

FILED
Department of Business and Professional Regulation
Deputy Agency Clerk
CLERK Brandon Nichols
Date **11/12/2009**
File # **2009-09402**

STATE OF FLORIDA
BOARD OF PROFESSIONAL ENGINEERS

FLORIDA BOARD OF
PROFESSIONAL ENGINEERS,

Petitioner,

vs.

Case No.: 2007051700, 2007051717

FILED
Florida Engineers Management Corporation
Clerk

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DATE

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11-12-2009

KEMP DANIEL SHALLOWAY, P.E., AND
SHALLOWAY ENGINEERS, INC.,

Respondent.

FINAL ORDER

This matter appeared before the FLORIDA BOARD OF PROFESSIONAL ENGINEERS at a duly-noticed public meeting on October 15, 2009, in Ponte Vedra Beach, Florida, for consideration of a Stipulation in the above-referenced matter. Petitioner was represented by John Rimes, Assistant General Counsel. Respondent was present with counsel, David Rankin, Esq. Upon consideration of the Stipulation, the documents submitted in support thereof, the arguments of the parties and otherwise being advised in the premises.

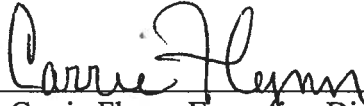
The Board rejected the Stipulation and offered a Counter-Stipulation (attached hereto as Exhibit A). Respondent signed and accepted the Counter-Stipulation on October 20, 2009.

IT IS HEREBY ORDERED AND ADJUDGED that the Counter Stipulation be and hereby is approved and adopted in toto and incorporated by reference herein. Accordingly, the parties shall adhere to and abide by all the terms and conditions of the Counter Stipulation.

This Final Order shall become effective upon filing with the Clerk of the Department of Business and Professional Regulation.

DONE AND ORDERED this ____ day of _____, 2009.

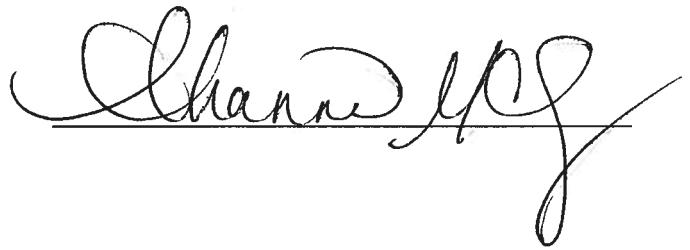
BOARD OF PROFESSIONAL ENGINEERS



Carrie Flynn, Executive Director
for John Burke, P.E., Chair

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to David Rankin, Esquire, 18540 Dale Mabry Hwy North, Lutz, Florida 33548, and by interoffice mail to Michael T. Flury, Office of the Attorney General, PL01 The Capitol, Tallahassee FL 32399-1050 and John Rimes, FEMC, 2507 Callaway Road, Suite 200, Tallahassee FL 32303-5268 this 3rd day of November, 2009.



4. Respondents agree to pay a **FINE** in the amount of \$2,000.00 and **COSTS** of \$5928.00 to the Board within thirty (30) days of the date that the Final Order adopting this Stipulation is filed with the Agency Clerk.

5. Respondent, SHALLOWAY, shall **APPEAR** before the Board when the stipulation is presented. At the appearance Respondent shall discuss his present practice and how he will assure the Board & public that he will not engage in the type conduct that occasioned these proceedings.

6. Respondents shall be placed on **PROBATION** for one (1) year subject to the following the following terms:

a. Respondent, SHALLOWAY, shall successfully complete a Board-approved course in **ENGINEERING PROFESSIONALISM AND ETHICS** within one (1) year of the date the Final Order adopting this Stipulation is filed. Prior to that date, Respondent shall submit to the Board a Certificate of Completion. It is the Respondent's responsibility to notify the Board that he has completed the course in a timely manner. Respondent may contact the Florida Engineering Society, 125 South Gadsden Street, Tallahassee, Florida 32301, (850) 224-7121, for information regarding the availability of such courses in Florida. Respondent may also elect to complete one of the following correspondence courses offered by:

Murdough Center for Engineering Professionalism
Texas Tech University
PO Box 41023
Lubbock, Texas 79409
Course No. PDH-20 Basic Studies in Engineering Ethics
Telephone 806-742-3525; Fax 806-742-0444; e-mail ethics@coe.ttu.edu.

EPD Program

Auburn University
Engineering Extension Service
217 Ramsay Hall
Auburn, Alabama 3689-5331
Course No. V98E Ethics and Professionalism
Phone 800-446-0382 or 334-844-4370

National Society for Professional Engineers
PDC Buncher Commerce Park Avenue A#16
Leetsdale, Pennsylvania 15056-1304
Course No. ONL-005 Ethics & Risk Management
Phone 800-417-0348 Fax 412-741-0609

Accredited College or University courses. Courses offered by Continuing Education Programs or Professional Business Programs (Exp: SunCam, Inc., C2Ed), are not Board Certified, and will not meet the requirements.

b. Respondent, SHALLOWAY, shall successfully complete the **STUDY GUIDE** which has been prepared by the Board of Professional Engineers and which will be furnished to Respondent, regarding the Engineering Practice Act, Chapter 471, Florida Statutes, and the Rules of the Board of Professional Engineers. Respondent will complete and return the Study Guide within thirty (30) days of the date, on which a Final Order incorporating this Settlement Stipulation is filed, to the Board of Professional Engineers at 2507 Callaway Road, Suite 200, Tallahassee, Florida 32303.

7. The period of probation shall terminate upon receipt by the Board of the completed Study Guide, Certificate of Completion for the Engineering Professionalism and Ethics course and payment of the fine and costs.

8. It is expressly understood that this Counter Stipulation is subject to approval of the Board and FEMC and has no force and effect until the Board issues a Final Order adopting this agreement.

9. This Counter Stipulation is executed by Respondents for the purpose of avoiding further administrative action with respect to this cause. In this regard, Respondents authorize the Board to review and examine all investigative file materials concerning Respondents prior to or in conjunction with consideration of the Stipulation. Furthermore, should this joint Stipulation not be accepted by the Board, it is agreed that presentation to and by the Board shall not unfairly or illegally prejudice the board or any of its members from further participation, consideration or resolution of these proceedings.

10. Respondents expressly waive all further procedural steps and expressly waives all rights to seek judicial review of or otherwise challenge or contest the validity of the joint Stipulation of Facts, Conclusions of Law, imposition of discipline and the Final Order of the Board incorporating said Stipulation.

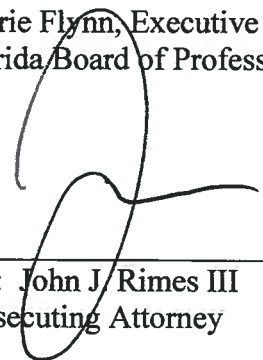
11. Respondents waive the right to seek any attorney's fees or costs from the Board in connection with this disciplinary proceeding.

WHEREFORE, the parties hereto request the Board to enter a Final Order accepting and implementing the terms contained herein.

 Oct 20 2009
Signature and Date

APPROVED this _____ day of _____, 2009

Carrie Flynn, Executive Director
Florida Board of Professional Engineers


BY: John J. Rimes III
Prosecuting Attorney

STATE OF FLORIDA
FLORIDA BOARD OF PROFESSIONAL ENGINEERS

RECEIVED

FLORIDA BOARD OF PROFESSIONAL
ENGINEERS,

OCT 23 2009

FLORIDA BOARD OF
PROFESSIONAL ENGINEERS

Petitioner,

v.

FEMC Case Nos.2007051700 & 2007051717

KEMP DANIEL SHALLOWAY, P.E., and
SHALLOWAY ENGINEERS INC.

Respondents,
_____ /

COUNTER STIPULATION

KEMP DANIEL SHALLOWAY, P.E., and SHALLOWAY ENGINEERS INC. hereinafter referred to as "Respondents", and the Florida Engineers Management Corporation, hereinafter referred to as "FEMC", hereby stipulate and agree to the following joint stipulation and Final Order of the Board, incorporating this Stipulation in the above-styled manner.

STIPULATED FACTS

1. For all times pertinent hereto, Respondent, SHALLOWAY, was a licensed engineer in the State of Florida, having been issued license number PE 19561. Respondent, SHALLOWAY ENGINEERS INC., is an engineering business registered with the Board of Professional Engineers and the holder of Certificate of Authorization # 9796.
2. Respondents were charged by an Amended Administrative Complaint filed by the Florida Engineers Management Corporation, and properly served upon Respondent with violations of Chapters 471 and 455, Florida Statutes. A true and correct copy of the Amended Administrative Complaint is attached hereto and incorporated by reference as Exhibit A.

3. Shalloway did disclose the potential conflict to his client, Indian Trail Improvement District, in a letter addressed to John Bonde, the District Administer of Indian Trail Improvement District, dated November 3, 1998. The letter stated the following:

The law governing engineers requires that I notify both parties in writing if there is a potential conflict of interest. As you are aware, we have been working on a project called the L-8 Storage Facility on behalf of the Indian Trail Improvement District (ITID). Because of the large amount of work required over the next few years, and the lack of money ITID has budgeted, you and Mr. Gotthelf requested that my fees be paid by Palm Beach Aggregates. At this point Palm Beach Aggregates has entered into a fee agreement with us and we are not billing ITID.

To date, no conflict has arisen, since both ITID and Palm Beach Aggregates have the same objectives, however, the potential for a conflict may arise in the future. If such a conflict arises, I can assure you the conflict will in no manner influence our professional judgment or the quality of our services. The arrangement is legal and acceptable as long as both parties are informed in writing of the potential conflict.

4. Mr. Bonde acknowledges receipt of Shalloway's letter in a letter dated December 1, 1998. In that letter, Bonde stated the following:

I "Thank you for your letter dated November 3, 1998. Your analysis and conclusions concerning the complementary goals of Palm Beach Aggregates and the Indian Trial Improvement District are reasonable. It appears to be in both of our mutual interests to continue your efforts to explore the L-8 Storage options.

If a conflict emerges between Palm Beach Aggregates and our District, then I would assume that you would be required to divulge the circumstances of the conflict. The District reserves the right to ask you to either terminate your relationship with Palm Beach Aggregates, or the District, should it be determined that the conflict of interest cannot be resolved and that said conflict is not in the best interest of our taxpayers.

5. Mr. Shalloway owed disclosure only to his client, ITID, who has raised no objection to the disclosure and has filed no complaints with regard to the disclosure that ITID received from Mr. Shalloway.

STIPULATED CONCLUSIONS OF LAW

1. Respondent, SHALLOWAY, in his capacity as a licensed engineer, admits that in such capacity he is subject to provisions of Chapters 455 and 471, Florida Statutes, and the jurisdiction of the Department, FEMC, and the Board.
2. Respondent, SHALLOWAY ENGINEERS INC., in its capacity as a licensed engineer business, admits that in such capacity it is subject to provisions of Chapters 455 and 471, Florida Statutes, and the jurisdiction of the Department, FEMC, and the Board.
3. Respondents admit that the facts set forth in the Administrative Complaint, if proven, constitute violations of Chapters 455 and 471, Florida Statutes, as alleged in the Complaint.
4. Section 471.033(1)(g), Florida Statutes mandates disclosure in writing to the engineer's client the full circumstances as to a possible conflict of interest.

STIPULATED DISPOSITION OF LAW

1. Respondents shall, in the future, comply with Chapters 471 and 455, Florida Statutes, and the rules promulgated pursuant thereto.
2. Should Respondents fail to timely comply with the terms of the Final Order, this case will be submitted to the Probable Cause Panel for review and determination of whether additional disciplinary action should be taken.
3. Respondents license and certificate of authorization to practice engineering shall be **REPRIMANDED**.

FILED
Department of Business and Professional Regulation
Deputy Agency Clerk
CLERK Brandon Nichols
Date 7/27/2009
File #

STATE OF FLORIDA
FLORIDA BOARD OF PROFESSIONAL ENGINEERS

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Respondents,
_____ /

AMENDED ADMINISTRATIVE COMPLAINT

COMES NOW the Florida Engineers Management Corporation (FEMC) on behalf of Petitioner, Florida Board of Professional Engineers, hereinafter referred to as "Petitioner," and files this Administrative Complaint against KEMP DANIEL SHALLOWAY, P.E., (Shalloway) and SHALLOWAY ENGINEERS INC., (SEI) hereinafter referred to as "Respondents". This Administrative Complaint is issued pursuant to Sections 120.60 and 471.038, Florida Statutes. Any proceeding concerning this complaint shall be conducted pursuant to Section 120.57, Florida Statutes. In support of this complaint, Petitioner alleges the following:

1. Petitioner, Florida Board of Professional Engineers, is charged with regulating the practice of engineering pursuant to Chapter 455, Florida Statutes. This complaint is filed by the Florida Engineers Management Corporation (FEMC) on behalf of Petitioner. FEMC is charged with providing administrative, investigative, and prosecutorial services to the Florida Board of Professional Engineers pursuant to Section 471.038, Florida Statutes (1997).

2. Respondent, KEMP DAVID SHALLOWAY, is, and has been at all times material hereto, a licensed professional engineer in the State of Florida, having been issued license number PE 8146. Respondent's last known address is 121 Claremont Lane, Palm Beach Shores, FL 33404. Respondent, SHALLOWAY ENGINEERS INC., is an engineering business registered with the Board of Professional Engineers and the holder of Certificate of Authorization # 9796. SEI's last known address is 505 S. Flagler Dr., #1330, West Palm Beach, FL 33401

3. From September 1991 until 2003, Shalloway was District Engineer for Indian Trail Improvement District (ITID), a Special Taxing District located in Palm Beach County, Florida. ITID provides services related to reclaiming the lands within its boundaries for water control, water supply, and to protecting the land within its boundaries from the effects of water by using the construction and maintenance of canals, ditches, levees, dikes, pumping plants, and other works and improvements.

4. While Shalloway personally was ITID's District Engineer, certain services relevant hereto were also performed for ITID through SFRN, Inc., an engineering business registered with the Board and holding Certificate of Authority # 7095. During the period of time relevant hereto, Shalloway was President of SFRN, Inc. In that capacity, Shalloway was personally in responsible charge of the provision of engineering services to ITID by SFRN, Inc. and, in his capacity as District Engineer, was responsible for the provision of advice to ITID relating to engineering services provided to ITID by SFRN, Inc.

5. In the late 1990s, the State of Florida and various governmental units thereof, including Palm Beach County, South Florida Water Management District (SFWMD), the City of

West Palm Beach, and ITID began exploring the possibility of purchasing certain rock pits existing in Palm Beach County. These rock pits were owned by Palm Beach Aggregates Inc., (PBA), a Florida corporation. The purpose of the rock pit purchase was to provide additional water storage capacity for the public served by the governmental entities involved. The governmental entities entered into a "Cooperative Agreement" in June 1999 (later followed by a "Consent Agreement" in 2000 between SFWMD & ITID) to facilitate and effectuate the rock pit purchase from PBA. ITID was designated as the contracting entity by the terms of the Cooperative Agreement and the Consent Agreement for purposes of entering into agreements with private entities, such as SFRN, Inc., to procure needed professional and consulting services in order to effectuate the PBA rock pit purchase.

6. In February 2003 and again in January 2004, the governmental entities referenced in Paragraph 5 purchased various rock pit properties from PBA for a total purchase price of approximately \$217,581,000.00. The decision to purchase such properties was materially based upon the engineering analysis and advice provided to ITID, SFWMD and the other governmental entities by Shalloway & SFRN, Inc.

7. While he was performing the engineering services related to the efficacy of the PBA rock pits for water storage, Shalloway, acting initially through a company which Shalloway controlled called Rio Bravo, Inc., entered into a "success fee" arrangement with the president of PBA, Enrique Tomeau. This arrangement provided in material part that Shalloway would receive a fee based upon the purchase price of the PBA rock pits by the abovementioned governmental entities. The "success fee" was not based on any engineering services performed for PBA but was contingent solely upon the final sale of the rock pits by PBA to the various governmental entities.

8. Shalloway ultimately created an engineering business (SEI), of which he was the sole owner. SEI succeeded Rio Bravo as the entity to which PBA agreed to pay the “success fee” proceeds. Upon the closure of the rock pit purchase transaction, monies in the amount of approximately \$2.4 million were paid to SEI (and thus to Shalloway) by PBA through disbursements to SEI over a period of time from July 2003 to July 2007.

9. Shalloway never disclosed in any fashion to ITID that he was due to be paid a “success fee” based upon the purchase of the PBA rock pits. This failure to disclose is particularly troubling insofar as throughout the period of time during which ITID, SFWMD and the other governmental entities were doing their due diligence prior to purchasing the rock pits, Shalloway was an ardent advocate of the purchase and, as a result of his favorable engineering opinions, was a prime mover in facilitating the ultimate purchase of the PBA rock pits.

10. Not only did Shalloway fail to disclose his special interest in the favorable outcome of the proposed rock pit purchase to ITID but he actually denied any existence of such an interest. For example, in a March 2001 letter from Shalloway, to Frank Finch, then-Executive Director of SFWMD, Shalloway stated, “Please let me clarify that neither my firm nor I works for Palm Beach Aggregates. We were merely pointing out water available to the public as good citizens.” At that time, not only was Shalloway under contract with PBA but had entered into the agreement with PBA to receive the “success fee” described in Paragraph 7.

11. Moreover, Shalloway was well aware that his “success fee” agreement with PBA materially contravened his client, ITID’s, interests. The Cooperative Agreement entered into between ITID and the other governmental entities contained explicit conflict of interest provisions, set out in Article 9.1D of the Agreement. These provisions required that any engineer or engineering firm retained by ITID on the PBA rock pit project could not have any existing

conflict of interest and would have to disclose to ITID any potential conflicts of interest.

Shalloway, as ITID's District Engineer, was well aware of the disclosure terms of the Cooperative Agreement but made no effort to inform ITID of the full scope of his "success fee" relationship with PBA even though that relationship was an obvious conflict of interest relationship that ITID would have had to disclose to the other governmental entities that signed the Cooperative Agreement.

12. Section 471.033(1)(g), Florida Statutes, provides in material part: "The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:... (g) [e]ngaging in ...misconduct, in the practice of engineering." Pursuant to the provisions of Section 471.033(2), Florida Statutes, the Board has adopted Rule 61G15-19.001(6) which provides in material part that "[a] professional engineer shall not commit misconduct in the practice of engineering. Misconduct in the practice of engineering as set forth in Section 471.033(1)(g), F.S., shall include, but not be limited to: (f) Becoming involved in a conflict of interest with an employer or client, without the knowledge and approval of the client or employer, but if unavoidable a professional engineer shall immediately take the following actions:

1. Disclose in writing to his employer or client the full circumstances as to a possible conflict of interest (*emphasis supplied*); and
2. Assure in writing that the conflict will in no manner influence the professional engineer's judgment or the quality of his services to his employer or client; and
3. Promptly inform his client or employer in writing of any business association, interest or circumstances (*emphasis supplied*) which may be influencing his judgment or the quality of his services to his client or employer[.]"

13. Shalloway, by agreeing to accept the “success fee” from PBA contingent upon the sale of the rock pits at the same time that he was providing engineering services which directly contributed to his client, ITID, and the other governmental entities, decision to purchase the PBA owned rock pits, had placed himself in an obvious conflict of interest with the interests of his client, ITID, and the entities for which ITID was acting as contracting officer. As such, Shalloway was required to follow the disclosure requirements set forth in Paragraph 10. By not doing so, and indeed, by actively denying any conflict, Shalloway committed misconduct in the practice of engineering by failing to disclose the “full circumstances” of his conflict and by not informing his client of the “success fee” arrangement which was plainly an “... interest or circumstance[]” that any reasonable person would perceive to be an influence on Shalloway’s engineering judgment.

14. SEI, a corporation wholly owned by Shalloway, was instrumental in facilitating the misconduct of Shalloway as set forth herein. By using SEI as a conduit through which the PBA payments were made, Shalloway actively concealed these payments from his client, ITID, and the other governmental entities.

15. Section 471.023(5), Florida Statutes, permits the Board to take action against a Certificate of Authority holder such as SEI in the same manner and based upon the same grounds as may be addressed to a Professional Engineer. Insofar as SEI was utilized by Shalloway as a material aid in the misconduct described herein, it too, committed misconduct in the practice of engineering.

16. Based on the foregoing, Respondents, Shalloway and SEI, are charged with violating Section 471.033(1) (g), Florida Statutes, and Rules 61G15-19.001(6) (f) by engaging in misconduct in the practice of engineering.

WHEREFORE, the Petitioner respectfully requests the Board of Professional Engineers to enter an order imposing one or more of the following penalties: permanent revocation or suspension of the Respondent's license, restriction of the Respondent's practice, imposition of an administrative fine, issuance of a reprimand, placement of the Respondent on probation, the assessment of costs related to the investigation and prosecution of this case, other than costs associated with an attorney's time, as provided for in Section 455.227(3), Florida Statutes, and/or any other relief that the Board deems appropriate.

SIGNED this 24th day of July, 2009.

Carrie Flynn
Executive Director

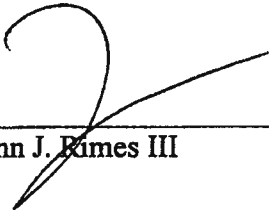

BY: John Rimes
Prosecuting Attorney

COUNSEL FOR FEMC:

John Rimes
Prosecuting Attorney
Florida Engineers Management Corporation
2507 Callaway Road, Suite 200
Tallahassee, Florida 32303
Florida Bar No. 212008
PCP DATE: July 15, 2008
PCP Members: Rebane, Seckinger

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was furnished to, David Rankin, Esquire, 18540 Dale Mabry Hwy North, Lutz, Florida 33548, Attorney for Respondents, by U.S. mail on the 24th day of July, 2009.



John J. Fimes III