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**Before the
State Of Wisconsin
Accounting Examining Board**

In the Matter of Disciplinary Proceedings Against
Stuart W. Peterson, Respondent

FINAL DECISION AND ORDER

Order No. **0005497**

Division of Legal Services and Compliance Case No. 15 ACC 028

The State of Wisconsin, Accounting Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, make the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Accounting Examining Board.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated at Madison, Wisconsin on the 7th day of November, 2017.

Member
Accounting Examining Board



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of Disciplinary Proceedings Against
Stuart W. Peterson, Respondent

DHA Case No. SPS-16-0070
DLSC Case No. 15 ACC 028

PROPOSED DECISION AND ORDER

The parties to this proceeding for purposes of Wis. Stat §§ 227.47(1) and 227.53 are:

Stuart W. Peterson
11772 E. Bolognesi Road
P.O. Box 54
Lake Nebagamon, WI 54849

Wisconsin Accounting Examining Board
P.O. Box 8366
Madison, WI 53708-8366

Department of Safety and Professional Services, Division of Legal Services and
Compliance, by

Attorneys Renee Parton and Sarah E. Norberg
Department of Safety and Professional Services
Division of Legal Services and Compliance
P.O. Box 7190
Madison, WI 53707-7190

PROCEDURAL HISTORY

These proceedings were initiated on December 14, 2016, when the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division), filed and served a formal Complaint against Respondent Stuart Peterson (Respondent), alleging that Respondent violated Wis. Admin. Code § Accy 1.407 by failing to respond to a January 28, 2016 communication from the Wisconsin Accounting Examining Board (Board) within 30 days of mailing such communication by registered or certified mail. Respondent failed to file an Answer to the Division's Complaint.

A telephone prehearing conference was held on January 18, 2017, at which the parties indicated that they wished engage in settlement discussions. Additional telephone status

conferences were held on February 21, 2017 and March 6, 2017. At the March 6, 2017 status conference, a hearing and related deadlines were scheduled, including a deadline of March 21, 2017 for the Division to file an Amended Complaint and a deadline of April 10, 2017 for Respondent to file an Answer to the Amended Complaint. Consistent with these discussions, on March 6, 2017, the administrative law judge (ALJ) issued a Scheduling Order.

On March 21, 2017, the Division filed an Amended Complaint which added an additional allegation that Respondent failed to respond to a November 1, 2016 communication regarding a settlement offer.

On April 14, 2017, the Division filed a motion for default based on Respondent's failure to file an Answer to the either the original or Amended Complaint. On April 17, 2017, the Division emailed the ALJ a copy of Respondent's Answer, which had not been filed with the ALJ. Respondent's Answer was dated April 9, 2017, postmarked April 10, 2017, and received by the Division on April 14, 2017.¹ On April 19, 2017, the ALJ issued a Notice of Default and Order which set a deadline of April 26, 2017 for Respondent to file and serve a statement showing why he should not be found to be in default. On April 27, 2017, the Division emailed a copy of a letter from Respondent to Division counsel dated April 23, 2017, which was faxed to the Division on April 26, 2017, but had not been provided to the ALJ.

On April 27, 2017, the ALJ sent an email to the parties stating that she would accept Respondent's Answer as timely filed and would either reinstate the original hearing schedule or reschedule the hearing date and related deadlines. Following correspondence with the parties, an Amended Scheduling Order was issued on April 28, 2017, rescheduling the hearing to June 26, 2017.

On June 13, 2017, nine business days before the scheduled hearing, the Division filed a Notice of Motion and Motion for Summary Judgment, based on Respondent's failure to respond to the Division's Requests for Admissions. On June 14, 2017, the ALJ contacted the parties by email to determine whether they were available for a telephone conference to discuss the Division's motion. The ALJ also attempted to reach Respondent by telephone to schedule a telephone conference, but was unsuccessful. On June 15, 2017, the ALJ issued a Notice of Telephone Status conference, setting a telephone conference for June 21, 2017. The status conference was held with the parties on June 21, 2017, at which the ALJ noted that a summary judgment motion had not previously been discussed or scheduled and that pursuant to Wis. Stat. § 802.08(2), motions for summary judgment were required to be filed at least 20 days prior to the scheduled hearing date. The Division agreed to withdraw its motion and the hearing was kept on the calendar for June 26, 2017. Over the objection of Division counsel, Respondent was also allowed to appear by telephone for the hearing.

The hearing was held on June 26, 2017 in Madison, Wisconsin, with Respondent appearing by telephone and testifying on his own behalf. Respondent did not offer any exhibits. Department Investigator Brian Henry and Division Paralegal Terri Rees testified for the Division

¹ At the time the Division filed its April 14, 2017 motion for default, it evidently had not yet seen the Respondent's Answer to the complaint, which was post-marked April 10, 2017 and received by the Division on April 14, 2017. Had Respondent also mailed a copy of his answer to the ALJ on April 10, 2017, it would have been timely filed. See Wis. Admin. Code § SPS 2.08(2) (filing complete upon mailing).

and the ALJ received Division Exhibits 1-15 into evidence. The ALJ received a mailed copy of the transcript on July 6, 2017.

FINDINGS OF FACT

1. Respondent Stuart Peterson is licensed in the State of Wisconsin to practice as a certified public accountant, having certificate number 10596-1, first issued on April 24, 1987, and current through December 14, 2017. (Amended Complaint ¶ 1; Answer)

2. On November 4, 2015, the Department received a complaint from the Potawatomi Property Owners Association, alleging that Respondent had not responded to its repeated requests for the return of documents. (Ex. 11; Hearing Transcript (Hrg. Tr.), pp. 16-18)

3. On January 28, 2016, Investigator Henry sent a letter to Respondent via certified mail, which states in relevant part:

This is our second letter to you in an attempt to inform you that we received a complaint against you from the Potawatomi Property Owners Association. The details of the complaint were reviewed and evaluated by a screening panel which included members of your credentialing authority, legal staff and other department staff.

The screening panel has requested additional information from you to determine whether the complaint should be opened for investigation. You were asked to provide a detailed written response to the complaint no later than July 28, 2015.² The Department has not received your complaint [sic] as of today, January 28, 2016.

I am formally requesting that you provide a detailed written response to the complaint no later than February 5, 2016.

(Ex. 1; Hrg. Tr., p. 20)

4. The January 28, 2016 letter also quoted Wis. Stat. § 440.20(5), which states that failure to respond within 30 days to a request for information from the Department or credentialing board in connection with an investigation of alleged misconduct could result in disciplinary action. (Ex. 1; Hrg. Tr., p. 20)

5. The Department received the signed certified letter receipt for Mr. Henry's January 28, 2016 letter on February 15, 2016, and Respondent testified at hearing that he had received the January 28, 2016 letter. Respondent also testified that he had received the prior correspondence regarding the complaint referred to in the January 28, 2016 letter. (Ex. 2; Hrg. Tr., pp. 21, 49)

6. Mr. Henry did not send the initial letter to Respondent referred to in his January 28, 2016 letter and believes it was sent by the screening panel. The Board's practice is to send a

² The Department did not offer into evidence the initial letter sent to Respondent.

copy of the underlying complaint to a credential holder when sending the initial request for a response to a complaint. (Hrg. Tr., p. 29)

7. Respondent indicated at hearing that he had received this initial letter requesting a response to the complaint. (Hrg. Tr., p. 49)

8. On February 15, 2016, Mr. Henry called Respondent at the two telephone numbers on file with the Department and also sent Respondent an email. Mr. Henry was not able to leave a telephone message for Respondent. (Hrg. Tr., pp. 21-22)

9. Respondent did not respond to the January 28, 2016 letter or to the email. (*Id.*)

10. On January 18, 2017, Mr. Henry sent another certified letter to Respondent, again requesting a response to the complaint. (Ex. 6; Hrg. Tr., p. 22)

11. Respondent replied to the January 18, 2017 letter on February 1, 2017 by contacting Mr. Henry by telephone. (Hrg. Tr., p. 23)

12. Prior to the conversation with Respondent on February 1, 2017, Mr. Henry had not spoken with Respondent in relation to the complaint. (Hrg. Tr., p. 23)

13. During the February 1, 2017 telephone call, Respondent stated that he was confused about the January 18, 2017 letter. Mr. Henry read the complaint to Respondent. Respondent acknowledged that he had received at least one communication from the Department and was confused as to why the Department wanted him to sign a document saying he was guilty. Mr. Henry also asked why Respondent had not responded to the earlier letters, and Respondent stated that he was confused. Mr. Henry informed Respondent that he should have contacted the Department with his questions. (Ex. 8; Hrg. Tr., pp. 24-25)

14. Mr. Henry had two additional telephone conversations with Respondent on February 2, 2017 and another conversation on February 15, 2017 regarding information Respondent had sent to Mr. Henry. During the February 15, 2017 conversation, Mr. Henry asked Respondent how many letters Respondent had received from Mr. Henry. Respondent replied that he had received six to eight letters but was not sure who they were from and that he had received two emails from Department Attorney Sarah Norberg. When asked why he did not respond to the emails from Attorney Norberg, Respondent stated he did not think of doing that and that he was confused about the situation. He also stated that he did not want to sign the documents admitting guilt sent by Attorney Norberg. (Ex. 9; Hrg. Tr., pp. 26-27)

15. On October 6, 2016, Department Paralegal Terri Rees sent a letter of settlement offer to Respondent, which asked for a response. Ms. Rees also followed up with an email asking Respondent if he had received the Department's settlement offer and asking him to respond. Respondent did not respond to either the mailed settlement offer or the follow-up email. (Hrg. Tr., pp. 36-38)

16. On November 1, 2016, Ms. Rees sent another letter with settlement documents to Respondent by certified mail and by email. The letter stated, in relevant part:

Please let me know by **November 10, 2016**, if you wish to resolve this case in this manner, or if you need more time for that decision. If you agree, please sign and date the second page of the Stipulation and return it to me and it will then be presented to the Board for its consideration If I do not hear from you, I will assume that you do not agree to the Stipulation and we may proceed to file a request for hearing.

Feel free to contact me (or have your attorney contact me if you are represented) if you have any questions about this letter or the other documents.

(Exs. 3 and 4; Hrg. Tr., pp. 38-39)

17. The Department received a signed receipt for Ms. Rees's November 1, 2016 certified mailing. (Hrg. Tr., p. 39)

18. Respondent did not reply to Ms. Rees's November 1, 2016 letter sent by certified mail or to the emailed version of the letter. (Hrg. Tr., pp. 39-40)

19. On March 2, 2017, Ms. Rees contacted Respondent by telephone and asked him if he had received settlement documents sent by Attorney Norberg sent on February 20, 2017. Respondent stated he had reviewed the documents. Ms. Rees asked whether Respondent wished to settle the case in the manner outlined in the settlement documents. Respondent replied that he did not want to sign anything that required him to admit guilt. Ms. Rees also asked if Respondent had received the Department's certified letters and Respondent stated he had. (Ex. 10; Hrg. Tr., pp. 40-41)

20. In his April 9, 2017 response to the Division's Amended Complaint, Respondent stated that he did not know what the underlying Potawatomi complaint was about until communications with Mr. Henry in January of 2016. In his April 23, 2017 letter to Division counsel, Respondent stated that he had received a letter from the Department on December 1, 2015 informing him he had a complaint against him from the Potawatomi Property Owners Association and asking for a response to the complaint. He stated that the letter did not state what the subject matter of the complaint was and that therefore he had nothing to respond to. He further stated that his first knowledge of the subject matter of the Potawatomi complaint was on February 11, 2016, while in contact with Mr. Henry.

DISCUSSION

Burden of Proof

The burden of proof in disciplinary proceedings is on the Division to show by a preponderance of the evidence that the events constituting the alleged violations occurred. Wis. Stat. § 440.20(3); *see also* Wis. Admin. Code § HA 1.17(2). To prove by a preponderance of the evidence means that it is "more likely than not" that the examined action occurred. *See State v. Rodriguez*, 2007 WI App. 252, ¶ 18, 306 Wis. 2d 129, 743 N.W.2d 460, citing *United States v. Saulter*, 60 F.3d 270, 280 (7th Cir. 1995).

Violations

The Board may revoke, limit, or suspend a certified public accountant or may officially reprimand the accountant, if it finds that the accountant has violated Chapter 442 of the Wisconsin Statutes or any duly promulgated standard or rule of practice or for any other sufficient cause. Wis. Stat. § 442.12(1)(b).

The Division alleges that by not responding to Mr. Henry's January 28, 2016 communication or to Ms. Rees's November 1, 2016 communication, Respondent violated Wis. Admin. Code § Accy 1.407, which provides that "[a] certified public accountant shall, when requested, respond to communications from the board within 30 days of the mailing of such communications by registered or certified mail." The Division has met its burden of establishing a violation with respect to Mr. Henry's communication, but not with respect to Ms. Rees's communication.

Mr. Henry's January 28, 2016 Request for Information

A violation occurs under Wis. Admin. Code § Accy 1.407 when the following elements are established: (1) there is a communication to a certified public accountant from the Board; (2) the communication is sent by registered or certified mail; and (3) the communication requests a response; and (4) the accountant fails to respond within 30 days. There is no dispute that these elements are satisfied with respect to Mr. Henry's January 28, 2016 request. Mr. Henry sent Respondent a letter on behalf of the Board by certified mail on January 28, 2016, requesting a response by February 5, 2016. Respondent failed to respond within 30 days. In fact, he failed to respond until over a year later, on February 1, 2017, despite numerous additional communications from the Department requesting a response. As a result, Respondent violated Wis. Admin. Code § Accy 1.407.

At hearing, Respondent argued that he did not respond because the Department did not give him sufficient information about the underlying complaint and that it was therefore "impossible" for him to respond to the repeated requests for information. (Hrg. Tr., p. 48) He testified that it was not until he spoke with Mr. Henry in February 2016 that he knew what the Potawatomi complaint was about. (*Id.*) Respondent asserted the same timeframe of February 2016 in his April 23, 2017 letter to Division counsel, although in his April 9, 2017 correspondence, he stated he first knew about the contents of the underlying complaint in January of 2016. Based on Mr. Henry's testimony that he first spoke with Respondent in February of 2017 rather than in 2016 and Mr. Henry's memorandum memorializing that conversation (Ex. 8), and because of Respondent's contradictory written and hearing statements in this proceeding regarding when he first understood the contents of the Potawatomi complaint, I credit Mr. Henry's testimony that the two first spoke in February of 2017, not in 2016. Further, Respondent's claims that he did not understand the complaint are undermined by Mr. Henry's testimony that a copy of the complaint is typically sent to the credential holder with the initial screening panel letter requesting a response, and also by Mr. Henry's January 28, 2016 letter to Respondent stating that the screening panel had previously asked Respondent for a detailed response to the complaint. Moreover, if Respondent had questions about the underlying Potawatomi complaint, he should have sought clarification rather than ignore the Department's requests for information.

Respondent also spoke at length during the hearing about the merits of the underlying complaint from the Potawatomi Property Owners Association. However, this case is not about the merits of the Potawatomi complaint. Rather, it is about Respondent's failure to reply to the Department's request for information. As stated by the Department's attorney in her rebuttal closing, if Respondent had provided the same information to the Department at the outset regarding the Potawatomi complaint that he testified to at hearing, this matter likely would not be before this tribunal. Instead, he chose to ignore the Department from at least January of 2016 until February 1, 2017, when he finally responded by contacting Mr. Henry by telephone.

By failing to respond to the Board's request, Respondent violated Wis. Admin. Code § Accy 1.407 and is therefore subject to discipline under Wis. Stat. § 442.12(1)(b).

Ms. Rees's November 1, 2016 Offer of Settlement

On November 1, 2016, Ms. Rees sent a settlement offer to Respondent, with a cover letter stating in relevant part:

Please let me know by **November 10, 2016**, if you wish to resolve this case in this manner, or if you need more time for that decision. If you agree, please sign and date the second page of the Stipulation and return it to me and it will then be presented to the Board for its consideration If I do not hear from you, I will assume that you do not agree to the Stipulation and we may proceed to file a request for hearing.

Feel free to contact me (or have your attorney contact me if you are represented) if you have any questions about this letter or the other documents.

The Division asserts that failure to respond to this letter constituted an additional violation of Wis. Admin. Code § Accy 1.407. The Division has failed to establish an additional violation.

Respondent's failure to respond to this letter did not constitute a violation of Wis. Admin. Code § Accy 1.407 because the letter cannot be construed as affirmatively requesting a response. The letter states, "Please let me know by **November 10, 2016**, if you wish to resolve this case in this manner, or if you need more time for that decision." This language is conditional and may reasonably be construed to mean that if Respondent did not wish to resolve the case in the manner offered by the Division and did not need additional time to consider his decision, he need not respond. Indeed, the letter then actually invites a nonresponse, or at least presents it as an acceptable option, by stating, "If I do not hear from you, I will assume that you do not agree to the Stipulation and we may proceed to file a request for hearing." For this reason, I conclude that the Division has failed to establish that Respondent violated Wis. Admin. Code § Accy 1.407 by not responding to Ms. Rees's November 1, 2016 offer of settlement.

Although the above rationale is sufficient to sustain the conclusion that there was no violation, I also observe that the purpose of Wis. Admin. Code § Accy 1.407 does not appear to include requiring a response to a settlement offer. Rather, consistent with the statutory provision upon which it is presumably based (and which Mr. Henry quoted in his January 18, 2016 letter), Wis. Stat. § 440.20(5), the rule appears designed to gather information regarding an actual

investigation into an allegation of misconduct against the credential holder. *See* Wis. Stat. § 440.20(5) (requiring a response to “a request for *information . . . in connection with an investigation of alleged misconduct* of the credential holder.” (Emphasis added.) The Department and boards are charged with ensuring that credential holders practice in a safe and ethical manner. To that end, they must be able to investigate and gather information from a credential holder when there are grounds to believe that the holder has not complied with the requirements of his or her profession. A credential holder should be required to provide the requested information so that the Department and boards may do their jobs of investigating misconduct and protecting the public. In contrast, there is no obligation that a credential holder engage in settlement negotiations, nor does public safety demand it. As a result, it seems unreasonable to construe the rule in a way which subjects a credential holder to professional discipline simply for failing to respond to a settlement offer.

Discipline

As a result of Respondent’s violation of Wis. Admin. Code § Accy 1.407, he is subject to discipline under Wis. Stat. § 442.12(1)(b). The three purposes of discipline are: (1) to promote the rehabilitation of the licensee; (2) to protect the public from other instances of misconduct; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206, 237 N.W.2d 689 (1976).

The Division requests a reprimand in this matter. Consistent with the purposes of discipline articulated in *Aldrich*, a reprimand is appropriate. The violation established by the Department was that for over a year, Respondent failed to respond in any way to Mr. Henry’s January 28, 2016 request for information regarding a complaint that was filed against him. He failed to respond even though Mr. Henry warned him that his professional license could be in jeopardy as a result of such failure. He failed to respond even though the Board and Department sent him repeated requests to do so dating back to 2015. Although Respondent claims he did not have sufficient information to respond, the record contradicts that assertion. Even if this were true, however, it is no justification because failing to respond in any way to the request for information is specifically prohibited by the rule. A reprimand will serve Respondent’s need for rehabilitation and deter other licensees from engaging in such conduct by demonstrating that it is not an option to ignore a licensing authority’s request for information. A reprimand will also protect the public by holding Respondent accountable for his conduct and helping ensure that the Board may do its job of investigating allegations of misconduct by professionals upon whom the public relies.

Costs

The Board is vested with discretion concerning whether to assess all or part of the costs of this proceeding against Respondent. *See* Wis. Stat. § 440.22(2). In exercising such discretion, the Board must look at aggravating and mitigating facts of the case; it may not assess costs against a licensee based solely on a “rigid rule or invocation of an omnipresent policy,” such as preventing those costs from being passed on to others. *Noesen v. State Department of Regulation & Licensing, Pharmacy Examining Board*, 2008 WI App 52, ¶¶ 30-32, 311 Wis. 2d 237, 751 N.W.2d 385. In previous orders, the Department and boards have considered many factors when determining if all or part of the costs should be assessed against a Respondent. Factors have included: (1) the number of counts charged, contested and proven; (2) the nature

and seriousness of the misconduct; (3) the level of discipline sought by the prosecutor; (4) the cooperation of the respondent; (5) any prior discipline; and (6) the fact that the Department is a program revenue agency, funded by other licensees. *See e.g., In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz*, LS 0802183 CHI (Aug. 14, 2008). It is within the Board's discretion as to which, if any, of these factors to consider, whether other factors should be considered, and how much weight to give any factors considered.

The Division requests that all costs be borne by Respondent. Based on the record, I conclude that Respondent should pay 75 percent of the costs of these proceedings. The Division alleged that Respondent violated Wis. Admin. Code § Accy 1.407 on two occasions, but it only proved one violation. However, Respondent's failure to provide information about a complaint against him, when requested by the Board, is serious conduct. As stated, the Department and boards have the responsibility to ensure that professionals practice in a safe, responsible and ethical manner. In serving that function, they must be able to effectively investigate allegations of misconduct against professionals. If credential holders refuse to cooperate with the very entities which granted their credentials, the boards and Department are severely hampered in performing their duties of protecting the public. Respondent chose to ignore Mr. Henry's January 28, 2016 letter for over a year, when Wis. Admin. Code § Accy 1.407 requires a response within *30 days*. Moreover, although not violations of Wis. Admin. Code § Accy 1.407 because the requests were not sent by certified or registered mail, Respondent repeatedly ignored the Division's requests for information over the course of two years.

In looking at other relevant factors, I note that Respondent has generally been cooperative in these proceedings and has had no prior discipline against him. I also note that the Division filed a motion for default based on failure to file an Answer to the Amended Complaint, when in fact, Respondent had mailed his answer to the Division by the due date but had simply not provided a copy to the ALJ. This motion was denied by the ALJ. In addition, the Division filed a last-minute motion for summary judgment, which it ultimately withdrew, and which would have been denied had it not been withdrawn. Nevertheless, Respondent should pay the bulk of the costs of these proceedings in light of the seriousness of his conduct, his lack of a reasonable defense, and the fact that any costs not borne by Respondent will be borne by others in his profession who have not engaged in misconduct.

CONCLUSIONS OF LAW

1. The Division met its burden of establishing that Respondent's failure to respond to Mr. Henry's January 28, 2016 letter violated Wis. Admin. Code § Accy 1.407.
2. The Division did not meet its burden of establishing that Respondent's failure to respond to Ms. Rees's November 1, 2016 letter did not violate Wis. Admin. Code § Accy 1.407.
3. A reprimand of Respondent is authorized and appropriate under Wis. Stat. § 442.12(1)(b) and the factors set forth in *Aldrich*.
4. Imposition of 75 percent of the costs of these proceedings on Respondent is authorized and appropriate under Wis. Stat. § 440.22(2).

ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that:

1. Respondent is REPRIMANDED.

2. Respondent shall pay 75 percent of recoverable costs in this matter in an amount to be established, pursuant to Wis. Admin. Code § SPS 2.18. After the amount is established, payment shall be made by certified check or money order payable to the Wisconsin Department of Safety and Professional Services and sent to:

**Department Monitor
Department of Safety and Professional Services
Division of Legal Services and Compliance
P.O. Box 7190
Madison, WI 53707-7190**

3. The terms of this Order are effective the date the Final Decision and Order is signed by the Board.

Dated at Madison, Wisconsin on July 31, 2017.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: _____

Jennifer E. Nashold
Administrative Law Judge