

IN THE MISSOURI SUPREME COURT

MISSOURI STATE BOARD OF)
ACCOUNTANCY,)
)
Appellant,)
)
vs.) **Case No. SC89037**
)
INTEGRATED FINANCIAL)
SOLUTIONS, LLC,)
)
Respondent.)
)

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY
THE HONORABLE RICHARD G. CALLAHAN, JUDGE

RESPONDENT’S SUBSTITUTE BRIEF

Respectfully submitted,

Dennis K. Hoffert # 28446
Law Office of Dennis K. Hoffert
P.O.Box 4600
St. Louis, MO 63108-0600
Tel. (314) 566-5417
Fax. (314) 367-7115
Email: dkhmsm@aol.com

Stefan J. Glynias #21934
Lashly & Baer, P.C.
714 Locust Street
St. Louis, MO 63101-1699
Tel. (314) 621-2939
Fax. (314)621-6844
Email: sglynias@lashlybear.com

Attorneys for Respondent.

TABLE OF CONTENTS

Table of Contents.....	p. 1
Table of Cases, Statutes and Authorities.....	pp. 2-4
Jurisdictional Statement.....	p. 5
Statement of Facts.....	pp. 6-9
Points Relied On.....	pp. 10-11
Standard of Review.....	p. 12
Argument.....	pp. 13-37
Conclusion.....	p. 38
Signature of Counsel.....	p. 39
Certification.....	p. 40-41
Appendix Table of Contents.....	p. 42
Appendix.....	pp. A1-A5

TABLE OF CASES, STATUTES AND AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bachtel v. Miller County Nursing Home District</i> , 110 S.W. 3d 805 (Mo. banc 2003).....	16
<i>Besard v. Gibbar, H & G Marine Services, Inc.</i> 982 S.W. 2d 808 (Mo. App. E.D. 199).....	28
<i>Bollinger v. Wartman</i> , 24 S.W.3d 731 (Mo. App. E.D. 2000).....	12
<i>Brown v. Melahm</i> , 824 S.W. 2d 930 (Mo. App 1992).....	23
<i>Estate of Croom v. Bailey</i> , 107 S.W.3d 457 (Mo. App. S. D.2003).....	11,15
<i>Fehrman v. Blant</i> , 825 S.W.2d 658 (Mo. App. 1992).....	23
<i>Hossaini v. Western Missouri Medical Center</i> , 140 F.3d 1140, (8 th Cir.1998),.....	27
<i>J.C. Nichols Co. v. Director of Revenue</i> , 796 S.W.2d 16 (Mo. banc 1990).....	11,36
<i>Jensen v. Jensen</i> , 877 S.W.2d 131 (Mo. App. E.D. 1994).....	28
<i>Jerry-Russell Bliss, Inc. v. Hazardous Waste Management Comm.</i> , 702 S.W.2d 77 (Mo 1985).....	11,35
<i>Konstantinidis v. Chen</i> , 626 F2d 933 (D.C. Cir. 1980).....	31

Kossmeyer v. Missouri State Bd. of Accountancy, 199 S.W. 3d 778 (Mo. App. E.D. 2006).....28

Monterrey Development Corporation v. Lawyers Title Insurance Corporation, 4 F.3d 606 (8th Cir. 1993).....28,31

Percy Bag Company v. Missouri Commission on Human Rights, 632 S.W.2d 480 (Mo.banc1982).....12

Prokoph v. Whaley, 592 S.W. 2d 819 (Mo. banc 1980).....12

Shockley v. Missouri Dept. of Social Services, 980 S.W. 2d 173 (Mo.App.E.D.1998).....32

State Bd. of Regis'n for the Healing Arts v. DeVore, 517 S.W. 2d 489 (Mo. App. W.D1974).....11,25

State Bd. of Regis'n for the Healing Arts v. Finch, 514 S.W. 2d 608 (Mo. App. W. D. 1974).....25, 36

State ex rel.Bd. of Regis'n for the Healing Arts v. McDonagh, 123 S.W.3d 146 (Mo. banc 2003).....12

State ex rel. Nixon v. Qucktrip Corp., 133 S.W. 3d 37 (Mo. banc 2004)....15

State ex rel. Safety Roofing Systems, Inc. v. Crawford, 86 S.W.3d 488 (Mo. App. 2002).....15

Tendai v. State Bd. Regis'n for the Healing Arts, 161 S.W.3d 358 (Mo. 2005).....12

Total Petroleum, Inc. v. Davis, 822 F.2d 734 (8th Cir. 1987).....28

Revised Statutes of Missouri

Section 314.200, RSMo.....10,11,25,26

Section 326.130.2(2).....7

Section 326.280, RSMo.....16

Section 326.289, RSMo(Cum. Sup. 2004).....6,10,11,13,14,15,16

17,20,22,23,24,38

Section 375.141, RSMo.....11,33,35

Section 536.140, RSMo.....12

Code of State Regulations

4 CSR 10-2.070.....21,22,23

4CSR 10- 2.095.....19,24

Other Reference Authorities

Black’s Law Dictionary Revised 4th Ed., 1968.....20

JURISDICTIONAL STATEMENT

This appeal is from an order of the Administrative Hearing Commission, the Circuit Court of Cole County and the Missouri Court of Appeals, Western District, each having found that Respondent, Integrated Financial Solutions, LLC, was entitled to a permit to practice as a certified public accounting firm as provided by Chapter 326 RSMo, more particularly, Section 326.289.

This Court has general jurisdiction over this matter and as more particularly set out in Article V, Section 10 of the Constitution of Missouri, 1945 (as amended).

STATEMENT OF FACTS

Pursuant to Rule 84.04(6) (f) Respondent provides the Court with this “Statement of Facts” which corrects the inaccuracies and lack of completeness of the “Statement of Facts” contained in Appellant’s brief.

Integrated Financial Solutions, LLC (IFS) is the applicant for a permit to practice as a public accounting firm as provided by Section 326.289 RSMo (Cum. Supp. 2004). IFS is a Missouri limited liability company in good standing. The application for the firm permit, filed by IFS on February 9, 2005, with the Missouri State Board of Accountancy (hereafter Board or Appellant) was in proper order and was accompanied by the required fee. (Stipulation Exhibit A: hereafter Stipulation Exhibits will be referred to as “Stip. Ex.____); (Hearing Transcript pp. 13, 19; Hereafter H.Tr. p.____.)

The application discloses that there are three (3) principals in IFS, including Steve Strauss, CPA (Strauss), Judy Elias, CPA (Elias) and Carl Kossmeyer (Kossmeyer). Kossmeyer has a 49% ownership interest in IFS (H.Tr. pp. 26, 98). Strauss has a 40% ownership interest in IFS (H.Tr. p. 98) and Elias holds an 11% ownership interest in IFS (H. Tr. P. 98).

On December 3, 1999, at a time when he was the holder of an individual permit and certificate as a certified public accountant, Kossmeyer entered a guilty plea to one count of felony wire fraud in the United States

District Court for the Eastern district of Missouri. The information alleged that the conduct underlying the guilty plea took place “from on or about 1995 until on or about 1996” (Stip. Ex. I, H.Tr. 14; Legal File pp. 46-47). Kossmeyer was sentenced to six (6) months home confinement, ordered to pay a \$ 100 fine and make restitution of \$93,726, all of which he timely and successfully completed (Hereafter references to the Legal File will be L.F. p. ____). (For the first time in any of these proceedings, and although found nowhere in the record, Appellant, by way of a footnote, introduces this Court to the idea of a Federal Trade Commission proceeding concerning Kossmeyer. As there is no mention of this FTC proceeding anywhere in the record, it is improperly included in Appellants brief and deserves no further mention.)

On July 18, 2000 the Administrative Hearing Commission (AHC) granted the Board’s motion for summary determination in the Board’s action against Kossmeyer for the felony plea, finding that cause existed for the Board to discipline Kossmeyer for his guilty plea to a federal crime in contravention of Section 326.130.2 (2), RSMo 2000. The AHC refused to find any other cause for discipline as requested by the Board (Stip. Ex. G, H.Tr. 14; L.F.p. 11). By its order of June 26, 2001 the Board revoked Kossmeyer’s certificate and permit (Stip. Ex F; H.Tr. p. 13; L.F. p 11).

Kossmeyer was permitted to, and did, practice accounting during the pendency of his appeal of the revocation, from 2001 to 2006. The revocation order is now final, all appeals having been taken (L. F.p.107).

The Board's Executive Director denied the permit requested by IFS, by letter dated March 4, 2005 (Stip. Ex. B; H.Tr. p. 13; L.F. pp. 40-42) solely on Kossmeyer's guilty plea (H.Tr. p. 50).

There have been **no** complaints against Kossmeyer since the date of the Board's disciplinary hearing in May, 2001 to the date of the IFS hearing before the AHC on January 9, 2006, nor during the pendency of Kossmeyer's appeal of his revocation (H. tr. pp. 56-57).

On July 13, 2006 the AHC issued its decision finding in favor of IFS's permit request, finding: "There is no basis to deny IFS's application. We grant IFS's application and grant it a permit" (L.F. pp.61-75).

The Appellant timely filed a "Petition for Judicial Review" with the Circuit Court of Cole County, appealing the decision of the AHC (L.F. p., 138). After briefing and oral argument, on December 12, 2006 the Hon. Richard G. Callahan Judge, found that a majority ownership and voting interest in IFS is held by certified public accountants, licensed by the state of Missouri (L.F.p. 137) and ordered the Appellant to issue a firm permit to IFS, forthwith (L.F. p. 139).

The appellant filed its appeal with this Court of Appeals, Western District, on January 18, 2007. On application from the Appellant, that Court stayed Judge Callahan's decision of December 12, 2006, on March 2, 2007. By its opinion of October 30, 2007, the Court of Appeals affirmed the decision of Judge Callahan and the AHC.

This Court subsequently accepted the case on Appellant's timely application.

POINTS RELIED ON

I.

The Administrative Hearing Commission did not err in finding that Integrated Financial Solutions, LLC was entitled to a firm permit to practice as a certified public accounting firm as provided by Chapter 326, RSMo, and that the Appellant had no cause to deny the firm a permit.

(Responds to Appellant's Point I & II)

A.

Construction of Section 326.289.

B.

The AHC correctly determined that the stay of Kossmeyer's license revocation was not relevant to the issuance of the firm permit to IFS.

C.

The AHC correctly applied Section 314.200, RSMo 2000.

D.

Judicial Estoppel

Estate of Croom v. Bailey, 107 S.W. 3d 457 (Mo. App. S.D. 2003)

State Bd. of Regis'n for the Healing Arts v. DeVore 517 S.W.2d 489

(Mo. App. W.D. 1974)

Section 314.200, RSMo.

Section 326.289, RSMo.

II

The Administrative Hearing Commission did not err in finding that a shareholder whose license had been revoked could properly be a shareholder in a CPA firm and correctly refused to impute the conduct of a non-licensed minority owner of IFS to the firm.

(Addresses Appellant's Point II)

J.C. Nicholas Co. v. Director of Revenue, 796 S.W.2d 16 (Mo banc.

1990)

Jerry-Russell Bliss, Inc. v. Hazardous Waste Management Comm.,

702 S.W. 2d 77 (Mo. 1985)

Section 326.289, RSMo

Section 375.141, RSMo

STANDARD OF REVIEW

The standard for review of an administrative decision where the Administrative Hearing Commission has interpreted the law or the application of the facts to law is *de novo*. *Tendai v. State Bd. of Regis'n for the Healing Arts*, 161 S. W. 3d 358, 365 (Mo. 2005), citing *State Bd. of Regis'n 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).

The decision of the agency is presumed to be correct and the burden of challenging the decision is heavy. *Bollinger v. Wartman*, 24 S.W. 3d 731, 733 (Mo. App. E.D. 2000). The reviewing court may not substitute its judgment for that of the agency even if the evidence might support findings of fact different from those found by the agency. *Percy Bag Company v. Missouri Commission on Human Rights*, 632 S. W. 2d 480, 487 (Mo. banc 1982); *Prokoph v. Whaley*, 592 S.W. 2d 819, 823 (Mo. banc 1980).

ARGUMENT

I.

The Administrative Hearing Commission did not err in finding that Integrated Financial Solutions, LLC was entitled to a firm permit to practice as a certified public accounting firm as provided by Chapter 326, RSMo, and that the Appellant had no cause to deny the firm a permit.

(Responds to Appellant's Point I & II)

A.

CONSTRUCTION OF SECTION 326.289.

Integrated Financial Solutions, LLC (IFS), Respondent, is the applicant for an initial firm permit, to practice accounting, as provided for by Section 326.289 RSMo (Cum. Supp. 2004) (A copy of Section 326.289 is attached to this brief and incorporated herein by reference as though set out in full and made a part hereof and is found in the Appendix at pp.A1-A3.) The arguments made by Appellant that the Administrative Hearing Commission (AHC) misapplied Section 326.289 and other provisions of Chapter 326 are without merit and misstate the conclusions of the Hearing Commissioner.

The primary statute at issue in this appeal is Section 326.289 which was enacted by the General Assembly in 2001 and is an integral part of the overall adoption by the legislature, with the strong support of Appellant and the Missouri Society of Certified Public Accountants, of what is known as the Uniform Accountancy Act (UAA). The UAA was the result of many years of work by a joint committee of the American Society of Certified Public Accountants and The National Association of State Board's of Accountancy. (As an aside, Respondent's counsel Hoffert was the only Missouri delegate to participate in the work of the joint committee and was the only attorney on the committee.).

Prior to 2001 there existed no comprehensive provision in Chapter 326 which regulated the licensing and composition of certified public accounting (CPA) firms comparable to Section 326.289. Prior to the adoption of the present Section 326.289 non-CPA's were prohibited from owning an interest in a CPA firm. The Appellant had rules which enforced this state of affairs. Section 326.289, for the first time, established that as long as a *majority* of a CPA firm is owned by CPA's, it makes no difference who or what owns the minority interest.

The application for the firm permit of IFS discloses, and the testimony before the AHC makes it perfectly clear, that there are three (3) principals in

IFS and what their respective ownership interests are. Carl Kossmeyer (Kossmeyer) has a 49% ownership interest in IFS (H. Tr. pp. 26, 98; L.F. p. 11); Steve Strauss, CPA, (Strauss) has a 40% ownership interest in IFS (H. Tr. p. 98) and Judy Elias, CPA (Elias) holds an 11% ownership interest in IFS (H. Tr. p. 98).

As Section 326.289 is a new statute, there is no case law upon which the Court can rely to determine its meaning. There being no common law, the Court must ascertain the legislative intent of the General Assembly in adopting the new statute.

It is a fundamental principal of statutory construction that courts presume the legislature, when enacting new legislation, acts with knowledge of the subject matter, surrounding circumstances, existing law, and the purpose and object to be accomplished. *Estate of Croom v. Bailey*, 107 S.W. 3d 457, 463 (Mo. App. S.D. 2003) relying on *State ex rel. Safety Roofing Systems, Inc. v. Crawford*, 86 S.W. 3d 488, 492 (Mo. App. 2002). Similarly, it is well settled that the primary rule of statutory construction is to ascertain the intent of the legislature from the language used by it and to give effect to that intent, if possible, and to consider words in their plain and ordinary meaning. *State ex rel. Nixon v. Quicktrip Corporation*, 133 S.W. 3d 33, 37 (Mo. banc 2004).

Section 326.289.1 provides in pertinent part:

* * *

Issuance and renewal of permits, procedure. ---1. The board may grant or renew permits to practice as a certified public accounting firm to entities that **make application and demonstrate their qualifications in accordance with this section** or to certified public accounting firms originally licensed in another state that establish an office in this state. (Emphasis added.)

* * *

By giving the words their “plain and ordinary” meaning it can be seen that the legislature intended that anyone seeking a firm permit had to comply “with this section”. No reference is made to any other section of Chapter 326 except Section 326.280, which has nothing to do with the matter at hand. Had the legislature intended that an applicant(s) for a firm permit had to comply with any other statute it would have so said. *Bachtel v. Miller County Nursing Home District*, 110 S.W. 3d 805 (Mo. banc 2003). The clear meaning of Section 326.289 is to require those seeking a firm permit to comply with this section. Respondent fully complied with “this section”, Section 326.289.

What was the defect or problem the legislature was trying to remedy in adopting Section 326.289?

Prior to the enactment of Section 326.289, non-licensed individuals, firms, shareholders, managers, etc. could not have an ownership interest in a firm which provided certified public accounting services. With the adoption of Section 326.289 this state of affairs was remedied.

A new statute must be construed in light of the defect it seeks to remedy and the usages, circumstances and conditions existing at the time. *Estate of Croom*, supra, at p. 463. By enacting Section 326.289.4 the legislature carefully selected the categories of persons who could own a minority interest in a CPA firm. No where, in any of Section 326.289, does the legislature even make reference to, or exclude, any individual based on any prior criminal conviction. To engraft a requirement, of any kind, into Section 326.289 regarding the criminal background of any minority “partners, officers, principals, shareholders, members [and] managers” would be a clear instance of a court not following the clear and ordinary meaning of what the legislature intended, but rather legislating itself.

Section 326.289.4 provides in pertinent part:

* * *

(1) Notwithstanding any other provision of law to the contrary, a simple majority of the ownership of the firm, in terms of financial interests and voting rights of all 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 or the corresponding provision of prior law.

Although firms may include non-licensee owners, the firm and its ownership shall comply with rules promulgated by the board.

(2) Any certified public accounting firm may include owners **who are not licensees**, provided that:

(a) The firm designates a licensee of this state who is responsible for the proper registration of the firm and identifies that individual to the board;

(b) All non-licensee owners are active individual participants in the certified public accounting firm or affiliated entities;

(c) The firm complies with other requirements as the board may impose by rule; (Emphasis added)

* * *

The statute is crystal clear on who may be in a firm with a majority CPA ownership and what criteria are to be met in order to receive a firm permit. The statute is as explicit as possible. The legislature even went so far as to exclude reference to any other statute when it inserted the phrase, **“[N]ot withstanding any other provision of law to the contrary”**.

The administrative Rules of the Board support Respondent’s and the AHC’s position on ownership. The Board addresses firm ownership in its Rule, 4 CSR 10-2.095.

4 CSR 10-2.095, entitled, “Ownership of CPA Firms” provides in pertinent part:

(1) Limited Liability Companies (L.L.C.).

(A) Ownership. Only the following may have a member’s interest in a L.L.C.:

1. A majority ownership shall consist of natural persons who hold a license as a certified public accountant (CPA) to practice public accounting issued by this state, another state or territory of the United States or the District of Columbia, or any other state.... **A minority ownership shall consist of natural persons who are active individual participants in the firm or affiliated entities.**

* * *

4. Limited liability companies (L.L.C.) holding a permit to practice public accounting issued by this state or foreign L.L.C. authorized by law in this state to practice public accounting, **provided that all non-CPA members are active participants in the firm or affiliated entities....** (Emphasis added.)

* * *

Section 326.289 provides: “Notwithstanding any other provision of law to the contrary, *a simple majority* of the ownership of the firm, in terms of financial interests and voting rights of all partners....are licensees pursuant to section 326.280....” “Majority” means, “The number greater than half of any total.” (Black’s Law Dictionary, Revised Fourth Edition, 1968.)

The facts of the case at bar clearly demonstrate that the “simple majority of the ownership”, 51%, of IFS is owned and controlled by two (2) CPA’s, licensed pursuant to Section 326.280. In this case, Kossmeyer’s 49% interest of IFS constitutes a minority ownership position. As a minority member of IFS, Kossmeyer does not control the firm, nor does Kossmeyer have the ability to have exclusive management control of the firm. Strauss

and Elias, collectively, have a 51% ownership of IFS. It is Strauss and Elias who have the power and authority to hire and fire employees, including Kossmeyer, manage the firm and, collectively, Straus and Elias have the ability to out vote Kossmeyer on all matters regarding the firm. The same would be true if Kossmeyer owned a 10% or a 40% interest in IFS: in each instance he would be a minority member. In short, Kossmeyer has neither the necessary ownership interest, nor right, to direct, manage or control IFS.

To support its position that the AHC erred in reaching its decision that IFS was to be licensed Appellant relies on an administrative Rule which it promulgated **after** the AHC had ruled against it. In its footnote 3 Appellant claims the Rules were amended to “clarify the language of the rule”. It is submitted that the rule was amended precisely for the purpose of thwarting the decision of the AHC and further the Appellant’s nearly ten (10) year campaign to prevent Kossmeyer from being an accountant.

Appellant relies most heavily throughout its brief on 4 CSR 10-2.070. Attached and found at Appendix page A-4 to this brief is 4 CSR 10-2.070 in existence at the time the Appellant denied IFS’s license application and in existence at the time of the hearing and decision of the AHC.

Attached to this brief as Appendix page A-5 is the proposed order of rule making which appeared in the Missouri Register amending the Rule to its

current state (Missouri Register, May 1, 2006, Vol. 31, No.9). In other words, after the case at bar had been tried before the AHC, Appellant became concerned that its then current Rules were inadequate to support its denial of the IFS license application, it sought to bootstrap itself into what it believes is a more grounded position.

4 CSR 10-2.070, in its current state and as Appellant would have this Court apply in the case at bar is an improper, impermissible usurpation of legislative authority and an attempt on the part of Appellant to expand its authority beyond the scope of the statute which authorizes its rule making authority in this area, namely, Section 326.289. IFS could not have raised this challenge to the Rule before the AHC because the Rule did not exist in this form until after the hearing before the AHC.

Appellant has asserted, without reference to any statutory authority, that its administrative rules require non-licensed firm owners to have never been licensed before. Nowhere, in any provision of Chapter 326, let alone Section 326.289 is there any mention of such a definition or restriction. This “requirement” is merely a concoction of Appellant and is in excess of, and an abuse of, its rule making authority.

As this Court well knows, an administrative agency’s rule making power does not permit it to revise the language of a statute. Revising and

extending the language of Section 326.289 is precisely what 4 CSR 10-2.070 attempts to do. (See generally: *Fehrman v. Blant*, 825 S. W. 2d 658 (Mo. App. 1992). It has long been the law in this state that a rule is void if it is beyond the legislative authority conferred upon the agency or if it attempts to expand or modify statutes. *Brown v. Melahm*, 824 S.W.2d930 (Mo.App.1992.)

While it is true that by its terms Section 326.289 gives the Appellant authority to promulgate rules concerning the section it does not authorize the Appellant to make rules which alter or restrict the meaning of Section 326.289. Appellant's Rule cannot be used as a bar to licensure of IFS.

The other rules cited by the Appellant were in existence well before the passage of the current Section 326.289. As noted earlier in this brief the legislature is presumed to be aware of the current law when it amends an existing law. Following this principle one must conclude that the enactment of the current Section 326.289 was intended to expand the ability of various entities to form CPA firms, not to restrict them. Appellant's administrative rules cannot impair the intent of the legislature.

Appellant's point regarding the application of the rules cited is without merit.

As clearly demonstrated by its application and through the testimony presented to the AHC, IFS complies with all of the provisions of Section 326.289 and 4 CSR 10-2.095 and is, therefore entitled to a firm permit, as properly determined by the AHC.

B.

The AHC correctly determined that the stay of Kossmeyer's license revocation was not relevant to the issuance of a firm permit to IFS.

Appellant makes much of the fact that a stay was in place regarding the revocation of Kossmeyer's individual permit. The AHC found that, as the statute only requires a simple majority ownership of a firm must be licensed, and since it was, Kossmeyer's individual status was irrelevant to the issue before it. (Appellant's Appendix, p. 14.)

Similarly, the Missouri Court of Appeals, Western District concluded that neither the regulations nor the statutes required that a shareholder may never have been disciplined.

On page 17 of Appellant's brief a straw man is created in the form of the three felon CPA's forming a firm (if there even were three CPA felons in the State). This argument completely ignores the reasoning of the AHC and the meaning of the statute. The statute speaks to the license status of a majority ownership of a firm, not the status of unlicensed, minority owners.

Kossmeyer's license revocation was complete when this case was before the circuit court and the Court of Appeals. The Appellant made these same arguments before those bodies that it makes before this Court. Those arguments had no merit then and they have no merit now.

C.

The AHC correctly applied Section 314.200, RSMo 2000.

The AHC examined the application of Section 314.200 to the case at bar (L.F. pp. 74-75). The AHC examined this Court's holdings in *State Bd. Of Regis'n for the Healing Arts v. Finch*, 514 S. W. 2d 608, 614 (Mo. App. W.D. 1974) which held that the denial of an applicant who had been convicted of a felony is discretionary, not mandatory. The AHC examined this Court's holding in *State Bd. of Regis'n for the Healing Arts v. DeVore*, 517 S. W. 2d 480, 486 (Mo. App. W.D. 1974) which held that a felony conviction did not mandatorily disqualify an applicant for licensure. The AHC then applied the facts of this case to those holdings and Section 314.200.

Section 314.200 states:

No Board or other agency created pursuant to laws of the state of Missouri, or by any city, county or other political subdivision of the state, for the purpose of licensing applicants for

occupations and professions may deny a license to an applicant primarily upon the basis that a felony or misdemeanor conviction of the applicant precludes the applicant from demonstrating good moral character, where the conviction resulted in the applicant's incarceration and the applicant has been released by pardon, parole or otherwise from such incarceration, or resulted in the applicant being placed on probation and there is no evidence the applicant has violated the conditions of his probation. The board or other agency may consider the conviction as some evidence of an absence of good moral character, shall also consider the nature of the crime committed in relation to the license which the applicant seeks, the date of the conviction, the conduct of the applicant since the date of the conviction and other evidence as to the applicant's character.

In the case at bar it is abundantly clear from the record that not only was Kossmeyer's criminal conviction in 1999 the primary reason for the denial of the IFS permit, it is the *only* reason the permit was denied.

(See: L.F. pp.40-42, the Appellant's denial letter; H.Tr. pp. 32, 50,

Appellant's Executive Director's testimony that the only grounds for denial

was Kossmeyer's 1999 criminal conviction.) Furthermore there was testimony from the Appellant's Executive Director that since the Appellant's disciplinary hearing regarding Kossmeyer's license revocation on May 25, 2001 to the IFS hearing before the AHC on January 9, 2006 the Appellant had received no complaints against Kossmeyer and that there was no other evidence, apart from the conviction, that motivated him to deny the IFS application (H. Tr. p57).

The AHC correctly applied the facts to the law, both case law and statutory law and concluded that Kossmeyer's criminal conviction is not cause for discipline or denial (L. F. p. 75).

E.

Judicial Estoppel

The doctrine of judicial estoppel prohibits a party from taking inconsistent positions in the same or related litigation. *Hossaini v. Western Missouri Medical Center*, 140 F. 3d 1140, 1143 (8th Cir. 1998). The underlying purpose of the doctrine is to protect the integrity of the judicial process. *Id.*; *Total Petroleum, Inc. v. Davis*, 822 F.2d 734,737 (8th Cir. 1987). Missouri has long recognized the doctrine of judicial estoppel. *Monterrey Development Corporation v. Lawyer's Title Insurance Corporation*, 4 F.3d 605, 609 (8th Cir.1993).

Judicial estoppel applies to prevent litigants from taking a position in one judicial proceeding, thereby obtaining the benefits from that position in that instance and later, in a second proceeding, taking a contrary position in order to obtain benefits from such a contrary position at that time. *Jensen v. Jensen*, 877 S. W. 2d 131, 135 (Mo. App. E.D. 1994); *Besard v. Gibbar, H & G Marine Services, Inc.*, 982 S. W. 2d 808, 810 (Mo. App. E.D. 1998).

Carl Kossmeyer and the Appellant have been litigating against each other since 1999. Stipulation Exhibits F, G and H, as well as the documents appearing at L.F. 99-108 attest to the history the parties have with each other. In its brief before the Missouri Court of Appeals, Eastern District, in the case, *Kossmeyer v. Missouri State Board of Accountancy*, 199 S.W.3d (778 Mo.App. E.D. 2006), counsel for Appellant told that Court:

Kossmeyer is no doubt an educated and intelligent man capable of seeking employment, other than a CPA. Unlike some other regulated professions, the law does not require a licensee to engage in all accounting functions. In fact, a non-licensee may even be an owner of a certified public accounting firm. Section 326.289.4 (1), RSMo. Even if Kossmeyer loses his CPA designation, there is certainly employment to be found in the

accounting field, other than as a CPA.(Appellant’s brief,
E.D.86759, pp.24-25; emphasis added)

By its admission to the Court of Appeals, Eastern District, Appellant acknowledges Kossmeyer’s qualifications. Moreover, the Board asserted and argued to the Court of Appeals that Kossmeyer has the right to participate in accounting activity and be a minority owner of an accounting firm, relying upon the very statute at issue herein.

In her opening statement before the AHC, then counsel for Appellant stated, in part, speaking about IFS, “Mr. Kossmeyer is a shareholder (of the firm), has shown himself to lack fitness for the practice of accounting....” (H. Tr. p. 21).

In her closing statement counsel told the AHC:

The Board acted properly in basing their denial on Mr. Kossmeyer’s conduct as resulted in the conviction in that Mr. Kossmeyer’s conduct and Mr. Kossmeyer’s criminal activity shows that he lacks the integrity required to be a part of a CPA firm and that conduct and that criminal conviction reflects adversely on the firm as a whole (H. Tr. p. 117).

Even more revealing of the completely contradictory positions being taken by the Appellant before the AHC and now this Court, as opposed to the one taken before the Eastern District is the unrefuted sworn testimony of Steven Strauss. Strauss testified regarding a telephone conversation he had with the Appellant's Executive Director after Appellant issued its denial letter of March 4, 2005. The following testimony was adduced:

Q (by Hoffert): And could you tell the Commissioner the substance of that conversation?

A (by Strauss): Well, I was calling after having read the denial letter. Frankly, I was very confused as to what the basis was for the denial of the application. So I was calling to find out exactly where in the statute was the -- what they were relying upon to deny the license.

And we discussed it. And he, Mr. Bishop, pointed me to the sections stated in the letter. And he referred, at least at one point, to the other rules. And when I asked where I could get a copy, he was not able to answer that. He said, everything you need is in the letter. So we discussed that. And I then discussed, well, what if we were to reapply, if I buy Mr. Kossmeyer out

and he becomes an employee. And he said no, you can't do that.

And I distinctly remember being told that not only could Mr. Kossmeyer not be an employee of the firm, that if I have a CPA firm, and we were already, we were sharing space, he could not share space with me. And I said well, we had this lease. He said, that's the break, or something to the effect of its too bad. (H. Tr. pp. 103-104).

Thus we have the paradox of the same party, with the same attorney (before the AHC), involving the same individual asserting diametrically opposed positions on the same critical point in now three different legal proceedings.

It has been held that because the doctrine of judicial estoppel focuses on the integrity of the court, judicial estoppel does not require proof of privity, reliance or prejudice by the party evoking it. *Konstantinidis v. Chen*, 626 F. 2d 933, 937 (D.C. Cir. 1980), cited with approval in, *Monterey Development Corporation*, supra, at p. 609. The doctrine applies, "...even when the prior statements are not made under oath, the doctrine may be invoked to prevent a party from playing fast and loose with the courts." *Id.* (citations omitted). Lest there be any doubt, it has long been held that the

doctrine of judicial estoppel can apply to quasi-judicial administrative actions. *Shockley v. Missouri Department of Social Services*, 980 S.W.2d 173, 175 (Mo. App. E.D. 1998).

It is patently clear from the two opposite positions taken by the Appellant *on the same issue* that the Appellant is indeed playing “fast and loose” with the AHC, the Court of Appeals for the Eastern District and now this Court. For this reason alone this Court should find in favor of IFS.

For the reasons stated above the decision of the AHC in ordering Appellant to issue a firm permit to IFS should be affirmed.

II

The Administrative Hearing Commission did not err in finding that a shareholder whose license had been revoked could properly be a shareholder in a CPA firm and correctly refused to impute the conduct of a non-licensed minority member of IFS to the firm.

The Appellant attempted to have the AHC “impute” Kossmeyer’s isolated criminal conviction in 1999, for events which occurred in 1995-6, as an indictment of IFS. The Appellant first raised this point in its post-hearing brief before the AHC. Now Appellant is asking this Court to “impute” Kossmeyer’s conviction in 1999 to IFS (which did not even exist until 2001) claiming that if it does not, the Appellant will have been stripped of its ability to regulate the accounting profession and the public will, thereby, be harmed. The position of Appellant is untenable and unsupported by any fact or law.

As the AHC correctly noted, the legislature has specifically made the conduct of officers and managers relevant in some licensing contexts, notably in the insurance industry (see Section 375.141, L. F. pp 9-10) but has not so provided in the accountancy law. As the AHC stated, while Kossmeyer is an owner of IFS, he is not the applicant (L. F. p. 11).

The Appellant argued before the AHC and now by implication to this Court that by associating with Kossmeyer the **firm** has committed acts which demonstrate incompetence, misconduct, misrepresentation and dishonesty. Further, the Appellant argues that the firm has, by associating with Kossmeyer, violated professional trust and confidence and has committed an act that reflects adversely on the firm's fitness to practice.

There is absolutely no evidence in the record to support these new found positions of the Appellant. No evidence of any of this conduct was presented before the AHC. None of these reasons were given in the letter denying the firm permit (L.F. pp. 40-43). These issues were first raised by the Appellant in its post-hearing brief to the AHC. The issues before the AHC were those raised in the Appellant's denial letter: all of those issues related to Kossmeyer. None of the positions taken by the Appellant now were ever presented before. The Appellant is bound by the reason it gave for denying IFS the firm permit it seeks. The Appellant's Executive Director testified before the AHC that the **sole** reason for denial of the permit was Kossmeyer's conviction (H. Tr. p. 32). (The statement contained in Appellant's footnote 8 to the contrary is incorrect.)

As the Hearing Commissioner correctly stated:

While Kossmeyer is an owner, he is not the applicant for a firm permit. The legislature specifically made the conduct of officers and managers relevant to obtaining an insurance license, (noting Section 375.141 relating to insurance licenses) it failed to so do in the accounting statute. The language is not ambiguous; there is simply no language in the accounting statute similar to that in the insurance statutes that would allow us to do as the Board asks....We cannot impute Kossmeyer's conduct of pleading guilty to a crime to IFS when the guilty plea was entered long before he became involved with IFS (L. F. pp. 71-72).

Appellant relies heavily on this Courts holding in *Jerry-Russell Bliss, Inc. v. Hazardous Waste Mgmt. Comm.*, 702 S.W.2d (Mo. 1985).

Appellant's reliance in *Jerry-Bliss* is misplaced. (Respondent's counsel, Hoffert, was the hearing officer for the Commission in the *Jerry-Bliss* case and wrote the decision which was adopted by the Commission.)

As this Court noted in *Jerry-Bliss, Id*, at p. 79,"The Commission concluded: 1) section 260.395.15 authorizes and requires the Department to consider transactions occurring before the effective date of the statute as a basis for the denial of a license application...." The Court confirms this

determination, *Id.*, at p.81. There is absolutely no similar statute in the Missouri accountancy law, Chapter 336.

This Court should likewise not impute the conduct of Kossmeyer in 1995-6 to the issuance of a firm permit to an entity in which he is a minority participant.

Appellant complains that the AHC did not “give deference” to its revocation of Kossmeyer’s certificate and permit when it found that his revocation was not an impediment to him being an owner of a CPA firm, as specifically provided by Section 326.289.4. As properly stated by the AHC in its July 13, 2006 decision, in a case such as this one, the AHC exercises the same authority that has been granted to the Board. *J.C. Nichols Co. v. Director of Revenue*, 796 S. W. 2d 16, 20 (Mo banc 1990). As such, the Commission decides the case *de novo*, *State Bd.of Regis’n for the Healing Arts v. Finch*, 514 S. W. 2d 608, 614 (Mo. App. W. D. 1974). An appeal of a license denial, such as the case at bar, vests in the AHC the same degree of discretion as in Appellant and it need not be exercised in the same way (*Id.* at p. 6).

The AHC properly exercised its discretion and authority in deciding the instant case without deference to the arbitrary action of Appellant.

Appellant's Point II is without merit.

CONCLUSION

IFS meets the qualifications for licensure as an accounting firm. IFS respectfully submits that the decision of the Administrative Hearing Commission, finding that there is no reason to deny a firm permit to it, is supported by competent and substantial evidence on the record as a whole. The decision of the Commissioner is clearly consistent with the law, as set out above, is not arbitrary or capricious in any respect and was a proper exercise of the Commissioner's discretion.

Appellant's arguments are without merit. Section 326.289.4 RSMo (Cum. Sup. 2004), by its plain and unambiguous terms, provides for the licensure of a firm which has the ownership and structure of IFS. Kossmeyer is not the controlling shareholder or controlling member of IFS: any other conclusion is unsupported by any evidence in the record and, is indeed, contrary to all of the evidence in the record

Based upon the facts presented to the Hearing Commissioner, the law as set out in the decision of the Hearing Commissioner, and for the reasons set forth herein, the July 13, 2006, decision of Commissioner John J. Kopp should be affirmed and a permit to practice as a certified public accounting firm should be issued to Integrated Financial Solutions, LLC by Appellant, Missouri State Board of Accountancy, forthwith.

Respectfully submitted,

By: _____
Dennis K. Hoffert # 28446
Law Office of Dennis K. Hoffert
P.O.Box 4600
St. Louis, MO 63108-0600
Tel. (314) 566-5417
Fax. (314) 367-7115
Email: dkhmsm@aol.com

By: _____
Stefan J. Glynias #21934
Lashly & Baer, P.C.
714 Locust Street
St. Louis, MO 63101-1699
Tel. (314) 621-2939
Fax. (314)621-6844
Email: sglynias@lashlybear.com

Attorneys for Respondent.

CERTIFICATION

The undersigned certifies that a true and correct copy of the foregoing, “Respondent’s Substitute Brief” was served upon Appellant by depositing two (2) copies of the same, together with a copy of a floppy-disk, as provided by Rule 84.06(g) with the United States Postal Service, first class postage prepaid and addressed to: Samantha Anne Harris, Attorney at Law. 300-B East High Street, Jefferson City, Missouri, 65101 and Stanley D. Davis, Attorney at Law, 2555 Grand Blvd., Kansas City, Missouri, 64108, attorneys for Appellant, this _____ day of April, 2008.

The undersigned further certifies, pursuant to Rule 84.06©, that:

- (1) The brief complies with the limitations contained in Rule 84.06(b);

- (2) The floppy-disk filed herewith, containing the brief, has been scanned for viruses and it is virus free. Rule 84.06(g);
and

- (3) As determined by the word processing system used to prepare the brief (Microsoft Word for Windows), the brief contains 6,963 words of monospaced face.

Respectfully submitted,

By: _____
Dennis K. Hoffert # 28446
Law Office of Dennis K. Hoffert
P.O.Box 4600
St. Louis, MO 63108-0600
Tel. (314) 566-5417
Fax. (314) 367-7115
Email: dkhmsm@aol.com

By: _____
Stefan J. Glynias #21934
Lashly & Baer, P.C.
714 Locust Street
St. Louis, MO 63101-1699
Tel. (314) 621-2939
Fax. (314)621-6844
Email sglynias@lashlybear.com

Attorneys for Respondent.

APPENDIX-TABLE OF CONTENTS

	<u>Page</u>
Section 326.289, RSMo (Cum. Sup. 2004).....	pp. A1-A3
4 CSR 10-2.070 (before October, 2006 Amendments).....	p. A4
4 CSR 10-2.070 (October, 2006 Amendments).....	p. A5