

BEFORE THE ACCOUNTANCY EXAMINING BOARD
OF THE STATE OF IOWA

| | | |
|---------------------|---|---------------------|
| IN THE MATTER OF: |) | DIA NO. 94DOCAB-1 |
| |) | CASE NO. 89-28 |
| JOHN L. HENSS |) | |
| |) | |
| Certificate No. 499 |) | FINDINGS OF FACT, |
| |) | CONCLUSIONS OF LAW, |
| Respondent |) | AND ORDER |

On December 4, 1993, a Complaint was filed by William M. Schroeder, Executive Secretary of the Iowa Accountancy Examining Board (hereinafter the Board), following a finding of probable cause by the Board. The Complaint, as amended at the hearing, alleged two counts: 1) that the Respondent was charged with conduct discreditable to the public accounting profession, in violation of Iowa Code section 542C.21(10) (1993), and as defined by 193A IAC 11.6(1), when he was permanently enjoined by the United States Court of Appeals for the Eighth Circuit from serving directly or indirectly as a fiduciary to any employee benefit plan subject to ERISA and permanently enjoined from acting as a service provider to any employee benefit plan subject to ERISA; and 2) that the Respondent was charged with dishonesty and/or gross negligence in the practice of public accounting pursuant to Iowa Code section 542C.21(2) (1993), as defined by 193A IAC 11.3(3) and 11.4(1), for having been enjoined by the United States Court of Appeals for the Eighth Circuit from acting as a service provider to any ERISA plan and further permanently enjoined from serving directly or indirectly as a fiduciary to any employee benefit plan subject to ERISA.

An Order and Notice of Hearing was issued on March 22, 1994, setting the hearing for May 16, 1994.

The hearing on the above Complaint was held on May 16, 1994, at 1:10 p.m. in the conference room, 1918 S.E. Hulsizer Avenue, Ankeny, Iowa. The following members of the Board were present: John C. Cain, C.P.A., Chairperson; Thomas L. Erpelding, C.P.A.; Jean E. Kruse, C.P.A.; Paul S. Stave, C.P.A.; David A. Vaudt, C.P.A.; Dorothy L. Votroubek, A.P.; Donna Brosdahl, Public Member; and Dorothy Dunphy, Public Member. Theresa O'Connell Weeg, Assistant Attorney General, appeared for the State. The Respondent, John L. Henss, appeared pro se. The hearing was closed to the public at the Respondent's request, pursuant to Iowa Code section 272C.6(1)(1993). Present also were members of the Board staff and a court reporter. Margaret LaMarche, Administrative Law Judge from the Iowa Department of Inspections and Appeals, presided.

The record was held open for five working days to allow the Respondent to file a brief in resistance to the admission of

Exhibit D and an additional five days to allow the state to respond. Exhibit D was admitted into the record.

After hearing the testimony and examining the exhibits, the Board convened in closed session, pursuant to Iowa Code section 21.5(1)(f) (1993), to deliberate its decision. The Board directed the Administrative Law Judge to prepare this decision and order.

THE RECORD

The record includes the Complaint, the Order and Notice of Hearing, Request for a Closed Hearing, the testimony of the witnesses, and the following exhibits:

State's Exhibit A: Martin v. Feilen, et al., Nos. 91-1086, 91-1295, United States Court of Appeals for the Eighth Circuit.

State's Exhibit B: Martin v. Feilen, Consent Order, filed November 23, 1992.

State's Exhibit C: Stipulation, August 2, 1982.

State's Exhibit D: Final Decision, Case No. 91-16, dated December 22, 1992.

Respondent's Exhibit 1: Martin v. Feilen, et al., Nos. 91-1086, 91-1295, United States Court of Appeals for the Eighth Circuit.

Respondent's Exhibit 2-8: not admitted

Respondent's Exhibit 9: Iowa Code section 542C.21

Respondent's Exhibit 10: 193A IAC 11.6(1)

Respondent's Exhibit 11: 193A IAC 12.4(1)(b)

Respondent's Exhibit 12: 193A IAC 11.3, 11.4

FINDINGS OF FACT

1. On February 2, 1960, the Respondent was issued Iowa CPA Certificate No. 499 by the Board. Iowa Certificate No. 499 is currently in good standing. (Board file)

2. On August 1, 1982, the Respondent and the Board entered into a Stipulation as a result of allegations that the Respondent failed to comply with applicable generally accepted auditing standards and generally accepted accounting principles in the performance of certain financial statements for the years 1979 and 1980. Pursuant

to the terms of the stipulation, the Respondent agreed to a one-year period of supervision, subject to certain conditions, including a continuing education requirement. (testimony of Bill Schroeder; State's Exhibit C)

3. On June 3, 1992, the United States Court of Appeals for the Eighth Circuit filed a decision in Case Nos. 91-1086 and 91-1295. Both involved the Secretary of Labor, United States Department of Labor, as the plaintiff. The Respondent, his professional corporation, and his public accounting firm, Oden, Henss and Thielking (OHT) were all named defendants, along with others. (Exhibit A).

a. The cases involved alleged breaches of fiduciary duties under ERISA. (Employee Retirement Income Security Act, 29 U.S.C. §§ 1000-1461) (Exhibit A, p. 2)

b. In May 1974 the Respondent, an outside accountant for Feilen Meat Company (FMC), proposed and structured an Employee Stock Ownership Plan (ESOP) for the company. (Exhibit A, p. 3)

c. In fall 1977, the Respondent proposed and structured a leveraged buy-out of FMC. (Exhibit A, p. 3)

d. Beginning with the leveraged buy-out in 1977, and ending with FMC's demise in February 1985, corporate insiders engaged in a series of transactions involving FMC, its stockholders, related entities, and in some cases the ESOP. (Exhibit A, p. 4)

e. The transactions were done at the recommendation of the Respondent and one of his partners at OHT, who had personal financial interests in many of the transactions in addition to their role as FMC's outside accountants. (Exhibit A, p. 4)

f. The Eighth Circuit Court of Appeals stated that ERISA imposes high standards of fiduciary duty upon those responsible for administering an ERISA plan and investing and disposing of its assets. The ERISA fiduciary is subject to a strict standard of care, 29 USC § 1104(a)(i); is liable for known breaches of co-fiduciaries, § 1105; and may not engage in prohibited transactions, § 1106. (Exhibit A, pp. 5-6)

g. The Eighth Circuit concluded that ERISA's fiduciary duties under § 1104 attach to transactions that involve investing the ESOP's assets or administering the plan. (Exhibit A, p. 10) In addition, the Eighth Circuit identified several transactions subject to ERISA which involved the Respondent or his corporation. (Exhibit A, pp. 10-12)

- h. The Eighth Circuit found that the Respondent and his partner "provided the ESOP with far more than accounting services. They recommended transactions, structured deals, and provided investment advice to such an extent that they exercised effective control over the ESOP's assets, since none of the other corporate insiders had the expertise in accounting and employee benefits law needed to spin the tangled web of transactions at issue." (Exhibit A, pp. 16-17)
- i. The Eighth Circuit further found that the Respondent and his partner were corporate insiders who "used their positions of trust and confidence to involve the ESOP in transactions in which they had personal interest" and concluded that the Respondent and his partner must be held responsible for any breaches of fiduciary duty that occurred in connection with the transactions subject to ERISA. (Exhibit A, p. 17)
- j. The Eighth Circuit found that an ESOP fiduciary is not prohibited from being on both sides of a transaction involving the ESOP's assets, but he must serve both masters (or at least the ESOP) with the utmost care and fairness. (Exhibit A, p. 19)
- k. The Eighth Circuit concluded that the responsible fiduciaries violated ERISA fiduciary duties by their "reprehensible self-dealing, not the kind of divided but honest loyalty Congress intended." (Exhibit A, p. 20)
- l. The Eighth Circuit specifically found that the Respondent was the dominant decision-maker for FMC and the ESOP with respect to all or nearly all the transactions, that he holds himself out as an ERISA expert who has structured and provided other services and advice to hundreds of ESOPs, and that he displayed an appalling insensitivity to the proper role of ESOPs and ESOP fiduciaries. (Exhibit A, p. 24)
- m. The Eighth Circuit permanently enjoined the Respondent from serving directly or indirectly as a fiduciary for any ESOP or ESOT or any other employee benefit plan covered by ERISA, and from engaging in any acts that violate fiduciary duties imposed by ERISA. (Exhibit A, pp. 22-23)
- n. The Eighth Circuit also permanently enjoined the Respondent from acting as a service provider to any ERISA plan. In reaching this decision, the court stated ". . . ESOP fiduciaries accept a concurrent responsibility to act prudently on behalf of the plan's beneficiaries. For Henss to believe otherwise, and to engage in the transactions here at issue, demonstrates such a fundamental misunderstanding of the ERISA statute, regulations, and case law as to require that he have

no further opportunity to subvert this important federal law."
(Exhibit A, p. 24)

4. The Eighth Circuit also remanded the case to the United States District Court for further consideration of other issues. On remand, the parties entered into a Consent Order. The Respondent agreed not to serve as a fiduciary or service provider to any benefit plan subject to ERISA, with the exception of his own ESOT, so long as the Respondent and his wife are the only participants and beneficiaries. (testimony of Bill Schroeder; Exhibit B)

CONCLUSIONS OF LAW

1. Iowa Code section 542C.21(2) and (10)(1993) provide in relevant part:

Causes for revocation, suspension, or refusal to renew.

After notice and hearing as provided in section 542C.23, the board may revoke or may suspend for a period not to exceed two years, a certificate issued under section 542C.5 or a license issued under section 542C.7 or 542C.8, or may revoke, suspend, or refuse to renew a permit issued under section 542C.20, or may censure the holder of a permit, for any one or any combination of the following causes:

• • •

2. Dishonesty, fraud, or gross negligence in the practice of public accounting.

• • •

10. Conduct discreditable to the public accounting profession.

(Iowa Code section 542C.21 is found at 116.21 in the 1991 Code)

2. 193A IAC 11.6(1) provides:

11.6(1) Acts discreditable. A CPA or AP shall not commit any act that reflects adversely on their fitness to engage in the practice of public accountancy.

3. 193A IAC 11.3(3) and 11.4(1) provide in relevant part:

11.3(3) Integrity and objectivity. A CPA or AP shall not, in the performance of professional services, knowingly misrepresent facts or subordinate judgment to others . . .

11.4(1) Competence. A CPA or AP shall not undertake any engagement for the performance of professional services which the accountant or accountant's firm cannot reasonably expect to complete with due professional competence, . . .

4. 193A IAC 12.4(1)(b) provides in relevant part:

12.4 Grounds for disciplinary action. The board may initiate disciplinary action against a CPA, AP, or a firm of CPAs or APs, on any of the following grounds:

12.4(1) For any of the grounds set forth in Iowa Code section 542C.21.

. . .

b. When considering alleged violations of Iowa Code section 542C.21(11)¹, the phrase "conduct discreditable to the public accounting profession" shall be construed in light of the following:

The reliance of the public in general and of the business community in particular on sound financial reporting, and on the implication of professional competence which inheres in the authorized use of a legally restricted title relating to the practice of public accountancy, imposes on a CPA or AP engaged in such practice certain obligations both to their clients and the public. These obligations include the obligation to maintain independence of thought and action, . . . to uphold the standards of the public accountancy profession, and to maintain high standards of personal conduct in all matters affecting one's fitness to practice public accountancy . . .

5. The preponderance of the evidence established that the Respondent violated Iowa Code section 542C.10(1993), conduct discreditable to the public accounting profession, as defined by 193A IAC 11.6(1), when he was permanently enjoined by the United States Court of Appeals for the Eighth Circuit from serving directly or indirectly as a fiduciary to any employee benefit plan subject to ERISA and permanently enjoined from acting as a service provider to any ERISA plan.

Public trust and confidence is essential to the practice of public accountancy. The findings of the Eighth Circuit eviscerates the public's trust in the Respondent. The Eighth Circuit specifically found that the Respondent used his position of trust and confidence to involve the ESOP in transactions in which he had personal interest. The Respondent failed to maintain independence of

¹This is an apparent typo in the rule. It should read 542C.21(10). There is no subsection 11.

thought and action and failed to uphold the standards of the public accountancy profession. The Respondent's actions which led to the issuance of the decision by the Eighth Circuit were conduct discreditable to the public accounting profession.

6. The preponderance of the evidence established that the Respondent violated Iowa Code section 542C.21(2) (1993), dishonesty and/or gross negligence in the practice of public accounting, as defined by 193A IAC 11.3(3) and 11.4(1), when he was enjoined by the United States Court of Appeals for the Eighth Circuit from acting as a service provider to any ERISA plan or from serving directly or indirectly as a fiduciary to any employee benefit plan subject to ERISA.

The findings of the Eighth Circuit and their decision to permanently enjoin him from acting as a service provider support the conclusion that the Respondent was either dishonest or, if he believed he was acting properly, grossly negligent in his public accounting practice. The Respondent held himself out to the public as a CPA who was an ERISA expert. The Eighth Circuit specifically found: ". . . ESOP fiduciaries accept a concurrent responsibility to act prudently on behalf of the plan's beneficiaries. For Henss to believe otherwise, and to engage in the transactions here at issue, demonstrates such a fundamental misunderstanding of the ERISA statute, regulations, and case law as to require that he have no further opportunity to subvert this important federal law." The court's findings established that the Respondent's actions fell far below the standard of care required of him.

ORDER

The Respondent has committed an egregious violation of the public trust. He has been previously disciplined by this Board. Given the seriousness of these violations and the prior disciplinary action, it is appropriate to revoke the Respondent's certificate.

IT IS HEREBY THE ORDER of the Accountancy Examining Board of the State of Iowa that the certificate of certified public accountant, No. 499, issued to John L. Henss, is hereby REVOKED.


IT IS FURTHER ORDERED that the Respondent shall pay a civil penalty of \$1,000.00 within thirty days of receipt of this decision and order.

IT IS FURTHER ORDERED that the Respondent may not apply for reinstatement until two years after the effective date of the revocation. Reinstatement would only be granted if the Respondent satisfies the requirements of 193A IAC 12.16.

DIA Docket No. 94DOCAB-1

Page 8

Dated this 10th day of JUNE, 1994.



~~John C. Cain, C.F.A.~~
Chairperson
Iowa Board of Accountancy Examiners

ML/jmm

cc: Theresa O'Connell Weeg

In accordance with Iowa Code section 542C.23(10) (1993),
judicial review of the board's action may be sought in
accordance with Chapter 17A of the Iowa Code.

BEFORE THE ACCOUNTANCY EXAMINING BOARD
OF THE STATE OF IOWA

| | | |
|---------------------------|---|-----------------------|
| IN THE MATTER OF |) | CASE NUMBER: 89-28 |
| |) | DIA NUMBER: 97DOCAB-1 |
| JOHN L. HENSS |) | |
| 1315 50TH STREET |) | |
| WEST DES MOINES, IA 50266 |) | FINDINGS OF FACT, |
| |) | CONCLUSIONS OF LAW, |
| CERTIFICATE NO. 499 |) | DECISION AND ORDER |
| RESPONDENT |) | |

On June 10, 1994, the Iowa Accountancy Examining Board (Board) revoked the certificate of certified public accountant, certificate number 499, issued to John L. Henss (Respondent). The Respondent filed an Application for Reinstatement, and a hearing was scheduled for November 19, 1996. The hearing was later continued at the Respondent's request.

The hearing on reinstatement was held on May 20, 1997 at 1:00 p.m. in the Board conference room at 1918 S.E. Hulsizer, Ankeny, Iowa. The following members of the Board were present for the hearing: David A. Vaudt, CPA, Chairperson; John M. Sklenar, CPA; Linda Crim Hopkins, CPA; Paul Stave, CPA; Dorothy L. Votroubek, AP; and Mary Ackerman, Public Member. The Respondent appeared and was represented by his counsel, Steven Udelhofen. The state was represented by Pamela Griebel, Assistant Attorney General. Margaret LaMarche, Administrative Law Judge from the Department of Inspections and Appeals, presided. The hearing was recorded by a certified court reporter. The Respondent elected to have a closed hearing, pursuant to Iowa Code section 272C.6(1).

After hearing the testimony and examining the exhibits, the Board convened in closed executive session, pursuant to Iowa Code section 21.5(1)(f)(1995), to deliberate its decision. The Board directed the Administrative Law Judge to prepare this Decision and Order, in accordance with their deliberations.

THE RECORD

The record includes the Application for Reinstatement, the Notice of Hearing, Motion to Continue, Order for Continuance, State's Motion to Compel Discovery, Ruling on State's Motion to Compel Discovery, the testimony of the witnesses, and the following exhibits:

- State Exhibit A: Board Findings of Fact, Conclusions of Law, and Order dated 6/10/94
- State Exhibit B: Polk County District Court, Stay Order, dated 7/29/94

- State Exhibit C: Polk County District Court, Final Order, 4/11/95
- State Exhibit D: Martin v. Feilen, 965 F.2d 660 (8th Cir. 1992)
- State Exhibit E: Respondent's Billing Statement, 1/10/95
- State Exhibit F: Respondent Answers to Interrogatories
- State Exhibit G: Respondent's Billing Statements, dated 11/18/94; 3/15/95; 6/30/95

FINDINGS OF FACT

1. On June 10, 1994, the Iowa Accountancy Examining Board issued Findings of Fact, Conclusions of Law, and an Order to the Respondent which revoked his certificate of certified public accountant, ordered him to pay a civil penalty of \$1,000.00 within thirty (30) days, and provided that the Respondent could not apply for reinstatement until two years after the date of revocation. Reinstatement would only be granted if the Respondent satisfied the requirements of 193A IAC 12.16. (State Exhibit A)

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

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

c) The Court further concluded that they had violated ERISA fiduciary duties by their "reprehensible self-dealing, not the kind of divided, but honest loyalty Congress intended" and that the Respondent "displayed an appalling insensitivity to the proper role of ESOPs and ESOP fiduciaries." The Court stated that the

Respondent's actions demonstrated a "fundamental misunderstanding of the ERISA statute, regulations, and case law as to require that he have no further opportunities to subvert this important federal law."

(State Exhibits A, C)

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

3. The Stay Order further provided that, during the pendency of the action, the Respondent shall refrain from publicly displaying a Certificate of Certified Public Accountant, from causing any communication to be made which refers to him as a "certified public accountant" and from engaging in any professional activity which requires by law that the person performing the function have a certificate of certified public accountant. (State Exhibit B)

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

5. The Respondent has not paid the \$1,000.00 civil penalty required by the Board's Order dated June 10, 1994. The Respondent was required to pay the civil penalty within thirty (30) days. The civil penalty was not stayed by the Polk County District Court. When asked why he had not paid the civil penalty prior to requesting reinstatement, the Respondent replied that he was financially unable to pay it. He testified that he personally lost approximately \$500,000 in the collapse of Feilen Meat Company, has been unable to pay his attorney the fees he owes, and has filed for bankruptcy. (Testimony of Respondent; State Exhibits A, B, F)

6. The Respondent never sent a notice to his clients stating that his certificate of certified public accountant had been revoked. The Respondent testified that he had few clients remaining at the time of his revocation because the Department of Labor had notified many of them concerning their action. The Respondent further testified that he does not "own" clients, and therefore unless he

was currently doing work for them he did not know if they would ever return to him for additional services. The Respondent testified that he showed clients for whom he had "work in progress" a copy of a newsletter which contained a publication of the revocation action by the Board. In addition, the Respondent testified that he offered these clients a copy of the Eighth Circuit decision. (Testimony of Respondent; Roger Murphy)

7. The Respondent testified that he removed the references to "certified public accountant" from his office, including scratching the paint off his door with a screwdriver. However, on November 18, 1994; January 10, 1995; March 15, 1995; and June 30, 1995 billing statements were issued by the Respondent's office which identified the Respondent as a "C.P.A." These four billing statements, which were for a total amount of \$7,750.00, went to two clients in Missouri.

a) The Respondent testified that when he became aware that his secretary was using his old letterhead for billing statements, he replaced the letterhead.

b) When asked whether he verified the accuracy of the billing statements mailed by his secretary, the Respondent replied that his secretary was a perfectionist and he had great faith in her.

c) In response to questions from the Board, the Respondent stated that the secretary had worked for him for 10 years and was aware that his certificate had been revoked by the Board.

(Testimony of Respondent; State Exhibits E, G)

8. The Respondent never returned his certificate to the Board office following his revocation. When a representative of the Board called the Respondent on September 26, 1996 and asked if he could pick up the certificate, the Respondent replied that he did not have it at his office. At the hearing, the Respondent testified that he had given his certificate to his attorney. His attorney made a professional statement that he has looked through his extensive files from the Respondent's action with the Department of Labor and cannot find it. However, the Respondent also added that he does not believe that he has an obligation to return his certificate, since the Board rule requiring him to surrender it in the event of its revocation was promulgated after his certificate was issued. This claim was also made in his answers to interrogatories. The Respondent further testified that "if" he had it, he would "probably" give it to the Board. (Testimony of Respondent; Roger Murphy)

9. After the Respondent filed his request for reinstatement, a representative of the Board called him and asked the Respondent for a copy of his current business cards and his stationery. The Respondent told him that the Board had no jurisdiction over him since his certificate had been revoked. At the hearing, the Respondent testified that he had no business cards, and he thought he had faxed a copy of his letterhead to the Board. (Testimony of Roger Murphy)

10. The Respondent wants his certificate reinstated so that he can represent his accounting clients before the Internal Revenue Service (IRS) and the Iowa Department of Revenue. The Respondent testified that while "enrolled agents" may appear before the IRS, he was told that if his CPA certificate had been revoked for cause, he would not be allowed to become an enrolled agent. (Testimony of Respondent)

11. The Respondent still believes that the decision of the Eighth Circuit was in error, and he was not a fiduciary of the employee stock ownership plan (ESOP) of the Feilen Meat Company. The Respondent further testified that he has complied with the injunctions of the Eighth Circuit and has not served as a fiduciary for any employment benefit plan subject to ERISA, nor has he provided services to any ERISA plan. However, the Respondent has been providing accounting services to small businesses who want employee stock ownership plans (ESOPs) that are not subject to ERISA. The Department of Labor has been reviewing at least one of these ESOPs to determine whether they are subject to ERISA. (Testimony of Respondent)

CONCLUSIONS OF LAW

1. 193A IAC 12.12(3) provides, in relevant part:

12.12(3) Notification requirements. Whenever a licensee's certificate, permit or license is revoked, ... under this chapter, the licensee shall:

a. Within 15 days of receipt of the board's final order, notify in writing all clients of the fact that the license has been revoked, ... Such notice shall advise the client to obtain alternative professional services;

b. Within 30 days of receipt of the board's final order, the licensee shall file with the board copies of the notices sent pursuant to paragraph 12.12(3)"a." Compliance with this requirement shall be a condition for an application for reinstatement.

2. 193A IAC 12.16 provides, in relevant part:

193A-12.16(272C,542C) Reinstatement. Any person whose certificate, ...has been revoked or suspended by the board may apply to the board for reinstatement in accordance with the terms of the order of revocation...

12.16(3) An application for reinstatement shall allege facts which, if established, will be sufficient to enable the board to determine that the basis for the revocation or suspension no longer exists and that it will be in the public interest for the license to be reinstated. The burden of proof to establish such facts shall be on the respondent.

3. 193A IAC 6.5 provides:

Every certificate, license or permit granted by the board shall, while it remains in the possession of the holder, be preserved by the holder, but such certificate, license or permit shall nevertheless always remain the property of the board. In the event that the certificate, license or permit is revoked or suspended in the manner prescribed by Iowa Code chapter 116, it shall, on demand, be delivered by the holder to the secretary of the board.

4. Based on this record, the Board is unable to conclude that the basis for the revocation of the Respondent's certificate of certified public accountant no longer exists or that it is in the public interest for his license to be reinstated.

The Respondent has failed to comply with the terms of the Board's June 10, 1994 Order. He has not paid the \$1,000.00 civil penalty. Even more significantly, although he claims inability to pay, he has had no correspondence with the Board which explained his failure to pay the penalty, nor has he attempted to make payment arrangements with the Board. He has chosen, instead, to ignore this provision of the Board's Order.

Second, the Respondent never sent written notices to his clients, as required by 193A IAC 12.12(3), and consequently also has not provided the Board with copies of his notices to clients. The Respondent alternatively claims that he either has no clients, is not sure who his clients are, or that he has notified the clients of his revocation in a manner that he has deemed adequate. The Board rule is quite specific as to what is required of the Respondent. The clear purpose of the requirement that letters be sent to clients, with copies to the Board, is so that the Board can verify that notice was provided. The state's exhibits establish that the Respondent did have clients during the relevant time period. The method of notification that the Respondent claims to have utilized does not comply with the Board rule and cannot be easily verified.

Third, the Respondent has never surrendered his certificate to the Board. The Respondent has alternatively stated that it is lost in his attorney's files, or that he is not legally required to produce it. The Respondent's claim that the Board's rule requiring him to surrender the certificate is invalid is rejected. The Respondent's revocation, which is the critical event, occurred after the Board rule requiring surrender was properly promulgated. The rule in question is not being retroactively applied to the Respondent and does not deprive the Respondent of a vested property right. The Respondent's "right" to his certificate was revoked in accordance with due process following a contested case hearing. The rule in question merely requires the Respondent to surrender the certificate that has been revoked.

Fourth, the Respondent has continued to represent himself to the public as a certified public accountant, after his certificate was revoked. The Respondent allowed at least four bills to be sent to clients under the name of "John L. Henss, C.P.A." This is in direct violation of both the Board's Order and of the Stay Order issued by the Polk County District Court. The Respondent's testimony that the bills were generated by his secretary, without any input from him, was simply not credible. It is not credible that the Respondent, who has asserted he has severe financial problems and few, if any, clients, would be completely removed from the process of preparing invoices totalling more than \$7,000.00. Moreover, while testifying that he never oversaw the billing process because his secretary of ten years was a "perfectionist," the Respondent asks the Board to believe that the secretary would then use old letterhead to issue billings when she knew that the Respondent's certificate had been revoked. Although the Board did not find this testimony to be credible, even if this had been true, the Respondent would still be responsible for the misrepresentation on his billing statements.

Fifth, the Board is convinced that the Respondent has repeatedly lied to them and refused to cooperate. His testimony concerning his methods of identifying and notifying clients was not credible. His testimony concerning his billing statements were inconsistent and incredible.

Finally, the Respondent continues to maintain that he was not a fiduciary and was without blame in his handling of the Feilen Meat Company ESOP, despite the holding of the Eighth Circuit to the contrary. This Board and the Respondent are bound by the Eighth Circuit's decision and its interpretation of ERISA, a federal law. Yet the Respondent continues to assert that the Federal District Court and the Eighth Circuit did not understand the case and their decisions were wrong. Given this attitude on the part of the Respondent, and his complete failure to comply with the Board's previous order, the Board cannot conclude that the reason for the

revocation of the Respondent's certificate no longer exists or that it is in the public interest to reinstate it.

ORDER

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

Dated this 2nd day of July, 1997.



David A. Vaudt, CPA
Chairperson
Iowa Board of Accountancy Examiners

cc: Steven L. Udelhofen
8515 Douglas Ave.
Suite 9, Omega Place
Urbandale, Iowa 50322
(CERTIFIED)

Pamela Griebel
Assistant Attorney General
Hoover Building
(LOCAL)

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

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BEFORE THE ACCOUNTANCY EXAMINING BOARD
OF THE STATE OF IOWA

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

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

The hearing on reinstatement was held on January 30, 2004 at 11:00 a.m. in the Board conference room at 1920 S.E. Hulsizer, Ankeny, Iowa. The Respondent appeared and was self-represented. The state of Iowa was represented by Pamela Griebel, Assistant Attorney General. The following Board members served as the presiding officers for the hearing: Linda Crim Hopkins, CPA, Chairperson; Wesley Stille, CPA; Ted Lodden, CPA; Tom Engelman, CPA; Richard Johnson, CPA; Susan Loy, LPA; and Susan Boe, Public Member. Margaret LaMarche, Administrative Law Judge from the Iowa Department of Inspections and Appeals, assisted the Board in conducting the hearing. A certified court reporter recorded the proceedings. The Respondent elected to have an open hearing, pursuant to Iowa Code section 272C.6(1).

After hearing the testimony and examining the exhibits, the Board convened in closed executive session, pursuant to Iowa Code section 21.5(1)(f)(2003), to deliberate its decision. The Board directed the Administrative Law Judge to prepare this Decision and Order, in accordance with their deliberations.

THE RECORD

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

FINDINGS OF FACT

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

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

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

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

(State Exhibits 4; 7)

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

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

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

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

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

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

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

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

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

(State Exhibit 9)

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

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

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

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

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

CONCLUSIONS OF LAW

193A IAC 16.5 provides, in relevant part:

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

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

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

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

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

193 IAC 7.30(3) provides:

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

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

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

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

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

Respondent's Legal and Constitutional Arguments

Due Process/Equal Protection

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

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

Statutory Interpretation of Iowa Code section 542C.21

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

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

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

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

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

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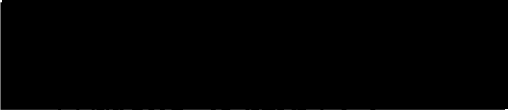
Page 9

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

ORDER

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

Dated this 27th day of February, 2004.



Linda Crim Hopkins, CPA
Chairperson
Iowa Board of Accountancy Examiners

cc: John L. Henss
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(CERTIFIED)

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