

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

JARED CERNOISKY, JR.)	CASE NO. CV-2017-06-2609
)	
Plaintiff)	JUDGE MARY MARGARET
-vs-)	ROWLANDS
)	
STATE BOARD OF REGISTRATION)	
FOR PROFESSIONAL ENGINEERS AND)	<u>ORDER</u>
SURVEYORS,)	
)	
Defendant)	

- - -

This matter is before the Court on Appellee State Board of Registration for Professional Engineers (Board) motion to dismiss. Appellant Jared Cernosky, Jr. (Cernosky), filed an opposition, the Board filed a reply, and Cernosky filed a sur-reply. The Board asserts this Court lacks subject matter jurisdiction to hear Cernosky's administrative appeal because the Board's "Notice of Incomplete Application" of Cernosky's application for registration as a professional engineer in Ohio was a ministerial act, not an adjudication. Cernosky asserts it was an adjudication and the Board's motion to dismiss should be overruled. When a litigant files a Civ.R. 12(B)(1) motion to dismiss for lack of subject matter jurisdiction, the Court must determine whether the complaint contains allegations of a cause of action that the trial court has authority to decide. *Crestmont Cleveland Partnership v. Ohio Dept. of Health* (2000), 139 Ohio App.3d 928, 936, 746 N.E.2d 222. The Court has jurisdiction to hear appeals from administrative agencies pursuant to adjudications and not ministerial functions.

On or about February 28, 2017, Cernosky applied for registration as a professional engineer with the Board through reciprocity because he has been a licensed engineer in the Commonwealth of Virginia since April 2016. The Board recognized Cernosky had four years and seven months of experience as of January 2017. The Board argues in its brief that O.A.C.

4733-9-01(C) requires the experience requirement to be met one hundred and twenty days before the Principles and Practice Examination (PE) date.

O.A.C. 4733-9-01(C):

Cut-off date for new or renewed applications for each examination is one hundred twenty days before the examination date. All experience or education and experience requirements must be met one hundred twenty days before the examination date.

The Board set April of 2016, the date Cernosky took the PE exam in Virginia, as the examination date for purposes of O.A.C. 4733-9-01(C). Therefore, the Board asserts Cernosky's experience and education requirements must have been met one hundred and twenty days before April of 2016 (December 2015), leaving Cernosky a full six months short of Ohio's four year experience requirement, rendering his application incomplete. The Board argues that if Cernosky had tried to take the PE exam in Ohio in April of 2016, he would have been ineligible because he did not have four years of experience at that time. The Board argues that even if Ohio's calendar year requirement were not used, Cernosky would fall two months short of the four year experience requirement as of December, 2015. The Board's notice explained that to complete the application, he would need to re-take and pass the PE exam after four years of acceptable engineering experience and that it must hold out of state applicants to the same standard as Ohio's applicants. The Board claims there was no discretion in its decision; it merely made a mechanical calculation of the days elapsed between the date Cernosky started earning experience and the date he took the PE exam in Virginia. Therefore, since the Board's action was ministerial, Cernosky was not given a hearing on the matter. Cernosky then filed this administrative appeal.

R.C. 119.01(D) defines adjudication as:

(D) "Adjudication" means the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person, but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature.

Although the General Assembly does not define "ministerial" in R.C. Chapter 119, the legislature has directed that courts shall construe statutory words and phrases in context and according to common usage, unless the words have acquired a technical or particular meaning. R.C. 1.42. The common definition of "ministerial" is "of or relating to an act that involves obedience to instructions or laws instead of discretion, judgment, or skill." Black's Law Dictionary (7 Ed.1999) 1011. Cf. *State ex rel. Trauger v. Nash* (1902), 66 Ohio St. 612, 64 N.E. 558. Balt. Ravens v. Self-Insuring Empls. Evaluation Bd., 94 Ohio St. 3d 449, 463, 764 N.E.2d 418, 430, 2002 Ohio LEXIS 765, *35, 2002-Ohio-1362.

A ministerial act is an act performed in a given state of facts, in a prescribed manner, in obedience to a legal mandate, and without regard to or the exercise of the actor's own judgment about the propriety of the act. *State ex rel. Trauger v. Nash*, 66 Ohio St. 612, 618, 64 N.E. 558 (1902).

Under R.C. 119.12, only an adverse order of an agency pursuant to an adjudication is appealable. *M.J. Kelley Co. v. Cleveland*, 32 Ohio St.2d 150, 290 N.E.2d 562 (1972), paragraph two of the syllabus. The Board asserts its rejection of Cernosky's application for incompleteness is not the same as the adjudicatory act of a "denial" under R.C. 4733.20(G), which would afford Cernosky the right to appeal.

Cernosky argues that his graduate school experience qualified him as of December, 2015 to take the PE exam in Virginia in April of 2016 with four years of experience. Ohio does not include graduate school experience that is concurrent with work experience. Cernosky asserts the Board is not permitted to weigh his underlying credentials under Virginia law, rather, it must look at his credentials at the time he applied to the Board for reciprocity. Cernosky claims the Board may not inquire into the circumstances of an applicant's PE exam from another state; it is only required that the applicant passed the PE exam. Cernosky further states the completion of four years of experience prior to the PE exam test date is required only for first time license applicants in Ohio who have not yet taken the PE exam.

For an Ohio applicant, R.C. 4733.11 states:

(A) The state board of registration for professional engineers and surveyors shall consider an applicant to be qualified for registration as a professional engineer if an applicant satisfies all of the requirements listed in either division (A)(1) * * * of this section as follows:

(1)

(a) Graduation from an accredited engineering curriculum of four years or more;

(b) A specific record of four years or more of practical experience in engineering work completed in addition to, and not overlapping in time, any school work completed under division (A)(1)(a) of this section that is acceptable to the board, not more than two years of which may be before graduation but after the completion of the second year of college, indicating that the applicant is competent to be placed in responsible charge of such work;

(c) Passing the prescribed examinations under divisions (A) and (B) of section 4733.13 of the Revised Code.

R.C. 4733.13 (A) and (B) state:

(A) When examinations are required as provided by section 4733.11 of the Revised Code, they shall be held at a time and place specified by the state board of registration for professional engineers and surveyors. The examinations shall test the applicant's knowledge to perform professional engineering or surveying services which shall insure the safety of life, health, and property. An examination referred to as the fundamentals of engineering or as the fundamentals of surveying examination shall test the applicant's knowledge of the fundamentals of engineering or surveying as appropriate.

(B) An examination referred to as the principles and practice of engineering examination shall test the applicant's knowledge of the branch of engineering in which the applicant specializes. For the purpose of this section, the branches of engineering are all those branches in which engineering examinations are offered by the board or the national council of examiners for engineering and surveying.

Cernosky states the provisions on reciprocity do not express an experience requirement in R.C. 4733.19:

R.C. 4733.19 states the Board's authority to issue registration by reciprocity:

A person registered or licensed to engage in the practice of engineering or surveying by a proper authority of a state, territory, or possession of the United States, or the District of Columbia, who, in the opinion of the state board of registration for professional engineers and surveyors, meets the requirements of this chapter, based on verified evidence, may, upon application and payment of the established fee, be registered.

It is undisputed by both parties that at the time Cernosky applied for reciprocity in Ohio in February 2017, he had more than four years of experience. The parties also do not dispute that as of December 2015, if Cernosky had applied to take the April 2016 Ohio PE exam, he

would not have had four years of experience under Ohio law. The relevant inquiry then, is whether the Board's selection of the cutoff date for experience was a ministerial act or an adjudicatory act.

Upon review, the sections of the Revised Code and Administrative Code the Board relied on reference an experience cutoff date for new or renewed applicants for examination. Cernosky did not apply to Ohio for examination, but for reciprocity. R.C. 4733.19 governs Ohio's reciprocity statute for engineers which requires that an applicant for reciprocity be registered in Ohio if he applies and: 1) is licensed or registered in another state to practice as an engineer; 2) pays the established fee, and; 3) in the opinion of the Board, meets the requirements of R.C. 4733.19. The Court finds the inclusion of the phrase "in the opinion of the Board" eliminates the Board's action in this case as ministerial since it was not one that involved obedience to instructions or laws, but instead, involved discretion, judgment, or skill. The Board's selection of the experience cutoff date and characterization of Cernosky's application as "Incomplete" as opposed to "Denial" does not alter the nature of its action, to wit: the Board opined that Cernosky lacked sufficient experience and denied his application for reciprocity.

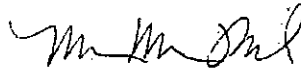
Merriam-Webster's online dictionary defines "denial" as: refusal to satisfy a request or desire; and "incomplete" as: lacking a usually necessary part, element, or step. "Incomplete" implies that Cernosky could complete his application by obtaining the missing element and resubmitting his application. However, Cernosky cannot complete his application for reciprocity as he cannot go back in time and obtain the additional six (6) months of experience the Board claims he lacked when he took the PE exam in Virginia in April 2016. Cernosky's application can never be completed. The Board's use of the term "incomplete" in an effort to couch its action as ministerial does not obscure its true nature of denying

Cernosky's application for reciprocity based on its opinion that Cernosky did not meet the requirements of R.C. 4733.19.

The exercise of discretion inherent in Ohio's reciprocity statute, R.C. 4733.19 makes the Board's decision adjudicatory in nature. R.C. 119.06 provides that no adjudication order shall be valid unless an opportunity for hearing is afforded. In the case at bar, the record reveals Cernosky was not afforded a hearing before the Board's issued its decision. Therefore, its decision is not valid and not ripe for appeal.

The Board's motion to dismiss for lack of subject matter jurisdiction because its act was ministerial is DENIED on that basis. However, this matter is REMANDED to the Board of Registration for Professional Engineers and Surveyors for a hearing on Mr. Cernosky's application for reciprocity.

IT IS SO ORDERED.



JUDGE MARY MARGARET ROWLANDS

CC: JARED CERNOSKY, JR., *PRO SE*
ATTORNEY CHRISTIE LIMBERT
ATTORNEY BRIAN R. HONEN