



The Association of Professional
Engineers and Geoscientists of Alberta

APEGA APPEAL BOARD DECISION

Date of Hearing: October 27, 2023

Date of Decision: December 18, 2023

Case: 20-003-FH

IN THE MATTER OF the Engineering and Geoscience Professions Act

and

THE APPEAL by Mr. Eric Chrysanthous, from a decision of the APEGA Discipline Committee in the matter of conduct of Mr. Chrysanthous.

HEARING PANEL:

Heather Kennedy, P.Eng.	(Panel Chair)
Lisa Dechaine, P.Eng.	(Panel Member)
Mark Ewanishin, P.Eng.	(Panel Member)
Garnett Schommer, P.Eng.	(Panel Member)
Harold Neth	(Public Member)

INDEPENDENT LEGAL COUNSEL FOR THE APPEAL BOARD:

Natalie Tymchuk, Emery Jamieson LLP

APPEARANCES:

Eric Chrysanthous, Appellant

Greg Sim, Field Law LLP, Legal Counsel for Investigative Committee

Summary

The Appeal Board of the Association of Professional Engineers and Geoscientists of Alberta (the "Appeal Board") ("APEGA") has considered this appeal and, pursuant to section 69(3)(b) of the *Engineering and Geoscience Professions Act*, RSA 2000, c E-11 (the "Act"), confirms the Discipline Committee's ("DC") findings and sanctions. With this confirmation, the appeal is dismissed.

Background

- [1] This is an appeal by the Appellant, pursuant to section 67 of the Act. The Appellant has appealed the findings and sanctions levied against him by the DC.
- [2] On September 13, 2018, APEGA Investigations received a complaint regarding the Appellant's conduct. The complaint came as a result of the Appellant being sanctioned by Discipline Committee of the Engineers and Geoscientists of British Columbia in August of 2018. ("EGBC").
- [3] The Appellant was sanctioned by EGBC for unprofessional emails and for failing to attend a rescheduled interview with EGBC. In August of 2019, the Investigative Committee decided to refer this matter to a DC hearing.
- [4] The same allegations that had been before EGBC were considered by APEGA's DC along with an additional allegation of failing to cooperate with and attempting to mislead APEGA's Investigation Panel.
- [5] In November of 2022, the DC held a formal hearing regarding the Appellant's conduct. The Appellant did not attend the hearing.
- [6] On January 6, 2023 the DC issued its findings decision (the "Conduct Decision") which found that two of the allegations had been fully proven and the third allegation partially proven against the Appellant and sought submissions regarding sanctions from the parties.
- [7] On April 17, 2023, the DC issued its decision on sanctions (the "Sanctions Decision") which included cancellation of the Appellant's registration.
- [8] On May 16, 2023 the Appellant submitted a Request for Appeal.

Preliminary Issues

New Evidence Application

- [9] The Appellant applied to have new evidence admitted before the Appeal Board ("New Evidence Application"). He was informed that the Appeal Board would decide whether to admit new evidence or not based on the following test:
 - 1. The new evidence should generally not be admitted, if by due diligence, it could have been adduced at the Disciplinary Committee hearing;

2. The new evidence must bear on a decisive or potentially decisive issue in the hearing;
3. The new evidence must be credible in the sense that it is reasonably capable of belief; and
4. The new evidence, if believed, must reasonably, when taken with the other evidence, be expected to have affected the result.

[10] The Appellant submitted documents along with his New Evidence Application, which he separated into two parts and listed as the following exhibits:

- [a] Exhibit A - Evidence of APEGA's infringement of Charter of Rights protecting free speech
- [b] Exhibit B - Evidence of hearing by APEGA to plant emails framing M51052 for EGBC

[11] Exhibits A and B each contained multiple documents. Some were already contained in the record, and some were new. A number of the documents were not new evidence, but case law or commentary on case law.

[12] The Appeal Board hearing panel considered submissions received from the Appellant and from the IC regarding the New Evidence Application. On September 20, 2023, the Appeal Board notified the parties that it has decided to reserve its decision on the New Evidence Application until it had heard the hearing. The panel also reminded the parties that, while they could refer to the new evidence in their appeal arguments, they would need to be prepared to address the new evidence test indicated above.

Further Requests

[13] On October 1, 2023, the Appellant also made requests for:

- [a] the hearing to be held in-person and in private,
- [b] recusal of certain appeal hearing participants,
- [c] a quorum of five Appeal Board members for the hearing,
- [d] an opportunity for settlement, and
- [e] suspension of an APEGA staff member.

[14] The Appellant provided submissions containing reasons for these requests. The IC provided a response submission opposing these requests.

[15] On October 20, 2023, the Appeal Board issued a procedural decision regarding the Appellant's further requests.

Discipline Committee Decisions

[16] The three charges before the DC were as follows:

Charge 1: That the Appellant engaged in email communications with members of the public and the engineering profession between December 26, 2010 and May 18, 2015;

Charge 2: That the Appellant engaged in unprofessional conduct in that he failed to comply with a November 1, 2016 request by or on behalf of the Investigative Committee of APEGBC (now EGBC) to attend for the purposes of a rescheduled interview on November 17, 2016;

Charge 3: That the Appellant engaged in unprofessional conduct in that he failed to cooperate with, or attempted to mislead the Investigation Panel of APEGA between September 20, 2018 and March 22, 2019

[17] The DC found that Charges 1 and 2 were proven and Charge 3 was proven partially regarding the attempted misleading of the Investigative Panel, and not regarding the alleged failure to cooperate.

[18] As a result, the DC sought submissions from both parties regarding appropriate sanctions. After considering the submissions, The DC ordered that the Appellant's registration be cancelled, that he pay 50% of the DC hearing costs within 12 months, and that he not be eligible for membership reinstatement until the costs are paid. The DC also directed that its decision be published in a manner which identifies the Appellant.

Appeal

[19] The Appellant's appeal takes issue with the DC's findings and sanctions, as well as the EGBC disciplinary proceedings. The Appellant's grounds of appeal can be summarized as follows:

[a] The comments attributed to the Appellant were planted with false evidence received from witnesses in the EGBC proceedings. New evidence consisting of correspondence from transit police officials confirmed that the Appellant did not pose a threat.

[b] The comments attributed to the Appellant, under a pseudonym, did not identify him as an engineer and were sarcastic. EGBC and APEGA infringed his *Charter* rights protecting freedom of speech,

contrary to the Saskatchewan Court of Appeal Decision in *Strom*¹, and they held hearings to make an example of the Appellant.

[c] The complaint against the Appellant to EGBC was unprofessional as it was retribution based on his attendance at public consultations and speaking out against public transit. His counter-complaint against the complainant should not have been refused by EGBC.

[d] The APEGA proceedings regarding the same conduct the Appellant had been disciplined for by EGBC constituted double jeopardy. He had no reason to appeal the EGBC sanctions because he had resigned from EGBC. The Appellant claims to not have been served notice of the EGBC hearing, that APEGA ignored his request to defer the DC hearing, and that APEGA forfeited a right to hold a second hearing as it had declined to participate in the EGBC proceedings.

[20] The Appellant also takes issue with the cost of legal counsel hired by APEGA for the disciplinary proceedings against him, on the basis that these are improper disciplinary proceedings as set out in his grounds of appeal. He also asserts that this is not a serious question of ethics and the sanctions are excessive.

[21] The IC did not appeal either of the DC's decisions.

[22] An appeal hearing date of August 18, 2023 was initially agreed upon by the parties.

[23] The Appellant requested that the hearing be rescheduled, and the IC did not oppose this request.

[24] The Appeal Board granted the Appellant's request and a new hearing date of October 27, 2023 was agreed upon by the parties. Notice of the hearing was issued pursuant to the Act.

[25] The appeal was heard via video conference by a hearing panel of the Appeal Board. The Appellant, upon his request to APEGA staff, participated in the hearing from APEGA's office and all other participants attended from various remote locations.

¹ *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 ("*Strom*").

Objection to Panel and Counsel

[26] At the outset of the hearing, the Appellant informed the Appeal Board that he objected to the participation of the members the hearing panel and to legal counsel for the IC, on the basis that he required copies of their identification and of their resumes as he required confirmation of their professional status. The Appellant clarified that he had no objection to the public member of the hearing panel. Counsel for the IC was provided an opportunity to respond to the Appellant's objection. The panel considered the Appellant's objection and informed him that they would be proceeding with the appeal hearing, because:

[a] It was not the practice of the Appeal Board to provide copies of identification or resumes of its panel members to appeal participants;

[b] As noted by counsel for the IC, the professional engineer members of the Appeal Board are appointed by the Council and, as there is a presumption of regularity for such appointments under the Act, there is no need to prove that members are in fact members of APEGA;

[c] The professional engineers who were on the panel are all listed as members on the APEGA website; and

[d] The panel was satisfied with the confirmation of counsel for the IC that he is a member of the Law Society of Alberta who has acted for APEGA for several years.

[27] The panel chair also directed APEGA staff to provide a list of the hearing panel members to the Appellant following the hearing. That list has been provided to the Appellant.

Standard of Review

[28] As submitted by the IC, the appropriate standard of review in a professional conduct appeal is reasonableness. In such a review, the Appeal Board must determine whether the DC's decisions:

[a] are justifiable, transparent and intelligible,

[b] fall within a range of possible, acceptable, legally defensible outcomes; and

[c] demonstrate an apparent line of analysis as to how the facts and the law were applied.

[29] For issues of procedural fairness, instead of applying a standard of review, the Appeal Board must determine whether the disciplinary proceedings met the level of fairness required by law.

Decision and Order

New Evidence Application

[30] The Appeal Board does not consider the case law and commentary contained in the “Exhibit A” documents provided by the Appellant with his New Evidence Application to consist of new evidence. The other documents in Exhibit A have no apparent bearing on this matter. The Appeal Board has considered the Appellant’s arguments regarding the case law he has cited.

[31] The Appellant stated in his New Evidence Application that the “Exhibit B” documents he provided prove that he did not send or author the emails that he claims were planted on him by EGBC. However, none of those documents contain any such evidence. Nor do those documents disprove the evidence heard in the EGBC and APEGA proceedings or contain any evidence that would otherwise have any effect on the DC hearing outcome.

[32] The Appellant also suggested that the new evidence proved that he was not a threat. It may be that a threat assessment was carried out regarding the Appellant himself. However, an assessment of the level of risk posed by the Appellant to the public has no bearing on the evidence of the tone or origin of the emails at question in this appeal.

[33] The Appeal Board has accordingly decided that the new evidence has no impact on a decisive or potentially decisive issue in this appeal and the Appeal Board has declined to admit or place any weight on the new evidence received.

Appeal of DC’s Decisions

[34] On an appeal under section 67 of the Act, the Appeal Board can:

[a] make any findings relating to the conduct of the investigated person that it thinks ought to have been made by the DC,

[b] quash, confirm or vary the finding or order of the DC or substitute or make a finding or order of its own; or

[c] refer the matter back to the DC for further consideration.

[35] In addition, the Appeal Board may order the investigated person to pay all or part of the costs of an appeal.

[36] After reviewing the record before the DC, the DC's decisions and the submissions made during the hearing, the Appeal Board confirms the DC's findings as per the Conduct Decision and the orders as per the Sanctions Decision.

Reasons

[37] Many of the Appellant's grounds of appeal center on the emails referenced in Charge 1.

Planted Evidence

[38] Regarding his claim that the emails were 'planted' by various people, the Appellant pointed to no evidence in the record, or in his proposed new evidence, to support this. Conversely, evidence provided by the Appellant to peace officers and to EGBC and APEGA provided a reasonable basis for the DC to conclude the Appellant was responsible for the emails at issue. The DC's overview of that evidence is set out at paragraphs 53 to 56 of the Conduct Decision.

[39] In the course of this appeal, the Appellant even provided alternate interpretations of the emails in arguing that they did not imply actual threats.

[40] The DC is entitled to deference on its findings of fact. It was also reasonable for the DC to rely upon findings of fact made by the EGBC, particularly as the IC had conducted an extensive interview of the Appellant in which various facts were confirmed. Based on the record in front of the DC, the inference that the Appellant sent the emails at issue is reasonable and upheld by the Appeal Board.

Freedom of Expression

[41] The Appellant's arguments that the DC decisions conflict with the *Strom* decision and infringe on his *Charter* rights were also raised before the DC before it issued its Sanctions Decision. The DC also considered the Appellant's rights to freedom of expression in its Conduct Decision. At paragraphs 59-75 of the Conduct Decision, the DC considered the issue with regulating concerns voiced by a professional in a public forum and

noted that the Appellant had gone further than merely voicing concerns, when his commentary included threats of violence and encouragement of others to commit violence, while referring several times to being an engineer, which crossed a line and was unprofessional. The Appeal Board agrees with the DC in this regard. As noted by the IC, the Appellant's conduct only stopped when law enforcement became involved. Whether the comments were intended to be sarcastic and whether the Appellant was assessed by law enforcement thereafter to pose a real risk or threat are irrelevant to the tone of the emails that had been sent up to that point. The tone was concerning when viewed objectively.

Retribution

- [42] The Appellant takes issue with what he has characterized as the EGBC's refusal to investigate his allegations that the complaint against him was retributory in connection with his public voicing of concerns. The Appeal Board notes that any decision that EGBC may have made on whether to proceed with an investigation of a complaint regarding another individual is not a decision that can be appealed to the APEGA Appeal Board. The Appellant has had opportunities both before the EGBC and APEGA to present evidence and arguments regarding the conduct that he was charged with, including the conduct alleged in the complaint against him and his public voicing of concerns.

Double Jeopardy and Procedural Fairness

- [43] The Appellant has stated in this appeal that he did not receive notice of the EGBC hearing and that he did not bother to appeal the EGBC decision as he had resigned from his EGBC membership. The Appellant indicated that he had felt the EGBC process did not apply to him. He has provided no reason upon which it could be concluded that he was somehow exempt from those proceedings or that he otherwise had no obligation or right to fully participate in those proceedings.
- [44] The Appeal Board notes that the Appellant had a right of appeal from the EGBC decision, including on any issues of procedural fairness, and that he had an opportunity to exercise that right. He chose not to, and so the EGBC decision stands.
- [45] As noted by the IC, the DC turned its mind to the issue of whether disciplinary proceedings could proceed in Alberta on fact findings made in prior conduct proceedings in British Columbia. The Appeal Board sees no reason to interfere with the DC's conclusion, based on established law, that such proceedings were permissible, as the prior proceedings were fair and

there is no substantial difference between the issues in each proceeding on Charges 1 and 2.

[46] There is also a transparent line of analysis in the Conduct Decision demonstrating that the DC did not simply adopt the findings of the EGBC. Instead, the DC engaged in its own analysis of Charges 1 and 2, including a review of evidence gathered by APEGA investigators, in concluding that the conduct at issue was unprofessional under the Alberta Act.

[47] Regarding the Appellants arguments that the proceedings before the DC were insensitive to circumstances preventing his attendance, the record demonstrates that he was properly served with notice of the DC hearing and there is no evidence of any reasonable grounds upon which the hearing should have been adjourned. The hearing proceeded in accordance with the Act and the Appeal Board finds that the DC's decision to proceed was fair.

Charge 2

[48] The Appeal Board can clearly follow the logic used by the DC in arriving at its decision on Charge 2. It is again important to note that, when registrants are licensed to practice in more than one jurisdiction, sanctions in one jurisdiction may impact a registrant's ability to practice in another jurisdiction. As the Appellant was an APEGA member at the time of his conduct in British Columbia, the DC compared the conduct against both the Alberta Act and the APEGA Code of Ethics and determined the conduct to be unprofessional under the applicable Alberta regulatory framework. A breach of British Columbia's *Engineers and Geoscientist Act* constitutes a breach of Rule of Conduct 4 under the APEGA Code of Ethics. The Appeal Board therefore upholds the DC's decision regarding this Charge.

Charge 3

[49] The Appellant's arguments did not focus to any significant extent on the DC's decision regarding Charge 3. However, the Appeal Board has considered whether this aspect of the DC's decision was reasonable.

[50] The DC found that Charge 3 was partially proven because, while the Appellant was cooperative in fulfilling requests from APEGA, the Appellant also provided both false and conflicting information which the DC viewed as an attempt to mislead the investigation. The Appeal Board agrees with this view, and further concludes that the DC appropriately decided this conduct is unprofessional and in violation of Rule of Conduct 5.

Sanctions

- [51] The Appellant's arguments regarding sanctions focus largely on his view that the conduct he was found to have engaged in, relating to his personal expression, is not serious and that the sanctions ordered by the DC are therefore excessive. He also argues that his prior history and good standing are mitigating factors.
- [52] The Appeal Board notes that the Appellant continues to demonstrate a lack of insight into the severity of this conduct. At paragraphs 20 and 35 and the Sanctions Decision, the DC provided an overview of its analysis and application of the legal principles set out in the *Jaswal*² decision. The Appeal Board agrees with this overview. The Appellant bears responsibility for the comments he made in the emails at issue, which were not just an isolated incident. There are limits on a professional's freedom of expression, particularly when a professional makes threats of violence, which are harmful and undermine the dignity, honour and reputation of the profession.
- [53] Had the Appellant engaged in a forthright manner with the APEGA investigation and the proceedings before the DC, there may have been some basis to impose milder sanctions. However, the manner that the Appellant engaged in this disciplinary process, including the lack of acknowledgment or willingness to reform his conduct, warrants a severe sanction. The Appellant's view that it was not worthwhile for him to engage with EGBC and APEGA is an attitude that has worked against him.
- [54] The DC considered the Appellant's prior history and standing, noted that his conduct must change if he wants to be a member of the profession, and concluded that the aggravating factors relating to his conduct outweighed the mitigating factors. The Appeal Board sees no reason to interfere with how the DC weighed these factors, as the DC provided clear and justified reasoning on this point.

² *Jaswal v. Medical Board (Nfld.)*, 1996 CanLII 11630 (NL SC)

[55] The Appellant also takes issue with the cost of the DC proceedings, based on his view generally that the disciplinary proceedings were not justified. The reasons above address the soundness and justification of the DC's Conduct Decision. Beyond this argument, the reasonableness of the DC's costs order is evident. Again, the DC analyzed and weighed the factors applicable to a determination of costs in disciplinary proceedings and provided a cogent and rational explanation for its award of 50% of the investigation and hearing costs. The Appeal Board agrees that the Appellant's conduct, both underlying the Charges and in the course of the proceedings before the DC, warranted the costs awarded.

[56] The Appeal Board adds that there should be consequences for the decisions made by the Appellant and, overall, concludes that the DC sanctions related to all of the Charges are appropriate and reasonable.

Conclusion

[57] For the reasons noted above, the Appeal Board upholds both the Conduct and Sanctions Decisions of the DC.

[58] The Appeal Board has not yet ordered costs with respect to this appeal and reserves the jurisdiction to do so. The IC has indicated that it is seeking costs of this appeal. If the IC wishes to make submissions on costs of this appeal, written submissions must be submitted to the Appeal Board by January 5, 2024. When submissions are received from the IC, they will be provided to the Appellant for his review and response.

Dated this 18th day of December, 2023

On behalf of the Hearing Panel of the APEGA Appeal Board

Heather Kennedy, P.Eng.
Chair, Appeal Board Panel

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