

MAINE BOARD OF ACCOUNTANCY

IN RE: Gary C. Dyke, C.P.A. ) Disciplinary Proceeding  
Complaint No. 2008-ACC-4281 ) DECISION

**I. PROCEDURAL HISTORY**

Pursuant to the authority found in 10 M.R.S.A. § 8003(5-A), 5 M.R.S.A. § 9051, *et seq.* and 10 M.R.S.A. § 8003-A., *et seq.*, the Maine Board of Accountancy (Board) met in public session at the Board's offices located in Gardiner, Maine on October 29, 2008 at 9:00 a.m. for the purpose of conducting an adjudicatory hearing to decide whether grounds exist for the Board to take disciplinary action against the Certified Public Accountant (C.P.A.) license held by Gary Dyke. A quorum of the Board was in attendance during all stages of the proceedings. Participating and voting Board members were Board Chairman Peter Chandler, C.P.A., Tracy Harding, C.P.A., and public member Deborah Gallant. Robert B. Jackson, C.P.A., served as the complaint officer and therefore did not participate as a Board member. Gary Dyke was present and not represented by legal counsel. Robert C. Perkins, Ass't. Attorney General, presented the State's case. James E. Smith, Esq. served as Presiding Officer.

The Board convened the hearing and preliminarily determined that there were no conflicts of interest among the Board members that would cause any to recuse them from the proceeding. Subsequently, State's exhibits 1-14 and Respondent's exhibit 1 were admitted into the Record as were the Board's Rules and relevant statutes. Following the parties' opening statements and the taking of testimony and closing arguments, the Board deliberated and made the following findings of fact by a preponderance of the credible evidence regarding the violations alleged in the Notice of Hearing (Complaint).

**II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**A. Count I**

Gary C. Dyke is alleged to have violated the provisions of 32 MRSA § 12273(1) (F) and Board of Accountancy Rules Chapter 8, § 5 (Due Care) by failing to prepare the amended 2001-

2005 Federal and State joint tax returns of Duane C. Humphrey and his wife in a timely manner. Gary Dyke, Canaan, Maine, was first licensed in Maine as a Certified Public Accountant on July 21, 1971. His current license expires on September 30, 2009. Mr. Dyke's office is located in Turner, Maine.

Duane Humphrey owned his own trucking business and entered into a contract with Federal Express (Fed. Ex.) to deliver some of the mail for that company's clients. He delivered packages for Fed. Ex. from 2001-2005 and had his income taxes prepared by Robert Grover, who had been recommended by other contract truckers. In 2005, Mr. Humphrey sold his truck and business and found other employment.

The Maine Revenue Service, criminal investigation unit, contacted Duane Humphrey in 2007 regarding his 2001-2005 returns. Mr. Humphrey then retained legal counsel and it was subsequently determined by the Revenue Service that any problems with Mr. Humphrey's tax returns were due to Robert Grover's preparations. Duane Humphrey was advised to file amended returns and accordingly retained Gary Dyke who had been recommended by other truckers. Mr. Dyke issued an invoice on February 25, 2007 for "Services to prepare amended federal and state income tax returns for the years 2001-2005 inclusive, and to prepare federal and state income tax returns for the year 2006." The invoice price was \$1,500.00, which Mr. Humphrey timely paid.

A meeting was then scheduled to occur on March 12, 2007 at the offices of Mr. Humphrey's attorney, Jonathan Block. The meeting was attended by Mr. Humphrey and his wife, Jonathan Block, Esq., and two agents from the Maine Revenue Service. On that date, Gary Dyke faxed to the meeting the Humphrey's draft copy of their 2001-2005 Amended Maine Income Tax Returns. In the cover letter, he stated that "I expect to have the federal and state returns finalized in the next few days."

On May 22, 2007, Jonathan Block, Esq. received a phone call from one of the Revenue Unit's agents. The agent had not yet received a copy of the amended tax returns and Mr. Block reminded the Humphreys that they could be subject to civil assessments and/or criminal enforcement actions. Two days later, Duane Humphrey phoned Gary Dyke and inquired as to the status of the tax returns. The latter said he "would get right on it." On July 11, 2007, Mr. Humphrey e-mailed his attorney, Mr. Block, and expressed his frustration that the returns had not been finalized. Mr. Block, in turn, e-mailed Gary Dyke and reiterated that his client faced substantial jeopardy if the returns were not filed "asap." He added: "I don't know what the problem

is but I just want to make sure that you appreciate the urgency of the situation.” A similar request was sent from Jonathan Block by e-mail on August 13, 2007. During this time, Mr. Humphrey made numerous phone calls to the licensee for the returns but to no avail.

Finally, with the agreement of the Humphreys, the Maine Revenue Service completed the Humphrey’s Amended Returns in September 2007. Mr. Humphrey then called Gary Dyke and demanded his finalized returns and reimbursement of the \$1500 fee. Gary Dyke refused, and never did refund the fee or deliver the finalized returns.

In his testimony, Gary Dyke offered a variety of excuses for not delivering the tax returns. Among them were that he was in poor health for a period of time, and that the Humphreys had not provided him with some necessary information. He further explained that Mr. Humphrey was unreasonable in demanding both the tax returns and the refund of his \$1500, and that these demands justified his retaining both the money and returns until a reasonable settlement could be effectuated.

The Board also considered the expert testimony of Robert B. Jackson, C.P.A. Mr. Jackson rendered his opinion that Gary Dyke demonstrated a lack of due care by not providing the results of his tax return preparations to the Humphreys within a reasonable time. This failure was made even more egregious considering that the Humphreys were facing potential civil and criminal penalties for their failure to file the amended returns.

The Board, by a unanimous vote, found in addition to the above facts that despite the licensee’s excuses, the undeniable fact was established that at least by mid-September 2007, the returns had been completed except for printing them off, which could have been simply accomplished. There was no good reason for the licensee to not complete and deliver the paid for returns, and such failure constituted a violation of 32 MRSA § 12273(1)(F)<sup>1</sup> and Board of Accountancy Rules Chapter 8, § 5, “Due Care.”

Due care imposes the obligation to perform professional activities with concern for the best interest of those for whom the activities are performed and consistent with the profession’s responsibility to the public. It is essential to preserving the public’s trust and confidence. Due care requires the licensee to discharge professional responsibilities with

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<sup>1</sup> 32 M.R.S. Sec. 12273 (1)(F), which was in effect at the time of the alleged violation, provides authority for finding violations of duly promulgated Board rules as do other statutory provisions.

reasonable care and diligence and to adequately plan and supervise all professional activities for which he or she is responsible.

In summary, Gary Dyke did not demonstrate due care for the Humphreys, who are members of the public, by failing to timely complete and deliver the Humphrey's tax returns, especially since they were in jeopardy of having civil and criminal sanctions issued against them.

## **B. Count II**

Duane Humphrey filed the present complaint with the Board on January 19, 2008. The complaint and a cover letter were then forwarded to Gary Dyke by the Department's Complaint Coordinator on January 22, 2008. The cover letter requested Mr. Dyke to forward a response to the complaint within 30 days of receipt of the letter. No response was forthcoming. On May 29, 2008, Assistant Attorney General (AAG) Robert C. Perkins sent a letter to Gary Dyke in which he requested the production of various documents including correspondence, research, and memoranda related to the preparation of the missing tax returns. The letter also informed Gary Dyke that "I am providing you with the opportunity to address the complaints made about your actions in this complaint within 21 days of the date of this letter." The letter also, in bold print, stated that:

You must provide this information within 21 days of the date of this letter to: (Address in original). Failure to produce any requested documents in the licensee's possession, or any matter under investigation is a disciplinary violation pursuant to 10 M.R.S.A. § 8003 (5-A)(A)(10) for which disciplinary sanctions can be imposed, including but not limited to fines, license suspensions or a license revocation.

In response, the licensee called AAG Perkins and requested a copy of the complaint and correspondence, which were mailed to him on June 2, 2008. Gary Dyke subsequently appeared at an informal conference on August 5 at which the Board discussed the Humphrey's complaint and whether to hold an adjudicatory hearing to resolve same. The licensee did not avail himself of the opportunity to discuss the matter with AAG Perkins and neither did he submit his written response to the complaint which was due by February 22, 2008.<sup>2</sup> Moreover, he never did produce the requested documents and did not respond to the complaint until the afternoon before this hearing.

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<sup>2</sup> At this hearing, Gary Dyke testified that he had several copies of his written response at the informal conference to give to the Board, but did not state a clear reason for his failure to do so.

At this hearing, Gary Dyke stated that he did not respond to AAG Perkins's request for production of documents because he interpreted the June 2 correspondence to relieve him of that obligation. The Board did not give this explanation any credence.

The Board further concluded that Gary Dyke violated the provisions of 10 MRSA § 8003 (5-A)(A)(10) by failing to produce the documents requested in a letter dated May 29, 2008 from Assistant Attorney General Robert C. Perkins. Additionally, no plausible reason was stated by the licensee to explain his last minute response to the Humphrey's complaint.

### III.

### SANCTIONS

The Board, by a vote of 3-0, based on the above facts and utilizing its training and experience, ordered as sanctions that:

1. Gary Dyke's certificate to practice as a Certified Public Accountant is hereby placed on **Probation until June 10, 2009, or until such earlier time as the Board certifies that he has complied with the following sanctions. Failure to comply by the dates listed shall constitute further violation(s).**
2. Before December 10, 2008, Gary Dyke shall submit to the Board for its pre-approval, the name of a Certified Public Accountant with his/her resume and a proposed letter of engagement instructing the proposed reviewer to review the controls that Gary Dyke has in place in order to provide reasonable assurance that his professional engagements will be performed on a timely basis and to issue a written report of his or her findings. If approved by the Board, the reviewer shall complete his/her charge and submit to the Board the results of the review by January 21, 2009.
3. Gary Dyke shall pay a **fine of \$3,000 (\$1,500 for each of the 2 violations)** by check or money order made payable to "**Treasurer, State of Maine**" and remitted to Cathy Neumann, Complaint Coordinator, 35 State House Station, Augusta, Maine 04333-0035 by February 21, 2009. The fine represents the maximum \$1,500 per violation and serves to demonstrate the seriousness with which the Board views the above violations and the licensee's lack of response to the Board's correspondence. There was no good reason for his delay in the preparation of the tax returns or his complete disregard of the Board's and Assistant Attorney General's requests for information and documents.

4. Gary Dyke shall pay the costs of this hearing which total \$1057.50. (Hearing officer-5 hours at hearing; 3 hours and 30 minutes to write the decision; =8 hours and 30 mins. @\$115=\$977.50) + (Copying costs-320 pp. @ \$.25=\$80). Payment shall be made by check or money order payable to "Board of Accountancy" and remitted to Cathy Neumann, Complaint Coordinator, 35 State House Station, Augusta, Maine 04333-0035 by February 21, 2009. Costs are ordered consistent with past Board practices and in recognition of the policy that those Board licensees who obey Board statutes and Rules should not be responsible for payment of hearing costs for those who violate such laws. Moreover, this hearing might not have been necessary and resolved informally or with a Consent Agreement if Mr. Dyke had responded to the Board's and Assistant Attorney General's correspondence.

**SO ORDERED.**

Dated: December 10, 2008



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Peter Chandler, Chairman  
Maine Board of Accountancy

**IV.**

**APPEAL RIGHTS**

Pursuant to the provisions of 5 M.R.S.A. § 10051.3 and 10 M.R.S.A. § 8003, any party that appeals this Decision and Order must file a Petition for Review in the Maine Superior Court within 30 days of receipt of this Order. The petition shall specify the person seeking review, the manner in which they are aggrieved and the final agency action which they wish reviewed. It shall also contain a concise statement as to the nature of the action or inaction to be reviewed, the grounds upon which relief is sought and a demand for relief. Copies of the Petition for Review shall be served by Certified Mail, Return Receipt Requested upon the Maine Board of Accountancy, all parties to the agency proceedings and the Attorney General.