

BEFORE THE ACCOUNTANCY EXAMINING BOARD
OF THE STATE OF IOWA

IN THE MATTER OF:)	CASE NUMBER: 02-07
)	DIA NUMBER: 02DOCAB001
ANDERSON, GABELMANN, LOWER,)	
WHITLOW, P.C.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	DECISION AND ORDER
RESPONDENT)	

On December 5, 2002, the Accountancy Examining Board for the State of Iowa (Board) filed a Complaint against Anderson, Gabelmann, Lower, Whitlow, P.C. (Respondent) alleging that the Respondent had violated certain statutes and rules of the Board by failing to furnish client "LIFO" work papers. A hearing was set for January 28, 2003.

The Respondent subsequently filed a Motion to Dismiss Complaint, and the state of Iowa filed a Response and Motion to Continue. The Board heard oral arguments from the attorneys in a conference call on January 28, 2003, and the hearing was continued. On April 21, 2003, the attorneys were allowed a further opportunity to present arguments on the Motion to Dismiss. An Order Denying the Motion to Dismiss and Order Setting Hearing was subsequently issued by the Board.

A prehearing conference was held by telephone on June 11, 2003, and the hearing was held on June 19, 2003 at 10:00 a.m. The Respondent was represented by its counsel, Louis R. Hockenberg and Lawrence McLellan. The state of Iowa was represented by Pamela Griebel, Assistant Attorney General. The following Board members served as the presiding officers for the hearing: Linda Crim Hopkins, CPA, Acting Chairperson; Wesley Stille, CPA; Richard Johnson, CPA; Ted Lodden, CPA; Susan Loy, LPA; and Marianne Mickelson, Public Member. Board member Tom Engelman recused himself due to a potential conflict of interest. Margaret LaMarche, Administrative Law Judge from the Iowa Department of Inspections and Appeals, assisted the Board in conducting the hearing. A certified court reporter recorded the proceedings.

The hearing was closed to the public, pursuant to Iowa Code section 272C.6(1)(2003). The State's Motion To Amend Charges was not resisted and was granted. After hearing the testimony

and examining the exhibits, the Board convened in closed executive session, pursuant to Iowa Code section 21.5(1)(f)(2003) to deliberate its decision. The members of the Board instructed the administrative law judge to prepare the Findings of Fact, Conclusions of Law, Decision and Order, in conformance with their deliberations.

THE RECORD

The record includes the Complaint, Notice of Hearing, Motion to Dismiss, State Response and Motion to Continue, Order Denying Motion to Dismiss and Order Setting Hearing, Answer, Motion to Amend Charges, the testimony of the witnesses, State Exhibits 1-13, and Respondent Exhibits A-G.

ISSUE

Whether the Board's statutes and rules obligated the Respondent CPA firm to provide a copy of a client's LIFO (last in, first out) inventory work papers upon request, even though the client owed money to the Respondent CPA firm, because the LIFO work papers include records which would ordinarily constitute part of the client's books and records and are not otherwise available to the client? The Board answers the question in the affirmative.

FINDINGS OF FACT

1. The Iowa Accountancy Examining Board (Board) issued Firm Permit No. 2002-0690 to Anderson, Gabelmann, Lower, Whitlow, PC (Respondent) on August 5, 2002. Permit No. 2002-0690 is currently in good standing. Barry Anderson and Todd Whitlow are two of the principals in the firm. (State Exhibit 1; Testimony of Barry Anderson; Todd Whitlow)

2. Todd Whitlow has been a CPA for 15 years and has been with the Respondent CPA firm since 1999. Todd Whitlow and Chris Ales, another CPA employed by the firm, provided tax preparation and tax consulting services for Erickson Truck Sales and Salvage ("Erickson Truck). Erickson Truck was originally two separate corporations, one incorporated in Wisconsin and the other in Minnesota. The two companies merged into the Minnesota corporation on January 1, 2001. (Testimony of Todd Whitlow; Respondent Exhibit E)

In the summer of 2000, Chris Ales left the Respondent firm but remained subject to a non-compete agreement, which prevented him

from providing accounting or tax preparation services to Erickson Truck. Todd Whitlow continued to provide tax preparation and consulting services to Erickson Truck until August 2001. At that time, Erickson Truck owed the Respondent CPA firm over \$14,000 in outstanding invoices.

In September 2001, Jack Erickson told the Respondent CPA firm that he would pay the outstanding invoice in full if the Respondent released Chris Ales from his non-compete agreement. The Respondent CPA firm was only willing to do so if Ales would take an offset to his buy out from the firm, and Ales refused. After the Respondent firm refused to release Ales from his non-compete agreement, Erickson Truck asked the Respondent CPA firm for a copy of its LIFO inventory work papers. (Testimony of Todd Whitlow)

3. Under the LIFO inventory method, the last item bought is considered the first item sold. When prices are rising, the LIFO inventory method provides the client with a higher cost of goods sold, thereby reducing income and income tax liability. There are various LIFO accounting methods, but essentially the CPA accumulates data each year to create a LIFO layer, after determining what inventory was left over from the previous year. The LIFO method is applied to the next year, and if inventories increase, calculations are performed and another layer is added. If inventories decrease, layers are sold off. In other words, the LIFO method involves a "stacking" of inventory layers as inventories increase at different prices. It is necessary for the CPA to have the information about all of the LIFO layers in order to prepare the client's tax returns and financial statements. (Testimony of Roger Murphy)

4. Barry Anderson consulted both the American Institute of Certified Public Accountants (AICPA) and William Schroeder, the Executive Officer of the Iowa Accountancy Board, to ask if the firm was obligated to provide the LIFO work papers requested by Erickson. The AICPA referred Anderson to their rule 501-1 (Respondent Exhibit 6), which provides that the member can require all fees be paid before information is provided to the client.

According to Barry Anderson's records, he called William Schroeder on October 29, 2001, and Mr. Schroeder returned his call. The telephone record submitted by Mr. Anderson includes two very brief calls to the Board office, one occurring on October 29, 2001 and the other on October 31, 2001. Barry Anderson recalled that after he summarized the position of the

AICPA, Mr. Schroeder told him that the Iowa Board would support the same position. Mr. Anderson also recalled that William Schroeder advised him to send a letter informing Erickson Truck that both the AICPA and the Iowa Board took the position that the CPA firm was authorized to withhold the LIFO records. (Testimony of Barry Anderson; Respondent Exhibit G)

William Schroeder does not recall a telephone conversation with Barry Anderson about LIFO inventory work papers. In addition, Mr. Schroeder, who is not a CPA, testified that he does not even know what a LIFO inventory work paper is, and he would never tell anyone that the rules of the Board were meant to be consistent with the AICPA rules. (Testimony of William Schroeder)

5. On November 21, 2001, Erickson Truck retained an attorney to obtain the LIFO work papers from the Respondent CPA firm. Erickson Truck's attorney, relying on Board rule 193A IAC 11.5(2), made a written demand to the Respondent CPA firm for the LIFO work papers on November 26, 2001.

On December 7, 2001, the Respondent's attorney responded to the written demand and refused to release the LIFO work papers, stating that the cited rule did not apply because the LIFO work papers were not "records which ordinarily constitute part of the client's books and records and are not otherwise available to the client." The Respondent's attorney further stated that the Respondent would gladly provide copies of its work papers upon payment, in full, of the outstanding invoices in the amount of \$14,340.80. Finally, the Respondent's attorney stated that the Respondent had reviewed the rule in question and had consulted with the Iowa Accountancy Board and the American Institute of Certified Public Accountants, both of which confirmed the position taken by the Respondent CPA firm. (State Exhibit 2)

6. On April 12, 2002, Jack Erickson sent a letter to the Respondent by facsimile, which stated that Erickson Truck would send Diane Artioli to the Respondent's firm on April 16th, and the Respondent should release any and all records pertaining to Erickson's accounts to her. The Respondent replied the same day and told Erickson that the Respondent would not permit the records to be viewed or released until the account was resolved. (State Exhibit 2)

7. On April 22, 2002, the Board received a written complaint against the Respondent CPA firm and Todd Whitlow from Jack Erickson, on behalf of Erickson Truck Sales & Salvage, Inc.

(Erickson Truck). The complaint cited to Board rule 193A IAC 11.5(2) and asserted that the Respondent firm had violated the rule by refusing to release its LIFO inventory accounting work papers unless Erickson paid the Respondent's outstanding bill, which Erickson disputes. In a cover letter to the complaint, Jack Erickson states: "lack of access to our records and workpapers has created a significant hardship for our business and our new CPA." Copies of the correspondence between the Respondent CPA firm and Erickson Truck were attached to the complaint. (Testimony of Roger Murphy; State Exhibit 2)

At the hearing, the Respondent CPA firm provided the following chronology concerning its litigation with Erickson Truck over the disputed invoice:

a. On February 6, 2002, the Respondent filed suit to collect on the account. Initial settlement discussions failed, Erickson filed a responsive pleading on April 12, 2002, and discovery was exchanged.

b. The case was set for trial on February 4, 2003. In early November, 2002, settlement discussions resumed, but the Respondent rejected Erickson's settlement offer. The Respondent filed a Motion for Summary Judgment on November 27, 2002.

c. The parties reached a settlement agreement on December 16, 2002, and Erickson delivered a settlement check on December 19, 2002.

d. On December 24, 2002, Erickson Truck sent a letter to the Board withdrawing its complaint against the Respondent.

(Respondent Exhibits A, B)

8. Roger Murphy has been a CPA for 28 years and was retained as a part-time consultant and investigator for the Board from 1994 until 2002, when the position was eliminated due to budget cuts. Mr. Murphy has recently retired from Iowa State University, where he taught accounting for 33 years. In his work as a CPA, Mr. Murphy has both reviewed and prepared LIFO inventory work papers. He also authored an article on work papers in the Board's July-September 2000 newsletter. In his article, Mr. Murphy stated that unlike the AICPA rules, the Board's rules do not permit the CPA to withhold work papers for nonpayment of a bill. (State Exhibit 12; Testimony of Roger Murphy)

In April 2002, Roger Murphy was asked by the Board to review and investigate the complaint filed by Erickson Truck and to report back to the Board. Roger Murphy recalled that he had two conversations with representatives of the Respondent firm regarding Erickson's request for LIFO work papers.

It appears that the first conversation was probably with Barry Anderson. Barry Anderson told Roger Murphy that he called both the AICPA and William Schroeder, Executive Officer for the Board, and both told him that it was permissible for the firm to withhold LIFO work papers for nonpayment of a bill. Mr. Murphy agreed that the AICPA rules permit the CPA to withhold the LIFO work papers for nonpayment, but doubted that William Schroeder would have given any advice about LIFO inventory work papers because Mr. Schroeder always referred this type of question to Murphy. After considering the testimony of Barry Anderson, Roger Murphy and William Schroeder, the Board was not persuaded that William Schroeder told Barry Anderson that LIFO papers could be withheld from the former client for non-payment or that the Board's rules were consistent or parallel with the AICPA rules. The Board believes it is likely that either Mr. Schroeder misunderstood the nature of the question being put to him or Mr. Anderson misunderstood the response.

Roger Murphy also had a second telephone conversation by speaker phone with several principals of the Respondent firm. Mr. Murphy reiterated his position that the LIFO work papers had to be turned over and could not be withheld for non-payment. The members of the firm did not specifically respond but thanked Mr. Murphy for his time. After this conversation, Mr. Murphy was under the impression that the Respondent CPA firm would release the LIFO work papers. (Testimony of Roger Murphy)

9. On June 18, 2002, Roger Murphy wrote a memorandum to the Board, citing 193A IAC 11.5(2), and stating his opinion that the rule required the Respondent to provide the LIFO work papers to Erickson Truck. Mr. Murphy suggested an informal discussion with the firm. (Testimony of Roger Murphy; State Exhibit 6)

On July 19, 2002, William Schroeder sent a letter to the Respondent firm, stating that the Board's Ethics Committee recently reviewed the complaint regarding the Respondent's failure to furnish LIFO working papers. Mr. Schroeder cited to 193A IAC 13.5(2)"b"(3) (the Board's new rule on the subject, which was effective 7/1/02) and stated that LIFO work papers are generally considered part of the client's records. Mr.

Schroeder asked whether the Respondent firm had provided Erickson Truck with a copy of their tax returns and whether the firm had already provided one copy of the LIFO work papers to the client. (State Exhibit 4)

Barry Anderson responded to this letter on July 25, 2002. He stated that the firm provided Erickson with a copy of its 2000 corporate tax return but that the LIFO work papers would not be released until Erickson paid its outstanding bill, which was then in litigation. (State Exhibit 5)

10. The LIFO inventory work papers at issue were prepared by Todd Whitlow in order to determine the LIFO adjustment and were maintained in the Respondent's office files. The LIFO work papers were never provided to Erickson Truck prior to December 19, 2002. The Respondent and Erickson did not have an agreement concerning ownership of the LIFO work papers.

Todd Whitlow specifically denies that the LIFO work papers were ever part of the client's books and records or that they were not otherwise available to the client. According to Mr. Whitlow, Erickson Truck had all of the detailed inventory records that went into the LIFO calculation. One of the Erickson Truck corporations had been using LIFO inventory methods for three years and had one inventory pool, and the other had used LIFO for four years and had two inventory pools. In the opinion of Todd Whitlow, it would not be difficult for another CPA to recreate the LIFO calculation, using the inventory records maintained by Erickson Truck. Erickson Truck did manage to file its income tax returns for 2001, even without access to the Respondent's LIFO work papers. (Testimony of Todd Whitlow)

11. The record includes conflicting opinions from CPA witnesses on the question of whether LIFO work papers are "records which would ordinarily constitute part of the client's books and records and are not otherwise available to the client."

a. In the opinion of Roger Murphy, all LIFO (last in, first out) inventory work papers, like depreciation records, would ordinarily constitute part of the client's books and records and are not otherwise available to the client. Roger Murphy testified that LIFO inventory work papers are an integral part of the client's financial records because they are necessary for tax preparation, and it would be difficult for a new CPA to reconstruct the various layers that go into the LIFO records without the former accountant's work papers. Mr. Murphy did not

believe it was necessary to review the specific LIFO work papers at issue in this case because there was no dispute that they existed. He further noted that in its complaint, Erickson Truck asserted that lack of access to the records and work papers had created a significant hardship for their business and their new CPA. In his opinion, if the Respondent firm had LIFO inventory work papers for Erickson Truck and had never provided a copy of the work papers to them, it was obligated to do so, even if fees remained unpaid.

b. Mark D. Wackerbarth has been a CPA for 27 years and has been active in a number of professional organizations, including peer review committees. He testified that in his opinion, work papers are owned by the accountant who prepared them, in the absence of an express agreement between the accountant and client. He further testified that he had reviewed the LIFO work papers at issue in this case and in his opinion, they would be "otherwise available to the client" because another accountant could easily recreate them and prepare a tax return for the corporation. For this reason, Mr. Wackerbarth believes that the prevailing practice of CPAs in Iowa would be to withhold the LIFO work papers from the client until all fees were paid. Mr. Wackerbarth also testified that it was his understanding that the Board's rules were intended to parallel the rules of the AICPA. (Testimony of Mark D. Wackerbarth)

CONCLUSIONS OF LAW

The Respondent CPA firm initially refused to provide a copy of Erickson Truck's LIFO inventory work papers in late fall of 2001. They continued to refuse to provide the LIFO work papers for a period of approximately one year until the litigation over the disputed fees was settled in late December 2002. Since the statutes and rules applicable to the CPA's obligation to release work papers changed effective July 1, 2002, it is necessary to address the refusal to provide the work papers under the law in effect both prior to and after July 1, 2002.

I. Statutes and Rule Effective Prior to July 1, 2002.

Prior to July 1, 2002, Iowa Code section 542C.31(2001) provided, in relevant part:

542C.31 Ownership or transfer of records.

All statements, records, schedules, working papers, and memoranda made by a certified public accountant or accounting practitioner incident to or in the course of professional service to clients by the accountant, except reports submitted by a certified public accountant or accounting practitioner to a client, remain the property of the accountant in the absence of an express agreement between the accountant and the client to the contrary.

Iowa Code section 542C.3(4) and (7)(2001) provided, in relevant part:

542C.3 Accountancy examining board created-moneys received-rules.

...

4. The board may adopt rules of professional conduct appropriate to establishing and maintaining high standards of integrity and dignity in the practice of the certified public accountant or accounting practitioner. Rules shall be adopted relating to the following matters:

...

b. Actions discreditable to the practice as a certified public accountant or accounting practitioner.

...

7. The board shall establish rules relative to the conduct of practice as a certified public accountant or accounting practitioner in respect to the enumerated items in subsections 4, 5, and 6, but this direction is not a limitation upon the rights of the board to make and adopt any rules relating to the conduct of certified public accountants or accounting practitioners which are not specifically enumerated in this chapter.

Pursuant to this broad statutory authority, the Board promulgated the following rule, which was effective from September 3, 1997 through June 30, 2002:

193A-11.5(542C) Responsibilities to clients.

...

11.5(2) Records. A CPA or AP shall furnish to a client or former client, upon request made within a reasonable time after original issuance of the document in question:

...

d. A copy of the working papers of the CPA or AP to the extent that such working papers include records which would ordinarily constitute part of the client's books and records and are not otherwise available to the client.

...

The Respondent relies, in part, on Iowa Code section 542C.31(2001) as providing authority for the proposition that it is not required to furnish the client with a copy of LIFO inventory working papers because the CPA is the owner of the working papers, absent an express agreement to the contrary. While Iowa Code section 542C.31(2001) does confer ownership of the working papers on the CPA, it does not address the issue of whether there is an obligation to provide a copy of the working papers to the client. This issue is addressed in 193A IAC 11.5(2). The Respondent argued that subrule 11.5(2) goes beyond the statutory authority granted to the Board by the legislature and is therefore invalid, but cites no legal authority in support of this argument. An agency rule is presumed valid and the party challenging the rule has the burden to demonstrate that a rational agency could not conclude that the rule was within its delegated authority. Overton v. State, 493 N.W.2d 857 (Iowa 1992). The Board is satisfied that 193A IAC 11.5(2) is within the broad rule-making authority delegated by Iowa Code sections 542C.3(4) and (7) (2001).

193A IAC 11.5(2)"d" provides a two-prong test for determining which working papers must be provided to a former client upon request: (1) do the working papers include records which would ordinarily constitute part of the client's books and records?; (2) are the working papers not otherwise available to the client? In answering these questions, the Board gave careful consideration to the opinions of both expert witnesses, but also utilized its own professional training and expertise.

The Board is convinced that both questions must be answered in the affirmative. LIFO inventory work papers are an integral part of the client's books and records. The CPA obtains the basic inventory and pricing information from the client and then uses this information to create the LIFO inventory layers. Information about all of the layers is essential to the preparation of the client's tax returns and financial statements. In addition, the Board is satisfied that the LIFO inventory work papers were not otherwise available to Erickson. Erickson Truck did not have the LIFO inventory work papers and

had never been provided a copy of them. The Board rejects the suggestion that the working papers should be considered "available to the client" merely because another CPA could or may be able to recreate the LIFO working papers, at additional cost to the client, using inventory and pricing information in the client's possession. Finally, 193A IAC 11.5(2) did not provide an exception to the duty to furnish the work papers if the former client owed the CPA money.

Based on the rule in effect prior to July 1, 2002, the Respondent CPA firm should have furnished Erickson Truck with a copy of the LIFO working papers. The preponderance of the evidence established that from November 2001 through June 30, 2002, the Respondent CPA firm was in violation of 193A IAC 11.5(2)"d".

II. Statute and Rule Effective After July 1, 2002.

Effective July 1, 2002, the legislature enacted Iowa Code section 542.18(2003), which provides, in relevant part:

542.18 Licensee's working papers-client records.

1. Subject to section 542.17, all statements, records, schedules, working papers, and memoranda made by a licensee or a partner, shareholder, officer, director, member, manager, or employee of a licensee, incident to, or in the course of, rendering services to a client, except reports submitted by the licensee to the client and except for records that are part of the client's records, are the property of the licensee in the absence of an express agreement between the licensee and the client to the contrary...

2. A licensee shall furnish to a client or former client, upon request and reasonable notice, the following:

a. A copy of the licensee's working papers, to the extent that such working papers include records that would ordinarily constitute part of the client's records and are not otherwise available to the client.

...

193A IAC 13.5(2) was also effective July 1, 2002 and provides, in relevant part:

13.5(2) Records. A CPA or LPA shall furnish to a client or former client, upon request made within a reasonable time:

...

b. In addition, the CPA or LPA shall furnish to a client, after the original issuance of the document in question to the client or former client, the following items, provided all fees due to the CPA or LPA are paid:

...

(3) A copy of the working papers of the CPA or LPA to the extent that such working papers include records which would ordinarily constitute part of the client's books and records and are not otherwise available to the client.

...

After July 1, 2002, the requirements of 193A IAC 11.5(2)"d" were codified at Iowa Code section 542.18(2)(2003), but the obligation to furnish a copy of the LIFO working papers did not change. However, the Board's new rule contained additional provisions addressing non-payment: "*after the original issuance of the document in question to the client or former client, the following items, provided all fees due to the CPA or LPA are paid.*" (additions in italics) These amendments were added by the Board to clarify that if the CPA had previously provided the working papers to the client, it was not obligated to provide a second copy unless all fees were paid. The change in the rule has no application to the facts present in this case, where the LIFO working papers were requested but were not provided to the client until after the fee dispute was resolved.

Based on the statute and rule in effect after July 1, 2002, the Respondent CPA firm should have provided its former client with a copy of the LIFO working papers upon request. The preponderance of the evidence further established that from July 1, 2002 until approximately December 24, 2002, the Respondent CPA firm was in violation of Iowa Code section 542.18(2)(a)(2003) and 193A IAC 13.5(2)"b."

III. Sanction

The Board considered the available sanctions and the specific factors relevant to the imposition of civil penalties. 193A IAC 16.3. The Board determined that the Respondent CPA firm was sincere in its belief, albeit mistaken, that it was not required to furnish the LIFO working papers to its former client. The

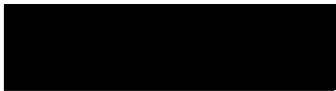
Respondent has pursued its legal arguments in good faith and has been cooperative with the Board. The LIFO working papers were in fact provided to the client within three weeks after the Board filed its Complaint. Finally, the Respondent CPA firm has assured the Board that it will comply with the Board's Decision in this case, and the Board is satisfied that a specific sanction is not necessary to ensure the Respondent's compliance or to deter future violations.

DECISION AND ORDER

IT IS THEREFORE ORDERED that Anderson, Gabelmann, Lower, Whitlow, P.C., Firm Permit No. 2002-0690, is found to have violated 193A IAC 11.5(2)"d," Iowa Code section 542.18(2)(a)(2003), and 193A IAC 13.5(2)"b". However, no sanctions will be imposed for the violation.

IT IS FURTHER ORDERED, pursuant to Iowa Code section 272C.6 and 193 IAC 7.41(1), that the Respondent shall pay \$75.00 within thirty (30) days of receipt of this decision for fees associated with conducting the disciplinary hearing. In addition, the Respondent shall pay all applicable costs of the transcript, if one is ordered, the costs of the court reporter, and any witness fees or expenses incurred by the state of Iowa. An itemization of these costs has been attached to this Decision and Order and are also payable within thirty (30) days.

Dated this 5th day of September, 2003.


linda Crim Hopkins, CPA
Chairperson
Iowa Accountancy Examining Board

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