

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 BOG 03255

Robert Payne, P.G.,)
 Petitioner,)
)
 v.)
)
N.C. Board for the Licensing of)
Geologists,)
 Respondent.)

PROPOSAL FOR DECISION

THE ABOVE-ENTITLED MATTER was heard before the undersigned Augustus B. Elkins II, Administrative Law Judge, in Raleigh, North Carolina. This case was heard pursuant to N.C.G.S. § 150B-40, designation of an Administrative Law Judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

After presentation of testimony and exhibits, the record was left open for the parties’ submission of materials, including but not limited to supporting briefs, further arguments and proposals after receipt of the official transcript. Mailing time was allowed for submissions including the day of mailing as well as time allowed for receipt by the Administrative Law Judge. Petitioner and Respondent filed timely materials on April 29, 2015 and March 23, 2015 respectively with receipt to the Undersigned of the later submission from the Office of Administrative Hearing’s (OAH) Clerk’s Office being April 30, 2015 at which time the record was closed for further submissions.

APPEARANCES

For Petitioner: Daniel S. Bullard
 Attorney for Petitioner
 Walker & Bullard, P.A.
 P.O. Box 223
 Gibsonville, NC 27249

For Respondent: Nancy Reed Dunn
 Assistant Attorney General
 N. C. Department of Justice
 Environmental Division
 Post Office Box 629
 Raleigh, NC 27602-0629

ISSUES

1. Whether the disciplinary action proposed by the Board, a letter of reprimand, is supported by the evidence presented to the Board.
2. Whether Petitioner acted in a manner which warranted disciplinary action.
3. Whether the Board properly proposed issuing a letter of reprimand to Petitioner.

APPLICABLE STATUTES and RULES (including but not limited to the following)

N. C. Gen. Stat. §§ 89E-1 through 89E-24 (1998) (Geologists Licensing Act prior to 1999 revisions),
North Carolina Administrative Code, Title 21, Chapter 21 (consolidated)

EXHIBITS (Transcript Page 5)

For Petitioner:

Petitioner's Exhibit 1 March 29, 2014 letter to Petitioner

For Respondent:

Respondent Exhibit 1 Report Prepared by Neil Gilbert
Respondent Exhibits 1A through 1L including the following:
 Complaint and emails submitted with complaint
 Notice of Investigation
 Response to Notice of Investigation
 Notice of Investigation sent to Stephen and Laura Savage
 Statement of Frank Siler
 Emails between Frank Siler and NCDENR
 UST Closure Report Prepared by Engineering and Environmental Science Company
 Letters submitted by Robert Payne re: previous incident
 Printout of web advertisement page for Cedar Rock Environmental
 Letter from website developer re: changes made to site
 Review of report by Bill Miller
 Review of report by George Bain
Respondent Exhibit 2 Report of additional Investigation prepared by Neil Gilbert
Respondent Exhibit 4 Notice of Proposed Disciplinary Action

WITNESSES

For Petitioner: Captain Ed Siler
Hadley Dullnig
Robert Payne

For Respondent: Neil Gilbert
John "Bill" Miller
George Bain
Lindsey Walata

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following Findings of Fact by a preponderance of the evidence. In making these Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in this case.

FINDINGS OF FACT

1. Petitioner is a licensed geologist holding North Carolina license number 970.
2. Respondent is an occupational licensing board established under the North Carolina Geologists Licensing Act to administer and enforce the provisions of the North Carolina Geologists Licensing Act. The Board consists of the State Geologist as an *ex officio* member and a permanent member of the Board, an academic geologist, a mining geologist, a consulting geologist, a company geologist and a lay person.
3. The North Carolina Geologists Licensing Act's purposes are to protect life, property, health and public welfare through the regulation of the practice of geology in the State of North Carolina; to define the practice of geology as a profession, establishing minimum professional standards of ethical conduct, professional responsibility, educational and experience background; and to prevent abuses of the practice of geology by untrained or unprincipled individuals.
4. The North Carolina Geologists Licensing Act required the Board to prepare and adopt a code of professional conduct which was made known in writing to every licensee and applicant for licensing under the North Carolina Geologists Licensing Act and was published by the Board.

The code of professional conduct may be amended from time to time after due notice and opportunity for hearing to all licensed members and the public for comment before adoption of the revision or amendments. The Code of Professional Conduct is located in Chapter 21 of Title 21 of the North Carolina Administrative Code. Petitioner is charged with being aware of the requirements of the North Carolina Geologists Licensing Act, the Rules and Regulations of the North Carolina Board for Licensing of Geologists, including the Code of Professional Conduct adopted by the Board

5. 21 NCAC 21 .1101 states that the geologist shall conduct his practice in order to protect the public health, safety, and welfare.
6. 21 NCAC 21 .1102 states that the “prohibitions listed in this Rule include, but are not limited to, the use of statements containing a material misrepresentation of fact or omitting a material fact necessary to keep the statement from being misleading; statements intended or likely to create an unjustified expectation; statements containing a prediction of future success; or statements containing an opinion as to the quality of services.”
7. The Board requires complaints about licensed geologists to be in writing and notarized. Once a valid complaint is received by the Board, it has the authority and duty to investigate the complaint. The Board is specifically authorized to appoint, employ, or retain investigators for the purpose of conducting such investigations.
8. 21 NCAC 21 .0501, states that:
 - (a) Any person may file with the Board a charge of negligence, incompetence, dishonest practice, or other misconduct or of any violation of Chapter 89E of the North Carolina General Statutes or of these Rules.
 - (b) Upon receipt of such charge or upon its own initiative, the Board may, consistent with procedures required by G.S. 150B, suspend or revoke the license or certificate of registration, may issue a reprimand as provided in Rule .0502 of this Section or may, upon a statement of the reasons therefore, dismiss the charge as unfounded or trivial, which statement shall be mailed to the geologist and the person who filed the charge.
9. 21 NCAC 21 .0502(a) states that “if evidence of a violation is found, but it is determined that a disciplinary hearing is not warranted, the Board may issue a reprimand to the accused party. A record of such reprimand shall be mailed to the accused party and within 15 days after receipt of the reprimand the accused party may refuse the reprimand and request that a Hearing be held pursuant to G.S. 150B.”
10. On February 20, 2013, a complaint was lodged against Petitioner by Laura Savage. Petitioner had been hired by a prospective purchaser of Ms. Savage’s property, Captain Ed Siler,

to investigate Ms. Savage's property for potential petroleum contamination from an underground storage tank.

11. Ms. Savages complaint alleged the following:

- a. Petitioner, who had been hired by a prospective purchaser to investigate the subject property for potential petroleum contamination from an underground storage tank, had conducted testing on her property without her knowledge;
- b. Petitioner conducted said tests, using a hand auger, and claimed to find soil dripping with oil, however, no samples were submitted for laboratory analysis;
- c. Petitioner made represented several times that "he knows the manager of the Fayetteville Environmental/Waste Management office and his word would stand for requiring action;" and
- d. That when Ms. Savage removed the petroleum underground storage tanks and conducted testing using a different environmental professional, no contamination could be found at the site.

12. Based upon her allegations, Ms. Savage stated the following conclusions:

- a. "Mr. Payne's findings were grossly false and ended up costing us money."
- b. "[T]he state regulator just took Mr. Payne's report (with no tests or "Proof") and required action on our part."
- c. "[Mr Payne's] work was not unbiased and he stood to gain financially from doing any "work" he deemed was necessary."

13. Ms. Savage included with her complaint emailed correspondence and documents reflecting subsequent testing performed. She also included emailed correspondence and copies of reports reflecting that an environmental professional that was subsequently hired by Ms. Savage had found no contamination at the site.

14. Petitioner received an email from Ms. Savage indicating her intent to file a complaint with the Board based on her belief that Petitioner had erroneously reported contamination on her property. Upon receipt of that email, Petitioner forwarded that email that same day to the Board, to the attention of Barbara Geiger. Petitioner included in the email a statement that he understood the seller's concern, but that the soil sample he took was clearly contaminated and was observed by Captain Siler, who also has knowledge in the field. Petitioner stated that he still had the sample stored at his place of business.

15. Ed Siler is a Captain in the Army Chemical Corps. He is a certified Department of Defense and Civilian Hazmat Technician, holds a Bachelor's degree in Archeology, has completed a Masters in Environmental Management, and is familiar with procedures involved in taking soil samples. Captain Siler, along with his wife, were both present on Ms. Savage's property when Petitioner took the soil sample.

16. The complaint was given to Neil Gilbert, an investigator retained by the Board, for investigation. On March 4, 2013, Mr. Gilbert notified Petitioner by letter that a Complaint against him had been received by the Board, and that an investigation had been commenced. Mr. Gilbert summarized what he felt to be the salient allegations from the Complaint as follows:

- a. That your report of Environmental Inspection for the subject UST dated December 29, 2012, purposefully and erroneously stated that subsurface soil “was saturated with fresh (red colored) fuel oil suggesting significant leakage from the UST has occurred.”
- b. That no laboratory test was done to support that contention.
- c. That as a result of your report, the property owner felt compelled to have the UST removed.
- d. That a later site inspection found levels of petroleum constituents that would not have required remedial measures.

17. On or before March 21, 2013, Petitioner responded to Mr. Gilbert by emailing numerous pages of correspondence between various parties involved in this transaction.

18. Petitioner forwarded to Mr. Gilbert a letter that he requested and received from the client who had hired him to conduct the testing, Captain Ed Siler. This letter, dated June 5, 2013, and which was included in Mr. Gilbert’s Investigation Report stated, in pertinent part:

My wife and I observed his assistant break ground on surface...We watched him probe the ground to determine the size of the tank and stick a ruler down to gauge how much oil was still in the reservoir; he said there was still 11 inches or approximately 110 or so gallons in a tank that was almost 10 feet long. The soil being brought out was normal in color and texture-sandy composition and reddish brown. At a depth of about 4 feet, the soil smelled of diesel. At a depth of about 4 and a half feet, the soil came up muddy in consistency and dripping a red tinted diesel oil that ran off in a continuous trail. The smell of diesel fuel was overwhelming. Mr. Payne took a small sample of the soil and packed it in his kit. He sent us a report shortly after. I presented this to my realtor with an amended offer, priced to reflect repairs that would have to be made to make the tank and home in compliance with this development. They refused our offer, and when nothing was done, I forwarded Mr. Payne’s report and a description of these events to Wayne Robinson [sic] at the DENR.

19. Mr. Gilbert received during his investigation a copy of an email Captain Siler sent to the North Carolina Department of Environment and Natural Resources (DENR) Fayetteville Regional Office notifying staff at that office of a suspected release from a petroleum underground storage tank on Ms. Savage’s property. That email was included in Mr. Gilbert’s Investigation Report.

20. Mr. Gilbert obtained a copy of a Notice of Regulatory Requirements (NORR) that was sent to Ms. Savage by the Fayetteville Regional Office of DENR. That NORR notified Ms. Savage that information received by that office confirms that a release or discharge had occurred from a petroleum underground storage tank on the property, and of the resulting initial response and abatement action requirements under applicable state regulations.
21. Mr. Gilbert also obtained a copy of a report prepared by Engineering & Environmental Science Company as a result of testing completed by that company following tank removal at the property. Those test results indicated that no contamination requiring action was found at the site.
22. Mr. Gilbert was provided by Petitioner with a letter prepared by Singleton Environmental, Inc. relating to an unrelated site at which Petitioner had found contamination and another company had conducted testing finding no contamination. This report was offered by Petitioner as an example of an incident in which two professionals conducted testing on a site which produced different findings.
23. In investigating Ms. Savage's claim, Mr. Gilbert noted that an email provided by Ms. Savage made reference to Petitioner's website claiming that it was company policy for a realtor to be present during testing. Accordingly, Mr. Gilbert reviewed Petitioner's website. He did not find evidence on the website that Petitioner had published such a policy on his website, and printed a page from Petitioner's website stating that "Cedar Rock prefers to perform the inspection in the presence of a realtor, seller, and/or buyer." Upon request, Petitioner provided Mr. Gilbert with a summary from his website developer showing all recent changes to the website as evidence that the language in question had not been recently altered.
24. Mr. Gilbert interviewed Ms. Savage and Mr. Payne in person as part of his investigation. Additionally, he interviewed James Brown and Wayne Randolph, DENR staff involved in issuing the NORR for the site, Michelle Downey, real estate agent for the Silers, Kenny Barefoot, real estate agent for the Savages, Captain Siler, and Pat Shillington and Chip Humphrey, environmental professionals involved with tank removal at the site. Mr. Gilbert spoke by phone with Henry Faircloth, a representative of Generations Construction who had conducted an initial walk-through inspection of the property with Captain Siler and advised him to check for contaminated soil. Mr. Gilbert testified that the excavation contractor and the one that did the subsequent hand auger sample, whose company was 301 Environmental, was not a geologist. The closure samples that were taken after tank removal were done by an engineer, so Petitioner was the only geologist in the series of events that led to the investigation.
25. Following the completion of his investigation, Mr. Gilbert was able to find no violation of the Code of Professional Conduct based on any of the complaints of Ms. Savage and the four salient points of the allegations that he set forth in his letter to Petitioner notifying him of the investigation.
26. In finding no violation Mr. Gilbert addressed the specific allegations:

a. Allegation No. 1 - Captain Siler, who has independent knowledge and expertise in the field of soil sampling personally observed Petitioner take the sample in question, and personally observed the soil from the sample as being saturated with oil. Accordingly, Mr. Gilbert did not find that Petitioner had purposely and erroneously reported oil and suggested that the UST had leaked.

b. Allegation No. 2- Mr. Gilbert found that because Mr. Payne's client did not wish to pay for testing to be conducted on the sample, Petitioner had not violated the Code of Professional Conduct by failing to submit the sample for laboratory analysis.

c. Allegation No. 3 - Mr. Gilbert concluded, based on his interview with Ms. Savage, that it was her concern regarding liability associated with leaving the tank in place that led her to pull the tank, and, accordingly, did not find that this allegation had been substantiated.

d. Allegation No. 4- While testing performed by Chip Humphrey following tank removal and excavation did not reveal the presence of any contamination requiring action, the fact that a third party with experience in the area verified the presence of petroleum in Petitioner's sample, lead to a finding that there was not a violation by Petitioner of the Code of Professional Conduct.

27. As none of the claims which formed the actual basis for the complaint were found to violate the Code of Professional Conduct, those issues are not before the Undersigned.

28. While Mr. Gilbert did not conclude in his Investigation Report that Petitioner had violated the Code of Professional Conduct in the manner alleged in the complaint, Mr. Gilbert did conclude that "The investigation did reveal a concern about Payne's handling of samples; that is not labeling samples, seemingly not understanding laboratory procedures and not retaining (or losing) the sample from the subject site."

29. Mr. Gilbert noted in his report that the sample had not been retained, and that while Petitioner had initially told Mr. Gilbert that he still had the sample, when Mr. Gilbert questioned Petitioner in his interview, Petitioner told him that he "held onto the sample for at least a month and when I spoke to [Board staff] I believed I still had it but it was in an unmarked jar. I routinely dispose of unmarked sample containers of soil that collect in the garage and I probably got rid of it without knowing it." Mr. Gilbert also requested that Petitioner provide him with field records, and Petitioner responded that he had not produced any documents other than a one page project summary sheet, and two photographs.

30. Notwithstanding the fact that none of the allegations which served as the basis for the actual complaint were found to constitute a violation of the Code of Professional Conduct, Mr. Gilbert's Investigation Report concluded that Petitioner had violated the Code of Professional Conduct. The facts upon which the alleged violations are based arose during the actual investigation of the Complaint.

31. As part of the Board's investigation procedures, the Investigation Report was provided to two licensed geologists for review and comment. William Miller, license number 1130, and

George Bain, license number 6, who are familiar with the Code of Professional Conduct and standard practices for geologists, identified Petitioner's handling of the sample as problematic. Mr. Miller stated that "Although Mr. Payne did not violate any laws by foregoing testing and by losing the oil-soaked soil sample he had saved, he demonstrated a lack of common sense by not labeling the sample, not having the sample tested, a lack of knowledge about laboratory methods, and incompetence by subsequently losing the sample." Mr. Bain stated that "not labeling and keeping the sample is unprofessional, sloppy work and if an employee of mine would have been fired."

32. Mr. Gilbert's Investigation Report with attachments was submitted to staff for the Board and subsequently reviewed by Lindsey Walata, the Board's chair. Ms. Walata requested that Mr. Gilbert conduct an additional investigation. Specifically, Ms. Walata noticed the following statement on Petitioner's website: "Once soil contamination is discovered, in most cases the affected property cannot be sold until the contamination has been cleaned up to State standards and properly assessed." Ms. Walata felt that this statement was highly misleading. She believed that this statement would lead a reader to believe that such sales are prohibited, despite the fact that State regulations specifically allow property that is contaminated with petroleum from an underground storage tanks to be sold so long as a "Notice of Residual Petroleum" is filed for the property. Ms. Walata directed Mr. Gilbert's attention to the Rules of Conduct of Advertising.

33. Mr. Gilbert conducted the additional investigation as requested by the Board's chair. He notified Petitioner of his investigation and requested a response to this specific allegation by letter dated January 29, 2014.

34. As part of his investigation, Mr. Gilbert printed out copies of several pages from Petitioner's website containing the language in question on January 27, 2014. On or about February 5, 2014, Petitioner responded to Mr. Gilbert, in writing. In his letter, Petitioner agreed that there is no legal prohibition against the sell of property with petroleum contamination from an underground storage tank, and agreed that the statement "could be misleading." Petitioner explained that what he had meant to relay to readers was that, for several practical reasons, it may be difficult to convey such property. He indicated that he had removed the statement from his website. Mr. Gilbert included Petitioner's response in his Report of Additional Investigation, as well as copies of the pages from the website. The Report of Additional Investigation was submitted to staff for the Board and reviewed by Ms. Walata.

35. Upon review of Mr. Gilbert's Investigation Report (initiated by the Savage complaint) and Report of Additional Investigation (initiated by Walata), Ms. Walata determined that Petitioner had violated the Code of Professional Conduct for licensed geologists, and the Rules of Conduct for Advertising for licensed geologists. Ms. Walata found that Petitioner had failed to adhere to practices for Geologists regarding the handling of soil samples by failing to properly identify the exact location from which the sample was taken, failing to properly label, preserve, and maintain the sample, and failing to retain the sample. Ms. Walata further found that the statements (which had been removed) from Petitioner's website violated the Rules of Conduct for Advertising in that they were misleading.

36. Ms. Walata determined that these violations did not rise to such a level as to require suspension or revocation of Petitioner's license, but determined that it was appropriate to issue to Petitioner a Letter of Reprimand explaining that these practices constituted a violation of Petitioner's duty as a licensed geologist and the potential harm posed by such practices.

37. A Notice of Proposed Disciplinary Action dated March 29, 2014 was mailed to the Petitioner by the Board. This proposed disciplinary action consisted of a proposed letter of reprimand which set forth two grounds upon which the Petitioner was alleged to have violated the Code of Professional Conduct. The Petitioner gave timely appeal to this proposed letter of reprimand. It is these two allegations which are before the Undersigned. The proposed letter of reprimand alleges as a ground for reprimand that Petitioner:

a. "In light of the totality of the factual circumstances revealed by the investigation as described more fully below, you failed to adhere to your primary obligation to conduct your practice to safeguard the life, health, property and welfare of the public, and failed to maintain a high standard of professional practice in violation of 21 NCAC 21.1101(a) and (b) by failing to properly label and maintain the soil sample at issue in the February 20, 2013 complaint, failing to retain said soil sample after being aware of the complaint and the highly relevant nature of the soil sample to it, and failing to properly document the exact location from where the soil sample was taken" and;

b. "In violation of 21 NCAC 21.1102(b), Rules of Conduct of Advertising, you included statements in no less than three sections of Cedar Rock Environmental's website that were without legal basis and were misleading."

38. In the Letter of Reprimand (LOR), the Respondent stated that Petitioner demonstrated "a practice of not properly labeling or maintaining samples," as well as not taking "adequate field notes regarding the precise location from which the sample had been taken." The LOR also set forth that after becoming aware that a complaint was going to be filed, Petitioner initially indicated that he had retained the sample, however was "unable to produce the sample when the investigator requested it," and stated that he had "likely disposed of it" because he routinely disposed of unmarked samples that are collected in his garage

39. Petitioner received an email from Ms. Savage on February 20, 2014 concerning her intent to file a grievance with the Board. Minutes after seeing the email, he immediately forwarded the email to Barbara Geiger of the Geology Board on that same day. Along with the forwarded email, he emailed Ms. Geiger and indicated that he still had a sample of the soil. Mr. Payne had not checked to see if he actually had retained the sample, but was relying on his memory, as he did not remember disposing of the sample.

40. When the Board Investigator, Mr. Gilbert, interviewed Petitioner over three months later on June 5, 2014, Petitioner told the investigator that he was mistaken and that he did not have the

sample and that he had likely disposed of the sample because he routinely disposed of samples that are unmarked and which he no longer needs.

41. Captain Siler was accepted by the Undersigned as an expert in the field of the identification of soil contaminants, including petroleum contaminants. Captain Siler stated that he indicated to Petitioner that he did not want to test the sample, as he observed the obvious presence of petroleum in the soil. He testified that smell of petroleum was overpowering and that the soil was visibly contaminated with petroleum. He testified to the soil drawn being of a muddy texture and that the petroleum actually separated from the soil once it was placed in a sample jar by Mr. Payne.
42. Petitioner, as well as Mr. Gilbert, Mr. Miller and Mr. Bain all testified that by the time the complaint was made on February 20, 2014, the soil sample, even if it had been retained, would have been held well past the time that it could have been submitted to a lab for analysis.
43. Captain Ed Siler and his wife Hadley Dullnig testified at the hearing that they had a specific recollection that Petitioner had, in fact, labeled the jarred sample before putting it away. Captain Siler and his wife each testified that they observed Mr. Payne place a tape label on the jar and place it in his truck. Petitioner testified that he had not recalled labeling the sample as described by Captain Siler, but that when he did label a sample, he would place tape on the jar as described by Captain Siler and write down name of the client, the date and time that the sample was taken, the type of test that may be ordered, and the address from which the sample was taken.
44. Mr. Gilbert, Mr. Miller and Mr. Bain were all unaware that Captain Siler had personally observed Petitioner label the sample until Captain Siler testified to that fact.
45. Mr. Gilbert testified that when he was preparing his report, he was working under the assumption that Petitioner had not labeled the sample, based on Petitioner's statement that he had not labeled the sample. At the hearing, and after hearing the testimony of Captain Siler and Hadley Dullnig, Mr. Gilbert's opinion was different than what he wrote in his report, in that he did believe that Petitioner did label the sample.
46. The Letter of Reprimand cites the failure to properly document the exact location from where the soil sample was taken as a cause for Petitioner's failure to conduct his practice in order to safeguard the life, health, property and welfare of the public and to maintain a high standard of professional practice.
47. Petitioner had not sent in his notes from the site for review by the Board so at the time of the review of the report of investigation, Ms. Walata and others saw no photos or sketches with Mr. Payne's report. At the hearing, Petitioner possessed and testified from his report which contained photographs of the areas where the sample had been taken, flags placed by Petitioner in the area, and his notes concerning the findings. Mr. Gilbert nor any of the Board members had seen this report which indicated that Petitioner did make a contemporaneous record and photographic history of the site.

48. The statement that was repeatedly made on Petitioner’s website that “in most cases the affected property cannot be sold until the contamination has been cleaned up to State standards and properly assessed,” was found to be misleading by Ms. Walata, Mr. Gilbert, Mr. Miller, and Mr. Bain. Each of these witnesses (all licensed professional geologists) felt that this language could lead a reader to believe that regulations required that contamination be cleaned up before a site could be sold. Petitioner admitted that no such legal prohibition exists. Ms. Walata testified that anyone who understands the applicable statute or a Notice of Residual Petroleum would find it to be a misleading statement.

49. Petitioner testified that in his experience in dealing with contaminated property in proposed real estate transactions, lenders would not lend money to purchase property with known contamination, and in most cases would not even foreclose on a property with known contamination. He testified that in his experience, the majority of real property transactions involved the requirement of financing to facilitate the sale. He further testified that in his experience, even the minority of buyers that can purchase property without the necessity of financing would not buy property with known contamination without remediation.

50. Without agreeing that a professional standards violation existed, Petitioner did agree to change the language of his website after he was contacted by the Board as a reasonable action by a professional in response to a request by the disciplinary board of his profession.

51. Ms. Walata testified that a letter of reprimand is basically “a letter that indicates that you have violated one of the standards, and it brings it to you attention.” She went on to state that the intent was to allow an individual to understand they make a mistake and amend their practice so they don’t make the mistake in the future. Ms. Walata saw the letter of reprimand as instructional.

BASED UPON the foregoing Findings of Fact the Undersigned makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings, and jurisdiction and venue are proper. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. All parties are properly before the Administrative Law Judge acting as presiding officer for the Board for Licensing of Geologists, an occupational licensing agency as defined at N.C.G.S. § 150B-2(4b). The parties received proper notice of the hearing in the matter. To the extent that the Findings of Fact contain Conclusions or Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. 21 NCAC 21 .0502(a) states that “if evidence of a violation is found, but it is determined that a disciplinary hearing is not warranted, the Board may issue a reprimand to the accused party. A record of such reprimand shall be mailed to the accused party and within 15 days after receipt of the reprimand the accused party may refuse the reprimand and request that a Hearing be held pursuant to G.S. 150B.”

3. The Board is aware of the regular standards in the geology profession since it is made up of a representative group of professionals from the geology field. In making its decision to issue a letter of reprimand to the Petitioner, the Board was unaware (through no fault of their own) of several material facts that were presented at this hearing.

4. Though certainly the Board is vested with proper authority to issue discipline, the Board’s rule cites that when a disciplinary hearing is not warranted, the Board may issue a reprimand. Black’s Law Dictionary cites that a reprimand is a public and formal censure or severe reproof administered to a person in fault by a body to which he belongs.

5. The Board for Licensing of Geologists’ rule tends to reveal that when disciplinary action is not warranted they may turn to a reprimand, yet a reprimand as it is generally understood is a disciplinary action “to reprove severely.”

6. Ms. Walata testified that a letter of reprimand’s intent was to allow an individual to understand they made a mistake and amend their practice so they don’t make the mistake in the future. Ms. Walata saw the letter of reprimand as instructional.

7. The Undersigned is aware that a letter of reprimand is the most lenient form of discipline available to the Board upon finding that a violation of its Rules has occurred. Reviewing the record in total, the preponderance of the evidence cannot support a finding of the violations set forth in the letter of reprimand nor the reprimand (a public and formal censure) of Petitioner based upon all information received and found credible at the administrative hearing.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following Proposal for Decision.

PROPOSAL FOR DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. The Undersigned enters the following Proposal for Decision based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge of the Agency with respect to facts and inferences within the specialized knowledge of the Agency.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned holds that the weight of Petitioner's evidence is greater as applied in administrative hearings than the weight of evidence of Respondent and as such reprimand of Petitioner on the allegations set for in the March 29, 2014 Letter of Reprimand for License No. 970 cannot be affirmed.

NOTICE

Final Decision authority lies with the North Carolina Board for Licensing of Geologists. The tribunal making the final decision in this contested case is required to give each party an opportunity to file exceptions to this Proposal for Decision, to submit proposed findings of fact, and to present oral and written arguments. N.C.G.S. § 150B-40(e).

A copy of the decision or order shall be served upon each party by one of the methods for service of process under G.S. 1A-1, Rule 5(b) and a copy shall be furnished to the party's attorney of record. N.C.G.S. § 150B-42(a). It is requested that the agency furnish a copy to the Office of Administrative Hearings.

IT IS SO ORDERED.

This is the 12th day of June, 2015.

Augustus B. Elkins II
Administrative Law Judge