

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

DAVID L COOK,

CASE NO.: 2014 CV 07086

Plaintiff(s),

JUDGE MICHAEL W. KRUMHOLTZ

-vs-

ACCOUNTANCY BOARD OF THE STATE OF
OHIO,

**DECISION AND ENTRY
OVERRULING IN PART AND
SUSTAINING IN PART THE APPEAL
OF DAVID L. COOK**

Defendant(s).

This matter is before the Court upon the Notice of Appeal of the Adjudication Order No. 2014-12-01 entered by the Accountancy Board of the State of Ohio, filed December 23, 2014 by Appellant, David Cook (“Cook”). On February 25, 2015, Cook filed his Appellate Brief. On March 17, 2015, the Accountancy Board of the State of Ohio (“the Board”) filed a Motion to Supplement the Record due to its inadvertently omitting the transcript of the December 9, 2014 hearing. On March 18, 2015, Cook filed a Motion for Finding in Favor of Appellant David L. Cook, due to the Board’s failure to certify a complete record to this Court. The Board filed its Memorandum in Opposition on March 19, 2015 and Cook filed his Reply March 20, 2015.

On March 23, 2015, the Court overruled Cook’s Motion for Finding in his Favor and sustained the Board’s Motion to Supplement the Record. In its March 23, 2015 Decision, the Court allowed Cook to supplement his original February 25, 2015 brief. Cook did not supplement his

brief and on March 30, 2015, the Board filed its Appellate Brief. Cook filed his Reply to the Board's Brief April 10, 2015. This matter is ripe for decision.

I. FACTS

On January 1, 2014, Cook submitted information to the Board to renew his Ohio CPA license. Rec. I, Ex. B, p. 41-43¹. In this submission, Cook reported 135 hours of continuing education credit. Rec. I, Ex. B, p. 42. The continuing professional education ("CPE") credits requirement to renew an Ohio license is 120 hours. Rec. I., Ex. B, p. 39. By letter dated February 4, 2014, Cook was informed he had been randomly selected by the Board for verification of his CPE credits earned from January 1, 2011 – December 31, 2013. Rec. I, Ex. B, p. 39. He needed to verify his CPE credits by March 31, 2014. Rec. I, Ex. B, p. 39. The following documents are acceptable to verify CPE credits: 1) an official transcript of courses completed, including dates completed, name and courses taken; 2) a certificate of completion; or 3) a letter from the program sponsor indicating completion of the program, the date the program was completed, the number of the CPE awarded, and name. Rec. I., Ex. B, p. 40.

After reviewing the documentation Cook submitted to verify his CPE credits, the Board could only verify 67 total credits. Rec. I., Ex. B, p. 3. Cook was informed of this by a May 1, 2014 email and was instructed to submit proper documentation by May 22, 2014. Rec. I., Ex. B., p. 3. On May 30, 2015, the Board sent Cook an email requesting he submit supporting documentation for CPE credits as soon as possible. Rec. I., Ex. B., p. 1. As of June 9, 2014, Cook had not submitted the required CPE credit documentation. Rec. I., Ex. A., p. 4. In its letter dated June 9, 2014, the Board told Cook to "cease and desist the use of the CPA designation" and informed him of his right to request a hearing pursuant to R.C. 119.07 regarding his CPE credits and any disciplinary action the Board may take. Rec. I., Ex. A., p. 4. On June 23, 2014, Cook requested a hearing before the Board. Rec. I., Ex. A., p. 3. Cook was informed by letter dated June 30, 2014 that his hearing was

¹ The Court will refer to the proceedings and testimony offered to the Board, filed January 15, 2015, as "Rec. I" and the supplemental record, filed March 25, 2015, as "Rec. II".

originally set for July 3, 2014, but the Board rescheduled the hearing for September 5, 2014. Rec. I., Ex. A., p. 2. The September 5, 2014 hearing was then rescheduled for November 7, 2014, at the request of Cook. Rec. I., Ex. A., p. 1.

In the interim, the Board conducted two field calls of Cook's office at 63 Grafton Avenue, Dayton, Ohio 45406. Rec. I., Ex. A., p. 5-6. The first field call occurred July 15, 2014 and the second occurred August 27, 2014. Rec. I., Ex. A., p. 5-6. The Board noted evidence indicating Cook was advertising as "David L. Cook, Certified Public Accountant." Rec. I., Ex. A., p. 5-6.

The November 7, 2014 hearing was held to consider disciplinary action against Cook's CPA certification and firm registration, "concerning fraud or deceit in obtaining an Ohio permit and violation of a rule of professional conduct . . . specifically, Ohio Administrative Code 4701-15-12, CPE Verification." Rec. I., Tr. p. 5:9 – 13. Before the Board could present any evidence, the hearing was continued to December 9, 2014 so that Cook could consult a lawyer. Rec. I., Tr. p. 10:5 – 25.

At the December 9, 2014 hearing, an investigator for the Board, Faith Ottavi ("Ottavi"), testified that she could not verify Cook completed 135 hours in the previous three-year period and that Cook did not submit "documentation of completion from the provider or CPE sponsor." Rec. II., Tr. p. 11:5 – 25. Ottavi also testified that Cook had previously appeared before the Board on January 30, 2004 for "failure to comply with the firm registration requirements, failure to obtain an Ohio permit, and failure to respond to Board communications," and in April of 2007 for "failure to comply with firm registration requirements." Rec. II., Tr. p. 12:10 – 14. The Board confirmed that Cook did not take down the CPA sign in front of his office after receiving the Board's June 14, 2015 letter. Rec. II., Tr. p. 18:3 – 12. It informed Cook that ignoring the letter to "cease and desist being a CPA" is a very serious matter. Rec. II., Tr. p. 27:14 – 15.

During his testimony, Cook admitted that his documentation was "not of the quality they needed to be, and she's right. Some of those could be ones that I did attend and have nothing for,

not even any notes; but I had 135 of them.” Rec. II., Tr. p. 14:10 – 13. He knew he had to obtain a certificate of completion for the CRE credits, and though he did not obtain these certificates, he thought he would get them. Rec. II., Tr. 15:19 – 25. Cook stated, however, he had documentation of the 135 hours with him at the hearing. Rec. II., Tr. p. 14:13 – 14.

Subsequently, the Board sent Cook Adjudication Order 2014-12-01, dated December 11, 2014 (“Adjudication Order”). The Adjudication Order stated that the Board

voted 9-0 to revoke [Cook’s] CPA certificate and firm registration, but to stay the revocation subject to submission of a \$5,000 fine for violation of ORC 4701.16(A)(1), a \$5,000 fine for violation of ORC Section 4701.16(A)(4), and completion of a Board approved Professional Standards and Responsibilities (PSR) course by January 31, 2015. In addition, [Cook] must submit supporting documentation for at least 53 CPE credits earned between July 16, 2013 and January 31, 2015. If [Cook] fulfill[s] the conditions of the stay of revocation, you will then be required to obtain an additional 120 hours of Continuing Professional Education (CPE) between the last date of CPE credit reported and December 31, 2016

Rec. I., p. 3.

II. LAW AND ANALYSIS

A. Legal Standards

R.C. 119.12 provides the standard of review for the common pleas court:

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

When a common pleas court reviews the order of an administrative agency, it “must consider the entire record and determine whether the agency’s order is ‘supported by reliable, probative, and substantial evidence and is in accordance with the law.’” *Accountancy Bd. Of Ohio v. Hattenback*, 161 Ohio App.3d 208, 2005-Ohio-2430, 829 N.E.2d 1231, ¶ 5 (10th Dist.). “Reliable, probative, and substantial evidence” is defined as:

(1) 'Reliable' evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2)

'Probative' evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) 'Substantial' evidence is evidence with some weight; it must have importance and value.

Bartchy v. State Bd. of Educ., 120 Ohio St.3d 205, 2008-Ohio-4826, 897 N.E.2d 1096, ¶ 39, citing *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St. 3d 570, 571, 589 N.E.2d 1303 (1992).

R.C. 119.12 requires a reviewing common pleas court to conduct two inquiries: a hybrid factual/legal inquiry and a purely legal inquiry. *Bartchy* at ¶ 37. Thus, the common pleas court's review of the administrative record is "neither a trial *de novo* nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witness, the probative character of the evidence, and the weight thereof.'" *Hattenbach* at ¶ 6 (citations omitted). As to the first inquiry,

'the common pleas court must give deference to the agency's resolution of evidentiary conflicts, but 'the findings of the agency are by no means conclusive.' * * * 'Where the court, in its appraisal of the evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative body, and necessary to its determination, the court may reverse, vacate, or modify the administrative order.'

Bartchy at ¶ 37, citing *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 470-471, 613 N.E.2d 591 (1993), quoting *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111, 407 N.E.2d 1265 (1980). This means that "an agency's findings of fact are presumed to be correct and must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable." *Bartchy* at ¶ 37, citing *Ohio Historical Soc.* at 471 and *VFW Post 8586 v. Ohio Liquor Control Comm.*, 83 Ohio St.3d 79, 81, 697 N.E.2d 655 (1998). As to the second, legal part of the common pleas court's inquiry, "[a]n agency adjudication is like a trial, and while the reviewing court must defer to the lower tribunal's findings of fact, it must construe the law on its own." *Bartchy* at ¶ 38, citing *Ohio Historical Soc.* at 471 and *VFW Post 8586* at 82.

B. Discipline of Certified Public Accountants

After notice and hearing as provided in Chapter 119. of the Revised Code, the accountancy board may discipline as described in division (B) of this section a person holding an Ohio permit . . . a firm registration [or] a CPA certificate . . . for one or any combination of the following causes: (1) Fraud or deceit in obtaining a firm registration or in obtaining a CPA certificate, . . . [or] an Ohio permit . . .; (4) Violation of a rule of professional conduct. . . .

R.C. 4701.16(A)(1), (4). “Obtaining” is not defined in this section. Thus, the principles of statutory construction “require courts to first look at the specific language contained in the statute, and, if unambiguous, to then apply the clear meaning of the words used.” *Roxane Lab. V. Tracy*, 75 Ohio St.3d 125, 127, 661 N.E.2d 1011 (1996); *Gesler v. City of Worthington Income Tax Bd. Of Appeals*, 138 Ohio St.3d 76, 2013-Ohio-4986, 3 N.E.3d 1177, ¶ 12. Further, “[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage.” *Gesler* at ¶ 12, citing R.C. 1.42. To obtain means “to get [or] to acquire.” *Webster’s Universal English Dictionary* 198 (2005). Under the Ohio Administrative Code for the Accountancy Board, a person who holds an Ohio CPA certificate “must retain evidence to support fulfillment of the continuing education requirement until the end of the next reporting period.” Ohio Adm.Code 4701-15-12(A).

The Board may discipline a person by any of the following:

- (1) Revoke, suspend, or refuse to renew any CPA certificate . . . or any Ohio permit, . . . or firm registration;
- (2) Levy against a registered firm or a holder of a CPA certificate, . . . an Ohio permit, or an Ohio registration a penalty or fine not to exceed five thousand dollars for each offense. Any fine shall be reasonable and in relation to the severity of the offense.
- (5) In the case of violations of division (A)(2) or (4) of this section, require completion of remedial continuing education programs prescribed by the board in addition to those required by section 4701.11 of the Revised Code[.]

R.C. 4701.16(B)(1), (2) and (5). Under R.C. 4701.11, the Board “shall not require more than one hundred twenty hours of those programs over any three-year period for applicants possessing an Ohio permit.” R.C. 4701.11.

C. Analysis

The primary issue before the Board was what, if any, disciplinary action to take against Cook for violating R.C. 4701.16(A)(1) and (4). The Adjudication Order was the Board's decision regarding the disciplinary action taken against Cook. Thus, the focus of the Court's decision will be on whether the Board's Adjudication Order is supported by reliable, probative, and substantial evidence and is in accordance with law.

The Board's decision to discipline Cook for violating R.C. 4701.16(A)(4) is supported by reliable, probative and substantial evidence. Cook was required to retain evidence supporting his fulfillment of the required CPE credits. In February 2014, the Board informed Cook he had until March 31, 2014 to submit verification of the CPE credits he claimed to have completed. Despite claiming to have completed 135 hours, Cook only provided proper supporting documentation to verify 65 hours. He was informed of this May 1, 2014 and was given the opportunity to verify at least 120 hours by May 22, 2014. Cook failed to do so. In the December 9, 2014 hearing, Cook testified that he did have verification for the remaining hours. Nothing in the record indicates this proof was submitted. The Board determined the disciplinary action against Cook after completion of the required hearing.

Thus, the Board acted in accordance with the law in disciplining Cook pursuant to R.C. 4701.16(B). Cook's discipline was a revocation of his CPA certificate and firm registration, but this was stayed subject to: (1) payment of a \$5,000.00 fine for violating R.C. 4701.16(A)(4); (2) completion of a Board approved Professional Standards and Responsibilities course by January 31, 2015; and (3) submission of proper supporting documentation for at least 53 CPE credits earned between July 16, 2013 and January 31, 2015. Once the conditions of the stay of revocation are completed, Cook must obtain the required 120 hours of CPE credit from the last date of CPE credit reported through December 31, 2016. The Court finds that such disciplinary action is supported by

reliable, probative and substantial evidence and is accordance with the law, and as such, **AFFIRMS** Adjudication Order 2014-12-01 to this extent.

However, the Board did not act in accordance with the law when it disciplined Cook for violating R.C. 4701.16(A)(1). There is no evidence in the record that the Cook committed fraud or deceit when he acquired his CPA certificate and/or Ohio permit. That is, no evidence exists proving Cook first acquired his CPA certificate and/or Ohio permit through knowingly providing false information about his residence, about the required age (attaining eighteen years of age), about the required education and experience, or about passing the examination. *See* R.C. 4701.06. Cook's discipline included his revocation being stayed subject to payment of a \$5,000.00 fine for violating R.C. 4701.16(A)(1). The Court finds that this \$5,000.00 fine is not supported by reliable, probative and substantial evidence and is not in accordance with the law, and as such, **VACATES** Adjudication Order 2014-12-01 to this extent.

Since this appeal commenced before January 1, 2015, the Court **REMANDS** Adjudication Order 2014-12-01 to the Board to set a new deadline for Cook to complete the Board approved Professional Standards and Responsibilities course, if necessary.

III. CONCLUSION

In summation, the Court concludes the following:

1. The Court **AFFIRMS** the following in the Board's Adjudication Order 2014-12-01:
"The Board members present voted 9-0 to revoke your CPA certificate and firm registration, but to stay the revocation subject to submission of . . . a \$5,000.00 fine for violations of ORC Section 4701.16(A)(4), and completion of a Board approved Professional Standards and Responsibilities (PSR) course by January 31, 2015. In addition, you must submit supporting documentation for at least 53 CPE credits earned between July 16, 2013 and January 31, 2015. If you fulfill the conditions of the stay of revocation, you will then be required to obtain an additional 120 hours of Continuing

Professional Education (CPE) between the last date of CPE credit reported and December 31, 2016.”

2. The Court **VACATES** the following in the Board’s Adjudication Order 2014-12-01: “. . . subject to submission of a \$5,000.00 fine for violation of ORC 4701.16(A)(1).”
3. The Court **REMANDS** for the Board to set a new deadline for Cook to complete the Board approved Professional Standards and Responsibilities course, if necessary.

The Court hereby **AFFIRMS** in part and **VACATES** in part the Accountancy Board of Ohio’s Adjudication Order 2014-12-01, and **REMANDS** to the Accountancy Board of Ohio to set a new deadline for David Cook to complete to Board approved Professional Standards and Responsibilities course, if necessary. Accordingly, the Court hereby **OVERRULES** in part and **SUSTAINS** in part the appeal of David L. Cook.

SO ORDERED:

JUDGE MICHAEL W. KRUMHOLTZ

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Case Number: 2014 CV 07086
Case Title: DAVID L COOK vs ACCOUNTANCY BOARD OF THE STATE OF OHIO

So Ordered

A handwritten signature in black ink, reading "Michael W. Krumboltz". The signature is written in a cursive style and is enclosed in a thin black rectangular border.