

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION, BOARD)	
OF ACCOUNTANCY,)	
)	
Petitioner,)	
)	
vs.)	Case No. 08-2648PL
)	
DAVID MCQUAY, JR.,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case before Lawrence P. Stevenson, Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), on July 22, 2008, in Tampa, Florida.

APPEARANCES

For Petitioner: Eric R. Hurst, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: David McQuay, Jr., pro se
110 North Lincoln Avenue
Tampa, Florida 33609-2908

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, David McQuay, Jr., committed the violations alleged in a four-count Amended Administrative Complaint issued by Petitioner,

Department of Business and Professional Regulation, Board of Accountancy, on February 6, 2008, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

Petitioner issued a four-count Amended Administrative Complaint (the "Complaint") on February 6, 2008, against Respondent, based on an audit that Respondent performed for the Mid-Florida Center for Medical Health and Substance Abuse, Inc. ("Mid-Florida Center"), a non-profit organization, for the financial year ending September 30, 2002. Petitioner's accounting expert reviewed the audit and found that Respondent failed to properly address several significant areas. These areas were set forth in the Complaint as follows:

(a) Financial Statements

i. Amendment No. 2 (Auditor Communication) to the Yellow Book necessitated changes to auditor's reports.

ii. Several necessary disclosures are missing in the notes to the financial statements.

iii. The Statement of Activities and Statement of Functional Expenses should not contain captions of "Memorandum Only" for the total columns.

iv. Donations of long-lived assets (depreciable) should not be reported as "Permanently Restricted Net Assets."

(b) Working Papers

i. There was no evidence of a reporting and disclosure checklist for not-for-profit organizations, which is common practice to include.

ii. No audit evidence was located for fraud risk factors or planning materiality.

iii. The management representation letter in this instance omitted the specific representations relative to the Single Audit and the referenced schedule of uncorrected misstatements in the management representation letter.

iv. No documentation was evident regarding a consideration of a going concern with the entity's financial position.

v. The management representation letter addressed the \$158,429 liability owed to the Executive Director, which was reversed off the books; however, the letter failed to justify the removal of the liability from the financial statements by specifically finalizing the matter.

vi. Relative to compliance testing, the working papers contained evidence of testing only one monthly invoice/progress report.

Based on these findings, the Complaint alleges in Count One that Respondent "violated Subsection 473.323(1)(g), Florida Statutes, by failing to properly address significant areas in the audit." Count Two alleges that Respondent "violated Section 473.323(1)(h), Florida Statutes, through Rule 61H1-22.002, Florida Administrative Code, by failing to comply with generally accepted auditing standards." Count Three alleges that Respondent "violated Section 473.323(1)(h), Florida Statutes,

through Rule 61H1-22.003, Florida Administrative Code, by issuing an opinion on financial statements that departed from generally accepted principles without describing the departures." Count Four alleges that Respondent "violated Section 473.323(1)(h), Florida Statutes, through Rule 61H1-22.001, Florida Administrative Code, by failing to perform his engagements with competency."

Respondent timely filed an election of rights requesting a formal hearing to contest the factual allegations of the Complaint. On June 5, 2008, the case was referred to the DOAH for assignment of an administrative law judge to conduct a formal administrative hearing. The case was set for hearing on July 22, 2008.

At the final hearing, Petitioner presented the testimony of Thomas F. Reilly, the expert in accounting who performed the review of the Mid-Florida Center's audit on behalf of Petitioner; and of Allan Nast, another expert in public accounting and auditing. Petitioner's Exhibits 1 through 16 were admitted into evidence. Respondent testified in his own behalf and presented the testimony of Selvin McGahee, a member of the board of directors of the Mid-Florida Center. Respondent's Exhibits 1 through 5 were admitted into evidence.

A Transcript of the hearing was filed with the DOAH on August 20, 2008. Petitioner filed a proposed recommended order

on August 27, 2008. Without objection from Petitioner, Respondent filed his proposed recommended order on September 3, 2008. Both proposed recommended orders have been fully considered in entering this Recommended Order.

All references to Florida Statutes and the Florida Administrative Code in this Recommended Order are to the versions applicable at the time of the Complaint, unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner, the Department of Business and Professional Regulation, Board of Accountancy (hereinafter referred to as the "Department"), is the state agency charged with the duty to regulate the practice of certified public accountants in Florida and to prosecute administrative complaints pursuant to Section 20.165, and Chapters 120, 455, and 473, Florida Statutes.

2. At all times relevant to the allegations of the Complaint, Respondent David McQuay, Jr., has been licensed in Florida as a certified public accountant. Mr. McQuay's license number is R 1736, and his address of record is 110 North Lincoln Avenue, Tampa, Florida 33609-2908.

3. Thomas Reilly, an expert in public accounting and auditing, reviewed an audit that Mr. McQuay performed for the Mid-Florida Center, a non-profit organization, for the financial

year ending September 30, 2002. The audit was completed on July 18, 2003.

4. Mr. Reilly prepared a report of his findings, dated September 5, 2005. He filed a subsequent report dated June 25, 2007, to include copies of various accounting standards and reference materials that were cited in the original report. In preparing his original report, Mr. Reilly met with Mr. McQuay and reviewed Mr. McQuay's complete set of working papers.

5. Mr. Reilly testified that he billed the Department \$3,444.00 for his services. No billing statements, invoices, or other documents were entered into evidence to support the amount of Mr. Reilly's fee. No expert testimony was offered to establish the reasonableness of the fee.

6. As indicated in the Preliminary Statement above, Mr. Reilly identified four issues relating to the financial statements. First, Mr. Reilly found that the audit did not include certain statements that are required by government auditing standards. The "Yellow Book" contains the authoritative auditing standards issued by the federal Governmental Accountability Office ("GAO"). Amendment No. 2 to the auditing standards, adopted in July 1999, requires that certain language be included in the auditor's report on the financial statement. In particular, Section 5.16.1 of Amendment No. 2 provides:

When auditors report separately (including separate reports bound in the same document) on compliance with laws and regulations and internal control over financial reporting, the report on the financial statements should also state that they are issuing those additional reports. The report on the financial statements should also state that the reports on compliance with laws and regulations and internal control over financial reporting are an integral part of a GAGAS [Generally Accepted Government Accounting Principles] audit, and, in considering the results of the audit, these reports should be read along with the auditor's report on the financial statements.

7. Mr. McQuay's report on the financial statements did not contain a statement calling the reader's attention to the fact that a separate report on internal control and compliance is included elsewhere in the audit report.

8. Mr. Reilly stated that the quoted language from the Yellow Book is mandatory, and that the GAO felt that the issue was important enough to call for the issuance of Amendment No. 2 to emphasize the revised mandate.

9. In response, Mr. McQuay pointed to his reliance on a commercially produced practice guide that did not include the revised language of Amendment No. 2. While conceding the error, Mr. McQuay continued to contend that the practice guide's position was reasonable: that the statement is required only when the reports on compliance with laws and regulations and internal control over financial reporting are issued separately

from the report on financial statements. In Mr. McQuay's case, the reports were issued under a single cover.

10. Given that the express language of Amendment No. 2 references "separate reports bound in the same document," Mr. McQuay's response to the charge is insufficient. The Department has demonstrated that Mr. McQuay's audit report deviated from professional standards as to its failure to include the mandatory Yellow Book language. The deviation is ameliorated by the fact that all of the reports referenced in Amendment No. 2 were in fact contained in Mr. McQuay's audit report. There was no indication that Mr. McQuay's failure to include the mandatory statement was intended to mislead a reader of the audit report, or that his failure to comply with the strict language of Amendment No. 2 had any practical effect on the soundness of the audit report.

11. The second allegation as to the financial statements is that necessary disclosures were missing in the notes to the financial statements. Mr. Reilly stated that the notes to the financial statements did not disclose the entity's capitalization policy for capital assets. The American Institute of Certified Public Accountants ("AICPA") Audit and Accounting Guide for Not-for-Profit Organizations requires disclosure of the entity's capitalization policy. Mr. Reilly testified that it is important for a reader of the audit to

understand the dollar threshold at which the entity has decided to capitalize fixed assets, and that the professional standards require the disclosure in the audit report.

12. In response, Mr. McQuay contended that the audit report did disclose the capitalization policy, citing to the following paragraph:

Property donated to the Center is stated at its estimated fair market value. Depreciation expense is computed by use of the straight-line method of the estimated economic life of the respective assets. Maintenance and repairs are expensed as incurred. Extraordinary repairs that significantly extend the useful lives of the related assets are capitalized and depreciated over the assets' remaining economic useful life.

13. This response is insufficient because the quoted language does not address the dollar threshold for capitalizing fixed assets, which is required under the standards for audits of nonprofit organizations.

14. Mr. Reilly stated that the notes also failed to include a required statement as to lease commitments. Where the entity has operating leases that commit the entity for more than one year, professional standards require disclosure of the amount of the future commitments for each of the first five years subsequent to the date of the statement of financial position. Mr. McQuay's audit notes indicate that Mid-Florida

Center had leases ranging as far as three years into the future, but do not disclose the amount of those lease commitments.

15. Mr. McQuay responded that audit standards provide that immaterial items need not be disclosed, and that it was his professional judgment that the leases in question were not material. Mr. Reilly replied that the audit report gives the reader no basis for making an independent judgment as to the materiality of the leases. Mr. Reilly's view is more consistent with the specific standard regarding lease disclosure, though Mr. McQuay's exercise of independent professional judgment in this instance was not so unreasonable as to constitute a violation of professional standards.

16. Mr. Reilly stated that the notes to the financial statements also omitted a statement of cash flows. However, Mr. McQuay's audit report properly identified this omission as a departure from generally accepted accounting principles ("GAAP"), rendering irrelevant any further discussion of the definition of cash equivalents.

17. In summary, as to the second allegation, the evidence proved that Mr. McQuay violated the standards by failing to address the dollar threshold for capitalizing fixed assets, but did not prove any other violations of the disclosure requirements.

18. The third allegation as to the financial statements was that the Statement of Activities and Statement of Functional Expenses should not contain captions of "Memorandum Only" for their "total" columns. Mr. Reilly contended that the "Memorandum Only" caption was inaccurate and misleading. Historically, the term "memorandum only" was used frequently on local government financial statements, where the auditor must give an opinion on different types of columns. Some of the columns were on a modified accrual basis and others on an accrual basis. Because these are two different bases of accounting, the "total" column was irrelevant.

19. Mr. Reilly pointed out that the only time an auditor would use the "memorandum only" terminology as to a nonprofit organization's audit would be in presenting comparative financial statements, or where the prior year's audit included a summary total that was not in accordance with GAAP. In those situations, an auditor would use the "memorandum only" caption, as well as other disclosures, in the notice of the financial statements and the auditor's report.

20. However, the Mid-Florida Center audit involved a single year's financial statement. Mr. Reilly opined that the total column on these financial statements was extremely significant, and that the "memorandum only" caption was extremely misleading. Mr. McQuay responded that the decision

was made to use the "memorandum only" caption because this was the initial audit for Mid-Florida Center, and that the caption does not materially change any substantive aspect of the financial statement and is therefore not misleading.

Mr. Reilly's position that the inclusion of the "memorandum only" caption was misleading and a violation of the standards cited in his report was correct, and Mr. McQuay's response was insufficient.

21. The fourth allegation as to the financial statements was that donations of long-lived depreciable assets should not be reported as "Permanently Restricted Net Assets." Mr. Reilly conceded that this was a very complicated issue for which Mr. McQuay had "quite a bit of support." Mid-Florida Center purchased land and some equipment from the Highlands County School Board. The fair value of the property exceeded the price paid by Mid-Florida Center. Under GAAP, the difference between the price paid and the value would be recorded as a donated asset. The dollar amount recorded in the financial statement was \$330,000, but there was no documentation showing how that number was arrived at, and no documentation showing the breakout between the land and the equipment.

22. Mr. Reilly testified that when he looked at the fixed assets, he found a \$280,000 item for land but could not be certain whether the item was part of this land or another piece

of property referenced elsewhere in the notes. However, \$330,000 was shown in a column called "permanently restricted." Mr. Reilly did not take issue with placing the land in that column. However, he thought that the equipment, i.e., the depreciable portion of that asset, should not be placed in the "permanently restricted" column.

23. Mr. Reilly testified that an item such as an endowment fund is the only thing that should be placed in a "permanently restricted" column. Once an asset is placed in service and begins depreciating, it must be placed in the "unrestricted" column. In his response, Mr. McQuay referenced a reversionary clause in the purchase agreement, whereby if Mid-Florida Center gave up its 501(c)(3) nonprofit status, the property would revert to the School Board. Mr. Reilly testified that this is a standard clause in government contracts, and is not a reason to classify the item as permanently or temporarily restricted.

24. While his report took issue with the placement of depreciable assets in the "permanently restricted" column, Mr. Reilly conceded that the relevant Statement of Financial Accounting Standards is not crystal clear and that he used non-authoritative practice guides to arrive at his conclusion. Mr. Reilly believed that it was misleading to label equipment in operation as "permanently restricted," but also conceded that the notes to the financial statement fully disclosed the issue.

Mr. McQuay insisted that his audit did distinguish between the land and equipment in the fixed assets and depreciation schedules. While his treatment of the item was subject to dispute, Mr. McQuay cannot be found to have violated professional standards as to this issue.

25. As indicated in the Preliminary Statement above, Mr. Reilly identified six issues relating to the working papers. The first allegation is that there was no evidence of a reporting and disclosure checklist for not-for-profit organizations. Mr. Reilly opined that it is common practice to include such a checklist, and that Mr. McQuay should have used one on this audit because nonprofits have unique disclosure requirements and Mid-Florida Center was the only nonprofit organization that Mr. McQuay was auditing at the time. Mr. Reilly noted that failure to use a checklist does not violate a particular auditing standard, but could be held to violate the more general professional standard of due care.

26. Mr. Reilly believed that due professional care mandates that a CPA use a checklist when auditing a nonprofit organization, and that a CPA "would be a fool" not to use one. A typical checklist is 70 pages long, and an accountant needs the list to jog his memory as to the many unique requirements of nonprofits. Mr. Reilly thought that Mr. McQuay might have

avoided some of the cited deficiencies if he had used a checklist.

27. Mr. McQuay responded that professional standards do not require the use of a checklist. Moreover, he asserted that his auditing software contains the functional equivalent of a disclosure checklist. While conceding that this was the only nonprofit he audited during the year in question, Mr. McQuay testified that he has been auditing nonprofit organizations for over 36 years and that his previous firm conducted 35 to 40 such audits annually. A checklist would be of no assistance out in the field, where the auditor is examining the client's working papers. Mr. McQuay stated that he does use a checklist when he is reviewing the work of a staff auditor, but that he did not need a checklist here because he was performing the audit himself.

28. Even after hearing Mr. McQuay's response, Mr. Reilly continued to hold that it was foolish not to complete a disclosure checklist. The fact that Mr. McQuay was the only person working on the audit provided all the more reason for the use of a checklist.

29. Accepting Mr. McQuay's testimony that his auditing software contained the equivalent of a checklist, it is found that his failure to use a paper checklist was not a violation of auditing standards or of due professional care.

30. The second allegation relating to the working papers was a lack of audit evidence for fraud risk factors or planning materiality. Statement on Auditing Standards No. 82 states that the auditor "should specifically assess the risk of material misstatement of the financial statements due to fraud and should consider that assessment in designing the audit procedures to be performed." The auditor should consider fraud risk factors relating to misstatements arising from fraudulent financial reporting and from misappropriation of assets. Statement on Auditing Standards No. 47 provides that the auditor should consider audit risk and materiality in planning the audit and designing auditing procedures and in evaluating whether the financial statements "taken as a whole are presented fairly, in all material respects, in conformity with generally accepted accounting principles."

31. Mr. Reilly found nothing in Mr. McQuay's working papers documenting that an assessment in conformance with Statement on Auditing Standards No. 82 was made, or that an audit risk and materiality assessment was made in accordance with Statement on Auditing Standards No. 47. Mr. McQuay responded that a separate section in his work papers dealt with fraud risk factors and materiality. He testified that his firm is careful in selecting clients and looks carefully at management capabilities and the risks involved in the

representation. Mr. Reilly reviewed Mr. McQuay's response and concluded that it did not come close to meeting professional standards. As to this issue, it is found that Mr. McQuay did violate professional standards as to documentation, though he may well have performed the assessments in question.

32. The third allegation relating to the working papers was that the management representation letter omitted the specific representations relative to the single audit and the referenced schedule of uncorrected misstatements in the management representation letter. The "single audit" is an Office of Management and Budget ("OMB") A-133 audit of an entity that has received \$500,000 or more of Federal assistance for its operations. Mr. Reilly found the omissions in the management representation letter constituted a violation of professional standards.

33. Mr. Reilly testified that the standards require that on every audit, the auditor obtain a management representation letter signed by the appropriate levels of management. Statement on Auditing Standards No. 85 contains the basic requirements for management representations. Mr. McQuay obtained a management representation letter from Mid-Florida Center in compliance with this basic requirement. However, because this was a single audit, additional representations were

required in the management representation letter over and above those found in a generic audit.

34. AICPA's Statement of Position 98-3, "Audits of States, Local Governments, and Not-for-Profit Organizations Receiving Federal Awards," paragraph 6.68 requires the auditor conducting an OMB A-133 audit to obtain written representations from management about matters related to federal awards. Paragraph 6.69 of the same document lists 22 items for which the auditor should consider obtaining written representations in a single audit. Mr. Reilly testified that most of these items were applicable in this case, but that none of them were included in the Mid-Florida Center's management representation letter.

35. In response, Mr. McQuay pointed to his engagement letter with the client. The engagement letter states that this would be an OMB A-133 audit, and that Mr. McQuay has explained to the client and the client has understood that management is responsible for compliance with the OMB A-133 audit requirements. Mr. McQuay did not think he needed to include the detailed representations of paragraph 6.69 when he already had an extensive engagement letter that covered these areas of management responsibility.

36. Mr. Reilly replied that the engagement letter and the management representation letter are two entirely different things. The engagement letter spells out the scope of

representation to the client at the outset of the engagement; completely different standards require the auditor to obtain written representations from management regarding elements spelled out in the standards, at the conclusion of the engagement. The engagement letter is irrelevant for purposes of the single audit's requirement that representations be obtained from management about matters related to federal awards. None of the specific statements referenced by Mr. McQuay in his engagement letter dealt with the specifics of federal awards. As to this issue, it is found that Mr. McQuay violated professional standards.

37. The fourth allegation relating to the working papers was that no documentation was evident regarding a consideration of a going concern with the entity's financial position. Mr. Reilly testified that it was apparent from a glance at the financial statements that the entity had severe financial problems. It had an adverse current ratio, with assets of \$33,000 and liabilities of \$138,000, not considering the issue of liability for back pay owed to the executive director. Under Statement on Auditing Standards No. 59, an auditor has the responsibility to evaluate and document any causes for doubt about the continuing viability of the entity, and further to evaluate and document management's plans to turn around the entity.

38. Mr. Reilly saw nothing that came close to meeting this standard. The only items of substance he found were a statement that the Mid-Florida Center was creating a new charter school and that fundraising activities were "ongoing." There were no specifics as to the charter school or the fundraising.

Mr. Reilly found these statements "grossly inadequate" to comply with professional standards. Statement on Auditing Standards No. 59 includes specific items that an auditor should evaluate, such as management's specific plans to curb expenditures and increase revenue. Mr. McQuay supplied a document titled "Going Concern Evaluation," but the document provided no specifics as to the evaluation that was performed.

39. Mr. McQuay responded that any startup organization such as the Mid-Florida Center will have poor current ratios. However, the entity had the management wherewithal to raise money and a committed, competent board of directors. The proposed charter school had already received funding for building renovation for the 2003-2004 school year. Mr. McQuay believed that his field work and evaluation of the management plans was sufficient to satisfy the standard.

40. As to this issue, it is found that Mr. McQuay violated professional standards, at least insofar as he failed adequately to document his consideration of a going concern with the

entity's financial position in accordance with Statement on Auditing Standards No. 59.

41. The fifth allegation relating to the working papers was that the management representation letter addressed the \$158,429 liability owed to the executive director, which was reversed off the books, but failed to justify the removal of the liability from the financial statements by specifically finalizing the matter. Mr. Reilly explained that, as of the balance sheet date, Mid-Florida Center owed several years' salary to its executive director, Dr. Arthur Cox, a significant liability that would make Mid-Florida's poor current ratio even worse. Mid-Florida removed the liability for Dr. Cox' salary from its books. Mr. Reilly did not have a problem with removing the salary, in the amount of \$158,429 from the books, provided Mid-Florida had secured a separate, standalone confirmation from Dr. Cox that he was totally relinquishing any rights to those funds.

42. However, the relinquishment issue was addressed in a management representation letter by way of what Mr. Reilly termed "squirrely wording." Rather than completely extinguish any rights Mr. Cox had to the salary, the Mid-Florida Center's board voted to change the liability from deferred compensation to amounts owed for future salary increases. Essentially, the board took the liability off the books at the present time, but

left open the possibility of reinstating it when Mid-Florida Center's finances permitted it to pay Dr. Cox the amount he was owed.

43. Mr. McQuay responded that the Form 990 for the year in question had been completed by another CPA and filed prior to his retention. Form 990 is the tax return for organizations exempt from income tax. The working trial balance prepared by the other CPA indicated that the liability for the back pay had been removed, and the Form 990 had been filed with the Internal Revenue Service without including the liability. In reconciling the Form 990 with the working trial balance for purposes of his audit, Mr. McQuay obtained the management representation letter referenced by Mr. Reilly. Mr. McQuay testified that he viewed the letter as firming up the matter that the previous CPA had dropped in his lap.

44. Selvin McGahee, a member of the Mid-Florida Center's board of directors, testified that Dr. Cox founded the Mid-Florida Center, writing the initial grants that got the entity started. Dr. Cox' focus on providing services led him to forego some of the salary that was budgeted for his position, in order to spend the funds on other positions. Mr. McGahee testified that this situation persisted for a couple of years, with Dr. Cox supplementing the organization's revenues by not paying himself. The board ultimately decided to remove the back pay

from its books, but had the intention of paying Dr. Cox his back salary if and when the organization generated sufficient unrestricted revenue to do so.

45. As to this issue, it is found that that Mr. McQuay violated professional standards and departed from generally accepted accounting principles. Removing the liability for back salary payments to the executive director should have been accompanied by an unequivocal renunciation of those funds by the executive director. As matters were allowed to stand by Mr. McQuay, Mid-Florida Center's balance sheet was significantly improved in a manner that did not finalize the issue of the possible reinstatement of the back pay liability in the future.

46. The sixth allegation as to the working papers was that, relative to compliance testing, the working papers contained evidence of testing only one monthly invoice/progress report. Mr. Reilly testified that the problem here was a lack of documentation. Though the auditor's judgment is paramount as to compliance testing, there are stated requirements that the auditor must meet. Because this was a single audit, OMB Circular A-133 Compliance Supplement was used. This Circular lists fourteen specific items of testing, each of which should be addressed by the auditor at least to the point of indicating that the auditor has determined the item to be inapplicable to the audit at hand.

47. Mr. Reilly testified that one of the specific issues he was called to investigate involved the lack of documentation regarding a grant that the Mid-Florida Center had obtained from the City of Bartow. The grant required the submission of a monthly invoice/progress report. Mr. Reilly could find evidence that Mr. McQuay had tested only one such invoice. Mr. Reilly conceded that it was "tough to say" what professional judgment demanded in this situation because he was not there when the audit was conducted. Mr. Reilly stated that he would probably have tested more than one invoice, but he could not say how many. The usual practice is to expand the testing if a problem is found with the first invoice. Mr. McQuay found no problems with the one invoice and progress report that he tested, and made the judgment that his examination was adequate. Mr. Reilly believed that, based on the overall scope of problems with Mid-Florida Center's documentation, Mr. Reilly concluded that the entity's invoices and progress reports were "lightly tested."

48. As to this issue, it is found that Mr. McQuay did not violate professional standards or generally accepted accounting principles. Mr. Reilly testified that he might have conducted the compliance testing more strenuously than did Mr. McQuay, but he could not state that Mr. McQuay's actions were outside the boundaries of his professional judgment.

49. Petitioner offered the testimony of Allan Nast, an expert in accounting and auditing. Mr. Nast reviewed the audit performed by Mr. McQuay, and also reviewed the reports prepared by Mr. Reilly. Mr. Nast agreed with Mr. Reilly's opinions in every particular. Mr. Nast's opinion has been considered and is respected by the undersigned, but does not change the findings of fact made above.

50. Mr. Nast testified that he billed Department \$1,365.00 for his services. No billing statements, invoices, or other documents were entered into evidence to support the amount of Mr. Nast's fee. No expert testimony was offered to establish the reasonableness of the fee.

51. Mr. McQuay testified that he believes he has been singled out for disciplinary action based on business reasons. Mr. McQuay pointed out that the initial complaint in this matter was filed by a competitor who was also the father of an accountant whose firm Mr. McQuay had rejected for work in his role as director of quality assurance for WorkNet Pinellas, Inc. Mr. McQuay, an African-American, also testified as to incidents of racism as he pursued his career in a profession dominated by white men. The undersigned has considered this testimony by Mr. McQuay, but cannot find that these matters had any bearing on the merits of the allegations lodged by the Department in the

Complaint after its thorough investigation of the initial complaint.

52. In summary, as to the four allegations regarding the financial statements recited in the Preliminary Statement above, it was found that the first allegation as to missing statements in the audit was proven, though ameliorated by the fact that all of the reports referenced by the missing statements were included in the audit report. As to the second allegation as to missing disclosures, it was found that Mr. McQuay violated professional standards as to only one of several of the alleged omissions. As to the third allegation regarding the "Memorandum Only" statement in the "total" columns, it was found that Mr. McQuay violated the relevant standards. As to the fourth allegation regarding the categorization of long-lived depreciable assets, it was found that Mr. McQuay did not violate professional standards.

53. There were six allegations regarding the working papers recited in the Preliminary Statement above. As to the first allegation regarding the disclosure checklist, it was found that Mr. McQuay did not violate auditing standards or the duty of professional care. As to the second allegation regarding lack of evidence for fraud risk factors or planning materiality, it was found that Mr. McQuay violated professional standards as to documenting his work, though he may have

performed the assessments in question. As to the third allegation regarding omissions in the management representation letter, it was found that Mr. McQuay violated professional standards. As to the fourth allegation regarding going concern considerations, it was found that Mr. McQuay violated professional standards. As to the fifth allegation regarding removal of liabilities owed to the executive director, it was found that Mr. McQuay violated professional standards. As to the sixth allegation regarding the sufficiency of compliance testing, it was found that Mr. McQuay did not violate professional standards.

CONCLUSIONS OF LAW

54. The DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto, pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2008).

55. In the Complaint, the Department seeks to impose penalties against Mr. McQuay, including imposition of a fine not to exceed \$5,000 per violation, assessment of costs associated with the investigation and prosecution of this matter, and/or imposition of any other penalty authorized by Chapters 455 and 473, Florida Statutes. The Department, therefore, has the burden of proving the allegations of the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor

Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Nair v. Department of Business & Professional Regulation, 654 So. 2d 205, 207 (Fla. 1st DCA 1995). Clear and convincing evidence is the proper standard in license disciplinary proceedings, because they are penal in nature and implicate significant property rights. See Osbourne Stern, 670 So. 2d at 935.

56. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n.5 (Fla. 1st DCA 1989), the Court defined clear and convincing evidence as follows:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of 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).

57. Judge Sharp, in her dissenting opinion in Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998)(Sharp, J., dissenting), reviewed recent pronouncements on clear and convincing evidence:

Clear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997). It is an

intermediate level of proof that entails both qualitative and quantative [sic] elements. In re Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995), cert. denied, 516 U.S. 1051, 116 S. Ct. 719, 133 L.Ed.2d 672 (1996). The sum total of evidence must be sufficient to convince the trier of fact without any hesitancy. Id. It must produce in the mind of the fact finder a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994).

58. The Complaint alleges in Count One that Respondent "violated Subsection 473.323(1)(g), Florida Statutes, by failing to properly address significant areas in the audit." Count Two alleges that Respondent "violated Section 473.323(1)(h), Florida Statutes, through Rule 61H1-22.002, Florida Administrative Code, by failing to comply with generally accepted auditing standards." Count Three alleges that Respondent "violated Section 473.323(1)(h), Florida Statutes, through Rule 61H1-22.003, Florida Administrative Code, by issuing an opinion on financial statements that departed from generally accepted principles without describing the departures." Count Four alleges that Respondent "violated Section 473.323(1)(h), Florida Statutes, through Rule 61H1-22.001, Florida Administrative Code, by failing to perform his engagements with competency."

59. Section 473.323, Florida Statutes, provides that the Board of Accountancy may take disciplinary action against the license of a certified public accountant if it is found that the

accountant has committed certain enumerated offenses. Count One of the Complaint alleges a violation of Subsection 473.323(1)(g), Florida Statutes, which provides:

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

* * *

(g) Committing an act of fraud or deceit, or of negligence, incompetency, or misconduct, in the practice of public accounting.

60. Counts Two through Four of the Complaint allege violations of Subsection 473.323(1)(h), Florida Statutes, which provides that disciplinary action may be taken for "[v]iolation of any rule adopted pursuant to this chapter or chapter 455."

61. Count Two of the Complaint alleges a statutory violation through Florida Administrative Code Rule 61H1-22.002, which provides:

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. Statements on Auditing Standards as published by the American Institute of CPAs, are for purposes of this rule, deemed and construed to be interpretations of generally accepted auditing standards, and departures from such statements must be justified by those who do not follow them.

62. Count Three of the Complaint alleges a statutory violation through Florida Administrative Code Rule 61H1-22.003, which provides:

A licensee shall not express an opinion that financial statements are presented in conformity with generally accepted accounting principles if such statements contain any departure from any such principle which has a material effect on the statements taken as a whole, unless he can demonstrate that due to unusual circumstances that financial statements would otherwise have been misleading. In such cases his report must describe the departure, the approximate effects thereof, if practicable, and the reasons why compliance with the principle would result in a misleading statement.

63. Count Four of the Complaint alleges a statutory violation through Florida Administrative Code Rule 61H1-22.001, which provides:

A licensee shall comply with the following general standards and must justify any departures therefrom:

(1) Professional competence. A licensee shall undertake only those engagements which he or his firm can reasonably expect to complete with professional competence. A CPA must be in charge of all public accounting services performed by the firm.

(2) Due professional care. A licensee shall exercise due professional care in the performance of an engagement.

(3) Planning and supervision. A licensee shall adequately plan and supervise an engagement.

(4) Sufficient relevant data. A licensee shall obtain sufficient relevant data to afford a reasonable basis for conclusions or recommendations in relation to an engagement.

64. As to Count One, Mr. McQuay has not been accused of committing an act of fraud or deceit, or of misconduct. If the allegation is to be sustained, Mr. McQuay must be found to have committed one or more acts of negligence or incompetence. The above Findings of Fact established by clear and convincing evidence that Mr. McQuay was negligent as to: addressing the dollar threshold for capitalizing fixed assets; including the "Memorandum Only" caption on the "total" columns of the Statement of Activities and Statement of Functional Expenses; failing to document his audit evidence for fraud risk factors or planning materiality; the omissions in the management representation letter; his failure to document consideration of a going concern with the entity's financial position; and his failure to obtain an unequivocal renunciation of future rights to back pay from Dr. Cox.

65. As to Count Two, the above Findings of Fact established by clear and convincing evidence that Mr. McQuay did not comply with the applicable generally accepted auditing standards as to: his failure to include mandatory Yellow Book language as to separate reports bound in the same document, though this failure was de minimus; his failure to address the

dollar threshold for capitalizing fixed assets; his inclusion of the "Memorandum Only" caption on the "total" columns of the Statement of Activities and Statement of Functional Expenses; his failure to document his audit evidence for fraud risk factors or planning materiality; the omissions in the management representation letter; his failure to document consideration of a going concern with the entity's financial position; and his failure to obtain an unequivocal renunciation of future rights to back pay from Dr. Cox.

66. As to Count Three, only one of Mr. McQuay's proven departures from the applicable generally accepted accounting standards even arguably had "a material effect on the statements taken as a whole." This departure was the failure to obtain a separate, standalone confirmation from Dr. Cox that he was relinquishing any rights to the \$158,429 in back salary that Mid-Florida Center was removing from its books. It is concluded that the Department failed to carry the burden of proving by clear and convincing evidence that, under all the circumstances (including the fact that this issue was dropped into Mr. McQuay's lap by a previous accountant), Mr. McQuay's omission caused a material effect on the entity's financial statements.

67. As to Count Four, it is concluded that the Department failed to prove by clear and convincing evidence that Mr. McQuay

undertook the Mid-Florida Center engagement without reasonably expecting to complete it with professional competence, that Mr. McQuay failed to adequately plan or supervise the engagement, or that Mr. McQuay failed to obtain sufficient relevant data to afford a reasonable basis for his conclusions. The Department did prove by clear and convincing evidence that Mr. McQuay failed to exercise due professional care in the performance of the engagement, for the same reasons he was held to be "negligent" as to Count One.

68. Subsection 473.323(3), Florida Statutes, provides:

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:

- (a) Denial of an application for licensure.
- (b) Revocation or suspension of a license.
- (c) Imposition of an administrative fine not to exceed \$5,000 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.

69. Subsection 455.227(3)(a), Florida Statutes, provides:

In addition to any other discipline imposed pursuant to this section or discipline imposed for a violation of any practice act, the board, or the department when there is no board, may assess costs related to the investigation and prosecution of the case excluding costs associated with an attorney's time.

70. A range of disciplinary guidelines for violations of Chapter 473, Florida Statutes, has been adopted in Florida Administrative Code Rule 61H1-36.004. The only provision of the guidelines that appears to address the statutory and rule violations alleged in the Complaint is Florida Administrative Code Rule 61H1-36.004(2)(h), which provides a range from "letter of guidance" to "reprimand and one (1) year probation (continuing education and review of practice at licensee's expense and limited area of practice) for each violation involving negligence or misconduct."

71. The Department in its Proposed Recommended Order has suggested imposition of a \$500.00 administrative fine, requiring Mr. McQuay to pay investigative costs of \$4,809.00, requiring Mr. McQuay to take sixteen hours of continuing professional education beyond the regular requirement, including eight hours related to nonprofit organizations, and placing Mr. McQuay on probation for a period of two years with conditions including

the review of his audits by a consultant selected by the Board of Accountancy for the first year, at Mr. McQuay's expense.

72. The Department did not provide sufficient evidence to support its investigative costs of \$4,809.00. Mr. Reilly and Mr. Nast testified as to the amount of their billings to the Department. However, the Department provided no billing statements, invoices, or other documents to support the amount of the experts' fees, and offered no expert testimony to establish the reasonableness of those fees.

73. Florida Administrative Code Rule 61H1-36.004(3) provides that the Board of Accountancy deviate from the disciplinary guidelines "upon a showing of aggravating or mitigating circumstances by clear and convincing evidence presented to the Board prior to the imposition of a final penalty."

74. None of the aggravating circumstances set forth in Florida Administrative Code Rule 61H1-36.004(3)(a) is applicable to Mr. McQuay's case, and the Department has urged no aggravating circumstances beyond those enumerated in the rule.

75. Florida Administrative Code Rule 61H1-36.004(3)(b) sets forth the mitigating circumstances as follows:

Mitigating circumstances; circumstances which may justify deviating from the above set forth disciplinary guidelines and cause the lessening of a penalty beyond the minimum level of discipline in the

guidelines shall include but not be limited to the following:

1. In cases of negligence, the minor nature of the engagement in question and lack of danger to the public health, safety and welfare resulting from the licensee's misfeasance.
2. Lack of previous disciplinary history in this or any other jurisdiction wherein the licensee practices his profession.
3. Restitution of any damages suffered by the licensee's client.
4. The licensee's professional standing among his peers including continuing education.
5. Steps taken by the licensee or his firm to insure the non-occurrence of similar violations in the future.
6. The degree of financial hardship incurred by a licensee as a result of the imposition of fines or the suspension of his practice.
7. Cooperation with the Department of Business and Professional Regulation and the Board including understanding and admission of the violation by the Respondent.

76. The evidence established several mitigating circumstances that should be considered in this case:

- a. There was no showing of danger to the public health, safety and welfare resulting from Mr. McQuay's misfeasance;
- b. The Department offered no evidence of prior discipline involving Mr. McQuay;

c. Mr. McQuay's client suffered no damages and in fact offered testimony in support of Mr. McQuay; and

d. Mr. McQuay would incur great financial harm if a significant fine and/or investigative costs were imposed.

77. Under all the circumstances, it is concluded that the recommended probation and continuing education are the most appropriate and sufficient disciplinary measures to be imposed upon Mr. McQuay. It is concluded that a financial penalty would be needlessly punitive under all the circumstances.

RECOMMENDATION

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

RECOMMENDED that

A final order be entered finding that David McQuay, Jr. committed the violations alleged in Counts One, Two, and Four of the Amended Administrative Complaint and requiring Mr. McQuay to take sixteen hours of Continuing Professional Education beyond the regular requirement, including eight hours related to nonprofit organizations, and placing Mr. McQuay on probation for a period of two years. During the first year of probation, all audits (including financial statements and working papers) will be reviewed by a consultant selected by the Board, at Mr. McQuay's expense. If any audit is deemed deficient upon

review by the Board, review of all audits will continue through the second year of Mr. McQuay's probation.

DONE AND ENTERED this 27th day of October, 2008, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 27th day of October, 2008.

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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.