UNITED STATES OF AMERICA
THE DEPARTMENT OF THE TREASURY

DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY,	)	
Complainant	)	**Complaint No. 2011-01**
v.	)	
WALTER H. ROSS,	)	
Respondent.	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT

I. Factual and Procedural Background

On March 15, 2010, Karen L. Hawkins, in her official capacity as Director of the Office of Professional Responsibility ("OPR"), United States Department of the Treasury, Internal Revenue Service ("IRS"), issued Complaint No. 2009-55426-XP for expedited suspension and Notice of Expedited Proceedings pursuant to 31 U.S.C. § 330 and Rule 10.82(b)(1) of the regulations governing practice before the IRS, codified at 31 C.F.R. Part 10 ("Rules").[1] *See* Complaint dated Dec. 14, 2010 ("Compl.") ¶ 5; Compl. Ex. 2. Respondent submitted a Response to the Complaint for expedited suspension, dated April 22, 2010. Compl. ¶ 6; Compl. Ex. 3. The parties held a conference on July 30, 2010. Compl. ¶ 7. On August 6, 2010, Ms. Hawkins issued a Decision suspending Respondent from practice before the IRS. Compl. ¶ 8; Compl. Ex. 4. In a letter dated November 29, 2010, Respondent requested a hearing before an Administrative Law Judge, as provided by Rule 10.82(g). Compl. ¶ 10; Compl. Ex. 5.

On December 4, 2010, Complainant initiated this proceeding by issuing a Complaint against Respondent pursuant to Rules 10.82(g) and 10.60. Compl. ¶ 11. The Complaint alleges that Respondent practiced (as defined by 31 C.F.R. § 10.2(d)) as a Certified Public Account

[1] All citations to the regulations codified at 31 C.F.R. Part 10 (§§ 10.0-10.93), Practice Before the Internal Revenue Service, can also be found in corresponding sections of Treasury Department Circular No. 230, entitled "Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, Enrolled Retirement Plan Agents, and Appraisers before the Internal Revenue Service" (Rev. 4-2008), issued pursuant to the provisions of 31 U.S.C. § 330.

("CPA") before the IRS, until he consented to the suspension of his North Carolina CPA certificate on January 5, 2010. Compl. ¶¶ 1, 4, 9; Compl. Ex. 1 (*Walter H. Ross, # 25538*, Case Nos. C2009160-1 & C2009160-2 (N.C. State Bd. of CPA Examiners, Jan. 25, 2010) (Consent Order)). The Consent Order cites Respondent's failures to file tax returns and pay tax liabilities, and references tax liens filed by the IRS against Respondent. Compl. Ex. 1. The Complaint alleges that without his state CPA license, Respondent is not permitted to practice before the IRS pursuant to 5 U.S.C. § 500 and 31 U.S.C. § 330. Compl. ¶ 11. Also, the Complaint states that Respondent's consent to the suspension of his North Carolina CPA certificate constitutes disreputable conduct for which he may be censured, suspended or disbarred from practice before the IRS pursuant to 31 C.F.R. § 10.51(a). Compl. ¶ 13. The Complaint seeks to have Respondent suspended from practice before the IRS for an indefinite period of time. Compl. at 4. The Complaint notes, without guarantee, that Complainant expects to terminate Respondent's suspension under Rule 10.82(f) when he provides evidence that he has regained his CPA license in North Carolina. Compl. ¶ 12.

On January 19, 2011, Respondent filed his Answer to the Complaint. In his Answer, Respondent listed "[r]elevant facts" regarding the suspension of his CPA certificate, including his history with depression, anxiety, and consequent impaired judgment. Answer at 2. Respondent alleges that he has filed all delinquent tax returns, and has been in full compliance with the IRS as of 2008. *Id.* Because of the high cost of legal fees and related costs, and because the North Carolina State Board of CPA Examiners "bullied" him into it, Respondent states that he "settled to be suspended for five years." Answer at 3. Respondent lists his training and explains why he is fit to practice. Answer at 4-7. Admitting that he cannot practice before the IRS without a CPA license, Respondent adds, "but if I am not suspended by the OPR I will have limited representation ability to practice before the IRS." Answer at 7 (citing Respondent's Exhibit 8, OPR Guidance on Restrictions During Suspension or Disbarment from Practice before the [IRS], September 2010). "This would enable me to give a complete service to the clients I have prepared tax returns for," Respondent claims. Answer at 7.

On April 15, 2011, Complainant filed a Motion for Summary Judgment ("motion" or "Mot."), requesting judgment as a matter of law that respondent is not eligible to practice before the IRS and requesting that Respondent be suspended indefinitely from practice before the IRS. Rule 10.68(a)(2) provides that "[i]f the non-moving party opposes summary adjudication . . . [it] must file a written response within 30 days unless ordered otherwise by the Administrative Law Judge." However, if no response is filed, "the nonmoving party is deemed to oppose the motion." 31 C.F.R. § 10.68(b). Service was made on Respondent via first class mail and email on April 15, 2011. More than thirty days have passed since then, and Respondent has not filed a response to the Motion. Therefore, Respondent is deemed to oppose the Motion.

II. Standards for Summary Adjudication

The Rules provide that "[e]ither party may move for a summary adjudication upon all or any part of the legal issues in controversy." 31 C.F.R. § 10.68(a)(2). The Rules provide further that "[a] decision shall thereafter be rendered if the pleadings, depositions, admissions, and any

admissible evidence show that there is no genuine issue of material fact and that a decision may be rendered as a matter of law." 31 C.F.R. § 10.76(a)(2).

A motion for summary adjudication is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). Therefore, federal court rulings on motions under Rule 56 of the FRCP provide guidance for ruling on a motion for summary adjudication in an administrative proceeding. *See Puerto Rico Sewer & Aqueduct Auth. V. EPA*, 35 F.3d 600, 607 (1st Cir. 1994) (holding that Rule 56 of the FRCP "is the prototype for administrative summary judgment procedures, and the jurisprudence that has grown up around Rule 56 is, therefore, the most fertile source of information about administrative summary judgment"), *cert. denied*, 513 U.S. 1148 (1995).

The party moving for summary judgment bears the initial burden of showing the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its initial burden, the non-moving party may not rely merely on allegations or denials in its own pleading, but instead "must present more than just 'bare assertions, conclusory allegations or suspicions' to show the existence of a genuine issue." *Podobnik v. U.S. Postal Service*, 409 F.3d 584, 594 (3rd Cir. 2005) (quoting *Celotex Corp. v. Catrett*, 477 U.S. at 325). If the non-moving party "fails to properly address another party's assertion of fact . . . the court may . . . consider the fact undisputed for purposes of the motion [or] grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it . . . . FRCP 56(e)(2)-(3).

In evaluating a motion for summary judgment, the tribunal must view the record in a light most favorable to the non-moving party indulging all reasonable inferences in that party's favor. *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990). The record to be considered by the tribunal includes any material that would be admissible or usable at trial. *Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir. 1993), *citing* 10A Charles A. Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice and Procedure § 2721, at 40 (2d ed. 1983). However, the burden of coming forward with evidence in support of their respective positions remains squarely upon the litigants. *See Northwestern Nat'l Ins. Co. v. Baltes*, 15 F.3d 660, 662-63 (7th Cir. 1994).

III. Relevant Statutes, Regulations and Standards

Section 330(b) of Title 31 of the United States Code provides that:

> After notice and opportunity for a proceeding, the Secretary [of the Treasury] may suspend or disbar from practice before the Department [] a representative who –
>
> (1) is incompetent;
>
> (2) is disreputable;
>
> (3) violated regulations prescribed under this section; or

(4) with intent to defraud . . . misleads or threatens . . . .

31 U.S.C. § 330(b). *See also*, 31 C.F.R. § 10.50(a) ("The Secretary of the Treasury, or delegate after notice and an opportunity for a proceeding, may censure, suspend, or disbar any practitioner from practice before the Internal Revenue Service if the practitioner is shown to be incompetent or disreputable (within the meaning of § 10.51) . . . .").

The term "disreputable" is not defined in the statute. However, examples of disreputable conduct are included in the Rules, set forth at 31 C.F.R. Part 10 (§§ 10.0-10.93) (Circular No. 230). Rule 10.51(a)(10) thereof provides in pertinent part that:

> (a) Incompetence and disreputable conduct for which a practitioner may be sanctioned under § 10.50 includes, but is not limited to –
>
> * * *
>
> (10) Disbarment or suspension from practice as an attorney, certified public accountant, public accountant or actuary by any duly constituted authority of any State, territory or possession of the United States . . . .

31 C.F.R. § 10.51(a)(10).

In determining the appropriate sanction for engaging in disreputable conduct, the Rules provide that "[t]he sanctions imposed . . . shall take into account *all relevant facts and circumstances*." 31 C.F.R. § 10.50(d) (emphasis added). The regulations do not provide any guidance as to what facts and circumstances are relevant, nor do they provide any standards for determining when it would be appropriate to impose one particular sanction (censure, suspension or disbarment) rather than another.

Finally, as to the standard of proof required in disciplinary cases, the applicable regulation states in pertinent part that –

> If the sanction is a monetary penalty, disbarment or a suspension of six months or longer duration, an allegation of fact that is necessary for a finding against the practitioner must be proven by clear and convincing evidence in the record.

31 C.F.R. § 10.76(b)

IV. Complainant's Arguments

In its submitted documents, Complainant asserts two theories as to why Respondent should be subject to suspension from practice before the IRS. In its Motion, Complainant focuses on an "eligibility" argument, asserting that Respondent "no longer qualifies to practice before the IRS" in accordance with the Rules governing "Who may practice" and "Definitions." Mot. at 2, 4 (citing 31 C.F.R. §§ 10.2, 10.3). Respondent may not practice, Complainant concludes, "until he meets the criteria to do so." Mot. at 2. Similarly, in the

Complaint, Complainant asserts that "without his state license, Respondent is not permitted to practice before the IRS under 5 U.S.C. § 500 and 31 U.S.C. § 330." Compl. ¶ 11.

Second, Complainant alleges that the suspension of Respondent's CPA certificate constitutes "disreputable conduct" as described in Rule 10.51(a), warranting suspension under Rule 10.50(a). Compl. ¶ 13; Compl. at 4. This theory is the Complainant's main focus, but is absent in the Motion.[2] While the Motion addresses the grounds for Respondent's expedited suspension pursuant to Rule 10.82, and explains the "eligibility" argument regarding the suspension presently sought, it does not mention "disreputable conduct" at all.

As to Respondent's Answer, Complainant contends that the allegations therein are "nothing more than an attempt to explain the circumstances that led to his North Carolina license suspension." Mot. at 5. In that state proceeding, Complainant states, Respondent was represented by counsel and consented to the discipline imposed. *Id.* Also, Complainant states that if Respondent seeks permission from this Tribunal to engage in "limited practice" under 31 C.F.R. § 10.7(c), such request is inappropriate for this proceeding. Mot. At 6.

As to sanction, Complainant requests that Respondent be suspended for an indefinite period from practicing before the IRS, and reiterates its argument that it is "undisputed" that Respondent is no longer qualified to practice. Mot. at 6. However, Complainant does not explicitly state what, if any, "facts and circumstances" are relevant to finding that indefinite suspension is an appropriate sanction, in accordance with Rule 10.50(d).

V. Discussion

A. Liability

The statutes upon which Complainant relies to show that Respondent, without his CPA certificate, is not qualified or eligible to practice before the IRS, do not inform this Tribunal's decision as to Respondent's liability in this disciplinary proceeding. First, the statute under which the Rules have been promulgated, 31 U.S.C. § 330, provides in pertinent part:

> (a) Subject to section 500 of title 5, the Secretary of the Treasury may –
>
> > (1) regulate the practice of representatives of persons before the [Department]; and
> >
> > (2) *before admitting a representative to practice*, require that the Representative demonstrate-
> >
> > * * *
> >
> > (C) necessary *qualifications* to enable the representative to provide to persons valuable service . . . . .

[2] In fact, the "Conclusion" of the Complaint refers *only* to the "disreputable conduct" grounds for suspension. Compl. at 4. The Motion does not refer to or cite Rule 10.50 or 10.51.

31 U.S.C. § 330(a) (emphasis added). Thus, Section 330(a)(2)(C) simply requires that persons who represent others before the IRS must prove their qualifications *before* they are admitted. Second, Section 500 of Title 5, another provision on which Complainant relies to show Respondent should be suspended based on his ineligibility to practice, provides in pertinent part:

> (c) An individual who is duly qualified to practice as a certified public accountant in a State may represent a person before the [IRS] . . . on filing with that agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.
>
> (d) This section *does not*-
>
> > (1) grant or deny to an individual who is not qualified as provided by subsection (b) or (c) of this section the right to appear for or represent a person before an agency or in an agency proceeding;
> >
> > (2) *authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency . . . .*

5 U.S.C. § 500(c), (d) (emphasis added). Section 500(d) bars this Tribunal from citing Section 500(c) (state-licensed CPAs may represent persons before IRS) as support for imposing discipline on Respondent in this proceeding. *See also Poole v. United States*, 1984 U.S. Dist. LEXIS 15351, *8-9 (D.D.C. 1984) (referring to 5 U.S.C. § 500, "Congress explicitly stated that the statute did not affect the agency's disciplinary policies") (citation omitted).

Also, Complainant's reliance on Rules 10.2(a)(2) and 10.3(b) is misguided. Rule 10.2 provides definitions of terms used in the Rules, and cannot be used as independent legal support for a practitioner's suspension or disbarment. Rule 10.3 provides, in pertinent part:

> § 10.3 Who may practice
>
> (a) Attorneys. Any attorney who is not currently under suspension . . . .
>
> (b) Certified public accountants. Any certified public accountant who is not currently under suspension or disbarment from practice before the [IRS] may practice before the [IRS] by filing with the [IRS] a written declaration that the certified public account is currently qualified as a certified public accountant and is authorized to represent the party or parties.

31 C.F.R. § 10.3. This Rule, as its title makes explicit, lists the categories of professionals "[w]ho may practice," prospectively, and does not address the removal of a practitioner's ability to practice once already permitted to do so. Both Rules 10.2 and 10.3 are part of Subpart A, Rules Governing Authority to Practice, separate from both Subpart D, Rules Applicable to Disciplinary Proceedings, and Subpart C, Sanctions for Violation of the

Regulations. Subpart A does not guide this Tribunal's determination in a disciplinary proceeding as to liability, but instead guides the Agency's practitioner admission process.[3]

However, is it is undisputed that Respondent consented to a suspension of his CPA certificate by the North Carolina State Board of CPA Examiners. Compl. ¶¶ 4, 13; Compl. Ex. 1; Answer at 3, 7. "Disbarment or suspension from practice as [a] . . . certified public accountant" constitutes "disreputable conduct" warranting discipline according to Rule 10.51(a)(10). Therefore, on that basis, Respondent is subject to a sanction.

B. Sanction

The issue in a disbarment proceeding is essentially whether the practitioner in question is fit to practice. *Harary v. Blumenthal*, 555 F. 2d 1113, 1116 (2d Cir. 1977). Practice before the IRS is a privilege, and one cannot partake of that privilege without also taking on the responsibilities of complying with the regulations that govern such practice. Disbarment and suspension are imposed in furtherance of the IRS' regulatory duty to protect the public interest and the Department by conducting business with the responsible persons only.

Respondent did not respond to the Motion with any facts that mitigate a sanction. Respondent as the non-moving party may not rely merely on allegations or denials in its Answer to show the existence of a genuine issue of material fact as to the sanction. *Podobnik v. U.S. Postal Service*, 409 F.3d at 594; *Celotex Corp. v. Catrett*, 477 U.S. at 325. There are no genuine issues of fact material to the sanction to impose. Consequently, holding a hearing on the issue of sanction is unnecessary, and summary judgment on the sanction is appropriate.

Neither part contests the allegation that Respondent's CPA license was the basis for his admission to practice before the IRS; nor do they contest that without such license, Respondent cannot qualify for practice before the Agency. Compl. ¶¶ 1, 9, 12; Mot. at 2, n.1; Answer at 7. Therefore, even assuming the truth of, and crediting to the fullest extent possible, any facts or circumstances Respondent has argued or implied in mitigation of his sanction, they still cannot mitigate the imposition of a term of suspension while Respondent is not qualified to practice. Once Respondent is suspended, Respondent's readmission to practice before the IRS will depend on the Agency's discretion ultimately in accordance with the provision of 5 U.S.C. § 500(c) ("duly qualified"), 31 U.S.C. § 330(a)(2)(C) ("necessary qualifications"), 31 C.F.R. § 10.2(a)(2) ("duly qualified"), 31 C.F.R. § 10.3(b) ("currently qualified as a certified public accountant"). *See also* 31 C.F.R. § 10.79(d) (after suspension, OPR may impose conditions on the a [sic] practitioner's practice that are "designed to promote high standards of conduct").

Therefore, the sanction of suspension until Respondent is qualified to practice before the Agency, with reinstatement dependent upon the qualifications set forth by the Rules, is commensurate with the nature of Respondent's disreputable conduct.

[3] However, Subpart A's conditions for admission as stated in the statutory and regulatory sections referenced above do provide guidance as to an appropriate length of suspension, given that they would guide or govern any attempt by Respondent to re-apply to practice before the Agency.

ORDER

It is hereby **ORDERED** that:

1. Complainant's Motion for Summary Judgment is **GRANTED;**

2. The hearing in this proceeding scheduled to commence June 28, 2011, is **CANCELLED;**

3. Respondent is hereby found to have engaged in disreputable conduct within the meaning of 31 C.F.R. § 10.50 as alleged the Complaint; and therefore,

4. Respondent **WALTER H. ROSS** is **SUSPENDED** from practice before the Internal Revenue Service until his CPA license is restored or he otherwise becomes qualified to practice, and when he meets all other criteria and conditions for practicing before the Agency.

/s/
Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency[4]

Dated: June 7, 2011
Washington, D.C.

NOTICE OF APPEAL RIGHTS

Pursuant to 31 C.F.R. § 10.76(d), unless appealed, this Decision will become final thirty (30) days after its issuance. Any appeal, in duplicate, must be filed within thirty (30) days pursuant to 31 C.F.R. § 10.77, with the Director of the Office of Professional Responsibility, and shall include a brief that states the appellant's exceptions to the Decision of the Administrative Law Judge and supporting reasons therefor.

[4] The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the United States Department of the Treasury, pursuant to an Interagency Agreement dated October 1, 2008.

In the Matter of Walter H. Ross, Respondent
Complaint No. 2011-01

CERTIFICATE OF SERVICE

I certify that a true copy of **Order Granting Complainant's Motion For Summary Judgment**, dated June 7, 2011, was sent this day in the following manner to the addresses listed below:

/s/
Maria Whiting-Beale
Staff Assistant

Dated: June 7, 2011

Copy by First Class Regular Mail and Facsimile To:

Andrew M. Greene, Attorney
Internal Revenue Service
Office of Chief Counsel
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Copy by First Class Regular Mail and E-Mail To:

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Ross Tax & Accounting Co.
Address Redacted
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