



**CONTENTS**

	<u>Page</u>
AUTHORITIES.....	iv
JURISDICTIONAL STATEMENT.....	1
STATEMENT OF FACTS.....	2
POINTS RELIED ON.....	8
ARGUMENT .....	10

Point I: The Administrative Hearing Commission erred in finding the Board could not consider revocation of Kossmeyer’s individual CPA license, which was stayed pending judicial review, in exercising its discretion to deny a new firm permit to IFS, because the Board’s statutes and promulgated regulations require all owners who will offer professional services in this state to maintain their individual CPA license status in that Kossmeyer’s revocation rendered him ineligible to be an owner of CPA firm. ....	10
Standard of Review .....	10
Analysis .....	11

Point II: The Administrative Hearing Commission erred in holding that, upon the application for a CPA permit by a newly-formed firm for a CPA permit, the Board may consider only actions taken on behalf of the applicant, and not the fitness of individual owners, because such a finding is inconsistent with both the regulatory purpose and language of Chapter

326, RSMo, in that IFS, as an applicant, does not have a prior history with the Board and, therefore, the Board must examine the circumstances of IFS’s ownership in considering the issuance or denial of a firm permit.

Standard of Review .....	20
Analysis .....	21
CONCLUSION .....	27
CERTIFICATE OF COMPLIANCE .....	28
CERTIFICATE OF SERVICE.....	29
APPENDIX .....	Separate Volume

**AUTHORITIES**

Page

**Cases**

*Dabin v. Dir. of Revenue*, 9 S.W.3d 610 (Mo. 2000)..... 24

*David Ranken, Jr. Technical Inst. v. Boykins*, 816 S.W.2d 189 (Mo. banc 1991)..... 15

*Fox v. Dir. of Insurance*, 1993 WL 13007900 (Mo. AHC) ..... 17

*Francois v. State Bd. of Reg. for the Healing Arts*,  
880 S.W.2d 601 (Mo.App. E.D. 1994) ..... 11

*Gott v. Dir. of Revenue*, 5 S.W.3d 155 (Mo. 1999)..... 9, 20, 21, 24

*Hughes v. State Bd. of Health*, 159 S.W.2d 277 (Mo. 1942) ..... 8, 15

*Jerry-Russell Bliss, Inc. v. Hazardous Waste Management Comm.*,  
702 S.W.2d 77 (Mo. 1985).....9, 23-24

*Maxwell v. Davies Co.*, 190 S.W.3d 606 (Mo.App. W.D. 2006)..... 24

*Mo. Bd. of Occupational Therapy v. Scott*, 2004 WL 345398 (Mo. AHC) ..... 18

*Mo. State Bd. of Accountancy v. Arthur Andersen*, 2003 WL 22128884 (Mo. AHC)..... 18

*Moore v. Board of Educ.*, 836 S.W.2d 943 (Mo. banc 1992) ..... 16

*Psychcare Mgmt, Inc. v. Dept. of Soc. Serv. Div. of Med. Serv.*,  
980 S.W.2d 311 (Mo. banc 1998) ..... 13

*Reed v. Rhodes*, 472 F.Supp. 603 (DC Ohio 1979)..... 9, 16, 18

*Ritter v. BJC Health Systems*, 987 S.W.2d 377 (Mo.App. E.D. 1999) ..... 8, 23

*Rundquist v. Dir. of Revenue*, 62 S.W.3d 634 (Mo.App. E.D. 2001) ..... 14

*Russell v. Mo. State Employees Retirement Sys.*, 4 S.W.3d 554 (Mo.App. W.D. 1999) .. 21

<i>Authorities, cont.</i>	<u>Page</u>
<i>State v. Nelson</i> , 9 S.W.3d 687 (Mo. App., E.D. 1999).....	18
<i>State Bd. of Reg. for the Healing Arts v. McDonagh</i> ,	
123 S.W.3d 146 (Mo. banc 2003) .....	9, 20
<i>State ex rel. Dir. of Revenue v. Scott</i> , 919 S.W.2d 296 (Mo.App. W.D. 1996).....	25
<i>State ex rel. Lentine v. State Bd. of Health</i> , 65 S.W.2d 943 (Mo. 1933) .....	18
<i>Tendai v. Mo. State Bd. of Reg. for the Healing Arts</i> , 161 S.W.3d 358 (Mo. 2005) ....	9, 20
<i>United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharmacy</i> ,	
159 S.W.3d 36 (Mo. 2006).....	13
<i>Wasem v. Mo. Dental Bd.</i> , 405 S.W.2d 492 (Mo.App. 1966).....	18
 <b><u>Missouri Constitution</u></b>	
Article V, Section 10 .....	1
 <b><u>Revised Statutes of Missouri</u></b>	
Section 326.253, RSMo .....	11, 14, 24
Section 326.256, RSMo .....	11
Section 326.280, RSMo .....	12
Section 326.289, RSMo .....	5, 6, 8, 11, 12, 13, 14, 17, 19
Section 326.292, RSMo .....	12
Section 326.310, RSMo .....	3, 5, 6, 9, 11, 13, 14, 21, 22
Section 375.141, RSMo .....	24, 25

<i>Authorities, cont.</i>	<u>Page</u>
Section 536.120, RSMo.....	3, 15
Section 536.140, RSMo.....	9, 20
 <b><u>Code of State Regulations</u></b>	
4 CSR 10-2.005 .....	11
4 CSR 10-2.051 .....	12, 13
4 CSR 10-2.070 .....	12, 13
4 CSR 10-2.072 .....	12, 13
4 CSR 10-2.095 .....	12, 13
20 CSR 2010-2.070 .....	13
 <b><u>Other Reference Authorities</u></b>	
Blacks Law Dictionary, 6 <sup>th</sup> Ed., (1990).....	15

## **JURISDICTIONAL STATEMENT**

The fundamental issue presented is whether the Missouri State Board of Accountancy may exercise its discretion to deny an application for a public accounting firm permit based on the criminal conduct of a 49% shareholder of that entity, when such conduct (a) constituted fraud, dishonesty, and moral turpitude; (b) related directly to the owner's qualifications to be a CPA; and (c) occurred before the legal formation of the entity seeking licensure.

After opinions by the Administrative Hearing Commission, the Circuit Court of Cole County, and the Court of Appeals, this Court granted transfer. This Court has jurisdiction pursuant to Article V, Section 10 of the Missouri Constitution.

## **STATEMENT OF FACTS**

Integrated Financial Solutions, LLC, (“IFS”) applied for a Certified Public Accountant firm permit on February 9, 2005. (LF 37-38.) On its application, IFS listed three owners, each of whom would be offering professional services to potential clients in Missouri: Steven Strauss, Judy Elias, and Carl Kossmeyer. Kossmeyer controlled 49% of the company shares, Strauss controlled 40%, and Elias controlled the remaining 11%. (TR 99.) Strauss and Elias were, and are, both licensed by the Board as individual CPAs and in good standing. However, Kossmeyer’s individual CPA license was revoked by the Board in 2001 based upon a felony conviction for wire fraud. At the time of IFS’s application, the Board’s revocation of Kossmeyer’s individual CPA license was stayed by the Circuit Court of St. Louis pending judicial review.

Kossmeyer’s criminal conviction occurred in 1999 when Kossmeyer pled guilty to wire fraud in the United States District Court for the Eastern District of Missouri in *United States v. Kossmeyer*, case no. 4:99CR343JCH. As part of his plea, he admitted that he “knowingly participated in a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations, and promises.” (LF 105.) Kossmeyer stipulated to the facts surrounding his conviction, which included a marketing scheme through a joint venture known as S & K Acquisition Group, Inc. As part of the scheme, Kossmeyer and his partner marketed a program to show clients how to acquire businesses without using any of their own funds. Kossmeyer’s involvement was substantial: he offered a training course which could be taken in person or through home

study at a purchase price of \$7,500 or \$495, respectively; Kossmeyer was listed as the author of a book, “How To Buy or Start Any Kind of Business Without Any of Your Own Cash” in which his photograph and CPA title were displayed on the cover; and Kossmeyer and his partner prepared and distributed a promotional video to potential buyers. All of these materials contained false statements of “success stories” of prior clients which attributed their success to the valuable assistance of Kossmeyer and his firm. Kossmeyer was convicted and sentenced to six months of house arrest, fined \$100.00 and ordered to pay \$93,726.00 in unpaid restitution.<sup>1</sup> (LF 40, 62; App. 37; TR 14.)

Despite Kossmeyer’s guilty plea and conviction, Kossmeyer fought the Board’s disciplinary action before the Administrative Hearing Commission. On summary determination, the Commission determined that Kossmeyer’s individual license to practice as a CPA was subject to discipline pursuant to Section 326.310.2(2), RSMo, because he pled guilty to fraud and his crime demonstrated he lacked good moral character, which is an essential element required for licensure. (LF 62.) After a disciplinary hearing, the Board revoked Kossmeyer’s individual license by its order dated

---

<sup>1</sup> In addition to his federal conviction, Kossmeyer was enjoined by the Federal Trade Commission from engaging in misrepresentation of sales and marketing and was fined \$265,000.00 collectively with the S&K Group, Inc., as a result of his involvement in the fraud relating to his conviction. *Federal Trade Comm. v. Neiswonger et al*, United States District Court for the Eastern District of Missouri, case no. 4:96CV02225 SNL.

June 26, 2001. (LF 62.)

Kossmeyer sought judicial review of the revocation of his license in accordance with Section 536.120, RSMo. His petition was filed in the Circuit Court of St. Louis, and a stay of the Board's revocation order was summarily issued in 2001. (LF 39, 74.) During the judicial review, the Board sought a dissolution of the stay or, at a minimum, a timely resolution of the review. (App. 36.) The Board's motions were routinely denied. The Circuit Court did not issue a ruling on the matter until July 25, 2005, in which it affirmed the Board's order of revocation. (LF 102.) Kossmeyer sought appellate review, and the Missouri Court of Appeals for the Eastern District affirmed the revocation in 2006 in *Kossmeyer v. Mo. State Bd. of Accountancy*, 199 S.W.3d 778 (Mo.App. E.D. 2006) (LF 98-108).

While Kossmeyer's individual appeal was pending, Kossmeyer formed IFS with Strauss and Elias as a Missouri Limited Liability Company. IFS was established with the Missouri Secretary of State in 2001, noticeably after the revocation order was issued against Kossmeyer's individual license. In the meantime, Strauss and Elias were each associated with another CPA firm, Strauss and Elias, PC.<sup>2</sup> (TR 100-101, 107.) IFS did

---

<sup>2</sup> Judy Elias and Steven Strauss have been part of a professional corporation which holds a certified public accounting firm permit, number P00319276, originally issued to Strauss and Elias, P.C. in 1988, which is a CPA firm unrelated to IFS. In addition, both Mr. Strauss and Ms. Elias are individual CPA's who have registered their place of business with the Board as a company called "Strauss and Company, P.C." (Affidavit of Tom

not apply for a CPA firm permit until February, 2005, in the months prior to the St. Louis County Circuit Court issuing a final decision after four years of judicial review.

By letter of March 4, 2005, the Board denied IFS's application for a firm permit. The Board cited Kossmeyer's association with the firm, his conviction for fraud, and the stayed revocation of his license as its basis for denial under the provisions of Chapter 326, RSMo, and the Board's promulgated regulations. (LF 40-42, 43-49.) Focusing on the admissions made by Kossmeyer during his guilty plea proceedings in federal court, the Board noted his intentional conduct of devising "a scheme and artifice to defraud and to obtain money by means of false pretenses, representations, and promises. . . ." The Board further found that Kossmeyer's fraud, misrepresentation, and dishonesty bore directly on his "performance of the functions or duties of a CPA," because Kossmeyer had capitalized on his status as a CPA and his claim of "expertise" as such to perpetrate his fraudulent scheme on the public. Relying on its statutory authority to deny an application for any license or permit under Section 326.310.2(2), (5), (6), and (13), RSMo, the Board concluded:

For these reasons, Mr. Kossmeyer's criminal conviction and the underlying conduct related to his criminal offense reflect adversely on the firm as a whole and demonstrates the firm's lack of fitness to engage in the practice

---

DeGroodt, attached to the Board's Application for Stay filed in the Missouri Court of Appeals.)

of accounting.<sup>3</sup> (LF 41.)

IFS sought review before the Administrative Hearing Commission. As a factual finding, the Commission recognized that Kossmeyer “could be subject to discipline and license denial.” (App. 11.) Further, the Commission agreed, as initial legal predicates, that the Board:

- (a) has discretion rather than a mandate to grant or deny licensure (App. 5.);
- (b) may deny an application for a firm permit as well as an individual license for any of the reasons listed in Sections 326.310 and 326.289, RSMo, (App. 8-9.); and
- (c) has a primary duty to protect the public, understanding that a license places the state’s seal of approval on the licensee. (App. 11.)

Notwithstanding the Commission’s recognition of the Board’s authority under Chapter 326, RSMo, it ordered the Board to issue a permit to IFS. First, it held that, because Kossmeyer’s conduct at issue occurred prior to the formation of IFS, that conduct could not be considered in connection with whether the firm met licensing standards. (App. 8-12.) Second, noting that the revocation of Kossmeyer’s CPA license was predicated on his felony conviction, the Commission did not give any deference to the Board’s reliance upon the facts leading to Kossmeyer’s criminal conviction. (App. 12-13.) Third, it rejected as “speculation” whether Kossmeyer’s revocation would be

---

<sup>3</sup> The Board also noted that once the inevitability of Kossmeyer’s individual license revocation was affirmed, that would provide an additional basis for denying IFS’s application, pursuant to Sections 326.310.3 and 326.289.4(1), RSMo. (LF 41.)

upheld and the stay lifted, while nonetheless implicitly recognizing the revocation would be an independent basis for refusing to grant IFS a permit. (App. 14). Based upon these conclusions, the Commission entered an order requiring the Board to issue IFS a firm permit.

The matter was then appealed to the Circuit Court of Cole County, which affirmed the Commission's Decision. The Circuit Court found IFS was qualified for licensure because "a majority of the ownership and voting interest of IFS is held by certified public accountants, licensed by the State of Missouri." (LF 137.)

The Board appealed to the Missouri Court of Appeals, Western District, which issued a stay of the issuance of a CPA firm permit to IFS pending appeal. The Court of Appeals subsequently affirmed the Commission's Decision.

This Court accepted transfer after timely application by the Board.

**POINTS RELIED ON**

**I. The Administrative Hearing Commission erred in finding the Board could not consider revocation of Kossmeyer’s individual CPA license, which was stayed pending judicial review, in exercising its discretion to deny a new firm permit to IFS, because the Board’s statutes and promulgated regulations require all owners who will offer professional services in this state to maintain their individual CPA license status in that Kossmeyer’s revocation rendered him ineligible to be an owner of CPA firm.**

*Reed v. Rhodes*, 472 F.Supp. 603 (DC Ohio 1979)

*Hughes v. State Board of Health*, 159 S.W.2d 277 (Mo. 1942)

Section 326.289, RSMo

Section 536.120, RSMo

**II. The Administrative Hearing Commission erred in holding that, upon the application for a CPA permit by a newly-formed firm for a CPA permit, the Board may consider only actions taken on behalf of the applicant, and not the fitness of individual owners, because such a finding is inconsistent with both the regulatory purpose and language of Chapter 326, RSMo, in that IFS, as an applicant, does not have a prior history with the Board and, therefore, the Board must examine the circumstances of IFS’s ownership in considering the issuance or denial of a firm permit.**

Section 326.310, RSMo

*Ritter v. BJC Health Systems*, 987 S.W.2d 377 (Mo.App. E.D. 1999)

*Jerry-Russell Bliss, Inc. v. Hazardous Waste Mgmt. Comm.*,  
702 S.W.2d 77 (Mo. 1985)

## ARGUMENT

**I. The Administrative Hearing Commission erred in finding the Board could not consider revocation of Kossmeyer’s individual CPA license, which was stayed pending judicial review, in exercising its discretion to deny a new firm permit to IFS, because the Board’s statutes and promulgated regulations require all owners who will offer professional services in this state to maintain their individual CPA license status in that Kossmeyer’s revocation rendered him ineligible to be an owner of CPA firm.**

### Standard of Review

The standard of review of an administrative decision where the Administrative Hearing Commission has interpreted the law or the application of facts to law is *de novo*. *Tendai v. Mo. State Bd. of Reg. for the Healing Arts*, 161 S.W.3d 358, 365 (Mo. 2005) (citing *State Bd. of Reg. for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 152 (Mo. banc 2003)). “To the extent that [the] conclusions of law contain statements of fact or ultimate fact, the Court defers to the commission as fact finder if the conclusions are supported by competent and substantial evidence when considering the record as a whole.” *Id.* (citing Section 536.140.2, RSMo; *McDonagh*, 123 S.W.3d at 152). “However, this Court owes no deference to the AHC’s decisions on questions of law, which are matters for this Court’s independent judgment.” *Gott v. Dir. of Revenue*, 5 S.W.3d 155 (Mo. 1999) (additional citations omitted).

## Analysis

Section 326.253, RSMo, sets out the Board’s overarching, legislatively-mandated duty: protect the public and ensure the integrity of the CPA profession. Discharge of this responsibility necessarily requires examination of the fitness of those who practice in the profession, whether as individuals or in the context of CPA firm. As the applicant, IFS has the burden of proving it meets the qualifications to be issued a firm permit. *Francois v. State Bd. of Reg. for the Healing Arts*, 880 S.W.2d 601, 603 (Mo.App. E.D. 1994) (denying reinstatement of a revoked licensee because the licensee failed to demonstrate rehabilitation of his moral character after a felony conviction). That burden requires IFS to demonstrate that it meets the threshold qualifications under Section 326.289, RSMo, and is otherwise fit for licensure under Section 326.310, RSMo.

Section 326.289, RSMo, specifically treats firm permits. The Board **may** grant a new firm permit, provided the applicant meets threshold requirements: (1) a majority of owners must be licensed CPAs in some state; (2) every owner who offers professional services in this state must be a licensed CPA in Missouri; (3) all owners, whether licensed or not, must be active individual participants in the firm; and (4) a firm may have a minority owner who is not a licensee, provided that owner does not perform any professional services in Missouri.<sup>4</sup> Section 326.289.1 and .4, RSMo. IFS must thus

---

<sup>4</sup> “Professional services” is defined by 4 CSR 10-2.005(7) as “any services including all services performed by a member while holding himself or herself out as a CPA.” “Professional” is also defined in Section 326.256.1(16), RSMo, as “arising out of or

demonstrate that “the partners, officers, principals, shareholders, members or managers, whose principal place of business is in this state and who perform professional services in this state are licensees pursuant to section 326.280.” Section 326.289.4(1), RSMo. Additionally, all CPAs who work in a CPA firm, must maintain their license in good standing. 4 CSR 10-2.051(8), 4 CSR 10-2.070(3)<sup>5</sup>, 4 CSR 10-2.072(5), 4 CSR 10-2.095.

Under the clear language of this section as well as the Board’s promulgated rules, if IFS applied for a CPA firm permit today, the law would prohibit the Board from issuing the firm permit because the revocation of Kossmeyer’s individual license has been (finally) upheld on appeal. Section 326.289.4, RSMo; 4 CSR 10-2.051(8), 4 CSR 10-2.070(3), 4 CSR 10-2.072(5), 4 CSR 10-2.095 (requiring CPAs to maintain their current licensure status where employed in a CPA firm). Even had IFS become licensed prior to the finality of Kossmeyer’s appeal, Sections 326.289.8 and 326.292.3(2), RSMo, requires IFS to bring the firm into compliance with the provisions of Section 326.289, RSMo, in the event of changes in firm ownership. Kossmeyer’s revocation would bring the firm out of compliance with Section 326.289.4, RSMo, and the firm would be subject to revocation of the permit pursuant to Section 326.289.8, RSMo.

The law places the responsibility to maintain licensure status on both the  

---

related to the specialized knowledge or skills associated with certified public accountants.” Professional services is also governed by Section 326.292, RSMo.

<sup>5</sup> 4 CSR 10-2.070 was amended effective October 31, 2006 in order to clarify the language of the rule and is found at 20 CSR 2010-2.070. (App. 35.)

individual and the firm. Sections 326.289.4(2)(c) and .8, RSMo; 4 CSR 10-2.051(8), 4 CSR 10-2.070(3), 4 CSR 10-2.072(5), 4 CSR 10-2.095. (App. 31-35.) For example, Board rule 4 CSR 10-2.051(8) states:

Each certified public accounting firm shall attest that all employees, representatives and agents practicing public accounting in Missouri and all Missouri resident partners, members, managers and shareholders of certified public accounting firms who hold Missouri certificates issued under prior law or any individual who received an initial license after August 28, 2001, hold an active Missouri license to practice in a certified public accounting firm.

The rules regarding a firm's responsibility to ensure its employees maintain their license "have independent power as law." *United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharm.*, 159 S.W.3d 361, 365 (Mo. 2006) (citing *Psychcare Mgmt., Inc. v. Dept. of Soc. Serv. Div of Med. Serv.*, 980 S.W.2d 311, 313-14 (Mo. banc 1998)). Thus, as a matter of law, all CPA firms are responsible for ensuring that its licensees maintain their license in good standing.

Receiving a firm CPA permit is a matter of privilege, not a right based on the mathematics of LLC ownership percentage. Section 326.289, RSMo, provides that the Board **may** issue a firm permit if the minimum qualifications are met; it does not **require** that it do so. The legislature certainly understands the important legal distinction between the discretionary "may," as used in Sections 326.289 and 326.310, RSMo, and

the mandatory “shall.” *Rundquist v. Dir. of Rev.*, 62 S.W.3d 634, 646 (Mo.App. E.D. 2001) (discussing statutory interpretation for mandatory and discretionary acts of a state agency). As such, the legislature authorized the Board to exercise its discretion in issuing or denying applications for the practice of public accountancy. Even the Commission recognized that the Board, in the discharge of its legislative mandate, had to look at the fitness factors of Section 326.310, RSMo, in the context of IFS’s application, an obligation mandated by the Board’s responsibility established by Section 326.253, RSMo.

At the time of IFS’s application, Kossmeyer was listed as an owner who would be providing professional services on behalf of the proposed CPA firm. (LF 38.) IFS was aware that his license had been revoked because he had been convicted of a white collar crime directly and inextricably intertwined with his activities as a public accountant. (TR 107.) To be sure, he had obtained a stay of the effect of that conviction pending judicial review of the revocation of his individual license, a proceeding which ultimately spanned five years as it wound its way through the lower courts.

The question is thus whether in deciding to issue IFS a CPA firm permit pursuant to Sections 326.289 and 326.310, RSMo, the Board was entitled to exercise its discretion in examining the revocation of Kossmeyer’s individual license and its impact upon the qualifications of IFS to practice public accountancy under the state’s seal of approval. The answer must be “yes,” both as a matter of law and public policy.

The well-recognized rule of law is that the powers conferred upon licensing

boards should receive liberal construction in order to enable them to safeguard the public health. *Hughes v. State Board of Health*, 159 S.W.2d 277, 278 (Mo. 1942). In revoking Kossmeyer's individual license, the Board determined that he was not fit to practice in the profession. A temporary stay of the Board's revocation order does not magically make him fit or vaporize the facts of his conduct, requiring the Board to put on blinders as to substance because of the mere existence of process.

The general rule of the effect of a stay is cited by Black's Law Dictionary, 6<sup>th</sup> Ed., pg. 1413, in the case of *Reed v. Rhodes*, 472 F.Supp. 603, 605 (DC Ohio 1979). There, the court found:

A stay does not reverse, annul, undo, or suspend what has already been done or what is not specifically stayed. Nor does a stay impair the force, or pass on the merits of the orders of the trial court. A stay merely suspends the time required for the performance of the particular mandates stayed. The sole purpose of a stay is to preserve the status quo pending an appeal so that the appellant may reap the benefit of a potentially meritorious appeal.

The stay order did not erase Kossmeyer's conviction and the facts of his intentional misconduct relating thereto, nor did it offer any assurance to the Board that Kossmeyer is fit to practice public accountancy. *Reed*, 472 F.Supp. at 605. See *Hughes*, 159 S.W.2d at 279 (finding that even a presidential pardon of a criminal conviction does not restore character and does not affect the Board's ability to revoke a license). The rule of *Reed* is

also consistent with the statutory intent of Section 536.120, RSMo,<sup>6</sup> to temporarily stay an order, while at the same time not to prejudice the public interest.

Certainly, maintaining the *status quo* may often be appropriate in licensing cases, as it serves an important part of due process. However, in this case, the issuance of a firm permit to IFS, where Kossmeyer is an owner and a provider of professional services on behalf of a proposed firm, would work a fundamental change in the *status quo*. Requiring the Board to issue IFS a CPA firm permit gives Kossmeyer a new and separate license distinct from his individual license to work as a CPA pending his judicial review. This new license is a property interest which is recognized and protected by procedural due process. *Dabin v. Dir. of Revenue*, 9 S.W.3d 610, 613 (Mo. 2000) (citing *Moore v. Board of Educ.*, 836 S.W.2d 943, 948 (Mo. banc 1992)). It is one thing to allow a CPA to continue to work during the pendency of a stay of revocation of his license; it's quite another to require the Board to grant a permit to a new firm in which he is a member and owner and through whose state-sanctioned name he will continue to practice, even after (as now) his revocation becomes final and unappealable.

It's not as if Kossmeyer didn't set time records for maintaining his CPA license after his felony conviction. The elephant in the room here – but very visible to the Board in considering IFS's permit – is the sheer length of time it took for Kossmeyer's

---

<sup>6</sup> Section 536.120, RSMo, states that “no such stay or other temporary relief shall be granted or continued unless the court is satisfied that the public interest will not be prejudiced thereby.”

revocation to be affirmed by the courts. Throughout the Circuit Court review, the Board sought a timely decision upon the merits; Kossmeyer certainly had no incentive to expedite the proceedings. (App. 45.) The point is not to be critical of overtaxed judicial resources; the point is that these kinds of delays can happen, and that fact militates in favor of the Board's discretion to treat Kossmeyer as unlicensed in considering IFS's application for purposes of Section 326.289, RSMo, and the Board's rules requiring current license status.

The Commission's talismanic approach to the concept of a stay, coupled with its insistence that a new firm has no history and that the conduct of its owners is irrelevant,<sup>7</sup> creates a perfect storm threatening to destroy the Board's effectiveness in protecting the public. Suppose, for example, three CPAs are convicted for perpetrating a financial fraud on the public. Their licenses are revoked, but they obtain a stay pending judicial review. They then form a new LLC and apply for a firm permit. The Commission would require the Board to issue that permit, because they are technically still "licensed," and their conduct could not be "imputed" to the newly-formed firm. If, as here, the stay remains in effect for five years, there's certainly nothing, in the Commission's view, to prevent this cycle from recurring. Suppose the same CPA's continue to commit financial crimes while members of the new firm. Notwithstanding any efforts of the Board, nothing under the holdings of the Commission would prevent them from forming yet another new firm,

---

<sup>7</sup> The legal error in the Commission's holding with respect to the applicability of Kossmeyer's conduct is discussed in Point II, *infra*.

and, as long as the stay of the revocation of individual licenses is in place, receiving a permit for that new “no history” entity. The stay thus becomes a “weapon for delay and confusion.” *Reed*, 472 F.Supp. at 605.

The Commission has not been so dismissive of a licensing board’s responsibilities in other contexts. For example, in *Mo. Bd. of Occupational Therapy v. Scott*, the same Commissioner that ruled on the IFS application reasoned that the stay of a revocation order was the equivalent of “discipline” for determining whether the licensee had been disciplined in another state. 2004 WL 345398 (Mo. AHC). In that case, the Commission gave deference to the licensing board’s findings despite the issuance of a stay.

The Commission has also recognized the similarity in appeals of criminal convictions and reasoned that “the public welfare takes priority over the individual applicant’s hope that he might get the conviction overturned.” *Fox v. Dir. of Insurance*, 1993 WL 13007900, pg. 3 (Mo. AHC). This principle is even stronger where the consideration is the issuance of a license versus the imposition of discipline. *Id.* at 4. This is so because once a license is granted, the licensee is given the state’s “seal of approval”. *Id.* (citing *State ex rel. Lentine v. State Bd. of Health*, 65 S.W.2d 943, 950 (Mo. banc 1933)); *Wasem v. Mo. Dental Bd.*, 405 S.W.2d 492, 497 (Mo.App. 1966) (citations omitted). Moreover, there is no vested right in the issuance of a license. *Jerry-Russell Bliss, Inc. v. Hazardous Waste Management Comm.*, 702 S.W.2d 77, 81 (Mo. 1985).

Even in *Mo. State Bd. of Accountancy v. Arthur Andersen*, the Commission

recognized that an appeal in a criminal case does not “render the decision any less a conviction.” 2003 WL 22128884 (Mo. AHC) (citing *State v. Nelson*, 9 S.W.3d 687 (Mo. App., E.D. 1999) (judgment was final when trial court imposed sentence)). Therefore, where a licensee is convicted of a crime, the Board may seek discipline despite the fact the licensee appeals, even where the conviction is stayed. There is no rational basis to distinguish a stay of a disciplinary action from a stay issued in other contexts.

The Commission recognized that but for the temporary stay of another proceeding, IFS would not be qualified for a firm permit at the time of its application. (App. 14.) The law simply cannot be that the Board must give IFS its seal of approval, when IFS’s qualification is tenuously based solely upon a stay of an owner’s individual license revocation. The revocation of Kossmeyer’s individual CPA license, regardless of the status of the stay, should have been considered and examined by the Commission. Indeed, now that the appeal of Kossmeyer’s individual license revocation is final, there can be no doubt that Kossmeyer is ineligible to be an owner of a licensed CPA firm pursuant to Section 326.289, RSMo, and the numerous promulgated regulations.

For all the reasons stated above, the Decision of the Commission issuing IFS a CPA firm permit should be reversed.

**II. The Administrative Hearing Commission erred in holding that, upon the application for a CPA permit by a newly-formed firm for a CPA permit, the Board may consider only actions taken on behalf of the applicant, and not the fitness of individual owners, because such a finding is inconsistent with both the regulatory purpose and language of Chapter 326, RSMo, in that IFS, as an applicant, does not have a prior history with the Board and, therefore, the Board must examine the circumstances of IFS’s ownership in considering the issuance or denial of a firm permit.**

Standard of Review

The standard of review of an administrative decision where the Administrative Hearing Commission has interpreted the law or the application of facts to law is *de novo*. *Tendai v. Mo. State Bd. of Reg. for the Healing Arts*, 161 S.W.3d 358, 365 (Mo. 2005) (citing *State Bd. of Reg. for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 152 (Mo. banc 2003)). “To the extent that [the] conclusions of law contain statements of fact or ultimate fact, the Court defers to the commission as fact finder if the conclusions are supported by competent and substantial evidence when considering the record as a whole.” *Id.* (citing Section 536.140.2, RSMo; *McDonagh*, 123 S.W.3d at 152). “However, this Court owes no deference to the AHC’s decisions on questions of law, which are matters for this Court’s independent judgment.” *Gott v. Dir. of Revenue*, 5 S.W.3d 155 (Mo. 1999) (additional citations omitted).

### Analysis

The Commission, as it must, recognized that under Section 326.310, RSMo, the Board has express authority to deny a firm permit based upon any of the acts listed in the statute, including criminal convictions. *Gott*, 5 S.W.3d at 159 (“Administrative agencies have only those powers expressly conferred or reasonably implied by statute”) (additional citation omitted). Reasonably construing Chapter 326, RSMo, if a firm applicant meets the threshold qualifications of Section 326.289, RSMo, the Board then may turn to the fitness factors of Section 326.310, RSMo. *Russell v. Mo. State Employees Retirement Sys.*, 4 S.W.3d 554, 556 (Mo.App. W.D. 1999) (statutes must be read in *pari materia* with other statutes on the same issue).

That is precisely what the Board did in considering IFS’s application. Kossmeyer’s felony conviction was a matter of record, but so were the facts to which he admitted in his plea proceedings. The March 4, 2005 denial letter is explicit: The Board denied the application not only for the conviction, but because “Mr. Kossmeyer’s **underlying conduct** in this instance demonstrates, at a minimum, misconduct, fraud, misrepresentation or dishonesty in the performance of the functions or duties of a CPA.” (LF 40, emphasis added.) The specifics of that conduct were cited, demonstrating cause for denial under Section 326.310.2(2), (5), (6), and (13), based on which the Board concluded:

For these reasons, Mr. Kossmeyer’s criminal conviction and the underlying conduct relating to the criminal offense reflect adversely on the firm as a

whole and demonstrates the firm's lack of fitness to engage in the practice of accounting. (LF 40-41.)<sup>8</sup>

The question thus becomes whether, in considering a new firm permit application, the Board may consider conduct of members and owners, who propose to provide professional services to the public through the firm, which occurred before the formation of the new legal entity. The Commission said no, predicated its holding on a principle of professional licensing law that appears to be a matter not directly addressed before this Court.

The Commission reasoned that, since a corporation acts only through its agents and Kossmeyer was not an agent of IFS at the time of his conduct and conviction, it would not "impute" Kossmeyer's conduct to IFS. (App. 9-12.) The concept that an agent cannot act on behalf of a non-existent principal is undebatable. It is axiomatic that conduct of any individual occurring before IFS was formed could not be imputed to IFS. If the question before this Court were whether IFS could be held liable to a person

---

<sup>8</sup> The Commission incorrectly found that the Board denied IFS a firm permit "solely on Kossmeyer's guilty plea." (App. A-4.) There is no substantial evidence to support this finding. The denial letter itself is clear as to the basis of the Board's decision, as was the testimony before the Commission. (LF 40-42; TR 27, 31, 32, 41, 42, 45, 52-53, 56, 66.) But the factual error played no role in the Commission's ultimate decision because of its legal holding that Kossmeyer's conduct could not legally be considered in connection with the decision as to whether to grant IFS a permit.

defrauded by Kossmeyer before the firm was formed, the answer is of course a straightforward no.

But the question is not whether somehow Kossmeyer's conduct may be imputed to IFS on a *respondeat superior* basis; the question is whether the Board may examine the conduct of members of an applicant firm, without regard to when that firm was legally incorporated.<sup>9</sup> With respect, the Commission got it precisely backwards: it is **because** a corporation acts only through its agents that the Board **must** examine the qualifications of members of a new firm under the statutory standards of Section 326.310, RSMo.

For example, in *Ritter v. BJC Health Systems*, the court of appeals recognized that corporations act only through agents and the corporate affiliations should not be shielded from scrutiny. 987 S.W.2d 377, 384 (Mo.App. E.D. 1999) (finding a corporation “is an artificial being, and, as an entity it must act through an agent”) (citation omitted). This

---

<sup>9</sup> The Commission perceived that “[w]hile Kossmeyer is an owner, he is not the applicant for a firm permit.” (App. 11.) However, the language of Section 326.289, RSMo, suggests the legislature may have seen the term “applicant” in the context of a firm permit to include not only the firm, but the firm's constituent members who would provide professional services. For example, Section 326.289.7, RSMo, imposes upon “applicants” (plural) certain disclosure obligations which “they” must meet. This language is much more consistent with a legislative understanding that of course the Board must consider the fitness of all owners and members of an applicant firm rather than be limited only to facts post-dating the incorporation of that entity.

principle was also recognized by this Court in *Jerry-Russell Bliss, Inc. v. Hazardous Waste Mgmt. Comm.*, 702 S.W.2d 77 (Mo. 1985). In *Jerry-Russell*, this Court affirmed the denial of a hazardous waste license to a new corporate entity based upon the prior conduct of the individual owners despite the fact that the conduct occurred prior to both the relevant statute and the incorporation of the applicant. The Court reasoned that the prior conduct of a corporation's principals and employees is relevant in determining the qualifications of a new corporation's application for licensure.<sup>10</sup> *Id.*

A new firm by definition has no history, and a rule of law that would mandate that the Board look only at the conduct of owners at the time of their affiliation with the applicant firm would write Section 326.310, RSMo, as well as Section 326.253, RSMo, out of the statutory scheme. The holding of the Commission, which would essentially require the Board to issue a permit to any new firm, and the legislative mandate that the

---

<sup>10</sup> This Court grounded its decision in part on the fact that the new entity was a continuation of the unincorporated business operated by the applicant, facts which are not present here. But the ground of the decision applying new statutory standards to old conduct is directly analogous to the situation here. This Court in *Jerry-Russell* recognized that a person who engages in conduct that makes him a menace to the public health is no less so because of the timing of that conduct. 702 S.W.2d at 81. IFS is no more fit to hold a firm permit simply because one of its owner's criminal conduct occurred before it was formed.

Board ensure the qualifications of all licensees – firms and individuals – are mutually exclusive, and in such a conflict the legislature wins. See *Maxwell v. Davies Co.*, 190 S.W.3d 606, 610 (Mo.App. W.D. 2006) (holding the primary rule of statutory construction is to ascertain the intent of legislature from the language used, to give effect to that intent if possible, and to consider words in the statute in their plain and ordinary meaning); *Gott*, 5 S.W.3d at 159.

The Commission was erroneously reinforced in its view that the Board was prohibited from considering Kossmeyer’s fitness by its examination and interpretation of insurance law, which it found “much more clear.” First, it is not readily apparent that the insurance statutes are more lucid on the point at issue. Section 375.141.3, RSMo, the first example cited by the Commission, deals with licensing actions authorized when a violation has both occurred and neither reported nor corrected, circumstances not present here. (LF 69.) The other two sections cited, 375.141.1 and .2, RSMo, do contain the language “at any time,” but are unclear as to whether that time frame even contemplates the issue here, which is conduct prior to the formation of a professional firm.

More important, even if the legislature did speak more distinctly in the insurance context, there is no legal authority in the Uniform Accountancy Act of Chapter 326, RSMo, that would in any way prevent the Board from doing what it did – examine Kossmeyer’s conduct in the context of his firm’s application. The Commission’s frustration with the absence of legislative language that meets its standards of clarity notwithstanding, the only fair reading of Chapter 326, RSMo, is that the legislature

intended the Board to have authority to exercise discretionary powers in issuing CPA firm permits to new corporations and to consider the background of the corporate owners. The Board serves no regulatory purpose if it does not have the discretion to prohibit, under the state's seal of approval, a firm from offering the professional services of an unfit individual. See *State ex rel. Dir. of Revenue v. Scott*, 919 S.W.2d 296, 301 (Mo.App. W.D. 1996) (citing *David Ranken, Jr. Technical Inst. v. Boykins*, 816 S.W.2d 189, 192 (Mo. banc 1991) (finding "The law favors statutory construction that harmonizes with reason, gives effect to the legislature's intent, and tends to avoid absurd results.")). IFS failed to meet its burden before the Board because Kossmeyer was a 49% owner of the firm, a convicted felon, and the Board previously determined he was unfit for licensure.

For all the reasons stated above, the Decision of the Administrative Hearing Commission granting IFS a firm permit must be reversed.

## CONCLUSION

As the regulatory authority over public accountancy, the legislature has granted the Board the discretionary power to issue or deny a CPA firm permit to a new corporate applicant. In exercising this power, the Board is authorized to examine the circumstances of the applicant, including its ownership, and the fitness of these owners who will be providing professional services in Missouri. Where an applicant includes an owner with a prior criminal record and discipline of an individual license, the Board may exercise its discretion and deny licensure. The Board is thus authorized to deny IFS a CPA firm permit because its 49% shareholder is a convicted felon and the Board previously determined he was unfit to practice in the profession by the revocation of his individual license. Proof of either Kossmeyer's revocation of his individual CPA license or his felonious conduct bearing directly upon his fitness to be a licensed CPA should be sufficient to deny the corporate application of IFS for a firm permit. The Decision of the Administrative Hearing Commission granting IFS a firm permit must be reversed.

Respectfully submitted,

---

Samantha Anne Harris, Mo. Bar no. 49813  
Hearne & Green  
300-B East High Street  
Jefferson City, MO 65101  
Telephone: (573) 636-9974  
Facsimile: (573) 635-4683  
E-mail: [sharris@hearnegreen.com](mailto:sharris@hearnegreen.com)  
*Attorney for Appellant*

---

Stanley D. Davis, Mo. Bar no. 46411  
Shook, Hardy, & Bacon, LLP  
2555 Grand Blvd.  
Kansas City, MO 64108  
Telephone: (816) 559-2422  
Facsimile: (816) 421-5547  
E-mail: [sddavis@shb.com](mailto:sddavis@shb.com)  
*Attorney for Appellant*

**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing brief complies with Mo. Ct. R. 84.06(c) and Special Rule XXXII in that:

- (A) It contains 5,706 words, as calculated by the undersigned's word-processing program;
- (B) A copy of this brief is on the attached 3½-inch diskette; and that
- (C) The diskette has been scanned for virus by the undersigned's anti-virus program and is free from any virus.

\_\_\_\_\_  
Samantha Anne Harris

**CERTIFICATE OF SERVICE**

I hereby certify that I did, on March 20, 2008, forward an electronic copy of the foregoing brief to Dennis K. Hoffert via e-mail and two true copies and a diskette of the foregoing brief by first class U.S. mail, postage prepaid, to the attorneys for Respondent:

Dennis K. Hoffert  
Attorney at Law  
P.O. Box 4600  
St. Louis, MO 63108

Stefan Glynias  
Lashly & Baer, PC  
714 Locust Street  
St. Louis, MO 63101

---

Samantha Anne Harris