STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Zimmerman, Evans and Leopold, Inc., d/b/a ZEL Engineers and Charles L. Drown, Appellants, v. South Carolina Department of Labor, Licensing and Regulation, South Carolina Board of Registration for Professional Engineers and Surveyors, Respondent.	Docket No. 11-ALJ-11-0433-AP **ORDER**

STATEMENT OF THE CASE

This matter is an appeal by Appellants Zimmerman, Evans and Leopold, Inc., d/b/a ZEL Engineers and Charles L. Drown ("Appellants") from a Final Order of the South Carolina Board of Registration for Professional Engineers and Surveyors ("Board") dated July 28, 2011. In its Final Order, the Board found that Appellants violated S.C. Code Ann. §§ 40-22-110(A)(2), (4) and (5), and Appellants were sanctioned with a public reprimand and a fine of $500.00. Upon review of this matter, the Board's Final Order is affirmed.

BACKGROUND

At all relevant times to this matter, Zimmerman, Evans and Leopold, Inc., d/b/a ZEL Engineers ("ZEL Engineers") held a valid certificate of authorization issued by the Board to practice or offer to practice professional engineering in the state of South Carolina. At all relevant times to this matter, Charles D. Drown ("Drown") was currently licensed as a professional engineer, and he was the designated person responsible for the professional services of ZEL Engineers pursuant to S.C. Code Ann. § 40-22-250. At all relevant times to this matter, the principals of ZEL Engineers were Joseph J. Tankersley (licensed in South Carolina); Jorge E. Jiménez (licensed in Georgia); Charles D. Drown (licensed in South Carolina); Stacey W. Gordon (licensed in South Carolina); and Frank W. Byne (licensed in Georgia).

On October 7, 2009, Stacey Gordon ("Gordon") received a call from Steve Cain ("Councilman Cain"), a town Council member with Batesburg-Leesville, South Carolina, regarding a proposed water treatment plant under consideration by the Batesburg-Leesville

County Council. Councilman Cain sought information regarding the technical aspects of the proposals. In response to Councilman Cain's call, ZEL Engineers internally discussed the matter and agreed to provide information to Councilman Cain, on a pro bono basis. ZEL Engineers did not want to participate in the water treatment project other than to provide expert consulting services to Councilman Cain. Based upon its decision, the firm's resume, as well as those of its principals, were sent to Councilman Cain.

Councilman Cain invited members of the firm to attend an October 19, 2009 presentation on the water treatment plant program. Gordon and Jorge Jiménez ("Jiménez") attended the presentation where Jiménez discussed the issues with Gordon and summarized them for Councilman Cain. The opinion was provided by the firm's principals. The Council members present at the October 19, 2009 presentation were further advised to engage the services of the Town's engineer to evaluate other viable alternatives.

On October 29, 2009, Councilman Cain held a public meeting to discuss the water system strategies with his Batesburg-Leesville constituency. Jiménez attended this meeting and provided information at the request of Councilman Cain. Jiménez told those in attendance that he was there as an expert for Councilman Cain, and that he was not licensed as a professional engineer in the state of South Carolina. Neither Gordon nor Drown were able to attend that meeting, and they directed Jiménez to attend.

By letter dated April 19, 2010, Jiménez provided Councilman Cain with a table summarizing the costs of a new 4 mgd (millions of gallons per day) facility for the town and included necessary connection projects. The summary table was prepared by Gordon, a South Carolina licensee. Gordon instructed Jiménez to send the summary to Councilman Cain. Jiménez signed the letter "Jorge E. Jiménez, P.E., Principal, ZEL Engineers.

At the invitation of Councilman Cain, members of ZEL Engineers attended the May 10, 2010 Council meeting. Jiménez, together with other firm principals, attended the meeting. Jiménez, at the request of Councilman Cain, passed out firm information to the Council members, City Clerk, and Town Manager. Jiménez did not address Council members as he was not on the agenda.

By letter dated May 10, 2010, Jiménez issued a follow-up letter to the Batesburg-Leesville Mayor and Council in which he stated that "we have done quite a bit of research to acquaint ourselves with the facts" involving the Batesburg-Leesville Water System. Jiménez

further stated, "viable options exist to reduce the costs to the citizens" of Batesburg-Leesville and advised that "a package of information" had been prepared for the Mayor and each Council member. The letter also listed the following attachments, "Map, Cost, FERC." Jiménez signed the letter "Jorge E. Jiménez, P.E., Principal, ZEL Engineers.

Between October 7, 2009, and June 8, 2010, numerous e-mail communications occurred between the Town of Batesburg-Leesville and the firm in which Jorge E. Jiménez routinely used "P.E." after his name or was acting on behalf of the firm. ZEL Engineers also provided specific "findings" to Councilman Cain. In stipulations presented to the Board, the parties acknowledge that any work performed by Jiménez was done at the direction of Gordon and Drown, both licensed engineers in South Carolina.

On December 29, 2010, the Board issued a Formal Complaint against Appellants alleging that Appellants violated provisions of S.C. Code Ann. §§ 40-22-2 et seq. and the rules and regulations of the Board. The Board conducted a hearing on July 19, 2011, and the parties submitted Stipulation of Fact and Exhibits during the hearing. On July 28, 2011, the Board issued its Final Order in which it found that Appellants had violated S.C. Code Ann. §§ 40-22-110(A)(2), (4) and (5). Consequently, the Board imposed a fine of $500.00 and ordered that Appellants be publicly reprimanded.

Based upon the Board's Final Order, Appellants filed a Notice of Appeal with the Administrative Law Court ("ALC" or "Court") on August 23, 2011.

STANDARD OF REVIEW

This case is before the ALC pursuant to S.C. Code Ann. § 1-23-600(D) and S.C. Code Ann. § 40-22-160 upon an appeal from a final decision of a licensing board or commission. As such, the Administrative Law Judge sits in an appellate capacity under the Administrative Procedures Act rather than as an independent finder of fact. The standard used by appellate bodies, including the ALC, to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5). This section provides:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision [of the agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5).

A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion reached by the agency. Bilton v. Best Western Royal Motor Lodge, 282 S.C. 634, 641, 321 S.E.2d 63, 68 (Ct. App. 1984). A decision will not be set aside simply because reasonable minds may differ on the judgment. Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307. The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996); Grant v. S.C. Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995).

In applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. Rodney v. Michelin Tire Co., 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996) (citing Kearse v. State Health and Human Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995)). The party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. Waters, 321 S.C. at 226, 467 S.E.2d at 917.

ISSUES ON APPEAL

1. Is the Board required to find that Appellants violated all of the grounds enumerated in S.C. Code Ann. § 40-22-110?

2. Did the Board err in sanctioning Appellants for violations of S.C. Code Ann. §§ 40-22-110(A)(2), (4) and (5) when Appellants were both licensed to practice professional engineering in the state of South Carolina and ZEL Engineer's employee, Jiménez, was supervised at all times by a licensed South Carolina professional engineer pursuant to S.C. Code Ann. § 40-22-80?

DISCUSSION

S.C. Code Ann. § 40-22-110

Appellants argue that the Board erred in its decision by concluding that Appellants violated S.C. Code Ann. § 40-22-110. Specifically, Appellants assert that based upon the plain language of the statute, all six factual findings must be established before the Board may sanction a licensee:

> (A) The board may seek administrative fines, pursuant to Section 40-1-120 or seek criminal penalties against a person or firm found guilty of unlicensed practice of engineering or surveying. In addition to the grounds provided for in Section 40-1-110, the board may cancel, suspend, refuse, revoke, or restrict a license as well as reprimand, fine, or require re-examination of an individual who is found guilty of:
> (1) the practice of fraud or deceit in applying for or obtaining a certificate of registration;
> (2) gross negligence, incompetency, or misconduct in the practice of engineering or surveying;
> (3) a felony or misdemeanor which, in the judgment of the board, adversely affects the registrant's ability to perform satisfactorily within the licensed discipline;
> (4) aiding or abetting any person in violation of a provision of this chapter or a regulation promulgated pursuant to this chapter;
> (5) a violation of this chapter or a regulation promulgated by the board; and
> (6) practicing in a registration category or tier for which the licensee has not been licensed by the board.

S.C. Code Ann. § 40-22-110(A).

Because the Board did not find that Appellants violated all six provisions enumerated in § 40-22-110, Appellants argue that the Board erred, and its decision must be reversed. In reviewing the Record, the Court concludes that Appellants failed to properly preserve this issue for the Court's review. Appellants never raised or argued this position to the Board. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."). Moreover, Appellants did not seek to have the Board's decision amended to include the Board's ruling on the issue of whether a licensee must violate all six grounds enumerated in § 40-22-110. See Hancock v. Wal-Mart Stores, Inc., 355 S.C. 168, 584 S.E.2d 398 (Ct. App. 2003) (finding that an issue was not preserved on appeal where party failed to file a motion to alter or amend judgment with the lower court to seek a determination on the issue). Accordingly, the Court

concludes that Appellants failed to preserve this issue for appellate review.

S.C. Code Ann. § 40-22-110(A)(4)

Pursuant to S.C. Code Ann. § 40-22-110(A)(4), the Board may impose penalties against a person or firm found guilty of "aiding or abetting any person in violation of a provision of this chapter or a regulation promulgated pursuant to this chapter." In its decision, the Board found that Appellants violated § 40-22-110(A)(4) by providing engineering services without being properly licensed in South Carolina. Appellants argue that the Board's decision is in error as there is no evidence in the record to support such a finding.

S.C. Code Ann. § 40-22-20(23) defines the "Practice of Engineering" as follows:

> "Practice of engineering" means any service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, investigation, expert technical testimony, evaluation, design and design coordination of engineering works and systems, design for development and use of land and water, performing engineering surveys and studies, and the review of construction for the purpose of monitoring compliance with drawings and specifications, any of which embraces such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems projects, and industrial or consumer products or equipment of control systems, communications, mechanical, electrical, hydraulic, pneumatic, or thermal nature, insofar as they involve safeguarding life, health, or property, and including such other professional services as may be necessary to the planning, progress, and completion of any engineering services. The mere execution, as a contractor, of work designed by a professional engineer or supervision of the construction of such work as a foreman or superintendent is not considered the practice of engineering.

Section 40-22-20(23) further states that "[a] person must be construed to practice or offer to practice engineering, within the meaning and intent of this chapter who:

> (a) practices any branch of the profession of engineering;
> (b) by verbal claim, sign, advertisement, letterhead, card, or in any other way represents himself to be a professional engineer or through the use of some other title implies that he is a professional engineer or that he is licensed under this chapter; or
> (c) holds himself out as able to perform or does perform any engineering service or work or any other professional service designated by the practitioner or which is recognized as engineering.

In reviewing the Record, Jiménez, throughout the process, provided engineering services, held himself out as, and used the designation of a professional engineer. Jiménez, a professional

engineer licensed by the state of Georgia, was not licensed as a professional engineer in the state of South Carolina when he was acting on behalf of the firm as a professional engineer in the Batesburg-Leesville water program matter. See S.C. Code Ann. § 40-22-250(B)(2) (stating that all personal of the firm who act on behalf of the firm in practicing or holding themselves out as professional engineers in this state must have a South Carolina engineering license). Notably, Jiménez did not perform an isolated act or merely assist other licensees – Jiménez actively participated on behalf of the firm as evidenced by the Record.

More specifically, on 3 occasions, Jiménez appeared before the County Council and presented or provided information to it and/or its members. Additionally, there are multiple instances where Jiménez identified himself as a licensed engineer through mail and e-mail correspondence. In those instances involving mail, Jiménez signed the letters "Jorge E. Jiménez, P.E., Principal, ZEL Engineers." In Jiménez's email, he routinely used the designation of "P.E." after his name.[1] Accordingly, there is substantial evidence in the Record to support the Board's conclusion that Jiménez engaged in the practice of engineering in South Carolina when he acted on behalf of the firm in the water treatment program matter by providing engineering services, holding himself out as, and using the designation of a professional engineer. Consequently, there is substantial evidence to find that the Appellants, through their knowledge and involvement in offering Jiménez's engineering services in South Carolina, aided in his unlicensed practice of engineering in this State.

Appellants also argue that Jiménez's actions were specifically authorized, pursuant to the exception to the licensing requirements, as provided for under S.C. Code Ann. § 40-22-280(A)(2). However, in South Carolina it is well settled that a party may not raise an issue for the first time on appeal. Elam, 361 S.C. at 23, 602 S.E.2d at 779-80. Here, Appellants did not raise this issue to the Board. Moreover, Appellants did not seek to have the Board's final order amended to include the Board's ruling on the issue of whether Jiménez's actions were authorized pursuant to § 40-22-280(A). See Hancock, 355 S.C. 168, 584 S.E.2d 398. Accordingly, the Court concludes that Appellants failed to preserve this issue for appellate review.

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[1] See also S.C. Code Ann. § 40-22-30(C) ("It is unlawful for an individual or firm to engage in the practice of engineering in this State, to use the title "engineer", or to use or display any title, verbal claim, sign, advertisement, letterhead, card . . . to indicate that the individual or firm engages in or offers to engage in the practice of engineering without being registered as an engineer or firm.").

S.C. Code Ann. § 40-22-110(A)(2)

Pursuant to S.C. Code Ann. § 40-22-110(A)(2), the Board may impose penalties against a person or firm found guilty of "gross negligence, incompetency, or misconduct in the practice of engineering or surveying." In its order, the Board found that Appellants violated § 40-22-110(A)(2) by providing engineering services without being properly licensed in South Carolina. Appellants argue that the Board's decision is in error as there is no evidence in the Record to support such a finding.

Appellants argue that, based upon the stipulations of the parties, the Board's finding that Appellants provided engineering services without being properly licensed in South Carolina is in error. As stated in the stipulations, is it undisputed that ZEL Engineers held a valid certificate of authorization as a firm in South Carolina, and that Drown was licensed as a professional engineer in South Carolina. Notably, the Board's findings against the Appellants are not for the failure of the Appellants to be properly licensed or authorized to practice, but stem from Jiménez, while acting on behalf of the firm as a professional engineer in South Carolina, not being licensed by the Board as required by S.C. Code Ann. § 40-22-250(B)(2).

In reviewing the Record, there is substantial evidence to support the Board's finding that Appellant's committed gross negligence, incompetency, or misconduct with regard to the Batesburg-Leesville water treatment program matter. Appellants, through their knowledge and involvement, offered or aided Jiménez's unlicensed practice of engineering services in South Carolina. More specifically, a South Carolina licensed engineer of ZEL Engineers, along with Jiménez, appeared at the presentation before the County Council; however, Jiménez – and not the South Carolina licensee – provided a summary of the issues for Councilman Cain. At another meeting attended by a South Carolina licensee of ZEL Engineers, and Jiménez, it was Jiménez passing out information to the Council members, City Clerk, and Town Manager.

Furthermore, in an e-mail communication to Councilman Cain, Jiménez stated that "we have done quite a bit of research to acquaint ourselves with the facts" of the water treatment program, and that a "package of information" had been prepared for the Council members. The letter attached to the packet of information was signed, "Jorge E. Jiménez, P.E., Principal, ZEL Engineers." The Record also includes numerous other emails from Jiménez where he offers to "come visit," lists South Carolina projects the firm was involved with and advising that the firm specializes in "water and wastewater systems," and offers to discuss all the issues in more detail.

Appellants were well aware of the water treatment program project and Jiménez's involvement in the project, including in-person presentations and numerous correspondences with the involved parties. Accordingly, the Board's conclusion that Appellants violated § 40-22-110(A)(2) is supported by the substantial evidence contained in the Record.

S.C. Code Ann. § 40-22-110(A)(5)

Pursuant to S.C. Code Ann. § 40-22-110(A)(5), the Board may impose penalties against a person or firm found guilty of "a violation of this chapter or a regulation promulgated by the board." Here, the Board issued a public reprimand against Appellants and assessed a five hundred dollar ($500) fine as a result of their violations of § 40-2-110. As noted above, the Board's decision that Appellants violated §§ 40-22-110(A)(2) and (4) is supported by the substantial evidence in the Record, and the Board is given the authority to assess penalties against licensees who have violated Title 40, Chapter 22 of the South Carolina Code. Further, the Board's assessment of penalties in this matter was not an abuse of discretion.

Based on the Board's findings of fact and conclusions of law, as well as the evidence presented during the disciplinary hearing, reasonable minds could reach the conclusion the Board reached in this matter. The Board observed the witnesses and is in the best position to judge their demeanor and veracity and to evaluate the credibility of each witness' testimony. See Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996). Accordingly, the Record neither mandates nor do Appellants articulate or cite support for any grounds on appeal that would require this Court to reverse the decision in this matter.

ORDER

Therefore, based on the foregoing, **IT IS HEREBY ORDERED** that the Board's Final Order is **AFFIRMED**.

AND IT IS SO ORDERED.

SHIRLEY C. ROBINSON
Administrative Law Judge

May 17th, 2013
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).
This 17 day of May 2013
By: Judicial Law Clerk