

**CERTIFIED MANAGEMENT ACCOUNTANTS OF ONTARIO
APPEAL COMMITTEE**

**ALLAN MACKAY, CPA, CMA (CHAIR))
JOHN WORTHINGTON, CPA, CMA)
VIRENDRA SAHNI, PUBLIC MEMBER)**

**DAY THE 3rd DAY OF
JUNE, 2014**

IN THE MATTER of the *Certified Management Accountants Act*, 2010, Statutes of Ontario, c.6, Schedule B as amended (the "Act")

AND IN THE MATTER of an Appeal under s.37(2) of the *Act* as to penalty from a Decision and Order of the Discipline Committee heard August 12, 2013, released on or about August 25, 2013 regarding the conduct of Mitchell Arrojado.

B E T W E E N:

CERTIFIED MANAGEMENT ACCOUNTANTS OF ONTARIO ("CMA ONTARIO")

Appellant

- and -

MITCHELL ARROJADO

Respondent

ORDER

THIS APPEAL was heard at Victory Verbatim, Ernst & Young Tower, 9th Floor, 222 Bay Street, Toronto, Ontario on Monday, the 26th day of May, 2014 in the presence of counsel for the Appellant, CMA Ontario, and the Respondent, Mitchell Arrojado, acting in person.

UPON READING the Notice of Appeal of CMA Ontario, the documents contained within the Appeal Book, the Statement of Fact & Law of CMA Ontario and

the Respondent's letter dated May 15, 2014 representing his response to the Statement of Fact & Law (penalty appeal); and

UPON HEARING the submissions of counsel for the Appellant and the submissions of the Respondent:

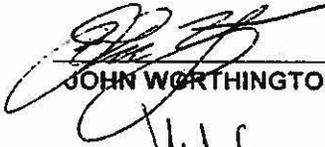
THE APPEAL PANEL ORDERS that the penalty appeal is allowed under the authority of s.37(2) of the *Act* and the Order of Discipline Committee is modified as follows:

- (a) the fine is increased from \$3,000.00 to \$8,500;
- (b) in addition to the other penalties imposed by the Discipline Committee, the Respondent shall be suspended for a period of six (6) months, to be served separately from any period when his membership is revoked or suspended due to non-payment of dues;
- (c) the Respondent's practice shall be subject to practice review by CMA Ontario for a period of twenty-four (24) months at his cost, commencing from the date of any resumption of practice by the Respondent; and
- (d) in the event that the Respondent fails to take and pass the accounting or business ethics course ordered by the Discipline Committee within six (6) months of the date of this Order, his membership shall be revoked without further notice to him.

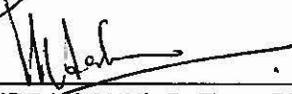
2. THE APPEAL PANEL ORDERS that there shall be no costs of the appeal.



ALLAN MACKAY, CPA, CMA
Chair of the Appeal Committee



JOHN WORTHINGTON, CPA, CMA



VIRENDRA SAHNI, P. Eng., FEC
Public Member

**CERTIFIED MANAGEMENT
ACCOUNTANTS OF ONTARIO (“CMA
ONTARIO”)**

- and - **MITCHELL ARROJADO**

CMA File #C1212-4/RC-12-10-00021-433164

Appellant

Respondent

**CERTIFIED MANAGEMENT
ACCOUNTANTS OF ONTARIO
APPEAL COMMITTEE**

ORDER

**CERTIFIED MANAGEMENT ACCOUNTANTS OF ONTARIO
APPEAL COMMITTEE**

IN THE MATTER of the *Certified Management Accountants Act*, 2010, Statutes of Ontario, c.6, Schedule B as amended (the “Act”)

AND IN THE MATTER of an Appeal under s.37(1) of the *Act* from a Decision and Order of the Discipline Committee heard August 12, 2013, regarding the conduct of Mitchell Arrojado

B E T W E E N:

CERTIFIED MANAGEMENT ACCOUNTANTS OF ONTARIO

(Applicant/Penalty Appeal Appellant)

- and –

MITCHELL ARROJADO

(Respondent/Penalty Appeal Respondent)

REASONS OF THE APPEAL PANEL

THE WITHIN APPEAL was heard at Victory Verbatim, Ernst & Young Tower, 9th Floor, 222 Bay Street, Toronto, ON M5K 1H6 on Monday, the 26th day of May, 2014 in the presence of Louis P. Strezos and Shannon O’Connor, lawyers for the Certified Management Accountants of Ontario (“CMAO”) as Penalty Appeal Appellant and Mitchell Arrojado (“Arrojado”) representing himself as Penalty Appeal Respondent.

This Appeal arises out of a decision of the Discipline Committee released on August 25, 2013 with respect to a hearing held August 12, 2013 regarding five (5)

counts of professional misconduct against Arrojado. The Discipline Committee found Arrojado to be guilty of professional misconduct and imposed the following penalty:

- (a) A reprimand to be recorded on Arrojado's record;
- (b) A fine of \$3,000.00 to be paid within eighteen (18) months;
- (c) An Order that Arrojado pay for and attend in its entirety an accounting or business ethics course approved by the Registrar, within six (6) months;
- (d) Notice to be published in accordance with the Discipline Committee Rules of Procedure to the Board, to the Members in the CMAO journal and on the public area of the CMAO website; and
- (e) An Order that in the event Arrojado fails to comply with any of the above terms within eighteen (18) months, revocation of his membership.

CMAO appealed the Discipline Committee's Decision with respect to the appropriate penalty for Arrojado's misconduct, seeking a higher fine and a period of suspension.

Arrojado also appealed from the Discipline Committee's Decision that he was guilty of professional misconduct and in breach of the Regulations, however, Arrojado's misconduct appeal was dismissed on May 9, 2014 for failure to comply with filing deadlines for appeal materials. As a result the only matter before the Appeal Panel was the penalty appeal by CMAO and these Reasons deal only with the penalty appeal.

Preliminary Matters

It was confirmed at the outset of the hearing that the parties had no objections to the panel members, no objection to the hearing remaining open to the public and no objection to the procedures set out in the Rules.

Mr. Strezos confirmed at the outset that CMAO would not be addressing the misconduct appeal as it had been dismissed for failure to file materials. The panel confirmed with Arrojado his understanding of this and specifically that because his misconduct appeal had been dismissed the finding of misconduct stands and the hearing would deal only with the appropriateness of the penalty.

The parties confirmed there were no preliminary motions.

Principles Respecting Imposition of Penalties

This panel adopts the statements of the Discipline Committee as set out in *CMA Ontario v. Dimova*¹ as to the principles and purposes of, considerations and factors in imposing penalties for disciplinary infractions by Members of CMAO as follows:

1. CMA Ontario regulates the profession of Management Accountants in the public interest.
2. Disciplinary orders are directed toward four main purposes
 - (a) Specific deterrence: the penalty in this case must dissuade the Member from repeating his or her conduct in the future;

¹ *CMA Ontario v. Dimova*, Reasons for Decision & Order dated February 22, 2013

- (b) General deterrence: the penalty must persuade other Members that similar conduct will not be tolerated;
 - (c) Improved competence, rehabilitation and/or restitution: the penalty should lead other Members generally, and the Member in particular, to improved competence and rehabilitation (restitution is not appropriate in this case); and
 - (d) Maintaining public confidence in the profession of Management Accounting: the penalty must help to ensure public confidence in the integrity, probity and trustworthiness not only in Members generally, but also in CMA Ontario as the self-regulatory body of Management Accountants.
3. Public confidence in the profession of Management Accountants is more important than the fortunes of any one Member.
 4. Public confidence is based on such matters as a Member's credibility, integrity, character, repute, and fitness. While mitigating factors and compassion for a Member may have a place, they should not compromise an impartial adjudication of those matters.
 5. The ability to practice as a Management Accountant or provide accounting services is not a right but a privilege. (Universal Truth)

The following factors are always generally material to what penalty should be imposed:

1. The existence or absence of a prior disciplinary record.
2. The existence or absence of remorse, acceptance of responsibility or an understanding of the effect of the misconduct on others.
3. Whether the member has since complied with his/her obligations by responding to or otherwise co-operating with CMA Ontario.
4. The extent and duration of the misconduct.
5. The potential impact of the Member's misconduct upon others, (considering not just the merits of the complaints that prompted CMA Ontario to intervene but whether and how the Member's unresponsiveness did or might reasonably be expected to affect a client's interests).
6. Whether the Member has admitted misconduct, and obviated the necessity of a more lengthy hearing required to establish its proof.

7. Whether there are extenuating circumstances (medical, family-related or others) that might explain, in whole or in part, the misconduct.
8. Whether the misconduct is out-of-character or, conversely, likely to recur.

Order Requested by the Appellant

CMAO seeks to modify the Order of the Discipline Committee, increasing the fine from \$3,000.00 to \$10,000.00 and adding a period of suspension of six (6) months to be served separately from any time when Arrojado's membership is revoked or suspended due to non-payment of dues. This is in addition to the other penalties ordered by the Discipline Committee involving the reprimand, the requirement that Arrojado take an accounting or business ethics course and publication of notice.

Standard of Review

The Appeal Panel accepts the submissions of CMAO that the penalty imposed by the Discipline Committee in this case is to be reviewed on a standard of reasonableness and that where a penalty imposed is unreasonable, the Appeal Committee may set aside the Reasons of the Discipline Committee and impose what it assesses to be an appropriate penalty.

Grounds for Appeal

CMAO advanced three (3) grounds of appeal being:

- (a) misapprehension of facts by the Discipline Committee;

- (b) insufficient reasons of the Discipline Committee; and
- (c) that the penalty was demonstratively unfit.

For the reasons set out below the Appeal Panel agrees with the position of CMAO on each of the grounds of appeal.

Misapprehension of Facts

The Appeal Panel is of the opinion that the Discipline Committee made an error regarding the likelihood of Arrojado repeating his misconduct.

The Appeal Panel is satisfied that in its submissions to the Discipline Committee CMAO clearly advanced the position that in their view there was a strong risk of the misconduct recurring due to ongoing concerns about whether Arrojado had, even at the time of the hearing before the Discipline Committee, a proper understanding of his professional obligations. Despite these submissions, at page 8 of its Reasons, the Discipline Committee states that CMAO had argued that “it is not likely that such misconduct will likely recur”.

Based on the evidence before the Discipline Committee, it is the view of the Appeal Panel that the risk of the misconduct recurring was high. Having misunderstood the risk of the misconduct recurring, in the view of the Appeal Panel this led to a misunderstanding of what penalty was required in order to protect the public interest.

It is the view of the Appeal Panel that this error as to CMAO’s position on the risk of recurrence led the Discipline Committee to impose a penalty which was too lenient.

Insufficiency of Reasons

The Appeal Panel accepts that the Reasons of the Discipline Committee must be read together with the outcome in order to assess whether the result falls within a range of possible outcomes and that the Appeal Panel may look to the record for purposes of assessing the reasonableness of the outcome.

The Appeal Panel concludes that the Discipline Committee's Reasons are inadequate in that they do not provide CMAO, its own Members, or the public with an understanding of the rationale behind the penalty imposed. As in the *Neinstein*² decision, in the view of the Appeal Panel, here, a reader would not understand what the Discipline Committee made of the evidence and what view the Discipline Committee took of Arrojado's conduct as to whether it thought Arrojado's actions were reprehensible and involved moral turpitude.

Having regard to the seriousness of Arrojado's conduct, the Discipline Committee had an obligation to explain why that misconduct did not merit a suspension and a higher fine. The Discipline Committee had an obligation to explain how the penalty it did impose provided sufficient protection for the public, particularly given the view maintained by Arrojado that he had not committed professional misconduct.

In its Reasons at page 9, the Discipline Committee indicated that the assessment of the penalty in this case reflected the Discipline Committee's view of the conduct of

² *Law Society of Upper Canada v. Neinstein*, 2010 ONCA 193

the Respondent and “the continuing burdens that he faces outside these disciplinary proceedings”. There is no explanation as to what the Discipline Committee was referring to by “continuing burdens” and the Appeal Panel is unable to determine from the evidence presented to the Discipline Committee what could have been construed as “continuing burdens”.

In summary, the Discipline Committee’s Reasons do not explain:

- (a) What was the Discipline Committee’s normative view of the conduct? Was the conduct a serious departure from the standards to be upheld CMAO members, was the conduct viewed as serious but with some mitigating factors?
- (b) Why did the Discipline Committee feel it appropriate to depart from the acceptable range of penalties for misconduct involving dishonesty and moral turpitude.
- (c) Why was the Discipline Committee not concerned about Arrojado’s continued failure to acknowledge his breach of his professional obligations in not immediately reporting to Mr. B [REDACTED] what he had uncovered, but rather delaying in order to give Mr. Z [REDACTED] time to disclose the irregularities to Mr. B [REDACTED], despite the fact that Arrojado was aware that Mr. B [REDACTED] and Mr. Z [REDACTED] were equal partners in the company.

- (d) What the Discipline Committee meant by “continuing burdens” and how those related to or were connected with the penalty imposed.
- (e) The extent to which the penalty was influenced by the Discipline Committee’s misapprehension of CMAO’s position regarding the likelihood of the misconduct being repeated.

Unfit Penalty

Having considered the decisions in *Gandza*³, *Davies*⁴ and *Duffield*⁵, the Appeal Panel concludes that the penalty imposed by the Discipline Committee was more lenient than the acceptable range.

In coming to its conclusion as to the appropriate amount of the fine which should be levied, the Appeal Panel gave specific consideration to the fact that the fine imposed in the *Gandza* matter of \$5,000.00 dated from eleven (11) years ago and took into consideration the necessity to adjust for that passage of time.

In coming to its modification of the penalty, the Appeal Panel specifically considered the fact that Arrojado never went willingly to Mr. B■■ to “blow the whistle” and disclose the falsified invoices, excessive cash withdrawals and remittances not made to CRA and WSIB (the “Irregularities”). Arrojado only revealed the Irregularities to

³ *Institute of Chartered Accountants of Ontario v. Donald Gandza*, Reasons for Decision & Order dated May 29, 2003

⁴ *Institute of Chartered Accountants of Ontario v. Robert Davies*, Reasons for Decision & Order dated March 24, 2005

⁵ *Institute of Chartered Accountants of Ontario v. James Duffield*, Reasons for Decision & Order dated December 1, 2001

Mr. B ■ when Mr. B ■ came to him after finding out from an outside source that the rent had not been paid. Arrojado continues to blame others, including Mr. B ■, for the manner in which he set up the business in allowing Mr. Z ■ to have sole control of the cash.

The Appeal Panel was also troubled by Arrojado's failure to register his practice for some eight (8) months even after he had been advised by CMAO of the need to register and received written notification that a failure to register within sixty (60) days could result in him facing charges of professional misconduct. Arrojado admitted that he carried on business in that eight (8) month period. His explanation for the delay in registering that he was "evaluating the cost" was not considered to be a reasonable explanation by the Appeal Panel.

The Appeal Panel concludes that a review of the jurisprudence for regulated professionals found to have engaged in dishonesty, either actively or passively, supports the position that a period of suspension is necessary to satisfy the principles of specific and general deterrence and denunciation. There were no extenuating circumstances presented by Arrojado to the Discipline Committee that would take his case out of the range of a period of suspension and a substantial fine. There is no evidence on the record of any financial difficulty that would justify fining Arrojado at a lower level.

Determination

It is the decision of this Appeal Panel that the decision of Discipline Committee with respect to penalty is inconsistent with the caselaw that was provided to the Discipline Committee. There are no reasons or analysis provided by the Discipline Committee for distinguishing or departing from the range of penalties set out in those cases. This Appeal Panel concludes that the Reasons of the Discipline Committee are inadequate in that they do not include a sufficient analysis of Arrojado's conduct in relation to the penalty imposed. The Appeal Panel concludes that there appears to have been a misapprehension of facts by the Discipline Committee, specifically in relation to how the Discipline Committee concluded that it was not likely the misconduct would recur.

This Appeal Panel has determined the penalty appeal will be allowed and the Appeal Panel hereby modifies the Order of the Discipline Committee as follows:

- (a) The amount of the fine will be increased from \$3,000.00 to \$8,500.00;
- (b) A period of suspension shall be added for six (6) months, to be served separately from any time when Arrojado's membership is revoked or suspended due to non-payment of dues;
- (c) there shall be a practice review of Arrojado's practice for a period of twenty-four (24) months by CMAO at Arrojado's cost, commencing from the date of any resumption of practice by him;

- (d) with respect to the requirement imposed by the Discipline Committee that Arrojado pay for and attend in its entirety an accounting or business ethics course, to be approved by the Registrar, within six (6) months of the date on which their Order becomes final, the Appeal Panel adds that a failure to take and pass such course within six (6) months shall result in revocation of his membership at that time (i.e. six (6) months from the date on which the Order becomes final), with no requirement that CMAO wait for the eighteen (18) months the Discipline Committee provided for general compliance with the terms of its Order.

The Appeal Panel orders that the penalties imposed on Arrojado by the Discipline Committee with respect to the reprimand and publication of notices shall stand, and Arrojado shall continue to have eighteen (18) months from the date of the Appeal Panel's Order to pay the fine, failing which his membership shall be immediately revoked without further notice or action on the part of the Appeal Panel. Notice of such revocation, disclosing his name, shall be given in the manner specified by the Discipline Committee.

Costs

At the conclusion of the hearing, the parties were advised that costs would be dealt with in writing following the release of the Appeal Panel's decision. It is the decision of this Appeal Panel that no costs will be awarded of the appeal because there is no express claim for costs set out in CMAO's Notice of Appeal. It is the view of the

Appeal Panel that the basket clause used in the Notice of Appeal “such further and other terms as counsel may advise and as the Appeal Panel may allow” was not sufficiently specific and would not necessarily have been understood by Arrojado, who was representing himself, as including a claim being made against him for costs. The Appeal Panel notes that as costs were not asked for or allowed by the Discipline Committee, Arrojado would not have had any specific experience which would have alerted him to the likelihood of a claim for costs. The Appeal Panel is of the view that Arrojado should be given the benefit of the doubt as to whether he would have chosen to respond differently to the appeal, perhaps by obtaining the representation of a lawyer, if he had been aware that a claim for costs was being made.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30th DAY OF JUNE, 2014.

Allan Mackay

ALLAN MACKAY, CPA, CMA (Chair)

John Worthington

JOHN WORTHINGTON, CPA, CMA

Virendra Sahni

**VIRENDRA SAHNI, P. Eng., FEC
Public member**