

RECEIVED

FEB 16 2018

BEFORE THE WEST VIRGINIA STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS **WV PE BOARD**

IN RE: ANDREW P. NICHOLS

C2018-02

CONSENT ORDER

Comes now the West Virginia State Board of Registration for Professional Engineers by Edward L. Robinson, P.E., its President, (hereinafter “the Board”) for the purpose of agreeing to resolve the Board-initiated Complaint against Respondent Andrew P. Nichols (“Respondent Nichols”). As reflected in this document, the parties have reached an agreement concerning the proper disposition of this matter, and the Board, upon approval of such agreement, does hereby **FIND** the following:

1. The matters set forth herein are within the jurisdiction of the Board, which is the state entity with the power and duty to regulate the practice of engineering in the State of West Virginia.
2. Respondent Nichols has held West Virginia P.E. License No. 017922 since November 5, 2008, which license is currently active through December 31, 2018.
3. At the time of the matters giving rise to this Complaint, Respondent Nichols held a faculty position at Marshall University (“MU”), which commenced in 2007; also in 2007, Respondent became the West Virginia division manager of Dennis Corporation, a South Carolina firm for which he had previously done part-time work in South Carolina.
4. In late 2016 it came to the attention of the Board that Respondent was involved in a federal investigation of what was termed a “pay-to-play” scheme involving public monies and contracts with the West Virginia Department of Highways (“WV DOH”).

5. Respondent Nichols, on June 12, 2017, plead guilty to one felony count of Conspiracy to Impede the Internal Revenue Service in violation of Title 18, United States Code, Section 371.
6. The guilty plea was in connection with an Information against Respondent Nichols in the United States District Court for the Northern District in Wheeling filed on June 5, 2017, and styled *USA v. Andrew P. Nichols*, 5:16-cr-40.
7. A judgment order was entered on August 28, 2017, regarding the guilty plea to the one count, and Respondent Nichols was sentenced to three years of probation and ordered to pay restitution to the State of West Virginia in the amount of Ten Thousand Dollars (\$10,000.00).
8. For purposes of this Consent Order, the following names refer to the following persons or firms: “Mr. Kenney” is Bruce E. Kenney III, a professional engineer and a former employee of the WV DOH who agreed to sanctions by the Board set forth in the Consent Order resolving Board Complaint C2017-16; “Mr. Miller” is James T. Miller, a professional engineer and an employee of both the WV DOH and Dennis Corporation at the time of some or all of the events and who agreed to sanctions by the Board set forth in the Consent Order resolving Board Complaint C2017-17; and “Mr. Dennis” and “Dennis Corporation” who agreed to sanctions by the Board set forth in the Consent Order resolving Board Complaint C2017-18.
9. The conviction relates to the manner and means of a conspiracy involving Respondent’s submission of expense reports to Dennis Corporation for bogus “advertising,” receiving reimbursement from Dennis Corporation, and using those funds to purchase cashier’s checks for Mr. Kenney.

10. These payments were, in part, bribes or kickbacks in exchange for future, official action taken or to be taken by Mr. Kenney in favor of Dennis Corporation beginning in or about July 2009 until such time as Respondent turned over the payment scheme to Mr. Miller in or about January of 2010.
11. Respondent's role in the pay-to-play scheme can be summarized in relevant part as follows:
 - a. Respondent Nichols introduced Mr. Kenney to Mr. Dennis in or about March of 2008, after which he hired Mr. Kenney as an employee of Dennis Corporation.
 - b. Respondent Nichols also hired another DOH employee, Mr. Miller, as an employee of Dennis Corporation.
 - c. In July of 2009, Respondent Nichols started submitting expense reports for claimed "advertising" expenses that had not been expended which were then approved by Mr. Dennis and paid by Dennis Corporation, and Respondent Nichols then converted the bogus expense checks of \$3,750.00 into cashier's checks payable to Mr. Kenney. Respondent Nichols contends this was at the direction of Mr. Dennis.
 - d. In January of 2010, Mr. Nichols delegated the transfer of this payment to Mr. Kenney to Mr. Miller.
12. The Board initiated Complaint Number C2018-02 at its regular meeting on July 18, 2017, to which Respondent, by counsel, filed a response on September 6, 2017, wherein Respondent admitted several of the allegations and violations set forth in the Complaint, but denied in part certain violations of the Rules of Professional Responsibility set forth in the Complaint.

13. Respondent provided the Board with unsigned copies of his “Annual Report of Faculty Member” from 2007 through 2011, all of which disclosed his professional consultation with Rahall Transportation Institute (“RTI”) and with Dennis Corporation, and the Board accepts Respondent’s representation that signed copies were submitted to MU’s Office of Academic Affairs.
14. Respondent stated that it was not until 2010 that a conflict with his work for Dennis Corporation, MU and RTI was evident, at which time he filled out and submitted the required “Significant Financial Interest Disclosure” form, a copy of which was provided to the Board.
15. The Board has taken into account the following factors in reaching this settlement: the circumstances leading to the violation, which were criminal acts; the nature and severity of the violation and the risk of harm to the public, which the Board finds to be serious; the fact that, while not fully disclosing the nature of his work for Dennis Corporation for obvious reasons, Respondent did disclose and MU was aware of it; the extent to which Respondent has cooperated with the Board and the Board’s investigation; and other matters as may be appropriate. W. Va. Code R. § 7-1-15.4.
16. The Board has incurred administration costs in excess of One Thousand Five Hundred Dollars (\$1,500.00) in the investigation, initiation and resolution of this Complaint.

CONCLUSIONS OF LAW

17. The Board is the state entity with the power and duty to regulate the practice of engineering in the State of West Virginia, and matters related to such practice are within the jurisdiction of the Board. W. Va. Code § 30-13-1 *et seq.*

18. The Board may suspend or revoke or refuse to issue, restore or renew a certificate of registration, or place on probation, impose a civil penalty or reprimand any professional engineer who has negligent, incompetent or committed an act of misconduct in the practice of engineering. W. Va. Code § 30-13-21(a)(2).
19. Respondent's actions resulting in a federal felony conviction for Conspiracy to Impede the Internal Revenue Service constitute acts of misconduct in the practice of engineering, in violation of W. Va. Code § 30-13-21(a)(2).
20. The Board may suspend or revoke or refuse to issue, restore or renew a certificate of registration, or place on probation, impose a civil penalty or reprimand any professional engineer who has been convicted of any crime which is a felony, or any crime whether a felony or misdemeanor if an essential element is dishonesty or is directly related to the practice of engineering. W. Va. Code § 30-13-21(a)(3).
21. Respondent Nichols plead guilty to a felony, an essential element of which is dishonesty and which was also directly related to the practice of engineering, in violation of W. Va. Code § 30-13-21(a)(3).
22. The Board may suspend or revoke or refuse to issue, restore or renew a certificate of registration, or place on probation, impose a civil penalty or reprimand any professional engineer who has failed to comply with any of the provisions of this article or any of the rules promulgated under it. W. Va. Code § 30-13-21(a)(4).
23. These rules include the Rules of Professional Responsibility, which include a general obligation in W. Va. Code R. § 7-1-12 to promote the public welfare and maintain a high standard of integrity and practice, including the responsibility to:
 - a. adhere to standards of highest ethical and moral conduct in all aspects of the practice of engineering (subsection a);
 - b. represent themselves before the public only in an objective and truthful manner (subsection c); and

- c. avoid conflicts of interest and faithfully serve the legitimate interests of their employers, clients, and customers within the limits defined by the Rules of Professional Responsibility (subsection d).
24. The actions of Respondent which resulted in his plea of guilty to the federal felony offense of Conspiracy to Impede the Internal Revenue Service violated the general provision set forth in W. Va. Code R. § 7-1-12 and each of the above-cited sub-sections.
 25. The Rules of Professional Responsibility set forth some specific rules regarding a registrant's obligation to society which prohibit a registrant from permitting the use of their name or firm name, or associating in business ventures with, any person or firm engaging in fraudulent or dishonest business or professional practices. W. Va. Code R. § 7-1-12.3(g).
 26. Not only did Respondent Nichols associate with a person and firm engaged in fraudulent or dishonest business or professional practices, but played a key role in the "pay-to-play scheme" and personally benefitted from his association with a person and firm engaged in fraudulent or dishonest business or professional practices, in violation of W. Va. Code R. § 7-1-12.3(g).
 27. Registrants shall make full prior disclosures to their employers of potential conflicts of interest or other circumstances which could influence or appear to influence their judgment or the quality of their service. W. Va. Code R. § 7-1-12.4(e).
 28. While Respondent did not make a full prior disclosure to MU, in the interest of settlement and due to the fact that Respondent did disclose to and MU was aware of his work for Dennis Corporation, the Board is not finding a violation of W. Va. Code R. § 7-1-12.4(e).
 29. The Board may suspend or revoke or refuse to issue, restore or renew a certificate of registration, or place on probation, impose a civil penalty or reprimand any professional engineer who engaged in dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm the public. W. Va. Code § 30-13-21(a)(11).

30. Respondent Nichols' involvement in the pay-to-play scheme which resulted in a federal felony conviction constitutes dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm the public, in violation of W. Va. Code § 30-13-21(a)(11).
31. The Board is authorized to "assess civil penalties against any person who violates any provision of this article or any rule promulgated by the board for each offense in an amount determined by the board." W. Va. Code § 30-13-21(b); *see also* W. Va. Code R. § 7-1-15.
32. In determining the amount of a civil penalty to be assessed, the Board may consider such factors as the circumstances leading to the violation; the nature and severity of the violation and the risk of harm to the public; the extent to which the cited person or firm has cooperated with the Board and the Board's investigation; and other matters as may be appropriate. W. Va. Code R. § 7-1-15.4.
33. The assessment of administrative costs is within the Board's sole discretion. W. Va. Code § 30-13-21(d)(4) and W. Va. Code R. § 7-1-14.4.

CONSENT OF RESPONDENT

Andrew P. Nichols agrees to the following:

34. Respondent is represented by counsel and is aware of his right to pursue this matter through appropriate administrative and/or court procedures, including his right to a formal hearing before the Board, and notwithstanding, Respondent intelligently and voluntarily waives these rights provided the Board accepts the terms and conditions set forth in this Consent Order.

35. Respondent accepts the findings and admits the violations set forth above and consents to the entry of this Consent Order freely and voluntarily and not under duress, restraint or compulsion.
36. Respondent hereby waives any and all objections regarding the timeliness of Board action on Complaint C2018-02, which waiver is binding on Respondent even in the event that the Board does not approve this Consent Order.
37. Should the Board not approve this Consent Order, Respondent has waived any objections to the Board or any of its members participating in the adjudication of this matter based on the Board's consideration of this Consent Order. This paragraph is binding on Respondent even if the Board does not approve this Consent Order.
38. Respondent acknowledges that the Board may reject this proposal, notice and hold a hearing, and, upon adjudication, impose such sanctions of a disciplinary nature as it deems appropriate based on the Complaint as filed.
39. Respondent understands there are related complaints naming other Respondent engineers involved in the pay-to-play scheme and agrees to cooperate in the investigation and prosecution of these other Respondents, including providing sworn testimony at any hearing which may be held in connection with these related pending complaints.
40. Respondent understands that this Consent Order constitutes a full and final settlement of this matter, and nothing in this Consent Order or the circumstances giving rise to the same may be the subject of any appeal or other civil or administrative actions except an action by the Board to enforce the terms of this Consent Order, but that nothing in this Consent Order prohibits the Board from considering this disciplinary action or the circumstances giving rise to same with regard to any future, unrelated disciplinary matter involving Respondent which may be before this Board.

41. Respondent understands that this Complaint, documents submitted to the Board by Respondent, and this Consent Order, together with other public documents which may be in the file, are public records which must be made available upon legal request in accordance with the state's Freedom of Information Act.
42. Respondent agrees that the sum and substance of the Complaint and this agreement in part or in their entirety will be set forth in Board publications and on the Board website, as well as other appropriate placements, including the non-public enforcement exchange database administered by the National Council of Examiners for Engineering and Surveying ("NCEES").
43. Respondent acknowledges that non-compliance with this Consent Order may result in the rescission of this agreement, the reinstatement of the Complaint, and the addition of any other charges which may arise or ensue from non-compliance with this Consent Order.
44. Respondent acknowledges that proof of any material misstatement or misrepresentation made in connection with this matter may result in the rescission of this agreement, the reinstatement of the Complaint, and the addition of any other charges which may arise or ensue from providing false information to the Board in violation of West Virginia engineering law.

ORDER

1. On the basis of the foregoing, and upon entry of this Consent Order, the Board hereby **ORDERS** that this Consent Order shall serve as settlement of Complaint Number C2018-02 pursuant to W. Va. Code § 30-13-22(b).
2. Respondent Nichols' professional engineering license is **REVOKED** for a period of three years from the date of entry of this consent order for his violation of W. Va. Code

§ 30-13-21(a)(3); his violations of W. Va. Code R. § 7-1-12 of the Code of Professional Responsibility, which violate W. Va. Code § 30-13-21(a)(4); and violation of § 30-13-21(a)(11).

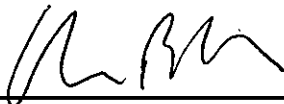
3. The Board **ORDERS** that Respondent return his professional engineering seal and certificate of registration to the Board within thirty (30) days of entry of this Consent Order.
4. The Board is aware that Respondent has or may agree to the voluntary and permanent surrender of his South Carolina professional engineering licensing, which permanent revocation shall not prevent Respondent from applying for reinstatement of his professional engineering license in West Virginia.
5. After the three-year revocation and payment in full of the civil penalties and administrative costs assessed herein, Respondent may apply for reinstatement of his professional engineering license without again having to take the professional engineering examination, but prior to such application, Respondent shall have successfully completed a Board-approved 30-hour course in professional ethics from the Murdough Center of Engineering Professionalism at Texas Tech University.
6. The Board **ORDERS** Respondent Nichols to pay the maximum civil penalty in the amount of Fifteen Thousand Dollars (\$15,000.00) for his violation of W. Va. Code § 30-13-21(a)(11).
7. The civil penalties imposed herein totaling Fifteen Thousand Dollars (\$15,000.00) must be paid within eighteen (18) months of the date of entry set forth below, such amount to be made payable to the W. Va. P.E. Board for transfer to the general fund of the State of West Virginia upon receipt.

8. The Board **ORDERS** Respondent to pay administrative costs in the amount of One Thousand Five Hundred Dollars (\$1,500.00), which is to be paid within sixty (60) days of the date of entry set forth below, made payable to the W. Va. P.E. Board for deposit into the account of the Board.
9. The sum and substance of the Complaint and this agreement in part or in their entirety shall be set forth in Board publications and on the Board website, as well as other appropriate placements, including the non-public enforcement exchange database administered by the National Council of Examiners for Engineering and Surveying (“NCEES”).
10. Any violation of or non-compliance with the terms of this Consent Order shall be immediate cause for the rescission of this agreement, the reinstatement of the Complaint, and further disciplinary action by the Board.
11. If the civil penalties and administrative costs totaling Sixteen Thousand Five Hundred Dollars (\$16,500.00) are not timely paid, this Consent Order may be summarily enforced in the Circuit Court of Kanawha County without further notice to Respondent upon application by the Board for the entry of a Judgment Order for the total amount of payment agreed to herein, together with pre-judgment interest from the date of the President’s signature hereon, post-judgment interest from the date of entry of the Judgment Order and all costs of any enforcement action(s), which judgment shall be fully executable in accordance with applicable law.
12. This matter shall be closed upon execution of this Consent Order by both parties and the full payment of the civil penalties agreed to herein.
13. This Consent Order constitutes a full and final settlement of this matter, and nothing in this Consent Order or the circumstances giving rise to same may be the subject of any

appeal or other civil or administrative actions except an action by the Board to enforce the terms of this Consent Order. This shall not prohibit the Board from considering this disciplinary action or the circumstances giving rise to the same with regard to any future, unrelated disciplinary matter involving Respondent which may come before this Board.

14. This Consent Order relates solely to matters set forth in West Virginia engineering law and does not evidence compliance with any other laws of the State of West Virginia or its political subdivisions, nor should any such compliance be implied.

AGREED TO BY:

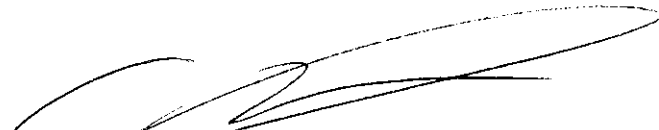


ANDREW P. NICHOLS
Respondent

ENTERED into the records of the West Virginia State Board of Registration for Professional Engineers this 21st day of February, 2018.

**WEST VIRGINIA STATE BOARD OF REGISTRATION
FOR PROFESSIONAL ENGINEERS**

By:



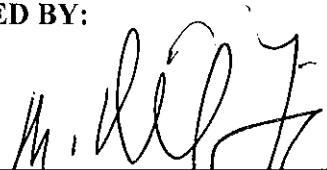
EDWARD L. ROBINSON, P.E.
BOARD PRESIDENT

PREPARED BY:

PATRICK MORRISEY
West Virginia Attorney General

By: **DEBRA L. HAMILTON (WV Bar No. 1553)**
Deputy Attorney General
Counsel for West Virginia State Board of Registration for Professional Engineers

APPROVED BY:

By: 

W. MICHAEL FRAZIER (WV Bar No. 1287)
FRAZIER & OXLEY, L.C.
Counsel for Respondent