

Minutes of Professional Conduct Meeting--April 21, 2016



COMMONWEALTH OF MASSACHUSETTS
Board of Registration
of
Hazardous Waste Site Cleanup Professionals
ONE WINTER STREET, 3rd Floor
BOSTON, MA 02108
617-292-5500

PROFESSIONAL CONDUCT COMMITTEE

Minutes of Meeting on April 21, 2016

Approved on May 19, 2016

Prepared by: Beverly Coles-Roby

Meeting Location: MassDEP WERO
436 Dwight Street
Springfield, MA 01103

List of Documents Used at the Meeting:

1. Agenda
2. Draft Minutes of Meeting on March 17, 2016
3. Active Case List

- 1. Call to Order:** Board member Dr. Gail Batchelder called the meeting to order at approximately 1:30 p.m. The Board members in attendance were Maria Pinaud, Farooq Siddique, Robert Rein, Debra Listernick, Kathleen Campbell, David Austin, and Dr. John Guswa. Board members Kirk Franklin and James N. Smith were absent. Staff members present were Beverly Coles-Roby and Lori Williamson. Also present were Wendy Rundle, Executive Director of the LSP Association ("LSPA"), Wes Stimpson of WES Associates, Ms. Linda Segal, and Michael Toomey.
- 2. Previous Minutes:** The draft minutes of the meeting held on March 17, 2016, were approved as amended. Dr. John Guswa abstained from voting to approve the minutes.
- 3. Old Business:**

Status of Complaint Review Teams & Active Case Table

At Dr. Batchelder's request, the Complaint Review Teams ("CRT") reported on progress made since the March 2016 meeting. Ms. Coles-Roby gave the reports on the status of each case as reflected in the Active Discipline Case List.

Ms. Coles-Roby prefaced her remarks by stating that the Active Case Table gives the most accurate picture of the disciplinary matters pending before the Board. She indicated that the Final Decision in 05C-07, approved by the Board in Quasi-Judicial Session on December 2,

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2015, will be ready for signatures by non-recused Board members during Quasi-Judicial Session at the May 2016 Board meeting. She also indicated that she and the LSP's legal counsel were sorting out scheduling the matter for oral argument before the Board in June 2016.

She reported that witness testimony was filed with the Office of Appeals and Dispute Resolution on March 21 and 22, 2016 in 08C-03. She added that the LSP's Pre-filed Witness Testimony is due on April 28th after the LSP requested additional time to file. Ms. Coles-Roby informed the committee that Ms. Williamson had done a great job of compiling the Parties Joint Exhibits, consisting of two volumes with hundreds of pages. The August 3-4, 2016 trial date was not changed.

Dr. Batchelder asked whether the dates for resolution of 10C-01 are the same as listed on the Active Case Table. Ms. Coles-Roby again reminded the committee that the sole issue before the Superior Court is whether the Board has the statutory and/or regulatory authority to issue press releases. She also said that the Scheduling Order remains in effect.

In the matter of 11C-04, Ms. Coles-Roby confirmed the LSP's interview date of April 27, 2016, with all parties. He will attend with his legal counsel. Lastly, as reported at the March 2016 meeting the interview will take place at MassDEP CERO.

Ms. Coles-Roby also told the Committee that documents are being gathered in 12C-01.

Ms. Coles-Roby stated that Ms. Williamson would present the results of her investigation thus far in 16C-01. Ms. Williamson told the committee that the case was filed by MassDEP, and focuses on one site, which is a large industrial commercial property. Mr. Siddique asked if the complaint was filed by an individual MassDEP employee or by MassDEP as a whole. Ms. Williamson answered that it was filed by the Boston office of MassDEP on behalf of the Bureau of Waste Site Cleanup. She continued to report that the LSP failed to conduct sub-slab or indoor air quality testing. However, the LSP contended that there were no sub-slabs in place at the time. Ms. Williamson said that the complaint mentioned two other Release Tracking Numbers ("RTNs"). Mr. Siddique responded that they were mentioned, but not included in the complaint. Mr. Rein commented that the committee could review the other RTNs if the case goes any further. Mr. Austin told the committee that he thought that it was unfair to the LSP. He asked how the committee could be objective if two RTNs were mentioned but not included. Dr. Batchelder reminded everyone that they could vote on the complaint as it stands and if it goes forward the other RTNs could be examined to determine if a pattern of practice exists. Mr. Austin reiterated his remark that he thought it was unfair and that it does not allow the committee to be objective. He went on to state that he has "seen a zillion of these; they are given out like candy [NOAF]." Dr. Batchelder noted that at this point the only issue the committee was deciding was whether it needed to appoint a Complaint Review Team ("CRT"). Mr. Siddique said, "We are deciding the merits of the complaint and if we should accept it for a CRT or not; review the complaint and LSP response in a situation where the MassDEP regulation has changed." He went on the say, "Paul Locke talked about this just the other day. There was no sub-slab. The basis of this

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complaint is misleading. The complaint should have come in a different form with all of the stuff that is inaccurate taken out.” Mr. Austin affirmed those comments stating, that he agreed with everything Mr. Siddique said. Ms. Listernick added that the LSP made a mistake; he divided instead of multiplying. The risk assessor admitted that a mistake was made. This technical mistake led to the error. Looking at 2007, the Johnson and Ettinger Model to evaluate vapor intrusion could be used. The conversion factor of one thousand caused a mistake of millions. The LSP, she told the committee, should have realized that was incorrect. Ms. Williamson said there was a Response Action Outcome (“RAO”) in 2007. MassDEP issued a Notice of Noncompliance (“NON”) in 2010. A revised RAO was issued in 2011. Dr. Batchelder said the question is whether this matter warrants further investigation. Then committee’s choices are establishing a Screening Team or a CRT, she said. Ms. Campbell commented that she did not think anyone felt comfortable with the information that we have now. Mr. Austin moved for further investigation via a Screening Team. Mr. Siddique indicated that the samples that were collected were the only ones that could have been collected, and it was not a violation. Dr. Guswa said that the complaint was not well written, and MassDEP could have added more information. Mr. Rein thought that a Screening Team needed to look at that. He said he was not comfortable saying that this is not a valid complaint. Dr. Batchelder said that the committee should appoint a Screening Team. A Screening Team comprised of David Austin, Dr. Guswa and Ms. Listernick and Ms. Coles-Roby. Ms. Pinaud abstained from voting on the matter. Mr. Austin said that he thought the complaint was really amateurish and the LSP’s response was really well done. He found it very bothersome that MassDEP had not possibly worked with the LSP in good faith. Ms. Pinaud added that it looked like a pattern. Mr. Austin responded that [the evidence of a pattern] was not in the complaint. Dr. Batchelder said it was suggested in the complaint. Mr. Siddique told the committee that MassDEP was merely insinuating that there was a pattern, which is unfair. Dr. Guswa added that if it was a pattern MassDEP should have put it in the complaint.

Ms. Coles-Roby announced that Ms. Williamson would likewise brief the committee on 16C-02. Ms. Williamson said that the complaint was filed by MassDEP and involved one site with an old 1000 gallon Underground Storage Tank and some residential property. The Immediate Response Action (“IRA”) was verbally approved. A written IRA Plan was proposed. Prior to the 21-day approval, the LSP began doing unapproved IRA work. There was a revised RAO in 2013. Mr. Austin commented that there was a discrepancy on the dates in the IRA Plan. He indicated that he did not know what to do; the matter is two years old; and the LSP paid a fine. Dr. Batchelder stated that this is a violation: a LSP performed an activity without permission. Mr. Siddique read from a portion of the Administrative Consent Order saying that it was “all done with because the LSP paid his fine.” Dr. Batchelder informed the committee that MassDEP took the action it did because the LSP violated the Rules of Professional Conduct. She went on to state that the only decision for the committee is to decide whether further investigation is warranted. Mr. Siddique noted that given the things that the LSP did to comply with the Administrative Consent Order he saw no need to appoint a Screening Team. Furthermore, Mr. Austin said this does not rise to the level of a complaint. Ms. Rundle asked whether the LSPs’ past history involved Administrative Consent Orders. Dr. Batchelder answered that she was not sure. Ms. Pinaud indicated that [in this case] applying remedial additives is different from missing a deadline.

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“This is more serious,” she said. Mr. Austin added that the residential properties were not affected by the additives. Dr. Batchelder asked if the committee had enough information to make a decision. Mr. Siddique responded that we know from the ACO; it’s all in there. The LSP made a mistake, paid the penalty for the offense. He also said that the LSP changed the practices at his firm, and it won’t happen again. Ms. Williamson commented that we will not know that it did not happen again without an investigation. Dr. Guswa moved to conduct no further investigation and to dismiss the complaint. Ms. Williamson asked the committee to articulate the grounds for the dismissal. She added that conducting an IRA without approval is a higher class of violation. Ms. Pinaud commented that this is a serious violation of the Massachusetts Contingency Plan (“MCP”). This must be a significant violation of Board regulations. She asked why the committee did not think so. Mr. Siddique answered by stating that the ACOP was for the MCP violations. The LSP complied with the ACOP. The LSP regrets the violations and changed the practices in his form. MassDEP informed the LSP that if it happens again it would constitute “willfulness.” Based on this, Mr. Siddique believed that there was no evidence of further violation. “The punishment was already assessed,” he stated. Dr. Guswa agreed saying that the LSP did not violate the MCP out of ignorance. Similarly, Mr. Austin told the committee that this was a onetime mistake, potentially serious, but still a onetime mistake. The committee voted five to two to dismiss the complaint. Ms. Pinaud abstained from voting on the matter.

4. New Business: None

5. Future Meetings: May 19, 2016--MassDEP CERO.

6. Adjournment: The meeting was adjourned at approximately 2:22 p.m.