

IN THE MATTER of the Society of Industrial and Cost Accountants of Ontario Act, 1941, Statutes of Ontario 1941, c.77; as amended by Statutes of Ontario 1967, c.129; Statutes of Ontario 1971, c.126; Statutes of Ontario 1981, c.100; and Statutes of Ontario 2004, c.8;

IN THE MATTER of the Certified Management Accountants Act, 2010, S.O. 2010, c.6, Sched. B;

AND IN THE MATTER of the Statutory Powers Procedure Act, Revised Statutes of Ontario 1990, c.S.22, as amended;

AND IN THE MATTER of a disciplinary proceeding pursuant to Sections 25 and 26 of the Bylaws of The Society of Management Accountants of Ontario, as to complaints regarding the conduct of or actions of Terence Kwan.

BETWEEN:

Certified Management Accountants of Ontario
(previously known as “The Society of Management Accountants of Ontario”)
(the “Society”)

(Applicant)

-and-

Terence Kwan (the “Respondent”)

(Respondent)

DECISION, ORDER AND REASONS OF THE DISCIPLINE COMMITTEE

The Discipline Committee held a hearing at Victory Verbatim, Ernst & Young Tower, Suite 900, 222 Bay St., Toronto, Ontario M5K 1H6, on Thursday, May 20, 2010 to hear evidence, and submissions and argument and to deliver its decision; all to consider matters arising out of a complaint regarding the conduct of Terence Kwan, a Member of Certified Management Accountants of Ontario (previously known as “The Society of Management Accountants of Ontario”).

The panel of the Discipline Committee conducting the hearing was composed of:

J. Allan Thom, CD, FCMA (Chair)

Cliff Bilyea, MBA (Public Member)

Ted Brabers, FCMA

Ken Diebel, FCMA

Ed Hazell, FCMA

James Karas (Public Member)

Anne Mackenzie, CMA

Counsel for the Applicant was Ms. Catherine M. Patterson of Ferguson Patterson Lawyers.

The Respondent was not present in person, and was not represented by counsel or an agent.

Counsel for the Discipline Committee was Mr. Hugh M. Kelly, Q.C., of Miller Thomson LLP, Barristers & Solicitors.

Ms. Patterson tendered a Document Brief; this was marked as Exhibit 1.

Ms. Patterson tendered a Certified Copy of the Policy "Continuous Professional Learning and Development (CPLD)" approved by the Board of Governors of The Society of Management Accountants of Ontario on May 8, 2004; this was marked as Exhibit 2.

Ms. Patterson tendered the Affidavit of Catherine Patterson, sworn the 31st day of March 2010, confirming service of the Notice of Hearing upon the Respondent; this Affidavit was marked as Exhibit 3.

Ms. Patterson tendered the Notice of Hearing addressed to the Respondent; this Notice was marked as Exhibit 4.

Preliminary Matters

No objections were raised against the matter proceeding or as to the jurisdiction of the Discipline Committee to hear the matter; the hearing commenced.

Charge

Ms. Patterson read the charges (as set out in the Notice of Hearing), as follows:

- 1) That Terence Kwan failed to report the required number of Continuous Professional Learning and Development activities for the period from July 1, 2004 to June 30, 2007, as was required by Section 19 of the Bylaws of the Society in 2005, 2006 and 2007.
- 2) That Terence Kwan failed to reply in writing to a letter from the Society dated December 1, 2008 which specifically requested a reply within thirty (30) days of the date of receipt of such letter.

By reason of the foregoing, it is alleged that Terence Kwan is guilty of professional misconduct as that term is defined in Sections 20(2)(b) and 20(2)(e) of the Bylaws of the Society in effect in 2005, 2006 and 2007, as is currently defined in Sections 1(2)(b) and 1(2)(e) of the Professional Misconduct and Code of Professional Ethics Regulation, and is in breach of Section 19 of the Bylaws of the Society in effect in 2005, 2006 and 2007 and Sections 22 and 31 of the current Bylaws of the Society.

As the Respondent was not present, the Discipline Committee proceeded as if the Respondent had pleaded not guilty to the charges.

Statute

The Certified Management Accountants Act, 2010, S.O. 2010, c.6, Sched. B (the "CMA Act") provides in part:

17. Subject to the by-laws, a member of the Corporation has the right to use the designations "Certified Management Accountant", "comptable en management

accrédité", "Registered Industrial Accountant" and "comptable en administration industrielle", and to use the initials "C.M.A.", "CMA", "R.I.A." and "RIA".

35. (1) The discipline committee shall hear every matter referred to it by the complaints committee.

(3) The discipline committee shall find a member or firm guilty of professional misconduct if in the committee's opinion the member or firm is guilty of professional misconduct as defined in the by-laws.

(4) If the discipline committee finds a member or firm guilty of professional misconduct, it may by order do one or more of the following:

1. If at least two-thirds of the committee panel hearing the matter agrees, revoke the member's membership or the firm's registration.

2. Suspend the member's membership or the firm's registration for a period determined in accordance with the by-laws.

3. Despite section 17, direct that a member whose membership is suspended refrain from using any designation, term, title, initials or description implying that the member is practising as a Certified Management Accountant or a Registered Industrial Accountant during the period of suspension.

4. Determine the timing and manner of the return of a certificate of membership to the Corporation by an individual whose membership is suspended or revoked.

5. Impose restrictions or conditions on the right of the member or firm to practise as a Certified Management Accountant.

6. Issue a reprimand and, if the committee considers it appropriate, direct that the reprimand be recorded in the register.

7. Direct the member or firm to take any specified rehabilitative measure, including requiring the member or any member practising as a Certified Management Accountant through the firm to successfully complete specified professional development courses or to seek specified counselling or treatment.

8. Direct the member or firm to pay a fine and specify the timing and manner of payment.

9. Direct that the imposition of a measure under this subsection be postponed for a specified period or on specified terms, including the successful completion of specified courses of study.

10. Direct that a failure to comply with the committee's order shall result in the revocation of the member's membership or the firm's registration.

11. Make any other order that the committee considers appropriate in the circumstances.

(5) Unless the discipline committee orders otherwise, a final decision or order of the committee under this section takes effect on the day on which the time to

appeal ... expires, if no notice of appeal is filed with the appeal committee in accordance with that subsection.

Bylaws

The Bylaws of the Society in effect in 2005, 2006 and 2007 provided in part as follows:

19. Rules of Conduct

All Members will comply with and their conduct will be governed by the by-laws and Code of Professional Ethics of the Society and rules established by the Board from time to time.

20. Professional Misconduct

(2) For the purposes of the by-laws, "professional misconduct" means:

- ...
- (b) a breach by a Member of the Act or the by-laws;
- ...
- (e) the failure of a Member to respond promptly and cooperate fully with respect to requests for information and other communications from the Society.

The current Bylaws of the Society provide in part as follows:

22. Rules of Conduct Governing Members

All Members shall be familiar with and comply with the bylaws, regulations and Code of Professional Ethics of the Society and the rules and standards established or adopted by the Board from time to time. The "Code of Professional Ethics" of the Society is set forth in the regulations.

25.6 Whenever the Discipline Committee finds a Member is guilty of professional misconduct, unless an appeal of the decision and order has been filed with the Chair of the Appeal Committee,

- (a) notice of the decision and order of the Discipline Committee, disclosing the name of the Member and brief particulars of the professional misconduct, will be published and distributed to the Board and to the Members and may at the discretion and by Order of the Discipline Committee be published in the local or daily newspaper of the community or communities where the Member resides and/or carries on business; and
- (b) the decision and order of the Discipline Committee, together with the written reasons for the decision and the name of the Member with brief particulars of the finding of professional misconduct, will be published and maintained in the public area of the Society's website;

unless the Discipline Committee determines that disclosure of the name of the Member in any or all of the above publications is not required in the public interest and its disclosure would be unfair to the Member.

31. Obligation to Reply to Society Requests

A Member will, in respect of any matter of professional conduct, reply in writing to any letter from the Society in which a reply is specifically requested within thirty (30) days of the date of receipt of such letter.

32. Continuous Professional Learning and Development

32.1 Every Certified Member shall undertake continuous professional learning and development relevant and appropriate to the Certified Member's work and professional responsibilities, as required by Section 32 and the regulations, and shall demonstrate compliance with the requirements as set out in Section 32 and the regulations, unless the Certified Member is exempt from such requirements under the provisions of the regulations.

32.2 The content and required minimum amount of continuous professional learning and development, the penalties and procedures applicable to non-compliance with the continuous professional learning and development provisions of Section 32 and the regulations and the exemptions available from the continuous professional learning and development obligations are set forth in the regulations.

32.3 Every Certified Member subject to the continuous professional learning and development requirement of Section 32 and the regulations shall submit annually, on or before the due date prescribed in the notice sent by the Society by mail, by electronic mail, or published in a publication of the Society generally circulated to its Members, a declaration in the prescribed form attesting whether the requirements of Section 32 and the regulations have been met.

Professional Misconduct and Code of Professional Ethics Regulation

The Professional Misconduct and Code of Professional Ethics Regulation of the Society (the "Code") provides in part as follows:

1. Professional Misconduct

(2) For the purposes of the by-laws, "professional misconduct" means:

- ...
- (b) a breach by a Member of the Act or the by-laws;
- ...
- (e) the failure of a Member to respond promptly and cooperate fully with respect to requests for information and other communications from the Society.

Witnesses

Ms. Patterson called two witnesses for the Society (in the order in which called): Ms. Sharon Armstrong, Vice President, Business Development of the Society (responsible for CPLD), and Ms. Katharine M. Harvey, Vice President, Regulatory Affairs and Registrar of the Society.

As the Respondent was not present, there was no evidence led on behalf of the Respondent.

Summary of Evidence

The Discipline Committee heard the witnesses, and reviewed all of the exhibits tendered as evidence. It is convenient to summarize this evidence.

Continuous Professional Learning and Development

Ms. Sharon Armstrong explained the contents of the Society's Document Brief, Exhibit 1.

Policy Requirements

The Board of Governors of the Society approved a policy dated May 8, 2004, requiring all Members, except retired Members (and except on a temporary basis, Members unable to work due to illness or disability), to undertake Continuous Professional Learning and Development. The purpose of the requirement stated in the policy is:

to facilitate the continuous professional development of CMAs' competencies to ensure they provide services of high quality to clients, employers, other stakeholders, and the public at large.

Certified Members are required to obtain a minimum of 120 learning credits over a three year period beginning July 1, 2004, and 30 learning credits annually. The range of qualifying activities articulated in the Policy is very broad, and many of the routine activities undertaken by Members qualify for the credits. Members are required to report the achievement of their CPLD activities using the Society's on-line reporting system.

Communications Prior to Introduction of CPLD Requirements

Commencing in February 2004, the Society communicated extensively with the Members, explaining the nature of the CPLD requirements, alerting them of the time-lines for compliance, and generally offering suggestions upon how the credits could be achieved. Included in the communications was information as to what would happen if a Member failed to meet the CPLD requirements.

All communications provided an access point for further information, by way of website particulars, an email address and a name and telephone number that the Member could call.

Communications After Introduction of CPLD Requirements

Although the communications to Members prior to the introduction of the CPLD requirements were general in nature, after CPLD has become a requirement, the Society began to target individual Members who were not recording their CPLD credits on-line. These communications

were focused upon trying to encourage Members to comply with the Society requirements. For the approximately 70% of Members who had provided email addresses, the earlier of these communications took the form of email messages; and for those who had not provided email addresses (or for those to whom the sent email messages had “bounced back”), the Society sent the same message via mail.

As time went on, emails and letters were sent to Members delinquent in their reporting urging them to comply, and noting that failure to comply could result in disciplinary proceedings on the basis of professional misconduct. In addition, the Society arranged for telephone calls to non-compliant Members advising them of their failure to report the required credits, or if the telephone call went to a voicemail system, leaving a message to the same effect. As time went on, the email, letter and telephone messages became somewhat more aggressive.

In those circumstances in the 2008-2009 year in which non-compliant Members had paid their membership dues, the Society notified them specifically that to keep their memberships up-to-date, they would have to become compliant with the CPLD requirement, and warning them that disciplinary proceedings would follow if they failed to do so.

As with communications before the CPLD requirement came into force, all communications provided an access point for further information, by way of website particulars, an email address and a name and telephone number that the Member could call.

Status of Respondent's Credits

The Respondent had reported 19.5 hours of credits during the three year period 2004-2007. In June 2008, he spoke with Ms. Ann Henderson, CPLD Advisor of the Society, but did not submit a plan as to how he would achieve compliance.

Complaint to Complaints Committee, and Notice to Respondent

By letter dated November 21, 2008, Mr. Merv Hillier complained to the Complaints Committee that the Respondent was guilty of professional misconduct for failure to report his CPLD activities for the period July 1, 2004 to June 30, 2007 as required by the Policy. By letter dated December 1, 2008, Katharine M. Harvey wrote to the Respondent advising him of the complaint and attaching a copy, and advising him of the requirement in accordance with the Bylaws to reply to the Complaints Committee with an explanation or representations within 30 days of receipt of the letter. The Respondent did not reply as required.

By email dated January 26, 2009, the Respondent was asked to provide the status of his reply to the Complaints Committee. The Respondent did not respond.

By letter dated October 12, 2009, Ms. Harvey advised the Respondent that the complaint would be considered by the Complaints Committee on October 23, 2009.

Response of Respondent

As the Respondent was not present, there was no response on behalf of the Respondent.

Submissions

Ms. Patterson submitted that the Society had proven that the Respondent had breached his obligations respecting CPLD and had failed to respond to the Society when required to do so, and was therefore guilty on both counts of professional misconduct.

On the assumption that the Discipline Committee would in fact find the Respondent guilty on both counts, Ms. Patterson requested the following penalty:

the Respondent be reprimanded, with the reprimand to be recorded on the Respondent's record;

the membership of the Respondent be cancelled/revoked and the removal of the name of the Member for the record of Members;

the imposition of a fine of \$5,000 payable on or before 30 September 2010;

require the Respondent to return his certificate of membership to the Society forthwith;

the notice of the decision and order of the Discipline Committee disclosing the professional misconduct to include the name of the Respondent;

request that, in the event that the Respondent applies for readmission to the Society, the Board of Governors review and consider the file of these proceedings.

As the Respondent was not present, there was no response to the Society.

Findings on the Charges

The Discipline Committee considered both the oral and written evidence presented and the submissions made, and found the evidence presented to be credible and reliable. The Discipline Committee is satisfied that the Society has established the facts supporting the allegations set out in paragraphs 1 and 2 of the Notice of Hearing. Accordingly, the Discipline Committee finds that the Respondent failed to comply with the Bylaws and Code of Professional Ethics of the Society in that:

contrary to the requirements of the "Continuous Professional Learning and Development (CPLD)" Policy approved by the Board of Governors of the Society on May 8, 2004, the Respondent failed to report the required Continuous Professional Learning and Development for the period July 1, 2004 through June 30, 2007; and

contrary to the Bylaws, the Respondent failed to reply in writing to the letter from the Society dated December 1, 2008, in which a reply was specifically requested within thirty (30) days of receipt of such letter;

such failures constituting professional misconduct by the Respondent as that term is defined in the Bylaws, and the Professional Misconduct and Code of Professional Ethics Regulation of the Society.

The Discipline Committee finds that the Respondent is guilty of professional misconduct as that term is defined in Sections 20(2)(b) and 20(2)(e) of the Bylaws of the Society in effect in 2005, 2006 and 2007, and as is currently defined in Sections 1(2)(b) and 1(2)(e) of the Professional Misconduct and Code of Professional Ethics Regulation, and is in breach of Section 19 of the Bylaws of the Society in effect in 2005, 2006 and 2007 and Sections 22 and 31 of the current Bylaws of the Society.

Order

Having found the Respondent guilty of professional misconduct as noted above, the Discipline Committee unanimously orders as follows:

1. Under the authority of paragraph 6 of s.35(4) of the *Certified Management Accountants Act*, the Discipline Committee orders that Terence Kwan be reprimanded the particulars of which Reprimand are attached to this Order, and that such Reprimand be recorded on the Respondent's record.
2. Under the authority of paragraph 1 of s.35(4) of the *Certified Management Accountants Act*, the Discipline Committee revokes the membership of Terence Kwan, and directs that the name of Terence Kwan be removed from the record of Members of the Society.
3. Under the authority of paragraph 8 of s.35(4) of the *Certified Management Accountants Act*, the Discipline Committee imposes a fine of five thousand dollars (\$5,000) payable in a lump sum on or before 30 September 2010.
4. Under the authority of paragraph 4 of s.35(4) of the *Certified Management Accountants Act*, requires the Respondent to return his certificate of membership to the Society forthwith.
5. Under the authority of paragraph 11 of s.35(4) of the *Certified Management Accountants Act*, the Discipline Committee orders that:
 - notice of the decision and order of the Discipline Committee disclosing the name of the Member and brief particulars of the professional misconduct be published and distributed to the Board and to the Members in the Society journal, and be published in the local or daily newspaper of the community or communities where the Member carries on business, if known, otherwise where he resides; and
 - the decision and order of the Discipline Committee, together with the written reasons for the decision and the name of the Member with brief particulars of the finding of professional misconduct, be published and maintained in the public area of the Society's website;

the Discipline Committee has determined that disclosure of the name of the Member by publication to the Board, in the Society journal and on the Society website, and in the local or daily newspaper of the community or communities where the Member carries on business or resides, is required in the public interest, and that its disclosure would not be unfair to the Member.

6. Under the authority of paragraph 11 of s.35(4) of the *Certified Management Accountants Act*, the Discipline Committee requests that, in the event that the Respondent applies for readmission to the Society, the Board of Governors would review and consider the file of these proceedings.

Decision and Order rendered on the 20th day of May 2010.