NEW JERSEY DEPARTMENT
OF COMMUNITY AFFAIRS,
BUREAU OF REGULATORY AFFAIRS
Petitioner,
v.
HERBERT P. MOORE
Respondent.

Initial Decision: October 2, 1989
Final Agency Decision: November 17, 1989
Approved for Publication by the Commissioner of Community
Affairs, Anthony M. Villane Jr.: November 27, 1989

SYNOPSIS

Petitioner sought to revoke respondent's licenses as a plumbing
subcode official and plumbing inspector because of alleged violations
of the conflict of interest rule, N.J.A.C. 5:23-4.5(h)(1). The matter was
transmitted to the Office of Administrative Law for a hearing.

The administrative law judge assigned to the case found that
respondent, while serving as plumbing inspector for the Borough of
Atlantic Highlands, also served as director of a company that was
building new homes in an adjacent municipality. This was a violation
of the conflict rule, which prohibits an inspector from engaging in
construction in the municipality in which he is employed or any
adjacent municipality. The administrative law judge cited several
mitigating factors, however, such as the fact that respondent was only
a part-time inspector, that respondent was unfamiliar with the details
of the conflict rule and that there was no evidence of any actual
conflict of interest. The judge concluded that an appropriate penalty
would be a letter of reprimand and a $500 penalty.

Upon review, this initial decision was modified by the Com-
mmissioner of Community Affairs. The Commissioner agreed that the
conflict rule had been violated, but reversed the determination regard-
ing penalty. The appropriate penalty was revocation of respondent's
licenses. The Commissioner held that the factors considered by the
administrative law judge were not mitigating. The rule applies to all
code enforcement officials, whether they are full-time or part-time,
and regardless of salary. Respondent should have been familiar with
the conflict rule and, if he had any questions about whether it applied
to his situation, he should have sought clarification. In addition, the
rule does not require a finding that there was actual conflict. The
purpose of the rule is to enhance public confidence in the impartiality of the construction code enforcement system by prohibiting those involved in enforcement from also engaging in construction.

Ellen A. Reichart, Deputy Attorney General, for petitioner (Peter N. Perretti, Jr., Attorney General of New Jersey, attorney)
Theodore D. Parsons, Jr., Esq., for respondent (Parsons & Cappiello, attorneys)

MILLER, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this case, the New Jersey Department of Community Affairs, Bureau of Regulatory Affairs ("petitioner" or "the Department") issued a Notice of Violation and Order to Revoke and Order to Cease and Desist to Herbert P. Moore ("respondent") as a Plumbing Subcode Official because of an alleged conflict of interest in violation of N.J.A.C. 5:23-4.5(h)1.

On May 5, 1989 this matter was filed in the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A hearing conference was conducted on June 26, 1989. The hearing was held on September 25, 1989, at which time the record was closed.

The essential facts in this case are not in dispute, having been established by stipulations made by counsel prior to the hearing, by the admission into evidence of various documents, and by the credible testimony on both Robert Hilzer (on behalf of the Department) and of respondent himself. Accordingly, I set forth below those facts which have been stipulated, and those additional facts which have been elicited through the testimony of witnesses.

STIPULATED FACTS

1. Respondent Herbert P. Moore holds a Plumbing Subcode Official, Plumbing Inspector I.C.S. license (# 002045) issued by the Department of Community Affairs.

2. Respondent was appointed as a Plumbing Subcode Official, Plumbing Inspector, I.C.S. for the Borough of Atlantic Highlands, New Jersey on April 4, 1985. Respondent has held this
position as a Plumbing Subcode Official/Plumbing Inspector I.C.S. for the Borough of Atlantic Highlands continuously since April 4, 1985. Respondent remains employed by the Borough of Atlantic Highlands in that capacity at the present time.

3. Since April 30, 1984, respondent has been a director of the Port Atlantic Building Group, Inc., a registered New Jersey new home builder.

4. The Port Atlantic Building Group has constructed homes in Port Monmouth, Middletown Township, Monmouth County, New Jersey, a municipality adjacent to the Borough of Atlantic Highlands; said homes were constructed by the Atlantic Building Group, Inc. at the following locations with permits, technical sections and certificates of occupancy issued on the following dates:

(a) A new home was constructed on Monmouth Avenue, Port Monmouth, Middletown Township, New Jersey, at Block 868, lots 4, 5, and 6. A construction permit, number 58687, was issued for this property on December 13, 1984, and a Certificate of Occupancy for this property was issued on August 20, 1985.

(b) A new home was constructed on Brainard Avenue, Port Monmouth, Middletown Township, New Jersey, at Block 868, lots 13, 14, and 15. A construction permit, number 60524, was issued for this property on August 6, 1985, and a Certificate of Occupancy was issued on November 19, 1985.

(c) A new home was constructed on Brainard Avenue, Port Monmouth, Middletown Township, New Jersey, at Block 868, lots 19, 20, and 21. A building technical section, permit number 60522, was issued for this property on August 6, 1985, and a Certificate of Occupancy was issued on November 19, 1985.

(d) A new home was constructed on Brainard Avenue, Port Monmouth, Middletown Township, New Jersey, at Block 868, Lots 16, 17, and 18. A building technical section, permit number 60521, was issued for this property on August 6, 1985, and a Certificate of Occupancy was issued on December 4, 1985.

(e) A new home was constructed at 20 Brainard Avenue, Port Monmouth, Middletown Township, New Jersey, at Block 868, Lots 22, 23, and 24. A building technical section, permit number 60519, was issued for this property on August 6, 1985, and a Certificate of Occupancy for this property was issued on August 6, 1986.

(f) A new home was constructed on Monmouth Avenue, Port Monmouth, Middletown Township, New Jersey at
Block 868, Lots 7, 8, and 9. A building technical section, permit number 58899, was issued on February 4, 1985, and a Certificate of Occupancy was issued on May 31, 1985.

(g) A new home was constructed at 422 Monmouth Avenue, Port Monmouth, Middletown Township, New Jersey, at Block 867, Lots 19-21 (24a). A construction permit number 61439 was issued for this property on December 3, 1985, and a Certificate of Occupancy was issued on October 21, 1987.

5. At no time before, during or after respondent's appointment as Plumbing Subcode Official/Plumbing Inspector I.C.S. for the Borough of Atlantic Highlands did respondent inform the Department of Community Affairs, Bureau of Regulatory Affairs, that respondent was a director of the Port Atlantic Building Group, Inc., a corporation building new residential homes in a municipality adjacent to the municipality where respondent was serving as a Plumbing Subcode Official/Plumbing Inspector I.C.S.

6. The Port Atlantic Building Group, Inc. is a registered New Jersey new home builder registered with the State of New Jersey, Department of Community Affairs pursuant to the mandate of N.J.S.A. 46:3B-1 et seq. and the regulations promulgated thereunder, N.J.A.C. 5:25-1.1 et seq.

ADDITIONAL FACTS

Respondent is now, and for many years previously has been, a resident of the Borough of Atlantic Highlands.

When respondent was appointed as a plumbing subcode official in April 1985, the position was (and continues to be) part-time in nature. From 1985 to 1988 the position paid a salary of $1,500 per year. In 1988 the salary for that position was increased to $3,000 per year.

In or about 1983 or 1984, the Port Atlantic Building Group, Inc. ("Port Atlantic")—of which respondent has been a stockholder and director—acquired a tract of land in Port Monmouth, New Jersey. Port Monmouth is an unincorporated area or section constituting a part of the municipality of Middletown Township. Beginning around 1983 or 1984 and continuing until 1988, Port Atlantic constructed approximately eight or ten homes on the aforesaid tract, including those homes mentioned in the stipulated facts above. In 1988, Port Atlantic became inactive when it sold whatever homes remained on the tract in question. All of the homes constructed by Port Atlantic
were modular, *i.e.*, prefabricated at a factory in Pennsylvania, and were put together after the materials arrived at the Port Monmouth site. The plumbing fixtures and facilities for each of these homes were connected by an independent plumbing contractor, with whom Port Atlantic had contracted.

From the time that respondent was appointed as a plumbing subcode official in 1985 until he was served with an Administrative Order in the Spring of 1989, respondent was unaware of the specific conflict of interest regulation in question. Although knowing of the existence of conflict of interest regulations in general, respondent believed that those regulations pertained only to any official's actual performance of work in the municipality in which he was employed or acting as a subcode official.

Respondent has had no other problems, difficulties or violations with the Department and has no criminal record.

**ISSUE AND ANALYSIS**

The applicable regulation in this case is *N.J.A.C.* 5:23-4.5(h)1, which, in applicable part, reads as follows:

No person employed by an enforcing agency as a construction or subcode official . . . shall engage in . . . any business or employment furnishing labor, materials, products or services for the construction or alteration or demolition of buildings or structures within any municipality in which he is so employed . . . and in any municipality adjacent to any municipality in which he is thus employed.

*N.J.A.C.* 5:23-5.25 is the applicable penalty provision. It allows the Department to impose a broad range of penalties for a violation of any of the regulations, including a letter of warning, reprimand, or censure, assessment of a civil penalty of not more than $500 and suspension or revocation of license.

Under the aforesaid facts there is no doubt that respondent has been guilty of a violation of *N.J.A.C.* 5:23-4.5(h)1. The only question in this matter is, considering the circumstances, what would be a fair, just and appropriate penalty. The determination of that question depends on an assessment of aggravating and mitigating factors.

There are three aggravating factors in this case: (1) respondent must be presumed to know his duties and responsibilities as a public official, and actual ignorance of same is not an excuse; (2) if respondent was unsure whether any of his dealings might be in conflict, he should have contacted the Department and sought its advice—which
he did not; (3) several of the construction permits were applied for after respondent had been appointed as a Subcode Official. In addition, one must always be sensitive to any appearance of impropriety and to the importance of maintaining public trust and confidence in the integrity of governmental employees and officials.

On the other hand, there are the following mitigating factors:

1. Respondent was employed as a subcode official only on a part-time basis;
2. Respondent earned only $1,500 per year as a salary for the performance of his duties;
3. Respondent was either misinformed or laboring under a mis-apprehension respecting the established interpretation of the conflict of interest regulation in question;
4. The permits and certificates of occupancy in question were issued in connection with homes built on a tract of land acquired before respondent was appointed as a subcode official;
5. There is no evidence of any actual conflict of interest on the part of respondent;
6. There is no evidence of any knowing or intentional violation of the Department's regulation; and,
7. Aside from the present case, respondent possesses an unblemished record.

**CONCLUSION AND ORDER**

Carefully considering and weighing the aforesaid factors, I CONCLUDE that an appropriate penalty in this case would be the issuance of a letter of reprimand to respondent, to be made part of his file, together with the assessment of a civil penalty in the amount of $500. It is so ORDERED.

This recommended decision may be adopted, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF COMMUNITY AFFAIRS, ANTHONY M. VILLANE, JR., who by law is empowered to make a final decision in this matter.

**FINAL DECISION BY THE COMMISSIONER OF COMMUNITY AFFAIRS, ANTHONY M. VILLANE, Jr.:**

Having reviewed the Initial Decision in this matter, together with any exceptions and replies submitted, I hereby modify the Initial Decision and uphold the order of the Bureau revoking the respondent's licenses as a plumbing subcode official and plumbing inspector I.C.S.
I uphold the finding of the Administrative Law Judge that, while serving as Plumbing Subcode Official and Plumbing Inspector I.C.S. for the Borough of Atlantic Highlands, the respondent served as a director of a firm that was building new homes in Middletown Township, a municipality adjacent to Atlantic Highlands, in contravention of N.J.A.C. 5:23-4.5(h)1.

I reverse the holding of the Administrative Law Judge as to the appropriate penalty because I find, for the following reasons, that the seven factors characterized by the Administrative Law Judge as "mitigating" are not:

1. The fact that respondent served on a "part-time" basis is irrelevant. The rules do not distinguish between "part-time" and "full-time" code enforcement officials and inspectors. All officials and inspectors are required to abide by the same rules regardless of time needed to do their job.

2. The salary paid to the respondent is a consequence of his "part-time" status and is irrelevant for the same reasons. A code official or inspector, regardless of what he is paid, is allowed to have other sources of income, provided that they do not interfere with the proper discharge of his construction code enforcement duties and do not place him in violation of the applicable rules, including those governing conflicts of interest.

3. If respondent was under any misapprehension concerning the applicability of the conflict of interest rules, he should have secured a ruling from the Bureau. He cannot be let off with nominal sanctions because he failed to do so and chose instead to follow his own interpretation of the rules.

4. The fact that the land on which respondent's firm built new homes was acquired before the respondent became a code enforcement official is irrelevant. He should have either declined to accept appointment as a code enforcement official in Atlantic Highlands or severed his connection with a firm doing construction in Middletown before taking office. He did neither.

5. N.J.A.C. 5:23-4.5(h)1 does not distinguish between "actual" conflict of interest and conflict of interest that is not "actual." It prohibits providing any services, including the service that one renders as a director of a homebuilding company, for the construction of buildings in the municipality in which a code enforcement official or inspector is employed or in an adjacent municipality. Respondent was in "actual" violation of that prohibition. In this regard, I wish to note that an important part of the public policy underlying the State
Uniform Construction Code Act was the Legislature’s desire to enhance public confidence in the construction code enforcement system by separating the enforcement community from those doing construction, so as to diminish the potential for partiality. Respondent’s conduct clearly breaches that separation.

6. A code enforcement official or inspector is required to be familiar with the provisions of the State Uniform Construction Code, particularly those directly relevant to his position. The entire code is included in the book that he is required to use in his daily work and special attention is given to the conflict of interest requirements in the course that every code official and inspector must take. Failure to familiarize oneself with the rule concerning conflict of interest is not a mitigating factor.

7. According to the record as set forth by the Administrative Law Judge, respondent has violated the conflict of interest rule on at least seven occasions. That the Bureau has elected to take a single action against the respondent and not seven separate actions should not be counted in the respondent’s favor.

With this modification, I adopt the Initial Decision as the Commissioner’s Final Decision.

You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey courts.