

# DRAFT

Minutes of the Meeting/Hearing of the Board of Licensure  
for Professional Engineers and Surveyors held December  
13, 2002 at Courtyard by Marriott, Santa Fe, NM.

Members Present: Ronald A. Forstbauer, PS, Chair  
Samuel W. Small, PE  
John Rockwell, PE  
Robert A. Smith, PE  
Charles G. Cala, Jr., PS  
Mary E. Wells, PE  
Rod Billingsley, PE/PS

Members Absent: Dr. Kenneth White, PE  
Edward P. Norris, Public Member  
Don Kaufman, Public Member

Others Present: Elena Garcia, Executive Director  
Anna Vigil, Investigator  
Mary Smith, Assistant Attorney General  
Hank Rosoff, PE, Vice President of Public & Professional Affairs, NMSPE  
Raymond Hensley, PE, President, NMSPE

## 1. CONVENE, ROLL CALL AND INTRODUCTION OF GUESTS

Chairman Forstbauer convened the meeting at 11:06 a.m. A roll call was taken. It was noted that a quorum was present. Three members as noted above were unable to attend.

## 2. APPROVAL OF THE AGENDA

It was moved by Mr. Small, seconded by Mr. Smith and unanimously,  
**VOTED:** To approve the agenda.

## 3. APPROVAL OF THE MINUTES

**3.1 Minutes of the November 1, 2002 Minutes** - It was moved by Mr. Small, seconded by Mr. Smith and unanimously,

**VOTED:** To approve the minutes of the November 1, 2002 meeting.  
Mr. Billingsley abstaining [Did not attend Nov. 1, 2002 meeting]

## 4. RULES HEARING – Sections 16.39.3.9 [Application – Engineering Intern & professional Engineer]; Section 16.39.3.10 [Examinations—Engineering intern and Professional Engineer]; Section 16.39.3.11 [Practice of Engineering]; Section 16.39.5.8 [Application—Surveyor Intern and Professional Surveyor]; Section 16.39.5.9 [Examinations—surveyor Intern & professional Surveyor]; and Section 16.39.5.10 [Practice of Surveying].

Chairman Forstbauer open the rules hearing indicating the purpose of the hearing was to consider proposed amendments to the board's rules (New Mexico Administrative Code) Sections 16.39.3.9 through

16.39.3.11 under engineering and rules 16.39.5.8 through 16.39.5.10 under surveying to allow engineering and surveying candidates to retake failed examinations more than three consecutive times, disallowing the review of failed examinations due to security and liability issues and removing language prohibiting firms to maintain a complete complement of professionals in every possible licensing discipline prior to obtaining work that would require other professionals in other disciplines. Other minor amendments are housekeeping items. The New Mexico Engineering and Surveying Practice Act, Section 61-23-10 authorizes this process. [61-1-29 NMSA 1978 of the Uniform Licensing Act]. The hearing was tape-recorded. The tape recording is also the record of today's proceedings.

The New Mexico Lobbyist Regulation Act regulates lobbying activities before state agencies, officers, boards and commissions in rule making or other policy-making proceedings. Under the law, a person is a lobbyist and must register with the Secretary of State if the person is paid or employed to do lobbying or he or she represents an interest group and attempts to influence a state agency, officer, board or commission while it is engaged in any formal process to adopt a rule, regulation, standard or policy of general application. An individual who appears for him or herself is not a lobbyist and does not need to register as long as his or her name and interest have been clearly identified. The law provides penalties for violations of its provisions. For more information and registration forms, contact David Harrell, Office of the Secretary of State, State Capitol Building, Room 420, Santa Fe, NM 87503.

Members of the audience were instructed to identify themselves on the attendance sheet. Those wishing to testify or comment should indicate so next to their names.

Chairman stated that all potential exhibits should be presented to the Board Administrator for marking prior to offering the exhibit for admission into the record. There were no exhibits presented.

Chairman stated the Board Administrator would present exhibits to the Board. As the presiding officer, he would rule on the admissibility of the exhibits offered for admission after allowing questions from members of the Board.

Exhibits admitted into evidence would be available for review by members of the public, but exhibits could not be removed from the table.

After the exhibits are offered by the Board Administrator and their admission ruled upon, he would open the hearing for oral presentations. In the interest of efficiency, he served the right to limit testimony that is irrelevant or unduly repetitious. Since the hearing was to be tape recorded, he asked that all witnesses identify themselves.

Pursuant to Section 61-1-29 (D) of the Uniform Licensing Act, any person testifying would be subject to examination. After each witness presented testimony, he would permit Board members to question the witness after being recognized by the presiding officer.

The public hearing of the Board was opened, the Board Director was asked to present exhibits for introduction.

Ms. Garcia asked the admission of the following exhibits.

Exhibit 1: Notice of rule making hearing that appeared in the New Mexico State Register.

Exhibit 2: Notice of rule making hearing that appeared in the Albuquerque Journal.

Exhibit 3: Copy of the proposed rule.

Exhibit 4: Letter from Hank Rosoff, PE, Vice President of Public and Professional Affairs, NMSPE.

Chairman inquired if anyone had any more exhibits and if there were any comments on the exhibits presented. No other exhibits were presented nor were there any comments. There being no comments, Chair Forstbauer admitted all four exhibits. Chairman asked for comments on **Rule 16.39.3.9 B or I**: No comments.

**16.39.3.10, Item C, D, E, and F. :** Mr. Rosoff indicated that NMSPE was in support of all the changes and indicated that they would be very good for the program. He inquired as to the type of documentation that would be required to substantiate further study in preparation for the exam. It was noted that the amendment was broad to allow the Board the flexibility to consider numerous forms of preparation. Mr. Small indicated that the wording should be “in preparation for (instead of “of”) the exam.”

**Section 16.39.3.11 (B):** Ms. Garcia requested further clarification of the intent of the deleted language “Hiring persons qualified to do the work only after the work has been solicited or obtained shall be in violation of these rules and regulations.” For example, was the intent to allow a firm that advertises civil engineering and has licensed civil engineer(s) to advertise or offer to practice electrical engineering without having a licensed electrical engineer within the firm. [Hiring as written in the rule referring more to an employee of the firm rather than a subcontract or association. The original intent of the language being stricken was to further clarify the rest of the language by saying a firm could not advertise (yellow pages, etc.) in an engineering discipline and hire an engineer in that discipline only after the work was obtained.] Mr. Forstbauer stated that the intent of modifying this section was that it would not preclude a person from obtaining a contract basically under the discipline that they are licensed in, but the contract might involve other professions or categories that they are not qualified, or do not have anyone in the company who is qualified. The way it is written in current rule, you could not even obtain that job, and now under the proposed language if an engineer does not have any surveyors on staff, he could go out and hire a surveyor and not be in violation. Mr. Forstbauer indicated that there is a distinction between hiring and subcontracting, but he does not feel it is a problem. If an engineering firm obtained a contract that involved significant surveying services, it could go out and hire a licensed surveyor. Mr. Cala asked if he, Mr. Forstbauer as a PS could pursue an engineering/surveying project and then hire a civil engineer to do the work. Mr. Forstbauer indicated that if surveying was a major portion of it, he could. But as a PS, he could not go out and solicit a civil engineering job and then hire a civil engineer. That was not the intent. Mr. Billingsley asked if he as a civil engineer signed a contract to do engineering work, has he not violated the rules. Mr. Forstbauer indicated that that would be a separate issue and the board is working on the issue of who signs contracts. He further stated that the intent was to make common practice lawful. Mr. Rockwell indicated that if that was the intent, he does not feel that the proposed words did that. He feels the words he eliminated improved the situation. The intent is not in the words that are left over. The words that are left over are superior (under current rule). The section should be reworded to get the words in there that match the intent. Mr. Smith inquired whether “organization” refers to a team or just one entity. Would a joint venture or subconsulting group be covered under that term? Mr. Hensley stated that NMSPE’s position is that firms that advertise engineering must have an engineer on their staff. His firm also has an architect on staff. They advertise in the yellow pages. They had to submit an affidavit to the Board of Architects signed by the architect of record. He indicated that the key issue here is “doing business as an engineering firm” or “advertising as an engineering firm.” The business is different than getting a group of subconsultants, etc.

advertising that you want to go after a project, be able to put your name in the yellow pages, sign a contract as an engineer means that you are in the business of engineering, so maybe a slight rewording is needed. Mr. Small stated that under Paragraph A an individual would need to be listed by the Board in that discipline in order to advertise or offer to practice engineering. Mr. Billingsley questioned that if he signs a contract that obligates him to do civil work and some electrical work, and he is not licensed as an electrical engineer is he not in violation of Paragraph A. Mr. Forstbauer stated that that condition exists whether this rule is changed or not. He believed this rule is trying to change something other than that and not attempting to solve that problem. Mr. Rockwell stated that it appeared that in order to accomplish the intent both Paragraph A and B would need to be changed. When you go out to do a civil engineering job and you need to have an electrical engineer too, you can advertise for that job you can obtain that job and maybe you hire a contractor maybe you hire an engineer on staff but you get the right engineer. But if the words are left in then you cannot do this without violating the law. Mr. Cala indicated that he was not with the board when the language was drafted, so he inquired whether the intent was to allow a surveying firm to be able to respond to a project that included engineering and surveying services and be awarded that service contract and then contract with another firm to handle the engineering service. It was noted that this was the intent. Mr. Smith inquired whether this provision included incidental practice. Ms. Smith indicated that paragraph A talks about advertising, e.g. business card, telephone directory, etc. Submitting a proposal that would include incidental work in another discipline would not be in violation.

It was moved by Mr. Small to withdraw consideration of 16.39.3.11 B changes from consideration at this time to address the issues at a later time. Motion died for a lack of second.

Mr. Rockwell suggested that it be approved as proposed since it is an improvement. It does not accomplish the whole task but it is in the right direction.

**Section 16.39.5.8:** No comments.

**Section 16.39.5.9 (C) existing and proposed (C):** Mr. Small stated the term “applicant” instead of “examinee” be used. By changing it to “examinee” the Board may be saying that the person has already been re- approved for examination. It was moved by Small, seconded by Mr. Billingsley and unanimously,

**VOTED:** to leave “16.39.5.9 (C) the word “an applicant” and not change to “an examinee” and anywhere else that it may appear including the engineering section (line 25 of engineering). Line 2 the word “of” should also change to “for” [same as engineering section].

**Section 16.39.5.10 (B):** It was moved by Mr. Smith, seconded by Ms. Wells and unanimously,

**VOTED:** To have section 16.39.3.11 be similar to section 16.39.5.10 in organizational structure.

It was moved by Mr. Smith, seconded by Mr. Small and unanimously,

**VOTED:** That the rules as discussed be approved as amended.

It was moved by Mr. Smith, seconded by Mr. Small and

**VOTED:** That paragraph 16.39.3.11 and Paragraph 16.39.5.10 be reviewed for further clarification.

It was moved by Mr. Small, seconded by Mr. Rockwell and unanimously,

**VOTED:** That it be referred to the Rules Committee.

Mr. Forstbauer concluded the public hearing by thanking members of the Board and all members of the audience for their participation and attendance. He indicated the rules adopted by the board will be filed at State Records and Archives in accordance with the State Rules Act and NM register publication deadlines. The adopted rules will become effective 30 days after they are filed and will be published in the NM Register as required by law. Persons who submitted oral or written comments will be given written notice of the action of the Board if address information is available.

## **5. CORRESPONDENCE/COMMUNICATIONS**

5.1 Jimmy D. Hill, PE – RE: NM PE Subcontracting design services to Non-NM licensee to be signed by NM PE: Mr. Billingsley brought up the concern of direct supervision and indicated that the licensee should only sign and seal drawings that were prepared under his supervision. After reviewing Mr. Hill's correspondence and discussions, it was moved by Mr. Small, seconded by Ms. Wells and unanimously,

**VOTED:** the Board respond stating that a NM licensee could subcontract a project out to another engineering firm out of Texas, not licensed to do engineering in NM, provided Mr. Hill is in responsible charge of the project, plans are prepared under his supervision, the project is within his area of competency and further provided he does a complete review of the work and signs and seals the drawings, thereby accepting full responsibility for the design.

Mr. Billingsley also brought up a concern of pre-engineered products used in engineering drawings and the stamping of these drawings.

## **6. COMMITTEE REPORTS/ACTIONS**

**6.1 Arch./Eng./Landscape Arch. JPC** - Mr. Smith reported that the JPC met on December 6, 2003 and that a written report would be available at the next regular meeting of the Board. He stated that the JPC discussed the position paper on design competitions and the Board needs to review and take formal action on that position. The JPC also discussed a letter from the building official from the City of Clovis requesting a waiver for architectural services. The problem was that there was no engineer of record for the entire project; therefore there was no basis for the request. The JPC responded that a variance could not be issued for the project unless there is a licensed prime professional in charge of that project. It appeared that the architectural work might be incidental to the engineering. Ms. Garcia indicated that there was a structural engineer on the project, but when she contacted the engineer, he had indicated that he had not been contracted for the entire project, only the structural engineering. Apparently, it was only the building official who was requesting the variance to the incidental practice rule. The JPC stressed that there must be a professional in responsible charge of the entire record to ensure compliance with the Building Code. Mr. Cala also indicated that he had taken to the Committee an informational item regarding the solicitation by an architect for surveying services, which included a request for a bid. He brought it up to see if the Architects Board would be able to follow up with this issue. They indicated that he would need to file a complaint.

Instead, he has obtained from Ms. Garcia copies of an attorney general opinion regarding this issue and the procurement code and has forwarded that to the architect so that they may amend their procedures. He indicated that he sees this type of problem at least once a month. Mr. Smith indicated that the next JPC's meeting is May 9, 2003.

**6.2 Fire Protection Engineering committee** – Mr. Smith indicated he is still trying to digest the fire protection issues that have been going on since 1995. The American Fire Sprinkler Association issued a white paper to ensure competence and responsibility in the design of fire protection sprinkler systems and in 2001, the NM State Fire Marshal's Office issues updated Minimum Information Required with Shop Drawings Submittals. Ms. Garcia stated that the Board had determined that it could not enforce its 1995 fire protection policy since it had the effect of a rule, and this is one of the reasons the board has been studying the issues to hopefully draft a workable rule for public hearing. [There had been many concerns with the provisions of the policy from the industry.] Ms. Smith indicated that under the State Rules Act it does not matter what you call something. In this case, a policy of the Board impacts people outside of the staff of the Board, then it should be a rule adopted in accordance with the State Rules Act. Unless and until this policy is adopted as a rule, it cannot be enforced. Ms. Smith indicated he also has a letter from NMSPE dated December 10, 2003 stating their position, and he also stated there is also a NICET position.

**ACTION:** Ms. Garcia will assist Mr. Smith in obtaining that position.

## 7. OLD BUSINESS

### 7.1 Proposed Amendments to Statutes

**7.1.1 Written Comments from NMSPE (Hank Rosoff, PE, Vice President, Public & Professional Affairs)** – Ms. Garcia and Mr. Forstbauer went over the proposed changes. It was noted that the major changes were to obtain authorization over non-licensees in violation of the Act as well as providing additional avenues for applicants to become licensed by substituting in certain cases the FE with long experience or with higher degrees. Mr. Rosoff further clarified his letter to the Board stating that in broadening the board's authority, it should also broaden the types of complaints received. It should not only be able to investigate a complaint against an individual, but also one against a firm. By including a definition of "person" as noted in NMSPE which reads, "As used in the Engineering and Surveying Practice Act [61-23-1 to 61-23-32 NMSA 1978] "person" means any individual, firm, partnership, corporation, company, association, joint stock association or body politic, including municipalities, state and federal agencies; and shall include any trustee, receiver, assignee or other person acting in a similar representative capacity."

Ms. Smith indicated that there should be no problem in defining "person" in the Act, however, she stated that in the Uniform Statutory and Rule Instruction Act there is a definition of "person" which applies here if not specifically defined in the Act. Mr. Rockwell indicated that the Board must be careful in perhaps not going after a specific person but a corporation. It was noted that it might be helpful to include in the Act since most individuals when they read the Act, do not have the definition of "person."

It was moved by Ms. Wells, seconded by Mr. Small and unanimously,

**VOTED:** To add the definition of “person” as recommended if it is basically the same as in state statute to the proposed revisions to the Act.

It was concurred that the state statute definition should be used. It was also noted that the citation should be included so that if it changes in the future, the Board can take a look at it and determine if it needs to be changed. Mr. Rosoff read his recommendation for Section 61-23-10 (D) which was reworded to strengthened this section by stating “The Board shall enforce the provisions of the Engineering and surveying Practice Act and....”

It was noted that subsection A of 61-23-10 (A) already stated “It shall be the duty of the board to administer the provisions of the Engineering and Surveying Practice Act and to exercise the authority granted the board in that act.” It was concurred that it said the same thing; therefore this recommendation is not necessary. Mr. Hensley indicated that NMSPE supports the Board in seeking authority to prosecute illegal practice by non-licensees. It wants the Board to be the policeman on these issues and the enforcement agency. Mr. Hensley also indicated that they had not reviewed the state statute defining “person.” They do want for instance municipalities, state and federal agencies, etc., as noted in their recommendation, to be included.

Ms. Smith indicated that the general state statute definition should be very close, if not identical, to NMSPE’s definition.

**7A. CLOSED SESSION (Complaints and Violations) No closed session was held.**

7.1 Case 01-01-18 Timothy Oden, PS – Ms. Garcia and Ms. Smith reported on the Appeal filed in District Court on behalf of Mr. Oden. The board has filed the record on appeal with the District Court. The next step is they will file the statement of appellant issues. The District Court is limited to the record that was before the Board. It cannot take new testimony or evidence to make sure the decision is in compliance with state law. If the court finds that the Board acted arbitrary and capricious, the Board may provide, for example, additional information, such as prior disciplinary actions on a licensee.

**8. ADJOURNMENT – Chairman Forstbauer adjourned the meeting at approximately 11:30 a.m.**

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Date Approved

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Ronald A. Forstbauer, PS, Board Chairman

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Elena Garcia, Executive Director