UNITED STATES

DEPARTMENT OF THE TREASURY

Director, Office of Professional Responsibility,
Complainant-Appellant ("C-A"),

v. **Complaint No. 2006-19**

George Diehl, C.P.A.,
Respondent-Appellee (R-A"). [sic]

Decision on Appeal

Basis of Authority

Under the authority of General Counsel Order No. 9 (January 9, 1991) and the authority vested in him as Assistant General of the Treasury who is the Assistant General Counsel of the Treasury who is the Chief Counsel of the Internal Revenue Service, through a series of Delegation Orders (most recently, an Order dated July 16, 2008) Donald L. Korb delegated to the undersigned the authority to decide disciplinary appeals to the Secretary of the Treasury filed under Part 10 of Title 31, Code of Federal Regulations ("Practice Before the Internal Revenue Service," sometimes known and hereafter referred to as "Treasury Circular 230"). This is such an Appeal filed by the Complainant-Appellant, the Director of Practice.

Background

The Charges, Evidence, Findings & Conclusions

This proceeding commenced on September 18, 2006 when C-A filed a Complaint against R-A alleging that R-A (i) was a Certified Public Accountant authorized to practice in New York State and as such authorized to practice before the Internal Revenue Service,[1] (ii) had in fact practiced before the Internal Revenue Service,[2] and (iii) had engaged in disreputable conduct within the meaning of §§ 10.51 and 10.51(k) of Treasury Circular 230 by threatening to kill IRS Revenue Officer Miamouna Diakite's life [sic] through the use of abusive language [sic]. Specifically, Ms. Diakite alleged that on or about July 12, 2005,

[1] R-A does not contest this allegation. Other evidence in the Administrative Record also supports this allegation.
[2] R-A does not contest this allegation. Other evidence in the Administrative Record also supports this allegation.

R-A said to her, when she refused to take the action he requested to release a level, [sic] "Do you know what I do to people like you? I kill them." Ms. Diakite also alleged that she had then said to him, "You don't mean that sir. . .," and that R-A then responsed [sic], "I do, I do. I'll kill you."[3] The R-A admitted that he had become angry with Ms. Diakite, but denied using the specific language in issue or threatening her life using other language.

Ms. Diakite's coworkers and superior testified that Ms. Diakite became very upset on the day of the conversation with R-A, that her reaction to the conversation was unlike any they had seen from her before despite the fact that she regularly dealt with difficult taxpayer representatives, that they recommended that she take the rest of the day off, and that upon her return to work she was reluctant to take forced collection action on her own, even when that action was called for. Over a period of some months, she was repeatedly urged by her superiors to take such action on other cases but kept leaving the action to her superiors. When she was repeatedly urged by her superiors to take forced collection action and did not do so, she resigned from the Internal Revenue Service. This inaction n [sic] Ms. Diakite's part was not typical of her actions before R-A's threats. The ALJ found the testimony of Ms. Diakite, her colleagues and superiors credible and clear and convincing evidence of the violation with which R-A is charged. So do I.

<u>The Sanctionj [sic] Sought by the C-A Imposed by the ALJ</u>

Having so found, the ALJ then imposed a six (6) month suspension in lieu of the disbarment initially sought by C-A. The Appellate Authority reviews the sanction proposed by the ALJ to determine its appropriateness in light of the charges proved and other "aggravating" and "mitigating" factors found present. The Appellate Authority performs this function *de novo* and with the full authority of the Secretary of the Treasury and the Internal Revenue Service (as the charging agency). The Appellate Authority may increase, decrease or affirm the sanction proposed by the ALJ. Had the only issue before me been whether the severity of R-A's conduct merited a six (6) month suspension or a disbarment, R-A's disbarment would have been wholly appropriate and fully justified. But that is not the only issue raised by this Appeal.

[3] R-A did not admit these allegations. However, in his Decision dated June 20, 2007, Steven Davis, an Administrative Law Judge of the National Labor Relations Board ("NLRB"), sitting by designation as the Administrative Law Judge in this proceeding under an interagency agreement between the NLRB and the Department of the Treasury, found on the basis of the demeanor of the witnesses, the allegations of the C-A had been proved. Based on the charges originally brought by the C-A and the fact that the allegations involved mixed questions of fact and conclusions of law, as the Appellate Authority, I would have to sustain these findings and conclusions are [sic] "clearly erroneous." Based on my review of the ALJ's Decision (which appears as Attachment 1, which is incorporated as if fully set forth herein) and of the entire Administrative Record (the Certification of which appears as Attachment 2), I find that the ALJ's findings and conclusions are not only not clearly erroneous, but are supported by clear and convincing evidence in the Administrative Record.

The Other Issue Raised on Appeal

On July 16, 2007, C-A filed his Appeal of the ALJ's Decision in this proceeding.[4] C-A's Appeal included a brief that stated exceptions to the ALJ's Decision and supporting reasons for the exceptions (the adequacy of which I will discuss below). While the Appeal itself was timely filed, C-A concedes that C-A failed to timely serve a copy of his Appeal on R-A or his attorney as required by §10.77(b) of Treasury Circular 230. Not until July 10, 2008 was R-A advised by C-A of the filing of C-A's Appeal. On July 29, 2008, the undersigned, in my capacity as Appellate Authority in this proceeding, wrote to Ronald J. Aiello, Esq., in his capacity as counsel for R-A, and Laurence T. Emert, Esq., counsel for C-A in this proceeding, requesting that each party address certain issues in this proceeding by September 10, 2008.[5] On September 9, 2008, Mr. Emert responded to my July 29, 2008 correspondence.[6] No other response was made to my July 29, 2008 correspondence by either party, by September 10, 2008 or otherwise.

In his September 9, 2008 response, C-A made the following statements, to which I make the following responses:

C-A's failure to serve R-A with a timely copy of his Appeal was inadvertent.

C-A's failure to serve R-A with a timely copy of his Appeal was inadvertent. Mr. Emert claimed that he believed that his client, C-A, had himself sent the Certificate of Service and copy of the Appeal to R-A and that C-A had thought that Mr. Emert, his attorney, had. It is clear from Treasury Circular 230 that the party appealing the Decision of the ALJ to the Appellate Authority has the obligation to serve a copy of its Appeal on the opposing party. This is not a new requirement. It has been a requirement of Treasury Circular 230 for years.[7] Neither is the requirement that the same section places on a replying party to serve a copy of his Reply on the moving party. In addition to R-A's [sic] failure to serve a copy of his Appeal on R-A in this proceeding, in at least three other cases immediately preceding my consideration of this case, Complainant has failed to serve copies of his Replies in other cases [sic]. Complainant is a component of the Internal Revenue Service, which is in turn a component of the Department of the Treasury. The Department of the Treasury is the author of Treasury Circular 230. It seems appropriate to charge C-A and his lawyer, both employees of the Department of the Treasury, with understanding their responsibility for adhering to their longstanding and clear obligations under Treasury Circular 230's notice and service requirements. Observing such requirements are necessary to the joinder of factual and legal disputes in these proceedings, and to the proper

[4] A copy of C-A's Appeal appears as Attachment 3 to this Decision on Appeal. and is incorporated herein as if fully set forth herein.

[5] A copy of that correspondence appears as Attachment 4 to this Decision on Appeal and is incorporated as if fully set forth herein.

[6] A copy of Mr. Emert's response appears as Attachment 5 and is incorporated in this Decision on Appeal as if fully set forth herein.

[7] See § 10.77 of Treasury Circular 230 (Rev. 6-2005) and § 10.77 of Treasury Circular 230 (Rev. September 26, 2008)

functioning of the Appellate Authority in Treasury Circular 230 proceedings. proceedings.

In his September 9, 2009 response, Mr. Emert makes several arguments as to why C-A's failure to serve R-A with a copy of his Appeal has not prejudiced R-A. First, Mr. Emert argues that R-A has not served the six (6) month suspension imposed by the ALJ because if, under § 10.76 of Treasury Circular 230 (Rev. September 26, 2008) or its predecessor, a Decision of the ALJ does not become final and effective if either party appeals the decision of the ALJ within thirty (30) days of the entry of the decision under § 10.76(d). Mr. Emert bases this statement not on any belief of whether R-A failed to in fact cease practicing before the Internal Revenue Service when the thirty (30) days following entry of the ALJ's decision [sic] but rather on the basis that, since C-A had filed a timely Appeal, the Decision never became final.

I find this argument wholly specious. § 10.76(d) provides: "<u>In the absence of an appeal to the Secretary of the Treasury or delegate</u>, the decision of the Administrative Law Judge will<u>, without further proceeding</u>, become the decision of the agency 30 days after the Administrative Law Judge's decision." (Emphasis added.) Mr. Emert would have me place controlling significance on the language first emphasized, but would have me ignore the language later emphasized. I choose not to do so. The latter language underscores the importance of the service requirements of § 10.77, because absent service, the opposing party (here, R-A, § 10.76(d) [sic] at least suggests that the decision of the ALJ had become final. The Department of the Treasury could have imposed a responsibility on the ALJ or the Complainant to act affirmatively to advise the Respondent that the ALJ's Decision had become final. Treasury chose not to do so, but rather chose to impose on the Appellant (in the case of the Appeal) or the Appellee (in the case of the Reply) the obligation to do so.

Mr. Emert also believes that if R-A had, contrary to what he should have presumed, continued to practice before the Internal Revenue Service for more than 30 days after the entry of the ALJ's Decision, he may actually have been advantaged by the C-A's failure to serve him with a copy of the Appeal. Perhaps so, unless you take into consideration the effects on both the R-A and his clients of this confusion and intermittent ability to practice, and the impact of this notice failure on R-A to plan needed changes in his life. For all R-A knew, if he was willing to sit out his six (6) month suspension, he could have planned for that contingency, both for himself and for his clients. If C-A were [sic] permitted to pursue his Appeal, the expectations of both R-A and his clients might be upended. Had R-A known from the date of C-A's Appeal that he could face Disbarment for a period of sixty (60) months, R-A might well have simply ceased practice before the Internal Revenue Service and pursued a different line of work.

I find, therefore, in light of the foregoing, that the six (6) months sanction imposed against R-A should be AFFIRMED. There remains the question of the commencement date of the suspension. C-A could have accessed the business records of the Internal Revenue Service to determine whether R-A continued to

practice before the Internal Revenue Service for more than thirty (30) days after the entry of the ALJ's decision. C-A failed to do so. If C-A wanted to have the suspension commence on the date of entry of this Decision on Appeal, it is my opinion that it should have proved by clear and convincing evidence that R-A failed to serve his suspension commencing thirty (30) days after the entry of the ALJ's decision. Having failed to do so, I find it appropriate to assume that R-A served his suspension starting thirty days after the entry of the ALJ's decision. Having so found, I find that R-A has completed his suspension. Having found that C-A's failure was not without prejudice to R-A, I do not find the precedents cited by Mr. Emert in his response apposite to this proceeding.

This Decision on Appeal constitutes Final Agency Action in this proceeding.

/s/
David F.P. O'Connor
Special Counsel to the Senior Counsel
Office of Chief Counsel
Internal Revenue Service
(As Authorized Delegate of
Henry M. Paulson,
Secretary of the Treasury)

November 18 , 2008 [by hand]
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that the Decision on Appeal in Complaint No. 2006-19 was sent this day by Certified Mail/Return Receipt Requested and by First Class United States Mail to the addresses listed below:

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/s/
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(As Authorized Delegate of
Henry M. Paulson,
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November 18, 2008 [by hand]
Washington, D.C.