



SPECIAL BOARD MEETING
PUBLIC MINUTES
July 8, 2015
Telephonic Meeting

Present

Larry Brown, CPA, Chair
Scott Wright, CPA, Vice-Chair
John Lauseng, CPA, Treasurer
Al Crackenberg, PA
Candace Fronk, CPA

Staff

Martin Pittioni, Executive Director
*Susan Bischoff, AAG
*Noela Kitterman, Investigator
*Bethany Reeves, Compliance Specialist

Excused Absence

Lynn Kingston, CPA
Roger Graham, Public Member

Guests

Stu Morris, OAIA
Sherri McPherson, OSCPA

*= present at Board Office

1. CALL TO ORDER/ANNOUNCE RECORDING OF MEETING/REVIEW AGENDA

The Board convened in Public Session at 3:01 p.m. Mr. Brown announced that the meeting was being recorded. Mr. Brown took roll call. Each person in attendance stated their name. No changes were made to the agenda.

2. OLD BUSINESS

A. Review of SOS Audits Division Administrative Rule Update

Ms. Fronk explained that she had reviewed the proposed Rules in detail, and Jessie Brigham and Rob Moody had also reviewed them and given their feedback to her. One of several minor changes was that the proposed rules would add BOA to the list of agencies that would be notified of any potential changes to the Rules.

Mr. Pittioni explained that if the Board wanted to make comments to the Secretary of State's office, either he or a Board member would write up the comments from the Board and submit them. In this case, comments are due by July 30, 2015.

Board members discussed the language in the proposed rules that required just a contract, and whether they would want to comment that they recommend the Rule say "engagement letter that otherwise meets professional standards".

In addition to that issue, Mr. Wright noted that in OAR 162-010-0020(10), the proposed Rules call for audit reports to have the names and addresses of the municipal corporation, but he thought only the CAFR was required to have that. He was also concerned that OAR 162-010-0020(11) seemed to use “annual report” interchangeably with “audit report”. Ms. Fronk noted that many municipal bodies use the term “annual report” to refer to the “audit report”.

It was agreed that Ms. Fronk and Mr. Wright would each write up their comments on their item of concern and provide them to Mr. Pittioni by July 24, 2015, and then Mr. Pittioni would create a formal letter on the Board’s behalf and submit it by the due date.

B. Discussion of Proposed Settlement in Case #14-021 – Dan Barnes

Mr. Pittioni rang off the line. Chair Brown announced that Mr. Pittioni had a direct conflict of interest with the Respondent, and so Mr. Pittioni would not be present during the Board’s consideration of the settlement agreement.

Ms. Bischoff summarized the case: The Respondent, who owns a commercial building, rented space to the Complainant. The Complainant was not a client of the Respondent at the time the rental agreement was entered into, but the Complainant later became a client of the Respondent. After the Complainant became a client of the Respondent’s CPA practice, the Respondent invested in the Complainant’s business. At the time of this investment, the Respondent did not disclose to the Complainant their differing interests or obtain a waiver of conflict of interest. The BOACC recommended that there was sufficient preliminary evidence to find a violation of Business Transactions with Clients and Integrity and Objectivity. The BOACC also voted to recommend that there was Professional Misconduct because the CPA created promissory notes for other investors in Complainant’s business that could potentially put the client at odds with other investors. Chair Brown commented that if the Board were to approve the settlement, the Board should also advise the Respondent in writing that he should not prepare promissory notes.

Ms. Fronk asked if the Board has a history of considering settlement agreements before any violations have been found by the Board. Ms. Bischoff noted that it has happened in administrative violations, and Board rules explicitly authorize the director to engage in settlement negotiations before the Board finds a violation by vote.

BOARD ACTION: Moved by Mr. Wright to accept the proposed settlement in Case #14-021 as presented.

DISCUSSION: None.

VOTE: 5 ayes – unanimous

POST-VOTE DISCUSSION: Ms. Fronk noted that in the future, she would prefer for the Board to vote on the violations first, then consider any settlement agreement. Chair Brown added that he believes this process is valuable because it is efficient, but that at the next public session, the Board should define the nature of the cases it wants to put into this process. Mr. Fronk agreed it was efficient and would be helpful in reducing the caseload, but she did not think cases with allegations of Professional Misconduct should be in this process. Chair Brown thanked the Board for testing out the process and thanked Ms. Bischoff for her initiative.

There was no disagreement to Chair Brown's suggestion of preparing written letter to the Respondent that the very act of preparing a promissory note could be considered the unlicensed practice of law, and should be restricted to attorneys.

3. GUSTAFSON CASE UPDATE AND REQUEST FOR BOARD GUIDANCE

Mr. Pittioni re-joined the conference call. Ms. Bischoff provided an update on the Gustafson case and asked the Board to make a policy decision on if and when it was appropriate for a Board to revisit a case it had previously decided, when that case had gone through a full process of legal review such as a contested case and appellate proceedings. She provided the following background information:

- The Gustafson case, Case #09-116 CNK, was hotly contested. There was a two-day long hearing before an administrative law judge (ALJ). The ALJ upheld the underlying violations and prepared a Proposed Final Order, which differed considerably from the Order prepared by the Board in the aspect of sanctions.
- The Board considered the Proposed Final Order but did not adopt it, and instead amended the Proposed Final Order with respect to the length of time the suspension would be in effect and issued a Final Order with that amendment.
- Mr. Gustafson appealed the Board's Final Order. The appellate court recently released its unanimous opinion, in which the Board's Final Order was fully supported.
- Several members that sit on the Board now, joined the Board after the Board dealt with this case prior to its appellate phase.
- The Board has received a request to enter into settlement negotiations to settle the case.
- If the Board were to enter into new settlement negotiations, they would first need to be provided with all information related to the case in order to reconsider the outcome.
- If this Board reconsidered the case and decided a different outcome, that would be the same as this Board setting aside the decisions of a prior Board.
- If the Board were to agree to enter into new settlement negotiations, Ms. Bischoff would bring a specific proposal from Gustafson to the August Board meeting.
- Mr. Pittioni noted that if the Board were to agree to a new settlement, it would undo prior actions taken by the Board and set aside the outcome of the contested case process and the recent decision made by the appellate court.

The members of the Board then discussed the issue, including making the following points:

- Chair Brown noted that it seemed to him that entering settlement negotiations would effectively re-open the case - after many years and much discussion by a prior Board; and to have the case re-opened by a Board composed of so many people who did not hear the original case, would set a dangerous precedent.
- Chair Brown was concerned that entering settlement negotiations now, at this very late stage in the process, would encourage other Respondents to exhaust their legal remedies and then try to settle with the Board.

- Chair Brown thought that it would be imprudent to re-open settlement negotiations, unless there were new or different facts that had not been considered previously.
- Ms. Bischoff noted that the Respondent appeared to think that he would prevail at the Oregon Supreme Court, and seemed to imply that the Board would save money on legal fees by negotiating a settlement with him now. She also noted that the Respondent's attorney seemed to believe that engaging in settlement negotiations would restore good will between the Respondent and the Board, because the attorney appears to blame the prior executive director for failure to reach a settlement with the Board in 2011.
- Ms. Bischoff agreed that that the only possible benefit she could see from entering settlement negotiations would be the possibility of saving on legal fees, if the Oregon Supreme Court were to take up the case.
- Mr. Pittioni added that the Oregon Department of Justice Appellate Division staff did not see any criteria that would cause the Oregon Supreme Court to take up the case, so the only risk to not entering settlement negotiations is the risk of delay from a Supreme Court review.
- Ms. Bischoff noted that the Respondent will be able to practice public accounting until a formal appellate court judgment is issued, and even then, the Respondent could challenge the judgment in the Oregon Supreme Court, and continue to practice until they issued their decision, if the Oregon Supreme Court were to take up the review.
- Ms. Bischoff noted that if the Board were to choose to re-enter negotiations, she would present a thorough discussion of the case so that all of the members of the board, including the ones who have come on since the case was last considered, would understand the facts of the case.

There was consensus that the Board did not want to re-open settlement negotiations at this time. Mr. Crackenberg cautioned against making a policy that the Board would never re-open negotiations, because he wanted the Board to retain the flexibility to re-open them if there was compelling reason, but he affirmed that in this case he saw no reason to re-open the negotiations, and opposed the request to do so. Mr. Pittioni summed up the Board's stance as very reluctant to set such a precedent, and was not prepared to go there in this matter. Ms. Bischoff said she would relay the Board's response to the Respondent.

4. ADJOURNMENT AND ANNOUNCEMENT OF NEXT MEETING

Mr. Brown announced the next meeting will be held on August 3, 2015 in Salem. Mr. Pittioni noted that the meeting is scheduled to be two days long, but as the agenda is developed, he would work with the Chair to determine how many days the meeting would actually be.

The meeting was adjourned at 3:45 p.m.