

Before the  
Administrative Hearing Commission  
State of Missouri



STATE BOARD OF ACCOUNTANCY,            )  
  )  
  )            Petitioner,                                    )  
  )  
  )            v.    )            No. 12-1987 AC  
  )  
SHERRI BERRY,                                    )  
  )  
  )            Respondent.                                    )

**DECISION**

We find cause for the State Board of Accountancy (“the Board”) to discipline Sherri Berry’s certified public accountant (“CPA”) license.

**Procedure**

The Board filed its complaint on November 7, 2012. Berry was personally served with the complaint via a private process server on January 3, 2013. The Board served Berry with a request for admissions on February 13, 2013. Berry did not file an answer or respond to the request for admissions. The Board filed a motion for summary decision on March 26, 2013. We granted Berry until April 3, 2013, to respond to the motion, but she did not do so.

Pursuant to 1 CSR 15-3.446(6), we may decide this case without a hearing if the Board establishes facts that Berry does not genuinely dispute and entitle the Board to a favorable decision. Facts may be established by admissible evidence such as a stipulation, pleading of the adverse party, discovery response of the adverse party, affidavits, or any other evidence

admissible under law. 1 CSR 15-3.446(6)(B). The Board’s motion is accompanied by the unanswered request for admissions and documentary evidence, including authenticated business records of the Board. Therefore, we make our findings of fact based on this admissible evidence.

### **Findings of Fact**

1. Berry was licensed by the Board as a CPA on August 24, 1992. Her license expired on September 30, 1993.

2. At all relevant times, Berry was employed as a bookkeeper by Pernikoff Construction Company in St. Louis, Missouri.

3. Between February 2004 and December 2007, Berry wrote 144 unauthorized checks on Pernikoff Construction Company’s business account totaling approximately \$379,500 and placed the money in her personal bank account.

4. Berry used the funds from the 144 checks for personal and family purposes.

5. On May 3, 2011, Berry pled guilty to one count of bank fraud and one count of tax evasion in *United States v. Sherri Berry*, case no. 4:10CR00612 ERW (E.D. Mo.).

6. The district court sentenced Berry to twelve months and one day imprisonment, fined her \$200, and ordered restitution to Pernikoff in the amount of \$229,500 and to the IRS in the amount of \$98,726.

### **Conclusions of Law**

We have jurisdiction over this case.<sup>1</sup> The Board has the burden of proof by a preponderance of the evidence.<sup>2</sup> A preponderance of the evidence is evidence showing, as a whole, that “the fact to be proved [is] more probable than not.”<sup>3</sup>

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<sup>1</sup> §621.045; §326.130.2, RSMo 2000. Statutory references are to the 2012 Supplement to the Missouri Revised Statutes unless otherwise noted.

<sup>2</sup> See *Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-30 (Mo. App., W.D. 2012) (dental licensing board demonstrates “cause” to discipline by showing preponderance of evidence).

<sup>3</sup> *Id.* at 230.

The Board alleges Berry is subject to discipline based on § 326.310.2(2), (6), and (13).

That statute states:

2. The board may file a complaint with the administrative hearing commission as provided by chapter 621 or may initiate settlement procedures as provided by section 621.045 against any certified public accountant or permit holder required by this chapter or any person who fails to renew or surrenders the person's certificate, license or permit for any one or any combination of the following causes:

\*\*\*\*\*

(2) The person has been finally adjudicated and found guilty, or entered a plea of guilty or nolo contendere, in a criminal prosecution under the laws of any state or of the United States, for any offense reasonably related to the qualifications, functions or duties of any profession licensed or regulated pursuant to this chapter, for any offense an essential element of which is fraud, dishonesty or an act of violence, or for any offense involving moral turpitude, whether or not sentence is imposed;

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(6) Violation of, or assisting or enabling any person to violate, any provision of this chapter or any lawful rule or regulation adopted pursuant to this chapter;

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(13) Violation of any professional trust or confidence[.]

We will examine each of these subsections in turn.

#### Subsection (2)--Berry's Guilty Pleas

Under subsection (2), the Board may discipline Berry's license if she has pled guilty to an offense reasonably related to the qualifications, functions, or duties of an accountant; an offense that has an essential element of fraud or dishonesty; or an offense involving moral turpitude. An essential element is one that must be proven for a conviction in every case. *State ex rel. Atkins v. Missouri Bd. of Accountancy*, 351 S.W.2d 483, 485 (Mo. App., K.C.D. 1961). Fraud is an intentional perversion of truth to induce another, in reliance on it, to part with some valuable thing belonging to him. *State ex rel. Williams v. Purl*, 128 S.W. 196, 201 (Mo. 1910). It

necessarily includes dishonesty, which is a lack of integrity or a disposition to defraud or deceive. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 359 (11<sup>th</sup> ed. 2004).

Berry pled guilty to one count of bank fraud under 18 U.S.C. § 1344 and one count of tax evasion under 26 U.S.C. § 7201. Title 18 of the United States Code § 1344 sets out the following offense:

Whoever knowingly executes, or attempts to execute, a scheme or artifice--  
(1) to defraud a financial institution; or  
(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;  
shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

The sentencing documents indicate Berry violated subsection (2) of this statute, which describes conduct that is dishonest and fraudulent under any reasonable interpretation.

Title 26 of the United States Code § 7201 defines tax evasion as:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

An essential element of the federal crime of tax evasion is dishonesty. We find Berry pled guilty to crimes that contain an essential element of dishonesty.

The Board contends Berry is also subject to discipline because the offenses to which she pled guilty are reasonably related to the qualifications, functions or duties of accountants. We agree. Section 326.256(18)(a) defines "public accounting" as, among other things, "[p]erforming or offering to perform for an enterprise...one or more services involving the use of

accounting or auditing skills[.]” Good moral character is a qualification for licensure in this profession,<sup>4</sup> and committing this crime shows a lack of good moral character. We find, therefore, Berry’s offenses are reasonably related to the qualifications, functions, or duties of an accountant. Berry is subject to discipline under § 326.310.2(2).<sup>5</sup>

Subsections (6) and (13)—Violation of Rule  
and Violation of Professional Trust

Section 326.310.2(6) allows for discipline for “violation of ... any provision of [Chapter 326] or any lawful rule or regulation adopted pursuant to [Chapter 326].” The Board alleges that Berry violated 20 CSR 2010-3.060. Section 326.310.2(13) allows for discipline for violation of any professional trust. The Board’s Rule 20 CSR 2010-3.060(1) provides, “[a] licensee shall not commit any act that reflects adversely on his or her or the firm's fitness to engage in the practice of public accounting.”

Berry wrote 144 business checks worth approximately \$379,500 without her employer’s permission, and as a result of her conduct, pled guilty to two federal crimes. We conclude that her dishonest actions reflect adversely on her fitness to be an accountant. She violated § 20 CSR 2010-3.060(1), and in so doing, is subject to discipline under § 326.310.2(6).

Professional trust is reliance on the special knowledge and skills that professional licensure evidences. *Trieseler v. Helmbacher*, 168 S.W.2d 1030, 1036 (Mo. 1943). Berry clearly violated her employer’s professional trust by misappropriating funds from the company’s accounts for her personal use. We find grounds for discipline under § 326.310.2(13).

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<sup>4</sup> § 326.280.1(3).

<sup>5</sup> We do not address whether Berry’s offenses also involve moral turpitude, as we have found sufficient grounds for discipline under § 326.310.2(2). However, we note the crime of income tax evasion has been held to constitute an offense involving moral turpitude. See *In re Foley*, 364 S.W.2d 1 (Mo. 1963).

**Summary**

We find cause to discipline Berry's license under § 326.310.2(2), (6), and (13).

SO ORDERED August 9, 2013.

\s\ Mary E. Nelson\_\_\_\_\_

MARY E. NELSON  
Commissioner