

BEFORE THE
STRUCTURAL PEST CONTROL BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JAMES MICHAEL FAGAINES

Applicator's License No. RA 40740,

Case No. 2014-1

OAH No. 2013080592

DECISION AFTER NON-ADOPTION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on January 30, 2014, in Los Angeles, California. Complainant was represented by Cristina Felix, Deputy Attorney General. James Michael Fagaines (Respondent) appeared and represented himself. Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on January 30, 2014.

On February 20, 2014, Administrative Law Judge Julie Cabos-Owen issued her Proposed Decision. On April 10, 2014, the Board issued its Notice of Non Adoption of the Proposed Decision. On May 5, 2014, the Board issued its Order Fixing Date for Submission of Written Argument. After review of the entire administrative record including the transcript and written argument, the Board hereby renders its decision in the matter.

FACTUAL FINDINGS

1. On July 8, 2013, Complainant Susan Saylor filed the Accusation while acting in her official capacity as Registrar/Executive Officer of the Structural Pest Control Board (Board), Department of Consumer Affairs, State of California.

2. On October 15, 2003, the Board issued Applicator's License Number RA 40740, Branches 2 (general pest) and 3 (termite), to Respondent, as an employee of Contractor's Termite Control, Inc. On March 26, 2012, Respondent left the employ of Contractor's Termite Control, Inc., and began working for Hometeam Pest Defense. On April 22, 2013, Respondent left the employ of Hometeam Pest Defense. On May 1, 2013, Respondent began employment with Professional Pretreat & Termite Corp., where he is currently employed. Respondent's applicator's license will expire on October 15, 2015, unless renewed.

3. On October 17, 2011, in the Superior Court of California, County of Los Angeles, Case Number 1JB04716, Respondent was convicted on his plea of nolo contendere of violating Penal Code section 314.1 (indecent exposure), a misdemeanor.

4. Respondent was placed on three years' summary probation and ordered to register as a sex offender and to complete 52 sexual impulse counseling sessions.

5. The facts and circumstances surrounding Respondent's October 17, 2011 conviction are as follows:

(a). On May 30, 2011, while driving on a public street, Respondent began masturbating in his vehicle. On seeing two teenage females on the opposite side of the street, he made a U-turn, pulled his vehicle alongside them and slowed to a stop, still masturbating with his left hand and driving with his right. The two females were able to hear Respondent moaning while he masturbated. As Respondent drove away, one of the victims documented Respondent's vehicle license plate number. The victims then contacted police.

(b). Respondent was subsequently apprehended by police. He initially denied being at the scene of the crime, but admitted his presence after he was told that witnesses obtained his license plate number. Respondent then stated he had only stopped to urinate. However, when he was told that two females reported him masturbating while they walked by, he admitted doing so. The police officer then asked Respondent why he would masturbate in a public place, and he responded, "I don't know. I just felt the urge." Respondent then asserted that the two females just happened to walk by while he was masturbating in his vehicle. However, when he was told that the females said he had driven by them in the opposite direction and then turned his vehicle around to pull alongside them, Respondent stated, "Yes, that is what really happened." He said that he had been driving and masturbating for a couple of minutes, then saw the victims and wanted to get a closer look at them. When asked why he had masturbated in front of the females, he said "I guess I have an issue." Respondent admitted to similar prior conduct "just a couple" of times. (Exhibit 4.)

6. Respondent's 2011 conviction demonstrates his willingness to engage in indecent behavior in the presence of members of the public. Since licensed applicators appear in public and have some contact with members of the public, they are expected to comport themselves professionally and respectably. Furthermore, licensed applicators are trusted with entering consumer's homes and businesses to conduct applications. The inability to control sexual urges endangers the public and demonstrates an unfitness to perform the functions authorized by a pest control applicator's license in a manner consistent with the public health, safety, or welfare. Consequently, Respondent's conviction is substantially related to the qualifications, functions and duties of a pest control licensee. (Cal. Code Regs., tit.16, §1937.1.)

7(a). As required by the criminal probation order, Respondent has completed the 52 sexual impulse counseling sessions.

7(b). In an April, 2013 progress report, the counseling program facilitator noted:

[Respondent] has completed his court ordered impulse control counseling treatment program. He appears motivated to build healthy relationships with others and move towards a satisfying and fulfilling life. He self-reports that he is

currently employed and involved in sports activities as well as other pro-social activities....

[Respondent] has some risk factors such as an alcohol abuse issue and impulsive behaviors that may endanger his ability to sustain a high quality of life....

(Exhibit D.)¹

8(a). Respondent declined to testify on his own behalf, but was called as a witness by Complainant pursuant to Government Code section 11513, subdivision (b). When testifying, he spoke quietly and kept his head down, appearing embarrassed and uncomfortable. Although given the opportunity to provide explanations regarding his crime and rehabilitation, his answers were terse and he appeared anxious for the proceedings to end. Although his reticent demeanor did not damage his credibility, it was an impediment to determining what rehabilitative efforts Respondent had made since his crime.

8(b). Respondent stated: "I was going through a divorce. I had been drinking, and I wasn't in my right mind at the time." He admitted that he had "an issue with impulse control" for "about a year or two" while going through divorce proceedings. However, he denied having any remaining impulse control problems. He also denied having a current alcohol abuse problem. Although he admitted that he still has "alcohol issues," he insisted that his problem "is not as bad as it used to be." Respondent has never participated in any alcohol sobriety program such as Alcoholics Anonymous.

8(c). When asked about the types of safeguards he had in place to prevent himself from acting on improper impulses, Respondent pointed to his employment and to involvement in recreational sports such as softball. He confirmed that his support network included family and friends whom he could contact for help.

9. Respondent is scheduled to remain on criminal probation until October 2014.

10. Respondent has not suffered any further convictions since 2011.

11. Respondent's current employment involves pre-treatment for new home construction, with no resident contact. However, an applicator's license does not limit employment to pre-treatment. As an applicator, Respondent is able to work in peoples' home applying pesticides. He has been with his present employer for almost two years.

12. Respondent has the support of his current employer, a long-time friend, and his ex-wife, all of whom submitted letters of recommendation on his behalf. His employer, Sabas Romo with Professional Pretreat & Termite Corp., described him as an "exemplary and upstanding employee." (Exhibit A.) Respondent's long-time friend described him as "a good

¹ Respondent's Exhibit D also contained additional statements by the counseling facilitator. However, on Complainant's counsel objection, Exhibit D was admitted only as "administrative hearsay" pursuant to Government Code section 11513, subdivision (d), to supplement or explain other evidence, but insufficient in itself to support a finding.

person at the core” who was “incredibly remorseful, and is willing to do whatever it takes to make reparations.” (Exhibit B.) His ex-wife described him as a hardworking man and a great father.” (Exhibit C.)

13(a). Complainant submitted as evidence of the costs of the prosecution of this matter a Certification of Costs and Declaration of Cristina Felix (Costs Declaration). The Costs Declaration indicated that the Board had been billed \$1,925 for the Attorney General’s legal services.

13(b). There was no evidence that any of the costs were unreasonable.

13(c). The evidence established that Complainant incurred total costs of \$1,925, all of which are deemed reasonable.

LEGAL CONCLUSIONS

1. The Board has the burden to prove, to a preponderance of the evidence, that the allegations contained in the accusation are true. *Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911. That burden was met.

2. Cause exists to revoke or suspend Respondent’s structural pest control applicator’s license, pursuant to Business and Professions Code sections 8649 and 490, and California Code of Regulations, title 16, section 1937.1, for his criminal conviction, which is substantially related to the duties, qualifications, and functions of a structural pest control licensee, as set forth in Factual Findings 3, 5-11.

3. The administrative law judge issued a proposed decision revoking Respondent’s license, staying the revocation and placing the license on probation with terms and conditions. The proposed discipline did not adequately protect the public. As a result, the Board rejected the proposed decision and has adopted this decision in the interest of public protection.

4. The Board has adopted criteria for consideration when evaluating a licensee’s fitness to remain licensed with the Board after having been convicted of a crime. (Cal. Code of Regs., Tit. 16, section 1937.2 subdivision (b).) Below is a discussion of each criteria stated section 1937.2 subdivision (b).

(a) Nature and severity of the act(s) or offense(s). Here, Respondent committed a serious sexual offense against two young women. As a result, Respondent is required to register as a sexual offender. As detailed in Factual Finding 5, the nature and severity of the offense is high.

(b) Total criminal record. Here, Respondent does not have a criminal record except for the sexual offense discussed above.

(c) The time that has elapsed since commission of the act(s) or offense(s). Here, Respondent was convicted in 2011. Therefore, only three years have elapsed since the offense and Respondent is still on probation until October 2014.

(d) Whether the licensee or registered company has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against the licensee or registered company. Respondent has complied with all terms of his probation including a 52 sexual impulse counseling sessions. However, since people have a strong incentive to obey the law while under the supervision of the criminal justice system, little weight is generally placed on the fact that a person has engaged in good behavior while on probation. (*In re Gossage* (2000) 23 Cal.4th 1080.)

(e) If applicable, evidence of expungement proceedings pursuant to Section 1203.4 of the Penal Code. This is not applicable because no evidence of expungement was admitted.

(f) Evidence, if any of rehabilitation submitted by the licensee or registered company. Respondent submitted letters from a friend, manager/supervisor, and ex-wife. These letters were admitted as administrative hearsay to supplement or explain other evidence. The letters alone are insufficient to support a finding of rehabilitation. Here, Respondent has not established substantive rehabilitation outside the constraints of the criminal justice system and the passage of time. Respondent did not fully acknowledge the wrongfulness of past actions which is an essential step towards rehabilitation. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940.) Furthermore, some of the evidence admitted by Respondent demonstrates a lack of rehabilitation. This includes his testimony where he stated: "I did have some alcohol issues in the past and still do but not as bad as it used to be." Additionally, Respondent's court ordered counselor remarked in her report: "[Respondent] has some risk factors such as an alcohol abuse issue and impulsive behaviors that may endanger his ability to sustain a high quality of life." These statements are especially concerning because Respondent testified he was going through a lot at the time of the incident and had been drinking. Despite Respondent's problem with alcohol, he has not participated in any alcohol sobriety program such as Alcoholics Anonymous.

5. According to the criteria set forth above, Respondent has established some rehabilitation. However, Respondent is not sufficiently rehabilitated.

6. When the Board disciplines a licensee, the Board reviews its disciplinary guidelines to determine the appropriate disciplinary action pursuant to California Code of Regulations section 1937.11.² Below is an evaluation of the criteria in the disciplinary guidelines.

² In determining whether the minimum, maximum, or an intermediate penalty is to be imposed in a given case, factors such as the following should be considered:

1. Actual or potential harm to the public.
2. Actual or potential harm to any consumer.
3. Prior disciplinary record.
4. Number and/or variety of current violations.
5. Mitigation evidence.

(a) The potential harm to the public and consumer is great because of the sexual risk Respondent poses. As explained above, there has not been sufficient rehabilitation. As such, the potential risk to the public and consumer is high.

(b) Respondent has not been subject to prior discipline and there is only one violation alleged in the accusation.

(c) Respondent presented some mitigation evidence including letters and testimony.

(d) Respondent has complied with all the terms of his criminal conviction. Respondent is on criminal probation until October 2014. Respondent does not have a criminal record beyond the conviction at issue.

(e) The conduct that resulted in a conviction was engaged in knowingly or with willful or reckless regard.

(f) Financial benefit does not appear to be a factor in this case.

(g) There was evidence presented that the conduct at issue was part of a pattern of practice. Respondent admitted to similar prior conduct "just a couple" of times. (Exhibit 4.)

7. Pursuant to Business and Professions Code section 125.3, Complainant is entitled to recover reasonable costs of prosecution of this matter in the amount of \$1,925, as set forth in Factual Finding 13.

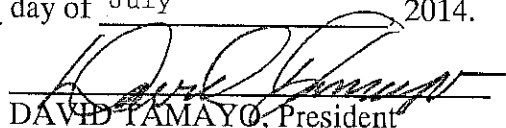
ORDER

WHEREFORE, THE FOLLOWING ORDERS are hereby made:

Respondent James Michael Fagaines' Applicator's License, Number RA 40740, is hereby revoked.

This decision shall become effective on August 30, 2014.

IT IS SO ORDERED this 31st day of July 2014.


DAVID TAMAYO, President
STRUCTURAL PEST CONTROL BOARD

6. In case of a criminal conviction, compliance with terms of sentence.

7. Overall criminal record.

8. Whether the conduct was knowing, willful, reckless or inadvertent.

9. The financial benefit to the respondent.

10. Evidence that the unlawful act was part of a pattern of practice.

11. Currently on probation.

The Board does not intend that any one of the above factors be required to justify the minimum or maximum penalty as opposed to an intermediate one.