

BEFORE THE BOARD OF PROFESSIONAL ENGINEERS
AND LAND SURVEYORS
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-06-0058-PEL REGARDING:

THE LICENSE APPLICATION OF) Case No. 1478-2006
DARIN G. CYPHERS, L.S.,)
Applicant.)
)
)

**PROPOSED FINDINGS OF FACT; CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER**

I. INTRODUCTION

Darin Cyphers appeals from the determination of the Montana Board of Professional Engineers and Land Surveyors to deny his application to sit for the professional surveyor’s licensing examination so that he could become a surveyor intern in Montana. Hearing Examiner Gregory L. Hanchett held a contested case hearing in this matter on March 8, 2006. Cyphers represented himself. Jack Atkins, agency legal counsel, represented the Business Standards Division of the Department of Labor and Industry. Cyphers, Greg Kays, Raul Wong, Jim Hahn, Brook Jasmine, Roger Saddler, and Luis Riancho all testified under oath. Pursuant to the stipulation of the parties, all witnesses except for Brook Jasmine appeared by telephone.

Department Exhibits 1 through 13 were admitted into evidence.¹ In addition, Cyphers’ Exhibit A-1 was admitted. Cyphers requested permission to submit additional evidence after the hearing which he was permitted to do (admitted as

¹ Cyphers failed to timely object to the admission of Exhibit 6, an e-mail from a person identified in the e-mail as Rick Johnson. Nonetheless, the document is clearly hearsay and cannot constitute evidence upon which a recommended decision in a contested case hearing can be based. Rule 801, Rules of Evidence; Mont. Code Ann. § 37-1-404 (which requires application of the rules of evidence to contested case proceedings in professional licensing cases). The hearing examiner cannot, and therefore has not considered the content of Exhibit 6 in arriving at his recommended decision in this matter.

Applicant's Post-Hearing Exhibit). The record in this matter was deemed submitted for decision on March 24, 2006. Based on the testimonial and documentary evidence adduced in this case, the hearing examiner makes the following findings of fact, conclusions of law, and recommended decision.

II. FINDINGS OF FACT

1. Cyphers had been a licensed mortgage broker in Texas for some years prior to his application to the State of Montana to obtain a professional surveyor's license.

2. On July 2, 2004, Cyphers entered a guilty plea to the offense of misapplication of fiduciary property in the 199th judicial district court of Collins County, Texas. As a result of a guilty plea, he was placed on community supervision for a period of three years with the terms that he complete community service and pay restitution of \$20,478.00.

3. As a result of the entry of the guilty plea, Cyphers' Texas mortgage broker's license was revoked (Exhibit 2, Cyphers' application to the Texas Board of Professional Land Surveying).

4. As of the time of the hearing in this matter, Cyphers has completed the required community service portion of the deferred sentence, but is still on community supervision for the offense. Cyphers' guilty plea will not result in a criminal conviction if he successfully completes his supervision period. At the time of his application to the Montana State Board of Professional Engineers and Land Surveyors, Cyphers did not inform the Board that he had completed the community service requirement and there is no evidence to show that Cyphers had actually completed that requirement at the time of his application.

5. Prior to applying to Montana, the licensee worked at various jobs in Texas completing some surveying work. One of his previous employers was Halff Associates located in Dallas, Texas. At that employer, he worked under Raul Wong and Greg Kays, both licensed land surveyors. In applying for that job, Cyphers represented to that employer that he was a licensed land surveyor in Montana when, in fact, he was not. At the hearing, Wong testified that he had "doubts" about Cyphers' performance.

6. Cyphers applied for a professional surveyor's license in Montana in 2005. As part of that application process, he disclosed his guilty plea discussed above.

In addition, he disclosed the contents of his application to the Texas Board of Professional Land Surveyors (Exhibit 2). Cyphers also solicited references from former employers which he directed to be forwarded to the Montana State Board of Professional Engineers and Land Surveyors. The Board received references from David Oakes (Exhibit 7), Roger Saddler (Exhibit 8), Anthony Williams (Exhibit 9), Earnest Boutwell (Exhibit 11), Bernard McGovern (Exhibit 13), all of whom are professional surveyors licensed in Ohio, and Luis Riancho (Exhibit 3) and Colin Henry (Exhibit 12), professional surveyors licensed in Texas. In addition, the Board received a copy of a reference provided to the Texas Board of Professional Surveyors from Forest Cope, a professor who taught Cyphers some type of surveying at Sinclair Community College (Exhibit 4).

7. Oakes' reference indicated that he could not verify Cyphers' employment with his (Oakes') firm because those records had been purged and therefore he could not recommend that Cyphers be licensed. Saddler noted that Cyphers had only worked for him for a short time and had been discharged. Saddler further noted that he did not know whether Cyphers was qualified to be licensed and that he did not recommend that Cyphers be licensed.

8. Riancho returned the reference along with a letter indicating that his firm did not complete the form because the firm "had no real contact with Mr. Cyphers since 1993 and also because there seems to be several discrepancies in the resume furnished by Mr. Cyphers" (Exhibit 3). In addition, Riancho's letter indicated that during Cyphers' employment with the firm, Riancho "found [Cyphers'] work to be less than standard for the position." *Id.*

9. Williams, Boutwell and Henry felt that Cyphers was competent to be licensed as a surveyor and further indicated that they recommended he be granted a license. McGovern's reference indicated that most of Cyphers' work under him was during Cyphers' "early years" and that McGovern did not know whether Cyphers was qualified (Exhibit 13). Cope's reference was at best equivocal, noting that he both recommended and did not recommend Cyphers for certification or registration, noting Cyphers was "ok based on my limited knowledge" (Exhibit 4, page 2).

10. In the initial processes of reviewing the application, the Montana Board found that Cyphers' degree from Sinclair Community College failed to meet the Board's curriculum requirements and that Cyphers had failed to meet the experience requirements (Exhibit A-1, Letter to Cyphers from the Montana Board of Professional Engineers and Land Surveyors dated May 16, 2005). Cyphers chose to try to remedy that problem by submitting additional evidence of experience and additional evidence

regarding the Sinclair College curriculum (Exhibit 10, Cyphers' Letter to the Montana Board of Professional Engineers and Land Surveyors dated August 4, 2005). While the application was still open, the Board also learned of Cyphers' guilty plea. The Board considered not only the references submitted, but also the guilty plea and the fact that the plea involved allegations of misappropriation and required restitution of \$20,000.00. Based upon this review, the Board denied Cyphers' application for his license, finding that Cyphers failed to satisfy the "good character and reputation" requirement of Mont. Code Ann. § 37-67-308(1).

III. CONCLUSIONS OF LAW²

1. Cyphers seeks to have the denial of his application for licensure overturned. As such, he bears the burden of proof to demonstrate that the Board's denial of the license was erroneous either in fact or law.

2. A professional licensing board may grant or deny a license. Mont. Code Ann. § 37-1-307(1)(e). Montana Code Annotated § 37-67-308(1) provides that to be eligible for admission to an examination to become either a licensed surveyor or surveyor intern, an applicant "must be of good character and reputation."

3. Cyphers has failed to show that either in fact or law he satisfied the "good character and reputation" requirement of Mont. Code Ann. § 37-67-308(1). In addition, he has failed to show that the Board's determination in this matter was incorrect either in fact or in law. Cyphers asserts that the Board did not adequately consider those good references which he received. In addition, he asserts that the Board in essence shifted the basis of its denial from its original position in the May 16, 2005 letter (inadequate proof of qualifying course work and inadequate experience) to a new ground of lack of good character and reputation.

In weighing the entire mix of the guilty plea and the references, it is not readily apparent that the Board's determination was in error. Some of the references were favorable. Others, however, notably the Riancho letter and the Saddler letter, were very unfavorable and directly reflected concerns about Cyphers' reputation and character. The guilty plea—which involved an essential quality of professional surveying—honesty and integrity—also supports a finding that character and good reputation have not been shown. The guilty plea involved misappropriation and an order of restitution. The unfavorable references and guilty plea taken together provide

²Statements of fact in the conclusions of laws are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

substantial evidence to show that Cyphers did not meet the good reputation and character requirement of Mont. Code Ann. § 37-67-308(1).

In addition, Cyphers is still on community supervision for the guilty plea. While he contends that he has completed all of the community work requirements,³ he still has not been released from the community supervision. At hearing, Cyphers maintained that he could be released for supervision at any time, but that he simply had failed to do so. Cyphers' testimony in this regard is not credible, particularly in light of the fact that there is nothing in the record of conviction that indicates he is eligible for early termination of the supervision. Moreover, if such were the case, Cyphers most certainly would have undertaken the steps to do so by the time of the hearing in light of the fact that the guilty plea and supervision was and is an important consideration in determining his character and reputation.

Cyphers' further argument that the Board changed the basis for the denial is factually incorrect. As Board Member Hahn testified, and as the May 16, 2005 letter contained in Exhibit A-1 makes clear, the review of the application was a single process. The Board had initial concerns regarding experience and curriculum qualifications and later also learned of the character and reputation issues. Cyphers has cited no case law or statute for his proposition that the Board lacked authority to review the application in the manner it did and the hearing examiner can find no error in the process.

In light of the Board's purpose of protecting the public as well as the substantial concerns regarding character and reputation raised by Cyphers' application, the hearing examiner is not persuaded that the Board erred either in fact or law in denying Cyphers' application at this time. Cyphers has thus failed to meet his burden of proof in this matter.

³ As noted earlier in this recommended decision, Cyphers did not present any evidence to the Board at the time of his application that he had completed his community service. It is difficult to comprehend how the Board's denial can be found to be in error on the basis of this evidence since the evidence was not presented to the Board in Cyphers' application.

IV. RECOMMENDED ORDER

Based upon the foregoing, the hearing examiner recommends that the Board affirm the denial of Darin Cyphers' application to sit for the professional surveyor's examination in the State of Montana.

DATED this 18th day of April, 2006.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Examiner

NOTICE

Mont. Code Ann. § 2-4-621 provides that the proposed order in this matter, being adverse to the licensee, may not be made final by the regulatory board until this proposed order is served upon each of the parties and the party adversely affected by the proposed order is given an opportunity to file exceptions and present briefs and oral argument to the regulatory board.