

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No.: 2018-0332

RON L. BEAULIEU & COMPANY

v.

New Hampshire Board of Accountancy

Rule 7 Mandatory Appeal

APPELLANT'S BRIEF

Respectfully submitted by,

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To be Argued by:
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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... 3
QUESTIONS PRESENTED 11
STATEMENT OF THE CASE AND FACTS 13
SUMMARY OF ARGUMENTS 20
ARGUMENTS 22

TABLE OF AUTHORITIES

CASES

Appeal of Anderson, 147 N.H. 181, 183 (2001)..... 37

Appeal of Daubert v. Merrell Dow Pharmaceuticals (92-102),509 U.S. 579 (1993) 31

Appeal of Estate of Teed (1952) 112 Cal. App. 2d 638,644; (citations) 34

Appeal of Kruse V. Bank of America (1988) 202 Cal. App. 3d 38, 51-52.. 34

Appeal of Richardson v. Perales, 402 U.S. 389,401 (1971) 33

Appeal of Robert Daniel Mays 161 N.H. 470 (N.H. 2011)..... 13. 37

Consolidated Edison Co. v. NLRB, 305 U.S. 197, 230 (1938). 34

STATUTES

RSA 309-B:10, I(a) 14

RSA 309-B:10, I(a)-(f) 14

RSA 309-B:10, I-a (e) and/or (j) 14, 23, 25, 29, 35

RSA 309-B:10, I-a (g) and/or (j) 14, 38

RSA 309-B:12, III 29, 36, 37

RSA 309-B:12, X 14, 19

RSA 309-B:19 12, 21, 22, 35, 37, 35

RSA 541. 19, 38

RSA 541:13 20

RSA 541-A:35 21, 27, 28

RULES

N.H. Code Ac 210.02 28
N.H. Code Ac 210.04 22, 32, 33
N.H. Code Ac 404.03 21, 38
N.H. Code Ac 404.03 (g)..... 38
Federal Single Audit Act of 1984, Federal Circular A-133 35

QUESTION PRESENTED

1. Did the court err in failing to overturn the ruling of the Accountancy Board (the Board) that RLB&CO's auditing work for the Tri-County Community Action Program (TCCAP) for the years 2008 through 2011 constituted professional misconduct under the following circumstances:

- a) The only evidence of professional misconduct against RLB&CO was contained in the conclusions of an unidentified author or authors (whose qualifications were not established) of a report prepared by the New Hampshire Office of the Attorney General (The Report). The Report concludes in its text that the audits conducted by RLB&CO for the years 2008 through 2011 exhibited professional misconduct under NHRSA; (See Apx. p. 581, 618).
- b) Not one witness from the AG's office appeared at the hearing to explain to the Board the logic behind how the conclusions in the Report were reached; (See Apx. p. 643).
- c) The Board's own investigator, a CPA and Board member, testified that he could not conclude based upon his investigation that RLB&CO had done anything which constituted professional misconduct; (See Apx. p. 655).
- d) The only expert witness in the case, Ron L. Beaulieu, CPA, testified that the work RLB&CO performed for Tri-County Community Action Program during the years 2008 through 2011 was performed in accordance with the Generally Accepted Auditing Standards; (See Apx. p. 522, 615, 670) and

e) When RLB&CO's attorney objected to the introduction of the Report into evidence, an attorney Board member agreed that any conclusions contained in the report should be excluded. The Board ruled that the conclusions contained in the report were not admitted into evidence. Irrespective of their exclusion from evidence, the Report's conclusions were adopted by the board and constituted the chief basis for the Board's finding of professional misconduct. (See Apx. p. 393, Tr. p. 9-11; Apx. p. 643, 644).

2. Did the court err in failing to overturn the ruling of the Board that RLB&CO failure to retain work papers for a minimum period of five years constituted a professional misconduct as a violation of RSA 309-B:19, when RSA 309-B;19 is silent as to how long a licensee must retain working papers, and provides that nothing in RSA 309-B;19 shall require a licensee to keep any work paper beyond the period prescribed in any other applicable statute. (See Apx. p. 522, 615).

3. Did the court err in failing to overturn the ruling of the Board that RLB&CO failed to retain work papers for a minimum period of five years as required by N. H. Admin Rules, Ac 404.03(g), when N.H. Admin Rules Ac 404.03 mandates a retention period only for client records (Accounting & Tax documents) and not working papers belonging to the CPA Firm (Auditing documents), especially in light of the fact that the Board's only expert, a CPA and Board member testified that he could not conclude that retaining paperwork for more than RLB&CO's three year standard retention period was required for auditing paperwork. (See Apx. p. 473, 484).

4. Did the court err in failing to overturn the ruling of the Board that RLB&CO failed to retain work papers for a minimum period of five years as required by N. H. Admin Rules, Ac 404.03(g), when the Board had no legal authority to define a retention period, and when an administrative rule is prohibited when it “adds to the Statute” rendering it unlawful. (see Supreme Court Decision in *Appeal of Robert Daniel Mays* 161 N.H. 470 (N.H. 2011)).
5. Did the court err in failing to overturn the Board’s ruling of professional misconduct was appropriate when the Board’s findings of facts made no reference to evidence, as required by RSA 541-A:35. (See Apx. p. 478, 522).
6. Did the court err in failing to overturn the Boards ruling of professional misconduct was appropriate when substantial evidence of misconduct was not admitted into evidence. (See Apx. p. 522, 615).
7. Did the court err in failing to overturn the Board’s ruling of professional misconduct when the only lawfully admitted evidence regarding professional conduct was the testimony of Ron Beaulieu who testified that RLB&Co’s work for TCCAP was performed within GAAP standards, and the testimony by the Board’s investigator and member who stated that he could not conclude that anything that RLB&Co did or didn’t do constituted professional misconduct. (See Apx. p. 481, 522).

STATEMENT OF THE CASE

On January 14, 2016 NHBOA informed Ron L. Beaulieu of a Complaint filed against Ron L Beaulieu & Company by the New Hampshire Department of Justice, Office of the Attorney General. On or

about January 10, 2017 this action was commenced by NHBOA against Ron Beaulieu and company for alleged professional misconduct on three grounds (See Apx. p. 4):

- 1) In violation of RSA 309–B:11 and RSA 309–B:10, I(a)-(f) for failing to comply with the subpoena duces tecum issued by NHBOA;
- 2) RSA 309–B:10 I–a (g) and/or (j) and Admin. Rule 404.03 (g) for failing to retain work papers and/or records required.
- 3) RSA 309–B:10 I–a (e) and/or (j) for professional misconduct in failing to properly conduct auditing services.

On April 9, 2017 a hearing was held at the NHBOA and was further convened to May 3, 2017 in public to deliberate. (See Apx. p. 470).

On August 11, 2017 the New Hampshire Board of Accountancy issued its Amended Final Decision and Order in which the Board found against Ron L. Beaulieu & Company on all three charges and after further hearing, suspended Ron L. Beaulieu’s license to practice as an accountant in the state. (See Apx. p. 492).

On October 20, 2017 Ron L. Beaulieu & Company filed a complaint in the superior court entitled “Appeal to Superior Court Under RSA 309-B:12, X”, seeking reversal of the board’s decision and order. (See Apx. p. 522).

On May 7, 2018 the Superior Court issued its order reversing in part and affirming in large part the board's August 11, 2017 decision. (See attached Order).

Post judgment pleadings were filed. Following the denial of Plaintiff's post judgment motions, this Rule 7 appeal was filed on June 8, 2018.

STATEMENT OF FACTS

1. Ron L. Beaulieu & Company is a Certified Public Accountancy Firm located in Portland, Maine. The Firm was established in 1986, and has professionally operated in each of the past 30 years under Firm Licenses issued by the Maine Board of Accountancy. Additionally, in 1991, the Firm began doing financial statement audits of New Hampshire entities, and had applied for and was granted Foreign Accountants Practice Permits, as issued by the New Hampshire Board of Accountancy, for each of the past 25 years. (See Apx. p.579-596; Apx. p. 426, Tr. p. 143, 144).
2. In 2008, Ron L. Beaulieu & Company was asked to reply to a Request for Proposal of Auditing Services for Tri-County Community Action Program, Inc. (TCCAP). They requested standard financial statement audits and standard federal compliance audits services. Ron L. Beaulieu & Company was chosen as the winning proposer of these specified auditing services, in part because of their extensive experience performing financial statement audits of nonprofit entities, and more specifically - community action program (CAPs) entities.
3. Ron L. Beaulieu performed standard financial statement audits and standard federal compliance audits services for TCCAP under engagement agreements from 2008 through 2012. (See Apx. p. 75-80, 83-88, 11-117, 119-123).

4 Professional services offered by the firm include Assurance Engagements, including Financial Statement Audits, Compliance Audits, Performance Audits, and Internal Control Audits. All of the assurance engagements are performed utilizing Generally Accepted Auditing Standards. Additionally, the firm offers professional services in Consulting, including accounting service, tax compliance services, and management advisory services. All consulting service engagements are performed utilizing Statements on Standards for Consulting Standards. All professional services are defined and detailed out in the engagement letter which serves as a contract between the firm and the client, specifying the scope and limitations of services to be provided. (See Apx. p. 75–80, 83-88, 113–117, 119-123).

5. In the nonprofit industry, Ron L. Beaulieu & Co. typically is engaged to perform financial statement audits, compliance audits, performance audits, and internal control audits. All of the assurance engagements are performed utilizing generally accepted that auditing standards. Additionally, the firm offers professional services in consulting, including accounting service, tax compliance service, and management advisory services. All consulting service engagements are performed utilizing statements on standards for consulting standards. All professional services are defined and detailed out in the engagement letter which serves as a contract between the firm and the client specifying the scope and limitations of services to be provided. (See Appx. P. 75 – 80, 83-88, 113–117, 119-123).

6. For each of the years which Ron L. Beaulieu & Company performed services for TCCAP, an engagement agreement was signed. Each of the

agreements called only for financial statement audits and compliance audits for the fiscal years ending on June 30, 2008, June 30, 2009, June 30, 2010 and June 30, 2011 and 2012. (See Apx. p. 437, Tr. p. 186).

None of the engagement agreements from 2008 through 2012 included the performance of Performance Audits or Internal Control Audits by Ron L. Beaulieu & Company. (See Apx. p. 75-80)

7. Ron L. Beaulieu & Company performed, completed, and issued reports on TCCAP's financial statement audits and compliance audits as of June 30, 2008, June 30, 2009, June 30, 2010, June 30, 2011. (See Apx. p. 408, Tr. p. 70 – 71; Apx. p. 430, Tr. p. 157–160).

8. Although Ron L. Beaulieu & Company was engaged to perform TCCAP's financial statement audits and compliance audits as of June 30, 2012, as of December 2012 the company could only work on planning steps of the financial statement audit, as management had not closed its books and was unable to provide its financial statements on even a trial balance. (See Apx. p. 408, Tr. p. 70,72; Apx. p. 409, Tr. p. 75). Ron L. Beaulieu & Company has performed more than seventy of these audits throughout the northeast. Collectively, the firm of Ron L. Beaulieu & Company has audited over 1.6 billion in revenues and expenses for non-profit agencies.

9. In December 2012, the Attorney General petitioned the 1st Circuit Court to suspend the Board of Directors of TCCAP, and appoint a Special Trustee. (See Apx. p. 45, 58, 59).

10. On February 6, 2013 Ron L. Beaulieu & Company was informed by the CPA Firm of Mason & Rich, that they had been engaged to conduct the audit of June 30, 2012. (See Apx. p. 410, Tr. p. 80; Apx. p. 411, Tr. p. 81).

11. On July 29, 2015 the Attorney General issued a Report on Tri-County Community Action Program, Inc. and stated in the report that a claim had been filed with the agency's insurer, which was denied, and that litigation against the officers and directors was being filed. Further, it stated that the officers and directors in turn were expected to file coverage litigation against the insurer. It further stated that litigation against Ron L. Beaulieu & Company was being contemplated. Eventually, the suit against TCCAP ended in a \$700,000 insurance settlement payment to the Attorney General. (See Apx. p. 673, Tr. p. 128).

12. On October 23, 2015 a civil suit, seeking \$1,300,000. was filed by the Attorney General against Ron L. Beaulieu, on behalf of Tri-County Community Action Inc., with the State of New Hampshire as a party and as Subrogee of any damages.

13. On June 12, 2017, the \$1,300,000.00 damages civil lawsuit against Ron L. Beaulieu & Company was settled and dismissed, with prejudice. (See Apx. p. 586).

14. The peer reviews of Ron L. Beaulieu & Company which covered each of the years upon which the NHBOA action was based found no deficiencies in the conduct and performance of its auditing services. (See Appx. p. 427, Tr. p. 145-147).

15. The Firm of Ron L Beaulieu & Company has been peer reviewed and has consistently received the highest level of report on all peer reviews since the reviews' inception in 1988. (See Apx. p. 427, Tr. p. 145).

16. The Firm's managing shareholder is Ron L. Beaulieu, CPA, CFF, ABV, CGMA. Mr. Beaulieu began his public accounting career immediately upon graduating with a Bachelor of Science – accounting

concentration degree from the University of Maine in 1978, and earned his Certified Public Accountant designation in 1980, after successfully completing the examination and obtaining the 2-years experience requirement. Mr. Beaulieu has also earned advanced designations including the CFF- Certified in Financial Forensic, ABV- Accredited in Business Valuations, and CGMA- Chartered Global Management Accountant. All designations and accreditations are issued by the American Association of Certified Public Accountants. Additionally, Mr. Beaulieu is an approved Peer Reviewer, and has been performing Peer Reviews of CPA Firms since 1991 (over 26 years) and has performed over 50 firm peer reviews. (See Apx. p. 582 11).

STANDARD OF REVIEW

On appeal to this court of the superior court's ruling, it is the Appellant's burden to show that the factual findings and rulings of the superior court lack evidentiary support or are legally erroneous.

On appeal to the superior court from the Board ruling, "Any person or firm adversely affected by any order of the board entered after a hearing under this section may appeal such order by filing a written petition with the superior court ... The record of the hearing of the board's action shall be presented to the superior court for its review pursuant to the procedures and standards of RSA 541." RSA 309-B:12, X.

"Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to

be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.” RSA 541:13.

SUMMARY OF ARGUMENT

I. Professional Negligence in conducting audits

The main issue of this appeal stems from the unlawful Decision of the New Hampshire Board of Accountancy (the Board) resulting from its unlawful adoption of the conclusory opinions contained in the Report on Tri-County Community Action Program, Inc. (the Report), that Ron L. Beaulieu & Company had engaged in professional misconduct for not properly conducting audits for the years 2008 through 2011. The Report, dated July 29, 2015 is not signed, and it does not identify its author, or authors, but it bears the names on its cover page of Joseph A. Foster, Attorney General and Thomas J. Donovan, Director of Charitable Trusts.

At the adjudicative hearing, Plaintiff objected to the admittance of the Report for both its factual content and the conclusions reached by its unnamed author or authors. The Board admitted the Report for limited purposes, e.g., its factual content, but sustained Plaintiff’s objection to the admission of any conclusions reached and stated in the Report by its author(s). (See Apx. p. 392, Tr. p. 5-11; Apx. p. 393, Tr. p. 9-11).

Contrary to its own ruling on the inadmissibility of the conclusions stated in the Report, the Board’s Order adopted the Report’s conclusions, and found, without any relevant evidence, that the Plaintiff had engaged in professional misconduct for not properly conducting audits for Tri County

Community Action Program (TCCAP) for the years 2008 through 2011. (See Apx. p. 487).

The Board's ruling also failed to make reference to evidence which might support its "findings of fact" as is required under RSA 541-A:35. The was not based upon substantial relevant evidence as required under state and federal caselaw. Further, the ruling of professional misconduct was made without any testimonial or documentary evidence that any act of Ron L. Beaulieu and Company constituted professional misconduct. (See Apx. p. 487).

On appeal, the Superior Court upheld the Board's ruling on professional misconduct. The court, in large part, merely repeated the Board's rationale that the Report's conclusions, which had been excluded from evidence, were sufficient, despite the lack of supporting facts, to warrant a finding of professional misconduct for not properly conducting TCCAP's audits for the years 2008 through 2011. The Court also ruled, contrary to Administrative Rule 210.02 that it was Ron L. Beaulieu and Company's burden to rebut the conclusions which were not admitted into evidence, and that it failed to do so. (See Apx. p. 487, 488).

II. Failure to retain audit records

The applicable audit work paper retention period was at least three years. Ron L. Beaulieu & Company's retention for a three year period was neither in violation of New Hampshire Statutes nor in violation of New Hampshire Board of Accountancy Rules. Specifically, RSA 309-B:19 is silent on specifying an audit work paper retention period. Additionally, Board of Accountancy Rule 404.03 does not address audit work paper retention, and if the rule is interpreted to apply to audit work papers, then

the rule is illegal based upon recent Supreme Court Cases. The Board's and the Court's findings of professional misconduct are contrary to the state statutes and rules and the federal rule.

ARGUMENT

I. THE BOARD FINDING OF, AND THE COURT UPHOLDING THE FINDING OF, PROFESSIONAL MISCONDUCT IN CONDUCTING AUDITS WAS ERROR.

In its May 7, 2018 order, the court notes that the technical rules of evidence did not apply that the board hearing, and that under NH Admin Rule AC 210.04, "all data" that will assist the board in arriving at the truth is admissible," except that irrelevant, immaterial or unduly repetitious evidence shall be excluded.

Based on the Board's ruling on Plaintiff's objection to the admission of the Report, the Report was entered into evidence on a limited basis. The limitation was that any conclusions rendered by the author(s) of the Report were not admitted into evidence (See Apx. p. 393, Tr. p. 10, 11).

In its ruling, however, the Board went far beyond admitting "data" in arriving at its decision. The Board's ruling adopted the Report's conclusions. There was no testimony or other evidence presented at the Board, or at the Superior Court, which identified what data contained in the report, or anywhere else, constituted relevant evidence upon which the Report's conclusions might have been based. Neither the Board nor the Superior Court identified what data, or what action or inaction by Beulieu, constituted evidence of Beulieu's alleged professional misconduct in conducting audits for TCCAP. (See Apx. p. 470-491; attached Order).

The Decision of professional misconduct for the firm's failure to perform its auditing services properly, is based almost entirely upon the conclusory statements in the Report. The relevant section of the Board's Decision states under Deliberations and Findings:

“The Board voted unanimously that the Respondent was in violation of New Hampshire RSA 309-B:10, I-a (e) and/or (j) in that he committed professional misconduct in failing to properly conduct auditing services for TCCAP for fiscal years 2008 through 2011. Specifically, the Board referred to the States Exhibit 1, page 3, (See Apx. p. 9) which sets forth the findings of the New Hampshire Department of Justice. More specifically, that report indicated that ‘many factors contributed to the agency's financial failure. They included poor financial controls, borrowing from restricted funds, incomplete financial reporting, failure to address audit management letter recommendations, ongoing operating deficits, over-expansion of programming and unsustainable acquisition of real estate assets.... In addition, the accounting firm retained by the agency to perform the annual financial audits for fiscal years 2008 through 2011 (Respondent) prepared incomplete and inaccurate reports and failed to detect or report internal control weaknesses and improper accounting procedures.’” This finding by the Board adopts, word for word, the conclusory statements of the unknown author(s) of the Report, which had been excluded from evidence based on the Board's ruling sustaining Appellant Ron L. Beaulieu and Company's objection. (See Apx. p. 470-491; attached Order). There was no testimony offered to explain how any of the "data" contained in the report was evidence of report inaccuracies, failures to detect report internal control weaknesses or improper accounting procedures.

It was error of law for the Board to have relied upon the Report's conclusions without substantial evidence to support the conclusions, because they had been excluded from evidence by ruling of the Board itself.

In upholding the Board's decision, the court ruled that the Board's conclusions that Beaulieu "had made inaccurate conclusions regarding TCCAP's risk level and failed to identify management concerns that were later found by a subsequent auditor", were among the "factual findings" which support the Board's conclusion that Beaulieu had engaged in professional misconduct. The conclusions contained in the Report are not "factual findings" or "data". With regard to Beaulieu's work, with the one exception noted below, the Report, and the Board fail to identify facts which constitute professional misconduct. In upholding the Board's finding of professional misconduct, the court merely ratified the improper use by the Board of the conclusions contained in the Report, the conclusions which the Board itself had ruled were excluded from evidence.

Additionally, the subsequent audit referred to by the court was conducted for the fiscal year 2012, and was based upon data which had not yet been provided to Beaulieu when his contract was terminated. (See Apx. p. 408, Tr. p. 70, 72; Apx. p. 409, Tr. p. 75). Ron L. Beaulieu & Company was engaged to perform TCCAP's financial statement audits and compliance audits as of June 30, 2012; but as of December, 2012, the company could only work on planning steps of the financial statement audit, as management had not closed its books and was unable to provide its financial statements or even a trial balance. The termination occurred on February 6, 2012. Ron L. Beaulieu & Company is blamed in the report for his alleged failure to find what the firm of Mason and Rich found after it

had been provided with financial data which was not yet available and therefore not provided to Ron L. Beaulieu & Company, the data which was necessary in order to complete the statement audits and compliance audits for fiscal year 2012.

The court notes that the Board had relied, not only, upon the conclusions contained within the report, but also, upon, "Mr. Beaulieu's own testimony at the hearing". Mr. Beaulieu had in fact testified at the hearing that he had made a mistake in his audit for the fiscal year 2013. There was no evidence, however, that the mistake was of any consequence to TCCAP. Ron Beaulieu testified that the mistake was inconsequential. Such a mistake does not in and of itself constitute the gross mismanagement required under the statute to amount to professional misconduct. RSA 309-B:10, I-a (e).

Ron L Beaulieu provided the only testimony with regard to the work he was under contract to perform for TCCAP, what the standard was for conducting an audit for a nonprofit agency and whether the work performed and the manner in which the work was performed fell within the professional standards for accountants conducting audits.

In 2008, Ron L. Beaulieu & Company was asked to reply to a Request for Proposal of Auditing Services for Tri-County Community Action Program, Inc. (TCCAP). They requested standard financial statement audits and standard federal compliance audits services. (See Apx. p. 419, Tr. p. 115, 116; Apx. p. 420, Tr. p. 117, 118). Ron L. Beaulieu & Company was chosen as the winning proposer of these specified auditing services, in part because of their extensive experience performing financial

statement audits of nonprofit entities, and more specifically - community action program (CAPs) entities.

In the Nonprofit Industry, Ron L. Beaulieu & Company offers the following services, but typically nonprofit entities do not elect to purchase these services:

a. Audit on the Design of Internal Control:

In this special purpose audit engagement, Ron L. Beaulieu & Company examines the suitability of the design of an entity's internal control over financial reporting to prevent or detect and correct material misstatements in its financial statement on a timely basis, as of a date, and based on selected criteria. Upon the completion of our test work, the company will state its opinion on whether or not the entity's internal control over financial reporting was suitably designed, in all material respects, to prevent or detect and correct material misstatements in the financial statements on a timely basis.

TCCAP did not engage RLB&CO to perform this service.

b. Audit on the Effectiveness of the Entity's Internal Control:

In this special purpose audit engagement, Ron L. Beaulieu & Company examine the effectiveness of an entity's internal control over financial reporting. Upon the completion of our test work, the company will state its opinion on whether or not the entity maintained, in all material respects, effective internal control over financial reporting.

TCCAP did not engage RLB&CO to perform this service.

c. Performance Audit:

In this special purpose audit engagement, Ron L. Beaulieu & Company will perform an objective and systematic examination of evidence to provide an independent assessment of the performance and management of the entity against objective criteria. Such audits will provide management, or those charged with governance, information to improve organizational operations, facilitate decision making, increase effectiveness, economy, and efficiency, and reduce cost. Upon the completion of its test work, the company will issue a report of our findings.

TCCAP did not engage RLB&CO to perform this service.

Ron L. Beaulieu & Company performed, completed, and issued reports on TCCAP's financial statement audits and compliance audits as of June 30, 2008, June 30, 2009, June 30, 2010, June 30, 2011. Mr. Beaulieu testified that those audits were conducted within the standards of the industry, and with the exception of one mistake which proved to be insignificant, were performed in full compliance with his contractual obligations to TCCAP.

Had Ron L. Beaulieu & Company been engaged to perform other services such as an Audit on the Design of Internal Control, an Audit on the Effectiveness of the Entity's Internal Control, or a Performance Audit, there is no doubt that the impending failures at TCCAP would have been identified long before its financial collapse.

BOARD'S FAILURE TO COMPLY WITH RSA 541-A:35

Under the Administrative Procedures Act, the Board was required to separately list the facts which support its findings. Whereas the conclusory

statements from the Report which were adopted by both the court and the board amount to opinions of law as opposed to factual findings, and the Report offers no facts in support of the opinions, the rulings violate RSA 541-A:35 because they fail to be “accompanied by a concise and explicit statement of the underlying facts supporting the findings”.

SHIFTING THE BURDEN OF PROOF

The burden was on the Board to prove its case against Ron L. Beaulieu and Company by a preponderance of the evidence, i.e., to prove that the company had violated the rules as alleged. (N.H. Admin. Rule 210.02).

In the absence of any relevant documentary or testimonial evidence of misconduct, the Board chose to unlawfully shift the burden to the Plaintiff to prove that his firm had not engaged in professional misconduct.

In its Final Decision and Ruling, the Board notes not only that it accepts the conclusory opinions of the Report, but also that it was Beaulieu’s burden to rebut the conclusions. The board states,

“The Board also discussed that TCCAP is charged with caring for the most vulnerable people in the State of New Hampshire, i.e., at risk children and adults. As a result of the audits from 2008 through 2011 not having been completed adequately, the State of New Hampshire was required to step in in order to save the agency. There was no evidence submitted by the Respondent to rebut this information.”

(See Apx. p. 17).

In its Final Order, the court ruled

“[Beaulieu] was found to have committed professional misconduct by failing to properly conduct auditing services for TCCAP for fiscal years 2008 through 2011, in violation of RSA 309-B:10, I-a(e) and/or (j). There was insufficient evidence, if any, submitted by [Beaulieu] to rebut this evidence.” (See attached Order).

“In light of the fact that RSA 309-B:12, III expressly permits for a licensee to present evidence and witnesses on licensee’s behalf, it was not improper for the Board to note that Beaulieu did not present adequate evidence to rebut the evidence against Beaulieu.”

Although the statute “permits” a licensee to submit evidence and witnesses, it does not shift the burden to rebut what the state had not proven.

Here the court’s conclusion that Beaulieu needed to submit rebuttal evidence appears to be based upon the court’s acceptance of the conclusions contained within the Report as facts admitted into evidence. The conclusions are not in themselves facts, and there were no facts admitted which support the Report’s conclusions. If, indeed, the Report had identified facts which were the basis for the conclusions reached by the report's author or authors, Beaulieu would have known what facts needed to be rebutted. The Report, however, fails to identify any such facts. The suggestion that Mr. Beaulieu should have rebutted these conclusions, shifts the burden onto him to create and present the facts which the state may have used in reaching its conclusions, and then to rebut those unknown facts.

Although the report does contain some data and facts, Beaulieu has no clue as to what data and what facts contained in the report are the basis for the report's conclusions. He testified that his work was performed properly. Without testimony as to what facts constitute the basis for the Report's conclusions of misconduct, no rebuttal was possible.

Thomas Musgrave provided the only testimony for NHBOA, other than that elicited from Ronald Beaulieu. Mr. Musgrave who is a CPA and a board member served as the investigator in this case. He testified that he could not identify any act engaged in by Ron L. Beaulieu & Company which fell below the generally accepted accounting principles and generally accepted auditing standards, or any other act, or failure to act by Ron L. Beaulieu & Company which might constitute a failure to properly conduct auditing services. Mr. Musgrave offered no evidence to rebut.

The Board's shifting of the burden and the court's failure to find this to be error as a matter of law constitute improper shifting of the statutorily prescribed burden of proof. This burden shifting constitutes legal error.

LACK OF SUBSTANTIAL EVIDENCE

There was no foundation laid in the Report for the statements and conclusions reached by its author or authors. A proper foundation would require authentication. In this case the actual author(s) are not identified. It would further require some explanation as to the purpose of the Report. No testimony was provided by the author(s) of the Report or any other witness as to the purpose or purposes of the report. On page 4 of the report (See App. p. 43-60), it states,

“The investigation has culminated in this report as well as recommendations to pursue recovery for losses that the State of New Hampshire incurred relating to TCCAP.”

(See Apx. p. 618).

Certainly, the pursuit of money was a purpose of the report. It is not stated anywhere that the purpose was to provide an expert opinion on the quality of the independent audit or to gather relevant information to assess auditor professional conduct or misconduct.

Further, in order to establish a foundation, the qualifications of the author(s) would also need to be established. Without any evidence to the contrary, one must assume that the author(s) of the Report are not experts, professionals, or para-professionals in the field of auditing. They are not Certified Public Accountants, Qualified Peer Reviewers, or even plain accountants, and therefore, they are regarded in the professional field of auditing as uneducated and inexperienced. They are not qualified, even outside of a hearing, to judge and conclude that Ron L. Beaulieu & Company displayed professional misconduct by not following Generally Accepted Auditing Standards. In order for an opinion of an expert to be allowed at a hearing, that expert must be qualified as an expert under the standard's established in *Daubert*. There was no attempt by the State's counsel to qualify the Report or its contents as an expert opinion. (See *Daubert v. Merrell Dow Pharmaceuticals* (92-102), 509 U.S. 579 (1993)).

Further, since no foundation had been laid, one can only assume that the purpose of the Report was not to provide highly technical, relevant, reliable, probative, substantial evidence and conclusions on auditor

professional misconduct, but only to provide a recommendation to pursue recovery, as is explicitly stated in the report.

The eighteen-page Report primarily discusses and concludes management misconduct and governance misconduct at Tri-County Community Action Program, Inc. Section X of the report (See Apx. p. 57, 58) is labeled Auditor Misconduct. Section X is only five paragraphs long, and simply provides statements, and a layperson's perceptions, assumptions, or conclusions. The Report's conclusions upon which the Board relied in its Decision of professional misconduct, make no reference to any specific act which constituted professional misconduct, or to any professional standard which the plaintiff is alleged to have violated.

The report was not an expert witness report, and therefore, was simply a lay witness report. In a professional misconduct allegation case, a lay witness report and/or testimony provides no relevant information, and therefore is neither relevant, nor substantial evidence.

For all of the above reasons, the Report does not have a tendency to make any fact more probable than it would be without the evidence, and therefore is irrelevant. Under the Board of Accountancy Administrative Rules

“all data that will assist the Board in arriving at the truth is admissible, except that irrelevant, immaterial, or unduly repetitious evidence shall be excluded”.

(N.H. Admin. Rule AC 210.04).

Even, assuming arguendo, the Board had not sustained Plaintiff's objection to the admission of the conclusions of the author(s) of the Report, for the reasons stated above, the entire

Report was not relevant and, therefore, is not admissible under the Board rule. (N.H. Admin. Rule AC 210.04). Further, for of the reasons stated above, the Report contained no relevant evidence and, based upon its lack of relevance, should not have been relied upon by the Board in reaching its ruling.

Had the Report's conclusions been admitted into evidence, they would have been admitted as hearsay conclusions. Additionally, the remainder of the Report admitted into evidence was hearsay. Because the Rules of Evidence do not apply to administrative hearings, hearsay can be admitted in the administrative hearing, but the Decision must be based on probative and substantial evidence. The State could have called the author(s) of the report to testify on it, however, the State did not. There was no other evidence admitted into the hearing to corroborated the Report, and as a result, the uncorroborated hearsay did not constitute substantial evidence.

The Report is based largely upon the statements and opinions of the new auditing company and the authors of the report. When entered into evidence these third-party statements constituted hearsay within hearsay. Because of the extreme unreliability of hearsay within hearsay, such statements are rarely admissible and should never be permitted as the basis for a ruling because they do not constitute substantial evidence.

Substantial evidence is defined as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). 'Substantial' evidence is not synonymous with 'any' evidence.

To constitute sufficient substantiality to support the verdict, the evidence must be,

“reasonable in nature, credible, and of solid value; it must actually be ‘substantial’ proof of the essentials which the law requires in a particular case.”

(*Estate of Teed* (1952) 112 Cal. App. 2d 638, 644; [citations].)

(*Kruse v. Bank of America* (1988) 202 Cal. App. 3d 38, 51-52.)

An administrative board cannot rely on hearsay alone in deciding a case. The U. S. Supreme Court declared that administrative decisions must have

“a basis in evidence having rational probative force.

Mere uncorroborated hearsay or rumor does not constitute substantial evidence.” *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 230 (1938).

The Report did not constitute substantial evidence as it was uncorroborated hearsay, and, as such, use of its conclusory statements as the basis for a finding of professional misconduct is error.

CONCLUSION

Based on each of the arguments stated above, the finding of professional misconduct by Ron L. Beaulieu and Co. under RSA 309 – B: 10 I –a (e) and/or (j) for professional misconduct in failing to properly conduct auditing services is error.

II. THE COURT ERRED IN FAILING TO REVERSE THE DECISION OF THE BOARD THAT RLB&CO FAILURE TO RETAIN WORK PAPERS FOR A MINIMUM PERIOD OF FIVE YEARS

CONSTITUTED A PROFESSIONAL MISCONDUCT AS A
VIOLATION OF RSA 309-B:19.

- A. It is a fact that for decades Ron L. Beaulieu & Company retained proprietary Audit Work Papers for at least a three year period as mandated by the Federal Single Audit Act of 1984, Federal Circular A-133, and as agreed to in the engagement letter signed by its auditing clients.
- B. New Hampshire Statute does not mandate an auditor to retain proprietary Audit Work Papers beyond the three year period as required by the Federal Single Audit Act, Federal Circular A-133 and auditor\client contract.
- C. RSA 309-B: 19 is silent on the length of time a licensee must retain its proprietary Audit Work Papers and the nonproprietary Client's Records in its possession.
- D. RSA 309-B:19, III simply states "Nothing in this section shall require a licensee to retain any work paper beyond the period prescribed in any other applicable statute.
- E. Both parties know of no other New Hampshire Statutes on this retention issue. Both parties recognize the Federal Statute titled the Single Audit Act of 1984 and Federal Circular A-133 which prescribe a three year proprietary Audit Work Paper retention period.

III. THE COURT ERR IN FAILING TO REVERSE THE DECISION
OF THE BOARD THAT RLB&CO FAILED TO RETAIN WORK
PAPERS FOR A MINIMUM PERIOD OF FIVE YEARS AS REQUIRED

BY N. H. ADMIN RULES, AC 404.03(G), WHEN N.H. ADMIN RULES AC 404.03 MANDATES A RETENTION PERIOD ONLY FOR CLIENT RECORDS (ACCOUNTING & TAX DOCUMENTS) AND NOT WORKING PAPERS BELONGING TO THE CPA FIRM (AUDITING DOCUMENTS), ESPECIALLY IN LIGHT OF THE FACT THAT THE BOARD'S ONLY EXPERT, A CPA AND BOARD MEMBER TESTIFIED THAT HE COULD NOT CONCLUDE THAT RETAINING PAPERWORK FOR MORE THAN RLB&CO'S THREE YEAR STANDARD RETENTION PERIOD WAS REQUIRED FOR AUDITING PAPERWORK.

- A. Ron L. Beaulieu & Company maintains its understanding that the Board of Accountancy Rule, Ac 404.03 requires a five year retention period of nonproprietary Client's Records, but does not define a retention period for auditors' proprietary Audit Work Papers.
- B. Incidentally, the Firm of Ron L. Beaulieu & Company did not have any nonproprietary Client's Records of TCCAP in its possession. This fact was not in disagreement.
- C. The Board of Accountancy maintains that Rule Ac 404.03 covers both Licensees' Work Papers and Client's Records, (regardless that Rule Ac 404.03 is titled "Client's Records").
- D. If in fact the Board of Accountancy rule covers both Licensees' Work Papers and Client's Records, as the Board maintains, then it would follow that the Board, in its Rule making function, had gone too far in promulgating this

particular rule. The Board, in creating this rule, has added to the specifics of New Hampshire RSA 309-B:19, which did not define the retention period of licensees' Work Papers, but allowed any other applicable statute to prescribe that retention period. The Board had no legal right to attempt to define a retention period for Licensees' Working Papers. Most importantly, the New Hampshire Supreme Court has held that "The authority given to promulgate rules and regulations is designed only to permit the board to fill in the details to effectuate the purpose of the statute." *Appeal of Anderson*, 147 N.H. 181, 183 (2001) (quotation omitted). Further, the New Hampshire Supreme Court has stated "Thus, administrative rules may not add to, detract from, or modify the statute which they are intended to implement." *Appeal of Robert Daniel Mays* (New Hampshire Board of Accountancy) 161 N.H. 470 (2011). Specifically, Rule Ac 404.03 Retention of Client's Records presently does add to and modifies the statute (RSA 309-B:19 III) which the rule is intended to implement. Because the Board may not "add to, detract from, or modify the statute which [the rule is] intended to implement, Rule Ac 404.03 is illegal.

CONCLUSION

In light of all the arguments stated above, it was error for the board to decide that Ron L. Beaulieu & Company engaged in professional

misconduct in violation of RSA 309-B: 10 I-a (g) and/or (j) and Admin. Rule 404.03 (g) for failing to retain work papers and/or records required.

For the foregoing reasons, the Appellant respectfully requests that this Honorable Court:

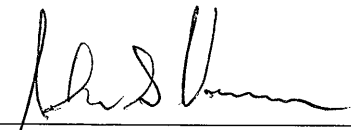
- (a) Overturn the Merrimack Superior Court's ruling of May 7, 2018;
- (b) Schedule oral argument on the Appellant's request for reinstatement of his license; and
- (c) For any other such relief as this Court shall deem equitable and just.

The Appellant requests 15 minutes oral argument before the full court as it will allow Appellant to answer unanticipated questions which will be helpful to understanding the nuances of the case.

Respectfully Submitted,
RON L. BEAULIEU & COMPANY

By and through its attorney,
Vanacore Law Office

Date: November 26, 2018

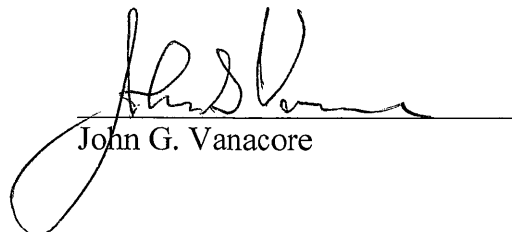
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CERTIFICATE OF SERVICE

I hereby certify that the original and a copy of the foregoing 6,923 word document was forwarded via pre-paid postage mail this 26th day of November, 2018, to Assistant Attorneys General, Seth M. Zoracki, Esq. and Heather Neville, Esq.:

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NOTICE OF DECISION

File Copy

Case Name: **Ron L. Beaulieu & Company v. New Hampshire Board of Accountancy**
Case Number: **217-2017-CV-00578**

Enclosed please find a copy of the court's order of May 07, 2018 relative to:

ORDER

May 09, 2018

Tracy A. Uhrin
Clerk of Court

(485)

C: John Garrett Vanacore, ESQ; Seth Michael Zoracki, ESQ; Lynmarie C. Cusack, ESQ

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

MERRIMACK, SS.

No. 217-2017-CV-578

RON L. BEAULIEU & COMPANY

v.

NEW HAMPSHIRE BOARD OF ACCOUNTANCY

ORDER

The Plaintiff, Ron L. Beaulieu & Company, appeals a decision by the New Hampshire Board of Accountancy ("the Board") to suspend the company's license to do business in New Hampshire. The Court held a hearing on January 17, 2018. For the following reasons, the Board's decision is REVERSED in part and AFFIRMED in part.

I. **Relevant Facts**

Ron Beaulieu is a licensed certified public accountant ("CPA") in Maine and he is the owner of Ron L. Beaulieu & Company ("Beaulieu"), which is licensed to do business in New Hampshire. (Certified Record [hereinafter "CR"], Tab 13 at 9.) The Tri-County Community Action Program, Inc. ("TCCAP") is a New Hampshire voluntary corporation registered as a charity with the Charitable Trusts Unit of the Attorney General's Office ("CTU") and qualified as a tax-exempt non-profit organization under § 501(c)(3) of the Internal Revenue Code. (CR, Tab 1 at 3.) TCCAP was designed to administer programs in northern New Hampshire to combat the causes of poverty and to help the

poor become economically independent. (Id.) In 2008, Beaulieu was retained by TCCAP to provide auditing services for the agency from 2008 through 2011. (CR, Tab 13 at 9.) Beaulieu performed, completed, and issued reports on TCCAP's financial statement audits and compliance audits as of June 30, 2008, June 30, 2009, June 30, 2010, and June 30, 2011.

In December 2012, the Attorney General received notice of serious financial conditions at TCCAP, which called into question its ability to continue providing services to the community. (CR, Tab 1 at 3.) As a result, the CTU initiated an investigation. (Id.) Following the investigation, on July 29, 2015, the Attorney General issued a Report ("the Report"). (CR, Tab 1.) The investigation revealed a number of factors that contributed to TCCAP's financial failure, including that "the accounting firm [Beaulieu] retained by the agency to perform the annual financial audits for fiscal years 2008 through 2011 prepared incomplete and inaccurate reports and failed to detect or report internal control weaknesses and improper accounting procedures." (Id. at 3)

Based on the information gathered during the investigation, the Board found a reasonable basis and probable cause for commencing an adjudicatory/disciplinary proceeding against Beaulieu. (See CR, Tab 5 ¶ 3.) The Board issued a hearing notice, dated January 9, 2017, notifying Beaulieu of the specific issues to be resolved through the proceeding, including whether Beaulieu failed to: (a) comply with a subpoena *duces tecum* issued by the Board; (b) retain work papers and/or records in compliance with New Hampshire law; and (c) properly conduct auditing services for TCCAP for fiscal years 2008 through 2011. (Id. at ¶¶ 5(A)–(C).)

On April 19, 2017, the Board held an adjudicatory/disciplinary hearing, during which the Board heard testimony from Thomas Musgrave, a board member who assisted in the investigation of TCCAP, and Mr. Beaulieu, the owner of Ron L. Beaulieu & Company. There were a number of exhibits admitted into evidence at the hearing, including the Report. (See CR, Tab 13 at 3–5.) On July 13, 2017, the Board issued its Final Decision and Order (“Final Order”). (CR, Tab 13.) In the Final Order, the Board unanimously concluded that:

[Beaulieu] committed professional misconduct by failing to retain work papers and/or all records of his work file for all audits conducted of TCCAP, in violation of RSA 309-B:10, I-a(g) and/or (j) and Board of Accountancy Rule Ac 404.03(g), which states that “A CPA shall ensure that the work product and the work papers created in the performance of an engagement for a client are retained for a minimum of 5 years after creation.”

...

[Beaulieu] was in violation of New Hampshire RSA 309-B:10, I-a (e) and/or (j) in that he committed professional misconduct in failing to properly conduct auditing services for TCCAP for fiscal years 2008 through 2011.

(Id. at 15–18.) The Board also concluded, by a vote of 3-to-1, that Beaulieu did not comply with the subpoena *duces tecum* dated October 16, 2016. (Id. at 15–16.) As a result of these violations, the Board unanimously voted to impose various sanctions, including a three-year license suspension and a \$5,000 fine. (Id. at 19–20.)

Beaulieu filed a motion to reconsider, a motion to stay the Board’s orders, and a motion to dismiss charges of misconduct. (CR, Tab 15.) The Board denied each of these motions on September 21, 2017. (CR, Tab 18.) On November 1, 2017, Beaulieu appealed the Board’s decision to the Court pursuant to RSA 309-B:12. Specifically, Beaulieu argues that the Board’s decision suffers from various errors of law, that certain

factual findings were not supported by the record, and that the Board's sanctions were "unreasonably harsh."

II. Legal Standard

RSA 309-B:12, X provides:

Any person or firm adversely affected by any order of the board entered after a hearing under this section may appeal such order by filing a written petition with the superior court in the county in which the respondent resides or, if not a resident of this state, in the county in which the respondent has a place of business or resident agent. . . . The record of the hearing of the board's action shall be presented to the superior court for its review pursuant to the procedures and standards of RSA 541. The superior court may affirm, reverse, or modify the board's order or may order a trial de novo. A trial de novo shall be pursuant to the board's rules and the rules of evidence shall not apply.

"The order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such [decision] is unjust or unreasonable." RSA 541:13. The Board's factual findings shall be deemed to be prima facie lawful and reasonable. Id. "This presumption may be overcome only by a showing that there was no evidence from which the Board could conclude as it did." Appeal of Boulard, 165 N.H. 300, 303 (2013).

III. Analysis

a. Appearance of Conflict of Interest/Bias

First, Beaulieu contends the Board's decision should be reversed because John Daigneault, a member of the Board, had a conflict of interest. Beaulieu further argues the Attorney General's Office involvement in preparing the Report, its representation of the Board in the complaint against Beaulieu, and its involvement in a separate civil suit initiated against Beaulieu created a conflict of interest and the appearance of bias. The

Board contends Beaulieu failed to properly preserve these arguments for review and that Beaulieu has not demonstrated any non-speculative basis to support his claims.

A party claiming bias on the part of a board member must raise that issue before the board "at the earliest possible time." See Bayson Props. V. City of Lebanon, 150 N.H. 167, 171 (2003); Sanderson v. Town of Candia, 146 N.H. 598, 602 (2001) ("We require issues to be raised at the earliest possible time, because trial forums should have a full opportunity to come to sound conclusions and to correct errors in the first instance."). Beaulieu was more than likely aware of the multiple roles of the Attorney General's Office prior to the hearing, at which point he could have raised the issue with the Board. To the extent Beaulieu's arguments are based upon the Board's findings set forth in the Final Order, Beaulieu could have raised these issues with the Board in his motion to reconsider but failed to do so. Because Beaulieu did not assert that the Attorney General's Office involvement created an impermissible bias or conflict at the earliest possible time, the Court concludes the issue has not been properly preserved for appeal.

Turning to Mr. Daigneault, it appears Beaulieu claims information was discovered after the hearing that indicated Mr. Daigneault had a conflict of interest in participating, deliberating, and voting in the hearing. The Court is unpersuaded. Prior to the hearing, Mr. Daigneault recused himself from the matter because he is a shareholder and partner at the accounting firm Leone, McDonnell & Roberts, which was a successor auditor for TCCAP. On the day of the hearing, and prior to the Board hearing any evidence, a discussion occurred between the Board and the parties regarding whether Mr. Daigneault could participate in and adjudicate the case as a board member. Mr.

Daigneault disclosed that a different branch of his firm conducted the audit of TCCAP and that he was in no way involved. After privately conferring with his attorney, Mr. Beaulieu agreed to Mr. Daigneault's participation in the hearing. Beaulieu now maintains that at the time of the hearing, he was unaware that Mr. Daigneault's firm had become a "major competitor" of Ron L. Beaulieu & Company. Specifically, he asserts Mr. Daigneault failed to disclose that in 2014, Leone, McDonnell & Roberts replaced Beaulieu as the auditor of record for two clients that unexpectedly left Beaulieu in the summer of 2014. Because Beaulieu does not explain how or when this information was discovered, it is not clear whether an objection regarding Mr. Daigneault's participation at an earlier time. Nevertheless, Beaulieu has failed to establish that the Board's decision should be reversed in light of Mr. Daigneault's participation.

"Administrative officials that serve in an adjudicatory capacity are presumed to be of conscience and capable of reaching a just and fair result. The burden is upon the party alleging bias to present sufficient evidence to rebut this presumption." Appeal of Dell, 140 N.H. 484, 492 (1995) (quotation & citation omitted). Beaulieu has failed to meet this burden. Beaulieu was aware that Mr. Daigneault's firm was a competitor at the time of the hearing given Mr. Daigneault's explanation as to his firm's involvement with TCCAP and the discussion that followed between the Board and the parties. Mr. Beaulieu expressly agreed to Mr. Daigneault's participation after privately conferring with his attorney. Beaulieu has failed to explain how the discovery of Mr. Daigneault's firm providing services to former clients of Beaulieu creates different circumstances than those present at the time Mr. Beaulieu, in essence, waived any objection to Mr.

Daigneault's participation at the hearing. For these reasons, the Court finds no conflicts of interest or bias that would justify overturning the Board's decision.

b. Finding that Beaulieu Failed to Comply with the Subpoena

With respect to the Board's finding that Beaulieu failed to comply with the subpoena *duces tecum* dated October 16, 2016, (see CR at Tab 3), Beaulieu asserts the finding was unlawful and unreasonable for two reasons. First, Beaulieu argues there was no evidence to support such a finding. Second, Beaulieu contends the Board's vote did not satisfy the requirements of RSA 309-B:12, VIII.

Reviewing the statute, the Court agrees the Board's vote was insufficient to sustain the charge that Beaulieu failed to comply with the subpoena. RSA 309-B:12, VIII provides: "In a hearing under this section, a recorded vote of a majority of all members of the board, excluding members disqualified by reason of paragraph IV or other reasons under this section, shall be required to sustain any charge and to impose any penalty with respect to such hearing." Paragraph IV prohibits a board member who has conducted the investigation from participating in the Board's decision of the matter. The only other paragraph under RSA 309-B:12 that can reasonably be read to limit participation is paragraph V, which provides that "the board shall be advised by counsel, and such individual shall not be the same counsel who presents or assists in presenting the evidence supporting the complaint under paragraph IV of this section."¹

Here, the Board is comprised of seven members. See RSA 309-B:4, I(a). Board member Thomas Musgrave conducted the investigation and presented evidence at the hearing. As a result, Mr. Musgrave was disqualified from participating in the Board's decision under RSA 309-B:12, IV. While two other members recused themselves for

¹ Neither party argues that paragraph V of RSA 309-B:12 is at issue in this case.

personal conflicts, the parties do not assert nor does the Court conclude that these members were disqualified under paragraph IV or for any other reason under RSA 309-B:12. Therefore, pursuant to RSA 309-B:12, there were six non-disqualified board members. Under the statute, votes by four of these six members were required to result in a majority. Without this majority vote, no charge or penalty can be sustained. The Board concluded, by a vote of 3-to-1, that Beaulieu did not comply with the subpoena.² Because this does not constitute a majority vote of all members not disqualified under RSA 309-B:12, the vote was insufficient to sustain the charge. Accordingly, the Board's finding that Beaulieu failed to comply with the subpoena *duces tecum* is REVERSED.

c. Failure to retain work papers

Next, Beaulieu challenges the Board's unanimous finding that Beaulieu failed to retain work papers for a minimum period of five years as required by RSA 309-B:19 and N.H. Admin. Rules, Ac 404.03(g). Beaulieu does not appear to dispute that he did not retain the relevant audit work paper for a period of five years. Rather, Beaulieu contends the retention of audit work papers for a three-year period does not violate any statute or rule and complies with the Federal Single Audit Act of 1984 and generally accepted auditing standards. For this reason, Beaulieu maintains it was unreasonable and unlawful for the Board to find a violation of RSA 309-B:10, I-a(g) and/or (j) and N.H. Admin. Rules, Ac 404.03. The Court disagrees.

RSA 309-B:19 is silent as to how long a licensee must retain working papers, but provides that "[n]othing in [RSA 309-B:19] shall require a licensee to keep any work paper beyond the period prescribed in any other applicable statute." RSA 309-B:19, III. Neither party has referenced any other applicable state or federal statute governing the

² The Board voted unanimously on all remaining charges and to impose sanctions against Beaulieu.

period a licensee is required to keep documents. However, the Board's administrative rules provide that "[a] CPA shall ensure that the work product and the work papers created in the performance of an engagement for a client are retained for a minimum of 5 years after creation unless the CPA is required by law to retain such records for a longer period of time." N.H. Admin. Rules, Ac 404.03(g).

Beaulieu asserts that RSA 309-B:19 and N.H. Admin. Rules, Ac 404.03 only require the retention of client records and not the work papers created by an auditor in the course of business. He maintains the sole rule governing the retention of audit work papers is promulgated under the Federal Single Audit Act, OMB Circular A-133. First, there is no language in either RSA 309-B:19 or N.H. Admin. Rules, Ac 404.03(g) that would indicate the statute or the Board's administrative rule do not apply to work papers created by an auditor. Moreover, the Federal Single Audit Act was "enacted for the purposes of setting uniform requirements for audits, to improve financial management of state and local government use of federal financial assistance, and to promote efficient and effective uses of federal financial assistance." County of Elk v. Highland Tp., 677 A.2d 398, 399 (Pa. 1996); see 31 U.S.C. §§7501-7506. Similarly, OMB Circular A-133 "sets forth standards for obtaining consistency and uniformity among Federal agencies for the audit of non-Federal entities expending Federal awards." 2 C.F.R. §200.100(d). Neither the Single Audit Act nor the relevant federal regulations prohibit the state's legislature or a state agency from creating and implementing separate standards for licensed certified public accountants that practice within the state.

Additionally, the Court finds no conflict between the federal regulations relied on by Beaulieu and the Board's administrative rules. The federal regulation requires that

“[t]he auditor must retain audit documentation and reports *for a minimum* of three years after the date of issuance of the auditor's report(s) to the auditee, unless the auditor is notified in writing by the cognizant agency for audit, oversight agency for audit, cognizant agency for indirect costs, or pass-through entity to *extend the retention period.*” 2 C.F.R. § 200.517 (emphasis added). This regulation not only expresses the possibility that the three-year retention period could be extended, but it also does not conflict with the Board’s administrative rules as the federal regulation sets a minimum retention period. Retaining the relevant documents for a period of five years would satisfy both rules.

For these reasons, Beaulieu has failed to establish that it was unlawful or unreasonable for the Board to conclude that Beaulieu was required to comply with the five-year retention requirement set forth in N.H Admin Rules, Ac 404.03(g). The Court finds no basis to reverse the Board’s unanimous decision that Beaulieu committed professional misconduct by failing to retain work papers and/or all records of his work file for all audits conducted of TCCAP, in violation of RSA 309-B:10, I-a(g) and/or (j) and Board of Accountancy Rule Ac 404.03(g).

d. Failure to properly conduct auditing services

Next, Beaulieu asserts the Board improperly relied on findings and conclusions contained in the Report to conclude that Beaulieu committed professional misconduct by failing to properly conduct auditing services for TCCAP. Beaulieu contends the Report is inadmissible hearsay and the Board’s reliance on the Report constitutes reversible error. Additionally, Beaulieu argues the Board’s failure to present any testimony that would allow for the authenticity, accuracy and reliability of the Report to

be examined is unjust and unreasonable. Finally, Beaulieu contends the Board failed to prove its case by a preponderance of the evidence.

Reviewing the record, the Court does not find that the Board erred by admitting the Report into evidence at the hearing or by relying on it to find Beaulieu committed professional misconduct. "An administrative agency is given broad discretion in determining the admissibility of evidence." Ruel v. N.H. Real Estate Appraiser, 163 N.H. 34, 45 (2011). It is undisputed that the rules of evidence do not apply to the Board's hearings. See RSA 309-B:12. V ("In a hearing under this section, the board shall not be bound by the technical rules of evidence."); N.H. Admin Rules Ac 210.04 ("Proceedings shall not be conducted under the rules of evidence . . ."). The Board's administrative rules provide that "all data" that will assist the Board in arriving at the truth is admissible, "except that irrelevant, immaterial, or unduly repetitious evidence shall be excluded." N.H. Admin. Rules, Ac 210.04(b). Given that the Report was created following the investigation and led to the Board's complaint against Beaulieu, no logical argument could be made that the Report is irrelevant or immaterial. Moreover, there has been no claim that the Report was repetitious of any other evidence admitted at the hearing. Thus, under the Board's administrative rules, the Report is plainly admissible.

The crux of Beaulieu's argument is that he was deprived of the opportunity to question the author of the Report or the individuals who performed the analysis upon which the Report is based. However, the Court notes that RSA 309-B:12 provides a licensee with the right to present witnesses. If Beaulieu believed that a particular witness's attendance was necessary, Beaulieu could have sought a subpoena to

compel the attendance of that witness. See RSA 309-B:12, III (“The licensee shall have the right, on application to the board, to the issuance of subpoenas to compel the attendance of witnesses and the production of documentary evidence.”).

Beaulieu further contends the Board failed to meet its burden because there was insufficient evidence to establish that Beaulieu engaged in professional misconduct by failing to properly conduct auditing services for TCCAP. In the Final Order, the Board describes in detail the facts relied upon in support of its finding of professional misconduct. These factual findings, which included that Beaulieu made inaccurate conclusions regarding TCCAP’s risk level and failed to identify management concerns that were later found by a subsequent auditor, are presumed to be lawful and reasonable. “This presumption may be overcome only by a showing that there was no evidence from which the Board could conclude as it did.” Boulard, 165 N.H. at 303. Here, the Board relied not only on the Report produced following the investigation, but also on Mr. Beaulieu’s own testimony at the hearing. The Court defers to the Board, five of the seven members of which are holders of certificates under RSA 309-B:5 or corresponding provisions of prior law, see RSA 309-B:4, I, to determine whether, among other things, Beaulieu’s inaccurate findings, failure to identify concerns with TCCAP, and improper destruction of work papers constitute professional misconduct. See In the Matter of Bloomfield, 166 N.H. 475, 481–82 (2014) (explaining that professionals are expected to recognize conduct constituting “unprofessional conduct” within their profession).

In arguing that the Board failed to meet its burden, Beaulieu contends the Board unlawfully shifted the burden to Beaulieu to prove that he did not engage in professional

misconduct. Beaulieu appears to base this argument on the following portion of the Board's Final Order: "[Beaulieu] was found to have committed professional misconduct by failing to properly conduct auditing services for TCCAP for fiscal years 2008 through 2011, in violation of RSA 309-B:10, I-a(e) and/or (j). There was insufficient evidence, if any, submitted by [Beaulieu] to rebut this evidence." (CR, Tab 13 at 19 ¶ C.) In light of the fact that RSA 309-B:12, III expressly permits for a licensee to present evidence and witnesses on the licensee's behalf, it was not improper for the Board to note that Beaulieu did not present adequate evidence to rebut the evidence against Beaulieu.

For the reasons above, Beaulieu has failed to established it was unreasonable or unlawful for the Board to find that Beaulieu committed professional misconduct by failing to properly conduct auditing services in violation of RSA 309-B:10, I-a(e) and/or (j).

e. Unreasonably harsh sanctions

Finally, Beaulieu challenges the sanctions imposed against him by the Board. RSA 309-B:10, I provides that the Board may take disciplinary action in any one or more of the following ways:

- (a) By written reprimand or censure.
- (b) By suspension or refusal to renew for a period of not more than 5 years, any such certificate, permit, or registration.
- (c) By limiting the scope of practice of any licensee or placing a licensee on probation, with or without terms, conditions, and limitations.
- (d) By revocation of any certificate, permit, or registration issued under RSA 309-B:7, 309-B:8, or 309-B:9 or corresponding provisions of prior laws.
- (e) By assessing administrative fines, after notification and due process, in amounts established by the board which shall not exceed \$2,000 per offense or, in the case of continuing offenses, \$200 for each day the violation continues, whichever is greater.

Beaulieu does not contend that the sanctions imposed were not authorized under the statute, but instead maintains the sanctions were “unjust and unreasonable.”

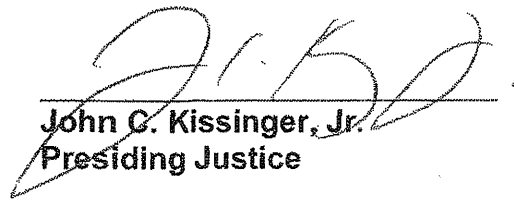
“[Courts] will set aside an administrative sanction only if it is so harsh or excessive as to be unreasonable or to constitute an abuse of discretion.” Appeal of Morgan, 144 N.H. 44, 56 (1999) (quotation & citation omitted). “Recognizing that appropriate sanctions are necessarily tailored to the facts of each case, [courts] will substitute [their] judgement for that of the agency only in exceptional cases.” Id. In this case, the Board imposed a number of sanctions, including, among other things, a three-year license suspension and a \$5,000 fine. In unanimously voting for such sanctions, the Board wrote that it voted to impose the sanctions “given the egregious effect [Beaulieu’s] unprofessional conduct had on the agency, TCCAP, who was charged with ensuring the welfare of the most vulnerable children and adults in this state.” (CR, Tab 13 at 19.) In light of the Board’s findings and its explanation for imposing the sanctions, the Court is unpersuaded that the sanctions were “so harsh or excessive as to be unreasonable or to constitute an abuse of discretion.” Moreover, the Court notes that under the statute, the Board was authorized to impose greater sanctions, including a lengthier suspension or license revocation. Reviewing the record and the parties’ arguments, the Court finds no basis to modify or set aside the sanctions imposed by the Board.

Conclusion

For the foregoing reasons, the Board's decision is REVERSED in part and AFFIRMED in part.

SO ORDERED.

5/7/18
Date


John C. Kissinger, Jr.
Presiding Justice