

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT**

In the Matter of:

BRUCE J. FORENPOHAR,
Certification No. 009908,

Respondent.

Master Case No. M2009-568

AMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL ORDER

APPEARANCES:

Respondent, Bruce J. Forenpohar, pro se

Department of Health Drinking Water Program (Program), by
Office of the Attorney General, per
Dorothy H. Jaffe, Assistant Attorney General

PRESIDING OFFICER: John F. Kuntz, Review Judge

AMENDMENT OF ORDER

Based on his own initiative, the Presiding Officer issues an Amended Findings of Fact, Conclusions of Law and Final Order to clarify the standard of proof in this waterworks operator certification case. Amended material is set forth in bold type.

INTRODUCTION

A hearing was held in this matter on November 16, 2009, regarding the allegations that the Respondent engaged in gross negligence regarding his required water works operator certification responsibilities.

ISSUES

- A. Did the Respondent engage in gross negligence regarding his required water works operator certification responsibilities under WAC 246-292-010?

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- B. If the Program proves the Respondent engaged in gross negligence regarding his required water works certification responsibilities, what is the appropriate sanction under RCW 70.119.110?

SUMMARY OF THE PROCEEDINGS

At the hearing, the Program presented the testimony of Richard Sarver and Denise Clifford. The Respondent testified on his own behalf.

The Presiding Officer admitted the following exhibits:

- Exhibit P-1: July 10, 2002 letter to Bruce Forenpohar regarding licensure as a water distribution specialist.
- Exhibit P-2: June 19, 2003 letter to Hillview Water Association acknowledging Bruce Forenpohar as the certified operator for the water system.
- Exhibit P-3: July 22, 2005 Coliform Monitor Violation for June 2005.
- Exhibit P-4: September 8, 2005 non-acute coliform maximum contaminant level violation for August 2005.
- Exhibit P-5: October 28, 2005 major coliform repeat violation for September 2005.
- Exhibit P-6: February 23, 2006 coliform monitoring violation for January 2006.
- Exhibit P-7: March 22, 2006 coliform monitoring violation for February 2006.
- Exhibit P-8: August 22, 2006 coliform monitoring violation for July 2006.
- Exhibit P-9: August 22, 2006 consumer confidence report violation for 2005.
- Exhibit P-10: Nitrate sampling reminder letter.
- Exhibit P-11: April 13, 2007 nitrate annual monitoring and reporting violation.

- Exhibit P-12: July 31, 2007 lead and copper monitoring and reporting violation letter.
- Exhibit P-13: August 6, 2007 Notice of Violation.
- Exhibit P-14: September 21, 2007 coliform maximum contaminant level violation for September 2007.
- Exhibit P-15: October 22, 2007 coliform repeat violation for September 2007.
- Exhibit P-16: October 30, 2007 consumer confidence reporting violation letter.
- Exhibit P-17: January 25, 2008 coliform violation letter for December 2007.
- Exhibit P-18: February 27, 2008 Notice of Violation for nitrate monitoring.
- Exhibit P-19: May 28, 2008 coliform violation letter for April 2008.
- Exhibit P-20: August 27, 2008 Notice of Violation for lead and copper monitoring.
- Exhibit P-21: September 25, 2008 coliform violation letter for August 2008.
- Exhibit P-22: October 23, 2008 Department Order.
- Exhibit P-23: December 2, 2008 Modified Department Order.
- Exhibit P-24: December 29, 2008 coliform violation letter for November 2008.
- Exhibit P-25: February 17, 2009 Notice of Correction/Violation issued to Bruce J. Forenpohar.
- Exhibit P-26: March 25, 2009 coliform violation letter for February 2009.
- Exhibit P-27: April 23, 2009 coliform violation letter for March 2009.

Exhibit P-28: May 12, 2009 Notice of Imposition of Penalties and Initial Order issued against Hillview Water Association and Bruce J. Forenpohar.

Exhibit P-29: June 1, 2009 e-mail exchange between the Program and Hillview Water Association regarding the certified operator for the water system.

Exhibit P-30: 2007 Consumer Confidence Report submitted by Darrin Scoggin, Hillview Water Association representative submitted to the Program on June 15, 2009.

Exhibit P-31: 2007 Consumer Confidence Report submitted to the Program by the Respondent on June 16, 2009.

Exhibit R-1: The Respondent's Written Statement dated October 8, 2009.

Under the Order on Summary Judgment, the Presiding Officer found that the pleadings and evidence showed there was no genuine issue of material fact related to the Program's allegations against the Respondent. Prehearing Order No. 4. More specifically, there is no genuine issue of material fact that the Respondent failed to:

- A. Sample for coliform bacteria in December 2006; April, August and November 2008; and February and March 2009 as required under WAC 246-290-300(3) and WAC 246-290-480(2)(b);
- B. Monitor for nitrates in 2006 and 2007 and submit the results to the Program under WAC 246-290-300(4), 40 CFR 141.23, and WAC 246-290-480(2)(b).
- C. Monitor for lead and copper in 2006 and 2007 and submit the results to the Program under WAC 246-290-300(5), 40 CFR 141.86, and WAC 246-290-480(2)(b).

D. Submit a yearly consumer confidence report in 2005, 2006, and 2007 under WAC 246-290-72001 to WAC 246-290-72012.

The Respondent had the legal duty to ensure that the required water samples were taken and submitted to the Program as required under chapter 70.119 RCW, chapter 246-290 WAC and 40 CFR 141. There is no evidence that the Respondent did so.

See Prehearing Order No. 4, Paragraph 3.5. Following the summary judgment, the hearing was conducted to determine whether the Respondent engaged in gross negligence in the performance of his required duties as a water works operator and, if so, what sanction is appropriate.¹

The Findings of Fact, Conclusions of Law and Final Order (December 2009 Final Order) was issued and served on December 11, 2009. In the December 2009 Final Order, the Presiding Officer held that the standard of proof is preponderance of the evidence. Subsequent to the issuance of the December 2009 Final Order, the Presiding Officer recognized that the correct standard of proof is clear and convincing evidence. On his own initiative, the Presiding Officer amended the December 2009 Final Order to correct the mistake contained in the December 2009 Final Order. CR 60(b) (1) and (11).

¹ The Program also contends that the Respondent is jointly and severally liable, in his capacity as the representative of the Hillview Water System, for a portion of the fine assessed against Hillview Water System. A separate final order will address that issue. *See Hillview Water Association*, Master Case No. M2009-569.

I. FINDINGS OF FACT

1.1 The competent operation of a public water system is necessary to protect the consumers' health. RCW 70.119.010. Toward that end, it is necessary to provide for the classification of all public water systems and to require the examination and certification of the persons responsible for the technical operation of such systems. RCW 70.119.010. An operator is an individual holding a valid certificate and employed by a public water system as the person responsible for active daily technical operation. RCW 70.119.020(3).

1.2 The operator functions as the "eyes and ears" for the water system. As the "eyes and ears" of the water system, the operator is the water system's direct contact with the Program. As the Program does not physically inspect each of the state's water systems on a regular basis, it is imperative that the operator provide the Program with all of the system's required water samples and reports necessary to enable the Program to monitor the system's compliance with state and federal drinking water law requirements.

1.3 The Program's standard approach is to provide the operator with technical assistance and guidance to ensure that the water system is safe. The Program engages in a graduated system or approach with operators and water systems to encourage their compliance with state and federal requirements. This graduated system includes the Program sending written letters to remind or instruct the operation of the system requirements (monitoring, submission of water samples and reports). Where an operator fails to respond to the letter reminders, the Program then sends a

variety of written notices to advise the operator of the monitoring and sampling requirement, and possible adverse action if either the operator or water system fails to comply with state and federal law. Failing to achieve compliance following its use of the written notice system, the Program will, as a last resort, seek to suspend or revoke the operator's certification.

1.4 On July 10, 2002, the Program issued the Respondent a Washington State Water Operator Certification No. 009908. The certificate of competency was issued by the secretary and stated the Respondent had met the necessary requirements. **The Respondent obtained his certificate following his attendance at a three-day class and the successful completion of a test.**²

1.5 On June 19, 2003, the Respondent was named as the mandatory certified water works operator for the Hillview Water Association, Yakima County, Washington. The Hillview Water Association operated the Hillview Water System. The Respondent acted as the Hillview Water System water works operator until June 2009.³

1.6 During the six year period that he acted as the Hillview Water System water works operator, the Respondent consistently failed to complete his statutory duties to ensure the safety of the system's water supply. More specifically, the Respondent failed to monitor the water system for specific items, including coliform bacteria, nitrates, inorganic chemical and physical substances, organic chemicals, and radium 228. The Respondent failed to monitor the system and provide the necessary

² See RCW 70.119.100.

³ The Respondent stated the records should reflect that Akland Irrigation performed as the operator for the Hillview Water System during the period December 2005 to March 2006.

samples and reports, despite receiving written requests and/or reminders from the Program regarding those requirements beginning in July 2005. Exhibits P-3 through P-12, Exhibits P-14 through P-17, Exhibit P-19, Exhibit P-21, Exhibit P-24, Exhibit P-26, and Exhibit P-27. The Respondent admits that he did not answer or respond to these written requests from the Program.

1.7 Because it failed to receive any response to its written requests and/or reminders, the Program took additional steps to encourage the Respondent to submit the required materials, reports and samples. These additional steps included issuing three written Notice of Violation documents to the Respondent in August 2007, February 2008, and August 2008. Exhibit P-13, Exhibit P-18 and Exhibit P-20. The Notice of Violation documents again notified the Respondent of his need to submit the required water samples and monitoring reports. These notices advised the Respondent of the potential adverse action that could result to the water system from his continued failure to comply with the state and federal water system requirements.

1.8 Failing to receive any response from the Respondent, the Program's next step was to issue an Order on October 23, 2008. Exhibit P-22. As a part of this Order, the Program notified the Respondent that the continued failure to comply with the monitoring sample requests and reports could result in a civil fine for which the operator (the Respondent) and every member of the Hillview Water Association would be jointly and severally liable. A Modified Order was issued on December 2, 2008. Exhibit P-23.

1.9 Despite all of the above written requests, notices and orders, the Respondent did not submit the requested material or contact the Program to discuss the

issues. The next step taken by the Program was the issuance of a written Notice of Violation to the Respondent on February 17, 2009, again to encourage the Respondent to contact the Program regarding the outstanding reports and water samples.

Exhibit P-25.

1.10 When it did not receive any response to that Notice, the Program finally served the Respondent with a Notice of Intention to Revoke for Twelve (12) Months on May 13, 2009. Under the terms of the Notice, the Program revoked the Respondent's water works operator certification for a 12-month period beginning on July 1, 2009. The Respondent was notified that he had 28 days from the receipt of the notice to appeal the Program's determination revoking his certification.

1.11 On June 15, 2009, the Respondent filed a Request for Adjudicative Proceeding with the Adjudicative Service Unit and appealed the Program's revocation determination.

1.12 The Respondent does not dispute that a water system operator has the duty to complete all of the necessary monitoring samples and submit all of the reports to the Program to ensure the safety of the water system. While he acknowledges that a water system operator is required by state and federal statute to perform these duties, the Respondent admits that he did not file the required reports. The Respondent assumed that the reports were being completed by other employees of the Hillview Water Association (specifically acting secretaries Pat Daulberg or Stephanie Smith). The Respondent remembers performing some of the required water system sample testing but provided no proof that the tests, in fact, were completed. The Respondent

admits that at no time during the relevant six-year period (July 2003 to June 2009) did he directly or indirectly contact the Program regarding the Hillview Water System requirements, despite the numerous written reminder letters, notices and orders issued to him by the Program.

II. CONCLUSIONS OF LAW

2.1 The Secretary of Health (and by delegated authority, the Presiding Officer) has jurisdiction over the Respondent and subject of the proceedings.

2.2 **The Program bears the burden of proving the allegations to suspend the Respondent's water works operator certification by clear and convincing evidence. *Ongon v. Department of Health*, 159 Wn. 2d 132 (2006) cert. denied 127 S. Ct. 2115 (2007); see *Brunson v. Pierce County*, 149 Wn. App. 855 (Court of Appeals Division Two, 2009); see also In the Matter of Sherry Byers-Eddy, Master Case No. M2008-117885 (Prehearing Order No. 4, issued August 8, 2008). Clear and convincing evidence requires that the trier of fact be convinced that the fact in issue is "highly probable". *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn. 2d 734-35 (1993) (internal citations omitted).**

2.3 **A water work operator certification is a "professional license":**

"Professional license" means an individual, nontransferable authorization to carry on an activity based on qualifications which include: (a) Graduation from an accredited or approved program, and (b) acceptable performance on a qualifying examination or series of examinations.

RCW 18.118.020(8); see *Brunson v. Pierce County*, 149 Wn. App. at 865 (citing to *Nguyen v. Department of Health*, 144 Wn. 2d 516, 527 (2001)). The Respondent

completed a three-day course and completed the Program's required examination, which is sufficient to meet the professional license criteria.

See Finding of Fact 1.4.

2.4 However, even under the clear and convincing (highly probable) standard of proof, the Program has met the evidentiary burden in this case.

There is clear and convincing evidence that the Respondent did not comply with even the minimum standards required for a certified water works operator, for the reasons set forth below.

2.3 RCW 70.119.110 provides the grounds for suspension or revocation of a certified operator's certificate. It states:

The secretary may revoke or suspend a certificate: (1) found to have been obtained by fraud or deceit; (2) for fraud, deceit, or gross negligence involving the operation or maintenance of a public water system; (3) for fraud, deceit, or gross negligence in inspecting, testing, maintenance, or repair of a backflow assemblies, devices, or air gaps intended to protect a public water system from contamination; or (4) for an intentional violation of the requirements of this chapter or any lawful rules, order, or regulation of the department. No person whose certificate is revoked under this section shall be eligible to apply for a certificate until the completion of the revocation period.

The department may revoke an operator's certificate for up to five years if the operator performs an act of gross negligence in the operation of a purification plant or a distribution system. WAC 246-292-100(1). Gross negligence is defined as:

[A]n act or omission performed or not performed in reckless disregard of a legal duty, or without even slight care. In considering whether an act or omission constitutes gross negligence, the department shall consider all relevant factors including, but not limited to:

- (1) The standard of care commonly exercised by operators;
- (2) Whether the legal duty was known or should have been known to the alleged violator; and

- (3) The degree to which the alleged violation endangered public health.

WAC 246-292-010.

2.4 Despite 20 letters requesting information regarding water samples or monitoring reports, three Notice of Violation documents and two Orders (an order and the modified order) over a six year period, the Respondent failed to act or submit any of the required reports or samples regarding the operation of the Hillview Water Association water system to the Program. The Respondent did not make direct or indirect contact with the Program regarding any of these letters, notices or orders. In fact, he made no contact at all during the six year period. By his failing to do so, the Respondent placed the health and safety of the Hillview Water System in danger. The Presiding Officer concludes the Respondent's failure to do so over a six year period is gross negligence on his part. For that reason, his certification should be revoked as requested by the Program.

III. ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is
ORDERED:

3.1 The Respondent's certification to practice as a mandatory certified water works operator under Washington State Operator Certification No. 009908 is
REVOKED for a 12-month period from the date of service of this order.

3.2 In the event he seeks to obtain a mandatory certified water works operator license at the end of the 12-month period, the Respondent shall take any required examination and meet all licensing requirements in effect at the time of such application.

Dated this __31__ day of December, 2009.

_____/s/_____
JOHN F. KUNTZ, Review Judge
Presiding Officer

NOTICE TO PARTIES

This order is subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate or national reporting requirements. If discipline is taken, it must be reported to the Healthcare Integrity Protection Data Bank.

Either party may file a **petition for reconsideration**. RCW 34.05.461(3); 34.05.470. The petition must be filed within 10 days of service of this order with:

Adjudicative Service Unit
P.O. Box 47879
Olympia, WA 98504-7879

and a copy must be sent to:

Department of Health Drinking Water Program
P.O. Box 478322
Olympia, WA 98504-7822

The petition must state the specific grounds for reconsideration and what relief is requested. WAC 246-10-704. The petition is denied if the Adjudicative Service Unit does not respond in writing within 20 days of the filing of the petition.

A **petition for judicial review** must be filed and served within 30 days after service of this order. RCW 34.05.542. The procedures are identified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, the above 30-day period does not start until the petition is resolved. RCW 34.05.470(3).

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The order is in effect while a petition for reconsideration or review is filed. "Filing" means actual receipt of the document by the Adjudicative Service Unit. RCW 34.05.010(6). This order is "served" the day it is deposited in the United States mail. RCW 34.05.010(19).

For more information, visit our website at <http://www.doh.wa.gov/hearings>.