3. That some time in June, 1970, the respondent, Francis J. Vivian, was employed by Smart Motors Inc., a Wisconsin corporation with its business address at 5901 Odana Road, Madison, Wisconsin, to prepare plans and specifications for, and to supervise construction of, a garage addition to be constructed at 5901 Odana Road, Madison, Wisconsin.

4. That the respondent prepared the plans and specifications for, and, at all times mentioned hereinafter, was responsible for supervising the construction of, the aforesaid garage addition.

5. That during the night of December 10 and 11, 1970 the roof of the addition designed by the respondent collapsed under the weight of snow which was less than half of the minimum live load specified by Ind 53.001 (2), 4 Wis. Adm. Code, which required that the roof be designed and constructed to support a minimum live load of 30 pounds per square foot of horizontal area.

6. That the collapse was caused by the failure of an "open web frame truss" designed by respondent which was not designed or constructed to support a reasonable live load.

7. That the respondent committed serious and material errors in the design and supervision of construction of the open web frame truss in that:

(a) The stress analysis diagram and data for the members of the truss do not correspond either with the actual truss design submitted for approval to the Department of Industry, Labor and Human Relations, or with the truss as constructed;

(b) Members of the truss were improperly designed and constructed with stresses reversed so that compression and tension members were reversed;

(c) The design and construction failed to take into account the effects of uneven loading and wind load factors on the truss;

(d) Welding done on members of the truss as constructed was spotty and discontinuous;

(e) The review of the design and supervision of construction of the truss was inadequate to properly safeguard life, health and property according to recognized and accepted standards in the practice of professional engineering.

8. That the respondent performed welding on the said garage addition without being certified by the Department of Industry, Labor and Human Relations, as required by Ind 53.16 (13), Wis. Adm. Code.

9. That the evidence does not establish that the Department of Industry, Labor and Human Relations discovered, or called respondent's attention to, errors of design and construction in respect to the truss.

CONCLUSIONS OF LAW

1. That respondent's errors in the design and supervision of construction of the open web frame truss which would not support a reasonable live load constituted gross negligence in the practice of professional engineering contrary to sec. 443.01 (13), Wis. Stats.

2. That performing welding for a project being constructed under his supervision, without being certified as required by Ind 53.16 (13), Wis. Adm. Code, constituted misconduct in the practice of professional engineering by the respondent.

3. That it is in the public interest to suspend for 60 days the certificate of registration as a professional engineer of the respondent, Francis J. Vivian.

ORDER

NOW THEREFORE, IT IS ORDERED, that the certificate of registration, number E-7378, of the respondent, Francis J. Vivian, as

a professional engineer, be, and the same hereby is, suspended for sixty (60) days; that said suspension will take effect thirty (30) days from the date of service of this order.

Dated this ~~24th~~ 30th day of August, 1974.

gzc

EXAMINING BOARD OF ARCHITECTS,
PROFESSIONAL ENGINEERS, DESIGNERS,
AND LAND SURVEYORS (ENGINEERS' SECTION)

John E Callen

* FILE IN VMAN

State of Wisconsin \ DEPARTMENT OF REGULATION & LICENSING

Virginia B. Hart
Secretary

EXAMINING BOARD OF ARCHITECTS, PROFESSIONAL ENGINEERS, DESIGNERS AND LAND SURVEYORS
CASS F. HURC, P.E., SECRETARY
201 E. WASHINGTON AVENUE
MADISON, WISCONSIN 53702
(608) 266-1397

June 4, 1974

Attorney John C. Gartzke
c/o Bieberstein, Cooper, Bruemmer,
Gartzke & Hanson
121 West Doty Street
Madison, Wisconsin 53703

SUBJECT: Vivian v. Examining Board (Engineers' Section)

Dear Mr. Gartzke:

As you are aware the Wisconsin Supreme Court has remanded the subject case to the Engineers' Section of this Board for further deliberation.

A meeting for this purpose has been scheduled on June 17, 1974. The Engineers' Section does want to notify you that you may represent the interests of your client, Mr. Francis J. Vivian, by filing a brief prior to the scheduled meeting date or by appearing in person to make oral arguments. If you desire to appear in person, the time from 11:00 a.m. till noon has been set aside for you.

Please advise us of your intent in this matter.

Sincerely,

C. F. HURC, P.E.
Administrator

CFH:lmf

cc: Chairman, Engineers' Section
Mr. Gordon Samuelsen

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

FRANCIS J. VIVIAN,

Respondent,

v.

EXAMINING BOARD OF ARCHITECTS, PROFESSIONAL ENGINEERS, DESIGNERS, AND LAND SURVEYORS,

Appellant.

NOTICE OF APPEAL

Circuit Court
Case No. 134-447

To: Bieberstein, Cooper, Brummer, Gartzke & Hanson
121 West Doty Street
Madison, Wisconsin 53703
-and-
Risser, Risser & Eckerle
140 West Wilson Street
Madison, Wisconsin 53703
Attorneys for Francis J. Vivian

Mr. Laurie E. Carlson
Clerk of Courts for Dane County
City-County Building
Madison, Wisconsin

Filed - Ap. 26 by G.S.

PLEASE TAKE NOTICE that the Examining Board of Architects, Professional Engineers, Designers, and Land Surveyors, by Robert W. Warren, Attorney General, Gordon Samuelsen, Assistant Attorney General, and Sherwood K. Zink, of counsel, appeals to the Supreme Court of the State of Wisconsin from a certain judgment entered in the above entitled action on the 3rd day of April, 1972, reversing the order of the Examining Board of Architects, Professional Engineers, Designers, and Land Surveyors, dated October 11, 1971, revoking the registration of Francis J. Vivian as a Professional Engineer and remanding the matter to the Board for further proceedings consistent with the Court's opinion, and from the whole and every part thereof.

Dated at Madison, Wisconsin, this 24th day of April, 1972.

ROBERT W. WARREN,
Attorney General,

GORDON SAMUELSEN,
Assistant Attorney General,

SHERWOOD K. ZINK,
Of Counsel,

Attorneys for Examining Board of Architects, Professional Engineers, Designers, and Land Surveyors.

STATE OF WISCONSIN | CIRCUIT COURT BRANCH II | DANE COUNTY

FRANCIS J. VIVIAN 571 Park Lane Madison, Wisconsin, Petitioner, v. EXAMINING BOARD OF ARCHITECTS, PROFESSIONAL ENGINEERS, DESIGNERS, and LAND SURVEYORS 110 North Henry Street Madison, Wisconsin, Respondent.	NOTICE OF ENTRY OF JUDGMENT Case No. 134-447

TO: Robert W. Warren, Attorney General
State of Wisconsin
Capitol Building
Madison, Wisconsin 53709

Gordon Samuelson, Assistant Attorney General
State of Wisconsin
Capitol Building
Madison, Wisconsin 53709

Sherwood Zink
Examining Board of Architects, Professional Engineers, Designers and Land Surveyors
Madison, Wisconsin 53709

PLEASE TAKE NOTICE, That April 3, 1972 the Circuit Court for Dane County, Branch II, entered judgment reversing the order of the Examining Board of Architects, Professional Engineers, Designers and Land Surveyors, dated October 11, 1971, revoking the registration of Francis J. Vivian as a Professional Engineer and remanding the matter to the Board for further proceedings consistent with the Court's opinion.

Dated this 3rd day of April, 1972.

FRED A. RISSER and PAUL C. GARTZKE

By _____
Paul C. Gartzke
Attorneys for Francis J. Vivian

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

FRANCIS J. VIVIAN,
Petitioner,

v.

EXAMINING BOARD OF ARCHITECTS, PROFESSIONAL ENGINEERS, DESIGNERS, AND LAND SURVEYORS,
Respondent.

J U D G M E N T

Circuit Court
Case No. 134-447

The above action having come on for hearing before the court, Francis J. Vivian, petitioner, appearing by Risser, Risser & Eckerle, by Fred A. Risser, and by Bieberstein, Cooper, Bruemmer, Gartzke and Hanson, by Paul C. Gartzke; Examining Board of Architects, Professional Engineers, Designers, and Land Surveyors, respondent, appearing by Robert W. Warren, Attorney General, by Gordon Samuelsen, Assistant Attorney General, and by Sherwood K. Zink, of counsel, and the court having considered the matter upon the record and written arguments of counsel, and having, on the 23rd day of March, 1972, filed its decision in writing, now, on motion,

IT IS ORDERED AND ADJUDGED that the order of the Examining Board of Architects, Professional Engineers, Designers, and Land Surveyors, dated October 11, 1971, revoking the registration of Francis J. Vivian as a Professional Engineer, with leave to apply for reinstatement after six months, be, and the same hereby is, reversed and the matter is remanded to the Board for further proceedings consistent with the court's opinion.

Dated at Madison, Wisconsin, this _____ day of _____, 1972.

BY THE COURT:

_____
J u d g e.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

134-447

FRANCIS J. VIVIAN,

Petitioner,

v.

EXAMINING BOARD OF ARCHITECTS,
PROFESSIONAL ENGINEERS, DESIGNERS,
AND LAND SURVEYORS,

Respondent.

Before: :Hon. W. L. Jackman, Judge

Hearing on Petition for Review: March 17, 1972

Appearances: Petitioner by Paul Gartzke and Fred A.Risser;
Respondents by Gordon Samuelsen and Sherwood K. Zink.

The issue on this petition for review under Chap. 227 is whether the record contains evidence adequate to permit the findings by the Board: 1. That it was incompetency to design the truss as plaintiff did; 2. That it was gross negligence on his part not to correct the design and 3. That it was misconduct for him to perform welding in violation of IND 53.16(13). Petitioner also attacks the validity of the statute, Sec. 443.01(13).

There is no dispute that petitioner was granted a certificate of registration, which in effect is a certificate of competency by the Board. There is no dispute that petitioner did make a serious error in design of the truss and did fail to discover it before erection. Does this constitute either incompetence or gross negligence.

Sec. 443.01(13) gives the Board the power to revoke the certificate of registration of one found guilty of "Any gross negligence, incompetency or misconduct in the practice of x x x professional engineering x x x."

"Gross negligence" is a term well understood in the Wisconsin law. Its philosophical implications with reference to the law of negligence were exhaustively discussed in Bielski v. Schulze, 16 Wis (2d) 1. It should be borne in mind that the revocation provisions of Sec. 443.01 were formerly found in Sec. 101.31, and were originally enacted when gross negligence was a viable part of negligence law and implied a course of conduct so reckless or in wanton disregard of the rights and safety of others as to evince a willingness to cause injury or damage. Bentson v. Brown, 186 Wis 629.

"Incompetence" is defined by Webster as "without adequate ability, knowledge, fitness, etc."; "Incompetent denotes a lack of requisite qualifications for performing a given act." Without attempting to define the term the court in Sailer v. Wis. R.E. Brokers Board, 5 Wis (2d) 344, and Lewis Realty v. Wis. R.E. Brokers Board, 6 Wis (2d) 99, did hold that failure to follow : clear, commonly used rules of the Board was incompetence. It seems to us that in the foregoing real estate cases the word incompetence was used rather loosely by the court. Competence to practice a profession is initially determined by the Board largely through examination. Perfect scores on examination are not required for certification. In fact, the passing grade is only 70%. A-E 1.15(5)(c) 2. The Board certifies as competent persons who, on examination make 30% mistakes. It would seem that the standards of the Board leave room for mistakes by the competent engineer. While these mistakes might be tragic, one must recognize that even the most competent persons do make professional mistakes. This is why we have malpractice cases against doctors, lawyers, engineers, architects, pharmacists, and others practicing the licensed occupations and professions. These cases are ordinarily the results of negligent conduct. Negligence is the failure to use ordinary care, which is inadvertence and is not the equivalent of either gross negligence or incompetence. Continued or repeated negligence might well be equated with incompetence, but a single instance of a failure to use ordinary care is not of itself incompetence. If the conduct is so bad as to demonstrate a total unconcern with the consequences it may be gross negligence or if it demonstrates a lack of ability to perform the professional functions it may be incompetence as that word is generally understood.

We are of the opinion that the acknowledged mistake of petitioner in the design resulting in the roof collapse under stress of a normal load was no more than an inadvertent error. There is no evidence from which one could infer any such recklessness as would add up to gross negligence or lack of ability to make a proper design as would be said to be incompetence. Petitioner was led astray by some erroneous calculations which apparently were not so obvious as to invite the express disapproval of the Commission's examiners of the plans, although there is a rather cryptic handwritten note in the record which the Board apparently construed as a criticism or inquiry. The Board did not ask for perfection when it licensed petitioner and we do not think that evidence of a single failure to use ordinary care in design or failure to detect the error is either gross negligence or incompetence in the sense those words were used in the statute as a basis for revocation of the certificate.

Had the legislature intended that ordinary negligence was to be a ground for revocation of a license, it would not have modified the negligence as gross. Nor had it intended that a single inadvertence was sufficient to show incompetence (especially when the Board in licensing does not require that no mistakes be made on examination) it would not have used the word incompetence which implies lack of ability, not a single instance of inadvertence.

We are forced to the conclusion that the Board's findings of gross negligence and incompetence must be set aside for lack of evidence to support such findings, the evidence justifying no more than a finding of ordinary negligence.

As to misconduct: There is a finding of misconduct of petitioner in doing welding without proper certification. Welding is only permitted to be done by persons certified as skilled. IND 53.16(13). Petitioner had no such certificate, yet he performed much of the welding. Misconduct in its usually accepted sense implies wrongdoing. It has been used in the Unemployment Compensation Act as a ground for denying benefits and there it is construed as an intentional and unreasonable interference with the employer's interest. Milwaukee Transformer Co. v. Ind. Com., 22 Wis (2d) 502. Does the violation of a rule of the Industrial Commission constitute misconduct? The Board considered that it does. As used in the Unemployment Compensation Act, misconduct requires conduct manifesting wrongful intent or evil design or intentional disregard of the employer's interest. Cheese v. Ind. Com., 21 Wis (2d) 8. There is opinion evidence of poor welds and of weld failure (Tr. 68), but petitioner controverts this. Petitioner admitted that he was well aware of the requirement of welding by certified welders and also claimed that the requirement was generally honored by its breach and was not enforced by the Department. He did assume that the welder he obtained from the union was certified. But he is only found to be guilty of misconduct because he did welding himself, not because of his employing uncertified welders. He was faulted for his personal conduct alone in doing welding.

We are of the opinion that the petitioner doing welding for the job without being certified was an intentional act knowingly done in violation of a known administrative rule which has the force of law. We think that it meets the concept of misconduct as an intentional disregard of lawful conduct or conduct manifesting wrongful intent. While the actual welding done by petitioner may have been small in amount, a finding of misconduct is supported by substantial evidence.

Petitioner attacks the revocation statute as unconstitutional because vague and indefinite. We do not consider it so. Hatfield v. N.M.Bd. of Reg. 290 P 2d 1077; Lewis Realty v. Wis RE Brokers Bd., 6 Wis (2d) 99; Boynton Cab Co. v. Neubeck, 237 Wis 249. The standards of conduct for professionals must have some flexibility, because there are unfortunately some persons who enter the professions who use ingenious methods to avoid professional responsibilities in pursuit of the dollar. To attempt to particularize too minutely the limits of correct conduct is to invite evasion by the unworthy. We believe the standards for revocation are sufficiently definite so that members of the profession should have no trouble staying within bounds of propriety.

We have determined that the evidence is not enough to justify revocation of petitioner's registration either on the ground of incompetency or of gross negligence. We believe there is evidence of misconduct of a relatively minor character. The Board revoked the registration of petitioner with no assurance that it will ever be restored. For doing some welding such a penalty shocks the court. A short suspension we consider to be the greatest penalty that should in good conscience be imposed and even a reprimand might be in order. The imposition of a penalty is a matter which should be in the province of the Board and the court should not interfere unless the penalty is so severe as to be arbitrary and capricious. We could modify the penalty in this case (Lewis Realty v. Wis. R E Brokers Bd., 6 Wis (2d) 99) but choose not to do so. We will remand the case to the Board to impose a penalty if it chooses to do so upon the petitioner for his violation of IND 53.16(13).

We direct the attorneys for petitioner to prepare the judgment in accordance with this opinion and, after submitting it to opposing counsel for approval as to form, present it to the court for entry.

Dated March 23, 1972

BY THE COURT

W. L. JACKMAN

Judge

STATE OF WISCONSIN

BEFORE THE EXAMINING BOARD OF ARCHITECTS, PROFESSIONAL ENGINEERS, DESIGNERS, AND LAND SURVEYORS (ENGINEERS' SECTION)

IN THE MATTER OF THE REVOCATION OF THE CERTIFICATE OF REGISTRATION AS A PROFESSIONAL ENGINEER OF FRANCIS J. VIVIAN, RESPONDENT (E-7378)	FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

This action coming on to be heard before the Engineers' Section of the Examining Board of Architects, Professional Engineers, Designers, and Land Surveyors on the 27th day of September, 1971, pursuant to notice duly given, and on the complaint of said Board, and the complainant having appeared by Sherwood K. Zink, Attorney for said Board, and the respondent, Francis J. Vivian, having appeared in person and by his Attorneys, Risser, Risser and Eckerle by Fred A. Risser, and the Engineers' Section of the Board having heard the evidence, and being advised in the premises, makes the following:

FINDINGS OF FACT

1. That Francis J. Vivian, of 571 Park Lane, Madison, Wisconsin, is duly registered under the provisions of Section 443.01, Wis. Stats., as a Professional Engineer, certificate number E-7378.

2. That C. F. Hurc is the Secretary of the Examining Board of Architects, Professional Engineers, Designers, and Land Surveyors and was duly authorized by the Engineers' Section of said Board to institute this proceeding under the provisions of Section 443.01(13), Wis. Stats.

3. That some time prior to July 4, 1970, the respondent, Francis J. Vivian, was employed by Smart Motors Inc., a Wisconsin corporation with its business address at 5901 Odana Road, Madison, Wisconsin, to prepare plans and specifications for, and to supervise construction of, a garage addition to be constructed at 5901 Odana Road, Madison, Wisconsin.

4. That the respondent prepared the plans and specifications for, and, at all times mentioned hereinafter, was responsible for supervising the construction of, the aforesaid garage addition.

5. That, on or about December 10, 1970, a portion of said garage addition collapsed.

6. That said collapse was caused by the failure of an "open web frame truss" which had been designed by the respondent.

7. That the said truss was not designed or constructed to support a reasonable live load.

8. That the data submitted for approval to the Department of Industry, Labor and Human Relations, for the portion of said structure which collapsed, contained inconsistencies.

9. That the respondent performed welding on the said garage addition without being certified by the Department of Industry, Labor and Human Relations, as required by Section IND 53.16(13), Wis. Adm. Code.

CONCLUSIONS OF LAW

1. That the failure to design an "open web frame truss" which would support a reasonable live load constituted incompetency, and that the failure to correct said design prior to construction constituted gross negligence, in the practice of Professional Engineering by the respondent.

2. That performing welding for a project being constructed under his supervision, without being certified as required by Section IND 53.16(13), Wis. Adm. Code, constituted misconduct in the practice of Professional Engineering by the respondent.

3. That it is in the public interest to revoke the certificate of registration as a Professional Engineer of the respondent, Francis J. Vivian.

ORDER

NOW THEREFORE, IT IS ORDERED, that the certificate of registration, number E-7378, of the respondent, Francis J. Vivian, as a Professional Engineer, be, and the same hereby is, revoked; that said revocation is to

take effect 30 days from the date of service of this Order; and, that consideration to an application of Francis J. Vivian, for the reissuance of a certificate of registration as a Professional Engineer, will not be considered prior to six months after the effective date of this Order.

IT IS FURTHER ORDERED, that a copy of these Findings of Fact, Conclusions of Law, and Order be served upon the respondent, Francis J. Vivian, by certified mail; and, that on or before the effective date of this Order, the respondent, Francis J. Vivian, deliver to the office of the Examining Board of Architects, Professional Engineers, Designers, and Land Surveyors his certificate of registration as a Professional Engineer, number E-7378 and his current renewal card.

Dated this 11th day of October, 1971.

EXAMINING BOARD OF ARCHITECTS,
PROFESSIONAL ENGINEERS, DESIGNERS,
AND LAND SURVEYORS (ENGINEERS' SECTION)

By: Pierce G. Ellis
Pierce G. Ellis, Chairman

STATE OF WISCONSIN

BEFORE THE EXAMINING BOARD OF ARCHITECTS, PROFESSIONAL ENGINEERS, DESIGNERS, AND LAND SURVEYORS (ENGINEERS' SECTION)

IN THE MATTER OF THE REVOCATION OF THE CERTIFICATE OF REGISTRATION AS A PROFESSIONAL ENGINEER OF FRANCIS J. VIVIAN, RESPONDENT (E-7378)

NOTICE OF HEARING

Case #71-E-1

TO: Francis J. Vivian
571 Park Lane
Madison, Wisconsin

PLEASE TAKE NOTICE, That a hearing will be held on the 13th day of August, 1971, at 110 North Henry Street, Madison, Wisconsin, at 10:00 o'clock in the forenoon, or as soon thereafter as the matter can be heard, on the question of whether the certificate of registration as a professional engineer in the State of Wisconsin, heretofore issued to the above named respondent, pursuant to Section 443.01, Wis. Stats., should be revoked by the Examining Board of Architects, Professional Engineers, Designers, and Land Surveyors (Engineers' Section). The issues involved and the charges then and there to be considered are set forth in the attached Complaint, to which you are required to make answer in writing at least 15 days before the date set for said hearing.

Dated at Madison, Wisconsin, this 13th day of July, 1971.

EXAMINING BOARD OF ARCHITECTS, PROFESSIONAL ENGINEERS, DESIGNERS, AND LAND SURVEYORS (ENGINEERS' SECTION)

By _____
Secretary

Post Office Address:

110 North Henry Street
Madison, Wisconsin 53702

STATE OF WISCONSIN

BEFORE THE EXAMINING BOARD OF ARCHITECTS, PROFESSIONAL ENGINEERS, DESIGNERS, AND LAND SURVEYORS (ENGINEERS' SECTION)

IN THE MATTER OF THE REVOCATION OF THE CERTIFICATE OF REGISTRATION AS A PROFESSIONAL ENGINEER OF FRANCIS J. VIVIAN, RESPONDENT (E-7378)

COMPLAINT

Case #71-E-1

The Engineers' Section of the Examining Board of Architects, Professional Engineers, Designers, and Land Surveyors, an agency of the State of Wisconsin, by C. F. Hurc, its Secretary, complains against the respondent, Francis J. Vivian, and alleges:

admits 1. That the respondent, Francis J. Vivian of 571 Park Lane, Madison, Wisconsin, is duly registered by the Engineers' Section of the Examining Board of Architects, Professional Engineers, Designers, and Land Surveyors, under the provisions of Section 443.01, Wis. Stats., as a Professional Engineer, certificate number E-7378.

admits 2. That C. F. Hurc is the Secretary of said Engineers' Section, and has been directed by said Section to institute these proceedings to revoke the registration, as a Professional Engineer, of said Francis J. Vivian, pursuant to the provisions of Section 443.01, Wis. Stats.

admits 3. On information and belief, that on or before July 24, 1970, the respondent was employed by Smart Motors, Inc., a Wisconsin corporation with its business address at 5901 Odana Road, Madison, Wisconsin, to prepare plans and specifications for, and to supervise construction of, a garage addition to be constructed at 5901 Odana Road, Madison, Wisconsin.

admits 4. On information and belief, that the respondent prepared the plans and specifications for, and at all times mentioned hereinafter, was responsible for supervising the construction of, the aforesaid garage addition.

admits 5. That, on or about December 10, 1970, a portion of said garage addition collapsed.

denies 6. On information and belief, that said collapse was caused by the failure of an "open web rigid frame truss" to support a snow load of approximately four pounds per square foot on the roof of said addition.

denies 7. On information and belief, that the said trusses were not designed or ~~constructed~~ to support a reasonable live loading.

denies 8. On information and belief, that the said collapsed portion of the building did not conform to the plans and specifications submitted to the Department of Industry, Labor and Human Relations for said structure.

denies P.E. work 9. On information and belief, that the welding for said project was performed by a person or persons not certified by the Department of Industry, Labor and Human Relations, contrary to Section Ind. 53.16 (13), Wis. Adm. Code, and that the respondent supervised, or actually performed said welding.

denies 10. On information and belief, that the welds made were inadequate.

denies 11. On information and belief, that the respondent prepared plans for the repair of the said building which provided for the use of beams and other welded material that was inadequate and had incurred structural damage as a result of the said collapse.

denies 12. That the improper design and ~~supervision of construction~~ construction of the said building addition, as alleged in paragraph 7, by the respondent, constitutes gross negligence, incompetency and misconduct in the practice of Professional Engineering, pursuant to Section 443.01 (13), Stats.

denies 13. That the supervision of construction of a building which does not conform to plans and specifications, constitutes gross negligence, incompetency and misconduct in the practice of Professional Engineering, pursuant to Section 443.01 (13), Stats.

denies 14. That supervising, or actually performing, the welding on said trusses contrary to Section Ind. 53.16 (13), Wis. Adm. Code, by the

respondent, constitutes gross negligence, incompetency and misconduct in the practice of Professional Engineering, pursuant to Section 443.01 (13), Stats., and Section A-E 4.06 (2), Wis. Adm. Code.

15. That the use of inadequate and structurally damaged materials in a building constitutes gross negligence, incompetency and misconduct in the practice of Professional Engineering, pursuant to Section 443.01, Stats.

WHEREFORE, complainant prays that the certificate of registration as a professional engineer of said respondent, Francis J. Vivian, be revoked.

EXAMINING BOARD OF ARCHITECTS,
PROFESSIONAL ENGINEERS, DESIGNERS,
AND LAND SURVEYORS (ENGINEERS' SECTION)

By _____
Secretary

VIVIAN, Respondent, v. EXAMINING BOARD OF ARCHITECTS, PROFESSIONAL ENGINEERS, DESIGNERS AND LAND SURVEYORS, Appellant.

No. 179. Argued November 26, 1973.—Decided January 4, 1974.

1. Architects and engineers—License—Suspension and revocation—Scope of judicial review.

The scope of judicial review, under the Administrative Procedure Act, of a determination made by the state examining board of architects and professional engineers in a proceeding relating to revocation of a practitioner's certificate of registration, is the same as that prescribed in the act, *i.e.*, whether there is substantial evidence to support the board's finding, giving due weight to its experience, technical competence and specialized knowledge.

2. Architects and engineers—License—Suspension and revocation—Statutory grounds for revocation—Distinct meaning ascribed to each.

Each of the three grounds set forth in sec. 443.01 (13) (a) 4, Stats. (which states that an architect or professional engineer's certificate of registration may be revoked for "any

gross negligence, incompetency or misconduct" in professional practice) has a distinct meaning, the words being neither entirely synonymous nor interchangeable, in that incompetency refers to some demonstrated lack of competence or ability to perform the professional functions, gross negligence involves some higher degree of failure to exercise ordinary care of judgment in a given situation, and misconduct relates to some deviation from a fixed duty or definite rule of conduct.

3. Architects and engineers—License—Suspension and revocation —"Incompetency" as a statutory ground—Meaning as applied to one or more acts.

The meaning of the term "incompetency" as used in sec. 443.01 (13) (a) 4, Stats., is not restricted to continued or repeated acts, because a single instance of failure to use ordinary care or single act negligently performed may under some circumstances demonstrate a lack of ability required of a professional man in a licensed and specialized profession.

4. Architects and engineers—License—Suspension and revocation —Disciplinary proceeding against professional engineer—Erroneous conclusion of "incompetency."

In a proceeding under sec. 443.01 (13) (a) 4, Stats., to discipline a licensed engineer who had been engaged to design and supervise the construction of a garage addition building which collapsed, conclusion of "incompetency" by the state examining board, by reason of respondent's "failure to design an 'open web frame truss' which would support a reasonable live load" is held to be erroneous, since that act, which was the first and only mistake made during his prior years of practice, could not in and of itself be so equated, and that determination was otherwise unsupported by substantial evidence.

5. Architects and engineers—License—Suspension and revocation —"Gross negligence"—Difference from ordinary negligence one of degree, not of kind.

The statutory ground for revoking an architect's or engineer's certificate of registration based on "gross negligence" refers to the degree of negligence, *i.e.*, gross or grave acts as compared to less serious or more ordinary acts of negligence, and in determining factually what constitutes gross negligence, due weight must be given to the experience, technical competency and specialized knowledge of the examining board which is knowledgeable as to the professions involved.

6. Architects and engineers—License—"Gross negligence"—Failure to correct deficiency in construction plans—Conclusion without factual support.

Since there is no evidence in the record to support the examining board's finding that respondent was warned or told of the defect by state representatives, its conclusion that his failure to correct his design after notice of defect constituted gross negligence is not sustained.

7. Architects and engineers—License—Engineer's deficiency in design—"Gross negligence"—Absence of board finding—Remand for factual determination.

Because the board's determination of gross negligence was based only on the respondent's failure to correct the design after warning, albeit unsupported by the record, but did not determine gross negligence based on the error itself, the proceeding is remanded for a factual determination of whether his failure to design and construct an "open web frame truss" which would support a reasonable live load constituted gross negligence—a matter peculiarly within the board's expertise.

8. Architects and engineers—License—Professional misconduct—Engineer's performance of welding without certification.

The examining board's conclusion, that respondent's performance of welding on the garage addition without being certified by the ILHR Department constituted misconduct, is supported by his admission that he was not a certified welder, and although statutorily responsible for supervision of construction as part of the practice of professional engineering, he did the welding, an intentional act knowingly performed in violation of a known administrative rule which had the force of law.

9. Architects and engineers—License—Suspension and revocation —Statutory term "misconduct"—Not constitutionally void for vagueness.

Challenge to the validity of sec. 443.01 (13) (a) 4, Stats., on the ground of alleged constitutional vagueness of the term "misconduct" (in the practice of professional engineering) is not sustained, because as used in the statute, the word relates to unprofessional acts synonymous with unprofessional conduct, *i.e.*, conduct that violates those standards of professional behavior established through professional experience.

APPEAL from a judgment of the circuit court for Dane county: W. L. JACKMAN, Circuit Judge. *Modified and, as modified, affirmed.*

Facts.

On July 13, 1971, the appellant, Examining Board of Architects, Professional Engineers, Designers and Land Surveyors, a state agency, filed a complaint against respondent, Francis J. Vivian, a registered professional engineer, alleging that his acts in designing and supervising the construction of a garage addition building that collapsed constituted gross negligence, incompetency and misconduct, contrary to sec. 443.01 (13), Stats., and sec. A-E 4.06 (2), 1 Wisconsin Administrative Code.

On October 11, 1971, following a hearing on the complaint, the appellate board entered the following findings of fact: (1) That respondent was employed to prepare plans and specifications for, and to supervise construction of, a garage addition; (2) that respondent prepared the plans and was responsible for supervising the construction of the garage addition (that collapsed); (3) that the collapse was due to failure of an "open web frame truss" which was designed by respondent and was not designed or constructed to support a "reasonable live load;" (4) that the data submitted for approval to the state ILHR department for the portion of the structure which collapsed contained inconsistencies; (5) that the respondent performed welding on the garage addition without being certified by the ILHR department as required by sec. IND 53.16 (13), 4 Wisconsin Administrative Code.

FINDINGS OF FACT.

Based on these findings of fact, the appellant board entered the following conclusions of law: (1) That the failure to design an "open web frame truss" which would support a "reasonable live load" constituted incompetency; (2) that the failure to correct said design prior to construction constituted gross negligence in the practice of professional engineering; (3) that performing welding without being certified constituted misconduct. Based on these findings and conclusions, the appellant board ordered that the certificate of registration of the respondent as a professional engineer be revoked and that consideration of an application of respondent for reissuance of a certificate of registration as a professional engineer was not to be considered prior to six months from the date of its order of revocation.

CONC. OF LAW.

On March 30, 1972, the circuit court held that: (1) Respondent was guilty of misconduct in performing welding in violation of IND 53.16 (13), 4 Wisconsin Administrative Code; (2) that the acknowledged mistake of respondent in the design resulting in the roof collapse did not constitute incompetence or gross negligence; (3) that there was no evidence from which one could infer any such recklessness as would constitute gross negligence or lack of ability to make a proper design as would be said to be incompetence. The court remanded the case to appellant board for imposition of an appropriate penalty. From the circuit court judgment, entered March 30, 1972, the board appeals.

CIR. CT.

For the appellant there were briefs by *Robert W. Warren*, attorney general, and *Gordon Samuelson*, assistant attorney general, attorneys, and *William Dusso* of Madison, of counsel, and oral argument by *Mr. Samuelson* and *Mr. Dusso.*

For the respondent there was a brief by *Risser, Risser & Eckerle* and *Bieberstein, Cooper, Bruemmer, Gartzke & Hanson* and *Paul C. Gartzke*, all of Madison, and oral argument by *Paul C. Gartzke.*

ROBERT W. HANSEN, J. The appellant board revoked the license of respondent as a professional engineer pur-

suant to the statute making any "gross negligence, incompetency or misconduct" grounds for such revocation.[1]

The scope of circuit court review of such board determination is prescribed by statute.[2] This court's scope of review is the same.[3] The issue in this case is whether there is substantial evidence,[4] not to be equated with preponderance of evidence,[5] that supports the board's find-

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[1] Sec. 443.01 (13) (a) 4, Stats.

[2] Sec. 227.20, Stats. (Administrative Procedure Act), providing:

"(1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, testimony thereon may be taken in the court. The court may affirm the decision of the agency, or may reverse or modify it if the substantial rights of the appellant have been prejudiced as a result of the administrative findings, inferences, conclusions or decisions being:

"(a) Contrary to constitutional rights or privileges; or

"(b) In excess of the statutory authority or jurisdiction of the agency, or affected by other error of law; or

"(c) Made or promulgated upon unlawful procedure; or

"(d) Unsupported by substantial evidence in view of the entire record as submitted; or

"(e) Arbitrary or capricious."

[3] *See: Milwaukee v. Wisconsin Employment Relations Comm.* (1969), 43 Wis. 2d 596, 600, 168 N. W. 2d 809; *Scharping v. Johnson* (1966), 32 Wis. 2d 383, 389, 145 N. W. 2d 691.

[4] *See: Milwaukee & Suburban Transport Corp. v. Public Service Comm.* (1961), 13 Wis. 2d 384, 389, 108 N. W. 2d 729, holding: "'It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, taking into account the entire record including whatever might fairly be said to detract from its weight. The latter requirement does not, however, furnished a "calculus of the value" by reason of which a reviewing court can assess the evidence.'" (Quoting *Green Bay & W. R. Co. v. Public Service Comm.* (1955), 269 Wis. 178, 187, 68 N. W. 2d 828.)

[5] *Margoles v. State Board of Medical Examiners* (1970), 47 Wis. 2d 499, 512, 177 N. W. 2d 353, stating: "'Substantial evidence is not equated with preponderance of the evidence. There may be cases where two conflicting views may each be sustained by substantial evidence. In such a case, it is for the agency to determine which view of the evidence it wishes to accept. . . .'" (Quoting *Robertson Transportation Co. v. Public Service Comm.* (1968), 39 Wis. 2d 653, 658, 159 N. W. 2d 636.)

ings, with due weight to be given to the experience, technical competence, and specialized knowledge of the board.[6] Neither this court nor the circuit court is to retry the case, substituting the court's judgment for that of the board.[7] Applying this statutorily mandated standard, we will review (1) the findings of fact, and (2) the conclusions of law that undergird the board's revocation of respondent's license.

Findings of fact.

The board found that the respondent was employed to prepare plans and specifications for and to supervise construction of a garage addition. It found that the respondent did prepare such plans and specifications and was responsible for the construction of said garage addition. It found that a portion of the addition constructed collapsed, and that the collapse was caused by the failure of an "open web frame truss," designed by respondent. As to gross negligence, incompetency or misconduct, the board made two material findings of fact: (1) That the said truss was not designed or constructed to support a

[6] Sec. 227.20 (2), Stats. (Administrative Procedure Act), providing:

"(2) Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. The right of the appellant to challenge the constitutionality of any act or of its application to him shall not be foreclosed or impaired by the fact that he has applied for or holds a license, permit or privilege under such act."

[7] *Muskego-Norway Consolidated Schools Joint School Dist. No. 9 v. W. E. R. B.* (1967), 35 Wis. 2d 540, 563, 151 N. W. 2d 617, stating: ". . . the reviewing court is not to substitute its judgment for the judgment of the board." (Citing *St. Joseph's Hospital v. Wisconsin Employment Relations Board* (1953), 264 Wis. 396, 59 N. W. 2d 448.)

reasonable live load. This is supported by substantial evidence.[8] (2) That the respondent performed welding on the said garage addition without being certified as required by sec. IND 53.16 (13), 4 Wisconsin Administrative Code. This is conceded.[9] It is upon these two findings of fact [10] that the board's conclusions of law rest.

Conclusions of law.

The board reached three conclusions of law to support its concluding that it was in the public interest to revoke the certificate of registration as a professional engineer of the respondent. It found, (1) That respondent was incompetent; (2) that respondent was guilty of gross negligence; and (3) that the respondent was guilty of misconduct. Each conclusion will be separately reviewed.

1. *Was respondent incompetent?*

The board held that respondent's "failure to design an 'open web frame truss' which would support a reasonable live load" constituted incompetency. The trial court

[8] Leon Boland, a plan reviewer with the ILHR department, agreed with Ergun I. Somersan, assistant chief engineer, that the collapse was due to structural design mistakes, poor welding and lack of lateral support. Respondent Vivian testified that the mistake in design caused the collapse.

[9] Respondent Vivian testified: "I . . . did do some of the welding on the leg," and conceded that he was not a certified welder.

[10] The board made a third finding of fact: "That the data submitted for approval to the Department of Industry, Labor and Human Relations, for the portion of said structure which collapsed, contained inconsistencies." Testimony is in dispute as to what was said or questioned in conversations between respondent and ILHR department representatives, but there is no dispute as to such contacts and conversations taking place. If there were inconsistencies in the plans and specifications submitted, it was for the ILHR department to resolve them before approving the plans and specifications submitted. Finding no conclusion of law reached as resting upon this finding of fact, we note it but comment on it no further.

set aside the board's finding of incompetence for lack of evidence. Quoting Webster as defining incompetence to mean "without adequate ability, knowledge, fitness, etc.," the trial court held as a matter of law that "a single instance of a failure to use ordinary care is not of itself incompetence," with the qualification that "if it demonstrates a lack of ability to perform the professional functions it may be incompetence as that word is generally understood." The trial court then struck the board finding of incompetence, holding: "There is no evidence from which one could infer any . . . lack of ability to make a proper design as would be said to be incompetence."

We are required to negative any implication that it is only continued or repeated acts that can constitute incompetency in any situation. Where a real estate broker violated board rules in a single real estate transaction, this court upheld an agency finding of incompetency based upon conduct in a single situation.[11] However, in the case before us, we agree with the trial court that the evidence does not establish incompetency. The statute involved makes incompetency or gross negligence or misconduct grounds for revocation of license.[12] While we have upheld revocation where the three were lumped together as grounds for revocation,[13] each has a distinct meaning. Incompetence does refer to some demonstrated

[11] *Sailer v. Wisconsin Real Estate Brokers' Board* (1958), 5 Wis. 2d 341, 92 N. W. 2d 841. (Cited and followed in *Lewis Realty v. Wisconsin Real Estate Brokers' Board* (1959), 6 Wis. 2d 99, 106, 94 N. W. 2d 238. Cited with approval in *Ford v. Wisconsin Real Estate Examining Board* (1970), 48 Wis. 2d 91, 108, 179 N. W. 2d 786.)

[12] Sec. 443.01 (13) (a) 4, Stats.

[13] *Kuehnel v. Registration Board of Architects* (1943), 243 Wis. 188, 191, 9 N. W. 2d 630, upholding an agency finding that an architect was guilty of "gross negligence, incompetency, and misconduct in the practice of architecture" as a result of several acts in connection with two buildings.

lack of competence or ability to perform the professional functions. Gross negligence does involve some higher degree of a failure to exercise ordinary care of judgment in a given situation. Misconduct does relate to some deviation from a fixed duty or definite rule of conduct. The three words are not entirely synonymous nor completely interchangeable.

We deal here not with the board's findings of fact, but with its conclusion of law that the facts found warrant concluding the respondent was incompetent, rather than negligent or grossly negligent, in failing to properly design the building addition.[14] We have here an admitted error in the designing of the roof supports for a building addition. While the record is nearly devoid of testimony bearing upon how easy it would be to make or notice such error, the ILHR department engineer testified that the error was not obvious. In a letter to that department, the respondent stated, "This has been the first and only failure that I have experienced during the eleven years of private practice, and I can assure you, the last." We are considering here what the board, in its conclusions of law, termed "failure to design an 'open web frame truss' which would support a reasonable live load." We would hold, under these circumstances and on this record, that what the trial court referred to as "the acknowledged mistake of petitioner in the design resulting in the roof collapse under stress of a normal load" did not constitute incompetency. By a somewhat different route, we reach the same conclusion the trial

[14] *See: Pabst v. Department of Taxation* (1963), 19 Wis. 2d 313, 322, 120 N. W. 2d 77, this court noting: "After setting forth its findings of fact, in the instant case, the board set forth its determination that the trust was administered in Wisconsin as a conclusion of law and not as a finding of fact. While the board's label is not conclusive with respect to determining the substance of the statement as either a conclusion of law or finding of fact, we deem it significant in this case. . . ."

court reached that the finding of incompetency by the board is unsupported by substantial evidence in view of the entire record as submitted.

2. *Was respondent grossly negligent?*

In its opinion the trial court went further to hold: ". . . we do not think that evidence of a single failure to use ordinary care in design or failure to detect the error is either gross negligence or incompetence . . . ." While terming such single failure as "no more than an inadvertent error," it is clear that the trial court considered the failure in design and supervision to be an act of ordinary negligence. It observed, "Had the legislature intended that ordinary negligence was to be a ground for revocation of a license, it would not have modified the negligence as gross." As a matter of law then, the trial court is putting the negligent act here in the area of inadvertence or ordinary negligence and, as a matter of law, outside the realm of gross negligence. The trial court, in its opinion, stated that the evidence justified "no more than a finding of ordinary negligence."

In holding gross negligence not applicable to the acts of respondent, the trial court cited and relied upon the *Bielski Case*[15] as implying a course of conduct, in the trial court's words, "so reckless or in wanton disregard of the rights and safety of others as to evince a willingness to cause injury or damage." But *Bielski* makes clear that, initially, the difference between ordinary and gross negligence was a matter of degree, not a difference in kind.[16] The decision tells not only how, but why, gross negligence "acquired by metamorphosis a new nature" in tort, and particularly automobile accident

[15] *Bielski v. Schulze* (1962), 16 Wis. 2d 1, 114 N. W. 2d 105.

[16] *Id.* at pages 14, 15, stating: ". . . Gross negligence is . . . apparently considered in terms of degree, rather than kind of negligence in our early cases."

cases.[17] There is no reason for importing that judicial history and result into the term "gross negligence" in this statute governing revocation of engineers' licenses. As here used, the term "gross negligence" refers to degree of negligence, exactly as the term traditionally did. Even as the term "unprofessional conduct" has a different meaning and application in various professions, so the term "gross negligence," applied to an architect or professional engineer, distinguishes between gross or grave acts of negligence as compared to less serious or more ordinary acts of negligence. The legislative command that due weight is to be given to "the experience, technical competence, and specialized knowledge of the agency involved," [18] in determining what is gross negligence, indicates the determination of the grossness of the negligence is to be made by those knowledgeable as to the particular profession involved.

While properly included in a conclusion of law, we see the determination of whether admitted negligence is of such a degree as to constitute gross negligence as essentially a fact-finding process. Certainly it is a determination in which experience, technical competence and specialized knowledge are required, where the finding

[17] *Id.* at page 15, stating: "It gradually waxed strong in flesh and spirit on such terms as 'such a degree of rashness or wantonness which evinced a total want of care,' or 'a willingness to harm although such harm may not have been intended,' 'rashly,' 'recklessly,' and 'wantonly,' 'little less than an intentional wrong,' 'willingness to perpetrate injury,' or 'a purpose to take known chances of perpetrating an injury.' Gradually, gross negligence acquired by metamorphosis a new nature:—ordinary negligence lay in the field of inadvertence but gross negligence in the field of actual or constructive intent to injure, and the two did not grade into each other. When the drinking cases increased in number, we reached the point that the concurrence of causal ordinary negligence and intoxication, as a matter of law, was gross negligence."

[18] Sec. 227.20 (2), Stats. (Wisconsin Administrative Procedure Act).

concerns the degree of negligence in a failure to act of a professional man in a licensed and specialized profession. A lay person would suspect that failure to properly design or construct a roof is more serious than the failure to properly design and build a doorjamb or windowsill. But such lay person might consider the slightest oversight to be gross negligence if it were causally connected to the collapse of a church or school gymnasium roof on the night of its public dedication program. Experience, competence and specialized knowledge of the profession and its standards are certainly helpful in determining whether a failure to exercise care was grossly negligent.

Holding that the determination of whether the failure to properly design or supervise the construction of the roof supporting truss was or was not gross negligence is a matter for the board to determine, subject to the scope of judicial review, we here would remand the case to the examining board to make such determination.

It is true that the appellant board found the respondent guilty of gross negligence, but it did so stating that "the failure to correct said design prior to construction constituted gross negligence." This cannot be read as a generalized reference to the fact that the respondent supervised the construction and thereby had additional opportunities to notice and correct the defect in the plans and specifications. Briefs and arguments make clear that the holding is that the respondent failed to correct his plans and calculations after being warned or notified by state engineers of probable defects. On this point the trial court opinion stated: ". . . Petitioner was led astray by some erroneous calculations which apparently were not so obvious as to invite the express disapproval of the Commission's examiners of the plans, although there is a rather cryptic handwritten note in the record which the Board apparently construed as a criticism or inquiry. . . ." The "rather cryptic" note is a penciled notation on a letter that began "A question developed

on stresses . . ." and ended with "This also checked out." We hold both note and notation too vague and unclear to constitute notice of possible defect, much less warning of actual defect, in the plans and specifications. There was testimony concerning a conversation of respondent with a state assistant chief engineer who did not take the stand as a witness. The hearsay version of that conversation had it ending with the state engineer being "satisfied." While it is true that respondent failed to correct the plans and specifications while he was supervising the construction, there is no evidence in this record to sustain a finding that he was warned or told of the defect by state representatives. There is no finding of fact that he was so warned or put on notice. On remand, the sole question as to gross negligence is to be whether the failure to design and construct an "open web frame truss" which would support a reasonable live load constituted gross negligence.

3. *Was respondent guilty of misconduct?*

The board found that "performing welding for a project being constructed under his supervision, without being certified as required by Section IND 53.16 (13), Wis. Adm. Code, constituted misconduct in the practice of Professional Engineering by the respondent." Respondent does not deny that he did welding on the project involved, and that he is not a certified welder. Professional engineers are required to abide by provisions of the state administrative code.[19] That code covers welder qualifications,[20] inspection requirements

[19] A-E 4.06, 1 Wisconsin Administrative Code, provides: ". . . The architect, professional engineer, designer, or land surveyor:

". . .

"(2) Shall abide by, and conform to, the provisions of the Wisconsin Administrative Code and all local codes and ordinances;"

[20] IND 53.16 (13), 4 Wisconsin Administrative Code, provides:

"(c) *Operator qualifications.* All welding shall be done by skilled workmen who shall give satisfactory proof of their skill and ability with process to be used on the proposed work."

for welders,[21] and certification of qualified welders.[22] Respondent contends that welding does not come within the definition of professional engineering, as statutorily defined. However, the statute provides that "responsible supervision of construction" is part of the practice of professional engineering.[23] The welding done by him as supervising engineer on the building project falls within the scope of "responsible supervision" of the construction project.[24] His welding work was done in the practice of professional engineering. The trial court held that "the petitioner doing welding for the job

[21] IND 53.16 (13), 4 Wisconsin Administrative Code, provides:

"(d) *Qualifications and inspection requirements for welding operations and operators.* 1. The state building code provides that the department of industry, labor and human relations shall determine necessary data, tests and other evidence required to prove the merits of materials, methods of construction and devices used in the construction, alteration and equipment of buildings or structures, and further, in connection with welding, requires such work to be done by skilled welders who must give satisfactory proof of their skill and ability."

[22] IND 53.16 (13) (d), 4 Wisconsin Administrative Code, provides:

"3. All welding operators employed as such in executive work covered by the Wisconsin state building code shall be previously qualified by tests as prescribed herein. These qualification tests shall be performed under the supervision of an approved testing laboratory or commercial testing engineer who will certify to the department of industry, labor and human relations that the operator has passed the prescribed qualification tests."

[23] Sec. 443.01 (2) (d), Stats., provides in pertinent part:

"(d) The practice of professional engineering within the meaning and intent of this section includes any professional service, requiring the application of engineering principles and data, wherein the public welfare or the safeguarding of life, health or property is concerned and involved, such as consultation, investigation, evaluation, planning, design, or *responsible* supervision of construction, alteration, or operation, in connection with any public or private utilities, structures, projects, bridges, plants and buildings, machines, equipment, processes and works. . . ." (Emphasis supplied.)

[24] *See: Kuehnel v. Registration Board of Architects, supra,* footnote 13, stating at page 197: ". . . Even though Kuehnel

without being certified was an intentional act knowingly done in violation of a known administrative rule which has the force of law," and that the finding of misconduct is here supported by substantial evidence. We agree.

Finally, respondent argues that the statute providing for revocation of license for misconduct is unconstitutionally vague. The statute refers to "misconduct in the practice of . . . professional engineering as a registered professional engineer." The word "misconduct" has a broad scope, and a wide range of meaning "according to the different connections in which it is used." [25] As used in this statute it clearly relates to unprofessional acts, and is synonymous with "unprofessional conduct," conduct that violates those standards of professional behavior which through professional experience have become established.[26] We do not find this statute, on its face, to be unconstitutionally vague. As applied to

might lawfully have made plans and specifications or supervised the erection of those dwellings in some capacity other than that of architect, he in fact was not acting in any such other capacity in relation to planning and supervising of the Cates and Jensen dwellings. The evidence in respect thereto clearly shows that he not only represented himself as a professional architect, but contracted to furnish his services in that capacity and that his services were engaged in reliance upon such representations. Consequently, the proceedings, determination, and the revocation of his certificate of registration because of his gross negligence, incompetency, and misconduct in the practice of architecture, were clearly within the jurisdiction of the board."

[25] 58 C. J. S., *Misconduct*, pp. 817, 818.

[26] *See: State v. Preston* (1968), 38 Wis. 2d 582, 157 N. W. 2d 615, 159 N. W. 2d 684. *See also: Reyburn v. Minnesota State Board of Optometry* (1956), 247 Minn. 520, 78 N. W. 2d 351; *Kansas State Board of Healing Arts v. Foote* (1968), 200 Kan. 447, 436 Pac. 2d 828; *Moore v. Board of Trustees* (1972), 88 Nev. 297, 495 Pac. 2d 605; *Board of Medical Examiners v. Mintz* (1963), 233 Ore. 441, 378 Pac. 2d 945; *Matter of Bell v. Board of Regents* (1945), 295 N. Y. 101, 65 N. E. 2d 184; *In re Hawkins* (1973), 17 N. C. App. 378, 194 S. E. 2d 540; *Martinez v. Texas State*

respondent, there is no shadow of right to claim vagueness. The respondent concedes a deliberate violation of a provision of the administrative code and that code requires licensed professional engineers to "abide by, and conform to, the provisions of the Wisconsin Administrative Code and all local codes and ordinances." [27] Given the specificity of this charge and the finding of fact and conclusion of law as to the welding work, we see no basis for claim of vagueness as applied to respondent. The trial court in its opinion, stated: ". . . We believe the standards for revocation are sufficiently definite so that members of the profession should have no trouble staying within the bounds of propriety." We agree, and hold the finding of misconduct based on respondent's doing the welding work to be supported by substantial evidence.

The trial court remanded this case to the examining board to impose a penalty on respondent, if it chose to do so, upon the board determination, upheld by the circuit court, that respondent was guilty of misconduct for his violation of IND 53.16 (13), 4 Wisconsin Administrative Code. We enlarge the nature of the remand to add that the examining board determine whether the respondent's

Board of Medical Examiners (Tex. Civ. App. 1972), 476 S. W. 2d 400. *See also: State ex rel. Richey v. Neenah Police & Fire Comm.* (1970), 48 Wis. 2d 575, 180 N. W. 2d 743; *State ex rel. Gudlin v. Civil Service Comm.* (1965), 27 Wis. 2d 77, 133 N. W. 2d 799.

[27] A-E 4.06, 1 Wisconsin Administrative Code, relating to adherence to statutes and codes, providing:

"Strict adherence to practice requirements of related sections of the Wisconsin statutes, the Wisconsin Administrative Code, and all local codes and ordinances should be maintained in all services rendered. The architect, professional engineer, designer, or land surveyor:

". . .

"(2) Shall abide by, and conform to, the provisions of the Wisconsin Administrative Code and all local codes and ordinances."

failure to design and supervise the construction of an "open web frame truss" which would support a reasonable live load constituted gross negligence. If the board determines such failure to design and supervise to constitute gross negligence, it shall impose a penalty appropriate to its finding of gross negligence and misconduct. If the board determines such failure to design and supervise to have been an act of ordinary negligence, it shall impose a penalty appropriate to its finding of an act of misconduct as to the welding.

By the Court.—Judgment appealed from is modified to expand the nature of remand to the board to include a determination of whether respondent's design error constituted gross negligence and, as modified, affirmed.