THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No.: 2018-0332

RON L. BEAULIEU & COMPANY

v.

New Hampshire Board of Accountancy

APPELLANT'S REPLY TO BOARD'S RESPONSIVE BRIEF

Respectfully submitted by,
VANACORE LAW OFFICE
John G. Vanacore, NH
Bar ID #2611 19
Washington Street
Concord, NH 03301
Ph: (603) 228-1180
Email: john@vanacorelaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

NEW HAMPSHIRE STATUTES

NEW HAMPSHIRE ADMINISTRATIVE RULES

STANDARD OF REVIEW

Simply stated, RSA 541:13 states "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." Thus, two separate situations would allow for reversal 1) Errors of Law or 2) Unjust or Unreasonableness.

ARGUMENT

The Board, in its Opposing Brief, does not rebuff any of Appellant's proffered evidence of Errors of Law. Instead, the Opposing Brief merely argues that "It was not unjust or unreasonable for the Board to conclude as it did". (See Opposing Brief Argument page 12 section II; page 19, section III).

A. Board's Ample Evidence Argument

In the Opposing Brief, the Board makes a general statement that ample evidence is in the record to support the Board's conclusion that the Company committed professional misconduct by failing to properly conduct audit services. However, the Board makes no reference in its Brief, to the location of that elusive and mysterious evidence.

The Board's finding of facts made no reference to underlying facts as required by RSA 541-A:35. RSA 541-A:35 Decisions and Orders states

"A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings."
(emphasis added.)

The Board fails to identify any explicit statement(s) of the underling facts which support its findings. Therefore, it follows, logically and legally, that there were no facts which support the Board's findings. Not complying with RSA 540-A:35 is an **error of law**. This issue was presented in the Appellant's Brief at Question Presented on page 7, in Summary of Argument on page 15, and again in Argument on pages 21 and 22. **The Board did not rebut this argument in its Opposing Brief.**

In the Board's Decision, it did attempt to present an underlying "fact" in its finding. The Board wrote in its Deliberations and Findings section, page 17 "Specifically, the Board referred to the States Exhibit 1 (AGO Report), page 3, which sets forth the finding of the New Hampshire Department of Justice." Here, as well as in other areas, the Board utilized the conclusions contained in the AGO Report as the factual basis for their findings of professional misconduct. However, it was **error of law** to rely upon those conclusions, whereas, following Appellant's timely objection, the conclusions written in the AGO Report were specifically excluded from evidence.

In the Board's Opposing Brief, page 14, it is footnoted (3) that "There are several assertions in the Company's brief that the AGO Report

was "entered into evidence on a limited basis" during the disciplinary/adjudicatory proceeding, and that the Board should not have relied on the conclusions contained in the AGO Report "because they had been excluded from evidence by ruling of the Board itself." The Opposing Brief argues that this assertion is belied by the Board's Final Decision and Order, which states that the AGO Report was "introduced into evidence and accepted into the record." Appellant does not dispute that the AGO Report was introduced into evidence over Appellant's objection. However, Appellant's objection was sustained by the Board with respect to any conclusions stated in the Report. (See Appellant's Brief - Summary of Argument page 14 and Apx. p. 392, Tr. P. 5-11; App. P. 393, Tr. P. 9-11). The Board now seems to suggest that, because the Board's Final Amended Decision and Order states that the AGO Report was "introduced into evidence and accepted into the order", that its ruling at hearing that the conclusions in the AGO Report were excluded from evidence was expunged without notice to the parties. Entering the excluded conclusions into evidence, and basing the Decision on the excluded evidence is a violation of Appellant's right to due process, and clear error.

The Board admits to using the Conclusions of the AGO Report. On page 14 of Opposing Brief, the Board admits that "The Board relied on various findings in the AGO Report". Additionally, on page 15 of Opposing Brief, the Board admits that "The Board gave weight to finding in the AGO Report". Again, it was an **error of law** to rely upon those Conclusions written in the AGO Report whereas they were specifically excluded from evidence at the Hearing.

The Board does not attempt to present underlying facts supporting the Boards' findings as written on pages 15 to 18 of the Board's Decision. No underlying facts have been presented by the Board to support its findings.

Nonetheless, even if the Board had identified some evidence which may have been probative of an act of professional misconduct, such evidence would be scintilla in nature, and not be substantial evidence as required by the US Supreme Court, in its decision on *Richardson v. Perales,* 402 U.S. 389, 401 (1971).

Lastly, even considering that the Board's Decision was defective, partly because it had failed to meet the requirements of RSA 541-A:35, it exclusively relied upon the AGO Report for opinions on issues which require the opinion of an expert. The opinions contained within the Report were offered by an unidentified individual or unidentified individuals of unknown qualifications to provide expert testimony on auditing, or accounting issues. The opinions should have been excluded for failure to meet the criteria established in *Daubert v. Merrell Dow Pharmaceuticals* (92-102), 509 U.S. 579 (1993). The Board's reliance on an expert opinion which does not meet the standards required by Daubert constitutes **error of law. The Board did not rebut this argument in its Opposing Brief.**

CONCLUSION

In summary of this Reply Brief arguments on the issue of conducting auditing services, the Board failed to explicitly state the underlying facts supporting their finding, as required by RSA 541-A:35. Secondly, the

Board made findings based upon Conclusions in the AGO Report, which were specifically excluded from Evidence. Thirdly, the Board relied upon an Expert Witness Report which failed to meet the criteria established by the US Supreme Court Case *Daubert* (1993). Fourth, if any evidence could be identified, its scintilla nature would not meet the threshold of substantial evidence and this would preclude a decision against the Company. *Richardson v. Perales,* 402 U.S. 389, 401 (1971). As a result of each and all of the above Errors of Law, the Board's finding and decision adverse to the Company was an error of law. Based upon the numerous errors of law presented herein, the Decision and Order of the Board regarding failing to properly conduct auditing services must be reversed.

B. Burden Shifting

The Board argues that there was no unlawful burden shifting because RSA 309–B:12, III specifically allowed for the appellant to "examine witnesses and evidence presented in support of the complaint, and [to] present evidence and witnesses on licensee's behalf." The Board also notes that the statutes provided the appellant "the right, on application to the Board, to the issuance of subpoenas to compel the attendance of witnesses and the production of documentary evidence."

Although the appellant had the noted avenues to pursue in order to rebut the evidence against him, the Board did not present relevant evidence of misconduct for the Appellant to rebut.

The conclusions of professional misconduct by the appellant contained in the AGO Report were the alleged basis of the Board's finding of professional misconduct. One fact contained in the AGO Report is the

alleged absence of engagement letters for the years 2008 through 2011. These were produced at the Board hearing. The other is the fact that no letters were sent from the appellant to TCCAP for those years identifying any problems which may have been revealed in the audit. The report did not, however, identify any problems which it claims that the appellant should have identified.

The appellant Mr. Beaulieu testified that his audit was conducted consistent with Generally Accepted Auditing Standards, and in full compliance with his contractual obligations to TCCAP. He testified that for the years 2008 through 2011 there were no audit items which required reporting to TCCAP.

The Board, in the absence of evidence against the appellant, found professional misconduct based upon the conclusions contained in the AGO Report.

The Board argues that it was incumbent upon the appellant to determine what facts may have been in the minds of those who produced the AGO Report, which led them to conclude that there was misconduct.

The appellant would, therefore, have been forced to create a case against himself while not believing he had done anything wrong, and then mount a defense against the case that he created. This goes beyond merely shifting the burden established under RSA 309-B, it runs contrary to basic tenets of American jurisprudence.

C. Rebuttal of Board's Work Paper Argument

In the Opposing Brief on page 19, relative to work paper retention, the Board makes the statement that

"To the contrary, he testified that he was unaware that New Hampshire law had such a requirement, and that the work papers at issue had been deleted or purged before the expiration of the five-year period. (See Apx. at 410, 412, 416-17").

In reviewing the transcribed pages, referred to above, there is no explicit statement as to what is written above. In fact, on p.102 of the transcript, as presented on page 416 in the appendix, the Board raises the question: "Again, under the Board's rules in New Hampshire, you're required to retain records for five years, correct?" Mr. Beaulieu answered:

"I don't think it's that simple. No, it's not correct."

Mr. Beaulieu's testimony not only expresses an awareness of the statutory and regulatory requirements, but also, his firm belief that the rule relied upon by the Board in its argument was inapplicable to the retainment of his auditing work papers.

Also, in the Opposing Brief on page 19, the Board states "the Company first argues that it 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,'". Nothing in New Hampshire **law** requires an auditor retain such work papers beyond this three-year period. (Appellant's Br. at 29). The Board goes on to state "Contrary to the Company's contention, however, the applicable **administrative rule** states...". The Board is once again confusing New Hampshire Law with Board Administrative Rules. Mr. Beaulieu's statement was specific in that

nothing in New Hampshire Law requires an auditor to retain work papers for any length of time. That was an accurate statement. In the Appellant's Brief, on page 29, RSA 309-B:19, III is quoted which simply states "Nothing in this section shall require a licensee to retain any work paper beyond the period prescribed in any other applicable statute." Mr. Beaulieu was not referring to any administrative rules at that time.

In its opposing brief, the Board refocuses its allegation that the minimum time retention period is established in *N.H. Admin Rules*, AC 404.03(g). For clarity purposes, it needs to be known that 404.03(g) is not a N. H. Admin Rule, as labeled above by the Board, but rather it is specifically a Board of Accountancy Rule, drafted by the Board. The Board states that the administrative rule could not be clearer in that it expressly applies to work papers created by a certified public accountant in the performance of any engagement for a client." The Boards statement that "the administrative rule could not be clearer," yet, just the opposite is true. In fact, the rule pertains only to **Retention of Client Records**, as is explicitly stated in the title of the Rule, and does not pertain to Auditors' Records, i.e. Proprietary Auditors' Work papers or also known as Licensees' Working Papers. Nowhere in the Rules does it state that headings used in the Rules are provided for convenience only and must not be used to construe meaning or intent. Therefore, a licensee should be afforded the opportunity to gain meaning or intent of a rule through, besides other things, the rule's title.

Had the Board, in its rule making, wanted the rule to cover Licensees' Working Papers, it could have, and accordingly should have,

titled the rule in a manner which would not create confusion. The Board should have been familiar with RSA 309-B:19, which covers both types of documents and is titled Licensees' Working Papers and Client Records. Accordingly, one could assume that the Board knowingly excluded the topic of Licensing Working Papers when creating Rule Ac 404.03(g). On the other hand, in its Ruling, the Board takes the position that the header Retention of Client Records is also intended to cover Licensees' Working Papers. The Board should apreciate that the current title, as it is written, is worthy of more than one interpretation and potentially misleading. Holding a licensee to the interpretation adopted in its Final Ruling and Order is, therefore, unjust and/or unreasonable and deprives the appellant of due process.

Perhaps more importantly, the Board exceeded its statutory authority in creating Rule Ac 404.03(g) Retention of Client Records, if it, as the Board found, applies to Licensees' Working Papers, whereas RSA 309-B:19 Licensees' Working Papers and Clients' Records states, **"Nothing in this section shall require a licensee to keep any work paper beyond the period prescribed in any other applicable statute."** Again, as mentioned above, the only other applicable statute, the Federal Single Audit Act establishes a three year retention period, which was complied with by the Company.

If in fact the Board of Accountancy rule covers both Licensees' Work Papers and Client's Records, as the Board argues, then it would follow that the Board, in its Rule making function, exceeded its statutory authority 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 exceeded its legal authority by attempting to define a retention period for Licensees' Working Papers. This 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, in a subsequent case addressing this issue, in an NH Board of Accountancy case, this 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* 161 N.H. 470 (2011). Specifically, Rule Ac 404.03(g) Retention of Client's Records presently does add to and modify 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 (g) is invalid.

CONCLUSION

In Summary of the work papers retention issue, the Board incorrectly interpreted Rule Ac 404.03 to cover licensees' working papers, when, in reality, the Rule only covers client records. The Board's ruling is therefore, error of law. Secondly, if the Rule were intended to apply to licensees working papers, then the Board's enactment of the Rule improperly modified the Statute that it was intending to implement, and the Rule is invalid. As a result of each and all of the above Errors of Law, the Board's finding and Decision adverse to the Company was error of law.

Based upon the numerous errors of laws presented, in conjunction with the standard of review, the Decision and Order of the Board regarding failing to retain work papers must be reversed. Additionally, based upon the misleading title of Rule 404.03, along with the unclear detail of the Rule, the Board's decision was unjust or unreasonable and must be reversed.

Respectfully Submitted,
RON L. BEAULIEU & COMPANY

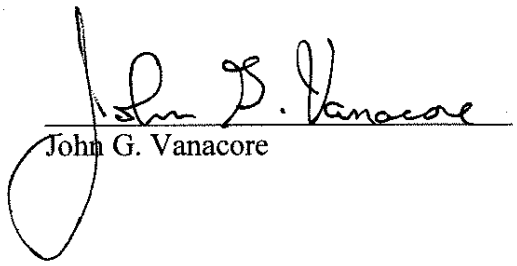
By and through its attorney,
Vanacore Law Office

Date: 2-14-19

By: _____
John G. Vanacore / Bar #: 2611
Vanacore Law Office
19 Washington Street
Concord, NH 03301
Ph: (603) 228-1180
Fax: (603) 224-1152
john@vanacorelaw.com

CERTIFICATE OF SERVICE

I hereby certify that the original and a copy of the foregoing document was forwarded via pre-paid postage mail and electronic delivery to Assistant Attorney General Seth M. Zoracki, Esq., counsel for the Defendant, on this 14th day of February, 2019.



John G. Vanacore