

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
BOARD OF ACCOUNTANCY,)	
)	
Petitioner,)	
)	
vs.)	Case Nos. 01-2597PL
)	01-2598PL
ROBERT JARKOW,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case by video teleconference on September 11, 2001, with the parties appearing from Miami, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charles F. Tunnickliff, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399-2202

For Respondent: Victor K. Rones, Esquire
Law Offices of Rones & Navarro
16105 Northeast 18th Avenue
North Miami Beach, Florida 33162

STATEMENT OF THE ISSUE

Whether the Respondent committed the violations alleged in the Administrative Complaint dated February 5,

1999, and, if so, what penalty should be imposed. The Respondent maintains that the instant action is barred by laches and violates Section 455.225, Florida Statutes.

PRELIMINARY STATEMENT

On February 5, 1999, the Petitioner, Department of Business and Professional Regulation (Department) on behalf of the Board of Accountancy filed an Administrative Complaint against the Respondent, Robert Jarkow. The complaint alleged that the Respondent had violated Florida law in connection with accounting work performed for Sound Advice, Inc. Respondent disputed the allegations of fact in that matter and requested a formal hearing. When the case was referred to the Division of Administrative Hearings for formal proceedings it was assigned DOAH Case No. 01-2597PL.

A second case, DOAH Case No. 01-2598PL, was also referred to the Division of Administrative Hearings regarding this Respondent. The Administrative Complaint in DOAH Case No. 01-2598PL was also filed by the Department on February 5, 1999. The two counts of this case alleged violations stemming from accounting work performed for an individual named Kasman who operated a company known as "Traditions Workshop, Inc."

The two cases were consolidated for hearing by order

entered July 16, 2001. Thereafter the matter was scheduled for final hearing.

At the hearing, the Petitioner announced its intention to dismiss the allegations found in DOAH Case No. 01-2597PL. Accordingly, that case is hereby closed.

All findings therefore relate to the allegations found in DOAH Case No. 01-2598PL. The evidence has been considered only as to issues set forth in that case.

The Petitioner presented testimony from Thomas Reilly, a certified public accountant who was accepted as an expert in accounting and auditing; and Marlyn Felsing, also an expert in accounting. The Petitioner's Exhibits numbered 1 and 2 were admitted into evidence.

The Respondent testified in his own behalf. Respondent's Exhibits numbered 1 and 2 were admitted into evidence.

Official recognition has been taken of the provisions of Chapter 61H1, Florida Administrative Code, as well as the Codification of Statement on Standards for Accounting and Review Services (SARS) as referenced by the parties.

The transcript of the proceedings was filed on October 18, 2001. Thereafter, the Petitioner requested

additional time to file a Proposed Recommended Order. Such motion was granted by order entered October 24, 2001. Petitioner's second motion for an extension of time to file a proposed order is hereby granted.

The parties filed proposed orders that have been fully considered in the preparation of this Recommended Order. The Petitioner's proposed order was filed with the Division of Administrative Hearings on November 9, 2001.

FINDINGS OF FACT

1. Petitioner is the state agency charged with the responsibility of regulating the practice of certified public accountants licensed within the state.

2. At all times material to the allegations of this case, the Respondent, Robert Jarkow, has been licensed in Florida as a certified public accountant, license number AC0010963.

3. On or about December 1996, the Respondent orally agreed to provide accounting services for an individual named Kasman who was doing business as Traditions Workshop, Inc. (Traditions).

4. Traditions manufactured uniforms and listed the federal government among its clients. Revenues to the

company from the sale of uniforms were presumably posted in accordance with written contracts.

5. Although the Respondent participated in the monthly completion of financial records for the company, the exact description of his responsibilities for the company and the individual are not known.

6. It is undisputed that Ms. Kasman asked the Respondent to provide a financial statement for the company as part of an effort to secure a line of credit from a bank in New York. It is also undisputed that Ms. Kasman refused to pay for the statement. According to the Respondent, based upon that refusal, he declined to prepare the instrument.

7. Nevertheless, a document entitled "Financial Statements" was generated with a notation "MANAGEMENT USE ONLY-NOT FOR DISTRIBUTION." The Respondent maintains that the document was not prepared as a financial report and that if generated using his data disk it was done without any intention on his part for the product being used to secure a line of credit.

8. The document did not comply with provisions of accounting practice.

9. The Respondent admitted that when his

relationship with the party deteriorated, and payment for services was not rendered, he did not release information to a succeeding accountant.

10. Ms. Kasman needed the information, depreciation schedules, in order to accurately complete tax records for Traditions.

11. The Respondent attempted to locate Ms. Kasman and her bookkeeper for hearing but was unable to do so.

12. Ms. Kasman filed a complaint with the Petitioner against the Respondent that was not investigated until several months after it was filed. The Respondent obtained a civil judgment against Traditions for unpaid accounting fees.

13. The Administrative Complaint filed in this case was submitted over a year after the consumer complaint.

14. Neither party presented testimony from the complainant, her bookkeeper, or her succeeding accountant.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. Section 120.57, Florida Statutes.

16. The Petitioner bears the burden of proof in this case to establish by clear and convincing evidence

the violations alleged to have been committed by this Respondent. While the Petitioner has established that the documents evidence violations of the SARS and rules of the administrative code, there is insufficient evidence to attribute the violations to the Respondent. Since the Respondent's relationship to the complainant and Traditions was based on an oral agreement, it cannot be concluded that the Respondent erroneously completed work for that entity. The work submitted did contain incomplete and erroneous accounting information as alleged by the Petitioner but such errors cannot wholly be attributed to the Respondent. The violations demonstrated on the "financial statement" cannot be attributed to the Respondent since he maintains he was not retained to create a financial statement. The contradictory testimony does not meet the burden of proof as to Count I of the Administrative Complaint.

17. As to Count II, the Respondent has admitted that he failed or refused to provide the depreciation schedules to the succeeding accountant.

18. Rule 61H1-23.002, Florida Administrative Code, provides in part:

(1) A licensee shall furnish to a client or former client within a reasonable time after request of the document the following if they are in

the licensee's possession or control at the time of the request: Any accounting or other records belonging to the client which the licensee may have had occasion to remove from client's premises, or to receive for the client's account, including records prepared as part of the service to the client which would be needed to reconcile to the financial statements or tax return prepared and issued by the certified public accountant. If the tax return or financial statement has not been issued, the certified public accountant must only return records received from the client, but this shall not preclude the licensee from making copies of such documents when same form the basis of work done by the licensee.

2) This rule shall not preclude a licensee from making reasonable charges for costs incurred. A licensee shall not withhold those items contemplated above under any circumstances following a demand for same from the client.

19. Based upon the foregoing, the Petitioner has established a violation of Count II.

20. Having considered the violation, and the aggravating circumstances presented, the Respondent's request for dismissal for laches must be addressed.

21. Section 455.225, Florida Statutes, provides, in part:

(2) The department shall allocate sufficient and adequately trained staff to expeditiously and thoroughly

determine legal sufficiency and investigate all legally sufficient complaints. When its investigation is complete and legally sufficient, the department shall prepare and submit to the probable cause panel of the appropriate regulatory board the investigative report of the department. The report shall contain the investigative findings and the recommendations of the department concerning the existence of probable cause.

22. The Respondent maintains that the Petitioner did not "expeditiously" complete the investigation of this case and that, as a result, the Respondent has been prejudiced by the inability to secure witnesses. Under the circumstances of this case, it is inconceivable how the inability to secure witnesses has prejudiced the Respondent. As to the violations outlined in Count I of the complaint, the lack of witnesses benefited the Respondent. Because the Petitioner did not secure the testimony of the complainant, her bookkeeper, or her succeeding accountant, the Respondent was given the benefit of the doubt as to the violations and deficiencies in the work product. As to Count II, the Respondent admitted the violation. Additional witnesses would not have reduced the violation. The Respondent did not release records because he had not been paid. Nothing in the rule grants that unilateral protection.

Thus it is concluded that Respondent's admission was sufficient to establish the Count II violation.

23. Finally, it is concluded that any delay in the prosecution of this case must be considered "harmless error" under the terms of Carter v. Department of Professional Regulation, Board of Optometry, 633 So. 2d 3 (Fla. 1994). The claims in this case were not so stale that due process considerations preclude the advancement of the Petitioner's cause. In this case the delay did not prejudice the Respondent, accordingly, no harm has been demonstrated. The Respondent's claim of laches is denied.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Business and Professional Regulation enter a final order finding the Respondent violated Rule 61H1-23.002, Florida Administrative Code, as set forth in Count II of the Administrative Code; imposing an administrative fine in the amount of \$1000; and placing the Respondent on probation for one year subject to terms as may be specified by the Board of Accountancy.

DONE AND ENTERED this 4th day of December, 2001, in Tallahassee, Leon County, Florida.

Hearings

J. D. PARRISH
Administrative Law Judge
Division of Administrative

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Hearings

Filed with the Clerk of the
Division of Administrative

this 4th day of December, 2001.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.