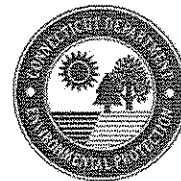


STATE OF CONNECTICUT

DEPARTMENT OF ENVIRONMENTAL PROTECTION
79 ELM STREET HARTFORD, CT 06106-5127



OFFICE OF ADJUDICATIONS

IN THE MATTER OF : **FOREST PRODUCTS**
TIMOTHY J. BIALOWAS : **HARVESTER CERTIFICATION**
: **SEPTEMBER 1, 2010**

FINAL DECISION

I **SUMMARY**

Timothy Bialowas (applicant) has applied for certification as a forest products harvester in accordance with the requirements of the Forest Practices Act. General Statutes §§23-65f through 23-65q. His certification was denied on the basis that he failed to demonstrate competence with respect to the required qualifications for certification due to, among other things, a prior felony conviction associated with the conduct of regulated forest practices.

Mr. Bialowas timely filed a request for hearing on the department's determination. A hearing was conducted on April 22, 2010. The parties to this proceeding are the applicant and the DEP Bureau of Natural Resources Forestry Division (staff). On April 16, 2010, the Commissioner delegated her authority to render a final decision in this matter to me. General Statutes §4-180; Regs., Conn. State Agencies §22a-3a-6(y).

I have reviewed the record, including all testimony and documentary evidence in this matter and find that the applicant was previously convicted of a felony for activities associated with forest practices in violation of the Forest Practices Act. In addition, the applicant has failed to demonstrate knowledge of the applicable statutes governing the conduct of forest practices or the ability to abide by such statutes. Most significantly, the applicant has failed to demonstrate the sound professional judgment necessary to conduct forest practices in compliance with the regulations governing the conduct of a forest practitioner. Therefore, the denial of the applicant's requested certification is *affirmed*.

II

DECISION

A

FINDINGS OF FACT

1. Mr. Bialowas filed an application for certification as a forest products harvester, which was received by the department on May 29, 2009. Subsequently, he was notified of his acceptance to the July 15, 2009 examination for such certification, which he successfully completed with a score of ninety. (Exs. DEP-4, 34; test. J. Hockla.¹)
2. Immediately prior to the start of the examination, the exam administrator was advised that the applicant had previously been convicted of a felony in connection with certain forest practices.² An April 1995 incident report (case number I9501763) prepared by the Stonington Police Department, identified the applicant as one of three individuals arrested and charged with larceny for illegally removing timber and a stone wall from property owned by Dominic Pianka. The applicant was also charged with criminal mischief and criminal trespass. Thomas F. Kirker, Jr., and Clifford Stimpson were also arrested and charged with larceny. (Ex. DEP-11; test. J. Hockla.)
3. The Connecticut Department of Public Safety State Police Bureau of Identification record of case number 9501763 revealed that the applicant was charged with and convicted of Larceny I, a class B Felony, and sentenced to a term of imprisonment of five years. This sentence was suspended; however, the court imposed a three-year sentence of conditional discharge.³ Further details of the applicant's conviction are not available from either the state police or the Town of

¹ The hearing on this matter was conducted on April 22, 2010. All testimony was received and recorded on that date and made a part of the evidentiary record of this proceeding.

² In the past, the department has conducted a background investigation of all applicants for certification. Presently, resources do not permit routine investigations, but an investigation is conducted when staff believes there is need to do so. (Test. J. Hockla.)

³ A sentence of conditional discharge may be imposed by the court for an offense, other than a class A felony, if the court is of the opinion that: (1) present or extended institutional confinement is not necessary for the protection of the public; and (2) probation supervision is not appropriate. The defendant is released with respect to the conviction but is subject to such conditions as the court may determine for the period of the conditional discharge. General Statutes §53a-29(b) and (c).

Stonington because the required time to retain such records (10 years) expired and the records have been destroyed. (Exs. DEP-7, 9, 33, 34; test. J. Hockla.)

4. During a telephone conversation with the applicant, staff confirmed that he had been arrested in 1995 while working with Thomas Kirker cutting firewood on property owned by Stimpson and that an adjoining property owner claimed that trees on his property had been cut. The applicant indicated that his involvement in the cutting activities was limited to preparing the cut logs for firewood. (Ex. DEP-12; test. J. Hockla, T. Bialowas.)

5. A summary of the quantity and value of timber removed from the Pianka property in April 1995, prepared by forester Clarence Merrill, indicated that the cut timber constituted a log volume of 40,130 board feet and 91 cords at a total value of \$8505.60. Merrill also prepared summaries of quantities and values of timber cut on land owned by The Mashantucket Land Trust, Inc. and George Brown, which abut the Stimpson and Pianka properties. However, these property owners were not referenced as complainants in the arrest report prepared by the Stonington Police Department. (Exs. DEP-11, 16; test. J. Hockla.)

6. The application for forest products harvester certification included the applicant's responses to four questions listed in Part III, page 3, which the department considers relevant to the requirement that an applicant demonstrate competence with respect to the qualifications for forest products harvester certification.⁴ The applicant responded "no" to each question,

⁴ Part III, entitled *Additional Registration, Certification, License Information and Background Information*, consists of the following four questions:

"For each state in which you are currently or have previously been registered, certified or licensed as a forest practitioner indicate: (a) your registration, certificate or license identifier (i.e., number); (b) whether you are still registered, certified, or licensed; and (c) if you are no longer registered, certified, or licensed indicate why."

"Have you ever been convicted of a felony associated with the conduct of a forest practice?
 Yes No If yes, give dates and explain.

"Have you ever received a cease and desist order, citation, or other administrative order from any federal, state, or local agency for conduct associated with a forest practice within the past 3 years?
 Yes No If yes, give dates and explain:

"Have you ever had a registration, certification or license as a forest practitioner denied, revoked or suspended in another state?
 Yes No If yes, give dates and explain."
(Ex. DEP-4.)

including a question regarding whether the applicant had ever been convicted of a felony associated with the conduct of a forest practice. Part III also provides for the applicant's signature directly below the following certification statement:

I have personally examined and am familiar with the information submitted in this document and all attachments and certify that, based on reasonable investigation, the submitted information is true, accurate and complete to the best of my knowledge and belief. I understand that any false statement made in this application or its attachments may be grounds for denial, suspension, or revocation of a certification.

(Exs. DEP-4, 34; test. J. Hockla.)

7. In early 2009, the applicant was identified operating a skidder, a heavy vehicle used for hauling cut trees, as part of a cordwood harvesting operation on property located in the Town of Sprague. At the time, the applicant was employed by Andrew Sharpe, a certified forest practitioner, who was under contract to cut 200 cords of wood on the site. The applicant, who was not certified to harvest forest products, was operating the skidder without the direct supervision of Mr. Sharpe or any other certified forest practitioner. Sharpe was admonished for allowing the applicant to work without direct supervision and advised that future similar occurrences could result in the revocation of his commercial forest practitioner certification.

(Exs. DEP-18 - 24, 28, 29; test. J. White, T. Theroux.)

8. During a January 5, 2009 field inspection of the wood harvesting site, the Town of Sprague Inland Wetlands Enforcement Officer James Theroux observed five separate areas where logs were hauled through intermittent and perennial streams and wetlands areas. Theroux also observed "significant disturbance, rutting, (two to four feet in depth) and sedimentation within wetlands, streams and their associated 100-foot upland review areas due to timber harvesting and the removal of timber and firewood." Theroux noted that "no portable bridges/log corduroy or erosion or sedimentation controls were implemented to protect the wetlands or watercourses during these activities." Sharpe was issued a Notice of Violation of local wetlands regulations and required to remediate the damage. (Ex. DEP-28; test. J. Theroux.)

9. Subsequent field investigations conducted by DEP staff confirmed the damage in the area, the presence of timber harvesting equipment on site, including a dump truck owned by

Kevin Bialowas, and observed the applicant in the landing area of the project preparing cordwood. Staff advised the applicant of the forest practices certification regulations and provided him with an application for certification and examination schedule. (Exs. DEP-25 - 26; test. J. White.)

10. Based on the information regarding the applicant's felony conviction, including Merrill's volume summary of timber cut on Pianka's property and the conversation with the applicant, staff concluded that he had been convicted of a felony associated with the conduct of a forest practice. In addition, staff concluded that the applicant had conducted forest practices without certification and without the direct supervision of a certified forest practitioner in 2009. These facts, combined with what staff considered a false statement on his application, led to a determination that the applicant had not adequately demonstrated his qualifications for certification as required by law and a recommendation that his application for forest products harvester certification be denied. (Ex. DEP-34; test. J. Hockla.)

11. The applicant was advised in a November 5, 2009 letter that the department had determined that he failed to demonstrate that he is competent with respect to the requirements for certification and that certification was therefore denied.⁵ The applicant timely requested a hearing on the department's decision. During the hearing, the applicant admitted operating the skidder without supervision at the time of Theroux's site investigation and on other occasions when Sharpe was in the area but not directly at the location where he was working. He testified that he only learned of the department's forest practices rules and regulations during the site investigations and when he was preparing for the certification examination. (Test. T. Bialowas.)

12. The applicant testified further that it was not his intention to make a false statement on his application regarding his felony conviction. He explained that he believed that all questions in Part III were interrelated and since he was not currently nor previously licensed or certified to conduct forest practices, his felony conviction was unrelated. The applicant also noted that he acknowledged his conviction during his telephone conversation with staff, however, he made no

⁵ A copy of this letter and all pleadings, petitions, rulings, briefs, formal notices, directives and conference summary memoranda are contained in the Office of Adjudications docket file and are a part of the record of this proceeding. General Statutes §4-177(d).

attempt to clarify his understanding of the application questions prior to submitting the application to the department. (Test. T. Bialowas.)

13. The department consistently requires that activities conducted by certified and uncertified practitioners conform to the statutes and regulations governing forest practices and to best management practices related to wetlands and water quality. The department provides information on forest practice requirements through examination study guides, DEP website publications and publications such as the 2007 field guide entitled *Best Management Practices for Water Quality While Harvesting Forest Products*. (Exs. DEP -3, 13-15; test. D. Emmerthal, J. White.)

B

CONCLUSIONS OF LAW

The Forest Practices Act, enacted in 1991, requires individuals to be certified by the DEP prior to conducting forest practices in the state. General Statutes §§23-65f through 23-65q. Forest Practitioners are people who design, supervise or participate in forest practices such as timber harvesting for logs or firewood. Anyone who “advertises, solicits, contracts or engages in an activity ... in connection with the harvest of timber from a tract of forest land in excess of 50 cords, 150 tons and 25,000 board feet in any twelve month period and ... receives remuneration” must be certified to conduct that activity. §§23-65f and 23-65h.

Applicants for any one of three forest practitioner classifications⁶ must complete an application and pass an examination to demonstrate adequate knowledge of the techniques and procedures normally employed in the operation for which certification is requested. §23-65h (c). Exceptions to the certification requirement include individuals whose involvement in a harvesting operation is limited to such activities as operating a skidder or chain saw, provided a certified forest practitioner is present at all times to provide direct, on-site supervision. §23-65h (b).

⁶ The three classifications for certification are: commercial forester, supervising forest products harvester and forest products harvester. (Ex. DEP-14; test. D. Emmerthal.)

An applicant for a forest products harvester certification is required to “demonstrate upon examination that he possesses adequate knowledge concerning techniques and procedures normally employed in the conduct of a harvest operation and the safe and environmentally responsible operation of harvesting equipment.” §23-65h(c)(3). If the Commissioner finds that an applicant is competent with respect to the required qualifications for certification, the requested certification must be issued. § 23-65h(c)(4). If the Commissioner determines that an applicant is not competent with respect to the required qualifications, certification must be denied. §23-65h(c)(5). The Commissioner may, in the exercise of discretion, deny certification for violations of any pertinent statutes or regulations or for, among other things, conviction of a felony associated with forest practices. § 23-65o.

The record shows that staff considered the applicant’s felony conviction to be associated with his participation in forest practices given the amount of timber harvested, over 40,000 board feet, the timing and basis for his arrest and his own account of the circumstances of the arrest. It is evident that the applicant was engaged in some way in activities connected to a commercial forest operation given that the operation involved the harvest of timber in excess of 25,000 board feet and in excess of 50 cords. §23-65f(2). Notwithstanding the absence of details in the police records of the applicant’s involvement in this timber harvesting operation, his conviction is clearly connected to it and therefore falls squarely within the express statutory grounds for denial of any certification. The Commissioner, in the exercise of discretion, was authorized by the legislature to deny the applicant’s certification on this basis alone. §23-65o.

Regarding the applicant’s response to questions on his application, staff concluded that the applicant provided false information pertaining to his felony conviction, which constitutes grounds for denial of his requested certification. Regs., Conn. State Agencies §23-65h-1(j). The applicant’s testimony regarding his interpretation of the questions in Part III of the application is not convincing. The applicant was clearly aware of and subsequently acknowledged his conviction. Immediately following his response to the questions in Part III, the applicant signed the document directly beneath his certification of the truth and accuracy of the information in his application and his express understanding that any false statement made in the application could be grounds for denying his certification.

The verification and attendant consequences for providing false or incorrect information clearly put the applicant on notice and it was, at a minimum, incumbent upon him to take affirmative steps to clarify the intent of the questions and to ensure that his responses to them were appropriate. A specific request for information of a felony conviction has serious implications. Given the significance of the question on the application and the fact that the applicant was fully aware of his conviction, his testimony leaves ample room for doubt of any genuine mistake.

In addition to the Commissioner's authority under the provisions of the Forest Practices Act, the Commissioner may also determine the suitability of the applicant for certification based on his prior conviction of a crime. The Commissioner may determine that the applicant is not suitable for the occupation, trade, vocation, profession or business for which the certification is sought after taking into account (1) the nature of the crime and its relationship to the job for which he has applied; (2) information pertaining to the degree of his rehabilitation; and (3) the time elapsed since his conviction or release. General Statutes §46a-80(b).


In this case, even though the applicant's conviction occurred more than thirteen years prior to his application for certification, the conviction was directly related to forest products harvesting. Given the events that occurred in the Town of Sprague in early 2009, particularly the obvious disregard for the protection of wetlands and streams in the area of the operation of the skidder, as well as the applicant's failure to acknowledge his conviction on his certification application and the lack of any evidence of rehabilitative activity offered by the applicant prior to or during the hearing, it is not unreasonable to conclude that the applicant is not suitable for certification as a forest products harvester. As noted above, the legislature has authorized the Commissioner, in the exercise of discretion, to deny the applicant's certification on a determination that he is unsuitable for the profession.

Perhaps most significant in this case are the regulations governing the conduct of forest practitioners. These regulations require, among other things, that a certified forester make certain disclosures to prospective clients including his level of certification and the forest practices he may legally perform, any business or financial arrangement that may influence his professional judgment and any exclusive contracts or obligations he may have to sell forest

products. Practitioners must limit their advertising to that appropriate for their certification and must not make or issue a false statement or provide false information. Practitioners must also avoid conflicts of interest, maintain client confidentiality; and accurately represent their professional qualifications. The regulations also provide that practitioners must comply with the requirements and procedures set forth in the Forest Practices Act. Regs., Conn. State Agencies §23-65j-1.

The regulations are clearly intended to require more of an applicant than the technical know-how to harvest forest products. It is clear that the regulations implementing the Forest Practices Act contemplate consideration of ethics and professional judgment as aspects of an applicant's competency to conduct forest practices. Throughout the applicant's history with the department regarding his conduct of forest practices, he has failed to demonstrate sound professional judgment or to acknowledge and abide by the statutes and regulations that govern his requested certification.

For the reasons set forth above, the denial of Mr. Bialowas' application for forest products harvester certification is *affirmed*.


Jean F. Dellamarggio, Hearing Officer

PARTY LIST

Final Decision In the Matter of Timothy J. Bialowas
Denial of Forest Products Harvester Certification

PARTIES

REPRESENTED BY

APPLICANT

Timothy J. Bialowas
96 Bundy Hill Road
Lisbon, CT 06351

Pro se

DEPARTMENT

Bureau of Natural Resources
Forestry Division
79 Elm Street
Hartford, CT 06106

Jennifer Hockla
Douglas Emmerthal