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NO.
STATE OF NEBRASKA
OFFICIAL
AUG 3 1994
DEPT. OF JUSTICE

DATE: July 28, 1994

SUBJECT: Certified Public Accountants; Disciplinary Action for Non-Payment of Fees

REQUESTED BY: Annette L. Harmon, Executive Director
Board of Public Accountancy

WRITTEN BY: Don Stenberg, Attorney General
Fredrick F. Neid, Assistant Attorney General

This is in response to the series of questions you have asked regarding surrender of certificates of certified public accountants due to non-payment of fees. Generally, the Board of Public Accountancy may require surrender or relinquishment of a certificate only if the certificate has been revoked pursuant to the provisions of the Public Accountancy Act, Neb. Rev. Stat. §§ 1-105.01 to 1-171 (1991 and Supp. 1993).

The first specific question you ask is whether the Board has authority "to ask for the return of a certificate if the individual refuses to pay fees for either an active permit or inactive registration on an annual basis?" We find no authority of the Board under the Public Accountancy Act to request or demand the relinquishment of a certificate unless the certificate has been revoked. State officials may act solely by virtue of statutes which prescribe their powers and exercise powers as are provided by statute. ***Aston v. Tate***, 173 Neb. 78, 112 N.W.2d 540 (1961). In ***Bohling v. State Board of Public Accountancy***, 243 Neb. 666, 501 N.W.2d 714 (1993), the Nebraska Supreme Court reversed and vacated an order of the Board revoking a certified public accountant certificate due to lack of statutory authority. The ***Bohling*** Court

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concluded that there was no statutory authority for the executive director to execute an order of revocation.

Revocation of a certificate is a disciplinary action which may be taken for certain violations of the Public Accountancy Act by Certified Public Accountants. Specific grounds for disciplinary action are set forth in Neb. Rev. Stat. § 1-137 (Cum. Supp. 1993) which states:

> **Individual certificates, registration, and permits; disciplinary action; grounds.** After notice and hearing as provided in sections 1-140 to 1-149, the board may take disciplinary action as provided in section 1-148 for any one or any combination of the following causes:
>
> (1) Fraud or deceit in obtaining a certificate as certified public accountant, in obtaining registration under the Public Accountancy Act of 1957, or in obtaining a permit to practice public accounting under the act;
>
> (2) Dishonesty, fraud, or gross negligence in the practice of public accounting;
>
> (3) Violation of any of the provisions of sections 1-151 to 1-161;
>
> (4) Violation of a rule of professional conduct promulgated by the board under the authority granted by the act;
>
> (5) Conviction of a felony under the laws of any state or of the United States;
>
> (6) Conviction of any crime, an element of which is dishonesty or fraud, under the laws of any state or of the United States;
>
> (7) Cancellation, revocation, suspension, or refusal to renew authority to practice as a certified public accountant or a public accountant in any other state, <u>for any cause other than failure to pay an annual registration fee in such other state</u>;
>
> (8) Suspension or revocation of the right to practice before any state or federal agency; or
>
> (9) Failure of a certificate holder or registrant to obtain an annual permit under the provisions of

> section 1-136, within either (a) three years from the expiration date of the permit to practice last obtained or renewed by the certificate holder or registrant or (b) three years from the date upon which the certificate holder or registrant was granted his or her certificate or registration, if no permit was ever issued to him or her, unless under the provisions of section 1-136 such failure shall have been excused by the board pursuant to the provisions of section 1-136.

(Emphasis added).

Disciplinary action may be imposed if a certificate holder fails to renew his or her annual permit to practice public accountancy for a period of three years. Accordingly, it is our opinion that the Board does not have authority to require a certificate holder to relinquish his or her certificate for failure to renew his or her annual permit if less than three years have lapsed since expiration or issuance of the permit.

The related question you ask is whether the certificate belongs to the individual until the three years pass, or can they keep it "forever" without paying fees. As we have previously pointed out, a holder may retain the certificate until the certificate has been revoked for cause. Consequently, if the Board would take no action after three years, the holder would retain the certificate indefinitely. You further inquire whether the statute or rules need to be amended to explicitly state that a certificate must be returned if the individual does not pay fees. We believe that the provisions of the Public Accountancy Act would have to be amended to require surrender of a certificate for failure to pay annual fees for less than a three year period.

You next ask whether the Board has the authority to collect for past years' fees. Yes, the Board may collect fees for prior years. Neb. Rev. Stat. § 1-136 (Cum. Supp. 1993) provides that the failure of a certificate holder to renew his or her annual permit deprives such person of his or her right to renewal unless the Board determines the failure to be excusable. If the Board finds the delay to be excusable, the Board may determine the amount of the renewal fee not to exceed one hundred dollars. In posing your questions, we note that you characterize the certificate as being in "good standing." For example, you inquire, "Must the board collect such fees before bringing the certificate into good standing?" It is the certificate holder, the certified public accountant, who is or is not in good standing. A certificate holder would not be in good standing if fees were not paid since annual permits to engage in the practice of public accountancy

automatically expire for non-payment of renewal fees. *See*, Neb. Rev. Stat. § 1-136 (Cum. Supp. 1993). A certificate holder to be in good standing would have a current permit to practice and would have paid renewal fees. It would seem that the Board would decline to issue or renew an annual permit if the certificate holder would not pay the requisite fee amounts.

You also inquire whether the Board may take disciplinary action against a certificate holder for failure to renew on an annual basis. Dependent on facts and circumstances, disciplinary action may be taken. Obviously, if the certificate holder failed to renew his or her permit and continued to practice public accountancy and hold him or herself out as a Certified Public Accountant, violations of the Act would occur. If the holder continued to practice without an active permit, Section 1-151 of the Act would be violated which constitutes grounds for disciplinary action under Section 1-137(3). Consequently, failure to renew a permit, whether active or inactive, may constitute violations of the Act unless the Board would determine that the failure was due to excusable neglect.

In conclusion, we believe the Board may require surrender of a certificate of certified public accountant if the Board has revoked the certificate for cause. The question whether failure to renew the annual permit constitutes grounds for disciplinary action is dependent on the individual facts and circumstances of each case.

Sincerely,

DON STENBERG
Attorney General

Fredrick F. Neid
Assistant Attorney General

Approved By:

Attorney General

21-594-6.10