

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, BOARD )  
OF ACCOUNTANCY, )  
 )  
Petitioner, )  
 )  
vs. ) CASE NOS. 92-3421  
 ) 92-5696  
EDWIN TUNICK, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in the above-styled cases on May 4, 1994 in Fort Lauderdale, Florida, before J. Stephen Menton, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charles F. Tunnicliff, Chief Attorney  
Department of Business and  
Professional Regulation  
Northwood Centre, Suite 60  
1940 North Monroe Street  
Tallahassee, Florida 32399-0792

For Respondent: Walter B. Lebowitz  
Qualified Representative  
420 Lincoln Road, Suite 238  
Miami Beach, Florida 33139

STATEMENT OF THE ISSUE

The issue in these consolidated cases is whether disciplinary action should be taken against Respondent's license to practice as a certified public accountant in the state of Florida based upon the alleged violations of Chapter 473, Florida Statutes, set forth in the Amended Administrative Complaints filed by Petitioner.

PRELIMINARY STATEMENT

On January 23, 1992, the Department of Professional Regulation (the "Petitioner" or the "Department") 1/ filed an Administrative Complaint (the "First DOAH Complaint") against Respondent Edwin Tunick charging Respondent with violating the laws and rules governing the practice of certified public accounting in Florida. Specifically, the First DOAH Complaint alleges that Respondent violated Sections 473.323(1)(a), 473.323(1)(g), 473.323(1)(h), Florida Statutes, and/or Rules 21A-22.001 and 21A-36.001(23), Florida Administrative Code (these rules have subsequently been renumbered as Rules

61H1-22.001 and 61H1-36.001(23), Florida Administrative Code). Essentially, the First DOAH Complaint charges Respondent with violating the terms of the probation imposed by the Department in a prior disciplinary proceeding, DPR Case Number 63043. Respondent disputed the allegations contained in the First DOAH Complaint and requested a formal hearing pursuant to Section 120.57, Florida Statutes. The case was referred to the Division of Administrative Hearings ("DOAH") where it was assigned DOAH Case Number 92-3421.

On July 6, 1992, the Department filed another Administrative Complaint (the "Second DOAH Complaint") against Respondent. The Second DOAH Complaint alleges that Respondent violated Sections 473.323(1)(a), 473.323(1)(g), 473.323(1)(h), Florida Statutes, and/or Rules 21A-22.001, 21A-22.002, and 21A-22.003, Florida Administrative Code, (these rules have subsequently been renumbered as Rules 61H1-22.001, 61H1-22.002, 61H1-22.003, Florida Administrative Code) in connection with his preparation of financial statements for American British Enterprises, Inc. and Federal Restaurants, Inc. Respondent denied the allegations of the Second DOAH Complaint and requested a formal administrative hearing pursuant to Section 120.57, Florida Statutes. The case was referred to DOAH where it was assigned DOAH Case Number 92-5696.

By Order dated October 1, 1992, DOAH Case Numbers 92-3421 and 92-5696 were consolidated. The Department was subsequently permitted to amend both of the administrative complaints pursuant to an Order dated November 3, 1993. After several continuances were granted at the joint request of the parties, the consolidated cases proceeded to hearing on May 4, 1994.

At the hearing, Petitioner presented the testimony of three (3) witnesses: Mark S. Einbinder, CPA, who was accepted as an expert in certified public accounting; Marlyn D. Felsing, CPA, who was accepted as an expert in auditing, tax and certified public accounting; and Morton Weinberger, CPA, who was accepted as an expert in auditing and certified public accounting.

At the outset of the hearing, Petitioner submitted a notebook containing twenty seven (27) premarked exhibits. During the course of the hearing, Petitioner's Exhibits 1-26 were accepted into evidence without objection. Petitioner's Exhibit 27 was an affidavit from Martha P. Willis, the deputy custodian of records for the Florida Board of Accountancy. During the hearing, Petitioner withdrew that exhibit and offered in its place a deposition of Ms. Willis taken on April 27, 1994. That exhibit was accepted without objection. In addition, during the hearing one of Petitioner's witnesses referred to Statements on Standards for Accounting and Review Services 1, ("SARS-1") Section .19. Petitioner requested an opportunity to submit a copy of SARS-1 as a late-filed exhibit. On May 17, 1994, Petitioner submitted a copy of SARS-1 which is hereby accepted into evidence as Petitioner's Exhibit 28.

Respondent presented the testimony of one witness, Morris I. Hollander, CPA, who was accepted as an expert in accounting and Securities Exchange Commission investigations and filings. Respondent offered five (5) exhibits into evidence, all of which were accepted without objection.

A transcript of the proceedings has been filed. At the conclusion of the hearing, the parties agreed upon a schedule for submitting proposed recommended orders. Petitioner timely submitted a proposed recommended order consisting of proposed findings of fact and conclusions of law. A ruling on each of Petitioner's proposed findings of fact is included in the Appendix to this Recommended Order. Respondent filed Respondents [sic] Proposed Final Order on August 20, 1994. Respondent's proposal consisted of a one page summary of the

proceedings and a proposed conclusion. No proposed findings of fact were submitted. Accordingly, no rulings are made in connection with Respondent's submittal.

#### FINDINGS OF FACT

Based upon the oral and documentary evidence adduced at the final hearing and the entire record in this proceeding, the following findings of fact are made:

1. At all times pertinent to these proceedings, Respondent was licensed to practice as a certified public accountant ("CPA") in the state of Florida, having been issued license number AC0001638. Respondent's most recent business address was 224 North Federal Highway, Suite #4, Fort Lauderdale, Florida 33301.

2. Petitioner has presented evidence of a number of Final Orders entered by the Florida Board of Accountancy (the "Board") against Respondent as a result of prior disciplinary action initiated by Petitioner. While the records presented are somewhat confusing and bear several different case numbers, it appears that, as a result of the various cases, Respondent has been on probation for approximately the last 12 years.

3. According to the records presented, the first action taken against Respondent's license is reflected in a Final Order dated December 31, 1981 and filed on February 8, 1982 in DPR Case Number 0000499. That Final Order indicates that a stipulation executed by Respondent "as to facts, law and discipline" was accepted by the Board "with no changes." The stipulation referenced in that Final Order was not included with the exhibits entered into evidence in this proceeding. Thus, the "facts, law and discipline" are not of record in this case.

4. Next, the Board entered a Final Order dated May 11, 1982 and filed on May 17, 1982 in DPR Case Numbers 16369, 16370 and 15399 imposing a \$1,000 fine against Respondent and suspending his license for eighteen (18) months. An Amended Final Order dated September 3, 1982 was filed in DPR Case Numbers 16369, 16370 and 15399 on September 15, 1982. That Amended Final Order accepted a signed stipulation dated July 30, 1982 and modified the Final Order entered on May 11, 1982. In lieu of the fine and suspension imposed in the May 11 Final Order, the Amended Final Order placed Respondent on probation for five years with a requirement for a review of Respondent's practice at the end of each year by a CPA selected by the Department at Respondent's expense. The independent certified public accountant was supposed to submit written and oral reports to the Board and the Department regarding Respondent's compliance with the applicable statutes and rules governing the accounting profession.

5. The Stipulation which was incorporated into the Amended Final Order specifically required Respondent to comply "with all provisions of Chapter 455 and 473, Florida Statutes, and the rules promulgated pursuant thereto." The Stipulation provided in part as follows:

D. The Board shall determine at a public hearing whether [Respondent] has complied with Chapters 455 and 473, F.S. and the rules promulgated thereto.

E. The Board may restrict or prohibit [Respondent's] practice of public accountancy during his period of probation as it deems

necessary to protect the public safety and welfare.

F. It is clearly understood and agreed that, in the event the DEPARTMENT, the BOARD or the BOARD'S Probable Cause Panel find sufficient evidence to believe reasonable cause exists that [Respondent] has violated any of the conditions of probation as outlined above, a notice of said violation shall be sent to [Respondent], by certified mail, setting forth the nature of the alleged violation and an emergency hearing will be held by the BOARD or the BOARD'S Probable Cause Panel, and upon a find [sic] of probable cause, [Respondent's] probation may be vacated and his license to practice accountancy in the State of Florida, subject to automatic suspension, with further disciplinary proceedings, pursuant to Chapters 455 and 473, F.S. If Respondent has not complied with all the terms and conditions of this joint stipulation and final order of the BOARD, the BOARD shall enter an Order imposing such further terms and conditions of probation pursuant to the statutory powers set forth in 473.323(1)(3), F.S., and shall further cause said matter to be referred to the BOARD'S Probable Cause Panel or such other jurisdictional authority as may be established for purposes of determining probable cause and initiating further administrative and/or judicial action against the Respondent.

\* \* \*

5. [Respondent] expressly waives all further procedural steps and expressly waives all rights to seek judicial review of, or to otherwise challenge or contest the validity of a joint stipulation of facts, conclusions of law and imposition of discipline, and the final order of the BOARD incorporating said stipulation.

6. At a meeting on January 21, 1985, the Florida Board of Accountancy reviewed a report from the consultant hired to conduct the inspection and review of Respondent's public accountancy practice in accordance with the terms of the Amended Final Order entered on September 15, 1982. Based upon its review of the consultant's report, the Board imposed an additional condition of probation that all audits, reviews and compilations prepared by Respondent were to be reviewed prior to their issuance by a CPA selected by Respondent at Respondent's expense. This additional aspect of Respondent's probation was incorporated in a Final Order dated February 15, 1985 and entered on February 28, 1985 in DPR Case Number 0016369.

7. In an Administrative Complaint dated December 4, 1985, Petitioner charged Respondent with violating the terms of his probation by issuing compilations without prior review by another CPA. This Administrative Complaint was assigned DPR Case Number 0063064. As reflected in a Final Order dated February 23, 1987 and filed on March 10, 1987 in DPR Case Number 0063064, Respondent's probation was extended until September 1988 based upon a signed Stipulation dated November 16, 1986 which was accepted by the Board during its meeting on January 30, 1987.

8. As a result of the March 10, 1987 Final Order extending Respondent's probation, Respondent was required to continue to obtain review and approval by an independent CPA prior to issuance of any audited financial statements, reviewed financial statements and compiled financial statements and related accountant's reports.

9. In an Administrative Complaint dated December 7, 1989 in DPR Case Number 0063064, Petitioner charged Respondent with violating Section 473.323(1)(g), Florida Statutes, as a result of his issuance of financial statements without prior review by a CPA as required by the previous Final Orders entered against Respondent. The Complaint did not specify any date(s) or specific financial statements involved.

10. At a meeting on February 22, 1990, the Board accepted a Counter-Settlement Stipulation signed by Respondent on March 26, 1990 in Case Number 0063064. The Board entered a Final Order dated April 4, 1990 and filed on April 10, 1990 confirming its acceptance of the Counter-Stipulation. 2/ The Counter-Settlement Stipulation incorporated in the April 1990 Final Order extended Respondent's probation "until the terms of probation have been met." The terms of probation were stated to be:

A. That the Respondent shall not violate the provisions of Chapters 455 or 473, Florida Statutes or the rules promulgated pursuant thereto or the terms and conditions of this joint stipulation.

B. A Department of Professional Regulation Certified Public Accountant consultant shall interview the Respondent's clients to determine the type of work product they are receiving from the Respondent.

C. A Department of Professional Regulation Certified Public Accountant Consultant shall conduct a review of the Respondent's tax practice along with work papers at the Respondent's expense.

The Counter-Stipulation further provided that:

5. Respondent and the Department fully understand that this Stipulation, and the subsequent Final Order incorporating same, will not in any way preclude additional proceedings by the Board and/or Department against the Respondent for acts or omissions not specifically detailed in the investigative findings of the Department upon which a finding of probable cause was made.

6. Respondent and the Department expressly waive all further procedural steps, and expressly waives [sic] all rights to seek judicial review of or to otherwise challenge or contest the validity of the joint stipulation and the Final Order of the Board, if said stipulation is accepted by the Board and incorporated in the Final Order....

11. In early 1991, Marlyn Felsing, a CPA retained as a consultant to conduct a review of Respondent's work pursuant to the terms of his probation,

met with Respondent and reviewed financial statements, work papers and various tax returns prepared by Respondent for his clients. Felsing reviewed the financial statements and/or business tax returns for approximately four of Respondent's business clients and reviewed the personal income tax returns for approximately three of Respondent's clients who were business owners. He also reviewed all of the related work papers and discussed his review with Respondent.

12. Felsing prepared a report dated April 23, 1991 detailing several problems and deficiencies he found during his review. A copy of Felsing's report was offered into evidence in this case and he testified at the hearing regarding many of those findings. This evidence was offered in support of the charges in the First DOAH Complaint (DOAH Case Number 92-3421) as amended. Neither Felsing's report nor any of his findings are specifically alleged in the First DOAH Complaint. That Complaint referenced a probation report which "revealed deficiencies which were brought before the Probable Cause Panel, and it was determined that Respondent had violated the terms of the Final Order." As noted in the Preliminary Statement above, the First DOAH Complaint was filed on January 23, 1992.

13. As reflected in a Final Order dated June 19, 1991, and filed on July 1, 1991 in DPR Case Number 0063064, the Board reviewed a probation report during its meeting on May 21, 1991 and approved a settlement stipulation extending the probation imposed by the April 4, 1990 Final Order for a period of one (1) year. The settlement stipulation referenced in this July 1, 1991 Order has not been offered into evidence in this proceeding.

14. As best can be determined from the evidence presented in this case, the Final Order entered in DPR Case Number 0063064 on July 1, 1991, was entered after review of the probation report prepared by Marlyn Felsing on April 23, 1991. Thus, it appears that the Board has already taken final action with respect to the deficiencies found in Felsing's report.

15. During the Board Meeting on May 21, 1991, the Board also considered whether disciplinary action should be taken against Respondent with respect to another Administrative Complaint filed against Respondent on January 7, 1991. That new Administrative Complaint was assigned DPR Case Number 95979 and contained allegations that Respondent "was associated with personal financial statements for Michael Raybeck which did not meet the appropriate standards."

16. As reflected in a Final Order dated June 19, 1991 and filed on July 1, 1991 in DPR Case Number 95979, the Board during its May 21, 1991 meeting accepted a settlement stipulation signed by Respondent on April 15, 1991. In that settlement stipulation, Respondent admitted the allegations in the Administrative Complaint in DPR Case Number 95979. The Settlement Stipulation provided as follows:

\* \* \*

Stipulated Disposition

2. Respondent's license to practice public accounting is currently on probation in case number 63064. Probation in this case shall run concurrently with the probation in case number 63064. The same CPA consultant who is assigned to review the Respondent's practice in Case Number 63064 shall also review the personal financial statements the Respondent's

office prepares. The consultant shall also review the Respondent's records to determine whether he is accepting commissions. These additional terms shall also be paid for by the Respondent.

\* \* \*

5. Respondent and the Department fully understand that this Stipulation, and the subsequent Final Order incorporating same, will not in any way preclude additional proceedings by the Board and/or Department against the Respondent for acts or omissions not specifically detained [sic] in the investigative findings of the Department upon which a finding of probable cause was made.

\* \* \*

8. This Settlement Stipulation is [sic] an admission of any liability on behalf of the Respondent and is being entered into merely to resolve a dispute. It shall not be admissible in any court of law or any subsequent administrative proceeding for any purpose.

17. As reflected in an Order dated September 29, 1992 and filed on September 30, 1992 in DPR Case Number 90-95979, the Board reviewed a probation report during its September 24, 1992 meeting and determined "that the probation imposed upon Respondent by the Final Order dated July 1, 1991, shall be extended and/or modified as follows: extend probation and defer action until Case Number 90-13254 is resolved." Case Number 90-13254 is the Second DOAH Complaint, which was filed on July 6, 1992 (DOAH Case Number 92-5696). The Second DOAH Complaint includes specific allegations against Respondent based upon his purported preparation of misleading financial statements for American British Enterprises, Inc. and Federal Restaurants, Inc.

#### The Second DOAH Complaint

18. The evidence presented in this case established that Respondent provided a number of accounting services to American British Enterprises, Inc. and Federal Restaurants, Inc. The exact nature and scope of the services provided by Respondent are not entirely clear.

19. Respondent's records of his engagement include a balance sheet of Federal Restaurants as of August 17, 1987; Consolidated Financial Statements of American British Enterprises, Inc. as of August 25, 1987; Interim Compiled Financial Statements, American British Enterprises, March 31, 1988; Financial Statements of American British Enterprises, Inc. November 30, 1988; and Financial Statements of American British Enterprises, Inc., December 31, 1988.

20. The Second DOAH Complaint, as amended, alleges that the financial statements referenced in paragraph 19 above were included in due diligence packages for American British Enterprises and were distributed to broker-dealers. No persuasive evidence was presented regarding any such distribution.

21. The Second DOAH Complaint also alleges that "Respondent distributed misleading financial statements to brokers with the purpose of driving up the price of the stock so they could sell shares they controlled at a profit." No evidence was presented to support this allegation.

22. Respondent's counsel suggested that all of the financial statements in question were simply drafts and were not intended to be issued. The evidence established that Respondent executed a letter in connection with the August 17, 1987 Balance Sheet of Federal Restaurants which provided as follows:

I have examined the accompanying Balance Sheet of Federal Restaurants, Inc., as of August 17, 1987 whose sole Assets are Cash and [sic] Purchase Deposit. My examination was made in accordance with standards established by the American Institute of Certified Public Accountants and accordingly, included such procedures as I considered necessary in the circumstances. In my opinion the enclosed Balance Sheet represents the financial position of Federal Restaurants, Inc., as of August 17, 1987 in accordance with generally accepted accounting principals.

Similarly, Respondent's records include a signed letter to the Board of Directors of American British Enterprises in connection with the August 28, 1987 Consolidated Balance Sheet. That letter provides that Respondent conducted an examination "in accordance with generally accepted auditing standards and accordingly, included such tests of the accounting records and such other auditing procedures as I considered necessary in the circumstances." The letter further opines that the financial statements "present fairly the Consolidated Financial Position...[of the companies] in conformity with generally accepted accounting principals."

Respondent's records also include a signed letter regarding both the November, 1988 and December, 1988 Financial Statements for American British Enterprises indicating that Respondent had conducted an audit in accordance with generally accepted auditing standards and that, in his opinion, the financial statements "present fairly, in all material respects, the financial position" of the company as of the stated date. There is no indication on any of these financial statements that they were drafts that were not to be issued.

23. Aside from the letters noted in paragraph 22, the only evidence presented that any of the financial statements listed in paragraph 19 above were issued was the testimony of one of Petitioner's experts who suggested that the statements had to have been issued since they were found in the SEC's files. However, no direct evidence was presented to establish that any investors or potential investors received the financial statements. Moreover, no evidence was presented that any such investors suffered a loss as a result of their reliance upon the financial statements.

24. Certified public accountants are required to utilize specific guidelines in the performance of accounting services. Those guidelines are codified in the Statements on Standards for Accounting and Review Services ("SSARS"). The failure to abide by the SSARS guidelines constitutes performance below acceptable accounting standards.

25. Petitioner has presented testimony from two experts regarding the deficiencies in the various financial statements referenced in paragraph 19 above. Many of the problems cited by Petitioner's experts relate to alleged deficiencies in Respondent's work papers. Respondent's expert has challenged some of those alleged deficiencies. Because the work papers have not been offered into evidence, it is impossible to resolve some of the conflicts in the



experts' opinions. Nonetheless, the evidence was sufficient to clearly and convincingly demonstrate that Respondent's work was not in accordance with generally accepted accounting principals in several respects and the financial reports identified in paragraph 19 failed to comply with the SSARS in several ways.

26. The August 17, 1987 balance sheet of Federal Restaurants indicates that the only assets of the company were cash and a purchase deposit on a contract to acquire a restaurant.

27. The balance sheet of Federal Restaurants as of August 17, 1987 has no notes to it. Accounting Principals Board ("APB") Opinion 22 provides that a description of all significant accounting policies of the reporting entities should be included as an integral part of the financial statements. In this particular instance, the omission of accounting policies is of minor importance since the balance sheet only reflects two assets: cash being held in escrow and a deposit on a contract to purchase a restaurant (the "Purchase Contract"). As discussed below, none of the financial statements prepared by Respondent disclosed the terms of the Purchase Contract. Furthermore, it appears from other documents in Respondent's records that the corporation is wholly owned by American British Enterprises and/or is jointly controlled, but there is no disclosure of that relationship in the financial statements. These omissions are significant deficiencies which have not been explained.

28. Statement of Auditing Standards ("SAS") 41 requires work papers to support the conclusions of an audit. According to SAS 41, the work papers constitute the principal record of the work that the auditor has done and the conclusions that he has reached concerning significant matters. Respondent's records do not include work papers for the August 17, 1987 audit.

29. SAS 22 provides guidance to an independent auditor making an examination in accordance with generally accepted auditing standards on the considerations and procedures applicable to planning and supervision, including preparing an audit program, obtaining knowledge of the entity's business, and dealing with differences of opinion among firm personnel. While there is conflicting evidence as to what was included in Respondent's work papers, the evidence was clear that Respondent's records for the August 17, 1987 audit do not comply with the requirements of SAS 22, because there was no clearly identified planning memos or audit programs. In fact, there is not even an engagement letter.

30. SAS 19 requires an independent auditor to obtain certain written representations from management as part of an examination made in accordance with generally accepted auditing standards and provides guidance concerning the representations to be obtained. Petitioner's experts contend that Respondent's work papers do not include an appropriate representation letter from management for any of the Financial Statements. Respondent's expert contends there was such a letter with respect to the August 27, 1987 Consolidated Financial Statements. While it is not clear what is contained in the records, it is clear that the records do not clarify conflicting documentation in Respondent's work papers regarding the relationship between Federal Restaurants and American British Enterprises. Furthermore, Respondent's records do not include a clear statement from management regarding the terms of the Purchase Contract and the apparent contingencies involved with that Contract. Consequently, Respondent has failed to comply with SAS 19 and SAS 45 (which addresses related-party disclosures).

31. The August 27, 1987 Consolidated Financial Statements are not properly consolidated in accordance with Accounting Research Bulletin ("ARB") 51. In addition, the consolidated Financial Statements do not include the disclosures required by Accounting Principals Board Opinion 22. Respondent's expert contends that the statements were mistakenly entitled and they should have been captioned as "combined" rather than consolidated financial statements. Even if this after the fact justification is accepted, the statements do not adequately disclose the relationship between the companies.

32. Respondent's expert suggests that the August 25 Consolidated Financial Statement for American British Enterprises and Federal Restaurants reflects a voidable acquisition of Federal Restaurants by American British Enterprises. If this interpretation is accepted, the August 17, 1987 Balance Sheet for Federal Restaurants was not necessarily misleading for failure to disclose its relationship with American British Enterprises. However, the August 25, 1987 Consolidated Financial Statements are incomplete since the transaction is not fully explained. Moreover, there is no disclosure that the companies were apparently under common control or ownership.

33. With respect to the November, 1988 balance sheet of American British Enterprises, the evidence established that there was a discrepancy between the amount reflected in the financial statement for a note receivable which was the major asset of the corporation and the confirmation in the work papers regarding that asset. While this discrepancy may have been due to a discount and/or accrued interest, no explanation is provided. The discrepancy constitutes a violation of SAS 1, Section 331, which addresses the appropriate background information for receivables, and SAS 1, Section 530 which addresses the dating of the auditor's report. If the discrepancy is due to a discount, Respondent failed to comply with APB Opinion 6, paragraph 14 which requires unearned discounts to be shown as a deduction from the related receivable and/or APB Opinion 21, paragraph 16 which provides for the discount or premium to be reported on the balance sheet as a direct deduction from or addition to the face amount of the note. The work papers for the November audit do not include a reconciliation between the 1982 financial statements of the predecessor corporation and the 1987 statements. There is no documentation of efforts to communicate with the prior auditor nor is there any discussion of the consistency of application of accounting principals between the two statements. As a consequence, the statements do not conform with SAS 7 which addresses communications with a prior auditor. The work papers fail to reflect any audit work being performed on the appraisal for the equipment collateralizing the note. In addition, the work papers include a confirmation from the stock transfer agent that doesn't agree with the number of shares reflected on the financial statement. There is no explanation for this discrepancy nor is there any clear indication of the audit work performed. The financial statements also include a footnote referencing a joint venture agreement. Respondent's records do not include any evidence of audit work performed with respect to this venture agreement.

34. The deficiencies noted in paragraph 33 also appear in the December 31, 1988 financial statements for American British Enterprises. Furthermore, Respondent's records do not contain an audit file for this December statement.

35. The November 30, 1988 and the December 31, 1988 audits of American British Enterprises do not contain a segregation between current and noncurrent assets. This deficiency is relatively insignificant since the company was essentially just a holding company. However, it does constitute a violation of ARB 43. Similarly, the cash flows in the financial statements were not

presented in the appropriate format or style required by Statement of Financial Accounting Standards 95. However, it appears that all of the necessary information was present.

36. The deficiencies found in the financial statements prepared for Federal Restaurants and American British Enterprises constitute negligence on the Respondent's part and establish a failure to exercise professional competence and due professional care in the performance of accounting services.

37. On or about June 14, 1990, the Securities and Exchange Commission ("SEC") filed a civil lawsuit against Respondent and three other defendants alleging the preparation of false and misleading financial statements for American British Enterprises, Inc. On August 5, 1991, Respondent executed a Consent of Edwin Tunick to the Entry of a Final Judgement of Permanent Injunction in the civil action initiated by the SEC. On September 2, 1991, a Final Judgement of Permanent Injunction as to Edwin Tunick was entered by the United States District Court for the Southern District of Florida (Fort Lauderdale Division) in Case Number 90-6483CIV-ZLOCH. That Final Judgment "permanently restrained and enjoined" Respondent from violating Section 17(a) of the Securities Act, 15 U.S.C. 77q(a) and Section 10(b) of the Exchange Act, 15 U.S.C 78 (j)b and Rule 10b-5 promulgated thereunder. The Final Judgment did not include any specific findings of any violations of the federal securities laws.

#### CONCLUSIONS OF LAW

38. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Sections 120.57(1) and 473.323(3), Florida Statutes.

39. Pursuant to Section 473.323, Florida Statutes, Petitioner is authorized to suspend, revoke, and/or impose an administrative fine not to exceed a \$1,000 if it finds that a licensed certified public accountant has violated any of the provisions of that Statute.

40. Section 473.323, Florida Statutes, provides, in pertinent part:

(1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:

(a) Violation of any provision of S. 473.317, s. 455.227(1), or any other provision of this act;

\* \* \*

(e) Making or filing a report or record which the licensee knows to be false, willfully failing to file a report or record required by state law... Such reports or records shall include only those which are signed in the capacity of a certified public accountant;

\* \* \*

(g) Upon proof that the licensee is guilty of fraud or deceit, or of negligence, incompetency, or misconduct, in the practice of public accounting;

(h) Violation of any rule adopted pursuant to this act or Chapter 455;

\* \* \*

(k) Performance of any fraudulent act while holding a license to practice public accounting;

\* \* \*

(3) When the board finds any licensee guilty of any of the grounds set forth in subsection (1), it may enter an order imposing one or more of the following penalties:

\* \* \*

(b) Revocation or suspension of a license.

(c) Imposition of an administrative fine not to exceed \$1,000 for each count or separate offense.

(d) Issuance of a reprimand.

(e) Placement of the licensee on probation for a period of time and subject to such conditions as the board may specify, including requiring the licensee to attend continuing education courses or to work under the supervision of another licensee.

(f) Restriction of the authorized scope of practice by the certified public accountant.

41. Petitioner has the burden of proof in this license disciplinary proceeding and, since Petitioner has requested revocation or suspension of Respondent's license, the allegations against Respondent must be proven by clear and convincing evidence. See, *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987); *Pic N' Save v. Department of Business Regulation*, 601 So.2d 245 (Fla. 1st DCA 1992); *Munch v. Department of Professional Regulation*, 595 So.2d 1136 (Fla. 1st DCA 1992); *Newberry v. Florida Department of Law Enforcement*, 585 So.2d 500 (Fla. 3d DCA 1991). "The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983).

42. As noted in *Smith v. Department of Health and Rehabilitative Services*, 522 So.2d 956 (Fla. 1st DCA 1988):

"clear and convincing evidence" is an intermediate standard of proof, more than the "preponderance of the evidence" standard used in most civil cases, and less than the "beyond a reasonable doubt" standard used in criminal cases. [citations omitted]

43. Disciplinary action may be based only upon the violations specifically alleged in the Administrative Complaint. See, *Kinney v. Department of State*, 501 So.2d 129, 133 (Fla. 5th DCA 1987); *Hunter v. Department of Professional Regulation*, 458 So.2d 842, 844 (Fla. 2d DCA 1984).

44. In the First DOAH Complaint, as amended, Petitioner charges Respondent with violating several sections of Section 473.323(1), Florida Statutes, as well as Rules 21A-22.0001 and 21A-36.0001(23), Florida Administrative Code. All of those alleged violations are based upon the assertion that Respondent violated his probation. The First DOAH Complaint does not include any specific incidences which purportedly constitute a violation of probation. Moreover, it appears that the Board has already taken final action with respect to the deficiencies contained in Marlyn Felsing's April 23, 1991 report. Specifically, the July 1, 1991 Final Order in DPR Case Number 0063064 extended Respondent's probation for an additional year. That Final Order was entered after the Board reviewed a probation report during its May 1991 meeting. While the probation report is not identified, indications are, and Petitioner has not disputed, that the Board was referring to Felsing's April 23 Report. Petitioner has provided

no explanation or justification for rescinding that Final Order and imposing some additional penalty based upon the same violations considered by the Board when it extended Respondent's probation. The July 1991 Final Order references a Settlement Stipulation which has not been offered into evidence in this proceeding. Petitioner has not alleged a breach of that Settlement Stipulation. In sum, because the First DOAH Complaint fails to delineate any specific violations and because it appears that all of the deficiencies cited in Marlyn Felsing's report and testimony were already considered by the Board when it entered the Final Order on July 1, 1991 in DPR Case Number 0063064, it is concluded that the First DOAH Complaint should be dismissed.

45. The Second DOAH Complaint, as amended, charges Respondent with violating Sections 473.323(1)(a), (e), (g), (h), and (k) Florida Statutes. These statutory provisions are set forth above.

46. No evidence was presented that Respondent knowingly or willfully filed any misleading reports or engaged in fraudulent conduct. Thus, the evidence was insufficient to establish that Respondent violated subsections (e) and (k).

47. Rule 21A-22, Florida Administrative Code, sets forth the competence and technical standards for licensees practicing public accounting during the time period in question. 3/ Subsections 22.001-.004 generally require a certified public accountant to exercise professional competence and due professional care in the performance of any accounting engagement and to comply with the pronouncements and standards published by the American Institute of Certified Public Accountants. Any deviation from these standards should be specifically justified. Petitioner has established that Respondent violated Rule 21A-22.001, Florida Administrative Code, which provides in pertinent part that a licensee shall comply with the following general standards and must justify any departure therefrom: undertake only those engagements which he or his firm can reasonably expect to complete with professional confidence; exercise due professional care in the performance of an engagement; adequately plan and supervise the engagement; and obtain sufficient relevant data to afford a reasonable basis for conclusions or recommendations in relation to an engagement. Petitioner has also established that Respondent violated Rule 21A-22.002, Florida Administrative Code, which provides in pertinent part that a licensee shall not permit his name to be associated with financial statements in such a manner as to imply that he is acting as an independent certified public accountant unless he has complied with the applicable generally accepted auditing standards. Finally, Petitioner has established that Respondent violated Rule 21A-22.003, Florida Administrative Code, which states that a "licensee shall not express an opinion that financial statements are presented in conformity with generally accepted accounting principals if such statements contain any departure from any such principal which has a material effect on the statements taken as a whole, unless he can demonstrate that due to unusual circumstances the financial statements would otherwise have been misleading. In such cases his report must describe the departure, the approximate affects thereof, if practical, and the reasons why compliance with the principal would result in a misleading statement."

48. As a consequence of the violations noted above, it is concluded that Petitioner has established by clear and convincing evidence that Respondent violated Section 473.323(1)(g), Florida Statutes, as a result of negligence in the practice of public accounting and Section 473.323(1)(h), Florida Statutes, by violating a rule adopted pursuant to Chapter 473.

49. Based upon the violations alleged in the First and Second DOAH complaints, Petitioner has requested revocation of Respondent's license. Rule 61H1-36.004, Florida Administrative Code, sets forth the disciplinary guidelines and the range of penalties for violations of Chapter 473, Florida Statutes. The penalties for a violation of Section 473.323(1)(g), Florida Statutes, include revocation, but apparently only if fraud or deceit is involved. As noted above, the evidence was insufficient to establish that Respondent engaged in fraudulent conduct.

50. For negligence or misconduct involving technical standards, Rule 61H1-36.004(2)(h) provides a minimum penalty of a letter of guidance and a maximum penalty of a reprimand and one (1) year probation.

51. The aggravating circumstances that can be considered in imposing a penalty in excess of the guidelines are set forth in Rule 61H1-36.004(3)(a). Those circumstances include the licensee's prior disciplinary history and the magnitude and scope of the engagement and the damage inflicted upon the general public by the licensee's misfeasance.

52. In this case, there is an extensive history of prior disciplinary action against Respondent. In addition, while the evidence presented regarding the First DOAH Complaint can not properly serve as an independent basis for the imposition of penalties in this proceeding, that evidence does raise serious concerns regarding Respondent's ability to practice public accounting with a minimum degree of professional proficiency.

53. On the other hand, permanent revocation of a professional license is a harsh punishment reserved for egregious cases where rehabilitation is improbable. See, *The Florida Bar v. Davis*, 361 So.2d 159 (Fla. 1978). Petitioner has not properly presented in this proceeding a sufficient basis for the extreme penalty which it is seeking. No evidence has been presented that any member of the public has ever suffered a loss as a result of Respondent's professional activities nor has any evidence been presented of any fraudulent or deliberately misleading actions taken by Respondent. As noted above, Respondent can only be disciplined in this proceeding for the allegations set forth in the Second DOAH Complaint. Respondent's prior disciplinary record justifies a substantial increase in the penalty, but revocation is not warranted based upon the facts properly presented in this case.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Board of Accountancy enter a Final Order dismissing the Administrative Complaint filed in DOAH Case Number 92-3421 (DPR Case Number 91-09729); finding Respondent guilty of violating Sections 473.323(1)(a), (g) and (h), Florida Statutes, and Rules 21A-22.0001, 21A-22.0002, and 21A-22.003, Florida Administrative Code, as alleged in the Administrative Complaint filed in DOAH Case Number 92-5696 (DPR Case Number 90-13254) and dismissing the other charges in that Complaint. As penalty for the violations, Respondent should be fined \$1,000, and his license should be suspended for three years. Before resuming practice, Respondent should be required to complete such mandatory continuing education courses as may be mandated by the Board and he should be placed on probation for three (3) years.

DONE and ENTERED this 14th day of November, 1994, at Tallahassee, Florida.

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J. STEPHEN MENTON  
Hearing Officer  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-1550  
(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 14th day of November, 1994.

ENDNOTES

- 1/ Subsequent to the filing of the Administrative Complaint, the Department of Professional Regulation was merged with the Department of Business Regulation and is currently known as the Department of Business and Professional Regulation.
- 2/ Apparently through inadvertence, the Final Order was mistakenly filed a second time on June 21, 1990.
- 3/ This Rule has subsequently been renumbered as Rule 61H1-22.

APPENDIX TO RECOMMENDED ORDER  
DOAH CASE NO. 92-3421 and 92-5696

Only Petitioner submitted proposed findings of fact. The following rulings are made with respect to the proposed findings of fact submitted by Petitioner.

Petitioner's proposed findings of fact

1. Adopted in substance in Findings of Fact 1.
2. Adopted in substance in Findings of Fact 1.
- 3-5. Adopted in substance in Findings of Fact 36.
- 6-7. Rejected as unnecessary.
8. Subordinate to Findings of Fact 18 and 19.
9. Rejected as unnecessary.
10. Rejected as a summary of testimony rather than a finding of fact. The subject matter is addressed in Findings of Fact 27.
11. Adopted in substance in Findings of Fact 27.
- 12-21. Rejected as summaries of testimony rather than findings of fact. The subject matter of these proposals is addressed in Findings of Fact 26-35.
22. Adopted in substance in Findings of Fact 30.
- 23-24. Rejected as summaries of testimony rather than findings of fact. The subject matter of these proposals is addressed in Findings of Fact 28 and 29.
25. Adopted in substance in Findings of Fact 28.
- 26-29. Rejected as summaries of testimony rather than Findings of Fact. The subject matter of these proposals is addressed in Findings of Fact 28 and 29.

30. Adopted in substance in Findings of Fact 29.

31-35. Rejected as summaries of testimony rather than Findings of Fact. The subject matter of these proposals is addressed in Findings of Fact 28 through 30 and 36.

36. Subordinate to Findings of Fact 18 and 19.

37-38. Rejected as summaries of testimony rather than Findings of Fact. The subject matter of these proposals is addressed in Findings of Fact 25, 31 and 32.

39. Adopted in substance in Findings of Fact 31.

40-41. Rejected as summaries of testimony rather than Findings of Fact. The subject matter of these proposals is addressed in Findings of Fact 31 and 32.

42. Adopted in substance in Findings of Fact 29.

43-67. Rejected as summaries of testimony rather than Findings of Fact. The subject matter of these proposals is addressed in Findings of Fact 22-23, 25, 27, 30, 32 and 36.

68. Subordinate to Findings of Fact 18 and 19.

69-70. Subordinate to Findings of Fact 22 and 23.

71. Subordinate to Findings of Fact 18 and 19.

72. Rejected as unnecessary.

73. Rejected as vague and unnecessary.

74-76. Rejected as summaries of testimony rather than Findings of Fact. The subject matter of these proposals is addressed in Findings of Fact 33 and 35.

77. Rejected as vague and ambiguous. The subject matter is addressed in Findings of Fact 33.

78. Rejected as a summary of testimony rather than Finding of Fact. The subject matter of this proposal is addressed in Findings of Fact 33.

79. Adopted in substance in Findings of Fact 33.

80-83. Rejected as summaries of testimony rather than Findings of Fact. The subject matter of these proposals is addressed in Findings of Fact 33.

83-84. Adopted in substance in Findings of Fact 33.

85. Adopted in substance in Findings of Fact 33.

86. Rejected as a summary of testimony rather than Finding of Fact. The subject matter of this proposal is addressed in Findings of Fact 33.

87. Rejected as unnecessary.

88-90. Rejected as summaries of testimony rather than Findings of Fact. The subject matter of these proposals is subordinate to Findings of Fact 22 and 23.

91. Adopted in substance in Findings of Fact 22.

92. Rejected as a summary of testimony rather than Finding of Fact. The subject matter of this proposal is addressed in Findings of Fact 22.

93. Subordinate to Findings of Fact 18 and 19.

94-97. Rejected as summaries of testimony rather than Findings of Fact. The subject matter of these proposals is addressed in Findings of Fact 34.

98. Rejected as unnecessary.

99. Rejected as unnecessary.

100. Rejected as a summary of testimony rather than Finding of Fact. The subject matter of this proposal is addressed in Findings of Fact 33.

101. Adopted in substance in Findings of Fact 33.

102-103. Rejected as summaries of testimony rather than Findings of Fact. The subject matter of these proposals is addressed in Findings of Fact 33.

104. Adopted in substance in Findings of Fact 33.

105. Rejected as a summary of testimony rather than Finding of Fact. The subject matter of this proposal is addressed in Findings of Fact 33.

106-108. Rejected as summaries of testimony rather than Findings of Fact. The subject matter of these proposals is addressed in Findings of Fact 33.



109-114. Rejected as summaries of testimony rather than Findings of Fact.  
The subject matter of these proposals is addressed in Findings of Fact 36.

115. Adopted in substance in Findings of Fact 4.

116. Adopted in substance in Findings of Fact 4.

117. Adopted in substance in Findings of Fact 6.

118. Adopted in substance in Findings of Fact 7 and 8.

119. Adopted in substance in Findings of Fact 10.

120. Adopted in substance in Findings of Fact 13.

121. Adopted in substance in Findings of Fact 11.

122. Adopted in substance in Findings of Fact 12.

123-129. Rejected as summaries of testimony rather than Findings of Fact.  
The subject matter of these proposals is unnecessary in view of Findings of Fact 13 and 14.

130. Rejected as unnecessary.

131-133. Rejected as summaries of testimony rather than Findings of Fact.  
The subject matter of these proposals is unnecessary in view of Findings of Fact 13 and 14.

134. Rejected as unnecessary.

135-140. Rejected as summaries of testimony rather than Findings of Fact.  
The subject matter of these proposals is unnecessary in view of Findings of Fact 13 and 14.

141. Rejected as unnecessary.

142. Rejected as unnecessary.

143. Rejected as unnecessary.

144-148. Rejected as summaries of testimony rather than Findings of Fact.  
The subject matter of these proposals is unnecessary in view of Findings of Fact 13 and 14.

149. Rejected as unnecessary.

150. Rejected as unnecessary.

151-155. Rejected as summaries of testimony rather than Findings of Fact.  
The subject matter of these proposals is unnecessary in view of Findings of Fact 13 and 14.

156. Rejected as unnecessary.

157-164. Rejected as summaries of testimony rather than Findings of Fact.  
The subject matter of these proposals is unnecessary in view of Findings of Fact 13 and 14.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.