

BEFORE THE WEST VIRGINIA BOARD OF ACCOUNTANCY

**WEST VIRGINIA BOARD OF
ACCOUNTANCY,**

Complainant,

v.

Complaint No. 2010-4

LELAND D. O'NEAL, C.P.A.,

Respondent.

FINAL ORDER

Pursuant to W. Va. Code R. § 1-2-10, and upon review of the record in the above-styled matter, a quorum of the West Virginia Board of Accountancy (Board) at a meeting on December 9, 2013, considered the Hearing Examiner's recommendations and, hereby **ADOPTS**, in its entirety, the Hearing Examiner's Findings of Fact and Conclusions of Law and Recommended Decision, dated October 30, 2013, which is attached hereto and incorporated by reference herein. Based on the Hearing Examiner's Findings of Fact and Conclusions of Law sustaining the allegations as outlined in the Board's *Statement of Charges* in their entirety that the Respondent conducted a substandard audit, including the Respondent's decision to audit the wrong party. Moreover, it was found that the Respondent's actions demonstrated conduct, practices or acts constituting professional negligence in violation of W. Va. Code §§ 30-9-20(a)(5), (6) and (9) and the provisions of W. Va. Code R. §§ 1-1-13.1e, f and I, and 1-1-19.2a, and as such, the Board hereby **ORDERS** as follows:

1. Respondent shall obtain and complete a Peer Review by June 30, 2014. The results of said Peer Review shall be reported to the Board, and the cost of such Peer

Review shall be the responsibility of the Respondent.

2. Respondent shall complete the following continuing education hours in addition to the regularly required continuing education hours in order to maintain licensure with the Board:
 - a. Sixteen (16) hours of continuing professional education on governmental accounting and auditing documentation topics, with at least 8 of these hours dedicated to Yellow Book Standards audit process (A-133). These sixteen hours shall not be obtained via online courses or self-study, and must be in live presentation format.
 - b. Eight (8) hours of continuing professional educational shall be completed in the area of ethics, and these eight hours shall not be obtained via online courses or self-study, and must be in live presentation format.
3. Respondent shall take and pass with a minimum score of 90% the AICPA Ethics Examination entitled *Professional Ethics: AICPA's Comprehensive Course*.
4. Respondent shall complete the requirements as outlined in Items numbered two and three before performing and completing any audits that are regarding the Yellow Book Standards.
5. Respondent shall pay the Board \$13,682.00, its cost of these proceedings, including but not limited to, the administrative costs and legal fees incurred by the Board in the investigation and disposition of this matter. Said amount shall be paid in four equal installments due on March 31, 2014, June 30, 2014, September 30, 2014 with the final amount due December 31, 2014.

6. Respondent shall obtain another accounting firm approved by this Board to review any audits that the Respondent conducts that are performed under the requirements of the Yellow Book Standards. This review shall be conducted prior to the audit report being issued by the Respondent. This requirement shall be for a period of two years from the entry of this Final Order.
7. Respondent shall within ninety days of entry of this Final Order, but no later than March 31, 2014, begin to submit a list of Yellow Book Standards (subject to A-133 regulations) audits that he has performed and issued since January 1, 2014. The Board may, at the Board's discretion randomly select a sample to be reviewed by the Board or a designated third party Auditor. Respondent shall submit such a list to the Board every three months, as of the end of each calendar quarter, for a period of two years effective upon entry of this Final Order.
8. Any violation of this Final Order shall be deemed grounds for additional discipline up to and including revocation of the Respondent's license.

ENTERED this 16th day of December, 2013.

WEST VIRGINIA BOARD OF ACCOUNTANCY

BY: _____

David D. Hill

Board President

BEFORE THE WEST VIRGINIA BOARD OF ACCOUNTANCY

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LELAND D. O'NEAL, C.P.A.,

Respondent.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

This matter comes before the undersigned hearing examiner for hearing and recommended decision by the February 16, 2010, Statement Of Charges filed by the complainant West Virginia Board of Accountancy (hereinafter "Board") against Respondent Leland D. O'Neal (hereinafter "Respondent" or "O'Neal").

This matter initially came on for hearing on March 15, 2011, pursuant to a "Second Notice of Hearing" dated December 7, 2010. Testimony having not been completed at the conclusion of that hearing and a third and fourth scheduled hearing having each been continued upon motion of the Respondent, the matter again came on for hearing on October 22, 2012, pursuant to a "Fifth Notice Of Hearing" dated July 20, 2012. This matter then came on for further hearing on March 21, 2013, pursuant to a "Sixth Notice Of Hearing" dated December 19, 2012.

At each of the hearing dates of this matter, Complainant Board appeared by Assistant Attorney General Katherine A. Campbell and Respondent appeared in person and by his counsel, Richard Robb.

At the March 15, 2011, hearing of this matter, the Board called as its witnesses Jo Ann Walker and Leah Nikaidoh, and introduced five (5) exhibits (Compl. Ex. 1-5), all of which were admitted to record. Respondent recalled Leah Nikaidoh in his presentation of evidence and introduced two (2) exhibits (Rsp. Ex. 1-2), which were admitted to record.

At the October 22, 2012, hearing of this matter, Respondent presented his case-in-chief, testifying on his own behalf and introducing ten (10) exhibits (Rsp. Ex. 3-12), all of which were admitted to record except for Exhibits 4, 5 and 7, which were not then admitted but instead held in abeyance. The Board presented no witnesses and introduced no exhibits at the said hearing.

At the October 22, 2012, hearing, Respondent brought on for hearing his Motion to Compel or Dismiss pursuant to his Notice Of Respondent's Motion To Compel Or Dismiss dated October 18, 2012. After consideration of the said motion, the pleadings as to the same as filed by the parties, and the oral arguments of counsel at hearing, the said motion was denied, and the objection and exception to the ruling noted on the record, by the undersigned hearing examiner at the October 22, 2012, hearing. October 22, 2012, Hearing Transcript at page 19. The said verbal order denying Respondent's Motion to Compel or Dismiss is hereby incorporated by reference and made a part of this recommended order.

At the March 21, 2013, hearing of this matter, the Board called as its witnesses Leah Nikaidoh, who appeared telephonically. Respondent presented no witnesses, but his Exhibits 4, 5 and 7 from the October 22, 2012, hearing, were then admitted to record.

At each of the said hearings, all witnesses were sworn, documents were received into evidence, the hearing was recorded electronically, and a transcript (consisting of three volumes) prepared and distributed to the parties.

After a review of the record and exhibits admitted into evidence at the hearing of this matter, after assessing the credibility of all testimony of witnesses of record and weighing the evidence in consideration of the findings as to credibility, and after consideration of the proposed findings of fact and conclusions of law as were filed by the parties, the undersigned hearing examiner makes the following findings of fact, conclusions of law, and proposed order. To the extent that these findings and conclusions are inconsistent with any proposed findings of fact and conclusions of law submitted by the parties, the same are rejected by the Hearing Examiner. Conversely, to the extent that these findings and conclusions are generally consistent with any proposed findings of fact and conclusions of law submitted by the parties, the same are accepted and adopted. To the extent that the testimony of any witness is not in accordance with these Findings and Conclusions, such testimony is not credited. Any proposed finding of fact, conclusion of law, or argument proposed or submitted by a party but omitted herein is deemed irrelevant or unnecessary to the determination of the material issues in this matter.

CREDIBILITY OF WITNESSES, TESTIMONY, AND EXHIBITS

The Hearing Examiner was and is satisfied that all records and documents entered as exhibits are complete, authentic and valid, and that they were entered with the proper evidentiary foundations. The Hearing Examiner was and is satisfied that the witnesses brought on by the parties were credible and truthful except as noted below. Neither the demeanor of the witnesses nor the substance of any testimony suggested any inconsistency, conflict, or ulterior motive except as noted below.

THE STATEMENT OF CHARGES

1. The Statement of Charges in this matter is of record as Compl. Ex. 2.
2. This matter arose from a complaint initiated by Office of the Inspector General for

the United States Department of Environmental Protection Agency (hereinafter "OIG"). OIG had conducted a quality control review of a certain audit performed by O-Neal for the town of Worthington, West Virginia (Compl. Ex. 5), and found certain deficiencies as noted in a July 14, 2009, Quality Control Review report which is of record as Comp. Ex. 4. That report was filed with the Complaint filed with the Board by OIG on August 26, 2009 (Comp. Ex. 1).

3. In the Statement of Charges at Paragraph 9, the Board generally noted that the said OIG report "... found this audit to be substandard in several areas ..."

4. In the Statement of Charges at Paragraph 10, the Board cited the specific finding of the OIG report that the documentation of the subject audit "... did not contain sufficient evidence that the audit was adequately planned and compliance testing was not supported by evidential matter."

5. In the Statement of Charges at Paragraph 11, the Board cited the specific finding of the OIG report that the subject audit report "... did not contain a finding that the recipient's accounting system was inadequate when it should have, and did not include a corrective plan from the recipient."

6. In the Statement of Charges at Paragraph 12, the Board cited the specific finding of the OIG report that O'Neal "... did not meet Federal continuing education requirements."

7. In addition to the above specific findings from the OIG report, the Board generally incorporated by reference and adopted as its findings the said OIG report at Paragraphs 13 - 14 of the Statement of Charges.

8. The Statement of Charges, at Paragraph 16, advised the Respondent O'Neal that, if the acts described in Paragraphs 3 through 14 of the Statement of Charges were proven to be true,

they would amount to conduct, practices or acts constituting professional negligence in violation of West Virginia Code 30-9-20(a)(5),(6) and (9) and West Virginia Code of Rules 1-1-13.1 e, f and i, and 1-1-19.2a, and (at Paragraph 17) that the Board has the power to impose certain sanctions as disciplinary action.

FINDINGS OF FACT

1. The Complainant Board is a state administrative agency charged with the responsibility of administering and enforcing state laws and regulations pertaining to the practice of accountancy in the state of West Virginia. *See W. Va. Code § 30-9-1 et seq.*

2. Respondent O’Neal is a licensee of the West Virginia Board of Accountancy as a Certified Public Accountant and is subject to the license requirements of said Board. Moreover, he is authorized to perform attest and compilation services as well. *See March 15, 2011, Record at 8-9* (hereinafter “3/15/11 R. at ____”)

3. Jo Ann Walker (hereinafter “Walker”), Board Executive Director, testified on behalf of the Board.

4. Walker testified that she has worked for the Board as Executive Director for over 39 years, and in that capacity she handles all matters that come before the Board, including complaints against licensees. *See 3/15/11 R. at 7.*

5. Walker testified that she received a complaint levied against the Respondent in September 2009 from the United States Environmental Protection Agency (hereinafter “USEPA”). *See 3/15/11 R. at 10.*

6. Walker further testified that she processed the complaint as she has all other complaints which have been received by the Board. When a response was received back from the

Respondent, Walker in turn forwarded the matter to the Complaint Committee for review. *See* 3/15/11 R. at 11-12.

7. Upon reviewing, the Complaint Committee recommended a finding of probable cause for violations of the Board's statute and regulations. The Board voted and found probable cause and issued a Statement of Charges and offered a Consent Order to the Respondent. *See* 3/15/11 R. at 13.

8. Walker testified that the Respondent declined the Consent Order, and arrangements were made to set the matter for hearing. *See* 3/15/11 R. at 15.

9. On cross-examination, Walker testified that the Respondent has been licensed since 1986, and has had only one other complaint which was ultimately dismissed by the Board. Moreover, the Respondent is current with all his CPE requirements. *See* 3/15/11 R. at 19 and 23.

10. Leah Nikaidoh (hereinafter "Nikaidoh") testified next on behalf of the Board.

11. Nikaidoh testified that she is a Project Manager for the Environmental Protection Agency, Office of the Inspector General. Moreover, she is the National Single Auditor Coordinator (hereinafter "Coordinator"). *See* 3/15/11 R. at 29.

12. Nikaidoh testified that as the Coordinator she is responsible for providing technical assistance to all federal agencies and recipients. All federal agencies identify a single point of contact in order to manage the review and issuance of single audit reports that relate to federal agency programs. *See* 3/15/11 R. at 30-31.

13. Nikaidoh further explained that the purpose of the single audit is not to overburden recipients from having multiple agencies audit the grant monies since most have received multiple grants from several different sources. With the passage of the Single Audit Act and the Circular A-

133 issued by the OMB (the process by which single audits are performed), recipients only have to obtain one audit. *See* 3/15/11 R. at 50-51.

14. Nikaidoh further explained that there are standards issued by the General Accounting Office for the preparation of audits which are found in the “Yellow Book.” *See* 3/15/11 R. at 31-32.

15. Nikaidoh testified that she has given training seminars on these standards as part of job duties. *See* 3/15/11 R. at 32.

16. All federal agencies conduct their own audits in regards to the money that particular agency distributes to an outside source. *See* 3/15/11 R. at 33.

17. Nikaidoh testified that she was familiar with the Respondent by reviewing a single audit report that he had prepared on behalf of an entity who had received grant monies from the USEPA. *See* 3/15/11 R. at 34-35.

18. Beginning for the fiscal year 2005, the threshold amount for expenditure to trigger the preparation of a single audit report was \$500,000.00 which is a cumulative amount. In other words, if an entity has spent in excess of \$500,000.00 from any federal agency, then a single audit report would need to be prepared for the expenditures of those funds; however, in the instant matter the threshold amount was \$300,000. *See* 3/15/11 R. at 35 and *See* March 21, 2013, Record at 18-19 (hereinafter “3/21/13 R. at ____.”).

19. In the instant case, Nikaidoh testified that all the funds had primarily come from the USEPA. *See* 3/15/11 R. at 35.

20. Nikaidoh further testified that in the instant case the USEPA was considered the oversight agency since the recipient’s federal dollars received were under 50 million dollars in one

year. Moreover, the USEPA was the oversight agency because the recipient had the most direct funds from the USEPA. *See* 3/15/11 R. at 37-38.

21. Once the single audit is received by the USEPA, it is placed into the backlog and worked upon in the order received by the USEPA. As such, Nikaidoh testified on cross-examination a single audit being conducted in December 2004, and the initial review not done until May 2006 is not unusual. *See* 3/15/11 R. at 38-39 and 135.

22. Nikaidoh testified that in reviewing the single audit report the “main things” the USEPA looks for are what USEPA money is involved and under what programs and if there are any findings that the USEPA needs to address regarding audit resolution. *See* 3/15/11 R. at 39.

23. Nikaidoh testified that typically if there are questions that arise during the course of the review, then telephone contact with the auditor is the first method of communication. Occasionally there are times when a letter may be issued to the auditor if it is believed there is a technical deficiency within the report or a potential for a technical deficiency. *See* 3/15/11 R. at 39-40.

24. Nikaidoh testified that if the responses are not adequate, then a decision is made whether a quality control review should be conducted. Questions of whether the audit report is substandard are factored into whether a quality control review is conducted or not, and Nikaidoh testified that a substandard report is one in which you cannot rely on the results in the single audit report because the work is not sufficient to support its conclusions. *See* 3/15/11 R. at 40-41.

25. To conduct a quality control review is the exception and not the norm, according to Nikaidoh. *See* 3/15/11 R. at 42.

26. Nikaidoh explained the typical process that follows a quality control review. First, the recipient and the single auditor are notified via letter and there is an entrance conference. The letter explains the guidelines that are adhered to during the quality control review such as the Yellow Book standards and the quality control guidelines issued by OMB. The review itself consists of reviewing areas of the standards: the Yellow Book, general, fieldwork and reporting standards. Further, a site visit is included in the review as well. *See* 3/15/11 R. at 44-45 and 48.

27. Nikaidoh testified that there is much contact with the auditor while conducting a quality control review since the auditor is able to better explain their audit documentation. The audit documentation is the evidence that the auditor prepared in order to support his work and conclusions. *See* 3/15/11 R. at 46-47.

28. Nikaidoh testified that not only is the audit documentation the evidence for the auditor to support his conclusions, but also it is required pursuant to the Yellow book standards and the American Institute of Certified Public Accountants standards. *See* 3/15/11 R. at 47-48.

29. Once, the quality control review is complete, Nikaidoh explained that there is an exit interview with a draft report issued at that time as well. The single auditor may respond to this draft report. Moreover, the draft report is sent not only to the single auditor, but to the recipient and the funding source, and all of these individuals may comment on its contents. These comments are then taken into consideration while compiling the final report. *See* 3/15/11 R. 48-50.

30. In the instant matter, Nikaidoh testified that prior to conducting the Respondent's quality control review she had never met him before nor dealt with him. *See* 3/15/11 R. at 54-55.

31. Nikaidoh testified that Complainant's Exhibit 4 was the Final Report issued to USEPA regarding the review of the Town of Worthington for the fiscal year ending June 30, 2004. *See* 3/15/11 R. at 55 and Complaint's Exhibit 4.

32. Nikaidoh testified that as part of the process, an initial review was completed by a member of her staff. There were questions regarding the Respondent's report due to recommendations not matching the findings and there being no criteria cited. In order to resolve these issues, Nikaidoh's staff attempted to contact the Respondent in May of 2006 without any success. *See* 3/15/11 R. at 56-59.

33. After having to put the Respondent's quality control review aside in order to complete other work, Nikaidoh's staff then sent a letter to the Respondent regarding this inquiry. Documentation was received from the single auditor, and a decision was made to conduct a quality control review in October 2007. This decision was based upon the lack of sufficient information provided by the Respondent to determine if the single audit was in compliance with auditing standards and OMB Circular A-133. *See* 3/15/11 R. at 59-61.

34. On cross-examination, Nikaidoh testified that the time frame of May 2006 when contact with the Respondent was first attempted and the quality control review being conducted in October 2007 was unusual; however, she stated that the delays were due to the communication issues with the Respondent and the Respondent's on-going health issues. *See* 3/15/11 R. at 136.

35. Nikaidoh testified that a telephone conference call was held in September 2007 to discuss the need for the quality control review, akin to the entrance interview as Nikaidoh had earlier discussed in her testimony. The Respondent and his attorney (not his current counsel) participated in this telephone conference call. *See* 3/15/11 R. R. at 61-62.

36. The Respondent indicated to Nikaidoh that he had sent in all the audit documentation, so there was no site visit conducted for this quality control review. *See* 3/15/11 R. at 65.

37. Nikaidoh explained that the Respondent raised concerns that this quality control review was triggered by an outside complaint; however, Nikaidoh testified that this quality control review was conducted because of the substandard single audit report submitted for the Town of Worthington. Moreover, this quality control review was conducted as with any other quality control review conducted by the Office of the Inspector General for the Environmental Protection Agency. *See* 3/15/11 R. at 67.

38. In making sure that all working papers and audit documentation had been received from the Respondent, a subpoena was issued by Nikaidoh, and no further documentation was received in response to that subpoena. *See* 3/15/11 R. at 69.

39. When the draft report was issued by the OIG/EPA, the Respondent did not offer any comments. *See* 3/15/11 R. at 72-73.

40. Nikaidoh testified that revisions were made upon comments received from the funding source (Region III). *See* 3/15/11 R. at 74 and Complainant's Exhibit 4.

41. Nikaidoh stated that ultimately the final quality control report found that the Respondent's single audit of the Town of Worthington to be substandard. *See* 3/15/11 R. at 76.

42. Nikaidoh testified that all applicable governmental standards were adhered to, including using the 2003 version of the standards that were in place at the time of the Respondent's single audit. *See* 3/15/11 R. at 77.

43. Nikaidoh then explained in what areas the Respondent's single audit report was substandard. The first area discussed was the "Fieldwork Standards" which require an auditor to

plan for the audit such as compliance testing and have supports for the conclusions. It was found that it could not be determined if any of these steps were adequately planned and performed by the Respondent. *See* 3/15/11 R. at 78.

44. Moreover, Nikaidoh further explained that a critical part of any audit is planning what you are actually going to test. In other words, you must have an understanding of the entity's internal controls that they rely upon to process all of their work that they do. The Respondent had documentation in the form of checklists; however, it was not adequate especially where he noted an exception. Nikaidoh testified that no basis for the exceptions could be determined during the quality control review. *See* 3/15/11 R. at 81-83.

45. Nikaidoh continued to testify that there was "Insufficient Evidential Matter" meaning that the Respondent did not obtain sufficient evidence to provide a reasonable basis for the report's opinion. The Respondent found in his single audit that the Town of Worthington did not comply with federal regulations and that the internal controls were not adequate; however, the documentation was either insufficient or lacking altogether. In other words, there was no evidence to back up what the Respondent stated was wrong in his single audit report. *See* 3/15/11/ R. at 83-84.

46. Another area where the single audit report was substandard was "Lack of Documentation." Nikaidoh testified that this meant the Respondent failed to adhere to the Yellow Book standards for documentation. Specifically, Nikaidoh cited standard 4.22 of the Yellow Book which states, "[t]hat auditors prepare documentation in sufficient detail to provide a clear understanding of the work performed, the audit evidence obtained, and the conclusions reached." *See* 3/15/11 R. at 88-89 and Complainant's Exhibit 4.

47. Nikaidoh testified that the critical component is that the standards require that through one's audit documentation, an independent source should be able to review the documentation and understand the nature, time and extent of the audit procedures, the results of the audit procedures and evidence obtained and conclusions reached by the audit. The audit should stand alone without any consultation of the auditor. *See* 3/15/11 R. at 90.

48. An example of the Respondent's lack of documentation was that the Respondent issued an adverse opinion on major program compliance which means he does not believe the information to be reliable, accurate or complete. Further, Nikaidoh testified that an adverse opinion is a serious charge and there needs to be underlying documentation to support such a conclusion; however, none was found in the instant case. In a subsequent telephone call with the Respondent, he explained that he had to reconstruct the Town of Worthington's financial records. *See* 3/15/11 R. at 93-94.

49. Nikaidoh testified that the biggest concern that arose out of the quality control review was the "Major Program Compliance Testing was not done for the Recipient." In the Respondent's single audit the recipient was the Town of Worthington, and this is who the auditor should be conducting the audit on. Yet, the Respondent when conducting his major program compliance testing it was conducted on the contractor who was administering the grant for the Town of Worthington. *See* 3/15/11 R. at 96-97.

50. Nikaidoh testified that the Town of Worthington had contracted with West Virginia's Region VI's Planning and Development Council (hereinafter "Region VI") to administer the grant, and the Respondent stated that the contractor had assumed responsibility for compliance in its

contract for project administration. The Respondent did not assess the Town of Worthington's compliance, and in other words, he audited the wrong entity. *See* 3/15/11 R. at 97.

51. Nikaidoh further testified that if administration is contracted out to a third party, then you need to be testing procurement compliance to determine if the contract is being managed correctly. It is a procurement management issue that the Town of Worthington is responsible for. *See* 3/15/11 R. at 97-98.

52. Another area of deficiency was "Noncompliance with Reporting Standards." Nikaidoh testified that it was determined that the recipient's accounting system was not adequate and was not included in the audit findings, there was no corrective action plan for the recipient which is required by OMB Circular A-133, and no citations to applicable federal criteria. *See* 3/15/11 R at 102-103.

53. The last area of a substandard nature was "Noncompliance with General Standards." This is not necessarily a problem with the single audit report itself, but instead involve general standards with the auditor himself. In the instant case, the Respondent had failed to achieve the required number of continuing educational hours as set by federal regulations by not achieving 80 hours for a two-year period. Moreover, there were issues with the Respondent's peer review. *See* 3/15/11 R. at 108-110.

54. Nikaidoh testified that if a single audit report is found to be substandard as was the case with the Respondent's report, then she is required to report it to the AICPA and the state board of accountancy. There were no outside influences nor complaints which prompted this referral. *See* 3/15/11 R. at 122-123.

55. The Respondent, Leland O'Neal, testified on behalf of himself at the October 22, 2012, hearing.

56. Respondent testified having only one prior complaint filed with the Board years ago by a client he had sued for non-payment who then complained to the Board O'Neal had not returned certain papers, and who later chose not to pursue the complaint against him. *See* October 22, 2012, Record at 23-24 (hereinafter "10/22/12 R. at ____").

57. O'Neal testified he performs anywhere from fifteen to twenty audits annually, primarily local governments and nonprofits, and 30 to 40 federal single audits all without complaint during his twenty-seven year career Oct. 2012 R. at 25-27.

58. Respondent testified that he knew that the Town of Worthington had a contract with Region VI for only the administration of the grant, and that the Town of Worthington was the recipient of the grant and not Region VI. 10/22/12 R. at 189-193 .

59. Respondent stated that regardless of the legal form of the Town of Worthington being the recipient of the subject grant and the legal form of the contractual relationship between the Town and Region VI, the true substance of the situation was that Region VI was not an independent contractor as to the Town, but instead part of the management of the town (10/22/12 R. at 190), and that Region VI, rather than the Town, was the responsible party against whom he would make audit findings (10/22/12 R. at 32, 38-39, and 49), testifying as follows:

And oftentimes accountants will get into a conflict between substance and legal form, and I felt as though in this instance, legal form was there based on the contract and also the substance of the situation. The town had absolutely no control over Region VI's actions in these matters.

10/22/12 R. at 39.

60. Respondent asserts through his testimony that he consulted counsel in regards to his determination that Region VI, rather than the Town of Worthington, should be the subject of his audit findings, and asserts in his post-hearing filing (at Finding of Fact No. 22) that he had “. . . consulted an attorney, who agreed Region VI had assumed full responsibility for the grant under its contract with the town.” Under cross-examination Respondent stated at several points that he consulted an attorney regarding that determination 10/22/12 R. at 208, 209, 222-23, 224-26.

61. Respondent failed to identify the attorney consulted¹, other than noting that the attorney was “. . . a friend of mine” (10/22/12 R. at 226), failed to produce any written opinion of his counsel as to the matter, and failed to produce any such attorney for testimony at hearing. Respondent’s testimony of record as to consultation with counsel is therefore found to lack credibility and is given no evidentiary weight in determination of this matter.

62. Respondent’s “Brief In Support Of Respondent’s Position In Regards To Inadequate Recipient Accounting System Not Reported,” which is his response to the OIG report as incorporated into the Statement of Charges in this matter, is of record as Rsp. Ex. 6, 7, 8, 9 and 10. Respondent also denied in the course of his testimony the OPIG report findings..

63. When questioned whether any of his concerns regarding the management of the grant between Region VI and the Town of Worthington as reflected in the said “Brief” were communicated to USEPA prior to the decision to conduct the quality control review, Respondent testified that he told Nikaidoh and Janet Casper; although, he does not remember that dates or times of these alleged conversations. *See* 10/22/12 R. at 227-228. When further questioned regarding this

¹ O’Neal does mention at a point in his testimony that Wayne Inge was an attorney who represented him at some point in his dealings with EPA (10/22/12 R. at 61), but does not identify Inge as the attorney who advised him prior to submission of the subject audit.

issue and directed to review Respondent's Exhibit 8, Respondent offered no explanation as to why in his written "brief" in support of schedule of federal awards and corrective plan that he stated that he spoke to Lisa McGowan in 2006 regarding Region VI's role in management in the Town of Worthington. He further stated that all future communications would need to be in writing. *See* 10/22/12 R. at 229-230.

64. Respondent, even though he certified that all audit related work papers and documentation along with any compliance testing were provided to the USEPA during the quality control review, testified that the "briefs" he submitted as evidence of his adequate preparation of the audit were not submitted to USEPA during the quality control review. *See* 10/22/12 R. at 194 and Respondent's Exhibits 6-10.

65. Moreover, a subpoena was issued by USEPA to ensure that all audit records had been received by USEPA in order to conduct the quality control review, and the Respondent responded that there were no more audit records. *See* 3/15/11 R. at 68-69.

66. When Respondent was questioned whether he had submitted Respondent's Exhibit 4 to USEPA when they were conducting the quality control review he was unsure in his answer. Moreover, upon review of Respondent's Exhibit 5 he believed that those materials had been submitted to USEPA. *See* 10/22/12 R. at 214-222.

67. Respondent testified he did respond to the draft quality control review; however, when asked to provide a copy of this document Respondent failed to do so. *See* 10/22/12 R. at 231-232.

68. Respondent testified that he believed the West Virginia Board of Accountancy was the entity who should be responsible for reporting his CPE's to the federal authorities in regards to his

failure to obtain the 80 hours of CPE that is required for performing audits. *See* 10/22/12 R. at 233 and 237.

69. Respondent testified that he does not believe that it is his responsibility as the auditor to provide a corrective action plan. *See* 10/22/12 R. at 235-236.

70. Nikaidoh in her rebuttal testimony given on March 21, 2013, via telephone with USEPA counsel present on the teleconference call, Eric Hanger, testified regarding the Respondent exhibits that had been introduced into evidence on October 22, 2012 by the Respondent during his case.

71. Nikaidoh testified that she had an opportunity to review Respondent's Exhibits 1-12. 3/21/13 R. at 13.

72. When specifically directed to Respondent's Exhibits 4-5, Nikaidoh testified that she had this information when conducting the quality control review. *See* 3/21/13 R. at 15.

73. Nikaidoh testified as she had earlier that the Respondent's audit of the Town of Worthington was substandard, and upon a review of these Respondent's Exhibit 1-12, her opinion did not change that the Respondent's audit of the Town of Worthington was substandard. *See* 3/21/13 R. at 15.

74. Nikaidoh further testified that one of the findings in the quality control review was that the Respondent audited the wrong party. Nikaidoh further elaborated on why the Respondent audited the wrong party by stating that:

[w]hen EPA gives a grant to an entity, and the entity signs the grant documentation, the entity is responsible for having its books and records reviewed as part of the single audit or OMB Circular A-133 if they meet the threshold requirements for expenditures. So in this case at the time the threshold was 300,000 dollars. The Town of Worthington is the grantee In this case, the Town of Worthington contracted with the Region 6 Planning Council to have them manage the project. . .

. . There was a contract signed. The contract was, I believe, in the work papers, and we had a copy of the contract, as well. Therefore, we consider the Region 6 to be a contractor. We don't consider them to be a sub-recipient because the grant itself did not allow for sub-recipient funding, which it would have to do so, and basically the Region 6 was providing a service. As a result, the Town of Worthington, they're the grantee If the entity they contract with does substantially most of the work, which does happen . . . the expectation is the town has to oversee that contract. They have to ensure contract requirements are met and that the project is being run For the major compliance portion, which is the portion where you test compliance with federal grant requirements, Mr. O'Neal audited the Region 6 Planning Commission, which doesn't make sense that you would audit one for financial statements and the other for major program compliance to begin with. Secondly, Region 6 is a contractor. Region has no obligation or privity to comply with federal grant requirements and be held accountable to EPA because the grant is not with Region 6 and EPA. The grant is with EPA and the Town of Worthington, and as such, in our opinion, the wrong party was audited for major program compliance.

See 3/21/13 R. at 18-21.

75. Nikaidoh testified at the very least there should have been a procurement finding that the Town of Worthington did not properly manage and oversee the contract, and the Respondent did not make any such finding. *See 3/21/13 R. at 22-23.*

76. As far as the Respondent's explanation that Region VI was part of the Town of Worthington's management, Region VI responded to the draft quality control review report, by stating that they are not part of the Town of Worthington's management. *See 3/21/13 R. at 23-24.*

77. When Nikaidoh was questioned regarding the use of specific federal criteria, she stated that both the OMB Circular A-133 and the Yellow Book standards require the specific citation to federal criteria. *See 3/21/13 R. at 32-34.*

78. Nikaidoh testified again stating that in her opinion that the Respondent's audit of the Town of Worthington was substandard as outlined in the Complainant's Exhibit 4. *See 3/21/13 R. at 39.*

79. In the course of this case, Respondent has made a number of allegations of third-party intervention allegedly causing his audit to be viewed with political disfavor. Respondent has produced no credible, probative evidence of any such interference. It is therefore found that such allegations have no factual basis in the record.

CONCLUSIONS OF LAW

1. The Board is a state agency created by W. Va. Code § 30-9-1 *et seq.*, and is empowered to regulate, among other things, the practice of accountancy in the state of West Virginia.

2. Pursuant to W. Va. Code § 30-9-20, in order to carry out its regulatory duties, the Board is empowered to suspend, revoke or otherwise discipline an individual's license or practice privilege.

3 Respondent O'Neal is a licensee of the Board and is therefore subject to the license requirements of said Board.

4. The Board served the Statement of Charges in this matter upon the Respondent pursuant to the laws and regulations which govern the Board.

5. The Board incorporated and adopted the findings of Complainant's Exhibit 4, the OIG, report, as part of the said Statement of Charges.

6. Proper Notice of Hearing was given in this matter for all three days of testimony.

7. The dominant issue in this case is Respondent's decision to disregard the legal form of the contractual relationship between the Town of Worthington and Region VI as to the expenditures and programs to be audited and instead prepare the subject audit applying Respondent's substantive determination that Region VI, and not the Town, was the true management entity in the matter and therefore the proper party to whom his audit findings should be directed. regardless of

legal form. Having made that determination in the course of preparation of the subject audit, Respondent has persisted in such opinion and, even after issuance of the OIG report, continued to assert the same at hearing.

8. The record reflects that Respondent's determination to disregard such legal contractual form was made by him, without advice of counsel. Although Respondent made reference in his testimony to consulting with counsel regarding the matter, a factual finding (stated above) found that the lack of any supporting documents or witnesses and the non-specific nature of his testimony causes the examiner to afford that testimony no evidentiary weight. It is therefore concluded that Respondent made a determination to look beyond the legal form of the subject contractual relationship to impose instead a substantive relationship on the Town and Region VI without advice of counsel. Such reinterpretation or modification of contract is at its essence a legal question, which would require at least advice of counsel if not decision by an agency or court of competent authority or jurisdiction before being accepted for audit purposes.

9. As to that dominant issue of whether Respondent did audit the wrong party, it is concluded that the overwhelming weight of the credible, probative evidence adduced at the hearing of this matter supports the findings of the OIG report as well as the allegations stated in the Complaint and Statement of Charges that the appropriate party to whom the audit should have been directed was the Town of Worthington, not Region VI.

10. As to the remaining issues as to the subject audit, Complainant Board produced at hearing the OIG report, a business product of a federal agency charged with review and comment on such audits that must be afforded substantial *prima-facie* evidentiary weight, and the highly credible supporting testimony of Leah Nikaidoh, to support the allegations stated in the Statement

of Charges. Respondent produced no witness other than himself to support his position. While his *pro se* "Brief" (Rsp. Ex. 6, 7, 8, 9 and 10) reflected considerable effort on his part to challenge the OIG report and comprehensively address the issues raised in that report, that "Brief" in combination with his testimony failed to produce sufficient probative, credible evidence to refute any of the findings of the OIG report regarding the performance of his audit for the Town of Worthington.

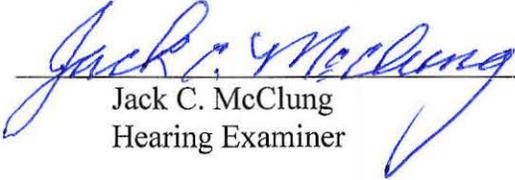
11. It is concluded that the Board has produced sufficient credible and reliable evidence to establish by a preponderance of the evidence that the Respondent did commit the acts alleged in the Statement of Charges as to the subject audit, and that such acts amounted to conduct, practices or acts constituting professional negligence in violation of West Virginia Code 30-9-20(a)(5),(6) and (9) and West Virginia Code of Rules 1-1-13.1e, f and i; and 1-1-19.2a, all as alleged in the Statement of Charges filed in this case.

RECOMMENDED ORDER

It is recommended as follows as to the subject Statement of Charges filed by the Complainant West Virginia Board of Accountancy against Respondent Leland D. O'Neal.

1. That the allegations as stated in the February 16, 2010, Statement Of Charges be SUSTAINED in all respects and that it be found by a preponderance of the evidence of record that Respondent Leland D. O'Neal engaged in the violations of law as alleged therein;
2. That any objection or defense by the Respondent thereto be DENIED; and, .
3. That the West Virginia Board of Accountancy discipline the Respondent Leland D. O'Neal accordingly as authorized by law.

Recommended this 30th day of October, 2013.



Jack C. McClung
Hearing Examiner