

BEFORE THE BOARD OF ARCHITECTS
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-07-0156-ARC REGARDING:

THE PROPOSED DISCIPLINARY) Case No. 1272-2007
TREATMENT OF THE LICENSE OF)
CARL POSEWITZ, License No. ARC 1672.)
)

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

I. INTRODUCTION

The Business Standards Division of the Montana Department of Labor and Industry (BSD) seeks to impose sanctions against the license of Carl Posewitz alleging that Posewitz violated Montana Code Annotated § 37-1-316(18) (which prohibits conduct that does not meet generally accepted standards of practice) and Administrative Rule of Montana 24.114.2301(1)(b) (which defines unprofessional conduct as practicing beyond the scope of knowledge and expertise of the licensee as defined by law).

Hearing Examiner Gregory L. Hanchett held a hearing in this matter on March 4, 2008. Arthur Gorov, agency legal counsel, represented the Department of Labor and Industry Business Standards Division (BSD). Don Snavely, Attorney at Law, represented Posewitz. Posewitz, Bayliss Ward, Chairman of the Montana Board of Architecture, Bill Schaff, a Montana licensed master plumber and owner of Garden City Plumbing, and James Hoffman, a Montana licensed architect, all testified under oath. Respondent's Exhibits A-1 through A-4 and B, C, D, E, F, and G were admitted into evidence by the stipulation of the parties. Based on the evidence adduced at the hearing in this matter, the hearing examiner finds that BSD has failed to sustain its burden of proof and recommends that the complaint be dismissed. This finding is based on the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. At all times material to this case, Posewitz has been a Montana licensed architect.
2. In his capacity as an architect, Posewitz provides a design/build service. Under this service, Posewitz produces preliminary architectural plans (known as “preliminary” or “bid” plans), from which he is able to receive preliminary bids from subcontractors for costs of building the project, and then coordinates obtaining bids from various bidding general contractors for any particular job.
3. In late 2005 or early 2006, one of Posewitz’s clients approached him about doing a design/build for a commercial building in Missoula. The building was being built to house a Fed Ex distribution facility and a sports warehouse facility for storing golf bags. Posewitz agreed to complete preliminary architectural drawings which would be provided to general contractors or subcontractors to obtain bids on various components of the building.
4. In order to retain Fed Ex as a tenant, Posewitz’s client was required to use Fed Ex’s standardized architectural drawings for the building. Posewitz simply took that standardized plan and copied it to create the preliminary/bid plan (Exhibit A-1) for the proposed building. The preliminary/bid plan includes such things as placement of windows and doors, types of windows and doors, placement of heaters, specified heaters, placement of fixtures, and building dimensions. It does not, however, specify such things as type or dimensions of heating, ventilation and air conditioning (HVAC) conduits, specifics for types or loads on electrical wiring, specifics for electrical panels, or other such specifics that would have to be designed by persons trained and/or licensed in those particular fields (e.g., a licensed master electrician would have to determine the proper size and routing of wiring and the conduit housing that electrical wiring).
5. Posewitz submitted the preliminary/bid plan on behalf of his client to contractors to obtain preliminary bids for building costs. In turn, the preliminary/bid plan was utilized by generals and their designated subcontractors to determine costs.
6. Based on the bids received, a general contractor was obtained to build the building. The preliminary/bid plan was then reviewed by the general contractor and his subcontractors to determine such things as whether the fixtures and heaters could be properly utilized in the building. The subcontractors in each speciality then determined the proper use and routing of the mechanical components (e.g., the HVAC subcontractor determined the proper sizing of the HVAC ducting, and the subcontracting electrician determined the proper wiring and size of the electrical panels given the energy demands of this particular building). Those subs in turn produced new drawings for their particular specialty to show such things as the routing and size of the HVAC ducting (Exhibit A-3), the routing, sizing and slope of the plumbing and gas lines (Exhibit A-2), and the sizing of the electrical wiring and the sizing and

particular electrical panels that had to be used (Exhibit A-4). Each of these drawings properly reflected that they had been produced by the particular subcontractor assigned with the responsibility of providing the particular component of the building. For example, Exhibit A-4 shows that it was created by Valley Electrical, a properly licensed electrical contractor in the State of Montana.

7. In some instances, the properly licensed subcontractor overruled the wishes of the client with respect to placement of fixtures. One such example was the arrangement of the heating units in the golf club storage side of the facility. The client's original plan was deemed to be inadequate by the properly licensed subcontractor charged with installing the system. The subcontractor, utilizing his expertise, made the changes required and those changes were implemented.

8. Exhibits A-2, A-3, and A-4 were properly prepared by the subcontractors. As the Department's expert conceded at hearing, these documents, having been properly signed off on by the subcontractors, do not show that Posewitz exceeded the scope of his license. In helping to prepare these plans, Posewitz did not exceed the scope of his license.

9. Likewise, preparation of the preliminary/bid plan did not exceed the scope of Posewitz's license. This plan does not show any of the specificity that would require the input of a general contractor or subcontractor. For example, there is no sizing nor even any routing of the HVAC ventilation that would require the expertise of a properly licensed HVAC subcontractor or the services of an engineer.

10. All of the plans were submitted to the proper government authorities to ensure compliance with applicable building and safety codes. All of the plans were approved.

11. After the building was completed, a certificate of occupancy was issued by the City of Missoula, showing that the building and its mechanical components met applicable safety standards and was safe for use by the public.

12. Posewitz's expert architect witness, James Hoffman, testified, and the hearing examiner finds, that the preliminary/bid plan which Posewitz prepared did not exceed the scope of his license.

III. CONCLUSIONS OF LAW

A. The Department Has Failed to Demonstrate Any Violation

1. Mont. Code Ann. § 37-1-316 provides in pertinent part:

The following is unprofessional conduct for a licensee . . . governed by this chapter:

* * *

(18) conduct that does not meet the generally accepted standards of practice.

2. Administrative Rule of Montana 24.114.2301(1)(b) defines unprofessional conduct as practicing beyond the scope of knowledge and expertise of the license as defined by law.

3. BSD bears the burden of proof in this matter to show by a preponderance of the evidence that the licensee committed an act of unprofessional conduct. Mont. Code Ann. § 37-3-311; *Ulrich v. State ex rel. Bd of Funeral Service* (1998), 289 Mt. 407, 961 P.2d 126.

4. The Department has failed to demonstrate by a preponderance of the evidence that the licensee was practicing beyond the scope of his license. BSD's expert witness conceded that preparation of the drawings embodied in Exhibits A-2 through A-4 did not violate the scope of practice requirements. All that BSD had left to prove its case was its expert's concern that the preliminary/bid plan (Exhibit A-1) exceeded the scope of practice because that drawing contained no indication that it was Fed Ex's standardized preliminary drawing for buildings housing Fed Ex tenants. The preliminary/bid plan, however, contains no information regarding specifics such as sizing of HVAC trunks or sizing of electrical wiring or panels. In short, it contains none of the types of specifics that would demonstrate that Posewitz exceeded the scope of his practice. This fact, coupled with Posewitz's expert's opinion that the preliminary drawing did not exceed the scope of practice, convinces the hearing examiner that as a matter of fact, Posewitz did not exceed the scope of his license in preparing the preliminary/bid plan.

B. The Failure to Demonstrate a Violation Requires Dismissal

5. If a licensee is found not to have violated any of the provisions of Mont. Code Ann. Title 37, Chapter 1, Part 3, then the Department prepares and serves the Board's findings of fact together with an order of dismissal of the charges. Mont. Code Ann. § 37-1-311.

6. Because BSD has failed to demonstrate that the licensee engaged in conduct that violated Title 37, Chapter 1, Part 3, MCA, dismissal of the charges is appropriate.

IV. RECOMMENDED ORDER

Based on the foregoing, the hearing examiner recommends that the Board of Architecture enter its order dismissing the allegations contained in the complaint filed against the licensee as BSD has failed to prove any violation alleged in the complaint.

DATED this 21st day of March, 2008.

DEPARTMENT OF LABOR & INDUSTRY

HEARINGS BUREAU

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