

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Petitioner,

vs.

Case No. 15-6271PL

RONALD M. SHULTZ,

Respondent.

_____ /

RECOMMENDED ORDER

On January 19, 2016, Administrative Law Judge Lisa Shearer Nelson conducted a duly-noticed hearing pursuant to section 120.57(1), Florida Statutes (2015), by means of video teleconference with sites in Tallahassee and Gainesville, Florida.

APPEARANCES

For Petitioner: Megan E. Kachur, Esquire
Cristin Erica White, Esquire
Stephen Johnson, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399

For Respondent: James H. Cervený, Esquire
James H. Cervený, Attorney at Law LLC
1031 Northwest 6th Street, Suite F-3
Gainesville, Florida 32601

STATEMENT OF THE ISSUES

The issue to be determined is whether Respondent, Ronald M. Shultz, violated section 473.323(1)(g) and (h), Florida Statutes (2014), and Florida Administrative Code Rule 61H1-23.002(1)(a) and (b), as alleged in the Administrative Complaint, and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On July 15, 2015, Petitioner, Department of Business and Professional Regulation (Petitioner or the Department), filed a two-count Administrative Complaint against Respondent, alleging that he violated section 473.323(1)(g) and (h), and rule 61H1-23.002(1)(a) and (b), with respect to his handling of the tax returns of Mr. and Mrs. William Beaty. Respondent disputed the facts alleged in the Administrative Complaint and on August 5, 2015, the case was referred to the Division of Administrative Hearings (DOAH) for assignment of an administrative law judge (ALJ), and docketed as DOAH Case No. 15-4400.

The case was originally noticed for hearing to take place October 9, 2015. However, on August 31, 2015, the parties filed a Joint Motion for Relinquishment of Jurisdiction, asking that jurisdiction be relinquished to the Board of Accountancy (the Board), for the Board to consider a Settlement Agreement. Accordingly, on August 31, 2015, an Order was issued

relinquishing jurisdiction to the Board of Accountancy and closing DOAH's file.

On November 4, 2015, Petitioner filed a Motion to Re-open Case, stating that the Board rejected the parties' proposed settlement. The case was re-opened and docketed as DOAH Case No. 15-6271.

On November 19, 2015, Respondent filed a Motion for Summary Final Order (Motion), which was amended the following day. The Motion asserted that the parties had entered into a settlement and that the Board's approval was unnecessary. Respondent also moved to amend his Answer to the Administrative Complaint. By Order dated November 23, 2015, the Motion was denied, as ALJs do not have final order authority to grant the Motion, and the Motion overlooked the requirements of section 455.225(6), Florida Statutes. The Order allowed Respondent to amend his Answer, and directed Respondent to file a response to the Order Re-opening File no later than November 25, 2015.

On December 7, 2015, a Notice of Hearing was issued scheduling the hearing for January 19, 2016, by video teleconference. The Order of Pre-hearing Instructions directed the parties to file a Joint Pre-hearing Statement. The parties filed unilateral statements, citing the inability to meet.

The case commenced and was completed as scheduled, on January 19, 2016. At hearing, Petitioner presented the testimony

of Leesha London, William Beaty, Jo Lee Beaty, and Barbara Houston, and Petitioner's Exhibits 1 through 16 were admitted. Respondent testified on his own behalf but presented no exhibits. The Transcript of the hearing was filed with DOAH on February 24, 2016. Petitioner's Proposed Recommended Order was filed February 23, 2016. Petitioner filed a Notice of Filing on February 25, 2016, explaining that it had a copy of the Transcript as of February 9, 2016, and had supplied a copy to opposing counsel. The notice essentially inquired as to the deadline for Respondent's proposed recommended order.

On February 25, 2016, a Scheduling Order was issued, indicating that Respondent's proposed recommended order was due March 7, 2016, based on the date the Transcript was filed with DOAH. Given that Petitioner had already filed its Proposed Recommended Order, it was given the opportunity to file a response to Respondent's proposed recommended order, should it choose to do so, no later than March 15, 2016. To date, Respondent has not filed a proposed recommended order. All references in this Recommended Order are to the 2014 codification in effect at the time of the alleged conduct, unless otherwise specified.

FINDINGS OF FACT

Based upon the documentary evidence and the witness testimony presented, and the entire record of this proceeding, the following findings of fact are found:

1. The Florida Board of Accountancy is the state agency charged with the licensing and regulation of the practice of certified public accounting pursuant to section 20.165 and chapters 455 and 473, Florida Statutes.

2. Respondent, Ronald M. Shultz, is a certified public accountant (CPA) licensed in the state of Florida. Respondent has been licensed since 1997 and holds license number AC 003065. His license is currently active, and he has no history of discipline by the Board.

3. Respondent's address of record is 1031 Northwest 6th Street, Suite F-2, Gainesville, Florida 32601.

4. At all times material to the allegations in the Administrative Complaint, Respondent was the owner of a CPA firm in the state of Florida, i.e., Ronald M. Shultz, CPA, PA. The firm's license was first issued in May of 2006, and is also in active status.

5. Respondent is the president and sole shareholder for his firm. While he employed others who worked in the firm, Respondent is ultimately responsible for all aspects of business conducted by the firm.

6. Ronald M. Shultz, CPA, PA, is in the business of providing tax services to clients, including the preparation of federal income tax returns.

7. The normal procedure employed in Respondent's office required that, once a client's tax return had been prepared, the client was called to come in and receive a copy of the return for review. The client also was given a copy of an IRS E-File signature authorization form (Form 8879), although the evidence was unclear as to when the form was given to the client. In any event, the client was usually told to review the return, and then a meeting would be scheduled to go over the return, especially in those cases where the return was complex or had a lot of "moving parts." Once the client had an opportunity to review the return and discuss it with Respondent, the client would provide a signed copy of Form 8879 and Respondent's firm's personnel would electronically file the return. No return is supposed to be filed without a signed Form 8879.

8. During the period giving rise to these proceedings, Respondent had a part-time employee named Jeff Gruver, and a former IRS-enrolled agent named Jeff Conklin. Mr. Gruver usually answered the phones, took messages, provided copies of returns to clients, and, once things were finalized with a return, electronically filed returns as directed. Mr. Gruver could answer simple tax-related questions such as, "the return

indicates you are getting a refund of this amount," or the return shows that you need to pay this much in taxes." Any more complicated questions were fielded by Mr. Conklin, or if necessary, Mr. Shultz.

9. Mr. Conklin is someone with whom Mr. Shultz had worked previously, and actually prepared tax returns for the firm. Mr. Shultz would generally review his work, and would go over the return with the client.

10. During this time period, Respondent relied on Mr. Conklin to a greater extent than was his normal practice. Mr. Shultz was in the midst of a protracted divorce, and helping with the care of his father, who was in declining health.

11. William and Jo Lee Beaty were clients of Respondent, and had been clients for several years. Respondent's office prepared their federal income taxes since at least 2009.

12. The Beatys' tax return generally has a lot of "moving parts." They typically request an extension of time for filing, and bring their paperwork to Respondent's office early in October, in order to have the return prepared by the October 15 deadline. Normally, the Beatys will owe additional taxes. They generally reviewed the return with Mr. Shultz, signed the Form 8879, and provided a check to send to the IRS when the return was filed.

13. In 2014, Mr. Beaty took the documents necessary for the preparation of the Beatys' 2013 tax return to Respondent's office. Mr. Beaty acknowledged that he often delivered the documentation very late in the process--often just days before the October 15 deadline--but thought that this year, he had delivered it as much as six weeks before. The complaint the Beatys filed with the Department indicates that the documents were delivered on or about October 1. While Respondent had no direct knowledge of when the documents were delivered to the office, he testified that his office records indicated that it was no earlier than October 1.^{1/} After consideration of all of the evidence, the documents were delivered most likely sometime in very late September or on October 1, 2014. Respondent directed Jeff Conklin to prepare the Beatys' tax return. Mr. Conklin had prepared their tax return the year before.

14. In the days immediately preceding the October deadline, Jo Lee Beaty started calling Respondent's office to see when she and her husband would be able to review the return and determine how much money they owed in taxes. She could not reach anyone from the firm, despite repeated phone calls.

15. Someone from Respondent's office (presumably either Mr. Conklin or Mr. Gruver) electronically submitted the Beatys' 2013 federal income tax return to the IRS on October 15, 2014. However, Respondent did not review the return before it was filed

and the Beatys did not see it, and were not informed as to its contents.

16. On or about November 6, 2014, Mr. Conklin notified Mr. Shultz that he was quitting his job, effective immediately. He did not notify Respondent that there were any problems with the Beatys' tax return.

17. Respondent was knowledgeable about the Beatys' prior returns, and knew that the 2013 return would include a significant amount of information, including multiple Schedule Cs, Schedule K-1s, significant information regarding businesses owned by the Beatys, and property rentals. Respondent was also aware that the Beatys typically wanted to review their tax return with him prior to its filing.

18. Not only were the Beatys unable to contact Respondent in order to schedule a meeting prior to the tax-filing deadline, but they were unable to contact him to determine whether the return was actually filed or to determine how much money was owed.

19. Mrs. Beaty called the office the day after the deadline and no one answered. The office was actually closed that day.

20. Mrs. Beaty made other calls to the office, although she was unable to say specifically how many times. However, when she was still unable to speak to anyone on November 13, 2014, nearly a month after the filing deadline, she made a request to the IRS

to get a copy of the couple's tax return. The IRS sent the Beatys a transcript of their filed return that same day, although it is unclear when they received it.

21. Mrs. Beaty continued to attempt to reach Respondent, with no success. She even spoke to Respondent's wife on the phone, and requested that she have Respondent return Mrs. Beaty's phone calls. Respondent first learned that the Beatys were trying to reach him when his wife called him with the message from Mrs. Beaty.

22. Respondent finally spoke to Mrs. Beaty on November 18, 2014. During this phone call, Respondent advised Mrs. Beaty that he would have their materials ready the following week. The Beatys did not receive the return or their documents as promised.

23. On or about December 9, 2014, Mrs. Beaty sent Respondent an email requesting their return and backup materials. The email states:

Ron,

We were not given an opportunity to review the return with you prior to you submitting it to the IRS electronically. I called for several days prior to the final October 15th deadline to file trying to talk with you an/or [sic] Jeff. No one was available. My calls were not returned. October 14th and 15th I called more than once trying to find out what we were going to owe so that we could be prepared to include a check with the return we would need to sign and send to the IRS. Still no return phone call. Late in the day on October 15, I was assured by

Jeff Gruver that the return would be filed and we would be able to take care of everything October 16th.

It is nearly two months now, we have not reviewed our return with you, for accuracy, as has been the procedure in years past. We have not received the return for our signatures and instructions for submission. It is not for a lack of trying. After the filing deadline, on October 16th we began calling the office on numerous occasions to talk with you or Jeff and get our return. We left messages both with Jeff Gruver and on the various voice mailboxes to no avail.

I have driven to the office only to find the man who was renting space from you there. He knew nothing of your schedule or when I might find you. He did indicate that Jeff C. now [sic] longer worked there. After calling Debra at the numbers on your sign twice you finally called. That was on or about November 18th or 19th. You told me you needed to review the return and would get it to us that week. I told you it needed to be before Friday November 21, 2014 as I was having surgery that day. You told me it would be before my surgery.

We didn't hear from you as promised. I called again the beginning of the next week (Thanksgiving week) and left a message which you returned early Tuesday afternoon I believe. You said you would get it to me later probably that day (this was a day that you had an afternoon doctor appointment). To date I have not heard from you again and had it not been for my call to the IRS I would have no proof that the return was filed nor any idea of what we owe.

We are sorry to have to terminate our relationship under these circumstances. We had previously been very satisfied with your service and as you know we had referred people to you. Ron, your negligence and

non-feasance comes as a great surprise. It is nonetheless inexcusable. We are contemplating reporting your inaction to the Florida DBPR.

Please respond to this email and tell me what time before 5:00 p.m. Tuesday, December 9, 2014, so I can pick up all of the documents we gave you to prepare our 2013 tax return, and copies of all of our records.

With disappointment,

Jo Beaty

24. Respondent did not respond to this email in a timely fashion and states that he did not do so because he was not checking his email regularly due to the issues with his father's health. As a consequence, his first response to the email was dated December 22, 2014, in which he stated in part:

First speaking about your federal tax return. Jeff Conklin told me your return was complete. He then told me basically he had to quit his current position with me for personal reason [sic] and simply walked out. When I went to find your file, none of your paperwork had been copied for what we call work papers Since Jeff left your file is [sic] disarray, I had to organize your paper work so that I could do an accurate review of your return. Yesterday I completed putting all of your paper work together and is now ready for my review. My plan is to complete the review tonight. And then, we can arrange a time to meet to go over your return.

25. Despite this communication over two months after the filing of the Beatys' tax return, they still did not receive their tax return or supporting documentation.

26. The Beatys hand-delivered a complaint to the Department on December 22, 2014. Respondent was sent a notification letter regarding the complaint on December 29, 2014. He placed the documentation in the Beatys' mailbox that same day. With the tax return and supporting documentation was an invoice for his services at a 50-percent discounted rate of \$350.

27. The Beatys were going to owe money, including some interest and penalties for being late, even had they paid their taxes on October 15, because payment was actually due on April 15. The IRS charges a failure to pay proper estimate penalty of \$200. When taxes are paid after the due date, the IRS also charges a penalty of .5 percent of the unpaid amount due per month, up to 25 percent of the amount due. Any portion of a month is treated as a full month. On November 24, 2014, the IRS sent the Beatys a letter notifying them that they owed their taxes, including the \$200 failure to pay proper estimated tax penalty; \$879.08 in penalties, and \$406 in interest. Some, but not all, of the penalties and interest are due to Respondent's failure to timely provide a copy of their tax return.

28. The Department expended \$260 in costs, not including time by the legal section, in the investigation of this case.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015).

30. This is a proceeding in which Petitioner seeks to discipline Respondent's license as a certified public accountant. Because disciplinary proceedings are considered to be penal in nature, Petitioner is required to prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

31. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). As stated by the Florida Supreme Court:

Clear 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 testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a 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.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting, with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005).

"Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 989 (Fla. 1991).

32. The Administrative Complaint contains two counts against Respondent. Count I charges Respondent with violating section 473.323(1)(g), which makes it a basis for discipline to commit "an act of fraud or deceit, or of negligence, incompetency, or misconduct, in the practice of public accounting." The Administrative Complaint alleges that Respondent violated this provision by filing the 2013 federal tax returns for Mr. and Mrs. Beaty without discussing the tax return with them.

33. The Department has proven that Respondent committed negligence by clear and convincing evidence, by his filing of the Beatys' 2013 tax return without discussing the tax return with them.

34. While the Department contends in its Proposed Recommended Order that Respondent also committed fraud by electronically submitting the tax return without a signed Form 8879, the Department did not make this allegation in the Administrative Complaint. Respondent can only be found guilty of those allegations specifically referenced in the Administrative Complaint. Trevisani v. Dep't of Health, 908 So.

2d 1108, 1109 (Fla. 1st DCA 2005); see also, Christian v. Dep't of Health, 161 So. 3d 416, 417 (Fla. 2d DCA 2014); Ghani v. Dep't of Health, 714 So. 2d 1113, 1114-15 (Fla. 1st DCA 1998).

35. Count II of the Administrative Complaint charges that Respondent violated section 473.323(1)(h), which makes it a basis for discipline to violate "any rule adopted pursuant to this chapter or chapter 455." In support of this contention, the Administrative Complaint identifies rule 61H1-23.002(1)(a) and (b). At the time of the alleged conduct, the rule provided:

- (1) A certified public accountant shall furnish to a client or former client upon request and reasonable notice:
 - (a) Any accounting or other records belonging to, or obtained from or on behalf of, the client that were provided to the certified public accountant; the certified public accountant may make and retain copies of such documents of the client when they form the basis for work done by the certified public accountant.
 - (b) Any accounting or other records that the certified public accountant was not specifically engaged to prepare that are related to an issued work product of the certified public accountant and that are not in the client's books and records or are otherwise not available to the client, with the result that the client's financial information is complete.

36. The Department has proven Count II by clear and convincing evidence. The rule does not specify that the information has to be requested in writing: here, the backup for the tax return should have been returned to the Beatys, along

with a copy of the tax return itself, on October 15, before the return was filed with the IRS. The fact that the Beatys had to make multiple requests for their records, and had to find out how much money they owed by requesting a transcript from the IRS is especially troubling.

37. The Board of Accountancy has disciplinary guidelines to establish a commonly-understood range of penalties for the violation of its statutes and rules, to put both the public and licensees on notice of the expected penalty for any proven violation. For a violation of section 473.323(1)(g), rule 61H1-36.004(1)(g) provides that for "[f]raud, deceit or misleading (Sections 455.227(1)(a), (m), 473.323(1)(g), (k), F.S.)," the penalty for a first offense is a reprimand, one-year suspension, two years of probation and a \$5,000 fine. However, rule 61H1-36.004(1)(h) provides that for negligence or misconduct, the minimum penalty for a first offense is a \$250 fine, and the maximum penalty is a reprimand and one year of probation.

38. As noted above, negligence or misconduct, as opposed to fraud or deceit, was demonstrated here. Therefore, a penalty in the range listed in rule 61H1-36.004(1)(h) is appropriate.

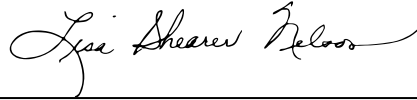
39. For a violation of rule 61H1-23.002, the penalty range is a \$250 fine to suspension until the records are returned. Here, the records have been returned.

40. The undersigned has also considered the aggravating and mitigating circumstances presented in this case. Respondent was dealing with significant turmoil in his personal life, some of which was beyond his control. However, he still owed a duty to his clients to respond to their very legitimate requests in a more timely manner. This is a case where the aggravating and mitigating circumstances tend to balance each other, such that there is no reason to deviate from the recommended range in either direction.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Board of Accountancy enter a final order finding that Respondent, Ronald M. Shultz, violated section 473.323(1)(g) and (h), and rule 61H1-23.002(1)(a) and (b). It is further recommended that Respondent's license be reprimanded; that he be placed on probation for a period of one year, subject to conditions determined by the Board; and that he pay an administrative fine of \$500 and investigative costs of \$260.00

DONE AND ENTERED this 8th day of April, 2016, in
Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of April, 2016.

ENDNOTE

^{1/} He did not, however, attempt to put these unidentified records
into evidence.

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.