the IBM’s initial disclosure statement as Exhibit B. IBM’s Exhibit F at F.16.

13. The IBM alleges that Dreiling violated a settlement agreement, executed on April 28, 2016, which required him to comply with all provisions of law and submit quarterly reports of his drilling and pump installation activities during a one (1) year probationary period, by failing to submit any of the required quarterly reports and failing to submit six (6) NOIs during the probationary period. *See* IBM’s Exhibit F at F.7.

Analysis

Threshold Matters

This section of the analysis contains findings of fact and conclusions of law relevant to this case as a whole. Additional findings of fact and conclusions of law relevant to particular allegations are contained in the analysis sections below. Any conclusion of law may also be considered a finding of fact and is hereby incorporated as such.

Findings of Fact

1. Dreiling is the holder of a water well drilling contractor's license, License No. 01-WD 099, and a water well pump installation contractor's license, License No. 01-PI 083.
2. Dreiling is currently engaged in the business of water well drilling and pump installation, and his licenses are active.

Conclusions of Law

1. The Board has authority to regulate the licensing of water well drillers and pump installers under Wyoming Statutes, Ch. 33-42.
2. The Board has authority to discipline the licenses of water well drillers and pump installers under Wyoming Statute § 33-42-111, which reads, in relevant part:

The board may withhold, deny, revoke or suspend any certificate or license issued or applied for in accordance with the provisions of this act upon proof that the certificate or license holder or applicant ... has willfully or negligently violated any of the provisions of this act, the rules and regulations adopted pursuant to this act or the statutes or rules and regulations of the state pertaining to underground water; or ... has failed while engaging in the business of water well construction contracting or water well pump installation contracting to comply with the state water well minimum construction standards.

3. Pursuant to Wyoming Statute § 33-42-111, a licensee may be disciplined for any failure to comply with the WWMCS, but only for a willful or negligent violation of other relevant statutes or rules.
4. In this case, the IBM bears the burden of proving by substantial evidence on the record that Dreiling's licenses should be disciplined.

Allegation #1: Improper Gravel Pack

Findings of Fact

1. Substantial evidence on the record shows that Dreiling used B12 as gravel pack on multiple wells.
2. At no time during the hearing in this case, or in any of the documentation appearing in the record in this case, did Dreiling contest the fact that he used B12 in any of the wells alleged.
3. There is no contention or showing in the record that Dreiling requested or received a variance concerning his use of B12 in any of the wells alleged.

4. The sole defense offered by Dreiling in response to this allegation is that he believes B12 is an appropriate gravel pack material that is or should be allowable under the WWMCS.

5. The IBM demonstrated through testimony that she, as the Administrator of the Groundwater Division of the SEO, applied and interpreted the WWMCS to determine that B12 does not comply with the WWMCS.

6. The record does not demonstrate any malicious intent or damage to the public health or welfare associated with Dreiling's use of B12.

Conclusions of Law

1. The SEO is the sole entity empowered to promulgate and interpret the WWMCS. *See* Wyo Stat. Ann. § 41-3-909.

2. The finding by the SEO that B12 does not comply with the WWMCS is binding upon the Board in this case; the sole issue for the Board to determine under this allegation is whether Dreiling did, in fact, use B12 as alleged.

3. The lack of malicious intent and damage to the public health or welfare associated with Dreiling's use of B12 are mitigating factors that the Board may and will consider in determining the appropriate discipline in this case.

Allegation #2: Nondisclosure of Material Facts Pursuant to Investigation

Findings of Fact

1. Dreiling received a letter, dated June 14, 2017, contained in the IBM's Exhibit F at F.22-F.23, which requested information regarding B12, as indicated by a voicemail left by Dreiling for the IBM on July 7, 2017, at 12:28 pm, which referenced this letter. *See* IBM's Exhibit F at F.2.

2. Dreiling received a letter, dated July 10, 2017, contained in the IBM's Exhibit F at F.25-F.26, which requested information regarding B12 and was sent via certified mail.

3. Dreiling did not provide any of the requested information regarding B12 in response to either letter referenced above.

4. The record contains no showing that Dreiling ever provided any requested information regarding B12 in connection with the IBM's investigation of this case.

5. Dreiling's behavior in connection with the IBM's investigation was willful and demonstrates a clear lack of respect for the Board's authority and the investigative process.

Conclusions of Law

1. Dreiling is under a legal duty, running to the Board, “to disclose any material facts requested ... in connection with a board investigation[.]” See Board’s Rules and Regulations, Ch. 5, § 1(a)(i).
2. Information regarding a licensee’s use of a particular gravel product in a gravel pack is material in an investigation into whether that licensee has used an improper gravel pack.
3. The information regarding B12 requested by the IBM in this case was requested in connection with a Board investigation.
4. Dreiling’s unwillingness to recognize the authority of the Board or his duty to engage in the investigative process is an aggravating factor that the Board may and will consider in determining the appropriate discipline in this case.

Allegation #3: Improper Surface Seal

Findings of Fact

1. While Dreiling contested the credibility of the evidence identifying the subject wells depicted in the IBM’s Exhibit F at F.34 and F.74, the evidence on the record, taken as a whole, demonstrates that these pictures depict the Ruiz #1 Well (at F.34) and the Ackerman South Stock Well (at F.74).
2. Had a proper surface seal been used on the Ruiz #1 Well or the Ackerman South Stock Well, the pictures referenced above would have shown evidence of an approved grout material somewhere between the ground surface and the level to which the casings of these wells were excavated, even allowing for the use of pitless adaptors and settling or shifting of the grout; no such evidence appears in these pictures.
3. The pictures referenced above clearly show only native material and/or drill cuttings surrounding the casings of these wells.

Conclusions of Law

1. The WWMCS, Ch. 3, § 2(h)(iii) states: “All wells shall have an annular surface seal of grout extending not less than 20 feet below ground surface or to useable water below ground surface.”
2. The Ruiz #1 Well and the Ackerman South Stock Well are “Type III Wells,” as defined in the WWMCS, Ch. 2, § 2(jjjj) and Ch. 3, § 2(b)(iii).
3. The WWMCS, Ch. 5, Appendix C-3 clearly shows that for Type III wells evidence of an approved grout should be present beginning at the ground surface or the base of a pitless adaptor

and extending down to 20 feet below the ground surface or to the beginning of useable water below the ground surface.

Allegation #4: Violation of Electrical Code

Findings of Fact

1. The information contained in the IBM's Exhibit F at F.37-F.50 demonstrates that Dreiling committed multiple violations of the applicable electrical code when installing electrical and pump equipment on the Ruiz #1 Well.
2. Though some of Dreiling's electrical code violations could present a hazard, none were of an egregious nature.
3. Dreiling did not have an opportunity to revisit the site of the Ruiz #1 Well after the electrical inspection performed by Inspector Rick Michon to rectify the violations.
4. According to Mr. Michon, when an inspection reveals electrical code violations the typical process is to allow the violator to rectify the situation.

Conclusions of Law

1. Dreiling's violations of the applicable electrical code when installing electrical and pump equipment on the Ruiz #1 Well were not willful or negligent, due to the nature of the violations committed and the lack of opportunity for Dreiling to rectify said violations.
2. Violations of an applicable electrical code which are not willful or negligent may subject a water well driller or pump installer license to discipline on the basis of a violation of the WWMCS but not on the basis of a violation of the Board's Rules and Regulations.
3. The non-egregious nature of Dreiling's electrical code violations and the lack of opportunity to rectify said violations are mitigating factors that the Board may and will consider in determining the appropriate discipline in this case.

Allegation #5: Non-Submission of Notices of Intent

Findings of Fact

1. Substantial evidence on the record shows that Dreiling failed to submit multiple NOIs as required by the Board's Rules and Regulations.
2. Dreiling did not contest any specific instance in which he is alleged to have failed to submit a NOI, but he expressed doubt that he had failed to submit all of the NOIs alleged.

3. Dreiling gave a plausible defense for his failure to submit NOIs, namely, that he was unaware, for an extended period of time, that the fax number he had been using to submit NOIs had changed.

4. Dreiling gave credible testimony that he has never intentionally failed to submit an NOI and that any such failure was either the result of using an outdated fax number or an oversight.

Conclusions of Law

1. Dreiling's failure to submit NOIs was not willful or negligent, due to a plausible defense and credible testimony regarding his intent.

2. Because a failure to submit NOIs is a violation of the Board's Rules and Regulations but not a violation of the WWMCS, a water well driller or pump installer license is only subject to discipline for a willful or negligent failure to submit NOIs.

Allegation #6: Non-Compliance with Prior Settlement Agreement

Findings of Fact

1. Substantial evidence on the record shows that Dreiling did not submit quarterly reports or NOIs as required by the settlement agreement executed on April 28, 2016.

2. Dreiling did not contest the fact that he had not submitted any of the quarterly reports or that he had failed to submit any particular NOI.

3. Dreiling acknowledged in testimony that he was subject to the settlement agreement and that he had not complied with its terms.

4. The sole defense offered by Dreiling for his non-compliance is that he was too busy to comply with the reporting burden imposed upon him for his past misconduct.

5. Dreiling's behavior and testimony with regard to the prior settlement agreement demonstrate a clear lack of respect for the Board's authority, a clear lack of appreciation of the gravity of the legal requirements to which he is beholden, and a clear unwillingness to conform his behavior to the mandates of the Board, even when given a second opportunity to do so under the terms of the settlement agreement.

Conclusions of Law

1. The terms of the settlement agreement executed April 28, 2016, impose mandatory legal requirements on Dreiling for his past misconduct, independent of any other sources of law to which Dreiling is beholden, and violation of those terms provides an independent basis for discipline, in addition to those announced in statute.

2. Dreiling's prior history of misconduct, his unwillingness to conform his behavior to the mandates of the Board, even during the probationary period provided in the settlement agreement, and his complete disregard of the requirements to which he agreed in the settlement agreement are aggravating factors that the Board may and will consider in determining the appropriate discipline in this case.

Order

In her testimony, the IBM recommended that Dreiling's licenses be revoked for a period of five (5) years for the sum of the alleged violations. In consideration of the violations proven by the record in this case, their potential impact on the public health and welfare, their potential impact on the integrity of the Board's processes and the Board's ability to effectively discharge its duties, and all relevant mitigating and aggravating factors,

THE BOARD HEREBY CONCLUDES AND ORDERS AS FOLLOWS:

1. With regard to Allegation #1, Dreiling did use B12 as alleged by the IBM, in violation of the WWMCS, Ch. 3, § 2(g).

2. With regard to Allegation #2, Dreiling did willfully fail to disclose material facts requested in connection with a Board investigation, in violation of Ch. 5, § 1(a)(i) of the Board's Rules and Regulations.

3. With regard to Allegation #3, Dreiling did fail to properly seal the Ruiz #1 Well and the Ackerman South Stock Well, in violation of the WWMCS, Ch. 3, § 2(h).

4. With regard to Allegation #4, Dreiling did fail to perform the pump/electrical installation on the Ruiz #1 Well in accordance with the applicable electrical code, in violation of the WWMCS, Ch. 3, § 3(h).

5. With regard to Allegation #4, Dreiling did not violate the applicable electrical code willfully or negligently on the Ruiz #1 Well, and, therefore, did not violate Ch. 5, § 1(a)(v) of the Board's Rules and Regulations in a manner that would subject Dreiling's licenses to discipline on that account.

6. With regard to Allegation #5, Dreiling did not fail to submit his NOIs willfully or negligently, and, therefore, did not violate Ch. 5, § 1(a)(ix) of the Board's Rules and Regulations in a manner that would subject Dreiling's licenses to discipline on that account.


7. With regard to Allegation #6, Dreiling did fail to comply with the settlement agreement executed on April 28, 2016.

8. For the violations proven by the record under Allegation #2 and Allegation #6, Dreiling's licenses shall be suspended for a period of no less than eighteen (18) months from the date of this Order.

9. For the remainder of the violations proven by the record under Allegation #1, Allegation #3, and Allegation #4, Dreiling's licenses shall be suspended for an additional period of no less than six (6) months, to be served consecutively with the period of suspension described above.

10. Dreiling's licenses shall be eligible for reinstatement after a period of no less than two (2) years and only upon application made after successful completion, after the date of this Order, of the Wyoming-specific licensure exam for water well drilling contractors and the Wyoming-specific licensure exam for water well pump installation contractors.

SO ORDERED THIS 3rd DAY OF June, 2019



John Midkiff, Chairman

June 3, 2019
Date

State Board of Examining
Water Well Drilling Contractors and
Water Well Pump Installation Contractors