

BEFORE THE ACCOUNTANCY EXAMINING BOARD
OF THE STATE OF IOWA

IN THE MATTER OF)	CASE NUMBER: 89-28
)	DIA NUMBER: 03DOCAB001
JOHN L. HENSS)	
)	
RESPONDENT)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	DECISION AND ORDER
)	

On June 10, 1994, the Iowa Accountancy Examining Board (Board) revoked CPA certificate number 499, issued to John L. Henss (Respondent). The Respondent's initial Application for Reinstatement was denied on July 21, 1997. On November 24, 2003, the Respondent filed a second Application for Reinstatement.

The hearing on reinstatement was held on January 30, 2004 at 11:00 a.m. in the Board conference room at 1920 S.E. Hulsizer, Ankeny, Iowa. The Respondent appeared and was self-represented. 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, Chairperson; Wesley Stille, CPA; Ted Lodden, CPA; Tom Engelman, CPA; Richard Johnson, CPA; Susan Loy, LPA; and Susan Boe, Public Member. 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 Respondent elected to have an open hearing, pursuant to Iowa Code section 272C.6(1).

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 Board directed the Administrative Law Judge to prepare this Decision and Order, in accordance with their deliberations.

THE RECORD

The record includes the testimony of the witness, State Exhibits 1-9, and Respondent Exhibits A and B.

FINDINGS OF FACT

1. On June 10, 1994, the Iowa Accountancy Examining Board issued Findings of Fact, Conclusions of Law, and an Order to the Respondent, which revoked his CPA certificate and ordered him to pay a civil penalty of \$1,000.00 within thirty (30) days. The Respondent was prohibited from applying for reinstatement until two years after the date of revocation, and reinstatement would only be granted if the Respondent satisfied the requirements of 193A IAC 12.16. (State Exhibit 4)

a) In its decision, the Board found that the Respondent had engaged in conduct discreditable to the public accounting profession, in violation of Iowa Code section 542C.10(1993), and as defined by 193A IAC 11.6(1). The Respondent had been permanently enjoined by the United States Court of Appeals for the Eighth Circuit from serving directly or indirectly as a fiduciary to any employee benefit plan subject to ERISA and permanently enjoined from acting as a service provider to any ERISA plan.

b) The Eighth Circuit found that the Respondent and his partner were corporate insiders who used their positions of trust and confidence to involve the employee stock ownership plan (ESOP) in transactions in which they had personal interest and concluded that they must be responsible for any breaches of fiduciary duty that occurred in connection with the transactions subject to ERISA.

c) The Court further concluded that they had violated ERISA fiduciary duties by their "reprehensible self-dealing, not the kind of divided but honest loyalty Congress intended" and that the Respondent "displayed an appalling insensitivity to the proper role of ESOPs and ESOP fiduciaries." The Court stated that the Respondent's actions demonstrated a "fundamental misunderstanding of the ERISA statute, regulations, and case law as to require that he have no further opportunities to subvert this important federal law."

(State Exhibits 4; 7)

2. The Respondent appealed the Board's Revocation Order to the Polk County District Court, and a Stay Order was issued on July 29, 1994. Pursuant to the terms of the Stay Order, the Respondent was not required to comply with 193A IAC 12.12(3) while his appeal was pending. 193A IAC 12.12(3) required a licensee whose certificate has been revoked to notify all clients, in writing, within 15 days of receipt of the Board's final order, of the fact of the revocation. In addition, licensees are required to advise clients to obtain alternative professional services. Within 30 days, the licensee is required to file copies of the notice sent to clients with the Board. Compliance with the notice requirement was a condition of reinstatement. (State Exhibits 5, 9)

3. The Stay Order further ordered the Respondent to refrain from publicly displaying his CPA certificate, from causing any communication to be made referring to him as a "certified public accountant," and from engaging in any professional activity requiring a certificate as a certified public accountant. (State Exhibit 9)

4. On April 11, 1995, the Polk County District Court issued an Order affirming the Board's revocation decision, dissolving the Stay Order entered on July 29, 1994, and ordering the Respondent to comply with the terms of the Board Order issued on June 10, 1994. (State Exhibit 6)

5. The Respondent filed an initial Application for Reinstatement, which the Board denied on July 21, 1997, following an evidentiary hearing. In that case, the Board found that:

a) The Respondent had not paid the \$1,000.00 civil penalty required by the Board's Order dated June 10, 1994. The Respondent claimed financial inability to pay the civil penalty.

b) The Respondent never sent a notice to his clients stating that his certificate of certified public accountant had been revoked, as required by 193A IAC 12.12(3). The Respondent testified that he had few clients remaining at the time of his revocation and that he did not "own" clients, and therefore unless he was currently doing work for them he did not know if they would ever return to him for additional services. The Respondent further testified that he showed clients for whom he had "work in progress" a copy of a

newsletter that contained a publication of the revocation action by the Board and also offered clients a copy of the Eighth Circuit decision.

c) On November 18, 1994, January 10, 1995, March 15, 1995, and June 30, 1995, the Respondent's office issued billing statements to two clients in Missouri that identified the Respondent as a "C.P.A." The Respondent's explanations for these billing statements were not credible.

d) The Respondent never returned his certificate to the Board office following his revocation.

(State Exhibit 9)

6. As of January 30, 2004, the Respondent still has not paid the \$1,000.00 civil penalty imposed on him by the Board's Order dated June 10, 1994. The Respondent has the financial ability to pay but challenges the Board's authority to require payment when his license has been revoked. (Testimony of Respondent)

7. As of January 30, 2004, the Respondent still has not sent clients written notice of the Board's June 10, 1994 revocation action, nor has he provided the Board with written verification of the notice.

At the reinstatement hearing on January 30, 2004, the Respondent provided the Board with a copy of an undated document entitled "Disclosure," which he wrote while working on a manuscript. (Respondent Exhibit A) The Respondent testified that he personally handed this document to most of his clients at the time his license was revoked and that he currently gives the document to all of his new clients. The "Disclosure" describes the Respondent's education, work history, and his purchase of a meat packing company with a group of investors. The "Disclosure" also states that the Department of Labor filed a lawsuit against several of the owners and appealed a district court decision to the Eighth Circuit. The "Disclosure" describes the Respondent's disagreement with the decision of the Eighth Circuit and with the proceeding before the Iowa Board of Accountancy. However, the "Disclosure" never states that the Board has revoked the Respondent's CPA certificate. (Testimony of Respondent; Respondent Exhibit A)

8. The Respondent still has not surrendered his CPA certificate to the Board. According to the Respondent, he gave his certificate to his attorney during the judicial review proceeding, and his attorney has since been unable to locate it. (Testimony of Respondent)

9. The Respondent's current accounting practice involves income tax preparation for approximately 250 clients and does not require a CPA certificate. (Testimony of Respondent)

CONCLUSIONS OF LAW

193A IAC 16.5 provides, in relevant part:

193A-16.5(272C,79GA,ch 55) Reinstatement.

16.5(1) The term "reinstatement" as used in this rule and in rule 193-7.38(17A,272C) shall include the reinstatement of a suspended license, ...and the issuance of a new license following the revocation or voluntary surrender of a license.

16.5(2) Any person whose license has been revoked, suspended or restricted by the board... may apply to the board to modify or terminate the suspension, issue or reissue the license,... in accordance with 2001 Iowa Acts, chapter 55, section 12, rule 193-7.38(17A,272C), the provisions of this rule, and the terms of the order of revocation...

...
16.5(4) All proceedings for reinstatement shall be initiated by the respondent and shall be subject to the procedures set forth in rule 193-7.38...

193 IAC 7.38(5) provides that an application for reinstatement shall allege facts which, if established, will be sufficient to enable the board to determine that the basis for the revocation... no longer exists and that it will be in the public interest for the license to be reinstated. Compliance with subrule 7.30(3) must also be established. The burden of proof to establish such facts shall be on the respondent.

193 IAC 7.30(3) provides:

7.30(3) Notification of clients. Within 15 days (or such other time period specifically ordered by the board) of the licensee's receipt of a final decision of the board, whether entered by consent or following hearing, which suspends or revokes a license...the licensee shall notify in writing all current clients of the fact that the license has been suspended, revoked or voluntarily surrendered. Such notice shall advise clients to obtain alternative professional services. Within 30 days of receipt of the board's final order, the licensee shall file with the board copies of the notices sent. Compliance with this requirement shall be a condition for the application for reinstatement.

Based on this record, the Board is unable to conclude that the basis for the revocation of the Respondent's CPA certificate no longer exists or that it is in the public interest for his certificate to be reinstated. The Respondent has failed to comply with the terms of the Board's June 10, 1994 Order. He has not paid the \$1,000.00 civil penalty, although he no longer claims inability to pay. The Respondent now seeks to challenge the Board's authority to impose the \$1,000.00 civil penalty, even though the Polk County District Court has affirmed the Board's order.

Any challenge to the Board's authority to impose a civil penalty is untimely and has been waived. In addition, the Respondent still has not surrendered his CPA certificate to the Board, nor has he adequately accounted for it.

The Respondent never sent written notices to his clients notifying them of the Board's revocation action, as formerly required by 193A IAC 12.12(3) and as currently required by 193 IAC 7.30(3), and consequently also has not provided the Board with the required copies of his notices to clients. Contrary to his testimony in his first reinstatement hearing, the Respondent now claims that he provided clients with a copy of the "Disclosure" marked Exhibit A. This testimony was not credible, but even if the Respondent had provided all clients with this disclosure, it does not satisfy the requirements of 193A IAC 12.12(3) or 193 IAC 7.30(3). The document fails to notify clients that the Respondent's CPA certificate was revoked by the Board and suggests that the Respondent has been continuously practicing public accounting since 1975.

Finally, the Respondent continues to assert that the decision of the Eighth Circuit was in error and that this Board was not justified in revoking his CPA certificate. The Respondent failed to demonstrate that anything has changed since his last reinstatement hearing. In light of the Respondent's failure to comply with the revocation order, the Board cannot conclude that the reason for the revocation of the Respondent's CPA certificate no longer exists or that it is in the public interest to reinstate it.

Respondent's Legal and Constitutional Arguments

Due Process/Equal Protection

In his Petition for Reinstatement, the Respondent provides sketchy references to court proceedings and news stories involving other CPA firms and argues that the Board's action in his case violates the due process and equal protection clauses of the United States Constitution. None of the cases cited by the Respondent concern actions taken by this Board. The Board's action revoking the Respondent's CPA certificate was upheld on judicial review in 1995. Any challenge to the revocation is untimely. The issue in this proceeding is limited to whether the Respondent has met his burden to establish that his CPA certificate should be reinstated. The Respondent has been afforded an evidentiary hearing on this issue. The Respondent's constitutional rights to equal protection and due process have not been violated by the Board.

The Respondent further asserts that a "secret witness" or "secret testimony" was presented to the Board in his original hearing, in violation of his due process rights. The Respondent submitted a copy of a letter dated June 30, 1994 that he obtained through the Freedom of Information Act (FOIA) (Respondent Exhibit B). Again, this challenge is clearly untimely. The Respondent could have obtained this letter and presented his arguments to the district court on judicial review. In addition, this argument is clearly without merit. The letter described by the Respondent as "secret evidence" is nothing more than a courtesy letter from an assistant attorney general to the attorney who represented the U.S. Department of Labor in the federal court case involving the Respondent. The letter does not establish or even suggest that any "secret" evidence was presented to the Board.

Statutory Interpretation of Iowa Code section 542C.21

The Respondent's certificate was revoked pursuant to the Board's authority under Iowa Code section 542C.21(1993), which provided, in relevant part:

After notice and hearing as provided in section 542C.23, the board may revoke or may suspend for a period not to exceed two years, a certificate issued under section 542C.5 or a license issued under 542C.7 or 542C.8,....

The Respondent argues that the two-year limit applied to both suspensions and revocations because the legislature did not place a comma after the word "revoke." The Board disagrees.

In the construction of statutes, words and phrases shall be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such meaning. Iowa Code section 4.1(38). When Iowa Code section 542C.21 is read in context and in the context of the entire statute, it is clear that the legislature did not place a time limit on revocations. Rather, the legislature provided that the Board "may revoke" or "may suspend for a period not to exceed two years..." Iowa Code section 542C.21(1993). In Iowa Code section 542C.24(1993), the legislature clearly conveys that a revoked certificate is voided when it provided that "upon application in writing and after hearing pursuant to notice, the board may issue a new certificate to a certified public accountant whose certificate has been revoked..." See also Iowa Code section 272C.3(2)(1993) ("Each licensing board may impose one or more of the following as licensee discipline: a. Revoke a license, or suspend a license either until further order of the board or for a specified period, upon any of the grounds specified in section...542C.21...")

This interpretation is entirely consistent with the common definitions of "revoke" and "suspend." "Revoke" means to "annul by recalling or taking back; to repeal; rescind," Webster's Collegiate Dictionary, 2nd Ed. (1948); and "to annul or make void by recalling or taking back, cancel, rescind, repeal, reverse," Black's Law Dictionary, Revised 4th Ed. (1968). In contrast,

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"suspend" means "to debar temporarily from a privilege, office, function, etc; as to suspend a student," Webster's Collegiate Dictionary, 2nd Ed. (1948); and "to interrupt; to cause to cease for a time; to postpone; to stay, delay or hinder; to discontinue temporarily, with an expectation or purpose of resumption," Black's Law Dictionary, Revised 4th Ed. (1968). Iowa Code section 542C.21(1993) did not place a two-year time limit on revocations.

ORDER

IT IS THEREFORE ORDERED that the application for reinstatement of a CPA certificate, filed by John L. Henss, is hereby DENIED.

Dated this 27th day of February, 2004.


Linda Crim Hopkins, CPA
Chairperson
Iowa Board of Accountancy Examiners

cc: John L. Henss
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(CERTIFIED)

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Judicial review of the board's decision may be sought in accordance with the terms of Iowa Code chapter 17A.