

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 21, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-1131
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-1817

**IN COURT OF APPEALS
DISTRICT IV**

ROLAND F. SARKO,

PETITIONER-RESPONDENT,

v.

**EXAMINING BOARD OF ARCHITECTS, LANDSCAPE
ARCHITECTS, PROFESSIONAL ENGINEERS, DESIGNERS
AND LAND SURVEYORS,**

RESPONDENTS-APPELLANTS.

APPEAL from an order of the circuit court for Dane County:
DAVID T. FLANAGAN, Judge. *Reversed.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 PER CURIAM. The Examining Board of Architects, Landscape Architects, Professional Engineers, Designers and Land Surveyors appeals a circuit court order which set aside its decision to suspend the license of land

surveyor Roland Sarko for incompetence. We conclude the suspension was reasonably based on the facts before the Examining Board, and therefore we reverse the order of the circuit court, thereby reinstating the Examining Board's decision.

BACKGROUND

¶2 Sarko was registered to practice as a land surveyor in the State of Wisconsin, and he operated his own land surveying businesses in Madison. The Examining Board initiated disciplinary proceedings against Sarko based on alleged deficiencies in four survey maps he had signed and sealed for a series of his firms' clients over a period of two and a half years.

¶3 The Examining Board found that Sarko's surveys were deficient in various ways, including: inadequate monumentation; missing information regarding boundaries, bearings, road width, north reference, lot area, curve information, reference to section or quarter sections lines, closure ratios and location; inaccurate meander lines; omission of a river; insufficient margins and headings; and lack of a surveyor's certificate and required representations. The Examining Board also found that Sarko had failed to timely file one of the maps with the county surveyor and had failed to file a new monument record with the county surveyor or register of deeds in regard to one of the other maps.

¶4 The Examining Board concluded that Sarko had violated several statutes and numerous administrative code provisions for the practice of his profession, and that his multiple failures to include required items in maps he had signed and sealed demonstrated incompetence within the meaning of WIS. STAT.

§ 443.12(1) (1999-2000).¹ The Examining Board suspended Sarko's license for one year and conditioned his license for the following three years on supervision by another qualified land surveyor.

STANDARD OF REVIEW

¶5 We review the administrative agency's decision rather than that of the circuit court. *Stafford Trucking, Inc. v. DILHR*, 102 Wis. 2d 256, 260, 306 N.W.2d 79 (Ct. App. 1981). We cannot substitute our judgment for that of the agency as to the weight or credibility of the evidence, and must uphold its factual findings if there is any credible and substantial evidence in the record upon which reasonable persons could rely to make those findings. *Advance Die Casting Co. v. LIRC*, 154 Wis. 2d 239, 249, 453 N.W.2d 487 (1989); *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54-55, 330 N.W.2d 169 (1983); WIS. STAT. § 227.57(6).

¶6 We are not bound by an agency's conclusions of law in the same manner as we are by its factual findings. *Begel v. LIRC*, 2001 WI App 134, ¶6, 246 Wis. 2d 345, 631 N.W.2d 220. However, we may nonetheless defer to its legal determinations. An agency's interpretation or application of a statute may be accorded great weight deference, due weight deference or de novo review, depending on the circumstances. See *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 284, 548 N.W.2d 57, 61 (1996).

¶7 Great weight deference is appropriate when: (1) the agency is charged by the legislature with the duty of administering the statute in question;

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

(2) the agency's interpretation of the statute is one of long standing; (3) the agency employed its expertise or specialized knowledge in interpreting the statute; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 660, 539 N.W.2d 98, 102 (1995). We are satisfied that the Examining Board meets the criteria for great weight deference in this case. The Examining Board has been charged by the legislature with promulgating rules and defining and enforcing professional conduct relating to land surveyors, and it has expertise in the standards of the profession. WIS. STAT. §§ 15.08(5)(b) and 443.12. Its definition of incompetence has been promulgated by rule and has been in effect for nearly fifteen years. WIS. ADMIN. CODE § A-E 8.03(2). Therefore, we will accord great weight deference to the Examining Board's decision and will affirm it so long as it was reasonable, even if an alternate decision might have been more reasonable. *UFE Inc.*, 201 Wis. 2d at 286.

DISCUSSION

¶8 With a few exceptions noted below, Sarko does not challenge the Examining Board's factual findings that the alleged mistakes and omissions in the four maps at issue occurred, and we are satisfied that the findings were supported by substantial evidence in the record. Rather, Sarko provides reasons for the mistakes and omissions which he argues show that they did not violate applicable regulations or demonstrate incompetence. The issue before us, then, is whether the Examining Board's series of conclusions that the various mistakes and omissions demonstrated incompetence were reasonable.

Incompetence Standard

¶9 As a threshold matter, Sarko disputes the standard the Examining Board used to measure his competence. WISCONSIN STAT. § 443.12(1) authorizes the imposition of discipline against a land surveyor for “any gross negligence, incompetence or misconduct in the practice of land surveying.” WISCONSIN ADMIN. CODE § A-E 8.03(2) defines incompetence² in the practice of land surveying as:

conduct which demonstrates any of the following:

(a) Lack of ability or fitness to discharge the duty owed by ... [a] land surveyor to a client or employer or to the public.

(b) Lack of knowledge of the fundamental principles of the profession or an inability to apply fundamental principles of the profession.

(c) Failure to maintain competency in the current practices and methods applicable to the profession.

Sarko, relying on *Vivian v. Examining Board of Architects, Professional Engineers, Designers & Land Surveyors*, 61 Wis. 2d 627, 213 N.W.2d 359 (1974), contends that ordinary negligence is insufficient to warrant discipline. We are persuaded, however, that Sarko’s contention is based upon a misunderstanding of *Vivian*.

¶10 In *Vivian*, an engineer had made an error in the design for a roof support for a garage which contributed to the collapse of the garage. *Id.* at 636.

² The administrative rule refers to “incompetency” rather than “incompetence,” but the parties do not argue that the distinction has any significance. We use the term incompetence for consistency throughout this opinion, except when quoting a source using the other term.

An engineer employed by the state testified that the design flaw was not obvious.

Id. The court began by noting:

We are required to negative any implication that it is only continued or repeated acts that can constitute incompetency in any situation.... The statute involved makes incompetency or gross negligence or misconduct grounds for revocation of license. While we have upheld revocation where the three were lumped together as grounds for revocation, each has a distinct meaning. Incompetence does refer to some demonstrated lack of competence or ability to perform the professional functions. Gross negligence does involve some higher degree of a failure to exercise ordinary care of judgment in a given situation. Misconduct does relate to some deviation from a fixed duty or definite rule of conduct. The three words are not entirely synonymous nor completely interchangeable.

Id. at 635-36. The court went on to conclude that the single design error at issue did not demonstrate incompetence, but remanded for a determination as to whether the error constituted gross negligence. *Id.* at 636-37, 639.

¶11 Sarko repeatedly asserts that his errors here constituted no more than ordinary negligence. It thus appears that he believes ordinary negligence can never be sufficient to demonstrate incompetence. However, while *Vivian* suggests that “less serious or more ordinary acts of negligence” would be insufficient to meet the *gross negligence* standard for discipline, we see nothing in the opinion to indicate that ordinary negligence, and particularly a pattern of ordinary negligence, could never demonstrate *incompetence* warranting discipline. To the contrary, the opinion makes clear that (1) the incompetence and gross negligence standards for discipline are distinct, and (2) that the court’s holding on the issue of incompetence was limited to the facts before it. As *Vivian* involved the commission of a single, non-obvious design error, the conclusion that incompetence had not been established there is readily distinguishable from the

situation here, which involves an alleged pattern of numerous errors and omission over a period of several years.

¶12 In sum, we are satisfied that the standard set out in WIS. ADMIN. CODE § A-E 8.03(2) represents a reasonable interpretation of the term incompetence as used in WIS. STAT. § 443.12 and does not conflict with *Vivian*. Thus, the Examining Board did not need to find that any or all of the alleged errors here rose to the level of gross negligence in order to make its findings regarding incompetence.

Weinke Survey

¶13 James Weinke engaged Sarko to conduct a land survey to assist him in the administrative process of obtaining approval to divide a parcel of land. Sarko agreed to produce a “preliminary certified survey map” for \$225, and a “certified survey map” for \$1,000. Sarko produced a map labeled as a “preliminary certified survey map,” which he concedes failed to satisfy the formal requisites for a certified survey map in sixteen different respects. Sarko argues that the omissions were appropriate, however, because he intended the map to be used only in preliminary pre-application procedures, and contemplated preparing a final certified map in compliance with code requirements for the actual application process. He further contends that Weinke submitted the preliminary map to the City of Madison Planning Office of his own accord, contrary to their agreement that he would prepare a second map for that purpose.

¶14 The latter assertion, however, was undermined by the application to the planning commission which Sarko completed, signed and dated on the same date as he certified the preliminary certified map, after Weinke had inquired about the delay. Thus, whatever Sarko’s original intent when agreeing to prepare two

maps, the record supports the Examining Board's determination that Sarko ultimately signed and sealed a seriously deficient map for use in the application process. Weinke's land division application was denied based upon the map's deficiencies. The Examining Board's conclusion that Sarko's conduct in regard to the Weinke survey demonstrated incompetence was reasonable.

Strand-Matty Survey

¶15 Judith Strand and Michael Matty also hired Sarko to prepare a certified survey map to assist them in dividing a parcel of land. The Examining Board found that Sarko failed to monument an angle point and failed to set meander corners twenty feet back from a lakeshore when doing the fieldwork. It further found that the map Sarko produced failed to show an exterior boundary, the area of the lots to the shoreline, and the government lot, section, township, and range information; that it was improperly referenced in relation to the section lines; that it exceeded the closure ratio; that it gave an improper legal description, and that the heading was not sufficiently prominent.

¶16 Sarko claims that he was not required to monument the angle point because it fell within a building foundation, that it was permissible to rely on existing meander corners and to relate the map to alternate section quarters, and that the heading was sufficiently prominent. However, expert witnesses disagreed with Sarko's interpretation of the applicable regulations and standard of practice. They testified that additional monumentation is required when there is an obstacle to marking an angle point, that new monumentation of a meander line is required when the old markers are less than twenty feet from shore, that it is standard practice to obtain a written waiver of the statutory requirement regarding required references when they are impractical; and that headings must be in bold as well as

capital type. The Examining Board was entitled to resolve conflicting accounts regarding the professional standard, and we will not set aside its determination on such technical matters within its expertise.

¶17 Sarko claims that the other mistakes which he concedes were made on the Strand-Matty map were minor in nature and did not demonstrate lack of knowledge or ability, but were rather the result of being hurried by the client into producing the map on the spot. Again, however, it was within the Examining Board's province to weigh the seriousness of the errors and to determine whether or not they were excusable based on time pressure. Its decision that the errors demonstrated incompetence was reasonable.

Jenks Survey

¶18 Daniel Jenks hired Sarko to survey some farmland. Sarko's employees did the fieldwork and prepared a map which Sarko signed and sealed. The Examining Board found that Sarko failed to file a new monument record or make an "as recorded" notation on the map even though his employees' measurement of the south line of the section did not agree with a certified corner record on file at the county surveyor's office; that the map did not reflect the Yahara river or exclude it from its area calculation; that several required monuments were not set; and that the map failed to show the location of the north corner.

¶19 Sarko claims that he was not required to file a new monument record or make an "as recorded" notation because the prior monument record had been "filed" rather than "recorded," as he understood the applicable code provision. Once again, however, there was expert testimony conflicting with Sarko's

interpretation of the code and of the standard practice for the profession, and the Examining Board was entitled to rely on the expert's opinion.

¶20 Sarko claims there was insufficient evidence to show that the missing monuments had never been placed because there were notations in the field file indicating that Sarko's employees had placed the monuments and the fields had been plowed prior to the time Sarko himself examined them after learning of the complaint. However, the Examining Board was entitled to rely on Jenks's testimony that the monuments had never been placed, and we will not disturb its factual findings in that regard.

¶21 Sarko similarly claims that the fact that the Yahara River flowed over a portion of the land at the time of the hearing was insufficient to show that it had been flowing over the land at the time the survey was conducted, because the course of the river had been altered during that time by the removal of a dam. Again, however, Jenks's testimony as to the river's location, as well as a contemporaneous drawing in the Dane County plat book, provide substantial evidence to support the Examining Board's implied factual finding that the river flowed over the land when the survey was performed.

¶22 Sarko acknowledges that the map should have shown the north corner, and we will not substitute our view of the seriousness of this omission for that of the Examining Board. The Examining Board's determination that Sarko demonstrated incompetence by signing and sealing the deficient Jenks's map and failing to file a new monument record was reasonable.

Voegeli Survey

¶23 Finally, Sarko concedes that he did not file the Voegeli map within sixty days of its completion, as required by statute, and that he did not place a monument at the southwestern corner of the lot. Sarko argues that his delay in filing the map was justified because he was attempting to resolve discrepancies with a survey commissioned on the neighboring property, and that he had obtained oral permission from the client to omit placing a stake which would have required partial destruction of a stone wall. However, the statutes do not list any exceptions to the time requirement, and the regulations require client permission for any deviations from formal requirements to be in writing. WIS. STAT. § 59.45(1)(b); WIS. ADMIN. CODE § A-E 7.01. It was therefore reasonable for the Examining Board to conclude that Sarko's conduct violated professional standards, indicating incompetence.

By the Court.—Order reversed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

